 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील)	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,		
केंद्रीय कर भवन, 7 th Floor, GST Building, Near Polytechnic, Ambavadi, Ahmedabad-380015		
सातवीं मंजिल, पॉलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015		टेलीफैक्स : 079 - 26305136
☎ : 079-26305065		

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)/94&95/Ahd-II/2017-18
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-337&338-2017-18
दिनांक Date : 21-02-2018 जारी करने की तारीख Date of Issue 20/3/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. SD-02/46&47/AC/16-17 दिनांक: 27/02/2017 issued by ASAC
Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Sequel Logistics Pvt. Ltd
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

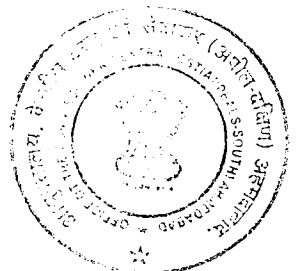
(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

... 2 ...



(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनोंक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैटल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

- (4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

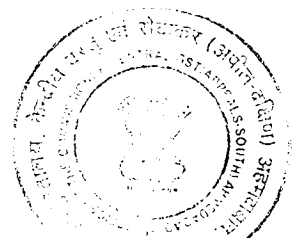
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो मांग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



:: ORDER-IN- APPEAL ::

M/s. Sequel Logistics Pvt.Ltd. 29/B,Shrimali Society Opp.Passport Seva Kendra, Near Mithakhali Six Roads,Navrangpura,Ahmedabad-380 009 (*hereinafter referred to as 'appellants'*) have filed the present appeal against the Order-in-Original No. SD-02/46&47/AC/2016-17 dated 27.02.2017 (*hereinafter referred to as 'impugned order'*) by the Assistant Commissioner, Service Tax, Div-II, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*).

2. Briefly stated the facts of the case are that the appellants are engaged in providing taxable services under the category of "Clearing and Forwarding Agents Services" and are registered with the Service Tax department under Service Tax Registration number AAHCS9813PST001. During the course of audit, it was noticed that the appellants are engaged in providing service of booking the cargo as an agent to different airlines. For providing such service they are receiving Commission on basis of the volume of the cargo. The airlines pay commission to the appellant as IATA Commission, the commission is being denoted as commission for some portion and "discount" for other portion by some of the airlines. Whereas some airlines are mentioning it as commission only. While calculating the commission, the airlines at the end of each fortnight or the month, send statement to the appellant showing the amount receivable as freight charges and adjusting the commission due to the appellant from the said amount. Thus the appellant is acting as an agent of the airlines for booking of cargo and receiving remuneration by way of commission for service provided to them. However they are not paying service tax on the said amounts received as commission/discount though service tax on the said amount. Consequently two Show cause notices were issued to them and the demand were confirmed vide impugned order under Section 73(2) of the Finance Act,1994 read with Section 68 of the Act, ordered for recovery of interest under Section 75, imposed penalty under Section 76 read with Section 78B of the finance Act,1994. Also imposed penalty under section 78 of the Finance Act, 1994.

3. Being aggrieved with the impugned order, the appellants preferred the present appeal on the following grounds;

3.1 The appellants has not received commission from the airlines however the nature of the receipt is Performance linked Incentive.

3.2 PLI received from the airlines cannot be considered as a Service and hence service tax cannot be levied.

3.3 Interest u/s.75 of the Act is not payable.

3.4 Penalty u/s.76 is not payable.

They relied on the following decisions;

- i. ITL Tours and Travels (P.) Ltd. Vs IncomeTax Officer[2011]44 SOT 277 (Mum.)

- ii. Jagran Prakshan Ltd. Vs Deputy Commissioner of Income Tax (TDS)[2012]21 taxmann.com 459 (AII.)
- iii. Kotak Securities Ltd.Vs Deputy Commissioner of Income Tax [2012] 18 taxmann.com 48 (Mum.)
- iv. Grey Worldwide India Pvt.Ltd. Vs. CST [2015]52 GST 1020.
- v. AKQA Media India Pvt.Ltd.[2016] 69 taxmann.com 390 (AAR-New Delhi)
- vi. Skylift Cargo Pvt.Ltd. Vs.Commissioner of Service Tax, Chennai.

4. Personal hearing in the case was granted on 14.11.2017 wherein CA Bhagyashree Bhatt and CA Dhawni Patwari appeared before me and reiterated the contention of their submission. Also submitted citation referred in their submission.

5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing. Core issue to be decided by me is that whether the PLI received by the appellant from the Airlines other than commission is liable for service tax or not.

6. To start with, It is pertinent to discuss the definition of service, Commission and Performance linked incentive.

As per Section 65 B(44) of the Finance Act,1994;

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) an activity which constitutes merely,—

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Definition of commission.

Mutually agreed upon, or fixed by custom or law, fee accruing to an agent, or sales person for facilitating, initiating, and/or executing a commercial transaction.



Oxford dictionary

To formally choose someone to do a special piece of work, or to formally ask for a special piece of work from someone:

A sum, typically a set percentage of the value involved, paid to an agent in a commercial transaction.

Collins dictionary.

If you commission something or commission someone to do something, you formally arrange for someone to do a piece of work for you.

Commission

From Wikipedia, the free encyclopedia

- Commission (remuneration), a form of payment to an agent for services rendered
- Commission (art), the purchase or the creation of a piece of art most often on behalf of another
- A contract for performance or creation of a specific work

Performance-linked incentives

From Wikipedia, the free encyclopedia

A **performance-linked incentive** (PLI) is a form of payment from an employer to an employee, which is directly related to the performance output of an employee and which may be specified in an employment contract. PLI may either be open-ended (does not have a fixed ceiling) or close-ended (has an upper ceiling which is normally stipulated in the employment contract).

Open-ended incentives are normally applicable to revenue-generating activities (e.g., sales), while close-ended incentives are associated with support functions (e.g., operations, human resources, administration, etc.)

7. While going through the above definition of **Performance linked Incentive** it is crystal clear that the **performance-linked incentive** (PLI) is a form of payment from an employer to an employee, which is directly related to the performance output of an employee and which may be specified in an employment contract. Here in this case there is as such no relation of appellant and airlines, and hence it can easily be concluded that PLI is nothing but a commission given to the appellant for performing an act i.e. booking more cargo to earn more commission and named it PLI to come out of the purview of service tax net.

As per the definition of commission in Wikipedia, the free encyclopedia; Commission (Remuneration), a form of payment to an agent for services rendered, A Contract for performance or creation of a specific work.

Here the contract in between the airlines and the appellant are that for booking of cargo the airlines will give a certain percentage of commission and for more booking of cargo will be given extra percentage of commission which is termed as Performance Linked Incentives.

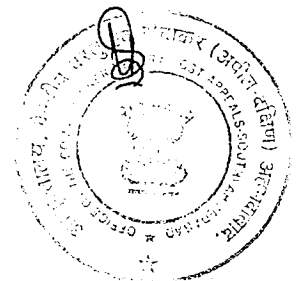
7.1 Further the contention of the appellant that they have not carried out any activity for consideration. Here it is quite clear that they are booking cargo of their customers/client with different airlines, for which Airlines gives commission which is chargeable to service Tax, but when bulk cargo booking is done i.e. in excess of limit fixed by the different airlines they receive only Performance linked incentive, as there is no activity for consideration hence not included in service, I do not find any force in their argument, as when to a certain extent booking cargo is an activity and commission received is taxable but crossing limit of booking cargo comes out of the purview of activity and consideration, and therefore not liable to service tax.

7.2 The reliance placed by the appellant on the different case laws is all together in different perspectives, and hence not applicable in the instant case. Reliance placed by the appellant in case of **Skylift Cargo Pvt.Ltd. Vs.Commissioner of Service Tax, Chennai, 2010(17) S.T.R.75 (Tri.-Chennai)**, wherein stay has been granted and is still pending for final decision the same has been **distinguished** in case of **Commr. Of S.T. Mumbai v/s. Greenwich Meridian Logistics (I) Pvt.Ltd. 2013(32) S.T.R. 753 (Tri.-Mumbai)**.

7.3 Further it is pertinent to note that the case pertains to the post negative list regime, prior to that under the category of Clearing and forwarding agent services it was mentioned that;

"It may be noted that the value of taxable services rendered by Clearing and forwarding agents continues to remain as the gross amount or remuneration or commission (by whatever name called) paid to such agent by the principle or client engaging such agent as provided under sub-rule (8) of Rule 6 of the Service Tax Rules,1994. For the services rendered the clearing and forwarding agent receives commission or remuneration which usually consists of two components,

1. Minimum commission on a flat rate or turnover basis depending on the packages consignment handled.



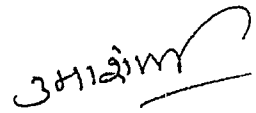
2. A variable commission based on performance which is computed on the performance indicators agreed upon between the agent and the principle. This is usually given as a percentage of the turnover.”

In view of the above discussed facts I conclude that both the components of commission and performed Linked Incentives are chargeble to service tax, hence the order passed by the original adjudicating authority is just and proper.

8. In view of above, I reject both appeals of the appellant, and uphold the impugned OIO.

9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

9. The appeals filed by the appellant stand disposed off in above terms.

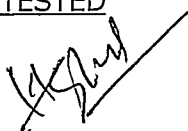


(उमा शंकर)

आयुक्त (अपील्स)

CENTRAL TAX & GST, AHMEDABAD.

ATTESTED


(K.H.Singhal)
SUPERINTENDENT,
CENTRAL TAX (APPEALS),
AHMEDABAD.

BY R.P.A.D.

To,

M/s. Sequel Logistics Pvt.Ltd.
29/B, Shrimali Society,Opp.Passport Seva Kendra,
Near Mithakhali Six Roads,Navrangpura,
Ahmedabad-380 009.

Copy To:-

1. The Chief Commissioner, Central Tax & GST, Ahmedabad zone, Ahmedabad.
2. The Principle Commissioner, Ahmedabad South.
3. The Deputy/Assistant Commissioner, Div-VI (Vastrapur) Ahmedabad-South.
4. The Assistant Commissioner, System-Ahmedabad
5. Guard File.
6. P.A. File.