केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते केंद्रीय कर भवन, 7th Floor, Central Excise Building,
Near Polytechnic,
सातवीं मंजिल, पोलिटेकनिक के पास, Ambavadi, Ahmedabad-380015
आम्बावाडी, अहमदाबाद-380015

☎ 079-26305065 टेलेफैक्स : 079 - 26305136

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)110/Ahd-II/2016-17 / 1151 to 1155
Stay Appl.No. NA/2016-17

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-071-2017-18**
दिनाँक **31.08.2017** जारी करने की तारीख Date of Issue 28/9/17

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

ग **Additional Commissioner, Service Tax, Ahmedabad** द्वारा जारी मूल आदेश सं **AHM-SVTAX-000-ADC-006-16-17** दिनाँक: **29/03/2016** से सृजित

Arising out of Order-in-Original No. **AHM-SVTAX-000-ADC-006-16-17** दिनाँक: **29/03/2016** issued by **Additional Commissioner, Service Tax, Ahmedabad**

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s. K & D Communication Limited
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 a 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 ...

(iii) वित्तीय अधिनियम,1994 की धारा 86 की उप–धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्त,, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ **(OIA)**(उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A2l9k केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश **(OIO)** की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise (Appeals)**(OIA)**(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax **(OIO)** to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 6.50/– पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjudication authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अन्तर्गत " माँग किए गए शुल्क " में निम्न शामिल है –

(i) धारा 11 डी के अंतर्गत निर्धारित रकम
(ii) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

⇨ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

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.

⇨ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

4(1) **इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।**

ORDER-IN-APPEAL

This appeal is filed by M/s. K & D Communication Limited, 4th floor, Chinubhai House, 7/B, Amrut Baug Society, Opp. S P Stadium, Ahmedabad 380 009 [hereinafter referred to as the 'appellant'] against OIO No. AHM-SVTAX-000-ADC-006-16-17 dated 29.3.2016, passed by the Additional Commissioner of the erstwhile Service Tax Commissionerate, Ahmedabad[for short - '*adjudicating authority*'].

2. A show cause notice dated 30.9.2014, was issued to the appellant, based on audit objection, alleging *inter-alia*, that [a] he had not paid service tax in respect of services rendered to AWEX-Wallonia Foreign Trade and Investment Agency, Mumbai (Belgium Consulate] and (b) that they had provided service in relation to *Vibrant Gujarat 2013* to various Government Corporations/Department, and had raised invoices and paid the service tax during the relevant month but when they did not receive the payment from their clients, towards the invoices, they *suo moto* issued credit notes and adjusted the service tax so paid against the service tax liability for the subsequent months of February and March 2013.

3. The aforementioned notice dated 30.9.2014 was adjudicated vide the impugned OIO dated 29.3.2016 wherein the adjudicating authority confirmed the demand along with interest and further imposed penalty on the appellant. Feeling aggrieved, the appellant has filed this appeal, raising the following averments:

(a) that the appellant was a company basically engaged in organizing business exhibitions;
(b) that the term *consulate* refers to the Office of the Consul who is on a diplomatic mission: that in the present case the exhibition services were provided at Gandhinagar, Gujarat where space was occupied by the Belgium consulate temporarily for the purpose of diplomatic mission only and that it should be considered as an extended office;
(c) that they are entitled to avail adjustment by raising credit note as per Rule 6(3) of the Service Tax Rules, 1994;
(d) that the adjudicating authority has not considered that after issue of credit notes in 2012-13, some dues were recovered subsequently in the year 2013-14 and hence debit notes were issued for renegotiated value of services and on the amount so received in the year 2013-14, the appellant has already discharged service tax liability as and when the amount was received;
(e) that out of the total credit notes of Rs. 3,13,50,184/-, issued in 2012-13, the appellant has received Rs. 1,34,97,865/- in the year 2013-14;
(f) that they had paid Rs. 16,68,335/- towards the service tax liability in respect of Rs. 1,34,97,865/- which was recovered in the year 2013-14; that they be given the benefit of the said amount from the total liability proposed;
(g) that in respect of the balance amount of Rs. 1,78,52,329/-, the appellant has not received any payment from the concerned parties;
(h) that as per Rule 4(7) of the CENVAT Credit Rules, 2004, it can be concluded that for taking the credit of service tax levied in the invoices the recipient of the service needs to make payment of value of services and service tax charged within three months from the date of invoice;
(i) that because of non payment of balance amount of service value and service tax the recipient of service could never take the credit of service tax amount charged in the invoices raised by the appellant; that even if he has taken it he is duty bound to reverse that credit;
(j) that under the Finance Act, 1994, service tax is payable on whatever amount received against bills raised and not on the amount of bills raised; that they would like to rely on the case of Prachar Communications Limited [2006(2) STR 492(Tri-Mumbai);
(k) that for the year 2012-13 the Income Tax Department had picked their case for scrutiny assessment under section 143(3); that the credit notes being part of the books of accounts were accepted by the IT department without any objection;
(l) that extended period of limitation is not invocable in the present case; that the CENVAT credit in the books on 31.3.2013 was Rs. 86,16,999/- and service tax demanded was Rs. 38,74,883/-; that even after the adjustment of service tax demand balance would be Rs. 47,42,116/-;
(m) that no penalty is imposable when there is a bonafide belief; that penalty under section 77 is not imposable.

4. Personal hearing in both these appeals were held on 18.8.2017, wherein CA Shilpang V Karia, appeared for both the appellants and reiterated the grounds of appeal.

5. I have gone through the facts of the case, the appellant's grounds of appeal, and the oral submissions made during the course of personal hearing.

6. Two issues need consideration [a] whether the appellant was liable to pay service tax in respect of services rendered to AWEX-Wallonia Foreign Trade and Investment Agency, Mumbai (Belgium Consulate]; and [b] whether there was short payment of service tax on account of the adjustment of so called *excess* service tax paid, towards the service tax liability of subsequent months.

7. In respect of the issue at [a] above, the adjudicating authority has stated that the certificate dated 28.11.2011, issued by the Protocol Division of the Ministry of External Affairs to the Embassy of the Kingdom of Belgium, under notification No. 33/2007-ST dated 23.5.2007, specifically grants exemption to "taxable services **within the limits** of NCT of Delhi and Maharashtra". In the present dispute, however, the services were provided by the appellant to AWEX-Wallania Foreign Trade and Investment Agency, Mumbai at Gandhinagar, in Gujarat State. Further, the adjudicating authority has also stated that the appellant failed to produce the copy of the serially numbered undertaking issued by the Embassy of the Kingdom of Belgium, New Delhi in the appellant's name. The appellant's averment, to this finding is that the term *consulate* refers to the Office of the Consul, who is on a diplomatic mission; that in the present case the exhibition services were provided at Gandhinagar, Gujarat, where space was occupied by the Belgium Consulate, temporarily for the purpose of diplomatic mission only and that it should be considered as its extended office. I do not find this argument tenable. The certificate dated 28.11.2011, supra, in para 2 states as follows:

> *"2. The tax exemption by the Embassy of the Kingdom of Belgium in New Delhi and the Belgium Consulate General in Mumbai will be effective from the date of the certificate. The tax exemption will be applicable to all taxable services within the limits of NCT of Delhi and Maharashtra respectively. "*
>
> [emphasis added]

In view of the foregoing, it is amply clear that the exemption is applicable to taxable services within the National Capital Territory of Delhi and Maharashtra State, only. The appellants argument that they are eligible for the exemption on the grounds that the place at Gandhinagar in Gujarat State where the exhibition was held is an extended office, is not a tenable argument, more so when the certificate issued in terms of notification, *supra*, clearly states that the exemption will be applicable to all taxable services "**within the limits**" of National Capital Territory of Delhi and Maharashtra.

8. In respect of the issue mentioned at [b], the facts briefly are that the appellant was allotted the Vibrant Gujarat 2013 project & various Government Corporations/Department had booked their stalls with them. The appellant raised invoices on such agencies charging service tax on the said invoices. The appellant consequent to raising the invoices also paid the service tax during the relevant month. However, when they did not receive the payments from their clients towards the invoices issued, the appellant *suo moto* issued Credit note and adjusted the tax paid earlier against their service tax liability for the subsequent months of February and March 2013. Department disputing this adjustment has demanded service tax in respect of value/amount of credit notes issued. The appellant, I find has raised his averment, on a wrong premise that under the Finance Act, 1994, service tax is payable on whatever amount is received against invoices raised and not on the amount of invoices raised. The appellant to substantiate his claim has also relied on the case of Prachar Communications Limited [2006(2) STR 492(Tri-Mumbai)]. I find that one thing that is not disputed is that the appellant had provided services for a consideration and had also issued invoices for the same. However, the averment raised is ignoring the fact that with the advent of the Point of Taxation Rules, 2011, [vide notification No. 18/2011-S.T., dated 1-3-2011] as amended, the situation has changed. These rules basically mean that from 1.4.2011, service tax will have to be paid on accrual basis. Service tax will be due when the invoice is raised or date of payment or provision of service, whichever is earlier. Till 31.3.2011, service tax was payable on collection or receipt basis, that is service tax was paid on realization basis, meaning that post 1.4.2011, service tax will have to be paid irrespective of the fact whether the payment of service is received or not. Hence, the argument that because they have not received the payment, they were not liable to discharge the service tax is not a correct argument more so when the dispute pertains to the period of January 2013.

9. Now moving to the next argument of the appellant that they are entitled to avail adjustment by raising credit note as governed under Rule 6(3) of the Service Tax Rules, 1994, I would like to reproduce the relevant extract of Rule 6 of the Service Tax Rules, 1994,

> *[(3) Where an assessee has issued an invoice, or received any payment, against a service to be provided which is not so provided by him either wholly or partially for any reason, [or where the amount of invoice is renegotiated due to deficient provision of service, or any terms contained in a contract] the assessee may take the credit of such excess service tax paid by him, if the assessee -*
>
> *[(a) has refunded the payment or part thereof, so received for the service provided to the person from whom it was received; or]*
>
> *(b) has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued.]*
>
> *[(4) Where an assessee is, for any reason, unable to correctly estimate, on the date of deposit, the actual amount payable for any particular month or quarter, as the case may be, he may make a request in writing to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, giving reasons for payment of service tax on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, on receipt of such request, may allow payment of service tax on provisional basis on such value of taxable service as may be specified by him and the provisions of [the Central Excise Rules, 2002,] relating to provisional assessment, except so far as they relate to execution of bond, shall, so far as may be, apply to such assessment.]*
>
> *[(4A) Notwithstanding anything contained in sub-rule (4), where an assessee has paid to the credit of Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, as the case may be, the assessee may adjust such*

excess amount paid by him against his service tax liability for the succeeding month or quarter, as the case may be.

[(4B) The adjustment of excess amount paid, under sub-rule (4A), shall be subject to the condition that the excess amount paid is on account of reasons not involving interpretation of law, taxability, [* *], valuation or applicability of any exemption notification.]*

[(4C) Notwithstanding anything contained in sub-rules (4), (4A) and (4B), where the person liable to pay service tax in respect of service of renting of immovable property has paid to the credit of Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, as the case may be, on account of non-availment of deduction of property tax paid in terms of Notification No. 29/2012-Service Tax, dated the 20th June, 2012, from the gross amount charged for renting of the immovable property for the said period at the time of payment of service tax, the assessee may adjust such excess amount paid by him against his service tax liability within one year from the date of payment of such property tax and the details of such adjustment shall be intimated to the Superintendent of Central Excise having jurisdiction over the service provider within a period of fifteen days from the date of such adjustment.]

As is evident, Rule 3, *ibid*, clearly states that where an assessee has issued an invoice, against a service to be provided, which is not so provided by him either wholly or partially for any reason, or where the amount of invoice is renegotiated, due to deficient provision of service, or any terms contained in a contract, the assessee may take the credit of such excess service tax paid by him, if the assessee has refunded the payment or part thereof, so received for the service provided to the person from whom it was received; or has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued. In the present dispute, it is the appellant's say that the credit note has been issued for non payment of invoice amount by the clients of the appellant. The appellant no-where has stated that the amount of invoice was renegotiated, etc.. Further, the appellant has further stated that in the year 2013-14 he had received part of the amount from his clients. Nowhere has the appellant stated that he has issued credit note for the value of the service not so provided. In-fact, the appellant had discharged the service tax since the services were performed and invoices for the same were issued. Hence, going by the wordings of the Rule 6(3), *ibid*, I do not find any merit in the averment of the appellant that it is applicable to the present case.

10. The appellants argument, that on the amount received in 2013-14, they had discharged the service tax, which was not considered by the adjudicating authority. The argument lacks merit, because the dispute before the adjudicating authority was not in respect of this payment. The adjudicating authority, I find was correct in upholding the demand since the taxable event had occurred in 2012-13 and the claim of the appellant that he was eligible for adjustment under Rule 6, was not a tenable argument.

11. The appellant's claim that for the year 2012-13, the income tax department had picked up their case for scrutiny assessment under section 143(3) and that the credit notes which were a part of the books of accounts, was accepted by the IT department without any objection, is not a valid argument because, the department is no where disputing that the existence of credit notes. Issuing a credit note is a part of accounting protocol. What the department is disputing is the adjustment carried out by relying on Rule 6(3)(b) consequent to issue of credit notes. The said rules, ibid, clearly states that the assessee may take the credit of excess service tax paid by

him, if he has issued a credit note for the value of the service not so provided to the person to whom such an invoice had been issued. In the present case the appellant has no where stated that the credit note was issued for the value of the service which was not provided by him. The appellant's own admission is that the credit note was issued in respect of the value of the invoices which were not paid by the clients. I therefore, do not find any merit in this argument. Hence, I uphold the confirmation of demand along with interest by the adjudicating authority.

12. Lastly, coming to the averment raised regarding, extended period, I find that the adjudicating authority in his order has held that as there was a short payment of service tax on account of irregular availment of exemption notification and short payment due to irregular availment of credit resulting in inelgibile adjustment of tax already paid, extended period was invocable. The appellant's argument is that there was no suppression and that they acted under a bonafide belief. The appellant has further stated that the department was well informed regarding the fact that the appellant had issued credit notes. However, no proof is submitted in this regard. I find that it was the departmental audit which has pointed out both the aforementioned points. Had it not been for the audit, this would never have seen the light of the day. Therefore, I do not find any merit in the argument, and find that this is a fit case for invocation of extended period since the ingredients needed for invocation of extended period i.e. suppression of facts and contravention of the provisions of the chapter and the rules made there under with the intent to evade payment of service tax, as per proviso to Section 73(1) is present in this dispute. Since, I have already held that extended period is invocable, I uphold the imposition of penalty on the appellant under Section 78 and 77.

13. In view of the foregoing, I uphold the impugned order of the adjudicating authority and reject the appeal filed by the appellant.

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

14. The appeal filed by the appellant stands disposed of in above terms.

उमा शंकर

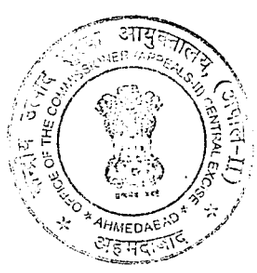
(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date : 31.08.2017

Attested

(Vinod Lukose)
Superintendent,
Central Tax(Appeals),
Ahmedabad.



V2(ST)110/A-II/2016-17

By RPAD.

To,

M/s. K & D Communication Limited,
4th floor, Chinubhai House, 7/B,
Amrut Baug Society,
Opp. S P Stadium, Ahmedabad 380 009

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad South Commissionerate.
3. The Deputy/Assistant Commissioner, Central Tax, Division VI, Ahmedabad South.
4. The Additional Commissioner, System, Central Tax, Ahmedabad South Commissionerate.
5. Guard File.
6. P.A.