

 सत्यमेव जयते	<b>केंद्रीय कर आयुक्त (अपील)</b> <b>O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,</b> केंद्रीय कर भवन, सातवीं मंजिल, पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015	 7 <sup>th</sup> Floor, GST Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)113/Ahd-South/2018-19  
Stay Appl.No. /2018-19

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-0129-2018-19  
दिनांक Date : 27-12-2018 जारी करने की तारीख Date of Issue

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. CGST-VI/11/Dutron/17-18 दिनांक: 04.06.2018 issued by  
Assistant Commissioner, Div-VI, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent  
**Dutron Plastics 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।

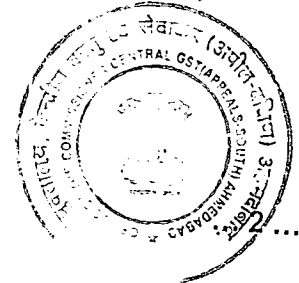
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4<sup>th</sup> Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, 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।



(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 दिनांक 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.

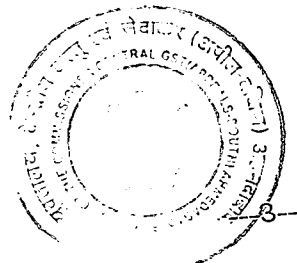
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-  
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 हॉस्पिटल 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 .

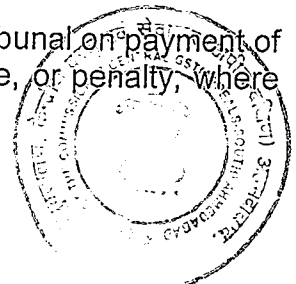
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 माँग 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."



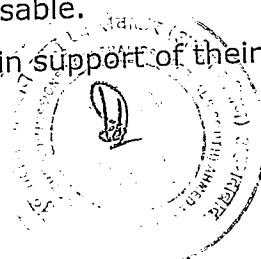
ORDER-IN-APPEAL

This appeal has been filed by M/s Dutron Plastics Ltd., Dutron House, Nr. Mithakhali Underbridge, Shrimali Society, Navrangpura, Ahmedabad [hereinafter referred to as "the appellant"] against Order-in-Original No:CGST/Div-VI/11/Dutron/17-18 dated 04/26.06.2018 [hereinafter referred to as "the impugned order"] passed by the Assistant Commissioner of CGST, Division-VI, Ahmedabad South [hereinafter referred to as "the adjudicating authority"].

2. Briefly stated, the fact of the case is that based on an audit objection, a show cause notice dated 09.06.2017 was issued to the appellant, alleging non-payment of service tax on Director's remuneration and commission under reverse charge mechanism, as stipulated under notification No.30/2012-ST dated 20.06.2012 read with notification No.45/2012-ST dated 07.08.2012. The said show cause notice proposes for demand/recovery of service tax amounting to Rs.42,50,118/- with interest pertains to the period of 2012-13 to 2015-16 and imposition of penalty. The adjudicating authority, vide the impugned has confirmed the demand with interest and imposed penalty of Rs.42,50,118/- under Section 78 (1) of the Finance Act, 1994.

3. Being aggrieved, the appellant has filed the instant appeal on the grounds that:

- The adjudicating authority has confirmed the demand on the ground that the Directors were not employed whole time with the appellant, therefore, the service is not covered under the ambit of excluded category as defined under meaning of 'Service'. There is presumption that if Director is whole time employment with the company, then only Director is an employee; such presumption has no basis leave apart any legal basis. As per income tax Act, an employee may be employed more than one employer; that when all employers issued Form 16 under the Act for tax deducted at source on salary, it establishes that the person to whom form 16 is issued is an employee.
- As per section 65(44) of FA, activity or function undertaken by an employee for the employer is not covered under the meaning of 'service'; that the Directors were under contractual employment with the appellant and were paid salary. Since the appellant deducted tax on salary paid to the Directors and when the relationship between appellant and the Directors is of employer and employee, the service rendered by the Directors is not covered under the definition of 'service'.
- The case of the appellant involved revenue neutrality. However, the adjudicating authority has not discussed the issue and totally silent of the said issue.
- Penalty under Section 78 is not imposable.
- They relied on various cases in laws in support of their arguments.



4. Personal hearing in the matter was held on 11.12.2018. Shri P.G.Mehta, Advocate appeared for the same and reiterated the grounds of appeal. He submitted copy of case law in respect of PCM Cement Concrete Pvt Ltd [2018 (9) GSTL 391-Tri.Kolkata] and requested to remand the case.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the appeal memorandum as well as at the time of personal hearing. The limited issue to be decided in the instant appeal is whether the appellant is liable to pay service tax on the amount paid as remuneration and commission to the Directors.

6. I find that the adjudicating authority has confirmed the demand mainly on the grounds that [i] the Directors were not full time employees of the appellant; [ii] just because the appellant had deducted TDS on the amount paid to the Directors does not mean that they were full time employees; and they had shown the amount under the head of remuneration and commission and under the salary head. Therefore, the adjudicating authority has concluded that the appellant is liable to pay service tax under the reverse charge mechanism as stipulated under notification No.30/2012-ST as amended vide notification 45/2012-ST supra and not covered under the ambit and scope of Section 65 B(44) of Finance Act, 1994. The relevant portion of the said notification and provisions of Section 65 B (44) of FA is as under:

Notification No.30/2012-ST as amended by notificationNo.45/2012-ST

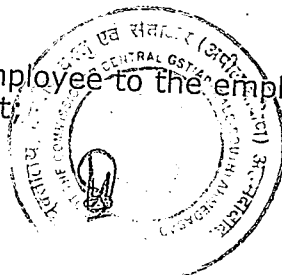
1. The taxable services-  
(A).....

.....  
(iva) provided or agreed to be provided by a director of a company to the said company.

Sl. No.	Description of a service	Percentage of service tax payable by the person providing service	Percentage of service tax payable by the person receiving the service
5A	in respect of services provided or agreed to be provided by a director of a company to the said company	Nil	100%

Section 65 B(44) of FA

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

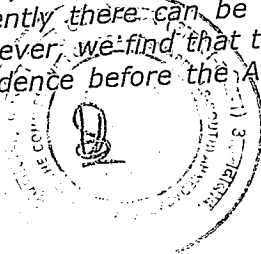


7. The appellant has contended that they are not liable to pay any service tax as the Directors were their employees and the activity or function undertaken by an employee for the employer is not covered under the meaning of 'service'. Therefore, the first issue to be decided in the instant case is whether the service rendered by the Directors was in the capacity of their employees or otherwise.

8. It is the main allegation that the Directors were not working as whole time Directors. The definition of the term "whole-time director" in Section 2(94) of the Companies Act, 2013, which reads as follows: "*whole-time director includes a director in the whole-time employment of the company*". The aforementioned definition brings out the element of employment in whole-time directorship. Therefore, whole-time directors can be termed as employees, consequent to which their salaries would not attract service tax in view of the provisions of Section 65B(44)(b) of the Finance Act, 1994. Non-whole time directors usually take away their remuneration in the form of 'fee for professional or technical services' or 'commission'. Service provided by non-whole time/ Nominee directors is in the nature of providing their professional/expert services to the company and since the non-whole time directors are not employees, such remuneration would not fall under the purview of 'salary'. Hence, such services would be chargeable to Service tax under Reverse charge by the Company w.e.f 07.08.2012, vide notification No. 45/2012-ST dated 7-8-2012, amending the Notification No. 30/2012-ST dated 20-6-2012 *supra*.

9. In the instant case, I find that service tax was demanded on remuneration and commissioner paid to S/Shri Rasesh Patel, Sudip Patel and Alpesh Patel under reverse charge mechanism, vide notification *supra*. The appellant has contended that the Directors were under contractual employment with them and were paid salary and issued form 16 in respect of deducted tax on salary paid to the Directors. The adjudicating authority has held that merely issuing Form 16 is not enough to say that the said Directors were their employees. I find that the appellant has not furnished any important documents regarding appointment of the Directors before the adjudicating authority, apart from Form-16. There are documents, importantly, Board resolution, offer letter from the Board to the Directors which shows that the directors are being appointed as whole-time directors, setting forth the terms of appointment, their duties / responsibilities and the salaries. I further find that during the course of personal hearing, the appellant has relied on Hon'ble Tribunal's decision in case of M/s PCM Cement Concrete Pvt Ltd *supra*. Para 8 of the said decision are as under:

**"8.** *The second issue for consideration is whether the consideration paid to the full time Directors will be liable to Service Tax. The claim of the appellant is that these Directors are whole time Directors and are employees of the appellant company. Consequently, there is an employee-employers relationship between the appellant and the Directors and consequently there can be no levy of service tax on such consideration paid to them. However, we find that the appellant had not placed any record, or any documentary evidence before the Adjudicating Authority to support*



their claim that the Directors are paid employees of the company. However, they have attached copies of the Form-16 statement issued to the Directors for the financial years 2012-2013 and 2013-2014 and have claimed in appeal papers that the Directors are employees of the company. However, we find that such documentary evidence was not submitted before the Adjudicating Authority. Hence we deem it necessary to set aside the operation of the Order-in-Original No. 08/COMM/ST/SLG/13-14, dated 6-2-2014 only in respect of the demand of service tax on the amount paid to the Directors and remand the matter to the Adjudicating Authority to consider the documentary evidence produced by the appellant and redecide the issue."


10. In view of above discussion, the issues to be reconsider by the adjudicating authority and decide afresh on the basis of records or any documentary evidences submitted by the appellant. The appellant is at liberty to produce all documents to support their claim before the adjudicating authority.

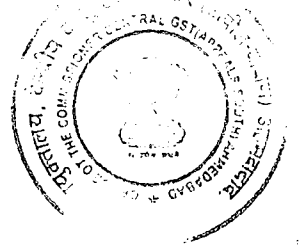
11. The appellant further argued that their case involved revenue neutrality and the adjudicating authority has not discussed the issue and totally silent of the said issue. This aspect may also be considered by the adjudicating authority while redecide the issue.

12. In view of above discussion, I remand the case to the adjudicating authority. The appeal stands disposed of in above terms.

उमा शंकर  
(उमा शंकर)  
आयुक्त (अपील्स)  
Date: /12/2018

Attested

  
(Mohanan V.V)  
Superintendent (Appeals)  
Central GST, Ahmedabad



By R.P.A.D

To

M/s Dutron Plastics Ltd.,  
Dutron House, Nr. Mithakhali Underbridge,  
Shrimali Society, Navrangpura, Ahmedabad

Copy to:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Principal Commissioner, Central CGST, Ahmedabad-South.
3. The Deputy/Assistant Commissioner, Central GST, Division-II, Ahmedabad South.
4. The Assistant Commissioner, System-Ahmedabad South
5. Guard File.
6. P.A. File.

