आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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सत्यमेव जयते

**By SPEED POST**

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| (क) | फ़ाइल संख्या / File No. | GAPPL/COM/STP/3394/2023 /166 - 170 |
| (ख) | अपील आदेश संख्याऔर दिनांक / Order-In –Appeal and date | AHM-EXCUS-001-APP-198/23-24 and 22.12.2023 |
| (ग) | पारित किया गया / Passed By | श्री ज्ञानचंद जैन, आयुक्त (अपील) Shri Gyan Chand Jain, Commissioner (Appeals) |
| (घ) | जारी करने की दिनांक / Date of Issue | 03.01.2024 |
| (ङ) | Arising out of Order-In-Original No. MP/205/DC/Div-IV/2022-23 dated 04.01.2023 passed by The The Deputy Commissioner, CGST Division-IV, Ahmedabad South. | |
| (च) | अपीलकर्ता का नाम और पता / Name and Address of the Appellant | M/s. Bapi Sahajahan Shaikh, 117, Chirag Park, Saniva Duplex, Nr. OCT, Chandola Road, Ahmedabad - 380028 |

कोई व्यक्ति इस अपील-आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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 पूवोक्त 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 :-

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 : -

(क) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने 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 मे हो माल की प्रकिया के दौरान हुई हो।

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.

(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 मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

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।

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

(घ) अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट 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।

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.

**(2)** 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 दिनाँक से तीन मास के भीतरमूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ का मुख्य शीर्ष 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.

**(3)** रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम होतो रूपये 200/- फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर अपीलीय न्यायाधिकरण के प्रति अपीलः-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

**(1)** केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गतः-
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

**(2)** उक्तलिखित परिच्छेद 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 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004।

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2ndfloor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad: 380004. In case of appeals other than as mentioned above para.

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. Registar 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 ओदश 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 हैं।

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 संषोधित की अनुसूची -1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू 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 in 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) एके प्रति अपीलो के मामले में कर्तव्यमांग (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 सेवाकर के अंतर्गत, शामिल होगा कर्तव्य की मांग (Duty Demanded)।

(1) खंड (Section) 11D के तहत निर्धारित राशि;
(2) लिया गलत सेनवैट क्रेडिट की राशिय;
(3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा ' लंबित अपील' में पहले पूर्व जमा की तुलना मेंए 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.

(6) (i) 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**

The present appeal has been filed by M/s. Bapi Sahajahan Shaikh, 117, Chirag Park, Saniya Duplex, Nr. Oct, Chandola Road, Ahmedabad - 380028 (hereinafter referred to as "the appellant") against Order-in-Original No. MP/205/DC/Div-IV/2022-23 dated 04.01.2023 (hereinafter referred to as "the impugned order") passed by the Deputy Commissioner, CGST, Division-IV, Ahmedabad South (hereinafter referred to as "the adjudicating authority").

2. Briefly stated, the facts of the case are that the appellant are holding PAN No. EJQPS4337. On scrutiny of the data received from the Central Board of Direct Taxes (CBDT) for the Financial Year 2015-16 and 2016-17, it was noticed that the appellant had earned an income of Rs. 10,51,723/- during the FY 2015-16, which was reflected under the heads "Sales / Gross Receipts from Services (Value from ITR)" filed with the Income Tax department. Accordingly, it appeared that the appellant had earned the said substantial income by way of providing taxable services but had neither obtained Service Tax Registration nor paid the applicable service tax thereon. The appellant were called upon to submit copies of Balance Sheet, Profit & Loss Account, Income Tax Return, Form 26AS, for the said period. However, the appellant had not responded to the letters issued by the department.

2.1 Subsequently, the appellant were issued Show Cause Notice and demanding Service Tax amounting to Rs. 1,52,499/- for the period FY 2015-16, under proviso to Sub-Section (1) of Section 73 of the Finance Act, 1994. The SCN also proposed recovery of interest under Section 75 of the Finance Act, 1994; recovery of late fees under Rule 7C of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994 and imposition of penalties under Section 77 and Section 78 of the Finance Act, 1994.

2.2 The Show Cause Notice was adjudicated ex-parte vide the impugned order by the adjudicating authority wherein the demand of Service Tax amounting to Rs. 1,52,499/-was confirmed under proviso to Sub-Section (1) of

Section 73 of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 for the period from FY 2015-16. Further (i) Penalty of Rs. 13,51,041/- was also imposed on the appellant under Section 78 of the Finance Act, 1994; (ii) Penalty of Rs. 10,000/- was imposed on the appellant under Section 77(1) of the Finance Act, 1994; (iii) Penalty of Rs. 5000/- was imposed on the appellant under Section 77(2) of the Finance Act, 1994 for not submitting documents to the Department; (iv) Late fees of Rs. 40,000/- for the service tax return not filed timely for the relevant period i.e. F.Y. 2015-16 under Rule 7C of the Service Tax Rules, 1994 read with Section 70 of the Finance Act, 1994 .

3. Being aggrieved with the impugned order issued by the adjudicating authority, the appellant have preferred the present appeal on the following grounds:

- Appellants submit that Show Cause Notice was issued on Dt. 22.04.2021. As per Section 73(1) of the Finance Act, 1994, normal time limit to serve Show Cause Notice is 30 months from relevant date. However such time limit of 30 months extend to 5 years in case of non-payment of service tax with an intent to fraud, suppression of fact, willful mis-statement or contravention of the provision of the service tax. Relevant provision of the Section 73(1) of the Finance Act, 1994.

  *"Where any service tax has not been paid or levied or paid or has been short levied or short paid or erroneously refunded the central excise officer may, within thirty months from the relevant date serve notice on the person chargeable with service tax, which has not been lavied or paid or which has been short levied or short paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :*

  *Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-*

  *(a) fraud; or*

  *(b) collusion; or*

*(c) Willful mis-statement; or*

*(d) Suppression offacts; or*

*(e) Contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax,*

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "thirty months", the words "five years" had been substituted.

- Sub Section 6 of Section 73 of the Finance Act, 1994, which defines the word "Relevant Date" the same is reproduces below; "For the purposes ofthis section, "relevant date" means,-

*(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid –*

*(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;*

*(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;*

*(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made there under;*

*(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made there under, the date of adjustment of the service tax after the final assessment thereof;*

*(iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund.]*

- In the instant case relevant date for the issue and service of show cause notice covering the period of 01.04.2015 to 31.03.2017 (i.e. ST-3-Apr-Sep-15, Oct-Mar-16, Apr-Sep-16 & Oct-Mar-17) was actual date cf filing of return and/or due date of Filling return and hence the time limit of issuing and serving notice of 30 months would be 25.04.2018, 25.10.2018, 25.04.2019 & 25.10.2019 respectively.
- Noticees submit assuming but without admitting to the allegation of suppression and even if it is assumed that extended period as per proviso

to subsection (1) of section 73 of the Finance Act, 1994 is invokable then also the date by which the subject SCN is to be issued and served for the period of 01.04.2015 to 31.03.2017 (i.e. ST-3-Apr-Sep-15, Oct-Mar-16, Apr-Sep-16 & Oct-Mar-17) was 5 years from actual date of filing of return and/or due date of Filling return i.e. 25.04.2020, 25.10.2020, 25.04.2021 & 25.10.2021 respectively and present SCN issued on 23.04.2021 and served on 17.03.2023 for said period is beyond the legislative provisions of Finance Act, 1994.

- Therefore the impugned SCN is liable to be set aside proposing to demand service tax for the period 01.04.2015 to 31.03.2017 on this ground only.

**SHOW CAUSE NOTICE IS VAGUE**

- The Appellants would like to submit that SCN is basic foundation of proceedings which may give rise to different consequences of law and same must be served upon which in subject case not being served. Composite SCN issued left the matter in dark. Appellants submit that on perusal of the impugned OIO and contentions thereof referred from SCN they submit that subject SCN is vague.
- To further elaborate it is further submitted that the impugned SCN fails to point out the reason on the basis of which department has considered that the differential value of services provided by the appellants are taxable services. Appellants submit that the SCN has resorted to the Section 72 of the Finance Act, 1994 and proceeded to demand the differential service tax under the Best Judgment Assessment.
- Appellants submit that the impugned SCN nowhere discusses the nature of activities being carried out by the appellants and assumed that whatever income they have earned is taxable service income liable to tax under the provisions of Finance Act 1994 and Rules made therein.
- In support of their contention, the appellants want to draw your kind attention on the decision in the case of

  (i) SBQ Steels Ltd. vs. Commissioner of Cus., C.Ex., & ST., Guntur 2014 (300) ELT 185 (AP).

  (ii) CCE vs. Shemco India Transport 2011 (24) STR 409 (Tri-Del.)

(iii) Amrit Food vs. CC 2005 (190) ELT 433 (SC)

**Impugned Order Is A Non-Speaking Order**

- Appellants submit that the impugned OIO has not considered the value of sale of goods while determining the alleged service tax liability which is covered under Negative list of Services under Section 66D(e) of the Finance Act, 1994.
- Appellants submit that Ld. Deputy Commissioner has not given any cogent findings. The Appellants submit that the impugned order in original is passed in gross violation of principles of natural justice.
- In support of their contention, the appellants want to draw your kind attention on the decision in the case of

  (i) Asst. Commissioner, Commercial Tax Department Vs. Shukla & Brothers reported at 2010 (254) ELT 6 (SC)=2011 (22) STR 105 (SC).

  (ii) Cyril Lasardo (Dead) V/s Juliana Maria Lasarado 2004 (7) SCC 431 at Para 11, 12, the Hon'ble Apex Court

**Presumption of the provision of taxable service**

- Appellants submit that the SCN also presumes that the differential amount is towards the provision of taxable services but does not identify the relevant taxable services in question. The SCN seeks to justify the said position on the premise that the requisite information which was called for has not been made available by the taxpayer which in fact is factually and grossly incorrect and hence the said presumption is valid. The appellant has submitted that the said approach may not be in accordance with law. Hon'ble Tribunal in the case of Shubham Electricals (supra) was faced with a similar issue wherein the department justified the issuance of SCN based on the presumption that in absence of availability of data from the taxpayer, the differential figure needs to be subjected to tax. The Hon'ble CESTAT allowing the appeal of the taxpayer held that the officers have powers under the Act to visit the premises and examine the facts for issuing the SCN. It was further held that "the failure to gather relevant

facts for issuing a proper show cause notice cannot provide justification for a vague and incoherent show cause notice which has resulted in a serious transgression of the due process of law".

- Appellants also refer to the decision in the case
  (i) Kush Constructions v. CGST NACIN 2019 (24) G.S.T.L. 606 (Tri. - All.)
  (ii) M/s Quest Engineers & Consultants Pvt. Ltd. Vs. Commissioner, CGST & C. Ex., Allahabad [2022 (58) GSTL 345 (Tri.-All.)

**Service Tax Demand based on merely data of Form 26AS and Income Tax Returns are not maintainable**

- Without prejudice to whatever submitted hereinabove appellants submit impugned SCN is issued merely based on the data shared by the CBDT i.e. Form 26AS & ITR without adducing any further evidences, documents, details, information and investigations.
- Appellants submit that its settled law propounded by different judicial for a time and again that no demand can be made based on merely data of Form 26AS and ITR.
- Appellants submit that in this regard they refer and rely on various decisions from different judicial fora and some of such noteworthy are mentioned hereunder :
  (a) Forward Resources Pvt. Ltd. vs. CCE & ST - Surat- I - Final Order No. A/10801/2022 Dated 15.07.2022 (Ahmedabad Tribunal)
  (b) Krishna Construction Co., vs. CCE ST - Bhavnagar - Final Order No. A/10973/2022 Dated 12.08.2022 (Ahmedabad Tribunal)
  (c) M/s Quest Engineers & Consultants Pvt. Ltd. Vs. Commissioner, CGST & C. Ex., Allahabad [2022 (58) GSTL 345 (Tri.-AIL.) I
  (d) Kush Constructions v. CGST NACIN 2019 (24) G.S.T.L. 606 (Tri. - AII.)
  (e) Luit Developers Private Limited Vs Commissioner of CGST & Central Excise –
  (f) Synergy Audio Visual Workshop Pvt Ltd versus Commissioner of Service Tax Bangalore 2008 (10) STR 578 (Tri. - Bang.)

(g) CCE Ludhiana vs Deluxe Enterprises 2011 (22) $TR 203

(h) Faquir Chand Gulati vs. Uppal Agencies Pvt. Ltd. 2008 (12) STR 401 (SC)

(i) Alpa Management Consultant Pvt. Ltd. vs. CST 2006 (4) STR 21 (Tri. - Bang.)

- Appellants submit that on perusal of above decisions it's amply clear that no demand of service tax can be made merely based on data of Form 26AS & ITR and in present case the subject notice is issued merely based on data received from CBDT and hence deserves to be quashed.

**Reconciliation of Income as per Form 26AS and Service Tax Returns**

- Without prejudice to whatever submitted hereinabove the appellant submit hereunder the reconciliation of income as per Form 26AS and its Taxability.

| Particulars | FY-2015-16 | FY-2016-17 |
|---|---|---|
| Income as per Books of Accounts & ITR | 10,62,205.00 | 12,96,669.00 |
| | | |
| Sale of Scrap | 9,820.00 | 12,250.00 |
| Saving Bank Interest | 662.00 | 942.00 |
| Income by way of supply of Pre-fabricated Aluminium related structures etc | 10,51,723.00 | 12,83,477.00 |
| Total Exempt & Non - Taxable Service supply / Goods Supply | 10,62,205.00 | 12,96,669.00 |
| | | |
| Gross Total Taxable Value of | 0.00 | 0.00 |

- The appellant submit that on perusal of above reconciliation statement it is amply clear that there is no shortfall in payment of service tax and the difference alleged in value of income as per Form 26AS / Income Tax Returns are purely on account of Exempt services.

**Appellants are not liable to pay alleged service tax since Trading of Goods and Supply of Pre-fabricated aluminium related furniture and fixture items covered under Negative List**

- Without prejudice to whatever submitted hereinabove appellants submit that even in case alleged activities are considered as services than the same would fall under the category of trading of goods and manufacturing and same is covered under negative list.
- Appellants would like to draw your kind attention to charging Section 66B of the Finance Act, 1994 the same reads as under;

  *"There shall be levied a tax (hereinafter referred to as the service tax) at the rate of fourteen percent. on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.",*

- Appellants submit that all the services other than those covered under the negative list are liable for payment of service tax under the Finance Act 1994. Thus it is important to see what amounts to service. The word "Service" is defined under Section 65B(44) of the Finance Act 1994.
- Appellants submit that it is very clear from the above that the transactions which are covered under Article 366(29A) of the constitution as deemed sale shall not be covered under the term service and thus not liable to service under Section 66B of the Finance Act, 1994.
- Appellants submit that Section 66D of the Finance Act 1994 defines the negative list of the services which are not chargeable to service tax, since the same have been excluded from the charging Section 66B of the Finance Act 1994. Appellants would like to draw your kind attention to Section 66D(e) & 66D(f) of Finance Act, 1994.

  *"Section 66D - The negative list shall comprise of the following services, namely :*

  *(e) trading of goods*

  *(f) Any process amounting to manufacture or production of goods excluding alcoholic liquor for human consumption.*

- Appellants submit that above two activities attract Sales-VAT and Central Excise Duty and also the same are exempt and/or not leviable to service tax. Appellants further submit that even the labour component of activities embedded within such wholesome services would also not leviable to service tax.
- Appellants submit that "Process amounting to Manufacture or production of Goods" is defined under Section 65B(40) of Finance Act, 1994 as follow :

  *"a process "a process on which duties of excise are leviable under section 3 of the Central Excise act 1944 or any process amounting to manufacture of alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotic on which duties of excise are leviable under any State Act for time being in force."*
- Appellants submit that thus Process on which duties of excise are leviable under section 3 of the Central Excise act 1944 would not be leviable to service tax.
- Appellants submit that as per section 3 of Central Excise act 1944, duty shall be levied and collected on all excisable goods which are produced or manufactured in India at the rate forth in first schedule of Central Excise Tariff act, 1944.
- Appellants submit that the term 'excisable goods' shall have a meaning assigned to it in section 2(d) of the central Excise Act namely,-

  *"Excisable goods" means goods specified in the First Schedule and the Second Schedule to the Central Excise Act, 1985 as being subject to duty of excise and includes salt"*
- Appellants submit that Manufacture means "some input material undergoing into a process and resulting into a different commercial commodity having different identity & utility from its input.
- Appellants submit that the expression "manufacture" has been defined in Section 2(£) of the Central Excise Act, 1944, according to which it includes any process –

  (j) Incidental or ancillary to the completion of a manufactured product;

(ii) Which is specified in relation to any goods in, the section or chapter notes of the schedule to the Central Excise tariff act, 1985 as amounting to manufacture Or

(iii) Which in relation to the goods specified in the Third Schedule [MRP goods etc], involves packing or repacking of such goods in unit container or labeling or re-labeling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer (Deemed Manufacture)

- Appellants submit that if one would look at pre-fabricated furniture and fixture work in reference of above definitions one can easily say that such prefabricated goods amounts to a manufacturing activity. As such items having a different identity & utility from its input i.e. aluminium pipes, sections, etc.
- Appellants submit that it is clear most of the goods supplied by them are covered under Chapter 73, 76, 81, 83 & 94 of the first schedule to the Central Excise tariff act, 1985.
- Appellants submit that during the year 2015-16 & 2016-17 they have earned income by way of :
  (a) Sale of waste scrap material and the said activity amounts to trading of goods;
  (b) Supply of Pre-fabricated items of aluminium and other metals by way of carrying our process which amount to manufacture and Production of goods;
- both the above activities by which income is earned are covered under negative list in Section 66D(e) & (f) of Finance Act, 1994 respectively and hence not leviable to service tax
- Appellants submit that in view of above such activity of sale of materials by them during the year 2015-16 & 2016-17 are exempt from service tax.

**Appellants are eligible for Small Scale Service provider exemption under Notification No. 33/2012-ST dated 20.06.2012.**

- Appellants would like to draw your kind attention to the Notification No. 33/2012-ST dated 20.06.2012 which provides for the exemption from service tax to small scale service providers. Appellants submit that as per said Notification taxable services of aggregate value not exceeding ten lakh rupees in any financial year from the whole of the service tax leviable thereon under section 66B of the Finance Act, 1994, abstract of relevant part from said notification is reproduced hereunder for the ease of your reference :
- Appellants submit that the income on account of taxable services is below the threshold limit of Rs. 10Lacs exemption as provided for under exemption Notification No. 33/2012-ST dated 20.06.2012 for the Financial Year 2015-16 & 2016- 17 and they are very well eligible to claim the same and hence they are not liable to pay any service tax on the alleged income as referred in the subject Notice.

**The value of the services provided by the Appellants should be treated as cum tax. Therefore, the calculation of service tax as demanded is incorrect.**

- Without prejudice to the above submissions, it is submitted that even if the Appellants are liable to pay any service tax on the amount received from their service receivers, the tax calculation itself is incorrect.
- It is submitted that the amount received by the Appellants from its service receivers has to be treated as inclusive of the amount of service tax payable. In the case of excise duty also, it has been held that the amount received should be taken as Q cum-duty price and the value should be derived there from, by excluding the duty alleged to be payable as required under section 4(4)(d)(ii) of the Central Excise Act. In support of this the Appellants rely on the Larger Bench decision in the case of Sri Chakra Tyres reported in 1999 (108) ELT 361. The said decision of the Larger Bench has been affirmed by the Hon'ble Supreme Court as the departmental appeal has been dismissed vide Order dated 26th Feb. 2002 reported in 2002 (142) ELT A279 (SC). We also rely on the Apex Court

judgment in the case of CCE v. Maruti Udyog Limited reported in 2002 (49) RLT1 (SC), wherein it has been held that the deduction under section 4(4)(d)(ii) is allowable, even in situations where no duty was paid at the time of removal. Thus, for service tax calculation, the amount paid by the service Q receiver should be considered as cum tax payment and service tax should be calculated accordingly. Reliance is also placed on the Trade Notice No.20/2002 dated 23.5.2002 of Delhi-II Commissionerate.

- The legislature has further clarified the legal position in respect of the value of the taxable service by incorporating Explanation No. 2 in section 67 of the Act by virtue of the Finance Act, 2004. The said Explanation is reproduced as below:

> *"Explanation No. 2 Where the gross amount charged by a service provider is inclusive of service tax payable, the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged.*

- Reliance is placed on the following judgments of the Hon'ble CESTAT.
  (a) Rajmahal Hotel v CCE 2006 (4) STR 370 (Tri-Del)
  (b) Gem Star Enterprises (P) Ltd. ◦ CCE 2007 (7) STR 342
  (c) Panther Detective Services v. CCE 2006 (4) STR 116 (Tri.-Del.)
- Hence from section 67 subsection (2) of the finance act 1994 and the Judgments referred by the Appellants, it became crystal clear that the consideration received for the services provided should be considered cum tax and the tax liability calculated by the department is not correct as the Appellants did not receive amount of tax in addition to that.

**No suppression since all facts were disclosed to the Department.**

- The Appellants submit that they have never concealed any details from the department purposefully
- Thus, in the present case, the department was well aware about all the facts. Therefore, allegation made in the show cause notice of suppression of facts with intent to evade payment of duty is not tenable and it has no legs to stand. It is well settled law that the Department cannot press into

service the machinery for invoking the extended period of limitation unless there is established an act of suppression or mis-declaration with intent to evade payment of duty. In this connection, the Appellants wish to place reliance on the decisions on the following decisions:

(a) Cosmic Dye Chemical vs. Collector of Central Excise, Bombay 1995 (75) E.L.T. 721 (S.C.)

(b) Tamil Nadu Housing Board vs. Collector 1994 (74) E.L.T. 9 (S.C.)

(c) Cadila Laboratories Pvt. Ltd. vs. CCE 2003 (152) E.L.T. 262 (S.C.)

(d) Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay 1995 (78) E.L.T. 401 (S.C.)

(e) M/s. Continental Foundation JointVenture Holding, Naphtha H.P. vs. CCE, Chandigarh-I 2007 (216) E.L.T. 177 (S.C.)

(£) Alumeco Extrusion vs. CCE 2010 (249) ELT 577

(g) National Rifles vs. CCE 1999 (112) E.L.T. 483

(h) SPGC Metal Industries Pvt. Ltd. vs. CCE 1999 (111) E.L.T. 286

(i) Gujarat State Fertilizers vs. CCE, Vadodara 1996 (84) E.L.T. 539

(j) ITI (TID) Ltd. vs. CCE 2007 (11) ELT 316 (Tri) 0 0) Neyveli Lignite Corporation Ltd. vs. CCE 2007 (209) ELT 310 (Tri)

(k) Commissioner vs. Bentex Industries 2004 (173) ELT A079 (SC)

(1) Commissioner vs. Binny Limited 2003 (156) ELT A327 (SC)

(m) Collector vs. Ganges Soap Works (P) Ltd. 2003 (154) ELT A234 (SC)

- In any event, the Appellants submit that the Show Cause Notice merely made a bald allegation of suppression. The Show Cause Notice has not brought on record any evidence to show that the Appellants have suppressed any fact from the Department.
- Moreover, the issue involved in the present case is one of interpretation of law. The Appellants were under a bonafide belief that the none of the services provided by them are liable to service tax on their. Hence, the entire demand is hit by time bar.
- The Appellants are not liable to pay service tax. Hence, no question of imposing penalty and interest on the Appellants.

4. Personal hearing in the case was held on 13.12.2023. Shri Pratik Trivedi, Charted Accountant, appeared on behalf of the appellant for personal hearing. He reiterated submission made in appeal memorandum.

5. Before taking up the issue on merits, I proceed to decide the Application filed seeking condonation of delay. As per Section 85 of the Finance Act, 1994, an appeal should be filed within a period of 2 months from the date of receipt of the decision or order passed by the adjudicating authority. Under the proviso appended to sub-section (3A) of Section 85 of the Finance Act, 1994, the Commissioner (Appeals) is empowered to condone the delay or to allow the filing of an appeal within a further period of one month thereafter if, he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the period of two months. Considering the cause of delay given in application as genuine, I condone the delay of 30 days and take up the appeal for decision on merits.

6. I have carefully gone through the facts of the case, grounds of appeal, submissions made in the Appeal Memorandum and documents available on record. The issue to be decided in the present appeal is whether the impugned order passed by the adjudicating authority, confirming the demand of Service Tax against the appellant along with interest and penalty, in the facts and circumstance of the case, is legal and proper or otherwise. The demand pertains to the period FY 2015-16.

7. I find that in the SCN in question, the demand has been raised for the period FY 2015-16 based on the Income Tax Returns filed by the appellant. I **further find that the order has been passed ex-parte.**

8. It is observed that the main contentions of the appellant are that (i) they have not received any SCN, Summons or notices for personal hearing; and (ii) The appellant is engaged in trading work i.e. making fabricator aluminium door, door grills etc. and selling them and installing at the premise of the buyer, which is

exempted under Section 66D(e) and 66(D)(f) of the Finance Act 1994 defines the negative list of the services which are not chargeable to service tax.

9. As regard, the contention of the appellant that the impugned order was issued without conducting personal hearing, it is observed that the adjudicating authority has scheduled personal hearing on three different dates i.e. 07.11.2022, 01.12.2022 and 13.12.2022. The appellant contended that they have not received any personal hearing letter and therefore could not attend the personal hearing.

10. I also find that the appellant submitted various documents in support of their claim for exemption from service tax, which was not produced by them before the adjudicating authority and first time submitted at appeal stage. In this regard, I am of the considered view that the appellant cannot seek to establish their eligibility for exemption at the appellate stage by bypassing the adjudicating authority. They should have submitted the relevant records and documents before the adjudicating authority, who is best placed to verify the authenticity of the documents as well as their eligibility for exemption.

11. Considering the facts of the case as discussed hereinabove and in the interest of justice, I am of the considered view that the case is required to be remanded back to the adjudicating authority to examine the case on merits and also to consider the claim of the appellant for exemption from the service tax. The appellant is directed to submit all the records and documents in support of their claim for exemption from the service tax before the adjudicating authority. The adjudicating authority shall after considering the records and documents submitted by the appellant decide the case afresh by following the principles of natural justice.

12. In view of the above discussion, I remand the matter back to the adjudicating authority to reconsider the issue a fresh and pass a speaking order after following the principles of natural justice.

13. अपील कर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है |

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

22.12.23

(ज्ञानचंद जैन)
आयुक्त (अपील्स)

Dated: 22nd December, 2023

सत्यापित /Attested:

(अरविन्द कुमार)
अधीक्षक(अपील्स)
केंद्रीय जीएसटी, अहमदाबाद

**By RPAD / SPEED POST**

To,
M/s. Bapi Sahajahan Shaikh,
117, Chirag Park, Saniya Duplex, Nr. Oct,
Chandola Road, Ahmedabad - 380028

Copy to :

1) The Principal Chief Commissioner, Central GST, Ahmedabad Zone
2) The Commissioner, CGST, Ahmedabad South
3) The Assistant Commissioner, CGST, Division IV, Ahmedabad South
4) The supdt(Systems) Appeals Ahmedabad, with a request to upload on Website,
5) Guard File
6) PA file