

आयुक्त (अपील - II) का कार्यालय केन्द्रीय उत्पाद शुल्क  
सैन्ट्रल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,  
आंबावाडी, अहमदाबाद- 380015.

क फाइल संख्या : File No : V2(ST)63/A-II/2015-16 / 2135 to 2139  
ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-SVTAX-000-APP-002-16-17  
दिनांक Date : 13.04.2016 जारी करने की तारीख Date of Issue 20/04/16.

श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals-II)

ग \_\_\_\_\_ आयुक्त सेवाकर अहमदाबाद : आयुक्तालय द्वारा जारी मूल आदेश सं  
\_\_\_\_\_ दिनांक : \_\_\_\_\_ से सृजित  
Arising out of Order-in-Original No SD-06/4-82/O&A/Unique Comm/14-15 Dated 10.07.2015  
Issued by Assistant Commissioner, Div-III, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants

M/s. Unique Communication Ahmedabad

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-

Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-  
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैनटल  
हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at  
O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

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(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी।

(ii) The appeal under sub section (1) of Section 86 of the Finance Act 1994 to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules 1994 and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated.

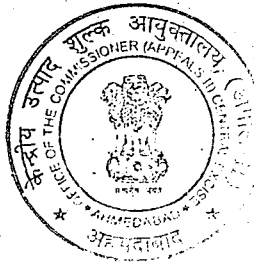
(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.-7 में की जा सकेगी एवं उसके साथ आयुक्ता, केंद्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्ता, सहायक / उप आयुक्ता अथवा A219k केंद्रीय 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 शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 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 (सीस्टेट) 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 अंतर्गत " 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 अर्जी एवं अपील को लागू नहीं होंगे।

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,

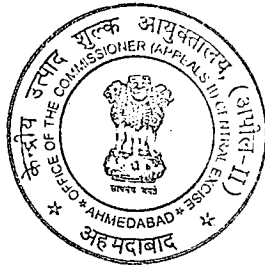
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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।

4(1) 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.

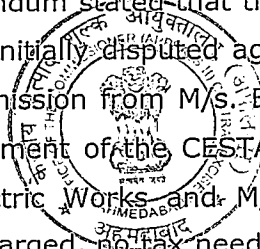


### Order-In Appeal

This order arises on account of an appeal filed by M/s. Unique Communication, B-2, Deepika Tower, Near AMTS Bus Stop, Naroda, Ahmedabad (hereinafter referred to as "the Appellants" for the sake of brevity) against Order-In-Original NO. SD-06/O&A/05/AC/Unique Commn./14-15 Dated 10.07.2015 (hereinafter referred to as the "impugned order" for the sake of brevity) passed by the Assistant Commissioner, Division-VI, Service Tax, Ahmedabad (hereinafter referred to as the "Adjudicating Authority" for the sake of brevity) .

2. Briefly stated the facts of the case are that on the basis on an intelligence that the appellants were evading Service Tax on the commission earned and received by them from M/s Bharati Airtel Ltd, Ahmedabad ( hereinafter referred to as 'M/s. Bharti' for sake of brevity) for providing services of 'promotion or marketing or sale of goods/services produced or provided by or belonging to the said M/s. Bharti ', investigation was carried out and it was revealed that the appellants were neither registered with the Service Tax Department nor paying Service Tax on the amount received as commission from M/s. Bharti. During investigation, it was revealed that the appellants were registered with the Service Tax department bearing number TMPRY4460CST001 (non PAN base) dated 24.09.2004. The appellants were issued a show cause notice on 20.10.2011 which was adjudicated by the then adjudicating authority who confirmed the demand of Service Tax amounting to ₹3,95,345/- under Section 73(1) of the Finance Act 1994 and demanded interest and penalty under Section 75, 76 (liability up to 10.05.2008), 77(1)©, 77 and 78 of the Finance Act 1994 respectively. He also directed the appellants file prescribed returns with late fee of ₹20,000/- for each return. Accordingly, the appellants filed an appeal before the then Commissioner (Appeals) who, remanded back the case for re-quantification of Service Tax demanded looking to the availability of exemption as per the Notification No. 6/2005-ST dated 01.03.2005 and penalty accordingly. The adjudicating authority, vide the impugned order, once again confirmed the demand of Service Tax amounting to ₹3,95,345/- under Section 73(1) of the Finance Act 1994 and demanded interest and penalty under Section 75, 76 (liability up to 10.05.2008), 77(1)©, 77 and 78 of the Finance Act 1994 respectively, in terms of Notification No. 6/2005-ST dated 01.03.2005. He however, directs the appellants to pay late fee of ₹2,000/- instead of ₹20,000/- per return.

3. Being aggrieved with the impugned order, the appellants filed the present appeal. The appellant in their Appeal Memorandum stated that the activity performed by them is not taxable though they had not initially disputed against the demand of Service Tax. They argued that they get commission from M/s. Bharti for the service which already got taxed. Relying on the judgment of the CESTAT, New Delhi in the case of CCE, Meerut vs. M/s. Virendra Electric Works and M/s. Bist Engg., they contended that since entire liability was discharged, no tax need to be collected from



the distributor for transaction relating to the goods. They have also placed reliance on the judgments of CESTAT in the cases of South East Corporation vs. CCE, Cochin, M/s. Kumar Telecommunications vs. CCE, Meerut and various other judgments. Further, they have contended that as no Service Tax was leviable as stated above, interest and penalty under various Sections is also not justified, that the show cause notice is also time barred as extended period is not imposable on them.

4. Personal hearing in the case was granted on 09.03.2016 wherein Shri Rohan Thakkar, Chartered Accountant, on behalf of the appellants, appeared before me and put forth a written submission. He reiterated the contents of the appeal memorandum and stated that earlier, the matter was remanded back by the then Commissioner (Appeals) for considering SSI exemption benefit but the same has not been considered by the adjudicating authority. He said that the appellants have also raised the issue of taxability of service which was not agitated in the first round of adjudication as well as appeal.

5. I have carefully gone through the facts of the case on records, grounds of the appeal, and written submission put forth by the appellant as well as oral submission made at the time of personal hearing. Looking to the facts of the case, I proceed to decide the case on merits.


6. In the present case, I find that it is not disputed that the appellants were appointed as distributor by M/s. Bharti and were found to be engaged in selling and marketing of SIM Card, Recharge Coupons etc, for which the appellants used to get commission from M/s. Bharti. Further, M/s Bharti who have appointed the appellants as their distributor and have paid commission to the appellants for services provided by the appellants, have also submitted, before the adjudicating authority, the details of the commission paid to the appellants. From above facts, it is clear that the appellants are distributor of M/s. Bharti and the appellants used to provide sale of the service and shall be responsible for the sale of the services and thus, appellants are doing promotion of business and marketing of activities of M/s. Bharti and for these activities, M/s. Bharti used to give commission for the same. Thus, I find that the relationship of the appellants with M/s Bharti are that of principal to agent and the transaction is not as principal to principal basis and therefore, the remuneration which the appellants had received from M/s. Bharti can be safely termed as commission and the services provided can be termed as promotion and marketing of services of M/s. Bharti and thus, falling under clause-II of the definition of 'Business Auxiliary Service' as defined under Section-65 of the Finance Act, 1994. In their appeal memorandum, the appellants have accepted the facts about earning of commission from M/s. Bharti and that on such commission; liability to pay Service Tax is upon the M/s Bharti and not on distributors. I find that though the appellants have not put forth any evidence that M/s Bharti have paid Service Tax on the entire value (Maximum Service Charge) inclusive of the value of commission amount paid to the appellants, it is the current practice in this field that the Telecommunication Companies like M/s Vodafone Essar Gujarat Ltd, or M/s Bharti etc. used to pay the Service Tax on the total MRP of the SIM



Cards under the category of Telecommunication Services. And this is what exactly contended by the appellants that M/s Bharti is solely responsible to pay service tax on said Maximum Service Charge which is being recovered from the customers. I find that, in the impugned order, the adjudicating authority has not submitted any observation on the above contention of the appellants. If M/s Bharti has paid the Service Tax on the entire Maximum Service Charge inclusive of the amount of commission paid to the appellant then demanding Service Tax once again from the appellant under the category of Business Auxiliary Service would be tantamount to double taxation. In view of above I find it appropriate to remit the case back, in the interest of justice, to the Adjudicating Authority to verify whether M/s. Bharti had discharged Service Tax on entire value of SIM Cards and Recharging Coupons as well as discount/commission has been given out of from the Service Tax value or not. From the impugned order it does not come out clearly as to whether M/s. Bharti had discharged Service tax on the entire value of SIM Cards/Recharge Coupons as well as discount/commission has been given out of from the service tax value.

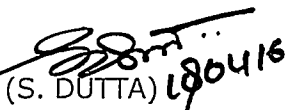
7. Thus, in view of discussion at Para 6 above and in the fitness of things, it would be just and proper to remand the matter to the Adjudicating Authority to give independent findings on the said issues raised by the appellants before me and also such other material that may be produced by the appellants in support of their contention. In the event of such materials being placed before the Adjudicating Authority, the same shall be considered in accordance with law. The appellants are also directed to put all the evidences before the Adjudicating Authority in support of their contention as well as any other details/documents etc. that may be asked for by the Adjudicating Authority when the matter is heard in remand proceedings before the Adjudicating Authority.

8. The appeal filed by the appellant is disposed off accordingly.

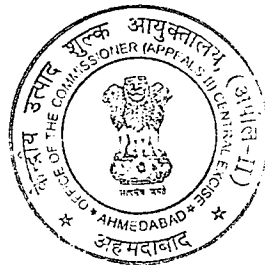
  
(UMA SHANKER)

COMMISSIONER (APPEAL-II)  
CENTRAL EXCISE, AHMEDABAD.

ATTESTED

  
(S. DUTTA) 180416

SUPERINTENDENT (APPEAL-II),  
CENTRAL EXCISE, AHMEDABAD.



To,

M/s. Unique Communication,

B-2, Deepika Tower,

Near AMTS Bus Stop, Naroda,

Ahmedabad

**Copy To:-**

1. The Chief Commissioner, Central Excise, Ahmedabad zone, Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Deputy/ Assistant Commissioner, Service Tax, Division-VI, Ahmedabad.
4. The Assistant Commissioner(Systems), Service Tax,, Ahmedabad
5. Guard File.
6. P.A. File.

