

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

क फाइल संख्या : File No : V2(ST)174 /A-II/2015-16 2090 to 2094

ख अपील आदेश संख्या : Order-In-Appeal No..AHM-SVTAX-000-APP-0112 -16-17

दिनांक Date : 29.09.2016 जारी करने की तारीख Date of Issue 05/10/16

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-05/15/DKJ/AC/2015-16 Dated 29.01.2016

Issued by Assistant Commissioner, Div-V, Service Tax, Ahmedabad

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

M/s. Shri Devidas Raghunath Borse 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 मैन्टल हास्पिटल 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.

(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 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.

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(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 A219k 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 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 (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014) की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्त 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 हैं -

- (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 बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जों 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 out of the appeal filed by Shri Devidas Raghunath Borse, C-75 Tejendra Vihar, Vibhag-2, Virat Nagar Road, Odhav, Ahmedabad (hereinafter referred to as the "the appellant") against the Order-In-Original No. SD-05/15/DKJ/AC/2015-16 dated 29.01.2016 issued on 29.01.2016 (hereinafter referred to as "the impugned order") passed by the Asst. Commissioner, Service Tax, Division-V, Ahmedabad (hereinafter referred to as "the Adjudicating Authority").

2. In the instant case, the facts and circumstances and contraventions of the provisions of the Finance Act, 1994 and the grounds relied upon are similar to those discussed in earlier Show Cause Notices dated 14.10.2011, 31.05.2013 and 16.04.2014 issued to the appellant and therefore, in terms of Section 73(1A) of the Finance Act, 1994, the present Show Cause Notice issued to the said appellant under F.No.SD-01/9-125/SCN/Devidas/14-15 dated 12.09.2014 demanding Service Tax amounting to Rs. 19,268/- for the period July, 2012 to March, 2013. Accordingly, briefly stated the facts of the case are as under:-

(i) During the audit verification of the records maintained by M/s Anup Engineering Ltd. Odhav (hereinafter referred to as 'the said service recipient'), it was observed that during the period from April, 2008 to March, 2009, the appellant had supplied laborers/workers to the above referred service recipient for attending certain activities in the premises of the said service recipient on contract basis. The appellant had rendered their services to the service recipient and the services so rendered were covered under the definition of "Manpower Recruitment or Supply Agency" service as defined under section 65 (105) (k) of the Finance Act, 1994. However, the appellant had not discharged their Service Tax liability.

(ii) Thereafter, since the issue involved in above litigation was recurring in nature, similar information for the next upcoming period viz., July, 2012 to March, 2013 was called for by the jurisdictional Service Tax Authorities from the service recipient, M/s Anup, vide letter dated 02.06.2014 which were submitted by them vide letter dated 09.06.2014. Since the appellant had continued the same practice of providing the service "Manpower Recruitment or Supply Agency" to the said service recipient and were not discharging the mandated Service Tax liable on the services rendered by them inasmuch as the appellant had neither obtained the requisite



Tax Registration nor filed any ST-3 returns under the category of "Manpower Recruitment or Supply Agency", a Show Cause Notice dated 12.09.2014 for the subsequent period of July,2012 to March,2013 was issued to the appellant proposing the demand of Service Tax amounting to Rs. 19,268/- on taxable value Rs. 6,23,528/- under Section 73(1A) of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 and also proposing the penalties under Section 70, Section 76 and Section 77 ibid as the circumstances under which the demand of Service Tax was raised were recurring in nature in the instant case also.

(iii) The above Show Cause Notice was adjudicated vide the impugned order, wherein the adjudicating authority held that from 01.07.2012 classification of service has been done away with. All services other than services included in negative list are taxable. Any activity undertaken where consideration is there is service in terms of section 65B. Impugned OIO confirmed the demand under section 73 with interest under section 75. Imposed penalty of Rs. 5000/-, 19268/- and 20,000/- under section 77, 78 and 70 respectively.

3. Being aggrieved by the impugned order, the appellant has filed an appeal on the grounds interalia mentioned as under:-

- a) They are not supplying any manpower supply to the service recipient but were carrying job work on kg rate basis at the premises of the service recipient.
- b) The exact nature of the job undertaken by the appellant for the service recipient involves completion of fabrication work as per their drawing, Making, Punching, and identification of all materials, setting up of components, welding and hydro/vaccum testing; that the appellant is required to complete assigned work at their risk and time. The appellant do fabrication work on contractual basis and the said activity is not covered within the scope of the definition of the taxable services {Section 65(105)(k)} and, since the appellant does not act as supply agency, notice is not falling within the definition of "Manpower Recruitment Agency" and therefore, is not liable to pay any service tax.
- c) Circular No. 96/7/2007-ST dated 23.8.07 contemplates that it is in respect of supply of Manpower; that it can be seen that the clarification specifically reads that the agency agrees for use of services of individual to another person for consideration as supply of manpower.



that in their case, there is no agreement for utilization of services of an individual but a job of fabrication work is given to them for execution.

- d)** Similarly, in case of supply of manpower, individuals are contractually employed by the manpower recruitment or supply agency, but in case of the appellant no individuals are contractually employed by service recipient. Appellant has not being Manpower Recruitment or Supply Agency provider is not collecting any consideration for supply of Manpower. In support to their contention that they are receiving lump sum or job charges, which is not covered under "Manpower recruitment or supply agency". They relied on the decisions in case of (i) S.S. Associates vs. CCEx. Bangalore reported at 2010 (19) S.T.R. 438 (Tri.-Bang) (ii) Divya Enterprises vs. CCEx. Mangalore reported at 2010 (019) STR 0370 (Tri.-Bang) and (iii) Ritesh Enterprise vs. CCEx. Bangalore reported at 2010 (18) STR 17 (Tri.-Bang).
- e)** They were engaged in manufacturing activities, which are not a service and liable for tax and relied on Notification No. 8/2005-ST dated 01.03.2005 in support of their contention; that they were working for excisable factory, so if the appellant were liable, the service tax paid by them would be available as a set off (CENVAT), then it would be revenue neutral situation.
- f)** The entire demand is time barred as the Show Cause Notice covers the period of 01.07.2012 to 31.03.2013 and has been issued on 17.09.2014. Thus, the Show Cause Notice invoking the extended period of limitation is bad in law; that the Show Cause has badly alleged that the appellant have suppressed the information from the department.
- g)** Penalty invoked under Section 76 and Section 77 of the Finance Act, 1994 is unjustified and unwarranted. Reliance is placed on various decisions of the higher judicial forum in their support.
- h)** The present case is a fit case to be covered under Section 80 of the Finance Act, 1994, which expressly provides that no penalty shall be imposed under Section 76 and Section 77 of the Finance Act, 1994, if the appellant has a reasonable cause for default. Reliance is placed on various decisions of the higher judicial forum in their support.

4. Personal hearing in the matter was granted on 14.09.2016, wherein Shri Vipul Khandhar, Chartered Accountant appeared on behalf of the appellant and reiterated the contents of the appeal memorandum.

DISCUSSION ANF FINDING.

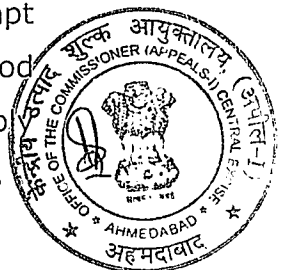


5. I have gone through the facts of the case, Show Cause Notice, the impugned order and the grounds of appeal under Appeal Memorandum. I proceed to decide the case on merits since the appellant has made payment of mandatory deposit of Rs.1,445/- (7.5% of the Service Tax of Rs.19,268/-) as evident from the Appeal memorandum at Col.5 thereto and also from letter dated nil informing about the payment thereto and from the enclosed copy of e-challan dated 04.03.2016 and thus, complied the requirement of fulfillment of mandatory pre deposit in pursuance to the amended provisions of Section 35F of the Central Excise Act,1944 made applicable to Service Tax matter in terms of the Section 83 of the Finance Act,1994 effective from 06.08.2014.

6. Issue to be decided is whether or not, the service rendered by appellant though hired man power at recipient factory in execution of job contract, on per kilogram basis, is taxable. In all previous SCN appellant has contended that service rendered does not fall under ambit of "Man power recruitment & supply service" as contract is kilogram basis and not on man power supply basis. I find that this periodical notice is covering period from 01.7.2012 to 31.03.2013 i.e. period wherein classification of service is done away with. In all previous OIO's issued in respect of previous periodical notice covering period prior to 01.07.2012 it was held that said activity is classifiable under "Man power recruitment and supply service" {Section 65(105)(k)} even though consolidated payment of job charges per kg is made to the appellant and even though the man-power are hired workers of appellant but control /supervision of man power for execution of work is not with appellant.

7. On going through grounds of appeal, I find the appellant has submitted same stereotyped reply which he has submitted in earlier period OIA. There is a futile attempt to prove that service rendered does not fall under "Man power recruitment and supply service" when classification of service itself is done away with. I find that appellant has not raised any contention against grounds confirming the duty and penalty under impugned OIO.

8. I find that, earlier i.e. prior to 01.07.2012, service tax was levied on those taxable services which were specifically mentioned in the Finance Act, 1994. This was called the 'Positive List'. Those not mentioned were exempt from service tax liability. There were 119 specific services up till the period of 30.06.2012 which were taxable. "Man power recruitment and supply service" classifiable under Section 65(105)(k) was one of the service.



Earlier, the classification of the service provided should have been with reference to the specific coverage within the 119 alternatives. Now, w.e.f. July 2012, the Service Tax law has undergone a sea change with the term 'service' by itself being defined and all the activities which satisfy the definition criterion fall under the service tax bracket.

9. Focus has now shifted from the 'Positive' approach to the 'Negative' approach in classification of services. Those services included in the Negative list are now not taxable and any service, if not falling under negative list, is liable to service tax. In addition to items included in negative list, there will be exemptions, abatements and composition schemes as issued by the CBEC from time to time which will further add more services in negative list.

10. In a new negative list era, to decide taxability, it is immaterial whether or not payment is received on kilogram basis and whether or not man power supplied for execution of job work are in direct control of recipient of service. What is material to decide the taxability is whether or not service rendered falls under services other than negative list service. I find that service rendered does not fall under negative list and no exemption Notification is available to said service.

11. In view of my above findings, the appeal filed by the appellant stands rejected and the impugned order is upheld. The appeal filed by the appellant thus stands disposed off in above terms.


(UMA SHANKER)

COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(R. R. PATEL)

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



BY R.P.A.D.

Shri Devidas Raghunath Borse,
C-75 Tejendra Vihar,
Vibhag-2, Virat Nagar Road,
Odhav,
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-I, Ahmedabad. OR DIV-V
4. The Assistant Commissioner, Systems, Service Tax, Ahmedabad.
5. Guard File.
6. P.A. File.

