

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)0122/A-II/2016-17/3204 - 09
ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-SVTAX-000-APP-167-168-16-17
दिनांक Date : 30.11.2016 जारी करने की तारीख Date of Issue 05/12/16

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 STC/57/Jt Commr/2007 Dated 19.12.2007

Issued by Joint Commissioner STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants
M/s. Haritha Fab Ahmedabad & Electrotherm (India) Ltd

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 :-

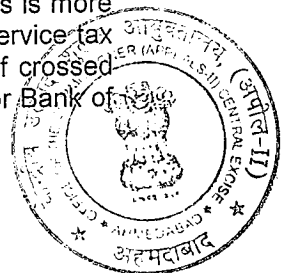
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी 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 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.



A. file

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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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 35फ 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 रुपए 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 अर्ज़ी 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,

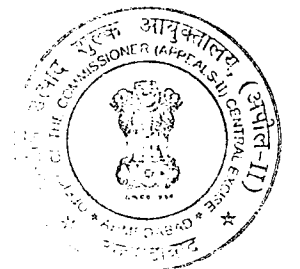
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

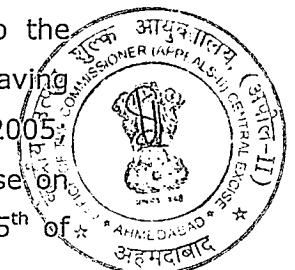


ORDER-IN- APPEAL

1. This order arises out of the appeals filed by M/s. Haritha Fab, 51, Baleshwar Bungalows, Opp. India Colony, Bopal, Ahmedabad (hereinafter referred to as the "first appellants") and M/s. Electrotherm (India) Ltd., Survey No. 72, Palodia (via Thaltej), Taluka Kalol, Dist. Gandhinagar (hereinafter referred to as the "second appellants") against the Order-in-Original number STC/57/Joint Commr/2007 dated 19.12.2007 (hereinafter referred to as the "impugned order") passed by the Joint Commissioner of Service Tax, Ahmedabad (hereinafter referred to as the "adjudicating authority").

2. The facts of the case, in brief, are that on the basis of information gathered by the officers of Director General of Central Excise Intelligence (DGCEI) that the first appellants were indulged in evasion of Service Tax on Business Auxiliary Services (BAS) provided to the second appellants by way of collecting service charges against the services of 'production of goods on behalf of the client' but were not paying Service Tax, an investigation was initiated against them.

2.1. Statements of Shri Hariharan P. Nair, the Proprietor of the first appellants and Shri Rajesh Mangal, Assistant General Manager (Accounts) of the second appellants were recorded on 14.08.2006 and 30.08.2006 respectively wherein they stated that the first appellants had been carrying out job work in respect of fabrication (basically welding) of tilting structure, top and bottom rings and parts thereof on contract basis with the second appellants @ ₹4/- to ₹7.25 per kg since last three years; that as job contractor, the first appellants were engaging the required manpower for the execution of the execution of the job work as per the drawings and designs provided by the second appellants; that all the required materials were being supplied by the second appellants; that the work of the first appellants was being supervised by Shri Rajeshbhai I. Patel, the planning engineer of the second appellants; that the job work was being carried out in the factory premises of the second appellants with the help of machineries installed there and were allowed to work in their premises for producing the required works/ providing the required services; that the work done by the first appellants did not result into the manufacture of any new product as their work was limited to welding and minor machining and after the completion of the work, the fabricated structures or profiles were handed over to the second appellants; that the first appellants had undertaken job work having value of ₹74,00,757/- during the period from 10.09.2004 to 28.02.2005; that the first appellants used to prepare job-wise bills and submit these on monthly basis and the payments of such bills were received by the 15th of



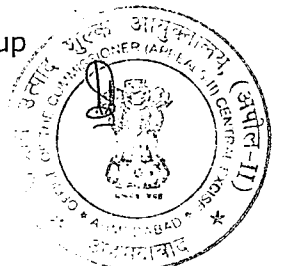
subsequent month. Shri Nair further stated that they had not been registered with the Central Excise/ Service Tax department and as they were not aware of their Service Tax liability, they had not paid any Service Tax; that as per the labour contract, it was mutually agreed that Service Tax should be charged extra.

2.2. Since, the first appellants had carried out the work of production of goods on behalf of the second appellants during the aforesaid period and a total value of ₹74,00,757/- realised towards payment of Business Auxiliary Services but not paid appropriate Service Tax amounting to ₹7,54,877/-, a show cause notice dated 31.10.2006 was issued to both the appellants. The first appellants paid an amount of ₹7,40,076/- (Service Tax ₹7,25,565/- + Ed. Cess ₹14,511/-) on 20.10.2006. The adjudicating authority, vide the impugned order, confirmed the demand for Service Tax amounting to ₹7,54,877/- under Section 73(1)(a) of the Finance Act, 1994 from the first appellants and appropriated the amount of ₹7,40,076/- already paid by them; ordered recovery of interest under Section 75; imposed penalty of ₹500/- under Section 75A; imposed penalty of ₹200/- per day or @ 2% of the Service Tax amount per month, whichever is higher, under Section 76; penalty of ₹2,000/- under Section 77 and penalty of ₹7,54,877/- under Section 78 of the Finance Act, 1994. A penalty of ₹7,54,877/- was also imposed upon the second appellants under Section 78 of the Finance Act, 1994.

3. Being aggrieved with the impugned order, the appellants preferred an appeal before the then Commissioner (Appeals-IV) who, vide Order-In-Appeal number 59 to 60/2008(STC)/RAJU/Commr.(A)/Ahd. dated 11.04.2008, rejected the appeal, without going to the merits of the appeal, on the ground of non-compliance of stay order, without going to the merit of the case, under Section 35F of the Central Excise Act, 1944 made applicable to the Service Tax under Section 83 of the Finance Act, 1994.

4. Being aggrieved with the said OIA, the appellants filed an appeal before the Hon'ble CESTAT, West Zonal Bench, Ahmedabad. The Hon'ble CESTAT, vide order number A/2091-2092/WZB/AHD/2008 & S/1043-1044/WZB/AHD/2008 dated 15.09.2008, remanded back the case directing the Commissioner (Appeals) to decide the case on merit without asking for any deposit.

5. In view of the above judgment of the Hon'ble Tribunal, I take up the case to be decided on merit.



6. Personal hearing in the case was granted on 14.09.2016 and Shri S. J. Vyas, Advocate, appeared before me. Shri Vyas stated that M/s. Harita Fab (the first appellants) are fabricators manufacturing parts of induction furnace at the factory of M/s. Electrotherm (India) Ltd. (the second appellants). Since, the activity is manufacturing, no Service Tax is payable under Business Auxiliary Services. Regarding the imposition of penalty on M/s. Electrotherm (India) Ltd., he stated that there is no provision to impose penalty under Service tax Laws on the receiver of the services.

7. I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum and written submissions made by the appellants. I find that the adjudicating authority, in the impugned order, had concluded that the first appellants were engaged in providing the services of 'production of goods on behalf of the client' falling under Business Auxiliary Services' to the second appellants. As per the statement of the Proprietor of the first appellants, they were offering job work to the second appellants in respect of fabrication (basically welding) of tilting structure, top and bottom rings and parts thereof on contract basis. The term 'Job Work' is defined in Notification number 214/86 dated 25.03.1986 as "*Explanation I. - For the purposes of this notification, the expression "job work" means processing or working upon of raw materials or semi-finished goods supplied to the job worker/ so as to complete a part or whole of the process resulting in the manufacture or finishing of an article or any operation which is essential for the aforesaid process*". Under Rule 2(n) of the Cenvat Credit Rules, 2004, the term 'Job Work' has been defined as "*(n) "job work" means processing or working upon of raw material or semi-finished goods supplied to the job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of an article or any operation which is essential for aforesaid process and the expression "job worker" shall be construed accordingly*". If one were to go by the definition of the term "job work", it is evident the raw materials have to be supplied by another person. In Prestige Engineering India Ltd v CCE Meerut, (1994 (09) LCX 0110), the Supreme Court held that when the job worker contributed his own material to the goods supplied by the customer and engaged in manufacturing, the activity was not one of job work. However, minor additions by the job worker would not take away the fact that the activity was one of job work. Thus, where the processing undertaken by the job worker does not amount to manufacture, the said job worker could be liable to Service Tax. Prior to Negative List regime i.e prior to 01.07.2012, Service Tax on job work, where the process does not amounts to manufacture, was levied under 'Business Auxiliary Service' as per which the activity of production or processing of goods for, or on behalf of the client, would be taxable. The liability in terms of job work can arise where the processing is done for the client. However, one should note that



where the processing amounts to manufacture, the same would not be taxable under Service Tax and the liability if any would have to be studied under the angle of Central Excise. Even if the taxability of the processing is to be seen under Business Auxiliary Service, the job worker would be entitled to exemption from Service Tax under Notification number 08/2005-ST dated 01.03.2005 where the goods after processing are returned to the principal manufacturer (the second appellants) for use in or in relation to manufacture of dutiable goods which are cleared on payment of duty of Central Excise. For more clarification I put forth below the contents of the said notification;

"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service of production of goods on behalf of the client referred in sub-clause (v) of clause (19) of section 65 of the said Finance Act, from the whole of service tax leviable thereon under section 66 of the said Finance Act:

Provided that the said exemption shall apply only in cases where such goods are produced using raw materials or semi-finished goods supplied by the client and goods so produced are returned back to the said client for use in or in relation to manufacture of any other goods falling under the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), as amended by the Central Excise Tariff (Amendment) Act, 2004 (5 of 2005), on which appropriate duty of excise is payable.

Explanation.-

For the purposes of this notification,-

- (i) *the expression "production of goods" means working upon raw materials or semi-finished goods so as to complete part or whole of production, subject to the condition that such production does not amount to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944);*
- (ii) *"appropriate duty of excise" shall not include 'Nil' rate of duty or duty of excise wholly exempt."*

Thus, from the above notification, it is very clear that as the first appellants are engaged in the production of goods on behalf of the second appellants, they are exempt from payment of Service Tax as they have used the raw materials/ semi finished goods of the second appellants and the said goods are handed over to the custody of the second appellants on completion of the



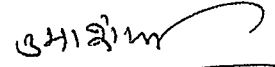
job specified to the former. Moreover, as per the definition of 'manufacture' given in Section 2(f)(i) of Central Excise Act, 1944, the process carried out by the appellants is "incidental and ancillary to the completion of a manufacture product", on which Central Excise duty is paid. It cannot be a case where Central Excise duty is paid and also Service Tax is levied. Thus, I allow the appeal of the first appellants as I find that they are not liable for Service Tax as per the Notification number 08/2005-ST dated 01.03.2005.

7.1. Further, regarding the imposition of penalty on the second appellants, I find that the second appellants should not be held responsible for the non-payment of Service Tax by the first appellants. The first and second appellants are absolutely different entities and are no way related to each other. No law can punish someone for the folly of another person. In the impugned order, the adjudicating authority has accused the second appellants to have connived with the first appellants regarding non-payment of Service Tax. However, no evidence has been recorded by the adjudicating authority in support of his claim. Simple accusation does not prove anybody guilty if the accuser is devoid of any substantial evidence. However, when the first appellants are not liable for Service Tax, the penalty imposed on the second appellants become null and void. Thus, I allow the appeal of the second appellants as I find that no penalty should be imposed on them.

8. In view of the above, I set aside the impugned order with consequential relief to the affected parties.

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

9. The appeals filed by the appellant stand disposed off in above terms.

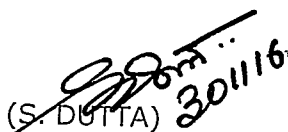


(उमा शंकर)

आयुक्त (अपील्स - II)

CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(S. DUTTA)

30/11/16
SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD.



BY R.P.A.D.

1. M/s. Haritha Fab,
51, Baleshwar Bungalows,
Opp. India Colony, Bopal,
Ahmedabad.

2. M/s. Electrotherm (India) Ltd.,
Survey No. 72, Palodia (via Thaltej),
Taluka Kalol,
Dist. Gandhinagar

Copy To:-

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Additional Commissioner, Service Tax, Ahmedabad
4. The Assistant Commissioner, Systems, Service Tax, Ahmedabad
5. Guard File.
6. P.A. File.

