

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)182/A-II/2015-16 / 3210-15

ख अपील आदेश संख्या : Order-In-Appeal No..AHM-SVTAX-000-APP-171-16-17

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 SD-05/14/DKJ/AC/2015-16 Dated 22.01.2016

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

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

**M/s. Ramesh Brothers 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 हास्पिटल कम्पाउण्ड, मेधाणी 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

*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 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 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 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 बशर्ते 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 होगा।

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,

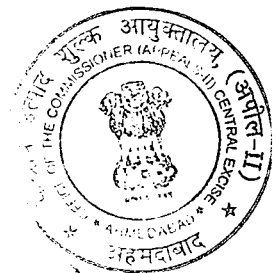
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

M/s. Ramesh Brothers, 614, 6<sup>th</sup> floor, Parekh Tower, Near Diwan Ballubhai School, Kankarya, Ahmedabad (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number SD-05/14/DKJ/AC/2015-16 dated 22.01.2016 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax Div-V, APM Mall, Satellite, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

2. The facts of the case, in brief, are that the appellants were engaged in providing taxable service under the category of 'Business Auxiliary service' and was not holding Service Tax registration number. It was noticed that Appellant had received an "Commission" and "discount" totaling of Rs. 36,17,605/- from M/s Travancore Titanium Products Ltd., Kerala ( TTPL ) during the year 2010-11 to 2013-14 for marketing their manufactured product, but appellant had not paid service tax of Rs. 4,21,101/- under Business Auxiliary service. Show cause notice dated 17.02.2015 demanding Rs. 4,21,101/-, on above incentive, with interest was issued.

3. Adjudicating Authority vide impugned OIO confirmed demand of Rs. 1,34,980/- under section 73(2) of FA 94 along with interest under Section 75 and also imposed penalty of Rs. 5000/- under Section 77(2) for failure to get registration, of Rs. 5000/- under 77(1)(a) for failure to self assess service tax liability, penalty of Rs. 5000/- under section 77(2) for failure to issue and penalty of Rs. 4,21,101/- under section 78 for suppression of facts was imposed on appellant. From the agreement dated 08.05.2010 it was concluded by the adjudicating authority that relation between appellant and TTPL was that of agent and principal. Moreover from debit note it was noticed to adjudicating authority that TTPL has deducted TDS under section 194 H of the Income Tax Act, 1961 and income was registered in appellant's ledger as "commission", therefore it was concluded in OIO that amount received was that of commission income which is chargeable to service tax.

4. Being aggrieved with the impugned order, the appellants preferred an appeal on 21.03.2016 before the Commissioner (Appeals-II) wherein it is contended that-

I. Appellant are registered with the Gjarat VAT authorities and have been doing trading activities of buying and selling product purchased from

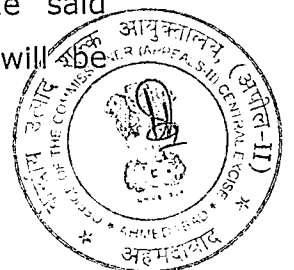


TTPL as STOKISTS of TTPL and in return gets trade discount as well as additional discounts on placing additional quantity than that of specified quantity in agreement.

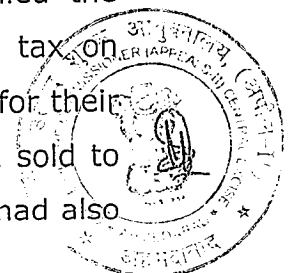
- II. Clause VII of agreement with TTPL dated 08.05.2010 shows "RELATIONSHIP" as " The parties hereto recognize and agree that relationship between them shall be that of seller and purchaser and not that of principal and agent".
- III. Renewed agreement dated 08.05.2010 shows "OBLIGATION OF THE COMPANY" at clause III(4) as "to pay/adjust to stokist Trade Discount rates specified by the company from time to time.
- IV. Appellant are in trade of purchase and sales of goods on behalf of the client customers in terms of OGS Purchase/ sales or LR sales by getting invoice directly in the name of customers and having our account in invoice which is normal business practice.
- V. TTPL issues credit notes under head of TRADE DISCOUNT and never issued under COMMISSION head for business done during the month. Appellant receives trade discount on achieving prescribed target of quantity and no circumstances commission is received.
- VI. Appellant sells goods by adding profit margin and charges VAT if sold in Gujarat and issue "C" form for other state sell. Under Central Sales Tax "F" is issued for commission agents so it is evident that we are not acting as commission agent.

5. Personal hearing in the case was granted on 08.11.2016 and Shri Milan Gandhi, CA, appeared before me. Shri Milan Gandhi, CA reiterated the grounds of appeal. He submitted additional submission wherein it is stated that-

- I. In the course of business granting discount either in the form of trade discount or cash discount is normally seen to encourage the customers to settle the amount in time and to purchase in huge quantity. The manufacturer or service provider may grant discount to their clients or may receive discounts in the course of purchase. In addition to discount incentives may also be granted if the target fixed is exceeded. Such discount/incentive will not form part of assessable value for levying service tax or excise duty and hence no service tax or excise duty is leviable on such discounts/incentives. The said connotation is confirmed by some of the tribunals which will be discussed below.



- II. In 'Euro RSCG Advertising Limited V. Commissioner of Service Tax, Bangalore' 2007 -TMI - 1721 - CESTAT, BANGALORE the tribunal held that cash discount is an income from payment of bills in advance and not from services rendered to clients and does not attract service tax. In addition to this the appellants received incentives from certain publications after they reached certain targets of advertising business given to them. This incentive is called as target incentive. It is in no way connected to the service rendered to the clients nor is billed to clients.
- III. In 'Kerala Publicity Bureau V. Commissioner of Central Excise' 2008 - TMI - 2534 - CESTAT, BANGALORE the tribunal held that incentives are collected from media. Revenue considered their receipts as extra commission and proceeded to levy service tax. Incentives in the form of discounts are not leviable to service tax and only charges on advertising charges are leviable.
- IV. In 'McCann Erickson (India) Private Ltd., V. Commissioner of Service Tax, Delhi' 2008 -TMI - 4235 - CESTAT NEW DELHI the tribunal held that the basic point which should be borne in mind is that service tax is levied on the gross amount received by the service provider from the recipient of the service for the services rendered. In this case the appellant is the service provider. The appellant being advertisement agency rendered advertising services by engaging print, electronic media etc., The tax authorities should see whether the appellants had discharged duty liability on the gross amount received from their clients. In this case the various media are not the clients of the appellant. If the media gives 15% discount to the appellant, the amount has nothing to do with the gross amount received by the appellant from their clients to whom they rendered advertisement services. Therefore there is no logic in demanding service tax on the discount of 15% received by the appellant from print media.
- V. In 'Commissioner of Service Tax, Mumbai V. Reliance Communications Ltd.,' 2008 -TMI - 30438 - CESTAT MUMBAI the respondents were engaged in providing services under the category of telephone services, on line information and database access and retrieval services, leased circuits etc., The respondents filed the refund claim on the ground that they have paid the service tax on Maximum Retail Price (MRP) of the recharge coupon vouchers for their prepaid services but the recharge vouchers had actually been sold to the distributors at a discounted price from the MRP and some had also

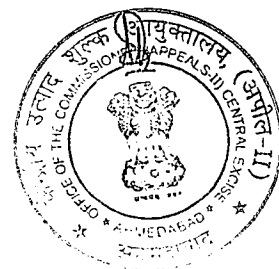


been distributed free of cost to distributors/operators. The claim was filed on the ground that the money value of the discount given on the recharge vouchers had not been received by the respondent and hence service tax is not payable on those as per Explanation (2) of Sec. 67 of the Finance Act, 1994 and Rule 6 of the Service Tax Rules, 1994. The refund claim was rejected on the ground that the invoices submitted in support of the claim were of Reliance Communications Infrastructure Ltd., ('RCIL' for short) and not respondents viz., Reliance Communications Ltd., ('RCL' for short).

- VI. The tribunal held that RCIL was authorized by RCL to issue invoices on their behalf. It is also undisputed that recharge coupon vouchers were sold by the RCIL to the distributors at a value which is less than that is printed on them. If that be so, it is the fact the RCIL has recovered only discounted value from the distributors. Provisions of the Finance Act, 1994 are that the service tax liability on a service provider is only for the amount which he gets paid.
- VII. The tribunal further held that RCIL is a service provider and having paid the service tax liability on the entire MRP of the recharge coupon vouchers they are eligible for the amount of the refund claim on the amount which is not realized by them from their distributors.
- VIII. In 'Brown Kraft Industry Ltd., V. Commissioner of Central Excise, Thane-II' 2007 -TMI - 1133 - CESTAT, MUMBAI the appellants are the manufacturers of corrugated boxes/tubes. They were not reversing the excess modvat/cenvat credit availed on the raw materials because of the trade discounts passed on by their suppliers at a later stage. It is alleged by the department that after giving the discount the transaction values changed and resulted in payment of reduced duty. This amounted to excess credit passed to the appellant to that extent of differential duty calculated on the discount amount.

#### DISCUSSION AND FINDINGS

6. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing. Sort question to be decided is as to whether relation between appellant and TTPL is principal to principal or Principal to agent



7. Now I take up the documents for scrutiny. I have perused agreement with TTPL dated 08.05.2010. I find that appellant is acting as Stokists of TTPL. From clause I (1) TTPL is selling goods to appellant which is evident from wording that..." The Company will sell and the Stokist will purchase during the currency of this agreement...". From clause II(3) of agreement it is inferred that title of goods is transferred to appellant and appellant is all responsible for loss or damage of goods after it is dispatched from TTPL. Clause VII of agreement with TTPL shows "RELATIONSHIP" that of seller and purchaser and not that of principal and agent.

8. Adjudicating authority has held that TDS is deducted from money received from TTPL, therefore commission received is liable for service tax under BAS. Regarding TDS deducted for commission paid through credit note it is to mention that merely deducting TDS by TTPL does not makes commission liable for service tax as that circumstances/activity is beyond appellant control. Nature of money received i.e. Commission or trade discount by whatever name you call, remains the same irrespective of deduction of TDS. It is well settled principal of law that law does not compel a man to do that which he can not possibly do and the said principal is well expressed in legal maxim "lex non cogit ad impossibilia". The unforeseen circumstances beyond the control of the appellant resulted in deduction of TDS.

9. When trading or buying and selling activity is involved, the incentive/discount received, even though it may be called by the name of commission, is not taxable under business auxiliary service. It is money received in course of trading/sales, therefore service tax liabilities does not arise. The definition defined under business auxiliary service presupposes the existence of relation between principal and a client and not between the principal and principal. To be covered under business auxiliary service, sale per se is not included but service in relation to sale is taxable event. However I am unable to extend the benefit of these arguments to appellant for the reason that appellant has not produced any evidence to substantiate that appellant has sold goods to client on payment of VAT. Agreement produced is not substantiated with documentary evidence like ledger, own invoice issued showing payment of vat, VAT return, CA Certificate of payment of VAT for SCN period etc. In the absence of such corroborative evidence appeal filed is of no use to appellant.



10. Appellant has pleaded for waiver of penalty under section 80 of Finance act. Amendment in Section 80 by Finance Act, 2015 (w.e.f. 14.05.2015) is done .Finance Act, 2015 has omitted section 80 of the Finance Act, 1994 w.e.f. 14.05.2015. Thus, there shall be no provision providing for waiver or reduction of penalties levied under sections 76, 77 or 78 in cases where reasonable cause exist or is shown. This would imply that there is no discretion now and that penalties become mandatory.

11. In view of above, appeal filed by the appellants is not allowed.

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

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

*उमा शंकर*

(उमा शंकर)

आयुक्त (अपील्स - II)

ATTESTED

*R.R. Patel*  
(R.R. PATEL)

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

To,

M/s. Ramesh Brothers,  
614, 6<sup>th</sup> floor, Parekh Tower,  
Near Diwan Ballubhai School,  
Kankarya, Ahmedabad

**Copy to:**

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, Service Tax ,Ahmedabad-
- 3) The Additional Commissioner, Service Tax, Ahmedabad
- 4) The Asst. Commissioner, Service Tax Div-V, APM mall, Satellite, Ahmedabad.
- 5) The Asst. Commissioner(System), C.Ex. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.

