

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)145/A-II/2015-16 / 4422 to 4427

ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-176-16-17

दिनांक Date : 30.11.2016 जारी करने की तारीख Date of Issue 12/01/17

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 AHM-SVTAX-000-ADC-012-15-16 Dated 21.01.2016

Issued by Addl Commr STC HQ Abad, Service Tax, Ahmedabad

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

M/s. Gujarat Foils Ltd 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, 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 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. यथाराशोधित 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 35फ के अंतर्गत वित्तीय (संख्या-2) अधिनियम 2014 (2014 की संख्या 29) 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 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,

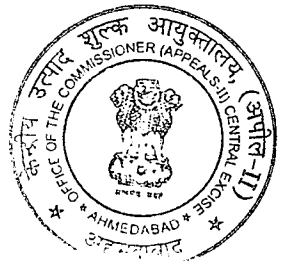
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

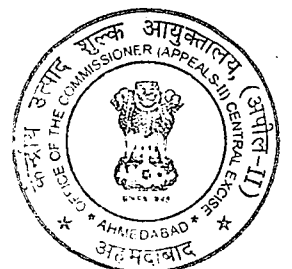


ORDER IN APPEAL

M/s. Gujarat Foils Ltd, 309, Akshrath, Opp. National Handloom Corporation, Off C.G. Road, Law Garden, Navrangpura Ahmedabad- 380 006 (*hereinafter referred to as 'appellants'*) have filed the present appeals on 11.02.2016 against the Order-in-Original number AHM-SVTAX-000-ADC-012-15-16 dated 22.01.2016 (*hereinafter referred to as 'impugned orders'*) passed by the Addl. Commissioner, Service Tax, 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 and holding Service Tax registration number AAAC G8002D ST001. The appellant entered in various agreements for Foil Mill project with M/s Excel Global FZE, UAE . M/s Excel Global FZE, UAE was entrusted job to locate and purchase second hand machinery. M/s Excel Global FZE, UAE was required to review, advice on transfer of latest technology from around globe and to ensure the successful commissioning of plant and machineries. Few contracts were pertaining to supply of material/machinery/parts. Agreement bearing No. 07-08-EXE-GFL-INTL-035 executed in May 2008 was for supply of technical service. The appellant had made payment of Rs. 1,21,73,125/- (25% of agreement) on 22.08.2009 and Rs. 1,16,00,000/- (25% of agreement) on 13.11.2009 but no technical service has been received in producing /stabilizing gauge foil production. Debit note dated 12.11.2009 showing 10,00,000/- USD payable by appellant ,has been issued by M/s Excel Global FZE, UAE. Departments contention is that as per rule 7 of the Service tax (Determination of Value) (Second amendment) Rules, 2012 the value of taxable service provided from outside India under section 66A is actual consideration charged for the service provided or to be provided i.e and point of taxation is date of debit note. Appellants had not paid service tax amounting to Rs. 48,02,720/-, under category of "consulting Engineer's service" provided by overseas consultant in violation of provisions contained in section 68(2) read with section 66A of Finance Act, 1994 read with Rule 6 of the service tax Rules, 1994 on agreed taxable value consideration of USD 10,00,000 (Rs. 4,66,28,340/-) paid/payable to overseas service provider M/s Excel Global FZE , UAE.

3. SCN dated 22.08.2014 issued was adjudicated by impugned OIO vide which demand of Rs. .48,02,720/- on taxable value Rs. 4,66,28,340/- was confirmed invoking extended period under section 73(1) of FA 94 along with interest under Section 75. Penalty of Rs. 10,000/- under Section 77(1)(a) for failure to take registration, of Rs. 10,000/- under Section 77(1) for failure to assess tax due and of Rs. 48,02,720/-under Section 78 for suppression of facts was imposed.



4. Being aggrieved with the impugned order, the appellants preferred an appeal on 11.02.2016 before the Commissioner (Appeals-II) wherein it is argued by appellant that-

- I. The appellant had agreed to get technical know-how, design & drawing for the establishment of plant, which has been one of the transfer of goods. As the appellant require technical knowhow, like design and drawing for the establishment of plant for which is an act of transfer of goods. Once the same is considered as transfer of goods, it is their belief that service tax is not applicable.
- II. It is a transfer of technology which is not taxable as circular No. 80/10/2004-ST dated 17.09.2004.
- III. The issue involved is interpretation of statutory provisions for that reasons, penalties can not be involved. Moreover there is no intention to evade the duty and no suppression of facts hence no penalty can be levied under section 78.

#### DISCUSSION AND FINDINGS

5. Personal hearing in the case was granted on 17.08.2016. Shri Vipul Khandhar and Smt. Rachna Khandhar, both Chartered accountant, appeared before me and reiterated the grounds of appeal. They stated that only part payment has been made therefore demand got reduced to that extent. Further stated that service received not consultancy engineering service as they have out rightly purchased technical know-how i.e. out right purchase of intellectual property rights (IPR).

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.

7. Short question to be decided is whether the transfer of technical know how received by the Appellant is a service which may be categorized under Intellectual Property Right Services or a consulting engineering service.

8. I find that the definition of Intellectual Property Right must be satisfied to term the services received by the Appellant as Intellectual Property Right Services.



I find no clue at all in the records as to which type of Intellectual Property Right is being assigned to the Technical know-how received by the Appellant. It is obvious from the definition of Intellectual Property Right that the right has to be a specific Right under a specific Law. Examples are given under the definition such as the Trade Mark which is a right provided under Trade Marks Act. Similarly the right mentioned as design in the definition is a right under the Designs Act. Therefore I find that the technical know-how received by the Appellant is nowhere established to result from the use of any Intellectual Property Right. As per the agreement, the purpose was of locating the second-hand machinery, supply of technology/information available, installation/commissioning of machinery with M/s Excel Global FZE, UAE therefore service does not fall within the scope of intellectual property right.

9. Technical know-how, although in the nature of intangible goods, is nevertheless 'goods' under VAT/ sales tax laws and is hence chargeable to State VAT. A permanent transfer of technical know-how is taxed as a sale of intangible goods. Permanent transfer of such know-how can only be treated as a sale and cannot constitute a service at all. Appellant has not produced any evidence like payment of VAT to substantiate that it is a permanent transfer of technical know-how. "Plans and drawings for transfer of technical know how" is specifically covered under chapter heading 4906 as a product liable to customs duty on importation. Thus, drawings and designs are 'goods' upon which customs duty is leviable upon being imported into India or exported from India. My view is supported from the decision of the Hon'ble Supreme Court in Associated Cement Companies Limited V/s Commissioner of Customs 2001 (128) ELT 21 (SC), wherein it has been held that drawings, plans, manuals etc are regarded as 'goods' attracting a specified rate of customs duty on their import into India. Appellant has not produced any Bills of Entry evidencing that customs duty has paid. Appellant has neither paid VAT nor customs duty as appellant himself was of view that import is of only "service".

10. Appellant has contended that service received is outright purchase of technical know-how and it is not taxable under CBEC Circular 80/10/2004, dated 17-09-2004. Said circular clarified that; "A permanent transfer of Intellectual Property Right does not amount to rendering of service. On such transfer, the person selling these rights no longer remains a holder of Intellectual property Right so as to come under the purview of taxable service. Thus, there would not be any service tax on permanent transfer of IPRs". I find that appellant has not produced any evidence to substantiate that it is a "permanent transfer of Intellectual Property Right". It is pertinent to note that such permanent transfer of know-how, drawing etc forming IPR attracts VAT/ Customs duty as discussed earlier. I hold that service



received is not classifiable under IPR service and it is correctly classifiable under consulting Engineering service in SCN.

11. Now I take up the issue regarding exemption of IPR under the Notification 17/2004-ST dated 10.09.2004. Appellant has contended that said IPR service imported is exempted under said notification. It is evident from the above notification that the benefit under notification 17/2004-ST is available to service charged under Section 66 of the Finance Act, 1994. When the Notification No.17/2004-ST has the mention of Section 66 only, the exemption provided in the notification cannot be applied in the cases of import of services where service tax is leviable under Section 66A.

12. Now I come to valuation aspect of case wherein it is contended by appellant that if a tall it is required to pay tax then it should only be on Rs. 2,37,73,125/- given to service provider. I find that debit note dated 12.11.2009 showing 10,00,000/- USD payable by appellant, has been issued by M/s Excel Global FZE, UAE. I am in full agreement with departments contention that as per rule 7 of the Service tax (Determination of Value) (Second amendment) Rules, 2012 the value of taxable service provided from outside India under section 66A is actual consideration charged for the service provided or to be provided i.e. 10,00,000 USD and point of taxation is date of debit note. I hold that appellant is liable to tax on whole agreed amount. I do not find any infirmity in OIO confirming duty under section 73(1) with penalty under section 75 of finance Act 1994.

13. As regards the imposition of penalty of Rs. 10,000 under Section 77(1)(a) and Rs. 10,000/- under section 77(2) of the Finance Act, 1994, I find that the adjudicating authority has correctly observed that the appellant had not been registered with Service Tax and has failed to declare the value of said service under the ST-3 returns of the concerned period and therefore liable for penalty. Hence I agree with the findings of the adjudicating authority and uphold the penal provisions invoked under Section 77(1)(a) and 77(2) of the Finance Act, 1994 under the impugned order.

14. Penalty imposed under Section 78 of the Finance Act, 1994 is appropriate in the instant case, as the appellant had suppressed the information relating to payment of such charges to the foreign commission agents, very well covered under the ambit of taxability under Section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of the Service Tax Rules, 1994. It was only during the course of audit proceedings that the entire event of payment of commission charges to agents located in foreign country had come to the knowledge of department. Had it



not been the audit scrutiny of the financial statements of the appellant, the payment of Service commission charges would have gone unheeded. Here in present case it not the case of interpretation of statue as argued by appellant to save him of penalty provision. Hence, I agree with the findings of the adjudicating authority and uphold the penal provisions invoked under Section 78 of the Finance Act, 1994 under the impugned order. In view of above, appeal filed by the appellants is rejected.

15. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

15. 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. Gujarat Foils Ltd,  
309, Akshrath,  
Opp. National Handloom Corporation,  
Off C.G. Road, Law Garden,  
Navrangpura, Ahmedabad- 380 006

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, service tax, Ahmedabad
- 3) The Additional Commissioner, <sup>S. Tax</sup> ~~C. Ex~~, Ahmedabad
- 4) The Dy./Asst. Commissioner, Service tax, Div-II, APM Mall, Ahmedabad.
- 5) The Asst. Commissioner(System), Service tax. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.



