

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)036/A-II/2016-17 & V2(ST)161/A-II/2016-17 / 218-23

ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-210-211-16-17

दिनांक Date : 24.01.2017 जारी करने की तारीख Date of Issue 14/02/17

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

C. Jure

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-02/29/AC/2015-16 Dated 28.01.2016 & SD-02/12/AC/2016-17

Dated 30.08.2016 Issued

by Assistant Commr STC, Service Tax, Ahmedabad

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

M/s. Hazira Port Pvt 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 :-

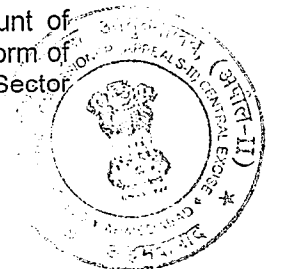
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 रूपर 5 लाख या उससे कम है वहाँ रूपर 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपर 5 लाख या 50 लाख तक हो तो रूपर 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपर 50 लाख या उससे ज्यादा है वहाँ रूपर 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 accompany ed 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 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 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) 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 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,

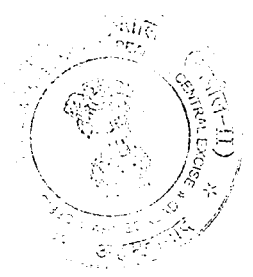
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.



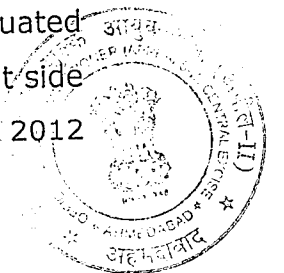
ORDER IN APPEAL

M/s. Hazira Port Private Ltd., 101-103, Abhijeet- II, Mithakhali Circle, Ellisbridge, Ahmedabad- 380 006 (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number SD-02/29/AC/2015-16 dated 28.01.2016 and SD-02/12/AC/2016-17 dated 30.08.2016 (*hereinafter referred to as 'impugned orders'*) passed by the Asst.Commissioner, Service Tax Div-II, APM Mall, Satellite, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

2. The facts of the case, in brief, appellant has incurred expenditure of Rs. 4,38,483/- and Rs. 4,28,551/- in foreign currency in FY 2013-14 and 2014-15 respectively for renewal of subscription charges of online web based periodical. Department resorting to erstwhile section 65(53) of FA, 1994, is of view that these periodical does not fall under the definition of section 2(1) of the Information Technology Act, 2000 as data and information were not intended to be processed in computer system and periodicals received online are similar to providing library access to members. Therefore appellant can not be covered under online information and database access and/or retrieval services and are liable for tax of Rs. 54,196/- and Rs. 52,969/- for FY 2013-14 and 2014-15 respectively under section 68(2) of CEA, 1994 read with rule 2(1)(d) of Service Tax Rules, 1944.

3. Adjudicating Authority vide impugned OIO's dated 28.01.2016 and 30.08.2016 confirmed demand of Rs. 54,196/- and Rs. 52,969/- respectively, under section 73(1) of FA 94 along with interest under Section 75 and also imposed penalty of Rs. 10,000/- under Section 77(2), Rs. 10,000/- under 77(1)(a) and penalty of Rs. 5000/- under section 77(2) in each OIO for both FY 2013-14 and 2014-15. Equal penalty of Rs. 54,196/- and Rs. 52,969/- in respective OIO under section 78 for suppression of facts was imposed on appellant for both FY 2013-14 and 2014-15.

4. Being aggrieved with the impugned order, the appellants preferred an appeal on 22.04.2016 for OIO dated 28.01.2016 and on 18.10.2016 for OIO dated 30.08.2016 before the Commissioner (Appeals-II) wherein it is contended that appellant have availed the service in nature of online database access and retrieval services from service provider situated abroad. The place of provision of service (i.e rendering of service) is outside taxable territory in terms of rule 9 of Place of Provision of Service Rule 2012



(POPSR- 2012 in short). Therefore it is not import of service hence appellants are liable for tax under section 68(2) of CEA, 1994 read with rule 2(1)(d) of Service Tax Rules, 1944.

5. Personal hearing in the both appeal case was granted on 21.12.2016. Shri Jigar Shah, Advocate and Shri Jagrut Shah, Executive Taxation appeared before me and reiterated the grounds of appeal.

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. The question to be decided is as to whether or not online periodical service received is liable for service tax.

7. Definition given in rule 2(L) of POPSR, 2012 is *... "online information and database access or retrieval services" means providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network*". Appellants are port service provider and it is necessary for them to keep track of movement of LNG tankers across the globe, shipping market etc, therefore they have subscribed said online periodicals. Said periodicals with data/information useful for port business are available in electronic form through internet i.e. computer network, therefore said online periodical service is covered under rule 2(L) of POPSR, 2012.

7.1 Adjudicating authority has relied upon erstwhile definition of period prior to negative list era to establish that said service is not covered under online information and database access or retrieval services. Erstwhile provisions of definition should not be resorted when classification of service itself is done away for post 30.06.2012 period. With the enforcement of Finance Act 2012, Section 65 relating to the "definitions" of the various terms relating to the service tax has been omitted. However, two important sections which have been introduced defining the new service tax code are Section 65B which provides for a whole new set of definitions in context of taxable services under the head "Interpretations" and Section 66D which states the "Negative list of service".

7.2 Para 5.9.5 of Education Guide published by CBEC after introduction of new regime of service tax throws a good light on "Online information and database access or retrieval services". It is reproduced as below..



"Online information and database access or retrieval services" are services in relation to online information and database access or retrieval or both, in electronic form through computer network, in any manner. Thus, these services are essentially delivered over the internet or an electronic network which relies on the internet or similar network for their provision. The other important feature of these services is that they are completely automated, and require minimal human intervention.

7.3 Appellant's services are providing database and information related to business undertaken by appellant, through computer network. Said services are like services stated in above para 5.9.5 of Education Guide published by CBEC. Said service is not like online commercial coaching classes. Adjudicating Authority has relied upon judgment of Dew soft Overseas Pvt. Ltd v CST, New Delhi [2008 -TMI - 1525 - CESTAT NEW DELHI], wherein it was held that online computer training through interactive process is not covered under the scope of online information and database access or retrieval services. Since appellant is not providing online commercial coaching classes, said judgment is applicable to present case.

8. Section 66A, which existed prior to 01.07.2012, in addition to the then main charging Section 66, under the old law, gave the statutory backing for levy of service tax on import of services. Section 66A is was applicable for services rendered by the person located outside India, in India and received by the service provider in India. levy of service tax on services rendered outside India and also received outside India was covered under Rule 3(iii) of the then prevailing Taxation of Service (Provided from outside India and received in India) Rules, 2006 (referred to, popularly, as 'Import of Services Rules') provided that, the only requirement for levy of service tax (under the old law) was that, such services should have been received by a person located in India. In old era there was no necessity that the service should have been received in India, so long as the service was received by a recipient located in India. Earlier, import and export of services rules were existing in service tax legislation for deciding the service tax implications on cross broader services. Export of Services, Rules, 2005 and Taxation of Services (Provided from outside India and received in India) Rules, 2006 were existing. The Place of Provision of Supply Rules, 2012 (POPSR, 2012) introduced with effect from July 1, 2012 vide Notification No. 28/2012-ST dated June 20, 2012 replaces the erstwhile Export of Services, Rules, 2005 and Taxation of Services (Provided from outside India and received in India)



Rules, 2006. The new POPSR, 2012 will, on the other hand, determine the place where a service shall be deemed to be provided, in terms of section 66C of the Finance Act, 2012

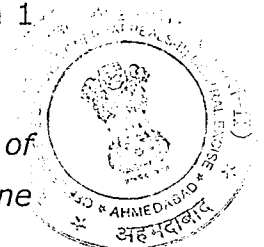
9. From 01.07.2012 service tax is payable on all services rendered in the taxable territory except the services as mentioned in the negative list and those granted exemption from the levy of Service tax. The essence of Service tax is that a service should be taxed in the jurisdiction of its consumption. The new charging section, Section 66B of the Finance Act, enables taxation of such services as are provided in the taxable territory. Thus, the services that are provided in a non-taxable territory would not be chargeable to Service tax. Thus, the taxability of a service will be determined based on the place of its provision. Therefore, it becomes essential to determine the "place" where the services have been provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided.

10. As per rule 9 of POPSR, 2012 of such online periodical service is "place of service provider" i.e. out side taxable territory. Therefore it is not import of service for appellant and not taxable also in terms of section 66B of CEA, 1994 vide which only services performed in taxable territory are taxable.

11. If the Service provider is not located in the taxable territory, and service receiver located in taxable territory, and service is provided in taxable territory only then service receiver will be liable to pay tax as Import of services under rule 2(1) (d) of service tax rules 1994 read with 68(2) of CEA, 1994. In the instance case place of provision of service is out side taxable territory in terms of rule 9 of POPSR, 2012, said services are not covered under rule 2(1) (d) of service tax rules 1994 read with 68(2) of CEA, 1994. Appellant is liable to pay tax and consequently penalties imposed in impugned OIO.

12. From para 1 of Circular No. 202/12/2016-Service Tax dated 9.11.2016 it is ample clear that online information and database access or retrieval services [OIDAR] are not liable for service tax as the place of provision of service is non-taxable territory i.e. location of foreign service provider in terms of rule 9 of Provision of Service Rules, 2012. Said para 1 reproduced as below....

"At present..... Further, in view of Place of Provision of Service Rules, 2012 rule 9(b), with respect to online

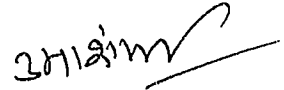


information and database access or retrieval services [OIDAR], the place of supply is location of service provider and thus such cross border B2B/B2C services provided by a person in non-taxable territory and received by a person in taxable territory are outside the levy of service tax."

13. In view of above, I set aside impugned OIO's dated 28.01.2016 and 30.08.2016. Consequently appeal filed by the appellants is allowed.

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

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



(उमा शंकर)

आयुक्त (अपील्स - II)

ATTESTED


(R.R. PATEL)

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

To,

M/s. Hazira Port Private Ltd.,
101-103, Abhijeet- II,
Mithakhali Circle, Ellisbridge,
Ahmedabad- 380 006

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. Commr, Service Tax Div-II, APM mall, Satellite, Ahmedabad.
- 5) The Asst. Commissioner(System), C.Ex. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.

