

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)063 & 62/A-II/2016-17 492/497

ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-234-235-16-17

दिनांक Date : 22.02.2017 जारी करने की तारीख Date of Issue 28/02/17

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-JC-036 & 037-15-16 Dated 16.03.2016 Issued  
by Joint Commissioner STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants  
M/s. Pradeep Overseas 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 :-

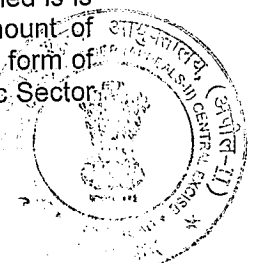
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-  
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर 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 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 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 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 बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जाएँ 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 Pradeep Overseas Ltd, Plot No. 104-106, Village Chancharwadi, Opp. Zydus Cadila, Changodar, Ahmedabad (hereinafter referred to as "appellant") has filed appeal against Order-in-Original No. AHM-SVTAX-000-JC-0367 037-15-16 dated 16.03.2016 (hereinafter referred to as "impugned order") passed by the Joint. Commissioner, Service Tax, Ambawadi Excise Bhavan, Ahmedabad (hereinafter referred to as "adjudicating authority"), on 16.03.2016

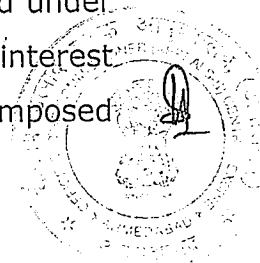
2. The facts of the case are that the appellant are manufacturing Man Made Articles like bed sheets, pillow covers, etc. and are also recipient of taxable services Business Auxiliary Service (zsb) specified / defined under Section 65(105) of the Finance Act, 1994 and are registered with Service Tax Department for payment of service tax as recipient of service in terms of Rule 2(1)(d)(iv) of the Service Tax Rules, 1994.

3. The appellant had paid in foreign currency as a commission for sales of exported goods to the persons who have provided services Business Auxiliary Service from person(s) based abroad and who did not have any office / establishment in India. In terms of rule 3 of Place of Provision of service rule 2012, appellant was liable to pay tax on Commission paid to foreign based agent rendering service for marketing of export goods. Appellant has not paid service tax on Commission paid therefore following two SCN were issued. Relevant particulars as below-

SCN dt.	Period covered	Commission Amount Paid	Service tax payable
25.09.2014	2012-13 to 2013-14 (up to 31.12.2013)	2,72,84,581/-	33,72,375/-
16.09.2015	Jan-2014 to September-2014	60,99,358/-	7,53,881/-

For previous period DGCEI has issued notice and proceedings are pending in CESTAT. Above two notices dated 25.09.2014 and 16.09.2015 were periodical notices issued under section 73(1A) of FA, 1994.

4. Vide impugned OIO whole duty demanded in SCN was confirmed under section 73(1) of Finance act 1994 and was ordered to recover with interest under Section 75. Penalty of Rs. 4,12,626/- and Rs. 10,000/- was imposed under section 76 and 77(2) of Finance Act, 1994.



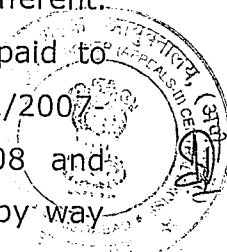
5. Being aggrieved, the appellant has preferred the present appeal on the grounds that:

- I. Provisions of section 73(1A) are not applicable in present case, as the facts prevailing at the time of issuing SCN by DGCEI and during the period invoked in present SCN are different. During previous period exemption was by way of refund and in present cases it is straightway exemption.
  - II. The adjudicating authority has erred in not considering the submission of revenue neutrality. Appellant is eligible for exemption notification 18/2009-ST.
  - III. The appellant submits that the entire amount received by them has to be considered as cum Service Tax Value and have relied upon series of judgements viz., P Jani and Co. vs. CST, Ahmedabad reported at 2010 (20) STR 701 (Tri.-Ahd.) and CCE, Patna Vs. Advantage Media Consultant, reported at 2008 (10) STR 449 (Tri. Kol.). The adjudicating authority has failed to consider these submissions.
  - IV. No penalty should have been imposed upon them in view of the Section 80 of the Finance Act, 1994 and that mere failure to pay service tax cannot be ground for not invoking the provisions of Section 80.
6. Personal Hearing in the matter was granted and held on 06.01.2017. Shri N.K.Tiwari, Consultant, appeared on behalf of the appellant for hearing and reiterated the contents of appeal memorandum.

#### DISUSSION AND FINDINGS

7. 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 appellant is required to pay service tax on commission paid for export goods marketing to foreign agents located in foreign territory.

8. I find that facts prevailing for previous SCN issued by DGCEI whose proceedings are pending in CESTAT and facts for present case are different. For previous period it was obligatory to pay tax on commission paid to foreign agent but exemption was by way of refund vide notification 41/2007-ST dated 06.10.2007 amended by 17/2008-ST dated 01.04.2008 and subsequent notification 32/2008-ST dated 18.11.2008. Exemption by way



of refund commission paid to foreign agent was admissible up to 06.06.2009 i.e between 01.04.2008 (Noti. 17/2008-ST dated 01.04.2008 ) to 06.06.2009.

9. Straight way exemption i.e. blanket exemption (up to 1% of FOB) but conditional exemption to said service is given from 07.07.2009 up to 01.07.2012 vide notification 18/2009 dated 07.07.2009 subject to filing of EXP-1 and EXP-2. New Noti. 42/2012 dated 29.06.2012 w.e.f. 01.07.2012 was introduced vide which exempted service tax in excess of service tax calculated on value up to 10% on FOB 2009 subject to filing of EXP-3 and EXP-4. I find that entire period of two SCN`s are covered under straightway exemption Notification 18/2009 and 42/2012 as shown below.

SCN dt.	SCN for period	Notification applicable	Notification in force	Filing of
25.09.14	2012-13 to 31.12.13	18/2009 dt. 07.07.2009 effective from 01.07.2012	07.07.2009 to 30.06.2012	EXP-1 EXP-2
		42/2012 dt. 29.06.2012 effective from 01.07.2012	01.07.2012 to 01.03.2015	EXP-3 EXP-4
16.09.15	01.01.14 to 30.09.14	42/2012 dt. 29.06.2012 effective from 01.07.2012	01.07.2012 to 01.03.2015	EXP-3 EXP-4

10. I find that for appeal for period 2012-13 to 31.12.13 (SCN 25.09.2014) appellant has not mentioned that they are eligible for blanket exemption vide notification 18/2009-ST and 42/2012-ST. However appellant have argued that it is revenue neutral. Appellant have not filed any EXP-1 and EXP-2 for said period.

11. Further I find that for period 01.01.14 to 30.09.14 (SCN 16.09.15) appellant has mentioned that they are eligible for blanket exemption vide notification 18/2009-ST but for said period 18/2009-ST was not in force. I find that during the period 01.01.14 to 30.09.14 appellant was eligible for exemption notification No. 42/2012-ST. Appellant have not filed any EXP-3 and EXP-4 for said period.

12. I find that in the instance case appellant is eligible for exemption granted vide Notification 18/2009-ST and 42/2012-ST from payment service tax on commission paid to foreign agents rendering marketing service of export goods for which he was required to file EXP-1/EXP-2 and EXP-3/EXP-4 respectively for above two notification. Moreover appellant

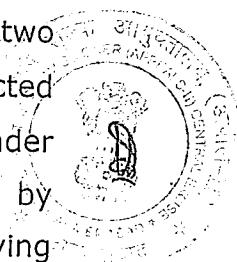


were required to satisfy other procedural/technical requirement like mentioning of tax amount/commission amount in various export document, giving of prior intimation etc. It is no where stated in SCN and OIO that said commission is not paid for marketing of export goods to foreign located agent. Adjudicating authority has never disputed the receipt and usages of services in export of goods, therefore substantial benefit can not be denied. The substantive benefit of exemption for which they are eligible cannot be denied on procedural/technical ground if otherwise appellant is eligible. My view is supported by following judgments-

- I. Wipro Limited Vs. Union of India [2013] 32 Taxmann.com 113 (Delhi High Court)
- II. Kothari Infotech Ltd V/S Commissioner of Central Excise, Surat - [2013] 38 taxmann.com 298 (Ahmadabad - CESTAT)
- III. Mannubhai & Co. Vs. Commissioner of Service Tax (2011)(21)STR(65)- CESTAT (Ahmadabad)
- IV. M/S Mangalore Fertilizers & Chemicals Vs Deputy Commissioner 1991 (55) ELT 437
- V. CST Delhi vs. Convergys India Private Limited 2009 -TIOL -888-CESTAT -DEL-2009 (16) STR 198 (TRI. - DEL)
- VI. CST Delhi vs. Keane Worldzen India Pvt. Ltd. 2008 - TIOL -496 - CESTAT -DEL: 2008 (10) STR 471 (Tri. - Del)

13. In this regard I wish to place reliance on the decision given by the Apex Court in the case of Mangalore Chemicals & Fertilizers Ltd. Vs. Deputy Commissioner [1991 (55) E.L.T. 437 (S.C.)] wherein it was held that the intention of the legislature is to grant exemption only upon satisfaction of the substantive conditions of the notification and so it is important to distinguish between condition that is procedural and is of technical nature and the condition which is substantive. It was concluded that the benefit of exemption should be given if the substantive conditions have been satisfied and the procedural/technical conditions may be condoned. In the case of M/s Ashima Dyecott Ltd. v/s CCE, Ahmedabad [2011-TIOL-1905-CESTAT-AHM] it has been held that technical reasons cannot defeat legislative intent.

14. Therefore, in view of the above decisions, case needs to be remanded back to original adjudicating authority for extending the benefit of said two notifications subject to fulfillment of other conditions. Appellant are directed to file all relevant return EXP-1/EXP-2 and EXP-3/EXP-4 prescribed under said notifications and shall produce all the documents as may be asked by adjudicating authority for arriving at eligibility of notification and for arriving



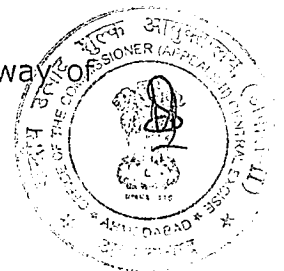
at correct admissible exemption amount. Appellant shall submit all documentary evidences to substantiate that foreign agent services is used in effecting sale/export of export goods and appellant shall also substantiate that exemption notification 18/2009-ST dated 07.07.2009 is available to them. Any difference in amount i.e SCN demanded minus eligible exemption amount shall be paid with interest.

15. I find that the appellant was required to pay the tax as a deemed service provider in terms of Section 66A of the Finance Act. Since the services were clearly input services for the appellant, the appellant was eligible for credit of service tax if the same had been paid by them. Under these circumstances, their claim for the revenue neutrality and consequently absence of intention to evade service tax is acceptable. Therefore, there is no justification for imposition of penalty. As it is a clear case of revenue neutrality and a case where intention to evade service tax is absent, the penalty under Section 76 which is imposable deserves to be waived in the light of provisions of Section 80 of the Finance Act, 1994.

16. It has been pleaded by the appellant that the entire amount should be considered as cum-tax value. I do not find any merits in the plea raised by the appellant. In the instant case the appellant has made payment to the overseas agents and thereby the liability to pay service tax has been fastened on them on the basis of being recipient of services under Section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(v) of the Service Tax Rules, 1994. So it sounds illogical that whatever payment made by them also included service tax portion. Further, the appellant has not demonstrated that they had deducted the service tax amount from the payment made to the overseas commission agents. In any case, benefit of cum-tax value cannot be granted .

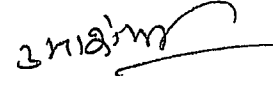
17. Adjudicating authority is directed to pass fresh order. These findings of mine are supported by the decision/order dated 03.04.2014 of the Hon'ble High Court, Gujarat in the Tax appeal No.276//2014 in the case of Commissioner, Service Tax, Ahmedabad V/s Associated Hotels Ltd. and also by the decision of the Hon'ble CESTAT, WZB Mumbai in case of Commissioner of Central Excise, Pune-I Vs. Sai Advantium Ltd and reported in 2012 (27) STR 46 (Tri. - Mumbai).

18. In view of above, appeal filed by the appellants is allowed by way of remand.



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

19. The 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 Pradeep Overseas Ltd,  
Plot No. 104-106,  
Village Chancharwadi,  
Opp. Zydus Cadila, Changodar,  
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 Joint Commissioner, Service Tax, Ahmedabad.
- 5) The Asst. Commissioner(System), C.Ex. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.

