

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)080/A-II/2016-17 ¹⁶⁴⁰/₁₆₄₅
ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-SVTAX-000-APP-251-16-17
दिनांक Date : 20.03.2017 जारी करने की तारीख Date of Issue 24/3/17

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

C. J. K.

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/13/HCV/DC/D-III/15-16 Dated 31.03.2016 Issued
by **Assistant Commr STC, Service Tax, Ahmedabad**

ध अपीलकर्ता का नाम एवं पता Name & Address of The Appellants
M/s. Dholu Construction and Projects 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, मेघानी 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 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 A219 के 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 (सीस्टैट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 43 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 हों

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 अर्ज़ों 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. Dholu Construction and Projects Ltd., 401, Gala Argos, Gujarat College Road, Ahmedabad- 380 006 (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number STC/13/HCV/DC/D-III/15-16 dated 31.03.2016 (*hereinafter referred to as 'impugned orders'*) passed by the Deputy Commissioner, Service Tax Div-III, APM Mall, Satellite, Ahmedabad (*hereinafter referred to as 'adjudicating authority'*);

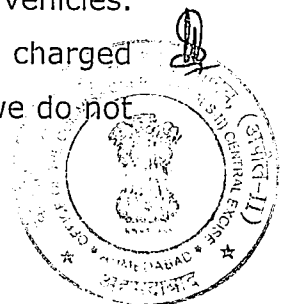
2. The facts of the case, in brief, are that the appellants were engaged in providing taxable service under the category of 'Mining service and Transport of goods by road service' and was holding Service Tax registration number AABC D5760E ST002. Reconciliation of Taxable value declared in ST-3 returns of 2013-14 with books of A/c it was revealed that appellant has declared less taxable value and hence has not paid tax of Rs. 4,12,454/- on said non declared taxable value of 33,37,7008. In reply to SCN dated 12.08.2015 appellant has submitted before adjudicating authority that said taxable value of 33,37,7008/- consist of

- I. Rs. 26,34,715/- Transport income
- II. Rs. 5,94,293 other income i.e 5,91,809/- scrap sale income + 2,483/- interest income
- III. Rs. 1,08,000/- rent income

3. Documentary evidence like truck ownership document, document to substantiate that they have charged below 750/- per trip, scrape sale income document, interest income document and rent tax payment document therefore adjudicating Authority vide impugned OIO confirmed demand of Rs. 4,12,454/- under section 73(1) of FA 94 along with interest under Section 75 and also imposed penalty of Rs. 4,12,454/- under section 78 for suppression of facts.

4. Being aggrieved with the impugned order, the appellants preferred an appeal on 03.06.2016 before the Commissioner (Appeals-II) wherein it is contended that-

- I. Transport income is for service of transportation of lignite to Rajasthan State Mines & Minerals Ltd. (RSMM) by road in our own vehicles. Transportation charge is collected Rs. 11 per MT and it is charged separately in invoice. Service is provided in own vehicle and we do not



issue any consignment notes therefore we are not GTA, consequently no service tax is payable.

- II. From 01.07.2012 service provided by truck owners or operator is not taxable unless they act as GTA. Truck owners or operators service is covered in negative list under Section 66D(p) of FA, 1994.
- III. Even if appellant is presumed to be GTA, the liability to pay tax is on receiver in terms of Section 68(2) read with rule 2(1)(d) of STR, 1994 read with notification 30/2012-ST dated 20.06.2012 effective from 01.07.2012.
- IV. Gross amount charged is Rs. 11 per MT therefore for lorry of 20MT charge would be less than sum of Rs. 750/-. In terms of notification 25/2012-ST dated 20.06.2012 effective from 01.07.2012 charges below are exempted for GTA.
- V. Scrap income and interest income are not service, therefore not taxable.
- VI. On rent income they have paid tax on 03.10.2015 with interest and it was intimated to adjudicating authority during hearing.

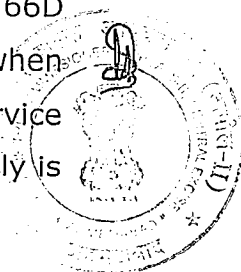
5. Personal hearing in the case was granted on 06.01.2017. ShriNilesh V. Suchak, CA, appeared before me and reiterated the grounds of appeal.

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.

7.1 (a) Appellant is raising lignite from mine and transporting it to the power house of RSMM. I have perused the sample invoice No. 68 dated 01.08.2015 raised in name of M/s RSMM for providing service, in July-2013, of raising lignite from mines and service of transportation from mines to power plant at a rate of Rs.191.71 and Rs. 11/- per MT respectively and has paid service tax on raising lignite but has not paid on transportation charge of Rs.11/- recovered per MT.

(b) It would be pertinent to note that Clause (p) of Section 66D (Negative List) specifies transportation of goods by road except when provided by GTA as a Non-Taxable service. It means that only service provided by GTA is taxable. Now the question arises as to what technically is



a Goods Transport Agency. Goods Transport Agency as defined u/s 65B(26) of Finance Act, 1994 introduced with effect from 01-07-2012 means:

Any person; that provides service 'in relation to'; transport of goods by road; & issues consignment note.

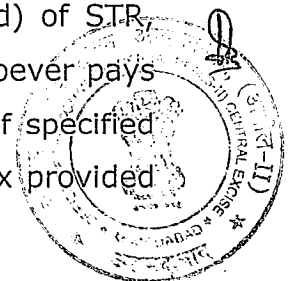
(c) Moreover, any person who is the owner of trucks or arranges the trucks by hiring them and provides transportation service cannot be termed as GTA. In addition to this, a GTA must have a direct contract with consignor/consignee and receive freight from consignor/consignee.

(d) A very thin line distinction can be drawn between the two, which can be noted from the Budget Speech dated 08-07-2004 delivered by Hon'ble Finance Minister, Shri P.Chidambaram which reads:

"the tax would be only on transport booking agents and there is no intention to levy service tax on truck owners or truck operators"

(e) Appellant has argued that they are not covered under GTA service in as much as they are transporting lignite by road in their own vehicle and are not issuing consignment notes. Consignment notes are issued by person booking goods of consignor for transportation to consignee. Appellant has argued that they are small truck operator providing transportation of goods service in own truck. In such cases transportation is covered under negative list of service under Section 66D(p). Appellant has not produced any evidence of ownership of transport carriage nor has produced any evidence that transportation was in their own carriage. In absence of such evidence I am unable to extend benefits of Section 66D(p).

7.2 (a) Let us presume that appellant is unable to produce ownership documents of goods carriage. In monthly bill, sample invoice No. 68 dated 01.08.2015, issued at the bottom it is specifically mentioned that "service tax on transportation of lignite and ash is not charged as the same is to be paid by service taker as per prevailing service tax rules." GTA is required to mention as to who shall pay the service tax. In that scenario appellant shall be treated as GTA. In this situation GTA is service provider. RSMM, a body corporate, Service receiver being of specified category under Notification 30/2012-ST was required to discharge liability under Reverse charge as Service Receiver in terms of Section 68(2) read with rule 2(1)(d) of STR, 1994. Under Notification 30/2012-ST, Consignor or Consignee whoever pays the freight will be liable for payment of service tax if they are of specified category. In this scenario appellant is not liable to pay service tax provided



consignment notes are issued and that it specifically mentioned as to who is liable to pay tax.

(b) Appellant argument that, they being Truck Operator does not fall in the ambit of GTA definition, as they does not issue any consignment note is not acceptable. A combined reading of Rule, 4B of Service Tax Rules, 1994 read with the definition of Goods Transport Agency would make it clear that issuance of consignment note is mandatory by all persons covered under the definition of Goods Transport Agency. This has been amply made clear by the CBEC in its letter to HPCL stating that non-issuance of consignment note can not be taken as a plea for non-application of service tax. Relevant portion of the Board's letter F.No. 166/02/2005 CX4 (part) dt. 30/01/2006 reads as follows:

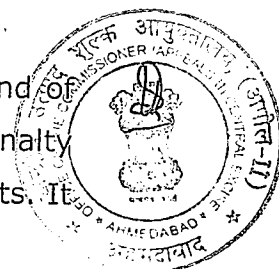
"Further, as per Rule 4B of the Service Tax Rules 1994 " any GTA which provide service in relation to transport of goods by road in a goods carriage shall issue a consignment not to the customer."

"Therefore, non observance of the said rules is a violation of the said provisions and such a violation cannot be taken to be a basis for non-application of service tax law."

(c) Appellant has not produced copy of transportation agreement made with RSMM and also has not produced any consignment notes wherein it is specifically mentioned in each consignment that RSMM is liable to pay service tax. No other evidence is produced that person who pays freight is of specified category. Therefore I am unable to extend benefits of Notification 30/2012-ST.

7.3 Let us again presume that consignor RSMM or consignee RSMM is not of specified category under Notification 30/2012-ST i.e. both are individual. In that case responsibility is on GTA i.e appellant is required to pay tax. Appellant has argued that in this situation also exemption is available to appellant under entry 21 of Notification No. 25/2012 as all consignment are below limits of Rs. 750/-. I am unable to extend benefits of notification 25/2012-ST as appellant has not produced any evidence to prove that all consignments were below Rs. 750/-.

7.4 In view of discussion at para 7.1, 7.2 and 7.3 I uphold the demand of service tax on transportation and consequently I uphold proportional penalty imposed under sectional 78 of FA Act, 1994 as it was suppression of facts. It



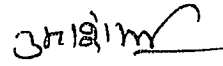
was at the instance of departmental officer initiation said demand has come out.

8. Regarding scrap income and interest income appellant has produced bills and ledger. I hold that such income is not taxable. Appellant has paid tax on rent income. I find that adjudicating authority has not taken in to consideration while passing the order even though it was argued. I hold that demand and proportional penalty in respect of scrap income, interest income and rent income is not sustainable. I set aside said demand and proportional penalty imposed under sectional 78 of FA Act, 1994.

9. In view of above, appeal filed by the appellants is partially allowed.

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

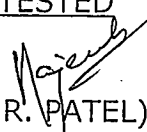
10. The appeals filed by the appellant stand disposed off in above terms.



(उमा शंकर)

आयुक्त (अपील्स - II)

ATTESTED


(R.R. PATEL)

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

To,

M/s. Dholu Construction and Projects Ltd.,
401, Gala Argos, Gujarat College Road,
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. Commissioner, Service Tax Div-III, APM mall, Satellite, Ahmedabad.
- 5) The Asst. Commissioner(System), C.Ex. Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.



