

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)21/A-II/2016-17 / 289 to 294
ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-SVTAX-000-APP-49-16-17
दिनांक Date : 21.07.2016 जारी करने की तारीख Date of Issue 25/07/16.

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 STC-11/ADC/2009 Dated 31.07.2009
Issued by ADC STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants
M/s. SAI Consulting Engineers 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, 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.



(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धारा (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/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act 1994, shall be filed in For 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 or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise 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 रू 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 adjuration 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 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 83 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 है

- (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 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,

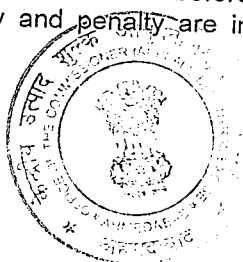
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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)(i) 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)(i) 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."



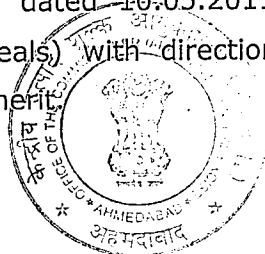
ORDER IN APPEAL

M/s. Sai Consulting Engineers Pvt. Ltd., Satyam Square, B/h. Rajpath Club, Bodakdev, Ahmedabad (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number STC-11/ADC/2009 dated 31.07.2009 (*hereinafter referred to as 'impugned orders'*) passed by the Additional 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 under the category of 'Consulting Engineers Service' and holding Service Tax registration number AADCS04815PST001. During the course of audit of the records of the appellants, during the period 2005-06 and 2006-07, it was noticed that they had received taxable value amounting to ₹ 258.36 lakhs by way of sub-consultancy services provided by them. However, they had not paid any Service Tax on the above sub-consultancy income which was worked out to ₹ 30.10 lakhs and the same was leviable and recoverable under 'Consulting Engineers Service'. Further, it was also noticed that during the above period, the appellants had wrongly utilized Cenvat credit with the strength of two invoices issued by Dr. M. S. Srinivasan, Ph.D (Engineering), Chennai who was not registered with the Service Tax department. The Cenvat credit utilized by the appellants on the above two invoices comes to ₹ 61,200/-. In view of the non-payment of Service Tax and wrong utilization of Cenvat credit, a show cause notice dated 20.10.2008 was issued to the appellants. The adjudicating authority, vide the impugned order, confirmed the demand of Service Tax of ₹ 30,71,200/- under Section 73(1) of the Finance Act, 1994 and disallowed the Cenvat credit wrongly utilized. She also ordered the recovery of interest under Section 75 of the Act and imposed penalty under Section 78 of the Act.

3. Being aggrieved with the impugned order, the appellants preferred an appeal before the then Commissioner (Appeals-IV) who, vide Order-In-Appeal number 88/2010(STC)/HKJ/Commr.(A)/Ahd. dated 10.03.2010, rejected the appeal, without going to the merits of the appeal, on the ground of non-compliance of stay order under Section 35F of the Central Excise Act, 1944 made applicable to the Service Tax under Section 83 of the Finance Act, 1994.

4. Being aggrieved with the said OIA, the appellants filed an appeal before the Hon'ble CESTAT, West Zonal Bench, Ahmedabad. The Hon'ble CESTAT, vide order number S/687-688/WZB/AHD/2011 & A/756-757/WZB/AHD/2011 dated 10.05.2011, remanded back the case to the Commissioner (Appeals) with direction not to insist for pre-deposit and decide the case on merit.



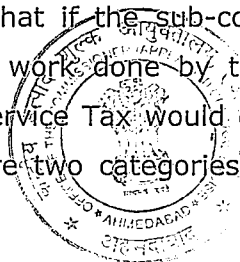
8

5. In view of the above judgment of the Hon'ble Tribunal, I take up the case to be decided on merit.

6. Personal hearing in the case was granted on 04.07.2016 and Smt. Shilpa P. Dave, Advocate, appeared before me. Smt. Dave reiterated the grounds of appeal. She submitted some compilation of circulars and judgments in support of her claim.

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. I find that the appellants have provided Consulting Engineers Service to the main contractors and have received a particular amount in return of rendering the service. The main contractors have stated in their certificate that they have borne the burden of the entire Service Tax which includes the part of the appellants too. The said certificates are vague and indistinct as it is very tough to correlate the actual taxable amount of the appellants without any supporting documents attached along with. Further, the adjudicating authority, in the impugned order, has stated that in a similar case of the said appellants, the Hon'ble CESTAT, Ahmedabad has granted partial stay to the appellants on a deposit of Rupees sixty lakhs. I find that the appellants have completely evaded the issue in their appeal memorandum as well as during the process of personal hearing. I find that in the above case, the Hon'ble CESTAT has not accepted the plea of the appellants and proclaimed that the appellants had not submitted any evidence establishing correlation that the main consultant had paid the entire amount of Service Tax payable by the appellants.

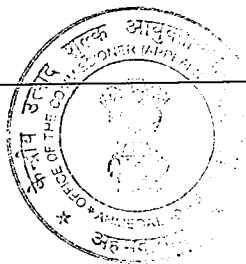
8. During the process of personal hearing, the appellants quoted two circulars in support of their argument viz. C.B.E.C. Circular of F. No. B43/5/97-TRU dated 02.07.1997 and Master Circular number 96/7/2007-ST dated 23.08.2007. In the C.B.E.C. Circular of F. No. B43/5/97-TRU dated 02.07.1997, in paragraph 3.4 it is clarified that 'the services should be rendered to a client directly, and not in the capacity of a sub-consultant/ associate consultant to another consulting engineer, who is the primary consultant. In case services are rendered to the prime consultant, the levy of the Service Tax does not fall on the sub-consultant but is on the prime or main consulting engineer who raises a bill on his client (which includes the charge for services rendered by the sub-consultant)'. On going through the said paragraph, I have come to the conclusion that if the sub-consultant provides service which is directly related to the work done by the main consultant to the client then the liability to pay Service Tax would come on the main consultant. Further, I find that there are two categories of sub-



10

contractors for works contract services: (i) those to whom the support services are outsourced and (ii) those to whom part of the main work is outsourced. Work done by (ii) is treated as work of the same nature as the service of the main contractor and cannot be treated with a different approach. On the other hand, sub-contractors of category (i) provide services that are different in their nature, and these are treated differently. They are, at best, input services for the main works contract service. In the present case, I find that the appellants fall under the first category as they were providing lay-out plan/ drawing of the road to be constructed. The service provided by the appellants can be treated it as input for the main contractor. Earlier the Board, in its Circular number. 138/07/2011-ST, dated 06.05.2011 clarified that when a principal contractor while providing works contract services obtained the service of various other service providers, such as architect, consulting engineer etc. These are separately classifiable services. Therefore, while the principal contractor would not be liable to pay service tax on the construction of roads, dams, Govt buildings etc. but the consulting engineer, architect, labour suppliers etc. who are providing services of design, drawing, engineering etc. for such constructions would be liable to pay service tax as their services are separately classifiable and will not be covered under the works contract service. Further, the Master Circular number 96/7/2007-ST dated 23.08.2007 in Reference Code number 999.03/23.08.2007 also very well clarified the situation. The said clarification is submitted as below;

| | | |
|---------------------------------|---|---|
| <p>999.03 / 23.08.07</p> | <p><i>A taxable service provider outsources a part of the work by engaging another service provider, generally known as sub-contractor. Service tax is paid by the service provider for the total work. In such cases, whether service tax is liable to be paid by the service provider known as sub-contractor who undertakes only part of the whole work.</i></p> | <p><i>A sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor.</i></p> <p><i>Services provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided.</i></p> |
|---------------------------------|---|---|



[Handwritten mark]

In view of the above Master Circular, I view that it is quite clearly clarified that the services provided by the sub-contractor are in the nature of input service and hence taxable. The Master Circular also has very evidently clarified that whether the services used as input services or otherwise by the main consultant, the sub-consultant has to bear the burden of Service Tax. Accordingly, I find that the adjudicating authority, vide the impugned order, has very rightly confirmed the Service Tax amounting to ₹ 30,71,200/- along with interest and penalty under Sections 73(1), 75 and 78 respectively of the Finance Act, 1994.

9. On the second issue of utilization of Cenvat credit by the appellants on the strength of faulty invoices, I agree with the view of the adjudicating authority. The invoices were not bearing Service Tax number and on verification it was found that the issuer of the said invoices was not even a registered service provider. Neither the issuer of the invoice, being a non-registered entity, can pass on the Cenvat credit nor can the appellants avail / utilize the same. The appellants should have properly verified the details before availing the said invoices. In view of the above, I disallow the appeal of the appellants pertaining to this issue only.

10. In view of above, I do not find any reason to interfere in the impugned order and reject the appeal filed by the appellants.


(UMA SHANKER)

COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(S. DUTTA) 220716

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

To,

Sai Consulting Engineers Pvt. Ltd.,
Satyam Square, B/h. Rajpath Club, Bodakdev,
Ahmedabad-380 015

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, Service Tax, Ahmedabad.
- 3) The Additional Commissioner, Service Tax, Ahmedabad.
- 4) The Dy./Asst. Commissioner, Service Tax, Division-II, Ahmedabad.
- 5) The Asst. Commissioner(System), Service Tax Hq, Ahmedabad.
- 6) Guard File.
- 7) P.A. File.

