

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)100/A-II/2015-16 / 1101 to 1105
ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-SVTAX-000-APP-058 -16-17
दिनांक Date : 22.07.2016 जारी करने की तारीख Date of Issue 02/08/16

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 SD-06/O & A/06/AC/Mukesh P /2015-16 Dated 27.08.2015

Issued by Assistant Commissioner, Div-VI, Service Tax, Ahmedabad

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

M/s. Mukesh Prabhudas Patel 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-380013

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 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 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 35F के अंतर्गत वित्तीय (संख्या-2) अधिनियम 2014 (2014 की संख्या 25) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1988 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 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 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,

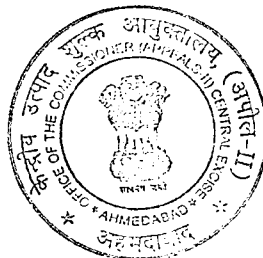
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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)(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

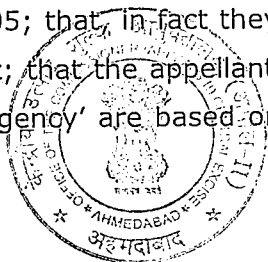
1. This order arises on account of an appeal filed by Shri Mukesh Prabhdas Patel, 44/Shivnandan Nagar, Manohar Villa Char Rasta , Nava Naroda, Ahmedabad- (hereinafter referred to as 'the appellant' for the sake of brevity) along with Condonation of Delay Application against Order-in-Original No. SD-06/O &A/06/AC/Mukesh P./15-16 dated 27.08.2015 (hereinafter referred to as the "impugned order" for the sake of brevity) passed by the Assistant Commissioner, Service Tax, Div. VI, Ahmedabad (hereinafter referred to as the "Adjudicating Authority" for the sake of brevity).

2. Earlier demand of Service Tax of Rs. 13,08,197/- for the period 2006-07 to 2010-11 and Rs. 36,339/- for the period April 2011 to March-12 has been issued on identical issue and already adjudicated. The facts of the case is that during the 2008-2009 period audit verification of the records maintained by M/s Anup Engineering Co Ltd. (hereinafter referred to as 'the said service recipient'), Behind 66 KV Sub Station Odhav, it was observed that the appellant had supplied laborers/workers to the above referred service recipient for attending certain activities in the premises of the said Service Recipient on contract basis. Appellant did not have the facility for production of such goods at their registered premises.

3. Thereafter, since the issue involved in above litigation was recurring in nature, similar information for the period April 2013 to March 2014 was provided by The Service Recipient vide letter dated 23.02.2015 that Rs. 10,10,308/- has been paid to Appellant. Service Recipient has debited the amount paid to the appellant against 'labor charges' in the party's ledger maintained by them.

4. Since the appellant had continued the same practice of providing the service of "Manpower Recruitment or Supply Agency" to the Service Recipient and were not discharging the mandated Service Tax liable on the services rendered by them inasmuch as the appellant had neither obtained the requisite Service Tax Registration nor filed any ST-3 returns under the category of "Manpower Recruitment or Supply Agency", a Show cause notice dated 25.03.2015 for the subsequent period of April 2013 to March 2014 was issued to the appellant proposing the demand of Service Tax amounting to Rs. 31,219/- under Section 73(1) of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 and also proposing the penalties under Section 76 and Section 77 as the circumstances under which the demand of Service Tax was raised were recurring in nature in the instant case also.

5. The above Showcause notice was adjudicated vide the impugned order, wherein the adjudicating authority held that the appellant had failed to produce any contract between them and the service recipient for completion of specific work assigned to them for a fixed price and time and claim the benefit of Notification No. 8/2005-ST dated 1.3.2005; that, in fact they had denied of having any such contract with the service recipient; that the appellant had provided the services of 'Manpower Recruitment or Supply Agency' are based on the ledger entries made by the service



recipient; that the act on the part of the appellant which render themselves under the category of 'Manpower recruitment or supply services' is very well suggested under CBEC Circular No. 96/7/2007-ST dated 23.8.2007; that the act on the part of the appellant indicate that they had provided labor/manpower to the service recipient for various tasks under taken by them and thus such activities are covered under the definition of 'manpower recruitment or supply agency' covered under Section 65 (68) of the Finance Act, 1994.

6. Broadly based on the findings above, the adjudicating authority confirmed the demand of Service Tax amounting to Rs. 31,219/- under Section 73(1) of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 and also invoked the penalties under Section 76 & 77 of the Finance Act, 1994.

7. Aggrieved by the impugned order, the appellant has filed an appeal on 26.11.2015 along with condonation of delay Application, citing the following grounds, mainly,

- a) that the job work activities carried out by the appellant in the factory premises of the Service Recipient consists of fabrication work and activities like cutting, slitting, bending, welding, etc. for the purpose of manufacturing of goods, which on being fully manufactured, are cleared on payment of Central Excise duty by the Service Recipient. The appellant periodically raises the Invoice on the service recipient for quantum of job undertaken during the month at specified/agreed rate for each job; that that the exact nature of the job undertaken by the appellant for the service recipient involves completion of fabrication work as per their drawing, setting up of components, snaw/gtaw welding, hydro testing, and vacuum testing of the goods.
- b) The appellant's work force is under complete administrative control of the appellant and is no manner answerable or accountable to the service recipient. Since the payments received by the appellant from the service recipient is for the quantum of job work executed, the appellant is never paid any extra amount for use of additional labour for execution of the entrusted job or on per day/hour basis for the labour used in execution of work.
- c) That on perusal of contract between the appellant and the service recipient, it can be observed that the service recipient has given the Lumpsum Labour Job Contract. All the workers/labourers are treated as labourers of the appellant. All labour act requirements is the responsibility of the appellant and not of service recipient. The payment in this job work contract is given to the appellant based on purchase order issued by the service recipient and it is not for labour hours or labour man-day. The appellant placed reliance to the definition of 'Manpower Recruitment or Supply Agency' as provided under Section 65 (68) of the Finance Act, 1994.
- d) Circular No. 96/7/2007-ST dated 23.8.07 contemplates that it is in respect of supply of Manpower, it can be seen that the clarification specifically reads that the agency agrees for use of services of an individual to another person for

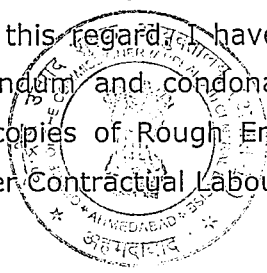


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- consideration as supply of manpower. In their case, there is no agreement for utilization of services of individual workmen, but a job/lump-sum work given to the appellant for execution. The appellant placed reliance on the decision in the case of Divya Enterprises reported at 2010 (19) STR 438 (Tri-Bang.)
- e) That the work force utilized by the appellants are not recruited as the employees by the service recipients nor supplied by the appellants and thus no service in relation to Manpower recruitment or supply is rendered by the appellants. The appellants have placed reliance on the decision in case of Rameshchandra C Patel reported under 2012 (25) STR 471 (Tri.-Ahmd.), in case of K Damodar Reddy Vs Commissioner of Central Excise, Tirupathi reported at 2010 (19) STR 593 (Tri.-Bang), decision in case of Ritesh Enterprise reported at 2010 (18) STR 17 (Tri.-Bang).
- f) that the activity of fabrication undertaken by the appellant does not amount to manufacture, even then, such job work activities carried out would be covered under Business Auxiliary Services and not under Manpower Recruitment or Supply Service; that the job work activities carried out by the appellant in the factory premises of service recipient even it not amounting to manufacture, would be exempted from service tax under the provisions of Notification No. 8/2005-ST dated 01.03.2005.
- g) The appellant has not been extended the benefit of cum tax principle while confirming the demand. The invoices raised by the appellant on the service recipient, clearly indicate that the appellant had not charged or collected any amount towards Service Tax from the service recipient. In light of this fact, the appellant wishes to submit that assuming that they are liable to pay the Service Tax under the category of Manpower Recruitment or Supply Service, the quantum of Service Tax should be reduced to Rs. 27,784/- from the existing demand of Service Tax of Rs. 31,219/-. The said concept has been an accepted legal position after the judgment of Honorable Supreme Court in case of Maruti Udyog Limited as reported under 2002 (141) ELT 3 (SC) and also in case of Professional Couriers Vs. Commissioner of Service Tax, Mumbai reported at 2013 (32) S.T.R. 348 (Tri.-Mumbai).
- h) That the adjudicating authority should have invoked the provisions of Section 80 of the Finance Act, 1994 for granting waiver from penalty under Section 76 and Section 77 of the Finance Act, 1994. The appellant had successfully demonstrated that the appellant had bonafide belief that their activities are exempted from Service Tax and they were not required to pay service tax.
10. Personal hearing held on 05.07.2016 was attended by Shri Gunjan Shah, CA on behalf of the appellant, who reiterated the contents of their appeal memorandum.

Discussion and finding

8. I have gone through the facts of the case, Showcase notice and the impugned order issued in this regard. I have also gone through the grounds of appeal under Appeal Memorandum and condonation of delay application. The appellant has also submitted the copies of Rough English Translation marked as 'Lumpsum Job Work Agreement under Contractual Labour Act'.



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9. I find that in the case before me the appeal has been filed on 26.11.2015 after receipt of the impugned order on 27.08.2015 by the appellant. As per the provisions of Section-85 (3) of the Finance Act, 1994 as amended vide the Finance Act, 2012 made effective from 28.05.2012, an appeal was required to be presented before the Commissioner, Central Excise (Appeals) within two months from the date of receipt of the impugned order. I find that the appeal should have been filed within two months from 27.08.2015 but the same was filed on 26.11.2015 and thus, there is a delay of 29 days in filing the appeal, for which the appellant filed a Condonation of Delay Application pleading for the condoning the delay as they were under impression to file the appeal within three months as the time limit of three months have been mentioned in the impugned order. I find that the preamble to the impugned order enclosed with the appeal memorandum, does mention by mistake three months for filing an appeal against the impugned order, for which the appellant should not be held responsible and also for the consequential delay. Thus, looking to the facts of the case and delay for the period of 29 days, I take a lenient view and condone the said delay and proceed to consider the appeal on merits.

10. On going through the impugned order, I find that the appellant has been charged for providing the services, taxable under the head of 'Manpower recruitment or supply service'. However the impugned order has pointed out absence of evidences in form of any contract entered between them and the service recipient on the basis of which the adjudicating authority could not hold or substantiate the claim of the appellant that the provision of services merit classification in other taxable services viz., 'Business Auxiliary Services'. The only evidence which emphasize the findings of the adjudicating authority is the ledger and that too of the service recipient. However, the appellant has placed Rough English Translation marked as 'Lumpsum Job Work Agreement under Contractual Labour Act' signed between the appellant and the Service Recipient and thus mandates upon me to place reliance on such evidences and the ones discussed under the impugned order so as to decide the issue.

11. The matter purely involves interpretation of the activity undertaken by the appellant, vis-à-vis the evidences and the submissions put up by the appellant and consequently its classification into taxable services. 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 w.e.f. 01.07.2012. However to check whether said service rendered falls under category of man power supply or not, definition prevailing prior to 01.07.2012 is resorted. For period prior to 01.07.2012 'Manpower recruitment or supply service' was defined under Section 65(68) read with Section 65 (105)(k) of the of the Finance Act, 1994,

65(68) "**manpower recruitment or supply agency**" means any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to any other person;

65(105)(k) to any person, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner;

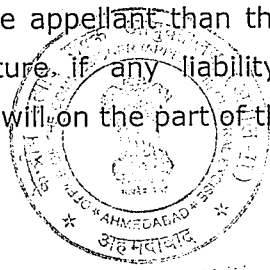


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Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, recruitment or supply of manpower includes services in relation to pre-recruitment screening, verification of the credentials and antecedents of the candidate and authenticity of documents submitted by the candidate;

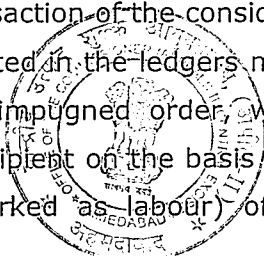
12. Hence before deciding the nature of the services rendered by the appellant, it would necessary to appreciate the facts stated under the contract agreement. The contract is marked as Lump sum Job Work Contract Agreement under Contractual Labour Act and the contract is for limited period, the terms of which are as follows,

1. That the appellant should not engaged more than nine persons and if at all is required to engage more than Nine persons than they should be engaged at the cost and risk of the service recipient as per the license under the Contract Labour Regulation and Abolition Act 1970. To complete the task if any labour persons are required then they must be brought by the appellant. The said labourers should be treated as labourers of the appellant and they will not be treated as labourers of the service recipient. The appellant will not work in the company (service recipient) on their own.
2. That the appellant should maintain registers like attendance register, salary register, leave register, etc and identity card as per the requirement of the Contract Labour Act. The service recipient can supervise such documentary compliances.
3. The appellant shall pay minimum wages as per the provisions of the Minimum Wages Act and the Service recipient shall not be responsible for this, hence the contractor shall not pay wages less than as prescribed under the Minimum Wages Act, 1948 and as resolved by Industrial Engineering units.
4. The appellant shall be responsible for all the present applicable acts such as Factories Act, Provident Fund Act, Employee State Insurance Act, Payment of Bonus Act, Workmen Compensation Act, Gratuity Act, Contract Labour Regulation and Abolition Act, 1970, Industrial Dispute Act. All the Registers and records should be maintained by the appellant and the service recipient will be allowed to inspect the records.
5. The appellant shall pay the salary within 7 days of the next month following the month to which the salary pertains in presence of the service recipient.
6. The appellant shall observe all the provisions of various labour laws and in case if Government or labour inspectors give inspection note than the appellant shall be responsible for answering the same and for the payment of penalties, if any.
7. If the workers of the appellant shall show any negligence than the appellant shall be responsible. If any equipment which belong to the service recipient and not properly maintained than the appellant will be responsible. If during the work any damages occur than the service recipient will deduct the said amount from payable amount of the appellant. If such amount exceeds the amount payable to the appellant than the service recipient will be able to recover the same. In future, if any liability arises on account of ESI Act, 1948, the responsibility will on the part of the appellant.



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8. If the activities such as theft, fire or any other illegal activities are undertaken by the worker of the appellant then entire responsibility will be on the appellant. If any worker is dismissed by the appellant than such worker shall not take any legal steps against the service recipient or shall not implicate company directly or indirectly. However, if any worker raised any objection and if any amount is paid to the worker than the appellant shall pay to the service recipient with interest at the rate of 18%. Reemployment, retrenchment of workers will not be treated as done in Factor or Company of the service recipient. If any compensation is payable on the above than it shall be responsibility of the appellant.
9. The appellant shall do the satisfactory work in accordance with the purchase order of the service recipient. For this purpose time period allotted is 1.4.2013 to 31.3.2014. No payment will be made to the appellant without purchase order and no payment of compensation shall be made for slack period.
10. If any confusion or dispute arises in respect of this agreement, both the parties have to compromise on mutual agreeable terms. If compromise is not possible then the arbitrator will be appointed. The decision taken by the arbitrator shall be binding on both the parties.
11. The damages of the appellant will not be borne by the Service recipients.
13. The above contract appears to be in the direction of sending labour to the service recipient for the nature of job, albeit not defined under the contract, accordingly there is a supply of labour. The contract is illusive of the nature of the work to be carried out by the manpower supplied at the end of the service recipient. At the same time, the contract speaks about the time stipulations under which the assigned work has to be completed and the nature of the work to be assigned under the Purchase Order. The contract also owes on the part of the appellant, all responsibilities for risks attached with the job may it be loss/damages during the course of work and the same would be subjected to the (monetary) deductions from the considerations. Although the entire contract is aimed at completion of job attaching the quality and conditions of the work to be carried out, the same appears to be subsequent to the supply of manpower of the appellant and conditions for the working on the same. Also the conditions in a way clearly demarcates the relationship between the labour employed at the end of Service recipient as an employer-employee relationship all throughout the course of the work undertaken with the appellant only although they have been destined to work at the premises of the service recipient for a contracted period of time. As per Para 32 of the impugned order, the findings of the adjudicating authority has discussed the observations marked under the ledgers prepared by the service recipient which goes ahead to show that the supplied labour is engaged in specialized work of fabrication, although contended to be done at the premises of the service recipient. The transaction of the consideration from the service recipient to the appellant are also manifested in the ledgers maintained at the service recipient's end, as discussed under the impugned order, which also go ahead by showing the payments done by service recipient on the basis of the bills based on the work carried out by the manpower (marked as labour) of the appellants. If the

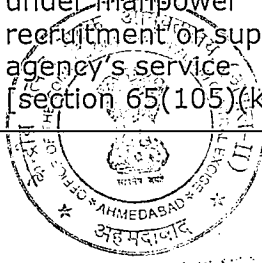


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contention of the appellant under the appeal memorandum is to be believed that they are not charging the service recipient on the basis of the man days or man-hours than the said invoices do suggest that the consideration is confined to the quantum of work of fabrication carried out by the appellant as agreed upon under the Purchase order and the price set under the same. However, this does not seem to suffice the contention contrary to the statute above. Since the mode of consideration for the services provided by the appellant is different than what the appellant perceives as it would have been, based on Mandays/manhcurs, so as to exit from taxability under the statute, would be incorrect. The fact remains that the appellant has contributed by way of provision of skilled labor in interim process of the entire manufacturing process, which is fabrication as per the designs and on the material supplied by the service recipient, albeit the same is subsequent to the supply of manpower and based on the contractual agreement. Also the consideration has been fixed on the basis of the work accomplished which appears to none different than the consideration which is analogical to the supply of manpower, because, the work is extracted through the manpower employed by the appellant at the service recipient's premises, however the same is specific in this case. Mere the nature of consideration does not steal the essence of the taxable services, under the category of 'Manpower recruitment and Supply Services'. The same has been also an admitted fact and accepted by the appellant that appellant has acted for supply of manpower, subsequent to which the entire job of carrying out the fabrication, has been completed. Hence, I find that the entire activity on the part of the appellant bears the essential characteristics of Manpower Supply and not of Business Auxiliary Services as defined respectively under Section 65 of the Finance Act, 1994. Accordingly the benefit of Notification No. 8/2005-ST dated 1.3.2005 also does not come into play.

14. Further, the same issue has been addressed categorically by way of clarification with regard to the 'Manpower recruitment and supply services' under Circular No. CBEC Circular No. 96/7/2007-ST dated 23.8.2007, relevant part reproduced as below,

Reference Code	Issue	Clarification
(1)	(2)	(3)
010.02/ 23-8-07	Business or industrial organizations engage services of manpower recruitment or supply agencies for temporary supply of manpower which is engaged for a specified period or for completion of particular projects or tasks. Whether service tax is liable on such services under manpower recruitment or supply agency's service [section 65(105)(k)].	In the case of supply of manpower, individuals are contractually employed by the manpower recruitment or supply agency. The agency agrees for use of the services of an individual, employed by him, to another person for a consideration. Employer-employee relationship in such case exists between the agency and the individual and not between the individual and the person who uses the services of the individual. Such cases are covered within the scope of the definition of the taxable service [section 65(105)(k)] and, since they act as supply agency, they fall within the definition of "manpower recruitment or supply agency" [section 65(68)] and are liable to service tax.



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15. With a view to the above Circular, and the similar evidences placed by the appellant bear all the ingredients that inspire of the work undertaken by the appellant at the premises of the Service recipient, the ultimate controls of the task force involved, in terms of the employer-employee relationships, rests with the appellant only.

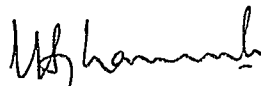
16. The appellant has relied upon judgements of Honorable CESTAT in case of Ritesh Enterprise Vs. Commissioner of Central Excise, Bangalore reported under STO 2009 CESTAT 1817 (Tri.-Bangalore) and M/s Divya Enterprise Vs. CCE Mangalore reported at STO 2009 CESTAT 1636 (Tri.-Bangalore). In both the case laws, the contract has been the soul and which embodies the true characteristic of the service provided. In the instant case, the purchase orders, if read as whole, primarily speaks of the supply of labour with all the responsibilities (related to the labour laws) lying with the appellant. Subsequently the purchase order dictates the nature of work to be extracted from the labour employed by the appellant. This is unlike the findings in case of M/s Divya Enterprises, wherein the supply of labour for the work contracted by the service recipient therein is missing. In the instant case, the same is foremost, although the contract i.e. the supply of labour is intermittent, depending on the quantum of work that has to be accomplished at the service recipient's premises. As regards lump sum payments, the nature of considerations although look different in this case but are task specific. Similarly in case of M/s Ritesh Enterprise, the order categorically speaks of the work assigned to the appellants and misses on the supply of labour, which is vice versa in the instant case. Hence, I uphold the demand of Service Tax under the impugned order in the instant case, under the taxable category of 'Manpower Recruitment or Supply Agency'.

17. The appellant in his grounds of appeal has sought the benefit of cum tax value and the requested for the demand to be reworked out accordingly. Here I don't find any infirmity in the impugned order regarding denial of cum-duty benefit inasmuch as the present matter is pertaining to the case of the deliberate Service Tax evasion and hence, benefit of cum-duty price can not be extended to the appellant. In this regard, I rely upon judgment of Hon'ble Tribunal, Delhi reported at 2011 (268) E.L.T. 369 (Tri. - Del.) in the case of M/s Pinkline Exim P. Ltd., V/s Commissioner of C. Ex. Jaipur-I, which is pari materia to the instant case. The Hon'ble Tribunal has held that benefit of cum duty price can not be extended in the cases of deliberate duty evasion by clandestine clearances. The relevant extract of the same are as under:-

"4.3 *It has been pleaded that in accordance with the ratio of Hon'ble Supreme Court's judgment in case of CCE, Delhi v. Maruti Udyog Ltd. reported in 2002 (141) E.L.T. 3 (S.C.) the price of the fabrics on which duty has been demanded, must be treated as cum duty price and assessable value must be calculated by permitting abatement of duty from the price. Tribunal in cases of Asian Alloys Ltd. v. CCE-III reported in 2006 (203) E.L.T. 252 (Tri. - Del.) and Sarla Polyester Ltd. v. CCE, reported in 2008 (222) E.L.T. 376 (Tri. - Ahmd.) has held that the ratio of Hon'ble Supreme Court's judgment in case of CCE, Delhi v. Maruti Udyog Ltd. is not applicable to the cases of deliberate duty evasion by clandestine clearances. Therefore this plea of the Appellant is also not acceptable."*

18. I also uphold the levy of penalty under Section 76 of the Finance Act, as the appellant has failed to assess and pay the appropriate Service Tax under Section 68 of the Finance Act, 1994, on the services provided by them made taxable under the category of 'Manpower recruitment or supply service. Similarly the appellant has failed to obtain the Service Tax Registration under the said head from the department and also failed to disclose the correct amount of Taxable value and nature of the service provided by them under their ST-3, hence liable for penalty under Section 77 of the Finance Act, 1994. Further, as regards invocation of provisions of Section 80 of the Finance Act, 1994, I find that the appellant has not shown any reasonable cause for their such failure for invoking Section 80 of the Act.

19 In view of my above findings, the appeal filed by the appellant stands rejected and the impugned order is upheld. The appeal filed by the appellant thus stands disposed off in above terms.



(UMA SHANKER)
COMMISSIONER (APPEALS-II)
CENTRAL EXCISE, AHMEDABAD

ATTESTED



(R.R. PATEL)
SUPERINTENDENT(APPEALS-II),
CENTRAL EXCISE, AHMEDABAD.

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Copy To:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, Service Tax, Ahmedabad.
- 3) The Deputy Commissioner, Service Tax, Division-VI, Ahmedabad.
- 5) The Assistant Commissioner (Systems), Service Tax(HQ), Ahmedabad.
- 6) The P.A. to Commissioner (Appeals-IV), Central Excise, Ahmedabad.
- 7) Guard File.

