

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)23/A-II/2016-17 / 1372 to 1377
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-66-16-17
दिनांक Date : 11.08.2016 जारी करने की तारीख Date of Issue 12/08/16

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 29/D/ST/2010 Dated 30.04.2010

Issued by Assistant Commr STC, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants
M/s. Infinium Motors Pvt Ltd Ahmedabad

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:-

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:-
Appeal To Customs Central Excise And Service Tax Appellate Tribunal :-

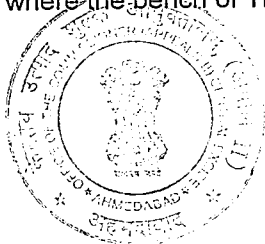
वित्तीय अधिनियम, 1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:-
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad - 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (1) के अंतर्गत निर्धारित फार्म एस.टी- 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना 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, 1984 की धारा 35F के अंतर्गत वित्तीय (संख्या-2) अधिनियम 2014 (2014 की संख्या 25) 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 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,

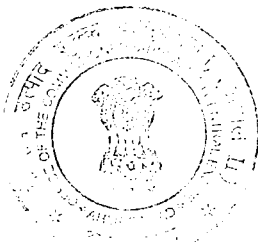
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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)(ii) 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."



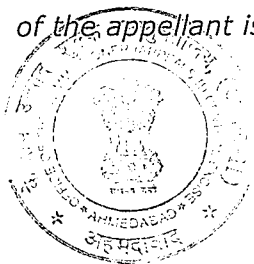
ORDER IN APPEAL

M/s. Inifinium Motors Pvt. Ltd., 842/YMCA Club, S.G. Highway, Jivraj Park. Ahmedabad (*hereinafter referred to as 'appellants'*) have filed the present appeals against the Order-in-Original number 29/D/ST/2010 dated 08.05.2010 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Central Excise, Div-IV, Vidhyalay Chambers, Paldi, 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 'Servicing of Motor Vehicle Services & Business Auxiliary service' and holding Service Tax registration number AADCI 4684B ST001. During the course of audit of the records of the appellants, it was noticed that they had received an "Incentive" from companies i.e. M/s Toyota & KMPL during the year 2003-04 for promoting their business, but they had not paid service tax under Business Auxiliary service on total amount of Rs. 35,75,569/- received by them. Show cause notice dated 08.10.2006 demanding Rs. 2,85,886/-, on above incentive, with interest was issued. Adjudicating Authority vide impugned OIO confirmed demand of Rs. 1,34,980/- under section 73(1) of FA 94 along with interest under Section 75 and also imposed penalty under Section 76.

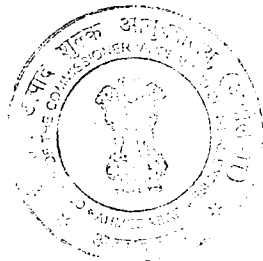
3. Being aggrieved with the impugned order, the appellants preferred an appeal on 08.07.2010 before the then Commissioner (Appeals-IV) who, vide Order-In-Appeal number 409/2010 (STC)/MM/Commr.(A)/Ahd dated 03.11.2010, accepted the contention of Appellant in total that service tax is not payable on said incentive but rejected the appeal as documentary evidences to substantiate that income received is "incentive" were not produced. Relevant para 6 of OIA dated 03.11.2010 is reproduced as below-

" I'm in agreement with the appellant's argument that when trading or buying and selling activity is involved, the incentive/discount received, even though it may be called by the name of commission, is not taxable under business auxiliary service. Further I also agree with the appellant's argument that the definition defined under business auxiliary service presupposes the existence of relation between principal and a client and not between the principal and principal. I am also in agreement with the appellant's argument that to be covered under business auxiliary service, sale per se is not included but service in relation to sale is taxable event. However I am unable to extend the benefit of these arguments to appellant for the reason that these arguments are not substantiated with documentary evidence. In the absence of which, I can not arrive at a conclusion whether the activity of the appellant is taxable service under BAS or not."



[Handwritten signature]

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/1063/WZB/AHD/2011 & M/1318/WZB/AHD/2011 dated 27.07.2011, remanded back the case to the Commissioner (Appeals) with direction to consider the documentary evidence that may be submitted by the appellant and decide the case on merit. It is to be verified that "incentive"/ "discount" received is for trading or buying and selling or not. If it is then it does not fall under BAS and service tax is not payable.
5. In view of the above judgment of the Hon'ble Tribunal, I take up the case to scrutinize the documentary evidence that may be submitted and consequently to decided on merit.
6. Personal hearing in the case was granted on 05.07.2016 and Smt. Shilpa P. Dave, Advocate, appeared before me. Smt. Dave reiterated the grounds of appeal. She submitted documents to show that there is purchase and sale of car by Tcyto to infinium Motor. She also made written submission enclosing 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 my predecessor Commissioner (Appeal) vide OIA dated 03.11.2010, has scrutinized the issue in hand and agreed to appellant contentions that said commission received is not chargeable to service tax. I am in total agreement my predecessor Commissioner (Appeal) findings. I find that my predecessor Commissioner (Appeal) had refrained from allowing appeal as appellant had not substantiated contentions by submitting documentary evidence.
8. Now I take up the documents for scrutiny. I find that appellant has purchased cars from Toyota Kirloskar Motor Pvt. Ltd on their on A/c on payment of VAT and has sold to client on payment of VAT. Transaction is principal to principal. In view of this, I hold that incentive received is in course of trading hence service tax is not payable by the appellant.
9. In view of above, appeal filed by the appellants is allowed.



Uma Shanker
(UMA SHANKER)

COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED

R.R. Patel
(R.R. PATEL)

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

To,

M/s. Inifinium Motors Pvt. Ltd.,

842/YMCA Club, S.G. Highway,

Jivraj Park. Ahmedabad

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, C.Ex., Ahmedabad-II.
- 3) The Additional Commissioner, C.Ex, Ahmedabad-II
- 4) The Dy./Asst. Commissioner, Central Excise, Div-IV, Vidhyalay Chambers, Paldi -II, Ahmedabad.
- 5) The Asst. Commissioner(System), C.Ex. Hq, Ahmedabad.
- 6) ~~Guard File.~~
P.A. File.

