रजिस्टर्ड डाक ए.डी. द्वारा

दूरभाष : 26305065

# 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)141 /A-II/2015-16** 1367 to 1371

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-SVTAX-000-APP-068 -16-17**

दिनाँक 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 _____ दिनाँक : _____ से सृजित

Arising out of Order-in-Original No SD-04/12/AC/2015-16Dated 31.12.2015

**Issued by Assistant Commissioner, Div-IV,,** Service Tax, Ahmedabad

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

**M/s. Shri Sankabhai K. Desai 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 :-

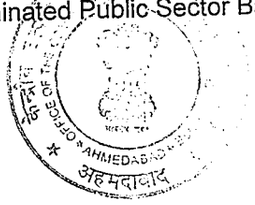
वित्तीय अधिनियम,1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:–
Under Section 86 of the Finance Act 1994 an appeal lies to :-

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 विरूद्ध 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 वहां 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 वहां 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 शर्तो 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, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ 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 होगे।

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**

Shri Sankabhai K. Desai, Post: Rajoda, Bavla, Ahmedabad *(hereinafter referred to as 'appellant')* has filed the present appeal against Order-in-Original No. SD-04/12/AC/2015-16 dated 31.12.2015 *(hereinafter referred to as 'impugned order')* passed by the Assistant Commissioner, Service Tax, Division-IV, Ahmedabad *(hereinafter referred to as 'adjudicating authority')*.

**2.** The facts of the case, in brief, are that the appellant is engaged in providing the service of 'Manpower Recruitment & Supply Agency' and supplies labourer/ worker to his customers. During the course of audit of the records of M/s. Bhagwati Autocast Ltd., Bavla, it was noticed that for the period 2009-2010, the appellant had supplied labours/ workers to the above mentioned factory for attending various works, related to manufacture of final products, on contract basis. However, on further scrutiny it came to light that the appellant did not discharge his Service Tax liabilities. Based on the audit report for the year 2009-10 and information provided by M/s. Bhagwati Autocast Ltd., periodical show cause notices were issued to the appellants. In the present case, information for the period from April 2014 to March 2015 was called for from M/s. Bhagwati Autocast Ltd. and from the details received it was found that the appellant, being the service provider, continued to follow the practice of not paying Service Tax on the taxable amount received. Accordingly, a show cause notice, dated 08.10.2015, was issued. The adjudicating authority, vide the impugned order, confirmed Service Tax of ₹16,395/- under Section 73(1A) of the Finance Act, 1994. He also ordered for the recovery of interest under Section 75 of the Finance Act, 1994 and imposed penalty under Sections 70, 76, 77 and 78 of the Finance Act, 1994.

**3.** Being aggrieved with the impugned order, the appellant filed the present appeal. The appellant stated that he denies all allegations imposed vide the impugned order. The appellant further argued that he is not providing the services of Manpower Recruitment & Supply Agency but carry out work at the premises of M/s. Bhagwati Autocast Ltd. on per MT basis at site. It is the responsibility of the contractor to hire the manpower and all the control and supervision was being carried out by the appellant and there was no control and supervision by M/s. Bhagwati Autocast Ltd. The appellant was not providing services related to Manpower Recruitment & Supply Agency but carrying out work at the premises of M/s. Bhagwati Autocast Ltd. on principal to principal basis. The appellant, in support of his claim, has relied upon the case laws of S. S. Associates vs. CCE, Bangalore, Divya Enterprise vs. CCE, Mangalore and Ritesh Enterprise vs. CCE, Bangalore. The appellant has also stated that the entire demand is time barred. The issue covers the period from 01.04.2014 to 31.03.2015 and the show cause notice was issued on 08.10.2015. The show-cause notice has invoked extended period of limitation alleging that the appellant has suppressed the information from the

department. But there is no suppression or willful wrong statement on the part of the appellant. That, the appellant has clearly indicated his transaction in TDS certificate, Income Tax return and financial statement. The appellant has further requested to delete the penalty under Sections 78 of the Finance Act, 1994. He has further stated that penalty under Sections 76 and 77 cannot be simultaneously imposed.

**4.** Personal hearing in the case was granted on 02.08.2016 wherein Shri Vipul khandhar, CA, on behalf of the appellant appeared before me and reiterated the contents of appeal memorandum.

**5.** I have carefully gone through the facts of the case on records, grounds of the Appeal Memorandum, the Written Submission filed by the appellant and oral submission made at the time of personal hearing. To begin with, I take the first contention of the appellant pertaining to whether the appellant was actually engaged in the service of manpower supply or carrying job work on kg rate basis at site. In this regard I agree with the adjudicating authority that the appellant was involved in a contractual work with M/s. Bhagwati Autocast Ltd. The appellant's contention that he was having a relation under principal to principal basis with M/s. Bhagwati Autocast Ltd. is not supported by any documentary evidence. Simply stating that he was not a labour supplier but doing job work on kg rate basis at site does not suffice the purpose of the appellant and it seems to be a mere afterthought on his part. The adjudicating authority has categorically stated that the terms and conditions of the contract made between M/s. Bhagwati Autocast Ltd. and the appellant categorically confirm his views. Thus, the case laws cited by the appellant do not hold any ground as they discuss the issue of job work and not Manpower Recruitment & Supply Agency.

**6.** As regards the issue that the show cause notice is hit by the law of limitation I agree to the views of the adjudicating authority that there has been suppression of facts and hence extended period has been rightly invoked. Therefore, the argument of the appellants that the show cause notice is hit by the law of limitation, under Section 73 of the Finance Act, 1994, is not acceptable to me. Further, regarding his argument that no suppression can be invoked as he has clearly indicated in TDS certificates, Income Tax returns and financial statements I would like to quote the judgement of Hon'ble CESTAT, Mumbai in the case of M/s. Daichi Karkaria Ltd. vs. CCE, Pune-I where the Hon'ble CESTAT, Mumbai proclaimed that;

*"....if some information is available in various reports and returns which are to be formulated in compliance to other statutes, it does not lead to a conclusion that the utilization of credit for the activity of renting is known to the Department. The Department is not supposed to know each and every declaration made outside the Central Excise and Service Tax law. Even if the Financial Report is available to the audit, the same is meaningless in the sense that it*

*does not indicate that input Service Tax credit utilized to pay the tax liability on such renting of property. The appellant's argument on limitation is rejected."*

**7.** Regarding their third plea that penalty under Sections 76 and 77 cannot be simultaneously imposed I believe that the appeallant has confused Section 78 with Section 77. Penalties cannot be simultaneously imposed under Section 76 and 78 of Finance Act, 1994 after 10.05.2008. There is no rule prescribed that states that there cannot be simultaneous imposition of penalty under Section 76 and 77 of Finance Act, 1994. All the case laws quoted by the appellant talk about simultaneous imposition of penalty under Section 76 and 78 and not under Section 76 and 77. In view of the above discussion, the argument of the appellant is not tenable under the rule of law. I uphold the imposition of penalty under Section 77.

**8.** As regards simultaneous imposition of penalty under Section 76 and 78 of the Finance Act, 1994, the appellants have argued that same is not permissible. I agree to the argument of the appellants and would like to quote the judgment of CESTAT, Ahmedabad in the case of M/s Powertek Engineers vs CCE Daman. In this case the view of the Hon'ble CESTAT is as below;

*"By their very nature, Sections 76 and 78 of the Act operate in two different fields. In the case of Assistant Commissioner of Central Excise v. Krishna Poduval - (2005) 199 CTR 58 = 2006 (1) S.T.R. 185 (Ker.) the Kerala High Court has categorically held that instances of imposition of penalty under Section 76 and 78 of the Act are distinct and separate under two provisions and even if the offences are committed in the course of same transactions or arise out of the same Act, penalty would be imposable both under Section 76 and 78 of the Act. We are in agreement with the aforesaid rule. No doubt, Section 78 of the Act has been amended by the Finance Act, 2008 and the amendment provides that in case where penalty for suppressing the value of taxable service under Section 78 is imposed, the penalty for failure to pay service tax under Section 76 shall not apply. With this amendment the legal position now is that simultaneous penalties under both Section 76 and 78 of the Act would not be levied. However, since this amendment has come into force w.e.f. 16th May, 2008, it cannot have retrospective operation in the absence of any specific stipulation to this effect. However, in the instant case, the appellate authority, including the Tribunal, has chosen to impose the penalty under both the Sections. Since the penalty under both the Sections is imposable as rightly held by Kerala High Court in Krishna Poduval (supra), the appellant cannot*

*contend that once penalty is imposed under Section 78, there should not have been any penalty under Section 76 of the Finance Act. We, thus, answer question no. 3 against the assessee and in favour of the Revenue holding that the aforesaid amendment to Section 78 by Finance Act, 2008 shall operate prospectively. In view of the above, penalties can be simultaneously imposed under Section 76 and 78 of Finance Act, 1994 for the period prior to 16.05.2008 before its amendment when proviso to Section 78 was added."*

In view of the facts and discussions hereinabove, since the period involved in the present case is after 16.05.2008 and since penalty under Section 78 has been imposed under the impugned order, I hold that imposition of penalty under Section 76 *ibid* is not sustainable in the eyes of law hence I drop the same.

**9.** In view of my above discussions and findings, the appeal is disposed off accordingly.

(UMA SHANKER)
COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

**ATTESTED**

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

**BY R.P.A.D.**

To,
Shri Sankabhai K. Desai,

Post: Rajoda, Bavla,

Ahmedabad

**Copy To:-**

1. The Chief Commissioner, Central Excise, Ahmedabad zone,Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Assistant Commissioner, system, Service Tax, Ahmedabad
4. The Deputy Commissioner, Service Tax, Division-IV, Ahmedabad.
5. Guard File.
6. P.A. File.