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)142 /A-II/2015-16** /1425 to 1429

ख अपील आदेश संख्या : Order-In-Appeal No..**AHM-SVTAX-000-APP-079 -16-17**

दिनाँक Date : **19.08.2016** जारी करने की तारीख Date of Issue 26/08/16

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-04/11/AC/2015-16 Dated 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. Sharphuddin A Syed 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.

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(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 A219k 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 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 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 (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(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

This appeal has been filed by Shri Sharphuddin A. Syed, At. Rajoda,Ta. Bavla, Dist. Ahmedabad (hereinafter referred to as the "the appellant") against the Order-In-Original No. SD-04/11/AC/2015-16 dated 31.12.2015 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Service Tax, Division-IV, Ahmedabad (hereinafter referred to as "the Adjudicating Authority").

2. Briefly stated the facts of the case are as under:-

(i) During the audit, verification of the records of M/s Bhagavati Autocast Ltd., Survey No.816, Village-Rajoda, Near-Bavla, Dist. Ahmedabad (hereinafter referred to as 'the said service recipient' for sake of bravity), for the period 2009-10, 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. The appellant had rendered their services to the service recipient and the services so rendered were covered under the definition of "Manpower Recruitment or Supply Agency" service as defined under section 65 (105) (k) of the Finance Act, 1994. However, the appellant had not discharged their Service Tax liability.

(ii) Service recipient furnished the contract entered with the appellant and the information with regards to the payments made to the appellant during the period 2009-10, 2010-11, 2011-12 and April,2012 to June,2012. The appellant had received total amount of Rs. 39,65,887/- from the service recipient for the taxable service provided under the category of "Manpower Recruitment or Supply Agency" on which service tax not paid comes to Rs. 4,13,909/- for the period 2009-10, 2010-11, 2011-12 and April,2012 to June,2012 and same was confirmed vide earlier OIO. Adjudicating Authority held that the appellant had to supply any convincing document which would even remotely suggest that the contract was for lump-sum assignment or for completion of job work rather than for supply for man power; that on the other hand entries in the ledger are very categorical as 'labour Charges' and such an amount has been paid after deduction of TDS; that the benefit of Notification No. 8/2005-ST dated 1.3.2005 is also not available as the appellant failed to establish that there was any contract of job work by the appellant or the said service recipient; that the appellant had provided the services of 'Manpower Recruitment or Supply Agency' are based on the ledger entries made by the said service recipient; that the act on the part of the appellant which render themselves liable for service tax 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 under reference code no. 010.02; 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.Broadly based on the findings above, the Adjudicating Authority held the amount of Rs. 39,65,887/- received by the appellant during the period from 2009-10 to June,2012 as taxable under the category of 'Manpower Recruitment or Supply Agency' services and confirmed the demand of Service Tax amounting to Rs. 4,13,909/-/- under Section 73(1A) 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 & 78 of the Finance Act, 1994.

Subsequently SCN for following period was issued and confirmed by adjudicating authority.

PERIOD	TAXABLE VALUE	Rate of tax- 25%	Service tax
7/2012 to 03/2013	14,31,273/-	3.095	44,226/-
4/2012 to 3/2014	23,62,030/-		72,987/-

Thereafter., the appellant had neither discharged the mandated Service Tax liable on the services rendered by them nor obtained the requisite Service Tax Registration and also nor filed any ST-3 returns under the category of "Manpower Recruitment or Supply Agency". Accordingly, for period April 2014 to march 2015, a Show Cause Notice dated 08.10.2015 was issued to the appellant proposing the demand of Service Tax amounting to Rs. 68,310/- on taxable value 22,10,686/- under proviso to sub-section (1) to 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, Section 77 and Section 78 ibid .

Vide impugned OIO service tax of Rs. 68,310/- has been confirmed under section 73A(1) of FA 1994, imposed penalty under section 76, Rs. 10,000/- under 77 and penalty of Rs. 68,310/- under 76 and Rs. 10,000/- under section 70 of FA 1994.

3. Being aggrieved by the impugned order, the appellant has filed an appeal and also submitted synopsis of the case during personal hearing, on the grounds interalia mentioned as under:-

a) They are not supplying any manpower supply to the service recipient but were carrying job work on per MT work basis at the premises of the service recipient, which can be verified from rate contract given to them.

b) The exact nature of the job undertaken by the appellant for the service recipient involves cleaning work, removal of black sand from the factory and other misc. work; that the appellant is required to complete assigned work at the factory of the service recipient for which amount paid to them for completing the work is in per MT basis and not on per man days. The contract entered upon is not for supply of labourers or persons but for carrying out the specific job. The appellant does the said work on contractual basis and the said activity is not covered within the scope of the definition of the taxable services {Section 65(105)(k)} and, since the appellant does not act as supply agency, the appellant is not falling within the definition of "Manpower Recruitment or Supply Agency" and therefore, is not liable to pay any service tax.

c) Circular No. 96/7/2007-ST dated 23.8.07 contemplates that it is in respect of supply of Manpower; that it can be seen that the clarification specifically reads that the agency agrees for use of services of an individual to another person for consideration as supply of manpower; that in their case, there is no agreement for utilization of services of an individual but a job work is given to them for execution.

d) Similarly, in case of supply of manpower, individuals are contractually employed by the manpower recruitment or supply agency, but in case of the appellant no individuals are contractually employed by service recipient. Appellant not being Manpower Recruitment or Supply Agency, is not collecting any consideration for supply of Manpower; that they are receiving lump sum or job charges, which is not covered under "Manpower Recruitment or

Supply Agency". In support to their contention, the appellant relied upon the decisions in case of (i) S.S. Associates vs. CCEx. Bangalore reported at 2010 (19) S.T.R. 438 (Tri.-Bang) (ii) Divya Enterprises vs. CCEx. Mangalore reported at 2010 (019) STR 0370 (Tri.-Bang) and (iii) Ritesh Enterprise vs. CCEx. Bangalore reported at 2010 (18) STR 17 (Tri.-Bang).

e) They were engaged in manufacturing activities and hence, not liable for service tax for the mfg. job work carried out by them and for which relied on Notification No. 8/2005-ST dated 01.03.2005 in support of their contention.

f) They were working for excisable factory, so if the appellant were liable, the service tax paid by them would be available as a set off (CENVAT), then it would be revenue neutral situation.

g) The entire demand is time barred as the Show Cause Notice covering the period of 01.04.2009 to 30.06.2012 has been issued on 26.09.2014. Thus, the Show Cause Notice invoking the extended period of limitation is bad in law; that the Show Cause has badly alleged that the appellant have suppressed the information from the department.

h) Penalties invoked under Section 76, Section 77 and Section 78 of the Finance Act, 1994 are unjustified and unwarranted. Reliance is placed on various decisions of the higher judicial forum in their support. Further, Penalty under Section 76 and 78 ibid can not be imposed. Further, after amendment to Section 78 ibid w.e.f. 16.05.2008, inserted vide Finance Bill, 2008, no penalty under Section 76 can be imposed if penalty under Section 78 ibid is imposed.

i) The present case is a fit case to be covered under Section 80 of the Finance Act, 1994, which expressly provides that no penalty shall be imposed under Section 76, Section 77 and Section 78 of the Finance Act, 1994, if the appellant has a reasonable cause for default. Reliance is placed on various decisions of the higher judicial forum in their support.

4. Personal hearing in the matter was granted on 02.08..2016 wherein Shri Vipul Khandhar, Chartered Accountant appeared on behalf of the appellant and reiterated the contents of the appeal memorandum and also submitted synopsis of the case.

DISCUSSION AND FINDING.

5. I have gone through the facts of the case, Show Cause Notice, the impugned order, the grounds of appeal under appeal memorandum and written synopsis as well as oral submission made during personal hearing..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 existing and defined under Section 65 of the Finance Act, 1994 during the period under dispute. For sake of reference, 'Manpower recruitment or supply service' as defined under Section 65(68) read with Section 65 (105)(k) of the of the Finance Act, 1994, is reproduced as under for ease of reference.

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) taxable service means any service provided or to be provided ' 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;

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;

6. I find that the Adjudicating Authority has pointed out that the bills/invoices submitted by the appellant which categorically indicate that the same had been raised for laobur work apart from the entries in the ledger and thus, held that the services provided by the appellant falls under the category of 'Manpower Recruitment or Supply Agency' services. Although, the appellant has contended as interalia mentioned at para-3 above both on merits as well on limitation.

6.1 The appellant contended that they were not providing any manpower supply to the service recipient but were carrying job work on per MT work basis at site and in support thereto, the appellant relied upon the Contracts between them, the main terms and conditions as mentioned at para-9 of the impugned order which I feel would be relevant to decide the case, are culled out as follows,

(i) Under the Contract the second party has to complete the work to the satisfaction of the first party by employing their workers.

(ii) Raw materials and semi finished goods has to be supplied by the first party and the second party can not use their own materials or semi finished goods.

(i) Second party has to ensure payment as per the provisions of Minimum Wages Act to the workers kept on work and the first party will not be responsible for this in any manner. The contractor has to ensure that the payment of remuneration is not less than the rates fixed under the Minimum Wages Act 1948 for the Industrial Engineering Industry.

(ii) It will be the responsibility of the second party to ensure that the workers do not show carelessness during their duty and all the goods and materials of the company, related to their work is kept carefully. If any loss or damage is caused the same will be the responsibility of second party and they will have to pay for the same or the same will be deducted from the contract amount. Further the second party will be liable for any liabilities in future under ESI Act 1948.

(iii) As per the Minimum Wages Act, 1948 second party has to pay wages to the workers by the 10th day of each month in the presence of the representative of first party.

(iv) Second party has to comply with provisions under Labour Act and has to appear before the officials of labour department, during inspection, as has to give replies during investigation, and resolve the objection raised and has to bear the penal and prosecution liabilities.

(v) It will be the responsibility of the second Party to comply with the provisions of the existing and the time to time applicable acts like Factory Act, Provident Fund, State Labour Insurance Policy Scheme, Bonus Payable Act, Workmen Compensation Act, Gratuity Act, Contract Labour Regulation And Abolition Act 1970, Industrial Dispute Act Etc., in so far as the workers employed by him are concerned. They have to maintain the register and records required under the aforesaid acts regularly and produce the same as and when demanded by the first party.

(vi) It will be the responsibility of the second party to obtain licence and registration under labour Act.

*(vii)*If any accident or injury occurs to the workers, it will be the responsibility of the second party to incur the medical expenses. The second party will be responsible to pay compensation under the workmen's compensation Act, 1923.

(viii) Second party will have to supply workers to completed assigned works. If due to less number of workers, the work assigned to them is delayed, 10% of the billing amount can be deducted by the first party.

(ix) 1% of the amount payable by the second party to the first party on monthly basis or Rs.300/- (Rs Three hundred only)whichever is less will be deducted and it will be utilized for welfare and for their accounting work.

6.1.1 The above contract appears to be in the direction of sending specialized and skilled labour to the service recipient for the nature of job, which is related to the cleaning work, removal of black sand from the factory and other misc. work. Accordingly, there is an inherent activity of supply of labour. There has been a categorical employment of manpower/labours for execution of the given work for which persons were employed by the appellant who had agreed for use of the services of the persons employed by him to the service recipient. The contract also 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 contract. 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. Thugh the staff is not contractually employed by the service recipient, but they come under their direction and supervision of the service recipient.. Further, they are under direct control of the service recipient as they could not do any work on their own. Even the wages to be paid , was to be given before the representatives of the service recipient. Thus, the service recipient indirectly hiring the labourers through the appellant to do their work in their factory premises and was ensuring that requisite payments to the workers are being made. Also the conditions of the contract clearly demarcates the relationship between the labour employed at the end of service recipient as an employer-employee relationsship all throughout the course of the work undertaken by the appellant in the premises of the service recipient. Another admitted fact as regards the Ledgers has been detailed under Para 12 of the impugned order, which have been categorically maintained under the head of Labour Charges wherein the transactions of the consideration from the service recipient to the appellant are manifested 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 charges) of the appellants. If the contention of the appellant is to be believed that they are not charging the service recipient on the basis of the mandays or manhours than the facts under the instant case do not suggest that the consideration is confined to the quantum of work of cleaning work, removal of black sand from the factory and other misc. work 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 would have been based on Mandays/manhours, so as to exit from taxability under the statute, would be incorrect. The undisputed facts that the entries mentioned as ' Labour Charges' and ' TDS on Cont' etc. which were noticed by the Audit during the course of Audit of Service recipient and further, investigation with the appellant wherein the appellant failed to supply any convincing documents in support of their contention, as well as the bills/invoices raised by the appellant for labour charges does specifically prove that the appellant had acted for supply of manpower. And hence, I find that the entire activity on the part of the appellant bears the essential characteristics of Manpower Supply and not of lump sum job work. Accordingly the service provided by the appellant is correctly falling under the category of 'Manpower Recruitment or Supply services'.

6.2 Further, after amendment from 16 th June, 2005, Service Tax was made leviable on temporary supply of manpower by manpower recruitment & supply agency. The CBEC has also issued a Circular No.B1/6/2005-TRU dated 27.07.2005, explaining the intent and scope of the levy, which is reproduced as under for better appreciation of the issue.

' MANPOWER RECRUITMENT SERVICE

. (.Board's Clarification vide TRU's letter No. B1/6/2005-TRU dt.27.7.2005)

22.1 Prior to 16-5-2005, service tax was leviable on services provided by manpower recruitment agencies in relation to recruitment of manpower. Amendments have been made to levy service tax on temporary supply of manpower by manpower recruitment or supply agencies.

22.2 A large number of business or industrial organizations engage the services of commercial concerns for temporary supply of manpower which is engaged for a specified period or for completion of particular projects or tasks. Services rendered by commercial concerns for supply of such manpower to clients would be covered within the purview of service tax.

22.3 In these cases, the individuals are generally contractually employed by the manpower supplier. The supplier agrees for use of the services of an individual employed by him to another person for a consideration. The terms of the individual's employment may be laid down in a formal contract or letter of appointment or on a less formal basis. What is relevant is that the staff are not contractually employed by the recipient but come under his direction.

22.4 Service tax is to be charged on the full amount of consideration for the supply of manpower, whether full-time or part-time. The value includes recovery of staff costs from the recipient e.g. salary and other contributions. Even if the arrangement does not involve the recipient paying these staff costs to the supplier (because the salary is paid directly to the individual or the contributions are paid to the respective authority) these amounts are still part of the consideration and hence form part of the gross amount.

22.5 Gem and Jewiellery Export Promotion Council have represented seeking clarification that hiring of skilled artisans for making jewellery does not constitute supply of manpower taxable under "manpower recruitment services". When the artisans are hired by any organisation or business, directly, without engaging the services of any other person in any manner, in such cases, the artisans are contractually employed by the company. There is no intermediary and hence no consideration is paid to or payable to any intermediary. The service tax would be leviable only when the services of a person are engaged for recruitment or supply of artisans."

From above, it is evident that the clarification given in the above circular underlines that large number of business or industrial organizations engages the services of commercial concerns for temporary supply of manpower which is engaged for specified period or for competition of particular projects or tasks. Services rendered by commercial concerns for supply of such manpower to clients would be covered within the purview of service tax. Thus, in view of facts and discussion herein above, and also entries in the ledger of the service recipient, it is clear that the appellant in the present case had simply supplied the labours to the service recipient for completion of a particular task at their premises under the supervision and control of their client which are taxable under the category of ' Manpower Recruitment and Supply Agency'.

6.3 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 organisations 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.

The appellant's contention that the said circular is in respect of Supply of manpower only and in their case there is no agreement for utilization of services of an individual but for job of cleaning etc., given to them for execution. However, I find that in view of facts and discussion herein above and also entries in the ledger of the service recipient and in absence of any concrete evidences put forth by the appellant in support of their above contention, I reject the said contention of the appellant being not sustainable in the eyes of law.

6.4 In view of the facts and discussion herein above, since their services falls under the category of 'Manpower Recruitment or Supply Agency' servicees and not under the 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. Further, benefit of the said notification is only available if it is established that the appellant had performed certain 'job work' on behalf of the service recipient and thus, claiming benefit of the said notification is also not correct as no documentary evidences thereto are made available by the appellant.

6.5 With a view to the above Circular, and the facts based on the scrutiny of the evidences discussed by the adjudicating authority under the respective paras (discussed) ibid bear all the ingredients that inspite of the work undertaken by the appellant at the premises of the said service recipient, the ultimate controls of the task force involved, in terms of the employer-employee relationships, rests with the appellant only. Hence, I uphold the confirmation of demand of Service Tax on the appellant alongwith order for interest thereon under the impugned order and set aside the appeal filed by the appellant.

7. With regard to the contention of the appellant on revenue neutrality, I find that by putting this contention, the appellant is trying to get waiver of the prerequisite of payment of Service Tax which has been found to be evaded under the claim for availability of the alternate scheme of Cenvat credit. I observe that if the said plea of revenue neutrality is accepted then it will lead to a situation which will make rules of payment of Service Tax redundant and nobody will discharge the Service Tax under the pretext of availability of Cenvat credit which is not the intention of the legislature. I find that in the case of Jay Yushin Ltd. V/s Commissioner of Central Excise, New Delhi reported at 2000(119) ELT 718 (Tri. L.B.) it is clearly held that revenue neutrality being a question of facts, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme. It is also held therein that where the scheme opted by the appellant is found to be misused, the existence of an alternate scheme would not be an acceptable defence. The appellant in the present case is found to have contravened the

provisions of law malafidely, which resulted into non payment of Service Tax, hence, opting for an alternate scheme on the plea of revenue neutrality, would not be an acceptable defence. Accordingly, this contention is also rejected being not sustainable.

8. . The appellant also seeks to appeal that the issue is barred by time limitations as the Show Cause Notice covering the period of 01.04.2009 to 30.06.2012 has been issued on 26.09.2014 and thus, the Show Cause Notice invoking the extended period of limitation is bad in law; I find that present show cause notice is for demand of period period April 2014 to march 2015, a Show Cause Notice dated 08.10.2015 . Demand is within time period.

8.1 It is argued that that the Show Cause has badly alleged that the appellant have suppressed the information from the department. I find that the issue has been unearthed during the course of Audit of the records of the service recipient; that subsequently during investigation on being sent several letters/reminders, the service recipient at last made available the copy of agreement and the details of payments to the appellant vide letters dated 31.05.2013 and 20.08.2014. Had the Audit not been conducted at the service recipient and subsequent investigation not carried out by the department, the said service tax evaded by the appellant would have gone unnoticed and unassessed. Further, the appellant had never approached the department for any clarification on the taxability on the issue in question if at all he had any confusion on it. Hence, going by the facts, it is clear that the appellant had evaded the payment of Service Tax by way of suppression of facts with an intent to evade the service tax and thus, the extended period would be very much applicable.

09. Further, with regards to various penalties, I find that as the appellant has failed to obtain the Service Tax Registration under 'Manpower recruitment or supply service' as defined under Section 65(68) read with Section 65 (105)(k) of the of the Finance Act, 1994 from the department and also failed to file the Service Tax Returns for the period in dispute, have contravened the provisions of the Finance Act hence, liable for penalty under Section 77 of the Finance Act, 1994. Further, in view of the facts and discussion herein above, especially at para -9 above, I find that the penalty under Section 78 ibid is correctly imposed under the impugned order. The various decisions and judgements relied upon by the appellant is of no help to them in view of the facts and discussion herein above. However, with regards to imposition of penalty under Section 76 of the Finance Act, I find that in pursuance to an amendment to Section 78 ibid w.e.f. 16.05.2008, inserted vide Finance Bill, 2008, no penalty under Section 76 can be imposed if penalty under Section 78 ibid is imposed. Thus, I set aside the impugned order imposing penalty under Section 76 ibid.

10.1 Further, the appellant have cited the judgments on non-imposition of penalty under Section 80 of the Act, if the appellant has a reasonable cause for default. I find that the appellant has contended that as there was bonafide belief that activities carried out by them not taxable and thus, it was a reasonable cause for their such failure, hence benefit of Section 80 of the Act should be extended to them. However, I do not agree with the same. As inspite of Audit objection as well as the stand of the department during further investigation carried out by the department and also the CBEC clarifications, as mentioned in forgoing paras, well back in the years 2005 and 2007, the appellant had neither obtained the service tax registration nor filed any ST-3 returns and thus,

refrained form payment of service tax thereon. Thus, I hold that the appellant is not eligible for the benefit of Section 80 ibid.

10.2 In view of the facts and discussion above, I uphold the impugned order imposing the penalty imposed under Section 77 and 78 of the Finance Act, 1994 .

11. The appeal filed by the appellant, thus disposed off in above terms.

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

ATTESTED

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

BY R.P.A.D.
To,
Shri Sharphuddin A. Syed,
At. Rajoda, Tal. Bavla,
Dist. Ahmedabad

Copy To:-

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