

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)125 /A-II/2015-16 /1533 to 1538
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-081 -16-17
दिनांक Date : 26.08.2016 जारी करने की तारीख Date of Issue 30/08/16

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-05/03/DKJ/AC/2015-16 Dated 19.10.2015

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

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

M/s. Ferromatik Milacron India 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 मेंटल हास्पिटल कम्पाउण्ड, मेघानी 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.



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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 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 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, 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 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 हैं -

- (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 होंगे।

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,

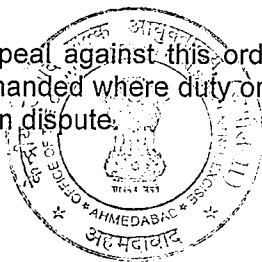
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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

M/s. Ferromatik Milacron India Pvt. Ltd. , 92/ Phase-I, GIDC, Vatva, Ahmedabad (*hereinafter referred to as 'appellants'*) have filed the present appeals on 07.01.2016 against the Order-in-Original number SD-05/03/DKJ/AC/2015-16 dated 19.10.2015 (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Service Tax, Div-V, APM Mall, 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' and holding Service Tax registration number AABCC 0881D ST001. During the course of audit of the records of the appellants, it was noticed that they had incurred expenditure of Rs. 899108/- & Rs. 36002/- during period 2009-10 & 2010-11 towards consulting Engineer's service provided by overseas consultant. The appellant has taken services in respect of translation of software from English to various foreign languages. Departments was considering said service taxable under head "consulting Engineer's" as explained under section 65(31) of FA 94 and since provider was located out side India recipient appellant was required to service tax under section 66A of FA 94.

3. SCN issued was adjudicated by impugned OIO vide which demand of Rs. 96,316/- was confirmed invoking extended period under section 73(1) of FA 94 along with interest under Section 75. Penalty of Rs. 2000/- under Section 77(2) and of Rs. 96,316/- under Section 78 was imposed.

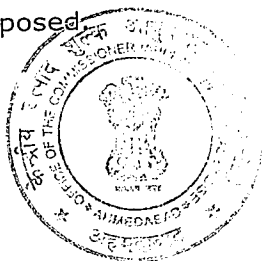
4. Being aggrieved with the impugned order, the appellants preferred an appeal on 07.01.2016 before the then Commissioner (Appeals-II) wherein it is argued by appellant that-

(i) Transaction though in foreign currency is not taxable as the activity is translation from on language to another language is not taxable.

(ii) Translation service is provided not provided by professionally qualified engineer but by experts having knowledge about foreign language as well as English language.

(iii) Translation service is not taxable in India hence if received from abroad will also not qualify for taxability under 66A also.

(iv) They always bonafiedely believed that said service is not taxable hence not paid tax. The Tax if paid , would also have been available as credit. Hence they have not filled ST-3. Since malafied intension is there the penalty under 77 and 78 should not be imposed.



5. Personal hearing in the case was granted on 07.07.2016 and Shri Rajesh Soni, AGM EXIM, appeared before me. Shri Rajesh Soni reiterated the grounds of appeal and also submitted letter dated 07.01.2016 for condoning the 9 days delay.

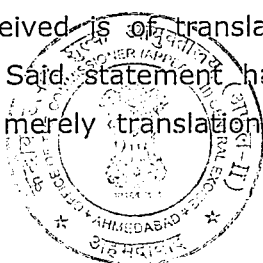
6. I have carefully gone through the facts of the case on records; grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing and submission for condonation of delay of 9 days in filing appeal.

7. I condone the delay and accept their submission in this regards and proceed to decide the case. The question to be decided is whether activity of translating software from one language to other language is taxable or not.

8. In practice, a compiler often translates a high-level programming language into a low-level language like machine code. There are compilers that translate between all different kinds of languages in software. For translating software from foreign language to English the service of software engineer expert as a "compiler" is required which is taxable under category of Information Technology Software services classifiable under Section 65(105)(zzzzz) introduced by finance bill 2008. I find that CBEC at para 4.1.7 of letter D.O. F. No. 334/I/2008-TRU dated 29.02.2008 had written to all Chief Commissioner that-

"services provided in relation to advice, consultancy and assistance on matter related to IT software shall be leviable to Service Tax under the IT software service. Consulting Engineer's service [section 65(105)(g)] in discipline of computer hardware engineer is leviable to service tax whereas consulting engineer's service in discipline of computer software engineering is not leviable to service tax by way of specific exclusion."

9. Contention of appellant during course of hearing is that it is a translation of technical literature only. But no documentary evidence was produced before me to substantiate their claim. Translation of text on paper from one language to another, say, from English to French in hard copy (printed paper) is a job of interpreter or linguist expert, but service received in present issue is not that sort of translation service which is evident from statement of Shri Rajesh Soni, Asst. General Manager recorded under section 14 of CEA 1944. Shri Rajesh Soni, in statement has confirmed that service received is of translation of software from foreign language to English language. Said statement has never been retracted also. Therefore argument that it is merely translation of technical literature is not acceptable.

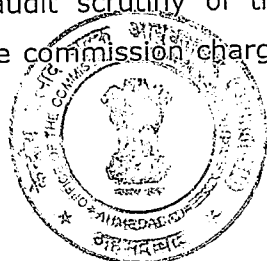


10. Prior to 16-5-2008, services relating to computer software like programming, modification of programmers etc were excluded under the category Consulting Engineer's service (Section 65(31) of the Finance Act, 1994). "Taxable Service" definition excluded the discipline of computer software engineering "out of purview of consultancy services". But with effect from 16-5-2008 software engineering services are classifiable under IT service. The advice, consultancy and assistance in relation to IT software would is liable under the new category of Information Technology Software services classifiable under Section 65(105)(zzzze).

11. Appellant has raised the contention that service received is not in nature of "consulting Engineer service" as it is not engineering activity. I find that said demand is raised in SCN by classifying under "consultancy service" but in fact it is classifiable under IT services. Wrong classification does not alter the taxability of service if otherwise it is classifiable under other services. Merely because there is wrong quoting of classification, the taxability of service cannot be vitiated altogether. Non mentioning of the correct classification in show cause notice had not vitiated the present proceedings as the issue is whether service received by appellant from foreign territory is taxable or not. My view is supported by judgments in case O.K. Play (I) Ltd. vs Commissioner of Central Excise, Delhi-III (Gurgaon), reported in 2004 (171) ELT 378, in which the decision of the Honble Supreme Court in Voltas Ltd. was followed and it was held in paragraph 23 that, the Tribunal is competent to classify the goods under the Heading which it found to be more appropriate

12. As regards the imposition of penalty of Rs. 2000/- under Section 77 of the Finance Act, 1994 , I find that the adjudicating authority has observed that the appellant had been registered with Service Tax failed to declare the value of these said service under the ST-3 returns of the concerned period, holds good under the provisions of Section 77 of the Finance Act, 1994. Hence I agree with the findings of the adjudicating authority and uphold the penal provisions invoked under Section 77 of the Finance Act, 1994 under the impugned order.


13. Penalty invoked under the impugned order under Section 78 of the Finance Act, 1994 is appropriate in the instant case, as the appellant had suppressed the information related payment of such charges to the foreign commission agents, very well covered under the ambit of taxability under Section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of the Service Tax Rules, 1994. It was only during the course of audit proceedings that the entire event of payment of commission charges to agents located in foreign country had come to the knowledge of department. Had it not been the audit scrutiny of the financial statements of the appellant, the payment of Service commission charges would have gone unheeded. Hence, I agree



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with the findings of the adjudicating authority and uphold the penal provisions invoked under Section 78 of the Finance Act, 1994 under the impugned order.

14. In view of above, appeal filed by the appellants is rejected.


(UMA SHANKER)

COMMISSIONER (APPEAL-II)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED


(R.R. PATEL)

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

To,

M/s. Ferromatik Milacron India Pvt. Ltd.
92/ Phase-I, GIDC, Vatva,
Ahmedabad

Copy to:

- 1) The Chief Commissioner, Central Excise, Ahmedabad.
- 2) The Commissioner, service tax, Ahmedabad
- 3) The Additional Commissioner, C.Ex, Ahmedabad
- 4) The Dy./Asst. Commissioner, Service tax, Div-III, APM Mall, Ahmedabad.
- 5) The Asst. Commissioner(System), Service tax. Hq, Ahmedabad.
- 6) Guard File.
P.A. File.

