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)122-123 /A-II/2015-16 / 1990 to 1994

ख अपील आदेश संख्या : Order-In-Appeal No..AHM-SVTAX-000-APP-092-093 -16-17

दिनाँक Date : 22.09.2016 जारी करने की तारीख Date of Issue 28/09/16

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-01/03 & 04/AC/Fitweld/2015-16 Dated 30.10.2015

Issued by Asstt. Commr., Division-I, Service Tax, Ahmedabad

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

M/s. Fitweld Enterprise 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.

G. Jil

आयुक्तालय (अपील-II) CENTRAL EXCISE ★ AHMEDABAD ★ OFFICE OF THE COMMISSIONER (APPEALS-II) अहमदाबाद

(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 A2l9k 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 रुपए 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 order arises out of an appeal filed by M/s Fitweld Enterprise, 2 Abhishek Apartment, Bileshwar Mahadev Society, Jantanagar Road, Ghatlodia, Ahmedabad-380 061 (hereinafter referred to as the "*the appellants*") against the Order-In-Original No. SD-01/03 & 04/AC/Fitweld/2015-16 dated 30.10.2015 (hereinafter referred to as "*the impugned order*") passed by the Assistant Commissioner, Service Tax, Division-I, Ahmedabad (hereinafter referred to as "*the Adjudicating Authority*").

2. In the instant case, based on three Show Cause Notices issued earlier to the said appellants under F.No. STC/4-88/O&A/ADC/D-I/11-12 dated 13.10.2011 demanding Service Tax amounting to ₹22,05,375/- for the period 04/2006 to 03/2011, F.No. SD-01/4-184/SCN/Fitweld/12-13 dated 31.05.2013 for the period 04/2011 to 03/2012 amounting to ₹4,09,786/- and F.No. SD-01/4-737/SCN/Fitweld/13-14 dated 17.04.2014 for the period 04/2012 to 06/2012 amounting to ₹1,56,448/-. The facts involved therein were that during the audit verification of the records maintained by M/s Anup Engineering Co Ltd. (hereinafter referred to as '*the service recipient*'), Odhav, it was observed that during the period from April, 2008 to March, 2009, the appellants had supplied laborers/workers to the above referred service recipient for attending certain activities related to fabrication work to be done on the inputs/raw material supplied by the service recipients and the final product came into existence only when finishing was undertaken by the service recipient, in the premises of the said service recipient, on contract basis. The appellants had rendered their services for manufacture of final products 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 appellants had not discharged their Service Tax liability. The jurisdictional range office, than, had written letters to the appellants to make payment of service tax along with interest and to furnish the details of such service provided by them and income received under taxable services during the period 2006-07 to 2010-11. The appellants submitted that they were not covered under "Manpower Recruitment or Supply Agency" service as they were carrying out specific work assigned to them under the contract at service recipient's premises; that the price and total time for completion of the said work was fixed; that the contract was not for supply of any labor or persons; that they had to complete the assigned work by employing their manpower at their risk and time; that any profit or loss in that contract was on their account; that the goods in question were an outcome of the process i.e. fabrication work done on the inputs/raw material supplied by the service recipients and the final product comes into existence only when finishing is undertaken by the service recipient; that the activity of processing or production

of goods carried out by the appellants on behalf of the service recipients does not amount to manufacture in light of Section 2(f) of the Central Excise Act, 1944; that they (job worker) generally carry out activities like cutting, slitting, bending, welding etc., of various sheets and structures which do not amount to manufacture; that the appropriate duty is being paid by the principal manufacturer on the final product at the time of clearance and they are entitled for exemption from Service Tax under the category of "Business Auxiliary Service" under Notification No. 8/2005-ST dated 1.3.2005. It was further held that the exemption under the Notification No. 8/2005-ST dated 1.3.2005 applied only in cases where such goods are produced using raw material or semi finished goods supplied by the client and the goods so produced are returned back to the said client for use in or in relation to manufacture of any other goods falling under the first schedule to Central Excise Tariff Act, 1985 (5 of 1986), as amended by the Central Excise Tariff (Amendment) Act, 2004 (5 of 2005), on which appropriate duty of Excise is payable. Whereas in the instant case, neither the raw material nor semi finished goods have been supplied by the service recipient to the appellants for job work nor any goods so produced by the said appellants was returned back to the said service recipient. As the said appellants did not have the facility for production of such goods at their registered premises, the activity of fabrication work said to be carried out at the premises of service recipient by the appellants with the help of man power supplied by them. Moreover, the service recipient has debited the amount paid to the appellant against 'labor charges' in the party's ledger maintained by them. Hence, the benefit of Notification Number 8/2005-ST dated 1.3.2005 could not be extended to the appellants in this case, as they have not fulfilled the conditions laid down therein as the process that has been undertaken by the appellants at the factory premises of Service Recipient are covered under the definition of 'Manpower recruitment or Supply Agency' as contemplated under Section 65(68) of the Finance Act, 194 and not under the 'Business Auxiliary Services'. Thereafter, since the issue involved in above matter litigation was recurring in nature, similar information for the next upcoming periods was called for by the jurisdictional Service Tax authorities from the service recipient as well as from the appellants and show cause notices were issued which were subsequently adjudicated by the adjudicating authority.

3. Since the appellants 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", two show cause notices dated 12.09.2014 and 25.02.2015 for the subsequent periods of July 2012 to March 2012 (for ₹1,41,266/-) and April 2013 to March 2014 (for ₹1,69,146/-)

respectively were issued to the appellants. The said show cause notices were adjudicated vide the impugned order, wherein the Adjudicating Authority held such activities are covered under the definition of 'Manpower Recruitment or Supply Agency' under Section 65 (68) of the Finance Act, 1994 and accordingly, confirmed the demand of Service Tax amounting to ₹3,10,412/- (₹1,41,266/- + ₹1,69,146/-) under Section 73(1A) of the Finance Act, 1994 along with Interest under Section 75 of the Finance Act, 1994 and also imposed the penalty under Sections 76, 77(2) and 78 with late fees under Section 70 of the Finance Act, 1994.

4. Aggrieved by the impugned order, the appellants have filed appeals on the grounds *interalia* mentioned as under:

a) The exact nature of the job undertaken by the appellants for the service recipient involves completion of fabrication work as per their drawing, setting up of components, cutting, slitting, welding, hydro testing and vacuum testing etc., of goods. The appellants raise the Invoice on the service recipient for quantum of job undertaken during the month at specified/agreed rate for each job.

b) The appellant's work force was under complete administrative control of the appellants and they were, in no manner, answerable or accountable to the service recipient. Since the payments received by the appellants from the service recipient were for the quantum of job work executed, the appellants were 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) The service recipient had given lump sum labour job contract and as such all the workers/labourers were treated as labourers of the appellants. Thus, the work force utilized by the appellants was for the purpose of job work and were neither recruited as the employees of the service recipient nor supplied by the appellants to the service recipient.

d) The work force utilized by the appellants was not recruited as the employees by the service recipient 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 (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) The Adjudicating Authority has erred in the impugned order by citing the event in analogy to Circular No. 96/7/2007, wherein the clarification under the circular specifically needs that the agency agrees for use of services of an individual to another person for a consideration as a supply of manpower, whereas in case of the appellants, there was no agreement

for utilization of services of an individual but a job/lump sum work given to the appellants for execution.

f) That if the activity of the fabrication undertaken by the appellants does not amount to manufacture, even then, such job work activities carried out by the appellants would be covered under Service Tax under the head of 'Business Auxiliary Services' and not under the 'Manpower Recruitment or Supply Agency' services. However, even if the said activity is covered under Service Tax, their activities are exempted under Notification No. 8/2005-ST dated 01.03.2005. Further the fabrication job work was carried out by the appellants within the factory premises of the service recipient itself and the raw material and the semi-finished goods were supplied by the service recipient and after the completion of the job work the same were returned back. Although the same was done within the premises of the service recipient only, even if not amounting to manufacture, would be exempted from service tax under said Notification No. 8/2005-ST.

g) The Adjudicating Authority has not forwarded the benefit of cum tax principle while confirming the demand. Hence, if the same was accorded, the demand would be reduced from ₹3,10,412/- to ₹2,87,572/-. The same is an accepted legal position in light of the judgment of Honorable Supreme Court's decision in case of Maruti Udyog Ltd as reported at 2002 (141) ELT 3 (SC),and also reliance was placed on decision in the case of Professional Couriers-2013 (32) S.T.R. 348 (Tri. Mumbai).

h) The penalties under Section 76 and 78 are unjustified and need to be waived off by invoking provisions of Section 80 of the Finance Act, 1994. Further, as all the facts were known to the department and this being the repetitive SCN, the penalty under Section 78 can not be imposed.

5. Personal hearing held on 17.08.2016 was attended by Shri Gunjan Shah, CA on behalf of the appellants, who reiterated the contents of their appeal memorandum. He submitted Board's Circular number 190/9/2015 dated 15.12.2015. He further, contended that penalty under Section 78 ibid could not be levied in a periodical SCN.

6. I have gone through the facts of the case, show cause notices and the impugned order issued in this regard. I have also gone through the grounds of appeal under appeal memorandum. On going through the impugned order, I find that the appellants have been charged for providing the services, taxable under the head of 'Manpower Recruitment or Supply Agency' 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 appellants that the provision of services merit classification in other taxable head.

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.

7. The matter purely involves interpretation of the activity undertaken by the appellants, *vis-à-vis* the evidences and the submissions put up by the appellants 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 Agency' service as defined under Section 65(68) read with Section 65 (105)(k) of the of the Finance Act, 1994, is reproduced as under:

> *"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;*
>
> *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;"*

8. Hence, before deciding the nature of the services rendered by the appellants, it would be necessary to look into terms/conditions stated under the contract agreement. The appellants have submitted the copy of Rough English Translation marked as 'Lumpsum Job Work Agreement under Contractual Labour Act' dated 15.04.2012 in support of their contention. I find that as stated at para-4 of the appeal memorandum, the appellants have produced the said copy of Rough English Translation marked as 'Lumpsum Job Work Agreement' dated 15.04.2012 since the original agreement was drawn in Gujarati language. This piece of agreement produced by the appellants has got no evidential value in as much as the same is not accompanied by the so claimed original agreement in Gujarati Language. Further, the English translation thereto does mention the date 15.04.2012 and in spite of this, the same was neither produced before the Investigating Officer nor before the Adjudicating Authority during adjudication proceedings and therefore, safely be concluded to be an after thought. Further, from the said copy of Rough English Translation marked as 'Lumpsum Job Work Agreement' dated 15.04.2012; it transpires that the

original agreement, if at all there as claimed by the appellants, was not registered under the law. In view of the fact that the agreement is not registered and not enforceable in court of law, it appears to be an afterthought. These facts have been admitted by the appellants during personal hearing when on being asked, it was submitted that the agreement is not registered one and the same was not produced at the time of investigation. However, I find that the contract marked as Lumpsum Job Work Agreement under Contractual Labour Act is for limited period, the terms of which are as below;

i. That the appellants 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 appellants. The said labourers should be treated as labourers of the appellants and they will not be treated as labourers of the service recipient. The appellants will not work in the company.

ii. That the appellants 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.

iii. The appellants 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.

iv. The appellants 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 appellants and the service recipient will be allowed to inspect the records.

v. The appellants 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.

vi. The appellants shall observe all the provisions of various labour laws and in case if Government or labour inspectors give inspection note than the appellants shall be responsible for answering the same and for the payment of penalties, if any.

vii. If the workers of the appellants shall show any negligence than the appellants shall hold be responsible. If any equipment which belong to the service recipient and not properly maintained than the appellants will be responsible for the same. If during the work any damage occur than the service recipient will deduct the said amount from payable amount of the

appellants. If such amount exceeds the amount payable to the appellants 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 be on the part of the appellant.

viii. If the activities such as theft, fire or any other illegal activities are undertaken by the workers of the appellants then entire responsibility will be on the appellants. If any worker is dismissed by the appellants 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 appellants shall pay to the service recipient with interest at the rate of 18%. Reemployment, retrenchment of workers will not be treated as done in Factory or Company of the service recipient. If any compensation is payable on the above than it shall be responsibility of the appellants.

ix. The appellants shall do a satisfactory work in accordance with the purchase order of the service recipient. No payment will be made to the appellants without purchase order and no payment of compensation shall be made for slack period.

x. 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.

xi. The damages of the appellants will not be borne by the Service recipients.

9. 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 appellants, all responsibilities for risks attached with the job may it be loss/damage 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 appellants 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 appellants only although they have been destined to work at the premises of the service recipient for a contracted period of time. The transaction of the consideration from the service recipient to the appellants is also manifested in the ledgers

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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. The mode of consideration for the services provided by the appellants is different than what the appellants perceive as it would have been, based on man days/man hours, so as to exit from taxability under the statute, would be incorrect. The fact remains that the appellants had 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 appellants 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 appellants that appellants had 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 appellants bear 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.

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

> *"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."*

With a view to the above Circular, and the similar evidences placed by the appellant bear all the ingredients that in spite of the work undertaken by the

appellants 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 appellants only.

11. The appellants have relied upon judgments 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 appellants. 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.

12. The appellants 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, 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.***

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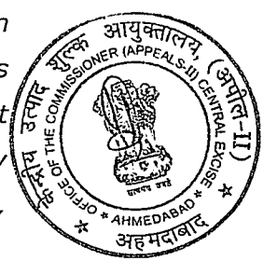
376 (Tri. - Ahmd.) has held that the ratio of Hon'ble Supreme Court's judgment in case of CCE, Delhi v. Maruti Udyog Ltd. is not applicable to the cases of deliberate duty evasion by clandestine clearances. Therefore this plea of the Appellant is also not acceptable."

13. In view of the facts and discussion herein above, I uphold the confirmation of demand of Service Tax under the impugned order in the instant case, under the taxable category of 'Manpower Recruitment or Supply Agency' services. Consequently, impugned order for interest is also upheld.

14. With regard to the late fee as prescribed under Section 70 ibid, I find that the appellants have not contested the same in the appeal before me. Hence, I uphold the impugned order on this issue being not contested by the appellant.

15. 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.

16. 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) 23.09.16
SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD.

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3. The Assistant Commissioner, Service Tax, Division-I, Ahmedabad.
4. The Assistant Commissioner, Systems, Service Tax Commissionerate, Ahmedabad.
5. Guard File.
6. P.A. File.