



आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क: O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,



द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan, रेस कोर्स रिंग रोड, / Race Course Ring Road,

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रजिस्टर्ड डाक ए. डी. द्वारा :-

क अपील / अपील संख्या / Appeal / File No. V2/30/GDM/2017 गृह आदेश नं / O.O. No. 18/ST/AC/2016-17 दिनांक / Date 28.12.2016

ख अपील आदेश संख्या (Order-In-Appeal No.):

KCH-EXCUS-000-APP-173-2017-18

आदेश का दिनांक / Date of Order: 06.02.2018 जारी करने की तारीख / Date of issue: 09.02.2018

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित / Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अथवा आयुक्त आयुक्त आयुक्त आयुक्त आयुक्त, केन्द्रीय उत्पाद शुल्क सेवा, राजकोट / जमनगर / गण्डिधाम द्वारा उपरोक्त ज्ञापित मूल आदेश से मुक्ति / Arising out of above mentioned O/O issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellant & Respondent :- 1.M/s. Ashapura Handling Service, Prop. Madanlal Hirji Gujjar, Plot No. 282, Sector-5, Gandhidham, Dist: Kutch-370201

इस आदेश(अपील) से व्यभिक्त कोई व्यक्ति निम्नलिखित तरीके से अपील प्रार्थना / परिष्कार के द्वारा अपील दावा कर सकता है / Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सेवा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अन्तर्गत एवं विल अडिजिस्ट्रेशन, 1994 की धारा 86 के अन्तर्गत निम्नलिखित तरह की जा सकती है / Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) विशेष बेंच न्यायाधिकरण से सम्बन्धित सभी मामलों सेवा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण की विशेष बेंच, गेट नंबर नं 2, आ. के. पुरम, नई दिल्ली, का की जा सकती है / The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बतलाया गया अपील के अलावा क्षेत्र जहाँ अपील सेवा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (सिस्टेट) की परिष्कार क्षेत्रीय परिष्कार, द्वितीय तल, बहामल भवन अलावा अहमदाबाद- 380016 को की जा सकती है / To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumal Bhawan, Asawa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपील न्यायाधिकरण के द्वारा अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 6 के अन्तर्गत निर्धारित फॉर्म एन-3 का प्रयोग करना चाहिए और इसमें से कम से कम एक प्रति के साथ, जहाँ उत्पाद शुल्क की रकम अथवा सेवा शुल्क, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न की। निर्धारित शुल्क का अभाव, संबंधित अपील न्यायाधिकरण की शिका के अलावा रजिस्टार के नाम से किसी भी सर्वोच्च न्यायाधिकरण से बैंक द्वारा जारी रेकॉग्निज बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उम्र शर्त में होना चाहिए जहाँ संबंधित अपील न्यायाधिकरण की शिका स्थित है। अथवा आदेश (स्टे ऑर्डर) के लिए अपील-पत्र के साथ 500/- रुपये का निर्धारित शुल्क जमा करना होगा / The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/fund is upto 5 Lac. 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपील न्यायाधिकरण के द्वारा अपील, विल अडिजिस्ट्रेशन, 1994 की धारा 86(1) के अन्तर्गत सेवा शुल्क अधिनियम, 1944, के नियम 9(1) के अन्तर्गत निर्धारित फॉर्म S.T.5 में कर प्रतिलिपि में की जा सकती है एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो उसकी प्रति साथ में संलग्न की। (उनमें से एक प्रति प्रस्तुत करने चाहिए) और इसमें से कम से कम एक प्रति के साथ, जहाँ उत्पाद शुल्क की रकम अथवा सेवा शुल्क, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न की। निर्धारित शुल्क का अभाव, संबंधित अपील न्यायाधिकरण की शिका के अलावा रजिस्टार के नाम से किसी भी सर्वोच्च न्यायाधिकरण से बैंक द्वारा जारी रेकॉग्निज बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उम्र शर्त में होना चाहिए जहाँ संबंधित अपील न्यायाधिकरण की शिका स्थित है। अथवा आदेश (स्टे ऑर्डर) के लिए अपील-पत्र के साथ 500/- रुपये का निर्धारित शुल्क जमा करना होगा / 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 fee of Rs. 1,000/- where the amount of service tax & interest demanded & penalty levied is Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied 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. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-

(i) विल अपीलियम, 1994 की धारा 86 की उप-धारा (2) एवं (2A) के अंतर्गत टॉर्न की गयी अपील, सेवाकर विधायकी, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रार ST-7 में की जा सकती एवं उसके साथ अपील, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क, द्वारा जारी आदेश की प्रतियाँ संलग्न की (जहाँ से एक प्रति प्रामाणिक होनी चाहिए) और अपील द्वारा स्थापित आयुक्त अथवा उप-अधीक्षक, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपीलियम न्यायधिकरण को अपील टॉर्न करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलियम अधिकरण (सेस्टैट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अपीलियम 1994 की धारा 35EE के अंतर्गत, जो कि विलियम अपीलियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलियम अधिकरण में अपील करने समय उत्पाद शुल्क/सेवा कर राशि के 10 प्रतिशत (10%), जब राशि एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जहाँ कि जारी काली अपीलियम देय राशि टॉर्न करीज चला से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "जान किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत राशि
- (ii) सेल्वेट जमा की गयी गई राशि
- (iii) सेल्वेट जमा विधायकी के नियम 5 के अंतर्गत देय राशि

- बशर्त कि इस धारा के अंतर्गत विलियम (नं. 2) अपीलियम 2014 के अन्तर्ग से चूटे किसी अपीलियम अधिकारी के द्वारा विचारणीय स्थिति नहीं एवं अपील को लागू नहीं होगी।

For an appeal to be filed before the CESTAT, 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, 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, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.

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

- (i) amount determined under Section 11 D,
- (ii) amount of erroneous Central Credit taken,
- (iii) amount payable under Rule 5 of the Central 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.

(C) भारत सरकार को पुनरीक्षण आवेदन -
Revision application to Government of India:
इस आदेश की पुनरीक्षण अधिकार विभागाधिकरण मामलों में, केन्द्रीय उत्पाद शुल्क अपीलियम, 1994 की धारा 35EE के प्रथम परतुक के अंतर्गत अर्ज सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, विल संकाय, राजस विभाग, चौथी मंजिल, जीवन टी/ भवन, संसद भवन, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35E ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहाँ नुकसान किसी माल को किसी कारखाने से भंडार गृह के परिवहन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह परिवहन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के अंतर्गत के लिए जो इन्हीं केडेट इस अपीलियम एवं इसके विभिन्न प्रावधानों के तहत मंगनी की गई है और ऐसी आदेश जो आयुक्त (अपील) के द्वारा विल अपीलियम (नं. 2), 1998 की धारा 109 के द्वारा निगत की गई लॉज अथवा समकालिक पर या बाद में परित किया गयी है। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998

(v) उपरोक्त आवेदन की दो प्रतियाँ प्रार संकाय EA-8 में, जो कि केन्द्रीय उत्पाद शुल्क (अपील) विधायकी, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संश्लेष के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियाँ संलग्न की जानी चाहिए; साथ ही केन्द्रीय उत्पाद शुल्क अपीलियम, 1994 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के संबंध के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major head of Account.

(vi) पुनरीक्षण आवेदन के साथ विनिर्दिष्ट निर्धारित शुल्क की अदायगी की जानी चाहिए। जहाँ संलग्न राशि एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न राशि एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए। / The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved is Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का संश्लेष है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त धारा में किया जाना चाहिए। इस लक्ष्य के होने हुए भी कि निरा पढी कपी से कपडे के लिए प्रामाणिक अपीलियम अधिकरण को एक अपील या केडीय सरकार को एक आवेदन किया जाना है। / In case, if the order covers various numbers of order- In Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) सहायसंचालित न्यायालय शुल्क अपीलियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 5.50 रुपये का न्यायालय शुल्क दिव्यित अर्ज होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 5.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलियम न्यायधिकरण (बारे विधि) विधायकी, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्बन्धित करने वाले नियमों की और भी ध्यान अवगत किया जाता है। / 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.

(G) उच्च अपीलियम अधिकारी को अपील टॉर्न करने से संबंधित न्याय, विस्तृत और संबंधित प्रावधानों के लिए, ऑनलाइन विचारणीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in.

ORDER-IN-APPEAL

The present appeal has been filed by M/s. Ashapura Handling Service, Plot No. 282, Sector-5, Gandhidham, Dist.: Kutch (hereinafter referred to as 'the appellant') against Order-in Original No. 18/ST/AC/2016-17 dated 28.12.2016 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Service Tax Division, Gandhidham, Kutch (hereinafter referred to as 'the lower Adjudicating Authority').

2. The facts of the case are that appellant was engaged in providing "Manpower Recruitment or Supply Agency Service" falling under Section 65 (105) (k) of the Finance Act, 1994 since 2008-09 and had not obtained Service Tax registration under any of the taxable category. During the course of investigation against M/s. A. V. B. & Co., Gandhidham, documents related to appellant were recovered and on scrutiny, it revealed that appellant was indulged in evasion of Service Tax by rendering taxable services but not registered with the Department and also not paying Service Tax, resulting into inquiry against appellant. Statement of Shri Madanlal (Madanrama) Hirarama Gujjar, proprietor of appellant was recorded on 27.12.2012 wherein he stated that appellant firm functioning since last five years and engaged in providing Manpower (Labour) Supply Services to their clients, not obtained any Service Tax registration and not filed any S.T.-3 returns; that services provided by him is purely of labour supply and liable to Service Tax but he has not obtained any Service Tax registration; he is ready to pay Service Tax payable on the services provided by him from the year 2008-09 to till date; that he had shown labour charges per ton as per request of their clients but actually he had charged and recovered the amount on the basis of number and days of the labours supplied by him. The appellant submitted copy of financial accounts for the year 2008-09 to 2012-13. The appellant as well as his son were issued with summons on 24.06.2013, 12.07.2013, 07.08.2013, 29.11.2013 and 07.01.2014 to appear for investigation, however, both of them failed to appear on the given dates. M/s. Maheshwari Handling Agency Private Limited, Gandhidham vide letter dated 04.10.2013 submitted copy of ledger in respect of appellant and copy of the invoices issued by the appellant.

3. Show Cause Notice F. No. V.ST/AR-GDM/ADC(PV)/119/2014-1 dated 23.09.2014 was issued to the appellant proposing to recover Service Tax of Rs. 22,66,949/- under Section 73(1) of the Finance Act, 1994 (hereinafter referred

to as "the Act") read with Section 68 of the Act alongwith interest under Section 75 of the Act. It was proposed to recover late fee of Rs. 20,000/- per return under Section 70 of the Act read with Rule 7C of the Service Tax Rules, 1994 (hereinafter referred to as "the Rules) and penalty under Section 77, 77(1)(C) on the appellant as well as on Proprietor, and 78 of the Act. The Show Cause Notice was decided by the lower adjudicating authority vide the impugned order wherein he confirmed the demand of Service Tax under Section 73(1) of the Act alongwith interest under Section 75 of the Act. He imposed late fee of Rs. 20,000/- per return under Section 70 of the Act read with Rule 7C of the Rules. He imposed penalty of Rs. 10,000/- under Section 77 of the Act and penalty of Rs. 22,66,949/- under Section 78 of the Act on appellant. He also imposed penalty of Rs. 10,000/- on appellant and on Shri Mahendra Madanlal Gujjar each under Section 77(1)(c) of the Act.

4. Being aggrieved with the impugned order, the appellant has preferred the present appeal on the grounds that the lower adjudicating authority has wrongly confirmed the demand of Service Tax, interest and penalties under various sections of the Finance Act, 1994. The lower adjudicating authority has passed order without giving proper opportunity of being heard. The findings of the lower adjudicating authority are not justified and bad in law.

5. During personal hearing in the matter, Shri Abhishek P. Doshi, Chartered Accountant reiterated the grounds of appeal; submitted that the workers/labourers given by the appellant are working under the guidance of the appellant and not as per order of the service recipients; that charges being collected by them is on tonnage basis and hence they are cargo handling service provider and not supplying man-power; that written submission in this regard will be submitted by them by 16.01.2018; that appeal may be allowed on basis of their claims.

5.1 On behalf of the appellant, the Chartered Accountant filed written submission on 13.01.2018 (received on 15.01.2018) wherein it has been stated that they were engaged in providing various services at Kandla Port which was not taxable and hence they had not obtained Service Tax registration; that the labour provided by them were engaged in loading and unloading of goods at port, cutting of bags, spreading of zola, cleaning of jetty etc at Kandla port to M/s. Maheshwari Handling Agency Private Limited on work to work basis and received payment on quantum of work performed by them; that the client gave

combined contract for all the services and made the payment on the basis of total quantity handled by them whereas sometimes clients have given contract only for one or some of the services and made the payment on the basis of quantity handled or some other measure mutually agreed; that sometimes they had charged per labour basis to their clients for some of the services like cleaning of jetty etc as it cannot be measured in terms of weight which are the measures only for charging of consideration and not the nature of service; that they are not engaged in any type of supply of manpower service but engaged in completion of a particular job; they have not entered into any written contract and the work has been carried out on the basis of oral contracts; that they classified their services as Cargo Handling Services, under bonafide interpretation of law, thus not collected and paid Service Tax on Cargo Handling Services related to export of goods; that their labourers worked under their supervision and control at the port and there was no obligation on the part of service recipient to handle or supervise the work and the recipients of services were not in any way concerned with number of labourers employed or any other matter but they were concerned with completion of specific work; that the works engaged in the work appointed by them and there was no responsibility on the clients or service recipients for any industrial dispute, legal statement, license, registration, salary statement etc; that nature of service cannot be decided only on method of issuing invoices; that the copy of letter submitted by M/s. Maheshwari Handling Agency Private Limited, relied upon in the Show Cause Notice has not been provided to them and would like to cross examine the authorized person of M/s. Maheshwari Handling Agency Private Limited; they submitted copy of audit report for the year 2010-11 wherein the nature of work has been defined as cargo handling services by the auditors; that they rely on the decisions in the case of Ritesh Enterprises reported as 2010-TIOL-539-CESTAT-BANG, Divya Enterprise reported as 2009-TIOL-2476-CESTAT-BANG, Shree Vallabh Industrial Services reported as 2012-TIOL-1752-CESTAT-AHM, Order-In-Appeal No. 860/2012(Raj)/AK/Commr(A)/Ahd passed by the Commissioner (Appeals), Rajkot in case of Roopsinh Jodhsinh Chauhan, Karnataka Personnel Services reported as 2011-TIOL-81-CESTAT-BANG.

5.2 They further stated that even if they would have discharged Service Tax liability, the same would have been available as Cenvat credit to the recipient of services resulting into revenue neutral situation and there is no loss of



revenue to the government; that Show Cause Notice has no evidence regarding suppression of information with intent to evade payment of Service Tax and the department was aware of the facts since statement of appellant in the month of September, 2012 but the Show Cause Notice was issued even after more than two years from date of recording of statement; that the Show Cause Notice issued under Section 73(1) of the Act on 23.09.2014 is barred by limitation; they relied upon decisions in case of Amco Batteries Ltd reported as 2003-TIOL-50-SC-CX, Sotex reported at 2006-TIOL-170-SC-CX, Padmini Products reported at 2002-TIOL-289-SC-CX, Jaiprakash Industries Ltd reported as 2002-TIOL-633-SC-CX; that the lower adjudicating authority passed order without giving proper opportunity of personal hearing; that the lower adjudicating authority wrongly charged interest and imposed various penalties upon them; that their case falls under provisions of Section 80 of the Act and they rely on the decision in the case of Hindustan Steel Ltd reported as 2002-TIOL-148-SC-CT-LB, Motorworld and others reported as 2012-TIOL-418-HC-KAR-Service Tax and Housing & Development Corporation Ltd reported as 2011-TIOL-1606-CESTAT-AHM.

FINDINGS:

6. I have carefully gone through the Show Cause Notice, impugned order, appeal memorandum, submissions made orally during the personal hearing and written submissions. The issue to be decided in this appeal is as to whether the appellant was liable to pay Service Tax under 'Manpower Recruitment or Supply Service' or under 'Cargo Handling Services', on the basis of the facts available in the case.

7. It is on record that during investigation against M/s. A.V.B. & Co., Gandhidham the documents related to the appellant were recovered. The proprietor of the appellant in his statement dated 27.12.2012 deposed that proprietor of M/s. A.V.B. & Co. is his brother-in-law and the appellant's documents/files were kept with M/s. A.V.B. & Co. for accounting purpose. Summons dated 24.06.2013, dated 12.07.2013, dated 07.08.2013, dated 29.11.2013 and dated 07.01.2014 were issued to the appellant as well as to Shri Mahendra Madanlal Gujjar to appear on 10.07.2013, 29.07.2013, 19.08.2013, 13.12.2013 and 17.01.2014 respectively, but both of them failed to appear on any of the dates given subsequently. Therefore, the Department extended the investigation at service recipient's end and in response to the summons dated

23.09.2013, M/s. Maheshwari Handling Agency Private Limited, Gandhidham vide their letter dated 01.10.2013 submitted copy of ledger and copy of invoices pertaining to the appellant. It is also on record that the appellant had submitted copy of financial accounts and Form 26AS for the years 2008-09 to 2011-12. The proprietor of the appellant in his statement dated 27.12.2012 accepted that they were providing Manpower (Labour) Supply Service to their clients but had not obtained Service Tax registration, had not paid Service Tax and not filed S.T.-3 returns.

7.2 On the basis of the documents submitted by the appellant as well as M/s. Maheshwari Handling Agency Private Limited, Gandhidham, the impugned order drew conclusion that the services provided by appellant are classifiable under "Manpower Recruitment or Supply Agency Services". Now, the appellant has come up with argument that they had provided Cargo Handling Services and has produced copy of audit report for the year 2010-11 in support of their argument. In the copy of audit report, the nature of business or profession has been mentioned as "Cargo Handling with Help of Labour" and accordingly they have shown income under the head "Export Cargo Handling Charges in their profit & loss account. I find that it is on record that the appellant has provided labours to their clients. However, they have argued that they have charged on tonnage basis as well as per labour and per hour basis without submitting any documentary evidences. They have also argued that they have supplied labours for dealing with export cargo and for jetty cleaning, but without any supporting documentary evidences.

7.3 It is also on record that the appellant had not filed any reply to the Show Cause Notice nor they had appeared for personal hearing given by the lower adjudicating authority. I find that the definition of Manpower Recruitment or Supply service, w.e.f. 07.07.1997 is as under:

"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;
[Section 65(68) of Finance Act, 1994 as amended]

"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

[Section 65 (105) (k) of Finance Act, 1994 as amended]

7.3.1 Whereas definition of Cargo Handling Service during period from April, 2009 to March, 2013 was as under:

"Cargo Handling Service" means loading, unloading, packing or unpacking of cargo and includes cargo handling services provided for freight in special containers or for non-containerized freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport and cargo handling services incidental to freight, but does not include handling of export cargo or passenger baggage or mere transportation of goods; (Section 65(23) of the Finance Act, 1994)


"Taxable Service" means any service provided or to be provided to any person, by a cargo handling agency in relation to cargo handling services; (Section 65 (105) (zr) of the Finance Act, 1994)

7.3.2 In view of above definitions, it is more than evident that the service provided by the appellant is Manpower Recruitment or Supply Agency Service as because the appellant has provided labour to their clients and failed to establish their contention that they have handled cargo service as because their clients have handled cargo services and the invoices issued reveal all facts in this regard, which says number of persons deployed/engaged.

7.4 The contention that the Show Cause Notice is time barred is not correct as detailed in findings given by the lower adjudicating authority in Para 22. I uphold the findings of the lower adjudicating authority, since the appellant did not provide any details even after being called for by the Department from June, 2013 to January, 2014 even though the proprietor accepted providing manpower supply service in his statement dated 27.12.2012.

7.5 In view of above, I also uphold imposition of late fee under Section 70 of the Act as well as imposition of penalties under Section 77 and Section 78 of the Act. I find that the appellant is liable for the above penalties and late fee and accordingly, I uphold the impugned order in this regard. I also find that the proprietor of the appellant has failed to comply with the summons issued to him, and hence he is liable to penalty under Section 77(1)(c) of the Act.

8. In view of above, I uphold the impugned order and reject the appeal.
९. अपीलकर्ता द्वारा दर्ज की गई अपीलस का निपटारा उपरोक्त तरीके से किया जाता है।
9. The appeal filed by the appellant is disposed off in above terms.


(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s. Ashapura Handling Service, Plot No. 282, Sector-5, Gandhidham, Dist.: Kutch C/o KSD & Associates, 03/411 Cosmo Complex, Mahila College Circle, Rajkot-360 001.	मे. आशापुरा हैंडलिंग सर्विसेस, प्लॉट न. २८२, सैक्टर-५, गांधीधाम, जिल्ला: कच्छ.
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Copy for information and necessary action to:

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for favour of kind information.
2. The Commissioner, GST & Central Excise, Kutch Commissionerate, Gandhidham.
3. The Assistant Commissioner, GST & Central Excise, Division - Gandhidham.
4. The Superintendent, GST & Central Excise, Range - Gandhidham.
5. Guard File.