



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



द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142

Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क अपील / फाइल संख्या /
Appeal / File No.
V2/41/GDM/2017

मूल आदेश सं /
O.I.O. No.
29/JC/2016

दिनांक /
Date
11.01.2017

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

KCH-EXCUS-000-APP-212-2017-18

आदेश का दिनांक /
Date of Order: 28.03.2018

जारी करने की तारीख /
Date of issue: 11.04.2018

11.04.2018

Passed by **Shri Lalit Prasad, Commissioner, Central Goods and Service Tax & Central Excise, Rajkot**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री ललित प्रसाद, आयुक्त, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क, राजकोट को वित्त अधिनियम १९९४ की धारा ८५, केन्द्रीय उत्पाद शुल्क अधिनियम १९९४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है।

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Lalit Prasad, Commissioner, Central Goods and Service Tax & Central Excise, Rajkot has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित /
Arising out of above mentioned OIO 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 Appellants & Respondent :-**
M/s PSL Limited, Varsana Survey No. 39,40,42, Bhachau Bhimasar Road, Taluka Anjar, Kutch ,,

इस आदेश(अपील) से व्यक्ति कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह 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:-

(ii) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए।/
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.

(iii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

- (iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए 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/refund 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) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए 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 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 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/-.

- (ii) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियों संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज 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 For 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.

- (iii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाले अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेनवेट जमा की ली गई गलत राशि
- (iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।

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 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.

(C) **भारत सरकार को पुनरीक्षण आवेदन :****Revision application to Government of India:**

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, 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-35B ibid:

- (i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन 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 भरी गई केन्द्रीय उत्पाद शुल्क के छुट (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 भगतान 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 भगतान के लिए जो ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं। /

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 प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य 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 निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।

जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भगतान किया जाए।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in 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 समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भगतान, उपरोक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पेटी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता 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, notwithstanding the fact that the one appeal to the Appellant 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) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा 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. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित 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 अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय 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

-4-

:: ORDER-IN-APPEAL ::

Being aggrieved with the Order-in-Original No. 29/JC/2016 dated 11.01.2017 (**hereinafter referred to as impugned order**) passed by the Joint Commissioner, Central Excise & Service Tax, Gandhidham (**hereinafter referred to as 'Adjudicating Authority'**), M/s. PSL Ltd (Coating Division), Varsana, Survey No 39, 40, 42 Bhachau -Bhimsar Road, Taluka- Anjar Kutch (**hereinafter referred to the appellants**) have filed present appeal.

2. The facts of the case are that the appellants are holders of Service Tax Registration in Form ST-2 bearing PAN based STC No AAACP2734KST017 issued under Section 69 of Chapter V of the Finance Act, 1994 (32 of 1994) for rendering the taxable services of "Goods Transport Agency Service" and "Business Auxiliary service". During the course of Audit conducted for the period from April 2012 to September 2013, it was noticed that there was a difference in the actual amount of Service tax paid on inward and outward GTA viz-a-viz the amount shown in their Trial Balance Sheet and ST-3 Returns, resulting into short payment of Service Tax to the tune of Rs. 1,23,42,015/-. This observation culminated into the issuance of a Show Cause Notice demanding the tax short paid during the F.Ys 2012-13 to 2014-15 along with interest and penalty. The adjudicating authority confirmed the demand raised along with appropriate interest and also imposed penalties under Section 73(1), 75,77 & 78 of the Finance Act, 1994 vide the impugned order.

3. Being aggrieved with the impugned order, the appellant preferred present appeal, before the Appellate authority on the following grounds :-

(i) That the demand has been raised considering only the debit side of the ledger account of "Freight Outward & Freight inward" wherein provision for payment of freight has been made and the same amount is credited at the end of the month whereby the provision for expenses automatically gets nullified at the end of the particular month. The debit side total of the ledger account of freight has been erroneously considered in the SCN as 'Trial Balance Figure' and therefore it suffers from infirmity of facts.

(ii) That the demand has been raised as there is a difference in the values shown in the debit side sum total of the ledger account and the ST-3 returns. It has been submitted by the appellant that the provisions created in the books of accounts are higher than the actual liability incurred and the actual amount paid.



- (iii) That demand cannot be confirmed merely because there is a huge difference between the provision created and the actual payment; that inadvertently, higher amounts were booked while creating the provision and that the actual expenses incurred was much lower than the provision created.
- (iv) The appellants have given the details regarding the amounts booked towards GTA expenses and the actual amount of service tax paid by them. That the service tax is paid on the actual amount paid by them to the service provider.
- (v) That they have discharged their service tax liability as per the provisions contained in Rule 7 of Point of Taxation Rules, 2011 (POTR, 2011), on the actual amounts paid during each financial year. That demand cannot be raised on provisional values reflected and that it is a settled principal that service tax liability is dependent on the actual amount which is paid to the service provider.
- (vi) That the assessable value for charging service tax is the gross amount paid by the service receiver.
- (vii) That the consideration accruing to service provider under contractual arrangement with service receiver alone is liable to service tax.
- (viii) That valuation of taxable services are to be done as per provisions contained in Section 67 of the Finance Act 1994.
- (ix) That the adjudicating authority has ignored the relevant provisions of Section 67 and given general finding that the applicability of service tax is as per constitutional provisions. Hence the demand confirmed in the impugned order is not sustainable as the Appellants have already discharged their service tax liability on the actual amounts paid to their service provider.
- (x) They placed reliance on the decision of Hon'ble Tribunal in the case of **Geep Industrial Syndicate Ltd V CCE Allahabad** reported in **1999 (111) ELT 564 (Tribunal)** wherein it has been held that actual figures are to be taken into consideration for the purpose of quantification of duty whether the same is more or less than the provisional figures. That the ratio of the said case is squarely applicable to their case contrary to the finding of the adjudicating authority.
- (xi) That if the department's interpretation is accepted, then Appellants have paid excess service tax for the FY 2014-15 since the value of GTA services as per ST-3 returns is more than that reflected in the Trial Balance Sheet, and the same should be adjusted against the alleged short payment.



(xii) That they have already discharged the interest liability vide Challan dated 24.03.2014 and since the entire amount of service tax has been paid along with interest, the question of denial of benefit of Rule 7 of POTR 2011 as held by the adjudicating authority does not arise.

(xiii) That in view of provisions contained in Section 73(3) of the Finance Act 1994, entire amount of service tax has been paid along with interest before issuance of Show Cause Notice, there is no need to issue to Show Cause Notice. They placed reliance upon the following case laws in their support :-

- a) K. Prabhakar Reddy 2011 (24) STR 330 (Tri. Bang)
- b) Tejas Agency 2014 (34) STR 803 (Guj)
- c) Adecco Flexione Workforce Solutions 2012 (26) STR 3 (Kar)
- d) C Ahead Technologies 2012 (26) STR J25 (Kar)
- e) Master Kleen 2012 (25) STR 439 (Kar)

(xiv) That CBEC had issued circular No **137/167/2006/CX-4 dated 03.10.2007** which stipulates that once service tax is paid along with interest, there is no need to issue show cause notice.

(xv) They have reiterated that they have discharged the entire service tax liability on actual expenses incurred on GTA and hence no amount remains unpaid.

(xvi) That they have been audited by the service tax authorities from time to time and all their activities were well within the knowledge of the department hence the allegation of suppression of facts cannot be sustained. That the entire demand is barred by limitation since show cause notice ought to have been issued within 18 months of the relevant date, which has not been done in their case. They placed reliance upon the following case laws in their support :

- a) Pragathi Concrete Products Pvt ltd 2015 (322) ELT 819 (SC)
- b) Rajkumar Forge Ltd 2010 (262) ELT 155 (Bom)
- c) Batliboi & Co Ltd V CCE, Surat 2000 (117) ELT 460 (Tri.- Bom)
- d) SipaniFibres Ltd Vs CCE, Bangalore 2007 (212) ELT 374 (Tri.- Bang)

(xvii) That it cannot be alleged that there was suppression of facts merely on the grounds of non payment of Service Tax. They placed reliance on the following case laws in their support :

- a) Padmini Products V CCE 1989 (43) ELT 195 (SC)
- b) CCE V Chemphar Drugs & Liniments 1989 (40) ELT 276 (SC)
- c) Gopal Zarda Udyog V CCE 2005 (188) ELT 251 (SC)



(xviii) That penalty under Section 77 of the Act was not imposable since they had already paid the service tax amount along with interest prior to issuance of SCN. That since they had already paid the service tax as assessed by them and filed the required returns in time, there was no contravention of Act and Rules which would make them liable for penalty under Section 77 of the Act. They drew support from the decision of the Apex court in the case of **Hindustan Steel Ltd V The State of Orissa reported in AIR 1970 (SC) 253** which was followed by the Tribunal in the case of **Kellner Pharmaceuticals Ltd Vs CCE reported in 1985 (20) ELT 80**.

(xix) That since there was no intention to evade payment of duty, or any suppression or concealment of material facts on the part of the appellant, penalty cannot be imposed under Section 78 of the Act. That they were under the bona-fide belief that they had correctly discharged their duty liability. They placed reliance upon the following judgements in their favour :

- a) Suvikram Plastex Pvt. Ltd. Vs CCE, Bangalore - III 2008 (225) E.L.T. 282 (T);
- b) Rallis India Ltd Vs CCE, Surat 2006 (201) ELT 429 (T);
- c) Patton Ltd Vs CCE, Kolkata - V 2006 (206) ELT 496 (T);
- d) CCE, Tirupati V Satguru Engineering & Consultants Pvt Ltd 2006 (203) ELT 492(T);
- e) Indian Hume Pipes Co Ltd V CCE, Coimbatore 2004 (163) ELT 273 (T);
- f) Akbar BadruddinJiwani V Collector of Customs 1990 (047) ELT 0161 (SC); and
- g) Chemphar Drugs and Liniments 1989 (40) ELT 276 (SC).

(xx) That Section 80 of the Act provides that no penalty can be imposed for any failure referred to in Sections 76, 77 or 78 if the assessee proves that there was reasonable cause for the said failure. Since the appellant was under a bonafide belief that they had correctly assessed and discharged their tax liability, in terms of provisions of Section 80, penalty cannot be imposed under Section 76, 77 and 78 of the Act. They placed reliance upon the following judgements in their favour :

- a) ETA Enineering Ltd. Vs CCE, Chennai, 2004 (174) E.L.T. 19 (T-LB);
- b) Flyingman Air Courier Pvt. Ltd. Vs CCE 2004 (170) E.L.T. 417 (T); and
- c) Star Neon Singh Vs CCE, Chandigarh, 2002 (141) E.L.T. 770 (T)

4. The Central Board of Excise and Customs vide Notification No. 26/2017-CX (N.T.) dated 17-10-2017 read with Order No. 05/2017-Service Tax dated 16-11-2017, has appointed undersigned as Appellate Authority under Section 35 of Central Excise Act, 1944 for the purpose of passing orders in these appeals.



5. Accordingly, personal hearing in the matter was held on 06.02.2018 which was attended by Ms. Priyanka Kalwani, Advocate and Shri Abraham Chacko, General Manager of the appellant who reiterated their grounds of appeals submitted earlier along with appeal. They submitted copies of corroborative judgments in their favour and requested for ten days time for submission of Balance Sheet for the relevant period.

6. Accordingly the appellant filed their final submissions vide their letter dated 16.02.2018 received on 19.02.2018, wherein they inter alia submitted that since the Appellant company prepares a consolidated Balance Sheet and Statement of Profit and loss, covering all the units of the company, it was not possible to submit the audited Balance Sheet of the particular unit under dispute.

6.1 The Appellant submitted photo copies of the Consolidated Audited Balance Sheet and Statement of Profit and Loss Account and Trial Balance Sheet covering all the units of the company. It has also been clarified by them that the financial year 2012-13 was extended upto 30-09-2013 comprising total of 18 months including 6 months of financial year 2013-14. Therefore 2013-14 financial year was limited for the period from 01-10-2013 to 31-03-2014. They also reiterated that the entire demand has been raised due to the erroneous reading of the debit side sum total figures of the Ledger Account of "Freight Outward & Freight Inward" instead of taking the closing balance figures. They also added that it was a common accounting practice to make a provision for estimated expenses at the end of the month for those expenses for which the bills were not received, in order to arrive at the correct financial position of the unit at the end of month and that the figures reflected as the closing balance in particular account should be considered for effective reading of the amount booked to the particular accounting head.

Discussions & Findings:

7. I have carefully gone through the entire appeal memorandum and the submissions made orally as well as in writing during the personal hearing. I find that appellant have debited an amount of Rs. 9,25,652/- vide debit entry No. 1 dated 12.04.2017 from their Input Service Tax credit account which is 7.5% of the amount of Rs. 1,23,42,015/- confirmed. Thus, I find that there is sufficient compliance to provisions of Section 35F(i) of Central Excise Act, 1944 and accordingly, I proceed to decide the appeal.

8. I find that in the present appeal the main point to be decided is that whether the appellant has actually short paid the amount of service tax payable on inward and outward freight, as transpires from the difference in



184

the amount of Freight charges as booked in the books of accounts, and that depicted in the ST-3 returns filed by the Appellants for the period mentioned in the Show Cause Notice.

8.1 The appellant has contended that since the company is preparing the consolidated Balance Sheet for all the group companies and hence it is not possible to produce the Balance Sheet for the appellant unit. Hence reliance has to be placed on the other records and returns. The Show Cause Notice has placed reliance upon the figures of freight inward and outward expenses as shown in the Trial Balance Sheet. I find that as per the accounting methodology, preparation of the Trial Balance Sheet is the first step in the 'end of accounting year process. It is a clearly understood fact that all the ledger accounts are closed and the balances are carried forward to the Trial Balance Sheet. Hence any particular Ledger Account may either have a debit or a credit balance depending upon whether the same is either expense or income. I find that the audit of records of the appellant lead to the revelation that the amount of freight expense as depicted in the Trial Balance Sheet of the audit period was much higher than the amount as shown in the ST-3 returns filed during the period.

8.2 I find that in the present case the charge for service tax is on providing taxable service by the service provider to a service recipient and the assessable value for the purpose of taxation is the gross amount charged by service provider to a service receiver. Section 67 of the Finance Act, 1994 deals with the valuation of taxable services and it stipulates that :-

"67 (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;"

Hence it is imperative that the gross amount charged by the service provider is known. The appellant has submitted voluminous records to this authority in support of their contention. However, it is not possible for this authority to scrutinize, verify and calculate the gross amount charged by the service providers. I find that the adjudicating authority has confirmed the demand on the basis of the difference between the figures appearing in the Trial Balance Sheet and the ST-3 returns, however, no efforts have been made by the adjudicating authority to arrive at the correct assessable value for levy of Service tax.



8.3 I further find that as per provisions contained in Rule 7 of the Point of Taxation Rules, 2011, the appellant was liable to pay service tax as and when they pay the transportation cost to the Goods Transport Agency. Rule 7 ibid stipulates that :-

"7. Determination of point of taxation in case of specified services or persons.-

Notwithstanding anything contained in rules 3, 4 or 8, the point of taxation in respect of the persons required to pay tax as recipients of service under the rules made in this regard in respect of services notified under sub-section (2) of section 68 of the Act, shall be the date on which payment is made:


*Provided that where **the payment is not made within a period of three months of the date of invoice**, the point of taxation shall be the date immediately following the said period of three months."*

It has been alleged in the Show Cause Notice that the appellant has not made the payment of Service Tax on GTA within the period of six months, hence they are not entitled to benefit of provisions of Rule 7. However the dates on which payment has been made by the appellant is not forthcoming from the record, in the absence of which it is not possible to determine the date on which payment of service tax was actually due and the date of expiry of the stipulated period.

8.4 I find that the adjudicating authority has confirmed the demand reiterating the grounds raised in the Show Cause Notice without assessing the actual tax liability. The adjudicating authority has observed in the "discussion and finding" (page 4 of the impugned Order) that : *".....As per the standard accounting practices, provisions for any liability is made when the liability has arised but invoice or other type of documentation has not been received by the noticee till the date of preparation of trial balance. I therefore find that the Show Cause Notice is not vague and cryptic and reliance is rightly made on provisions made by the assessee in this regard."* However, I find from the Ledger Account produced before me that the appellant has made debit entries pertaining to payments made to various service providers and in certain cases provisional entries have been debited on the last day of the month and the same amount reversed on the first day of next month. Thus, it appears that the appellant was passing the debit entries on receipt of invoices from the service providers. In view of provisions contained in Section 67 (1)(i) of the Finance Act 1994, service tax is chargeable on the gross amount charged by the service provider for the services provided by him. Hence quantification of the gross amount charged by various service providers is crucial for correct assessment of the service tax liability. This data can be acquired from the appellant. The fact remains that even if the appellant has failed to make

181
payment to the service provider within the stipulated period as per proviso to Rule 7 of POTR, 2011, the point of taxation will be determined as mentioned therein. However there will be no change in the tax liability calculated, as stipulated under Section 67 of the Finance Act, 1994. The said payment dates have to be correctly determined, so as to arrive at the actual interest liability. Hence, I am of the opinion that the entire issue needs to be revisited by the adjudicating authority for proper and detailed scrutiny of the records, in order to assess the tax liability correctly.

9. In view of the above discussion, I remand back the matter to the original Adjudicating Authority for de novo proceedings after proper scrutiny of all the relevant records and after considering all the arguments put forward by the appellant.


(LALIT PRASAD)
COMMISSIONER, CGST & CEX, RAJKOT/
COMMISSIONER (APPEALS-III),
CGST & CEX, RAJKOT

F. N. V.2/41/GDM/2017
Place: Rajkot.
Dated: 28-03-2018

By Speed Post.

To,

M/s. PSL Ltd. (Coating Division),
Vill.-Varsana,
Survey No. 39, 40 & 42,
Bhachau - Bhimsar Road,
Taluka- Anjar (Kutch).

Copy to:

- (1) The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad.
- (2) The Commissioner, CGST & Central Excise, Kutch Commissionerate.
- (3) The Commissioner, CGST & Central Excise, Rajkot Commissionerate.
- (4) The Assistant Commissioner, CGST & CEX, Division Anjar - Bhachau.
- (5) Sr. P.S. to Commissioner, CGST & C. Ex., Rajkot Commissionerate.
- (6) Guard File.