



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,

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.	मूल आदेश सं / O.O. No.	दिनांक / Date
	V2/12/RA./2017	DC/JAM/ST/03/2016-17	21.11.2016

Handwritten notes: 62984/6281, 21/11/2016, 6296/6297

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

RAJ-EXCUS-000-APP-129-2017-18

आदेश का दिनांक / Date of Order:	01.12.2017	जारी करने की तारीख / Date of issue:	04.12.2017
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कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/संयुक्त आयुक्त/उपायुक्त/सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / जामनगर / गंधीधाम। द्वारा उपरोक्तित जारी मूल आदेश से सुक्ति: /
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 Appellant & Respondent :-**
M/s. Rajhans Metals Pvt. Ltd., (Formerly known as M/s. Rajhans Alloys Pvt. Ltd.), Plot No. 3985, GIDC, Phase-III,,Dared, Jamnagar - 361 004

इस आदेश(अपील) से व्यभिक्त कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दाख 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:-

(i) दक्षिण मूल्यांक से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पाद 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.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा क्षेत्र सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिन, , दक्षिणीय तल, बहमनी भवन असावा अहमदाबाद, 360016 को की जानी चाहिए। /
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumik 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) नियमवली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये फार्म EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की रॉय, ब्याज की रॉय और लगाना सेवा जुद्धिया, रूप 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति सलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी शार्वरिजल बैंक के बैंक द्वारा जारी रेकॉर्डित 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 नियमवली, 1994, के नियम 9(1) के तहत निर्धारित फार्म S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में सलग्न की (अन्य से एक प्रति प्रस्तुतित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की रॉय, ब्याज की रॉय और लगाना सेवा जुद्धिया, रूप 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति सलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी शार्वरिजल बैंक के बैंक द्वारा जारी रेकॉर्डित 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/-.

- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्जे की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न की (उनमें से एक प्रति प्रामाणिक होनी चाहिए) और आयुक्त द्वारा स्थापक आयुक्त अथवा उपस्थित, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपील 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 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 अपील न्यायाधिकरण (सेस्टाट) के प्रति अपील 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 अपील न्यायाधिकरण में अपील करने समय उत्पाद शुल्क/सेवा कर सांग के 10 प्रतिशत (10%), जब सांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि टाट करेड रूप से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "सांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेल्वेट जमा की ली गई राशि
(iii) सेल्वेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्त यह कि इस धारा के प्राधान वित्तीय (सं. 2) अधिनियम 2014 के अंतर्गत से पूर्व किसी अपील न्यायाधिकरण के संलग्न विवादपूर्ण रकम अर्जी एवं अपील को लागू नहीं होवे।
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, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अथवा सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन टॉप 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-35B ibid:
- (i) यदि मात्र के किसी नुकसान के मामले में, जहां नुकसान किसी मात्र के 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 मात्र के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में मात्र 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 मात्र के विनिर्माण में प्रयुक्त कच्चे मात्र 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 an 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 मात्र 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 भुगतान के लिए जो इप्टी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (सं. 2), 1998 की धारा 109 के द्वारा निर्यात की गई तरीक अथवा समावधि 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 फॉर्म संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संकेपन 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 अद्यतनी 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 अदावती की जानी चाहिए।
जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम 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 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 भुगतान, उपरोक्त ढंग से किया जाना चाहिए। इस तथ्य के होते हुए भी की निम्न पढी कार्य से बचने के लिए सहायिका अपील न्यायाधिकरण को एक अपील या केटीय अथवा अर्जेंट 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, 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 scripioria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) सहायिका न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट 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 अपील 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 अपील न्यायाधिकरण को अपील दायित्व करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपील न्यायाधिकरण 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 ::

M/s. Rajhans Alloys Pvt. Ltd., Dared, Jamnagar [presently known as M/s. Ranjhans Metals Pvt. Ltd. (Unit-II)], Plot No.3985, GIDC, Phase-III, Dared, Jamnagar (hereinafter referred to as 'the appellant') has filed the present appeal against the Order-In-Original No. DC/JAM/ST/03/2016-17 dated 21/25.11.2016 (hereinafter referred to as 'the impugned order'), passed by the Deputy Commissioner, Central Excise Division, Jamnagar (hereinafter referred to as "the lower adjudicating authority").

2. The brief facts of the case are that the appellant is registered for "Goods Transport Agency Service" and "Business Auxiliary Service" and holding Service Tax Registration No. AAACR5424Q5D002. During the course of CERA audit for the period from 2010-11 to 2014-15 (upto 10.07.2014), it was found that the appellant had paid export sales commission to overseas commission agent in the year 2012-13 and 2013-14 on overseas sales. Section 66A of the Act provides that where any taxable service was provided by a person having business establishment or fixed establishment outside India and the service received by a person located in India, such services shall be the taxable service and taxable service shall be treated as if the recipient himself provided the service in India and accordingly, the Service Tax was payable by service receiver. As per Notification No. 32/2012-ST dated 20.06.2012 where services are rendered by any person who is located in non-taxable territory and received by the person located in taxable territory, the Service Tax will be payable by the recipient of service and the recipient of service would be liable to pay Service Tax only when the place of provision of service is in taxable territory as per Place of Provision of Service Rules, 2012. Further, with effect from 01.07.2012, the term "service", has been categorically defined in clause (44) of new Section 65B inserted vide Finance Act, 2012. Thus w.e.f. 01.07.2012, all the services, other than those mentioned in negative list are taxable and it is no longer mandatorily required to classify each and every transaction related to service provided by the service provider. The services received by the appellant were not falling under negative list and therefore, the services received by the appellant would attract Service Tax under Section 66 read with Section 66B of the Finance Act, 1994 (hereinafter referred to as "the Act"). In terms of definition of "service" defined in clause (44) of Section 65B read with Section 66A of the Act, the services provided by the overseas service provider for sale of goods manufactured by the appellant (service

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recipient located in India) was a taxable service under the category of "Business Auxiliary Service" classifiable under Section 65(105)(zzb) of the Act. The appellant paid Rs. 8,68,310/- as foreign sales commission to the overseas service provider during the period 2012-13 and 2013-14, on which Service Tax of Rs. 1,07,323/- was required to be paid by the appellant.

3. Show Cause Notice F. No. V.ST/JMN-06/DEMAND/2016-17 dated 17.08.2016 was issued by then Deputy Commissioner, Central Excise Division, Jamnagar, proposing recovery of Service Tax of Rs.1,07,323/- under proviso to sub-section (1) of Section 73 alongwith interest under Section 75 of the Act. It was also proposed to impose penalties under Section 76(1), 77(1), 77(2) and 78(1) of the Act.

4. The show cause notice was adjudicated by the lower adjudicating authority, who confirmed the demand of Service Tax of Rs. 1,07,323/- under proviso to sub-section (1) of Section 73 alongwith interest under Section 75 of the Act but dropped the proposal to impose penalty under Section 76 of the Act. However, he imposed penalty of Rs. 5,000/- under Section 77(1), Rs. 10,000/- under Section 77(2) and penalty of Rs. 1,07,323/- under Section 78 of the Act giving an option under proviso to Section 78 of the Act.

5. Being aggrieved with the impugned order, appellant preferred the present appeal, inter-alia on the following grounds:

(i) The impugned order is untenable in law in as much as the same is against the relevant provisions of the place of provision of Services Rules, 2012 (hereinafter referred to as 'the Rules') as the provisions of Section 66B of the Act provides that Service Tax can be levied on any service only and only if the place of provision of such service is in the taxable territory of India. Secondly, the Central Government issued 'the Place of Provisions of Services Rules, 2012' to determine whether a particular service is provided in Indian taxable territory or not. They also refer to Rule 9 of the Rules which provides that in case of certain specified services the place of provision of service shall be the location of the service provider. The sub-clause (c) of the Rules covered 'intermediary services' which provides that if the location of such service provider is outside the taxable territory then such transactions/ services are not liable to Service Tax. They also refer to the definition of 'intermediary' as provided under Rule 2(f) of the Rule. On referring to Rule 9 of the Rules and

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definition of 'intermediary', in the present case, services have been provided by commission agents located outside India and therefore, such services are not liable to Service Tax since place of provision of such services are outside the taxable territory. Therefore, the impugned order is untenable in law being against the relevant provisions of the Rules.

(ii) The impugned order is unsustainable in law being against the principal of revenue neutrality in as much as if it is assumed that they were obliged to pay Service Tax on above services under reverse charge mechanism, then also the taxes paid were always available to them as Cenvat credit. They rely on the decision in the case of Jet Airways India Ltd. Vs CST, Mumbai reported as 2016-YIOL-2072-CESTAT-MUM, Synpol Products Ltd. Vs CCE & S.T. Ahmedabad-II reported as 2016 (335) ELT 697 (Tri.-Ahmd.), STI Industries Vs CCE, Daman reported as 2015 (327) ELT 514 (Tri.-Ahmd.)

(iii) The impugned order is barred by limitation as the present demand pertains to financial year 2012-13 and 2013-14, whereas, the relevant Show Cause Notice had been issued on 17.08.2016 i.e. extended period of limitation had been invoked. However, the necessary ingredients to invoke extended period of limitation i.e. suppression of facts or willful misstatement are completely absent in the present matter. They were under bona fide belief that since services were provided outside the taxable territory of India the same were not liable to Service Tax and therefore, the impugned order is not sustainable in law. They rely on the decision in the case of Texyard International Vs CCE, Trichy reported as 2015 (40) S.T.R. 322 (Tri.-Chennai). They also submitted that the present issue involves interpretation of law and hence in such issues the extended period of limitation cannot be invoked and thus the impugned order is barred by limitation.

(iv) The appellant further submitted that since Service Tax itself is unsustainable, the recovery of interest and penalties under various Sections not sustainable in law. They rely on the decision in the case of Patel Alloys (Steel) (P) Ltd. Vs CCE, Ahmedabad - 2013 (293) ELT 264 (Tri.-Ahmd.), Akash Optifibre Ltd Vs CCE, Jaipur - 2010 (261) ELT 404 (Tri.-Del.). The present matter involve interpretation of law and thus in such case penal provisions cannot be invoked.

6. A personal hearing in the matter was held, wherein Shri Dinesh Kumar

Jain, Chartered Accountant appeared and reiterated grounds of appeal; that the services have been availed from foreign Commission Agent, who are covered under Intermediaries and hence Service Tax is not payable by them as per Rule 9 of the Rule of Provision of Services Rules, 2012. The demand is wrongly made to be paid by them.

FINDINGS:

7. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and submission made during the personal hearing.

7.1 The issue to be decided in the present case is as to whether the appellant was liable to pay Service Tax on export sales commission paid to foreign commission agent on reverse charge mechanism, or not.

8. I find that the appellant has paid sales commission to overseas commission agent in the year 2012-13 and 2013-14. The said services are classifiable under "Business Auxiliary Service" as per Section 65(19) of the Act, as detailed below:

Business auxiliary service" means any service in relation to,
 (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
 (ii) promotion or marketing of service provided by the client; or
 (iii) any customer care service provided on behalf of the client; or
 (iv) procurement of goods or services, which are inputs for the client; or
 Explanation: For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client.
 (v) production or processing of goods for, or on behalf of, the client.
 (vi) provision of service on behalf of the client; or
 (vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, but does not include any activity that amounts to "manufacture" of excisable goods.

[Explanation. – For the removal of doubts, it is hereby declared that for the purposes of this clause, –

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person –

- (i) deals with goods or services or documents of title to such goods or services; or
- (ii) collects payment of sale price of such goods or services; or
- (iii) guarantees for collection or payment for such goods or services; or
- (iv) undertakes any activities relating to such sale or purchase of such goods or

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services;

Further Section 65(105)(z) of the Act stipulates: "Taxable Services" means any service provided or to be provided to a client by any person in relation to business auxiliary service.

8.1 The charging Section is Section 66A which is re-produced below for ready reference:

SECTION 66A Charging of service tax on services received from outside India:

(1) Where any service specified in clause (105) of section 65 is,—

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India,

such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1.— A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2.—Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.

The services provided in the negative list (exempted from Service Tax) are tax free as per the charging section 66B. However, the "Business Auxiliary Service" is not covered under the negative list as per Section 66B of the Act.

8.2 The Government vide Notification No. 25/2012-Service Tax New Delhi, the 20th June, 2012 exempted the following taxable services by the following persons in respective capacities -

Item NO.34. Services received from a provider of service located in a non-taxable territory by -

- (a) Government, a local authority, a governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession;
- (b) an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) for the purposes of providing charitable activities; or
- (c) a person located in a non-taxable territory;

However, vide Notification No. 30/2012-ST dated 30.06.2012 has clarified the situation as detailed below:

Sl.No.	Description of a service	Percentage of service tax payable by the person providing service	Percentage of service tax payable by the person receiving the service
10	in respect of any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory	Nil	100%

Thus, it is clear that in respect of any taxable services provided or agreed to be provided by any person who is located in non-taxable territory and received by any person located in the taxable territory, the person receiving the service is liable to pay Service Tax on reverse charge mechanism.

8.3 The impugned order as well as Show Cause Notice at para 2 has clearly stated that the appellant had paid export sales commission to overseas commission agent in the year 2012-13 and 2013-14 on overseas sales. I find that for this the Government has issued the following Notification which exempts the taxable service received by an export of goods and used for export of goods as detailed below:

Notification No.18/2009 - Service Tax, dated 7th July, 2009

hereby exempts the taxable service received by an exporter of goods (hereinafter referred to as the exporter) and used for export of goods (hereinafter referred to as the said goods), of the description specified in column (3) of the Table below (hereinafter referred to as the specified service), pertaining to sub-clauses of clause (105) of section 65 of the said Act specified in the corresponding entry in column (2) of the said Table, from the

whole of the service tax leviable thereon under section 66 and section 66A of the said Act, subject to the conditions specified in column (4) of the said Table,

Serial No.	Sub-clause	Description of the taxable service	Conditions
2.	(zzb)	Service provided by a commission agent located outside India and engaged under a contract or agreement or any other document by the exporter in India, to act on behalf of the exporter, to cause sale of goods exported by him.	(1)The exporter shall declare the amount of commission paid or payable to the commission agent in the shipping bill or bill of export, as the case may be. (2) The exemption shall be limited to one per cent of the free on board value of export goods for which the said service has been used.
3.			(3) The exemption shall not be available on the export of canalised item, project export, or export financed under lines of credit extended by Government of India or EXIM Bank, or export made by Indian partner in a company with equity participation in an overseas joint venture or wholly owned subsidiary. (4) The exporter shall submit with the half yearly return after certification of the same as specified in clause (g) of the proviso- (i) the original documents showing actual payment of commission to the commission agent; and (ii) a copy of the agreement or contract entered into between the commission agent located outside India and the exporter in relation to sale of export goods, outside India:

Provided that-

(a) the exemption shall be available to an exporter who,-

(i) informs the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the factory or the regional office or the head office, as the case may be, in

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Form EXP1, before availing the said exemption;

(ii) is registered with an export promotion council sponsored by the Ministry of Commerce or the Ministry of Textiles, as the case may be;

(iii) is a holder of Import-Export Code Number;

(iv) is registered under section 69 of the said Act;

(v) is liable to pay service tax under sub-section (2) of section 68 of said Act, read with sub clause

(iv) or sub-clause (v) of clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994, for the specified service;

(b) the invoice, bill or challan, or any other document issued by the service provider to the exporter, on which the exporter intend to avail exemption, shall be issued in the name of the exporter, showing that the exporter is liable to pay the service tax in terms of item (v) of clause (a);

(c) the exporter availing the exemption shall file the return in Form EXP2 every six months of the financial year, within fifteen days of the completion of the said six months;

(d) the exporter shall submit with the half yearly return, after certification, the documents in original specified in clause (b) and the certified copies of the documents specified in column (4) of the said Table;

(e) the documents enclosed with the return shall contain a certification from the exporter or the authorised person, to the effect that taxable service to which the document pertains, has been received and used for export of goods by mentioning the specific shipping bill number on the said document.

(f) where the exporter is a proprietorship concern or partnership firm, the documents enclosed with the return shall be certified by the exporter himself and where the exporter is a limited company, the documents enclosed with the return shall be certified by the person authorised by the Board of Directors;

(g) where the amount of service tax in respect of the service specified against serial No. 2 of the Table exceeds one per cent. of the free on board value of the export then, the amount in excess of the said one percent. shall be paid within the period specified under rule 6 of the Service Tax Rules, 1994;

8.3.1 The above Notification provides for exemption from payment of Service Tax on taxable service under Section 65 (105) (zzb) which is received by an exporter of goods and used for export of goods subject to 1% of the FOB value and subject to conditions as laid down in the Notification mentioned supra. In the context of refund of service tax paid on foreign agency commission, Notification 18/2009 dated 07/07/2009 (in the table, sl.no.2 , condition no. 2) says "exemption shall be limited to one percent of the free on board value of export goods for which the said service has been used". This means that

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amount of service tax paid, which can be refunded to the exporter, is restricted to one percent of the FOB value of export goods in relation to which the taxable service of the foreign agent was used. In other words, it is clear that the person who paid export sales commission to overseas commission agent on overseas sales is required to pay Service Tax first and then can claim the refund of the same by following the mechanism enumerated in the above mentioned Notification.

8.4 The Notification No. 18/2009 dated 07.07.2009 was amended vide Notification No. 42/2012 which is re-produced below for ready reference:

Notification No 42/2012-ST, the 29th June, 2012 stipulates for exemption of excess of the service tax calculated on a value up to ten per cent of the free on board value of export goods for which the said specified service has been used, subject to the conditions specified in column (3) of the said Table,

Table

Sr. No.	Description of the taxable service	Conditions
(1)	(2)	(3)
1.	Service provided by a commission agent located outside India and engaged under a contract or agreement or any other document by the exporter in India, to act on behalf of the exporter, to cause sale of goods exported by him.	<p>(1) The exporter shall declare the amount of commission paid or payable to the commission agent in the shipping bill or bill of export, as the case may be.</p> <p>(2) The exemption shall be limited to the service tax calculated on a value of ten per cent of the free on board value of export goods for which the said service has been used.</p> <p>(3) The exemption shall not be available on the export of canalised item, project export, or export financed under lines of credit extended by the Government of India or EXIM Bank, or export made by Indian partner in a company with equity participation in an overseas joint venture or wholly owned subsidiary.</p> <p>(4) The exporter shall submit with the half-yearly return after certification of the same as specified in clause (g) of the proviso—</p> <p>(i) the original documents showing actual payment of commission to the commission agent; and</p>

		(ii) a copy of the agreement or contract entered into between the commission agent located outside India and the exporter in relation to sale of export goods outside India:
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Provided that-

(a) the exemption shall be available to an exporter who,-

(i) informs the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the factory or the regional office or the head office, as the case may be, in Form EXP3 appended to this notification, before availing the said exemption;

(ii) is registered with an export promotion council sponsored by the Ministry of Commerce or the Ministry of Textiles, as the case may be;

(iii) is a holder of Import-Export Code Number;

(iv) is registered under section 69 of the said Act;

(v) is liable to pay service tax under sub-section (2) of section 68 of said Act, read with item (G) of sub-clause (i) of clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994, for the specified service;

(b) the invoice, bill or challan, or any other document by whatever name called issued by the service provider to the exporter, on which the exporter intends to avail exemption, shall be issued in the name of the exporter.

(c) the exporter availing the exemption shall file the return in Form EXP4, every six months of the financial year, within fifteen days of the completion of the said six months;

(d) the exporter shall submit with the half yearly return, after certification, the documents in original specified in clause (b) and the certified copies of the documents specified in column (3) of the said Table;

(e) the documents enclosed with the return shall contain a certification from the exporter or the authorised person, to the effect that specified service to which the document pertains, has been received and used for export of goods by mentioning the specific shipping bill number on the said document.

(f) where the exporter is an individual or a proprietorship concern or an HUF or a partnership firm, the documents enclosed with the return shall be certified by the exporter himself and where the exporter is any other person, the documents enclosed with the return shall be certified by the person authorised by the Board of Directors or any other competent person;

(g) where the amount of commission charged in respect of the specified service exceeds ten per cent. of the free on board value of the export then, the service tax shall be paid within the period specified under rule 6 of the Service Tax Rules, 1994, on such amount, which is in excess of the said ten per cent;

8.4.1 Vide above Notification, the Government has allowed exemption limited, by way of refund, to the service tax calculated on a value of ten per cent of

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the free on board value of export goods for which said service has been used, subject to the conditions mentioned therein which is to be followed by the person who intend to avail either exemption from payment to Service Tax for the goods exported or to claim refund later on.

8.5 In view of the legal position as enumerated in para hereinabove, it is clear that the appellant is liable to pay Service Tax on export sales commission paid to overseas commission agent during the year 2012-13 and 2013-14. However, the remedy of exemption or refund has been given by the legislature which the appellant has not followed but have claimed that the services received by them were of 'intermediary' services as defined under Rule 2(f) of the Place of Provision of Services Rules, 2012 and as per Rule 9 of the Rules. The place of provision of service in case of 'intermediary service' is the location of service provider. Therefore, Service Tax is not liable to be paid since the place of provision of services is outside the taxable territory. For this, we need to have a look at definition of 'intermediary' given in Rule 2(f) of the Rules as was in force upto 30.09.2014 which reads as under:

(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account.

The above mentioned definition was amended vide Notification No. 14/2014-ST dated 11.07.2014 and w.e.f. 01.10.2014, which reads as under:

(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service on his account.;

8.5.1 In view of above, earlier exemption was there on Commission paid to overseas agent for Export of Goods but it was conditional and upto prescribed limited. But from 1st October 2014, it is out of purview of service tax. Taxation of Commission agent service dealing in goods was governed by Rule 3 of Place of Provision of Service Rules 2012 upto 30th September 2014. As per said Rule 3, Service will be deemed to be provided at the location of 'Service Recipient'. However, vide Notification No 14/2014 ST dated 11th July 2014, government has amended Rule 2(f) read with Rule 9 of the Place of Provision of Service Rules 2012, by replacing definition of Intermediary, to include, commission

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agent dealing in goods. Hence from 1st October 2014, Taxation of Commission agent service dealing in goods will be governed by Rule 9 of Place of Provision of Service Rules 2012. As per said Rule 9, Service will be deemed to be provided at the location of 'Service Provider'. Analysis of changes in definition of Intermediary is as under:

From 1st July 2012 to 30th September 2014	From 1st October 2014 onwards
"intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account	"Intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or A SUPPLY OF GOODS, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account
Analysis: Prima facie this definition deals with intermediary dealing in provision of services like Recovery Agent	Analysis: Now Intermediary will also include intermediary dealing in goods that is commission agent.

8.5.2 Therefore, the recourse of Rule 9 of the Rules read with Rule 2(f) of the Rules taken by the appellant is of no help to them as prior to 01.10.2014, Commission agent service dealing in goods was governed by Rule 3 of Place of Provision of Service Rules 2012 (upto 30th September 2014) and not Rule 9 of the Rules as contended by the appellant. The sales commission agents located overseas have arranged supply of the goods on behalf of the appellant. Therefore, the activity can be reckoned as services of 'intermediary' with effect from 01.10.2014 only and not prior to that, when the words 'supply of goods' were not included in the said definition. The demand pertains to the period 2012-13 and 2013-14, therefore, during the period covered in the Show Cause Notice, the appellant was required to pay Service Tax and was not qualified for exclusion under Rule 9 read with Rule 2(f) of the Rules.

8.6 The second contention pleaded by the appellant regarding revenue neutral position and relied upon various judgment of the higher appellate forum. I find that they become eligible to avail Cenvat credit of Service Tax does not exonerate them from tax liability they have incurred under the law.

The claim of availment of Cenvat credit arise only when the Service Tax is paid by the appellant and such grant of Cenvat credit is not otherwise allowed by law. Therefore, the argument advanced by the appellant is not tenable in the eyes of law. The reliance placed by them on various judgment is of no help to them as the facts and circumstances of the involved therein is altogether different from the present case.

8.7 The next argument of the appellant is that demand is time barred since the period covered in the demand is for the year 2012-13 and 2013, whereas the relevant Show Cause Notice was issued on 17.08.2016 and it was argued that the necessary ingredients to invoke extended period of limitation are absent. They also argued that they were under bona fide belief that since services were provided outside the taxable territory of India, they were not liable to Service Tax. I find that the appellant being private limited company and having Central Excise as well as Service Tax registration since long. They are well aware of the Rules/Act/Law of the land. If they had any doubt regarding taxability, they should have either approached the Department or their legal consultant to address the issue properly. The Service Tax law casts obligation on the assessee to act honestly since the legislation has put full faith on the assessee by way of introduction of self assessment regime. Since the legislation has no physical control over assessee, whatever stated by the assessee is construed as true and correct. When the wrong doings by an assessee is detected in audit then and then only, the Department come to know about it. It is proved beyond doubt that the appellant has suppressed the vital facts from the department and had disclosed during the course of audit only. Therefore, the provisions of extended period have rightly been invoked in this case. As far as bona fide belief is concerned, I find that mere arguing that they were under bona fide belief is not sufficient and the appellant had to come out with cogent evidences on record to prove their bona fides, which they have failed. Mere arguments made by the appellant are of no help to them. Therefore, I am of the considered view that the extended period has rightly been invoked against them and the case-laws relied upon by them are not applicable in view of the facts of the case on hand.


8.8 In view of above, I hold that the appellant is liable to pay Service Tax. Once the tax is held to be payable, the interest is also required to be paid by them. The penalties under Section 77(1), Section 77(2) and Section 78 of the Act are also upheld for the reasons detailed by the lower adjudicating authority

as discussed at length.

9. In view of above facts, I hold that the appellant is liable to pay Service tax along with interest on the sales commission paid to overseas commission agent and the appellant is liable to penalties under Section 77(1), Section 77(2) and Section 78 of the Act. Accordingly, I uphold the impugned order and reject the present appeal.

९.१ अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

9.1 The appeal filed by the appellant is disposed of in above terms.


1/12/2012
(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s. Rajhans Alloys Pvt. Ltd., Dared,
Jamnagar presently known as M/s.
Ranjhans Metals Pvt. Ltd. (Unit-II),
Plot No.3985, GIDC, Phase-III, Dared,
Jamnagar

मे. राजहंस अलॉय्स प्राइवेट लिमिटेड, दरेड,
जामनगर जो अभी मेसर्स: राजहंस मेटल्स
प्राइवेट लिमिटेड, (यूनिट-II) प्लॉट सं.
३९८५, जी.आई.डी.सी., दरेड, जामनगर के
नाम से जाना जाता है.

Copy to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner, GST & Central Excise, Rajkot.
- 3) The Assistant Commissioner, GST & Central Excise Division, Jamnagar.
- 4) The Superintendent, GST & Central Excise, Range, Jamnagar.
- 5) Guard File.