

रजिस्टर्ड डाक ए.डी.द्वारा :-

क अपील / फाइलसंख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date:
V2/185/BVR/2018-19	03/SERVICE TAX/DEMAND/18-19	8/2/2018

ख अपीलआदेशसंख्या(Order-In-Appeal No.):

BHV-EXCUS-000-APP-230-2019

आदेश का दिनांक/
Date of Order: 25.09.2019

जारी करने की तारीख /
Date of issue: 26.09.2019

**श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Gopi Nath, Commissioner (Appeals), Rajkot**

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर,
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/ST / GST,
Rajkot/Jamnagar/Gandhidham :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellants & Respondent :-**
M/s. Madhavi Ghanshyam Lakhani, 2296/49, Nalanda Tenament Hill Drive, Bhavnagar-364001.

इस आदेश(अपील) से व्यथित 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:-

(i) 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.

(ii) 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- 380016 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। /

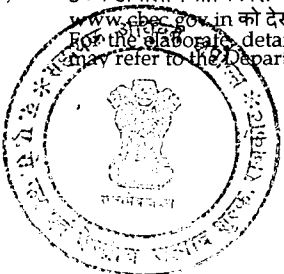
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund 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/-.



- (i) 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 प्रतियाँ 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 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 अपीलीय प्राधिकरण (सेस्टेट) 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, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली 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
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होंगे।/
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 अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, 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 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 भुगतान 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 प्रतियाँ 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 प्रतियाँ 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 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, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी 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 filled 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 संबन्धित 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



:: ORDER-IN-APPEAL ::

Ms. Madhavi Ghanshyam Lakhani, 2296/49, Nalanda Tennament, Hill Drive, Bhavnagar-364001 (hereinafter referred to as "**appellant**") was an associate of M/s Herbalife International India Pvt. Ltd., Bangalore (hereinafter referred to as '**Herbalife**') filed an appeal against OIO No. 3/Service Tax/Demand/2018-19 dated 30.07.2018 (hereinafter referred to as "the impugned order") issued by the Assistant Commissioner, CGST, Division, Bhavnagar-I (hereinafter referred to as "the adjudicating authority").

2. Briefly stated that, during the course of investigation carried out by the DGGSTI, BZU, Bhopal, it was revealed that the appellant had not paid service tax on the services provided by them to Herbalife. The above acts of the appellant culminated into issuance of Show Cause Notice dated 03.05.2018 which was confirmed by the adjudicating authority vide OIO No. 03/Service Tax/Demand/18-19 dated 30.07.2018. Feeling aggrieved, the appellant filed the present appeal, interalia, on the following grounds:

(i) that discounts of various types paid by M/s Herbalife (i.e named as commission e.g. commission, profit/wholesale, split commission, incentives etc.) in respect of the goods purchased from M/s Herbalife, directly by the appellant and indirectly by the downline and upper line matrix of associates is as per the agreement. The commission earned is in relation to sponsorship of products of M/s Herbalife like displaying the name of the company, its logo, displaying its different products, holding events, seminars etc. The purchased goods are liable to Sales Tax under the Sale of Goods Act and the amount of VAT/Sales tax has already been mentioned with discounts in the invoices. The whole marketing matrix is controlled and managed by M/s Herbalife and the discounts on the products is also determined by M/s Herbalife. The said discounts are receipts of the associates.

(ii) the amount earned from M/s Herbalife is covered within the definition of Sponsorship Service as per Section 65(99a) of Finance Act, 1994 and is a 'Taxable Service' as per provisions of Section 65(105)(zzzn) of Finance Act, 1994. As per Notification No. 30/2012-Service Tax dated 20.06.2012, the said receipts are sponsorship income and service tax will be applicable on reverse charge basis and according M/s Herbalife are liable to pay service tax on reverse charge basis.



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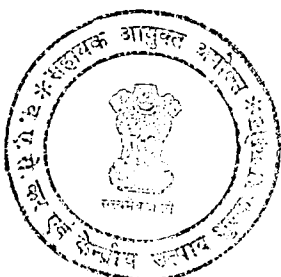
- (iii) extended period has been invoked for period of 5 years even when there is no fraud, collusion etc.
- (iv) levying penalty u/s 77 is not justified.
- (v) penalty u/s 78 of the Act is not justified as there is no wilful evasion or intention to evade tax.

3. Personal hearing in the matter was granted on 03.09.2019. Shri P.M. Bhayani, Chartered Accountant appeared for the hearing on behalf of the Appellant. He reiterated the written submissions of appeal memo for consideration.

4. I have carefully gone through the facts of the case, the impugned order, appeal memorandum filed by the appellant and written as well as oral submissions made by the appellant. The issue to be decided in the present appeal are:

- (i) whether the appellant (service receiver) is liable to pay service tax amounting to Rs. 24,19,756/-.
- (ii) whether Herbalife is liable to pay service tax under reverse charge mechanism.
- (iii) whether interest is chargeable under Section 75 of the Finance Act, 1994.
- (iv) whether penalty u/s 77 and 78 of the Act are imposable upon the appellant.

5. During the course of investigation carried out by the DGGSTI, BZU, Bhopal, it was revealed that the appellant was an associate of Herbalife since 2012 and was involved in business of sale of Herbalife products and recruitment of associates for Herbalife; that the business involved two types of work namely (i) Team building and (ii) product sale to customer. Team building was meant to introduce fresh associates called down-line associates with Herbalife, and accordingly the appellant was working as millionaire level associate since 2013. The role of the appellant was to motivate people to join the firm and sell the food supplement products of Herbalife, for which the appellant got commission from associates. Further, the appellant functioned as an associate for sale of food supplement products of Herbalife. Such services provided by the assessee to M/s Herbalife fall under the category of 'other than negative list' and was



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therefore leviable to Service Tax.

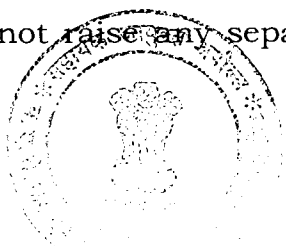
6. The appellant has contended that the nature of service provided by them was covered under 'Sponsorship Service' as defined under Section 65(99a) of the Finance Act, 1944, therefore as per Notification No. 30/2012-Service Tax dated 20.06.2012, the said receipts are sponsorship income and service tax will be applicable on reverse charge basis and accordingly M/s Herbalife are liable to pay service tax on reverse charge basis.

In this regard, I find that the appellant is one of the independent distributors of M/s Herbalife and received commission for promoting, marketing and selling the goods produced by M/s Herbalife. After examining the rules and regulations for sales and marketing of the products, I observe that the appellant vide their submission dated 17.05.2018 to the adjudicating authority at para no.3 has submitted that *"they have received **commission income** from the company as per the agreement and as well as the rules framed thereunder by M/s Herbalife. **The commission earned by the member are clearly defined in the agreement.**"* They have further submitted that, *arrangement to earn income as a sponsor as per agreement is as under:*

- i) You can earn money by sponsoring someone who either sells Herbalife products or purchases them at a discount for their own or household use and***
- ii) You can earn money by selling Herbalife products that you buy at a discount.***
- iii) You cannot earn money simply for recruiting or sponsoring someone (means without above event).***

On going through the above, I find that as per the agreement, of the appellant with M/s Herbalife the appellant has to sponsor/ recruit someone **and sell the product**. They cannot earn commission by simply recruiting/sponsoring someone. Thus, the plea of the appellant that the services provided by them is sponsorship services and therefore, M/s Herbalife is required to pay service tax under Reverse Charge Mechanism is not acceptable.

6.1 Further, from the submissions made by the appellant, I infer that, M/s Herbalife raised bills on the sale of products to the appellant (distributors) by raising sale invoices and charges value added tax on them. The appellant did not raise any separate sale document in respect of subsequent sales made by



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them and did not charge sales tax/VAT on such sales and thus, they acted as a commission agent on behalf of M/s Herbalife by promoting their products. Thus, I conclude that the services provided by the appellant to Herbalife is covered under the category of 'other than negative list' and the appellant is required to pay Service Tax on the income earned by them.

7. Further, I find that with effect from 01.07.2012, the term "service", has been categorically defined in clause (44) of new section 65B inserted in Finance Act, 2012, and the same reads as under:-

"Section 65 B (44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include - (a)

an activity which constitutes merely, -

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner, or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

....."

Section 66B reads as under:

"Section 66B : *There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."*

8. I find that, the definition takes within its ambit only activity carried on by a person for another for consideration. Therefore, with effect from 01.07.2012, all the services, other than those mentioned in the negative list are taxable and it is no longer mandatorily required to classify each and every transactions related to service provided by the service provider. The activity undertaken by the appellant, as described above, is not falling under the negative list of services and therefore, the service provided by them would attract service tax under the category of 'other than negative list'.

9. Further, I find that one of the grounds raised by the appellant in the grounds of appeal is that extended period and penalties have been wrongly imposed in the impugned order. In this regard, I find that the negative list



regime is very clear and except the categories mentioned therein, no activity is entitled for exemption from service tax leaving no scope to harbor any doubt. Though there is no ambiguity in law, the appellant was making a wrong interpretation of law and did not bring the relevant material facts to the notice of the department on their own. The fact of non-payment of service tax, has come to light only on specific intelligence collected by the Departmental Officers. Therefore the required ingredient of suppression of these facts for imposing penalty is found to be existed in this case and such suppression was not without intention to evade the Service Tax. In that context, the meaning of 'positive act of suppression' also changes. In an era of self-assessment, the onus is on the assessee to comply with the regulations, it is their duty to come before the department, declare the activities and seek guidance of the department if required. Therefore, Appellant failed to prove their bonafide in absence of any communication with the department about their activity and any doubts on taxability. No evasion can be justified in the guise of bona fide belief of taxability. Therefore, suppression of facts and intent to evade the payment of service tax are established in this case and therefore, the extended period of limitation has rightly been invoked in this case and this act has rendered the Appellant liable to imposition of penalty under Section 78 of the Act. Hence, I hold that the penalty imposed in the impugned order is justified and uphold imposition of penalty of RS. 24,19,756/- on the Appellant under Section 78 of the Act. In this regard, I rely on Final Order of the Hon'ble CESTAT, in a case of TVS Motor Co. Ltd. reported as 2012 (28) S.T.R. 127 (Tri. - Chennai), wherein it is held as under:

“13. So far as ground of no penalty advanced by learned counsel is concerned there is nothing on record to show that the appellant avoided its liability bona fide when it is an established business concern with vast experience in application of provisions of Finance Act, 1994. Its returns did not disclose bona fide omission. Rather facts suggest that knowable breach of law made the appellant to suffer adjudication. Accordingly, no immunity from penalty is possible to be granted on the plea of tax compliances made which was found to be a case no payment of tax on the impugned services provided during the relevant period.”

Therefore, the appellant's plea is not acceptable.

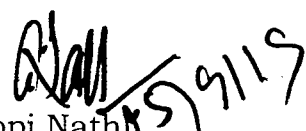
Since the appellant has contravened the provisions of Section 70 of the Act read with Rule 7 of Service Tax Rules, 1994, penalty of Rs.10,000/- under Section 77 of the Act is imposable on them and hence, the impugned order to this extent is also correct, legal and proper. Accordingly, I uphold the imposition of penalty of Rs.10,000/- on appellant under Section 77 of the Act.

10. In view of the above discussions, I uphold the impugned Order and dismiss the appeals filed by the appellant.

By Regd. Post AD

To,

Ms. Madhavi Ghanshyam Lakhani,
2296/49, Nalanda Tennament,
Hill Drive, Bhavnagar-364001.


(Gopi Nath)
अंबा अय्यर
Amba Aiyar
अधीक्षक
Superintendent

Commissioner (Appeals)

श्रीमति. माधवी घनश्याम लाखानी,
2296/49, नालंदा टेननमेंट,
हिल ड्राइव, भावनगर-364001.

Copy to:

- 1) The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner, CGST & Central Excise Commissionerate, Bhavnagar.
- 3) The Deputy Commissioner, CGST & Central Excise, Division, Bhavnagar-I.
- 4) Guard file.

