

ORDER IN APPEAL :

M/s. Shri Hari Exuders (Franchisee- Shri Hatusha Vagrubha Rathod Village- Lal Kulkarni, Bhu) (hereafter referred to as 'Appellant') have filed present appeal against Order in Original No. 24/ AC/ 2018-19 dated 28.10.2018 (hereinafter referred to as 'impugned order') passed by the Assistant Commissioner, Service Tax Division, Gandhinagar (hereinafter referred to as 'lower adjudicating authority').

2. The brief facts of the case are that audit records of M/s Astacure Velkay Ltd. Bhu, revealed that the Appellant had rendered taxable services from 2009-10 to 2012-13 to M/s. Ashapura Velkay Ltd. Bhu, and not obtained Service Tax registration and also failed to pay Service Tax on such services. Show Cause Notice No. V (aj) 9-48/ A/ ST/ AC-48/ 14-15 dated 7.10.2014 was issued to the Appellant asking them to show cause as to why Service Tax of Rs.4,62,052/- should not be demanded and recovered from them under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'Act') along with interest under Section 75 of the Act and proposing imposition of penalties under Section 76, Section 77, Section 78 of the Act and also recovery of late fee for non filing of GT-5 returns under Section 73 of the Act. The Show Cause Notice was adjudicated vide the impugned order, which confirmed Service Tax demand of Rs.4,62,052/- under Section 73(1) of the Act along with interest under Section 75 of the Act imposed penalty of Rs.4,62,052/- under Section 76 of the Act, imposed penalty of Rs.4,57,217/- under Section 76 of the Act and also imposed penalty of Rs.10,000/- Section 77 of the Act and late fee of Rs.2000/- per return and late of Rs.20,000/- per return under Section 73 of the Act for the respective period.

3. Being aggrieved with the impugned order, the Appellant has preferred present appeal on the following grounds.

- (i) The appellant was not served any notice for personal hearing as mentioned in the impugned order which is violation of natural justice.
- (ii) The lower adjudicating authority has not discussed the activities carried out by the Appellant and how the said activities were covered under taxable services of 'Manpower Recruitment & Supply Agency' that there is no attempt to classify the service under any category of taxable service and outrightly conceived and alleged that appellant has provided under category of 'Manpower Recruitment & Supply Agency' and 'Supply of Tangible Goods' that impugned order discarded the allegation of omission of services under the taxable category of 'Supply of Tangible Goods' and confirmed the demand under 'Manpower Recruitment and Supply Agency'

(iii) The activities undertaken by them are not covered under the category of 'Manpower Recruitment or Supply Agency Service', as they had never recruited or supplied any manpower to the service recipient and they had only undertaken the assigned work related to construction, loading, unloading, repairs and supply of tractors, rollers, JCB. They never supply as manpower for they were under the control and direction of the service recipient. In all these activities, payment was made by the recipient at a pre-fixed rate for the work done, JCB used and vehicles supplied. They provided following services to M/s Ashapura Volasis Ltd as reflected in their work orders and invoices.

- (a) Loading and unloading of materials within the factory premises of M/s. AVL
- (b) Supply of vehicles and equipments.
- (c) Repair works.
- (d) Activities/process in relation to manufacture of excisable goods.

(iv) Appellant has provided services for internal shifting of finished goods within factory area with the help of labour and using Trucks owned by them; that though there is no process in the show cause notice or in the impugned order concerning this activity classifiable under taxable category of 'Cargo Handling Services' under Section 65 (123) of the Act, appellant submitted that their activity is also not taxable classification under this category as goods are not transported outside the factory premises thus not involving transportation of goods and hence goods can not be said to be 'Cargo'. Appellant relies upon the decision of Hon'ble CESTAT in the case of M/s. Modi Construction Co reported as 2009(12) STR 34 (11-Kolkata), M/s. Suresh Kumar reported as 2010(20) STR 548 (11-Del) and M/s. Scrap Material Handling Co. 2009(15) STR 68 (11-Del), that shifting of material and covered under any of the taxable services as notified during the material period.

(v) As regards supply of vehicles and equipments by the appellant to the service recipient, appellant submitted that impugned order has confirmed the demand under wide category of services of 'Manpower Recruitment Agency'; that as per definition of 'Supply of Tangible Goods' under Section 65 (15)(zzzz); read with M.T. D.R. letter D.C. F. No. 334/1/2008-TD dated 29/2/2008, the taxable services must have (i) a supply, (ii) such supply must be of tangible goods, (iii) it should not result in passage/assignment of right of possession and of effective control over the said tangible goods to the assessee, at the expense of the lessor/owner/provider of tangible goods, that in view of this definition, the activities carried out by them are not 'supply of tangible goods'.

(vi) Appellant had carried out repair works involving of supply of materials which is not supply of manpower and also the value of materials supplied required to be deducted from the total value.

(vii) Appellant has undertaken works assigned to them through appellant's

own employees' hired labour and not as a labour contractor service. Capital goods, excise assessee and activities carried out in the premises in connection with these goods on which central excise duty has been paid and may be covered under job work. It is CBEC Circular No. 190/W2015-5 dated 10.12.2015 which is made applicable in their case too as per which services provided by them are not manpower supply services.

(vi) Extended period of limitation is not invocable in this case as mere omission to give correct information and suppression of facts unless it is deliberate to evade payment of tax. There could be various reasons for non-payment of service tax such as, the assessee is under bonafide belief that they are not required to pay the service tax either relying upon the decision of various courts or trade practice. Therefore, longer period of limitation was illegally invoked against the Appellant.

(vii) If Service Tax is treated as payable, the consideration is to be treated as inclusive of Service Tax payable and cum tax benefit should be granted.

(viii) It is settled position of law that for imposing penalty under Section 78 of the Act, existence of suppression etc. is required to be proved by the Deptt. which is absent in the present case. There was no intention to evade tax by them. Hence no penalty was imposed upon them and relied upon the case law of Tamil Nadu Housing Board reported as 1984(71) ELT 8, Town Hall Committee, Mysore City Corporation reported as 2011(241)TR 172 (Karn) and others.

(ix) The Appellant was not required to pay any Service Tax hence they had not filed any S/T-3 returns and hence no fine can be imposed on them under Section 79 of the Act.

(x) The provisions of Section 80 of the Act will apply in the present case. The levy of penalty is discretionary and if the Officer is satisfied that there is a reasonable cause, the penalty can be waived. The commission prevalent in the Service Tax law, being a new and emerging law, has to be held as a reasonable cause that prevented the Appellant from making payment of Service Tax on the impugned transactions.

3. Personal Hearing in the matter was attended by Smt R.C Prasad, Consultant on behalf of the Appellant and reiterated the grounds of appeal and made written submissions stating that the appellant has not been served any SCN or even impugned order and they came to know the order only at the time of officers coming for recovery of demand commenced. That he also claimed that no investigation has been made at their end. That the SCN or order does not have any evidence of any service being provided or have been provided by them, that the order does not specify which services has been provided by them but talks of 2 services without quantifying the demand under each service. That the activities

undertaken by them are discussed in the written submissions; that none of these activities are covered under Manpower or even supply of Tangible Goods services as no goods have been supplied to service recipient for their use. That OIA No. ACH-EXCISE-009-4PF-100-2018-19 dated 26.9.2018 of Commissioner (Appeals), Rajkot has also held that the activities are not covered under Vancouver Supply; that what is not alleged in SCN or which service has not been covered by the impugned order cannot be covered/decided by OIA as has been decided by the Hon'ble Supreme Court in the case of M/s. Toyo Engineering India Ltd reported as 2006 (201) ELL 513 (SC) as the grounds has to be narrated/alleged in the SCN.

4.1 In the written submission, Appellant submitted that the show cause notice, does not propose to classify the service under any category of taxable service and conceived that the appellant had provided taxable services under category of 'Manpower Recruitment or Supply Agency' that taxable value was shown to be taken from Form 26AS/Prof. & Loss Account, without verifying as to whether entire value of alleged activity was received towards providing of manpower supply or otherwise; that the order is bad in law as in fact as there is no proposal in the show cause notice to classify the taxable service under which the service tax is being demanded; that the lower adjudicating authority without verifying the details of the work, had considered entire amount of income attributable to 'Manpower Recruitment & Supply Agency' services. Appellant referred Para 14.1 to 14.8 of the Appearal manual issued by Central Board of Excise & Customs in say that the order is non-directory nature.

4.2 Appellant reiterated the submissions made in Appeal memorandum and further submitted that no vehicle or equipment was given on rent, that the appellant had used its own vehicle to shift goods from one place to other place and that too on some occasions, that entire income was for shifting of goods from one place to another, that there is no such evidence on record to suggest that any vehicle and equipment was given on rent per hour, that even if payment made at the rate per hour, it is an agreement for payments for shifting of materials or goods and on this type of payment method will not alter the nature of services, that if such interpretation is allowed then all the use operators, who charge on per kilometer basis, will have to be classified under supply of tangible goods services. That to classify a service, the activities have to be under the purview of that service and not the mode and nature of payments. That from the copies of the Billed Invoices and work orders it can be seen that the activities can be summarized as (i) Water transfer through tankers (ii) Spraying of water on road (iii) Waste water transfer (iv) work of bore operation through labourers; that none of the work relates

to 'Supply of manpower' or 'Supply of tangible goods'

4.2 Appellant submitted that department cannot travel beyond scope of show cause notice by mentioning such facts, which were never part of the show cause notice and relied upon the Honble Supreme Court's decision in the case of M/s. Tuyo Engineering India Ltd reasoned as 2009 (201) F.T.T. 515 (S.C.)

4.3 Appellant also submitted that the service tax liability is also incorrectly calculated as basic exemption limit of Rs.10 lacs is not considered for the year 2008-09 and 2009-10; that therefore no service tax is payable for F.Y. 2008-09 and it would be Rs.1,55,242/- for F.Y. 2009-10 as against proposed service tax demand of Rs.2,47,275/-.

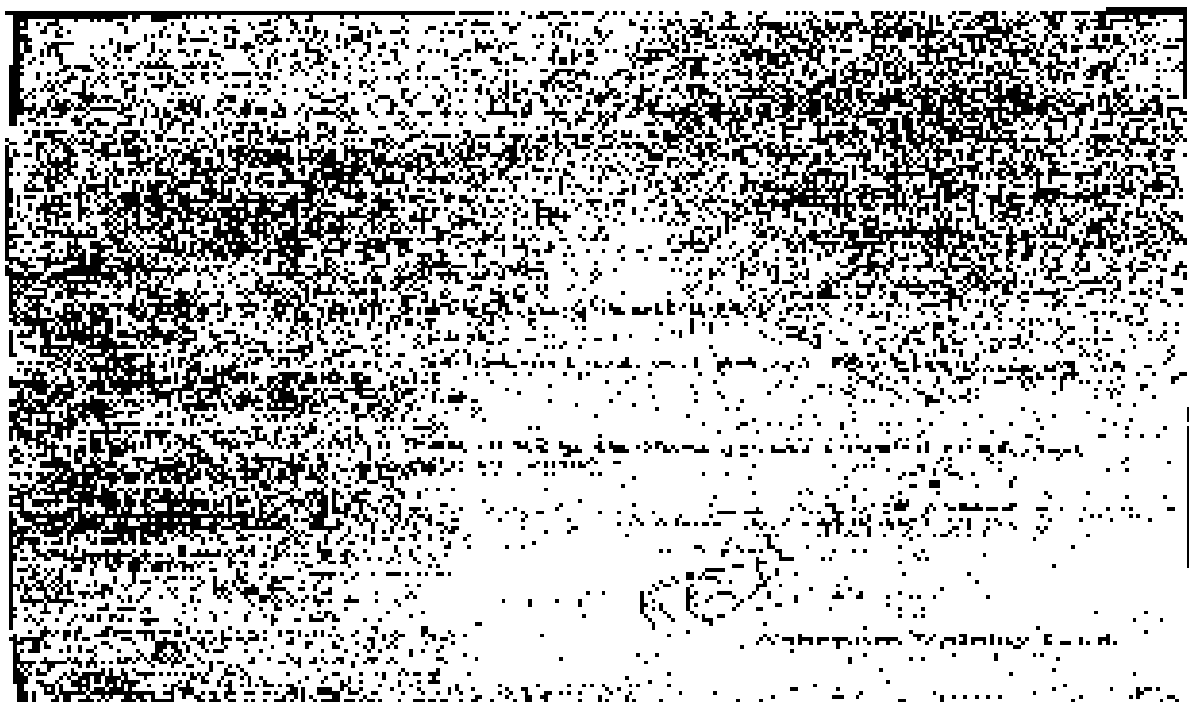
Findings:-

5. I have carefully gone through the facts of the case, the impugned order, written as well as oral submissions made by the Appellant. The issue to be decided in the present appeal are:-

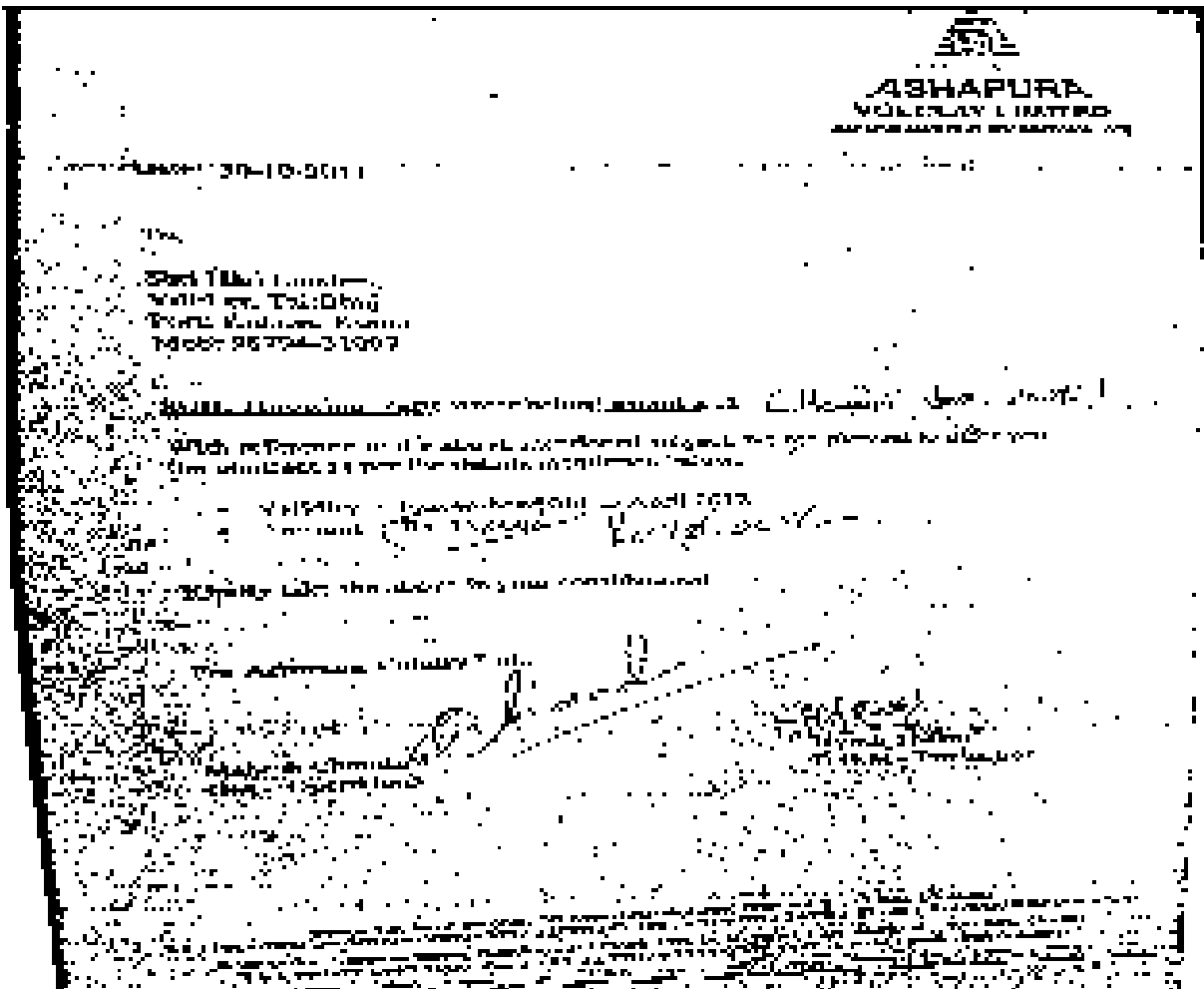
- (i) whether the services rendered by the Appellant are liable to Service Tax or not
- (ii) whether the services are covered under the category of 'Manpower Recruitment or Supply Agency services' or not

6. I find that the Appellant has in most of the cases carried out the work of (i) emptying waste water from Ponds and other areas and its subsequent transfer, throwing and spraying at road or other places by using lance's and (ii) work relating to bore operations through labours. Copy of sample contract and invoices (Image I to Image IV) are as under:-

(Image I)



(Image-I)



(Image-II)

Sl. No.	Name of the Member	Address	Mobile No.	Signature
1
2
3
4
5
6
7
8
9
10

(Image-IV)

The image shows a document with a header section containing logos and text in a non-Latin script. Below this is a section with a large number '4 054'. The main body of the document consists of a table with multiple columns and rows, but the text within the cells is almost entirely obscured by noise and grain. The table appears to have at least four columns and several rows of data.

[Handwritten signature]

6.1 The Appellant used vehicles and equipments at the work site of service recipient along with required manpower. The payments were received at pre-fixed rate for the work done on 'per day' basis and vet design/programs were used for carrying out specific task like shifting of material/waste/water etc. On going through the impugned order I find that the lower adjudicating authority has confirmed Service Tax demand under taxable services category of 'Manpower Recruitment or Supply Agency Service' without discussing the activities

undertaken by the appellant. It is Appellant's contention that they never supplied any manpower to M/s. Ashapura Volatley Ltd., service recipient, but had undertaken the specific works like spraying of water, waste waste lifting etc. and hence, in view, none of the work relates to 'supply of manpower' or 'Supply of tangible good' as such. It is Appellant's contention that the works were carried out by them by using equipments of the Appellant and using their staff.

6.2 I would like to reproduce the definition of 'Manpower Recruitment or Supply Agency' given under Section 65(53) of the Act, which reads as under:-

"manpower recruitment or supply agency means any person engaged in providing any service directly or indirectly in any manner for recruitment or supply of manpower, temporarily or otherwise, to any other person."

6.3 The term 'taxable service' has been defined under Section 65(116)(K) of the Act, as under:

"any service provided or to be provided to any person by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower temporarily or otherwise, in any manner"

6.4 The term 'supply of manpower' has been defined under Rule 2(f)(g) of the Service Tax Rules, 1994 as under:

"supply of manpower means supply of manpower, temporarily or otherwise, to another person to work under his superintendence or control"

6.5 I refer to an order passed by the Hon'ble CESTAT in the case of Ganesh DCL reported as 2017(4) GSTL 329 (Tri. Del.), wherein it has been held that demand of Service Tax under 'Manpower Recruitment or Supply Agency Service' is not sustainable in absence of evidence of supply of manpower with details of number and nature of manpower duration and other conditionalities for such supply. I also rely on an order passed by the Hon'ble CESTAT in the case of K. Damodara Reddy reported as 2010(119) STR 593 (Tri. Bang), wherein it has been held as under:-

"6. We have heard both sides. We find that the appellant had carried out the activities of loading of cement bags into wagons, surface cleaning, scanning wagon documents, filling wagon clearing etc. for M/s. India Cement Co., during the material period. We find that the appellants were compensated for the various items of work at separate rates prescribed under the contract. The appellant did not supply manpower during the material period on a day-to-day basis or on a contract basis. The appellants carried out the work as a contractor employing its own labour. Such an activity is not classifiable as 'manpower recruitment or supply agency'.

(Emphasis supplied)

5.6 Further rely on an order passed by the Hon.ble CBS (A) in the case of M/s. Divya Enterprises reported as 2310/12) STR 570 (Tri-Fang), wherein it has been held as under:-

"9. On a careful consideration of the above reproduced letter and facts from the entire 2009 papers, we find that the contract which has been given to the appellants is for the execution of the work of loading, unloading, lugging, stacking, de-stacking etc. In the entire records we find that there is no whisper of supply, manpower to the said M/s. Apin Wal & Co. or any other recipient of the services in both these appeals. As can be seen from the reproduced contracts and the invoices issued by the appellants that the entire 2009 work of the contract was an execution of work as managed by the appellants and the recipient of services. We find that the Hon.ble Supreme Court in the case of Super Fly Fabrics Ltd. v. CCL Punjab (supra) in paragraph 8 has laid down the ratio which is as under:-

"There cannot be any doubt whatsoever, that a document has to be read as a whole. The contract and deed will weigh the parties, the job entered into a contract ought to be ascertained only from the terms and conditions thereof. Merely the recitals of the document for any particular activity undertaken by the parties to the contract would be decisive."

An identical view was taken by Hon.ble Supreme Court in the case of Arora of A. v. Kany. Bhawan (supra) and Central and City, Kalyana and Mahara (supra) in a similar issue. The ratio of all the three judgments of the Hon.ble Supreme Court, is that the tenor of agreement between the parties has to be understood and interpreted on the basis that the said agreement reflected the job and understanding of the parties. The said ratio applies to the contract case in hand. We find that the entire tenor of the agreement and the purchase orders issued by the appellants, services rendered already indicates the execution of a lump-sum work. In our opinion the lump-sum work would not fall under the category of providing of service of supply of manpower temporarily or otherwise either directly or indirectly."

(Emphasis supplied)

5.7 I also rely on the clarification issued by the Board vide Circular No 150/9-2015 S.T dated 15-12-2015 issued from F. No. 354/153/2014-100 wherein it is clarified as under:-

"2. The matter has been examined. The nature of manpower supply service is quite distinct from the service of job work. The essential characteristics of manpower supply service are that the supplier provides manpower which is at the disposal and temporarily under effective control of the service recipient during the period of contract. Service rendered essentially is on the basis of extent and quality of manpower. Deployment of manpower normally rests with the service recipient. The value of service has a direct correlation to manpower deployed i.e., manpower deployed multiplied by the rate. In other words, manpower supplier will charge for supply of manpower even if manpower remains idle."

(Emphasis supplied)

5.8 By respectfully following the above case laws and Board's Circular I hold that the services rendered by the Appellant to M/s. Ashapura Volclay Ltd are not covered under the category of 'Manpower Recruitment or Supply Agency'.

7. In view of above I hold that the impugned order constituting the demand by classifying the services under 'Manpower Recruitment or Supply Agency' is not

correct legal and procedural since, the demand of service tax has not sustained demand of interest and imposition of penalty vide the impugned order cannot survive and are required to be set aside.

9. Therefore, set aside the impugned order and allow the appeal.

10. अपीलकर्ता द्वारा दत्त गैर मुद्दे अपील का निष्पत्त अग्रोक्त तरीके से किया जात है।

11. The appeal filed by the Appellant is disposed off as above.

(Signature)

(Signature)
 कुमार संतोष
 आयुक्त (अपीलेंस)

By Regd. Post A.C.
 To

M/s. Shri Jain Packers. (Proprietor: Shri Patubha Vaghusha Rathod) Village-Lax Kakra Bhu.	के.एस. वी. एच. जोशी (प्रो.इ.ए. - श्री पटुभा वाघुशा राजेड) गाँव - लख - कुकरा भु.
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Copies to:

- 1) The Chief Commissioner, CGST & Central Excise Ahmedabad Zone, Ahmedabad for his kind information.
- 2) The Commissioner, CGST & Central Excise, Kutch Commissionerate, Gandhidham for necessary action please.
- 3) The Assistant Commissioner, CGST & Central Excise Division, Bhuj for further necessary action.
- 4) Guard File