



अभियुक्त (अपीलर), वर करपालक, वरदा एवं सेवा कर ऑडि विभागीय प्रथम मंडलः  
 OFFICE INCHARGE/INCHIEF (APPEALS) GST & SERVICE TAX DIVISION

सुप्रीम नगर, नं. १०० ई, बंगला रोड, कोलकाता-७००००१।  
 २५ नवीं मील रोड, बंगला रोड, कोलकाता-७००००१।

फ़ैक्स: २६६११११

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**इतिहासिक क्रम क्र. जी. वृत्तान्त :**

| क्र. | विवरण (Details)                             | दिनांक (Date) | पृष्ठ (Page) |
|------|---|---------------|--------------|
| १.   | पहला आदेश (First Order)<br>G.O. No. 118     | 12.09.2018    | 1            |
| २.   | द्वितीय आदेश (Second Order)<br>G.O. No. 202 | 12.09.2018    | 1            |

**अपील आदेश संख्या (Inter-In-Appeal No.)**

**KCOE-IT&S-CUS-000-APP-225-2018-19**

आदेश का दिनांक / Date of Order: **14.12.2018**      जारी करने की तिथि / Date of Issue: **8.12.2018**

**कुमार संतोष, आयुक्त (अपीलर), राजकोट क्लर ऑफिस /**  
**Passed By: Shri Kumar Santosh, Commissioner (Appeals), Rajkot**

१. यह आदेश, निम्न प्रस्ताव अनुसार जारी किया गया, जिसमें प्रथम क्रम में आदेश, कोलकाता, कोलकाता नगर महानगरपालिका और नगर प्रशासन द्वारा जारी किया गया।  
 Issued in accordance with the proposal submitted by the appellant in the first order, Rajkot, Kolkata Municipal Corporation and City Corporation, Kolkata.
२. अपीलकर्ता के पते/पता के नाम एवं पता (Name & Address of the Appellant & Respondent)  
**Mrs. Shri Jagdishwar Lodha, (Proprietor- Eshabha Machhuda Rathod) Village: Lal Kusma, Bhuj.**
३. अपीलकर्ता, प्रथम आदेश में निर्धारित कर का भुगतान करने में विफल रहा और अतिरिक्त कर का भुगतान करने में विफल रहा।  
 The appellant failed to pay the tax as determined in the first order and failed to pay the additional tax as determined in the first order.
४. अपीलकर्ता को अपील करने के लिए निर्देश दिया गया, जिसमें प्रथम क्रम में आदेश, कोलकाता, कोलकाता नगर महानगरपालिका और नगर प्रशासन द्वारा जारी किया गया।  
 The appellant was directed to file an appeal against the first order, Rajkot, Kolkata Municipal Corporation and City Corporation, Kolkata.
५. अपीलकर्ता को अपील करने के लिए निर्देश दिया गया, जिसमें प्रथम क्रम में आदेश, कोलकाता, कोलकाता नगर महानगरपालिका और नगर प्रशासन द्वारा जारी किया गया।  
 The appellant was directed to file an appeal against the first order, Rajkot, Kolkata Municipal Corporation and City Corporation, Kolkata.
६. अपीलकर्ता को अपील करने के लिए निर्देश दिया गया, जिसमें प्रथम क्रम में आदेश, कोलकाता, कोलकाता नगर महानगरपालिका और नगर प्रशासन द्वारा जारी किया गया।  
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९. अपीलकर्ता को अपील करने के लिए निर्देश दिया गया, जिसमें प्रथम क्रम में आदेश, कोलकाता, कोलकाता नगर महानगरपालिका और नगर प्रशासन द्वारा जारी किया गया।  
 The appellant was directed to file an appeal against the first order, Rajkot, Kolkata Municipal Corporation and City Corporation, Kolkata.
१०. अपीलकर्ता को अपील करने के लिए निर्देश दिया गया, जिसमें प्रथम क्रम में आदेश, कोलकाता, कोलकाता नगर महानगरपालिका और नगर प्रशासन द्वारा जारी किया गया।  
 The appellant was directed to file an appeal against the first order, Rajkot, Kolkata Municipal Corporation and City Corporation, Kolkata.
११. अपीलकर्ता को अपील करने के लिए निर्देश दिया गया, जिसमें प्रथम क्रम में आदेश, कोलकाता, कोलकाता नगर महानगरपालिका और नगर प्रशासन द्वारा जारी किया गया।  
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 The appellant was directed to file an appeal against the first order, Rajkot, Kolkata Municipal Corporation and City Corporation, Kolkata.
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१४. अपीलकर्ता को अपील करने के लिए निर्देश दिया गया, जिसमें प्रथम क्रम में आदेश, कोलकाता, कोलकाता नगर महानगरपालिका और नगर प्रशासन द्वारा जारी किया गया।  
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१५. अपीलकर्ता को अपील करने के लिए निर्देश दिया गया, जिसमें प्रथम क्रम में आदेश, कोलकाता, कोलकाता नगर महानगरपालिका और नगर प्रशासन द्वारा जारी किया गया।  
 The appellant was directed to file an appeal against the first order, Rajkot, Kolkata Municipal Corporation and City Corporation, Kolkata.





**:: ORDER IN APPEAL ::**

Mrs. Sri. Nageshwar Leacera, (Proctorate- Chinbila Madhuble Talhude Village- Let. Kukma, Dhule) (hereinafter referred to as "Appellant") have filed present appeal against Order-in-Original No. 15/ AC/ 2015-16 dated 0.6.2015 (hereinafter referred to as "impugned order") passed by the Assistant. Commisioner, Service Tax Division, Gandhinagar (hereinafter referred to as "lower adjudicating authority")

2. The chief facts of the case are that during audit of records of M/s. Ashapura Volclay Ltd, Dhule, it was alleged that the Appellant has rendered taxable services from 2008-10 to 2011-12 to M/s. Ashapura Volclay Ltd, Dhule and not obtained Service Tax registration and failed to pay Service Tax on such services. Show Cause Notice No. Y (a) 849/ 10/ ST/ AC-44/ 14-15 dated 7.10.2014 was issued to the Appellant asking them to show cause as to why Service Tax of Rs.1,85,924/- 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 Sections 77, Section 78 of the Act and also recovery of late fee for non filing of ST 3 returns under Section 70 of the Act. The Show Cause Notice was adjudicated vide the impugned order, which confirms Service Tax demand of Rs.1,85,924/- under Section 73(1) of the Act along with interest under Section 75 of the Act, imposed penalty of Rs.43,316/- (FY 2009-10) and Rs.79,361/- (2010-11) under Section 76, penalty of Rs.12,000/- under Section 77, penalty of Rs. 3,35,924/- under Section 78 and late fee of Rs.2,000/- per return for the year 2008-10 and 2010-11, penalty of Rs. 20,000/- for the year 2011-12 under Section 70 of the Act.

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 also 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' or 'Supply of Tangible Goods'; that it is not discussed which activity was classifiable under what category and how

service tax was calculated separately for both category.

(i) The activities undertaken by them are not covered under the category of 'Manpower Recruitment or Supply Agency Service', as they has never recruited or supplied any manpower to the service recipient and they has only undertaken the assigned work related to construction, loading, unloading, repairs and supply of materials, orders, JCB. they never supplied manpower and 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 Metalay Ltd as reflected in their work orders and invoices.

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

(ii) Appellant has provided services for internal shifting of finished goods within factory area with the help of labours and Lorry Trucks owned by them; that though there is no proposal in the show cause notice or in the impugned order proposing the activity classifiable under taxable category of 'Cargo Handling Services' under Section 65 (23) of the Act; that their activity does not merit classification under this category as goods were not transported outside the factory premises thus it did not involve transportation of goods so 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 2008/12/ STR 34 (Tri-Kolkata); M/s. Sunder Kumar reported as 2010/20/ STR 6rd (Tri-De.) and M/s. Scrap Material Handling Co. 2008/16/ STR 32 (Tri-De); that Shifting of material is not covered under any of the taxable services as notified during the material period.

(iii) As regards supply of vehicles and equipments by the appellant to the service recipient, it is submitted if the impugned order has confirmed the demand under single category of services of 'Manpower Recruitment Agency'; that as per definition of 'Supply of Tangible Goods' under Section 65 (15)(zzv), read with M.P. & E. letter No. F. No. 347/2006-TRU 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/or effective control over the said tangible goods to the lessee/user at the expense of the lessor/owner/provider of tangible goods; that in view of the definition, the activities carried out by them are not 'supply of tangible goods'.

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

(vii) Appellant has undertaken work assigned to them themselves through their own employes/hired labour and not as a labour contractor; service recipient is central excise assessee and activities carried out on its premises are in connection with those goods on which central excise duty has been paid and covered under job work, that CBEC Circular No. 1909/2015-ST dated 15.12.2015 can be made applicable in their case too as per which, service provided by them are not manpower supply service.

(viii) Extended period of limitation is not invokeable in this case as mere omission to give correct information is not 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.

(ix) 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.

(x) It is settled position of law that for imposing penalty under Section 76 of the Act, existence of suppression etc. is required to be proved by the Dept., which is absent in the present case. There was no intention to evade tax by them, hence no penalty was imposable upon them and relied upon the case laws of Tamil Nadu Housing Board reported as 1954(74) F.T.R. 9, Town Hall Committee, Mysore City Corporation reported as 211(24)S.T.R. 177 (Kar.) and others.

(xi) The Appellant was not required to pay any service tax, hence, they had not filed ST-3 returns and hence no fine can be imposed on them under Section 70 of the Act.

(xii) 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 provision present 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

improperly furnished.

3. Personal Hearing in the matter was attended by Shri R D Prasad Consultant, who reiterated the grounds of appeal and submitted that the appellant has not been served any SCN or even imugted order and they came to know the order only when the officers came for recovery of demands confirmed that no investigation has been made at their end that neither SCN nor order has any evidence of any service being or have been provided by them. That the imugted order does not specify which service 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 the activities undertaken by them is are covered under Manufacturer Supply Service or even supply of Tangible Goods services as no goods have been supplied to service recipient for their use, that in a similar case vide OIA No. KCH-EXCUS-2004APP-138-2019-19 dated 28.8.2019 Commissioner (Appeal) Rajkot has held that the activities are not covered under Manufacturer Supply services; that what is not alleged in SCN or which service has not been covered by the imugted order cannot be covered/decided by OIA as has been decided by the Hon'ble Supreme court in the case of M/s. Toys Engineering India Ltd reported as 2006 (201) ELI 513 (SC) as the ground has to be materialized/alleged in the SCN

4.1 In written submission, Appellant has submitted that the show cause notice does not propose to classify the service under any category of taxable service and conceived that the appellant has provided taxable services under category of 'Manpower Recruitment or Supply Agency' and 'Supply of Tangible Goods Service' that taxable value was shown to be taken from Form 23AS/Profit & Loss Account without verifying as to how much value of alleged service activity was received for 'Manpower Recruitment or Supply Agency' and how much for 'Supply of Tangible Goods Service'; that the order is bad in law as much as there is no proposal to classify the taxable service under which the service tax is being demanded and also there is no bifurcation of amount of taxable services; that the lower assessing authority without verifying the details of the work, has considered entire amount of income towards provision of service and has levied under two different categories of services that without accepting anything, appellant submitted that even for to make the payment of service tax, they must be communicated as to how much amount is to be paid against 'Manpower Recruitment & Supply agency services' and how much towards 'Supply of tangible goods services'. Appellant referred Para 14.5 to 14.8 of the Assessment manual

issued by Central Board of Excise & Customs to say that the order is non-deferentia.

4.2 Appellant reiterated the submissions made in Appear. Memorandum and further submitted that no vehicle or equipment was given on rent; that the respondent had used its own vehicle to shift goods from one place to other place and that too on some occasions; that order in issue was for shifting of goods from one class to another; that there is no such evidence on record to suggest that any vehicle and equipment was given on rent or that even if payment made at the rate per hour, it is an agreement for payment for shifting of materials or goods and of this type of payment method will not alter the nature of services; that if such interpretation be allowed then all the cab 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 must fall under the definition of that service and not the mode and nature of payments; that from the copies of the Bills/Invoices and work orders it can be seen that the activities can be summarized as (i) Water transfer through tankers (ii) Miscellaneous civil work (iii) Waste transfer (iv) Cement/Plaster shifting (v) Loading of materials in godown (vi) taking out gypsum/bentonite/ Mg from waste water and (vii) Gypsum shifting; that none of the work relates to 'Supply of manpower' or 'Supply of tangible goods'.

*(Signature)*

4.3 Appellant submitted that department cannot travel beyond scope of show cause notice by mentioning such facts in the order, which were never part of the show cause notice and relied upon the Honble Supreme Court's decision in the case of *Mie Toyo Engineering India Ltd* reported as 2006 (201) E.L.T. 513 (S.C.)

4.4 Appellant also submitted that the service tax liability is incorrectly calculated as basic exemption limit of Rs 10 lacs is not considered for the year 2009-10 and 2010-11, that no service tax is payable by them for F.Y. 2009-10 and it would be Rs.55,278/- for FY 2010-11 as against proposed service tax demand of Rs 1,59,728/- for FY 2010-11.

**Findings:-**

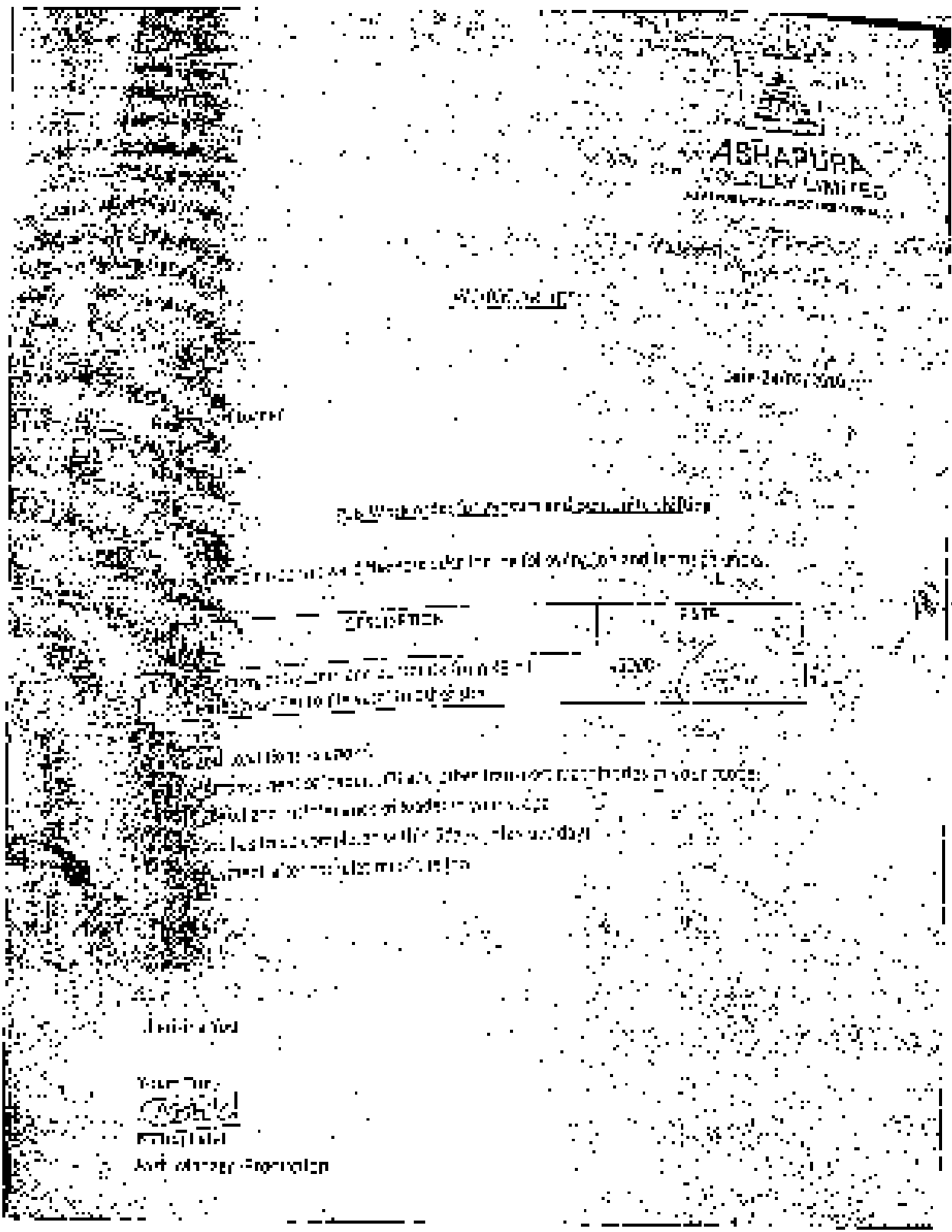
5. I have carefully gone through the facts of the case, the impugned order, written as well as oral submissions made by the Appellant. The issues to be decided in the present appeal are:

- (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 in 'Supply Agency Service' and 'Supply of Tangible Goods Service' contract

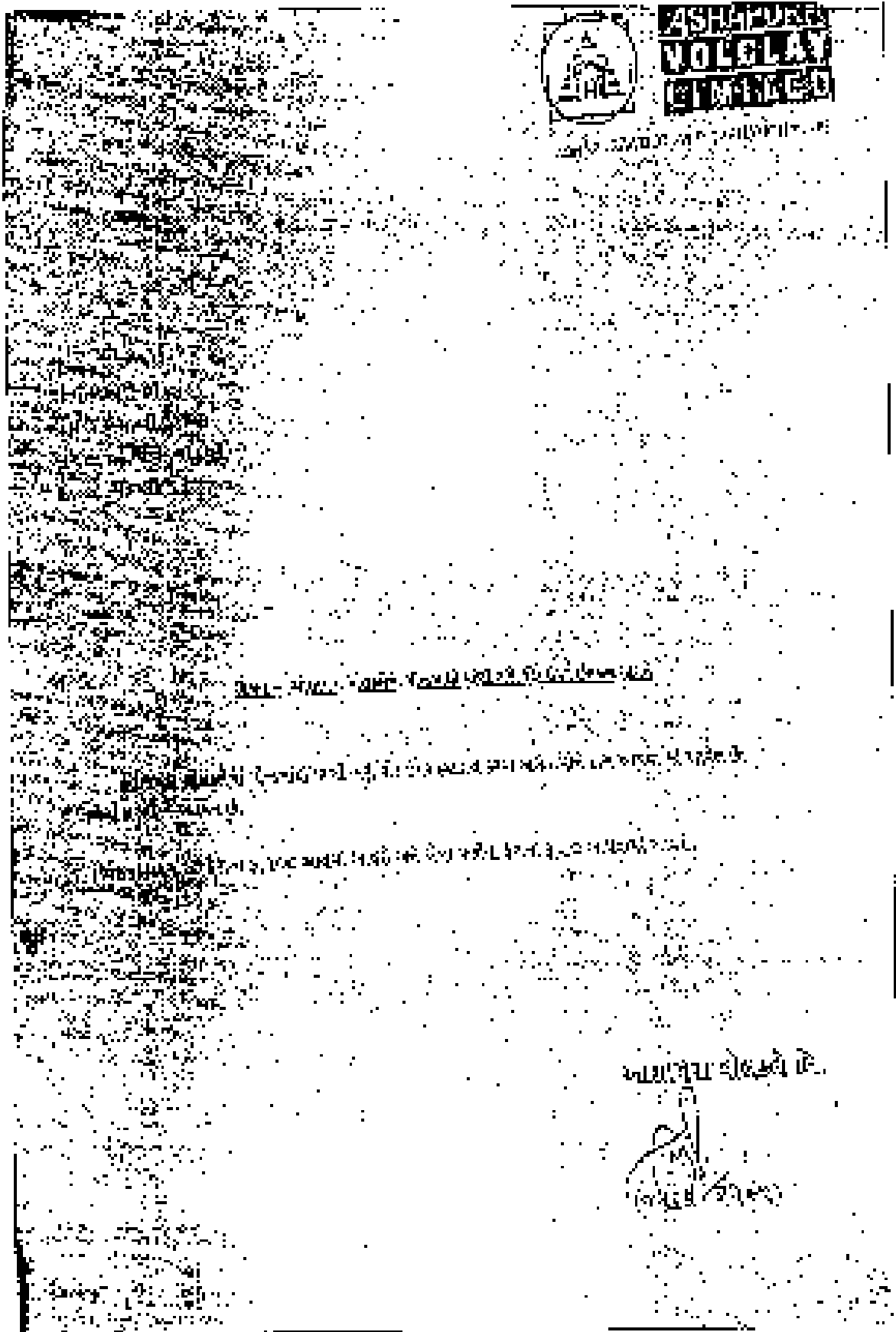
6. It is noted that the Applicant has carried out the work of (i) loading/unloading of Gypsum and Bentonite using their business JCBs (ii) transfer of waste from one place to another (iii) emptying waste water by using Tankers (iv) shifting of 'WSS loose Material' (v) spraying water on roads and emptying the Pond using two Tankers. Copy of sample contract (Image-I and Image II) and invoices (Image-III to Page-V) are as under.

(Image-I)

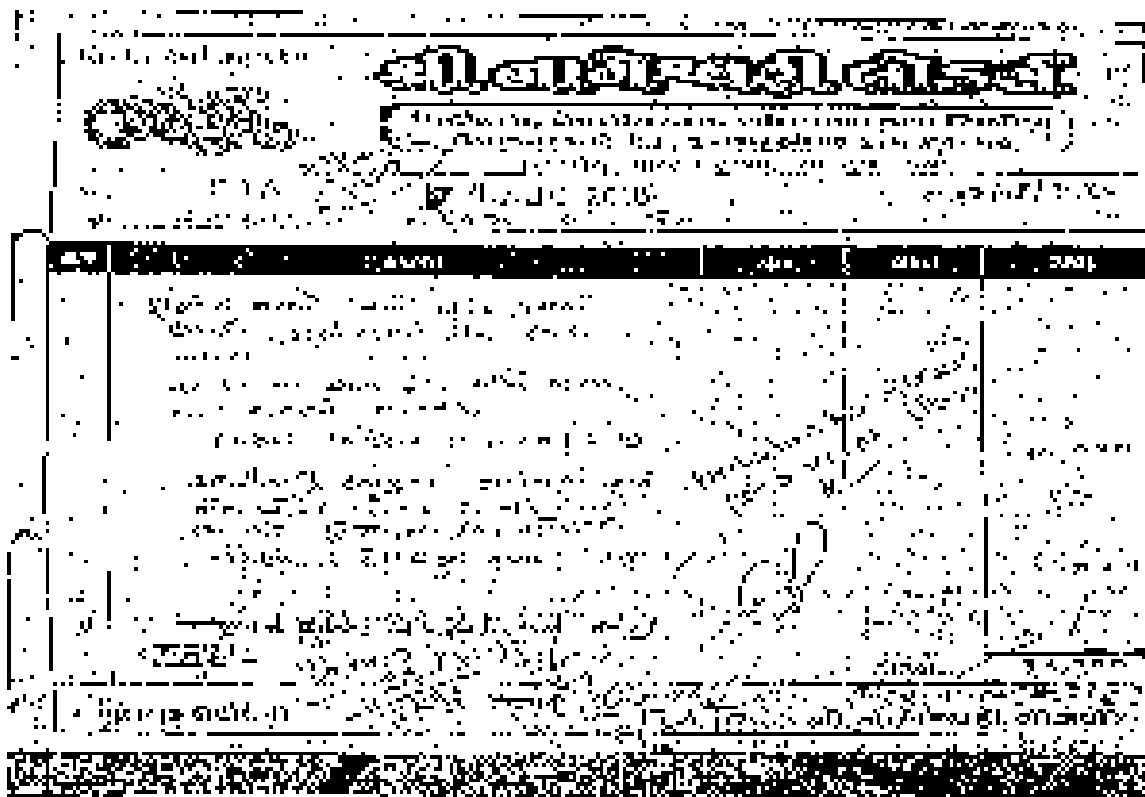




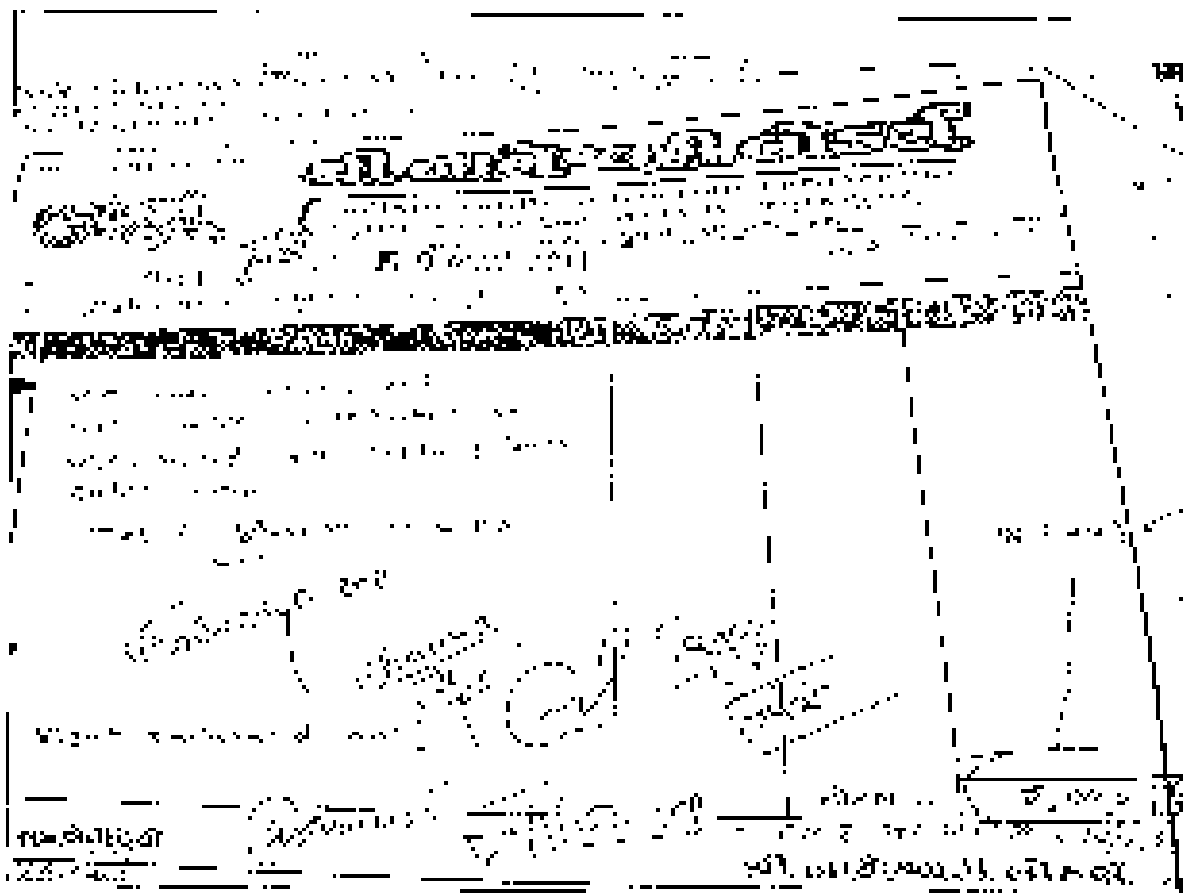
(Image-1)



(Image-11)



(Image-12)



(Image-V)

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# श्री अन्वेषण संस्थान

12 FEB 2011 13 FEB 2011

| विवरण   | दिनांक | स्थान |
|---|--------|-------|
| <p>10 टर्कर ड्रॉइंग, प्लांट</p> <p>5 टर्कर ड्रॉइंग, प्लांट</p> <p>3 टर्कर ड्रॉइंग, प्लांट</p> <p>एक टर्कर ड्रॉइंग, प्लांट</p> |        |       |

श्री अन्वेषण संस्थान

2. The Appellant used their vehicles and equipments at the work site of service recipient along with required manpower. The payments were received at a fixed rate for the work done on per hourper day' basis when vehicles/equipments 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 two category of taxable services i.e. 'Manpower Recruitment or Supply Agency Service' and 'Supply of Tangible Goods' without discussing the activities undertaken by the appellant. The Appellant's contention that they never supplied any manpower to M/s. Anagira Volcity Ltd the service recipient but had undertaken the specific work like shifting of Gypsum & Bentonite, spraying of water, civil patch work, repairing of water barriers etc. and hence, to me 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 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(58) of the Act which reads as under -

'Manpower recruitment or supply agency' means any person engaged in operating any agency, 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(105)(K) and as under-

'any service provided or to be provided in 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(1)(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 From plain reading of above reproduced definitions, I find that there has to be (i) supply of manpower and (ii) manpower so supplied has to work under superintendence or control of the client for service tax payment under the taxable category of 'Manpower Recruitment or Supply Agency Services'. I find that the appellant has executed specific work with manpowers to the client at agreed rate as reflected in their contracts/invoices and received consideration based upon the quantum of work executed by them. I find that the lower adjudicating authority has very vaguely concluded that manpower was supplied by the Appellant without discussing any specific contract/invoice justifying such a conclusion. I find that the evidences available in the case have not established that the Appellant had supplied manpower to M/s Ashapura Volday Ltd; that the manpower manning equipments, vehicles etc. were under superintendence or control of the service recipient in any manner. It is on record that the Appellant had used equipments, vehicles for loading and unloading of materials as per the requirement of the appellant under their contract and not supplied to the service recipient. Thus, vital documents required to conclusively under the category of 'Manpower Recruitment or Supply Agency' are missing in the present case. Therefore, the services rendered by the appellant cannot be classified under the taxable category of 'Manpower Recruitment or Supply Agency'.

6.6 In this regard, I rely on an order passed by the Honble GSTAT in the case of Ganesh Dull reported as 2017(4) GST 305 (Tri-Trib), wherein it has



wherein it is clarified as under:-

"The matter has been examined. The nature of manpower supply service is different 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 permanently under effective control of the service recipient during the period of contract. Service providers' responsibility is only to the 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 multiplies by the rate. In other words, manpower supplier will charge for supply of manpower even if manpower remains idle.

(Emphasis supplied)

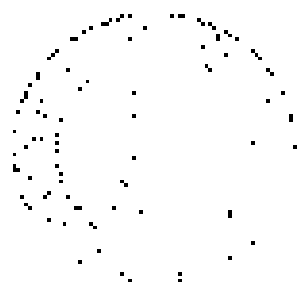
6.0 By respectfully following the above case laws and Board's Circular I find that the services rendered by the Appellant to M/s Ashapura Volbay Ltd are not covered under the category of 'Manpower Recruitment or Supply Agency'.

6.1 I find that the service under the category of 'Supply of Tangible Goods Service' is defined under Section 85(125)(zzzz) read with under:-

any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and attached with such machinery, equipment and appliances.

6.1 I find that any service is covered under the definition of supply of tangible goods if goods are supplied to service recipient and not when the tangible goods are used by the service provider while carrying out specific work assigned by the service recipient. I find no evidence adduced and/or discussed in the impugned order to hold that the tangible goods were supplied by the appellant for use of the service recipient. On the contrary as discussed in foregoing paras, appellant has used the tangible goods owned by them for carrying out the work undertaken by them and hence confirmation of demand holding that appellant supplied tangible goods is also not justified just because Tangible goods like tanker, tractor are mentioned in the documents and also because payment modalities are based on commercial terms for completion of work done for payment. The work undertaken by the appellant e.g. shifting of gypsum from one place to another by using the order of the appellant or spraying waste water from Road can't justify to be treated as supply of tangible goods. I find merit in appellant's contention that neither SCN nor the impugned order discussed as to how the activities performed by them are classifiable under 'supply of tangible goods service'. I therefore hold that the Appellant is not liable to pay Service Tax under the category of 'Supply of Tangible Goods Service'.

6. In view of above, I find that the impugned order confirming demands by



classifying the services undertaken by the appellant under 'Manpower Recruitment or Supply Agency' and/or 'Supply of Tangible Goods Service' is not correct legal and proper. 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.

२.१ अपीलकर्ता द्वारा दली की गई अपील का निम्नलिखित प्रकार से निर्यात किया जाता है।

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

20/01/2015

श्री सुनील कुमार शर्मा  
(कुमार सतीश)  
आयुक्त (अपीलेंस)

By Head Post AD

To,

M/s. Shri. Nageshwarji Traders  
(Proprietor Dhanraj Machhara)  
Kathodi  
Village- Dhanraj  
Kukna Bhu.

श्री सुनील कुमार शर्मा  
(प्रोप्रायटोर श्री धनराज मखरा शर्मा)  
गांव - धनराज - कुकना  
बुज

Copy 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 Bhu. for further necessary action.
- 4) Guard File.