

	::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क:: O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,	 सत्यमेव जयते
	द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan, रेस कोर्स रिंग रोड, / Race Course Ring Road,	
	राजकोट / Rajkot - 360 001	
	Tele Fax No. 0281 - 2477952/2441142	
	Email: cexappealsrajkot@gmail.com	

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/2 /EA2/GDM/2017	मूल आदेश सं / O.I.O. No. 17/ST/AC/2016-17	दिनांक / Date 26/12/2016
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ख अपील आदेश संख्या (Order-In-Appeal No.):

KCH-EXCUS-000-APP-012-2018-19

आदेश का दिनांक / Date of Order:	10.05.2018	जारी करने की तारीख / Date of issue:	16.05.2018
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Passed by **Shri Sunil Kumar Singh, Commissioner, CGST & Central Excise, Gandhinagar.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री सुनील कुमार सिंह, आयुक्त, केन्द्रीय वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीनगर, को वित्त अधिनियम १९९४ की धारा ८५, केन्द्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है..

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

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम/ भावनगर। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham/ Bhavnagar :
घ अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellants & Respondent :-
M/s Balakrishna Bokka, Sector 14, B-470, Rotary Nagar. Gandhidham-370 220

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- ३८००१६ को की जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above



- (iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

- (B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 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 नियमावली, 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 For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

- (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 अर्जी एवं अपील को लागू नहीं होगा।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**

Revision application to Government of India:

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामले में, केंद्रीय 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 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 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 क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं। /
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का 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 पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय 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, not withstanding 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-1 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 और 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

The subject appeal no. 2/EA2/GDM/2017 is filed by Assistant Commissioner, Service Tax Division, Gandhidham(hereinafter referred to as 'the appellant' or 'the department') against Order in Original No. 17/ST/AC/2016-17 dated 26.12.2016 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Service Tax Division, Gandhidham (Kutch) (hereinafter referred to as 'adjudicating authority') in the case of M/s Balakrishna Bokka, Gandhidham (Kutch) (hereinafter referred to as 'the respondent').

2. The facts of the case in brief are that the respondent is registered with service tax department as service provider under the category of 'Cargo Handling Service under Section 65 of Finance Act, 1994. During the course of audit of the records of the appellant, it was observed that they had also provided labours to their various clients as and when they were contacted by their clients for loading and unloading cargo and the said activity of providing labours was in nature of manpower recruitment or supply agency. Further, the invoices raised by the respondent, specifically shows that they were labour supplier / labour contractor as they had provided labours to various cargo handling agencies like Chamunda Handling, Momai Krupa Handling, Shree Ganesh Handling, Avadh Cargo Carrier, Shree Ravechi Handling etc. The said invoices did not mention the cargo was meant for export. Further, from Form 3CD prescribed under Income Tax Act, 1961 alongwith Tax Audit Report for the year 2011-12 and 2012-13, it was observed that the nature of business was shown by the respondent as 'labour contractor'. Therefore, it was found that the respondent had misclassified the activities carried out by them under the category 'Cargo Handling Service' under Section 65(23) of the Finance Act, 1994 instead under category 'Manpower Recruitment or supply agency' as defined under Section 65(68) of Finance Act, 1994.

3. Further, with effect from 01.07.2012, tax has been levied on all the services except those specified under Section 66D of the Finance Act, 1994. Accordingly, the respondent was liable to pay service tax on all the services provided by them. On verification of profit and loss account, it appeared that the respondent had not paid service tax on the following income during the period the period considering their service as Cargo Handling Service meant for export goods, as tabled below:

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Year	Nature of service shown	Amount as per Profit & Loss Account (Rs.)	Rate of Service Tax	Service Tax payable (Rs.)
2010-11	Labour income-Export	8,84,799/-	10.30%	91,135/-
2011-12	Handling income-Export	1,24,92,116/-	10.30%	12,86,689/-
2012-13	Handling income (export & Agri Produce)	14,57,721/-	12.36%	1,80,174/-
2013-14	By Handling income- (Agriculture produce)	43,85,661/-	12.36%	5,42,068/-
	Total			21,00,066/-

4. It appeared that the exemption claimed by the respondent in respect of handling of export cargo contending the same as under 'Cargo Handling Services' was not correct as the said activities rightly fall within the ambit of 'Manpower recruitment or supply agency' provided to various clients which was not out of the purview of service tax. It appeared that the respondent had arranged the billing / invoicing in such manner so as to escape the burden of service tax on 'Manpower recruitment or supply agency' under the guise of 'Cargo Handling Service'.

5. Further, on reconciliation of amount shown in the ST-3 returns and Balance Sheets, by the audit officers, it was observed that there was a difference of Rs.6,57,371/- as compared to ST-3 returns with balance sheet for F. Y. 2011-12, accordingly, it appeared that service tax of Rs.67,709/- was required to be recovered with interest on this difference also.

6. Accordingly, it was found that the respondent had not paid service tax of Rs.21,67,775/- (Rs.21,00,066/- + Rs.67,709/-) by misclassifying the service category as 'cargo handling service' instead of 'Manpower Recruitment and Supply Agency' and due to difference in income shown in balance sheet vis-à-vis ST-3 return for the financial year 2011-12 respectively.

7. Therefore, a show cause notice was issued to the respondent proposing classification of service under 'Manpower Recruitment or supply agency' under Section 65(105)(k) read with Section 65(68) of the Finance Act, 1994 and recovery of service tax of Rs.21,67,775/- under proviso to Section 73(1) of the Finance Act, 1994 with interest under Section 75 of the Act, *ibid*. The show cause notice also proposed penal action under Section 76, 77 and 78 of the Act, *ibid*.

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8. The said show cause notice has been decided vide impugned order wherein adjudicating authority has dropped the demand holding that service provided by the respondent is cargo handling services and hence the demand is not sustainable.

9. Being aggrieved with the impugned order, the department filed appeal on the following grounds:

(i) The impugned order is cryptic and non-speaking in its discussions and findings. The OIO only discusses what the party contends, but does not record its findings in a cogent, cohesive and logical manner.

(ii) Reliance is placed upon the following judgments:

- (a) CCE, Delhi vs J.D. Auto Electrical (P) Ltd.-2016 (337) ELT 171 (P&H)
- (b) Thames Water Asia Pvt. Ltd. vs Commr of S. T, Bangalore-2010(249)ELT 536(Tri-Bang)


10. The respondent filed cross-objections dated 9.10.2017 against the department appeal, wherein they have contended that:

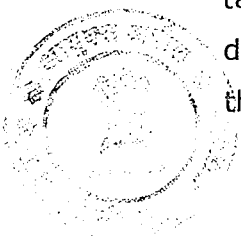
(i) From the order it may be seen that the adjudicating authority was satisfied with the contention made by the respondent and for that reason only he discussed all the contention made by the respondent. The adjudicating authority had concluded his findings in the last lap of each paragraphs that the respondent is not liable to pay service tax, interest or penalty thereon.

(ii) The department is not aggrieved by the ultimate result of the impugned order, nor has it given any ground on merit or the issue. It is objecting only the style of the order.

(iii) There is no clear and specific grounds/allegation in the notice and for that reason only the adjudicating authority had dropped the proceedings proposed in the notice.

(iv) The activities carried out by the respondent does not fall under the taxable service 'Manpower supply' service and as such the appeal filed by the department may be dismissed. They have also relied upon certain case laws in this regard.





11. Personal hearing in the matter was fixed on 31.01.2018, 22.02.2018, 16.03.2018 and 05.04.2018. However, none appeared for personal hearing. Shri Rajesh C Prasad, Consultant of the respondent, requested for adjournment. Another personal hearing was fixed on 13.04.2018 and same was attended by Shri Rajesh C Prasad, Consultant of the respondent and reiterated the contents of cross objection filed. Further, he pleaded that there is no merit in the appeal filed by the department.

12. I have carefully gone through the impugned order passed by adjudicating authority, the submission made by the appellant in the appeal memorandum, the cross-objection filed by the respondent against the department's appeal as well as by the representative of respondent at the time of personal hearing. I find that the limited issue to be decided is -

"Whether the impugned order passed by the adjudicating authority is cryptic and non-speaking in its discussion and findings. "

12.1 It is observed that the department in its appeal memorandum has stated that the impugned order only discusses what the party contends. The adjudicating authority did not record his findings in a cogent, cohesive and logical manner.

12.2 It is further observed from the brief facts of the case, as mentioned in impugned order, that the service provided by the appellant was in nature of Manpower Recruitment or Supply Agency Service and also the invoices raised by the appellant specifically show that they were labour supplier/labour contractor. It has been further alleged that the appellant has misclassified the activities carried out by them as 'Cargo Handling Service' as they had provided labour to various cargo handling agencies like Chamunda Handling, Momai Krupa handling etc. and invoice raised did not mention that the cargo is meant for export. Further, various vouchers issued by the appellant clearly mentioned 'Received cash amount for labor work done.

12.3 From impugned order, it is observed that, while adjudicating the case, the adjudicating authority in discussion and findings portion basically mentioned what the appellant have contended in their defence and without making his own discussion on the issue he has jumped on the conclusion that the service provided by the appellant fall under Cargo Handling service. He has not recorded his own and independent descriptive findings how the service fall under the category of 'Cargo Handling Service'. In the last para of the

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impugned order, he has merely concluded that the service provided by the appellant was Cargo Handling Services and service tax demanded for misclassifying the service under Manpower Recruitment and Supply Agency is not sustainable. He has not made any detailed discussion on the issue how the activities carried out by the appellant fall under category 'Cargo Handling Service' instead of Manpower supply. He has also not thoroughly examined the invoices, raised by appellant to various cargo handling agencies, and other related documents to know whether these invoices were issued for supply of manpower or were issued for cargo handling service on quantum basis as claimed by appellant. For classifying a service under Manpower Recruitment or Supply Agency, the basic conditions are: (i) the manpower will work under supervision and control of the service receiver, (ii) the value is calculated on days, man-day basis and the payment to be made is related to number of manpower supplied and not related to number of manpower supplied and not related to quantum of work carried out and (iii) the deployment of manpower rest with the service recipient. From the impugned order, it is observed that the adjudicating authority has not discussed about any of the above aspect in the impugned order before coming to the conclusion that the service provided by the respondent were not 'Manpower Recruitment or Supply Agency' service. Without examining these aspects, the adjudicating authority has merely held that the service provided by the respondent covered under 'Cargo Handling Service'. The respondent claimed the income generated on account of Cargo Handling of Export Cargo and the Agricultural produce and hence exempted from payment of service tax. However, the adjudicating authority has not given any discussion on this issue whether and how service provided by appellant is exempted from payment of service tax. From para 9 of the impugned order, it is observed that there is a demand of service tax of Rs.67,709/- on account of reconciliation of amount shown in the ST-3 returns and balance sheets. However, the adjudicating authority has not made any discussion on this issue and simply dropped the demand. Hence, I find that the impugned order passed by the adjudicating authority is cryptic and non-speaking order and the same needs to be remanded back to him for fresh adjudication. The following case laws relied upon by the appellant is applicable to this case:

- (i) CCE, Delhi vs J.D. Auto Electrical (P) Ltd.-2016 (337) ELT 171 (P&H)
- (ii) Thames Water Asia P Ltd. vs Commr of S. T, Bangalore-2010(249)ELT 536(Tri-Bang)

13. Therefore, in view of above observation and by relying upon the above case laws, I set aside the impugned order and allow the appeal filed by department by way of remand the matter back to adjudicating authority with a direction to decide the matter afresh on merit, keeping above observation in

mind and by following principle of natural justice to pass reasoned and speaking order within reasonable time frame. The respondent is also directed to place all relevant documents along with their written submissions before adjudicating authority to enable him to decide all aspects involved in the matter on merits.

14. For remanding the case back to adjudicating authority, I also rely upon the case law of Honda Seil Power Products Ltd.- 2013 (287) ELT 353 (Tri. Del.) wherein a similar view has been taken as regard inherent power of the appellate authority to remit back the matters under the provisions of Section 35A(3) of the Central Excise Act, 1944. Further, Hon'ble Gujarat High Court, in Tax Appeal No. 276 of 2014, in the case of Associated Hotels Ltd. has held that even after amendment in Section 35A ibid after 10-05-2011, Commissioner of Central Excise would retain the powers of remand.

15. The appeal filed by the appellant stand disposed off in above terms.

B. Singh
10.05.18

Sunil Kumar Singh 10.05.18
(Sunil Kumar Singh)
Commissioner (Appeals)/
Commissioner,
CGST & Central Excise,
Gandhinagar

By Regd. Post AD

F. No.: V2/2/EA2/GDM/2017

Date: 10.05.2018

To,

The Commissioner, CGST & Central Excise,
Kutch (Gandhidham)
"Central Excise Bhavan", Plot No.82, Sector-8,
Opp. Ramlila Maidan, Gandhidham.

Copy To:

- (1) The Chief Commissioner, CGST & Central Excise, Ahmedabad.
- (2) The Commissioner (Appeals), CGST & Central Excise, Rajkot
- (3) M/s Balakrishna Bokka, Sector 14, B-470, Rotary Nagar, Gandhidham.
- (4) The Assistant Commissioner, CGST & C. Ex., Division Gandhidham
- (5) The Assistant Commissioner (Systems), CGST, Rajkot.
- (6) The Superintendent, CGST & Central Excise AR- Gandhidham
- (7) PA to Commissioner of CGST & Central Excise, Gandhinagar.
- ✓ (8) Guard file.

