



::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road.

राजकोट / Rajkot - 360 001

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सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/202/GDM/2017	15/JC/2017-18	28-Sep-17

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

KCH-EXCUS-000-APP-137-2018-19

आदेश का दिनांक / Date of Order:	24.09.2018	जारी करने की तारीख / Date of issue:	26.09.2018
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कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। 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 :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellant & Respondent :-**

Shri. Ashapura Loaders (Prop: Badubha Jalubha Jadeja), Village: Ler., Kukma, Bhuj (Kutch).

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) नियमवाली, 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 रजिस्ट्रार 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 रजिस्ट्रार 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 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, बशर्त 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
- बशर्त 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 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 का भुगतान क लिए जा इयुटा 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 समयावधि 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। / जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए। / The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पदों 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 Appellate 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 का 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 present appeal has been filed by M/s Shri Ashapura Loaders, Village Ler, Kukma, Bhuj (hereinafter referred to as “appellant”) against Order-In-Original No. 15/JC/2017-18 dated 28.09.2017 (hereinafter referred to as “impugned order”) passed by the Joint Commissioner, Central Goods and Service Tax, Kutch (hereinafter referred to as “lower adjudicating authority”).

2. The brief facts of the case are that during the course of audit of records of M/s Ashapura Volclay Ltd, Bhuj, it was found that the Appellant had rendered taxable services from 2009-10 to 2011-12 to M/s Ashapura Volclay Ltd, Bhuj without getting Service Tax registration and had not discharged Service Tax; that the Appellant had provided services to M/s Ashapura Volclay Ltd, Bhuj but failed to pay Service Tax on such services.

2.1 Show Cause Notice No. V.ST/AR-GDM/ADC(PV)/147/2014-15 dated 10.10.2014 was issued to the Appellant calling them to show cause as to why Service Tax of Rs. 5,83,180/- 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 *ibid* and proposing imposition of penalties under Sections 77 and 78 of the Act and recovery of late fee for non filing of ST-3 returns under Section 70 of the Act.

2.2 The above Show Cause Notice was adjudicated vide Order-in-Original No. 33/JC/2015 dated 29.03.2016, which confirmed Service Tax demand of Rs. 5,83,180/- under Section 73(1) of the Act along with interest under Section 75 *ibid* and penalty of Rs. 10,000/- was imposed under Section 77, penalty of Rs. 5,83,180/- under Section 78 and late fee of Rs.2000/- per return under Section 70 of the Act. Being aggrieved with the impugned order, the Appellant preferred appeal before Commissioner (Appeals), Rajkot who vide Order-in-Appeal No. KCH-EXCUS-000-APP-004-2017-18 dated 31.05.2017 remanded the matter to the lower adjudicating authority for *denovo* adjudication with direction to pass a reasoned and speaking order after granting opportunity of hearing. The Appellant was also directed to furnish all relevant documents before the lower

adjudicating authority in support of their claim that services rendered by them were not supply of manpower and were not taxable.

2.3 In *de novo* adjudication, the lower adjudicating authority, after examining the submissions of the Appellant, held that the Appellant rendered "Manpower Recruitment or Supply Agency Service" to M/s Ashapura Volclay Ltd, Bhuj but failed to discharge Service Tax on the payments received from their service receiver. The lower adjudicating authority confirmed Service Tax demand of Rs. 5,83,180/- under Section 73(1) of the Act, along with interest under Section 75 *ibid* and imposed penalty of Rs. 10,000/- under Section 77 and penalty of Rs. 5,83,180/- under Section 78 of the Act and late fee of Rs. 2,000/- per return 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 order has been issued in complete disregard to the directions given by the Hon'ble Commissioner(Appeals). The appellant had submitted evidences before the adjudicating authority showing that their activities are not covered by the definition of 'Manpower Recruitment or Supply Service'. However, the adjudicating authority did not discuss any evidence produced by them but gave vague reference to some records which was never part of Show Cause Notice.

(ii) Their activities/services 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. They had only undertaken the assigned work related to construction, loading, unloading, repairs and supply of tractors, loaders, JCB. They never supplied manpower nor they were under the control and direction of the service recipient. In all those 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 Volclay Ltd as reflected in their work orders and invoices:

- (a) Loading and unloading of Gypsum using loaders/JCBs of the Appellant;
- (b) Supply of vehicles and equipments;
- (c) Repair works of roads using JCB of the Appellant.

(iii) There was not a single case of supply of manpower, who were

employed to the service receiver and worked under superintendence & control of service recipient so as to be covered under Rule 2(1)(g) of the Service Tax Rules, 1994, which reads as under:

“‘Supply of Manpower’ means supply of manpower, temporarily or otherwise, to another person to work under his superintendence or control”

(iv) The Appellant relied upon following case laws, wherein it has been held that lump-sum work / contract for specific work cannot be considered as ‘Supply of man power’:

- (a) Divya Enterprises-2010(19) STR 370(Tri. Bang),
- (b) S.S. Associates-2010(19) STR 438 (Tri. Bang),
- (c) K.Damodar Reddy -2010 (19) STR 593 (Tri-Bang),
- (d) Seven Hills Construction- 2013(31) STR 611(Tri. Mumbal);
- (e) Prabhalgad Majdoor Sahakari Sanstha Ltd - 2013(32) STR 742;
- (f) Rama Enterprise - 2015(38) STR 963.

(v) Extended period of limitation is not invocable 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, larger period of limitation was illegally invoked against the Appellant.

(vi) 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.

(vii) 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 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 law of Tamilnadu Housing Board reported as 1994(74) ELT 9.

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

(ix) 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 confusion 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.

3.1 In Personal Hearing, Shri R.C Prasad, Consultant, appeared on behalf of the Appellant and reiterated the grounds of appeal and submitted that they have taken goods from one place to another using their own vehicles and getting hired labour on trip basis/ work basis; that they are not supplying manpower to anyone but getting labour, who come on their own and there is no manpower supply to them nor they are supplying manpower to anyone else; that CESTAT in many case laws including Divya Enterprises-2010(19) STR 370(Tri. Bang), S.S. Associates-2010(19) STR 438 (Tri. Bang), K.Damodar Reddy -2010 (19) STR 593 (Tri-Bang), Seven Hills Construction- 2013(31) STR 611(Tri. Mumbal) has held that supply of manpower means supply of manpower, temporary or otherwise, to another person to work under his supervision or control and hence their case is not covered under Rule 2(1)(g) of the Service Tax Rules, 1994 as also clarified by CBEC Circular dated 15.12.2015 under F.No. 354/253/2014-TRU.

Findings:-

4. 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 whether the services rendered by the Appellant are liable to Service Tax or not and whether the services are covered under the category of “Manpower Recruitment or Supply Agency Service” or not.

5. I find from records that the Appellant had carried out the work of loading/unloading of Gypsum using their loaders/JCBs, repair work of roads using JCBs, supply of vehicles/equipments on ‘per hour/per day’ basis etc. For this purpose, the Appellant used/supplied vehicles and equipments to their service recipient along with required manpower for handling said vehicles/equipments. The payments were received at pre-fixed rate for the work done and on ‘per hour/per day’ basis when

vehicles/equipments were supplied as such. On going through the impugned order, I find that the lower adjudicating authority has confirmed Service Tax demand under the category of "Manpower Recruitment or Supply Agency Service", on the ground that corroborative evidences proved that the Appellant had provided manpower to M/s Ashapura Volclay Ltd. On the other hand, the Appellant has argued that they had never recruited or supplied any manpower to M/s Ashapura Volclay Ltd, service recipient, but had undertaken the assigned work related to loading and unloading of Gypsum using loaders/JCBs of the Appellant, supply of vehicles and equipments with manpower, repair works of roads using JCB of the Appellant etc. for which payments were received at pre-fixed rate for the work done/vehicles supplied; that the Appellant's manpower was never under the control and direction of the service recipient.

5.1 I would like to reproduced the definition of "Manpower Recruitment or Supply Agency" given under Section 65(68) 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."

5.2 The term 'taxable service' has been defined under Section 65(105)(K) *ibid*, 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."

5.3 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"

5.4 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 Service'. I find that the appellant has claimed to have executed specific work with manpower to their client at pre-fixed rate as reflected in their contracts/invoices and received consideration based upon the quantum of work executed and vehicles supplied. I find that the lower

adjudicating authority has vaguely concluded that manpower was supplied by the Appellant without discussing any specific contract/ invoice to arrive at such a conclusion. I find that the lower adjudicating authority has failed to establish that the Appellant had supplied manpower to M/s Ashapura Volclay Ltd and 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 has supplied equipments, vehicles to the service receiver for loading and unloading of materials. Thus, vital ingredients/conditions required to cover activity under the category of 'Manpower Recruitment or Supply Agency' are missing in the present case. On the contrary, the facts emerging from records indicate supply of vehicles with manpower and there is no evidence of supply of any manpower *per se* by the Appellant. Therefore, the services rendered by the appellant cannot be classified under the taxable category of 'Manpower Recruitment or Supply Agency'.

5.5 I rely on an order passed by the Hon'ble CESTAT in the case of **Ganesh Dutt** reported as 2017(4) GSTL 323 (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. Damodarareddy** reported as 2010 (19) STR 593 (Tri-Bang), wherein it has been held that,

"6. We have heard both sides. We find that the appellant had carried out the activities of loading of cement bags into wagons, spillage cleaning, stenciling, wagon door opening/closing, wagon cleaning etc., for M/s. India Cements Ltd., 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 appellants did not supply manpower charging for the labour provided on man-day basis or man-hour 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."

5.6 I further rely on an order passed by the Hon'ble CESTAT in the case of **Divya Enterprises** reported as 2010(19) STR 370 (Tri-Bang), wherein it has been held that,

"9. On a careful consideration of the above reproduced letter and facts from the entire case papers, we find that the contract which has been given to the appellants is for the execution of the work of loading, unloading, bagging, stacking destacking etc., In the entire records, we find that there is no whisper of supply manpower to the said M/s. Aspin Wall & 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 appellant that the entire essence of the contract was an

execution of work as understood by the appellant and the recipient of services. We find that the Hon'ble Supreme Court in the case of *Super Poly Fabriks Ltd. v. CCE, 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 purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor 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 *State of AP v. Kone Elevators (India) Ltd.* (supra) and *UOI v. Mahindra and Mahindra* (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 role and understanding of the parties. The said ratio applies to the current case in hand. We find that the entire tenor of the agreement and the purchase orders issued by the appellants' service recipient clearly indicates the execution of a lump-sum work. In our opinion this lump-sum work would not fall under the category of providing of service of supply of manpower temporarily or otherwise either directly or indirectly.”

5.7 I also rely on the clarification issued by the Board vide Circular No. 190/9/2015-S.T. dated 15-12-2015 issued from F. No. 354/153/2014-TRU, wherein it is clarified that,

“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 providers accountability 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 multiplied by the rate. In other words, manpower supplier will charge for supply of manpower even if manpower remains idle.”

(Emphasis supplied)

6. 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”. However, on careful examination of the services rendered by the Appellant, I find that the services are covered under the category of ‘Supply of Tangible Goods Service’ which is defined under Section 65(105)(zzzzj) *ibid*, as 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 effective control of such machinery, equipment and appliances;”

6.1 The essential condition for covering the service provided under the category of ‘Supply of Tangible Goods Service’ is that tangible goods are supplied without transferring the right of possession and effective

admittedly supplied vehicles/equipments to service recipients along with the manpower required to carry out the said work using those equipments which were supplied on 'per hour/per day' basis to the service recipients. I further find that the Appellant carried out the work without transferring the right of possession or effective control of such equipments. So, the necessary ingredients to cover the services rendered by the Appellant under the category of 'Supply of Tangible Goods Service' are present in this case. I, therefore, hold that the Appellant is liable to pay Service Tax under the category of 'Supply of Tangible Goods Service' on the consideration received from their service recipients.

7. In view of above, I uphold confirmation of demand under Section 73(1) of the Act. It is natural consequence that the confirmed demand is paid along with interest at applicable rate under Section 75 of the Act. I, therefore, also uphold the order to pay interest on confirmed demand.

7.1 The Appellant has argued that extended period of limitation is not invocable in this case as mere omission to give correct information is not suppression of facts unless it is deliberate to evade payment of tax. I find that Para 19 of the impugned order has recorded findings on the argument of the Appellant and I concur with the findings of the lower adjudicating authority that invocation of extended period of limitation was just and proper as vital details were suppressed by the Appellant from the Department with intent to evade payment of Service Tax.

7.2 The Appellant has pleaded that cum-tax benefit may be given to them considering the payment received as inclusive of Service Tax. I find that this is a clear case of deliberate evasion of Service Tax. I find that the Hon'ble CESTAT in the case of **Dhillon Kool Drinks and Beverages Ltd.** reported as 2011 (263) ELT 241 has held that benefit of cum-tax value cannot be granted in cases of deliberate evasion of duty following the judgement of the Hon'ble Apex Court in the case of Amrit Agro Industries Ltd reported as 2007(210) ELT 183(SC). By respectfully following the above judgements, I hold that the Appellant is not eligible for cum-tax value benefit.

8. Regarding imposition of penalty under Section 78 of the Act, the Appellant has contended that existence of suppression etc. is required to

be proved by the Department for imposing penalty under Section 78 and that there was no intention to evade payment of Service Tax by them. I find that non payment of Service Tax by the Appellant came to light during Audit of records of M/s Ashapura Volclay Ltd, to whom the Appellant had rendered services. The Appellant had not obtained Service Tax registration and was not paying Service Tax on the services rendered by them to M/s Ashapura Volclay Ltd. Had the records of M/s Ashapura Volclay Ltd not audited, the non payment of service tax would not have come to the knowledge of the Department. Hence, this is a clear case of suppression of facts with intent to evade payment of Service Tax. The Appellant is, therefore, rightly held liable for imposition of penalty under Section 78 of the Act. I, therefore, uphold imposition of penalty under Section 78 *ibid*.

8.1 Regarding imposition of penalty under Section 77, I find that the lower adjudicating authority has held the Appellant liable to penalty on the ground that the Appellant failed to pay service tax in accordance of the provisions of Section 68 of the Act and also failed to assess correct Service Tax liability. I concur with the findings of the impugned order and uphold imposition of penalty under Section 77 of the Act.

8.2 Regarding imposition of late fee under Section 70 of the Act, the Appellant has argued that since they were not required to pay any Service Tax, they had not filed any ST-3 returns and hence no fine can be imposed on them under Section 70 of the Act. I find that the Appellant had rendered the services, which was taxable. Hence, late fee under Section 70 of the Act has rightly been imposed on them for failure to file Service Tax returns.

8.3 It has been pleaded by the Appellant that there was a reasonable cause on their part in not depositing service tax since the confusion prevalent in the Service Tax law, being a new and emerging law, which prevented the Appellant from making payment of Service Tax on the impugned transactions. In this regard, I find that Service Tax was introduced in 1994 and was not that new in 2015-16 but more than 20 years old. Further, the provisions contained in Section 80 of the Act which stipulated not to impose penalties prescribed under Sections 76,77 and 78,

if the assessee proves that there was 'reasonable cause' for the failure which attracted the said penalties, has been withdrawn w.e.f. 14.5.2015 and hence, no benefit can be given now to the Appellant.

8.4 In addition to above legal position, I also find that the Appellant has only given arguments to get rid of payment of Service Tax and penalty imposed on them but has not come clean and has not made payment of Service Tax evaded by them. In view of these facts, I am of considered view that failure on the part of the appellant for not paying service tax was not caused due to any reasonable cause but is a clear case mind set to evade payment of service tax and hence, the present case does not merit any leniency.

9. In view of above, I uphold the impugned order and reject the appeal.

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

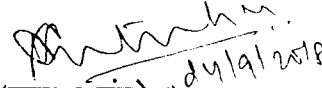
9.2 The appeal filed by the Appellant is disposed off as above.

सत्यप्रियत,



विपुल शाह

अधीक्षक (अपील्स)


(कुमार संतोष) 24/9/2018
आयुक्त(अपील्स)

By R.P.A.D.

To,
M/s Shri Ashapura Loaders,
Village Ler, Kukma,
Bhuj.

Copy to:-

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for kind information please.
- 2) The Commissioner, GST & Central Excise, Gandhidham Commissionerate, Gandhidham for information and necessary action.
- 3) The Joint Commissioner, GST & Central Excise, Gandhidham Commissionerate, Gandhidham for necessary action.
- ✓ 4) Guard File.