



:: आयुक्त (अपील) 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



सत्यमेव जयते

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रजिस्टर्ड डाक ए.डी.द्वारा :-

DIN - 20210564SX000000B768

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / OIO No.	दिनांक/ Date
	V2/11/BVR/2020	34/stax/Demand/2020-21	13.8.2020

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

BHV-EXCUS-000-APP-001-2021

आदेश का दिनांक / जारी करने की तारीख /
Date of Order: **24.05.2021** Date of issue: **27.05.2021**

श्री अखिलेश कुमार, आयुक्त (अपील), राजकोट द्वारा पारित/
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals),
Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं सेवाकर,
राजकोट / जामनगर / गांधीधाम। द्वारा उपयुक्तलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant
Commissioner, Central Excise/ST / GST,
Rajkot / Jamnagar / Gandhidham :

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

M/s. Tamboli Castings Ltd, Survey No. 207,208, Behind GEB Sub-station, Vartej, Bhavnagar.

इस आदेश (अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से 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 मामलों सीमा शुल्क, केन्द्रीय उत्पाद 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 (सिस्टट) 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, रुपये 5 लाख या उससे कम, 5 लाख रुपये या 50 लाख रुपये तक अथवा 50 लाख रुपये 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। स्वयं आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपये 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 सकती है 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, रुपये 5 लाख या उससे कम, 5 लाख रुपये या 50 लाख रुपये तक अथवा 50 लाख रुपये 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। स्वयं आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपये 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 fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.



- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जमाना विवादित है, या जमाना, जब केवल जमाना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि इस 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 गयी गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं-2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं 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 कोपनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश को पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक 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 छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो क्यूटी 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 संप्रपण 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 साथ '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 पडती 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 filed 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 टिकट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in



:: ORDER-IN-APPEAL ::

M/s Tamboli Castings Ltd, Bhavnagar (hereinafter referred to as "appellant") has filed Appeal No. V2/11/BVR/2020 against Order-In-Original No. 34/Service Tax/Demand/2020-21 dated 13.8.2020 (hereinafter referred to as "impugned order") passed by the Assistant Commissioner, Central GST Division, Bhavnagar-I (hereinafter referred to as "the adjudicating authority").

2. The facts of the case, in brief, are that the Appellant was engaged in the manufacture of investment casting and was registered with Central Excise Department having Registration No. AACCT1354MST001. During the course of audit of the records of the appellant undertaken by the Departmental officers, it was observed that they had paid Commission of Rs. 30,00,000/- to their Whole-time Directors in the F.Y. 2016-17. It appeared that the Appellant was required to discharge service tax on the said Commission paid to Whole-time Directors on reverse charge basis in terms of Notification No. 30/2012-ST dated 1.7.2012 amended by Notification No. 45/2012-ST dated 7.8.2012. On being pointed out, the Appellant paid service tax amount of Rs. 4,50,000/- along with interest of Rs. 1,72,727/- under protest vide Challan dated 4.5.2019.

2.1 Show Cause Notice No. VI(a)/8-57/Circle-IV/AG-21/2017-18 dated 28.2.2019 was issued to the Appellant calling them to show cause as to why service tax of Rs. 4,50,000/- 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 proposed imposition of penalties under Sections 76, 77 and 78 of the Act.

2.2 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who confirmed service tax demand of Rs. 4,50,000/- under Section 73(1) of the Act along with interest under Section 75 *ibid* and imposed penalty of Rs. 4,50,000/- under Section 78 of the Act and Rs. 10,000/- under Section 77 *ibid*.

3. Being aggrieved, the Appellant has preferred the present appeal, *inter-alia*, on the various grounds as under:

- (i) The Adjudicating Authority has not disputed that there exists employee-employer relationship in respect of salary and perquisites paid to Whole-time Directors and therefore, such salary and perquisites were outside the ambit of 'Service' as defined u/s. 65B(44) of the Act and



consequently not liable to service tax. As per Section 2(94) of the Companies Act, 2013, a Whole-time director is a director in whole-time employment of the company. Therefore, the emoluments paid to whole-time director, irrespective of the name or nomenclature given, is considered as directors' remuneration and not otherwise. The adjudicating authority failed to appreciate that the commission, which was given as a part of same Board Resolution under which salary and perquisites were given, was not on account of any other services but as a bifurcation of the overall figure of directors' remuneration. In other words, it was just a different modality of directors' remuneration and the same is not a service within the definition of "service" under Section 65B(44) of the Act. Therefore, the non-mention thereof in the Negative List does not matter when it is not considered as service in the first place.

(ii) That the total remuneration including commission paid to the Whole-time directors was subjected to the TDS under Section 192B of the Income Tax Act, which is applicable to the payment of salary. A challan showing the TDS from commission under the head salary' is enclosed. The Whole-time directors declared the entire remuneration (including commission) received from the appellant under the head 'Income from Salary' in their returns of income and the same has not been disputed by the Income Tax Authorities. A copy of return of income of one of the Whole-time directors is enclosed. Thus, when the commission paid to the Whole-time director were considered and accepted as salary by the Income Tax Department being one branch of the Government (Ministry of Finance), the another branch of the same Ministry of Government (Service Tax Department) cannot treat the same as services liable to the service tax and relied upon case law of (a) Rent Works India (P) Ltd. 2016 (43) S.T.R. 634 (Tri. - Mumbai).

(iii) When the adjudicating authority himself treated the salary and perquisites as not liable for service tax on the ground of existence of employee-employer relationship, there was no justification in treating the other component of the same whole-time directors' compensation i.e. commission as liable to service tax and relied upon following case laws wherein it has been held that payment of commission as a percentage of profit to the directors will not in any manner alter or



dilute the position of employer employee status and service tax is not leviable on payment of commission to the directors:

- (a) Bengal Beverages (P.) Ltd. – 122 [taxmann.com](#) 111
- (b) Maithan Alloys Ltd. - 2020 (33) G.S.T.L. 228 (Tri. - Kolkata)

(iv) The Adjudicating Authority invoked the extended period of limitation under the proviso to Section 73(1) on the ground that the appellant suppressed the facts regarding the commission paid to the Whole-time directors with the intention to evade service tax and the same came to notice of the Department only during the course of audit of the records. However, neither in the SCN nor in the adjudication order, it is specified as to which fact was suppressed by them. The fact of payment of commission paid to the Whole time Directors was duly disclosed in the books of accounts. Therefore, there was no suppression and extended period of limitation cannot be invoked.

(v) That the liability to pay service tax on commission paid to the directors was a debatable legal issue and the appellant was under bonafide belief that the said incomes were not liable for service tax. It was not a case of any malafide intention on the part of the appellant. The fact of having paid commission to the directors was duly disclosed in the audited accounts. Therefore, this is not a fit case for imposing penalty under Section 78 and relied upon following case laws:

- (a) Maa Shakti Party Plot – 33 [taxmann.com](#) 69
- (b) Mundra Port & Special Economic Zone Ltd. – 15 [taxmann.com](#) 33

4. Personal hearing in the matter was conducted in virtual mode through video conferencing on 10.3.2021. Shri Janmesh Bharvada, C.A. appeared on behalf of the Appellant and reiterated the grounds of appeal memorandum.

5. I have carefully gone through the facts of the case, grounds of appeal and written and oral submissions made by the appellant. The issue involved in the present appeal is whether commission paid to the Whole-time Directors by the appellant is chargeable to Service Tax and whether the appellant is required to discharge Service Tax under reverse charge mechanism in accordance with Notification No. 30/2012-ST dated 1.7.2012 amended by Notifications No. 45/2012-S.T. dated 7.8.2012 or not.

6. On going through the impugned order, I find that the Appellant had paid



Commission of Rs. 30,00,000/- to their Whole-time Directors during the F.Y. 2016-17. The adjudicating authority held that the Appellant is liable to pay service tax on the commission paid to their Whole-time Directors in terms of Notification No. 30/2012-ST dated 1.7.2012.

6.1 The Appellant has contended that the adjudicating authority failed to appreciate that there existed employee-employer relationship in respect of salary and perquisites paid to Whole-time Directors as a Whole-time director is a director in whole time employment of the company as per Section 2(94) of the Companies Act, 2013. The Appellant further contended that the commission was not on account of any other services but as a bifurcation of the overall figure of Directors' remuneration and that it was just a different modality of directors' remuneration and the same is not a service within the definition of "service" under Section 65B(44) of the Act. It was further argued that the total remuneration including commission paid to the Whole-time directors was subjected to the TDS under Section 192B of the Income Tax Act, which is applicable to the payment of salary and hence no service tax was payable on commission paid to Whole-time Directors.

7. I find that a company is liable to pay service tax in respect of services provided or agreed to be provided by a director of a company to the said company, as per Notification No. 30/2012-ST dated 1.7.2012 amended by Notifications No. 45/2012-S.T. dated 7.8.2012. However, if there exist employer-employee relation between the director and his company, then such service rendered by a director to his company is outside the purview of service tax, in view of exclusion provided in the definition of term 'Service' under Section 65B(44) of the Act, which reads as follows: -

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

- (a)
- (b) a provision of service by an employee to the employer in the course of or in relation to his employment;"

(Emphasis supplied)



[Handwritten signature]

8. On examining the facts of the case in backdrop of the above legal provisions, I find that the Appellant had paid commission to their Whole-time Directors. As per Section 2(94) of the Companies Act, 2013, "*whole-time Director includes a Director in the whole time employment of the company;*". The Whole-time Director is a key managerial position who is responsible for day to day functioning of the company. The Whole-time Director is paid remuneration which may include variable component in the form of commission as a percentage of profit based on performance of the company. So, there exist employer-employee relationship between the Whole-time Director and the company. In the present case, the commission paid to the Whole-time directors was subjected to TDS under Section 192B of the Income Tax Act, as per the evidences produced by the Appellant before me. I find that Section 192 of the Income Tax Act is the applicable provisions for TDS on payments to employees. Since, TDS was deducted on the commission paid to Whole-time Directors under Section 192 of the Income Tax Act, such commission has to be considered as directors' remuneration towards discharge of their duties as employees of the company irrespective of name or nomenclature used for such emoluments. I find that the Appellant has taken this plea before the adjudicating authority but the same was not considered. As the commission was paid to Whole-time Directors for provision of service in the capacity of employees, such service is outside the purview of service tax in terms of Section 65B(44) of the Act. I rely on the Order passed by the Hon'ble CESTAT, Kolkata in the case of Maithan Alloys Ltd. reported as 2020 (33) G.S.T.L. 228 (Tri. - Kolkata), where it has been held that,

"6. In the instant case, it is not in dispute that service tax has been duly paid on remuneration paid to directors who are not whole-time employee directors. The only dispute herein is for payment of remuneration to whole time directors, which is a fact on record. The provisions of Companies Act, 2013, contained in Section 2(94), duly defines 'whole-time director' to include a director in the whole-time employment of the company. A whole-time director refers to a director who has been in employment of the company on a full-time basis and is also entitled to receive remuneration. We further find that the position of a whole-time director is a position of significance under the Companies Act. Moreover, a whole-time director is considered and recognized as a 'key managerial personnel' under Section 2(51) of the Companies Act.

Further, he is an officer in default [as defined in clause (60) of Section 2] for any violation or non-compliance of the provisions of Companies Act. Thus, in



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our view, the whole-time director is essentially an employee of the Company and accordingly, whatever remuneration is being paid in conformity with the provisions of the Companies Act, is pursuant to employer-employee relationship and the mere fact that the whole-time director is compensated by way of variable pay will not in any manner alter or dilute the position of employer-employee status between the company assessee and the whole-time director. We are thoroughly convinced that when the very provisions of the Companies Act make whole-time director (as also in capacity of key managerial personnel) responsible for any default/offences, it leads to the conclusion that those directors are employees of the assessee company.

7. Further, in the present case, the appellant has duly deducted tax under Section 192 of the Income-tax Act which is the applicable provisions for TDS on payments to employees. This factual and legal position also fortifies the submission made by the appellant that the whole-time directors who are entitled to variable pay in the form of commission are 'employees' and payments actually made to them are in the nature of salaries. This factual position cannot be faulted in absence of any evidence to the contrary. The submission of Ld. DR as well as the finding made by the Commissioner in the impugned order that since the whole-time directors are compensated by way of variable pay and hence not employees, does not have any legal basis and is completely misplaced, and the same cannot be sustained. The decision of the Tribunal in *Rent Works India* (supra) has clearly set the legal position that when the Income Tax Department considers payment in the nomenclature 'consultancy fee' as salaries, on which TDS is also made, the said payments cannot be said towards rendition of taxable service for levy of service tax. The decision in case of *PCM Cement Concrete Pvt. Ltd.* (supra) has set the legal proposition that consideration paid to whole-time directors would be treated as payment of salaries inasmuch as there would be employer-employee relationships and in such case the levy of service tax cannot be sustained.

8. In view of the above discussions and the settled legal judicial precedence and provisions contained in statutes referred to above, demand of service tax on remuneration paid to whole-time directors cannot be sustained and hence set aside. Since demand of service tax is set aside, penalty and interest are also not sustainable.

(Emphasis supplied)

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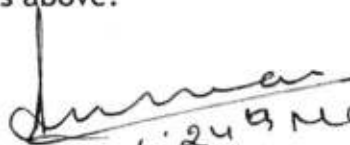


8.1 By respectfully following the above order of the Hon'ble Tribunal, I hold that the Appellant is not liable to pay service tax on commission paid to their Whole-time Directors on reverse charge basis. I, therefore, set aside the confirmation of demand of Rs. 4,50,000/-. Since, demand is set aside, recovery of interest and imposition of penalties under Sections 77 and 78 of the Act are also required to be set aside and I order accordingly.

9. In view of above, I set aside the impugned order and allow the appeal.

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

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


24 May, 2021
(Akhilesh Kumar)
Commissioner (Appeals)

Attested



(V.T.SHAH)

Superintendent (Appeals)

By RPAD

To, M/s Tamboli Castings Ltd Survey No. 207,208, Behind GEB Sub-station, Vartej, Bhavnagar.	सेवा में, मे० तंबोली कास्टिंग्स लिमिटेड, सर्वे न० 207,208, जीईबी सब स्टेशन के पीछे, वरतेज, भावनगर।
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प्रतिलिपि :-

- 1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
- 2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
- 3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर-1 मण्डल, को आवश्यक कार्यवाही हेतु।
- 4) गार्ड फ़ाइल।



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