



::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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रजिस्टर्ड डाक ए.डी.द्वारा:- DIN-20211064SX0000924649

क	अपील / फाइल नम्बर/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/1 /RAJ/2021	04/AC/MUNDRA/2020-21	17-09-2020

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

KCH-EXCUS-000-APP-254-2021

आदेश का दिनांक / Date of Order:	29.10.2021	जारी करने की तारीख / Date of issue:	03.11.2021
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श्री अखिलेश कुमार, आयुक्त (अपील्स), 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 उपरलिखित 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. Momay Labour Contractor, Proprietor: Bharatsinh Jadeja, C/o Bhatiyani Enterprise, N.No.209, Navapura Near Darbargadh, Mandvi Dist: Kutchh- 370465

इस आदेश (अपील) से व्यक्ति 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 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 (मिस्टेट) 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 माँग, ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 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। स्वयं 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 माँग, ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 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। स्वयं 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 is more than five lakhs or less, Rs.5000/- 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 महायुक्त 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 रुपये से अधिक न हो।

- केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
- धारा 11 डी के अंतर्गत रकम
 - सेनवेट जमा की ली गई गलत राशि
 - सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं- 2) अधिनियम 2014 के जारेंच से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील की लागू नहीं होगी।/

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 :

- amount determined under Section 11 D;
- amount of erroneous Cenvat Credit taken;
- 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 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, जहाँ 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) मुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो छूटी 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 समायाचिधि 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 साथ-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 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 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-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 बर्णित एवं अन्य संबंधित 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 present appeal has been filed by M/s. Momai Labour Contractor, Proprietor: Shri Bharatsinh Jadeja, Village: Merau, Taluka: Mandvi, District: Kutch (hereinafter referred to as "appellant") against Order-In Original No. 04/AC/MUNDRA/20-21 dated 17.09.2020 (hereinafter referred to as "impugned order") passed by the Assistant Commissioner, Central Goods and Service Tax, Mundra Division, Mundra Kutch (hereinafter referred to as "adjudicating authority").

2. The facts of the case, in brief, are that during the course of audit of records of M/s. Ashapura Minechem Ltd., Kutch, it was found that the Appellant had rendered taxable services from F.Y. 2008-09 to F.Y. 2012-13 to M/s. Ashapura Minechem Ltd., Kutch without getting Service Tax registration and had not discharged Service Tax. It was contention of the audit that the appellant had provided service under Manpower Recruitment or Supply service as defined under erstwhile Section 65 (68) of the Finance Act, 1994 read with Section 65 (105) (k) of the Act to M/s Ashapura Minechem Ltd. They had received consideration of Rs. 60,37,644/- from the said firm as detailed in the SCN on which they had not paid service tax amount of Rs. 6,71,314/-.

2.1 Subsequently, Show Cause Notice No. V.ST/AR-IV/GDM/ADC/172/2013 dated 12.09.2013 was issued to the Appellant for demand and recovery of Service Tax amount of Rs. 6,71,314/- 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 the impugned order dated 17.09.2020 whereby the Service Tax demand of Rs. 6,71,314/- was confirmed under Section 73(1) of the Act along with interest under Section 75 ibid. Penalty of Rs. 10,000/- was imposed under Section 77 along with penalty of Rs. 6,71,314/- under Section 78. Late fee as prescribed under Section 70 of the Act was also directed to be recovered.

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

- 1) The appellant had done job work of processing of goods on behalf of their clients in their factory premises;
- 2) The activities carried out by them were in relation to manufacturing process of Processed Blended Bentonite;
- 3) They made contract with M/s. Ashapura Minechem Ltd., Kutch



on 01.04.2008 and the same was composite work order for conversion of crude Bentonite to blended Bentonite;

- 4) The production/processing of goods on behalf of the client is under 'Business Auxiliary Services' but the said service excluded the activities related to amounts to manufacture;
- 5) As per Notification no. 08/2005-Service Tax, such processed goods cleared on payment of Central Excise Duty then there is no question for payment of Service Tax on such activities provided by them;
- 6) They had carried out job work at premises of their clients and for that they received jobwork charges on MT bases i.e. on the basis of the quantity of Bentonite manufactured by them, as per contract;
- 7) The allegation regarding suppression of facts by the Lower Adjudicating Authority is not acceptable as their activities are not suppressed as their client registered with Central Excise Department and regularly filed returns and paid the duty time to time;
- 8) The Show Cause Notice is time barred as audit officer had conducted on 13/14.11.2009 and present Show Cause Notice was issued on 12.09.2013;
- 9) The activities carried out by them at the premises of their client was job work i.e. services for manufacture of the blended Bentonite and not merely supply of manpower;
- 10) There was no 'employer employee relationship' existed between the appellant and the individual labour engaged by them;
- 11) Their service provided to their clients was not falls under the purview of 'Manpower recruitment or supply agency services';
- 12) They had their own labour and they all work together to undertake a job work of manufacture of blended Bentonite;
- 13) They relied upon the decisions given by the various appellate authorities PSL Corrosion Control Semces Ltd. - 2008 (12) STR 504 (Tri-Ahmd.) and Fire Controls - 2010 (19) STR 99 (Tri.-Bang);
- 14) They also relied upon the decision issued by the Commissioner (A), Central Excise, Rajkot in the case of Shri Jadeja Vesaljee Velubha of Mudra Taluka vide OIA NO.RJT-EXCUS-000-APP-09-14-15 dated 11.04.2014 wherein all the demand of Service Tax dropped. The present case have contained similar issue as contained in the case cited;
- 15) They also stated that they had not followed the provisions under Section 67,68,69 and 70 of the Finance Act, 1994 and Rule



4A and 5 of the Service Tax Rules, 1994 as they had not providing any taxable services as manufacture services are exempted;

16) They stated that the Lower Adjudicating Authority has not given any opportunity to be heard in person viz. new adjudicating authority;

17) They also stated that if they had supplied, "Manpower recruitment or supply agency services' to their clients then there was no liability for payment of Service Tax on them as from 01.07.2012 to 31.03.2013 the same service attracted under Reverse Charge Mechanism and their client was liable for payment of Service Tax on such services;

3.2 The appellant has filed a Miscellaneous Application for condoning the delay in filing of present appeal for 2 days late with a reason that due to pandemic Covid-19 situation, he could not file appeal in time for restriction in travelling and tracing 7 years old records.

4. Personal Hearing in the matter was held on 18.08.2021 in virtual mode. Shri R. Subramanya, Advocate, appeared on behalf of the appellant. He reiterated the submissions as made in the appeal memorandum. He relied upon the decision given by the Commissioner (Appeal), Rajkot in the case of Shri Jadeja Vesaljee Velubha of Mudra Taluka.

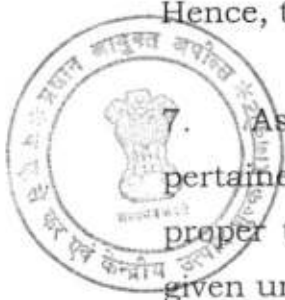
Findings: -

5. I have carefully gone through the facts of the case, the impugned order, written as well as oral submissions made by the Appellant. It is observed that the issue to be decided in the present appeal are whether the services rendered by the Appellant are liable to Service Tax under the category of "Manpower Recruitment or Supply Agency Service" or not. The demand pertains to period Financial Year 2008-09 to Financial Year 2012-13.

6. First of all, I take up the application for condonation of delay in filing the appeal by 2 days. I find that the applicant has submitted that the appeal was filed late due to pandemic situation in Covid 19, which appears to be genuine. Hence, the delay in filing appeal is condoned.

7. As regards the issue on merits, since the major portion of demand pertained to period prior to 01.07.2012, i.e., pre-negative list regime, it would be proper to examine the definition of "Manpower Recruitment or Supply Agency" given under erstwhile Section 65(68) of the Act, which reads as under:

" 'manpower recruitment or supply agency' means any person engaged in



dy

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

7.1. Further, the term 'taxable service' has been defined under erstwhile Section 65(105)(K) of the Act *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."

7.2. Further, the term 'supply of manpower' has been defined under erstwhile 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"

7.3. It is observed from the legal provisions above that there has to be (i) supply of manpower, temporarily or otherwise to another person, and (ii) manpower so supplied has to work under superintendence or control of the client, in order to get classified under the taxable category of 'Manpower Recruitment or Supply Agency Service'.

8. Further, the terms of Work Order dated 01.04.2008 made between the appellant and M/s. Ashapura Minechem Ltd., Kutch are as under:

1. a. *Unload the Bentonite lumps- receiving truck from Mines.*
b. *Blend the Material as per Company's requirement.*
c. *Fill the Hopper of Raw Material.*
d. *Operate the Grinding Machine.*
e. *Pack the finished material as per company's instruction either in Jumbo Bag, 50 Kg Bag or 25 Kg Bag.*
f. *Stacking the packed material in finished good warehouse.*
g. *Clean the premises with the help of Cleaning Machine.*
h. *Loading the Pallets/ Bags in to containers or trucks.*
2. *Period: Period shall be open from 01st April-08*
3. *Rate: Depend upon process & work on Per MT basis per day of finished Goods produced by you.*
4. *Supervision: All your activities will be supervised by our Site in charge/ Supervisor and you shall obey any instruction given by him*
5. *Working time: you shall work in all 3 shifts. Normal Shift shall be comprise of 8 Hrs. However you can extend your working period to any time with the prior permission from Mines manager/site in charge.*
6. *Payment terms: You may engage any number of skilled / un-skilled workers as per your requirement, but the rate agreed upon as above will remain the same i.e. based upon the quantity of final product manufactured by you. You shall submit bill before 10h of every month for the actual quantity produced by you and payment between 11h and 20th every month.*

8.1. It is observed from the Work Order/Contract above that the appellant had carried out following activities in the factory of M/s. Ashapura Minechem Ltd., Kutch:

- to unload the Bentonite in lump from truck;
- to fill the Hopper of raw material;



- to blend the materials as per requirement of company;
- to operate the grinding machine;
- to pack the finished goods in bags of various sizes;
- to stack the said packed material in the godown and loaded on the truck or containers as per direction of the company

To undertake all the above works, the appellant was free to hire any number of persons and overall supervision on the work was done by the supervisors of M/s Ashapura Minechem Ltd., Kutch.

8.2. It is observed that the 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 Minechem Ltd., Kutch. However, I find that no such corroborative evidences has been brought on record. It is apparent from the Work Order dated 01.04.2008 discussed above that the appellant had undertaken the activities relating to processing of Bentonite as per requirement of company till packing of the finished goods in bags of various sizes and it's loading on the truck or containers as per direction of the company. The appellant had been paid the amount on quantum basis i.e. production of per MT of Blended Bentonite. It is further observed that the work order does not mention the supply of man power in specific terms nor the payment has been made on the basis of number of man power supplied.

8.3. It is further observed that the adjudicating authority has incorrectly come to a conclusion that manpower was supplied by the Appellant with remark that the Work Contract in question was without validation of time limit and no specific rate for work done by the appellant, was fixed. Hence, the Work Order in question produced by the appellant was held to be incomplete, inconclusive and ambiguous. In this regard, I find that the adjudicating authority has failed to establish that the Appellant had supplied manpower to M/s. Ashapura Minechem Ltd., Kutch, which was under superintendence or control of the service recipient in any manner. It is on record that the Appellant has executed the work as prescribed under Work Order dated 01.04.2008 and for executing such work they hired man. 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 clearly establishes execution of work/task as per the Work Order and for that purpose they were hiring man force and there is no evidence of supply of any manpower per se by the Appellant. Therefore, it is held that the services rendered by the appellant cannot be classified under the taxable category of 'Manpower Recruitment or Supply Agency' under erstwhile Section 65(68) of the Act as proposed in the SCN and confirmed in the impugned order for period up

to 30.06.2012.

8.4. I rely on the 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.

8.4.1. I also rely on the 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."

8.4.2. I further rely on the 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 UO/ 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."

8.5. 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)

8.6. By respectfully following the above case laws and Board's Circular, I hold that the services rendered by the Appellant to M/s. Ashapura Minechem Ltd., Kutch are not classifiable under the service category of "Manpower Recruitment or Supply Agency" as contained under erstwhile Section 65(68) of the Act till 30.06.2012. The demand confirmed in the impugned order to that extent is not legally sustainable and is liable for being set aside.

8.7. It is further observed that in the negative list regime w.e.f. 01.07.2012, the term service has been defined under Section 65B (44) of the Finance Act, 1994 to mean any activity carried out by a person for another for consideration, and includes a declared service, but shall not include various activities mentioned in that section. Moreover, Section 66D of the Finance Act, 1994 contains Negative List of Services and at clause (f) includes any process amounting to manufacture or production of goods.

8.8. It the contention of the appellant that their services attract exemption from payment of Service Tax as they were doing job work and that the final product were cleared on payment of Central Excise Duty by the principal manufacture. The definition of job work given under Rule 2(n) of the CENVAT Credit Rules, 2004 is reproduced below:

(n) "job work" means processing or working upon of raw material or semi-finished goods supplied to the job worker, so as to complete a part or whole of the process resulting in the manufacture or finishing of an article or any operation which is essential for aforesaid process and the expression "job worker" shall be construed accordingly;

I find from the impugned order that though this contention was raised in defence reply, the adjudicating authority has not given any findings on it. Further, the appellant has also not submitted any documents to arrive at a conclusion in this regard. The Work Order made between appellant and M/s. Ashapura Minechem Ltd., Kutch do indicate that they were providing activities in relation to

processing of Bentonite as per requirement of company till packing of the finished goods in bags of various sizes and it's loading on the truck or containers as per direction of the company but in absence of any discussion in the impugned order, it is not possible to come to a conclusion that they were acting as job worker.

8.9. However, it is observed that crude Bentonite is classifiable under CETSH 2508.10 of the Central Excise Tariff Act, 1985 and after undergoing the chemical processes of acid or alkali activation, a new chemical product, processed Bentonite classifiable under CETSH 3802.90 is produced. Since there is a change in classification in Tariff, I am of the view that the conversion process amounts to manufacture. My views are bolstered by the clarification given by the BOARD vide Circular No. 32/2002-Cus., dated 10-6-2002 issued vide F. No. 528/22/2001 -CUS. (TU), wherein it has been stated as follows:

"2. The matter has been examined. Goods, namely, "Bentonite" in natural or crude form is classifiable under sub-heading 2508.10 whereas decolourising earth would be classifiable under sub-heading 2508.20. Bentonite is stated to be naturally occurring clay predominant in Indonesia, Germany, Japan, USA, and India. India is, however, stated to be importing bentonite and its derivatives for use in cosmetics, medicinal formulations, drilling industry and food industry. HS Explanatory Notes to heading 25.08 states that it includes all natural clay substances, but it excludes activated clay from the scope of the heading.

3. Clay Bentonite in crude form is stated to be made effective by activating it with acid or alkali. Some of the mineral acids used for acid activation are hydrochloric acid, sulphuric acid, etc. After the acid activation process, it is stated that the molecular structure undergoes modification. The acid activation process is stated to be effective in removing the deficiencies by creating voids in the crystal structure of bentonite by replacing bigger atoms of molecules, like, aluminium, magnesium, iron, etc., by smaller atoms of hydrogen and such an activated bentonite is stated to have specific PH ranging from 2 to 5 depending on the brand and grade of the product. The activation is sometimes also done by soda ash resulting in a product which is alkaline in nature with a PH ranging from 8.5 to 10.5. After acid or alkali activation, the bentonite undergoes washing, grinding, heating and packing resulting in a new chemical product, namely, bleaching earth/activated clay, etc. This finished product is said to have properties like adsorptive capacity, acid properties, catalytic properties, ion exchange capacity and particle size distribution which is highly useful for various industrial applications like purification, filtration, bleaching, etc. HS Explanatory notes to heading 38.02 states that the heading includes activated clays and activated earths, but excludes natural clayey substances.

4. Keeping the foregoing view, the Board is of the considered opinion that such goods misdeclared as 'decolourising earth'/processed bentonite are classifiable under CTH 3802.90 as 'activated bleaching earth'."

Since the appellants are undertaking the activity related to conversion of crude Bentonite lumps into the processed Bentonite at the premises of M/S Ashapura Minechem Ltd., from the raw materials and machinery supplied by said Company and after completion of the conversion process, such processed Bentonite is packed in to various size of packing Bags and stacked in the



premises and loaded into container or lorry for dispatch, I find that the activities/services provided by the appellant are nothing but the activities falling under the category of those 'amounting to manufacture'. Hence, they are held to be exempt from payment of Service Tax as Negative List of Service under Section 66 D (f) of the Finance Act, 1994. The demand confirmed in the SCN is liable to be set aside for the period since 01.07.2012.

8.10. Further, the appellants have also contented that they were charging / billing in terms of quantum of production or tonnage basis and were receiving payments accordingly and not on the work done on hourly basis and had also submitted the copies of some invoices in support of their plea. On going through the copies of the invoices and work contract/order submitted by the appellant, I find merit in the argument of the appellant. I find that the essence of the mutual agreement between the appellant and M/S Ashapura Minechem Ltd., Kutch, was execution of work as per contract and invoices were not for utilization of services of an individual.

8.11. In view of discussion made above, I set aside the demand of service tax confirmed in the impugned order. As the demand of service tax is set aside, the question of levy of interest and penalty do not arise. Accordingly, the same are set aside.

9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
9. The appeal filed by the Appellant is disposed off as above.

F.No. V.2/1/GDM/2021
Date: 29.10.2021

Munna
29th October, 2021
(अखिलेश कुमार)
आयुक्त(अपील्स)

By R.P.A.D.

To,
M/s. Momai Labour Contractor,
Proprietor: Shri Bharatsinh Jadeja,
Village: Merau, Taluka: Mandvi, District: Kutch

अ.न. सी. गजरीया
(अधीक्षक)
leja
अ.न. सी. गजरीया
N. C. GAJARIYA
SUPERINTENDENT

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. Assistant Commissioner, Central Goods and Service Tax, Mundra Division, Mundra Kutch for necessary action.
4. Guard File.



