



::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 / 2<sup>nd</sup> 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

DIN-20221264SX000000AE60

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	GAPPL/COM/STP/1463/2022	BHV-EXCUS-000-JC-PK- 024-2021-22	30-03-2022

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

**BHV-EXCUS-000-APP-111-2022**

आदेश का दिनांक / Date of Order:	30.11.2022	जारी करने की तारीख / Date of issue:	02.12.2022
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श्री शिव प्रताप सिंह, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Shlv Pratap Singh, 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. Rajdebhai Lakhmanbhai Der,, 01, At Hindorna,, Near Paramount Hotel, Rajula, Amreli-365560

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 सम्बंधित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर० के० 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 असारवा अहमदाबाद- 380016 को की जानी चाहिए। /

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

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहाँ उत्पाद शुल्क की माँग, ब्याज की माँग 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 रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहाँ संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थान 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 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, जहाँ सेवाकर की माँग, ब्याज की माँग 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 रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहाँ संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थान 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 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/-



- (ii) 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.

- (iii) 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 8 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 विचारार्थीन स्थापन 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 को पुनरीक्षण आवेदन :

**Revision application to Government of India:**

इस आदेश को पुनरीक्षणयाविका 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 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 समायाविधि पर या बाद में पारित किए गए हैं। /  
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

- (v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /  
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Chiallan 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 रूपय या उससे कम हो तो रूपय 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपय से ज्यादा हो तो रूपय 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 चाहिए। इस तथ्य के हवि हुए भी को लिखी पढ़ी 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 स्थान 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 संबंधित मामलों को सम्मिलित करने वाले नियमों को 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](http://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](http://www.cbec.gov.in).



**:: अपील आदेश / ORDER-IN-APPEAL ::**

(hereinafter referred to as "Appellant") has filed the present Appeal against Order-in-Original No. BHV-EXCUS-000-JC-PK-024-2021-22 dated 30.03.2022 (hereinafter referred to as 'impugned order') passed by the Joint Commissioner, Central GST, Bhavnagar (hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that the Income Tax Department provided data/ details of various persons, who declared in their Income Tax Returns for financial year 2015-16 to have earned income by providing services classified under various service sectors. The Income Tax Department also provided data of Form 26AS showing details of total amount paid/ credited under Section 194C, 194H, 194I & 194J of the Income Tax Act, 1961 in respect of various persons which depicted that such persons had earned income from providing services. The said data also contained the details of the Appellant who had not filed S.T.-3 returns. The jurisdictional Superintendent issued letter dated 09.09.2020 and email calling for the information/ documents for the financial year 2015-16. Since no reply/ response was given by them, the Service Tax was determined on the basis of data/ details provided by the Income Tax department.

3. The above investigation culminated into Show Cause Notice dated 29.12.2020 proposing to demand Service Tax of Rs. 50,39,184/- including all cess under Section 73(1) of the erstwhile Finance Act, 1994 (hereinafter referred to as 'the Act') by invoking extended period alongwith interest under Section 75 of the Act from the Appellant. It was also proposed to impose penalty under Section 77(2), 77 (1)(c) and Section 78 of the Act.

4. The adjudicating authority vide the impugned order confirmed Service Tax demand of Rs. 50,39,184/- under Section 73(1) by invoking extended period of 5 years along with interest under Section 75 of the Act. The adjudicating authority imposed penalties of Rs. 10,000/- each under Section 77(2) and Section 77 (1)(c) of the Act. The penalty of Rs. 50,39,184/- was also imposed upon the Appellant under Section 78 of the Act.

5. Being aggrieved, the Appellant has preferred the present appeal on various grounds as stated below:

- (i) The Show Cause Notice and impugned order has been issued without investigation and only based on the data provided by income tax department as per TDS and Income Tax return is not sustainable in law as no investigation and effort to know whether the said amount is towards providing service or if there



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the service then which type of service has been provided by them and Service Tax is payable or otherwise on such services. The Appellant issued advisory not to issue notices without any verification and notices must not to be given due to ITR-TDS and Service Tax amounts are distinct. They placed reliance on Ravindra Pratap Thareja Vs. ITO reported as TS-657-ITAT-2015(JAB), Court on its own motion Vs. CIT (2013) 352 ITR 273, CCE Vs. Mayfair Resorts (2011) 22 STR 263 and Synergy Audio Visual Workshop P. Ltd. Vs. Commissioner of S. T. Bangalore 2008 (10) STR 578, Amrish Rameshchandra Shah Vs. UOI and Others - 2021-TIOL-583-HC-MUM-ST. They also relied upon CBIC instruction dated 26.10.2021 and Order-In-Appeal No. BHV-EXCUS-000-APP-022-2021-22 dated 31.03.2022 issued by the then Commissioner (Appeals), Rajkot. They further stated that Hon'ble CESTAT Kolkata in the case of M/s. Luit Developers Pvt. Ltd. Vs. Commissioner of CGST & C.Ex., Dibrugarh reported in 2022-TIOL-180-CESTAT-KOL.

(ii) The adjudicating authority has issued the order on the basis of facts and his own interpretations which were not a part of the Show Cause Notice as there was no specific charge for any particular service or any ground which has been mentioned in the impugned order. The impugned order has been issued not on the basis of any material evidence available on records or any investigation but just negating the submissions made by them. The Adjudicating Authority ignored the instructions issued by the Board and mentioned such facts and taken such grounds which was never a part of the Show Cause Notice. There is an established principle that the facts and allegations which have not been mentioned in the Show Cause Notice, should not be a part of Order-In-Original. The impugned order has travelled beyond the scope of Show Cause Notice and they rely on Huhtamaki PPL Ltd. Vs. C.Ex. & S.T., Surat-I reported in 2021(50) GSTL 309 (Tri.-Ahmd.), R. Ramadas vs. Joint Commissioner of C.Ex., Puducherry-2021 (44) GSTL 258 (Mad.), Mackintosh Burn Ltd. Vs. Commissioner of Service Tax, Kolkata-2020 (35) GSTL 409 (Tri.-Kolkata), Swapne Nagari Holiday Resort Vs. Commissioner of C.Ex. Raigad-2019 (21) GSTL 559 (Tri.-Mumbai), ST Electricals Pvt. Ltd. Vs. Commissioner of Central Excise, Pune-I-2019 (20) GSTL 273 (Tri.-Mumbai), Ajanta Manufacturing Ltd. Vs. Commissioner of Customs, Kandla-2019 (369) ELT 1067 (Tri.-Ahmd.).

(iii) They are owner of different trucks and are providing trucks on hire basis to different persons who are providing services as "Goods Transport Agents" and as such the income received by them is exempted from payment of Service Tax.

The Adjudicating Authority has also acknowledged these facts but had mentioned that the Appellant had not provided any documentary proof to prove the stand that they have provided their truck to other transporter on hire basis.



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They had provided all the details evidencing ownership of the trucks, copies of ~~consignment notes LRs showing name of truck owner and driver as 'Raidebhai L Der'~~ alongwith proof. The Adjudicating Authority had relied on 'declared service' but failed to appreciate that the services are exempted vide entry No. 22(b) of Notification No. 25/2012-Service Tax dated 20.06.2012. They relied on Order-In-Appeal No. BHV-EXCUS-000-APP-022-2021-22 dated 31.03.2022 issued by the then Commissioner (Appeals), Rajkot.

(iv) The value arrived for demand of Service Tax by resorting to Section 72 of the Act is in gross violation of the mandate and procedures mentioned in Section 72. They relied on judgment of Principal Commissioner, S.T. Delhi-I Vs. Creative Travel Pvt. Ltd. - 2016 (45) STR 33 (Del.) Carlsberg India Pvt. Ltd. Vs. Commissioner of Service Tax, Delhi - 2016 (42) STR 55 (Tri.-Del.), Coca Cola (I) Pvt. Ltd. Vs. Commissioner of Service Tax, Delhi-2015 (40) STR 547 (Tri.-Del.), N.B.C. Corporation Ltd. Vs. Commissioner of Service Tax-2014 (33) STR 113 (Del.).

(v) The charge of non disclosure of true and correct details is baseless and extended period cannot be invoked. They placed reliance in the case of Oriental Insurance Company Ltd. Vs. Commissioner, LTU, New Delhi-2021-TIOL-307-CESTAT-DEL, Blackstone Polymers Vs. Commissioner of Central Excise, Jaipur-II - 2014 (301) ELT 657 (Tri.-Del.), Kirloskar Oil Engines Ltd. Vs. Commissioner of Central Excise, Nasik- 2014 (178) ELT 998 (Tri.-Mumbai), Hindalco Industries Ltd. Vs. Commissioner of C.Ex., Allahabad-2003 (161) ELT 346 (Tri.-Del.), Circular No. 1053/02/2017-CX, F.No. 96/1/2017-CX.I dated 10.03.2017.

(vi) No penalty imposable under Section 77(1) and 78 of the Act and they relied on judgment in the case of Tamilnadu Housing Board Vs. Collector of Central Excise, Madras as reported at 1994 (74) ELT 9 (SC), Commissioner of C.Ex., Mysore Vs. Town Hall Committee, Mysore City Corporation-2011 (24) STR 172 (Kar.), BSNL Vs. Commissioner of Service Tax, Bangalore - 2008 (9) STR 499 (Tri.-Bang.), Commissioner of C.Ex., Ludhiana Vs. Instant Credit-2010 (17) STR 397 (Tri.-Del.)

6. Personal hearing in the matter was held on 29.11.2022. Shri R. C. Prasad, consultant appeared for personal hearing and handed over written submissions. He reiterated the contents thereof and the submissions made in the appeal. He submitted that the impugned order was passed without according mandatory pre-Show Cause Notice consultations. The Adjudicating Authority has passed the order denying claim of the Appellant of renting of trucks to GTA stating lack of documentary evidence. However, the Appellant has submitted LR for the parties mentioned in Form 26AS, which proves their credentials as GTA. Therefore, the



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Appellant is eligible for exemption from Service Tax. In view of this, he requested to set aside Order-In-Original and allow the appeal.

6.1 In written submission produced at the time of personal hearing, the Appellant contested that they are providing trucks on hire basis to different persons who are providing services as 'goods transport agents' and as such the income received by them is exempted from payment of Service Tax. These facts were submitted to the Adjudicating Authority and he acknowledge the same at para 3.8 of the impugned order but not granted the benefit by stating reason of non submission of documentary proof. They have submitted sample copies of LR/CN of the GTA to whom they have provided truck on rent basis. They further stated that their service is exempted by way of entry No. 22(b) of Notification No. 25/2012-Service Tax dated 20.06.2012. The appellant further stated that the mandatory process of holding pre-notice consultation was not followed before issue of the Show Cause Notice and they rely on Amadeus India Pvt. Ltd. Vs. Pr. Commissioner, Central Excise, Service Tax and Central Tax Commissionerate-2019-TIOL-1027-HC-DEL-ST, Back Office IT Solutions Pvt. Ltd. Vs. UOI and others-2021-TIOL-867-HC-DEL-ST, Dharamshil Agencies Vs. UOI - 2021-TIOL-1563-HC-AHM-ST.

7. I have carefully gone through the case records, impugned order, appeal memorandum and written submission filed during the course of personal hearing by the Appellant. The issue to be decided in the case on hand is that whether the Appellant is liable to pay service tax on activity carried out by them or not.

9. I find that the Adjudicating Authority found that the activity of the Appellant is covered under Section 65B(44) of the Act as well as under clause (f) of Section 66(E) of the Act and held that the Appellant was liable to pay service tax on transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods. I find that the subject issue was clarified by the Board vide Circular No. 198/08/2016-Service Tax dated 17.08.2016 which is re-produced below for reference:

**Subject: Service tax liability in case of hiring of goods without the transfer of the right to use goods.**

*In terms of sub-clause (d) of clause (29 A) of Article 366 of the Constitution of India, the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration is deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. It follows that such transactions will be liable for Sales Tax/Value Added Tax. In terms of section 66E(f) of the Finance Act, 1994, transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods is a "declared service" and hence liable to service tax. In this regard some representations have been received.*

2. The matter has been examined. I am directed to draw your attention to the fact that in any given case involving hiring, leasing or licensing of goods, it is essential to



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determine whether, in terms of the contract, there is a transfer of the right to use the goods. Further, the Supreme Court in the case of *Bharat Sanchar Nigam Limited vs Union of India*, reported in 2006(2) STR 161 SC, had laid down the following criteria to determine whether a transaction involves transfer of the right to use goods, namely,

- a. There must be goods available for delivery;
- b. There must be a consensus ad idem as to the identity of the goods;
- c. The transferee should have a legal right to use the goods – consequently all legal consequences of such use, including any permissions or licenses required therefor should be available to the transferee;
- d. For the period during which the transferee has such legal right, it has to be to the exclusion to the transferor this is the necessary concomitant of the plain language of the statute – viz. a “transfer of the right” to use and not merely a licence to use the goods;
- e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same right to others.

3.1 This criteria must invariably be followed and applied to cases involving hiring, leasing or licensing of goods. The terms of the contract must be studied carefully vis-a-vis the criteria laid down by the Supreme Court in order to determine whether service tax liability will arise in a given case. It is not possible to either give an exhaustive list of illustrations or judgements on this issue. Cases decided under the Sales Tax /VAT legislations have to be considered against the background of those particular legislative provisions and terms of contract in that case.

3.2 The following case law may also be referred to. These should not be applied mechanically but their applicability to the facts of a given case, the terms of the contract in the given case and the criteria laid down by the Supreme Court should be examined carefully.

3.2.1. *Commissioner VAT vs International Travel House Ltd – Delhi High Court judgement dated 8-9-2009 in ST Appeal 10/2009.*

3.2.2 *Rashtriya Ispat Nigam Limited vs Commercial Tax Officer reported in 1990(77) STC 182 and State of Andhra Pradesh vs Rashtriya Ispat Nigam Limited reported in 2002 (126) STC 114*

3.2.3. *State Bank of India vs State of Andhra Pradesh reported in 1988 (70) STC 215 A.P*

3.2.4 *Ahuja Goods Agency vs State of Uttar Pradesh reported in 1997 (106) STC 540*

3.2.5 *Lakshmi AV Inc vs Assistant Commercial Tax Officer reported in 2001(124) STC 426 Karnataka*

3.2.6 *G. S. Lamba and Sons vs State of Andhra Pradesh reported in 2015(324) ELT 316*

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4.1 There will also be cases involving either a financial lease or an operating lease. The former generally involves a transfer of the asset and also the risks and rewards incident to the ownership of that asset. This transfer of the risks and rewards is also recognised in accounting standards. It is generally for a long term period which covers the major portion of the life of the asset and at the end of the lease period, usually the lessee has an option to purchase the asset. The lessee bears the cost of repairs and maintenance and risk of obsolescence also rests with him. In contrast, an operating lease does not involve the transfer of the risks and rewards associated with that asset to the lessee. It is for a short term period and at the end of the lease period the lessee does not have an option to purchase the asset. The cost of repairs, maintenance and obsolescence rests with the lessor.

4.2. Similarly in the aircraft industry there are “dry leases” and “wet leases”. Generally speaking, “wet leases” may involve short term provision of an aircraft along with crew, maintenance and insurance while the lessee bears other operating expenses. In contrast, a “dry lease” is for a relatively longer term and involves the provision of an aircraft only without crew.

4.3 The above two situations have been elaborated only to explain and emphasize the diverse nature of such transactions. There can be variations and in some cases, a combination.



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5. In all these cases, no a priori generalisations or assumptions about service tax liability should be made and the terms of the contract should be examined carefully, against the backdrop of the criteria laid down by the Supreme Court in the *Bharat Sanchar Nigam Limited* case as well as other judicial pronouncements.

9.1 The para 4.1 of the above mentioned Circular also speaks about the type of lease and it should be recognized in the books of account, and the lessee bears the cost of repairs and maintenance and risk of obsolescence also rests with him. I find that lower Adjudicating Authority has not discussed or elaborated reasoning for arriving at the conclusion that the activity carried out by the Appellant falls under the scope of Section 66E(f) of the Act as directed in the circular. On perusal of the impugned order, I find that the lower Adjudicating Authority has not tested the ingredients narrated by the Board in above mentioned Circular to prove the taxability of the services carried out by the Appellant.

9.2 On the contrary, on perusal of the records, I find that as per the Tax Audit Report Part-B of form No. 3CD submitted by the Appellant, their nature of business or profession is Transporter. It is also mentioned in the books of account that the Appellant has borne the expenses viz. diesel expenses, insurance expenses, repairs and maintenance expenses, road tax, salary expenses etc. Further, I find from the documents submitted by the appellant that during the relevant period, the Appellant had never made any agreement / contract with the recipient of the services to use the goods without transfer of its right. Instead, they had supplied the said trucks for transportation of goods to Goods Transport Agencies in which the position and control always lies with the Appellant. Further, on verification of LR/CN submitted by the Appellant, it appears that they charged the freight per trip from their customers.

9.3 In view of the above, it is clear that the Appellant is engaged in providing trucks on hire basis to different goods transport agencies and hence, the conclusion drawn by the Adjudicating Authority that the services provided by the Appellant is transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods under clause (f) of Section 66(E) of the Act (i.e. declared services) is devoid of any basis.

10. The Appellant produced lorry receipts/ consignment notes issued by the Goods Transport Agencies to whom they have provided their trucks on hire basis. On verification of the said LR/CN, it is found that there is mention of name of consignee and consignor, truck number of truck owned by the Appellant. Name of truck owner and driver is shown as "RAJDEBHAJ L DER" in some of LR/CN. All these material facts prove that the Appellant was engaged in providing their trucks on hire basis to the Goods Transport Agencies.

11. Now coming to the taxability under Goods Transport Agency services, the





same is defined under clause 26 of Section 65B of the Act as under:

~~“(26) goods transport agency means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called;”~~

11.1 On verification of documents viz. books of accounts, profit & loss accounts and copies of LR/CN issued by the Goods Transport Agency, it is amply clear that the services provided by them is transport of goods other than a Goods Transportation Agency as they have not issued consignment notes. The Appellant has submitted copies of LR/CN issued by Goods Transport Agencies wherein the name of the Appellant, his truck number, name of consignor and consignee is mentioned. Therefore, it is amply clear that the Appellant is an individual truck owner who has provided their trucks on hire basis to Goods Transport Agencies.

12. It is the contention of the Appellant that their services are covered under entry No. 22(b) of Notification No. 25/2012-Service Tax dated 20.06.2012. The same is re-produced below for sake of reference:

“22. Services by way of giving on hire -

(a) to a state transport undertaking, a motor vehicle meant to carry more than twelve passengers; or

(b) to a goods transport agency, a means of transportation of goods;”

On plain reading of the above provisions of Notification No. 25/2012, I find force in the contention of the Appellant that their services are exempted by way of entry No. 22(b) of the Notification No. 25/2012-Service Tax dated 20.06.2012 in the backdrop of findings recorded in para No.9, 10 and 11 which clearly establish that the Appellant has provided their trucks on hire basis to the various Goods Transport Agencies.

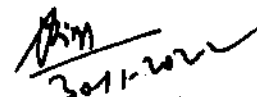
13. In view of discussions and finding, I set aside the impugned order and allow the appeal filed by the Appellant.

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

14. The appeal filed by Appellant is disposed off as above.

सत्यापित / Attested

  
Superintendent  
Central GST (Appeals)  
Rajkot

  
(शिव प्रताप सिंह)/(Shiv Pratap Singh),  
आयुक्त (अपील)/Commissioner (Appeals)

By R.P.A.D.

To,  
M/s. Rajdebhai Lakhmanbhai Der,  
01, at Hindorna, Near: Paramount  
Hotel, Rajula, Dist.: Amreli-365560

सेवा में,  
मे. राजदेभाई लखमणभाई डेर, 01,  
हिंडोरणा, पेरामाउंट होटल के पास,



राजुला, जिल्ला: अमरेली- 365560 ।
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**प्रतिनिधि :-**

- 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) अपर/संयुक्त आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर को आवश्यक कार्यवाही हेतु।
- 4) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर-1 मण्डल को आवश्यक कार्यवाही हेतु।
- 5) गार्ड फाइल।

