

::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

Tele Fax No. 0281 - 2477952/2441142 Email: cominrapp13-cexamd@nic.in

रजिस्ट्रार कक्ष, श्री. द्वारा :-

DIN-20220964SX0000510231

क	अपील / फाइल संख्या/ Appeal / File No.	मूलआदेश सं / OIO No.	दिनांक/ Date
	V2/380/RAJ/2021	07/JC(RSS)/2021-22	25-05-2021

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

RAJ-EXCUS-000-APP-338-2022

आदेश का दिनांक / Date of Order:	19.09.2022	जारी करने की तारीख / Date of issue:	22.09.2022
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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/अतिवादी का नाम एवं पता / Name & Address of the Appellant & Respondent :-

M/s. Tushti Agri Products Pvt. Ltd., C/o Shree Jagdish Trading Co, House No. 2/3205, Basmati House, Danapith New Para Bazar, Rajkot

इस आदेश (अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है। /

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए। /

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असारवा अहमदाबाद- 380016 को की जानी चाहिए। /

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

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

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/-, Rs. 5,000/-, 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, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/-



- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरम्भ 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 की 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 इकाई, 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-35E 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 फुट (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 इयूटी 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 तरीक़ अथवा समयावधि पर या बाद में परित 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 समक्ष के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी क्वे लिखा 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.



ORDER-IN-APPEAL

M/s Tushti Agri Products Pvt. Ltd, C/o Shree Jagdish Trading Co, House No. 2/3205, Basmati House, Danpith, Near Para Bazar, Rajkot (*hereinafter referred to as 'Appellant'*) has filed Appeal No. V2/380/RAJ/2021 against Order-in-Original No. 07/JC (RSS)/2021-22 dated 25.05.2021 (*hereinafter referred to as 'impugned order'*) passed by the Joint Commissioner, Central Excise & CGST, Rajkot (*hereinafter referred to as 'adjudicating authority'*).

2. The facts of the case, in brief, are that as per data received from the Income Tax Department, the appellant appeared to have received various amounts as consideration for providing taxable service. It appeared that the appellant had not obtained registration under Service Tax Rules and did not pay service tax on the consideration received for providing taxable service. The appellant, in spite of being asked by the concerned officer, did not produce any details or information about the nature of service provided by them.

2.1 Based on the data provided by the Income Tax department, a Show Cause Notice No. V.ST/Div-I-RJT/JC/AS/37/2020-21 dated 29.09.2020 was issued to the Appellant calling them to show cause as to why the value of taxable services provided by them during the period F.Y. 2014-15, F.Y. 2015-16 and F.Y. 2016-17 should not be assessed/determined at Rs. 3,82,27,524/- under Section 72 of the Finance Act, 1994 and service tax amount of Rs. 53,74,976/- should not be demanded and recovered from them under proviso to Section 73(1) of the Act, along with interest under Section 75 of the Act, and proposing imposition of penalty under Sections 77 and 78 of the Act.

2.2 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order, wherein he confirmed demand of service tax amount of Rs. 46,39,237/- under Section 73(1) of the Finance Act, 1994, along with interest under Section 75 of the Act, and dropped demand of Rs. 7,35,739/- on limitation. He also imposed penalty of Rs. 46,39,237/- under Section 78 and Rs. 10,000/- under Section 77(1)(a) and Rs.10,000/- under Section 77(2) of the Finance Act, 1994.

3. Being aggrieved, the Appellant has filed the present appeal *comprising, inter alia*, that the adjudicating authority had travelled



beyond the scope of show cause notice. Appellant submitted that the Joint Commissioner had discussed the meaning of 'Agriculture' and 'Agriculture produce' in the impugned order which was not in the show cause notice. Appellant contended that in cases where the consequential demand traverses beyond the scope of show cause notice, it would be deemed that no show cause notice has been given. Appellant relied upon the following case laws in this regard:

- (a) *Huhtamaki PPL Ltd-2021-TIOL-249-CESTAT-AHM*
- (b) *Syndicate Bank, Manipal-2020-TIOL-1222-CESTAT-BANG*
- (c) *M/s Neccon Power and Infra Ltd-2020-TIOL-988-CESTAT-KOL*
- (d) *Platinum IT Solutions-2019-TIOL-3409-CESTAT-CHD*

3.1 The appellant further submitted that the show cause notice and the consequential order has been issued without investigation and only based on the data provided by Income tax department is not sustainable in law. They submitted that the department ought to have conducted inquiry whether particular assessee is required to pay service tax or not and if they are required to pay then under which service tax category. The appellant contended that Form 26AS itself is not a perfect system. Relying upon the cases laws of *Mayfair Resorts - 2011 (22) STR.263*, *Synergy Audio Visual Workshop P. Ltd - 2008 (10) STR.578* and *Amrish Rameshchandra Shah - 2021- TIOL P583-HC-MUM-ST*, the appellant argued that show cause notice issued without any verification and based only on data provided by Income tax authorities is not sustainable.

3.2 The appellant submitted that the value arrived for demand of service tax by resorting to Section 72 of the Finance Act, 1994 is in gross violation of the mandate and procedures mentioned in Section 72 itself. They relied upon the following case laws:

- (a) *Creative Travel Pvt. Ltd-2016 (45) STR.33 (Del)*
- (b) *Carlsberg India Pvt. Ltd-2016 (42) STR.55 (Tri-Del)*
- (c) *Coca Cola (I) Pvt. Ltd-2015 (40) STR.547 (Tri-Del)*
- (d) *NBC Corporation Ltd-2014 (33) STR.113 (Del)*

3.3 The appellant submitted that in Section 66D(d)(i), it is clearly written that agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing and such agricultural operations directly related to production of any produce are covered in the negative list of services. They contended that other operations such as cleaning, grading, sorting etc. will also qualify as operations directly related to production of any



agriculture produce. The appellant submitted that the observation that all the processes are required to be done at an agricultural farm is not correct. The phrase 'carried out at an agricultural farm' is describing the processes but not limiting the processes and that if these processes are not carried out at an agricultural farm, then it would be excluded.

3.4 Appellant submitted that as far as interpretation of definition of Agriculture produce as per Finance Act, 1994 was concerned, it does not describe illustration of activities which will fall under the definition of agricultural produce; however, illustrative list of activities were provided in negative list defined under Section 66D. Thus, principle of harmonious construction should be applied while interpreting definition of agriculture produce and accordingly, activity like tending, pruning, grading, sorting etc may be carried out at farm level or elsewhere, as long as, they do not alter the essential characteristics they were covered under the meaning of agriculture produce; activities like cleaning, packing and sorting service do not alter essential characteristics of such product; example-wheat remains wheat, cumin seeds remains cumin seed etc. The appellant referred to para 4.4.6 of Education guide of Service tax in this regard.

3.5 The appellant submitted that in the taxation statute, external aids (CBEC Education Guide) for interpretation must be used for the purpose of extending benefit of taxing statute. They have also contended that the adjudicating authority has taken support of two clarifications issued under GST which is quite different from service tax law.

3.6 The appellant submitted that they had provided similar services in case of 'non-agriculture produce' on job work basis, and the summary of sales register and bifurcation of its turnover is as under:

(Amount in Rs.)

Particulars	2014-15	2015-16	2016-17
Total turnover as per audited Financial statement	13942657	14745458	14230683
Trading of Goods covered under Section 66D(e)	2960021	903279	827974
Bill amount of agriculture produce on which job work carried covered under Section 66D(d)	10666614	13683123	12561922
Bill amount of non-agriculture produce on which job work carried	316024	159056	840787

3.7 The appellant submitted that as per Notification No. 33/2012 dated 20.06.2012, government had exempted taxable services of aggregate value not exceeding Rs. 10 lakhs and the value of taxable services was not exceeding the said limit and they were not liable to any service tax and not liable for taking registration.

3.8 The appellant submitted that entire details have taken from TDS returns, Income Tax returns, 26AS and ST-3 returns and as such there is no suppression and the show cause notice was time barred. They relied upon the following case laws:

- (a) *Oriental Insurance Company Ltd-2021-TIOL-307-CESTAT-DEL*
- (b) *Blackstone Polymers-2014(301)ELT.657 (Tri-Del)*
- (c) *Kirloskar Oil Engines Ltd-2004 (178) ELT.998 (Tri-Mum)*
- (d) *Hindalco Industries Ltd-2003 (161)ELT.346 (Tri-Del)*

3.9 It was submitted that in the case of interpretation of law, no penalty is imposable. It is settled position of law that to impose penalty under Section 78 of the Act, existence of suppression etc is basically required to be proved which is absent in the present case. They relied upon the following case laws:

- (a) *Tamilnadu Housing Board-1994 (74) ELT.9 (SC)*
- (b) *Town Hall Committee, Mysore city Corporation-2011 (24) STR.172 (Kar)*
- (c) *BSNL-2008 (9) STR.499 (Tri-Bang)*
- (d) *Instant Credit-2010 (17) STR.397 (Tri-Del)*

4. Personal hearing was conducted in virtual mode through video conferencing on 28.07.2022. Mr. Rajesh C. Prasad, Authorised Representative, appeared on behalf of the Appellant. He reiterated the submission made in Appeal Memorandum as well as those in additional written submissions made as part of hearing.

4.1 In the written submission made at the time of personal hearing, the appellant referred to Instruction dated 26.10.2021 of CBIC wherein instructions have been issued for proper investigation before issue of show cause notice. The appellant submitted that there was no mention of the nature of services provided by the appellant, no service wise and year-wise bifurcation of the income.

4.2 High Court of Bombay in the case of *Amrish Rameshchandra Shah-*

2021-TIOL-583-HC-MUM-ST had quashed identical show cause notice in which the service tax was demanded without any verification. They have further relied upon the following case laws:

- (a) *Forward Resources Pvt. Ltd-2022-TIOL-624-CESTAT-AHM*
- (b) *Ved Security-2019-TIOL-3162-CESTAT-KOL*
- (c) *Luit Developers Pvt Ltd-2022-TIOL-180-CESTAT-KOL*
- (d) *Alpa Management Consultant Pvt Ltd -2007 (6) STR.181 (Tri-Bang)*

5. It is observed that the appellant had filed application for condoning delay of 15 days in filing the appeal on the ground that the person, who received the order on behalf of the company, was under home isolation due to Covid symptoms. The reason appears to be genuine and since the delay is within condonable limit of 30 days as provided under proviso to Section 85 (3A) of the Finance Act, 1994, I condone the same and proceed to decide the appeal on merits.

6. I have carefully gone through the facts of the case, the impugned order, grounds of appeal in the appeal memorandum and oral as well as written submissions made by the Appellant. The issue involved in the present appeal is whether the impugned order, confirming the demand against the appellant and imposing penalty, in the facts and circumstances of the case is legal and proper or otherwise. It is the contention of the appellant that they were engaged in trading of food grains and job work in relation to agricultural produce, which are covered under Negative List of service under Section 66D(d) and (e) of the Finance Act, 1994 respectively.

7. It is observed that the show cause notice in the present case was issued on the basis of data provided by the Income Tax department and the adjudicating authority has confirmed the demand after considering the written as well as oral submissions and documents submitted by the appellant. The first contention of the appellant is that the impugned order has travelled beyond the scope of show cause notice as the adjudicating authority had discussed the meaning of 'Agriculture' and 'Agriculture produce' in the impugned order, which was not in the show cause notice. In this regard, I find that show cause notice was issued demanding service tax under Section 73 of the Finance Act, 1994 considering the income received by the appellant as taxable income. The appellant was not registered with the department. Before issuing the notice, the appellant



was asked to produce documents for determining the tax liability but they failed to do so. They have produced the documents only at the time of adjudication. Only in reply to the notice, the appellant claimed exemption as per Section 66D(d) of the Finance Act, 1994, which pertained to service provided in relation to agriculture and agricultural produce. After considering the submissions made by the appellant in their defense, the adjudicating authority has discussed the eligibility of exemption claimed by them in the impugned order and, therefore, it cannot be said that the adjudicating authority has travelled beyond the scope of show cause notice. The case laws relied upon by the appellant are not relevant to the issue at hand in as much as they pertained to demand raised by the department against the registered assessee, whereas in the case at hand, the appellant was not registered with the department.

8. The appellant also raised a contention that show cause notice and the impugned order has been issued without investigation and only based on the data provided by Income Tax department and hence is not sustainable in law. In this regard, I find that the appellant was asked to produce the information/documents like income tax returns, Form 26AS, Balance Sheet (including profit and loss account), VAT/Sales Tax returns, contract/agreements so as to ascertain the service tax liability, but the appellant did not co-operate and not produced any document as called for by the jurisdictional officer. However, during the process of adjudication, the appellant had produced copy of Form 26AS, Audited Annual Report, sample job work challan etc and also bifurcation of job work-income. The adjudicating authority has determined the tax liability on the basis of submissions made by the appellant and documents produced before him. In the case law of *Amrish Rameshchandra Shah-2021-TIOLP583-HC-MUM-ST* on which the appellant placed reliance, Hon'ble High Court has quashed the show cause notice when on verification it was found that the service is not taxable. At the same time, the High Court has given liberty to the department to investigate the case and issue fresh notice. In the present case, I find that the situation is different. On verification, the adjudicating authority found the activities carried out by the appellant to be taxable and has given clear findings in this regard. Therefore, the contention of the appellant that show cause notice and the impugned order has been issued without investigation and only based on the data provided by Income tax department is incongruous and legally not



sustainable.

8.1. Another contention raised by the appellant is that the value arrived for demand of service tax by resorting to Section 72 of the Finance Act, 1994 is in gross violation of mandate and procedures mentioned in Section 72 itself. In this regard, I find that Section 72 of the Act provides for best judgment assessment which read as under:

SECTION 72. Best judgment assessment. —

If any person, liable to pay service tax, —

(a) fails to furnish the return under section 70;

(b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder, the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

Plain reading of the above provision of law would reveal that the procedure set out is that the proper officer require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment. In this case, I find that the adjudicating authority has called for the required documents from the appellant and he has determined the tax liability on the basis of documents produced by the appellant. The appellant was also heard before issuing assessment order. As such, I hold that there is no violation of the provisions of Section 72 of the Act and the contention of the appellant, in this regard, is fallacious.

9. Now coming to the merits of the case, I find that the appellant has divided their turnover in to three parts viz., related to (i) Trading of Goods, which are covered under Negative List under Section 66D(e) of the Finance Act, 1994; (ii) Job work in relation to agricultural produce which are covered under Negative List under Section 66D(d); and (iii) Job work in relation to non-agricultural produce, which are taxable service under the Finance Act, 1994. The break-up of the income under each head is given



in the table at Paragraph 3.6 above.

10. It is observed that the appellant had claimed certain turnover as trading of goods, which are covered in Negative List under Section 66D(e) of the Finance Act, 1994. As per Section 66D(e) of the Finance Act, 1994, trading activity is covered under negative list. Though the appellant had claimed the same before the adjudicating authority also, as evident from Paragraph 18 of the impugned order, it is observed that no findings in this regard have been made by him while passing the impugned order. The appellant did not produce any evidence to substantiate this claim in the appeal memorandum also. Therefore, this aspect needs to be examined at the end of the adjudicating authority. If there is any turnover pertaining to trading activity, the same is to be excluded from the taxable value while determining the service tax liability of the appellant. Under the circumstance, I find it fit to remand this issue to the adjudicating authority for re-determining amount of service tax demand after considering the turnover of trading activity, if any, and after verification of relevant documents. The Appellant is also directed to produce relevant documents before the adjudicating authority. Needless to mention that de novo proceedings shall be carried out by adhering to the principles of natural justice.

11.1 With regard to the turnover towards job work carried out in respect of agricultural produce, I find that the appellant has contended that the service provided by them is covered under the Negative List of services. According to them, operations such as cleaning, grading, sorting etc. will also qualify as operations directly related to production of any agricultural produce. The provisions contained under Section 66D(d) and (e) of the Finance Act, 1994 read as under:

(d) services relating to agriculture or agricultural produce by way of—

(i) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing;

(ii) supply of farm labour;

(iii) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market;

(iv) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use;

(v) loading, unloading, packing, storage or warehousing of agricultural produce;



(vi) ~~agricultural extension services~~

(vii) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce;

(e) trading of goods;

11.2 Further, the definition of 'agriculture' and 'agricultural produce' as defined under Section 65B(3) and (5) of the Act read as under:

(3) "Agriculture" means the cultivation of plants and rearing of all life-forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products;

(4)

(5) "Agricultural produce" means any produce of agriculture on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market;

From the plain reading of the above provisions, I find that Section 66D(d)(i) covers agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing. In the present case, the activities carried out by the appellant are cleaning, grading, sorting and such activities in no way could be directly related to production of agricultural produce.

11.3. The appellant also contended that even Section 65D(d)(iii) also mentioned tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market and these processes need not be done at an agricultural farm. According to them, principles of harmonious construction should be applied while interpreting definition of agricultural produce and accordingly activities like tending, pruning, sorting, grading etc. may be carried out at farm level or elsewhere. They have placed reliance on Para 4.4.6 of Education Guide of Service Tax issued by the Board.

11.4. In this regard, I find that Section 65D(d)(iii) of the Act mentioned certain activities carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market. Paragraph 4.4.6 of Education Guide has clarified the matter as under:



4.4.6 Would operations like shelling of paddy or cleaning of wheat carried out outside the farm be covered in the negative list entry relating to agriculture as sub-clause (iii) of clause (d) of section 66D relating to services by way of processes carried out at an agricultural farm?

The said sub-clause (iii) also includes 'such like operations which do not alter the essential characteristic of agricultural produce'. Therefore, activities like the processes carried out in agricultural farm would also be covered if the same are performed outside the agricultural farm provided such processes do not alter the essential characteristics of agricultural produce but only make it marketable in the primary market. Therefore, cleaning of wheat would be covered in the negative list entry even if the same is done outside the farm. Shelling of paddy would not be covered in the negative list entry relating to agriculture as this process is never done on a farm but in a rice sheller normally located away from the farm.

11.5. Harmonious reading of Section 66D(d)(iii) of the Act and Paragraph 4.4.6 of Education Guide would reveal that only those activities which are necessary for making it marketable for the **primary market** and do not alter the essential characteristics of agricultural produce are covered under negative list. These activities are normally carried out in an agricultural farm, but the Education Guide clarifies that certain activities performed outside the agricultural farm which do not alter the essential characteristics and necessary for making it marketable in primary market are also covered in the negative list. It is conspicuous in Section 66D(d)(iii) and the Education Guide that the processes that are necessary for making it marketable in the **primary market** only which are covered under the negative list. It is settled principles of law that the language employed in a statute is the determinative factor of legislative intent. In the present case, from the language used in Section 66D (d), it is clear that only those services which are mainly used by a farmer or agriculturist for making the agricultural produce marketable in primary market are covered under the negative list. Thus, the benefit cannot be extended to those processes carried out on agricultural produce after clearing the same in primary market. In this regard, I rely upon some of the decisions of Hon'ble Supreme Court, which are discussed in subsequent paragraphs.

11.6 In the case of *Tara Agencies-2007* (214) E.L.T. 491 (S.C.), the Hon'ble Supreme Court has held that;

62. The intention of the legislature has to be gathered from the language used in the statute which means that attention should be paid to what has been said as also to what has not been said.

11.7 In the case of *Trutuf Safety Glass Industries-2007* (215) E.L.T. 14 (S.C.), it is held that;

16. It is well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the



Legislature. The language employed in a statute is the determinative factor of legislative intent.

11.8 Similarly, in the case of *Dharmendra Textile Processors - 2008* (231) E.L.T. 3 (S.C.) it is held that;

13. It is a well-settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements.

11.9 Thus, I am of the considered view that those processes that are necessary for making the agricultural produce marketable in **Primary Market only** are covered under negative list under Section 66D(d) of the Finance Act, 1994 and those processes, which are carried out after clearing them in primary market, even if the processes carried out do not alter the essential characteristics, are not covered under the negative list.

12. In the present case, the adjudicating authority has observed that process of cleaning is undertaken at the end of the appellant to make the agricultural produces marketable in the **Secondary market**. The adjudicating authority has observed that the appellant is doing large scale cleaning and sorting process at their plant with help of machinery and their customers are traders and exporters who are procuring huge quantity of grains from the primary market and getting them cleaned and sorted by the appellant. From the documents produced by the appellant, which is part of their defense reply to the show cause notice, I find the observation of the adjudicating authority to be correct. Hence, I am of the considered view that the contentions of the appellant in this regard are not legally sustainable in terms of the provisions of Section 66D (d) of the Finance Act, 1994 and the findings of the adjudicating authority are legally sustainable.

13. In respect of the turnover in relation to job work carryout out on non-agricultural produce, the appellant has not claimed any exemption other than the exemption under Notification No. 33/2012 dated 20.06.2012 for clearances not exceeding Rupees ten lakhs. Thus, in effect, the appellant has conceded that the said activity is taxable. However, after considering the turnover in respect of job work of agricultural produces, which I found to be taxable, the aggregate value of services exceeded the



threshold of exemption under Notification No.33/2012-ST dated 20.06.2012 and the appellant is required to pay service tax on the said turnover also.

14. In view of the above discussions, I do not find any infirmity in the order of the adjudicating authority so far as it relates to taxability of the service provided by the appellant. Interest and penalty are natural corollary to the demand confirmed and I uphold the demand of interest and penalty imposed under Section 77(1)(a), 77(2) and 78 of the Finance Act, 1994.

15. In view of the above, I uphold the impugned order so far as it relates to taxability of services provided by the appellant and the matter is remanded to the adjudicating authority for re-quantifying the demand and penalty as per findings given in Para 10 above.

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

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

सत्यापित / Attested

[Signature]

Superintendent
Central GST (Appeals)
Rajkot

By R.P.A.D.

[Signature]
19th September,
(AKHILESH KUMAR)
Commissioner (Appeals) 2022.

To M/s Tushti Agri Products Pvt. Ltd, C/o Shree Jagdish Trading Co, House No.2/3205, Basmati House, Danpith, Near Para bazar, Rajkot	सेवामें, मे०तुष्टि० अग्रि प्रोडक्ट्स प्राइवेटलिमिटेड C/o श्री जगदीस ट्रेडिंग कंपनी हाउस नुं.2/3205, बासमती हाउस दानीपत, नियर परा बाजार, राजकोट।
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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, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
- 3) ऊपआयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट-I मंडल, राजकोटआयुक्तालय, को आवश्यक कार्यवाही हेतु।

✓ 47 गार्ड फ़ाइल।

