



:: 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



सत्यमेव जयते

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DIN- 20230364SX000000C2E8

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	GAPPL/COM/STP//3289/2022	453/AC/NIS/BVR-3/2022-23	12:00:00 AM

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

BHV-EXCUS-000-APP-098-2023

आदेश का दिनांक / Date of Order:	23.03.2023	जारी करने की तारीख / Date of issue:	23.03.2023
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श्री शिव प्रताप सिंह, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Shiv Pratap Singh, Commissioner (Appeals), Rajkot.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं सेवाकर, राजकोट / जामनगर / गांधीधामा द्वारा उपरलिखित जारी मूल आदेश से मृजित: /

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. Hamirbhai Kanabhai Kotadiya, 207, Ramji Mandir,, At-Vadhera Village, Tal-Jafrabad, Amreli-365540

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 प्रांत अपील, केन्द्रीय उत्पाद शुल्क अधोनेयम, 1944 को धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है। /

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

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

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

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ 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) 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, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 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/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-



:: अपील आदेश / ORDER-IN-APPEAL ::

M/s. Hamirbhai Kanabhai Kotadia, Vadhera (hereinafter referred to as "Appellant") has filed the present Appeal against Order-in-Original No. 453/AC/NIS/BVR-3/22-23 dated 22.09.2022 (hereinafter referred to as 'impugned order') passed by the Assistant Commissioner, Central GST Division-3, Bhavnagar (hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that the Income Tax Department shared the third-party information/ data based on Income Tax Returns/ 26AS for the Financial year 2015-16 & 2016-17 of the Appellant. Letters dated 18.08.2020 & 02.12.2020 were issued by the Jurisdictional Range Superintendent requesting the Appellant to provide information/documents viz. copies of I.T. Returns, Form 26AS, Balance Sheet (including P&L Account), VAT/ Sales Tax Returns, Annual Bank Statement, Contracts/ Agreements entered with the persons to whom services provided etc. for the Financial year 2015-16 & 2016-17. However, no reply was received from the Appellant.

3. In absence of data/ information, a Show Cause Notice dated 21.12.2020 was issued to the Appellant, demanding Service Tax and cess to the tune of Rs. 7,84,641/- under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'the Act') alongwith interest under Section 75 of the Act. It was also proposed to impose penalties under Section 77(1)(a), 78, 77(2) and 77(1)(c) of the Act upon the Appellant.

4. The adjudicating authority vide the impugned order confirmed the demand of Rs. 7,84,641/- under Section 73(1) along with interest under Section 75 of the Act, imposed penalty of Rs. 7,84,641/- under Section 78 of the Act, imposed penalty of Rs. 5,000/- each under Section 77(1)(a) & 77(2) of the Act.

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

(i) The Appellant is engaged mainly in the business of manufacturing of bricks and thereby supplying of civil construction material mainly bricks, grit stone, sand, while stone (bela), steel material supply, tiles and sanitary wares supply to the customers at proposed civil construction site. Shri Kalubhai Valerabhai Lakhontra (Prop. Parth Construction) has deducted TDS on civil construction material supply contract and on the basis of the same there were such huge liability of the Service Tax has been casted vide the impugned order. The TDS deductor has also issued a certificate to the effect that they have not made any payment of Service Tax to the Appellant since they have purchased materials from the Appellant. They have produced copies of purchase bills for Civil material purchase for re-sale and contended that on sales and purchase, no



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Service Tax is leviable. The Adjudicating Authority has erred in passing the impugned order without verifying the relevant documents submitted before him through their letter dated 21.01.2021 which was duly acknowledged by the office of the Adjudicating Authority on 02.02.2021.

6. Personal hearing in the matter was held on 17.03.2023. Shri Mahesh Ladumor, appeared for personal hearing and submitted that the Appellant did not provide any service to any one but purchased construction related materials for different vendors/ Shops and supplied it to M/s. Parth Construction [proprietor: Kalubhai V. Lakhontra, P/45]. He referred to Form 26AS showing name of the deudctor (p/34 & 38), letter dated 13.01.2021 for the deductor (P.42) and purchase invoices (P.46-52). He submitted that the appellant had replied to the Show Cause Notice vide letter dated 21.01.2021 which was received by the Adjudicating Authority on 02.02.2021 and duly acknowledged (P.29). However, the Adjudicating Authority has ignored this and passed the impugned order for demand, interest and penalty ex-parte, causing injustice to the Appellant. Therefore, he requested to set aside the same.

7. I have carefully gone through the case records, Show Cause Notice, impugned order and appeal memorandum filed by the Appellant. I find that Show Cause Notice had been issued without verifying any data or nature of services provided by the Appellant and the same had been issued only on the basis of data received from the Income Tax department. The Adjudicating Authority has confirmed the demand of Service Tax vide the ex-parte order without considering the reply to the Show Cause Notice submitted by the appellant and duly acknowledged by him. Now the main issue to be decided in the instant case is whether the activity carried out by the Appellant amounts to rendering any service covered under the Act and as to whether the amount received for providing the services is taxable, or otherwise.

9. It is the contention of the Appellant that they have filed reply to Show Cause Notice vide their letter dated 21.01.2021 which was received and acknowledged by the office of the Adjudicating Authority on 02.02.2021. They further argued that they are engaged in sale and purchase of building materials and supplied the same to their customer based on contract entered by them with their customer. On verification of Form 26AS, it is evident that the amount mentioned therein has been treated as base for demand of Service Tax by the Adjudicating Authority. The said income is received from Shri Kalubhai Valerabhai Lakhontra, proprietor of M/s. Parth Construction. The Appellant produced copy of balance sheet wherein figures of opening stock, material purchase, closing stock etc. has been mentioned. The copies of purchase invoices submitted by the Appellant suggest that they have purchased building materials like steel, sanitary wares, cement, bricks etc. and supplied the same



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to Shri Kalubhai Valerabhai Lakhontra, proprietor of M/s. Parth Construction, who has deducted TDS on the amount paid to the Appellant. Shri Kalubhai Valerabhai Lakhontra, proprietor of M/s. Parth Construction has issued a certificate in favour of the Appellant to the effect that their's is a proprietorship concern in the name of Parth Construction engaged in business of civil contractor and heavy earthmoving equipment work contractor. They purchased various civil construction materials from the Appellant and deducted TDS on the same since they were under obligation as per Section 44AB of the Income Tax Act, 1961.

10. All these material facts supported by documentary evidences suggest that the Appellant was engaged in sales and purchase of building materials, which is trading, not service and is not liable to Service Tax.

11. I find that the term 'service' is defined under Section 65(44) of the Act as under:

"Service means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

(a) An activity which constitute merely-

(i) A transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii)....

(iii)"

Therefore, sale of goods does not fall under definition of service.

11.1 Under Section 66B of the Act, service tax shall be levied on the value of all services, other than those service specified in the negative list. Negative list denotes the list of services on which no service tax is payable under Section 66B of the Act. As per Section 66D (e), trading of goods is a service specified under the negative list which is as under:

"SECTION 66D. Negative list of services.—

The negative list shall comprise of the following services, namely :—

(a)....

(b)

(c)

(d)....

(e) trading of goods;"

Accordingly, on the activity of trading of goods, no service tax is payable.

11.2 Section 66B provides that service tax is leviable on all 'services' other than the services specified under the negative list. Therefore, for being subject to service tax an activity needs to qualify as a service first. The term 'service' is defined under Section 65B (44) which specifically excludes an activity of mere



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transfer of title in goods by way of sale. Thus, the activity of trading which is merely buying and selling of the goods is not a service. Hence, the question of service tax levy on the same does not arise. Accordingly, it is not liable to service tax, as the same is not a service. Further, negative list of services comprises services but an activity of trading of goods is not a service, therefore it can be specified under the negative list of services.

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

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

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

सत्यापित / Attested

आर. अ. बोरीचा / R. S. BORICHA (शिव प्रताप सिंह) / (Shiv Pratap Singh)
अधीक्षक / Superintendent
के. व. एवं सेवा कर अपील, राजकोट आयुक्त (अपील) / Commissioner (Appeals)

By R.P.A.D. CGST Appeals, Rajkot

To, M/s. Hamirbhai Kanabhai Kotadia, 207, Ramji Mandir, AT: Village- Vadhera, Taluka: Jafrabad, Dist.: Amreli.	सेवा में, मे. हमीरभाई कानाभाई कोटडीया, 207, रामजी मंदिर, गाँव: वाढेरा, तालुका: जाफराबाद, जिल्ला: अमरेली।
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प्रतिलिपि :-

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

