::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔरकेन्द्रीय 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 – 2477952/2441142Email: commrappl3-cexamd@nic.in

सत्यमेव जयते

रजिस्टर्डडाकए.डी.द्वारा

DIN- 20230464SX0000777D66

| क | अपील / फाइलसंख्या/ Appeal /File No. | मूल आदेश सं / O.I.O. No. | दिनांक/Date |
|---|---|---|---|
| | GAPPL/COM/STP/735/2022 | 113/AC/NIS/SNR/2022-23 | 06.12.2022 |

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

## BHV-EXCUS-000-APP-111-2023

| आदेश का दिनांक / Date of Order: | 30.03.2023 | जारी करने की तारीख / Date of issue: | 03.04.2023 |
|---|---|---|---|

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 एवंसेवाकर,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 theAppellant&Respondent :-

**M/s. Deep Jaysukhbhai Shah C/o- Rajdeeo Ceramic Ind., Amarpar, Thangadh-, 363530**

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 आधिनेयम ,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 अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असार्वा अहमदाबाद- ३८००१६को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in 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 माँग ,ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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 dutydemand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम,1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना,रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 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 सार्वजिनक 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/-.

(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 Commissionerauthorizing 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" मे 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 आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/

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 कोपुनरीक्षण आवेदन :**
**Revision application to Government of India:**
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर 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 छुट (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 ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गईं है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं॰ 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए है।/
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 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । / In case, if the order covers various umbers 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-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in.

## :: अपील आदेश / ORDER-IN-APPEAL ::

M/s. Deep Jaysukhbhai Shah, Thangadh (hereinafter referred to as "Appellant") has filed the present Appeal against Order-in-Original No. 113/AC/NIS/SNR/2022-23 dated 06.12.2022 (hereinafter referred to as 'impugned order') passed by the Assistant Commissioner, Central GST Division, Surendranagar (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 of the Appellant. Letter dated 12.01.2021 and email dated 13.01.2021 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. However, no reply was received from the Appellant.

3. In absence of data/information, a Show Cause Notice dated 24.03.2021 was issued to the Appellant, demanding Service Tax and cess to the tune of Rs. 2,47,264/- 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 above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who confirmed Service Tax demand of Rs. 2,47,264/- under Section 73(1) along with interest under Section 75 of the Act, imposed penalty of Rs. 2,47,264/- under Section 78 of the Act, imposed penalty of Rs. 3,000/- each under Section 77(1)(a) and 77(2) 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 is any service then which type of service has been provided by them and whether Service Tax is payable or otherwise on such services. The CBIC has 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 difference benches of CESTAT and High Court had consistently taken view that no demand of Service Tax can be made on the basis of data provided by income tax authorities, 26AS, Balance sheet of ITR and they relied on the decisions in the case of Vatsal Resources Pvt. Ltd. Vs. CCE, Surat - 2022-TIOL-681-CESTAT-AHM, Reynolds Petro Chem Ltd. Vs. CCE, Surat-2022-TIOL-731-CESTAT,AHM. Shresth Leasing and Finance Ltd. Vs. CCE, Surat-2022-TIOL-711-CESTAT-AHM, Quest Engineers & Consultant Pvt. Ltd. Vs. Commissioner of CGST & C.Ex., Allahabad-2022-(58) GSTL 345 (Tri.-All.), Ganpati Mega Builders (I) Pvt. Ltd. Vs. Commissioner of Cus.,C.Ex. & S.T. Agra-2022(58)GSTL324 (Tri.All.). Further there was no mention of nature of services provided by them and no service wise and year-wise bifurcation of the income, no whisper of any verification or any investigation carried out by the department.

(iii) The Adjudicating Authority had issued the impugned order without taking into consideration the reply to Show Cause Notice dated 02.12.2022 submitted through email and submission made at the time of personal hearing by Shri Amit Viramgami employee of Shri Hitesh V Shah & Co. CA, Surendranagar. 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.).

(iv) They were engaged in the activity of purchasing and selling of equity shares of various companies from the stock market. In the profit & loss account it was recorded net of income of loss and out of total taxable service of Rs. 17,05,272/- on which the Service Tax has been demanded, Rs. 9,00,000/- was received towards trading of shares. The entire transaction is that of trading and not any means of providing any service. They relied upon definition of service and clause 29A of articles 366 of constitution of India. The activity which constitute transfer in title of goods is not service. Thus, trading of goods is in negative list as per Section 66D(e) of the Act and the goods also includes securities. Therefore, they are not liable to Service Tax. The other services provided by them is Rs. 8,05,272/- received as commission income as mutual fund agent and same are exempt being below threshold limit of Rs. 10 Lakhs as per Notification No. 33/2012-Service Tax dated 20.06.2012. In the Financial year 2014-15, the turnover of taxable service was Rs. 7,42,500/- which was below Rs. 10 Lakhs and hence they are eligible for benefit of threshold limit of Rs. 10 Lakh during the current period under review also.

(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), 77(2) and 78 of the Act in the case of interpretation of law and they relied on judgment in the case of ITEL INDUSTRIES PVT. LTD. as reported at 2004 (163) ELT 219 (Tri.-Bang.), Hindustan Steel Ltd. reported in 1978 ELT (J159), 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. The matter was posted for hearing on 23.03.2023. Shri R. C. Prasad, consultant appeared for personal hearing and submitted that the Appellant is

not providing service to anyone but is having income only by way of interest, dividend on shares and income of Rs. 9,00,000/-from short term trading of shares. None of these incomes is liable to Service Tax. Appellant had replied to JRS letter ~~by~~ of enquiring by email and also replied to the Show Cause Notice but these have been deliberately ignored to pass the impugned order ex-parte. He requested to set aside the Order-In-Original.

6.1 The consultant submitted written submission at the time of personal hearing which is akin to grounds of appeal submitted by the Appellant.

7. I have carefully gone through the case records, Show Cause Notice, impugned order and appeal memorandum filed by the Appellant. The issue to be decided in the case on hand is whether the activity carried out by the Appellant is liable to Service Tax or not.

8. I find that the lower Adjudicating Authority in an ex-parte order found that in the ITR for the year 2015-16 of the Appellant, shared by the Income Tax Department, the Appellant had provided services of Rs. 17,05,272/- and Service Tax including cesses of Rs. 2,47,264/- was not paid by the Appellant. It is the claim of the Appellant that they vide their email dated 02.12.2022 has submitted their written submission. Shri Amit Viramgami employee of Shri Hitesh V Shah & Co. CA, Surendranagar appeared for hearing on behalf of the Appellant but the Adjudicating Authority passed the impugned order without considering the same.

9. It is the contention of the Appellant that they are engaged in trading of shares/ securities in stock market which is out of the purview of Service Tax. I find that the Appellant submitted the copy Audit Report for the financial year 2015-16 alongwith Profit & Loss Account & Balance Sheet. In trading, profit & loss account there is mention of sales & other income, dividend of shares, income from mutual fund commission, profit of shares short etc. Thus, it is on record that the Appellant is engaged in sale purchase of shares/ securities. Further, the trading of goods is falling under Section 66D of the Act. The stock and shares are goods as per definition of 'goods' under Section 2(7) of the Sale of Goods Act, 1930 which is as under:

> *"(7) "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;"*

10. I find that 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.

10.1 Section 66B provides that service tax is leviable on all 'services' other than the services specified under the negative list. Therefore, for being exigible 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 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, even if trading activity is not specified under the negative list of services, it is not liable to service tax, as it is not a service.

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

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

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

सत्यापित / Attested

आर. एस. बोरीचा / R. S. BORICHA
अधीक्षक / Superintendent
के. व. एवं सेवा कर अपील्स, राजकोट
CGST Appeals, Rajkot

30-3-23

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

By R.P.A.D.

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|---|---|
| To,<br>M/s. Deep Jaysukhbhai Shah, C/o Rajdeep Ceramic Ind., Amrapar, Thangadh-363530. | सेवा में,<br>मे॰ दीप जयसुखभाई शाह, c/o राजदीप सिरमिक इंडस्ट्रीज़, अमरापर, थानगढ़-363530 । |

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 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, सुरेन्द्रनगर को आवश्यक कार्यवाही हेतु।
5) गार्ड फ़ाइल।