

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan

रेस कोर्स रिंग रोड / Race Course Ring Road

राजकोट / Rajkot - 360 001

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रजिस्टर्ड डाक ए.डी.द्वारा

DIN- 2G230464SX000000E0EB

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/Date
	GAPPL/COM/STP/359/2022	BHV-EXCUS-000-JC-PG-001-2022-23	31.010.2022

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

BHV-EXCUS-000-APP-121-2023

आदेश का दिनांक / Date of Order:	31.03.2023	जारी करने की तारीख / Date of issue:	05.04.2023
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श्री शिव प्रताप सिंह, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Shiv Pratap Singh, Commissioner (Appeals), Rajkot.

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:
अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellant & Respondent :-

M/s. EXIM TRADING CONSULTANCY C/O VIPUL N JOSHI,, OPP. BUS STOP,, NEAR NEW ACC ROAD, CHHAYA, PORBANDAR-360575

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, 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 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) नियमवाली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग, ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए 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 जहाँ 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 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 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 जहाँ 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 is more than 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 Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये से अधिक न हो।

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

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

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

- amount determined under Section 11 D;
- amount of erroneous Cenvat Credit taken;
- amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार को पुनरीक्षण आवेदन :

Revision application to Government of India:

इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, 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 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 तरीक अथवा समयाविधि 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 प्रतियाँ 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 प्रतियाँ 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 रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-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. Exim Trading Consultancy, Porbandar (hereinafter referred to as "Appellant") has filed the present Appeal against Order-in-Original No. BHV-EXCUS-000-JC-PG-001-2022-23 dated 31.10.2022 (hereinafter referred to as 'impugned order') passed by the Joint Commissioner, Central GST HQ, 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 2016-17 of the Appellant. Letter dated 09.09.2021 was issued physically as well as through email 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 2016-17. However, no reply was received from the Appellant.

3. In absence of data/information, a Show Cause Notice dated 14.10.2021 was issued to the Appellant, demanding Service Tax and cess to the tune of Rs. 65,60,987/- 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. 65,60,987/- under Section 73(1) along with interest under Section 75 of the Act, imposed penalty of Rs. 65,60,987/- under Section 78 of the Act, imposed penalty of Rs. 10,000/- 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



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(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 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 not been issued on the basis of any material evidence available on records or any investigation but just negating the submissions made by them. The entire findings of the Adjudicating Authority are based on his own knowledge or presumptions. None of the facts based on which the demand has been confirmed and penalty imposed was a part of the Show Cause Notice. There was no mention of any of the activities carried out by the appellant in the Show Cause Notice or impugned order. The Show Cause Notice is the culmination of efforts from the beginning of investigation/ proceedings for contravention of provisions of the tax statute(s) till conclusion of investigation/ proceedings by way of a formal issuance of a written notice to the Appellant. Issuance of Show Cause Notice is a statutory requirement and it is the basic document for settlement of any dispute relating to tax liability or any punitive action to be taken for contravention of provisions of Service Tax laws and or allied laws, which are required to be enforced by the departmental officer. The Adjudicating Authority has ignored the instructions issued by the Board and without verifying the facts and acting against the spirit



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and direction of the instructions issued by the Board had issued the impugned order. 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) 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 CBIC master Circular No. 1053/2/2017-CX. Dated 10.03.2017 wherein it was clarified by the CBIC that pre-show cause notice consultation with the Principal Commissioner and Commissioner is being made mandatory prior to issue of Show Cause Notice in the case of demand of duty above Rs. 50 Lakhs (except for preventive/offence related Show Cause Notices). The present Show Cause Notice and impugned order is not a result of any preventive search or booking of any offence against them. They further placed reliance on the decisions in the case of 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.

(v) They were engaged in providing service of 'transport of goods by road/ Goods Transport Agency service'. The department is not having the knowledge of the activities carried out by them. They had submitted that they were engaged in providing Goods Transport Agency service and submitted related documents. Right from the beginning sine introduction of Service Tax, it was provided that in case of Goods Transport Agency, it is the recipients of service, who is required to pay Service Tax under reverse charge mechanism. In budget speech 2004-05, it was clarified by the finance minister that there is no intention to levy Service Tax on truck owner or truck operators. After introduction of negative list based Service Tax Notification No. 30/2012-Service Tax dated 20.06.2012 was issued by which again the liability to pay Service Tax was fixed on the recipients of the service of Goods Transport Agency. In no case, Goods Transport Agency is required to pay Service Tax. The Adjudicating Authority confirmed the demand of Service Tax ignoring the factual activities of



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the Appellant and without any evidence or basis had observed that the Appellant had transferred the goods (trucks) by way of hiring without transfer of right to use such goods as provided under clause (f) of the Section 66D *ibid* and as such liable to pay Service Tax. They are providing Goods Transport Agency service by using its own trucks and sometimes taking trucks on hire. In all the cases, it is issuing consignment notes, which is pre-requisite to qualify as Goods Transport Agency. They submitted copies of consignment notes issued by them. In case of Goods Transport Agency, it is either the consignor or consignee, who pays the freight to pay the Service Tax under reverse charge mechanism and in any case the Goods Transport Agency is not required to pay Service Tax. They have submitted copies of declaration by the service recipients to the effect that they being recipients of services have paid the Service Tax. The most of the service recipients are private limited/ limited companies and as such they are falling in the list of persons liable to pay Service Tax as per Rule 4(1)(d)(v) of the Service Tax Rules, 1944. They are issuing consignment notes and as per second proviso to the Rule 4A of the Service Tax Rules, 1944, in case of Goods Transport Agency, for transport of goods by road an invoice, bill or challan shall include any document, by whatever name called which shall contain the details of consignment note. They have mentioned all the required details in the invoices also.

(vi) The activities of the Appellant were of working as 'pure agent' and no Service Tax is payable on the amount received under the head 'container lift on charges' for the expenses incurred on behalf of another person. The said charges were paid at the port on behalf of customer and later on it was recovered from the customers without adding any profit. They rely on Rule 5 of Service Tax (Determination of value) Rules, 2006 and explanation thereto. They further stated that (i) there was no written contract but an oral contract and they rely on Section 10 of the Indian Contract Act, 1872, Nanak Builders and Investors Pvt. Ltd. vs. Vinod Kumar Alag AIR 1991 Delhi 315, Alka Bose vs. Parmatma Devi & Ors [CIVIL APPEAL NO(s). 6197 OF 2000], (ii) Neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service (iii) Does not use such goods or services so procured (iv) Receives only the actual amount incurred to procure such goods or services.

(vii) With regards to income of detention charges, the Show Cause Notice failed to identify the activity carried out by the Appellant and relied upon the definition of 'service' as per Section 65B (44) of the Act. It is clear that in order to charge Service Tax, there must be some sort of activity involved and that activity must be carried out. The amount received for compensation of loss occurred due to withholding of trucks/ containers cannot form part of taxable



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value for the purpose of levability of Service Tax under Section 67 of the Act. Only transaction in money is out of the gamut of definition of service. The Service Tax is levied on service, and if there is no provision of service then Service Tax on what is required to be examined first and explain in the notice. They relied upon the decisions in the case of Ratnamani Metals & Tubes Ltd. Vs Commissioner of C.Ex. & S.T., Kutch (Gandhidham)-2021 (47) GSTL 352 (Tri.-Ahmd.), M/s. Steel Authority of India Ltd., Salem Vs. Commissioner of GST and Central Excise, Salem- 2021-TIOL-485-CESTAT-MAD. There is no consideration for any service as explanation to sub-section (1) of Section 67 clearly provides that only an amount that is payable for the taxable service will be considered as 'consideration'. In the present Show Cause Notice/ impugned order, the 'consideration' is not for any service or there is no service for which there was any consideration.

(viii) The Appellant further submitted that other ancillary service provide by them is below the threshold limit prescribed under Notification No. 33/2012-Service Tax dated 20.06.2012. The demand of Service Tax is time barred as extended period cannot be invoked for subsequent Show Cause Notice as they were issued with Show Cause Notice No. 43/2020-21/TPV/PBR dated 08.09.2020 by invoking extended period alleging suppression of facts. They relied upon Master Circular No. 1053/2/217-CX. Dated 10.03.2017, Collector of C.Ex., Vadodara Vs. Dhiren Chemical Ind. - 2002 (139) ELT 3 (S.C.), Smartchem Technologies Ltd. Vs. UOI -2011 (272) 522 (Guj.), Milcent Appliances Pvt. Ltd. Vs. UOI - 2006 (205) ELT 130 (Guj.), Nizam Sugar Factory Vs. Collector of Central Excise, A.P.-2006 (197) ELT 465 (SC), ECE Industries Ltd. Vs. Commissioner of Central Excise, New Delhi-2004 (164) ELT 236 (SC), Rekha Kailash Yadav Vs. Commissioner of Central Excise & Service Tax, Raigad - 2019-TIOL-1921-CESTAT-MUM, Commissioner of Central Excise and Service Tax, Siliguri Vs. M/s. Sentries-2017-TIOL-3893-CESTAT-KOL, M/s. Philips Carbon Black Ltd. Vs. Commissioner of CGST & Central Excise, Bolpur - 2020-TIOL-629-CESTAT-KOL, Shapoorji Pallonji & Co. Ltd. Vs. Commissioner - 2018 (19) GSTL J68 (Tri.-Mumbai), Tata Consultancy Services Ltd. Vs. Commissioner of Service Tax, Delhi - 2018 (18) GSTL 478 (Tri.-Del.)

(ix) 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.



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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 Adjudicating Authority has confirmed the demand in respect of Goods Transport Agency services only on the ground of non-submission of consignment notes, even though sample consignment notes and other documents were submitted to him. The appellant has now submitted entire bunch of consignment notes at the time of personal hearing for verification. Further, details of amounts received from recipients, majority of which are body corporates, is placed at P-100 of the appeal. Certificates of discharge of liability by recipients, other than corporates, on reverse charge mechanism basis are also enclosed. Therefore, he requested to set aside the Order-In-Original, since the liability is nil, as explained in Para 2.6 of the additional written submissions handed over at the time of personal hearing.

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, impugned order and appeal memorandum filed by the Appellant. I find that 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 otherwise.

8. I find that Show Cause Notice had been issued without verifying any data or nature of services provided by the Appellant as the same had been issued only on the basis of data received from the Income Tax department and the Adjudicating Authority has confirmed the demand of Service Tax vide impugned order after considering the submissions of the Appellant. The Appellant is a partnership firm. They submitted copy of profit & loss account for the year 2016-17 wherein the direct income has been mentioned as 'container lift on charges', 'detention charges', other additional charges, other charges, other transportation & 'transportation charges' on which the Service Tax has been



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demanded by the Adjudicating Authority in the Show Cause Notice and confirmed the same vide impugned order. It is the contention of the Appellant that they are engaged in the business of 'transport of goods by road/ Goods Transport Agency services'. It is the findings of the Adjudicating Authority that the Appellant has not submitted the consignment notes which are *sine-qua-non* for Goods Transport Agency services. On the other hand, it is the contention of the Appellant that they have submitted sample copies of consignment notes to the Adjudicating Authority. With the Appeal memorandum, the Appellant submitted sample copies of L.R.s issued by them wherein there is mention of date, from place, to place, consignor's name and address, container number, truck number and 'Service Tax payable by consignor/consignee' etc. They have also provided a list of their customers to whom they have provided transportation service by road. On verification of name of customers, it is found that most of them are either exporter, cold storages, private limited, factory, sea foods processor factory etc. All these customers are fulfilling the criteria of persons specified under the provisions of I(A)(ii) (a) to (f) of Notification No. 30/2012-Service Tax dated 20.06.2012. The relevant excerpts of Notification No. 30/2012 are as under:

"GSR.....(E)..... the Central Government hereby notifies the following taxable services and the extent of service tax payable thereon by the person liable to pay service tax for the purposes of the said sub-section, namely:—

I. The taxable services,—

(A) (i)

(ii) (ii) provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is,—

(a) any factory registered under or governed by the Factories Act, 1948 (63 of 1948);

(b) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India;

(c) any co-operative society established by or under any law;

(d) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder;

(e) any body corporate established, by or under any law; or

(f) any partnership firm whether registered or not under any law including association of persons;

(iii)

(iv)

(v)

(II) The extent of service tax payable thereon by the person who provides the service and the person who receives the service for the taxable services specified in (I) shall be as specified in the following Table, namely:—

Table

Sl. No.	Description of Service	Percentage of service tax payable by the person providing service	Percentage of service tax payable by the person receiving the service
2	in respect of services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road	Nil	100%



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Explanation-I. - The person who pays or is liable to pay freight for the transportation of goods by road in goods carriage, located in the taxable territory shall be treated as the person who receives the service for the purpose of this notification."

9. On plain reading of the provisions of above mentioned Notification, it is quite clear that the recipients of services of Goods Transport Agency are liable to pay Service Tax. Further, explanation-I to the Notification also states that the person who pays or is liable to pay freight for the transportation of goods by road in goods carriage shall be treated as the person who receives the services for the purpose of this Notification, which means if any person not falling under the category (a) to (f), then in that case, the receiver of transport service who pays or liable to pay freight is treated as the person who receives the service and hence liable to pay Service Tax. Further, in the Goods Transport Agency services, there is mention of consignment note, by whatever name called. Thus, a bill, invoice, challan or lorry receipts can be treated as consignment notes. Here in the case on hand, the Appellant issued lorry receipts which can be termed as consignment notes. Therefore, I am of considered view that the Appellant is not liable to pay Service Tax on transportation charges.

10. For the consideration earned for container lift on charges, it is the contention of the Appellant that they were working as pure agent and no Service Tax is payable on such amount. Now, as per the contention of the Appellant, whether activity carried out by them is working as 'pure agent' as per Rule 5 of Service Tax (Determination of value) Rules, 2006 and whether the Service Tax is payable on amount received for the expenses incurred on behalf of their customers or otherwise. The same is re-produced below:

"Rule 5. Inclusion in or exclusion from value of certain expenditure or costs.-

(1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service.

Explanation. - For the removal of doubts, it is hereby clarified that for the value of the telecommunication service shall be the gross amount paid by the person to whom telecommunication services actually provided.

(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely :-

- (i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured**
- (ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;**
- (iii) the recipient of service is liable to make payment to the third party;**
- (iv) the recipient of service authorises the service provider to make payment on his behalf;**
- (v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;**



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(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;

(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

Explanation 1.-For the purposes of sub- rule (2), "pure agent" means a person who-

(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;

(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;

(c) does not use such goods or services so procured; and

(d) receives only the actual amount incurred to procure such goods or services."

On plain verification of the copies of invoices submitted by the Appellant, it is found that they have charged the amount for container lift on charges from their customer and for that they have paid the said amount to the respective agencies on behalf of their customers. For any extra amount charged by the Appellant for their customer, the Appellant has charged the Service Tax on that extra amount and shown separately in the invoices. They have also submitted the copies of bills issued by them to their customers wherein container lift-on charges have been show separately and the same amount was recovered by them. Thus, receipt and expense amount tallied with the amount mentioned in their bills of the respective customers.

10.1 I find from the invoices and other documents submitted by the Appellant that they have fulfilled all the conditions as laid down under the definition of the Pure Agent given in the Explanation 1 to the Sub rule (2) of Rule (5) of Service Tax (determination of Rules) 2006. I further find that the Appellant has substantiated their claim for reimbursement of expenses, i.e. acting as pure agent for the expenses borne by the Appellant on behalf of their clients submitted the copies of the Profit and Loss Account clearly shown the container lift-on charges in the direct Income of the Annual Profit & Loss Account for F.Y. 2016-17 and the same amount has been shown as direct expenses and also submitted the copies of the bills in which the other than transportation expenses i.e. container lift-on charges were shown separately.

10.2 In view of the above, I find that the Appellant has fulfilled all the conditions as laid down under the definition of Pure Agent as supra and the expense of container lift of charges received from their clients are nothing but the reimbursement of expenses borne by the them on behalf of their clients during the relevant F.Y. 2016-17. Thus, I find that they are working as 'pure agent' of their customers/ clients and are eligible for exclusion of expenditure or costs incurred by them as 'pure agent' of their customers.



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10.3 Therefore, I am of considered view that the income of container lift-on charges borne by the Appellant on behalf of their customers and recovered on reimbursement basis are required to be excluded from the total taxable value on which Service Tax has been demanded.

11. For remaining income from detention charges, other additional charges and other charges, the same is below the threshold exemption limit of Rs. 10 Lakh for the year 2016-17. For this, the Appellant produced copy of tax audit report for the year 2015-16 under which the other income was also below threshold limit of Rs. 10 Lakh and hence they are also eligible for threshold limit of Rs. 10 Lakh during the year 2016-17. Therefore, I find that the Appellant is not liable to pay Service Tax on remaining income as shown above.

12. In view of the 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

Signature

Signature
31-3-23

के. जी. सावलाणी / K. G. SAVLANI

अधीक्षक / Superintendent

(शिव प्रताप सिंह) / (Shiv Pratap Singh),

आयुक्त (अपील) / Commissioner (Appeals)

By R.P.A.D. के. व. एवं सेवा कर अधीक्षक, राजकोट

CGST Appeals, Rajkot

To,
M/s. Exim Trading Consultancy,
C/o Vilas N. Joshi, Opp.: Bus Stop,
Near New ACC Road, Chhaya,
Porbandar-360 575.

सेवा में,
मे. एक्सिम ट्रेडिंग कन्सल्टन्सी,
C/o विलास एन. जोशी, बस स्टॉप के
सामने, न्यू एसीसी रोड के बाजू में, छाया,
पोरबंदर- 360 575 ।

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, जूनागढ़ को आवश्यक कार्यवाही हेतु।
- 5) गार्ड फ़ाइल।

