



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
वस्तु एवं सेवा GST Building, 7th Floor,
कर भवन, Near Polytechnic,
Ambavadi, Ahmedabad-
380015
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015



☎ : 079-26305065

टेलीफैक्स : 079 - 26305136

क फाइल संख्या : File No : **V2(48)04/ST-4/STC-III/2017-18** ²⁸⁷
ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-0177-17-18**
दिनांक Date : **29.12.2017** जारी करने की तारीख Date of Issue: **17-1-2018**
श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals) Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश :
AHM-CEX-003-DC-066-2017 दिनांक : **27.03.2017** से सृजित

Arising out of Order-in-Original: **AHM-CEX-003-DC-066-2017**, Date: **27.03.2017** Issued by: Deputy Commissioner, Central Excise, Div:Kalol, Ahmedabad-III.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Letra Graphix Pvt.Ltd.,

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

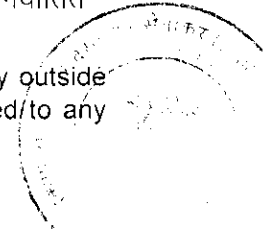
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur 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.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) 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.



- (ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।
- (C) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) 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 and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनोंक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी 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.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- पब/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

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/- and Rs.10,000/- where amount of duty / penalty / demand / 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 Asstt. Registrar of a branch of any

nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपयुक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number 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 Appellate Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lacs fee of Rs. 100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ के अंतर्गत वित्तीय (संख्या-2) अधिनियम 2014 (2014 संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1998 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

• आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।

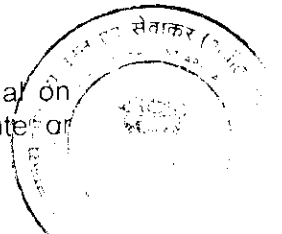
For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06/08/2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten 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.

(6)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(6)(i) In view of above, 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."



:: ORDER-IN- APPEAL ::

The Assistant Commissioner, Central Excise, Division-Kalol, Ahmedabad (hereinafter referred to as 'appellant') has filed the present appeal against the Order-in-Original number AHM-CEX-003-DC-066-16-17 dated 27.03.2017 Orders-in-Original (hereinafter referred to as 'impugned orders') passed by the Deputy Commissioner, Central Excise, Kalol Division, Ahmedabad-III in the case of M/s. Letra Graphix Pvt Ltd, Unit-II, Plot No. 40/3, Palodiya, Post- Rakanpur, Taluka- Kalol, Dist.-Gandhinagar-382115 (hereinafter referred to as 'respondent').

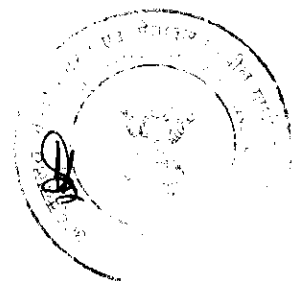
2. During the course of audit of the financial records of the Respondent having Central Excise registration No. AAACL2737QXM002, it was observed that they had availed 100% Cenvat Credit of service Tax in respect of Manpower Supply Services. In the instant case service recipient is a Private Limited Company registered under category of "Body Corporate". However, M/s Hitika Enterprise, the service provider is a Proprietorship ascertained from the stamp on the body of invoice issued by M/s Hitika Enterprise. As per provisions of Section 68(2) of the Finance Act, 1994 read with Rule 3(d) of the Service Tax Rules, 1994 and Notification No. 30/2012-ST, the service provider is liable to pay service tax to the extent of 25% of service tax payable and assessee was liable to pay balance 75% of service tax payable. However, the service provider had paid 100% i.e. full service tax and service recipient had taken the credit of 100% service tax credit resulting in wrong availment of Cenvat credit on Service Tax to the tune of Rs. 51,429/-, being 75% of the Service Tax which the respondent was supposed to pay. The respondent has availed Cenvat credit of Service Tax without proper duty paying documents like GAR-7 Challan.

2.1 In view of the above, A Show Cause Notice dated 22.09.2016 was issued to disallow and demanding Cenvat Credit of Rs. 51,429/- under Rule 14 of CCR,2004 read with Section 11A(4) of Central Excise Act, 1944 and Interest in terms of the provisions of Rule 14 of the CCR, 2004 read with Section 11A (4) of Central Excise Act, 1944 as well as Penalty under Rule 15(2) of the CCR, 204 read with Section 11AC of Central Excise Act, 1944. The adjudicating authority allowed the said credit and also dropped the other charges.

3. The impugned order was reviewed by the Commissioner of Central

Excise, Ahmedabad-III, and issued review order No. 05/2017-18 dated 22.06.2017 for filing an appeal under section 35E of Central Excise Act, 1944 before Commissioner of Appeals, Central Excise, Ahmedabad on the following ground:

- (i) The adjudicating authority allowed the 75% of Cenvat Credit of the Service Tax paid on Manpower Service paid by the Service provider instead of the same being liable to be paid by the Service recipient. The same no way allowable in terms of the provisions of Rule 2(d)(i)(F)(b) of the service Tax Rules 1994, which defined the persona liable to pay Service Tax under Reverse Charge Mechanism in Manpower Supply Services
- (ii) As per provisions of Rule 9(5) of CCR, 2004, the manufacturer of the final product or provider of the output service shall maintain proper records for receipts, disposal, consumption and inventory of the input & capital goods in which the relevant information regarding value, duty paid, Cenvat credit taken and utilise, the person from whom the input or capital goods had been procured is recorded and the burden of proof regarding the admissibility of the Cenvat Credit shall lie upon the manufacturer or provider of output service provider is liable to pay 25% and the balance 75% was liable to be paid by them. However, the assessee (respondent) had taken 100% Cenvat Credit paid by the Service provider that too without possessing any proper duty paying documents for the same and without paying 75% of total service Tax payable by him. So he has clearly violated the provisions made in this regard.
- (iii) The Adjudicating authority has totally ignored the provisions of Notification no. 30/2012-ST dated 20.06.2012, wherein at Sr. No. 8 of the Table therein specifically mentions percentage of Service Tax payable by the person providing Service Tax and that is receiving service . Sr. No. 8 of the Table therein states 25% of the Service Tax to be paid by the person providing service, whereas remaining 75% is payable by the person receiving the service.
- (iv) The Adjudicating authority has allowed availment of 75% of Cenvat Credit to the assessee (respondent) even though assessee failed to pay the said 75% of the Service Tax on the Service received by him. The Adjudicating Authority has taken



pleas that the total Service Tax was paid and that there was no loss to the Department in terms of such availment of Credit. Thus Adjudicating authority's plea that the Cenvat Credit availment was revenue neutral is wrong and against the Rule and provisions.

4. Personal hearing in the matter was granted and held on 01.12.2017. Mr. Nirav Shav, Advocate on the behalf of respondent appeared before me and submitted that they file the cross objection within 7 days.

5. The respondent vide their cross objection dated 03.12.217 submitted as follows:

- i. This is appeal filed by the department, wherein demand for reversal of Cenvat Credit is dropped by the Adjudicating Authority. The issue in the present appeal is pertaining to availment of service tax on man power supply service. The service provider is man power supplier. As per the service tax law, service tax to the tune of 75% of total amount is required to be paid by service receiver and only 25% is required to be paid by the service provider.
- ii. Entire service tax is paid by service provider and hence, the department objected to such payment by the service provider and has demanded reversal of Cenvat Credit of service tax paid at the rate of 75% from the service provider. However, the adjudicating authority has dropped the demand entire service tax payable to the Government stands paid and there is no short payment of service tax as far as the Exchequer is concerned. Further the adjudicating authority has held that the assessment at the end of service provider is final and cannot be reopened at the end of recipient of service.
- iii. The adjudicating authority has also correctly relied upon following judgments: (a) Sarvesh Refractories P Ltd reported at 2007 (218) ELT 488 (SC), (b) MDS Switchgear Ltd. reported at 2008(229)ELT485(SC) (c) Kitchen Appliances I Ltd reported at 2013 (288) ELT 567 and (d) V G Steel Industries reported at 2011(271) ELT508 (P&H).
- iv. It is submitted that demand notice is correctly dropped by the authority and appeal against the order is required to be rejected.

6. I have carefully gone through the facts of the case on records,



grounds of appeal and oral submissions made by the appellants at the time of personal hearing. The issue involved is whether the appellant is eligible for the 75% excess CENVAT credit taken or otherwise.

7. As per Sr. No. 8 of the notification No. 30/2012-ST dated 20.06.2012, appellant, being service receiver, was required to pay service tax on 75 % of taxable value and M/s. Hitika Enterprise, the service provider, was required to pay service tax on 25 % of taxable value. M/s. Hitika Enterprise however, paid 100% service tax instead of 25% liability and appellant thereafter, availed CENVAT credit on the basis of invoice issued by M/s. Hitika Enterprise. Contention of department is that M/s. Hitika Enterprise was liable to pay only 25% of service tax, therefore appellant is eligible for only 25% of service tax under Rule 9 of CENVAT Credit Rules, 2004, even though 100% service tax payment had been made by M/s Hitika Enterprise. The excess credit taken i.e. 75% of service tax, comes to Rs. 51,429/-.

7.1 Rule 9 of the Cenvat Credit Rules, 2004 states as follow:

Rule 9. Documents and accounts.-

(1) *The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely :-*

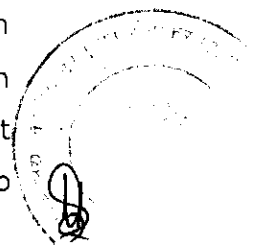
- (a).....
- (b).....
- (c).....
- (d).....

(e) ***a challan evidencing payment of service tax by the person liable to pay service tax under sub-clauses (iii), (iv), (v) and (vii) of clause (d) of sub-rule (1) of rule (2) of the Service Tax Rules, 1994; or***

[Emphasis Supplied]

7.2 As per Para 1(e) of rule 9 of CENVAT Credit Rules "a challan evidencing payment of service tax, by the service recipient as the person liable to pay service tax" is proper document to take credit. Since NO service tax payment has been made as a recipient of service under notification no. 30/2012- ST dated 20.06.2012, no credit is allowable to appellant.

8. The aforesaid provisions very clearly stipulate that the CENVAT Credit shall be taken by the service recipient on the basis of a challan evidencing payment of service tax, by the service recipient as the person liable to pay service tax. The liability of payment of tax on the appellant can not be discharged by M/s. Hitika Enterprise, the service provider. I also



find that the appellant has not discharged his own liability and availed the excess CENVAT credit and thus contravened the provisions of Rule 9 of CENVAT Credit Rules, 2004, hence the appellant is not eligible for CENVAT credit.

9. **Article 265** of the Constitution of India state that "*Taxes not be imposed saved by the authority of law. No taxes shall be levied or collected except by authority of law*". Therefore no tax shall be **levied** or **collected** without an authority of law. It further states that "Taxes not to be imposed save by authority of law". **Article 265 contemplates two stages** - one is **levy of tax** and other is **collection of tax** and that levy of tax includes declaration of liability and assessment, namely, quantification of the liabilities. After the quantification of the liability follows the collection of tax and it should be only by an authority of law.

10. I would like to quote the charging Section 66B of the Finance act, 1994 which states that

*"SECTION 66B.Charge of service tax on and after Finance Act, 2012.—There shall be **levied** a tax and **collected in such manner** as may be prescribed."*

I find that in present case, the taxes have been levied on service provider and service receiver in certain manner and only that person in such manner as prescribed can discharge the tax liability.

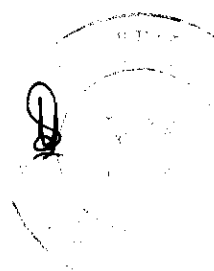
11. Section 68(1) makes it mandatory for service provider to pay tax. Section 68(1) is reproduced as below

"(1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed."

The analysis of above section 68(1) gives us vital points that tax shall be paid in such manner as may be prescribed.

12. Section 68 (2) makes it mandatory that for notified services, the receiver or receiver and provider on shared basis will pay the service tax. Section 68(2) is reproduced as below-

"(2) Notwithstanding anything contained in sub-section (1), in respect of [such taxable services as may be notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66



and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider."

13. The analysis of above section 68(2) gives us vital points that tax shall be paid in such manner as may be prescribed. Notification No. 30/2012-ST dated 20.06.2012 issued under section 68(2) for certain services has notified that some services tax liability shall be shared between provider and receiver of service to the extent of percentage prescribed in notification.

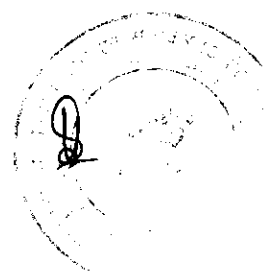
13.1 The mandate of this section 68(1) and 68(2) is very clear and does not give any scope of interpretation leading to the conclusion **that the tax liabilities casted on one person cannot be discharged by any other person in the manner, which is not prescribed by the law.** The plain and simple reading of section 68(1) and 68(2) is that the person on whom the tax liability is casted, he only should discharge it and also in the manner specified.

13.2 In view of above, excess service tax paid by M/s. Hitika Enterprises, service provider, is without authority of law, therefore it is in nature of deposit, and therefore credit of same is not eligible to the appellant. Only "duty" can be availed as credit and not the "deposit".

14. Hon'ble High Court of Mumbai has interpreted it in case of Idea Cellular [2016(42)STR 823]. Hon'ble High Court has very clearly stated as follows:

"..... As postulated by Article 265 of the Constitution of India a tax shall not be levied except by authority of law i.e., a tax shall be valid only if it is relatable to statutory power emanating from a statute. The collection of VAT on the sale of SIM cards, not being relatable to any statutory provision, must be held to be without authority of law and as a consequence non est...." (para 12).

15. When it is crystal clear in notification that service provider will pay 25% and service receiver shall pay 75% of service tax, then there should not be any reason to by-pass clear provision by M/s. M/s. Hitika



Enterprise to pay 100% of service tax. In a catena of judgments the Apex court has ruled that "Enlarging scope of legislation or legislative intention is not the duty of Court when language of provision is plain - Court cannot rewrite legislation as it has no power to legislate..."

DHARAMENDRA TEXTILE PROCESSORS 2008 (231) E.L.T. 3 (S.C.)

Interpretation of statutes - Principles therefore - 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 - Language employed in statute is determinative factor of legislative intent.

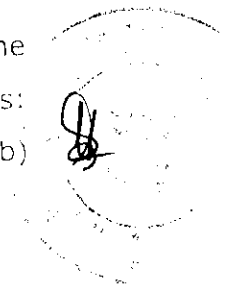
PARMESHWARAN SUBRAMANI 2009 (242) E.L.T. 162 (S.C.)

Interpretation of statutes - Legislative intention - No scope for court to undertake exercise to read something into provisions which the legislature in its wisdom consciously omitted - Intention of legislature to be gathered from language used where the language is clear - Enlarging scope of legislation or legislative intention not the duty of Court when language of provision is plain - Court cannot rewrite legislation as it has no power to legislate - Courts cannot add words to a statute or read words into it which are not there - Court cannot correct or make assumed deficiency when words are clear and unambiguous - Courts to decide what the law is and not what it should be - Courts to adopt construction which will carry out obvious intention of legislature. [paras 14, 15]

16. Appellant had relied upon various tribunal judgments wherein it is held that in cases where duty liability of service receiver is discharged by service provider and vice-versa, there is no revenue loss to exchequer. But Tribunal judgments cited by appellant in their appeal memo, has not dealt with this vital Constitutional point of Article 265. Hon'ble Tribunal has also not considered the legal position as well as constitutional provision in their order.

17. Appellant had argued that there should not be double taxation on same service. I am of the view that M/s. Hitika Enterprise had paid only 25% of service tax and excess paid (75%) is deposit. Therefore, there is no double taxation if 75% of service tax is demanded from appellant by virtue of sr. no. 8 of notification No. 30/2012-ST.

18. Vide ground of appeal, the appellant has stated that, The adjudicating authority has also correctly relied upon following judgments: (a) Sarvesh Refractories P Ltd reported at 2007 (218) ELT 488 (SC), (b)



MDS Switchgear Ltd. reported at 2008(229) ELT485 (SC) (c) Kitchen Appliances I Ltd reported at 2013 (288) ELT 567 and (d) V G Steel Industries reported at 2011(271) ELT508 (P&H). On going through the OIO, it is learnt that no such judgments are quoted by the adjudicating authority in their order. However the above said judgments are not similar to the present case.

19. In view of the above facts and discussions held in the above paragraph, I allow the appeal filed by the Department (appellant) and set aside the impugned order.


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

20. The appeals filed by the appellant stand disposed off in above terms.

उमा शंकर

उमा शंकर)
केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED


(S. DUTTA)
SUPERINTENDENT (APPEAL),
CENTRAL TAX, AHMEDABAD.

To,
M/s. Letra Graphix Pvt Ltd, Unit-II,
Plot No. 40/3, Palodiya, Post- Rakanpur,
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Copy to:-

1. The Chief Commissioner, Central Tax Zone, Ahmedabad.
2. The Commissioner, Central Tax, Gandhinagar.
3. The Dy. / Asstt. Commissioner, Central Tax, Division- Kalol.
4. The Addl./Joint Commissioner, (Systems), Central Tax, Gandhinagar.
5. Guard file.
6. P.A file.

