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By R.P.A.D.

F. No. V/15-92/Dem-ST/HQ/2010-11

Date of Order: 15/02/2012

Date of Issue: 15/03/2012

Passed by

IMAMUDDIN AHMED
Joint Commissioner
Central Excise
Bhavnagar

Order-in-Original No: 22 / BVR / Jt.Commr / 2012

This copy is granted free of charge for private use of the person(s) to whom it is sent.

Any person(s) deeming himself aggrieved by this Order may appeal against this order under Section 85 of Finance Act, 1994 to the Commissioner, Central Excise(Appeals), Rajkot, Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 within three months from the date of its communication. The appeal should bear a court fee stamp of Rs 2.50/- paise only.

The appeal should be filed in form ST-4 in duplicate, as per the provisions of Section 85 of the Finance Act, 1994 read with Rule 8 of the Service Tax Rules, 1994. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeal) Rules, 2002.

It should be accompanied with the following:

- Copy of appeal in duplicate
- Copies of the order, one of which shall be certified copy **OR** the other must bear a court fee stamp of Rs 2.50/- paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

BY R.P.A.D.

To,
M/s. Hindustan Unilever Ltd.,
Plot No. 130/1, Holiday Home Road, Chorwad,
District: - Junagadh-362 250

Subject: Show Cause Notice Number No. V/15-92/Dem-ST/HQ/2010-11 dated 19.04.2011 issued to M/s. New Hindustan Unilever Ltd., Junagadh demanding Service Tax of Rs. 22,57,207/-.

BRIEF FACTS:

01. M/s Hindustan Unilever Ltd., Plot No. 130/1, Holiday Home Road, Chorwad, District Junagadh-362250 (herein after referred to as "the Noticee") is holding Service Tax Registration No. AAACH1004NST068 under the category Transport of Goods by Road and Business Auxiliary Service (BAS) for payment of service tax as leviable.

02. As provided under Para (a) (i) and para (c) of the Notification No.18/2009-ServiceTax dated 07.07.2009, prior to availing the exemption for the whole of the service tax leviable on taxable service in respect of 'Goods Transport Agency Service' and 'Foreign Commission Agent Service' received by them and used for export of goods in terms of Notification No.18/2009-Service Tax dated 07.07.2009, the Noticee filed Return in Form-EXP2 before the Assistant Commissioner, Service Tax Division, Bhavnagar. They filed a Return on 26.04.2010 for the period from 01.10.2009 to 31.03.2010 claiming exemption of Service Tax of Rs. 14,16,075/- and further a Return was filed on 25.10.10 for the period from 01.04.10 to 30.09.2010 claiming exemption of Service Tax of Rs.8,41,132/-. Thus, the total amount of exemption of Service Tax claimed by the Noticee comes to Rs.22,57,207/- for the period from 01.10.2009 to 30.09.2010.

03. On scrutiny of these Returns in Form-EXP2 it was found that these have been filed by the Noticee for claiming exemption for Service Tax on the services (i) Transport of Goods by Road (GTA); and (ii) Business Auxiliary Service (Foreign Commission Agent Service).

04. The 'Transport of Goods by Road Service' is covered under the category of (zzp), at Sr. No. 1 of the Table of Notification No.18/2009-Service Tax dated 07.07.2009, as Service provided to an exporter for transport of the said goods by road from any container freight station or inland container depot to the port or airport, as the case may be, from where the goods are exported; or Service provided to an exporter in relation to transport of said goods by road directly from their place of removal to an inland container depot, a container freight station, a port or airport, as the case may be, from where the goods are exported subject to condition that the exporter shall have to produce the consignment note, by whatever name called, issued in his name.

05. The Noticee has furnished Consignment Note-cum-Transport Bill, issued by the Service Provider which is in the name of the Noticee, for the period from 01.04.2010 to 30.09.2010 only, for transportation charges for 'to and from' i.e. from Pipavav to Chorwad and back to Pipavav. The Noticee is eligible for exemption of service tax on taxable value for transport of export goods by road to the extent of taxable value of transportation charges from the factory to the port of export only. Whereas, the Consignment Note-cum-Transport Bill is for 'to and from' i.e. to factory (place of removal) and from there to port. Thus, the Noticee is not eligible for exemption under Notification No.18/2009-Service Tax dated 07.07.2009.

06. The 'Foreign Commission Agent Service' is covered under the category (zzb), at Sr. No. 2 of the Table in Notification No.18/2009-Service Tax dated 07.07.2009 as service provided by a commission agent located outside India and engaged under a contract or agreement or any other document by the

exporter in India, to act on behalf of the exporter, to cause sale of goods exported by him subject to certain conditions.

07. On scrutiny of the documents filed with the Return in Form-EXP2 for the period from 01.10.2009 to 30.09.2010, it is noticed that the Noticee has not declared the amount of commission paid or payable to the commission agent in the shipping bill; the original documents showing actual payment of commission to the commission agent have not been furnished; copy of the agreement or contract entered into between the commission agent located outside India and the exporter in relation to sale of export goods, outside India is also not furnished as required under the conditions of the said exemption Notification.

08. It is further found that the Noticee has filed these two Returns in Form-EXP2 for the period from 01.10.2009 to 31.03.2010 and from 01.04.2010 to 30.09.2010 on 26.04.2010 and 25.10.2010 respectively i.e. beyond the prescribed limit of fifteen days after completion of the half year. Thus, they have not fulfilled another condition mentioned in Para (c) of the Notification No.18/2009-Service Tax dated 07.07.2009. By not fulfilling the conditions of Notification No.18/2009-Service Tax dated 07.07.2009, the Noticee has rendered themselves ineligible for the benefit of exemption as per Notification No.18/2009-Service Tax dated 07.07.2009 and are therefore liable for payment of Service Tax of Rs.22,57,207/-. Also, the Noticee appears to have contravened provisions of Section 68 of the Finance Act 1994 read with Rule 6 of the Service Tax Rules, 1994, in as much as they failed to pay service tax, at the appropriate rate and liable for penal action under Section 76 of the Finance Act 1994.

09. Therefore, a show cause notice F. No. V/15-92/Dem-ST/HQ/2010-11 dated 19.04.2011 was issued to the Noticee, as to why:

- (i) The benefit of exemption as per Notification No.18/2009-Service Tax dated 07.07.2009 claimed by filing return in Form-EXP2 for the period from 01.10.2009 to 31.03.2010 and from 01.04.2010 to 30.09.2010 should not be rejected.
- (ii) Service tax amounting to Rs.22,57,207/- (Rupees Twenty two lakhs fifty seven thousand two hundred and seven only), should not be recovered from them under Section 73 of Finance Act, 1994
- (iii) Interest at the appropriate rate should not be levied as per Section 75 of the Finance Act, 1994.
- (iv) Penalty should not be imposed upon them under Section 76 of the Finance Act, 1994 as discussed at Para 9 of this Notice.

DEFENCE & PERSONAL HEARING:

10. The Noticee did not file reply to the show cause notice in the prescribed time limit therefore, reminders dated 07.06.2011 and 24.06.2011 were issued. Finally they filed reply to the show cause notice vide their letter dated 22.12.2011 and submitted that :

- (A) The bill is issued by Meridian for Transportation charges of empty container from port to factory and loaded container from factory to port. There is no bifurcation of charges between port to factory and factory to port.
- (B) During this period, while making the shipment it was not clear whether the commission was to be payable or not and the same was not

mentioned in the Proforma Invoice and hence, the same was not mentioned in the shipping bill.

- (C) They do not have any formal agreement. However, the commission payable is mentioned in Proforma Invoice, the copy of which was filed along with the Return, wherever applicable. (Illustrative copies of Proforma Invoices submitted by them.)
- (D) They have filed the Return based on their understanding that the last date for filing the Return is 25th of the next month on completion of half year and hence, they had filed during those dates. This being curable and forgivable lapse, may kindly be condoned.
- (E) In view of the submissions, exemption under notification No.18/2009-ST dated 07.07.2009 is not deniable for the aforesaid curable and procedural lapse, when fact of utilization of the said services for export of goods is not in dispute.

It is settled position of law that exemption under Notification is not deniable for such curable and procedural lapse based on the following judgments :

- (a) 1991 (55) ELT 437 (SC) – Mangalore Chemical & Fertilizers.
 - (b) 2000(118) ELT 271 (T-LB)- Breach Candy Hospital.
 - (c) 1990 (47) ELT 500 (SC) – Wood Papers Ltd.
 - (d) 1986 (24) ELT 411 (T) – J.B.A. Printing Inks Ltd.
 - (e) 1997 (92) ELT 703 (T) – Lokhandwala Construction.
- (F) The fact of utilization of the said services for export is not in dispute and hence, benefit pertaining to export under the said notification is not deniable which view gets substantiated from the ratio of following judgments :
 - (a) Ashok Layland Ltd. – 1999 (105) ELT 30 (Mad).
 - (b) T.I.Cycles – 1993 (66) ELT 497 (T)
 - (c) Ahmed & Co. – 1993 (67) ELT 759 (G.O.I.)
 - (d) Dutta Engineering Works – 1994 (72) ELT 311 (T).
 - (G) Regarding interest, in the instant case, since the Service Tax was not payable, liability to pay interest under Section 75 also would not come in picture.
 - (H) Penalty under Section 76 is not sustainable: This penalty is over and above payment of Service Tax in accordance with the provisions of Section 68 and interest under Section 75. Penalty under Section 76 can arise only where there is a failure to pay service tax. In the instant case, liability to service tax does not arise and hence, there is no failure to pay service tax.
 - (I) For imposing penalty, presence of mens-rea is a mandatory requirement and in the absence of which imposition of penalty is unjustified, as enshrined by the Hon'ble Supreme Court in the case of Hindustan Steel Ltd. Vs. State of Orissa – {1978 (2) ELT (J-159)} and number of subsequent judgments from various judicial for based thereupon.
 - (J) In the instant case none of the acts were backed up with any ulterior motive or malafide intention to evade duty and therefore, imposition of penalty is incorrect and uncalled for based on settled position on the issue. They relied upon the following judgments :
 - (a) 2010 (258) ELT 465 (SC) – Sanjiv Fabrics.
 - (b) 2007 (207) ELT 27 (P & H) – UT Ltd.
 - (c) 2007 (5) STR 251 (P & H) – Kamal Kapoor.

10.1 Personal hearing in this case was fixed for 20.10.11, 18.11.2011, 14.12.2011, 15.12.2012, 09.01.2012, 10.01.2012, 24.01.2012, 25.01.2012, 09.02.2012 and 10.02.2012. The Noticee was informed regarding personal hearing. vide letter dated 10.10.2011, 21.10.2011, 01.12.2011, 19.12.2011

13.01.2012 and 31.01.2012. However, nobody appeared for personal hearing on any of the dates also no reason has been provided by the Noticee regarding not appearing for personal hearing.

FINDINGS :

11. I have carefully gone through the facts of the case available on record. I have seen the show cause notice issued to the Noticee in this case and the submissions made by the Noticee in writing. I find that sufficient opportunities have been provided to the Noticee for personal hearing, which they have not availed, as mentioned in para supra. Thus, principle of natural justice has been properly followed and the matter cannot be kept pending indefinitely therefore, I proceed to decide the matter on the basis of evidence available on record.

11.1 The issue to be decided in this case is whether the Noticee has violated the conditions of the Notification No.18/2009-Service Tax dated 07.07.2009 and are therefore, liable for payment of Service Tax of Rs.22,57,207/- in respect of service tax on (i) Transport of Goods by Road service (GTA); and (ii) Business Auxiliary Service (Foreign Commission Agent Service).

11.2 I find that the Noticee has not disputed about alleged violations of the conditions of the exemption notification No. 18/2009-Service Tax dated 07.07.2009. In their reply dated 22.12.2011 to the show cause notice, they have categorically admitted that transportation charges mentioned in the bill are for transportation of containers 'to and from' the factory and there is no bifurcation of two way freight charges in the bill. They have submitted copies of the bills raised by the service provider.

11.3 On scrutiny of these 'Consignment - cum - Transport Bill', it is found that the same are issued by 'Meridian Freight Forwarder Pvt. Ltd.' for "being Transportation charges of 1 x 40' reefer container from Pipavav to Chorwad & back to Pipavav". It is further found that in a few cases the charges includes 'Trailer Detention Charges'. Thus, the bills are raised for services which are not covered under the said exemption notification. It is a matter of fact that they have claimed exemption for full amount of service tax on the charges mentioned in the bill. Which meant they have claimed benefit of exemption of service tax on transportation charges paid by them, not only for the transportation of export goods from the place of removal (i.e. the factory premises) to the port of export but they have also claimed exemption of service tax on the transportation charges incurred by them prior to removal of goods from the place of removal which is not allowed under the said notification.

11.4 The exemption from payment of service tax on 'Transport of Goods by Road service (GTA)' is prescribed under the notification number 18/2009-Service Tax dated 07.07.2009. According to the said notification exemption is available from whole of the service tax leviable on service provided to an exporter for transport of the said goods (export goods) by road from any container freight station (CFS) or inland container depot (ICD) to the port or airport, as the case may be, from where the goods are exported; or Service provided to an exporter in relation to transport of said goods by road directly from their place of removal, to an inland container depot, a container freight station, a port or airport, as the case may be, from where the goods are exported. Thus, the notification is very clear about the description of the taxable service eligible for exemption. No exemption can be allowed for service other than for the service mentioned in this notification. Whereas, the Noticee has claimed exemption from payment of service tax on taxable

service received from port to the place of removal which is not covered under the said exemption notification, therefore, the same is required to be rejected and service tax is required to be recovered from them under Section 73 of the Finance Act, 1994 alongwith interest at appropriate rates under Section 75 of the Finance Act, 1994.

12.1 In respect of second issue regarding exemption from payment of service tax on Business Auxiliary Service (Foreign Commission Agent Service) provided by a commission agent located out side India, which is also allowed vide notification number 18/2009-Service Tax, dated 07.07.2009 subject to certain conditions mentioned therein. I find that the Noticee has not followed the prescribed condition. They have categorically admitted that they have not declared the amount of commission paid or payable to the commission agent in the shipping bill. Also they have not submitted copy of the agreement to prove that they had engaged an agent for selling of the goods in foreign market. They have made contradictory statement regarding mentioning of payable commission to the agent.

12.2 I find that in para 9(B) of the reply dated 22.12.2011, the Noticee has submitted that while making the shipment it was not clear whether the commission was to be payable or not and the same was not mentioned in the Proforma Invoice and hence, the same was not mentioned in the shipping bill. Whereas in the very next para they have submitted that they did not have any formal agreement. However, the commission payable is mentioned in Proforma Invoice. To avail exemption from payment of service tax in respect of the said service, it is mandatory to declare the amount of commission paid or payable to the commission agent in the shipping bill or bill of export, as the case may be, as prescribed in the said exemption notification. This is necessary as the exemption is limited to one percent of the free on board (FOB) value of export goods for which the said service has been used. These conditions are prescribed for smooth and hassle free implementation of the exemption notification.

12.3 Regarding late filing of Return, they have contended that they had filed the Return based on their understanding that last date for filing the Return is 25th of the next month on completion of half year and hence, they had filed during those dated; that this being curable and forgivable lapse, may kindly be condoned. They have further contended that exemption under Notification No. 18/2009-ST dated 07.07.2009 is not deniable for the aforesaid curable and procedural lapse, when fact of utilization of the said services for export of goods is not in dispute. They have relied upon various judgments in support.

12.4 The above contentions of the Noticee can not be accepted. Also relied upon judgements are not helpful to them in the present matter. The Noticee has claimed exemption under Notification number 18/2009 Service Tax dated 07.07.2009. In a number of judgments, various appellate authorities, including the Hon,ble Apex Court has held that condition for exemptions have to be strictly construed and if exemption is subject to condition, non-fulfilment of condition to result in denial of exemption. In the present matter the Noticee has not fulfilled conditions of the said exemption Notification therefore, they are not eligible for benefit of the exemption. They were required to mention/declare the amount of commission paid or payable to the commission agent in the shipping bill which they have not done, they have not submitted a copy of the agreement with the commission agent and they have not filed prescribed Return in time. Thus they have not fulfilled various conditions of the said exemption Notification therefore, they are not eligible for exemption from payment of service tax under Notification No.

18/2009-Service Tax dated 07.07.2009. In holding this I rely upon the following judgments.

- (i) Punjab State Sports Council Vs. Commissioner of Customs (I), Mumbai-2011 (269) ELT 540 (Tri.-Mumbai).
- (ii) CCE, Jammu Vs. Jindal Drugs Ltd., -2011(267) ELT 653 (Tri.- Del.).
- (iii) CCE, Ghaziabad Vs. Radhu Products (p) Ltd. -2010) (260) ELT 98 (Tri. Del).
- (iv) Hotel Leela Venture Ltd. Vs. Commissioner of Customs (Gen.) Mumbai - 2009 (234) ELT 389 (S. C.).
- (v) Sarabhai M. Chemicals Vs. CCE, Vadodara, -2005 (179) ELT 3(S.C.)
- (vi) Saraswat Sugar Mills Vs. CCE, Delhi-III -2011 (270) ELT 465 (S.C.)
- (vii) Union of India Vs. Ganesh Metal Processors Industries, -2003 9151) ELT 21 (S.C.).
- (viii) Orient Traders Vs. Commercial Tax Officer, Tirupati -2009 (237) ELT 447 (S. C.).

13. Since they are not eligible for exemption from payment of Service Tax of Rs. 22,57,207/- in respect of services (i) Transport of Goods by Road service (GTA); and (ii) Business Auxiliary Service (Foreign Commission Agent Service) therefore, the same is required to be recovered from them under Section 73 of the Finance Act, 1994 along with interest at appropriate rates under Section 75 of the Finance Act, 1994.

14. Regarding imposition of penalty under Section 76 of the Finance Act, 1994 I find that the Noticee have failed to pay Service Tax of Rs. 22,57,207/- on services viz. (i) Transport of Goods by Road service (GTA); and (ii) Business Auxiliary Service (Foreign Commission Agent Service) Knowingly during the period from 01.10.2009 to 30.09.2010 therefore, they are liable for penal action under Section 76 of the Finance Act, 1944.

15. The Noticee has relied upon various decisions in support of their contention. However, the findings of these judgments can not be made applicable in the present matter as the facts of the cases relied upon are different than the facts of the present matter. In this case it is admitted by the Noticee that they have not fulfilled the conditions of the exemption.

15.1 In view of the findings hereinabove and the provisions of Law I hold that the Noticee is not eligible for exemption under the Not. No. 18/2009 - Service Tax dated 07.07.2009 therefore, the amount of Service Tax of Rs. 22,57,207/- is required to be recovered from them under Section 73 of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1944. Consequently they are liable for penal action under Section 76 of the Finance Act, 1994, I therefore, pass the following order.

ORDER

- 16.** (i) The benefit of exemption under Notification number 18/2009-Service Tax dated 07.07.2009 claimed by M/s Hindustan Unilever Ltd., Plot No. 130/1, Holiday Home Road, Chorwad, District Junagadh-362250 for the period from 01.10.2009 to 31.03.2010 and from 01.04.2010 to 30.09.2010 is rejected.
- (ii) I order for recovery of Service Tax of Rs. 22,57,207/-(Rupees twenty two lakhs fifty seven thousand two hundred seven only) under Section 73 of Finance Act, 1994 from M/s Hindustan Unilever Ltd., Plot No. 130/1, Holiday Home Road, Chorwad, District Junagadh-362250.

- (iii) I order for recovery of interest at appropriate rates under Section 75 of the Finance Act, 1994, on the amount of Service Tax mentioned in (ii) above.
- (iv) I impose a penalty at the rate of rupees two hundred (Rs.200/-) per day or two percent (2%) per month whichever is higher, under the provisions of Section 76 of the Finance Act, 1994 starting with the first day after the due date till the date of actual payment of Service Tax amount, provided that the total amount of the penalty payable in terms of this account shall not exceed the Service Tax payable.

Imamuddin Ahmed
15/3/12

(IMAMUDDIN AHMED)
JOINT COMMISSIONER,
CENTRAL EXCISE,
BHAVNAGAR.

F. No. V/15-92/Dem-ST/HQ/ 2010-11

Date: - /03/2012

By Registered A.D. Post

To,
M/s Hindustan Unilever Ltd.,
Plot No. 130/1,
Holiday Home Road, Chorwad,
District Junagadh-362250.

Copy to:

1. The Commissioner of Central Excise, Bhavnagar (RRA)
2. The Assistant Commissioner (Recovery Cell) of C. Ex., Bhavnagar.
3. The Assistant Commissioner, Service Tax Division, Bhavnagar.
4. The Superintendent, Service Tax Range, Junagadh.
5. Guard file.