::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,
द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142
Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/113/BVR/2017 6817 to 6821	**90/AC/Stax/Div/2016-17**	**27.02.2017**

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

BHV-EXCUS-000-APP-88-2017-18

आदेश का दिनांक / Date of Order:	**15.01.2018**	जारी करने की तारीख / Date of issue:	**17.01.2018**

Passed by **Shri Gopi Nath, Additional Director General (Audit), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री गोपी नाथ, अपर महानिदेशक ऑडिट, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा८५, केंद्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.217 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Gopi Nath, Additional Director General of Audit, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ 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 / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता &** प्रतिवादी का नाम एवं पता /Name & Address of the **Appellants &** Respondent :-

M/s Gujarat Meritime Board, Ship Breaking Yard, Alang Dist : Bhavnagar

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, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावो 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

160

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of 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 क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the 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 रुपए से अधिक न हो।

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

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

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन 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 :

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules

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

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलो मे, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक 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 मे, 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 मे या भंडारण मे माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह मे 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 मे प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (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 इयूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद मे पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 मे, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख 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 जाएँ ।
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 मे कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding 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 मे वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर 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.

ORDER-IN-APPEAL

This order arises on account of an appeal filed by M/s. Gujarat Maritime Board, Ship Breaking Yard, Alang, Dist., Bhavnagar (herein after referred to as 'the appellant' for the sake of brevity) against an Order-In Original No. 90/AC//STAX/DIV/2016-17 Dated 27.02.2017 (herein after referred to as the 'impugned order' for sake of brevity) by the Assistant Commissioner, Service Tax Division, Bhavnagar (herein after referred to as the 'Adjudicating Authority' for sake of brevity).

2. Briefly stated the facts of the case are that -

(i) the appellant are holding Service Tax RegistrationNo. AABCG6676LST017 for providing the Port Services. During the course of audit and on verification of the invoices for the year 2012-13, it was observed that the appellant had collected Vehicle Entry Fees from the vehicles entered into the port area which comes under the services provided by the port and as per the provisions made under "Port Services", the appellant is liable to pay service tax on gross amount charged by them for such service provided by them. The appellant had collected Vehicle Entry Fee totally amounting to Rs.51,77,300/- during the year 2012-13 on which service tax of Rs.6,39,139/- was liable to be paid under the provisions of the Finance Act,1994. However, on being pointed out by the Audit team, the appellant did not agree with the said objection. Further, the jurisdictional Range Superintendent vide letters dated 18.08.2015, 17.11.2015, 05.01.2016 and lastly dated 08.02.2016 had called for the month wise data/information for the subsequent period from April,2013 to March,2015 regarding Vehicle entry collection fee, so collected by them but the appellant did not reply and not provided the same till that date. Therefore, their service tax liability for the period from April,2013 to March,2015 could not be quantified in absence of required datas. However, after placing reliance on the decision of Hon'ble CEGAT 5 member Bench-3 in the case of Bihari Silk & Rayon Processing Mills V/s CCE-2000((12) ELT 617, decision for issuance of show cause notice without quantification of demand for the period from April,2013 to March,2015 was taken. These facts culminated into issuance of a Show Cause Notice dated 01.03.2016 to the appellant demanding Service Tax of Rs.6,39,916/- for the period 2012-13 + an amount to be quantified for the period from April,2013 to March,2015(for which quantification is pending due to non-availability of concerned data) under Section 73(1) of the Finance Act,1994 with interest and penalties as proposed in the impugned SCN.

(ii) The appellant during the proceedings before the Adjudicating Authority vide submission dated 13.01.2017 provided the details of Vehicle Entry Fee for the period from 2013-14 to 2014-15 and accordingly, it transpired that the appellant had collected Vehicle Entry Fee amounting to Rs.38,42,000/- and Rs. 24,56,000/- on which service tax liable to be paid of Rs. 4,74,878/- and Rs.3,03,560/- for the year 2013-14 and 2014-15 respectively, under the provisions of the Finance Act,1994.

(iii) The Adjudicating Authority under the impugned order confirmed the demand of Service Tax of Rs.14,18,354/-/- (Rs. 6,39,916/- + Rs. 4,74,878/- + Rs.3,03,560/- inclusive of Cess for the Financial year, 2012-13, 2013-14 and 2014-15 respectively) and to be recovered from the appellant under Section 73(1) read with Section 68 of the Finance Act,1994 and ordered for interest under Section 75 of the Finance Act,1994 and imposed penalty of Rs. 14,18,354/- under Section 78 of the Finance Act,1994 and a penalty of Rs.10,000/- under Section 77(2) and Penalty of Rs.10,000/- under 77(1)(c) of the Finance Act,1994.

3. Aggrieved, the appellant had filed present appeal on the grounds interalia mentioned as under:-

(i) The appellant contended that they had made various submission and oral arguments, before the Adjudicating Authority. However, the Adjudicating Authority had clearly overlooked the same and mechanically confirmed the demand under the impugned order. Therefore, the impugned order is non speaking order which has been passed in gross violation of principles of equality, fair play and natural justice and hence, the same is liable to be set aside on this ground itself. Reliance is placed on various decisions of the higher judicial forum by the appellant in support of their contention.

(ii) The Adjudicating Authority has travelled beyond the scope of SCN in as much as the SCN dated 01.03.2016 included the period of 2013-14 and 2014-15 without ascertaining the amount of service tax; that by exceeding his jurisdiction to confirm the demand even though the SCN issued for demanding service tax of Rs.6,39,916/- for 2012-13, the Adjudicating Authority had confirmed the demand of Rs. 14,18,354/- for the period inclusive of 2013-14 and 2014-15 too. The Adjudicating Authority has also ignored the fact that they have paid the service tax of Rs. 3,03,560/- for the period 2014-15.

(iii) The appellant are a body constituted under the provisions of Gujarat Maritime Board Act,1981 to administer minor ports within the state and hence, it is a sovereign public authorities and thus, there can not be levy of service tax on Vehicle Entry Fees collected by them as the charges are collected for discharging sovereign

function assigned to them under the scheme of the constitution. Reliance is placed on the CBEC circular No.89/7/2006-ST dated 18.12.2006 as well as Master Circular dated 23.08.2007 and also FAQs 2008 dated 04.12.2008 and FAQs 2010 dated 01.09.2010 issued by DGST. Further, no findings are given by the Adjudicating Authority on this submission. Reliance is placed on various decisions of the higher judicial forum by the appellant in support of their contention.

(iv) As the levy of tax on the entry of vehicles is specifically assigned to the State Government vide Entry-57 which governs the taxes on vehicles whether mechanically propelled or not and vide Entry-59 which governs Tolls and the Vehicle entry fees collected by them governed by Entry-57 & 59 of List II of Schedule VII of the Constitution of India which is subject matter of State Government, no tax can be collected by the Central Government. Further, the vehicle entry fees are being levied by them in compliance of The Bombay Landing & Wharfage Fees Act,1882 and Rules made there under and thus, appellant have to charge the vehicle entry fee and since the same is collected in compliance of statutory obligation, the same can not be equated with rendering service.

(v) For the period on or after 01.07.2012, on introduction of taxation of services on the basis of negative list, the activities of the appellant are exempted by way of Entry No.39 of Mega Notification No. 25/2012-ST dated 20.06.2012, since their activity is covered within the municipal function as defined in Article 243W of Constitution of India. The functions entrusted to Municipality under Article 243W of the Constitution includes matters listed in Twelfth Schedule thereto which inclues activity at sr. No.2- "Regulation of Land-use and Construction of buildings and at Sr. No. 4- Roads and Bridges of the Twelfth Schedule. The appellant contended that since they are authority for regulating the land use covered within the port area and collection of vehicle entry fees are for use of roads within port area, their activity of collection of vehicle entry fees are covered within the municipal function as defined under Article243W of the Constitution and hence exempted from service tax vide sr. no.39 of Mega Notification No. 25/2012-ST dated 20.06.2012 w.e.f.01.07.2012. The Adjudicating Authority had not dealt with this submission hence the impugned order is to be set aside.

(vi) Reliance placed by the Adjudicating Authority on the decision in the case of Western Agencies-2008(12) STR 739 (Tri.- Chennai) and CBEC Circular dated 09.07.2001 is irrelevant . As the period covered in the present case is FY 2012-13 and in any case on or after 01.07.2012 with introduction of negative list based service tax regime, this Circular can not be relied upon. Further, Reliance on the said decision in the Western Agencies is also erroneous as the said decision was referred in Larger Bench as reported in 2011(22) STR 305(Tri. LB) which was stayed by the Hon'ble High Court-2011(24) STR J50(Mad.)

(vii) Cum-Tax benefit should have been given. As the consideration received is inclusive of service tax payable, benefit of Cum-Tax should have been given and value should be derived there from. Reliance is placed on various decisions of the higher judicial forum by the appellant in support of their contention.

(viii) Extended period of limitation is wrongly invoked as their financial records are always subject to Audit by the department, which is done from time to time. Further, issue involved in this case is of interpretation of law and the appellant were under bonafide belief of non levy of tax on this activity. Further, omission to inform the department can not be equated with suppression of facts. Thus, as there is no suppression of facts on their part, the extended period of limitation is not invokable. Reliance is placed on various decisions of the higher judicial forum by the appellant in support of their contention.

(ix) And hence, no penalty can be imposed under Section 78 ibid. Further, Section 80 of the Finance Act, 994 also applicable in the present case. Reliance is placed on various decisions of the higher judicial forum by the appellant in support of their contention. Further, when the activity of the appellant is not taxable, penalty under Section 77 ibid is wrongly imposed.

4. Personal hearing was held on 18.12.2017, wherein Shri H.P.Singh Virk, Chartered Accountant, appeared on behalf of the appellant and reiterated the submissions of the appeal memorandum and requested to decide the case accordingly.

5. I have gone through the appeal memorandum and oral submission made during personal hearing. I proceed to decide the case on merits since the appellant has made payment of mandatory deposit of Rs.1,07,000/- (7.5% of Rs.14,18,354/- vide Challan CIN No.00053471304201703500 dated 13.04.2017 and thus, complied with the requirement of fulfillment of mandatory pre deposit in pursuance to the amended provisions of Section 35F of the Central Excise Act,1944 made applicable to Service Tax matter in terms of the Section 83 of the Finance Act,1994 effective from 06.08.2014.

6. The issue for decision before me is whether or not service tax is leviable on the vehicle entry fee collected by the appellant for allowing the entry of vehicles in the port areas, during the period from 2012-13 to 2014-15. I find that there is no dispute about the amount of vehicle entry fees collected by the appellant during the period in question. However, the appellant has vehemently contended on various grounds both on merit as well on limitation as interalia mentioned at para-3 above.

7. The appellant contended that they are a body constituted under the provisions of Gujarat Maritime Board Act,1981 to administer minor ports within the state and hence, it is a sovereign public authorities and thus , there can not be levy of service tax on

Vehicle Entry Fees collected by them as the charges are collected for discharging sovereign function assigned to them under the scheme of the constitution. Reliance is placed on the CBEC circular No.89/7/2006-ST dated 18.12.2006 as well as Master Circular dated 23.08.2007 and also FAQs 2008 dated 04.12.2008 and 2010 dated 01.09.2010 issued by DGST. For ease of reference, the said circular is reproduced as under.

Circular No. 89/7/2006- ST

Dated: 18th December, 2006

F.No. 255/1/2006-CX.4

Government of India

Ministry of Finance

Department of Revenue

(Central Board of Excise and Customs)

Subject: Applicability of service tax on fee collected by Public Authorities while performing statutory functions /duties under the provisions of a law – regarding

A number of sovereign/public authorities (i.e. an agency constituted/set up by government) perform certain functions/ duties, which are statutory in nature. These functions are performed in terms of specific responsibility assigned to them under the law in force. For examples, the Regional Reference Standards Laboratories (RRSL) undertake verification, approval and calibration of weighing and measuring instruments; the Regional Transport Officer (RTO) issues fitness certificate to the vehicles; the Directorate of Boilers inspects and issues certificate for boilers; or Explosive Department inspects and issues certificate for petroleum storage tank, LPG/CNG tank in terms of provisions of the relevant laws. Fee as prescribed is charged and the same is ultimately deposited into the Government Treasury. A doubt has arisen whether such activities provided by a sovereign/public authority required to be provided under a statute can be considered as 'provision of service' for the purpose of levy of service tax.

2. The issue has been examined. The Board is of the view that the activities performed by the sovereign/public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature of compulsory levy as per the provisions of the relevant statute, and it is deposited into the Government treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/public authority under the provisions of law does not constitute provision of taxable service to a person and, therefore, no service tax is leviable on such activities.

3. However, if such authority performs a service, which is not in the nature of statutory activity and the same is undertaken for a consideration not in the nature of statutory fee/levy, then in such cases, service tax would be leviable, if the activity undertaken falls within the ambit of a taxable service."

From plain reading of the above circular it transpires that (i) if the activities performed by the sovereign/public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law, (ii) if fee collected by them for performing such activities is in the nature of compulsory levy as per the provisions of

the relevant statute, (iii) if such activity is purely in public interest and is undertaken as mandatory and statutory function (iv) if these are not in the nature of service to any particular individual for any consideration. If these conditions are satisfied then and then such an activity performed by a sovereign/public authority under the provisions of law does not constitute provision of taxable service to a person and, no service tax is leviable on such activities. Now, issue to be examined that the activity of collection of entry fee by the appellant satisfy these conditions or not.

7.1 The appellant The Gujarat Maritime Board, has been constituted under the provisions of Gujarat Maritime Board Act,1981 to administer the minor ports in the state, by the Gujarat State Government. Hence, I refer the provisions of the said Gujarat Maritime Board Act,1981 so as to see the works and services to be provided by the appellant i.e. Gujarat Maritime Board and I find that as per Section 25 of the said Act, the Board may execute work within or without limits of ports, and provide such appliances as it may deem necessary or expedient Viz.

Such work and appliances may include

(a) .wharves, quays, docks, stages, jetties, piers, place of anchorage and other works within the port or port approaches or on the foreshore of the port or port approaches in the State, with all convenient arches, drains, landing places, stairs, fences, roads, bridges, tunnels and approaches, and buildings required for the residence of the employees of the Board as the Board may consider necessary;

(b) buses, locomotives, rolling stock, sheds, hotels, warehouses and other accommodation for passengers and goods and other appliances for carrying passengers and for conveying, receiving and storing goods landed, or to be shipped or otherwise;

(c) moorings and cranes, scales and all other necessary means and appliances for loading and unlading of vessels;

(d) reclaming, exCavatingand raising and raising any part of the foreshore of the port or port approaches which may be necessary for the execution of the works authorised by this Act or otherwise for the purposes of this Act;

(e) such breakwatersand otherworksas maybe expendientfor the protectionof the . port; . (0 dredgers and other machines for cleaning, widening, deepening aDdimproving any portion of the port or poit approaches or of the foreshore of the port or port approaches; .

(g) light-houses, liglit-ships. beacons. buoys. pilot boats and other appliances necessary for the safe navigation of the port and the port approaches in so far as it relates.to State functions;

(h) vessels, tugs, boats, barges and launches and lighters for the use within the limits of the port"or beyond those limits. whether in territorial waters or othetwise, for the purpose of towing or rendering assistance to any vessel, whether entering or leaving the port or bound elsewhere and for the purposes of saving or protecting life or property and f9r the purpose of landing, shipping or transhipping passengers or goods under section 32; .

(i) sinking of tubewells and equipment, maintenance and use of boats, barges and other appliances for the purpose or the supply of water at the port; . .

j) engines and other appliances necesSary for the extinguishing of tires;.

(k) land abutting the sea coast including creeks;

(l) ferry boats and other works and equipment appertaining to the running ferry service or between the ports;

(m) 'construction of models and plans for carrying out hydraulic studies;

(n) dry docks, slipways, boat basins and workshops to carry out repaiis or overhauling of vessels, tugs, boats, machinery or other appliance.

Thus as per the above Act, the appellant is to do the above work which can be considered as its sovereign functions.

7.1.1 Further, as per Section 32 of the said Act, The Board shall have power to undertake the following services :- (a) stevedoring, landing, shipping or transhipping passengers and goods between vessels in port and the wharves, piers, quays, or docks belonging to or in the possession of the Board; (b) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises; (c) carring passengers within the limits of the port or port approaches, by such means and subject to such restrictions and conditious as the State Government may think fit to impose; and (d) piloting, hauling, mooring, remooring, hooking or measuring of vessels or any other service in respect of vessels.

7.1.2 Form above facts, it is crystal clear that the above functions and services by the appellant can be considered as their sovereign function.

7.1.3 From the facts mentioned herein above, the function of collection of vehicle entry fee is examined so as to ascertain whether it can be considered as sovereign functions by the appellant. The work and services as detailed at para 7.1.1 and 7.1.2 above are considered to be the sovereign function of the appellant and the same does not include the activity or function of collection of vehicle entry fee. Further, the services of providing entry into the port by collecting the vehicle entry fee, also does not fall within the terms and conditions as specified vide CBEC circular No.89/7/2006-ST dated 18.12.2006 as referred at para-7 above.

7.1.4 In view of above, I hold that the services of providing entry into the port by collecting the vehicle entry fee can not be considered as the sovereign function of the the appellant.

7.2 Further, the appellant contended that for the period on or after 01.07.2012, on introduction of taxation of services on the basis of negative list, the activities of the

appellant are exempted by way of Entry No.39 of Mega Notification No. 25/2012-ST dated 20.06.2012, since their activity is covered within the municipal function as defined in Article 243W of Constitution of India ; that the functions entrusted to Municipality under Article 243W of the Constitution includes matters listed in Twelfth Schedule thereto which inclues activity at sr. No.2- "Regulation of Land-use and Construction of buildings and at Sr. No. 4- "Roads and Bridges" of the Twelfth Schedule. The appellant contended that since they are authority for regulating the land use covered within the port area and collection of vehicle entry fees are for use of roads within port area, their activity of collection of vehicle entry fees are covered within the municipal function as defined under Article243W of the Constitution and hence exempted from service tax vide sr. no.39 of Mega Notification No. 25/2012-ST dated 20.06.2012 w.e.f.01.07.2012.

7.2.1 This arguments at para-7.2 above is also not going to help the appellant in view of the facts and discussion herein at para-7 and 7.1 above.

7.2.2. In view of above facts and discussion, I hold that that being the services of providing entry into the port by collecting the vehicle entry fee can not be considered as the sovereign function of the appellant, the appellant is not eligible for the exemption under Notification No. 25/2012-ST dated 20.06.2012. And hence in view of the above facts, the reliance placed on various decisions of the higher judicial forum by the appellant in support of their contention, is of no help to them.

8. Further with regard to the contention as interalia mentioned at Para-3(iv) above that the levy of tax on the entry of vehicles is specifically assigned to the State Government vide Entry-57 which governs the taxes on vehicles and vide Entry-59 which governs Tolls and the Vehicle entry fees collected by them governed by Entry-57 & 59 of List II of Schedule VII of the Constitution of India which is subject matter of State Government, no tax can be collected by the Central Government, I find that this contention is rather misplaced since issue involved in the present case is of not collecting tax on vehicles, but service tax on the vehicle entry fees. Further, Tolls collected is entirely different thing and same can not be equated with the entry fee being collected for allowing the vehicles into the port. Reliance is placed on the CBEC Circular No. 152/3/2012-S.T., dated 22-2-2012, the relevant portion thereto is reproduced as under for ease of refrence.

> 2. Service tax is not leviable on toll paid by the users of roads, including those roads constructed by a Special Purpose Vehicle (SPV) created under an agreement between National Highway Authority of India (NHAI) or a State Authority and the

150

concessionaire (Public Private Partnership Model, Build-Own/Operate-Transfer arrangement). 'Tolls' is a matter enumerated (serial number 59) in List-II (State List), in the Seventh Schedule of the Constitution of India and the same is not covered by any of the taxable services at present. Tolls collected under the PPP model by the SPV is collection on own account and not on behalf of the person who has made the land available for construction of the road

From above it is clear that Toll which is paid by the user of the roads, including those roads constructed by a SPV created under an agreement between NHAI/SA and the concessionaire (PPP Model or BOPT arrangement) and thus,'Tolls' is a matter enumerated (serial number 59) in List-II (State List), in the Seventh Schedule of the Constitution of India. Thus,Tolls collected is entirely different thing and same can not be equated with the entry fee being collected for allowing the vehicles into the port.

8.1 Thus, this contention is rejected being not sustainable in the eyes of law.

9. Further, the appellant's contention that reliance by the Adjudicating Authority on the decision in the case of Western Agencies-2008(12) STR 739 (Tri.- Chennai) and CBEC Circular dated 09.07.2001 is irrelevant and also since the period covered in the present case is FY 2012-13 and in any case on or after 01.07.2012 with introduction of negative list based service tax regime, this Circular can not be relied upon.

9.1 I find that, as per the amendment in the Union Budget of 2010-11 and clarification made by the CBEC in Para-1.4 of the Annexure-B of Circular No.334/1/2010 TRU dated 26.02.2010, all the services provided entirely within the Port/Airport premises are to be considered as Port Services and the same should be treated as Port Services. Further, vide CBEC circular No.D.O.F.No.334/03/2010-TRU New Delhi, dated 1st July 2010, it is clarified that in the Finance Bill, 2010, with intent to ease the classification disputes, the definitions of port, other port and airport services were amended to comprehensively cover under their ambit, all services provided within an airport or a port or other port irrespective of whether or not such activities are authorized by the authorities or whether or not they are otherwise classifiable as distinct taxable services. In effect all services that are wholly rendered within the prescribed area of the port or other port or an airport, are to be classified within the ambit of 'port services' or 'airport services'. Since, the period also covers year 2012-13, the amendment carried out by the Finance Act, 2010 is very much applicable in the present case.

9.1.1 For the period on or after 01.07.2012, on introduction of taxation of services on the basis of negative list, I find it appropriate to refer the relevant provisions of law which are reproduced as under for the ease of the reference.

SECTION [66B. Charge of service tax on and after Finance Act, 2012. —There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen per cent.] on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.]

[* * *]

From above provisions, it transpires that service tax shall be levied on all services other than those services specified in the negative list.

SECTION [66D. Negative list of services. — The negative list shall comprise of the following services, namely :—

(a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere—

[(i) * * * *]

(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;

(iii) transport of goods or passengers; or

(iv) [Any service], other than services covered under clauses (i) to (iii) above, provided to business entities;

As per Section 66D ibid, the negative list comprise also the services by Government or a local authority excluding the following services also to the extent they are not covered elsewhere.

(iv) [Any service], other than services covered under clauses (i) to (iii) above, provided to business entities;

Thus, from above it is clear that if the services are provided by the Government or a local authority to business entities, then the same is also taxable after 01.07.2012. Hence, this contention of the appellant is of no help to the appellant and hence, rejected.

9.2 with regard to the contention that reliance on decision in the Western Agencies is also erroneous as the said decision was referred in Larger Bench as reported in 2011(22) STR 305(Tri. LB) which was stayed by the Hon'ble High Court-2011(24) STR J50(Mad.). I find that finally, the Hon'ble High Court, Madras vide decision referred at 2015(38) STR J123 (Mad.) dismissed the appeal filed against the decision reported at 2011(22) STR 305(Tri. LB) in the case of Western Agencies. Thus, this contention is of no help to them.

9.3 In view of above, I reject this contention of the appellant being not sustainable.

10. Further, with regard to the contention of the appellant as interalia mentioned at para-3(ii) above, that the Adjudicating Authority has travelled beyond the scope of SCN

in as much as the SCN dated 01.03.2016 included the period of 2013-14 and 2014-15 without ascertaining the amount of service tax, I find that there is no force in it in as much as inspite of being asked by the jurisdictional Range Superintendent vide letters dated 18.08.2015, 17.11.2015, 05.01.2016 and lastly dated 08.02.2016 for the month wise data/information for the subsequent period from April,2013 to March,2015 regarding Vehicle entry collection fee, the appellant did not reply and not provided the same till that date. It was only made available during the adjudication proceedings. Therefore, their service tax liability for the period from April,2013 to March,2015 could not be quantified in absence of required datas. However, after placing reliance on the decision of Hon'ble CEGAT 5 member Bench-3 in the case of Bihari Silk & Rayon Processing Mills V/s CCE-2000((12) ELT 617, decision for issuance of show cause notice without quantification of demand for the period from April,2013 to March,2015 was taken. Further, on the basis of information provided by the appellant during the adjudication proceedings, the service tax involved for the period from 201-14 and 2014-15 was worked out and after proper consideration of their submission on this issue placed during the adjudication proceedings, the Adjudicating Authority had passed the impugned order.

10.1 Further, with regard to the contention that the Adjudicating Authority has also ignored the fact that they have paid the service tax of Rs. 3,03,560/- for the period 2014-15, I find that the Adjudicating Authority at page-14 of the impugned order has given thorough findings on this issue. I agree with the same. Moreover, neither any contrary to the above findings has been placed with the appeal memorandum nor any concrete evidences/documents have been placed before me by the appellant in support of this contention.

10.2 In view of above facts and discussion, I reject this contention of the appellant being not sustainable in the eyes of law.

11. The appellant contended that Cum-Tax benefit should have been given since the consideration received is inclusive of service tax payable. I find that the said contention of Cum-Tax value is not acceptable in view of the provisions of the Section 67(2) of the Finance Act,1994. Unless the invoice does not specifically indicate/mention that the gross amount charged includes service tax, it can not be treated as Cum-Tax value. The appellant has not produced any evidences which specify that the gross amount charged includes Service Tax. Therefore, in absence of any cogent evidences showing the gross value inclusive of Service Tax, the benefit of the Cum-Tax value can not be extended in view of the relevant provisions of the Section 67(2) of the Finance Act, 1994

and in pursuance to the decision of the Hon'ble Tribunal decision in the case of M/s Shakti Motors- 2008 (12) STR 710 (Tri.Ahmedabad). In view of the above, reliance placed on various decisions of the higher judicial forum by the appellant in support of their contention, is of no help to them.

12. The appellant has contended that the extended period of limitation is wrongly invoked as their financial records are always subject to Audit by the department, which is done from time to time as well as issue involved in this case is of interpretation of law and the appellant were under bonafide belief of non levy of tax on this activity and also omission to inform the department can not be equated with suppression of facts. Reliance is placed on various decisions of the higher judicial forum by the appellant in support of their contention. I find that being holder of Service Tax Registration, the appellant was very much conversant with the provisions and procedures with regard to the Service Tax and hence, it was open to the appellant to approach the department for any clarification in case of any confusion or any problem in interpretation of issue of levy of service tax in the present case. I find that no such efforts were put by the appellant. Further, I find that demand confirmed under impugned order was due to suppression of taxable value by not showing the taxable value in the ST-3 Returns which was detected by the department when their records were verified during Audit by the department. Had the department not unearthed the same during conducting of audit, it would have gone unassessed. Further, I find that the jurisdictional Range Superintendent vide letters dated 18.08.2015, 17.11.2015, 05.01.2016 and lastly dated 08.02.2016 had called for the month wise data/information for the subsequent period from April,2013 to March,2015 regarding Vehicle entry collection fee, so collected by them but the appellant did not reply and not provided the same till that date. It was only made available during the adjudication proceedings. Thus, there was clear cut suppression with intent to evade the service tax. Hence, the extended period is correctly invoked and also the penalty under Section 78 ibid is correctly imposed under the impugned order.

12.1 Further, with regards to penalty under Section 77 ibid, the appellant contended that the SCN does not specify under which sub-section, clause and sub-clause, the penalty is proposed I find that this is far away from the facts in as much as in SCN while proposing the penalty under section 77, the specific sub-section, clause and sub-clause with non compliance of the particular act by the appellant had been mentioned . I also find that the appellant failed to assess their correct tax liability and not filed thee ST-3 returns for the period under dispute with regards to said Vehicle entry fees, the penalty of Rs. 10,000/- is correctly imposed. Also the appellant failed to furnish information/produce documents as called for the department on time, the the penalty of Rs. 10,000/- is correctly imposed under Section 77(1) (c) ibid.

12.2 In view of the facts stated herein at para-12 above, the reason given by the appellant to justify the reasonable cause for their failure to pay the tax is not acceptable and thus, the appellant is not eligible to the benefit of provisions of Section-80 of the Finance Act,1994.

12.3 In view of the facts above, reliance placed on various decisions of the higher judicial forum by the appellant in support of their contention, is of no help to them. Hence, I hold that the appellant was correctly imposed penalty under Section 77 and 78 of the Finance Act, 1994.

13. Accordingly, I uphold the impugned order and thus, the appeal filed by the appellant is rejected.

(Gopi Nath)
Commissioner (Appeals)/
Additional Director General (Audit)

To,

M/s. Gujarat Maritime Board,
Ship Breaking Yard,
Alang, Dist:Bhavnagar

Copy To:-

1. The Chief Commissioner, CGST, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, CGST, Bhavnagar.
3. The Commissioner, CGST, Appeals, Rajkot
4. The Assistant Commissioner, CGST Division, Rajkot (Adjudicating Authority).
5. The Assistant Commissioner, Systems, CGST, Rajkot
6. Guard File.
7. P.A. File.