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::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

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रजिस्टर्ड डाक ए. डी. द्वारा :-

क अपील / फाइल संख्या /
Appeal / File No.
V2/20 & 21/EA2/BVR/
2017

मूल आदेश सं /
O.I.O. No.
AC/JND/12 & 11/2017

दिनांक /
Date
31.01.2017

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

BHV-EXCUS-000-APP-198-TO-199-2017-18

आदेश का दिनांक /
Date of Order: 06.03.2018

जारी करने की तारीख /
Date of issue: 16.03.2018

Passed by **Shri P. A. Vasave, Commissioner, CGST & Central Excise, Kutch(Gandhidham)**

अधिसूचना संख्या २६.१७दिनांक (टी.एन) शु.उ.के-२०१७/१० २०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं . दिनां .टी.एस-२०१७/०५क १६ ,के अनुसरण में २०१७.११.श्री पी. ए. वसावे ,आयुक्त, केन्द्रीय वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, कच्छ (गांधीधाम), को वित्त अधिनियम १९९४ की धारा ८५केन्द्रीय उत्पाद शुल्क के ३५की धारा १९४अधिनियम अंतर्गत दर्जे 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 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri P. A. Vasave, Commissioner, CGST & Central Excise, Kutch(Gandhidham), 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/ भावनगर) 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/ Bhavnagar :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellants & Respondent :-**
M/s Lilanand Magnesites P. Ltd., Shed No. K/1-409 A & B, Plot No. 508, GIDC Estate Porbandar - 360 577

इस आदेश(अपील) से व्यक्ति 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, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

- (iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) 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 मांग, व्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भगतान, 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 मांग, व्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भगतान, 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 is 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 प्रतियों 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 S.T.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.

- (iii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) 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 भगतान किया जाए, बशर्त 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

- बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विधाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।

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 मामले में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परतक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /

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

- (i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। /

In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

- (ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /

In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

- (iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं। /

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

- (v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।

जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।

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

- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पेटी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण 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, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /

One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित 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.

- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलायी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। /

For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:ORDERs-IN-APPEAL:

The present appeals have been filed by the Assistant Commissioner, Service Tax Division- Bhavnagar on behalf of the Principal Commissioner, Central Excise & Service Tax, Bhavnagar (hereinafter referred to as "the Revenue") in pursuance of the direction and authorization issued by the Revenue under Section 84(1) of the Finance Act, 1994, against the Orders-In-Original No. AC/JND/12/2017 dated 31.01.2017 & AC/JND/11/2017 dated 31.01.2017 (hereinafter referred to as "the impugned orders") passed by the Assistant Commissioner, Central Excise Division, Junagadh (hereinafter referred to as the Lower Authority) in the case of M/s. Lilanand Magnesites Pvt Ltd, Porbandar (hereinafter referred to as "the Respondent").

2. Briefly stated the facts of the case are that the respondent are holding Service tax Registration and are engaged in the provision of taxable services under the category of "Goods Transport Agency" Services as defined under Section 65(105)(zzp) of the Finance Act, 1994 read with Rule 4 of the Service Tax Rules, 1994 (hereinafter to be referred to as "the Act").

During the course of Audit of records of the respondent for the period from 2012-13, 2013-14 & 2014-15 it was noticed that the respondent have paid commission to its directors during the period from 2012-13, 2013-14 & 2014-15 and have not paid applicable service tax on the commission paid to their Directors. The amount of commission paid and liability of Service tax, under reverse charge mechanism, is according to below mentioned table:-

Table-A

Sr.No.	Financial Year	Amount of Commission Paid to Directors (Rs.)	Service Tax & Cess payable@12.36% (Rs.)	Order-In-Original No. & Date.	Appeal No. & Date
1	2012-13 & 2013-14	98,00,000/-	12,11,280/-	AC/JND/11/2017 Dated 31.01.2017	V2/21/EA2/2017 13.04.2017
2	2014-15	56,00,000/-	6,92,160/-	AC/JND/12/2017 Dated 31.01.2017	V2/20/EA2/2017 13.04.2017

3. According to Notification No.30/2012 dated 20.06.2012 amended vide Notification No.45/2012 dated 07.08.2012 any monetary or non monetary consideration such as directors fees, commission, bonus, company car, travel reimbursements etc paid to its directors by a company would attract the service tax w.e.f 07.08.2012. Accordingly the respondents were required to pay service tax on reverse charge mechanism on the commission paid to their directors.

3.1. As the respondents failed to pay the applicable service tax under reverse charge mechanism the respondents were issued Show Cause Notice F.No/15-01/DEM-ST/HQ/2015-16 dated 15.04.2015 & another Show Cause Notice F.No/15-

180/Dem-ST/HQ/2015-16 dated 28.07.2016 demanding above amount of service tax along with interest under Sec 75 of the Act and penalty under Section 78 of the Act.

3.2 The matter was decided by lower authority who dropped the demand proceedings vide impugned orders holding that the relation between directors and the respondents is that of employee and employer as defined under Sub section (b) of Section 66B (44) of the Act and the commission paid to the directors cannot be covered under "Business auxiliary Services" as per section 65(19) of the Act. Therefore the commission paid to the Directors in the form of salary by the Company does not qualify as a taxable amount.

3.3. The impugned orders were reviewed by the Revenue and the present appeals have been filed on the grounds that the lower authority has committed an error by dropping the demand of service Tax along with interest and penalty proposed vide above Show Cause Notices.

Grounds of Appeal:-

4. The revenue have filed appeal on the following grounds:-

i) that the lower authority has erred in dropping the demand of service tax on commission paid, over and above the salary, to the directors of the respondents holding that the relation between the directors and the respondent is that of employee and employer, the same does not fall within the category of "service" as defined under Section 66(B) of the Act. Therefore commission paid to the Directors is in the form of salary and does not qualify for levy of service tax.

ii) that the Directors commission is over and above their remuneration, the same is chargeable to Service Tax. Instead the lower authority, without verifying the original employment records and /or their salary payment details, has dropped the demand.

iii) that the services which are defined under Section 65(105) have become taxable except the services covered under Negative list and the services which are specifically exempt under any Notification. The services rendered by the Directors for which commission has been received are not either in the Negative list nor are specifically exempt under any Notification.

iv) that the Adjudicating authority has erred in considering the provisions of Income Tax Law for dropping the demand of service tax, by holding that the Directors have been issued Form-16, which shows income from salary and also that the company has deducted TDS on the amount paid by them to the Directors. However, the lower authority has erred in applying Income Tax Law for deciding demand under Finance Act, 1994 and Form-16 issued under Income Tax, 1961, can not be made a basis to drop the demand of Service Tax, that too under reverse charge mechanism.

5. The **Personal Hearing** in the matter was fixed on 30.01.2018. Shri Dinesh Kumar Jain, Chartered Accountant, authorised representative of the respondents



appeared on behalf of the respondents and submitted detailed written submission dated 20.01.2018 and requested for early disposal of the case.

6. The respondent in their written submission dated 20.01.2018 submitted that:-
- i) the provisions of section 65B (44) of the Act, wherein, the word 'service' have been defined, categorically provides that 'a provision of service by an employee to the employer in the course of or in relation to his employment' is not covered within the scope of 'service' and therefore, outside the net of service tax;
 - ii) also as per provisions of section 2(34) read with section 2(51) and section 2(94) and section 197(6) of the Companies Act, 2013 that provide that a 'whole-time director' is nothing but a 'whole-time employee' of the company, working as a key managerial person for the said company, and he can be compensated by way of not only remuneration but also by way of commission, as in the present case.
 - iii) the respondent further referred to section 17 (1) of the Income Tax Act, 1961, wherein, the word 'salary' has been defined. In the said sub-section (1) of section 17, at clause (iv), it has been provided that salary includes 'any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages' and therefore, commission paid to any director is nothing but a part of salary only.
 - iv) that it is an admitted fact that income tax was deducted on remuneration / commission paid to the directors under section 192 of the Income Tax Act, 1961 i.e. TDS on salary and not under section 194H/J of the said Act i.e. TDS on commission or brokerage remuneration / commission paid to directors was debited under the head 'salary, wages and bonuses' these directors have shown income of remuneration / commission, received from the respondent, under the head 'income from salary' in their individual income tax returns.
 - v) that above crucial facts themselves establish that these directors were employees of the respondent and therefore payments made to them during the course of their employment is not liable to service tax and therefore, notification No. 30/2012-ST dated 20.06.2012 is not at all applicable in the present case.
 - vi) the respondents further submit that the departmental contention that commission paid to directors are neither covered under 'negative list' nor are specifically exempted is completely irrelevant in the present case since the



subject directors are employees of the company and out of purview of the definition of 'service' itself.

vii) about non-applicability of provisions of Income Tax law in the present case, the respondent submitted that the same is also untenable in law since the learned adjudicating authority have referred to these provisions only to establish that commission paid to directors were nothing but part of their salary because relations between the respondent and the directors were in the nature of employee and employer.

7. I observe that in the case of Appeal No.V2/20/EA-2/BVR/2017 the impugned order is dated 31.01.2017 & received on 02.02.2017 and the appeal has been filed on 13.4.2017 and in the case of Appeal No.V2/21/EA-2/BVR/2017 the impugned order is dated 31.01.2017 & received on 02.02.2017 and the appeal has been filed on 13.4.2017.Hence I find that both the appeals are filed in time.

7.1. I have gone through the impugned orders, the grounds of appeal filed by the revenue and Oral & written submission made by the respondents at the time of personal hearing in the case. The brief issue to be decided in the Departmental appeal is whether impugned orders, dropping the demand of service tax, along with interest and penalty on the commission paid by the respondent to their Directors, passed by the lower authority, are correct, legal or otherwise.

8. While dwelling upon the reasons of rejection of demand by the lower authority I observe that the lower authority was of the opinion that the as per clause (b) to Section 65B (44) of the Act the provision of service by an employee to the employer in the course of or in relation to his employment shall not constitute to be a taxable service. The lower authority in the impugned order also referred Board Circular No.115/9/2009-ST dated 31.07.2009 wherein the Board categorically clarified that the commission paid to whole time directors, being compensation for their performance as Directors, would not be liable to Service Tax.

8.1. The lower authority while dropping the demand vide the impugned orders discussed the liability of Service Tax in para 14 & 15 of impugned orders on the commission received by the Directors as under:-

By going through the Memorandum and Articles of Association of M/s Lilanand Magnesites Pvt Ltd 14.01.1995 in the schedule/details of the said documents the name of Shri Dhirenghai A Kamdar one of the Directors in question, has been mentioned as the person desirous of being formed into a Company in pursuance of these Articles of Association and respectively agree to take the number of shares (as given therein) in the capital of the company. Thus, in this regard, it clearly indicates that Shri Dhirenghai A. Kamdar is a permanent/ Whole-time Director of the noticee company, as his name has been

incorporated as the founder of the company since its inception i.e. from the day on which the certificate of incorporation was granted to the noticee, by the Registrar of Companies (ROC), Gujrat. Also, by going through the copies of Form-32, submitted to the Registrar of Companies (ROC), wherein, the name of Shri Mayank D. Kamdar, the other director in question, has been shown as 'director' since 2005. I find that the noticee has submitted the copies of board resolutions which authorize payment of said commission to the directors and was signed by one of the directors, Shri Dhirenghai A. Kamdar. I also find that copies of relevant pages of 'Annual Financial Accounts' of the noticee for the F.Y 2012-13 and 2013-14 signed by both the directors for and on behalf of Board of Directors is submitted and by going through these documents, I find that the remuneration and commission paid to the directors are debited by the noticee in their book of accounts under the head 'Salaries, wages and Bonus'. I also find from the Certificate issued under Section 203 of the Income Tax Act, 1961 for Tax Deducted at Source (TDS) on Salary [Form-16 issued under Rule 31(1)(a)] issued to the directors for the relevant period that Income Tax at source is deducted (TDS) from the salary by the noticee as an employer in respect of the directors who are mentioned as the employees of the noticee and who have been provided with an Employee Reference Number as well. Also, the copies of Income tax returns for the relevant period and computation of total income prepared for filing of those Income Tax Returns by the directors were submitted in which I find that the directors have shown commission received from the noticee under the head 'Income from Salary'. As mandated under the relevant provisions of the Income Tax Act as well as the Companies Act and 'Profession Tax' has also been deducted by the employer i.e. the noticee. This clarifies that the directors are full time directors of the noticee company and the remunerations & commissions received by them from the noticee, was in the form of salary only, which clearly reflects that the relation between them was in the nature of employee and employer.

9. The main contention of the revenue, in this appeal, is that the commission paid to the Directors, for the services they render apart from the services for that they get paid, in the form of remuneration, is not the one which is provided by the employee to its employer. But the services rendered by Directors to the company, for which they get commission, fall within the category of "service" as defined under Section 66(B) of the Act. Therefore the commission paid by the respondent to their Directors is liable for levy of service tax.

10. The respondent in their written submission dated 20.01.2018 submitted that as per provisions of section 2(34) read with section 2(51) and section 2(94) and section 197(6) of the Companies Act, 2013 provides that a 'whole-time director' is nothing but a 'whole-time employee' of the company, working as a key managerial person for the said company, and he can be compensated by way of not only remuneration but also by way of commission, as in the present case. Also as per the provisions of Section 65B (44) of the Act, wherein, the word 'service' has been defined categorically which provides that 'a provision of service by an employee to the employer in the course of or in relation to his employment' is not covered within the scope of 'service' and therefore, outside the net of service tax.

10.1. The revenue in their grounds of appeal pointed out that the lower authority has erred in considering the provisions of Income Tax Law for dropping the demand of service tax, by holding that the Directors have been issued Form-16, which shows



income from salary and also that the company has deducted TDS on the amount paid by them to the Directors. However, the lower authority has erred in applying Income Tax Law for deciding demand under Finance Act, 1994 and Form-16 issued under Income Tax, 1961. The provisions of Income Tax Act, 1961 cannot be made basis to drop the demand of Service Tax, that too under reverse charge mechanism.

10.2. The respondent submitted the copies of special resolutions in both the cases in which it has been proposed that a sum of Rupees not exceeding 98,00,000/- (48,00,000+50,00,000/-) in respect of the profits of the Financial year ending 31st Mar-2013 & 2014 respectively, and in second appeal a sum of Rs. 56,00,000/- in respect of the profits of the Financial year ending 31st Mar-2015 be determined and distributed as commission amongst the Directors of the Company in such amounts and proportions and in such manner as may be directed by the Board of Directors, and further that the commission paid to each of the Directors of the Company pursuant to this shall be in addition to the fee for attending meetings of the Board or any Committee thereof which each such Directors may be entitled to receive under the Articles of Association.

11. On the above contention of the revenue and to drive their point home the respondent relied upon the case law in the case of Nashik Metals(P) Ltd V/s Income tax Officer, Ward-2(3) Pune before ITAT Pune. In this case the Hon'ble Tribunal in para 7.2 of its Order held that as the assessee had made payment to its employee directors not for selling any goods or articles but for managing affairs of the assessee-company. Amount was not paid for selling any particular goods/articles and therefore amount paid by Assessee Company to its directors does not come within ambit of provisions of section 194H of Income Tax Act, 1961. Merely because the directors have shown the said commission income in their hands as "income from other sources", the same cannot be a ground to exclude the commission paid to the directors from the ambit of salary. Therefore, the commission paid to the directors should be treated as salary in their hands and treated accordingly and the provisions of section 40(a)(ia) are not applicable.

11.1. The revenue in their grounds of appeal submitted that as all the services which are defined under Section 65(105) have become taxable except the services covered under Negative list and the services which are specifically exempt under any Notification. The services rendered by the Directors for which commission has been received by the Directors are not covered under either the Negative list nor are specifically exempt under any Notification.

11.2. The respondents in their written submission dated 20.01.2018 submitted that the contention of the department that commission paid to directors are neither covered under 'negative list' nor are specifically exempted by any Notification is completely irrelevant in the present case since the subject directors are employees of the company and out of purview of the definition of 'service' itself.

Findings:-

12. I find that meaning of word 'service' as per 'Oxford Dictionary' is the action of helping or doing work for someone. But in the parlance of levying service tax the term service has been defined in Section 66(B) of the Act. Section 66 B of the Act, which is the charging section, with effect from 01.07.2012, and Section 65(B) (44) of the Act stipulate levy of service tax and exclusions thereof. For ease of reference Section 66 B and Section 65(B) is reproduced below:-

"Section 66B : There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve 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."

Section 65(B) which stipulates levy of service tax and exclusions of services thereof which is reproduced below:-

Section 65B (44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) an activity which constitutes merely,— (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or (iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

12.1. Notification No. 45/2012-S.T. dated 07-08-2012 and Notification No.10/2014-ST dated 11.07.2014, which amended Basic notification No. 30/2012-S.T. dated 20.06.2012, by inserting an entry making services provided by a director of a company to the said company chargeable to service tax under reverse charge mechanism. The relevant text of the entry inserted vide Notification No. 45/2012-ST dated 07.08.2012 is reproduced below :-

Sl. No.	Description of a service	Percentage of service tax payable by the person providing service	Percentage of service tax payable by the person receiving the service
1	2	3	4
5A	in respect of services provided or agreed to be provided by a director of a company to the said company	Nil	100%

12.2. I find that by inserting the above entry making a specific reference to services provided by director of a company to the said company, a legal fiction has been created in Service Tax law and the recipient of the service has been made liable to pay service tax on such services in reverse charge mechanism. The phrase "provided or agreed to be provided by a director of a company to the said company" has a very wide scope and had such services been in the nature of employee-employer relationship, there was no need to tax them under reverse charge mechanism and the interpretation as advanced by the appellant would render it totally redundant. The specific provisions of levy of Service Tax on the services rendered by the Whole Time Directors and Managing Directors to the said company, effective from 07-08-2012, have been covered under the service as provided vide Notification No.30/2012-ST as amended.

12.3. The position, responsibility and nature of work allotted to the Directors vis-à-vis employee of the company has its own distinction which is distinguishable from provisions of the Companies Act,1956 as prevailed at the material time. The provisions of the Companies Act,1956 distinguish Directors of a Company from the employees of that company. Section 2(13) of the Companies Act, 1956 defines a 'director' as "*any person occupying the position of a director by whatever name called*". Directors of a company are individuals that are elected as, or elected to act as, representatives of the stock holders to establish corporate management related policies and to make decisions on major company issues. They act on the basis of resolutions made at directors' meetings, and derive their powers from the corporate legislation and from the company's Articles Of Association. The Hon'ble Supreme Court has observed that a Managing Director can be regarded as a principal employer for the purposes of the ESI Act, 1948 in the case of Employees State Insurance Corpn. Vs. Apex Engineering P. Ltd., reported in [(1998) 1 Comp LJ 10: [1998] 1 LLJ 274 (SC)]. In such a legal position, Directors and Managing Director cannot be considered as employees of the company as being projected by the respondent.

12.4. I find that the respondent have relied upon the case law of Nashik Metals(P) Ltd V/s Income tax Officer,Ward-2(3) Pune before ITAT Pune in which the commission was shown as income from other sources. The ITAT held that because the directors have shown the said commission income in their hands as "income from other sources", the same cannot be a ground to exclude the commission paid to the directors from the ambit of salary. I find that the circumstances of this case to the

circumstances of the case at hand is entirely different and hence cannot be applied in this case.

The argument of the respondent that remuneration received by the Directors are shown by them as salary for income tax purpose and they have deducted TDS etc. on such salary is out of context. The expression "Salary" is actually an accounting head mentioned under Section 192 of Income Tax Act, providing for the deduction to be made of income as under :

"Section 192.SALARY.

Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made on the estimated income of the assessee under this head for that financial year.

12.5. It is the responsibility of the company to deduct the TDS and deposit to the Govt. account under various heads meant for such TDS. Issuance of TDS certificates, in the form of Form-16, neither necessary nor suffice for holding the said relationship as employee-employer relationship. The provisions of Section 309 of the Companies Act, 1956 shows that there are specific restrictions and specific conditions in respect of the remuneration paid to the directors, which distinguishes a company's directors' remuneration from salary to the employees of the company.

12.6. I find that the statutory provisions make the role of Directors distinct from an employee, to look after the top management functions of the company and set strategies and policies to achieve the objectives of the company. The directors are authorized to take decisions and let them be executed through employees of the company. Hence, directors are agents of the company and not employees, they are also 'owners' of the company, whereas, in the case of employee's service, there must be a master-servant relationship. A master gives orders to employees, for performing a particular task in a particular manner and employee is obliged to do so, which is missing completely in case of Directors of a company.

12.7. I also find that Directors can be appointed as directors in other companies/on the Board of other Companies as per provisions of Section 275 of the Companies Act, 1956, which provides, "After the commencement of this Act, no person shall, save as otherwise provided in section 276, hold office at the same time as director in more than twenty companies." This kind of privilege is not available to the employees of a Company. Hence, this clearly brings out the distinction in spheres of responsibility,



work, services of the Director vis-à-vis employee and the Directors cannot be said to be employees of the company.

12.8. I find that in a similar matter in the case of Sandeep Kohli Vs. Asstt. Commr. Income Tax dated 29.6.2001 reported as [2002-82 ITD 498] the Hon'ble Income Tax Appellate Tribunal has specifically held that the Director appointed as Whole Time Director cannot be considered as employee of the company; that there being no relationship of master and servant between company and the director; that the remuneration paid to the Directors cannot be treated as salary." On subsequent Appeal No.20-29 of 2001 against above decision, the Lucknow Bench of the Hon'ble Allahabad High Court, vide their judgment dated 19.7.2012 has upheld the above decision of Income Tax Appellate Tribunal on the ground that the full time directors are not employees of the company and remuneration paid to them is not salary.

I further find that there is no provision under the Finance Act, 1994, for treating such directors as employees of that company for the purpose of non- payment of Service Tax. Therefore, the appellant's contention that full time directors are employees of the company is not correct, legal and proper in terms of the Finance Act, 1994.

13. The respondent placed reliance on Board's Circular No. 115/09/2009-ST dated 31.07.2009 to support their contention that remuneration paid to whole time directors are not chargeable to service tax. In this regard, I find that the provisions of said Circular cannot be applied here as the said Circular was issued prior to 30.06.2012, i.e. in the positive regime of service tax though it concluded that the services provided by directors are services but clarified that such services not liable to service tax under BAS or management consultancy service etc. under positive tax regime till 30.06.2012. However, from 01.07.2012, the Negative list of services is in vogue. The services of the Directors are taxable services as these are neither part of the services mentioned in negative list of services in terms of Section 66D of the Finance Act, 1994 nor are placed in the exempted category.

14. In view of above discussions, it can be summarily concluded that:-

- (i) The Directors are appointed as per the Resolution of the Board as per provisions of the Company law, whereas the employees are appointed by the orders of the Directors.



- (ii) The Directors are executing the decision taken by the Board and implement them as per their skills and capabilities through their employees whereas the employees were working as per the directions of the management of the company and performing the duties in a manner prescribed by the management.
- (iii) Directors are not employees of the company but are agents of the company and are performing the managerial functions on behalf of the company.

15. The above discussion makes it amply clear that Directors exercise their powers through Board of Directors and are distinct from the employees. Company is actually an intangible entity and is a juristic person run by the Board of Directors. The Directors act as employers on behalf of the company rather than acting as employees. This makes the actual distinction between Directors and employees making services of the former to the company as taxable, whereas that of later, outside the scope of service tax.

15.1. Accordingly, on merit I hold that the commission paid by the respondent to their directors is correctly held as consideration for services provided by the directors to them and accordingly, is chargeable to the Service Tax, to be paid by the respondent under reverse charge mechanism.

15.2. As regards imposition of penalties, I find that the appellant is an established company managed by professionals and always had knowledge by virtue of Income Tax laws that their Directors can work for other companies as well by rendering them their services as Directors and are statutorily treated as distinct persons from the employer-employee relationship.

15.3. I find that negative list regime is very unequivocal, and except the categories mentioned therein, no activity is entitled for exemption from levy of service tax leaving no scope to harbor any doubt whatsoever. Therefore, it transpires that though there was no ambiguity in law, the respondent on his own was giving an interpretation of law and not brought the relevant material facts to the notice of the department at any point of time. Hence required ingredient of suppression of these facts, mis-statement etc. for imposing penalty under Section 78 of the Act, is found to be existing in this case and such suppression was not without intention to evade the tax.

15.4. To find support to my views, in imposing the penalty on the respondent, I rely upon the Order passed by the Hon'ble CESTAT, Chennai, in the case of TVS Motor

Co. Ltd. reported in 2012 (28) S.T.R. 127 (Tri. - Chennai), in which it was held as under:-

"13. So far as ground of no penalty advanced by learned counsel is concerned there is nothing on record to show that the appellant avoided its liability bona fide when it is an established business concern with vast experience in application of provisions of Finance Act, 1994. Its returns did not disclose bona fide omission. Rather facts suggest that knowable breach of law made the appellant to suffer adjudication. Accordingly, no immunity from penalty is possible to be granted on the plea of tax compliances made which was found to be a case no payment of tax on the impugned services provided during the relevant period."

15.5. Thus, in such cases where assesseees did not declare the correct facts and deliberately mis-construed the facts leading to evasion of service tax on their part tantamount to suppression of facts with an intent to evade service tax. Therefore, I find no infirmity in imposing penalty under Section 78 of the Act along with applicable interest under Section 75 of the Act.

However I offer an option of reduced penalty, the respondents are eligible for reduced penalty subject to condition that they should pay the Service Tax, applicable interest and penalty within 30 days from the date of receipt of this order.

16. In view of the above discussion and findings, I set aside the impugned orders and allow the appeals filed by the revenue.

(Pramod A Vasave)
Commissioner (Appeals)/
Commissioner
GST & Central Excise, Kutch

To

M/s. Lilanand Magnesites,Pvt Ltd,
Shed No.K/1-409-A&B,
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Porbandar-360 577.

Copy to-

1. The Chief Commissioner GST & C.Ex, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & C.Ex. Bhavanagar.
3. The Assistant Commissioner, GST & C.Ex Division,Junagadh.
4. The Superintendent GST & C.Ex Range Porbandar.
5. Guard File.