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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 / 2<sup>nd</sup> 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



सत्यमेव जयते

**रजिस्टर्ड डाक ए. डी. द्वारा :-**

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/170/BVR/2017	AC/JND/22/2017	20-03-2017

7448 to 7452

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

**BHV-EXCUS-000-APP-227-2017-18**

आदेश का दिनांक / Date of Order:	<b>21.03.2018</b>	जारी करने की तारीख / Date of issue:	<b>26.03.2018</b>
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**कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /**  
**Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot**

ग अथ आयुक्त/ आयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / जयनगर / गण्डीधम) द्वारा उपरलिखित जारी मूल आदेश से सूचित /  
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 Keshodwala Foods,Plot No. 305 GIDC Udhoygnagar Veraval, Dist : Gir Somnath 362 269,

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) कस्टीकरण मूल्यांकन से सम्बंधित 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 जाती 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 बतलाए गए अपीली के अलावा हेच सभी अपीली सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहमाली भवन असावा अहमदाबाद- 380016 को की जाती चाहिए ।  
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> Floor, Bhaumali Bhawan, Asawa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवाली, 2001, के नियम 8 के अंतर्गत निर्धारित किए गए फॉर्म EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की सीमा व्याज की सीमा 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 कमशः 1,000/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थान 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/-.

(iv) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती है 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 सीमा व्याज की सीमा 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 कमशः 1,000/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थान आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is more than 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) किल अधिनियम, 1994 की धारा 86 की उप-धारा (2) एवं (2A) के अंतर्गत दर्जे की गयी अपील, सेवाकर नियमवली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रथम S.T.-7 में की जा सकेगी एवं उसके साथ आवृत्त, केन्द्रीय उत्पाद शुल्क अध्यादेश अध्यादेश (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियां संलग्न करें (जुमने से एक प्रति प्रमाणित होनी चाहिए) और आवृत्त द्वारा सहायक आवृत्त अथवा उपवृत्त, 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 Form 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 अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एक 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 मान 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
- धारा 11 डी के अंतर्गत रकम
  - सेस्टेट जमा की ली गई गलत राशि
  - सेस्टेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (स. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विधायकी स्थापन नहीं एवं अपील को लागू नहीं होगी।
- For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.
- Under Central Excise and Service Tax, "Duty Demanded" shall include :
- amount determined under Section 11 D;
  - amount of erroneous Cenvat Credit taken;
  - amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) भारत सरकार को पुनरीक्षण आवेदन :  
**Revision application to Government of India:**  
इस आदेश की पुनरीक्षण प्राधिकार निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अथवा सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जेवन दीप भवन, संसद भवन, 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:
- यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
  - 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 an excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
  - 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.
  - मुनिविधत उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इमुटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे क्रेडिट जो आवृत्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तरीक़ अथवा समयावधि 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.
  - उपरोक्त आवेदन की दो प्रतियां प्रथम संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संशेषण 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.
  - 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.
  - यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त दंड में किया जाना चाहिए। इस तथ्य के होते हुए भी की निम्न मूल आदेशों से बचने के लिए सहाय्यिता अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाना 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 filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
  - सहाय्यताप्राप्त न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं संलग्न आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the 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.
  - सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्बन्धित करने वाले विषयों की और भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
  - उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलकर्ता विभागीय वेबसाइट [www.cbec.gov.in](http://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](http://www.cbec.gov.in)

**:: ORDER-IN-APPEAL ::**

M/s Keshodwala Foods, Plot No. 305, GIDC Udhyognagar, Veraval 362269, Dist., Gir-Somnath holding Service Tax Registration No. AADFK6651QST001 (hereinafter referred to as "the appellant") for providing Taxable Services of 'Business Auxiliary Services and Goods Transport Agency Services' filed appeal against Order-In-Original No. AC/JND/22/2017 dated 20.03.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central Excise Division, Junagadh (hereinafter referred to as "the lower adjudicating authority")

2. The appellant was required to file ST-3 returns w.e.f. 01.04.2006 for Half Year ending April to September on or before 25<sup>th</sup> October and for Half Year ending October to March on or before 25<sup>th</sup> April or the date prescribed by the Government. It was found that the appellant had not filed ST-3 returns during Financial Year 2006-07 to 2013-14 as detailed in the Show Cause Notice and never disclosed reason for non filing of the ST-3 returns to the department.

2.1 The Superintendent, Service Tax Range, Junagadh vide letter dated 01.09.2015 called for information Category wise service provided along with consideration received during 2013-14; Copy of ST-3 Returns for 2013-14; Form 26AS for F.Y.2013-14; Balance Sheet and Income Tax Return for F.Y 2013-14 from the appellant. The appellant vide their letter dated 09.09.2015 replied that they were engaged in Fish Export Business and no Service Tax is leviable on Fish Export and provided copy of Form 26AS for F.Y. 2013-14. The Jurisdictional Range Superintendent vide letter dated 12.10.2015 had again called for copy of ST-3 Returns, Balance Sheet and Income Tax Returns and appellant vide letter date 01.11.2015 produced copy of Balance Sheet and Income Tax Return for F.Y.2013-14 and also informed that they have no income liable to pay service tax in F.Y.2013-14. The verification of Balance Sheet for F.Y. 2013-14 revealed that the appellant had paid Rs. 14,73,18,830/- in 2012-13 and Rs. 17,77,73,112/- in 2013-14. On inquiry, they also informed that they have paid Rs. 1,35,93,912/- as Trailer Freight during 2012-13 and Rs. 1,49,33,000/- in 2013-14:

2.2 The jurisdictional Superintendent vide letter dated 09.12.2015, 11.12.2015, 30.12.2015, 12.01.2016 and 28.01.2016 has now called for information for F.Y. 2010-11 to 2014-15 regarding payment made to the Transporters as receiver of GTA services used for Transportation of Goods by



Road while exporting the goods outside India, however, the appellant did not provide any information except Balance Sheet for F.Y. 2013-14. The appellant vide letter dated 06.01.2016 informed that they were engaged in export of Sea Food which was not liable to pay service tax as pisciculture activity is considered as agricultural activity; that pisciculture is breeding, rearing, and transplantation of fish by artificial means, in other words, fish farming; that it is principal form of aquaculture, while other methods may fall under mariculture; that it involves raising fish commercially in tanks or enclosures, usually for food; that a facility that releases juvenile fish into the wild for recreational fishing or to supplement a species' natural numbers is referred to as fish hatchery. The appellant vide letter dated 27.01.2016 further informed that as per their business activities, they were purchasing natural fish of Sea water from fishermen and they are Sea Foods Exporters. A statement dated 18.04.2016 of Shri Kadar Husenbhai Sama, authorized signatory of the appellant was recorded wherein he stated that they had neither filed any Service Tax returns prior to FY 2014-15 nor paid any Service Tax under the category of GTA or Business Auxiliary Service prior to 2014-15 as they were under the impression that the amount paid under the said transportation was exempted vide Notification No. 31/2012-ST dated 20.06.2012; that the expenses shown against Sales Commission / Brokerage is the amount paid to various commission agents in India and Foreign Country engaged by them for sales of goods not having any branch in India; that expenses shown against Legal/ Licence/ Statutory fees was paid for availing services of fish testing, surveyor and export inspection agency fees and they did not avail any service from advocate; that the expenses shown against freight outward was paid towards freight paid on outward transportation of finished goods from their factory premises to the port of export.

2.3 As per Balance Sheet for the year 2010-11 to 2014-15 and data of Trailer Freight for outward Transportation provided vide letter dated 18.04.2016 of the appellant, they had also shown expenses as Freight Inward and Carriage & Freight/ Freight Inward Fish as below:

Year	Freight Inward	Carriage of Freight/ Freight Inward Fish	Total paid	Freight
2010-11	4094343	255020	4349363	
2011-12	1960865	428918	2389783	
2012-13	6391178	897135	7288313	
2013-14	4545241	570689	5115930	
2014-15	7485695	362726	7848421	

2.4 It was revealed that the appellant had not paid Service Tax of Rs. 27,08,400/- on freight, not paid Service Tax of Rs. 2,43,365/- on amount of Rs. 11,95,446/- towards Sales Commission and Brokerage during F.Y. 2010-11 and Rs. 9,72,764/- during FY 2013-14 to Foreign Agents and did not pay Service Tax of Rs. 1,43,054/- on Commission / Brokerage Income of Rs. 11,57,398/- during FY 2014-15 under Business Auxiliary Service. For availing exemption from payment of Service Tax under GTA service, procedure has been prescribed vide Notification No. 18/2009-S.T. dated 07.07.2009 as amended vide Notification No. 31/2012-S.T. For availing exemption from payment of Service Tax under Commission Agent located outside India, procedure has been prescribed vide Notification No. 18/2009-S.T. dated 07.07.2009 read with Notification No. 42/2012-S.T. dated 29.06.2012, however, the appellant did not follow prescribed procedure.

2.5 Show Cause Notice No. V/15-06/Dem-ST/HQ/2016-17 dated 19.04.2016 was issued to the appellant proposing to demand Service Tax of Rs. 27,08,400/- in respect of GTA Service for the FY 2010-11(w.e.f. October-2010) to 2014-15, Service Tax of Rs. 2,43,365/- under Business Auxiliary Service for Sales Commissioner paid to foreign agent during FY 2010-11 and 2014-15 and Service Tax of Rs. 1,43,054/- on Income Received as Commission/ Brokerage during 2014-15, including Education Cess and Secondary & Higher Education Cess, total Service Tax of Rs. 30,94,819/-, under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'the Act') read with Section 68 of the Act alongwith interest under Section 75 of the Act. It was also proposed to recover late fee under Section 70 of the Act read with Rule 7C of the Service Tax Rules, 1994 (hereinafter referred to as 'the Rules') for non filing of ST-3 returns in prescribed time limit. It was further proposed to impose penalties under Section 76 of the Act for non payment of Service Tax, under Section 70 of the Act for failing to assess their correct liability, incorrect discharge of Service Tax liability, under Section 77 of the Act for contravention of provisions of Section 68, 69 of the Act, under Section 77(2) of the Act and under Section 78 of the Act for suppressing the facts from the Department.

2.6 The Show Cause Notice was adjudicated by the lower adjudicating authority vide the impugned order wherein Service Tax of Rs.30,94,819/- was confirmed under Section 73(1) of the Act alongwith interest under Section 75 of the Act. It was ordered to recover late fee of Rs. 1,58,000/- under Section 70 of the Act read with Rule 7C of the Rules for non filing of ST-3 returns in time.

The lower adjudicating authority did not impose any penalty under Section 76 and 77 of the Act but imposed penalty of Rs. 30,94,819/- under Section 78 of the Act by offering reduced penalty of 25% under proviso to Section 78 of the Act.

3. Being aggrieved with the impugned order, the appellant filed appeal, *inter-alia*, on the following grounds:

1. They are called upon to pay the Service Tax on goods transport agency service. They are paying freight for the transportation of fishes from their factory to the port which not a taxable activity as the entire business is related to fish processing and same falls within the ambit of agriculture business. There are various benefits granted under the Finance Act to agriculture business and the Show Cause Notice nowhere mentioned that the product in question do not fall under the agriculture business. The GTA service is defined under Section 65B(26) of the Act and as per Notification No. 30/2012 dated 20.06.2012, full Service Tax shall be paid by the person liable to pay freight other than the service provider after considering abatement. As per Notification No. No. 25/2012 has granted exemption for services provided by a GTA by way of transport in a goods carriage of (a) agricultural produce and (b) food stuff including.... and term 'agriculture' has been defined under sub clause (3) of Section 65B and 'agriculture produce' has been defined under sub clause (5) of Section 65B. As per definition of agricultural produce, their business is of producing processed fish from raw fish only, live fish are processed and are preserved in proper temperature. The input is fish and finished product is also fish for them and the fish are processed to make it marketable and eatable. They are engaged in the business of fisheries which is exempted from the service tax vide Notification No. 25/2012.
2. As per Notification No. 30/2012 dated 20.06.2012, exporter who wants to avail exemption shall file EXP-1 and EXP-2 within prescribed time to prescribed authority however, they are held liable for the services which are exempted in nature itself. The benefit of incentives granted by the government for promoting export business cannot be denied by any authority merely by procedural lapse. The final goods got exported which can be verified by other means like invoice, shipping bill etc and they had used same service for the purpose of export only and they rely on the decision in the case of Mangalore Chemicals & Fertilizers Ltd reported as 1991 (55) ELT 437 (S.C.) and Rupam Impex Vs ACIT. The intention to issue

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Notification No. 18/2009-S.T. dated 07.07.2009 to exempt specified taxable services from payment of Service Tax was to facilitate the exporters so that their export business is not hampered. The exemption notification should be so interpreted and the word used therein should be assigned such meaning as would enable the assessee to secure the benefits intended to be given by the legislature and object of notification is not frustrated. The impugned notice nowhere alleges that services on which exemption have been claimed were not used for export of goods and therefore, the impugned notice proposing denial of benefit of the said notification is not tenable in law. The allegations made in the impugned notice are purely procedural in nature and substantial benefit should not be denied for procedural lapses, if any and they rely on the decision in the case of Manubhai reported as 2011 (21) STR (65).

3. For Service Tax demand on foreign commission they rely on the definition of Business Auxiliary Service provided at Section 65(19)(zzb) and as per Section 66(d)(ii) service provided by a commission agent for sale or purchase of agricultural produce are not taxable. Prior to 01.07.2012, Notification No. 8/2004-S.T. dated 09.07.2004 exempted the services of commission agent in relation to agricultural produced from payment of Service Tax and same is continuing by specifying in the negative list. The conditions specified in Notification No. 42/2012 is procedural is nature and for which intention of benefit cannot be denied. The taxation of commission agent service dealing in goods was governed by Rule 3 of Place of Provision of Service Rules, 2012 upto 30.09.2014 and as per which service will be deemed to be provided at the location of 'Service Recipient'. However, vide Notification No. 14/2014-S.T. dated 11.07.2014, the Government has amended Rule 2(f) read with Rule 9 of the Place of Provision of Service Rules, 2012 by replacing definition of intermediary, to include, commission agent dealing in goods. Therefore, from 1<sup>st</sup> October, 2014, taxation of commission agent service dealing in goods will be governed by Rule 9 of Place of Provision of Service Rules, 2012 which defines services provided by foreign commission agent, outside India to Indian person, it is not liable to Service Tax.
4. They further argue that various penalties imposed upon them are not sustainable. For imposition of penalty under Section 70 of the Act read with Rule 7 of the Rules, they are not liable to such penalty as their receipts does not exceeds the basic threshold limits as prescribed under



Notification No. 6/2005 as amended and CBEC Circular No. 97/8/07-S.T. dated 23.08.2007. They also rely on the decision in the case of Amrapali Barter Pvt. Ltd., Suchak Marketing Pvt. Ltd. That penalty under Section 75 demanded for interest and penalty under Section 76, 77 and 78 cannot be imposed as they were not liable to pay Service Tax and not a person in default.

5. For procedural lapses they rely decision in the case of Ambalal & Co. reported as 2010-TIOL-111-SC-CUS, Indian Tobacco Association reported as 2005 (070) RLT 0201 (SC). For classification of their product as Food Stuff, they rely on the decision in the case of K. Janardhan Pillai & Others reported as AIR 1981 SC 1485.

4. Shri Hemal Doshi, Chartered Accountant appeared and reiterated grounds of appeal and submitted that they process sea food which is exempted by Notification No. 25/2012-ST dated 20.06.2012; that they fall under National Fisheries Development Board for following regulations etc which is under Ministry of Agriculture; that Hon'ble Supreme Court has held in K. Janardhan Pillai & Otheers (AIR 1981 SC 1485) that sea foods is also food itself that in case of M. Ambalal & Co. reported as 2010-TIOL-111-SC-Cus it has been decided that an exemption notification must be construed in such a way to give exemption benefits; that they have exported the entire production to foreign countries; that they should have followed procedure and they are ready to follow now; that they would submit written submission in this regard within 3-4 working days.

#### **FINDINGS:**

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and written as well as oral submissions of the appellant. The issue to be decided in the present appeal is as to whether appellant is liable to pay Service Tax on GTA Service, Commission Agent Service and Business Auxiliary Service for sales commission paid to foreign agents or not.

6. It is on record that the appellant was holding Service Tax registration since 24.03.2006 but neither filed S.T.-3 returns from April, 2006 to March, 2014 nor paid any service tax. The appellant argued that since they were engaged in the business of fish processing and the same falls within the ambit of agricultural business and exempted from Service Tax vide Notification No.



25/2012. They were paying freight for the transportation of fishes from their factory to the port. Let's examine some basic facts for deciding the issue, which are as under:

'Goods' means every kind of movable property that can be brought to the market to be bought and sold.

Item No. 21(a) of Notification No. 25/2012 dated 20.06.2012 grants full exemption from Service Tax to transport of the products 'Fruits, Vegetables, Egg, Milk, Food grains or pulses' by road in a goods carriages. These articles are of daily necessity and are transported throughout the year and hence the exemption is granted since it serves the common man from the burden of possible price-rise.

The entry No. 21 of Notification No. 25/2012 was amended vide Notification No. 3/2013-Service Tax dated 01.03.2013 and the definition was substituted which reads as "foodstuff including flours, tea, coffee, jiggery, sugar, milk products, salt and edible oil excluding alcoholic beverages.

The food means "any solid substance (not liquid) that is used as a source of nourishment, material, usually of plant or animal origin, that contains or consists of essential body nutrients such as carbohydrates, fats, proteins, vitamin or mineral and is ingested and assimilated by an organism to produce energy, stimulate growth and maintain life."

Food stuff means "Foodstuff (usually plural) means a substance that can be used or prepared for use as food."

The term Agriculture means "the cultivation of plants and rearing of all life-forms of animals except the rearing of horses for food, fiber, fuel, raw material or other similar products."

Agricultural produce means "Agricultural produce" means any produce of agriculture on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market."

6.1 Thus, the agriculture sector has been supported by keeping the bulk of services relating to agriculture or agriculture produce in the negative list vide the Finance Act, 2012. Hence, the services relating to agriculture shall include

by way of agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or seed testing. Therefore, it can be construed that the farm fish without any further processing is done or such processing is done which does not alter the essential characteristics is out of purview of Service Tax. But in case on hand the issue is not related to farm fish as it is nowhere mentioned that the appellant is having their own farms for fish breeding, rearing, and transplantation of fish by artificial means, in other words, fish farming which is the principal form of aquaculture, while other methods may fall under mariculture and it involves raising fish commercially in tanks or enclosures, usually for food. A facility that releases juvenile fish into the wild for recreational fishing or to supplement a species' natural numbers is generally referred to as a fish hatchery. On the contrary it is on record that the appellant vide their letter dated 27.01.2016 has informed that as per their business activities, they are purchasing natural fish of sea water from fisherman and they are sea foods exporters. Therefore, it can safely be construed that the appellant has not obtained fish out of an agricultural activity and it is ocean caught fish and thus it cannot be termed as agricultural produce. They purchase fishes from the fisherman and carrying out process like cutting of heads and tails, peeling, deveining, cleaning and freezing etc. Therefore, I hold that it is not an agricultural produce as argued by the appellant. Once it is established that it is not agricultural produce, the applicability of provisions of Notification No. 25/2012 do not arise at all looking to the facts of the present case.

6.2 Since the provisions of Notification No. 25/2012 are not applicable to the appellant, for availing export related benefits, they have to follow the procedures laid down vide Notification No. 18/2009-ST dated 07.07.2009, as amended vide Notification No. 31/2012-S.T. dated 20.06.2012.

6.3 I find that the appellant has paid sales commission to overseas commission agent in the year 2010-11 and 2013-14. The said services are classifiable under "Business Auxiliary Service" as per Section 65(19) of the Act, as detailed below:

*Business auxiliary service" means any service in relation to,*  
*(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or*  
*(ii) promotion or marketing of service provided by the client; or*  
*(iii) any customer care service provided on behalf of the client; or*

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(iv) procurement of goods or services, which are inputs for the client; or  
 Explanation: For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client.

(v) production or processing of goods for, or on behalf of, the client.

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, but does not include any activity that amounts to "manufacture" of excisable goods.

[Explanation. – For the removal of doubts, it is hereby declared that for the purposes of this clause, –

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person –

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

Further Section 65(105)(zzb) of the Act stipulates: "Taxable Services" means any service provided or to be provided to a client by any person in relation to business auxiliary service.

6.4 The charging Section is Section 66A which is re-produced below for ready reference:

SECTION 66A Charging of service tax on services received from outside India:

(1) Where any service specified in clause (105) of section 65 is, –

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India,

such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision

of service is located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

*Explanation 1.*— A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

*Explanation 2.*—Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.

The services provided in the negative list (exempted from Service Tax) are tax free as per the charging section 66B. However, the “Business Auxiliary Service” is not covered under the negative list as per Section 66B of the Act.

6.5 The Government vide Notification No. 25/2012-Service Tax New Delhi, the 20th June, 2012 exempted the following taxable services by the following persons in respective capacities -

Item N0.34. Services received from a provider of service located in a non-taxable territory by -

- (a) Government, a local authority, a governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession;
- (b) an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) for the purposes of providing charitable activities; or
- (c) a person located in a non-taxable territory;

However, vide Notification No. 30/2012-ST dated 30.06.2012 has clarified the situation as detailed 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
10	in respect of any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory	Nil	100%

Thus, it is clear that in respect of any taxable services provided or agreed to be provided by any person who is located in non-taxable territory and received by



any person located in the taxable territory, the person receiving the service is liable to pay Service Tax on reverse charge mechanism.

6.6 The impugned order stated that the appellant had paid export sales commission to overseas commission agents in 2010-11 and 2014-15 on overseas sales. I find that for this the Government has issued following Notification which exempts the taxable service received by an export of goods and used for export of goods as detailed below:

Notification No.18/2009 - Service Tax, dated 7th July, 2009

hereby exempts the taxable service received by an exporter of goods (hereinafter referred to as the exporter) and used for export of goods (hereinafter referred to as the said goods), of the description specified in column (3) of the Table below (hereinafter referred to as the specified service), pertaining to sub-clauses of clause (105) of section 65 of the said Act specified in the corresponding entry in column (2) of the said Table, from the whole of the service tax leviable thereon under section 66 and section 66A of the said Act, subject to the conditions specified in column (4) of the said Table,

Serial No.	Sub-clause	Description of the taxable service	Conditions
1.	(zzp)	Service provided to an exporter for transport of the said goods by road from any container freight station or inland container depot to the port or airport, as the case may be, from where the goods are exported; or Service provided to an exporter in relation to transport of said goods by road directly from their place of removal, to an inland container depot, a container freight station, a port or airport, as the case may be, from where the goods are exported.	The exporter shall have to produce the consignment note, by whatever name called, issued in his name.
2.	(zzb)	Service provided by a commission agent located outside India and engaged under a contract or agreement or any other document by the exporter in India, to act on behalf of the exporter, to cause sale of goods exported by him.	(1)The exporter shall declare the amount of commission paid or payable to the commission agent in the shipping bill or bill of export, as the case may be. (2) The exemption shall be limited to one per cent of the free on board value of export goods for which the said service has been used.
3.			(3) The exemption shall not be

		<p>available on the export of canalised item, project export, or export financed under lines of credit extended by Government of India or EXIM Bank, or export made by Indian partner in a company with equity participation in an overseas joint venture or wholly owned subsidiary.</p> <p>(4) The exporter shall submit with the half yearly return after certification of the same as specified in clause (g) of the proviso-</p> <p>(i) the original documents showing actual payment of commission to the commission agent; and</p> <p>(ii) a copy of the agreement or contract entered into between the commission agent located outside India and the exporter in relation to sale of export goods, outside India:</p>
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Provided that-

(a) the exemption shall be available to an exporter who, -

(i) informs the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the factory or the regional office or the head office, as the case may be, in Form EXP1, before availing the said exemption;

(ii) is registered with an export promotion council sponsored by the Ministry of Commerce or the Ministry of Textiles, as the case may be;

(iii) is a holder of Import-Export Code Number;

(iv) is registered under section 69 of the said Act;

(v) is liable to pay service tax under sub-section (2) of section 68 of said Act, read with sub clause

(iv) or sub-clause (v) of clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994, for the specified service;

(b) the invoice, bill or challan, or any other document issued by the service provider to the exporter, on which the exporter intend to avail exemption, shall be issued in the name of the exporter, showing that the exporter is liable

to pay the service tax in terms of item (v) of clause (a);

(c) the exporter availing the exemption shall file the return in Form EXP2 every six months of the financial year, within fifteen days of the completion of the said six months;

(d) the exporter shall submit with the half yearly return, after certification, the documents in original specified in clause (b) and the certified copies of the documents specified in column (4) of the said Table;

(e) the documents enclosed with the return shall contain a certification from the exporter or the authorised person, to the effect that taxable service to which the document pertains, has been received and used for export of goods by mentioning the specific shipping bill number on the said document.

(f) where the exporter is a proprietorship concern or partnership firm, the documents enclosed with the return shall be certified by the exporter himself and where the exporter is a limited company, the documents enclosed with the return shall be certified by the person authorised by the Board of Directors;

(g) where the amount of service tax in respect of the service specified against serial No. 2 of the Table exceeds one per cent. of the free on board value of the export then, the amount in excess of the said one percent. shall be paid within the period specified under rule 6 of the Service Tax Rules, 1994;

6.7 The above Notification provides for exemption from payment of Service Tax on taxable service under Section 65 (105) (zzb) which is received by an exporter of goods and used for export of goods subject to 1% of the FOB value and subject to conditions as laid down in the Notification mentioned supra. In the context of refund of service tax paid on foreign agency commission, Notification 18/2009 dated 07/07/2009 (in the table, sl.no.2 , condition no. 2) says "exemption shall be limited to one percent of the free on board value of export goods for which the said service has been used". This means that amount of service tax paid, which can be refunded to the exporter, is restricted to one percent of the FOB value of export goods in relation to which the taxable service of the foreign agent was used. In other words, it is clear that the person who paid export sales commission to overseas commission agent on overseas sales is required to pay Service Tax first and then can claim refund of the Service Tax paid by following the mechanism enumerated in the said Notification.

6.8 The above Notification provides for exemption from payment of Service Tax on taxable service under Section 65 (105) (zpz) which is received by an exporter of goods and used for export of goods subject to condition that the exporter shall have to produce the consignment note, by whatever name called, issued in his name and subject to conditions as laid down in the

Notification mentioned supra. In the context of refund of service tax paid on GTA service, Notification 18/2009 dated 07/07/2009 (in the table, sl.no.1) condition says "the exporter shall have to produce the consignment note, by whatever name called, issued in his name". This means that amount of service tax paid, which can be refunded to the exporter, is available to them on production of consignment note issued in the name of exporter. In other words, it is clear that the person who paid GTA is required to pay Service Tax first and then can claim the refund of the same by following the mechanism enumerated in the above mentioned Notification.

6.9 The Notification No. 18/2009 dated 07.07.2009 was amended vide Notification No. 42/2012, which is re-produced below for ready reference:

Notification No 42/2012-ST, the 29th June, 2012 stipulates for exemption of excess of the service tax calculated on a value up to ten per cent of the free on board value of export goods for which the said specified service has been used, subject to the conditions specified in column (3) of the said Table,

Table

Sr. No.	Description of the taxable service	Conditions
(1)	(2)	(3)
1.	Service provided by a commission agent located outside India and engaged under a contract or agreement or any other document by the exporter in India, to act on behalf of the exporter, to cause sale of goods exported by him.	<p>(1) The exporter shall declare the amount of commission paid or payable to the commission agent in the shipping bill or bill of export, as the case may be.</p> <p>(2) The exemption shall be limited to the service tax calculated on a value of ten per cent of the free on board value of export goods for which the said service has been used.</p> <p>(3) The exemption shall not be available on the export of canalised item, project export, or export financed under lines of credit extended by the Government of India or EXIM Bank, or export made by Indian partner in a company with equity participation in an overseas joint venture or wholly owned subsidiary.</p> <p>(4) The exporter shall submit with the half-yearly return after certification of the same as specified in clause (g) of the proviso—</p> <p>(i) the original documents showing</p>



		actual payment of commission to the commission agent; and (ii) a copy of the agreement or contract entered into between the commission agent located outside India and the exporter in relation to sale of export goods outside India:
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Provided that-

(a) the exemption shall be available to an exporter who,-

(i) informs the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the factory or the regional office or the head office, as the case may be, in Form EXP3 appended to this notification, before availing the said exemption;

(ii) is registered with an export promotion council sponsored by the Ministry of Commerce or the Ministry of Textiles, as the case may be;

(iii) is a holder of Import-Export Code Number;

(iv) is registered under section 69 of the said Act;

(v) is liable to pay service tax under sub-section (2) of section 68 of said Act, read with item (G) of sub-clause (i) of clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994, for the specified service;

(b) the invoice, bill or challan, or any other document by whatever name called issued by the service provider to the exporter, on which the exporter intends to avail exemption, shall be issued in the name of the exporter.

(c) the exporter availing the exemption shall file the return in Form EXP4, every six months of the financial year, within fifteen days of the completion of the said six months;

(d) the exporter shall submit with the half yearly return, after certification, the documents in original specified in clause (b) and the certified copies of the documents specified in column (3) of the said Table;

(e) the documents enclosed with the return shall contain a certification from the exporter or the authorised person, to the effect that specified service to which the document pertains, has been received and used for export of goods by mentioning the specific shipping bill number on the said document.

(f) where the exporter is an individual or a proprietorship concern or an HUF or a partnership firm, the documents enclosed with the return shall be certified by the exporter himself and where the exporter is any other person, the documents enclosed with the return shall be certified by the person authorised by the Board of Directors or any other competent person;

(g) where the amount of commission charged in respect of the specified service exceeds ten per cent. of the free on board value of the export then, the service tax shall be paid within the period specified under rule 6 of the Service Tax Rules, 1994, on such amount, which is in excess of the said ten per cent;

6.9.1 Vide above Notification, the Government has allowed exemption limited,

by way of refund, to the service tax calculated on a value of ten per cent of the free on board value of export goods for which said service has been used, subject to the conditions mentioned therein which is to be followed by the person who intend to avail either exemption from payment to Service Tax for the goods exported or to claim refund later on.

6.10 In view of the legal position as enumerated above, it is clear that the appellant is liable to pay Service Tax on export sales commission paid to overseas commission agent during the year 2010-11 and 2014-15 as they have not followed the conditions above for exemption or refund but have claimed that the services received by them were of 'intermediary' services as defined under Rule 2(f) of the Place of Provision of Services Rules, 2012 and as per Rule 9 of the Rules. The place of provision of service in case of 'intermediary service' is the location of service provider. Therefore, Service Tax is not liable to be paid since the place of provision of services is outside the taxable territory. For this, we need to have a look at definition of 'intermediary' given in Rule 2(f) of the Rules as was in force upto 30.09.2014 which reads as under:

*(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account.*

The above mentioned definition was amended vide Notification No. 14/2014-ST dated 11.07.2014 and w.e.f. 01.10.2014, which reads as under:

*(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service on his account.;*

6.10.1 In view of above, earlier exemption was available on Commission paid to the overseas agent for Export of Goods but it was conditional, however, from 1st October 2014, it is out of purview of service tax. Taxation of Commission agent service dealing in goods was governed by Rule 3 of Place of Provision of Service Rules 2012 upto 30th September 2014. As per said Rule 3, Service will be deemed to be provided at the location of 'Service Recipient'. However, vide Notification No 14/2014 ST dated 11th July 2014, government has amended Rule 2(f) read with Rule 9 of the Place of Provision of Service Rules 2012, by replacing definition of Intermediary, to include, commission

agent dealing in goods. Hence from 1st October 2014, Taxation of Commission agent service dealing in goods will be governed by Rule 9 of Place of Provision of Service Rules 2012. As per said Rule 9, Service will be deemed to be provided at the location of 'Service Provider'. Analysis of changes in definition of Intermediary is as under:

From 1st July 2012 to 30th September 2014	From 1st October 2014 onwards
"intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account	"Intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or A SUPPLY OF GOODS, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account
<b>Analysis:</b> Prima facie this definition deals with intermediary dealing in provision of services like Recovery Agent	<b>Analysis:</b> Now Intermediary will also include intermediary dealing in goods that is commission agent.

6.10.2 Therefore, the recourse of Rule 9 of the Rules read with Rule 2(f) of the Rules as taken by the appellant is of no help to them as prior to 01.10.2014, Commission agent service dealing in goods was governed by Rule 3 of Place of Provision of Service Rules 2012 (upto 30th September 2014) and not Rule 9 of the Rules as contended by the appellant. The sales commission agents located overseas have arranged supply of the goods on behalf of the appellant. Therefore, the activity can be reckoned as services of 'intermediary' with effect from 01.10.2014 only and not prior to that, when the words 'supply of goods' were not included in the said definition. The demand pertains to the years 2012-13 and 2013-14, therefore, I find that the appellant was required to pay Service Tax and was not qualified for exclusion under Rule 9 read with Rule 2(f) of the Rules.

6.11 With regard to GTA service, Notification No. 18/2009 dated 07.07.2009 was amended vide Notification No. 31/2012 which is re-produced below for ready reference:

G.S.R.... (E). -In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 18/2009-Service Tax, dated the 7<sup>th</sup> July, 2009, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R.490 (E), dated the 7<sup>th</sup> July, 2009, except as respects things done or omitted to be done before such supersession, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service received by an exporter of goods (hereinafter referred to as the exporter) and used for export of goods (hereinafter referred to as the said goods), of the description specified in column (2) of the Table below (hereinafter referred to as the specified service), from the whole of the service tax leviable thereon under section 66B of the said Act, subject to the conditions specified in column (3) of the said Table, namely:-

Table

Sr. No.	Description of the taxable service	Conditions
(1)	(2)	(3)
1.	Service provided to an exporter for transport of the said goods by goods transport agency in a goods carriage from any container freight station or inland container depot to the port or airport, as the case may be, from where the goods are exported; or Service provided to an exporter in relation to transport of the said goods by goods transport agency in a goods carriage directly from their place of removal, to an inland container depot, a container freight station, a port or airport, as the case may be, from where the goods are exported.	The exporter shall have to produce the consignment note, by whatever name called, issued in his name.

Provided that-

(a) the exemption shall be available to an exporter who,-

(i) informs the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction over the factory or the regional office or the head office, as the case may be, in Form EXP1 appended to this notification, before availing the said exemption;

(ii) is registered with an export promotion council sponsored by the Ministry of Commerce or the Ministry of Textiles, as the case may be;

(iii) is a holder of Import-Export Code Number;

(iv) is registered under section 69 of the said Act;

(v) is liable to pay service tax under sub-section (2) of section 68 of said Act, read with item (B) of sub-clause (i) of clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994, for the specified service;

(b) the invoice, bill or challan, or any other document by whatever name called issued by the service provider to the exporter, on which the exporter intends to avail exemption, shall be issued in the name of the exporter, showing that the exporter is liable to pay the service tax in terms of item (v) of clause (a);

(c) the exporter availing the exemption shall file the return in Form EXP2, every six months of the financial year, within fifteen days of the completion of the said six months;

(d) the exporter shall submit with the half yearly return, after certification, the documents in original specified in clause (b) and the certified copies of the documents specified in column (4) of the said Table;

(e) the documents enclosed with the return shall contain a certification from the exporter or the authorised person, to the effect that taxable service to which the document pertains, has been received and used for export of goods by mentioning the specific shipping bill number on the said document.

(f) where the exporter is a proprietorship concern or partnership firm, the documents enclosed with the return shall be certified by the exporter himself and where the exporter is a limited company, the documents enclosed with the return shall be certified by the person authorised by the Board of Directors;

2. This notification shall come into force on the 1<sup>st</sup> day of July, 2012.



6.11.1 Vide above mentioned Notification, the government has allowed exemption to the exporter, on production of the consignment note, by whatever name called, issued in name of exporter, subject to the conditions mentioned therein which are to be followed by the person, who intend to avail exemption from payment to Service Tax for the goods exported.

6.11.2 In view of above legal position, it is clear that the appellant is liable to pay Service Tax on GTA paid during the year 2010-11 to 2014-15. The remedy of exemption or refund has been given on conditions, which the appellant has not followed but have claimed that the services received by them were for export and hence they are not liable to pay Service Tax on GTA service, which is factually incorrect because they failed to follow the prescribed procedure for exemption from payment of Service Tax while exporting the goods. Therefore, the arguments advance by the appellant for non payment of Service Tax on GTA services as well as on sales commission paid to overseas commission agents under Business Auxiliary Service are devoid of any merits and liable to be quashed and I do accordingly. I hold that the appellant has violated the provisions and not complied with the conditions mentioned in Notifications No. 18/2009, 31/2012 and 42/2012 respectively and hence, they are liable to pay Service Tax as confirmed in the impugned order. Once Service Tax is held payable, interest become payable automatically and I hold so.

6.12 The appellant further argued that benefit granted by the government cannot be denied merely on procedural lapse and they relied on the judgment of Mangalore Chemicals & Fertilizers Ltd reported as 1991 (55) ELT 437 (S.C.) and Rupam Impex Vs ACIT. On this, I find that it is nowhere alleged to deny or take away the benefits of export made by the appellant. It is not a case of denial of export benefit/refund on export for non compliance of provisions and conditions of Notifications. On the contrary, the appellant have already pocketed the benefits for exporting goods. The only issue is to demand Service Tax on GTA service and Business Auxiliary Service which is not paid by the appellant despite not following procedures as laid down under Notification No. 18/2009, 31/2012 and 42/2012 respectively. Thus, it cannot be termed as procedural lapse but gross violations of notifications governing exemption from payment of Service Tax. My views get support from the judgment in the case of Avis Electronics Pvt. Ltd. reported as 2000 (117) ELT 571 (Tri.-LB) wherein Hon'ble CESTAT held as under:

"8. In the light of the above finding arrived at by us on the question referred to us, we hold that insistence on document evidencing payment of duty on the inputs as prescribed by Rules is not a technicality to be complied with for availing Modvat credit. Observation made by the appellate authority that insistence on duplicate copy of invoice is purely a procedural requirement is against Rules so cannot be sustained. When a particular thing is directed to be performed in a manner prescribed by Rules, it should be performed in that manner itself and not otherwise. A combined reading of the provisions contained in the Rules makes it clear that a manufacturer who wants to take credit of the duty paid on inputs must base his claim on the duplicate copy of the invoice. In case the duplicate copy has been lost in transit, he can take credit on the basis of the original. This can be done only if he satisfies the concerned Asstt. Collector about the loss of the duplicate copy in transit."

(Emphasis supplied)

6.12.1 Further in the case of D. D. International Pvt. Ltd. reported as 2016 (41) S.T.R. 868 (Tri.-Del.), Hon'ble CESTAT held as under:

"3. We have considered the contentions of the appellant. We find that condition (c) contained in the proviso to the Notification No. 18/2009 reads as under :-

"(c) the exporter availing the exemption shall file the return in Form EXP-2 every six months of the financial year, within fifteen days of the completion of the said six months."

It is evident that the said condition is a condition of exemption notification and therefore non-fulfilment thereof prima facie disentitles the appellant to the benefit of the said notification. In addition non-compliance with the provisions of Section 35F is *prima facie* a valid ground for rejection of the appellant's appeal before the Commissioner (Appeals)."

(Emphasis supplied)

6.12.2 Therefore, the arguments made by the appellant are devoid of merits and accordingly, I reject the same.

7. The appellant has further argued that they have not made any misstatement or fraud and not liable to penalty under Section 78 of the Act. It is on record that the appellant is holding Service Tax registration since 24.03.2006 and has not filed single S.T.-3 return from April, 2006 to March, 2014 nor paid any service tax. Thus, it is established that they have not declared anything to department about their activity as well as services availed/ provided by them including its value. Based on third party analysis data received from Income Tax Department, it was come to the notice that the appellant is having income and even though they have not filed any S.T.-3 return since April, 2006. The jurisdictional Range Superintendent has issued letters dated 01.09.2015, 12.10.2015, 09.11.2015, 02.12.2015, 09.12.2015,

11.12.2015, 30.12.2015, 12.01.2016 and 28.01.2016 and called for the information for the years from 2010-11 to 2014-15 from the appellant. In response, the appellant vide their letter dated 09.09.2015 replied that they are engaged in fish export business and no Service Tax is leviable on fish export and provided copy of Form 26AS for the year 2013-14. The appellant vide letter dated 01.11.2015 produced copy of balance sheet and income tax return for FY 2013-14 and also informed that they have no income liable to pay Service Tax in FY 2013-14. The appellant vide letter dated 02.12.2015 informed that Ocean Freight charges were including in freight outward charges mentioned in the Balance Sheet and also submitted the figures of Trailer Freight paid by them for the year 2012-13 and 2013-14. The appellant vide their letter dated 06.01.2016 informed that they were engaged in export of sea food and not liable to pay Service Tax on the said pisciculture activity, which is considered as agriculture activity. The appellant vide letter dated 27.01.2016 informed that as per their business activities, they are purchasing natural fish of sea water from fishermen and they are sea food exporters. Therefore, the appellant has suppressed the material facts from the department till September, 2015 by non filing of S.T.-3 returns and the same was noticed only during verification of third party data. Therefore, the lower adjudicating authority has rightly imposed penalty under Section 78 of the Act and I uphold the same. I also uphold penalty under Section 70 of the Act read with Rule 7C of the Rules imposed by the lower adjudicating authority for non filing ST-3 returns in time.

8. In view of above, I uphold the impugned order and reject the appeal.
९. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
9. The appeal filed by the appellant is disposed of in above terms.

*(Handwritten Signature)*  
 (कुमार संतोष)  
 आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s Keshodwala Foods, Plot No. 305,  
 GIDC Udhoygnagar, Veraval 362269,  
 Dist., Gir-Somnath

मे. केशोदवाला फूड्स, प्लॉट संख्या ३०५,  
 जीआईडीसी उधयोगनगर, वेरावल -  
 ३६२२६९ जिल्ला: गीर-सोमनाथ

**Copy for information and necessary action to:**

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
- 2) The Commissioner, GST & Central Excise, Bhavnagar.
- 3) The Assistant Commissioner, GST & Central Excise, Division-Junagadh.
- 4) The Superintendent, GST & Central Excise, Range-Veraval.
- 5) Guard File.