



**आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्कः**  
**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  
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सत्यमेव जयते

रजिस्टर्ड ड्राफ्ट ए. डी. द्वारा :-

क अपील / फाइल संख्या / Appeal / File No. V2/125/BVR/2017	मूल आदेश सं / O.J.O. No. 106/AC/Stax/Div/2016-17	दिनांक / Date 23.03.2017
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ख अपील आदेश संख्या (Order-In-Appeal No.):

**BHV-EXCUS-000-APP-259-2017-18**

आदेश का दिनांक / Date of Order:	26.03.2018	जारी करने की तारीख / Date of issue:	05.04.2018
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Passed by **Dr. Balbir Singh, Additional Director General (Taxpayer Services), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पट्टे बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, डॉ. बलबीर सिंह, अपर महानिदेशक करदाता सेवाएं, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा ८५, केंद्रीय उत्पाद शुल्क अधिनियम १९५४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Dr. Balbir Singh, Additional Director General of Taxpayer Services, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /  
 Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellants & Respondent :-**  
**M/s Shyam Power Tech(Unit of Shyam Steel P. Ltd.), Plot No. 2264-B, "Shaym", Hill Drive, Bhavnagar,**

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/  
 Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

- (A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है।/  
 Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-
- (ii) 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.
- (iii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीले सीमा शुल्क, केंद्रीय 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, 2<sup>nd</sup> 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) नियमवाली, 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, ब्याज की मांग और लगाया गया जुर्माना, रुपये 5 लाख या उससे कम, 5 लाख रुपये या 50 लाख रुपये तक अथवा 50 लाख रुपये 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 भुगतान, 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 भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपये 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, ब्याज की मांग और लगाया गया जुर्माना, रुपये 5 लाख या उससे कम, 5 लाख रुपये या 50 लाख रुपये तक अथवा 50 लाख रुपये 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 भुगतान, 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 भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपये का निर्धारित शुल्क जमा करना होगा।

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

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

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति 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 मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये 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
- सेनवेट जमा की ली गई गलत राशि
- सेनवेट जमा नियमवाली 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 विचाराधीन 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 :

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

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

- (i) यदि माल के किसी नुकसान के मामले 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
- (ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केंद्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /  
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /  
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी 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 संभाषाविधि 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 केंद्रीय 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 केंद्रीय 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। जहां 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, उपरोक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पंजी 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, 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.
- (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 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.
- (F) सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /  
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलाधी 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. Shyam Power Tech, "Shyam", Plot No. 2264-B, Hill Drive, Bhavnagar (a Division of M/s. Shyam Steels P. Ltd., Bhavnagar) (hereinafter referred to as "the appellant"), has filed the present appeal against DIO No.106/AC/STAX/DIV/2016-17 dated 23.03.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner (AE), Central Excise, H.Q.Bhavnagar (hereinafter referred to as "the adjudicating authority").

2.1 Briefly stated, the facts are that during the course of search on 21.09.2012, it has been observed that the appellant is providing services to their customers by renting DG Sets since 2005 and undertaking repairs/overhauling of the DG Sets and Machineries of others too, which is taxable service under the category of "Supply of Tangible Goods" and "Management, Maintenance or Repairs" Services, respectively. However, on going through ST-3 Returns, it was observed that the appellant had not paid Service Tax thereon during the financial year 2008-09 to 2009-10 and had paid Service Tax on some amount thereof under "Business Auxiliary Service" since 2010-11.

2.2 A statement of Shri Shyam B. Khillan, Managing Director of the appellate firm was also recorded on 21.09.2012, wherein he inter alia stated that they were providing services by renting DG Sets since 2005 to their customers and undertaking repairs/overhauling of the DG Sets and Machineries of others too; that these sets were manned by them and fuel was being provided by the customers; that for the said purpose, they had entered with the agreements with their customers; that they were not paying any VAT/CST/Sales Tax on the DG sets given on rent. He explained the amount shown under the following Account Heads in the Annual Reports were as follows:-

**Job Work (Contract)** - are the amounts paid to various persons who have been hired for operation & maintenance of DG Sets given on rent as well as overhauling services provided to other customers;

**DG Sets Maintenance Expenses** - are the amounts incurred towards maintenance of DG Sets given on rent and on the ones which have been overhauled /repaired during the period;

**Labour Income for generating power** - are the incomes earned from customers to whom DG Sets have been given on rent;

**Power Plant Overhauling Charges** - are incomes earned on account of Overhauling / Repairing undertaken for the clients in respect of their machineries.

2.3 During the scrutiny of the Purchase/Service Orders seized, it was observed that the DG Sets were given on rent to their customers for power generation in consideration of which the amount was charged on per unit of power generated, and in case of power was generated less in a particular period, certain minimum amount was guaranteed as consideration.

2.4 During the scrutiny of the invoices seized, it was also observed that the description of services had been shown as "Generating & Providing Electrical Energy from fuel supplied by you [i.e. Tanfac/GSL (India)] with the help of DG Set installed at your premises which were operated by our employees". Further the charges for said service had been shown as "FIX" or "@Rs.0.99 or Rs.1.12 per unit.

2.5 Inquiry was also extended to various service recipients (customers) of the appellant to ascertain the exact nature of job carried out by the appellant. During the inquiry, it was observed that some of the customers had purchased machineries & spares and obtained maintenance or repair service from the appellant, whereas some of the customers had taken Gen Set on hire/rental from the appellant.

*Osmanatto*  
26/03/18

2.6 The appellant vide letter dated 09.11.2012 informed that due to oversight, service tax in respect of Business Auxiliary Service in respect of three customers was neither collected nor paid to the government exchequer during the F.Y. 2010-11. Accordingly, the appellant paid Service Tax of Rs.48,091/- on the gross amount of Rs. 5,15,000/- along with interest of Rs. 18,591/-.

2.7 Another statement of Shri Khillan was also recorded on 23.08.2013 wherein he inter alia stated that the power plant was installed by them at the site of customers and the power was generated with the help of said power plant; that consideration was paid to them on per unit of power generated; that certain minimum amount was guaranteed as consideration even if power generated was less in a particular month; that the maintenance of power plant installed for the aforesaid purpose was also being undertaken by them; that they had classified said service under the category of "Business Auxiliary Service"; that the consumables i.e. Lubricating Oil & Fuel Oil required for power generation was being supplied by the customers; that the cost of aforesaid consumables was borne by the customers and was not included in the consideration paid to them;

2.8 Another statement of Shri Khillan was also recorded on 09.10.2013 wherein he inter alia stated that the machineries and equipments required for generation of electricity was supplied & installed by them at the site of customers; that the cost of maintenance & operation of machineries / equipments supplied at the site of the customers for generation of electricity was borne by them as it was the condition to keep said machineries / equipments in a working condition all the time; that the right of possession and effective control over the machinery and equipments supplied at the site of customer for generation of electricity remained with the appellant only.

3. Accordingly, a SCN dated 18.10.2013 was issued to the appellant proposing for classification of machineries/equipments provided on rental basis under the category of "Tangible Goods Service", & classification of repairing/reconditioning/maintenance/overhauling activity provided under the category of "Management, Maintenance or Repair Service". It is also proposed in said SCN for demand of Service Tax of Rs.9,71,182/- under the provisions of Section 73(1) of Finance Act, 1994 along with interest as provided under Section 75 of Finance Act, 1994. Imposition of penalties had also been proposed under Section 77 & 78 of Finance Act, 1994 in the captioned SCN.

4. The aforesaid SCN was adjudicated by the adjudicating authority vide the impugned Order dated 23.03.2017 passing the order as under:-

- (a) The supply of machineries/equipments on rental basis have been classified under the category of "Tangible Goods Service",
- (b) The repairing/reconditioning/maintenance/overhauling activity provided by the appellant have been classified under the category of "Management, Maintenance or Repair Service",
- (c) Confirmed the demand of Service Tax of Rs.9,21,394/- under Section 73(2) of Finance, 1994 along with interest thereon under Section 75 of Finance Act, 1994,
- (d) Dropped the demand of Service Tax of Rs.97,293/- in view of benefit of the cum-duty-price;
- (e) Appropriated the amount of Service Tax of Rs.48,091/- & Interest of Rs.18,591/- paid by the appellant during the course of inquiry against their appropriate head of aforesaid demand;
- (f) Imposed penalties of Rs.5,000/- & Rs.8,73,889/- upon the appellant under Section 77 & 78 of Finance Act, 1994, respectively.



5. Feeling aggrieved, the appellant has filed the present appeal on the following grounds:-

- The CBEC vide Circular No. 334/1/2008-TRU dated 29.02.2008 clarified regarding the scope of "Supply of Tangible Goods for use" no longer had possession or any control over such DG sets/equipments and thus the installation of DG Set in the customer's premises for the production of electricity is not in the nature of supply of tangible goods like machinery, equipment or appliances;
- The agreement clearly states that the DG Sets installed in the premises of the customer shall be operated or shut down as per the requirements and direction of the customer. Thus, the effective control and possession of the DG Sets lies with the customers during the material period;
- The taxable event is the act of transfer of right to use goods. Therefore, if the agreement is entered prior to 16.05.2008, service tax would not be payable under the category of "Supply of Tangible Goods for use service", even if payments are made subsequently. In this case, the appellant had entered into an agreement with M/s. GSL (India) Ltd. for the supply, installation and production of electricity in the premises of M/s. GSL (India) Ltd. on 06.11.2005 for a period of three years from the date of commencement of the trial production of power/electricity. Further, after the expiry of the said agreement, the appellant entered into an oral agreement with M/s. GSL (India) Ltd. for the continuance of the agreement. Therefore, the appellant supplied DG Set to M/s. GSL (India) Ltd. prior to 16.05.2008 and since the taxable event occurred prior to 16.05.2008, no service tax would be levied on the subsequent payments;
- In a similar situation, the CBEC, vide Circular dated 09.07.2001 issued from F.No. BII/I/2000-TRU clarified that in case of lease or hire-purchase agreements entered into prior to the imposition of levy (prior to 16.07.2001) will not be liable to service tax, provided the property/goods has also been received by the lessee prior to 16.07.2001. The ratio of the above circular is applicable in full force to the case off the appellant. In this regard, the appellant relied upon the following decisions pronounced by the higher appellate forum:-
  - (i) Coromandal Finance Co.Ltd. Vs. Commr. of Commercial Taxes, A.P., Hyderabad, as reported in 2001 122 STC 0538 H.C.-A.P.;
  - (ii) Mod Mundipharma Pvt. Ltd. Vs. CCE, Meerut, reported in 2009(15)STR713(Tri.Delhi);
  - (iii) 20<sup>th</sup> Century Finance Corporation and Anr. Vs. State of Maharashtra, reported in 2000 6 SCC 12 S.C.;
  - (iv) Petronet LNG Ltd Vs. CCE, reported in 2013 TIOL 1700 CESTAT Del;
- In any case, no service tax can be levied on the income earned under the invoice dated 01.05.2008 raised by the appellant on M/s. GSL (India) Ltd, since the taxable category of "Supply of Tangible Goods" Service was introduced only w.e.f. 16.05.2008;
- The consideration was received by the appellant for generation of electricity and on the basis of the number of units of electricity produced by the DG Sets during the specified period of time;
- The appellant had voluntarily been collecting and paying the service tax on the activity of generation & distribution of electricity within the customer's premises under the category of "Business Auxiliary Service";



- Electricity is clearly recognized as 'goods' under the VAT law and electrical energy is included under Schedule-I to the Gujarat Value Added Tax Act, 2003 at Sr.No. 21. Therefore no VAT is levied on the sale or purchase of electrically energy. Hence, no service tax can be levied thereon. In this regard, the appellant relied upon the following judicial pronouncements:-
    - (a) CST, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur, reported in 2002 TIOI 226 SC CT;
    - (b) State of A.P. Vs. National Thermal Power Corpn. Ltd. and Ors etc., reported in 2002 TIOI 107 SC CT;
  - The activity of generation of electricity carried out by the appellant amounts to manufacture as defined in Section 2(f) of Central Excise Act, 1944. Accordingly, 'Electrical Energy' is classifiable under CETH 27160000 of CETA, 1985. Hence, Service Tax cannot be levied thereon. In this regard, the appellant relied upon the following judicial pronouncements:-
    - (a) Mahindra & Mahindra Ltd., reported in 2005 (190) ELT 301 (Tri.-LB);
    - (b) M/s. Neo Structo Construction Ltd. Vs. CCE, reported in 2010 (19) STR 361 Tri.;
    - (c) M/s. Orient Paper & Industries Ltd. Vs. Orissa State Electricity Board 1989 (42) ELT 552 (H.C.Orissa)
    - (d) M/s. CMS (India) Operations and Maintenance Co. P. Ltd. Vs. CCE, reported in 2007 (7) STR 369 Tri.;
  - The appellant had neither charged, nor collected any service tax during the F.Y. 2008-09 & 2009-10;
  - Getting itself registered subsequently was purely a voluntary act and in no case it alters the legal position of the taxability or otherwise of a particular service category.
  - The transmission & distribution of electricity is exempted vide Notification No.11/2010 dated 27.02.2010;
  - There was clearly no case of any fraud, collusion, wilful statement, suppression of facts or contravention of any provisions with an intent to evade payment of service tax. Accordingly, extended period cannot be invoked. The appellant relied upon some of the judicial pronouncements in the matter;
  - In view of the above, the interest and penalties upon the appellant were also not imposable.
6. Personal hearing was also held on 13.03.2018, wherein Shri Vishal Parakh, CA appeared on behalf of the appellant and reiterated the submissions made in the appeal memorandum.
7. The appeals were filed before the Commissioner (Appeals), Rajkot. The undersigned has been nominated as Commissioner (Appeals) / Appellate Authority as regards to the case of appellant vide Board's Circular No. 208/6/2017-Service Tax dated 17.10.2017 and Board's Order No. 05/2017-Service Tax dated 16.11.2017 issued by the Under Secretary (Service Tax), G.O.I, M.O.F, Department of Revenue, CBEC, Service Tax Wing.
8. I have carefully gone through the facts of case, the grounds mentioned in the appeal and the submissions made by the appellant. The question, to be decided in this appeal, is as to whether:-



- Renting of DG Sets is classifiable under the category of "Supply of Tangible Goods" Service;
- Repairing/overhauling of the DG Sets and Machineries of others under the category of "Management, Maintenance or Repairs" Service;
- Extended period can be invoked in this case;
- Interest & penalty can be imposed upon the appellant.

9. In this regard, I find that the appellant is installing DG Sets at the customer's premises for the production of electricity, and the consideration was received by the appellant on the basis of the number of units of electricity produced by the DG Sets during the specified period of time. The DG Sets installed in the premises of the customer shall be operated or shut down as per the requirements and direction of the customers. Thus, the effective control and possession of the DG Sets lies with the customers during the material period.

10. In this regard, the CBEC, vide Circular No. 334/1/2008-TRU dated 29.02.2008, clarified that:-

*"Transfer of the right to use any goods is leviable to sales tax / VAT as deemed sale of goods [Article 366(29A)(d) of the Constitution of India]. Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.*

*Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.*

*Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT / sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid."*

11. In view of the above, I find that since the appellant no longer had possession or any control over such DG sets/equipments, installed at the customer's premises for the production of electricity, it is not in the nature of supply of tangible goods.

12. I also find that in the present case, the appellant had entered into an agreement with M/s. GSL (India) Ltd. for the supply, installation and production of electricity in the premises of M/s. GSL (India) Ltd. on 06.11.2005 for a period of three years from the date of commencement of the trial production of power/electricity. Further, after the expiry of the said agreement, the appellant entered into an oral agreement with M/s. GSL (India) Ltd. for the continuance of the agreement. I also find that "Supply of Tangible Goods Service" was included in the taxable category of services w.e.f. 16.05.2008 and the taxable event is the act of transfer of right to use goods. Here, in this case, the appellant supplied DG Set to M/s. GSL (India) Ltd. prior to 16.05.2008 and since the taxable event occurred prior to 16.05.2008, no service tax would be levied on the payments under the category of "Supply of Tangible Goods Service", even if payments are made subsequently. In this regard, I rely on the CBEC Circular dated 09.07.2001 issued from F.No. BII/1/2000-TRU, wherein the Board has clarified that in case of lease or hire-purchase agreements entered into prior to the imposition of levy (prior to 16.07.2001) will not be liable to service tax, provided the property/goods has also been received by the lessee prior to 16.07.2001. The ratio of the above circular is applicable in full



force to the case of the appellant. In this regard, I also rely upon the following judicial pronouncements:-

- (i) Coromandal Finance Co.Ltd. Vs. Commr. of Commercial Taxes, A.P., Hyderabad, as reported in 2001 122 STC 0538 H.C.-A.P.;
- (ii) Mod Mundipharma Pvt. Ltd. Vs. CCE, Meerut, reported in 2009(15)STR713(Tri.Delhi);
- (iii) 20<sup>th</sup> Century Finance Corporation and Anr. Vs. State of Maharashtra, reported in 2000 6 SCC 12 S.C.;
- (iv) Petronet LNG Ltd Vs. CCE, reported in 2013 TIOL 1700 CESTAT Del.

13. As stated above, the appellant is installing DG Sets at the customer's premises for the production of electricity, and the consideration was received by the appellant on the basis of the number of units of electricity produced by the DG Sets during the specified period of time. Electricity is clearly recognized as 'goods' under the VAT law and electrical energy is included under Schedule-I to the Gujarat Value Added Tax Act, 2003 at Sr.No. 21. Therefore no VAT is levied on the sale or purchase of electrically energy. Hence, no service tax can be levied thereon. In this regard, I rely upon the following judicial pronouncements:-

- (a) CST, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur, reported in 2002 TIOL 226 SC CT;
- (b) State of A.P. Vs. National Thermal Power Corpn. Ltd. and Ors etc., reported in 2002 TIOL 107 SC CT;

14. I also find that the activity of generation of electricity carried out by the appellant amounts to manufacture as defined in Section 2(f) of Central Excise Act, 1944. Accordingly, 'Electrical Energy' is classifiable under CETH 27160000 of CETA, 1985. Hence, Service Tax cannot be levied thereon. In this regard, I rely upon the following judicial pronouncements:-

- (a) Mahindra & Mahindra Ltd., reported in 2005 (190) ELT 301 (Tri.-LB);
- (b) M/s. Neo Structo Construction Ltd. Vs. CCE, reported in 2010 (19) STR 361 Tri.;
- (c) M/s. Orient Paper & Industries Ltd. Vs. Orissa State Electricity Board 1989 (42) ELT 552 (H.C.Orissa)
- (d) M/s. CMS (India) Operations and Maintenance Co. P. Ltd. Vs. CCE, reported in 2007 (7) STR 369 Tri..

15. In any case, no service tax can be levied on the income earned under the invoice dated 01.05.2008 raised by the appellant on M/s. GSL (India) Ltd, since the taxable category of "Supply of Tangible Goods" Service was introduced only w.e.f. 16.05.2008.


16. On going through the Para 85 (Page 22) of impugned order, I find that the adjudicating authority has confirmed the demand of Service Tax of Rs.8,25,798/-, payable during the F.Y. 2008-09 to F.Y.2009-10 under the category of "Supply of Tangible Goods" Service, and Service Tax of Rs.48,092/-, payable during the F.Y. 2010-11 under the category of Maintenance & Repair Service. I also find that the appellant had already paid Service Tax of Rs.48,091/- on the gross amount of Rs. 5,15,000/- along with interest of Rs. 18,591/- leviable thereon, vide GAR-7 Challans dated 07.11.2012 i.e. during the course of investigations & before issuance of the SCN dated 18.10.2013. I also find that the amount of Service Tax was quantified on the basis of appellant's audited annual reports. It means that there was no intention of the appellant to evade payment of Service Tax leviable thereon. Further, the appellant has voluntarily paid the amount of Service Tax before issuance of SCN. Accordingly, the provisions of Section 73(3) of Finance Act, 1994 will attract wherein it is stated that no SCN was required to be issued when Service tax along with interest has been paid by the assessee before issuance of SCN. In this



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regard, I rely upon the the judgement of the Hon'ble Tribunal in the case of M/s. Rolex Logistics Pvt.Ltd. Vs. Commr. of S.Tax, Bangalore, as reported in 2009 (13) S.T.R. 147 (Tri. - Bang.), wherein it is held that "Show cause notice based on balance sheet and other documents maintained by assessee - Service tax regularly paid and returns filed - - Extended period for demand not invocable". I also find that I also rely upon the several judgements of higher appellate forum on this issue wherein it is held that penalty cannot be imposed in the case where the amount of Service Tax along with interest is paid before issuance of SCN.

17. In view of above, I set aside the impugned OIO and allowed the appeal.
18. The appeal filed by the appellant stand disposed of in above terms.

  
 (DR. BALBIR SINGH)  
 ADDITIONAL DIRECTOR GENERAL (DGTS),  
 AZU, AHMEDABAD

Date : .03.2018

F.No. V2/125/BVR/2017

BY RPAD.

To,

M/s. Shyam Power Tech,  
 "Shyam", Plot No. 2264-B, Hill Drive,  
 Bhavnagar

Copy to :

1. The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone.
2. The Commissioner, CGST & Central Excise, Bhavnagar.
3. The Commissioner (Appeals), CGST, Rajkot.
4. The Jurisdictional Deputy / Assistant Commissioner, CGST & Central Excise, Bhavnagar Commissionerate;
5. The Additional / Joint Commissioner , Systems, CGST, Rajkot;
6. Guard File.