::आयुक्त (अपील-III) का कार्यालय,केंद्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS-III), CENTRAL EXCISE,
द्वितीय तल, केन्द्रीय उत्पाद शुल्क, भवन / 2nd Floor, Central Excise, Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – - 360001
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
	V2/44 /GDM/2016 2859 to 2864	38/ST/AC/2015-16	22.04.2016

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

KCH-EXCUS-000-APP-005-2017-18

आदेश दिनांक / Date of Order: **29.05.2017** जारी करने की तारीख / Date of issue: **31.05.2017**

श्री उमा शंकर, आयुक्त (अपील-III) द्वारा पारित /
Passed by **Shri Uma Shankar**, Commissioner (Appeals-III)

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 एव पता / Name & Address of the **Appellant**/ Respondent :-

M/s. Indian Oil Corporation Ltd., Kandla Foreshore Terminal Near Booster Station,, OLD Kandla, Kutch - 370 210, .

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

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, ओ-20, न्यू मेन्टल हॉस्पिटल कम्पाउंड, मेघाणी नगर, अहमदाबाद-380016, को की जानी चाहिए ।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad: 380016, in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो 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 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 । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 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 शाँव ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो 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 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 । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-

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(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दायर की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दायर करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST-7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।/
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.
Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामले में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, 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-35 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 गये माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) मुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो कुछ क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे क्रेडिट जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (सं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा तत्पश्चात्‌वि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

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

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम है 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 विधा पूर्ण करने के प्रयोजन के लिए याचिकाकर्ता अपीलीय न्यायाधिकरण के 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-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 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, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते है । /
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

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:: ORDER IN APPEAL ::

M/s. Indian Oil Corporation Limited, Kandla Fore Shore Terminal, Near Booster Station, Old Kandla – Kutch – 370 210 (hereinafter referred to as 'the appellant') has filed the present appeal against the Order-in-Original No.38/ST/AC/2015-16 dated 22.04.2016 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Service Tax Division, Gandhidham (hereinafter referred to as 'the lower adjudicating authority').

2. The facts of the case are that, on the basis of investigation conducted by the DGCEI, New Delhi, it reveals that the appellant have availed services of goods transport agencies (GTA) for transportation of the petroleum products and are liable to pay service tax under Section 68 (2) of the Finance Act, 1994. It was noticed that the appellant have not included the toll charges while discharging their service tax liability during the period from Oct-2013 to March-2015 and hence short-paid the amount of service tax. Accordingly, SCN No. IV/15-43/ST/Adj/2015-16 dated 13.10.2015 was issued to the appellant proposing recovery of service tax of Rs.62,348/- alongwith interest and penal actions, which was decided by the lower adjudicating authority, who vide impugned order, confirmed service tax demand alongwith interest under Section 73 & Section 75 of the Act and also imposed penalties under Section 76 & Section 77 of the Act.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal on the following grounds:

(i) Mandatorily as per the Agreements with GTAs, routes approved by the appellant only have to be used by the transporters and the service charges also are fixed by the appellant on round trip basis and the route approved. For the transportation activity undertaken only the said service charges are paid, which is clear from the clause (a) to Point 6 in the agreement. The agreement also stipulates that while transporting petroleum products, Entry/Transit/Bridge/Toll taxes paid by the transporter would be reimbursed separately by the appellant on round trip basis at actual subject to production of original receipts evidencing such payment as is reflected in Point 6(c)(ii) of the agreement. In other words, the transportation charges are fixed by the appellant and if at all while plying on approved routes any toll charges are required to be paid, the same are reimbursed at actual based on the original receipts produced by the transporter. The said toll charges are paid for access to road and cannot form part of consideration for the transportation services provided by the transport contractors. This itself shows that such expenses on

account of toll charges do not have any nexus to the service of transportation of goods availed by the appellant. It is further submitted that whether the transporter carries the goods of the appellant or traverses through the route empty, the toll charges have to be paid, meaning thereby that, toll charges are to be paid for traversing through that route and not for transportation of goods of the appellant.

(ii) Without prejudice, for argument sake, if it is accepted that the value of toll taxes are to be included in the value of taxable service, then in a situation where the goods are transported by the same transporter in two different routes (one involving toll taxes and another route not involving toll taxes), involving the same distance, then value of service would vary between the two movements and lead to a peculiar situation of variable consideration for same service. Therefore, the toll charges cannot be attributed to transportation of goods but only towards the movement of the vehicle in a prescribed route. Further, the value of toll taxes is neither controlled by the appellant nor the transporter and the adjudicating authority at para 12.4 has himself concluded that toll charges are user charges. Therefore, the cost of transportation is only what is fixed by the appellant based on shortest routes on round trip basis on which service tax is paid by the appellant. Toll charges is paid for plying through designated routes and not for transportation of goods and is reimbursed at actual and in a case where, the transporters travel through route wherein no toll is to be paid, no such charges are reimbursed, hence, it cannot be said that toll charges form an intrinsic part of cost of transportation. In case, the transporter uses different route for delivery of the product and incur toll expense, the same will not be reimbursed to the said transporter due to deviation in the shortest route in line with the agreement. The payment of toll charges is ultimately made because of levy imposed by the State Government/Highway Authority and not by transporter on account of transportation of goods. Therefore, the observation of the adjudicating authority that the toll charges ultimately becomes part of the transportation cost and that is why reimbursement is asked, is not proper and not correct.

(iii) Further equating the payment of toll charges on which neither the transporter nor appellant has any control in same manner of diesel, depreciation, running cost, etc. is not proper and only show the intention of the adjudicating authority to confirm the demand without providing proper logical justification. Reliance is placed on the Tribunal judgment in the case of Inox Air Products Limited – 2014-TIOL-803-CESTAT-MUM and submitted that the toll charges incurred by the transporters is for access to the roads/path used by them for transportation of goods owned by the

appellant and is not a part of service of transportation provided by the transporters and hence the same reimbursed at actual by the appellant which need not be included in the taxable value for payment of service tax. The appellant provided the copy of the decision of Commissioner (Appeals), Nashik vide Order-In-Appeal No. RPS/161/NSK/2013 dated 29.05.2013 in their own case, pertaining to their Manmad Terminal and relied on the same. The appellant also relied on another case pertaining to their Ambala Canntt. Unit, wherein the Commissioner (Appeals) vide Order-In-Appeal No. 223-225/SVS/PKL/2013 dated 11.04.2013 has also held that toll charges reimbursed at actual to the transporter is not includible into the taxable value and has placed reliance on Circular No. 152/3/2012-ST dated 22.02.2012 for coming to the said conclusion and to the best of appellant's knowledge, the said Order-In-Appeal has attained finality as the said order has not been challenged till date by the department. The department cannot take a contrary stand and arrive at different conclusions for the same factual position in appellant's own different units; in support, reliance is placed on the Hon'ble Supreme Court judgment in the case of Novapan – 2007 (209) ELT 161 (SC).

(iv) Without considering the elaborate submission made by the appellant, which almost covers the observations made by the adjudicating authority and without offering his comments on the same, the adjudicating authority has passed the impugned order, which is legally not correct. It is a mandatory requirement that the authorities should offer findings to each of the defence submissions. In the instant case by not having offered the findings with regard to each of the pleas/defences made, the adjudicating authority has passed a non-speaking order and hence, the same is not sustainable in support of which reliance is placed on the following judgments:-

- D. Balkrishna & Co. – 2000 (122) ELT 631 (Tri.)
- Baldev Krishan – 1997 (95) ELT 121 (Tri.)
- Agarwal Metal Works (P) Ltd. – 1981 (8) ELT 602 (CBE&C)
- Ram Prakash – 1987 (31) ELT 930 (Tri.)
- Kesoram Cement – 1989 (40) ELT 413 (Tri.)

(v) Without giving any reasonable cause as to why the justification/explanation given by the appellant on the issue is not acceptable as well as without bringing any cross evidence, the adjudicating authority has just passed the impugned order on the findings that transporter being a service provider cannot act as pure agent being contrary to the said rule, is legally not tenable, being non speaking. The appellant submitted that, since the transporters pay toll charges as a pure agent on their

behalf, the said toll charges are not to be included into the taxable value for payment of service tax.

(vi) The Hon'ble High Court in the case of Inter Continental Consultants & Technocrats Pvt. Ltd. – [2013 (29) STR 9 (Delhi High Court)] have held that Rule 5(1) of Service Tax (Determination of Value) Rules, 2006 is ultra vires and levy of tax is only on consideration paid for taxable service and nothing more. It has been further held that *"the expenditure of costs incurred by the service provider in the course of providing the taxable service can never be considered as the gross amount charged by the service provider for such service provided by him."*. An appeal has been filed against this decision before the Hon'ble Supreme Court by the department which is pending for decision. The Hon'ble CESTAT Ahmedabad vide Order No. A/10854/2014-WZB dated 07.04.2014 – 2016 (42) STR 843 (Tri.-Ahmd had held that issue regarding of levy of service tax on reimbursable expenses other than for CHA service has already settled. The Tribunal followed decision in 2015 (38) STR 246 (Tri.-Ahd) and 2013 (29) STR 9 (Tri-Delhi) to hold that the said charges are not liable to be included in gross value of services provided and service tax is not leviable.

(vii) The transporters pay toll charges as a *"pure agent"* on their behalf as they fulfill all the conditions/stipulations contained under rule Rule 5(2) of Service Tax (Determination of Value) Rules, 2006, in as much as:

(a) that when the GTAs make payments of toll charges, GTAs are acting as a pure agent of the appellant;

(b) that the appellant receives and uses the said services of access to a road on payment of toll charges for delivery of their goods and services of such toll charges are procured by GTAs on behalf of the appellants;

(c) that the appellant is liable to make payment for service rendered, i.e. toll charges in connection with maintaining the roads, infrastructure development of the state, etc. to the State authority collecting toll charges;

(d) that the appellant authorizes GTAs to make payment of the said consideration for service, i.e. toll, on their behalf as per agreement, as, otherwise, the appellant ought to have paid the amount directly;

(e) that the appellant know that the amount reimbursed at actual to GTA are incurred as toll charges paid for plying through the designated routes to the State authorities for maintenance of roads;

(f) the amount paid by GTA as toll are separately billed for getting reimbursement of such toll charges from the appellant;

(g) that the GTAs collect only that much amount from the appellant, which has been paid by them to toll collecting authority i.e. reimbursed at actual on production of the original toll receips alongwith the bills;

(h) that the services procured by GTAs from toll collecting authorities, as a pure agent of the appellant, are over and above the services of transportation of goods.

(viii) For the sake of argument, the appellant also submitted that if the representative of the appellant would have accompanied each vehicle and paid the toll charges directly in this case, such payment would have been completely disassociated with the freight charges and no one would contemplate to include such toll charges in the taxable value of GTA service. The same has been emphasized by the Commissioner (Appeals), Nashik in his order dated 29.05.2013. In the present alleged situation, the nature of toll charges remains same but the only difference is that instead of direct payment by the appellant, toll charges are initially paid by the transporter and were subsequently reimbursed by the appellant. Thus, in this situation also, the payment of toll charges is ultimately made by appellant and not by the transporter on account of transportation of goods.

(ix) The transporters are covered under the definition given to "pure agent" in the Explanation 1 to Rule 5(2) of the said Rules based on the following submissions:-

(a) the appellant has entered into agreement with GTAs interalia to the effect that Entry/Transit/Bridge/Toll taxes paid by the transporter would be reimbursed by the appellant on round trip basis at actual subject to production of original receipts evidencing such payment.

(b) the transporters does not hold any title to the goods which they are transporting

(c) the transporter does not use the services so procured but used by the appellant for delivery of their product to their buyers

(d) the transporter receives the actual toll charges billed because the appellant reimburse the same at actual only on production of receipts showing payment of toll charges.

The appellant relied on the judgment in the case of Link Intime India Pvt. Ltd. –

2015 (38) STR 705 (Tri.-Mumbai)

(x) The adjudicating authority at para 12(4) has further recorded that even though toll is in state list, it is not a tax. The findings of the adjudicating authority is not correct in as much as toll charges is statutory in nature and cannot form part of the consideration for payment of service tax. In this connection, the appellant relied on the decision in the case of Pharmalinks Agency (I) Pvt. Ltd. – 2015 (37) STR 305 (Tri.-Mumbai).

(xi) It is alleged at Para 12(5) that the CBEC vide its Circular No. 152/3/2012-ST dated 22.02.2012 is not relevant in the case since this is a case of valuation of GTA service. At the cost of repetition, the appellant relied on the Hon'ble Delhi High Court's decision the case of Inter Continental Consultants & Technocrafts Pvt. Ltd. *(supra)* wherein it has been held that *Rule 5(1) of Service Tax (Determination of Value) Rules, 2006 is ultra vires and levy of service tax is only on consideration paid for taxable service and nothing more.* From the plain reading of the above circular, it is clear that service tax is not payable on toll charges paid by road users, for using the roads. Thus toll charges paid by the users of road are not covered under any of the taxable service which means that toll charges are *per se* not liable to service tax. The CBEC has clarified that Toll is a matter enumerated at Sr.No. 59 in List II (State List) in the seventh schedule of the Constitution of India and toll fee paid by the user is not covered by any of the taxable service. Thus, by considering the toll as a form of tax also, it cannot be included in the freight amount for the purpose of payment of service tax under Section 67 of the Act. The toll *per se* is not leviable to service tax as "services by way of access to a road or bridge on payment of toll charges" is covered under the negative list of services under Section 66D (h).

(xii) It has also been held in the following cases that toll charges is not includible in the taxable value for the purpose of payment of service tax.

- Swarna Tallway (Pvt.) Ltd. – 2011 (24) STR 738 (Tri.-Bang.) – Deptt. appeal dismissed by Andhra Pradesh High Court – 2013 (31) STR 419 (A.P.)
- Ideal Road Builders Pvt. Ltd. – 2013 (31) STR 350 (T)
- Intertoll India Consultants – 2011 (24) STR 611 (T)
- MM.K. Toll Road Pvt. Ltd. – 2013 (30) STR 190 (T)

(xiii) The original SCN dated 22.04.2014 for the period from Oct-2008 to Sept-2013 alleged that all the amounts paid to transporters by appellant shall be part of gross value of taxable services received and in order to compensate for components of

transit costs including toll charges, an abatement of 75% was allowed, based on Committee report presented in October-2004. In this connection, it is submitted that the Committee Report is an internal view and does not have any legal basis and cannot be the determinative factory for includibility of toll charges into the taxable value. Notification No. 32/2004 dated 03.12.2004, grants abatement, subject to condition that credit had not been availed and benefit of exemption Noti. 12/2003-ST had not been claimed. The exemption notification cannot enlarge the scope of the levy in terms of Section 67 of the Finance Act, 1994. Further reliance is placed on the judgment of the Apex Court in the case of Doypack System – 1988 (36) ELT 201 (SC). The impugned SCN, issued on the same grounds taken by the committee, is not sustainable and not as per law. Hence, the practice followed by the appellant to discharge service liability on GTA portion only, is not questionable and as per law.

(xiv) It is submitted that the expenses on account of toll charges are reimbursed at actual on production of original receipt and such expenses are not to be included into taxable value based on the following judgments:-

- E.V. Mathai & Co. – 2003 (157) ELT 101 (T)
- S & K Enterprises – 2008 (10) STR 171 (T) – Dismissed Dept.'s appeal by Supreme Court – 2009 (14) STR J20 (SC)
- Relinace Indus. Ltd. – 2008 (12) STR 345 (T) – Dept.'s appeal dismissed by Supreme Court – 2011 (23) STR J-226 (SC)
- Scott Wilson Kirkpatrick India - - 2012-TIOL-1253-CESTAT-MUM
- RMG Connect – 2012-TIOL-822-CESTAT-MUM
- LSE Securities Ltd. – 2012-TIOL-593-CESTAT-MUM
- Sri Sastha – 2007 (6) STR 185 (T)
- Bhagyanagar – 2006 (4) STR 22 (T)
- Nilahita – 2007 (6) STR 318 (T)
- Sanagmitra – 2007 (8) STR 233 (T)

(xv) Since the service tax paid on toll charges can be built up in the prices, the appellant would not have any inducement to suppress any information and undervalue and hence, demand is not sustainable, based on the following judgments:-

- Reliance Industries Ltd. – 2009 (244) ELT 254 (T)
- Jay Yushin Ltd. – 2000 (119) ELT 718 (Tri.-LB)

(xvi) Prior to the amendment of Section 67 of the Finance Act, 1994 the phrase

"consideration" has been defined as "consideration includes any amount that is payable for the taxable service provided or to be provided." Only w.e.f. 14.05.2015, by substituting the meaning assigned to "consideration" in the explanation to Section 67, any reimbursable expenditure has been treated as "consideration" for provision of service and since the toll charges are reimbursed at actual, during the period prior to 14.05.2015, by any stretch of imagination, it cannot form part of consideration.

(xvii) Without prejudice, in an event of upholding service tax liability, the assessable/transaction value has to be arrived at after excluding element of service tax, etc. based on Hon'ble Supreme Court judgment in the case of Maruti Udhyog Ltd. – 2002 (141) ELT 3 (SC), which has been reaffirmed by the Hon'ble Apex Court, by dismissing the Review petition filed by the revenue, as reported in 2005 (179) ELT A-102 (SC). Accordingly, CBEC has also issued Circular No. 803/36/2004-CX dated 27.12.2004 clarifying this aspect. Further Section 67(2) of the Finance Act, 1994, also makes this matter abundantly clear, without any ambiguity.

(xviii) The invocation of extended period was not correct, since appellant being the PSU, there cannot be any suppression of facts or malafide intention to evade payment of service tax etc. In the instant case, none of the exigencies are present. There are divergent views between the department on the same factual position in the appellant's own case at different locations and under the circumstances, alleging suppression with an intent to evade service tax on part of the appellant is not correct and hence extended period is not invocable based on the following judgments:-

- Jaiprakash Industries Ltd. – 2002 (146) ELT 481 (SC)
- Mentha & Allied Products – 2004 (167) ELT 393 (SC)
- Mahindra & Mahindra Ltd. – 2006 (201) ELT 27 (Tri.)

Since the credit of tax paid on transportation services is available to the appellant, the said demand leads to revenue neutral situation, and therefore there cannot be any intention to evade tax, hence demand for extended period is not sustainable. There was no conscious withholding of any information and hence, invocation of extended period is incorrect based on the following judgments.

- Pushpam Pharmaceuticals – 1995 (78) ELT 401 (SC)
- Cosmic Dye Chemical – 1995 (75) ELT 721 (SC)
- Tamil Nadu Housing Board – 1994 (74) ELT 9 (SC)
- Chemphar Drugs & Liniments – 1989 (40) ELT 276 (SC)

- Ugam Chand Bhandary – 2004 (62) RLT 240 (SC)
- Surat Textile – 2004 (62) RLT 351 (SC)

(xix) Since the demand itself is not sustainable, question of payment of interest under Section 75 of the Finance Act, 1994 also does not arise.

(xx) Penalty under Section 76 would arise only where there is a failure to pay service tax. In the instant case, based on the submissions made hereinabove, it is clear that the appellant have correctly paid the service tax on taxable value in the instant case, as toll charges are not to be includible.

(xxi) The penalty under Section 77, would be applicable, only in a case where, no penalty is separately provided in Chapter X of Finance Act, 1994 and there is contravention of provisions of the said Chapter and the rules made thereunder. In the instant case, there is no contravention of any of the provisions and hence, the proposal for imposition of penalty under Section 77(2) does not sustain.

(xxii) Since the toll charges have no nexus to transportation service provided by GTAs for transportation of goods they believed that the said charges reimbursed at actual by the appellant is not a consideration for such transportation service, hence, did not include the said charges into taxable value for payment of service tax. Under the provisions of Section 80 of the Finance Act, 1994, if there was reasonable cause for failure to pay service tax, penalty is not imposable. The appellant relied on following case laws.

- S.R. Enterprises – 2008 (9) STR 123 (Bom.) – upheld by Supreme Court – 2008 (12) STR J133 (SC)
- Hutchison Telecom – 2006 (1) STR 80 (T) – upheld by Bombay High Court – 2008 (9) STR 455 (Bom.)
- Flyingman Air Courier – 2006 (3) STR 283 (T)
- Ess Ess Enginerring – 2010-TIOL-1447-T
- Arvind Ltd. – 2010 (19) STR 752 (T)

(xxiii) The penalty on PSUs is not imposable as held in the following cases:-

- Markfed Refined Oil & Allied Ind. – 2008 (229) ELT 557 (Tri.) – Upheld by Punjab & Haryana High Court – 2009 (243) ELT A-91 (P&H)
- Hindustan Petroleum Corpn. Ltd. – 2001 (136) ELT 943 (T)

(xxiv) In absence of mens rea, imposition of penalty is unjustified as enshrined by the Hon'ble Supreme Court in the case of Hindustan Steel Ltd. – 1978 (2) ELT (J-159) and number of subsequent judgments from various judicial for a based thereupon.

4. Personal hearing in the matter was held on 15.03.2017. Shri Pankaj Mahindra, Asstt. Manager (Finance), Western Region, appeared on behalf of the appellant and reiterated the grounds of the appeal. He submitted the decision of Intercontinental Consultant and Technocrafts Pvt. Ltd. – 2013 (29) STR 9 (Del.) and Order-In-Appeal No. RPS/161/NSK/2013 dated 29.05.2013 passed by Commissioner (Appeals), Nashik.

5. I have carefully gone through the facts of the case, impugned order, appeal memorandum and submissions made by the appellant at the time of personal hearing. The limited issue to be decided in the present appeal is whether the amount of toll charges paid by the service provider while rendering services of GTA, is includible in taxable value of such services, or otherwise.

6. I observe that the appellant is the recipient of Goods Transport Agency Services provided by various transport operators for transportation of goods and have discharged the service tax liability under Section 68(2) of the Finance Act, 1994. However, the appellant has not paid the amount of service tax at the appropriate rate on toll fee paid by the service provider. I find that as per Section 67(1) of the Finance Act, 1994, where the provision of service is for a consideration, in money, the service tax is chargeable on gross amount charged by the service provider for such service provided by him. Further sub-section (3) of the Section 67 provides that the gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service. As per explanation (a) to Section 67, "consideration" includes any amount that is payable for the taxable services provided or to be provided.

7. The appellant contended that the agreement stipulates that, while transporting petroleum products, entry/transit/bridge/toll taxes paid by the transporter would be reimbursed by the appellant on round trip basis at actual subject to production of original receipts evidencing such payment and thereby toll charges do not have any nexus to the service of transportation of goods availed by the appellant. I do not find any force in the argument made by the appellant. I find that toll is a

charge payable to use a bridge or a road and such charges are being fixed depending upon the type of vehicle passes through it. Therefore, in the event of goods transport operators plying over the bridge or road pays toll charges while rendering the GTA service, such charges are intrinsic part of the amount of taxable service provided by him and have direct nexus to the provision of GTA service. In other words, it could be said that without payment of toll charges, the transport truck cannot ply over the road/bridge and without passes through the bridge/roads and the provision of service cannot take place. It is undisputed fact that the transporters have paid toll charges while plying over the roads/bridges and therefore such toll charges are considered to be paid in connection with the provision of GTA service to the appellant. Further, as per Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006, only expenditure incurred by the service provider as a 'pure agent' of the recipient of service shall be excluded from the value of the taxable services. In order to claim expenditure incurred by the service provider as reimbursable expenditure, certain legal parameters as ingrained in the sub-rule 2 of Rule 5 have to be followed, which is reproduced below for better understanding of the fact:

> *"(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely :-*
>
> *(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;*
> *(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;*
> *(iii) the recipient of service is liable to make payment to the third party;*
> *(iv) the recipient of service authorises the service provider to make payment on his behalf;*
> *(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;*
> *(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;*
> *(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and*
> *(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.*
>
> ***Explanation 1.*** *- For the purposes of sub-rule (2), "pure agent" means a person who -*
>
> *(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;*
> *(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;*
> *(c) does not use such goods or services so procured; and*
> *(d) receives only the actual amount incurred to procure such goods or services.".*

From the records, I find that the appellant has not fulfilled the condition No. (ii) and (iii) of Rule 5(2) of the Valuation Rules in as much as the appellant did not receive and use above service procured by the transporters from a third party and the appellant was not liable to make payment for such service to the third party but in fact the amount of toll charges have been paid by the service providers (GTAs). Therefore the transporter/service provider cannot be treated as pure agent of the appellant. Further the transporters/service providers have paid the toll charges towards plying over the roads/bridge in connection with the provision of service and have received the gross amount towards provision of service including the amount of toll charges paid and therefore they cannot be treated as 'pure agent' of the appellant in terms of sr.no. (c) and sr.no. (d) of the explanation 1 provided in the said rules. Therefore, the pleadings of the appellant fail on this count.

8. The appellant relied on the judgment of the Delhi High Court in the case of Inter Continental Consultants & Technocrats Pvt. Ltd. – [2013 (29) STR 9 (Delhi High Court)] and contended that Rule 5(1) of Service Tax (Determination of Value) Rules, 2006 is held to be ultra vires and levy of tax is only on consideration paid for taxable service and nothing more. In the present case, I find that Section 67 of the Finance Act provides that the appellant is liable to pay service tax on the gross amount charged in respect of the service provided. In the present case, the service is of GTA service. The case before the Hon'ble Delhi High Court was with reference to consulting engineer service and in that regard, the Hon'ble High Court held that the expenditure such as travel cost, hotel stay, transportation are not to be included in the gross amount for the purpose of taxable service. In the present case there are no such expenses. The appellants are paying the gross amount in respect of the GTA service provided by the goods transport agencies, hence in view of the provisions of Section 67 of the Finance Act, the appellants are liable to pay service tax on the gross amount paid towards receipt of such service in terms of Section 68(2) of the Finance Act, 1994.

9. The appellant has also contended that CBEC vide its Circular No. 152/3/2012-ST dated 22.02.2012 has clarified that service tax is not payable on toll fees paid by road user and that Toll is a matter enumerated at Sr.No. 59 in List II (State List) in the seventh schedule of the Constitution of India and toll fee paid by the user is not covered by any of the taxable service. I find that the said Circular categorically clarifies the leviability of service tax on toll charges collected by the toll collecting agencies under Public, Private Partnership model as the same is collection on own account and not on behalf of the person who has made the land available for construction of the road, which is not the case here, thus the said Circular has no

applicability to the present case. Further, the case-laws relied upon by the appellant wherein the facts of the case were that the collection of toll charges under the contracts comes within the purview of 'Business Auxiliary Services' and accordingly demands for service tax along with interest were made, whereas in the present case the appellant has not paid the amount of service tax on toll charges paid by the transporter (service provider) while rending GTA service and therefore the same cannot be made applicable to the present case.

10. On the issue of cum tax benefit under Section 67(2) of the Act, I find that the appellant admittedly have not paid service tax on the amount of toll charges in which case the Supreme Court judgment in the case of *Amrit Agros* [2007 (210) E.L.T. 183 (S.C.)] is directly applicable wherein it has been held that *"unless it is shown by the manufacturer that the price of goods includes Excise duty element, no question of excluding the duty from the price would arise in computing the assessable value of excisable goods"*. In fact, Section 67(2) of the Act allows cum-tax benefit only if the gross amount charged for the service is inclusive of service tax payable. In the light of the admitted fact that the price charged by the appellant did not include any service tax, the cum-tax benefit cannot be extended to them.

Accordingly, I uphold the demand of recovery of short-paid service tax in the category of GTA service, alongwith interest at applicable rate.

11. As regards plea of the appellant for not imposing penalty under Section 76/77 of the Finance Act, 1994 by invoking provisions of Section 80 of the Finance Act, 1994, I observe that Section 80 of the Finance Act, 1994 provides that notwithstanding anything contained in the provisions of Section 76, Section 77 or Section 78, no penalty shall be imposable on the assessee for any failure referred to in the aforesaid provision, if the assessee proves that there was reasonable cause for the said failure. In the present case, I find that the appellant was under the bonafide belief that toll charges reimbursed at actual by them is not a consideration for such transportation service, hence, did not include the said charges into taxable value for payment of service tax. Further, the appellant is a Public Sector Undertaking unit, there cannot be any malafide intention on their part to evade payment of service tax. Hence, I find that present case is fit for invocation of section 80 of the Finance Act, 1994 for waiver of penalty imposed upon the appellant vide impugned order against short-payment of service tax on GTA service. My view is bolstered by the following case laws wherein penalty is waived invoking section 80 of the Finance Act, 1994:

- Central Industrial Security Force [2013 (06) LCX 0178]
- Madhya Pradesh Financial Corporation [2011 (09) LCX 0345]

In view of above, I allow the appellant immunity from penalty under Section 76/77 of the Finance Act, 1994 by invoking provisions of Section 80 of the Finance Act, 1994. Accordingly, I uphold the impugned order to the extent of demand of non-payment of service tax in the category of GTA service by excluding the amount of toll charges from the gross amount of taxable service, however, the penalty imposed upon the appellant are set aside and the appeal is allowed to that extent only.

12. In view of above, while upholding the impugned order to the extent of recovery of amount of service tax alongwith interest, I set aside the impugned order in respect of penalties imposed under Section 76/77 of the Finance Act, 1994. The appeal filed by the appellant is partially allowed in above terms.

१३. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

13. The appeal filed by the appellant stands disposed off in above terms.

(उमा शंकर)
आयुक्त (अपील्स - III)

By Speed post

To,
M/s. Indian Oil Corporation Limited,
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Near Booster Station,
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1) The Chief Commissioner, Central Excise, Ahmedabad.
2) The Commissioner, Central Excise and Service Tax, Gandhidham.
3) The Assistant Commissioner, Service Tax Division, Gandhidham
4) The Superintendent, Service Tax Range-II, Gandhidham.
5) PA to Commissioner (Appeals-III), Central Excise, Ahmedabad.
6) Guard File.