



आयुक्त (अपील) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क:
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealsrajkot@gmail.com



सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No	मूल आदेश सं / O.I.O No	दिनांक / Date
	V2/54/GDM/2016	05/JC/2016	29.07.2016

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

KCH-EXCUS-000-APP-010-2017-18

आदेश का दिनांक / Date of Order:	27.07.2017	जारी करने की तारीख / Date of issue:	28.07.2017
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कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अग्रे आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / आसमनगर / गंधीधाम। 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 Appellant & Respondent :-
M/s. Shiv Logistics, Office No. 66, Shakti Shopping Centre Shakti Nagar Mundra District-Kutch-370421.

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 अपील न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जज के पास 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) विशेष न्यायालय में सम्बन्धित सभी मामलों में सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण की विशेष पीठ, ईस्ट 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 अपील के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (विस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहमाली भवन असावा अहमदाबाद को की जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asawa Ahmedabad in case of appeals other than as mentioned in para- 1(a) above

(iii) अपील न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 6 के अंतर्गत निर्धारित किफाई राशि एच-3 की धारा 3(1) में दूनी किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की राशि ज्यादा की राशि और ज्यादा राशि जमा, राशि 5 लाख या उससे कम, 5 लाख राशि या 50 लाख राशि तक अथवा 50 लाख राशि से अधिक है तो क्रमशः 1,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सर्वजिनस बैंक के बैंक द्वाारा जारी रेखांकित बैंक ड्रफ्ट द्वारा किया जाना चाहिए। संबंधित ड्रफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। स्वयंसेवक (स्टै ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- राशि 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) अपील न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित प्रथम S.T.-5 में धार प्रतियों में की जा सकती एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रामाणिक होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की राशि ज्यादा की राशि और ज्यादा राशि जमा, राशि 5 लाख या उससे कम, 5 लाख राशि या 50 लाख राशि तक अथवा 50 लाख राशि से अधिक है तो क्रमशः 1,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सर्वजिनस बैंक के बैंक द्वाारा जारी रेखांकित बैंक ड्रफ्ट द्वारा किया जाना चाहिए। संबंधित ड्रफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। स्वयंसेवक (स्टै ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- राशि 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 fee 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/-.

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 fee 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) विना अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दायी की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म S.T.-7 में की जा सकती एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न की (जिनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उप-आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दायी 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 S.T.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की विनियमित अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करने समय उत्पाद शुल्कसेवा 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 टन 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) सेल्वेट जमा की गयी गलत राशि
 - (iii) सेल्वेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के अंतर्गत विनियम (सं. 2) अधिनियम 2014 के अंतर्गत 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 :

- (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 प्राधिकार निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम पराग के अंतर्गत अन्तःस्थित, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, सराव जल, नई दिल्ली-110001, को किया जाता 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 मांग के किसी नुकसान के मामले में, जहां नुकसान किसी मांग को किसी कारखाने से भंडार गृह के परामर्श के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह चारोंपट्टन के दौरान, या किसी भंडार गृह में या भंडारण में मांग के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में मांग के नुकसान के संबंध 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 मांग के विनिर्माण में प्रयुक्त कच्चे मांग 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 an 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 मांग 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 ब्यूटी कैशिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत संपन्न की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा विनियमित अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा निर्यात की गई लॉजिक अथवा अग्रव्यक्ति 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 फॉर्म संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनियमित है, इस आदेश के लक्षण 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 अटॉपगी के साथ 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 अटॉपगी 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 चाहिए। इस लक्ष्य के होते हुए भी की निम्न चर्ची कच्चे से बनने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केटीस 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 Appellate 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) सहायक विनियमित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं संलग्न 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-1 in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को अभिगमित करने वाले विधियों 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.

(G) उच्च अपीलीय प्राधिकारी को अपील दायी करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलकर्ता विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

ORDER-IN-APPEAL

M/s. SHIV LOGISTICS, Office No. 66, Shakti Shopping Centre, Shakti Nagar, Mundra, District- Kutch-370421 (hereinafter referred to as 'the appellant') have filed the present appeal against the Order-in-Original No. 05/JC/2016 dated 29.07.2016 (hereinafter referred to as the 'impugned order') passed by the Joint Commissioner, Central Excise & Service Tax, Gandhidham (hereinafter referred to as 'the lower adjudicating authority').

2. The facts of the case in brief are that the appellant had rendered Cargo Handling service falling under Section 65 (105) (zr) of the Finance Act, 1994 (hereafter referred to as the "Act") and holding Service Tax Registration No. AHAPC6703HSD001. Earlier a case had been booked against the appellant for short / non payment of service tax amounting to Rs. 36,40,348/- for the period from January 2012 to September 2012 which resulted into issuance of Show Cause Notice bearing No. V.ST/AR - STII & R/ADC/221/2013 dated 08.10.2013, wherein the lower adjudicating authority had vide OIO No. 15/ADC/2015 dated 23.02.2015 confirmed the demand of service tax of Rs. 36,40,348/- under Section 73(1) of the Act, ordered recovery of interest under Section 75 of the Act and appropriation of Rs. 36,40,348/- and Rs. 4,51,777/- already paid against duty confirmed and interest liability. He also imposed penalties under Section 70, 77 and 78 of the Act, while dropping proposal for penalty under Section 76 of the Act because of penalty under Section 78 of the Act.

2.1 An inquiry was initiated by the department and statements of Shri Mohd. Asif Kutchi, Accountant and Authorized Person of the appellant was recorded on 26.08.2013 and further statements of Shri Batuksinh Sodha, Manager and Authorized Person of the appellant were recorded on 28.10.2013 & again on 31.12.2013 wherein they inter alia stated that the appellant was providing handling cargo service i. e. loading and unloading of cargo; that earlier a case had been booked against the appellant for non payment of service tax though they collected the same for the period from January 2012 to September 2012 however, the appellant had paid the same; that the appellant again collected service tax for the period from October 2012 to June 2013 but did not pay to the Government exchequer. As per provisions of Section 68 of the Act read with Rule 6 of the Rules, the appellant (being a proprietary concern) was required to pay service tax by the 5th day of the month following the quarter in which the services were rendered whereas the appellant had collected service tax but had not deposited to the Government exchequer. The appellant deposited Rs. 11,84,154/- towards vide challan dated 04.09.2013 and dated 07.09.2013 and interest Rs. 13,500/- vide challan dated 04.09.2013 only after department initiated inquiry. The present

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appeal against the impugned order is in respect of Show Cause Notice bearing No. V.ST/AR-GDM/ADC(PV)/92/2014-15 dated 13.08.2014, covering the period from October-12 to June-13, wherein the lower adjudicating authority has confirmed the demand of service tax amounting to Rs. 11,84,154/- under Section 73 of the Finance Act, 1994 (hereinafter referred to as the "Act"); ordered recovery of interest under Section 75 of the Act and imposed penalties under Section 78 of the Act and Section 77 of the Act.

3. Being aggrieved by the impugned order, the appellant has preferred the present appeal on the grounds as:

3.1 They paid Service Tax amounting to Rs.11,84,154/- along with interest via Challans dated 04.09.2013 and dated 07.09.2013 before issuance of SCN on 13.08.2014. Hence, no SCN should have been issued as per provisions of Section 73(3) of the Act and no penalty should have been imposed on them. They relied on the following judgments:-

- (i) Kandla Earth Movers- 2013 (30) STR 622 (Tri. -Ahmd)
- (ii) Manipal County- 2014 (36) STR J188 (Kar)
- (iii) ABE Value Point System Pvt. Ltd -2014 (34) STR J145 (Kar)
- (iv) Dinesh Chandra Agarwal -2013 (31) STR 5 (Guj)
- (v) Lawn Textile Mills Pvt Ltd- 2013 (297) ELT 561 (Tri. - Chennai)
- (vi) P Govindraj -2014 (36) STR 400 (Tri.- Ahmd.)
- (vii) Jay Shipping-2010 (20) STR 774 (Tri.- Ahmd.)
- (viii) CMA CGM Global (India) Pvt. Ltd. - 2016 (41) STR 292 (Tri. - Mum)
- (ix) Sinhagad Technical Education Society - 2016 (41) STR 283 (Tri. - Mum)
- (x) Bombay Intelligence Security (India) Ltd - 2015 (40) STR 158 (Tri. - Mum)

4. Personal Hearing in the matter was held on 28.06.2016 wherein Shri R. Subramanya, Advocate, appeared on behalf of the appellant and reiterated the grounds of appeal.

Findings:

5. I have carefully gone through the impugned order, appeal memorandum, records of personal hearing and the documents submitted by the appellant. The limited issue to be decided in the present appeal is as to whether the appellant is liable to imposition of penalty under Section 77 and 78 of the Act or otherwise.

6. I find that the impugned show cause notice was confirmed by the lower adjudicating authority on the ground of non-payment of service tax though collected the same by the appellant with suppression of the facts with intent to evade payment of service tax.

7. I also find that the appellant has not disputed payment of service tax but has only disputed the imposition of penalties under Section 77 and 78 of the Act on the

ground that the appellant had paid Service Tax along with interest before issuance of show cause notice and, therefore, no penalty could be imposed upon them as per various case laws already decided and contended that once the service tax along with interest is paid and also duly intimated to the authorities, sub-section 3 of Section 73 comes into operation.

8. For clarity, sub-section (3) and sub-section (4) of Section 73 of the Finance Act, 1994 are re-produced hereunder:-

(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid :

Provided that the [Central Excise Officer] may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the [Central Excise Officer] shall proceed to recover such amount in the manner specified in this section, and the period of [thirty months] referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation.[1] — For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [Central Excise Officer], but for this sub-section.

[Explanation 2. — For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service tax under this sub-section and interest thereon.]

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —

- (a) fraud; or*
- (b) collusion; or*
- (c) wilful mis-statement; or*
- (d) suppression of facts; or*
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.*

8.1 Thus, sub-section (3) of Section 73 of the said Act provides that the Central Excise officer shall not serve any notice under Section 73(1) of the said Act, when any service tax not levied or paid or has been short-levied or short-paid or erroneously refunded, is paid along with interest, prior to issuance of notice. However, sub-section (4) of Section 73 specifically provides that nothing contained in sub-section (3) of Section 73 shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud; collusion; wilful mis-statement; suppression of facts; or contravention of any of the

provisions of this Chapter or of the rules made there under with intent to evade payment of service tax.

8.2 The records evidently make it clear that the appellant was liable to deposit service tax for the quarter of (1) October 2012 to December 2012 by 05.01.2013; (2) January 2013 to March 2013 by 31.03.2013 and (3) April 2013 to June 2013 by 05.07.2013. However, the appellant paid service tax on 04.09.2013; 04.09.2013 and 07.09.2013 respectively. Taking into consideration the rate of interest, I find that an amount of Rs. 13,500/- appropriated against interest liability is not sufficient to discharge their interest liability in full. The lower adjudicating authority has also ordered that "remaining amount of interest, if any, should also be recovered". Thus, the appellant's plea that they have paid service tax along with interest it not correct.

9. I find that this case was detected by the department after it made inquiry that the appellant collected service tax from their customers but intentionally not deposited the same into Government account. The records indicate that the appellant failed to file correct returns for the relevant period on due dates and thereby acted deliberately in defiance of the law with intent to evade payment of service tax collected. These facts were narrated in the show cause notice and the impugned order confirmed demand under proviso to Section 73(1) of the said Act. I, therefore, hold that the present case does not come under purview of Section 73(3) of the Finance Act, 1994 and the argument of the appellant is not tenable at all in this regard.

10. I also find that Section 78 of the Act was amended with effect from 14.05.2015 and it was provided that where a notice has been served under sub-section (1) of Section 73 or under the proviso thereto, but no order has been passed under sub-section (2) of Section 73, before the date on which the Finance Bill, 2015 receives the assent of the President, then the provisions of amended Section 76 or Section 78, as the case may be applicable. In the instant case, since the impugned order has been issued on 30.11.2015, penal provisions will be governed under amended Section 78 of the Act, as amended w. e. f. 14.05.2015. Amended Section 78 is reproduced below for ready reference:-

SECTION [78. Penalty for failure to pay service tax for reasons of fraud, etc. —
(1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made there under with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax :

Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the



date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined :

Provided further that where service tax and interest is paid within a period of thirty days of

- (i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;
- (ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined ;

Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period ;

Explanation. — For the purposes of this sub-section, "specified records" means records including computerised data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of accounts shall be considered as the specified records.

(Emphasis supplied)

10.1 It is correct that the appellant has paid Service Tax before issuance of impugned show cause notice but they failed to pay interest amount in full and also failed to pay any amount towards penalty. They failed to pay penalty @15% of service tax within a period of thirty days of the date of service of notice and also failed to pay penalty @25% of service tax within a period of thirty days of the date of receipt of the order even though reduced penalty is available only when reduced penalty is also paid within such period. Therefore, the case laws, provisions and other reliance made by the appellant are not applicable in the present case.

10.2 It is also on record that the appellant has not paid service tax on their own even though collected from their customers. They paid Service Tax before issuance of impugned show cause notice but they did so after department detected their non-payment on detailed inquiry in this regard. It is evident that the facts of collection of Service Tax and non-payment thereof were suppressed by the appellant with intent to evade payment of service tax. The lower adjudicating authority confirmed the demand along with interest and imposed penalty under Section 78 of the Act in view of the above facts. The case laws relied upon by the appellant are not applicable to the order passed after 14.05.2015 i. e. amended Section 78 of the Act. The appellant paid service tax only after the department established collection of service tax by them from customers but not paid to the Government exchequer. The show cause notice has been issued proposing imposition of penalty under Section 78 of the Act because appellant

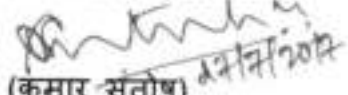
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failed to pay penalty @15% of service tax before issuance of SCN. The appellant also did not pay penalty @15% of service tax within 30 days from date of receipt of SCN and also did not pay @25% of service tax within a period of thirty days of the date of receipt of the order proposing imposition of penalty under Section 78 of the Act. Therefore, I am of view that imposition of penalty equal to service tax determined under Section 78 of the Act by the lower adjudication authority is legal and proper. However, the lower adjudicating authority was required to give option to the appellant in his Order – in - Original discussing clause (ii) of second proviso to Section 78 of the Act, that if the appellant pay interest and reduced penalty within 30 days from the receipt of the adjudication order then penalty would get reduced to 25% of service tax so determined. Having not been done so by the lower adjudicating authority, payment of full interest liability as well as reduced penalty of 25% of service tax can be availed by the appellant within 30 days of receipt of this order, as per ratio of the judgement of the Hon'ble Supreme Court in the case of R. A. Shaikh Paper Mills P. Ltd. reported at 2016 (335) E.L.T. 203 (S.C.) read with CBEC Circular F. No. 208/07/2008 – CX – 6 dated 22.05.2008.

11. As discussed in Para 9, the appellant has failed to file correct returns for the relevant period on due dates and therefore imposition of penalty of Rs. 10,000/- under Section 77 of the Act by the lower adjudicating authority is justified.

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

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


(कुमार संतोष) 22/05/2016
आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s. SHIV LOGISTICS, Office No. 66, Shakti Shopping Centre, Shakti Nagar, Mundra, District- Kutch-370421.	मै. शिव लॉजिस्टिक्स, ऑफिस नं. ६६, शक्ति शॉपिंग सेंटर, शक्ति नगर, मुंद्रा, डिस्ट्रिक्ट - कच्छ. पिन - 370421
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Copy to:

1. The Chief Commissioner, GST & Central Excise, Ahmedabad.
2. The Commissioner, GST & Central Excise, Gandhidham.
3. The Assistant Commissioner, GST & Central Excise Division, Gandhidham.
4. Guard File.

failed to pay penalty @15% of service tax before issuance of SCN. The appellant also did not pay penalty @15% of service tax within 30 days from date of receipt of SCN and also did not pay @25% of service tax within a period of thirty days of the date of receipt of the order proposing imposition of penalty under Section 78 of the Act. Therefore, I am of view that imposition of penalty equal to service tax determined under Section 78 of the Act by the lower adjudication authority is legal and proper. However, the lower adjudicating authority was required to give option to the appellant in his Order – in - Original discussing clause (ii) of second proviso to Section 78 of the Act, that if the appellant pay interest and reduced penalty within 30 days from the receipt of the adjudication order then penalty would get reduced to 25% of service tax so determined. Having not been done so by the lower adjudicating authority, payment of full interest liability as well as reduced penalty of 25% of service tax can be availed by the appellant within 30 days of receipt of this order, as per ratio of the judgement of the Hon'ble Supreme Court in the case of R. A. Shaikh Paper Mills P. Ltd. reported at 2016 (335) E.L.T. 203 (S.C.) read with CBEC Circular F. No. 208/07/2008 – CX – 6 dated 22.05.2008.

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

सत्यापित,

(कुमार संतोष)

आयुक्त (अपील्स)

By R.P.A.D.

आर. एन. मीणा,

To,

अधीक्षक (अपील)

M/s. SHIV LOGISTICS,
Office No. 66, Shakti Shopping Centre,
Shakti Nagar, Mundra,
District- Kutch-370421.

श्री. शिव लॉजिस्टिक्स,
ऑफिस नं. ६६, शक्ति शॉपिंग सेंटर,
शक्ति नगर, मुंद्रा, डिस्ट्रिक्ट - कच्छ.
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