



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



द्वितीय तल, जी एस टी भवन / 2<sup>nd</sup> Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142

Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/37/GDM/2017	मूल आदेश सं / O.I.O. No. 24/ST/AC/2016-17	दिनांक / Date 31.01.2017
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ख अपील आदेश संख्या (Order-In-Appeal No.):

**KCH-EXCUS-000-APP-186-2017-18**

आदेश का दिनांक / Date of Order:	<b>21.02.2018</b>	जारी करने की तारीख / Date of issue:	<b>22.02.2018</b>
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Passed by **Shri Lalit Prasad, Commissioner, Central Goods and Service Tax & Central Excise, Rajkot**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढे बोर्डे ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री ललित प्रसाद, आयुक्त, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क, राजकोट को विलत अधिनियम १९९४ की धारा ८५, केन्द्रीय उत्पाद शुल्क अधिनियम १९४४ 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, Shri Lalit Prasad, Commissioner, Central Goods and Service Tax & Central Excise, Rajkot 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 उपरोक्त 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 Patel Construction Co., Nelkanth Street, B.B.Z. South 60,,Zanda Chowk,,Gandhidham,**

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 विलत 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 उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए।/  
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ 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) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का 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/- 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 मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का 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/- 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 fee of Rs. 1000/- 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 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 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 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

- धारा 11 डी के अंतर्गत रकम
- सेनवैट जमा की ली गई गलत राशि
- 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 विधायक स्थागन अर्जों 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, केन्द्रीय 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 केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है।  
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
- (iii) यदि उत्पाद शुल्क का भगतान 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 भगतान के लिए जो ड्यूटी 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 तरीख अथवा संमायाविधि पर या बाद में पारित किए गए हैं।  
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /  
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।  
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भगतान 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 भगतान, उपरोक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पेटी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /  
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /  
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.



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

Being aggrieved with Order-in-Original No. 24/ST/AC/2016-17 dated 31.01.2017 (**hereinafter referred to as "impugned order"**), **M/s. Patel Construction Company**, Neelkanth Street, BBZ South 60, Zanda Chowk, Gandhidham 370 201 (**hereinafter referred to as "appellants"**) have filed the present appeal.

**2.1** The appellants are registered as providers of the taxable services in the nature of "Construction of Commercial or Industrial Building", "Packing Services", "Renting of Immovable Property Services" and "Supply of Tangible Goods" under the Finance Act, 1994 and the rules made thereunder. During the audit of financial records of the appellants, it was noticed that they have provided the services of "Cleaning Activity & Garbage cleaning work at Kandla Port" valued @ Rs. 58,70,231/- & Rs. 15,18,183/- during the Financial Years 2010-11 & 2011-12 respectively, however they had not paid required Service Tax thereon by wrongly availing the exemption under Notification No. 25/2007 dated 22.05.2007 by the said services under the category of "Commercial or Industrial Construction Services".

**2.2** Therefore, Show Cause Notice dated 13.10.2015 was issued to the appellant on the grounds that as per explanation given under Notification No. 25/2007 dated 22.05.2007, Commercial or Industrial Construction services provided in relation to the execution of work contract in relation to construction of port or other port shall not include the service of completion and finishing, repairing, alteration, renovation, restoration, maintenance or repair provided in relation to existing port and or other port. Further, Board vide Circular No: B1/16-TRU dated 22.05.2007 has clarified that such services provided to in relation to existing port or other port or shall be outside the scope of exemption under the said notification. Thus, the short paid Service Tax of Rs. 6,04,634/- for the Financial Year 2010 - 2011 & Rs. 1,56,373/- for the Financial Year 2011-12, totaling to Rs. 7,61,007/- was demanded by invoking proviso to Section 73(1) of the Finance Act, 1994 along with interest. It was further proposed to impose penalty under Section 76, 77 & 78 *ibid.*




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**3.** The said Show Cause Notice was adjudicated by the Lower Adjudicating Authority vide his impugned order wherein he held that services provided by the appellants were not classifiable as the category of "commercial or industrial construction services" eligible for exemption under Notification No. 25/2007-Service Tax dated 22.05.2007. Therefore, the demand of Service Tax of Rs. 7,61,007/- was confirmed under proviso to Section 73(1) of the Finance Act, 1994, along with interest. Further, penalty equivalent to Service Tax confirmed was imposed under Section 78 *ibid* and penalty of Rs. 10,000/- was imposed under Section 77 *ibid*.

**4.1** Being aggrieved with the impugned order, the appellant have preferred the present appeal on the grounds that services of cleaning of port undertaken by them is not covered under the definition of "cleaning services" given under Section 65(24b) of the Finance Act, 1994; that they have merely removed the waste lying inside the Kandla port and transported the same to the dumpyards located 3 - 5 kilometers away from the port; that the activity was confined to roads inside the port that are used by the lorries for transportation of bulk agri-produce and agri-product which are brought from outside the port to jetty for loading on board the vessels calling at the port; that there is constant spillage of these commodities from the lorries on the roads which has to be removed on a regular basis for preventing the roads from becoming slippery; that the removal of aforesaid spillage from the roads inside Kandla Port and its transportation to dumpyards located outside the port cannot be held as liable to Service Tax under the category of "cleaning activity" specified in Section 65(24b) of the Finance Act, 1994.

**4.2** The appellants further argued that it is neither alleged nor held that they have provided any specialized cleaning services such as disinfecting, exterminating or sterilizing of objects or premises and hence removal of waste is liable to Service Tax under the category of "cleaning services"; that most of the waste removed by them comprised to agri-produce and agri-products exported from Kandla Port and hence they are in relation to agriculture which is specifically excluded from the taxable services.



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**4.3** The appellants stated that the demand is time barred as they have already shown that these exempted services were provided in their statutory returns and placed reliance on the case law of **Chemphar Drugs & Liniments - 1989 (40) ELT 276 (SC)**, **Tamil Nadu Housing Board - 1994 (74) ELT 9 (SC)**, **Cosmic Dye Chemicals - 1995 (75) ELT 721 (SC)**, **Pushpam Pharmaceuticals Company - 1995 (78) ELT 401 (SC)**, **Anand Nishikawa Co. Ltd - 2005 (188) ELT 149 (SC)** & **Pahwa Chemicals Private Limited - 2005 (189) ELT 257 (SC)**; that since they have not charged/not collected the Service Tax therefore Lower Adjudicating Authority has erred in computing the tax liability after applying cum tax principle and placed reliance on the case law of **Advantage Media Consultant - 2008 (10) STR 449 (Tri. Kolkata)** maintained as reported at **2009 (14) STR J49 (SC)**.

**5.** The Central Board of Excise and Customs vide Notification No: 26/2017-Cx(NT) dated 17.10.2017 read with Order No: 05/2017-Service Tax dated 16.11.2017, has appointed undersigned as appellate authority under Section 35 of Central Excise Act, 1944 for the purpose of passing orders in this appeal.

**6.** Accordingly, personal hearing in the matter was held on 07.02.2018 which was attended by Shri Chetan Dethariya, Chartered Accountant wherein he reiterated the submissions filed.

**7.** Shri Chetan Dethariya, Chartered Accountant, vide his letter dated 07.02.2018 filed another submissions wherein apart from repeating earlier submission stated that their business transactions were within the knowledge of the department and the same issue is pending for the earlier period before Tribunal and placed on records the copy of Order-in-Original and Service Tax return.

**Discussion and findings:**

**8.** I have carefully gone through the entire case records and the submissions made by the appellant orally as well as in writing. I find that as the appellant has deposited an amount of Rs. 76,200/- vide Challan dated 22.03.2017, which is in excess of mandatory 7.5% of the duty, thus I find that there is compliance to requirement of Section 35F(i) of



Central Excise Act, 1944. Therefore, I proceed to decide the appeal on merits.

**9.1** I find that only issue to be decided in this case is whether the cleaning services provided by the appellants in the Kandla Port are eligible for exemption, as claimed by the appellants or otherwise?. I find that the nature of work done by the appellant is not disputed i.e. the appellants have provided the cleaning activity and Garbage cleaning work at Kandla Port. However, the appellant have sought the exemption of Service Tax thereon on the grounds that the said services are classifiable under "Commercial & Industrial Construction Services" and as they have been provided to port therefore they are exempted from Service Tax under Notification No. 25/2007-Service Tax dated 22.05.2007 w.e.f. from 01.06.2007 to 30.06.2012, which reads as under:

*"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts commercial or industrial construction service, referred to in sub-clause (zzq) of clause (105) of section 65 of the Finance Act, and services provided in relation to the execution of works contract, referred to in sub-clause (zzzza) of clause (105) of section 65 of the Finance Act, provided to any person by any other person in relation to construction of port or other port, from the whole of the service tax leviable thereon under section 66 of the Finance Act.*

*Explanation - For the purposes of this notification, it is hereby declared that, -*

- (i) *commercial or industrial construction service or services provided in relation to the execution of works contract in relation to construction of port or other port shall not include services of completion and finishing, repair, alteration, renovation, restoration, maintenance or repair provided in relation to existing port or other port; and*
- (ii) *"port" and "other port" have the meanings respectively assigned to them in clauses (81) and (76) of section 65 of the Finance Act.*

*2. This notification shall come into force on the 1st day of June, 2007.\**

**9.2** I further find that Notification No. 25/2007-Service Tax dated 22.05.2007, was rescinded vide Notification No. 34/2012-Service Tax dated 20.06.2012 and Notification No. 25/2012-Service Tax dated 20.06.2012 has been issued w.e.f. 01.07.2012 and its relevant excerpts are as under:

*\*Exemptions from Service tax — Mega Notifications — Notification No. 12/2012-S.T. superseded*

*In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210(E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services*





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from the whole of the service tax leviable thereon under section 66B of the said Act, namely :-

01. ....
02. ....
03. ....
04. ....
05. ....
06. ....
07. ....
08. ....
09. ....
10. ....
11. ....
12. ....
13. ....
14. *Services by way of construction, erection, commissioning, or installation of original works pertaining to,-*
  - (a) *an airport, port or railways, including monorail or metro;*
  - (b) *a single residential unit .....*
  - (c) *low-cost houses ...*
  - (d) *post-harvest storage infrastructure....*
  - (e) *mechanised food grain handling system....\**

Thus, upon reading of both the notifications, I find that they exempt the services provided in relation to construction service provided in course of construction of port. However, I find that cleaning services cannot be equated with commercial or industrial construction service by any stretch of imagination.

**9.3** Now, another point which comes up for consideration is that since the services provided are not in the nature of Commercial or Industrial Construction service then what is correct classification of the service for which Service Tax is being demanded?. I find that Show Cause Notice does not provide the alternative classification of the services till 30.06.2012. However, on or after 01.07.2012 due to insertion of Section 66D in the Finance Act, 1994 there was no need for classification of service as all the services are taxable except the services covered under negative list or/and the services which are specifically exempted, which is not the case in present matter.

**10.1** Apart from merits, I find that service of the same nature, provided by the Noticee during the Financial Year 2005-06 to 2009-10, was point of dispute in Show Cause Notice V.ST/AR-GND/Commr/73/2011 dated 15.04.2011 and Commissioner, Central Excise, Rajkot vide his Order-in-Original No: 56/Commr/2012 dated 03.10.2012 has confirmed the demand of Service Tax by classifying the said service under **"Cleaning Activity Services"**.



**10.2** I find that the Show Cause Notice on hand demands Service Tax, by denying the benefit of exemption notification, for the Financial Year 2010-11 and 2011-12 by invoking the suppression clause. I find that no extended period can be invoked in this case since the facts of service being provided was in knowledge of the department since Show Cause Notice for the earlier period upto 2009-2010 was already issued to the appellant. Therefore, the facts were in the knowledge of the department. Therefore, no demand of Service Tax for the Financial Year 2010-11 and 2011-12 by invoking the suppression clause can be made in this Show Cause Notice dated 13.10.2015. I find that my views are well supported by the judgment of Hon'ble Supreme Court in the case of **Nizam Sugar Factory V/s. Collector of Central Excise, A. P.** reported at **2006 (197) ELT 465 (SC)** wherein it has been clearly held that when all relevant facts were in the knowledge of the department at the time of issuance of first Show Cause Notice, while issuing subsequent Show Cause Notices, same / similar facts cannot be taken as suppression of facts. Hence, I find that demand fails on the limitation issue.

**11.** Accordingly, I allow the appeal filed by the appellant on the limitation and set aside the impugned order in toto.

F. N. V.2/37/GDM/2017

Place: Rajkot.

Dated: 21.02.2018



**(LALIT PRASAD)**

COMMISSIONER, CGST & CEX, RAJKOT/  
COMMISSIONER (APPEALS-III),  
CGST & CEX, RAJKOT

**By Speed Post**

To,

**M/s. Patel Construction Company,**

Neelkhant Street, BBZ South 60,

Zanda Chowk,

**Gandhidham 370 201**

Copy to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner, GST & Central Excise, Kutch.
- 3) The Commissioner, GST & Central Excise, Rajkot.
- 4) The Assistant Commissioner, GST & Central Excise, Division: Gandhidham Urban.
- 5) Guard File.