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



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

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रजिस्टर्ड ट्राक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/71/GDM/2016	मूल आदेश सं / O.I.O. No. 15/JC/2016	दिनांक / Date 09.09.2016
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7412 to 3415
385

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

KCH-EXCUS-000-APP-197-2017-18

आदेश का दिनांक / Date of Order:	27.02.2018	जारी करने की तारीख / Date of issue:	05.03.2018
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Passed by **Shri Lalit Prasad, Commissioner, Central Goods and Service Tax & Central Excise, Rajkot**

अधिसूचना संख्या २६.१७/दिनांक (टी.एन) शु.उ.के-२०१७/१० २०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं . १६/दिनांक .टी.एस-२०१७/०५११ ,में के अनुसरण २०१७ श्री ललित प्रसाद ,आयुक्त , केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क ,राजकोट को वित्त अधिनियम १९९४ की धारा ८५की १९७४केन्द्रीय उत्पाद शुल्क अधिनियम , के अंतर्गत दर्ज अधारा 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 उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellants & Respondent :-**
M/s Roopsangji Samatji Payar, Hahapar, Miyani, Tal : Abdasa, Dist : Kutchch 370 650

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

- (A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-
- (i) 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 अपीले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असारवा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd 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 fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर 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, बशर्त 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
- सेनवेट जमा की ली गई गलत राशि
- सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं 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 :

- amount determined under Section 11 D;
- amount of erroneous Cenvat Credit taken;
- amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :****Revision application to Government of India:**

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

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

- (i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसस्करण 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 छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /

In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

- (iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तरीख अथवा संभाव्यविधि 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-5 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 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, उपर्युक्त टंका से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी 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-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 संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /

Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलाधी विभागीय वेबसाइट www.cbec.gov.in 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 ::

Being aggrieved with the Order-in-Original No: 15/JC/2016 dated 09.09.2016 (**hereinafter referred to "as impugned order"**) passed by the Joint Commissioner, Central Excise & Service Tax, Gandhidham (Kutch) (**hereinafter referred to "Lower Adjudicating Authority"**), **M/s. Roopsangji Samatji Payar**, Hajapar Miyani, Taluka: Abdasa, Dist Kutch - 370 650 (**hereinafter referred to "as the appellants"**) have filed the present appeal.

2.1 The facts of the case are that during the course of audit of records of M/s. Ashapura International Limited and M/s Ashapura Minechem Limited, it was found that they have availed the services of mining, digging of materials from the appellants at their mining site for which they have made payments to the appellants. However, it was observed that the appellants has neither got registered themselves under the provisions of the Finance Act, 1994 and rules made thereunder nor they have paid Service Tax on the amounts received from service receivers.

2.2 Therefore, upon being requested to provide the details / documents of the services provided by them to M/s. Ashapura International Limited and other parties the appellant furnished the copies of the Form 26AS for the Financial Years 2009-10 to 2013-14. It appeared that as the appellant have provided the services in the nature of "Mining Services" classifiable as taxable service under Section 65 (105) (zzzy) of the Finance Act, 1994 to M/s. Ashapura International Limited and other parties, therefore they were liable to pay Service Tax thereon. Accordingly, based on data appearing in Form 26AS, Show Cause Notice dated 07.10.2014 was issued to the appellant.

2.3 The said Show Cause Notice dated 07.10.2014 was adjudicated by the Lower Adjudicating Authority vide his impugned order ex-parte, as the appellant neither filed any reply to the Show Cause Notice nor appeared for personal hearing before the adjudicating authority. In his impugned order, the Lower Adjudicating Authority confirmed the demand of Service Tax of Rs. 23,18,240/- under proviso to Section 73(1) of the the Finance Act, 1994 along with interest. He further




imposed penalty of Rs. 10,000/- under Section 77 *ibid* , penalty of Rs. 20,000/- per return under Section 70 *ibid* read with Rule 7C of Service Tax Rules, 1994 and penalty of Rs. 23,18,240/- under Section 78 *ibid*.

3.1 Being aggrieved, the appellants have filed present appeals on the grounds that they have not provided any mining services, which has been presumed in the impugned order; that they own leases of mine in their name and have sold certain products upon payment of Value Added Tax; that the services provided by them were in nature of transport contractor and the activity of loading was incidental to transportation of goods which is exempted; that income of Rs. 2,21,200/- and Rs. 28,82,000/- in relation to goods sold on which Tax has been Collected on Source by "OF Geologist and Mining" have also been taken into consideration as income from mining; that similarly interest income of Rs. 15,757.56 and Rs. 14,098.87 for Financial Year 2012-13 & 2013-14 have also been taken as mining income; that rent income of Rs. 1,37,037/- from Shri Vimal Pratapbhai Vanza during the Financial Year 2012-13 has also been taken into consideration.

3.2 The appellant further contended that transportation income was not taxable and were eligible for exemption under Notification No. 6/2005-Service Tax upto 30.06.2012 and under Notification No. 33/2012-Service Tax from 01.07.2012 therefore no Service Tax is payable by them for the period from Financial Years 2009-10 to 2013-14.

3.3 The appellant further stated that Service Tax on GTA is not payable by them and it is payable by recipient; that the contents of Form 26AS cannot be taken as basis for confirmation of demand as it does not include nature of activity carried out; that since demand of Service Tax does not exists therefore no interest is payable; that likewise no penalty under Section 77 and 78 of the Finance Act, 1994 is imposable.

3.4 The appellant further stated that the benefit of cum-tax is admissible to them; that since all the transactions were recorded in their books of accounts therefore extended period cannot be invoked.



4. 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 85 of the Finance Act, 1994 for the purpose of passing orders in this appeal.

5. Accordingly, personal hearing in the matter was held on 20.02.2018 which was attended by Dr. Nilesh V. Suchak, Chartered Accountant on behalf of the appellant. During the hearing, Ld. Chartered Accountant submitted another written submission and requested that their appeal be allowed.

6.1 In the additional submissions the appellant has argued that they have not provided any mining service and there is no evidence to this effect; that he has sold minerals from his mines and apart from sale of goods they have provided services of transportation as transport contractor and the income thereof is credited to job work account or transport income account; that as per Form 3CD they are in business of manufacturing of Bantonite and Transport Contractor; that therefore they are not engaged in providing mining services; that after mining was brought into Service Tax net from 01.06.2007 and as per clarification issued vide letter F. No. 232/2/2006-CX 4 dated 12.11.2007 the transportation of mineral from pithead to a specified location within mine/factory or for transportation are post mining activity and thus it is not a mining service.

6.2 The appellant further stated that when they have not issued any consignment note therefore their services cannot be equated with GTA Service as per Circular No: 186/5/2015-Service Tax dated 05.10.2015 and placed reliance on the case law of **Western Coal Fields Limited - 2017 (4) GSTL 260 (Tri. Del)**; that even if it is held that they have provided GTA services then the Service Tax liability is on receiver of the services.

Discussion and findings:

7. I have carefully gone through the entire records and the submissions made in writing, as well as orally, during the personal



hearing. I find that the appellant has deposited an amount of Rs. 1,74,000/- as pre-deposit therefore, there is compliance to Section 35F(i) of Central Excise Act, 1944, made applicable in Service Tax matters vide Section 83 of the Finance Act, 1994. Therefore, I proceed to decide the appeal on merits.

8. I find that the case of the department is that since the appellant has provided services in the nature of mining they were required to pay Service Tax thereon by following the provisions stipulated in the Finance Act, 1994 and the rules made thereunder.

To counter the charges as made in Show Cause Notice, I find that appellant has made various arguments, which are summarized as under:

- (i) that they are holders of mining lease and the transportation service provided by them was incidental to the sales of the minerals mined by them;
- (ii) that they have objections against certain sums taken into consideration while making the demand;
- (iii) that they are eligible for value based exemption;
- (iv) that Form 26AS cannot be taken as basis for confirmation of demand as it does not indicate the nature of activities carried out.
- (v) that benefit of cum tax is admissible to them;

9.1 I find that Show Cause Notice has been issued on the grounds that the appellants have provided mining services to M/s. Ashapura International Limited and M/s Ashapura Minechem Limited. The appellant's contention is that the transportation services provided by them are incidental to the minerals sold by them. Thus, they have contended that amount shown as payment in Form 26AS by M/s. Ashapura International Limited and M/s Ashapura Minechem Limited are in relation to transportation services and the same has been



accounted for in their books of accounts as Job-work Income or Transport Income.

9.2 Upon perusal of the Form 26AS for the financial year, as far as payments made by M/s. Ashapura International Limited, M/s Ashapura Minechem Limited and M/s. Ashapura Infrastructure Limited are concerned, I find them as under:

Financial Year	Name of Deductor	Section of Income Tax Act, 1961 under which deduction has been made	Amount
2009-10	Ashapura Minechem Limited	194C	26,18,154.00
	Ashapura International Limited	194C	30,06,124.00
Total for 2009-2010----->			56,24,278.00
2010-11	Ashapura Minechem Limited	194C	17,82,174.00
	Ashapura International Limited	194C	15,76,902.00
	Ashapura Infrastructure Ltd	194C	90,115.00
Total for 2010-2011----->			34,49,191.00
2011-12	Ashapura Minechem Limited	194C	15,79,408.00
	Ashapura International Limited	194C	40,45,296.00
	Ashapura Infrastructure Ltd	194C	25,200.00
Total for 2011-2012----->			56,49,904.00
2012-13	Ashapura Minechem Limited	194C	21,67,997.00
	Ashapura International Limited	194C	5,07,558.00
Total for 2012-2013----->			26,75,555.00
2013-14	Ashapura Minechem Limited	194C	7,06,024.00
	Ashapura International Limited	194C	2,39,121.00
Total for 2013-2014----->			9,45,145.00

9.3 I find that above deductions made by M/s. Ashapura International Limited, M/s Ashapura Minechem Limited and M/s. Ashapura Infrastructure Limited are under Section 194C of the Income Tax Act, 1961, which according to the appellants are in relation to the transportation services provided by them.

9.4 I find that Section 194C of Income Tax Act, 1961 provides for Tax Deduction at Source upon **payments to contractors**, however sub-section (6) as it stood prior to 01.06.2015, reads as under:

- (6) *No deduction shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of a contractor during the course of business of **plying, hiring or leasing goods carriages**, where such contractor furnishes a declaration to that effect along with his Permanent Account Number, to the person paying or crediting such sum.*

(emphasis supplied)



Thus, if the services provided by the appellant were in relation to transportation of goods then while making its payment there was no statutory onus upon M/s. Ashapura International Limited, M/s Ashapura Minechem Limited and M/s. Ashapura Infrastructure Limited under Income Tax, 1961 to deduct the tax at source as provided under Section 194C *ibid*.

10.1 I find that appellant have produced Form No 3CD, prescribed under Rule 6G(2) of Income Tax Rules, 1962 read with Section 44AB of the Income Tax Act, 1961, duly audited by Chartered Accountant for the Financial Years 2009-10 and 2010-11 and have contended that they are transport contractor and not engaged in providing mining services as per Part B - Column No. 8(a), which appears to be incorrect.

10.2 Upon referring the Form 3CD, available on the official website of Income Tax department, I find its format as under:

*FORM NO. 3CD [See rule 6G(2)]
Statement of particulars required to be furnished under section 44AB
of the Income-tax Act, 1961*

PART - A

1. Name of the assessee
2. Address
3. Permanent Account Number (PAN)
4. **Whether the assessee is liable to pay indirect tax like excise duty, service tax, sales tax, customs duty, etc. if yes, please furnish the registration number or any other identification number allotted for the same**
5. Status
6. Previous year from.....to.....
7. Assessment year
8. **Indicate the relevant clause of section 44AB under which the audit has been conducted**

PART - B

9. (a) If firm or association of persons, indicate names of partners/members and their profit sharing ratios.
(b) If there is any change in the partners or members or in their profit sharing ratio since the last date of the preceding year, the particulars of such change
10. (a) Nature of business or profession (if more than one business or profession is carried on during the previous year, nature of every business or profession)
(b) If there is any change in the nature of business or profession, the particulars of such change.
11. (a) Whether books of account are prescribed under section 44AA, if yes, list of books so prescribed.
(b) List of books of account maintained and the address at which the books of account are kept. (In case books of account are maintained in a computer system, mention the books of account generated by such computer system. If the books of account are not kept at one location, please furnish the addresses of locations along with the details of books of account maintained at each location.)
(c) List of books of account and nature of relevant documents examined.




10.3 Upon comparing the Form 3CD furnished by the appellant and the prescribed format, I find that Sl. No. 4 of Part A requires the Chartered Accountant to state whether the assessee is liable to pay indirect tax like excise duty, service tax, sales tax, customs duty, etc. if yes, he is required to furnish the registration number or any other identification number allotted for the same. However, I find that no such report is given by Chartered Accountant. I further find that Column No: 8 of Part A requires Chartered Accountant to indicate the relevant clause of section 44AB under which the audit has been conducted. I find that no such column appears in the Form 3CD produced by the appellant.

10.4 Thus, I find that Form 3CD produced by the appellant does not have any evidentiary value since it is not in line with the provisions of Income Tax Act, 1961 and the rules made thereunder.

11.1 I find that pages of Form 3CD for the Financial Years 2009-2010 & 2010-11 and Profit and Loss Accounts for the Financial Years 2009-2010 to 2013-14 have been produced before me. Thus, they have prepared the books of accounts on the basis of the invoices issued by them to their customers. I find that they have not volunteered to produce the entire bills issued by them to M/s. Ashapura International Limited, M/s Ashapura Minechem Limited and M/s. Ashapura Infrastructure Limited during Financial Years 2009-2010 to 2013-14 for reconciling them with Form 26AS so as to strengthen their case that whatever income they have received are in relation to transportation services and not in relation to mining services. Alternatively, they could have reconciled the same with the ledgers of Job-work and transportation incomes.

11.2 Even otherwise from the copy of Invoice No. 053 dated 31.12.2010 issued to M/s. Ashapura Infrastructure Limited, which according to the appellant pertaining to transportation services for Rs. 27,150/-, I find that the same does not appear to have been booked under Transport Income in Profit & Loss Account for the Financial Year 2009-10. Likewise, for the Invoice No: 168 dated 30.04.2013 I find that it has been issued for an amount of Rs. 1,49,580/- to M/s. Ashapura Minechem Limited however, I find that the same does not appear to have



been booked under Transport Income in Profit & Loss Account for the Financial Year 2013-14. Thus, by producing just two invoices and selective pages of the Balance-Sheet, appellant has failed to convince me especially so when they have not provided any data to the Jurisdictional Superintendent of Service Tax or to the Lower Adjudicating Authority.

11.3 As regards to the reliance placed on the case law of **Western Coal Fields Limited - 2017 (4) GSTL 260 (Tri. Del)**, I find that as per facts of the case, consignor and consignee were same therefore the same is not applicable as the facts are different from the present case.

12. Accordingly, since no cogent evidence has been produced by the appellant that the payments received by them from M/s. Ashapura International Limited, M/s Ashapura Minechem Limited and M/s. Ashapura Infrastructure Limited, during Financial Years 2009-2010 to 2013-14 were in relation to GTA services, I hold that mining services were provided by the Noticee as under, on which Service Tax at applicable rates is required to be paid by them:

Financial Year	Name of Deductor	Section of Income Tax Act, 1961 under which deduction has been made	Amount
2009-10	Ashapura Minechem Limited	194C	26,18,154.00
	Ashapura International Limited	194C	30,06,124.00
Total for 2009-2010----->			56,24,278.00
2010-11	Ashapura Minechem Limited	194C	17,82,174.00
	Ashapura International Limited	194C	15,76,902.00
	Ashapura Infrastructure Ltd	194C	90,115.00
Total for 2010-2011----->			34,49,191.00
2011-12	Ashapura Minechem Limited	194C	15,79,408.00
	Ashapura International Limited	194C	40,45,296.00
	Ashapura Infrastructure Ltd	194C	25,200.00
Total for 2011-2012----->			56,49,904.00
2012-13	Ashapura Minechem Limited	194C	21,67,997.00
	Ashapura International Limited	194C	5,07,558.00
Total for 2012-2013----->			26,75,555.00
2013-14	Ashapura Minechem Limited	194C	7,06,024.00
	Ashapura International Limited	194C	2,39,121.00
Total for 2013-2014----->			9,45,145.00

13.1 As regards to the error in quantification of demands, I find that value of services, on which demand of F. Y. 2009-2010 has been made, is Rs. 58,40,978/- out of which, as held in paras supra, mining



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services valued at Rs. 56,24,278/- have been provided, thus leaving the difference of Rs. 2,16,700/-. On the other hand I find that an amount of Rs. 2,21,200/- is shown as TAX COLLECTED AS SOURCE by "OF GEOLOIST & MINING" under Section 206CD of Income Tax Act, 1961 which is not a payment for any service but is pertaining to profit and gains from the business of trading. Thus, liable for exclusion. Accordingly the value of taxable services for F. Y. 2009-2010 is reduced from Rs. 58,40,978/- to Rs. 56,24,278/-

13.2 For the Financial Year 2010-11, I find that value of services, on which demand has been made is Rs. 35,89,191/-, out of which it has been held in paras supra that services valued at Rs. 34,49,191/- are mining services, thus there is a difference of Rs. 1,40,000/-. I find that said amount has been received from Shri Naranbhai Shivjibhai Vekaria and have been reported under Section 194C of Income Tax Act, 1961 for which appellant has not produced any evidence. Therefore, in absence of any evidence I hold that the value of taxable services for F. Y. 2010-2011 is Rs. 35,89,191/-.

13.3 As regards to Financial Year 2011-12, I find that value of services, on which demand has been made is Rs. 85,31,904/-, which excludes an amount of Rs. 9,788.99 which is interest income booked by M/s. Paschim Gujarat Vij Company Limited, out of which it has been held in paras supra that services valued at Rs. 56,49,904/- are mining services, thus there is a difference of Rs. 28,82,000/- which is shown as TAX COLLECTED AS SOURCE by "OF GEOLOIST & MINING" under Section 206CD of Income Tax Act, 1961. As held earlier since it is not a payment for any service but is pertaining to profit and gains from the business of trading, hence liable for exclusion. Accordingly the value of taxable services for F. Y. 2011-12 is reduced from Rs. 85,31,904/- to Rs. 56,49,904/-.

13.4 With reference to Financial Year 2012-13, I find that value of services, on which demand has been made is Rs. 28,28,349/-, out of which it has been held in paras supra that services valued at Rs. 26,75,555/- are mining services, thus there is difference of Rs. 1,52,794/-. Upon perusal of Form 26AS, I find that an amount of Rs.



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1,37,037/- paid as rent by Shri Vimal Pratapbhai Vanza and interest of Rs. 15,757.56 by M/s. Paschim Gujarat Vij Company Limited have been reported under Section 194I & 194A of Income Tax Act, 1961. Since the Show Cause Notice does not propose Service Tax on the renting services provided hence I find that the same is liable for exclusion. Further interest income is not a taxable service therefore same is also liable for exclusion. Accordingly the value of taxable services for F. Y. 2012-13 is reduced from Rs. 28,28,349/- to Rs. 26,75,555/-

13.5 In the case of Financial Year 2013-14, I find that value of services, on which demand has been made is Rs. 9,59,243/-, out of which it has been held in paras supra that services valued at Rs. 9,45,145/- are mining services, thus there is difference of Rs. 14,098/-. Upon perusal of Form 26AS, I find that it is an amount interest from M/s. Paschim Gujarat Vij Company Limited which have been reported under Section 194A of Income Tax Act, 1961. Since interest income is not a taxable service therefore same is liable for exclusion. Accordingly the value of taxable services for F. Y. 2013-14 is reduced from Rs. 9,59,243/- to Rs. 9,45,145/-.

13.6 Accordingly, the revised value of services is tabulated as under:

Financial Year	Value of taxable services
2009-2010	Rs. 56,24,278/-
2010-2011	Rs. 35,89,191/-
2011-2012	Rs. 56,49,904/-
2012-2013	Rs. 26,75,555/-
2013-2014	Rs. 9,45,145/-

14.1 The appellants have argued that the benefit of exemption under Notification No. 6/2005-Service Tax upto 30.06.2012 and under Notification No. 33/2012-Service Tax from 01.07.2012 is admissible to them. I find that Notification No. 6/2005-Service Tax dated 01.03.2005, as amended exempted the services upto Rs. 10 Lakhs provided in any financial year subject to condition that value of the taxable services provided in preceding financial year was less than Rs. 10 Lakhs. I find that appellant has not placed on records the value of services provided in Financial Year 2008-2009, therefore, I am unable to extend this benefit for the Financial Year 2009-2010.



14.2 For the subsequent Financial Years i.e. 2010-11, 2011-12, 2012-13 & 2013-14, I find that value of the services provided in preceding Financial Year was more than Rs. 10 Lakhs therefore, benefit of exemption is not admissible.

15. I find that Jurisdictional Superintendent of Service Tax had requested the appellant to provide the data so as to enable him to correctly determine the Service Tax liability. I find that they have simply submitted the Form 26AS through email. I also find that it is a fact that the appellant had not registered themselves under the Finance Act, 1994 and the rules made thereunder also they have not filed ST-3 returns. Therefore, I find that only recourse available was to resort to Section 72 *ibid*. Thus, I find that in absence of any other data the demand of Service Tax has been rightly made on the basis of Form 26AS by invoking the suppression clause.

16 I find that another set of contention put forth by the appellant is that cum-tax benefit be allowed to them. However, I find that except making this statement the appellant has not placed on records any evidence to prove that the receipts, received by them as reflected in Form 26AS, is inclusive of Service Tax. Thus, I find that cum tax benefit is not extendable in absence of any documentary evidence showing that the amount received is of inclusive of Service Tax. I find that my views are well supported by the decision of the Tribunal in the case of **Rudra Galaxy Channel Limited - 2015 (38) S. T. R. 445 (Tri. Mum)** wherein the ratio laid down by **Apex Court in the case of Amrit Agro Industries Limited - 2007 (210) ELT 183 (S.C.)** has been followed.

17. Thus, the revised Service Tax calculation is as under:

Financial Year	Value of taxable services (In Rs.)	Rate of Service Tax inclusive of cess	Amount of Service Tax (including Cess)
2009-10	56,24,278/-	10.30%	5,79,301/-
2010-11	35,89,191/-	10.30%	3,69,687/-
2011-12	56,49,904/-	10.30%	5,81,940/-
2012-13	26,75,555/-	12.36%	3,30,699/-
2013-14	9,45,145/-	12.36%	1,16,820/-
Total			19,78,447/-



18. I further find that since there is a failure on the part of the appellant to pay Service Tax within stipulated time and to file correct returns and also they have till date not filed returns. Therefore, I find that the penalty of Rs. 10,000/- imposed under Section 77 of the Finance Act, 1994 and penalty of Rs. 20,000/- per return imposed under Section 70 *ibid* read with Rule 7C of Service Tax Rules, 1994 needs no interference. However, the penalty under Section 78 *ibid* shall be equal to Rs. 19,78,447/-

19. Appeal of the appellants is partially allowed and impugned order modified accordingly.

F. N. V.2/71/GDM/2016
Place: Rajkot
Dated: 27.02.2018



(LALIT PRASAD)

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

By Speed Post

To,
M/s. Roopsangji Samatji Payar,
Hajapar Miyani,
Taluka: Abdasa, Dist Kutch - 370 650

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- 3) The Commissioner, GST & Central Excise, Rajkot.
- 4) The Assistant Commissioner, GST & Central Excise, Division: Bhuj.
- 5) Guard File.