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



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

राजकोट / Rajkot - 360 001

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**रजिस्टर्ड डाक ए. डी. द्वारा :-**

क	अपील फाइल संख्या Appeal / File No.	मूल आदेश सं / OID No.	दिनांक / Date
	V2/11 /EA2/RAJ/2016	29/ADC/BKS/2015-16	26.02.2016

4283 to 4286

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

**RAJ-EXCUS-000-APP-035 -2017-18**

आदेश का दिनांक / Date of Order:	<b>28.08.2017</b>	जारी करने की तारीख / Date of issue:	<b>28.08.2017</b>
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**कुमार सतोष, आयुक्त (अपील), राजकोट द्वारा पारित /**  
**Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot**

ग अपर आयुक्त/अनुप आयुक्त/उप-अनुप आयुक्त/सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, राजकोट / जामनगर / गण्डीधाम / द्वारा उपरलिखित जारी मूल आदेश से सृजित /  
Arising out of above mentioned OID 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, Dwarkesh Enterprises, Bazar Line, Okha Port,OKHA.

इस आदेश(अपील) से व्यक्ति कोई व्यक्ति निम्नलिखित तरीके से उपरोक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दाखल 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 अन्तर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अन्तर्गत 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) सर्वोच्च न्यायालय से सम्बन्धित सभी मामलों 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 अपील के अलावा सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहामनी भवन अथवा अहमदाबाद-380016 को की जानी चाहिए /  
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 6 के अन्तर्गत निर्धारित फीट नये फॉर्म EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहाँ उत्पाद शुल्क की सीमा व्याज की सीमा और लगाया गया जुर्माना, तथा 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेसक्रिड बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहाँ संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। संबंधित आदेश (स्टे ऑर्डर) के लिए आवंटन-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 अन्तर्गत सेवाकर विधमवली, 1994 के नियम 9(1) के अन्तर्गत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती है 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, जहाँ सेवाकर की सीमा व्याज की सीमा और लगाया गया जुर्माना, तथा 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेसक्रिड बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहाँ संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। संबंधित आदेश (स्टे ऑर्डर) के लिए आवंटन-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/-



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

The Principal Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "the appellant department") has filed the present appeal against the Order-in-Original No. 29/ADC/BKS/2015-16 dated 26.02.2016 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "the adjudicating authority") in the case of M/s. Dwarkesh Enterprise, Bazar Line, Okha Port, Okha (hereinafter referred to as "the respondent").

2. The facts of the case are that SCN No. V.ST/AR-JMN/JC/52/2013 dated 01.04.2013 was issued to the respondent demanding recovery of not paid/short paid amount of service tax to the tune of Rs. 46,69,199/- under proviso to Section 73(1) of the Finance Act, 1994 (hereinafter referred to as "the Act") alongwith interest under Section 75 of the Act and imposition of penalty under Rule 7C of the Service Tax Rules, 1994 and under Section 76, 77 & 78 of the Act. The proposals made in the SCN were confirmed by the lower authority vide Order-In-Original No. 128/ADC/MG/2014-15 dated 05.03.2014 and also imposed penalty under Section 76, 77 & 78 of the Act and ordered recovery of late fee under Section 70 of the Act. The appellant filed the appeal before the then Commissioner (Appeals), Central Excise & Service Tax, Rajkot who vide Order-In-Appeal No. RJT-EXCUS-000-APP-234-14-15 dated 19.12.2014 has upheld the demand of service tax alongwith interest and consequential penalties for the period from Oct-2007 to March-2009, however remanded the case back to the lower authority for ascertaining the correct liability of service tax for the FY 2009-10 to 2010-11. The adjudicating authority in denovo proceedings vide impugned order, dropped the demand of service tax of Rs. 3,92,565/- and Rs. 3,22,997/- for the FY 2009-10 and 2010-11 respectively, and consequential interest and penalty.

3. Aggrieved to the impugned order, the appellant department preferred the present appeal on the ground that the adjudicating authority has wrongly dropped the amount of service tax to the extent of Rs. 2,81,321/- on receipt of payments during the financial year 2011-12, for the services provided during the FY 2009-10 & 2010-11. The Commissioner (Appeals) in his order dated 19/23.12.2014, vide para-8 had remanded the matter back to the lower authority for verification. The respondent while submitting their plea had stated before Commissioner (Appeals) that the demanded amount of service tax of Rs. 46,69,199/- should have been restricted to Rs. 42,34,958/- only, since the payment towards the services provided involving service tax of Rs. 4,34,241/- [Rs. 3,92,565/- + Rs. 3,22,997/ (demand in the SCN) – Rs. 2,81,321/- was required to be adjusted for the payments received during FY

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2011-12 but related to the services provided in FY 2009-10 & 2010-11] do not become payable in absence of receipt of payments and were in accordance with the provisions of Rule 6 of the Service Tax Rules, 1994. However, the appeal has been filed seeking confirmation of demand of Service Tax of Rs. 42,34,958/- under section 73(2) of the Act for the years from 2007-08 to 2011-12 along with payment of interest under Section 75 of the Act and imposition of penalty under Section 76, 77 & 78 of the Act and to confirm the late fees under Section 70 of the Act, which were not the subject matter of remand proceeding.

4. Personal hearing in the matter was held on 25.04.2017 which was attended by Shri Dinesh Kumar Jain, Chartered Accountant, on behalf of the respondent and submitted that they have not applied for refund and will not file refund of excess payment of Rs. 2,81,321/- made in FY 2011-12. Due to change of appellate authority, the personal hearing was again held on 28.07.2017 which was also attended by Shri Dinesh Kumar Jain, Chartered Accountant, who reiterated the Grounds of Appeal and contentions made by them during personal hearing attended on 25.04.2017.

4.1 He made written submission stating that the demand of Rs. 46,69,199/- was proposed by taking into consideration the excess payment of Rs. 2,81,321/- during the year 2011-12; that Commissioner(Appeals), Rajkot vide his order dated 19.12.2014 has already upheld the demand of service tax of Rs. 42,34,958/- alongwith interest and consequential penalties for FY 2007-08 and 2008-09 and remanded the case back to the lower authority for ascertaining the correct liability of service tax for FY 2009-10 and 2010-11 only keeping in mind the provisions of then Rule 6 of Service Tax Rules, 1994 which required that service tax was payable on 'receipt of payment' and not on the basis of 'invoicing'; that the present departmental appeal is devoid of merits and therefore, is required to be dismissed.

#### FINDINGS:-

5. I have carefully gone through the facts of the case, the impugned order, appeal memorandum and the submissions of the appellant. The limited issue to be decided by me is whether the impugned order whereby the proceedings for recovery of differential service tax of Rs. 4,34,241/- during the period from 2009-10 & 2010-11 has been dropped in view of then Rule 6 of the Service Tax Rules, 1994, applicable during the material time, is proper or otherwise.

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6. It is pertinent to mention that the department did not go in appeal against the earlier Order-In-Appeal No. RJT-EXCUS-000-APP-234-14-15 dated 19.12.2014, which remanded verification of Service Tax liability of the Respondent for 2009-10 & 2010-11 only and decided other issues. The relevant Para 8 of Order-In-Appeal dated 19.12.2014, is reproduced as under:

"8. As regards to demand of differential service tax of Rs. 4,34,241/- during the period from 2009-10 to 2011-12, I find that the appellant has questioned the duty calculation for the period from 2009-10 to 2010-11, which according to them, they had correctly discharged based on payments received by them whereas the department had calculated the same based on their billing. I find force in the plea of the appellant as prior to 01.04.2011, Rule 6 of the Service Tax Rules, 1994 clearly specifies that service tax was to be paid to the credit of the Central Government by the 5<sup>th</sup> day or 6<sup>th</sup> day in case of electronic transfer through internet banking, of the month following the calendar month in which payment towards the value of the taxable service was received. On going through Annexure-A to the SCN showing duty calculation for the FY 2009-10 to 2011-12, I observe that differential service tax for the FY 2009-10 to 2010-11 has been ascertained as Rs. 3,92,565/- and Rs. 3,22,997/- respectively and for the FY 2011-12 i.e. it is shown as (-) Rs. 2,81,321/-. Thus, prima facie it appears that the excess payment of service tax amounting to Rs. 2,81,321/- is likely to be payment of service tax on the amount received by the appellant towards taxable services provided by them prior to framing of Point of Taxation Rules, 2011 (effective from 01.04.2011). Since the details of taxable services provided and payment received for rendering such services by the appellant during the FY 2009-10 to 2010-11 are not available on records with this office, therefore, I feel it appropriate to remand the case back to the lower authority for ascertaining the correct liability of service tax keeping in mind the above aspects."

6.1 It is on record that the Department did not go in appeal against the issues framed by Commissioner (Appeals) as well as the issues decided vide Order-In-Appeal dated 19.12.2014, whereas the respondent has gone in appeal on other issues decided, which is pending in the Hon'ble CESTAT, Ahmadabad. However, neither Department nor respondent filed appeal on remanded part of Order-In-Appeal i.e. service tax liability during 2009-10 & 2010-11 to be quantified as remanded by the then Commissioner (Appeals). Having not gone in appeal to CESTAT against remand order, the Department can't come in appeal to Commissioner (Appeals) on the issues which have not been remanded Commissioner (Appeals). It is a fact that no issue, other than which has been remanded, could have been decided by the Additional Commissioner in the de-novo proceedings. Hence, the demands pertaining to years 2007-08 & 2008-09 being raised by the department in the present appeal could not have been decided by the lower adjudicating authority in de-novo proceedings and Para 3.3 & 3.4 of the impugned order have recorded correct findings, which are reproduced as under:

3.3 It is observed that as per Section 68(1) of the Finance Act, 1994, every person providing taxable service to any person shall pay Service Tax at the prescribed rate, in such manner and within such period as may be prescribed. Further, Rule 6 of the Service Tax Rules, 1994 prescribed the manner and time limit for this purpose. During the relevant period, Rule 6 provides that the Service Tax shall be paid to the credit of the Central Government by the 5<sup>th</sup>/6<sup>th</sup> day of the month/quarter, immediately following the month/quarter in which the payment are received, towards the value of taxable services. The CBEC vide Para 301 of its Circular No. 97/8/2007-ST dated 23.08.2007 has also clarified that Service Tax liability for a particular month of quarter is required to be discharged on the payment towards the value of taxable service received during that month or quarter, as the case may be. It is evident from the show cause notice that the demand is raised on the basis of billing/invoicing instead of receipt of payment. Therefore, I find force in the plea of the Noticee in this regard, as also observed by the appellate authority and accordingly, during the relevant period, the Noticee is required to pay Service Tax of payment received towards the value of the taxable service. Further, in the present context, with regard to correct liability of the Noticee for the period under consideration, I find that the Noticee by providing copies of respective ST-3 returns and ledgers submitted that they have received the payment of Rs. 1,40,56,145/- and Rs. 1,76,39,693/- during the Financial Year 2009-10 and 2010-11 respectively and already paid Service Tax of Rs. 14,47,783/- and Rs. 18,16,886/- for the respective financial year. The said contention of the Noticee got verified from the Jurisdictional Range Officer and found to be correct.....

3.4 In view of foregoing findings, the correct liability of the Noticee towards service tax for the Financial Year 2009-10 and 2010-11 comes to Rs. 14,47,783/- and Rs. 18,16,886/- which the Noticee have already discharged. The said payments of Service Tax have already been considered while proposing the demand. Hence, no further amount of Service Tax for the said period is required to be recovered from the Noticee. Therefore, I find that no differential amount of Service Tax is demandable from the Noticee."

(Emphasis supplied)

7. Rule 6(1) of Service Tax Rules, 1994, as was prevailing prior to 01.04.2011, reads as under:-

- (1) The service tax shall be paid to the credit of the Central Government,-  
 (i) by the 6th day of the month, if the duty is deposited electronically through internet banking; and  
 (ii) by the 5th day of the month, in any other case, immediately following the calendar month in which the payments are received, towards the value of taxable services:

(Emphasis supplied)

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7.1 Hence, for the period prior to 01.04.2011, the service provider was required to pay service tax by 5<sup>th</sup>/6<sup>th</sup> day of the month, following the calendar month in which the payments had been received, towards the value of taxable services and not the month in which invoice had been raised/issued. The adjudicating authority, in de-novo proceedings vide impugned order, after verification of ST-3 returns and ledgers submitted by the respondent, held that they had discharged the service tax liability correctly during the year 2009-10 and 2010-11 based upon the amount of payments received by them towards provision of services and observed that no further amount of service tax for the said period was required to be paid by them. The appellant department has not produced any documentary evidences contrary to the above findings. Accordingly, I have no option but to uphold the impugned order and reject the appeal.

8. In view of above facts and legal position, I reject the appeal filed by the department.

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

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

(कुमार संतोष)  
आयुक्त (अपील्स)

**By Speed Post**

To,

1	M/s. Dwarkesh Enterprise, Bazar Line, Okha Port, Okha	मै. द्वारकेश एंटरप्राइज, बाजार लाइन, ओखा पोर्ट, ओखा
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**Copy to:**

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
- 3) The Assistant Commissioner, GST & Central Excise, Jamnagar Division,  
Jamnagar.
- 4) Guard file.