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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

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 / OID No.	दिनांक / Date
	V2/156 /RAJ/2016	52/ADC/PV/2015-16	31.03.2016

4590 & 4593

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

**RAJ-EXCUS-000-APP-039 -2017-18**

आदेश का दिनांक / Date of Order:	<b>08.09.2017</b>	जारी करने की तारीख / Date of issue:	<b>11.09.2017</b>
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कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /  
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अपर आदेशों से उत्पन्न अपीलें/उत्पाद शुल्क, केन्द्रीय उत्पाद शुल्क, राजकोट / जामनगर / गणधियानगर द्वारा उपरोक्तित जहाँ मूल आदेश से उत्पन्न।

Arising out of above mentioned O/O 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. Jeet Construction Co., "Shivam", Sakhyanagar Main Road.,Rajkot

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से उपरोक्त 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 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) विशेषण न्यायालय में सम्बन्धित सभी मामलों-सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, ईस्ट ब्लॉक नं 2, पुरम, नई दिल्ली, को की जानी चाहिए। /

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.R. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बतलाए गए अपील के अलावा सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टैट) की पश्चिम क्षेत्रीय पीठ, द्वितीय तल, बहुमानी भवन असावा 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, Bhauwaji Bhawan, Asawa 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 फिल गरी फॉर्म EA-3 को धार परिशिष्ट में दर्ज किया जाता चाहिए। इसमें से कम से कम एक प्रति के साथ, जहाँ उत्पाद शुल्क की सीमा 5 लाख की सीमा और सेवाकर 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 राजका के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेस्ट्रिक्टेड बैंक ड्रफ्ट द्वारा किया जाना चाहिए। संबंधित ड्रफ्ट का भुगतान बैंक की उस शाखा में होना चाहिए जहाँ संबंधित अपीलीय न्यायाधिकरण की राजका स्थित है। स्वतंत्र आदेश (स्टैट 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/-.

(iv) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अन्तर्गत सेवाकर नियमवली, 1994 के नियम 9(1) के तहत निर्धारित फॉर्म S.T-5 में धार परिशिष्ट में की जा सकती है। इसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (जिसमें से एक प्रति प्रामाणिक होनी चाहिए) और इसमें से कम से कम एक प्रति के साथ, जहाँ सेवाकर की सीमा 5 लाख की सीमा और सेवाकर 5 लाख रुपए या 50 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 राजका के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेस्ट्रिक्टेड बैंक ड्रफ्ट द्वारा किया जाना चाहिए। संबंधित ड्रफ्ट का भुगतान बैंक की उस शाखा में होना चाहिए जहाँ संबंधित अपीलीय न्यायाधिकरण की राजका स्थित है। स्वतंत्र आदेश (स्टैट 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. 1,000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

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(ii) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दायें की गयीं अपील, सेवाकर नियमवली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म ST-7 में की जा सकती एवं उसके साथ अपील, केन्द्रीय उत्पाद शुल्क अध्याय आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा जारी अधेश की प्रतियाँ संलग्न की (उपरोक्त में एक प्रति परामर्शित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उप-आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर को अपील पर न्यायधिकारण को अधिसूचना देते वहाँ पर निर्देश देते जाने अधेश की प्रति भी साथ में संलग्न करनी होती है।  
The appeal under sub-section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in Form 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.

(iv) सेवा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील परामर्शण (सेक्टर) के प्रति अपील के प्रस्ताव में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एक के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस अधेश के प्रति अपील परामर्शण में अपील करते समय उत्पाद शुल्क/सेवा कर मात्र के 10 प्रतिशत (10%), जब मात्र एवं न्यूनतम विवादित है, या न्यूनतम, जब केवल न्यूनतम विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि इस तरह से जमा की जाती है।  
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'मान किए गए शुल्क' में विवाद शामिल है।

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेक्टर जमा की जो नई गारंटी राशि
- (iii) सेक्टर जमा नियमवली के नियम 6 के अंतर्गत देय रकम

बशर्त यह कि इस धारा के अंतर्गत वित्तीय (सं. 2) अधिनियम 2014 के अंतर्गत से पूरे किसी अपील परामर्शण के प्रस्ताव विवादित प्रस्ताव नहीं एवं अपील को रद्द नहीं होनी।

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 की पुनरीक्षण आवेदन :

**Revision application to Government of India:**  
इस अधेश की पुनरीक्षण परामर्शण विभागाधिकारित प्रस्ताव में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के अंतर्गत अर्ज अपील, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त सेवाएं, पारस भवन, चौथी मंजिल, जीवाणु दीप अड्डा, सराव 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 आप के किसी नुकसान के मामले में, जहां नुकसान किसी मात्र को किसी कारखाने से अड्डा गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक अड्डा गृह से दूसरे अड्डा गृह पारगमन के दौरान, या किसी अड्डा गृह से या अड्डा गृह में मात्र के पारगमन के दौरान, किसी कारखाने या किसी अड्डा गृह में मात्र 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 मात्र के विनिर्माण में प्रयुक्त कच्चे मात्र पर अभी नई 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 मात्र के बाहर, नेपाल या भूटान को मात्र निर्यात किया गया है।  
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) अधिनियमित उत्पाद के उत्पादन शुल्क के अभाव के लिए जो क्वॉटि कैपिट इत अधिनियम एवं इसके विभिन्न प्राधान्यों के तहत प्रमाण की गई है और ऐसे अधेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (सं. 2), 1998 की धारा 100 के द्वारा नियमित की गईं तरीक अथवा प्रस्तावों पर या बाट में जारी किए गये 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. 100 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रत्येक सप्ताह EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 9 के अंतर्गत निर्दिष्ट है, इस अधेश के अंतर्गत के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल अधेश व अपील अधेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अपील के साथ, के लिए 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 विभिन्न 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 is Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस अधेश में कई मूल अधेशों का उल्लेख है तो प्रत्येक मूल अधेश के लिए शुल्क का भुगतान, उपरोक्त देय से किया जाना चाहिए। इस तरह के होते हुए भी की निम्न पढी कारों से बचने के लिए परामर्शित अपील परामर्शण को एक अपील या केवल मात्र को एक आवेदन किया जाना है।  
In case, if the order covers various numbers of order, in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scripps work if existing Rs. 1 lakh fee of Rs. 100/- for each.

(E) महाप्रार्थित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची 1 के अनुसार मूल अधेश एवं स्थगन अधेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क स्टिकट 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) सेवा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील परामर्शण (अपील) नियमवली, 1992 में शामिल एवं अन्य सम्बंधित प्रस्तावों को सम्मिलित करने वाले नियमों की और भी ध्यान अवगत किया जाना 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 अपील परामर्शण को अपील टाकिस करने में संबंधित व्यापक, विस्तृत और नवीनतम प्राधान्यों के लिए, अपीलारी विभागीय वेबसाइट [www.cbec.gov.in](http://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](http://www.cbec.gov.in).

**ORDER-IN-APPEAL**

**M/s. Jeet Construction Co., "Shivam", Sakhiyanagar Main Road, Rajkot** (hereinafter referred to as '**the appellant**') filed present appeal against Order-in-Original No 52/ADC/PV/2015-16 dated 31.03.2016 (hereinafter referred to as "**the impugned order**") passed by the Additional Commissioner, Central Excise, Rajkot (hereinafter referred to as "**the lower adjudicating authority**").

2. The facts of the case, in brief, are that the appellant was engaged in providing taxable services "Construction Services in respect of Commercial or Industrial Building" under Service Tax Registration No. AADFJ8118KST001 and had undertaken to comply with the conditions prescribed under the Service Tax Rules, 1994 (hereinafter referred to as 'the Rules'). During the period from financial years 2005-06 to 2009-10, the appellant had rendered services to M/s. Tata Tele Services Ltd, Ahmedabad, M/s. GTL Ltd, Ahmedabad, M/s. Idea Cellular Ltd, Ahmedabad for construction of concrete foundation of mobile towers which included the excavation work of pits, placing steel bars, cement concreting and other allied works and also to M/s. Bharti Cellular Ltd., M/s. Idea Cellular Ltd., M/s. Vodafone Essar Gujarat Ltd. etc for laying optical cable fiber network, which included excavation of trench, laying of duct/cable, backfilling, soil leveling and related ancillary works.

2.1 A Show Cause Notice F.No. V.ST/AR-I,Rjt./JC/191/2010 dated 13.09.2010 was issued proposing to recover service tax of Rs. 49,88,581/- under proviso to Section 73(1) of the Finance Act, 1994 (hereinafter referred to as the "Act") along with interest under Section 75 of the Act and imposition of penalties under Section 77 and 78 of the Act. The lower adjudicating authority vide the OIO No. 28/JC/2012 dated 16.04.2012 confirmed demand of service tax of Rs. 35,39,288/- under proviso to Section 73(1) of the Act along with interest under Section 75 of the Act and appropriated Rs. 28,00,000/- already paid by the appellant and also imposed penalties under Section 77 and 78 of the Act.

2.2 Being aggrieved by the said OIO No. 28/JC/2012 dated 29.02.2012/16.04.2012, the appellant had preferred appeal (F. No. V2/560/RAJ/2012), which was decided vide OIA No. 91/2013(RAJ)CE/AK/Commr(A)/Ahd dated 25.02.2013. The relevant Paras of that Order-in-Appeal are reproduced as under:

.....  
 .....

*"9.3 Furthermore, on going through the contention of the appellant*



and the findings at para 8.2 of the impugned order, I find that the appellant had further sought the reduction of the demand of service tax of Rs. 10,02,210/-, resulting from the sum received by them in respect of services of laying of cables, which has been set aside by the lower adjudicating authority terming as non-taxable activity, however confirmed under section 73A(2) of the Finance Act, 1994, considering that the service tax has been recovered by the appellant from the serviced recipient.

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I find that while setting aside liability of service tax on Laying of cables/OFC, the lower adjudicating authority at para 8.2 of the impugned order has inter alia, held as under:-

"8.2 .....CBEC vide its Circular No. 123/5/2010-TRU dated 24<sup>th</sup> May, 2010 has clarified the applicability of service tax on laying of cable under or along with roads and similar activities. This circular has examined the taxability of different activities taking into account the scope of all related services such as site-formation, excavation/earth moving, erection, commissioning or installation services, commercial or industrial construction service, or work contract services. Accordingly, I find that the status of the activities carried out by the noticee for the purpose of taxation is covered under sr. no. 2 of the Table annexed to the said circular, which specifically exhibits the status of "Laying of cables under or alongside road" as non taxable service under any clause of sub-section (150) of section 65 of the Finance Act, 1994. Therefore, I decide that the services rendered by the noticee in relation to laying of cable are not taxable. Accordingly, I hereby drop the demand of service tax in relation to laying of cables on the ground of being non-taxable service. However, as a matter of fact which has not been disputed by the noticee, I also find that the service tax amount collected by them from clients is required to be credited to the amount of central Government under the provisions of section 73(A)(2) of the Finance Act, 1994....."

So what can be gathered from the above is that, though the activity of laying of cable under the main category of Commercial Or Industrial Construction, has been held to be not taxable activity by the lower adjudicating authority, the demand has been confirmed on such non-taxable portion also under section 73A ibid, on the ground that the appellant had collected such service tax from the customer/service recipients.

9.4 The appellant, in the above backdrops are contesting the portion of the non-taxable demand of service tax of Rs. 10,02,210/- for the service laying of cable provided to M/s. Bharti Cellular Ltd., Ahmedabad, on two counts. One, that they have not collected service tax in respect of such laying of cable services, and two, the statement of Shri Vipul Zaverbhai Bhalgama, Engineer (Technical) of M/s. Bharti Airtel Ltd. Rajkot dated 13.01.2010 relied upon for holding that service tax has been collected, was in reality not an employee of M/s. Bharti Cellular Ltd. and therefore the same cannot be relied upon for confirming demand under section 73A(2) of the Finance Act, 1994. In support of their first contention, the appellant had submitted during the course of personal hearing, photocopies of two Work Orders issued by M/s. Bharti Cellular Ltd. to the appellant. As regards, the second contention, I find that as per the record, Shri Vipul Zaverbhai Bhalgama is an engineer of M/s. Bharti Airtel Ltd. and therefore how far the significance can be attached to his statement for confirming the

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demand in relation to M/s. Bharti Cellular Ltd. is issue to be pondered over. However, since, collection of service tax on the impugned activity of laying of cable, which the lower adjudicating has held to be non-taxable activity in the impugned order, is question of fact, which can be verified, the issue to this limited extent, is remitted back to the lower adjudicating authority, who shall after verifying the bills and work orders, or through any other means, take a call again, to ascertain, whether the appellant had actually collected service tax from M/s. Bharti Cellular Ltd., so as to warrant confirmation of the demand under section 73A(2) of the Finance Act, 1994. It is stand of the appellant that they have not collected service tax in respect of service recipient, M/s. Bharti Cellular Ltd., and therefore to put to rest these divergent in contention/findings, de novo verification is only alternative.

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10. As regards, imposition of penalty under section 78 of the Finance Act, 1994, I find that the appellant has vehemently pleaded that they had made payment in excess of the amount required to be paid under section 73A(2) of the Finance Act, 1994 and therefore no penalty could be lawfully imposed under sections 77 and 78 of the Finance Act, 1994 in respect of the demand confirmed taking recourse to section 73A of the Act. In support of their above contention, the appellant also relied upon the decision of the Hon'ble Tribunal in the case of M/s. Indian Oil Corporation Vs. CCE, Meerut reported in 2002 (142) **ELT** 157 (Tri-Del) wherein it has been inter alia held as under:-

"There is no short payment of duty by the appellants. They only failed to pay the amount which they collected in excess of the duty from the buyers, in terms of section 11D. Therefore, they could be only directed to pay that amount, the order of the Commissioner regarding imposition of the penalty under section 11 AC and Rule 173Q, as well as 210 of the Rules and demanding interest under section 11AB, is set aside. Appeal allowed."

I also find that in the case of M/s. Daebu Automotive Seat India Ltd. Vs. CCE, Chennai-IV reported in 2012 (286) **ELT** 387 (Tri-Chennai) it has been inter alia held as under:-

"Penalty - Amount collected as duty but not deposited with Govt. - There is no provision either in the Excise Act or Rules for imposition of penalty where demand has been paid under section 11D of Central Excise Act, 1944. Penalty can be imposed only on the demand confirmed under section 11A(1) *ibid* which was further restricted to 25% to be paid within 30 days of the order as the appellant had paid entire amount of duty along with interest before adjudication - Rule 25 of Central Excise Rules, 2002."

*Amis*  
I find that as held at para 8.2 of the impugned order the lower adjudicating authority has confirmed the demand inter alia holding, that, ".....However, as a matter of fact which has not been disputed by the noticee, I also find that the service tax amount collected by them from their clients is required to be credited to the account of central Government under the provisions of section 73A(2) of the Finance Act, 1994."

In light of the above findings of the lower adjudicating authority and contention and case-laws cited by the appellants, I do find force in the plea of the appellant that penalty cannot be imposed upon the

portion of the demand of service tax attributable to demand under section 73A(2) of the Finance Act, 1994, which is *pari materia* with the provisions of section 11D of the Central Excise Act, 1994. I also find that no reference to penal provisions has been made in the text of the section 73A of the Finance Act, 1994 and ipso facto invocation of penal provisions in respect of the demand confirmed under the section 73A is not in order and legal. I accordingly set aside the same.

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10.1 Besides, I find that the appellant has pleaded that once the demand on laying of cable (set aside in the impugned order) is considered, there is no short payment of service tax under category of construction of towers. The appellant contended in the appeal memorandum that, eventually, since the construction of tower has been held to liable to service tax, the service tax payable thereupon on such construction of tower activity came to Rs. 7,76,371/-, which was already paid by them from time to time, before commencement of inquiry and therefore no penalty action is warranted.

I find that, if that is so, as contended by the appellant, the question of imposition of penalty under section 77 and 78 of the Finance Act, 1994 would not arise. I find that the issue had caught seriousness, in the first place, as taxability of laying of cable was considered to be taxable activity. However, since the laying of cable activity, which as per the para 5 of the impugned order, contributed to large portion of overall demand of Rs. 88,59,175/-, which has already been set aside, or confirmed under section 73A(2) of the Finance Act, 1994, the question of the imposition of penalty would naturally not arise.

11. In light of the above discussion and findings, I pass the order as follows:-

(i) I uphold the demand on Construction of tower activity, which the appellant too have not disputed.

(ii) The issue of confirmation of demand of service tax of Rs. 10,02,210/- under section 73A of the Finance Act, 1994, is remitted back to the lower adjudicating, in Light of direction given in the foregoing paras of this order.

(iii) Penalty under section 78 of the Act, on portion on the demand attributable to section 73A of the Finance Act, 1994, is set aside. Also the interest on the portion of demand attributable to section 73A of the Finance Act, 1994 cannot be charged under section 75 of the Finance Act, 1994, and therefore there is no question of charging interest on such amount. The same too is set aside.

(iv) Penalty under section 78 of the Finance Act, 1994 attributable to any portion of demand of service tax on the activity of construction of tower, if paid AFTER initiation of the inquiry, shall stand upheld. However, if the appellant had paid, before, initiation of inquiry, there is no case of imposition of penalty under section 78.

(v) Demand of service tax under section 73A of the Finance, Act, excepting the demand which has been explicitly set aside and the one of Rs. 10,02,210/- which subject to the verification in the proceedings remitted, as discussed in the foregoing para, is confirmed.

(vi) Penalty of Rs. 10,000/- imposed under section 77 of the



*Finance Act, 1944, will stand confirmed, only if any part of service tax liability under construction of tower activity, was not paid before initiation of inquiry, or else the same has to be set aside.*

11.1 *The aspect of the imposition of penalties under section 77 and 78 of the Act, has been deliberately left open, as it is not clearly forthcoming from the impugned order, that the entire portion of the demand of service tax in respect of the activity of the construction of concrete cellular tower has been paid before initiation of inquiry, albeit the appellant has vehemently contended that they have paid the entire liability in respect of the activity of Construction of foundation cellular tower before initiation of inquiry."*

(Emphasis supplied)

2.3 It is on record that the appellant has not gone in appeal against remand portion of this Order-in-Appeal dated 25.02.2013 whereas the department has not gone in appeal against any portion of this OIA dated 25.02.2013.

2.4 In de-novo proceedings, the lower adjudicating authority vide the impugned order has held that the appellant has charged and collected service tax of Rs. 10,02,210/- on the services rendered by the appellant for laying optical fiber cable network for M/s. Bharti Cellular Ltd.; that before 24.05.2010 when CBEC issued Circular No. 123/5/2010-TRU dated 24.05.2010 clarifying that laying of cable is not a taxable service, the appellant was providing services of laying of optical fiber cable network to M/s. Bharti Cellular Ltd., M/s. Idea Cellular Ltd., M/s. Vodafone Essar Gujarat Ltd. and when they had charged service tax on similar work from two different service recipients then not collecting from M/s. Bharti Cellular Ltd. appears to be an apparent mismatch; that the action of the appellant that they had charged and collected service tax on similar work during the same period from other clients leads to convince that the value received from M/s. Bharti Cellular Ltd. included service tax.

2.5 The lower adjudicating authority has also held that the payment of service tax payable on construction of mobile towers was less than the service tax collected by the appellant for construction of towers and laying of optical fiber network for the reason that the appellant had accepted nonpayment of service tax right from the day inquiry was initiated; that the payments made by the appellant during the period of demand were payments made by them towards total liability on "commercial or industrial construction service" and it included service tax on laying of optical fiber network also. Accordingly, the lower adjudicating authority imposed penalty of Rs. 15,38,077/- under Section 78 of the Act on the short payment of service tax payable on construction of towers and also imposed penalty of Rs. 10,000/- under Section 77 of the Act.

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

(a) The demand of service tax of Rs. 10,02,210/- should be quashed and set aside as the appellant has not been collected any service tax from M/s. Bharti Cellular Ltd., Ahmedabad on laying of optical fiber cable network as it was not paid by them on the ground that it is not a service taxable activity. The appellant submitted certificate of an independent Chartered Accountant, certifying that Rs. 10,02,210/- has not been collected from M/s. Bharti Cellular Ltd., Ahmedabad. They also submitted copy of ledger, invoices and work contract entered with M/s. Bharti Cellular Ltd., Ahmedabad to support their above contention.

(b) The demand of penalty under Section 78 and 77 of the Act should be quashed and set aside as they had already paid service tax amount even before the date of commencement of inquiry. The appellant submitted a certificate of M/s. Kared & Co. - independent Chartered Accountants certifying that the appellant has discharged service tax of Rs. 7,86,655/- for the period from 2005-06 to 2009-10 on the activity of construction of towers for M/s. Bharti Cellular Ltd., Ahmedabad. They also submitted copy of ST-3 and challans in support of their contention. The appellant further submitted that lower adjudicating authority has misdirected while confirming penalty under Section 78 of the Act by imposing penalty of Rs. 15,38,077/- while the disputed service tax payable was Rs. 7,76,380/- only for the activity of construction of tower as had already been confirmed in OIA 91/2013(RAJ)CE/AK/Commr(A)/Ahd dated 25.02.2013.

4. Shri Chetan Dethariya, CA, appeared for personal hearing on behalf of the appellant and reiterated the grounds of appeal and submitted that the issues involved in this appeal have been explained by them in their written submission dated 25.04.2017. He emphasized that Rs. 7,69,072/- out of Rs. 7,76,380/-, was paid by the appellant before inquiry was initiated by the department and differential Rs. 7,308/- was also paid before issuance of SCN; that in view of such facts, there is no case of imposition of penalty on them under Section 78 of the Act; that they have not collected any amount of service tax on laying of optical fiber cable network from M/s. Bharti Cellular Ltd., Ahmedabad as no amount was paid by them on the ground that laying of cable is exempted from service tax; that imposition of penalty of Rs. 15,38,077/- is not correct at all as the disputed amount of service tax is only for Rs. 7,76,380/-. The department was given personal hearing notices but no one appeared any time/on any date.



**Findings:**

5. I have carefully gone through the impugned order, appeal memorandum, records of personal hearing and documents submitted by the appellant. uoo

6. The issues to be decided in the present appeal are (i) whether the appellant is liable to pay service tax on service of laying of optical fiber cable network to M/s. Bharti Cellular Ltd, Ahmedabad or not; (ii) whether penalty is imposable on the appellant under Section 77 & Section 78 of the Act or not; and (iii) if imposable, what should be the quantum of penalty?

7. It is a fact, as stated by the lower adjudicating authority that the appellant had provided service of laying of optical fiber cable network to three different service providers, namely, M/s. Bharti Cellullar Ltd., M/s. Idea Cellular Ltd. and M/s. Vodafone Essar Gujarat Ltd. during the period from 2005-06 to 2009-10. It is also a fact as emerging out of certificates of Chartered Accountant, documents submitted by the appellant that they had collected service tax on laying of optical fiber cable network from M/s. Idea Cellular and M/s. Vodafone Essar Gujarat Ltd. but M/s. Bharti Cellular Ltd did not pay service tax to the appellant on the ground that Circular No. 123/5/2010-TRU dated 24.05.2010 has clarified that laying of cables under or alongside roads is not a taxable service. I find that the said Circular dated 24.05.2010 issued by CBEC under subject "Applicability of service tax on laying of cables under or alongside roads and similar activities" has clarified at Sr. No. 2 of Para 3 that laying of cables under or alongside roads is not a taxable service under any clause of sub-section (105) of Section 65 of the Finance Act, 1994. Para 2(iv) of the circular also clarifies that 'site formation and clearance, excavation and demolition services' are attracted only if the service providers provide these services independently and not as part of a complete work such as laying of cables under the road. CBEC Circular No. 123/5/2010-TRU dated 24.05.2010 is reproduced as below:

***Circular No. 123/5/2010-TRU, dated 24-5-2010***

*"Subject : Applicability of Service tax on laying of cables under or alongside roads and similar activities - Clarification regarding.*

*Disputes have arisen in some parts of the country regarding applicability of service tax on certain activities such as shifting of overhead cables to underground on account of renovation/widening of roads; laying of electrical cables under or alongside roads/railway tracks; between grids/sub-stations/transformers the distribution points of residential or commercial complexes and such activities as electrification of railways, installation of street-lights, traffic lights, flood-lights. This clarification takes into account the taxability of different activities taking into account the scope of all services (such as site formation/excavation/ earth moving service, commercial or industrial construction services; erection, commissioning or installation services; or works-contract service) that are presently taxable as well as those which are covered under the Finance Act, 2010.*

***2. Scope of certain taxable services in brief;***

(i) 'Commercial or industrial construction services', in brief, (i) cover construction of and the completion, finishing, repair, alteration, renovation, restoration or similar activities pertaining to buildings, civil structures, pipelines or conduits. Therefore, only such electrical works that are parts of (or which result in emergence of a fixture of buildings, civil structures, pipelines or conduits, are covered under the definition of this taxable service. Further, such activities undertaken in respect of roads, railways, transport terminals, bridges, tunnels and dams are outside the scope of levy of service tax under this taxable service. -30d

(ii) Under 'Erection, commissioning or installation services', (ii) the activities relevant to the instant issue are (a) the erection, commissioning and installation of plant, machinery, equipment or structures; and (b) the installation of electrical and electronic devices, including wiring or fitting there for. Thus, if an activity does not result in emergence of an erected, installed and commissioned plant, machinery, equipment or structure or does not result in installation of an electrical or electronic device (i.e. a machine or equipment that uses electricity to perform some other function) the same is outside the purview of this taxable service.

(iii) 'Works Contract' incorporates the inclusions and exclusions (iii) of the aforementioned two taxable services (amongst others) and it is the nature of the contract (i.e. a contract wherein the transfer of property in goods involved is leviable to a tax as sale of goods) rather than the nature of activities undertaken, that distinguishes it from the previously stated taxable services. Thus, even in the case of 'works contract' if the nature of the activities is such that they are excluded from aforesaid two services then they would generally remain excluded from this taxable service as well.

(iv) 'site formation and clearance, excavation, earthmoving and (iv) demolition services' are attracted only if the service providers provide these services independently and not as part of a complete work such as laying of cables under the road.

### 3. The taxable status of various activities, on which disputes have arisen

Based on the foregoing, the following would be the tax status of some of the activities in respect which disputes have arisen,

S. No.	Activity	Status
1	.....	.....
2	Laying of cables under or alongside roads	Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994
3	.....	.....
4	.....	.....
5	.....	.....
6	.....	.....
7	.....	.....
8	.....	.....

4. The conclusions drawn above are essentially general in nature and would have to be applied in an individual case depending upon its facts and circumstances. The pending disputes/cases may be decided based on the clarifications contained in this circular."

(Emphasis supplied)

7.1 In view of above, it is very clear that laying of optical fiber cables under or alongside roads is not a taxable service and service tax is not payable on the activity of laying of cables under or alongside roads, as has been held in the previous Order-in-Appeal dated 25.02.2013 also. B. S. S.

7.2 However, many service providers including appellant with intent not to get entangled in litigation were charging service tax from their clients. It has been claimed by the appellant that they have collected service tax on services of laying of optical fiber network from M/s. Idea Cellular Ltd. and M/s. Vodafone Essar Gujarat Ltd. but have not

collected any service tax from M/s. Bharti Cellular Ltd., Ahmedabad. The findings of lower adjudicating authority that since the appellant had charged and collected service tax on laying of optical fiber cable network from two service recipients, namely, M/s. Idea Cellular Ltd. and M/s. Vodafone Essar Gujarat Ltd., hence, they must have collected service tax from M/s. Bharti Cellular Ltd., Ahmedabad appears to be factually incorrect and is not supported by any evidences in the impugned order. The lower adjudicating authority has not given any evidence to substantiate his findings in this regard. The appellant has categorically stated that they had neither charged nor collected any amount towards service tax from M/s. Bharti Cellular Ltd., Ahmedabad for laying of optical fiber cable network as it was a non-taxable activity. The appellant has also submitted certificate dated 10.03.2017 of independent Chartered Accountants, namely, M/s. Kared & Co., Rajkot certifying non collection of service tax from M/s. Bharti Cellular Ltd., Ahmedabad. The appellant also submitted copy of ledger for the period from 2005-06 to 2007-08, sample invoices and work contract entered with M/s. Bharti Cellular Ltd., Ahmedabad to support their claim of non-collection of service tax from M/s. Bharti Cellular Ltd., Ahmedabad. In view of above factual position, I am unable to agree with the view of the lower adjudicating authority that since the appellant had collected service tax from M/s. Idea Cellular Ltd. and M/s. Vodafone Essar Gujarat Ltd., then they must have collected from M/s. Bharti Cellular Ltd., Ahmedabad also even when department has failed to give any evidences to this effect and the appellant submitted their accounts duly certified by Chartered Accountant to the lower adjudicating authority.

7.3 The non-taxability of laying of optical fiber cable network rendered by the appellant is not in dispute and CBEC Circular No. 123/5/2010-TRU dated 24.05.2010 has clarified the issue as discussed in Para 7 above and also held in the previous round of Order-in-Appeal dated 25.02.2013 and Order-in-Original dated 29.02.2012(Para 8.2) also. Since, service tax liability does not arise on laying of optical fiber cable network, the appellant is not required to pay service tax for services provided to M/s. Bharti Cellular Ltd., Ahmedabad as it has not been collected by the appellant from M/s. Bharti Cellular Ltd., Ahmedabad. In view of this factual position, confirmation of service tax liability of Rs. 10,02,210/- by the impugned order is set aside.

8. The appellant has contested imposition of penalty of Rs. 15,38,077/- under Section 78 of the Act on the ground that they have discharged their liability of service tax on service of "construction of mobile towers" along with interest before issuance of show cause notice. I find that they have claimed to have paid service tax of Rs. 7,69,072/- along with interest before initiation of inquiry in the course of routine monthly compliance and these facts have also been duly reflected in ST-3 returns and



they have paid Rs. 7,308/- after initiation of inquiry but before issue of SCN. This has also been confirmed vide letter F. No. IV/15-112/ST/REC/16-17 dated 24.05.2017 by the Assistant Commissioner, Service Tax Division, Rajkot wherein he has stated that the Range Superintendent, AR – II, Rajkot vide his letter F. No. AR-I/RJT/Jeet/2005-06 dated 18.05.2017 has submitted that the appellant had paid service tax Rs. 7,69,072/- on "construction of tower" during the period from 05.07.2005 to 27.05.2008 through various challans. The remaining amount of Rs. 7,308/- was paid on 10.11.2009 i. e. after investigation but before issuance of Show Cause Notice. In such a factual position, imposition of penalty of Rs. 15,38,077/- is not correct, legal and proper and penalty of Rs. 7,308/- only can be imposed as discussed below.

8.1 OIA 91/2013(RAJ)CE/AK/Commr(A)/ahd dated 25.02.2013 passed by the then Commissioner (Appeals) has upheld penalty under Section 78 of the Act attributable to that portion of demand of service tax, which is related to activity of construction of mobile towers, only if the appellant has not paid service tax before initiation of inquiry by Rajkot Commissionerate. I agree to this view. It is a fact as stated by the department in letter dated 24.05.2017 of the Assistant Commissioner, Service Tax Division, Rajkot that Rs. 7,69,072/- has been paid by the appellant as service tax on the activity of construction of mobile towers in the course of routine monthly compliance and much before initiation of inquiry. However, service tax of Rs. 7,308/- was paid along with full interest after initiation of departmental inquiry and hence penalty of Rs. 7,308/- can be imposed under Section 78 of the Act, if ingredients to impose penalty under Section of the Act is present in the case.

8.2 I find that Section 78 of the Act was amended with effect from 14.05.2015, which stipulated 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 78 would be applicable. In the instant case, the SCN was issued on 13.09.2010, Order-in-Original was passed on 29.02.2012, Order-in-Appeal was passed on 25.02.2013 and case was pending for orders under de-novo proceedings and hence amended Section 78 shall not be applicable but Section 78 of the Act as it existed in 2005-06 to 2009-10 would be applicable.

8.4 It is a fact that the transactions are available in the specified records of the appellant hence penalty @ 50% of service tax amount is imposable as per 1<sup>st</sup> proviso to Section 78 of the Act. Therefore, I am of the considered view that penalty of Rs. 3,654/- is imposable on the appellant under the then proviso to Section 78 of the

Act.

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8.5 I find that the appellant did not pay their full service tax liability and hence penalty of Rs. 10,000/- imposed under Section 77 of the Act for the said contravention is reasonable and proper and I uphold the same.

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

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

*(Handwritten Signature)*  
 (कुमार संतोष)  
 आयुक्त (अपील्स)

By Speed Post

To, <b>M/s. Jeet Construction Co.,</b> "Shivam", Sakhiyanagar Main Road, Near Airport, Rajkot-360001.	प्रति, मे. जीत कन्स्ट्रक्शन कं., "शिवम", सखियानगर मेइन रोड, एयरपोर्ट के पास, राजकोट - 360001.
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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, Division - I, Rajkot.
4. Guard File.