



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



द्वितीय तल, जी एस टी भवन / 2nd 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 / G.O. No.	दिनांक / Date
	V2/204 /RAJ/2016	01/ST/2016-17	26.05.2016

4448 & 4448
4261 & 4262

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

RAJ-EXCUS-000-APP-040 -2017-18

आदेश का दिनांक / Date of Order:	11.09.2017	जारी करने की तारीख / Date of issue:	12.09.2017
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कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

ग अथवा आयुक्त/ संयुक्त आयुक्त/ उप-आयुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गान्धीधाम। द्वारा उपलब्धित जारी मूल आदेश से सूचित: /

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. Khedut Hat,, Moti Bazar,, Darbar Chowk,Gondal - 360311

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

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित 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) विशेष न्यायालय से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपील 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 बतलाने वाली अपील के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, श्यामली भवन अशाही अहमदाबाद-380016 को की जानी चाहिए। /
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Shyamali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपील न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवाली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये फॉर्म EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की श्रेणी, व्याज की श्रेणी और लगाना तथा जुर्माना, रुपये 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 सलमन करे। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सर्वव्यक्ति होर के बैंक द्वारा जारी रेकॉन्सि बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। स्थान आदेश (स्टै ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपये का निर्धारित शुल्क जमा करना होता। /

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/fund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपील न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत 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 सलमन करे (उसमें से एक प्रति धसमणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की श्रेणी, व्याज की श्रेणी और लगाना तथा जुर्माना, रुपये 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 सलमन करे। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सर्वव्यक्ति होर के बैंक द्वारा जारी रेकॉन्सि बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। अथवा आदेश (स्टै ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपये का निर्धारित शुल्क जमा करना होता। /

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) विल अपीलियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दंडों की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रथम S.T.-7 में की जा सकती एवं उसके साथ अनुसूक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पत्रित आदेश की प्रतियाँ संलग्न की जा सकेंगी एवं उनके साथ अनुसूक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पत्रित आदेश की प्रतियाँ संलग्न की जा सकेंगी एवं उनके साथ अनुसूक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पत्रित आदेश की प्रतियाँ संलग्न की जा सकेंगी।
 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.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की विलीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करने समय उत्पाद 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 अपीलित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'जमा किए गए शुल्क' में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेस्टैट जमा की गई गलत राशि
- (iii) सेस्टैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्त कि इस धारा के प्रावधान विलीय (सं. 2) अधिनियम 2014 के अंतर्ग में पूर्व किसी अपीलीय प्राधिकारी के अग्रत विचारणीय प्रस्ताव अर्जों एवं अपील को लागू नहीं होगी।

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.

Under Central Excise and Service Tax, "Duty Demanded" shall include :

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules

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

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

इस आदेश की पुनरीक्षण प्राधिकर निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम प्रपत्र के अंतर्गत अग्रत पत्रित, भारत सरकार, पुनरीक्षण आवेदन ईकाई, विल अखण्ड, राजस्व विभाग, चौथी मंजिल, लोक टॉप भवन, हाट 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 मांग के किसी नुकसान के मामले में, जहां नुकसान किसी मांग 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 मांग के पारगमन के दौरान, किसी कारखाने या किसी भंडार गृह में मांग 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 मांग के विनिर्माण में प्रयुक्त कच्चे मांग पर गरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है।
 In case of rebate of duty of excise on goods exported to any country or territory outside India of an excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को मांग निर्यात किया गया है।
 In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इमुटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा विल अपीलियम (सं. 2), 1998 की धारा 109 के द्वारा निर्यात की गई लोहा अथवा स्मॉलफायरि पर या बंद में पत्रित 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. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रथम संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संशोधन 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 अद्यतनी के साथ धारा 11-6 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 O.I.O and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अद्यतनी की जानी चाहिए।
 जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो ती रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
 The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त इन से किया जाना चाहिए। इस तथ्य के होने हुए भी की निष्ठा पढी कार्य से बचने के लिए सहाय्यिता अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार 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 Appellate Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if existing Rs. 1 lakh fee of Rs. 100/- for each.

(E) ब्याजसंशोधित 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 जमा होना चाहिए।
 One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सर्वे विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्बन्धित करने वाले नियमों की और भी ध्यान आकर्षित 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 अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम धारणाओं के लिए, अपीलीय 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

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M/s Khedut Hat, Moti Bazar, Darbar Chowk, Gondal- 360311(hereinafter referred to as 'the appellant') have filed the present appeal against the Order-in-Original No. 01/ST/2016-17 dated 26.05.2016 (hereinafter referred to as the 'impugned order') passed by the Assistant Commissioner, Service Tax Division, Rajkot (hereinafter referred to as the 'the lower adjudicating authority').

2. The facts of the case are that the appellant was not paying service tax on the taxable services under the category of "site formation and clearance, excavation, earthmoving and demolition service" provided to their various customers. The appellant held "license to possess explosive for use" (Form No. 22) from "Petroleum and Explosive Safety Organization (hereinafter referred to as "PESO") for use of explosives by them at the site of clients under their supervision and control. Form 22 holder can purchase the permitted quantity, multiple times in a month, as provided in license, from authorized seller of such explosive who possess license in Form No. 21. The appellant cannot sell their explosive but have to consume explosives before closure of the firm. Appellant's main clients are Contractors of Canal, Bridge, Pipeline and owner of mines/crusher for mining/excavation/digging earth, breaking stones/rocks. Their clients give them the number of holes to be exploded and the appellant shot firer decides the quantity of explosives to be used and takes the materials from their magazine in their explosive van to the site of client. Their shot firer fires/charges the explosive at the premises of the clients and whatever excess explosive remains is returned back to their magazine. So the appellant does not hand over any material/explosives at any point of time to any client. The explosives are consumed during the provision of service and there is no delivery of explosives as these are never handed over to any client, thus it can't be said sale of explosives and all work/activities carried out by the appellant fall under "service" as per Section 65(44) of the Finance Act, 1994 (hereinafter referred to as the "Act") and fall under the category of "site formation and clearance, excavation, earthmoving and demolition service" under Section 65 (97a) of the Act. However, the appellant was neither registered with the department nor paying service tax on the said services. Hence, a Show Cause Notice No. VI(a)/16-17/SCN/AC/ST/15-16 dated 10.02.2016 for the period from April, 2014 to March, 2015 was issued to the appellant and demand confirmed vide impugned order, wherein the lower adjudicating authority confirmed demand of service tax of Rs. 4,19,711/- under Section 73 of the Act; ordered recovery of interest under Section 75 of the Act and also imposed penalties


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under Section 70, Section 77 and Section 78 of the Act.

3. Being aggrieved by the impugned order, the appellant has preferred the present appeal, inter-alia, on the below mentioned grounds:

(a) Whole Activity has been carried out as per provision under Explosive Rules, 2008 framed under Explosive Act, 1884 (4 of 1884). The appellant carried out the activities as per the statutory requirement and hence, they are not liable for service tax. They placed reliance upon the case law of Harshita Handling reported as 2010 (19) S.T.R. 596 (Tri- Delhi).

(b) The lower adjudicating authority held in the impugned order that the appellant has undertaken drilling work to feed the explosives and blast the hard rock/soil and therefore activities of the appellant fall under the category of "site formation and clearance, excavation, earthmoving and demolition service". The appellant stated that the lower adjudicating authority has erred in defining the work done by the appellant. The appellant is simply supplied the blasting materials and explosives and as per the requirement, drilling work is done to feed the explosive and blast the hard rock or soil. The appellant even did not remove or gather the rock or soil which comes out due to blasting. The appellant did not engage any person for leveling of the area or to engage in any other manner in order to make the site usable for any purpose. Thus, the demand of service tax under the category of "site formation and clearance, excavation, earthmoving and demolition service" is incorrect. They relied on the judgments (i) Indo Nippon Chemicals Co. Ltd. - 2009 (16) STR 639 (Tri-Ahmd.); (ii) Purni Ads. Pvt. Ltd. - 2010 (19) STR 242 (Tri.- Ahmd.); (iii) Canny Detective & Security Services - 2010 (20) STR 695 (Tri.- Ahmd.); and (iv) Kirloskar Pneumatic Co. Ltd. - 2011 (22) STR 121 (Tri.- Mumbai), without specifying as to how these case laws are applicable to them.


119 (c) The appellant has supplied the materials to their customers. Their main work has been to supply explosives and blasting materials and the appellant has charged only for the same and they have not charged for any service. The work of blasting, transportation and shot firing were incidental to sale of explosives as per statutory obligation. The appellant stated that the work incidental to sale/supply of goods is not service taxable and they have paid the applicable VAT on explosives. They placed

reliance upon a case law of M/s. SIEMENS PRODUCTS LIFECYCLE MGMT. SOFTWARE INDIA P. LTD 2015 (40) STR 726.

(d) The appellant has not charged any amount from his customers other than the price of explosives and other blasting materials plus profit margin and VAT. Actually appellant's activity is nothing but sale and it does not amount to providing service. Since the appellant has not received any consideration for alleged service the very first condition of service is not fulfilled and hence activity is not taxable. They placed reliance upon the case law of M/s. Hindustan Zinc Ltd. Vs Commercial Taxes officer [TS-406-SC-2014-VAT].

(e) This case is made absolutely on the basis of interpretation of law. Hence demand can be made under normal period of eighteen months and the demand beyond normal time is time barred i. e. for the period prior to 10.08.2014.

(f) This case is absolutely on the basis of interpretation of law and the appellant still believes that service tax is not leviable on sale of explosive. The appellant has been paying VAT considering the work as sale and had the same categorized under service tax, the appellant would have paid service tax. There was no mala fide intention in the part of the appellant to evade payment of service tax. Therefore, no penalty should be imposed on them.

(g) One of the appellant's clients named M/s. Varun Construction Company has used the activities of the appellant for construction of landfill site for disposal of rejected waste as per work order given by Municipal Corporation of Rajkot, which falls under the exempted category as per Notification No. 25/2012 – ST dated 20.06.2012 [Sr. No. 25(a)]. Thus, the work done by the appellant for main contractor is exempted and not taxable. Similarly, another appellant's clients named Shri Bipinbhai Mohanbhai Patel used the activities of the appellant for construction of Road which falls under the exempted category as per Notification No. 25/201 – ST dated 20.06.2012 [Sr. No. 13(a)]. Thus, work done by the appellant for this main contractor is also exempted and not taxable.

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(h) The lower adjudicating authority has categorized and defined the service rendered by the appellant under "site formation and clearance, excavation, earthmoving and demolition service" and not under the "Work Contract Service". If the service does not fall under the category of Work Contract then only service portion is required to be taxed not the value of material. In this case lower authority has considered the full value of transaction, including the price of blasting material's cost. The blasting material's cost can be derived from the price at which the same was purchased. So value of service is value of service, as per order i.e. Rs. 43,95,732/- minus purchase cost i.e. Rs. 40,52,310/- is Rs. 3,43,422 (which is less than 10 Lakhs). Thus, service tax is not payable as per Notification No. 33/2012 – ST.

4. Personal Hearing in the matter was attended to by Shri N. M. Unakdat, C.A. who reiterated the grounds of appeal and submitted that the actions undertaken by the appellant is covered as sale as decided by the Hon'ble High Court of Rajasthan and upheld by the Hon'ble Supreme Court; that they undertake delivery of explosives at the depth of 3' to 6' below ground level, then they feed explosives and blast the land rock and soil but do not remove debris, hence is it not any taxable service; that these actions are incidental supply/sale of goods i. e. explosives, as held in Hindustan Zink Ltd. case; that the demand prior to 10.08.2014 is time barred; that service tax can't be demanded on full value but on value/consideration received by them for the activity minus purchase cost of explosives and other material.

Findings:

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

6. The issues to be decided in the present appeal are (i) whether the appellant is liable to pay service tax against the activities done by them under the category of "site formation and clearance, excavation, earthmoving and demolition service", or otherwise and (ii) whether penalty is imposable on the appellant under Section 70, Section 77 & Section 78 of the Act or not.

7. I find that the lower adjudicating authority has held the activities carried

out by the appellant is "service" on the ground that the appellant's activities do not mean "sale" of goods. In the sale of goods, the goods have to be delivered/handed over to the buyer by the seller in as such condition. In this case, there is no delivery of goods and goods are not handed over to the customer. The appellant has stated that they cannot hand over the explosives to their customers as per Explosive Rules, 2008. The appellant has accepted to have charged from their customers the price of explosives and other blasting materials plus profit margin and VAT. I do not find force in the arguments of the appellant as they are purchasing explosive materials but not selling the same to their customers but undertaking activities like blasting, for the purpose of site clearance. The case of M/s. Hindustan Zinc Ltd. Vs Commercial Taxes officer, Udaipur is not relevant as because it was a case of supply of explosives by M/s. Hindustan Zinc Ltd. to their contractor who had been undertaking blasts and not the activities of the contractors under taken, what has been held is that *"Supply of explosives to contractor for use in mining operations constitutes 'sale' " and nothing has been held that activities of contractor undertaken are sale.*

8. I find that many activities have been carried out by the appellant as per provisions of the Explosive Rules, 2008 framed under Explosive Act, 1884 (4 of 1884). The appellant argued that they carried out activities as per the statutory requirement and hence not liable for service tax. I find that the nature of activities carried out by the appellant is not open for all in general but to be carried out by few authorized persons who hold valid licence under Explosive Rules, 2008 framed under Explosive Act, 1884 (4 of 1884). However, the activities undertaken by the appellant to their customers do constitute service as these activities are not statutory obligations of the government. I, therefore, find that the ratio of case law of Harshita Handling reported as 2010 (19) S. T. R. 596 (Tri. Del) is not applicable at all.

8.1 I do not find that the appellant has simply supplied the blasting materials & explosives but they carried out drilling work to feed the explosives and blast the hard rock or soil as per requirement of their customers. It is not essential that the service of removing debris is necessary to define the activities undertaken by the appellant. The work undertaken by the appellant has to be termed as site formation and clearance, excavation, earth moving and demolition service.


8.2 I am of the considered view that the activities carried out by the appellant is a "service" and not "sale" of explosives.

9. In view of the discussion as held above, I find that the value of the material of explosives received during supply of the said services should be included in the taxable value of the said services, in terms of Section 67 of the Act read with Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006. The taxable value for charging service tax is the gross amount charged by the appellant for such service provided and should also be inclusive of all other elements of expenses including value of material of explosives. Therefore such charges are required to be included for the purpose of charging service tax.

10. In view of above facts and circumstances of the case, I have no option but to reject the appeal and I do so.

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

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


 (कुमार संतोष)
 आयुक्त (अपील्स)

By R.P.A.D/Speed Post.

To,

M/s. Khedut Hat, Moti Bazar, Darbar Chowk, Gondal- 360311	मेसर्स खेडूत हट, मोटी बाज़ार, दरबार चौक, गोंडाल- ३६०३११
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Copy to:

1. The Chief Commissioner, GST and Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST and Central Excise, Rajkot Commissionerate, Rajkot.
3. The Assistant Commissioner, GST and Central Excise Division-II, Rajkot.
4. Guard File.