

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

दवितीय तल, जी एस टी भवन / 2<sup>nd</sup> Floor, GST Bhavair,

रेस कोस रिंग रोड. / Race Course Ring Road.

राजकोट / Rajkot - 360 001

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रजिस्टर्ड डाक ए. डी. दवारा :-

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V2/261/RAJ/2016 6 61 3 50 64

मून अदेश गाः O10 No

Diese /

DC/JAM/ST/01/2016-17

30.09.2016

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

# RAJ-EXCUS-000-APP-077 -2017-18

आदेश का दिनांक /

27.09.2017

जारी करने की तारीख

29.09.2017

Date of Order:

कुमार संतोष, आयुक्त (अपील), राजकोट दवारा पारित / Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

Date of issue:

अगर आयुक्ता अञ्चल अञ्चला उपयुक्ता सहायक आयुक्ता केन्द्रीय उत्पाट कृत्वा संवाकर, राजमीर ( जासलार ) संवीधासः द्वारा उपरसिव्धित जारी ग मूल आदेश से स्थित /

Arising out of above mentioned OIO issised by Additional/Joint/Deputy/Assistant Committationer, Central Excele / Service Tax. Rajkot / Jamnagar / Gandhidham

अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name&Address of the Appellant & Respondent :-M/s. Saraswati Engineering., Block 8-A, Moti Nagar., Co-Operative Society., Sikka Patiya, Dist : Jamnagar

इस मादेश(मपील) से त्यपित कोई त्यक्ति सिम्मलिक्ति तरिके से उपयुक्त प्राधिकारी । प्राधिकारण के समक्ष अपील दावर कर सकता है।/ Any person aggreeved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way

सीमा शुन्क केन्द्रीय उत्पाद शुन्क ार्च मेताका अर्थाजीय स्थापाधिकाण के वर्ति अपील, केन्द्रीय उत्पाद शुन्क ऑग्नियम 1944 की धारा 358 के अन्नेत एवं वित्त अधिनियम, 1994 की धारा 86 के अन्नेत निम्नोतिशित जगह की जा सकती हैं ए (A)

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 358 of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal less to

वर्गीकरण मृत्याकन में संस्कृतियात तथी मामने सीमा कुन्क, केन्द्रीय उत्पादन कुन्क एवं सेसकर अपेशीय न्यायाणिकरण की विशेष पीठ, तेसर बर्नाक स 2. भार के पुरस सह दिल्ली, को की नानी साक्षिण ए (0)

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

उपरांका परिच्छेद १(अ) में बताए तए अपीनों के अलाग तक सभी अपीने सीमा शुरूक केंद्रीय उत्पाद शुरूक एवं संवाकर अपीनीय स्थायाधिकरण (सिम्टेट) के पश्चिम क्षेत्रीय फीठिकर , दक्षितीय तान, बहुमानी मारन अभावों अहमदाबाई- २०००६ की की जानी पाहिए प्र 0.0

To the West regional trench of Eustoms, Excise & Service Tax Appellate Tribunal (CESTAT) at 2" Floor, Bhaumali Bhawan, Asarwa Ahmedabad-385016 in case of appeals other than as mentioned in para: 1(a) above

अभीकीय न्यायाधिकरण के शतक अभीन परनून करने के लिए केन्द्रीय उत्पाद शुरूक (अभीन) नियमावनी, 2001 के नियम 6 के अनरन जियोदिन किए सर्य प्रयद EA-3 की यार पनियो में दर्ज किया जाना पातिए। इनमें में कम में कम एक पति के साथ, जहां उत्पाद शुरूक की मींग न्याज की पति नियम के अध्या 50 लाख क्या में अधिन है तो कमल 1,000/- रुपये अथा 10,000/- रुपये का नियादिन जाग शुरूक की पति सामन की। नियादिन शुरूक का अगलान मंत्रीयिन अभीकीय न्यायाधिकरण की शासा के सहायक प्रतिन्दार के लाख में कीमा भीकीय न्यायाधिकरण की शासा के सहायक प्रतिन्दार के लाख में होगा पतिए। जा स्थितिन अपीनीय न्यायाधिकरण की शासा दिखत है। स्थानन आदेश (उट्ट अपित) के लिए आदेदन-पत्र के लाख 500/- रुपए का नियादिन शुरूक जमा करना होगा। (140

The appeal to the Appellate Tribunal shall be filled in quadruplicate in form EA-3 2 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 demandinterestromaty/refund is upto 5 Lac., 5 Lac. to 50 Lec 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. 500i.

अभीकीम क्यापाधिकरण के समझ अपील, विका अधिनियम, 1994 की धारा तर्त्त संवादत सेवादत सिवस्वाली, 1994, के जियम (6)) के लहत निर्दारित पाप 5.1.5 में धार पतियों से की जा सकेशी एवं उनके साथ दिल आदेश के विरुद्ध अपील की गयी ही, उसकी पति साथ से मतन करें (उनसे में एक पति प्रसाधित होनी चाहिए) भीर इनसे से कम से बस एक पति के साथ, जहां मैवाकर की मांग उपाज की मींग और तसाय स्था जुमील, उपाए 5 लाख पर उससे कम 5 लाख उपाए था 50 साथ उपाए तक मध्या 50 लाख उपाए से अधिक है तो बमश 1,000% उपयो 5,000% उपयो 10,000% उपयो का लिखीरित अस्त शतन की पति सतस्य बरें। निर्धारित शुक्त का मुसानत समीचित भवीतीय क्याधिकरण की शाखा के महायक इजिस्टान के लाम है किसो भी साथितित्यक क्षेत्र के बेंद इंगाए जारी जिल्लीकर देन हायर द्वीरात किया जनता साथित। सम्बाधन अपीतीय ज्याधिकरण की शाखा के बैंक की उस शाखा में होना पाणिए जुक्त समीचित अपीतीय ज्याधाधिकरण की शाखा विभात हैं। स्थान अधीश (मेरे आहेर) के लिए आहेदन-पत्र के साथ 500% स्थाप मा निर्धारित शुक्त उस्ता करना होता। (B)

The appeal under sish section (1) of Section 86 of the Finance Act, 1954 to the Appellate Tribunal Shall be filled 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 comfied copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakts or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five takes but not exceeding Rs. Fifty Lakes, Rs.10.000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakes rupees, in the form of crossed bank draft in tayour of the Assistant Register 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/-

- वित्त अधिनियम, 1994 की धारा 85 की उप-ध्याओं (2) एवं (2A) के अतरोत दर्ज की नदी अपीत, तेवाका नियमवाली, 1994. के नियम 9(2) एवं (1) 9(2A) के तहार विधितित प्रयप S.T. 7 में की जा अवेशी एम उसके आधा अध्युक्त, केनदीय उत्पाद शुरूक अध्यत आयुक्त (अपीज), केनदीय उत्पाद शुरूक दक्का पारित अदेश की प्रतियों समस्य की (उभने से एक पनि प्रभागित होनी प्राहित) और अग्रका दक्का प्रहासके आयुक्त अधना उत्तरपुक्त केन्द्रीय इत्पाद शतका संसामा, को अपीतीय न्यायाधिकरण को आवेदन दन्ने करने वर निर्देश देने वाने अदेश की पति भी शता में संसम्भ करनी होगी । / The appeal under sub-section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules. 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Exciser Service Tax to file the appeal before the Appaltate Tribunal
- #. केंग्रीम इत्याद शुल्क एवं मेवाकर आंग्रेलीय वाधिकरण (संस्टेट) के पति अयोगों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35रफ के ऑस्पेन, जो की किलीय अधिनियम, 1994 की धारा 83 के अस्पेन सेवाकर को भी लागू की गई है, इस आदेश के पनि अधीनीय पाधिकरण में अधीन करने समय उत्पाद शुरूकरमेगा कर मांग के 10 परिश्वात (10%), जब गान एवं जुमीना विवादित है, या जुमीना जब केवल जुमीना विवादित है, का मुगतान किया जाए, बक्ती कि इस धारा के अस्पेन जमा कि जाने वाली अधीनित देय एशि दम करीड़ न्याए में अधिक म ही।

केन्द्रीय उत्पाद मुख्य एवं शेक्षान्य के अतमीत 'साम किए सार शुरूक' से लिश्न सामित है पारा 11 ही के अवसीत रकत

- संसर्वेट जन्म की भी गई गतल शक्ति 665
- बेजरेट जमा नियमायती के ज़ियम 6 के अंतरीत देश (भाग (86)

- बक्तरी यह कि इस धारा के प्राथमान जिल्लीय (n. 2) अधिनियम 2014 के भारम से पूर्व किसी अधीरीय प्राधिकारी के समक्ष विधाराधीन रक्षमान अजी एवं अपील को लागू रही होगे।/

For an appeal to be filed before the CESTAT, under Section 35F of the Cardral 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-doposit payable would be subject to a ceiling of Rs. 10 Crores.

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

- amount determined under Section 11 D:
- amount of empreous Cenvat Credit taken 60
- amount payable under Rule 6 of the Cernat Credit Rules. 010
- 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.

#### भारत सरकार को प्रतीक्षण आवेदन :

(C)

Revision application to Government of India: इस अध्येश की पुन्तीकाचा धारिका किम्मनिवित मामनो से केटीय अध्यट शुन्त अधिनियम १९९४ की घटा 35EE के प्रथम परापक के आर्थन अवट क्षत्रिक, मारान सरकार, पुनरीकाच आर्थेटन ईकाई, विरुप अध्याप, एजस्य विकास, धीयो मानिया, जीवन टीप कवल, समद मार्ग, नई दिल्ली 110001 को Swan sesan surface.

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 Parlament Street New Celhi 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 (bit).

- यदि सात के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारधाने में अधर गृह के पारगमन के दौरान या किसी अन्य कारखाने या किर किसी एक मेंबर गृह से दूसरे भंगार गृह पारगमन के दौरान थर किसी भंडार गृह में या भंडारणे में मान के प्रमतकार्य के दौरान किसी कारखाने या किसी भंडार गृह में मार्च के गुकरान के मामले में। III
  - In case of any loss of goods, where the loss occurs in transit from a factory to a wurehouse or to another factory or from one warehouse to another during the course of processing of the goods in a wurehouse or in storage whether in a factory or in a warehouse
- भारत के बहुर किसी राष्ट्र या होंच को नियान कर रहे मान के तिनिर्माण में प्रमुक्त करने मान पर भी गई केन्द्रीय उत्पाद शुल्क के तुर (पिबेट) के मामसे में, जो भारत के बहुर किसी राष्ट्र या होंचे को निर्मात की गयी हैं। ? 00 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
- वरि उत्पाद शुल्क का अुमाना किए फिल आरम के बाहर, वेपान या भूटान को गांव विश्वान किया गया है। / (111) In case of goods exported outside india export to Nepili or Bhutiin, without payment of duty.
- मुजिजियन उत्पाद के उत्पादन शुरूक के मुजनान के लिए उठ दण्टी केबीट इस अधिनियम एवं इसके विभिन्न पातपानी के तहन मान्य की गई है और ऐसे अंटेक जो अधुक्त (अपीन) के देवारा किन्न अधिनियम (न. 2). 1998 की धारा 100 के दुवधा विश्वन की गई नारीख अधवा समासाविधि या या बाद में पासित किए गाँ हैं।2 (IV)

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.

उपयोगार अर्थदम की दो परिषय प्रथम संदया EA-8 मी भी के कर्दीय उत्पादन शुल्य (अपीस) नियमायारी 2001, के लियम 9 के अंतरीत विसिद्धिय है. इस आदेश के संवेषण के 3 मान के अन्तरीत की जानी चाहिए । उपरोगन अर्थदम के लाय मूल आदेश व अर्थित आदेश की दो परिचया सन्तरन की जानी पाविश आप में अर्थित उत्पाद शुल्य अरिपतियम, 1944 की घारा 35-EE के लाल विध्योगित शुल्य की अर्थ्यमी के मारूच के लीं, पर TR-4 की प्रति (v)

The above application shall be made in duplicate in Form No. EA-6 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 lee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account. सामान की जानी पातिए। /

- पुनरिकाण अवेदन के लाथ निरन्तिकित विधीरित कुल्क की अदायमी की कानी पाहिए । जहाँ अतरन रकन एक लाख हमार्थ था उससे कम ही तो कपये 2007 का मुहलात किया जाए और गाँद सतरन रकन एक लाख क्यमें से उकादा ही तो (vi) The revision application shall be accompanied by a fee of Rs. 2001- where the amount involved in Rupees One Lac or less and Rs. 19901- where the amount involved in roote than Rupees One Lac. यमे 1000 / का भूगताल किया जाए ।
- पदि इस आदेश से कई सुझ आदेशों का असावेश हैं जो पार्थक सूत्र आदेश के लिए शुरूक को सुनातल. उपगुक्त देग से किया जाना पाहियों। इस तक्य के हिने हुए भी की लिखा पढ़ी कार्य से शयते के लिए पार्थियों। अपीतीय न्याणिकरण भी एक अपीत या केटीय सरकार को एक अपदेश किया जाना है। । In case, if the order covers various numbers of order in Original fee for each OLO, 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 Gost. As the case may be, is filled to avoid scriptoria work if excising Ris. 1 take fee of Ris. 1000- for each. (D)
- वकासंभाषित स्थायासय शुल्क अधिनियस. १९७५ के अनुसूची । के अनुसार मूंग आदेश गर स्थास आदेश की पति पर सिर्धारित ६५० रणये का (E) न्यायासम् शुरुक टिकिट समा होता चाहिए। One copy of application or O.s.O. as the case may be and the order of the adjudicating authority shall beer a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act. 1975. as amended
- तीमा शुरूक केन्द्रीय उत्पाद शुरूक एवं सेटाकर अपीतीय स्थापाधिकाल (कार चिति) विश्वासको 1982 से वर्णित एवं अस्य संबंधिया मामजों की तरिकालित करने बाते जिल्ला की और भी च्याज आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs. Exceed and Service (F) Appellate Tribunal (Procedure) Rules, 1982.
- स्वीतीय प्रतिकारी को अपील टाविन करने में सर्वापन स्थापक विश्तृत और नवीरताथ प्रतापालों के लिए अपीलापी विभागीय वेकासदूर (G) www.cbec.gov.in भी देख गमते हैं For the elaborate detailed and latest provisions relating to filing of appeal to the higher appealant authority, the appealant may refer to the Departmental website www.cber.gov.in



# ::ORDER-IN-APPEAL::

M/s. Sarawati Engineering Block 8-A, Moti Nagar Co-operative Society, Sikka Patiya Tal. & Dist Jamnagar (hereinafter referred to as "the appellant") against Order in Original No. DC/JAM/ST/01/2016-17 dated 30.09.2016 (hereinafter referred to as "the impugned order") passed by the Deputy Commissioner, Central Excise, Jamnagar (hereinafter referred to as "the lower adjudicating authority").

- 2. The facts of the case are that during the course of audit, it was observed that the appellant had provided erection & dismantling of scaffolding under taxable category of Erection, Commissioning and Installation Service, as defined under Section 65(105)(zzd) readwith Section 65(29) of the Finance Act, 1994 (hereinafter referred to as "the Act"), and paid service tax on gross value upto 06.09.2012, however, thereafter the appellant started paying service tax on 25% of taxable value of such service provided to M/s. Leo Coats (India) Pvt. Ltd. under Notification 30/2012-ST classifying the said services as "Manpower Supply", whereas the appellant continued to pay service tax on gross taxable value of such service provided to their other service recipients. On being asked, the appellant informed that with effect from 07.09.2012, they were not considering the said service under Erection, Commissioning and Installation service but as Manpower Service for M/s. Leo Coats (India) Pvt. Ltd. only and therefore they paid service tax on 25% of taxable value under the Notification No. 30/2012-ST. Show Cause Notice No. V.ST/AR-II/JMN/ADC(SS)/203/2014-15 dated 12.01.2015 covering the period from F.Y. 2009-10 to 2013-14 was issued, which was adjudicated vide OIO No. 10/ADC/PV/2015-16 dated 29.05.2015 and the same was upheld vide OIA No. RAJ-EXCUS-000-APP-043-16-17 dated 29.08.2016.
- 2.1 The appellant vide letter dated 29.07.2015 submitted details regarding said service valued at Rs. 43,56,113/- provided to M/s. Leo Coats (India) Pvt. Ltd. for the subsequent year 2014-15 and informed that they had paid service tax of Rs. 1,34,604/- (@25%) considering the service as manpower supply service.

- 2.2 SCN No. V.ST/JMN-02/Demand/16-17 dated 19.04.2016 (hereinafter referred to as "the impugned SCN") was issued for subsequent period for year 2014-15 proposing recovery of service tax of Rs. 4,03,812/-under proviso to Section 73(1) of the Act along with interest under Section 75 of the Act and imposition of penalties under Section 76, 77 and 78 of the Act. The lower adjudicating authority, vide impugned order, confirmed demand of service tax under Section 73(1) of the Act and interest under Section 75 of the Act and also imposed penalty under Section 76 and Section 77 of the Act and dropped penalty under Section 78 of the Act.
- Being aggrieved by the impugned order, the appellant filed present 3. appeal, interalia, on the grounds that the lower adjudicating authority has erred in classifying their activity as 'Erection, Commissioning and Installation Service' instead of 'Manpower Supply Service'; that the appellant had to provide workers to M/s. Leo Coats (India) Pvt. Ltd. as per contract to carry out erection and dismantling work; that the consideration of service provided shall be based on number of workers supplied and number of days worked by labour; that the due tax (remaining 75%) has already been paid by the service recipient under reverse charge mechanism during the year 2014-15 and there was no revenue loss to the government; that judicial precedent as decided in the matter of Navyug Alloys P. Ltd reported as 2009 (13) STR 421 (Tri.Ahd) was not followed in the impugned order; that the appellant has provided manpower supply service and paid service tax on 25% of taxable value and filed ST-3 returns, there is no suppression of facts and no evasion of service tax, therefore no penalty under Section 76 of the Act should be imposed; that the appellant is not liable to penalty under Section 77 of the Act as they properly classified the service under taxable category of manpower supply service.
- 4. Personal hearing in the matter was attended by Shri Himanshu P. Agravat, Advocate who reiterated the grounds of appeal and submitted that they charged two rates (i) for skilled manpower @ Rs. 750/- per day per person (ii) and for unskilled manpower another rate @ Rs. 650/- per day per person and the total bill is on the above basis; that 75% has been paid by recipient of service and 25% by them; that period involved is 2014-15 only in negative list regime when classification of service is not material; that full 100% service tax has already been deposited to the Government account; that nothing is still payable

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to the Government; hence the impugned order should be set aside and appeal allowed.

### Findings:

- I have carefully gone through the facts of the instant case, the 5. impugned order, appeal memorandum and the submissions made by the appellant during the course of personal hearing.
- The issue to be decided in the present appeal is whether the services provided by the appellant is 'Erection, Commissioning and Installation Service' or 'Manpower Supply Service'.
- 6.1 I find that the appellant's main contentions is that the lower adjudicating authority has erred in classifying their activity as 'Erection, Commissioning and Installation Service' instead of 'Manpower Supply Service'; that the type of services should be considered after appreciating all facts and circumstances of the case and actual control and supervision over manpower supplied by them. I am of the view that to arrive at the correct conclusion, material facts are required to be looked into. Agreement entered between two parties which decide terms of business i.e. type of service in the instant case and unit rate to determine the value. I observe that the lower adjudicating authority has relied upon the contract No. LEO/SRT/0101 dated 01.09.2012 entered between the appellant and service recipient i.e. M/s. Leo Coats (India) Pvt. Ltd. which explicitly reveals that "(i) the appellant was the contractor who has to work as per the instruction and priorities given by the M/s. Leo Coats (India) Pvt. Ltd.; (ii) the recipient did not guarantee of the complete scope of work; (iii) site supervisor and site-incharge was the scope of the appellant; (iv) job was to be carried out under the supervision of the appellant; (v) job description refers Scaffolding Erection & Dismantling and (vi) rate was per CUM". For proper understanding, a scanned image of Contract Order No. LEO/SRT/0101 dated 01.09.2012 is reproduced below:



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The contract agreement referred above, no where suggests that the appellant has to charge per man-hour or per man power for supply of services to the recipient. Rate agreed upon between the appellant and M/s. Leo Coats (India) Pvt. Ltd. was per CUM (for better understating it should read as "cubic meter") which also not indicative of any manpower supply. Job description specifically refers "Scaffolding Erection & Dismantling" and "Additional Platform". In addition to that, I also observed from the said Contract Order No. LEO/SRT/0101 dated 01.09.2012 that there is Special Conditions D and E, which read as under:

# "D) Mobilization time:

 Contractor shall mobilize required resources at job site immediately

# E) Payment Terms:

- Payment shall be paid within 45 days from the date of receipt of certified measurement of bill"
- 6.3 It can be seen that Condition D) does not suggest providing manpower at the Job Site and Condition E) refers payment on the basis of measurement of work and non on the basis of manpower supplied.
- I find that the appellant argue that they provided service to M/s. Leo Coats (India) Pvt. Ltd. and provided workers to carry erection and dismantling word as per the agreement, but not produced any agreement during the course of adjudication proceeding and not even in appeal memorandum or at the time of personal hearing. The lower adjudicating authority has relied upon the contract No. LEO/SRT/0101 dated 01.09.2012 entered between the appellant and M/s. Leo Coats (India) Pvt. Ltd. and for which the appellant neither contested nor produced any other or new agreement. Therefore, earlier contract dated 01.09.2012 was taken as base to decide the service actually provided by the appellant.
- 6.5 It is a fact that the appellant had provided erection & dismantling of scaffolding to their all service recipients treating the identical service as Erection, Commissioning and Installation Service, and paid Service Tax on total

gross value upto 06.09.2012. Thereafter, the appellant started paying service tax on 25% of taxable value of such service provided to M/s. Leo Coats (India) Pvt. Ltd. under Notification 30/2012-ST classifying the said services as "Manpower Supply", whereas they still paid service tax on total gross value of such service provided to their other service recipients treating the same service as Erection, Commissioning and Installation Service!!

- 6.6 The above discussed facts lead to conclusion that the service provided by the appellant was not "Manpower Supply Service" and the grounds of appeal does not hold ground. The appellant's view suffers from legal infirmity and there is no merit in this appeal. I hold that the service provided by the appellant is 'Erection, Commissioning and Installation Service' and not Manpower Supply Service.
- As regards, revenue neutrality of the demand, it can not be allowed 7. under any law but more under Service Tax Law that the tax liability of one person can be discharged by any other in the name of revenue neutrality. Revenue neutrality comes into play where on one hand the assessee pays the due tax and at other hand credit is eligible to him, which can be treated as mere book entry. Under the CENVAT regime, which applies to service tax also, the provider of taxable services has to discharge service tax liability and if such services are used as input services by other service providers or manufacturers of the goods down the line, they can avail input service credit on the service tax paid. There is no exemption for input service or input service provider under the law. The entire scheme of invoice based Central Value Added Tax, which is in force in this case, envisages payment of tax at each stage of taxable event and availment of credit of tax so paid at the subsequent stage. Th tax regime in force, has to be given meaningful effect, and it is mandatory that the service tax liability is to be discharged the way it has been provided under law. My view draws support from the clarification issued by the CBEC, vide Circular No.138/07/2011-S.T. dated 06-05-2011 and No.147/16/2011-S.T. dated 21-10-2011 whereby it has been clarified that classification of the service would have to be independently done as per the rules and the taxability. Thus, even if the payment of tax or duty, as the case may be, is revenue neutral at subsequent stage, the liability of Service Tax by a service provider has to be discharged at that particular stage unless it is specifically exempted. Thus, this plea of the appellant can not be accepted. The case laws quoted by the appellant are in

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respect of reverse charge mechanism whereas in the present case the liability is totally on the appellant being the service provider and not covered under the reverse charge mechanism. I therefore hold that the argument regarding revenue neutrality is just to escape the payment of Service Tax by the appellant.

- 8. The appellant has assailed impugned order for imposition of penalty under Section 76 of the Act on the ground that penalty under Section 76 of the Act cannot imposed as there is no suppression of facts and no evasion of service tax. I find that the impugned SCN is periodical in nature and the department had knowledge of the facts. I find that the lower adjudicating authority has properly and correctly confirmed the demand under Section 73(1) treating it for normal case rather than invoking suppression of facts and conforming demand under proviso to Section 73(1) of the Act. In such case penalty under Section 76 of the Act is imposable and not under Section 78 of the Act.
- 8.1 I further find that Section 76 of the Act has been amended w.e.f. 14.05.2015. CBEC issued Circular F. No. 334/5/2015-TRU dated 28.02.2015 stating that Section 76 or Section 78 of the Act, as amended w.e.f. 14.05.2015, shall be apply to cases where no notice is served, or notice is served but not yet adjudicated, as the case may be, as per new Section 78B of the Act. In the instant case, there is no suppression of facts etc. by the appellant for the period under consideration and hence penalty is imposable under Section 76 of the Act, which w.e.f. 14.05.2015 is as under:

"SECTION 76. Penalty for failure to pay service tax. — (1)
Where service tax has not been levied or paid, or has been shortlevied or short-paid, or erroneously refunded, for any reason, other
than the reason of fraud or collusion or wilful mis-statement or
suppression of facts or contravention of any of the provisions of
this Chapter or of the rules made thereunder with the intent to
evade payment of service tax, the person who has been served
notice under sub-section (1) of section 73 shall, in addition to the
service tax and interest specified in the notice, be also liable to pay
a penalty not exceeding ten per cent, of the amount of such service
tax:

# Provided that where service tax and interest is paid within a period of thirty days of —

- (i) the date of service of notice under sub-section (1) of section 73, no penalty shall be payable and proceedings in respect of such service tax and interest shall be deemed to be concluded;
- (ii) the date of receipt of the order of the Central Excise

  Officer determining the amount of service tax under subsection (2) of section 73, the penalty payable shall be
  twenty-five per cent. of the penalty imposed in that order,
  only if such reduced penalty is also paid within such period."

(Emphasis supplied)

- 8.2 In view of above, the appellant is liable to penalty under amended Section 76 of the Act read with Section 78B of the Act @10% of the amount of service tax of Rs. 4,03,812/-, which has been imposed by the lower adjudicating authority. However, the lower adjudicating authority was required to give option to the appellant in his Order in Original discussing proviso (ii) to Section 76 of the Act, that if the appellant pays service tax along with interest and also reduced penalty within 30 days from the receipt of the adjudication order then penalty would get reduced to 25% of the penalty imposed in the order. Having not been done so by the lower adjudicating authority, payment of full interest liability as well as reduced penalty of 25% of the penalty imposed can be availed by the appellant now within 30 days of receipt of this order, as per ratio of the judgement of the Hon'ble Supreme Court in the case of R. A. Shaikh Paper Mills P. Ltd. reported at 2016 (335) E.L.T. 203 (S.C.) read with CBEC Circular F. No. 208/07/2008 CX 6 dated 22.05.2008.
- As regard imposition of penalty under Section 77 of the Act, the appellant pleaded that they have not contravened any provisions of the Act and hence they are not liable to penalty under Section 77 of the Act. I find that it is a fact that the appellant has wrongly classified the service being provided by them to M/s. Leo Coats (India) Pvt. Ltd. and hence failed to correctly assesse their service tax liability which resulted in short payment of service tax and contravention of provisions of the Act. Thus, I find that penalty of Rs. 10,000/-imposed under Section 77 of the Act by the lower adjudicating authority in the impugned order is correct, legal and proper.

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- In view of above facts, discussion and findings, I find no reason to interfere with the findings of the adjudicating authority and hence, I uphold the impugned order and reject the appeal.
- ९.१ अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

9.1 The appeal filed by the appellant stands disposed off in above terms.

(कुमार संतीष)

आयुक्त (अपील्स)

# By R.P.A.D.

To, M/s. Saraswati Engineering Block 8-A, Moti Nagar CO-op Society, Sikka Patiya Tal. & Dist, Jamnagar. मे सरस्वती एंजिनीरींग ब्लॉक 8-ए , मोटी नगर को ओप सोसाइटी सिक्का पटिया तालुका एवं जिल्ला : जामनगर .

Copy to:

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