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आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क: O/O 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

Tele Fax No. 0281 - 2477952/2441142 Email: cesappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या Appeal / File No.	मूल आदेश नं / O/O No.	दिनांक / Date
	V2/34/RAJ/2017	105/ADC/PV/2016-17	26.12.2016

6729 46730 (6731) d 682 + 192

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

RAJ-EXCUS-000-APP-183-2017-18

आदेश का दिनांक / Date of Order:	15.01.2018	जारी करने की तारीख / Date of issue:	16.01.2018
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कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अथ आयुक्त/ आयुक्त आयुक्त/ आयुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / जामनगर / गण्डीधम) द्वारा उपरलिखित जारी मूल आदेश से नृजित /
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 Appellants & Respondent :-**
I,M/s. Penta Global Engineering Co., 212, Neo Square P. N. Marg, Jamnagar - 361 008,

इस आदेश(अपील) से व्यक्त कोई व्यक्ति निम्नलिखित तरीके से उपरोक्त प्राधिकारी / प्राधिकरण के समक्ष अपील द्वारा 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 अपील 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) विशेषकरण मुद्दाओं से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, अर. 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 बतलाए गए अपील के अलावा शेष सभी अपील सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठ, द्वितीय तल, भृगुमाली भवन असावा अहमदाबाद, 360016 को की जानी चाहिए। /
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asawa Ahmedabad-360016 in case of appeals other than as mentioned in para- (i)(a) above

(iii) अपील न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001 के नियम 6 के अन्तर्गत निर्धारित किए गये फॉर्म EA-3 को धारा प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की रॉज, अलाव की रॉज और असावा सेवा जुड़ोला, रूप 5 लाख का उससे कम, 5 लाख रूप 50 लाख रूप तक अथवा 50 लाख रूप से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति लागू करी। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किली भी सर्वोच्च न्यायाधीशों के बैंक द्वारा जारी रेगुलर 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। स्पष्ट आदेश (स्टे ऑर्डर) के लिए अर्द्ध-पत्र के साथ 500/- रूप का निर्धारित शुल्क जमा करना होगा। /
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपील 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 प्रतियों में की जा सकती एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो उसकी प्रति साथ में संलग्न की (इनमें से एक प्रति प्रस्तुत होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की रॉज, अलाव की रॉज और असावा सेवा जुड़ोला, रूप 5 लाख का उससे कम, 5 लाख रूप 50 लाख रूप तक अथवा 50 लाख रूप से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति लागू करी। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किली भी सर्वोच्च न्यायाधीशों के बैंक द्वारा जारी रेगुलर 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। स्पष्ट आदेश (स्टे ऑर्डर) के लिए अर्द्ध-पत्र के साथ 500/- रूप का निर्धारित शुल्क जमा करना होगा। /
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) विल अधिनियम, 1994 की धारा 86 की उप-धारा (2) एवं (2A) के अंतर्गत दाने की नयी अपील, सेवाकर नियमवली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म ST-7 में की जा सकती है। इसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा जारी अधेश की प्रतियाँ संलग्न कर (जहाँ से एक प्रति प्रामाणिक होनी चाहिए) और आयुक्त द्वारा संलग्न अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, को अपील न्यायाधिकरण को आवेदन दाने करने का निर्देश देने वाले अधेश की प्रती 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.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (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 अधेश के प्रति अपील न्यायाधिकरण में अपील करने समय उत्पाद शुल्क/सेवाकर का सांग के 10 प्रतिशत (10%), जब सांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय रशि टल करीब 50% से अधिक न हो।
 केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "सांग किए गए शुल्क" में विशेष शक्ति है।

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेमिस्टेड जमा की गई रकम राशि
- (iii) सेमिस्टेड जमा निष्काशनी के नियम 6 के अंतर्गत देय रकम

- बशर्त कि इस धारा के प्राधान्य विलीय (नं. 2) अधिनियम, 2014 के अंतर्गत से पूर्व किसी अपील न्यायाधिकारी के समक्ष विचारणीय स्थिति अर्थात् अपील को जमा 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 Central Credit taken;
- (iii) amount payable under Rule 6 of the Central 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 अधेश की पुनरीक्षण अधिकार निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम पराग के अंतर्गत आवेदन अथवा भारत सरकार, पुनरीक्षण आवेदन इकाई, विल संसाधन, राजस्व विभाग, चौकी अजिमे, जौहन दीप भवन, संसद भवन, नई दिल्ली-110001, को किया जा सकता है।
 A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid.

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के परिवहन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह परिवहन के दौरान, या किसी भंडार गृह में या भंडारण में माल के परिवहन के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।
 In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है।
 In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India

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

(iv) मुद्रित/अमुद्रित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इच्छा केन्द्रित इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत प्राय की गई है और ऐसे अधेश जो आयुक्त (अपील) के द्वारा विल अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा निर्यात की गई राष्ट्रीय अथवा अंतरराष्ट्रीय पर या बाह्य में जारी किए गए हैं।
 Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां फॉर्म संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 9 के अंतर्गत निर्दिष्ट है, इस अधेश के प्रेषण के 3 महीने 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 अदायगी के साथ के लिए या 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 निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
 जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000/- का भुगतान किया जाए।
 The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस अधेश में कई मूल अधेशों का समावेश है तो प्रत्येक मूल अधेश के लिए शुल्क का भुगतान, उपरोक्त इन से किया जाना चाहिए। इस तथ्य के होते हुए भी की निम्नलिखित नए से करने के लिए स्थापित अपील न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।
 In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if existing Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल अधेश एवं स्थगन अधेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट लगा होना चाहिए।
 One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-1 in terms of the Court Fee Act, 1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (नए विधि) नियमवली, 1982 में उल्लिखित एवं अन्य संबंधित मामलों को सम्बन्धित करने वाले नियमों की भी ध्यान अवगत किया जाता है।
 Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules: 1982.

(G) उच्च अपील न्यायाधिकारी को अपील दाखिल करने से संबंधित विवरण, विस्तृत और अधिकतम प्रावधानों के लिए, अपील न्यायाधिकारी 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 ::

M/s Penta Global Engineering Company, 212-Neo Square, P.N. Marg, Jamnagar (hereinafter referred to as 'the appellant') has filed the present appeal against the Order-In-Original No. 105/ADC/PV/2016-17 dated 26.12.2016 (hereinafter referred to as 'the impugned order'), passed by the Additional Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "the lower adjudicating authority").

2. The appellant is holding Service Tax Registration No. AECPB5823NSD001 and providing services viz., "Manpower recruitment supply service", "Erection, Commission and Installation service", " Construction service other than residential complex, including commercial/ industrial building" etc., classifiable under Section 65(25b) read with 65(105)(zzzq), Section 65(105)(zzzd) and Section 65 (105) (zzzz) of the Finance Act, 1994 (hereinafter referred to as "the Act").

3. The brief facts of the case are that the appellant had been providing taxable service since FY 2011-12 and charged & collected Service Tax from their service recipients but not paying Service Tax to the government account; that they had not filed ST -3 returns disclosing details of services provided by them during F.Y. 2011-12 to 2014-15. The Officers of Central Excise & Service Tax, Rajkot visited the premises of the appellant on 01-09-2015 and recovered incriminating documents pertaining to the services provided by the appellant. In the statement of Shri Binu Balkrishnan, Proprietor of the appellant, stated that he deposited Service Tax as per his convenience and due to financial crunch he could not deposit Service Tax. He accepted to pay all outstanding Service Tax as they had charged and collected service tax on invoices from their clients however, there was no payment of Service Tax to the tune of Rs. 42,75,674/- and submitted worksheet showing the details of gross income and outstanding Service Tax liabilities as detailed below:

Year	Certified Bill Amount Rs.	Total ST Amt (Rs.)	ST(75%) Paid By RIL Rs.	S.Tax (25%) Paid By PGEC Rs.	ST PAID	ST TO BE PAID
					Rs.	Rs.
2011-12	16,79,558	2,07,593	1,55,695	51,898	51,898	-
2012-13	1,24,82,353	15,42,819	10,00,187	5,42,632	5,42,632	-
2013-14	2,64,56,612	32,70,037	7,14,668	25,55,369	17,88,710	7,66,659
2014-15	2,28,27,156	28,21,436	53,220	27,68,216	0	27,68,216
2015-16 (Upto 30-06-15)	57,03,188	7,40,799	-	7,40,799	0	7,40,799
Total	6,91,48,867	85,82,685	19,23,770	66,58,915	23,83,240	42,75,674

3.1 On basis of documents submitted by the appellant vide letter dated 07-12-2015, it was confirmed that during FY 2012-13 to FY 2014-15, an amount of Rs. 59,18,115/- was charged and collected by them as t but they paid only Rs. 22,90,229/- only of Service Tax and Rs. 6,44,816/- as interest for delayed payment as under:

F. Y.	Gross Receipts (Taxable value of the services)	S.Tax charged and collected at the applicable rate	Total invoice amount	(Amount in rupees)				Total Service tax payable by them as on initiation of the inquiry
				Total Service Tax paid during the year (prior to initiation of the inquiry)				
				Cash paid	CENVAT utilized	Int. paid	Total Amount paid	
2010-11	0		0				0	
2011-12	0		0				0	
2012-13	1,41,61,887	5,61,180	1,47,23,067	4,05,923	1,55,259	14,598	5,75,780	0
2013-14	2,64,56,637	25,88,719	2,90,45,356	16,97,069	31,978	6,30,218	23,59,265	8,59,672
2014-15	2,28,27,154	27,68,216	2,55,95,370	0	0	0	0	27,68,216
TOTAL	6,34,45,678	59,18,115	6,93,63,793	21,02,992	1,87,237	6,44,816	29,35,045	36,27,886

3.2 It was also found that they had received services from M/s. Urja Corporation and even though 75% of Service Tax for Manpower Supply services provided by M/s. Urja Corporation, they had paid entire amount of Service Tax to M/s. Urja i.e. 100% of the service tax amount and had wrongly availed CENVAT credit on entire amount of Service Tax paid by them to M/s. Urja which.

3.3 The appellant had failed to discharge true and complete Service tax liability of Rs. 38,95,472/- during the period from F.Y. 2012-13 to 2014-15, which is summarized as under:

F. Y.	GROSS RECEIPT (EXCLUSIVE OF S.TAX) -	ABATEMENT / EXEMPTION CLAIMED, IF ANY	SERVICE TAX PAYABLE THEREON (Amount in Rs.)				
			S.Tax at the applicable rate @ 12.36%	S.Tax to be paid on MRS service received from sub-contractors	Total Service Tax payable by M/s. PGEC	Service tax paid through Cash (other than interest)	Service tax to be recovered
2010-11	0	0	0	0	0	0	0
2011-12	0	0	0	0	0	0	0
2012-13	1,41,61,912	85,42,342	6,94,579	80,346	7,74,925	4,05,923	3,69,002
2013-14	2,64,56,605	65,91,557	24,55,320	0	24,55,320	16,97,069	7,58,251
2014-15	2,28,27,176	4,30,583	27,68,219	0	27,68,219	0	27,68,219
TOTAL	6,34,45,693	1,55,64,482	59,18,118	80,346	59,98,464	21,02,992	38,95,472

3.3 The appellant had agreed in statement dated 01-09-2015 to pay Service Tax and interest and they paid some amount vide various challans during investigation, as per details given below:

Sl. No.	Challan No. & Date	Bank	Amount(Rs.)
01	01083 dated 07-09-2015	Bank of Baroda	20,00,000/-
02	0784 dated 28-09-2015		14,73,855/-
03	01083 dated 09-10-2015 (total challan amount Rs. 8,26,145/-)		61,020/-
Total Payment against the Service Tax liabilities			35,34,875/-

3.4 Show Cause Notice No. V.ST/AR-JMR/ADC/BKS/179/2015-2016 dated 10.02.2016 was issued demanding Services Tax of Rs. 38,95,472/- alongwith Education Cess and Secondary & Higher Secondary Education Cess under proviso to Section 73(1) of the Act read with Section 68 of the Act. Rs. 35,34,875/- deposited by them during investigation was proposed to appropriate against their service tax liability. It was proposed to recover the interest at the applicable rate under Section 75 of the Act and also demand wrongly availed & utilized Cenvat credit of Rs. 1,87,237/- under provisions of Rule 14 of Cenvat Credit Rules, 2004 read with proviso to Sub-section (1) of Section 73 of the Act alongwith interest. Show Cause Notice also proposed to impose penalty under Section 76, 77(2) and Section 78 of the Act.

3.5 The lower adjudicating authority vide impugned order confirmed the demand of Services Tax of Rs. 38,95,472/- including Education Cess and Secondary & Higher Secondary Education Cess, under proviso to Section 73(1), read with Section 68 of the Act and Rs. 35,34,875/- already deposited into government account was appropriated. He ordered to levy interest at the applicable rate under Section 75 of the Act on the amount of Service tax as confirmed and also order to appropriate the interest amount of Rs. 7,24,900/- paid by appellant. Penalty Rs. 10,000/- was imposed under Section 77 of the Act and penalty of Rs. 38,95,472/- under Section 78 of the Act.

4. Being aggrieved with the impugned order, appellant preferred the present appeal, mainly, on the following grounds:

1. They had sub contracted some work to their sub-contractor and availed Service Tax credit on the Service Tax paid by their sub-contractors as it is their input service used for providing taxable service.
2. Based on the invoices, ledgers, profit & loss accounts and audit financial statements, they had calculated Service Tax of Rs. 35,34,875/- payable for the period from April, 2012 to March, 2015 and interest of Rs. 7,24,900/-. They have also paid the Service Tax alongwith interest thereon.

3. The Service Tax was deposited as and when funds could be arranged as the service receiver being Reliance Industries Ltd., they were not getting the bills realized in time and bills were kept pending for long time but they had to make payments to the labour, equipment etc and due to these reasons, they had suffered huge financial crunch resulting into non deposit of Service Tax during the period under reference.
4. They had shown Service Tax payable in their books of accounts and the entire billing were recorded in the balance sheets for the entire period and thus it cannot be alleged that they had any intention to evade payment of Service Tax. The only cause for non payment of Service Tax was financial crunch.
5. On being pointed out about short deposit of Service Tax of Rs. 42,75,674/-, they paid Rs. 43,00,000/- towards their Service Tax liability.
6. They had provided manpower recruitment/ supply agency services and services related to erection, commissioning and installation services. The services related to manpower was provided to M/s. Reliance Industries Ltd and as per the Notification No. 30/2012 dated 20.06.2012, 25% of Service Tax on the gross value of the services provided was to be paid by the appellant and on remaining 75% of gross value, Service Tax was to be paid by M/s. Reliance Ind. Ltd. as service recipient. Accordingly, the invoices prepared against this service was clearly reflecting the amount of Service Tax, 25% to be payable by them and on remaining 75% payable by Reliance. They had charged and collected Service Tax on 25% of gross value. For other services, they charged and collected the Service Tax at full rate applicable at the material time.
7. They will provide a copy of the chartered accountant's certificate to the effect that the Service Tax credit was available and not 'written off' from their books of account and stated that a copy of the CA certificate to such effect is attached herewith.
8. The total demand of Service Tax of Rs. 38,95,472/-, is not correct as calculation of Service Tax for 2012-13 appears to be erroneous and they claimed correct Service Tax payable is Rs. 5,94,530/- and not Rs. 7,74,925/- as demanded in the Show Cause Notice.
9. The entire amount of Service Tax has been paid before the Show Cause Notice was issued. There was reasonable cause of non-realization of bills from service recipient and thus they were facing financial crunch and

there was delay in making payment of Service Tax. However, entire amount has been paid well before issue of Show Cause Notice.

10. As per Section 76, when the entire Service Tax and interest is paid within 30 days of the date of Show Cause Notice, then no penalty shall be levied and all proceedings shall be deemed to be concluded. That their case falls within the provisions of Section 80 and they requested to drop the entire proposals to impose penalties relying on the following case laws:

- Bharat Forge Ltd vs CCE, Pune-II cited in 2016 (42) STR 312 (Tri. Mum)
- Radhe Residency vs CCE, Surat cited in 2016 (42) STR 65 (Tri-Ahmd)
- ITC Infotech India Ltd vs CCE, ST & Cus, Bangalore cited in 2016 (39) STR 818 (Tri-Bang)
- Infotech Enterprises Ltd vs CC, XEx, & ST, Hyderabad cited in 2015 (37) STR 402 (Tri-Bang)
- Commissioner vs Y. Sunil cited in 2014 (35) STR J134 (Kar)
- Commissioner vs ICE Network Pvt Ltd cited in 2015 (39) STR J90 (Kar)
- Commissioner vs CABS India cited in 2015 (39) STR J176 (Kar)
- Commissioner vs Macro Service cited in 2015 (37) STR J130 (Kar)

11. Due to interpretation of various provisions, the Service Tax was not paid and requested not to impose penalties by invoking provisions of Section 80 of the Act. The option to pay penalty @25% may be granted on the balance amount, if any. The imposition of penalties is not sustainable when the benefit of waiver of Show Cause Notice itself was to be granted in terms of Section 73(3) of the Act.

5. A personal hearing in the matter was held and Shri R Subramanya, Advocate and Apeksha Subramanya, Consultant reiterated grounds of appeal and submitted that the demand should have been of Rs. 35.34 lakhs and not 38.95 lakhs, which happened due to wrong calculation of Service Tax payable in 2012-13 by the Department; that abatement has been counted @60% only whereas it should be @67% as per Notification in respect of Erection, Commissioning & installation service in 2012-13; they requested to allow them to submit written ph submission in this respect within 7 days.

5.1 The appellant vide their letter dated 17.11.2017 submitted details of payment of Service Tax and calculation for the year 2012-13 alongwith calculation sheet etc. They also submitted copy of calculation sheet for availment of Service Tax credit based on invoices issued by M/s. Urja Corporation as well as Worker Insurance Policy. They have also submitted reconciliation of total service revenue with 26AS, Profit & Loss Account and with ST-3 returns. The documents submitted along with letter were found

to be computer printouts without any signature/authentication. The duty calculation failed to describe as to how this was arrived at and under which service category. It was also silent on demand of Rs. 80,346/- on manpower recruitment or supply agency services on reverse charge mechanism for the service received by them from their sub-contractors.

FINDINGS:

6. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and submissions made during and after personal hearing. The issue to be decided in the present appeal is as to (i) whether the appellant is liable to pay Service Tax of Rs. 38,95,472/- as demanded in the Show Cause Notice or of Rs. 35,34,875/- as claimed by the appellant and (ii) Whether they are liable to penalties under Section 77 and 78 of the Act or otherwise.

7. I find that the appellant paid Service Tax of Rs. 35,34,875/- out of total demand of Service Tax of Rs. 38,95,472/- before issuance of Show Cause Notice and they have never challenged the taxability of the services provided by them however, they have contested Service Tax calculation for F. Y. 2011-12 and 2012-13. The appellant in his statement dated 01.09.2015 has submitted worksheet showing details of gross income and outstanding Service Tax liability. On the basis of documents viz. ledgers, invoices, form No. 26AS, financial statement etc. for F. Y. 2012-13 to 2014-15, the department concluded that the appellant had collected Service Tax to the tune of Rs. 59,18,118/- from their service recipients and they were liable to pay the same, as detailed at para 6 of the Show Cause Notice as well as impugned order. It is also alleged that appellant had paid Rs. 21,02,992/- Service Tax and remaining amount Rs. 38,15,123/- plus demand of Rs. 80,346/-, total Rs. 38,95,472/- was required to be paid by them, whereas the appellant paid Rs. 35,34,875/-.

7.2 With regard to non-payment of Service Tax on reverse charge mechanism on Manpower Recruitment and Agency Services received from M/s. Urja Corporation, the appellant has not spelled out a single word in their appeal memorandum. Since the investigation has found out that they were required to pay Service Tax on 75% of the value of services received from the service provider as the service provider has paid Service Tax on 25% of the value. Therefore, I have no option but to hold confirmation of demand of Service Tax of Rs. 80,346/- correct as done in the impugned order.

7.3 As far as Service Tax liability for the year 2011-12 and 2012-13 is concerned, the appellant has submitted calculation sheet showing the Service Tax liability at Rs. 5,94,530/-. However, Service Tax of Rs. 80,346/- on manpower supply service has not been added by them which needs to be added and after adding this, total Service Tax liability for F.Y. 2011-12 and 2012-13 would be Rs. 6,74,876/- and not Rs. 5,94,530/- as claimed by the appellant. The Show Cause Notice has arrived at Service Tax liability of Rs. 7,74,925/- for F. Y. 2011-12 and 2012-13 including Service Tax liability on manpower recruitment services, which is confirmed in the impugned order without any details or calculation. To ascertain the correct Service Tax liability, letter F. No. V2/34/RAJ/2017 dated 21.11.2017, dated 01.12.2017, dated 15.12.2017 and dated 26.12.2017 were issued to Rajkot Commissionerate to report the correct liability. The Assistant Commissioner (AE), CGST, Rajkot vide letter F. No. IV/06-53/CEP/2015-16 dated 08.01.2018 has reported as under:

"2. The demand of Service Tax in Show Cause Notice for the year 2012-13 & 2013-14 is as below:-

F. Y.	Gross Receipt (Exclusive of Service Tax)	Abatement/ Exemption claimed, if any	Taxable Value	Service Tax at the applicable rate
2012-13 (As per invoice)	1,41,61,911/-	93,51,794/-	48,10,117/-	5,94,530/-
2012-13 (After adjustment of invoice RA 03 dated 06.03.2013)	1,41,61,911/-	85,42,343/- [93,51,794/- (-)8,09,451/-]	56,19,568/-	6,94,579/-
2013-14 (as per invoice)	2,64,56,612/-	57,82,107/-	2,06,74,505/-	25,55,369/-
2013-14 (After adjustment of invoice RA 03 dated 06-03-2013)	2,64,56,612/-	65,91,558/- [57,82,107/- (+) 8,09,451/-]	1,98,65,054/-	24,55,320/-

3. The assessee had showed the invoice No. RA 03 dated 06.03.2013 in ST-3 return of F. Y. 2013-14. Hence the abatement for Bill No./Invoice No. RA 03 dated 06.03.2013 of Rs. 8,09,451/- had been considered in the financial year 2013-14. In F. Y. 2013-14 the abatement as per invoices pertaining to F.Y. 2013-14 is Rs. 57,82,107/- only, but after considering the figure of invoice No. RA 03/06.03.2013, for abatement, the amount is worked out to Rs. 65,91,558/- (i.s. Rs. 57,82,107/- + Rs. 8,09,451/-)

4. Therefore, the demand of Service Tax for the F.Y. 2012-13 is worked out as Rs. 6,94,579/- after the deduction of abatement of Rs. 85,42,343/- only as shown in Show Cause Notice, without considering the amount of abatement

of Rs. 8,09,451/- pertaining to invoice No. RA 03, dated 06.03.2013, which the assessee has considered in the F.Y. 2013-14 as per ST-3 return."

7.4 The Department has submitted Service Tax liability for the year 2011-12 and 2012-13 as Rs. 5,94,530/- (Rs. 51,898/- + Rs. 5,42,632/-) as mentioned in para 3.1 of the impugned order, Rs. 5,61,180/- for the year 2012-13 as mentioned in para 4 of the impugned order, Rs. 5,61,180/- for the year 2012-13 as mentioned in para 6 of the impugned order and Rs. 6,94,579/- for the year 2012-13 (excluding Service Tax of Rs. 80,346/- on manpower recruitment services) as mentioned in para 12 of the impugned order. The Department has also submitted detailed report justifying demand of Rs. 6,94,579/- in 2012-13 as the appellant has considered Bill No. RA 03 dated 06.03.2013 in quarter April-2013 to June-2013 and accordingly paid Service Tax in that quarter. The appellant has shown abatement of Rs. 85,42,342/- during the F.Y. 2012-13 and abatement of Rs. 65,91,557/- during the F. Y. 2013-2014, respectively, in their S.T.-3 returns which has been allowed by the Department as mentioned in the Show Cause Notice as well as the impugned order. Therefore, the claim of the appellant becomes without any basis. The value of abatement of Rs. 8,09,451/- was for the year 2012-13 but the appellant has shown the same in S.T.-3 returns for year 2013-14 and hence the Department has rightly contended that Service Tax of Rs. 6,94,579/- was payable in F.Y. 2012-13. In case, the abatement of Rs. 8,09,451/- is considered for the year 2012-13, the demand for year 2013-14 would increase resulting into revenue neutral position. Therefore, the total demand of Rs. 7,74,925/- (Rs. 6,94,579/- plus Rs. 80,346/- on manpower services) in 2012-13 is correct and the impugned order does not require interference in this regard.

7.5 The appellant did not pay their Service Tax liability fully before issue of Show Cause Notice, hence, applicability of Section 73(3) of the Act is devoid of any merits. I find that this case was detected by the department and inquiry was initiated that the appellant collected service tax from their customers but did not deposit the same into Government account. The records of the case also indicate that the appellant failed to file returns for the relevant period on due dates and thereby acted deliberately in defiance of the law with intent to evade payment of service tax already collected. These facts have been narrated in the show cause notice and the appellant has failed to satisfactorily reply and only taking shelter of bad financing position to say that this gives them power to play with government money. I, therefore, hold that the present

case does not come under purview of Section 73(3) of the Act but penalty is imposable under Section 78 of the Act as discussed below in Para 7.6.

7.6 The appellant did not pay Service Tax on their own, even if collected from customer and the same was paid only after being detected by the Department. Therefore, the case is not fit at all for invocation of Section 80 of the Act.

7.7 With regard to option of payment of 25% penalty under Section 78 of the Act is concerned, I find force in the argument made by the appellant, since the lower adjudicating authority has not given this option in the impugned order. I find that Section 78 of the Act was amended with effect from 14.05.2015 to make amended provisions applicable in all pending Show Cause Notices yet to be adjudicated as Show Cause Notices yet to be issued for past period. The Amended Section 78 is reproduced below for ready reference:-

SECTION 78. Penalty for failure to pay service tax for reasons of fraud, etc.
 – (1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by 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 there under with the intent to evade payment of service tax, the person who has been served notice under the proviso to 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 which shall be equal to hundred per cent. of the amount of such service tax :

Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined :

Provided further that where service tax and interest is paid within a period of thirty days of –

- (i) *the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty 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 sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined :*

Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period:

Explanation. – For the purposes of this sub-section, “specified records” means records including computerised data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of accounts shall be considered as the specified records.

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(Emphasis supplied)

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7.8 It is correct that the appellant had not paid full Service Tax before issuance of impugned show cause notice. They had also not paid full interest amount. They also failed to pay penalty @15% of service tax within a period of 30 days of the receipt of Show Cause Notice dated 10.02.2016 and also failed to pay penalty @25% of service tax determined within a period of 30 days from the date of receipt of the impugned. It is worth mentioning that 25% reduced penalty is available only when reduced penalty is also paid within 30 days of receipt of order determining Service Tax.

7.9 It is on record that the appellant did not pay service tax on their own even though collected from their customers. It is evident that the facts of collection of Service Tax and non-payment thereof were suppressed by the appellant with intent to evade payment of service tax. The appellant paid service tax only after the department established collection of service tax by them from customers but no payment by them to the Government exchequer. Therefore, I am of considered view that imposition of penalty equal to service tax determined under Section 78 of the Act by the lower adjudication authority is correct, legal and proper. However, the lower adjudicating authority was required to give option to the appellant in the impugned order discussing clause (ii) of second proviso to Section 78 of the Act, that if the appellant pay interest and 25% reduced penalty also within 30 days from the receipt of the impugned order then penalty would get reduced to 25% of service tax so determined 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. Having not been done so by the lower adjudicating authority, payment of full interest liability as well as reduced penalty of 25% of service tax can be availed by the appellant within 30 days of receipt of this order as has been held by the Hon'ble Gujarat High Court in the case of G. P. Prestress Concrete Works reported as 2015(323) ELT 809 (Guj.)

8. With regard to penalty of Rs. 10,000/- imposed under Section 77(2) of the Act, I find that the appellant had not filed the ST-3 return in prescribed time limit. Therefore, imposition of penalty of Rs. 10,000/- under Section 77 of the Act is also correct and proper and reject appeal in this regard.

9. In view of above, the impugned order is uphold and appeal is rejected.

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

9.1 The appeal filed by the appellant is disposed of in above terms.

(Handwritten Signature)
15/1/2019
(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s Penta Global Engineering Company, 212-Neo Square, P.N. Marg, Jamnagar	मे. पेंटा ग्लोबल इंजीनियरिंग कंपनी, २१२-निओ स्क्वेर, पी. एन. मार्ग, जामनगर.
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Copy for information and necessary action to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
- 2) The Commissioner, GST & Central Excise, Rajkot.
- 3) The Assistant Commissioner, GST & Central Excise, Division, Jamnagar.
- 4) The Superintendent, GST & Central Excise, Range, Jamnagar.
- 5) Guard File.