



::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 / 2<sup>nd</sup> Floor, GST Bhavan

रेस कोर्स रिंग रोड / Race Course Ring Road

राजकोट / Rajkot - 360 001

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**रजिस्टर्ड डाक ए.डी.द्वारा :-**

क अपील / फाइलसंख्या/  
Appeal / File No.  
V2/12/BVR/2019

मूल आदेश सं /  
O.I.O. No.  
BHV-EXCUS-000-ADC-09-2018-19

दिनांक/  
Date:  
18/1/2019

ख अपीलआदेशसंख्या(Order-In-Appeal No.):

**BHV-EXCUS-000-APP-234-2019**

आदेश का दिनांक/  
Date of Order: 21.10.2019

जारी करने की तारीख /  
Date of issue:

21.10.2019

**श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /  
Passed by Shri Gopi Nath, Commissioner (Appeals), Rajkot**

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं सेवाकर,  
राजकोट / जामनगर / गांधीधाम द्वारा उपरलिखित जारी मूल आदेश से सृजित: /  
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST,  
Rajkot/Jamnagar/Gandhidham :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता / Name & Address of the Appellants & Respondent :-**

**M/s. Dada Earth Movers, Plot No.27, Opp: Shakti Nivas, Pragati Society, Ghogha Road, Bhavnagar, Gujarat**

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

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के 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) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए। /

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

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असारवा अहमदाबाद- 370016 को की जानी चाहिए। /

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para-1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/ interest/ penalty/ refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is 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) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न 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 Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्ट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते 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, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।  
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है  
(i) धारा 11 डी के अंतर्गत रकम  
(ii) सेनवेट जमा की ली गई गलत राशि  
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम  
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा। /  
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 पुनरीक्षणयाचिका निम्नलिखित मामले में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद 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 माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल 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 माल के प्रसंस्करण 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 भरी गई केन्द्रीय उत्पाद शुल्क के छुट (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 माल 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 ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाचिधि पर या बाद में पारित 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 प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट हैं, इस आदेश के संप्रेषण 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 अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /  
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।  
जहां 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 आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय 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 filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट 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-I in terms of the Court Fee Act, 1975, as amended.
- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित 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 अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट [www.cbec.gov.in](http://www.cbec.gov.in) को देख सकते हैं। /  
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website [www.cbec.gov.in](http://www.cbec.gov.in)

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

M/s Dada Earthmovers, Bhavnagar (*hereinafter referred to as* "Appellant") filed Appeal No. V2/12/BVR/2019 against Order-in-Original No. BHV-EXCUS-000-ADC-9-2018-19 dated 18.1.2019 (*hereinafter referred to as* 'impugned order') passed by the Addl. Commissioner, Central Goods & Service Tax, Bhavnagar Commissionerate (*hereinafter referred to as* 'adjudicating authority').

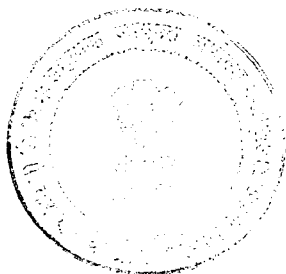
2. The brief facts of the case are that search carried out by the officers of the Directorate General of Central Excise Intelligence at premises of the Appellant revealed that the Appellant had rendered services of (i) site formation (ii) dredging (iii) cargo handling and (iv) supply of tangible goods service during the period from 2011-12 to 2016-18 but had obtained service tax registration only on 3.7.2013 and had not paid /short paid service tax on the consideration received by them.

2.1 Show Cause Notice No. DGCEI/AZU/36-7/2017-18 dated 10.4.2017 was issued to the Appellant calling them to show cause as to why Service Tax of Rs. 52,71,302/- should not be demanded and recovered from them under Section 73(1) of the Finance Act, 1994 (*hereinafter referred to as* 'Act') along with interest under Section 75 and proposing imposition of penalty under Sections 70,77 and 78 of the Act.

2.2 The Show Cause Notice was adjudicated vide the impugned order, which confirmed demand of Service Tax of Rs. 52,60,480/- under Section 73(1) and ordered for its recovery along with interest under Section 75 of the Act and also imposed penalty of Rs. 52,60,480/- under Section 78 of the Act, Rs. 20,000/- under Sections 70 of the Act and Rs. 10,000/- under Section 77 of the Act.

3. Aggrieved, the Appellant has preferred appeal, *inter-alia*, on the following grounds:-

(i) They provided services to M/s Sarasvati Builders, M/s Patel Engineers and M/s National Builders Infrastructure as sub-contractor and their main contractors had paid service tax; that they had produced duty paying documents before the adjudicating authority however same was neither verified by him nor referred to the inquiry officer and hence, the impugned order is required to be set aside.



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(ii) The adjudicating authority denied benefit of cum-tax; since the Appellant had not charged service tax separately in the invoices, they are eligible for cum-tax benefit of Rs. 4,21,470/-.

(iii) They had rendered services for leveling of agriculture land which are not taxable. Similarly, they had provided JCB/Loader on hire basis to their clients which were used for construction of roads which is specifically excluded from taxable service as per provisions of Section 65(105)(zzzza) of the Act and hence, they are not required to pay any service tax on those activities.

(iv) They rendered services to Government authority which is not liable to service tax and hence, service tax demand of Rs. 9,793/- is required to be set aside.

(v) There was no malafide intention on the part of the Appellant to evade payment of service tax and hence, penalty imposed under Section 78 of the Act is not sustainable.

4. In hearing, Shri K.B. Babaria, Consultant appeared on behalf of the Appellant and reiterated the submission of appeal memo for consideration.

5. I have carefully gone through the facts of the case, the impugned order, the grounds of appeal memorandum and written as well as oral submissions made by the Appellant. The issue to be decided in the present appeal is whether the impugned order holding that the Appellant is liable to pay Service Tax and imposing penalty is correct, legal and proper or not.

6. On going through the records, I find that investigation carried out by DGCEI revealed that the Appellant had rendered various taxable services like (i) site formation (ii) dredging (iii) cargo handling and (iv) supply of tangible goods service during the period from 2011-12 to 2016-18 but had not paid /short paid service tax on the consideration received by them. The adjudicating authority confirmed service tax demand of Rs. 52,60,480/- under Section 73(1) of the Act and also imposed penalties under Sections 70,77 and 78 of the Act. The Appellant has contested impugned order on various grounds, which I examine herein under:

7. The Appellant has contested that they rendered services to M/s Sarasvati Builders, M/s Patel Engineers and M/s National Builders Infrastructure as sub-contractor and their main contractors had paid service tax and hence, they are

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not required to pay service tax on services rendered by them to their main contractors. I find that payment of service tax by main contractor cannot be a reason for non payment of service tax by the Appellant. In Service Tax law, there is no exemption *per se* if rendered by sub-contractor to main contractor, even if main contractor has discharged service tax. If services are taxable under the provisions of the Finance Act, 1994, then service provider is obligated to discharge service tax. I rely on the Order passed by the Hon'ble CESTAT, New Delhi passed in the case of Murari Lal Singhal reported as 2019 (25) G.S.T.L. 45 (Tri. - Del.), wherein it has been held that,

"11.1 From the record i.e. scrutiny of contract it is perused that cement and steel had been supplied by M/s. GEA Energy Systems only under all the work orders. In such circumstances, it cannot be held that the liability of appellant as sub-contractor is same as the liability of the main contractor which is mentioned to have been discharged for the entire contract for the purpose. In the given circumstances, for the impugned contract, the appellant as sub-contractor cannot be held to have stepped into the shoes of the main contractor. Resultantly, any discharge of tax liability by the main contractor cannot be held as the discharge of the liability of sub-contractor. The discharge of liability *qua* contractor and sub-contractor has way back been clarified by the Department itself vide their C.B.E. & C. Circular No. 96/7/2007-S.T., dated 23-8-2007 vide which it was clarified that sub-contractor is essentially a favourable service provider and is liable to pay Service Tax. The fact that services provided by such sub-contractor are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by a sub-contractor. Services provided by sub-contractor are in the nature of input services. Service Tax is therefore leviable on any taxable service provided whether or not the services are provided by a person in his capacity as a sub-contractor or whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provider. Such proposition finds support from the basic rule of Cenvat credit and service of a sub-contractor may be input service provided for a contractor if there is integrity between the services. Thus tax paid by a sub-contractor may not be denied to be set off against the ultimate Service Tax liability of the contracts if the contractor is made liable to service tax for the same transaction, though the exchequer cannot be enriched on account of double taxation. Thus, liability of sub-contractor to pay tax depends on the contract between him and main contractor and thus varies from case to case and even from contract to contract. The adjudicating authority has



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also relied upon the said circular. Hence we do not find any error in the findings qua this particular issue. Order to this extent is upheld.”

(Emphasis supplied)

8. The Appellant has contested that they had provided JCB/ Tractor on hire basis to their clients which were used for leveling of agriculture land and for construction of roads, which are not taxable and hence, they are not required to pay any service tax on those activities. I have gone through sample invoices/work order furnished by the Appellant in appeal memorandum. I find that invoices were issued for providing Tractor on hire basis and charging on per hour basis. Similarly, work order was issued to the Appellant for supply of JCB machine/tractor and charges were on per hour/day basis. In these transactions, essence of the service provided was supply of JCB/Tractor on hire basis, which is correctly classified under the category of ‘supply of tangible goods service’. I find that usage of such JCB/Tractor whether for leveling of agriculture land or construction of roads as claimed by the appellant, does not alter nature of service provided. I, therefore, hold that the Appellant is correctly held liable for payment of service tax in respect of services rendered for supply of JCB/Tractor.

9. Regarding plea of the Appellant to grant them cum-tax benefit, I find that as per the provisions of Section 67(2) of the Act, the Appellant is required to prove that gross amount charged by them was inclusive of service tax payable. However, the Appellant has not been able to prove with documentary evidence that price charged by them was inclusive of service tax and therefore, request for cum-tax benefit cannot be acceded to. I rely on the Order passed by the Hon’ble CESTAT, New Delhi passed in the case of N.V. Marketing Pvt. Ltd. reported as 2018 (17) G.S.T.L. 257 (Tri. - Del.), where it has been held that,

“8. Regarding the claim of the appellant for recalculation of tax liability considering the value as cum-tax value, we note that the provisions of Section 67(2) are very clear to the effect that gross amount charged by the service provider should be inclusive of service tax payable, to consider such amount for backward calculation. In the absence of any evidence to the effect that the amount of consideration now taken up for tax liability is inclusive of service tax in terms of an arrangement or documentation, we note that the findings of the Original Authority is correct in this regard.”

9.1 I also rely on the Order passed by the Hon’ble CESTAT, New Delhi in the case of Cellebrum Technologies Ltd. reported as 2015 (40) S.T.R. 707 (Tri. - Del.), wherein it has been held that,



"9. The appellants also pleaded that the amount received by the appellants should be treated as cum-tax amount and the demand has to be confirmed on that basis (if at all) and cited the judgment of the Supreme Court in the case of *CCE v. Maruti Udyog* [2002 (141) E.L.T. 3 (S.C.)] in support thereof. However, we find that the appellants have clearly stated that they did not charge Service Tax from their clients in which case the Supreme Court judgment in the case of *Amit Agros v. CCE* [2007 (210) E.L.T. 183 (S.C.)] is directly applicable wherein it has been held that "*unless it is shown by the manufacturer that the price of goods includes Excise duty element, no question of excluding the duty from the price would arise in computing the assessable value of excisable goods*". The Supreme Court further observed that "*one cannot go by the general indication that the price would always means cum-duty price, particularly when an assessee had cleared the goods based on exemption notification. In this case, it is obvious that the price charged should be transaction value, since the notice has apparently not included any Service Tax amount*".

Indeed, Section 67(2) of Finance Act, 1994 allows cum-tax benefit only if the gross amount charged for the service is inclusive of Service Tax payable. In the light of the admitted fact that the *price* charged by the appellants did not include any Service Tax, the cum-tax benefit cannot be extended to them."

9.2 I also rely on the Order passed by the Hon'ble CESTAT, Mumbai in the case of Rudra Galaxy Channel Ltd reported as 2015 (38) S.T.R. 445 (Tri. - Mumbai), wherein it has been held that,

"7.1 From the appeal memorandum it is evident that the appellant is not disputing the tax liability. However, he is seeking abatement towards the tax from the total consideration received; however, there is no documentary evidence available on record to show that the amount received by the appellant was cum tax. In the absence of such a documentary evidence it is difficult to accept the submission of the appellant that consideration received should be treated as cum tax. In the *Amrit Agro Industries Ltd.* case (supra) the Hon'ble Apex Court held that unless it is shown by the manufacturer that price of goods includes excise duty payable by him, no question of exclusion of duty element from price will arise for determination of value. Thus, in the absence of any documentary evidence, cum tax benefit cannot be granted to the appellant. Thus, we are unable to consider the plea of the appellant that consideration received should be treated as cum tax."



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10. Regarding contention of the Appellant that they are not liable to pay service tax of Rs. 9,793/- in respect of services rendered to Government authority, I find that the adjudicating authority has already dropped the demand of service tax in respect of services provided to CSMCRI, Bhavnagar as per findings recorded at para 3.8 to 3.9 of the impugned order. So, there is no merit in the contention raised by the Appellant.

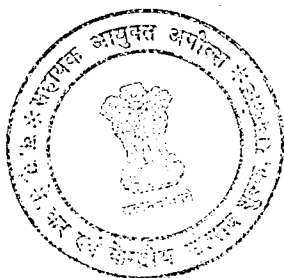
11. In view of above, I uphold confirmation of service tax demand of Rs. 52,60,480/-. Since, demand is confirmed, it is natural that confirmed demand is required to be paid along with interest. I, therefore, uphold confirmation of interest under Section 75 of the Act.

12. Regarding imposition of penalty under Section 78 of the Act, the Appellant has pleaded that there was no malafide intention on their part to evade payment of service tax and hence, penalty may be set aside. I find that non payment of service tax by the Appellant was unearthed during investigation carried out by DGCEI. Had there been no investigation by DGCEI, the non payment of service tax by the Appellant would have gone unnoticed. So, there was suppression of facts and extended period of limitation was rightly invoked in the impugned order. Since the Appellant suppressed the facts of non-payment of Service Tax, penalty under Section 78 of the Act is mandatory as has been held by the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) E.L.T. 3 (S.C.), wherein it is held that when there are ingredients for invoking extended period of limitation for demand of duty, imposition of penalty under Section 11AC is mandatory. The ratio of the said judgment applies to the facts of the present case. I, therefore, uphold penalty of Rs. 52,60,480/- imposed under Section 78 of the Act.

13. Regarding penalty imposed under Section 70 of the Act, I find that it is a fact that the Appellant had failed to assess service tax they were liable to pay and also failed to file service tax returns and therefore, penalty of Rs. 20,000/- imposed under Section 70 of the Act is required to be upheld and I do so.

14. Regarding penalty imposed under Section 77 of the Act, I find that the Appellant was providing taxable services since 2011-12 but obtained service tax

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registration only on 3.7.2013 and hence, they are correctly held liable to penalty of Rs. 10,000/- under Section 77 of the Act.

15. In view of above, I uphold the impugned order and reject the appeal.

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

16. The appeal filed by the Appellant is disposed off as above.

सत्यापित,



विपुल शाह  
अधीक्षक (अपील्स)



(GOPI NATH)  
Commissioner(Appeals)

By R.P.A.D.

To, M/s Dada Earthmovers, Plot No. 27, Opp Shakti Niwas, Pragati Society, Ghogha Road, Bhavnagar.	सेवा में, मे. दादा अर्थमुवर्स, प्लॉट न. 27, शक्ति निवास के सामने, प्रगति सोसाइटी, घोघा रोड, भावनगर।
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प्रति:-

- 1) प्रधान मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
- 2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
- 3) अधिक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
- 4) गार्ड फ़ाइल।