O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE

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[illegible]

अपील / फ़ाइल संख्या Appeal /File No.	मूल आदेश सं. O.I.O. No.	दिनांक Date:
V2/35/BVR/2019	[illegible]/2019	[illegible]/2019

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

BHV-EXCUS-000-APP-239-2019

आदेश का दिनांक / Date of Order :	28.10.2019	जारी करने की तारीख / Date of issue:	05.11.2019

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Gopi Nath, Commissioner (Appeals),Rajkot

ग [illegible]

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 Appellant&Respondent :-

M/s.Lilanand Magnesites Pvt Ltd. Shed no. K/1-[illegible] A & B, Plot No. [illegible], GIDC Estate, Porbandar-[illegible]

[illegible]

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) [illegible]

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) [illegible]

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) [illegible]

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at [illegible] Floor, [illegible] in case of appeals other than as mentioned in para- 1(a) above

(iii) [illegible]

[illegible]

(B) [illegible]

[illegible]

[illegible]

[illegible] The appeal under sub section [illegible] of Section [illegible] of the Finance Act 1994, shall be filed in For ST-7 as prescribed [illegible] Rule [illegible] of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner [illegible] Central Excise (Appeals) [illegible] shall be a certified copy [illegible] and copy of the order passed by the Commissioner [illegible] or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

[illegible]

[illegible] 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.

[illegible]
Revision application to Government of India:
[illegible]
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, [illegible] 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:

[illegible] 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

[illegible] 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.

[illegible] In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

[illegible] 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 and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

[illegible] 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.

[illegible] The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved is Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

[illegible] In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

[illegible] 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.

[illegible] 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.

[illegible] 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. Lilanand Magnesites Pvt. Ltd., Shed No. K/1-409-A & B, Plot No. 508 GIDC Estate, Porbandar, Pin – 360 577 *(hereinafter referred to as 'appellant')* has filed the present appeal against Order-in-Original No. ACJUND/02/2019 dated 28.03.2019 *(hereinafter referred to as 'impugned order')* passed by the Assistant Commissioner, CGST Division, Junagadh *(hereinafter referred to as 'the adjudicating authority')*.

2 Brief facts of the case are that during the course of audit of records of the appellant for the period from 2012-13 to 2014-15, it was observed that the appellant had paid commission to their Directors but not paid service tax on the said commission under reverse charge mechanism. Accordingly, two SCNs were issued to the appellant which were dropped by the adjudicating authority vide OIO No. ACJUND/11/2017 and No. ACJUND/12/2017 both dated 31.01.2017. The department filed appeals before the Commissioner (Appeals) against the said OIOs and the Commissioner (Appeals) vide OIA No. BHV-EXCUS-000-APP-198 TO 199-2017-18 dated 16.03.2018 has allowed the appeals by holding that the commission paid by the appellant to their Directors is chargeable to service tax and required to be paid by the appellant under reverse charge mechanism.

2.1 For subsequent period from 2015-16 to 2017-18, the department had called for details of the commission paid by the appellant to their Directors, from the appellant. SCN No. V/3-03/D/2018-19 dated 11.07.2018 was issued to the appellant on the ground that the service tax on such commission not paid by the appellant during the period from 2015-16 to 2017-18 and demanding service tax of Rs. 24,99,600/- under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as "the Act") along with interest under Section 75 of the Act and proposed to imposed penalty under Section 78 of the Act. The adjudicating authority vide impugned order has adjudicated the said SCN and confirmed the demand of service tax of Rs. 18,07,340/- under Section 73(2) of the Act along with interest under Section 75 of the Act, dropped the demand of service tax of Rs. 6,92,160/- and imposed penalty of Rs. 18,07,340/- under Section 78 of the Act without benefit of reduced penalty option.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal, *inter-alia*, on the following grounds:

(i) that the impugned order is not sustainable in law that the adjudicating authority ignored relevant provisions of Section 2(h) of Income Tax Act, 1961 as well as the Companies Act, 2013 which provides that whole-time directors are nothing but employees of the company and any remuneration / commission paid to them is part of their salary only; that the adjudicating authority relied upon Order in Appeal No. BHV-EXCUS-000-APP-[illegible] 2017-18 dated 16.03.2018 which is based on judgments issued under Income Tax Act, 1961 and ESI Act, 1948, that the case law of Sandvik Asia Ltd. Vs. Assistant Commissioner of Income Tax reported as 2002-82 ITD 493 relied in the said OIA dated 16.03.2018 is not relevant as the director in that case was not whole-time director, whereas in the present case, the directors are whole-time directors, and the directors were looking after day-to-day business of the company, thus, they were nothing but employees of the company and hence, the appellant is not liable to pay service tax under reverse charge mechanism for payments made to such directors as per the case law of the Hon'ble CESTAT Mumbai in case of M/s. Allied Blenders and Distillers Pvt. Ltd. Vs. Commissioner of Central Excise & Service Tax Aurangabad reported as 2017 (51) STR 161 (Tri.-CESTAT Mumbai.

(ii) that the show cause notice is self-contradictory, that the appellant not only paid commission but also pay remuneration to the whole-time directors; that the service tax has been demanded only on commission payment and not on remuneration; that this aforesaid fact establishes that as far as 'remuneration' paid to these directors is concerned, the department has treated it as salary payment to directors and that can be the only reason why no tax demand has been proposed for 'remuneration' payment; that since department has accepted that 'remuneration' payment was nothing but salary payment, the same logic should apply to commission payment also and hence, the present service tax demand is untenable in law since these 'commission payments' have also been made to very same directors only.

(iii) that the service tax is chargeable only and only when there is some provision of 'service' in the taxable territory by one person to another in terms of Section 66B; that the service tax demanded on commission paid to the whole-time directors who are nothing but employees of the appellant; and therefore, the impugned order is untenable in law being against the provisions of Section 66B read with Section 65B(44) of the Act, that the whole time director is nothing but a whole-time employee of the company, working as a key managerial person for the said company, and he can be compensated by way of not only remuneration

but also by way of commission based on net profits of the company as per provisions of Section 2(34), Section 2(51), Section 2(94) and Section 197 (B) of the Companies Act, 2013; that the 'salary' defined under Section 17 (1) of the Income Tax Act, 1961 and salary includes 'any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages' and therefore commission paid to any director is nothing but a part of salary; that it has been held in judicial pronouncements in relation to Income Tax provisions, that commission paid to directors for the work done in their capacity as whole-time directors is to be treated as an incentive in addition to salary and the same didn't come within the purview of commission or brokerage or fee for professional or technical services; that the appellant placed reliance on case laws of Nashik Metals (P.) Ltd. V/s. Income Tax Officer, Ward-2 (3), Pune reported as [2014] 50 taxmann.com 185 (Pune - Trib.) and Jahangir Biri Factory (P.) Ltd. V/s. DCIT reported as [2008] 126 TTJ 587 (KOL.); that Income tax deducted on remuneration / commission paid to directors under Section 192 of the Income Tax Act, 1961 i.e. TDS on salary and not under Section 194H of the said Act i.e. TDS on commission or brokerage; that remuneration / commission paid to directors was debited under the head 'salary, wages and bonuses', that these directors have shown income of remuneration / commission, received from the appellant, under the head 'income from salary' in their individual income tax returns, that thus, the employer-employee relationship between the 'whole-time directors' and the appellant has clearly been established on the basis of Form No. 16, the financial accounts of the appellant as well as the Income Tax Returns filed by the Directors, and therefore payments made to them during the course of their employment is not liable to service tax and hence Notification No. 30/2012-ST dated 20.06.2012, as amended, is not applicable in the present case; that the appellant placed reliance on the following case laws:

- M/s. Alkco Blenders & Distillers Pvt. Ltd. V/s. CCE&ST Aurangabad - 2019 (1) TMI 423 – CESTAT Mumbai

- M/s. Ram Works India Pvt. Ltd. V/s. CCE, Mumbai-V - 2016(43) S.T.R. 624 (Tri. Mumbai)

(iv) The appellant submitted that the Show Cause Notice dated 11.07.2018 proposes service tax demand of Rs. 24,99,500/- which also contained a service tax demand of Rs. 8,12,000/-, against commission announced for financial year 2014-15 and paid in financial year 2015-16 amounting to Rs. 56,00,000/-; that for the said commission of Rs. 56,00,000/-, the department had already issued a notice dated 28.07.2016 proposing recovery of service tax of Rs. 6,82,100/- and hence second time tax demand on the very same transaction not tenable in law,

that the adjudicating authority, at para 10.17 of the impugned order had accepted the submission of the appellant, but, dropped the demand of service tax of Rs. 6,92,160/- only and confirmed balance service tax demand of Rs. 1,18,840/- by observing that the same arose due to error in calculation of tax rate; that the above approach of the adjudicating authority is not only beyond the scope of show cause notice dated 31.07.2019 but also without authority of law since it is settled legal position that a very same single transaction cannot be taxed twice under the same Act.

(v) The appellant submitted that the impugned order confirmed service tax demand of Rs. 10,37,640/- which also contained a service tax demand of Rs. 3,37,500/- for commission paid in financial year 2017-18 which was announced for financial year 2016-17; that the said demand has been issued under Section 68(2) of the Act and confirmed under Notification No. 30/2012-ST dated 20.06.2012; that the payment to directors for commission announced for financial year 2016-17 was paid on 26.09.2017 and accordingly, 'the point of taxation' in terms of Rule 7 of the Point of Taxation Rules, 2011 for the above transaction occurred on 26.09.2017, however, by this time, the provisions of the Finance Act, 1994 were no more applicable being omitted vide Section 173 of the Central Goods & Service Tax Act, 2017 and hence, the confirmed service tax demand of Rs. 3,37,500/-, on director's commission paid on 26.09.2017, is untenable in law; that the adjudicating authority held at Para 10.16 of the impugned order that since the Finance Act, 1994, have been omitted by the time above commission was paid (26.09.2017), Rule 6A instead of Rule 7 of the 'Point of Taxation Rules, 2011' will be applicable; that Rule 6A of the 'Point of Taxation Rules, 2011' is applicable only in a case when the 'date of invoice' or the 'date of payment' of a particular transaction is not available, whereas, in the present case, the 'date of payment' of the said transaction is available and hence Rule 6A not applicable in present case.

(vi) The appellant submitted that the impugned order is against the Circular No. 115/8/2009-S.T. dated 31.07.2009, wherein, the CBEC has categorically clarified that remuneration / commission paid to whole-time directors, being compensation for their performance, would not be liable to service tax.

(vii) The appellant submitted that recovery of interest under Section 75 of the Act and imposition of penalty under Section 78 of the Act are not proper and

correct since the recovery of service tax itself is untenable in law on merits, as discussed hereinabove.

4 A personal hearing in the matter was attended by Shri Dinesh Kumar Jain, C.A. and he reiterated the submissions of appeal memo and submitted copy of Order 2019 (4) TMI 1585 – CESTAT Kolkata in the case of Malthan Alloys Ltd Versus CCE & ST, Bolpur for consideration.

5. I have carefully gone through the facts of the case, the impugned order, Appeal Memorandum and written as well as oral submissions made by the appellant during personal hearing. The issue to be decided in the instant appeal is whether in the facts and circumstances of the present case, the impugned order passed by the adjudicating authority confirming demand of service tax along with interest and penalty on the commission paid by the appellant to their directors, is correct or not.

6. I find that the directors of the appellant were whole-time directors of the company, for which remuneration have been paid to them by the appellant. The appellant also paid commission, over and above remuneration, to the directors.

6.1 The appellant argued that the whole-time directors are nothing but whole-time employees of the company as per provisions of Section 2(94), Section 2(51), Section 2(94) and Section 197 (6) of the Companies Act, 2013, they can be compensated by way of not only remuneration but also by way of commission based on net profit, as in the present case; that the commission, over and above remuneration, paid to the whole-time directors is nothing but a part of salary as the 'salary' defined under Section 17 (1) of the Income Tax Act, 1961 and salary includes 'any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages'; therefore, commission paid to any director is nothing but a part of salary, that as per the provisions of Section 65B(44) of the Act, wherein, the term 'service' has been defined categorically which provides that 'a provision of service by an employee to the employer in the course of or in relation to his employment' is not covered within the scope of 'service' and therefore, outside the net of service tax.

6.2 I find that the word 'service' needs to be interpreted on the basis of the definition given in the law. The word 'service' had been defined in the Finance Act, 1994 in Section 65B(44) of the Act. Section 65B(44) of the Act stipulates

levy of service tax and exclusion of services thereof which is reproduced as under:

> Section 65B(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-
> (a) .....
> (b) a provision of service by an employee to the employer in the course of or in relation to his employment;
> (c)

(Emphasis supplied)

6.3 Charging Section 66B of the Act is as under:

> "SECTION 66B. Charge of service tax on and after Finance Act, 2012. - There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent. on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."

6.4 The Central Government has expanded the provisions of payment of service tax under reverse charge mechanism to include services rendered by a director also. Notification No. 45/2012-S.T. dated 07.08.2012 and Notification No. 10/2014-ST dated 11.07.2014, which amended Basic Notification No. 30/2012 S.T. dated 20.06.2012, by inserting an entry that any monetary or non-monetary consideration (such as director's fee, commission, bonus, company car, travel reimbursement etc.) paid to the directors would attract service tax and the company would be required to pay service tax on gross amount paid to the director under reverse charge mechanism. The relevant part of the entry inserted vide Notification No. 45/2012-ST dated 07.08.2012 is reproduced below:

Sl. No.	Description of a service	Percentage of payable by the provider of the service	Percentage of service payable by the person receiving the service
1	2	3	4
5A	In respect of services provided or agreed to be provided by a director of a company to the said company	Nil	100%

6.5 In view of the above, no further scope for interpretation other than that the services provided or agreed to be provided by a director of a company to the said company is chargeable to service tax. Any interpretation different to this would make the said entry of the above notification redundant. Notification No. 45/2012-ST dated 07.08.2012 is a conscious act and cannot be ignored which specifically clarified that not only the tax is to be levied but also gives the mechanism of collection of the tax that the tax should be collected on reverse charge mechanism. Whereas the exemption as per Section 66B(44) is only on the service by an employee to the employer in the course of or in relation to the employment which is different to services provide by the director for which remuneration is declared and decided after the results of the company and the

word commission comes in play instead of the salary.

6.6 The appellant pleaded that the whole-time director is nothing but a whole-time employee of the company and taken recourse to the provisions of Section 2(34), Section 2(51), Section 2(94) and Section 197 (6) of the Companies Act, 2013; Section 17 (1) & Section 192 of the Income Tax Act, 1961. The position, responsibility and nature of work allotted to the directors vis-à-vis employee of the company has its own distinction which is distinguishable from provisions of the Companies Act, 1956 as prevailed at the material time. The provisions of the Companies Act, 1956 distinguish directors of a company from the employees of that company. Section 2(13) of the Companies Act, 1956 defines a 'director' as "*any person occupying the position of a director by whatever name called*". Directors of a company are individuals that are elected as, or elected to act as, representatives of the stock holders to establish corporate management related policies and to make decisions on major company issues. They act on the basis of resolutions made at directors' meetings, and derive their powers from the corporate legislation and from the company's Articles Of Association. The Hon'ble Supreme Court has observed that a Managing Director can be regarded as a principal employer for the purposes of the ESI Act, 1948 in the case of Employees State Insurance Corpn. Vs. Apex Engineering P. Ltd., reported in [(1996) 1 Comp LJ 10 (1998) 1 LLJ 274 (SC)]. In such a legal position, Directors and Managing Director cannot be considered as employees of the company as being projected by the appellant. Further, tax even in indirect taxes and direct taxes are different, definition under the Companies Act, 2013 are not for the purpose of charging the tax; tax events are independent to one another and cannot be co-related or inter dependent to one another; definitions of other statutes are helpful for the purpose of creating analogy if the statute does not provide clarity for charging and taxability; whereas in the present case, Section 65B(44) & Section 66B of the Act read with Notification No. 45/2012-ST dated 07.08.2012 abundantly clarifies tax overs.

6.7 The appellant argued that as per Income Tax provisions, commission paid to directors for the work done in their capacity as whole-time directors is to be treated as an incentive in addition to salary and the same didn't come within the purview of commission or brokerage or fee for professional or technical services and they placed reliance on the case law of Nashik Metals(P) Ltd V/s Income tax Officer, Ward-2(3) Pune before ITAT Pune in which the commission

was shown as income from other sources. The DGST held that because the directors have shown the commission income in their hands as "Income from other sources", the appellant cannot take a ground to exclude the commission paid to the directors from the value of salary. I find that the circumstances of this case to the circumstances in which said ruling is entirely different and hence cannot be applied in this case.

6.8 The argument of the appellant that commission received by the Directors and shown by them as salary for income tax purposes and they have deducted TDS etc. on such salary is out of context. The commission head is actually an accounting head mentioned under Section 192 of Income Tax Act providing for the deduction to be made of income as under

"Section 192 SALARY
Any person responsible for paying any income chargeable under the head 'Salaries' shall at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made on the estimated income of the assessee over the assessment year."

6.9 It is the responsibility of the employer to deduct the TDS and deposit to the Govt. account under various heads as well as issue TDS certificates, in the form of Form-16, neither necessary nor sufficient for proving the said relationship as employee employer relationship. The provisions of Section 309 of the Companies Act, 1956 show that there are specific restrictions and specific conditions in respect of the remuneration paid to the directors which distinguishes and exempts directors' remuneration from salary to the employees of the company.

6.10 The appellant placed reliance on Board's Circular No. 115/09/2009 ST dated 31.07.2009 to support their contention that remuneration paid to whole time directors are not chargeable to service tax. In this regard, I find that the provisions of said Circular cannot be applied here as the said Circular was issued prior to 30.06.2012, i.e. in the positive regime of service tax though it concluded that the services provided by directors are services but clarified that such services not liable to service tax under BAS or management consultancy service etc. under positive tax regime till 30.06.2012. However, from 01.07.2012 the Negative list of services is in vogue. The services of the Directors are taxable services as those are neither part of the services mentioned in negative list of services in terms of Section 66D of the Finance Act, 1994 nor are placed in the exempted category.

6.11 In view of above, I am of considered view that the commission paid by the appellant to their directors is correctly held as consideration for services provided by the directors to them and accordingly, is chargeable to the Service Tax, to be paid by the appellant under reverse charge mechanism.

7. As regards imposition of penalties, I find that the appellant is an established company managed by professionals and always had knowledge by virtue of Income Tax laws that their Directors can work for other companies as well by rendering them their services as Directors and are statutorily treated as distinct persons from the employer-employee relationship. I find that negative list regime is very unequivocal, and except the categories mentioned therein, no activity is entitled for exemption from levy of service tax leaving no scope to harbor any doubt whatsoever. Therefore, it transpires that though there was no ambiguity in law, the appellant on his own was giving an interpretation of law and not brought the relevant material facts to the notice of the department at any point of time. Hence required ingredient of suppression of these facts, mis-statement etc. for imposing penalty under Section 78 of the Act is found to be existing in this case and such suppression was not without intention to evade the tax. I placed reliance upon case law of the Hon'ble CESTAT, Chennai, in the case of TVS Motor Co. Ltd. reported as 2012 (28) S.T.R. 127 (Tri. - Chennai). Thus, in such cases where assessees did not declare the correct facts and deliberately mis-construed the facts leading to evasion of service tax on their part tantamount to suppression of facts with an intent to evade service tax. Therefore, I find no infirmity in imposing penalty under Section 78 of the Act along with applicable interest under Section 75 of the Act.

8. The appellant further contended that the show cause notice dated 11.07.2018 proposed demand of service tax of Rs. 24,90,600/- which included service tax demand of Rs. 8,12,000/- (@14.5%) on commission of Rs. 56,00,000/- (announced for financial year 2014-15 and paid in financial year 2015-16); that the department had already issued show cause notice dated 28.07.2016 for demand of service tax of Rs. 6,92,160/- (@12.36%) for the above referred commission amount of Rs. 56,00,000/- (announced for financial year 2014-15 and paid in financial year 2015-16); that the adjudicating authority vide impugned order dropped the demand of service tax of Rs. 6,92,160/- only and confirmed balance service tax demand of Rs. 1,19,840/- (Rs. 8,12,000 – Rs. 6,92,160) by observing that the same arose due to error in calculation of tax rate.

8.1 I find that second show cause notice dated 11.07.2018 issued in respect of the same amount of commission of Rs. 56,00,000/- covering the same period i.e. financial year 2015-16. I find that it is settled position now that when the first show cause notice is issued raising demand on a ground, issuance of second

show cause notice on the same issue for the same period is not sustainable. I relied upon decisions of the Hon'ble Supreme Court in case of M/s Duncans Industries Ltd reported as [illegible] 017 (SC) and of the Hon'ble High Court of Kolkata in case of [illegible] Ltd. reported as 2011 (266) ELT 64(Cal.). Thus, the second show cause notice dated 11.07.2018, inter alia demanded service tax of Rs. 8,12,000/- on commission of Rs. 56,00,000/- covering the same period, which is not sustainable. I find that the adjudicating authority has dropped demand of service tax of Rs. 2,92,160/- on this count. However, I am of the opinion that remaining demand of Rs. 1,19,840/- (Rs. 8,12,000/- (-) 6,92,160/-) is also not sustainable in view of my above findings. Hence, I set aside demand of service tax of Rs. 1,19,840/- and uphold the demand of service tax of Rs. [illegible],500/- (Total confirmed demand of Rs. 18,07,340/- (-) Rs. [illegible]), which is required to be paid by the appellant along with interest. Since, demand of service tax of Rs. 1,19,840/- is set aside, equivalent penalty of Rs. 1,11,840/- imposed under Section 78 is also required to be set aside and upheld imposition of penalty of Rs. 16,87,500/- and I do so.

9. The appellant further pleaded that the commission for the year 2016-17 was paid on 26.09.2017 and as per the provisions of Rule 7 of the Point of Taxation Rules, 2011, point of taxation for the above transaction was 26.09.2017 that the provisions of the Finance Act, 1994 were not applicable to the said transaction, since the said Act was omitted vide Section 173 of the Central Goods & Service Tax Act, 2017 and hence, the confirmed service tax demand of Rs. 5,37,500/- on director's commission paid on 26.09.2017, is untenable in law.

9.1 In this regard, it is a fact on the records that the services have been provided by the directors of the Appellant during the financial year 2016-17 for which commission was paid to them on 26.09.2017. Thus, provision of the services was completed before 01.07.2017, when the Finance Act, 1994 was in operation. I find that the date of invoice is not available in this case, whereas the 'date of payment' is 26.09.2017 which falls after the omission of the Finance Act, 1994. However, the provision of the said services was completed during the year 2016-17 and therefore the point of taxation can be correctly determined in terms of provision of Rule 8A of the Point of Taxation Rules, 2011, which is reproduced as under:

> "RULE 8A. Determination of point of taxation in other cases.-
> Where the point of taxation cannot be determined as per these rules as the date of invoice or the date of payment or both are not available, the Central Excise officer may require the concerned person to produce such documents or other evidences as he may deem necessary and after taking into account such material and the affidavit, if

of the provisions of different points of time, shall, by an order in writing, after giving an opportunity of being heard, determine the point of taxation to the best of his judgment."

9.2 In view of the above, Rule 8A of the Point of Taxation Rules, 2011 shall appropriately be applicable in this case, since the date of invoice is not available in this case and service was rendered during the year 2016-17.

9.3 I further find that Section 174 of the CGST Act, 2017, inter alia, indicates the extent of erstwhile Finance Act, 1994, which would continue upon introduction of CGST Act. It also provides for exceptions as to continuation of certain provisions of the erstwhile laws for the sake of smooth transition. Thus, the provisions of Section 174 of the CGST Act, 2017 saves the rights and privileges accrued under the existing law. The Section 174 of the CGST Act, 2017 reads as under:-

SECTION 174. Repeal and saving. —

(1) Save as otherwise provided in this Act, on and from the date of commencement of this Act, the Central Excise Act, 1944 (1 of 1944) (except as respects goods included in entry 84 of the Union List of the Seventh Schedule to the Constitution), the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955), the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), and the Central Excise Tariff Act, 1985 (5 of 1986) (hereafter referred to as the repealed Acts) are hereby repealed.

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (32 of 1994) (hereafter referred to as "said" amendment or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) of section 173 shall not—

(a) revive anything not in force or existing at the time of such amendment or repeal; or

(b) affect the previous operation of the amended Act or repealed Acts and orders or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts:

Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

(d) affect any duty, tax, surcharge, fine, penalty, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Act or repealed Acts; or

(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed;

(f) affect any proceedings including that relating to an appeal, review or reference, instituted before on, or after the appointed day under the said amended Act or repealed Acts and such proceedings shall be continued under the said amended Act or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed.

(3) The mention of the particular matters referred to in sub-sections (1) and (2) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal."

9.4 In view of above, the repeal of the Acts mentioned in sub-section (1) of Section 174 of the CGST Act, 2017 would not affect any right, privilege,