



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

द्वितीय तल, जी एम टी भवन / 2<sup>nd</sup> Floor, GST Bhavan  
रेस कोर्स रिंग रोड / Race Course Ring Road  
राजकोट / Rajkot - 360 001



सत्यमेव जयते

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रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल नम्बरा Appeal / File No.	मूल आदेश नं / O.I.O. No.	दिनांक / Date
	V2/225/GDM/2017	18/JC/2017-18	30-10-2017

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

**KCH-EXCUS-000-APP-029-2019**

आदेश का दिनांक / Date of Order:	27.02.2019	जारी करने की तारीख / Date of issue:	07.03.2019
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कुमार संतोष, प्रधान आयुक्त (अपील्स), राजकोट द्वारा पारित /  
Passed by Shri Kumar Santosh, Principal 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 **Appellant** & Respondent :-

**M/ s Ashotosh Container Services Pvt. Ltd., Railway Survey No. 169/42 & 169,, On the way  
to MPSEZ,, Village Dhrub, Taluka- MundraDist. Kutch.**

इस आदेश (अपील) में 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 क प्रांत अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 को धारा 35B के अंतर्गत एवं विन अधिनियम, 1994 की धारा 86 क 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 उत्पाद 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 वृत्तांग रूप अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 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 क समक्ष अपील प्रस्तुत करने क लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, क नियम 6 क अंतर्गत निर्धारित किए गये प्रपत्र EA-3 का चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, व्याज की मांग और लगाया गया जुर्माना, रुपां 5 लाख या उससे कम, 5 लाख रुपां या 50 लाख रुपां तक अथवा 50 लाख रुपां 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 रजिस्ट्रार 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) क लिए आवेदन-पत्र के साथ 500/- रुपां का निर्धारित शुल्क जमा करना होगा।/  
Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

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 क समक्ष अपील, विन अधिनियम, 1994 को धारा 86(1) क अंतर्गत सेवाकर नियमवली, 1994, क नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती एवं उसके साथ जिस आदेश क 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, व्याज की मांग और लगाया गया जुर्माना, रुपां 5 लाख या उससे कम, 5 लाख रुपां या 50 लाख रुपां तक अथवा 50 लाख रुपां 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 रजिस्ट्रार 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) क लिए आवेदन-पत्र के साथ 500/- रुपां का निर्धारित शुल्क जमा करना होगा।/  
Application made for grant of stay shall be accompanied by a fee of Rs.500/-

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) विन अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकती एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करे (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 (सस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की विनियम अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करने समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जमाना विवादित है, या जमाना, जब केवल जमाना विवादित है, का भुगतान किया जाए, यद्यपि कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दम करोड़ रुपय में 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 गयी गई गलत राशि  
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम  
- यद्यपि यह कि इस धारा के प्रावधान विनियम (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किमी अपीलीय प्राधिकरण के समक्ष विचारणीय स्थान 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.  
भारत सरकार को पुनरीक्षण आवेदन :  
**Revision application to Government of India:**  
(C) इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994, की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, विन 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 (i) of Section-35B ibid:  
(i) यदि माल के किमी नुकसान के मामले में, जहाँ नुकसान किमी माल को किमी कारखाने से भंडार गृह के पारगमन के दौरान या किमी अन्य कारखाने या फिर किमी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किमी भंडार गृह में या भंडारण से माल के प्रसंस्करण के दौरान, किमी कारखाने या किमी 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 किमी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किमी राष्ट्र या क्षेत्र का 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) मतिश्चित्त उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इंडी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा विन अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि 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 प्रतियाँ प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रपण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियाँ संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साथ ही 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। /  
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 आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त हिसाब से किया जाना चाहिये। इस नथ्य के हात 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, 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.  
(E) यथांशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट 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 प्राधिकरण को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और त्वरिततम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट [www.cbec.gov.in](http://www.cbec.gov.in) का 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. Ashutosh Container Services Private Limited, Survey No. 169/42 & 169, on the way to MPSEZ, Village – Dhrub, Tal. Mundra, District - Kutch (hereinafter referred to as 'appellant') filed present appeal against Order-in-Original No. 18/JC/2017-18 dated 30.10.2017 (hereinafter referred to as "impugned order") passed by the Joint Commissioner, Central GST, Gandhidham (Kutch) (hereinafter referred to as "the adjudicating authority"):-

2. The brief facts of the case are that the appellant had paid service tax on lift on/lift off charges of the empty and loaded containers from the shipping lines and transportation of loaded containers from CFS to port jetty and vice versa, however, no service tax was paid by the appellant on transportation of empty containers from Jetty to CFS and vice versa by claiming benefit of exemption under Notification No. 25/2012-ST dated 20.6.2012. Statement of Shri Kapil Thacker, Manager (Finance & Accounts) and Authorized signatory of the appellant was recorded on 3.3.2015 wherein he stated that in case of imported goods, they charged service tax on the importer/CHA on composite service/bundled service on transportation of loaded container till loading of imported goods to the trucks arranged by importers under the head of "cargo handling service"; that in case of export of the goods, the exporters bring their goods for export to appellant's CFS; that in most of the cases, as the appellant have empty containers lying at CFS, the appellant after unloading the goods from exporter's vehicles, stuff them in to the empty containers, lift on loaded containers and transport of loaded containers to the port for which they billed the exporter export composite charges and also charged weightment charge from the exporter under the head of "Export Cargo Handling charges" and discharged service tax; that regarding activities of movement of empty containers from port to CFS and vice-versa and from one CFS to another, they provided service of transportation of empty containers and raised invoices and shown amount of empty lift on/lift off charges and amount of transportation of empty containers separately and discharged service tax on amount of lift on/lift off charges for movement of containers from other CFS to the appellant's CFS and vice-versa; that in case of non-availability of containers, the lift on/lift off charges of empty containers along with its transportation charges, a composite invoice is being issued on exporters/CHA as "Empty containers for export stuffing"; that they availed services of transporters for movement of empty containers. Show Cause Notice No. DGCEI/AZU/36-95/2016-17 dated 29.3.2017 was issued to the appellant proposing recovery of Service Tax of Rs. 55,04,881/- for the period from F.Y. 1.7.2012 to 31.3.2015 under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as "the Act") along with interest under Section 75 of the Act, imposition of penalty under Section 78 of the Act and recovery of late fee under Section 70 of the Act read with Rule 7C of Service Tax Rules, 1994 for failure to file ST-3 returns. The impugned order confirmed Service Tax of Rs. 55,04,881/- along with interest, imposed penalty of Rs. 55,04,881/- under Section 78 of the Act and ordered to

recover applicable late fee for failure to file ST-3 returns in time.

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

(i) The impugned order is a non-speaking order inasmuch as the impugned order has not dealt with specific prayer of the appellant that they are not engaged in loading of empty containers at port and this fact warranted verification before adjudication; that the lower adjudicating authority has also failed to deal with specific plea of appellant that the SCN is contrary to CBEC Circular No. 104/7/2008-ST dated 6.8.2008, which was binding on all revenue officers as held by the Hon'ble Supreme Court in the case of Ranadey Micronutrients reported as 1996 (87) ELT 19 (SC).

(ii) The lower adjudicating authority at Para 23 of the impugned order admitted that the appellant is providing service of transportation of empty containers from port to CFS and vice-versa. When it is an admitted position that the appellant had provided transportation of empty containers and when there is no dispute over the fact the transportation charges were below the specified limit under Sl. No. 21 of Notification No. 25/2012-ST, then there was no requirement to issue consignment note as provided in Explanation to Rule 4B of Service Tax Rules, 1994 and therefore, the lower adjudicating authority could not have held that the appellant cannot be treated as GTA because they had not issued consignment note.

(iii) Even assuming without admitting that loading of empty containers in vehicle is performed by the appellant, as mentioned in Para 27 of the impugned order, have been clarified vide CBEC Circular No. 104/7/2008-ST dated 6.8.2008, as forming part of principal service, namely, transportation of goods by road and the lower adjudicating authority at Para 23 of the impugned order admitted that the appellant is providing service of transportation. Therefore, the appellant submit that the impugned order is contrary to the aforesaid Circular and hence, the impugned order is not tenable in the eyes of law.

(iv) The reliance placed by the lower adjudicating authority on the decision of the Hon'ble CESTAT in the case of Bharathi Soap Works reported as 2008 (9) STR 80 (Tri. - Bang.) is misplaced inasmuch as in that case, the transporter was not exempted from the requirement to issue consignment note in terms of Explanation to Rule 4B of Service Tax Rules, 1994.

(v) The issue involved is pertaining to interpretation of statute, trade practice followed by other CFS as bonafide belief of appellant flowing from CBEC Circular dated 6.8.2008 and hence, service tax could not have been demanded by invoking extended period of limitation.

(vi) Since demand of service tax is not tenable on merit as well as limitation, the appellant is not liable to pay interest under Section 75 of the Act and no penalty is required

to be imposed under Section 78 of the Act.

(vii) The appellant has not collected service tax from the service recipients and hence, their total receipt for rendering the service should be treated as inclusive of service tax as held by the Hon'ble CESTAT in the case of Advantage Media Consultant reported as 2008 (10) STR 449 (Tri. – Kolkata), which has been upheld by the Hon'ble Supreme Court reported as 2009 (14) STR 449 (SC).

4. Personal hearing in the matter was attended by Shri Vikas Mehta, Consultant, who reiterated the grounds of appeal and submitted that in a similar appeal against M/s. Siddhi Vinayak Logistics, Order-in-Appeal dated 5.3.2018 has decided the issue; that Para 3 of CBEC Circular No. 104/7/2008-ST dated 6.8.2008 covers this issue in their favour; that Notification No. 34/2004-ST dated 3.12.2004 and Notification No. 12/2012-ST dated 20.6.2012 also granted exemption to the services by a GTA, if the amount does not exceed Rs. 1,500/- each time as is their case; that Paras/Ground No. A-2, A-3, A-4, D are very clear and specific but even then, the lower adjudicating authority has looked other way to deny them the available benefit; that this appeal needs to be decided in their favour in view of factual and legal position.

#### FINDINGS:

5. I have carefully gone through the facts of the case, impugned order, grounds of appeal and the submissions made during personal hearing. I find that the appellant has already deposited an amount equivalent to 7.5% of service tax confirmed vide impugned order and thus has complied with the requirement of Section 35F(i) of the Central Excise Act, 1944, as made applicable in service tax matters vide Section 83 of the Act. Therefore, I proceed to decide this appeal. The issue to be decided in the present case is as to whether confirmation of demand of service tax on movement of empty containers from Jetty to CFS and vice versa provided by the appellant is correct or not.

6. The appellant has undertaken the activity of bringing the empty containers from the port to their CFS and vice-versa and have provided handling services like lift on, lift off and storing them in their empty container yard, which have not been disputed. It is also not disputed that the appellant has issued bills to the container lines, bifurcating in two parts – transportation charges and handling charges but they have not discharged service tax on transportation charges on the ground that it is a GTA service and below the exemption limit. However, for handling charges, they have paid service tax. I find that the definition of Cargo Handling Service, as provided under Section 65(23) of the Finance Act, 1994, as it stood during relevant time, reads as under: -

(23) 'cargo handling service' means loading, unloading, packing or unpacking of cargo and includes,

(a) cargo handling services provided for freight in special containers or for noncontainerized freight, services provided by a container freight terminal or

any other freight terminal, for all purposes of transport, and cargo handling service incidental to freight; and

- (b) service of packing together with transportation of cargo or goods, with or without one or more of other services like loading, unloading, unpacking, but does not include, handling of export cargo or passenger baggage or mere transportation of goods;

(emphasis supplied)

6.1 Thus, for classifying any activity/service as Cargo Handling Service, the presence of cargo is a must. I find that the transportation of empty containers with the help of transporters cannot be considered as cargo handling service in view of fact that there is no cargo and in view of Para 14 of Annexure – I to Board's Circular No. B11/1/2002-TRU dated 01.08.2002, which reads as under: -

*14. CFSs also sometimes undertake storing/washing/repairing and handling of empty containers for the shipping lines for which they charge the shipping lines. Empty containers cannot be treated as cargo. Therefore, the activities mentioned above do not come within the purview of cargo handling services.*

(Emphasis supplied)

6.2 In view of above, transportation of empty containers from port to CFS and vice-versa can't be called Cargo Handling Service and no service tax is payable on such transportation charges under Cargo Handling Service as held in Order-in-Appeal No. KCH-EXCUS-000-APP-193-TO-194-2017-18 dated 5.3.2018 in the case of Siddhi Vinayak Logistics.

7. I also find that the lower adjudicating authority has held that the appellant had not issued consignment notes, therefore, the service cannot be considered as GTA service. I find that the statute defines Goods Transport Agency, as under: -

*"goods transport agency" means any person which provides service in relation to transport of goods by road and issues consignment note, by whatever name called;*

7.1. Thus, to classify a person as GTA service provider first condition is that he should be providing services in relation to transport of goods. I find that the first condition of goods transport agency is not disputed. The second condition is that consignment note should have been issued and it is also undisputed that consignment notes have not been issued. Regarding issuance of consignment notes, the appellant contended that there was no requirement to issue consignment note as provided in Explanation to Rule 4B of Service Tax Rules, 1994.

7.2 I find that Rule 4B of Service Tax Rules, 1994, reads as under:

*"Any goods transport agency which provides service in relation to transport of goods by road in a goods carriage shall issue a consignment note to the recipient of service:*

*Provided that where any taxable service in relation to transport of goods by road in a goods carriage is wholly exempted under section 93 of the Act, the goods*

transport agency shall not be required to issue the consignment note.

*Explanation.- For the purposes of this rule and the second proviso to rule 4A, "consignment note" means a document, issued by a goods transport agency against the receipt of goods for the purpose of transport of goods by road in a goods carriage, which is serially numbered, and contains the name of the consignor and consignee, registration number of the goods carriage in which the goods are transported, details of the goods transported, details of the place of origin and destination, person liable for paying service tax whether consignor, consignee or the goods transport agency."*

7.3 I find that Notification No. 34/2004-Service Tax dated 03.12.2004 and subsequent Notification No: 12/2012- Service Tax dated 20.06.2012 granted exemption to the services provided by a Goods Transport Agency, if the amount charged does not exceed Rs. 1,500/-. I find that in this case there is no allegation in SCN that the amount charged is more than Rs. 1,500/- whereas the appellant has submitted that amount is less than Rs. 1500/- in each and every case. Thus, I find that since the Notification exempted payment of Service Tax, the appellant providing services of Goods Transport Agency was otherwise also not required to pay Service Tax on the transportation charges of empty containers, which were below exemption limit of Rs. 1,500/-.

8. In view of above, I set aside the impugned order and allow the appeal filed by the appellant.

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

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

प्रमाणित  
21/3/19

(कुमार संतोष)  
प्रधान आयुक्त (अपील्स)

By Speed Post

To,

M/s. Ashutosh Container Services Private Limited, Survey No. 169/42 & 169, on the way to MPSEZ, Village – Dhruv, Tal. Mundra, District - Kutch

मेसर्स आशुतोष कंटेनर सर्विसेस प्राइवेट लिमिटेड,  
सर्वे न. १६९/४२ एवं १६९,  
एमपीएसईजेड के तरफ,  
गाँव: ध्रुव, तालुका: मुँदरा  
जिल्ला: कच्छ

Copy to:

- 1) The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad for kind information please.
- 2) The Commissioner, CGST & Central Excise, Gandhidham Commissionerate, Gandhidham (Kutch) for necessary action.
- 3) The Assistant Commissioner, Central GST Division, Mundra for necessary action.
- 4) Guard File.

