NATION TAX MARKET	[illegible] O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE [illegible] 2nd Floor, GST Bhavan, [illegible] Race Course Ring Road, [illegible] Rajkot – 360 001 Tel. Fax No. 0281 – 24[illegible] Email: [illegible]@gmail.com	[illegible]

[illegible]

क	[illegible] Appeal / File No. V2/[illegible]/2018	[illegible] O.I.O. No. 108/AC/S.Tax/[illegible]/2016-17	[illegible] Date 21.09.2017

ख [illegible] Order-In-Appeal No.):

BHV-EXCUS-000-APP-070-2018-19

[illegible] Date of Order:	26.04.2018	[illegible] Date of issue:	08.05.2018

Passed by Shri P. A. Vasave, Commissioner, CGST & Central Excise, Kutch(Gandhidham)

[illegible]

In pursuance of Board's Notification No. 26/2017-Cus(N.T.) dated 17.10.2017 read with Board's Order No. [illegible] dated [illegible], Shri P. A. Vasave, Commissioner, CGST & Central Excise, Kutch(Gandhidham), has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग [illegible]

Arising out of the above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham / Bhavnagar:

घ [illegible] / Name & Address of the Appellants & Respondent :-

1. M/s Sunrise Transport Co., Tarun Complex 03, Wadi Plot, Porbandar.

[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, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para-1(a) above.

(iii) [illegible] 2001, [illegible]

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 favor 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) [illegible] 1994, [illegible]

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/-.

(ii) [illegible] 1994, [illegible]

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.

(C) [illegible]

[illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

[illegible] 2014 [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.

(i) भारत सरकार को पुनरीक्षण आवेदन :

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, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi 110 001 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:

(ii) [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.

(iii) [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.

(iv) [illegible]

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

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

(vi) [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.

(vii) [illegible]

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.

(C) [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.

(D) [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.

(E) [illegible]

Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(F) [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::

1.0. **BRIEF FACTS AND GROUNDS OF APPEAL:**

1.1. The subject appeal has been preferred by M/s. Sunrise Transport Co., "Tanna Complex", 33, Wadi Plot, Porbandar-360575 (hereinafter referred to as "the appellant") against the Order-in-Original No. 100/AC/STAX/DIV/2016-17, dtd.21.03.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner (AC), Service Tax Division, Bhavnagar (hereinafter referred to as "the Adjudicating authority"). The Appellant are engaged in providing taxable services of categories "Commercial & Industrial Construction", "Works Contract Service" etc. and they are registered with service tax vide Registration No. AAYFS8744RSD02.

1.2. Intelligence gathered revealed that M/s. Tecon Infrastructure Pvt. Ltd. (hereinafter referred to as "TIPL") and its sister concern units, including the Appellant were indulging into the evasion of service tax by non-payment/short payment of service tax in respect of taxable services provided/received by them. Based on the intelligence, search of the office premises of the Appellant was carried out on 03.12.2014.

1.3. In the course of investigation, statement of Shri Mahendrakumar Gokaldas Kotecha, Partner of the Appellant was recorded on 03.12.2014, wherein he interalia stated that they are engaged in providing transport of goods by road service since 2010-11 and that they had provided the service to M/s. TIPL only; he produced the balance sheet of the Appellant for the FY 2010-11, 2011-12 and 2012-13; that on perusing a copy of contract dtd.20.09.2010 entered by the Appellant with M/s. TIPL, he stated that as per the contract the Appellant would get Rs.25/- per MT for the services of metal transportation to be provided to M/s. TIPL; that they had not charged any service tax to M/s. TIPL for the services provided to them and M/s. TIPL has not deducted any service tax from the payments to be made to the Appellant.

1.4. In a further statement dtd.20.04.2015, Shri Mahendrakumar Gokaldas Kotecha, Partner of the Appellant produced copies of three service tax returns filed by them for the period ended on March 2011, September 2011 and March 2012; that in the FY 2010-11, the Appellant had provided construction service to M/s. Chiteg Construction (hereinafter referred to as "M/s. CC") as their sub contractor in relation to the Project of conversion of wet dock into dry dock; he produced six invoices raised and ledger of M/s. CC maintained in their books of accounts; that the three service tax returns filed by them were pertaining to the services they had provided to M/s. CC; that they had discharged service tax liability on actual receipt of consideration basis, however service tax on the amount not received from M/s. CC had not been paid since as per the provisions of service tax laws prevailing up to 01.07.2011, service tax was payable on amount actually received from the service recipient against the taxable service provided; that except the service provided to M/s. CC as mentioned above, the Appellant had provided services of transportation of goods and materials & excavation works to M/s. TIPL during last five years; he agreed that service tax was payable under the category of

"Transportation of goods by road service", however for the services of excavation or soil/strata provided for two canal projects. Hence the same was exempted from service tax. That on submitted copies of the invoices raised by the Appellant on M/s. TIPL for providing services of transportation of goods as well as excavation of soil/strata. That he also submitted Ledger of M/s. TIPL maintained on their books of accounts, that the Appellant had not provided any type of services to any other company. That all the Appellant stopped functioning in the year 2014-15; that service tax on the transaction of goods by road service provided by Appellant to M/s. TIPL were payable by them under the Reverse Charge Mechanism.

1.8 After investigation, it appeared that during 2010-11 the Appellant had provided Commercial and Industrial Construction services in terms of Section 65(105)(zzq) of the Finance Act, 1994 (hereinafter referred to as "the Act") to M/s. CC as per six RA bills and also provided services of site formation & clearance, excavation and earthmoving & demolition as per Section 65(105)(zzzz) of the Act to M/s. TIPL as their sub-contractor for two Canal projects. It also appeared that as per the ledger of M/s. CC maintained by the Appellant, they had received Rs.2,85,531/- during 2010-11 to 2014-15 from M/s. CC for providing the services of Commercial and Industrial Construction services. Whereas in the ST-3 returns filed by the Appellant, they had not included their income for the same as Rs.17,04,225/- with a view to evade payment of service tax and short paid service tax to the tune of Rs.59,280/-; that the services of site formation & clearance, excavation and earthmoving & demolition provided in the course of construction of canal were not included in the scope of the said Notification No. 17/2005-ST dtd 07.06.2005, hence liable to service tax and accordingly, the Appellant had not paid service tax of Rs.5,43,712/- for such services provided by the Appellant to M/s. TIPL. Thus, there was total short payment/non-payment of service tax of Rs.5,97,492/- by the Appellant during 2010-11 to 2013-14, which was in contravention of the provisions of Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994 ("The Rules"), that the Appellant had filed only three service tax returns and it also contained wrong details and thereby may had committed an offence in terms of Section 70 of the Act, that the same was found as appropriate case for invoking the provisions of the Proviso to Section 73(1) of the Act for demanding the short paid/non-paid service tax with interest at the rate applicable under Section 75 of the Act. In this regard, therefore a Show Cause Notice dtd 23.04.2015 was issued to the Appellant proposing therein the demand and recovery of service tax of Rs.5,97,492/- under Proviso to Section 73(1) of the Act along with interest under Section 75 of the Act; penalty under Section 78 of the Act and Section 77(2) of the Act.

1.9 In Reply to the SCN dtd.23.04.2015, the Appellant vide their letter dtd.20/25.05.2015 submitted as follow:

(a) As regards the construction services provided by them to M/s. CC, it was submitted that they raised six RA Bills for Dry Dock project for Rs.1,36,70,218/- against this, they

received consideration of Rs.18,27,703/-; thus, the Service tax liability worked out to be Rs.27,252/- after availing the threshold exemption limit of Rs.10,00,000/- and thereby there was no case for additional tax liability of Rs.36,360/-.

(b) As regards the services provided by them to M/s. TIPL, for the Pachhan-Kolkhada and Bhadar-II Dam project work, hence the same were classifiable under Section 65(91a) of the Act, which service is exempted from the service tax. Thus, there was no evasion of service tax and no case for imposing penalty on them.

1.7 The Appellants were also granted personal hearing and thereafter the Order came to be passed by the adjudicating authority. The adjudicating authority found that the Appellant had raised the invoices on M/s. CC for providing services in relation to Dry Dock Project charging service tax @10% of the billed amount, and as per the ledger of M/s. CC which was produced during statement dtd.20.04.2015, the Appellant has received Rs.21,18,961/- from M/s. CC whereas it has been argued by the Appellant that they had received only Rs.18,27,703/-. However, it is apparent on examination of their accounts that the Appellant did not consider the TDS amount deducted by M/s. CC. Thus, the adjudicating authority has found that the service tax of Rs.32,530/- demanded from the Appellant in respect of the services provided by them to M/s. CC has been correctly calculated.

1.8. As regards the services provided by the Appellant to M/s. TIPL, it was found by the adjudicating authority that M/s. TIPL were awarded two Projects of Construction of Pachhar Kolkhada spreading channel and Bhadar-II Canal by the Gujarat Government. M/s. TIPL had sub-contracted its related excavation work to the Appellant. The services provided by the Appellant in this regard were excavation in Kolkhada/Hill all types of strata is apprehensibly the taxable services of "Site Formation and Clearance Excavation and Earthmoving and demolition and such other similar activities", which is classifiable under erstwhile Section 65(105)(zzzz) of the Act. The erstwhile Notification No. 17/2009-ST, dtd.07.07.2009 exempted service tax on such services provided to any other person in the course of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams, ports or other ports, but here such services were been provided in the course of construction of channel and canal, which are not exempted under the said Notification. Further to this, as clarified by the CBEC vide Circular No. 138/7/2011-ST dtd.08.08.2011 and No. 147/16/2011-ST, dtd.21.10.2011, the sub-contractor is essentially a provider of taxable service and the services provided by them are in the nature of input services and if the sub-contractors are providing works contract service to the main contractor for completion of the main contract which is exempted works contract service, then service tax is not leviable on the works contract service provide by such sub-contractor. In the instant case, the main contractor is M/s. TIPL who had provided the exempted works contract service, but the services of merely excavation of soft/HARD/RAI types of strata provide by the Appellant were not being in the nature of the exempted Works Contract service, but they are the taxable service of Site formation and

clearance, excavation and earthmoving and demolition", which is classifiable under erstwhile Section 65(105)(zzza) of the Act, liable to service tax under Section 66 of the Act. Accordingly it was held that the service tax of Rs 1,4[illegible]/- demanded in respect of such service is correctly payable by the Appellant.

1.8. The adjudicating authority had thereby confirmed the demand of Rs.5,82,492/- under proviso to Section 73(1) of the Act with interest on the same in terms of Section 75 of the Act and also imposed penalty of Rs [illegible],492/- on the Appellant under Section 78(1) of the Act, providing them the option of reduced penalty. Penalty of Rs.10,000/- was also imposed on the Appellant under Section 77(2) of the Act. Accordingly passed the OIO No. 158/AC/STAX/D-V/2016-17 dtd.21.03.2017.

1.10 Being aggrieved by the OIO dtd 21.03.2017, the Appellant has filed the present appeal, mainly contending the following grounds:

(i) The adjudicating authority had not at all dealt with the pleas made in written reply to the SCN, while passing the impugned order and thus, it is a non speaking order and non-reasoned order.

(ii) The findings made by the adjudicating authority were without considering the reply to the SCN filed by them, and passed the impugned order in mechanical manner.

(iii) M/s. TIPL were awarded Work Order No. AB-IV[illegible]3448 dtd. 15.05.2006 and No. 476, dtd.13.02.2007 by the Government of Gujarat for construction of Padhiyar Kotkhada Canal and Bhadar-I WR Project. Under the MOU dtd. [illegible] 2010 and 01.02.2011, M/s. TIPL awarded the Appellant the contracts of excavation of soil/SRMR etc. and accordingly they rendered the services and raised the invoices. As per the terms of "Site formation and clearance, Excavation and Earthmoving and Demolition" as defined vide Section 65(97a) of the Act, such service were excluding the services provided in relation to irrigation and watershed development. So, the services provided by the Appellant may not considered as service provided under Section 65(105)(zzza) of the Act, hence exempted from the levy of service tax. The adjudicating authority made reference to the CBEC Circulars, but deliberately avoided to discuss the nature of service being provided by them, which is by virtue of definition itself an exempted service. Thus, the CBEC Circulars were not at all relevant to the instant case of the Appellant.

(iv) The Appellant had also relied upon the following case laws:

(a) ITD Cementation India Ltd. v/s. CST, Mumbai [2014(35) STR 807 (Tri-Mumbai)]
(b) Commissioner vs. ITD Cementation India Ltd. [2015(38) STR J425(SC)]

(v) The Appellant, however, agreed with the findings of the adjudicating authority that the TDS deducted by M/s. [illegible] were not counted as payment received by the Appellant.

(v) The short payment as agreed by the Appellant was due to lack of knowledge and technical interpretation of the TDS deducted by the service recipient and there was no malafide intention to evade the payment of service tax or to contravene any provisions of the Act; Otherwise, there was no short payment of service tax on the services provided by the Appellant to M/s. CC. Since the services provided by the Appellant to M/s. TIPL were not a taxable service at all, they did not consider the same to be mentioned in ST-3 returns and there was no suppression on their part which may warrant levy of any penalty under Section 78 and 77(2) of the Act. For this, the Appellant sought immunity from the payment of penalty.

(vi) The OIO dtd.21.03.2017 was received by the Appellant on 25.03.2017 and the appeal has been filed on 18.05.2017. While filing the appeal the Appellant represented that they had made pre-deposit of Rs.40,687/- vide CAR-7 Challan CIN 00904011705201700178 dtd.17.05.2017 under Accounting Code 03440060.

1.11 The Central Board of Excise and Customs had vide Notification No. 23/2017-CEx (NT), dtd.17.10.2017 read with Boards Order No. 05/2017-ST, dtd.15.11.2017 has appointed the undersigned as appellate authority under Section 35B of the Central Excise Act, 1944 for the purpose of passing orders in the present appeal.

1.12. Accordingly, the Appellant were granted opportunity of hearing on 21.01.2018, which was attended by Shri Amit Prajapati, Chartered Accountant and Authorised representative of the Appellant. During hearing, he reiterated the grounds in appeal. The definition provided in Section 65 (105)(zzh) had specifically restricted the services in relation to agriculture, irrigation, watershed development and drilling, desilting, renovating or desilting of water sources of water bodies. However, their pleas were not at all considered during adjudication. With this submission, he requested to drop the demand of service tax, interest and penalties. He also represented that the maximum penalty which can be imposed under Section 78 of the Act is 30%, as the tax has been demanded based on ledgers and recorded in books of accounts.

1.13. Vide letter dtd.31.02.2018, the Appellant filed their further written submission, in which they submitted that copies of the work order dtd.15.02.2007 and 15.05.2009 assigned to M/s. TIPL and the MOU dtd.30.11.2011 and 01.11.2013 they had with M/s. CC were already provided in appeal.

1.14 Copy of the appeal memo was provided to the Assistant Commissioner Service Tax Division, Dhanagar vide letter dtd.28.05.2017 and they were also informed about the hearing schedule, but nothing has been received from them.

2.0. FINDINGS:

2.1. I have carefully gone through the appeal papers placed before me and the submissions made by the Appellant during the proceedings, which took place before me. I find that the Appellant has made pre-deposit of Rs.40,687/- vide CAR-7 Challan CIN

[illegible] dtd. [illegible].05.2017, which is more than 7.5% of the amount of service tax of Rs.5,62,492/- confirmed in the impugned Order. Thus, I find that there is substantial compliance to Section 35F of the Central Excise Act, 1944 read with Section 83 of the Act. Accordingly, I proceed to decide this appeal.

2.2. Primafacie, I find that the points for determination in the present appeal in terms of Section 35A (4) of the Central Excise Act, 1944 read with Section 85 of the Act are the following:

(a) Whether there was short payment of service tax in respect of services provided by Appellant to M/s. CC?

(b) Whether the Appellant were entitled for exemption from service tax in respect of services they had provided to M/s. TIPL in terms of exclusion clause provided in Section 65(97a) of the Act?

(c) Whether the case law of IFB Corporation India Ltd. relied upon by the Appellant is applicable in the present case of the Appellant?

(d) What should be the amount of service tax demand to be confirmed? Under which provisions of the Act such demand may be confirmed? Is there any case for levy of interest under Section 75 of the Act on such confirmed demand? Is there any case for imposing penalty on the Appellant under Section 78 of the Act and what should be the quantum of such penalty? Is there any case for imposing penalty on the Appellant under Section 77(2) of the Act and what should be quantum of such penalty?

(e) What should be the order, which is just and proper, in the context of the grounds of appeal, submission made by the Appellant during hearing as well as by way of additional submission and merits of the case before me?

2.3 As regards the point (a), I find it an undisputed fact that at the relevant time, the Appellant were assigned work contract by M/s. CC, for Dry Dock Project. It is not being disputed that during the relevant time the service tax liability was to be considered on receipt basis till 30.06.2011, even though I noticed an admission from the Appellant that the outstanding service tax liability of Rs.21,26,561/- has been reflected as Service Tax payable in the Audited Financial report of the Appellant for FY 2010-11, being the amount of service tax charged but not received from the service recipient against the due payment of Rs.1,25,11,470/-. The Appellant also agreed with the same and agreed about the short payment of service tax of Rs.33,389/- on account of mistake in calculating the TDS component. With this, I decide the point (a) in affirmative.

2.4. Now coming to point (b), I find that the notice has proposed the demand of service tax from the Appellant in respect of services of excavation of soil/SRHP for two rural projects provided by them to M/s. TIPL as a sub-contractor in terms of MOU dtd.01.11.2010 and 20.11.2011 in the category of 'Site formation and clearance,

excavation and earthmoving and demolition" as defined under clause (zzzh) of Section 65(97a) of the Act, which is a class/ taxable service" under clause (zzzz) of Section 65(105) of the Act. It is an apparent fact that the Appellant has not charged any service tax in their invoices dtd. 31.10.2010 for 12.2010, 28.02.2011 and 31.03.2011 in respect of these services, which they had provided during 2010-11, considering these services of the exempted category. In the statement dtd.05.12.2014 and 20.04.2015 also, there is a sufficient answer from the Appellant that they were not required to charge service tax on the service of such category which had been provided by them towards canal projects of the Government. In the statement dtd.05.12.2014 AND 20.04.2015, the Appellant were not questioned on this aspect. But in para 5.1(i), (ii),(iv) and(v) of the Notice, the Appellant were asked to clarify on the aspect alleging that erstwhile Notification No. 17/2005-ST. dtd.07.06.2005 did not accord exemption to the services, which were provided in the course of construction of canal. Further, referring to the clarification provided by the CBEC vide Circular's No. 116/7/2011-ST. dtd.03.05.2011 and No. 147/10/2011-ST. dtd.21.10.2011 clarified that just because the main contractor is providing works contract service of exempted category, it would not automatically lead to the classification of service being provided by the sub-contractor to the contractor as Works contract service and the classification would have to be independently done as per the rules and legality would get decided accordingly. In this context, it was alleged in the Notice that the services being provided by the Appellant were not of the category of works contract service in nature and appears to be the taxable service of "Site formation and clearance, excavation and earthmoving and demolition and such other similar activities" classifiable under Section 65(105)(zzzh) of the Act, hence the said services were liable to be taxed under erstwhile Section 66 of the Act. In this respect, although mentioned by the Appellant in their returns of service tax about such services as Works contract service and outright exemption, the clarification has been provided by the Appellant in their reply to the Notice before the adjudicating authority and also in the grounds of appeal placed before me in the present appeal that Section 65(105)(zzzh) of the Act allows the department to consider the services provided or to be provided to any person, by any person in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities as 'taxable service'. But while defining the term of 'site formation and clearance, excavation and earthmoving and demolition services' vide Section 65(97a) of the Act, the provision has been made to exclude the services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies. It is not disputed that the services were provided by the Appellant to M/s. TIPL as their sub-contractor for the main contract for Construction of Pachhim-Kachchha Spreading Channel and Bridges-II WR Project. In this context, the services provided by them were not falling within the category of 'taxable service' under the classification of service provided vide Section 65(105)(zzzh) of the Act, as has been alleged in the notice and has to be considered as exempted service. So far the circulars of the CBEC are concerned, the same are not relevant when the services were not of "taxable category" while rendering of Section 65(105)(zzzh)

of the Act. Apparently Notification No. 17/2005-ST dtd.07.06.2005 did not provide exemption to the projects related to canal etc. as there was no need of such exemption at all, in view of the fact that said services in relation to canal were not covered under the taxable category at all. It has been correctly argued that their pleas in this regard remained unheard before the adjudicating authority and due to non-consideration on this aspect the demand which has been confirmed required to be set aside. I accept my considered view on this aspect by finding significant force in the averments made by the Appellant in this regard. The issue getting closed when the term defined vide Section 65(97a) of the Act explicitly disallow coverage to the services provided in relation to irrigation and watershed projects. There is no reason to differ with the pleas made by the Appellant in this respect. Finding full justification in favour of the Appellant's submission on this aspect, I am to decide the point (b) also with contention.

2.5. On point (c), I find the facts of the said case law are almost similar to the present case of the Appellant. It was viewed by the CESTAT, WZB, Mumbai in that case that the Appellant of the said case were required to construct diaphragm wall, anchor slab and retention wall with special fill for guide bund in different sectors alongside the Western and Eastern Bank of Sabarmati River in Ahmedabad. In the instant case before me the Appellant are not required to attend such civil work but only required to provide the services within the limited scope of "Excavation in soil/SR/HR" and "Excavation in all type of strata", but apparently the work order specifically indicates that those services were to be provided by the Appellant as sub contract work of Pachhtar-Kotda Channel and Bhadar-I WR Project. In this context, looking to the view adopted by CESTAT in Para 12 of the Order dtd.22.07.2014 that *"...In our view, the water body is already existing, what is being done is to renovate the banks of the river. In view of this position, we are of the view though the activity undertaken by the appellants are covered by the main definition but gets excluded due to the exclusion clause. In view of this analysis, the activity undertaken by the appellant will not get covered by the "Site formation and clearance, excavation, and earthmoving and demolition service" and accordingly no service tax would be chargeable"*, which is squarely applicable in the present case also. I find that the view expressed by the CESTAT has been strengthened by rejection of appeal filed by the department against the said CESTAT Order dtd.22.07.2014 before Hon'ble Supreme Court was dismissed on merits. In this context, I need to follow the judicial discipline, which requires me to consider the said services provided by the Appellant out of the net of the "taxable service" and accordingly, my decision in respect of point (c) is in corroboration of what has been submitted by the Appellant in this respect.

2.6. As regards to point (d), I find the undisputed fact on record that the Appellant had short paid the service tax in respect of services they had provided to M/s. CC. As per the SCN and OIO, the quantum of short paid service tax is found to be of Rs.39,380/-, with which the Appellant has also agreed. I, therefore, uphold the amount of confirmed demand of short paid service tax under section 73(1) of the Act from Rs.39,380/- (Rupees Thirty Nine Thousand Three Hundred Eighty only) towards the services of Commercial

and Industrial Construction services provided to M/s. CC classifiable under Section 65(105)(zzq) of the Act. The demand has been raised by way of invoking the extended period of 5 years in light of the apparent ingredient of suppression and mis-declaration noticed on the part of the Appellant. It is argument of the Appellant that they failed to consider the amount of TDS reduction, which lead to the short payment of service tax is not correct in as much they are much aware about the TDS provisions and can not escape to consider its implication while discharging service tax liability. Thus, the aforesaid demand of service tax of Rs.39,300/- has to be upheld under Section 73(1) of the Act and the remaining amount of demand of service tax of Rs.5,42,112/- has to be set aside allowing in favour of the Appellant the benefits of exclusion clause provided in Section 73(2)(a) of the Act. Consequently, the Appellants are liable to pay interest at applicable rate on the said amount of service tax of Rs.39,300/- under Section 75 of the Act. The Appellant has claimed that maximum amount of penalty which can be imposed in terms of Section 78 of the Act is @50% whereas on them penalty @100% has been incorrectly imposed. However, I do not find such plea backed by any legal provision. Hence I reject the same. In terms of Section 78 of the Act, where any amount of service tax short paid by reason of wilful mis-statement or suppression of facts or in contravention of any of the provisions of the Chapter V of the Act or of the rules made thereunder with intent to evade payment of service tax, the penalty is also payable by such person, which shall be equal to hundred percent of the amount of such service tax. There is no exception of 50% penalty. In this case I modify the amount of penalty under Section 78(2) of the Act from Rs.5,82,492/- to Rs.39,300/- (Rupees Thirty Nine Thousand Three Hundred Only only)

 after the findings of the adjudicating authority that the Appellant had suppressed the value of taxable services mentioned in the ST-3 returns filed by them from time to time, which resulted into short payment of service tax with intention to evade the payment of service tax. The said facts of short payment of service tax came to the knowledge of the department only after initiation of the inquiry against the Appellant. I also find that this is an appropriate case for imposing penalty under Section 77 of the Act for failure to correctly assess, pay service tax due thereon and for failure to file returns of service tax with correct details about the services rendered in terms of Section 70 of the Act read with Rule 7 of the Rules. However, in the context of the peculiar circumstances of the case, I reduce the said amount of penalty under Section 77 of the Act from Rs.10,000/- to Rs.2,000/- (Rupees Two Thousand Only). Accordingly, I decide the point (c) with such alteration of part of the demand of service tax, interest and penalties and as the same mentioned setting aside remaining part of the demand of service tax, interest and penalties.

2.7. In the conclusion of all the above and while rendering the decision on point (c), I pass the order for modification in the amount of contravention of demand of service tax of from Rs.5,82,492/- to Rs.39,300/- (Rupees Thirty Nine Thousand Three Hundred Eighty only) under Section 73(1) of the Act, with interest liability at applicable rate thereon under Section 75 of the Act. I order for upholding and setting aside the demand of service tax of Rs.5,43,112/- confirmed under impugned order under Section 73(1) of the Act with

quashing and setting aside the consequent demand of interest, which was confirmed on said amount of service tax under Section 75 of the Act. I order for modification in the amount of penalty from Rs.5,43,112/- under Section 78(1) of the Act to Rs.39,350/- (Rupees Thirty Nine Thousand Three Hundred Fifty only) under Section 78(2) of the Act, I set aside the amount of penalty of Rs.5,43,112/- imposed on the Appellant under Section 78(1) of the Act. As regards the imposition of penalty of Rs.10,000/- on the Appellant under Section 77(2) of the Act, I modify the said penalty amount from Rs.10,000/- to Rs.2,000/- (Rupees Two Thousand Only) under Section 77(2) of the Act and set aside the balance amount of penalty of Rs.8,000/- imposed on the Appellant under Section 77(2) of the Act.

9.0 In the above terms, I dispose the appeal by way of allowing the appeal filed by the Appellant in the above mentioned by way of partial modification in the confirmed amount of short paid service tax, interest thereon and penalties.

(P. A. Vasava)
Commissioner (Appeals)
Commissioner
CGST & Central Excise,
Kutch (Gandhidham)

F. No. V2(ST)44/KUT/2017 Date: 23.04.2018

By R.P.A.D.

To,

M/s. Sunrise Transport Co
Tractor Complex, S. Wadi Rd.
Porbandar-360575
Email: tscorpbr@gmail.com

Copy to:
M/s. Patel Prajapati & Co.,
Chartered Accountants
B-610, Titanium City Centre
Near Sachin Tower, 100 ft Anand Nagar Road
Satellite, Ahmedabad-380015
Email: punitas@gmail.com

Copy to:

1. The Chief Commissioner, CGST & C. Ex., Ahmedabad Zone, Ahmedabad.
2. The Commissioner, CGST & C. Ex., Bhavnagar.
3. The Additional Commissioner, CGST & C. Ex.(System), Bhavnagar
4. Guard Commissioner CGST & C. Ex., Bhavnagar.
5. Spare Copy.