[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]:

[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]

[illegible] (Order-In-Appeal No.):

RJV-EXCUS-000-APP-[illegible]-2018-19

[illegible] Date of Order:	1-05-2018	[illegible] Date of Issue:	18.05.2018

[illegible], [illegible], [illegible]:

Passed by Shri K. Hari Raman, Commissioner (Appeals), Rajkot

1. [illegible]

[illegible]

2. [illegible]

1. M/s Reliance Infrastructure Engg. Contractor Knwn as Project Director and Officers Engineering, Co Ltd,Plot No. Opposite Port Post , Dedicate, Vill : Kandla (Port) Anjar([illegible],

[illegible]

3. [illegible]

[illegible]

4. [illegible]

[illegible]

5. [illegible]

[illegible]

6. [illegible]

[illegible]

7. [illegible]

[illegible]

(1) [illegible]

The appeal under sub section [illegible] Commissioner [illegible] to file the appeal before the Appellate Tribunal.

(2) [illegible]

I [illegible]

II [illegible]

III [illegible]

[illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

[illegible]

(C) [illegible]

[illegible]

[illegible]

[illegible]

(i) [illegible]

[illegible]

(ii) [illegible]

[illegible]

(iii) [illegible]

[illegible]

(iv) [illegible]

[illegible]

(v) [illegible]

[illegible]

(vi) [illegible]

[illegible]

(vii) [illegible]

[illegible]

(viii) [illegible]

[illegible]

(ix) [illegible]

[illegible]

:: ORDER IN APPEAL ::

M/s Reliance Defence and Engineering Ltd. (hereinafter referred to as M/s. Pioneer Defence and Offshore Eng. Co. Limited(SEZ)' Pioneer Park, Post – Jodhpur Vas – Rajula Dist - Amreli, (hereinafter referred to as 'the appellant') filed appeal against the Order-in-Original No. PD/09/2017 dated 28.5.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Service Tax Division, Bhavnagar (hereinafter referred to as "the lower adjudicating authority").

2. Brief facts of the case are that the appellant holding Service Tax registration No. AABCP1151SD003 filed refund claim of Rs.2,71,01,935/- under Notification No. 12/2013-ST dated 01.07.2013 for the service tax paid on the service providers for the specified services used in authorized operations in the SEZ for the period from Oct, 2016 to Dec 2016. The then adjudicating authority vide letter dated 26.05.2017 communicated discrepancies found in the refund claim in light of Notification 09/2016-ST dated 01.07.2013 (hereinafter referred to as "the said notification"). After considering reply and submissions during personal hearing the claim was decided vide the impugned order wherein amount of Rs. 29,43,369/- was rejected on various grounds.

3. Being aggrieved, the appellant preferred the present appeal against the impugned order to the extent of rejection of refund of Rs. 28,43,369/-, inter-alia on the following grounds -

3.1 The impugned order is ex facie erroneous and suffers from legal deficiency as well as procedural discrepancies; that they had filed refund claim of Rs.2,10,70,585/-, that they had agreed for curtailment of refund by Rs.1,30,31,648/-; that therefrom, they were entitled to get refund of Rs.2,39,77,135/-. However, the adjudicating authority sanctioned refund of Rs.1,81,67,282/- and rejected refund of Rs. 28,43,369/- whereas adjudicating authority erred in rejecting refund claim of Rs. 28,43,369/- against actual rejection of Rs. 27,10,257/- and figure of rejection is incorrect.

3.2. Refund of service tax amount of Rs. 18,75,251 (Query Sr. No 1,2 and 11 in order) paid towards invoices of hiring of tug calling under supply of tangible goods is rejected on the ground that the said service falls under 'Ship Management Service' which is not covered in the list of approved service for SEZ unit. The appellant submitted that the then adjudicating authority erred in stating that 'hiring of tug' falls under 'ship management service' as services

scope of work stipulated at Annexure A to Work Order specifies that Tugs were taken on hire on monthly basis for appointed/undertaken duties of work order No. IS/1600840/18 dated 17.02.2016 and work order No. IS-IBX240/0956 dated 31.03.2016 wherein the contract price has been mentioned as inclusive of Service tax @14% + Swachh Bharat Cess @0.5%; that the terms mentioned in the work order prove that tugs were taken on hire on monthly basis and it falls under the category of "supply of tangible goods" which was in the list of specified service approved by the committee of KASEZ that plain reading of the definition of taxable service under sub clause (zzzh) of section 65(105) of the Act make it very clear that person taxable service received by them was in the nature of "Supply of tangible goods" and not "Ship Management" service and the same is in the specified list approved by the approval committee.

3.6 Refund amount of Rs. 18,4804- is rejected on the ground of being time barred that the appellant vide letter dated 15.03.2017 had requested the adjudicating authority for condonation of delay as delay was caused due to change in software, that adjudicating authority simply reiterated his findings of earlier order, that order rejecting refund claim on the ground of time barred is without taking into consideration the relevant provisions of law and in particular Notification No. 12/2013-S.T. dated 01.07.2013. It is the view adjudicating authority has not even disclosed in the impugned order as to how and under which Section of the Central Excise Act, 1944 or the Finance Act, 1994 appellant's claim was considered as time barred, that it is a SEZ unit and had not taken cenvat credit/exemption/drawback in terms of provisions of Notification No. 12/2013-S.T. dated 01.07.2013 and in particular Para 11(p) of the said Notification in respect of amount of service tax paid by appellant on the services received and used for authorized operations that therefore, since they have filed refund claim within one year as prescribed under Section 11B of the Central Excise Act, 1944 is not applicable in the present case inasmuch as Para 11(p) stipulates to file refund claim within one year from the end of the month in which actual payment of service tax was made by it and at the same time, it also provides that such refund claim may be filed within such extended period as the Assistant Commissioner or Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall permit; that similarly the said clause of notification does not restrain the assessee to give any reason for late filing of the claim and it also does not specifically mention that it is discretionary power of the Assistant Commissioner or the Deputy Commissioner to permit or to condone the delay/consumption, that it only empowers the authority to extend the period for filing the claim and the adjudicating authority was duty bound to permit filing of

refund claim beyond one year as the word "shall" is used before the word "remain" even if he was not satisfied with the explanation of appellant he ought to have issued SCN in the interest of justice before rejecting the claim under reference. Therefore, order was unlawful. The appellant relies upon decision in the case of M/s. APA Exploration Vs. CCE, Nasik reported as 2012(27) STR 20 (Tri.-Del.). The appellant further relied decision of Commissioner (Appeals)'s order in their own case decided vide O/A NO. SVR-EXCUS-000-APP-52 TO 54-14 dated 21.11.2014 wherein decision of M/S. HINDUSTAN SUPER was relied upon, I find there is no major difference in the situation and facts prevailing in the present case as well as in the above mentioned case passed by Hon'ble Commissioner (Appeals) except for the amount of refund; that however, adjudicating authority appears to have misinterpreted the issue on irrelevant grounds.

5.3.1 Adjudicating authority failed to appreciate that request for extension of time limit can only be made after the time limit has expired and the provision also does not envisage that claimant is at liberty to apply for such extension in advance. Appellant further submits that request for extension of time limit or its condone delay can only be made after any claim is filed after expiry of permissible period. That in other words, such request cannot be made prior to filing of the claim; that if above averments in the impugned order are considered to be true for sake of argument, in that case appellant was required to file applications for extension in respect of each of the twelve invoices under the refund application during the period from October, 2013 to December, 2013 before these invoices crossed expiry date of one year, that the adjudicating authority might have taken note of a simple example that in case claim/ appeal is being filed either by an assessee or the department before Commissioner (Appeals) or CESTAT after expiry of stipulated time, application for condonation of delay is also filed simultaneously with the appeal, that the appellate authority in such cases does not insist that such application should be filed before expiry of specified time limit as the law that statutory provisions nowhere talks of such time restriction, that besides, even if allegation that request for extension was not made with the refund application but was made at a later stage or reply to query is considered for sake of argument, even in that case substantial benefit cannot be denied for such procedural lapse.

5.3.2 They further argued that Circular-in-Appeal dated 29.12.2014 of Commissioner (Appeals) is still in force according to which refund claim cannot be considered as time barred and shall not be denied for some procedural lapses.

on the grounds detailed in the impugned order that in respect of transactions with the certain service providers on regular terms, it makes lump sum payments in cash from time to time; that such practice is known or ascertained followed by the trade in general, that payment in such cases is not made monthwise in one instalment but it is made in two or more instalments; that however, refund claim in respect of such transactions is filed only after the payment against a particular invoice of service provider is settled; that the Department has raised query for such payments vide letter dated 28.08.2017 the then adjudicating authority failed to take note of the provisions of the said Notification, as amended, especially clause (d), (e) and (f) of the said Rule. The appellant explained as under:-

(i) As per the provisions of clause (d), the amount indicated in invoice including the service tax payable thereon shall have been paid to the person liable to pay the service tax thereof; and as per clause (e), the refund claim shall be filed within one year from the end of the month in which or last payment of such invoice was made to the service provider, and as per clause (f), the SEZ unit shall submit only one claim of refund under this notification for every quarter.

(ii) In the business, practically it was impossible to fulfil all the three procedure and conditions in the business firms such payments are being made in instalments. Even in case of availing of continuous contract of services, payments are made without retaining specific invoices. So while complying one procedure and condition, other may not be fulfilled by the claimant for the very reasons in clause (e) it is provided that 1[(i) as the case may be, shall permit to file refund claim. Even one was will in accordance with

2.4 Refund of Rs.48,5[illegible] was rejected on the ground that Appellant did not submit the longer proof of payments for query sr. no. 43 . that Appellant had submitted invoice No. 1[illegible] dated 22.05.2015 in passing(Annexed) Voucher and Journal Voucher passing the entry in ledger to prove that from Total Payment of Rs.5,72,[illegible] towards invoice No. 1[illegible] dated 22.05.2015 in addition to part payment of Rs. [illegible] that journal Voucher showing proof of payment against SI no. 1[illegible] was not considered by the adjudicating authority

4. Personal hearing in the matter was attended to by Shri P.D. Kachchhi, Advocate, on behalf of the appellant wherein he reiterated the grounds of appeal and stated that refund of Rs.48,55,2[illegible] was rejected towards supply of tangible

goods is covered by Commissioner (Appeals) earlier Order dated 30.01.2018 wherein Department has considered the service as "Ship Management Services" based on Invoice or Adaptor or Service; hold out of refund of Rs.7,80,439/- rejected on the ground of Time Barred in Sr. No 2,83,886/- only is pre-deposit and balance amount is not time barred as explained in Appeal Memo which is also decided in another case by Commissioner (Appeals) Order dated 20.01.2018; that refund of Rs.4,96,674/- at Revenue has also rejected on ground of amount not matching with other details and ledger not submitted, which were in fact submitted and again submitted as one grounds of Appeal at the Appeal Memorandum

FINDINGS

5 I have carefully gone through the facts of the case, the impugned order and submissions made by the appellant in grounds of appeal as well as written submission & during the course of personal hearing. I find that the issue involved is whether adjudicating authority was correct in rejecting different refund amounts claimed under Notification no. 12/2013-ST dated 01.07.2013 on the stated grounds or not?

6. The appellant has pointed out that the refund of Rs.24,45,388/- was rejected vide the impugned order however they are now contesting for refund amount of Rs. 20,17,287/- only on the grounds detailed in the present appeal and they accept rejection of refund of Rs.4,28,101/- in respect of invoice issued by Ericsson A Richard, Iran and had already received Rs.1,17,230/- of refund at adjudication level.

7. The appellant contended that refund of Rs. 8,79,201/- in respect of service tax paid on services of hiring of tugs is rejected on the ground that the same falls under "Ship Management Service" which is not in the list of approved service for SEZ unit. The appellant also submitted that hiring of tug cannot be classified as Ship Management Service as tugs were taken on hire on monthly basis and it falls under the category of "Supply of Tangible Goods" which was already in the list of specified service approved by the Committee. I find that appellant has procured three separate Work Order No. 16-17/OSA/0018/18 dated 31.05.2018 & 18-17/SS/500/11 dated 20.06.2018 & 18-17/SS/500/11 dated 19.07.2018 issued by M/s. A.K. Ship Management & Services, Mumbai wherein the service description has been mentioned as under :

Work Order No. 16 (WO/SHIP/DB/16) dtd.27.03.2013 and 18 (WO/Modification) dated 20.04.2013

"Rate of Fixed cost for providing Tugs of capacity 45 tonbollard pull on mentioned mining basis including cost for auxiliary engine, fresh water and oil etc.

Remarks: 2 Nos Tug Required for Marine Vessel's Movement in SDCL Basin

02 Tugs for 02 (Two) Months.

Service has been from dates:) to :)"

Work Order No. 16-17/SHIP/DB/17 dated 05.09.2016

"Mobilisation & Demobilisation of Tug

Survey Req from date 10.09.2016 to Dated 16.09.2016

Hiring of Tug. Capacity 45 to 55 BP on sea going vessel

Service Req from dates: 10.09.2016 to 16.09.2016"

7.1 Let us examine the definition of Ship Management Services and Supply of Tangible Goods services to decide the proper service, which are reproduced hereunder for ready reference:

Ship Management Service:

"As per Section 65 (56) of the Finance Act, 1994 "Ship" means a sea going vessel and includes a sailing vessel"

As per Section 65(105)(zzzz) of the Finance Act, 1994:

"Ship management service" includes –

(i) the supervision of the maintenance, survey and repair of ship;

(ii) engaging crew or providing shore crew;

(iii) receiving the hire or freight charges on behalf of the owner;

(iv) arrangements for loading and unloading;

(v) providing for victualling or stowing of ship;

(vi) negotiating contracts for bunker fuel and marine oil;

(vii) payment on behalf of the owner of expenses incurred in providing services or in relation to the management of ship;

(viii) the entire ship management or insurance administration;

(ix) dealing with insurance, salvage and crew claims; and

(x) arranging of insurance in relation to ship.

As per Section 65(105)(zzzd) of the Finance Act, 1994:

"Taxable service" means any service provided or to be provided to any

person), under a contract or an agreement by any other person in relation to ship management services."

Supply of Tangible Goods Services:

"As per Section 65(105)(zzzz) of the Finance Act, 1994 "Taxable Service" means any service provided or to be provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances."

7.1 On going through both the definitions, it is amply clear that the services received by the appellant merits classification under 'Supply of Tangible Goods Services' and not under 'Ship Management Services' since there is no mention of hiring of tangible goods in the definition of 'Ship Management Services'. Further, Government of India, Department of Revenue vide their letter D.O. F. No.334/1/2008-TRU dated 28th February, 2008 has clarified as under:

"4.4 SUPPLY OF TANGIBLE GOODS FOR USE:

4.4.1 Transfer of the right to use any goods is leviable to sales tax / VAT as deemed sale of goods [Article 366(29A)(d) of the Constitution of India]. Transfer of right to use involves transfer of such possession and control of the goods to the user of the goods.

4.4.2 Excavators, dredgers, dumpers, trucks, pocklain cranes, compaction equipment, cranes, etc., oilfield construction vessels & barges, geo technical vessels, rig and tackle facilities, pipelaying machineries etc. supplied for use, with no legal right of possession and effective control (i.e. transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.

4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT / sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other relevant facts. This could be ascertainable from the factor that either or not VAT is payable or paid."

7.2 In the case of Indian National Ship Owner's Association Vs. Union of India reported as 2009 (013) S.T.R. 1087 (Bom.), it was held that providing vessels on time charter basis without giving effective control was covered under 'dry rental' and not under service 'ship'. The said decision of the Hon'ble Bombay High Court was upheld by the Hon'ble Supreme Court reported as 2011 (023) S.T.R. 0003 (S.C.). Therefore, in view clarification issued by CBEC as well as judgments of the Hon'ble Courts, the services received by the appellant are

under the scroll of 'Supply of Tangible Goods Services' and not under 'Ship Management Services'. The supply of tangible goods service is in the list of Approved Services for SEZ unit of the appellant. I, therefore, hold that Refund of Rs.15,75,201/- is admissible to the appellant. Hence the appeal is allowed.

8 The appellant has contended that rejection of Refund of Rs.15,75,201/- as time barred is not correct and for this they heavily relied upon the notification, which uses the word "shall" in respect of power of extension of time limit delegated to the Assistant Commissioner or Deputy Commissioner, as the case may be. The appellant has stated that the Refund claim is not time barred as they have made the payment in two or more instalments to the service provider that they made lump sum payment in parts and payment is not made invoice wise or month wise and refund was claimed consequently by way of instalments. The appellant also submitted that due to change in their software they could not file refund claim in time and has requested the adjudicating authority for condonation of delay. I observe that the appellant while accepting the delay, has contended that the substantive benefit should not be denied for procedural aspects in absence of substantial grounds. I find that the adjudicating authority has summarily rejected the request for condonation of delay without assigning any reasons. The adjudicating authority has not recorded any valid reason for rejecting the request. I find that Para 3 (a) of the Notification 12/2013-ST reads as under :

> *"(a) the claim for refund shall be filed within one year from the end of the month in which actual payment of service tax was made by such Developer or SEZ Unit to the concerned service provider or such extended period as the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall permit;"*
>
> (Emphasis supplied)

9.1 From above, it is clear that the language of Notification is unambiguous and specifically says that the Assistant Commissioner or Deputy Commissioner 'shall' permit the period extension of time for the claim. Thus, discretion vested is not absolute and exercise of power is required to be used with justifiable reasons and those reasons had to be recorded by the lower adjudicating authority. I also find that the decision in the matter of M/s. ARK Identification reported as 2017 (27) STR 25 (Tri. Del.) relied upon by the appellant is very relevant and also applicable in this case. The Hon'ble CESTAT has, interalia, held that adjudicating authority was expected to exercise the power unless there is a reason for not exercising such power. Relevant portion of the judgment is reproduced as under:-

"4. Considered the arguments on both sides. I do not agree with the argument that the Show Cause Notice dated 7.3.2017 cannot be made applicable to the claim filed before the date on pending on that date. I also consider the fact that even under the earlier notification, the Deputy Commissioner has power to condone the delay. The delay involved was only 17 days and since a quasi judicial authority is given any power, he is expected to exercise it unless there is a reason not to exercise such power. No reason has been recorded in the impugned order in the facts and circumstances of the case. I consider that the appellant should have considered the claim as per the provisions of Notification No. 17/2011-C.E. dated 1-3-2011 which was in force on the date when he passed the order. I hold that the claims are not time barred and the matter is remanded to the adjudicating authority to decide the case afresh, on the merits of the claim."

(Emphasis supplied)

8.2 The adjudicating authority in his order did not state any reason for not condoning the given period and for rejecting the substantive benefit of refund of the appellant. I find considerable force in the appellant's submission in absence of any recorded reasons in the impugned order where refund claim is otherwise admissible to the appellant in relation to the different services used for manufacture of exported goods. I am of considered view that the appellant cannot be deprived of their legitimate and substantive benefit of refund for the payments made on the input of goods, utilization of the services and payment of service tax are not disputed. Also, my order of the Joint Secretary (RA), Government of India in the case of M/s. Modern Process Printers reported as 2016 (334) E.L.T. 0332 (Govt. of India) interalia held that,-

"9.3. ... In fact, as regards refund applications, it is now a well settled law that procedural infraction of non-compliance of any kind to be examined if exports have really taken place, and that law is settled now that substantive benefit cannot be denied for procedural lapses. A procedure has been prescribed to facilitate verification of substantive requirements. The core aspect or fundamental requirement for rebate is its manufacture and subsequent export. As soon as this requirement is met, other procedural deviations can be condoned."

(Emphasis supplied)

8.3 I, therefore, hold that the adjudicating authority needs to re-examine the facts on record to arrive at the proper decision and therefore I remand the matter of refund of Rs.7,48,438/- back to the jurisdictional adjudicating authority, who will consider all facts and decide refund claim in the light of findings in Para 8 to 8.2 of this order.

5. The refund of Rs.73,597/- has been denied on the ground that proof of payment (ledger) has not been submitted by the appellant. The appellant's claim that they have submitted ER-1 assessed (authorized) voucher and Journal Voucher passing the entry in ledger indicating proof of payment. I find from printed

voucher no. 41500103-42 dated 21.10.2016 produced before me that a cash entry has been made towards bill payment against bill No. 109/22.5.2015 and part payment against 'SOP' as per say Appellant. I find no reason to reject the Journal Voucher unless any contrary evidence is available disputing the accounting entry in the books of Appellant. Therefore, I hold that Appellant has provided accounting entry showing proof of payment. I do not find it reasonable to oppose the appellant from such legitimate claims. I, therefore, allow appeal for Refund of Rs.46,857/- to the appellant.

10. In view of the above facts and circumstances, I allow appeal for refund of Rs. 19,75,201/- as per Para 7 to 7.3, refund of Rs.7,99,439/- by way of remand to be decided afresh as per Para 8 to 8.3 and refund of Rs.46,857/- as per Para 9 above.

11 उपरोक्तानुसार अपील का निपटारा किया जाता है।

11 The appeal of the appellant is disposed of as above.

By R.P.A.D.

To,

M/s. Ashutosh Industries,
Engineering Unit, (Earlier known as
M/s. Pravin Polymers and Others)
Eng. Div. Survey,
Bhavdev Park, Rajula,
District Amreli-365560 (Gujarat).

सेवा में,
मे. आशुतोष इंडस्ट्रीज
(पहले ये विख्यात प्रेक्षण्य
और अन्यान्य पॉलिमर्स कंपनी की इंजी. यूनि.)
भवदेव पार्क, राजुला
जिला - अमरेली-365560.

Copy for information and necessary action to:-

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
2. The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.
3. The Assistant Commissioner, GST & Central Excise, Division Amreli.
4. Guard File.