::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,
द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142
Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/240/RAJ/2017	**44/ADC/RKC/2016-17**	**14-03-2017**

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

RAJ-EXCUS-000-APP-014-2018-19

आदेश का दिनांक / Date of Order:	**05.04.2018**	जारी करने की तारीख / Date of issue:	**11.04.2018**

Passed by **Shri Gopi Nath, Additional Director General (Audit), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री गोपी नाथ, अपर महानिदेशक ऑडिट, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा८५, केंद्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.217 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Gopi Nath, Additional Director General of Audit, Ahmedabad Zonal Unit, Ahmedabad 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 अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ 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 / Service Tax, Rajkot / Jamnagar / Gandhidham :

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

1.M/s D. B. Padhiyar Infra P. Ltd., A-204, Imeprial Heights, Opp : Big Bazar, 150 Feet Ring Road Rajkot,

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

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असार्वा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/

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

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

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

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a 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) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" मे निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के दवारा वित्त अधिनियम (न॰ 2), 1998 की धारा 109 के दवारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय 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) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

ORDER-IN-APPEAL

This order arises on account of an appeal filed by M/s. D.B. Padhiyar Infra Pvt. Ltd, A-204, Imperial Heights, Opp. Big Bazaar, 150 feet Ring Road, Rajkot -360 005 (herein after referred to as 'the appellant' for the sake of brevity) against an Order-In Original No. 44/ADC/RKC/2016-17 Dated 14.03.2017 (herein after referred to as the 'impugned order' for sake of brevity) passed by the Additional Commissioner, Central Excise & Service Tax, Rajkot (herein after referred to as the 'Adjudicating Authority' for sake of brevity).

2. Briefly stated the facts of the case are that -

(i) the appellant is holding a Service Tax Registration No. AAECD5144MSD001 with effect from 28.02.2013 under the category of ' Maintenance or Repair Service', ' Erection, Commissioning and Installation Service' ' Construction Services other than Residential Complex, including Commercial/ Industrial Buildings or Civil Structures' and 'Works Contract Service'. On the basis of an intelligence that the appellant was not paying appropriate service tax on the services provided by them, an enquiry was initiated by the department. During the course of enquiry, two statements of Shri Dilipbhai M. Chavda, General Manager of the appellant firm were recorded on 12.02.2015, and 08.01.2016. Investigation revealed that - **(a)** on perusal of the Scope and Subject as mentioned in the Work Orders/Contracts as detailed at para-6.1.1 of the impugned order, it appeared that the appellant had provided 'Erection, Commissioning and Installation Service' under the said contracts but the appellant has mis-classified /mis-declared the same under "Commercial or Industrial Construction" to avail undue benefit of abatement and thus, instead of paying service tax on full value, they have intentionally and deliberately evaded the duty to the extent of abatement and thus, short paid the service tax of Rs. 27,61,647/- during the period from April,2013 to September, 2014. **(b)** the appellant had rendered taxable services under the category of 'Erection, Commissioning and Installation Service', 'Maintenance or Repair Service', and 'Commercial Construction Services' totally valued of Rs. 4,79,61,339/- during the period from June,2014 to January,2015 and collected Service Tax of Rs. 58,57,031/- but not paid/deposited the same in the Government exchequer. **(c)** the appellant also failed to pay Service Tax of Rs. 3,152/- under reverse charge mechanism in respect of legal services availed by them during the period from 2013-14 and 2014-15. **(d)** on difference of Rs.1,35,216/- in the income shown in Form 26AS as compared to Audit Report for the year 2013-14, the appellant could not explain the same and hence, on the said difference, the appellant was required to pay service tax of Rs.16,713/-. Further, during the course of enquiry, the appellant had paid total Service Tax amounting to Rs 58,76,896/- *[Rs. 58,57,031/- + Rs. 3,152/- and Rs. 16,713/- respectively towards (b), (c) and (d) as above]* and also paid interest of Rs.3,61,506/- towards delayed payment of Service Tax of Rs. 58,57,031/- for the period from June-2014 to January-2015.

(ii) These facts culminated in to issuance of a Show Cause Notice dated 17.05.2016. The Adjudicating Authority under the impugned order confirmed demand of Service Tax totally amounting to Rs. 86,38,543/- and ordered to recover it from the appellant under the provisions of Section 73(2) of the Finance Act, 1994 and ordered to appropriate the amount of Rs. 58,76,896/- already deposited by the appellant against their Service Tax liability of Rs.86,38,543/-. Also confirmed the demand of interest at appropriate rate on the confirmed Service Tax amount of Rs. 86,38,543/- under the provisions of Section 75 of the Finance Act, 1994 and also ordered to appropriate the amount of Rs. 3,61,506/- already paid by them against their interest liability as ordered above. Also imposed penalty of Rs. 30,000/- at the rate of Rs.10,000/- per return for failure to correctly assess the tax liability and failure to disclose correct details about their taxable income and also failure to file ST-3 Returns u/s. 77(2) of the Finance Act,1994. Also Imposed penalty of Rs.86,38,543/- u/s. 78 of the Finance Act. However, refrained from imposing penalty u/s. 76 of the Act on the appellant. Also refrained from imposing of penalty on Shri Dilip M. Chavda, General Manager of the appellant firm under u/s. 77(2) of the Finance Act,1994.

3. Being aggrieved, the appellant had filed present appeal on the grounds interalia mentioned as under:-

The appellant put their contentions after dividing the confirmed demands into two parts viz. (a) Non-payment of Service Tax of Rs. 58,57,031/- from June-2014 to January-2015 and (b) Short payment of Service Tax of Rs. 27,61,647/- from April,2013 to September,2015 by paying Service Tax on abated value. The Contentions on the same are as under.

(A) <u>Non-payment of Service tax of Rs. 58,57,031/- from June-2014 to January-2015.</u>

They are not contesting the issue of non-payment of Service Tax to the extent of Rs.58,76,896/- *[Rs. 58,57,031/-collected but not paid during June-2014 to January,2015 + Rs. 3,152/- on legal service under RCM and Rs. 16,713/- on account of excess amount found in 26AS]* along with interest thereon as well as on the issue of limitation thereon . However, they are contesting the question of imposition of penalty under Section 78 ibid thereon, as there was no intention to evade tax and to suppress anything. Further, penalty not imposable when non-payment of service tax was due to financial crisis for merely 8 months and for that there is penal interest to the extent o 18% , 24% and 30% during that period . Reliance is placed on various decisions of the higher judicial forum by the appellant in support of their contention.

(B) <u>Short payment of Service Tax of Rs. 27,61,647/- from April,2013 to September,2015 by paying Service Tax on abated value</u>

On this issue, the appellant contended both on merits as well as limitation as mentioned under.

(i) The Impugned order passed by the Adjudicating Authority is illegal, improper and invalid in as much as the same has been passed without proper appreciation of the facts and submission made by the appellant.

(ii) The Adjudicating Authority has totally ignored the decision of CESTAT-Mumbai in the case of Gammon India Ltd. V/s Commissioner of C.Ex.,Cus and ST, Nagpur-2015(37) STR 225(Tri.-Mumbai) . In the present case, they have been awarded only service contracts and hence, the same by itself be termed as works contract because it involves both delivery of service as well as transfer of property in the material in execution of such contract in their case. These materials involved are Cement, steel, Sand, Copper, Coal, Salt etc. supplied by them which become the part of the immovable property once they are used in the erection and installation of the towers and they had paid SalesTax/VAT on the said materials.

(iii) The Adjudicating Authority has totally ignored the CBEC Circular No. B1/16/2007-TRU dated 22.05.2007 wherein it was clarified that contracts which are treated as works contracts for the purpose of levy of VAT/Sales Tax shall also be treated as Works Contracts for the purpose of levy of service tax.

(iv) The Adjudicating Authority has also ignored that their Contractee M/s L&T and GETCO, for which the benefit of abatement had been denied, had deducted tax at source under Section 59B(3) of the Gujarat Value Added Tax Act,2003 which is applicable to works contracts only and given the Certificate for the material period in Form-703 which proves that service provided by them to M/s L&T and GETCO is purely works Contracts and hence, eligible for the benefit of abatement.

(v) Further, period of demand is from April,2013 to September,2014 i.e. after introduction of Negative List concept w.e.f. 01.07.2012. Hence, after 01.07.2012, there is no question of classification of service which can be legally enforceable. Secondly, this classification is only for showing in ST Returns and payment of Service Tax and hence, mere change in classification by the department does not justify the demand.

(vi) **On limitation,** the appellant contended that –

(a) The Departmental Audit was conducted on 07.08.2014 for the period from April,2013 to March,2014 and during which their entire records viz. Contracts, bills, ledgers, balance sheet, audit reports, TDS certificates(Form 26AS) etc. were thoroughly checked by the Audit Officers and accordingly FAR dated 10.09.2014 was issued raising Revenue para-1 and 2 and Service Tax Rs. 8,35,320/- and interest Rs.2,68,015/- on Erection, Commissioning and Installation as well as on Commercial & Industrial Construction Services respectively, was paid.

(b) As the audit for the period from April,2013 to March,2014 extended to May,2014 were undertaken by the Audit and no such objection of wrong classification of service and abatement was ever taken by the department and hence, they have the necessary bonafide belief that whatever done by them till 07.08.2014-i.e. date of audit, is correct. On this ground, extended period can not be invoked.

(c) After, audit on 07.08.2014, an another wing of the same department i.e Service Tax Intelligence Wing after six months can not take a separate stand of wrong classification and abatement. Even, if the department want to change the classification and demand the differential tax, the same should be made within the normal period i.e. 18 months and not beyond that. As, the demand within normal period of 18 months will cover the period from March,2015 onwards

only and hence, the demand is time barred.

(d) They have categorically shown the said services provided under Commercial & Industrial Construction Services (CICS) and also prepared the bills accordingly alongwith abatement. Further, they themselves changed the classification from October-2014 under Erection, Commissioning and Installation Services without taking abatement. So being their voluntary act which is much prior to initiation of enquiry by the department. Hence, there is no question of suppression so as to evade the tax.

(e) Reliance is placed on various decision of the higher judicial forum by the appellant in support of this contention.

(vii) The Adjudicating Authority has erred on facts and in law in levying the penalty equivalent to the amount of Service Tax demand u/s. 78 of the Finance Act, 1994, as they have not made any fraud, suppression with intent to evade tax. Once the extended period is not invokable, and the demand itself is time barred, the penalty can not be imposed under Section 78 ibid.

4. Hearing in this case was granted on 22.02.2018, 12.03.2018 and 21.03.2018 and the appellant was accordingly intimated vide three different letters addressed to the appellant at the address given in the appeal memorandum. However, neither the appellant nor its authorized representative had remained present on any of the said dates. Apart, no request for any further date or adjournment has been asked for by the appellant. Thus, three opportunities have been granted to the appellant for being heard in personal hearing and the same is not responded by the appellant. So, in view of the proviso to Section 35(1A) of the Central Excise Act,1944 read with the provisions of Section 85(5) of the Finance Act,1994, I proceed to decide the case based on the appeal memorandum and other documents available on records with me.

5. I have gone through the appeal memorandum. I proceed to decide the case on merits since the appellant has already made the payment of Service Tax Rs.58,76,896/- during the course of investigation which had been appropriated under the impugned order against their Service Tax liability in the present case, which can be considered as compliance towards fulfillment of mandatory pre deposit in pursuance to the amended provisions of Section 35F of the Finance Act,1994 made applicable to Service Tax matter in terms of the Section 83 of the Finance Act,1994 effective from 06.08.2014.

6. I find that the Adjudicating Authority under the impugned order confirmed demand of Service Tax amounting to Rs. 86,38,543/- and ordered to appropriate the amount of Rs. 58,76,896/- already deposited by the appellant against their Service Tax liability of Rs.86,38,543/-. This confirmed demand of Rs.86,38,543/- is consisting of four different issues Viz. **(a)** short payment of service tax of Rs. 27,61,647/- to the extent of abatement in respect of 'Erection, Commissioning and Installation Service' during the period from April,2013 to September, 2014. **(b)** Service Tax of Rs. 58,57,031/- collected but not paid/deposited in the Government exchequer on the taxable services under the category of 'Erection, Commissioning

and Installation Service', 'Maintenance or Repair Service', and 'Commercial Construction Services' during the period from June,2014 to January,2015 **(c)** Non payment of Service Tax of Rs. 3152/- under reverse charge mechanism in respect of legal services availed by them during the period from 2013-14 and 2014-15. **(d)** Service Tax of Rs.16,713/- on difference of Rs.1,35,216/- in the income shown in Form 26AS as compared to Audit Report for the year 2013-14. Further, during the course of enquiry, the appellant had paid total Service Tax amounting to Rs 58,76,896/- *[Rs. 58,57,031/- + Rs. 3,152/- and Rs. 16,713/- respectively towards (b), (c) and (d) as above]* and also paid interest of Rs.3,61,506/- towards delayed payment of service tax of Rs. 58,57,031/- for the period from June-2014 to January-2015. There is no dispute on it.

7. I find that the appellant had not contested the issue of non-payment of Service Tax to the extent of Rs.58,76,896/- [Rs. 58,57,031/-collected but not paid during June-2014 to January,2015 + Rs. 3,152/- on legal service under RCM and Rs. 16,713/- on account of excess amount found in 26AS] along with interest thereon as well as on the issue of limitation thereon. However, they are contesting the question of imposition of penalty under Section 78 ibid thereon. Thus, I uphold the impugned order confirming the demand Viz. (a) Service Tax of Rs. 58,57,031/- collected but not paid/deposited in the Government exchequer during the period from June,2014 to January,2015 (b) Non payment of Service Tax of Rs. 3152/- under reverse charge mechanism in respect of legal services availed by them during the period from 2013-14 and 2014-15. (c) Service tax of Rs.16,713/- on difference of Rs.1,35,216/- in the income shown in Form 26AS as compared to Audit Report for the year 2013-14, alongwith order for interest thereon and order for appropriation of payment of Service Tax amounting to Rs 58,76,896/- with payment of interest of Rs.3,61,506/- towards delayed payment of service tax of Rs. 58,57,031/- for the period from June-2014 to January-2015, being not contested by the appellant .

7.1 However, the appellant had contested the imposition of penalty under Section -78 of the Finance Act,1994 on the said amount of Service Tax to the extent of Rs.58,76,896/- [Rs. 58,57,031/-collected but not paid during June-2014 to January,2015 + Rs. 3,152/- on legal service under RCM and Rs. 16,713/- on account of excess amount found in 26AS] on the grounds as interalia mentioned at Para-3(A) above. It is their contention that there was no intention to evade tax and to suppress anything and also penalty not imposable when non-payment of service tax was due to financial crisis for merely 8 months and for that there is penal interest to the extent o 18% , 24% and 30% during that period .

7.1.1 I do not find force in it. I find that the appellant had rendered taxable services under the category of 'Erection, Commissioning and Installation Service', 'Maintenance or Repair Service', and 'Commercial Construction Services' totally valued of Rs. 4,79,61,339/- during the period from June,2014 to January,2015 and collected Service Tax of Rs. 58,57,031/- but not paid/deposited the same by them in the Government exchequer. I find that the appellant had obtained the Service Tax Registration effective from 28.02.2013. There is no dispute that the appellant had provided the said services and also charged and collected the said Service Tax of Rs. 58,57,031/- but not paid/deposited the same by them in the Government exchequer during the period from June,2014 to January,2015 by citing the reason that the same was due to

financial crisis. When service tax is charged and also collected by the appellant then how this reason of financial crisis can be raised by the appellant. The appellant in such situation can not retain with him any service tax amount which is collected from their service receiver. Further, I find that this issue had come to the notice of the department when inquiry was initiated in the month of February,2015. Further, from the challan-wise payment details as detailed at Para-7 of the impugned order, I find that the appellant started making payment thereto from 13.02.2015 on wards which clearly establishes that due to initiation of inquiry only, the department could recover the said amount during investigation. Had the said enquiry not initiated by the department, the same would have gone escaped. Further, being a registered unit under Service Tax, the appellant was very much aware of the provisions of Acts and Rules. Thus, from the facts and discussion here in above, the appellant was very much liable to penalty under Section 78 of the Finance Act,1994. Charging of interest to the extent of 18% , 24% and 30% during that period is towards late payment of the said service tax and thus, the same can not be equated with the penalty charged under Section 78 ibid. In view of these facts and discussion, reliance placed on various decisions of the higher judicial forum by the appellant in support of their contention, is of no help to them. So, I reject this contention of the appellant being not sustainable in the eyes of law. Thus, I uphold the impugned order imposing penalty under Section 78 of the Finance Act,1994 on the said amount of Service Tax.

8. On the issue of short payment of Service Tax of Rs. 27,61,647/- from April,2013 to September,2015 by paying Service Tax on abated value, I find that the appellant has contested the same both on merits as well as on limitation on the grounds interalia mentioned at Para-3-(B) above. I find that the issue involved here in this case is for the period from April,2013 to September,2015 after introduction of Negative List concept w.e.f. 01.07.2012. Hence, after 01.07.2012, while charging Service Tax one has to see whether the same is 'Service' or not and also does not cover under the negative list as per the Finance Act,1994. Further, after introduction of the negative tax regime from 01.07.2012, for abatement purpose, there is a Notification No. 24/2012-ST dated 06.06.2012 effective from 01.07.2012 under which for certain services abatement is allowed if the contract is composite means with both materials and services. It is therefore, imperative to see the terms and conditions of the respective contracts entered into between the appellant and the service recipients. I find that the details of the contracts awarded are as mentioned at Para-6.1.1 of the impugned order. I have gone through the same and find that the said details are not disputed by the appellant. On plain reading of details of the said contracts, it clearly transpires that the scope and subject thereto are pertaining to services of Érection, Commissioning and Installation only without any materials. I find that the Adjudicating Authority at para-6.1.3 of the impugned order very categorically observed that "The Noticeee has provided services of erection of towers, strengthening of transmission lines to various service receivers.....Further, materials for the tower(s) were supplied by the service receiver(s) to the Noticeee. In the instant case, the whole work appeared to have been carried out under the one and only service category of 'Erection, Commissioning and Installation service'....and Service Tax was liable to be paid on full value of services without taking abatement ". Thus, it is clear that the materials in respect of the said contracts

were supplied by the service recipients only.

8.1 Further, materials of the Transmission Line towers etc. work were made available by the respective service recipients only. This fact is supported by the statement of Shri Dilipbhai Chavda, General Manager of the Appellant firm, recorded on 08.01.2016, the relevant portion thereto is reproduced as under for ease of reference.

" on being asked to elaborate the service provided by company "the service of supply and erection commission of 'GETCO Transmission Line' as stated by me in first para of page two of earlier statement dated 12.02.2015, I hereby state that GETCO awards a work related to 'Transmission line' in two parts one being 'supply portion' and other as 'erection portion' in (1) 'service of supply'-we purchase tower materials such as different types/size angles, insulators, nut bolts etc. and supply the same to GETCO, for which we have been awarded contract as 'Supply Contract' and then we issue bills to GETCO , without charging any service tax, (2) 'Erection Commission'- we prepare base of foundation and erect the tower with the help of 'supply material' which we had supplied to GETCO under 'supply contract', this work is being done as per the contract awarded as 'erection portion' of the said work, and we issue bills to GETCO only for erection portion, charging service tax on the same under erection commission or installation services. In this way we provide only 'Erection Commission or installation Services' to GETCO."

These above facts have never been retracted by the appellant. From these facts, it clearly transpires that the service contracts were excluding the materials and in that service contract, the materials were supplied by the service recipient only. Further, these facts have been mentioned at Para-3 of the impugned order and on this basis as well as on the basis of the details of the various contracts, the Adjudicating Authority at Para-6.1.3 of the impugned order has very categorically observed and held that materials for the tower(s) were supplied by the service receiver(s) to the appellant.

8.1.1 In view of above facts and discussion, I find that the service contracts in question for the period involved, were without supply of materials and in these contracts the materials were supplied by the service recipients only. So, as per the provisions of said Notification No. 24/2012-ST dated 06.06.2012 effective from 01.07.2012, the abatement is not admissible.

8.1.2 Further, from the statement of Shri Dilipbhai Chavda, General Manager of the Appellant firm, recorded on 08.01.2016 wherein he stated that " On being asked that vide letter dated 15.12.2015 we have supplied copies of 'Cenvat invoices' wherein it is seen that we have taken Cenvat credit on excise duty PAID on cement also, how it is admissible when we are providing erection,commission and installation service only to GETCO. We will check the same and revert back within two days". These facts have not been retracted by the appellant. If so, then the appellant is not admissible to abatement in view of the following provisions of the Notification No. 24/2012-ST dated 06.06.2012 effective from 01.07.2012.

Explanation 2.--For the removal of doubts, it is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess paid on **any inputs**, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.".

8.1.3 Further, I find that the appellant in the appeal also contended that from October, 2014, they started paying service tax without availing abatement. The Adjudicating Authority at Para-29 of the impugned order also observed that from October,2014, the appellant themselves

started paying Service Tax under the category of 'Erection, Commissioning and Installation Service' without changing the pattern of rendering service to their clients. This itself proves that the appellant was not eligible for the abatement during the relevant period.

8.1.4 In view of the facts and discussion herein above, the reliance placed by the appellant on the decision of CESTAT-Mumbai in the case of Gammon India Ltd. V/s Commissioner of C.Ex.,Cus and ST, Nagpur-2015(37) STR 225(Tri.-Mumbai) is of no help to them as in this case it is clearly found that the appellant was not eligible for abatement under the said notification. Further, on being appeal filed against this decision of CESTAT, Mumbai,, the Hon'ble Supreme Court admitted the departmental appeal- *Commissioner* v. *Gammon India Ltd. - 2016 (45) S.T.R. J300 (S.C.).* Further, in view of the facts and discussion herein above, the reliance placed on the CBEC Circular No. B1/16/2007-TRU dated 22.05.2007 is of no help to the appellant.

8.1.5 In view of the facts and discussion herein above, I find that the appellant was not eligible for any abatement and service tax was required to be paid on full value during the period in question. Hence, I hold that the Adjudicating Authority has correctly held that abatement was not admissible to the appellant during that period.

8.2 Now, I take up the issue of limitation. On this issue, the appellant contended as interalia mentioned at Para-3-B (vi) above. Their contention on this issue of limitation mainly moves around the issue of audit conducted on 07.08.2014 by the Departmental Audit Officers for the period from April,2013 to March,2014. It is the contention of the appellant that during audit, their entire records viz. Contracts, bills, ledgers, balance sheet, audit reports, TDS certificates(Form 26AS) etc. were thoroughly checked by the Audit Officers and accordingly FAR dated 10.09.2014 was issued. I find from the copy of FAR dated 10.09.2014 appended to the appeal memorandum that the auditors on verification of ledger account/Books of accounts vis-à-vis ST-3 Returns and Duty Challans, unearthed the short payment of Service Tax. Thus, act of auditors was limited to reconciliation of service tax payments on the basis of challans/ST-3 returns that with ledgers/Books of accounts. I do not find that that the copies of the Contracts with the recipients of services were made available to the auditors during audit and consequently, this issue has not been examined by the auditors. Further, when the Service Tax Intelligence Wing of the Department initiated investigation based on specific intelligence and on being examined the various agreements/contracts entered between the appellant and the service receivers very first time, had found that the appellant had deliberately short paid the Service Tax by wrongly availing the abatement. Further, when the statement of Shri Dilipbhai Chavda, General Manager of the Appellant firm, recorded during investigation, it was revealed that GETCO awarded a work related to 'Transmission Line' in two parts one being 'supply portion' and other as 'erection portion' and thus, department came to know that the tower materials such as different types/size angles, insulators, nut bolts etc. were supplied by GETCO only and then under 'Erection Commission Contracts', the appellant erected the tower with the help of

'supply material' supplied by GETCO, a service receiver and thus, the appellant issued bills to GETCO only for erection portion. Thus, from the scope and subject of the various contracts and from the details revealed by Shri Dilipbhai Chavda, General Manager of the Appellant firm, it was very first time came to the knowledge of the department that the appellant has carried out erection commissioning and installation of transmission line towers etc. by using the materials supplied by the service receivers and thus, deliberately paid short duty on abated value. Even for the time being presumed that the contract copies were made available to the auditors as contended by the appellant, one cannot infer by simply going through service contract that there is another contract for supply of goods and that the service recipient was actually providing all the materials for erection. It is apparent that the appellant had bifurcated one composite work into two contracts, viz. supply contract and service contract in order to wrongly avail the abatement available in works contract scheme. Thus, it transpires that if there was only one composite contract the abated value would be more and the appellant would be required to pay more service tax. Thus, the intent appears to be clear and therefore the stand taken by the appellant is not tenable.

8.2.1 Further, I find that the appellant from October, 2014, started paying service tax without availing abatement. Thus, inspite of knowing the facts that the tax to be paid without availing abatement, they intentionally short paid the service tax due to this reason for the period from April,2013 to September,2014. It is only due to investigation by the Service Tax Intelligence Wing of the department, this short payment could be unearthed. Had this enquiry not been initiated by the department, the said duty/tax would have gone escaped. Further, being a registered unit from 28.02.2013, it was open for them to approach the department for any clarification in case of any confusion on it. I find no such efforts are there from the appellant. And hence, lateron payment without abatement from October, 2014 would not absolve them from any penal consequences under the Finance Act,1994.

8.2.2 In view of the facts and discussion herein foregoing paras, I find that the appellant had deliberately short paid service tax on abated value by suppressing the facts and thus, intentionally contravened the provisions of the Act/Rules with sole motive to evade the service tax. Hence, I hold that the extended period is very much invocable in the present case and thus, consequently the appellant was also liable to penalty under Section 78 of the Finance Act,1994.

8.2.3 In view of the facts and discussion herein above, reliance placed on various decisions of the higher judicial forum by the appellant in support of their contention, is of no help to them in as much as the same are on totally different set of facts from that involved in the present case.

9. On the issue of imposition of penalty of Rs. 30,000/- at the rate of Rs.10,000/- per return for failure to correctly assess the tax liability and failure to disclose correct details about their taxable income and also failure to file ST-3 Returns u/s. 77(2) of the Finance Act,1994, I find that the appellant has not put any specific contention on it. However, I find from the facts and

discussion herein above that the appellant has failed to assess the correct value and consequently correct tax liability and also failed to disclose correct details about their taxable income in T-3 Returns and also failed to file ST-3 Returns and thus, made themselves liable for the penalty. I uphold the impugned order of imposition of penalty of Rs. 30,000/- at the rate of Rs.10,000/- per return u/s. 77(2) of the Finance Act,1994.

10. In view of the facts and discussion herein above I uphold the impugned order confirming demand of Service Tax amounting to Rs. 86,38,543/- and ordering to appropriate the amount of Rs. 58,76,896/- already deposited by the appellant against their Service Tax liability of Rs.86,38,543/- along with interest thereon with appropriation of the amount of Rs. 3,61,506/- already paid by them against their interest liability. Further, I uphold the impugned order of imposition of penalty of Rs.86,38,543/- u/s. 78 of the Finance Act and also penalty u/s. 77(2) of the Finance Act,1994.

11. The appeal filed by the appellant is thus, rejected.

(Gopi Nath)
Commissioner (Appeals)/
Additional Director General (Audit)

सत्यापित,
11/04/2018
प्रवीण पोपट
अधीक्षक (अपील्स)

To,

M/s. D.B. Padhiyar Infra Pvt. Ltd,
A-204, Imperial Heights, Opp. Big Bazaar,
150 feet Ring Road,
Rajkot -360 005

Copy To:-

1. The Chief Commissioner, CGST, Ahmedabad Zone, Ahmedabad.
2. The Principal Commissioner, CGST, Rajkot.
3. The Commissioner, CGST, Appeals, Rajkot
4. The Additional Commissioner, CGST, Rajkot (formerly *Central Excise & Service Tax, Rajkot)* (Adjudicating Authority).
5. The Assistant Commissioner, Systems, CGST, Rajkot
6. Guard File.
7. P.A. File.