



::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL 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
	V2/173/RAJ/2017 V2/11/EA2/RAJ/2017	52/ST/2016	14-02-2017

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

RAJ-EXCUS-000-APP-069-TO-070-2018-19

आदेश का दिनांक / Date of Order:	01.05.2018	जारी करने की तारीख / Date of issue:	03.05.2018
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**कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot**

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. **Shri Mittal Mandap Service, 4-B, Panchratna Complex, Near Amrapali Railway Crossing, Raiya Road,**

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

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण 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 उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए। /

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 360016 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) नियमवाली, 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 मांग, ब्याज की मांग 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 क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) 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 अंतर्गत 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 मांग, ब्याज की मांग 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 क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) 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" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमवाली 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 अर्जी एवं अपील को लागू नहीं होगा।
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,
Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) भारत सरकार को पुनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामले में, केन्द्रीय 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 क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए हैं। /
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमवाली, 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 रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिए। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। /
In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding 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-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.
(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमवाली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर 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 ::

M/s. Mittal Mandap Service, 4-B, Pancharatna Complex, Near Amrapali Railway Crossing, Raiya Road, Rajkot – 360 007 (*hereinafter referred to as "Appellant Assessee*) and the Principal Commissioner, Central Excise & Service Tax, Rajkot (*hereinafter referred to as the "Appellant Department"*) both have filed appeals against Order-in-Original No: 52/ST/2016 dated 14.02.2017 (*hereinafter referred to as the "the Impugned Order"*) passed by the Assistant Commissioner, Service Tax Division, Rajkot (*hereinafter referred to as the "the Lower Adjudicating Authority*)

2. Brief facts of the case are that the appellant-assessee engaged in providing service of Pandal and Samiyana Service had obtained service tax registration on 23.10.2012 and filed Service Tax Returns ST3 for Financial Year 2012-13, but stopped paying Service Tax and filing ST-3 returns thereafter. The scrutiny of their Form 26AS, Profit and Loss Account, Balance Sheets for Financial Year 2011-12 to 2015-16 revealed that the appellant-assessee had provided 'Pandal and Shamiana Services' and had collected Service Tax from their customers but had not deposited the collected Service Tax with the Government.

2.1 Accordingly, SCN was issued by the Department, which was adjudicated vide the impugned order confirming demand of Service Tax of Rs, 22,45,705/- under Section 73(2) of the Finance Act, 1994 (*hereinafter referred to as "the Act"*) along with interest under Section 75 of the Act and imposing penalty under Section 77(2), 77(1)(a) and Section 78 of the Act.

Appeal by Appellant-Assessee

3.1 Being aggrieved with the impugned order, the appellant-assessee preferred appeal, *inter-alia*, on the following grounds:

(i) The lower adjudicating authority had taken a new concept of 'higher value taken for S.T purpose' from the value shown in financial report vis-a-vis value shown in Form 26AS. The value shown in 26AS was not the correct value for the purpose of Service tax as it shows the actual receipt of amount, also for the purpose of calculation of service tax, there was a concept of payment of tax after receipt of consideration for the service and later on it was being done as per point of supply provisions. There is no provision to demand service tax on higher of the two.

(ii) The larger period of limitation has illegally been invoked against them and the proposed demand is barred by limitation of time. The

extended period of limitation is not invocable in the present case as there was/is no suppression of facts with intent to evade payment of service tax by them. In absence of such evidence, the charge of suppression of facts is not established. Merely making allegation of suppression in the SCN without any proper evidences cannot be the ground for invoking extended period of limitation under proviso to Section 73(1) of the Act.

(iii) The entire details have taken from balance-sheet, Form 26AS and ST-3 returns and hence it is not forthcoming as to how the facts were suppressed by them from the department. Appellant also relied upon the following case laws:-

- (a) Blackstone Polymers reported as 2014 (301) E.L.T. 657 (Tn. - Del.)
- (b) Kirloskar Oil Engines Ltd. reported as 2004(178) ELT 998 (Tn. - Mum)
- (c) Hindalco Industries Ltd. Reports as 2003 (161) ELT 346 (Tn. - Del.)

Appeal by Appellant Department

3.2 The department also preferred appeal, *inter-alia*, on the following grounds:-

- (i) The adjudicating authority remained silent on 'late fee' under Section 70 of the Act read with Rule 7C of the Service Tax Rule, 1994, as respondent had violated said provisions having failed to file ST-3 returns within stipulated time limit except for the Financial Year 2012-13, as proposed vide Para 19(iii) of SCN issued vide F. No. VI(A)/6-29/SCN/AC-22/ST/16-17 dated 18.10.2016.
- (ii) The aforesaid provisions of recovery of late fees for non-filing/ late filing of periodical Service Tax returns are mandatory and there is no discretion available to the lower adjudicating authority for waiver of the same.

Cross Objection filed by Appellant-Assessee

4. The appellant assessee filed cross objection on 31.07.2017 against the appeal filed by the department wherein they, *inter-alia*, submitted that:-

- (i) If late fee under Section 70 of the Act read with Rule 7C of Service Tax Rules, 1994 was required to be imposed, then for what purpose penalty under Section 77(2) was imposed ? Penalty under Section 77(2) of the Act can be imposed only when no penalty is separately provided for alleged contravention of the Act or Rules made there

under and it may be seen that lower adjudicating authority had imposed penalty under Section 77(2) of the Act considering fact that there is no 'penalty' for non-filing of return and only late fee was there.

- (ii) As per Section 85(4) of the Act, for imposing or enhancing any penalty, the Commissioner(Appeals) is required to issue Show cause against such enhancement.

5. The personal hearing in the matter was held wherein Shri R. C. Prasad, Consultant reiterated the grounds of appeal and also submitted that entire case was made by the Department on the basis of records available in the financial statements of the appellant; that Form 26AS is not account statement but TDS statement and hence can't be relied upon for determining Service Tax payable by them as has been held by ITAT in the case of Shri Ravindra Pratap Thareja vide order No. 173 & 137/Jab/2014 dated 08.11.2017; that they have not been issued any notice under Section 72 of the Act before applying Best judgment assessment, which is required to be issued as has been held by CESTAT in the case of NBC Corporation Ltd reported as 2014(33) STR 113 (Del); that the appellant has already paid Rs. 19,50,578/- as also held in Para 11 of the impugned order and in Para 15.3 it has been appropriated also; the differential Service Tax is only Rs. 1,89,484/- then imposition of penalty of Rs. 22.45 lakhs is highly unjustified especially when the case has been booked on the basis of records of the appellant showing these transactions and hence 50% penalty can't be imposed under Section 78 of the Act; that since Service Tax calculation to be paid as made in the impugned order is not correct, penalty under Section 78 is not imposable; that their appeal needs to allowed and penalty set aside or reduced as held by the Hon'ble High Court in the case of Kanishka Prints Pvt. Ltd. reported as 2017(349) ELT 619 (Guj). In respect of departmental appeal they submit that the departmental appeal is not sustainable as because order has imposed penalty under Section 77(2) for the purpose; that order did not say late fee but penalty or Rs. 10,000/- in Para 15.4 of the impugned order is for this reason only and hence they can't be penalized twice for the same offence; on being asked as to why ST-3 returns had been file late, he submitted that return could not be filed by them because how much Service Tax is payable was not clear to them.

FINDINGS:-

6. I have carefully gone through the facts of the case, impugned order, grounds of both appeals and cross objections filed by the appellant-assessee as

well as the grounds of appeal filed by Appellant-Department. The issues to be decided in the present appeals are

- (i) Whether the Appellant-Assessee is liable to pay Service Tax on "Pandal and Samiyana Services" provided by them or not;
- (ii) Whether they are liable to be imposed penalty under Section 78 of the Act or otherwise;
- (iii) Whether late fee under Section 70 is required to be ordered or penalty imposed under Section 77(2) of the Act has covered late filing of ST-3 return by the Appellant-Assessee;
- (iv) Whether penalty under Section 77(2) of the Act is imposable on the Appellant-Assessee or otherwise.

7. I find that the Appellant-Assessee had provided Service under category of "Pandal and Samiyana Services" taxable under Section 65(105)(zzw) of the Act up to 30.06.2012 and taxable under 66(B) of the Act w.e.f. 01.07.2012. The investigation has established that Appellant-Assessee had provided services mainly to Rajkot Municipal Corporation, Indian Oil Corporation and Jilla Panchayat etc. and charged and collected Service Tax at full rate from them but not deposited with Government exchequer and also accepted their tax liability through Shri Mittal Prataprai Bavishi, Authorized Signatory of the Appellant-Assessee in his statement dated 06.10.2016. The Appellant-Assessee has not disputed the taxability of the said services provided by them and accepted their service tax liability but pointed out some calculation errors/ mistakes.

7.1 I find that the contention of Appellant-Assessee that calculation of Service Tax liability is not correct has been discussed at length at Para 10 & 11 of the impugned order. It is on record that the Appellant-Assessee contested that they being small assessee, their annual financial reports are not subjected to audit under Income Tax Act, 1962, however, on other hand they also argued that the department has erred by relying on higher value for arriving at service tax. It is on record that their financial reports are not audited and they have failed to submit all invoices though they were at liberty to defend their case by submitting relevant documents. It is also on record that the Appellant-Assessee did not produce each and every relevant document to justify their claim and the lower adjudicating authority confirmed demand of service tax on higher value. The Appellant-

Assessee has failed to substantiate their case at the stage of appeal also in as much as they have not produced any documentary evidences in support of their arguments. The lower adjudicating authority has confirmed demand of Rs. 22,45,705/ [as shown in Table-A of the impugned order], whereas, the Appellant-Assessee has contested that it should be Rs. 21,40,062/-.

7.2 I find that demand of Service Tax pertained to the period from F.Y. 2011-12 to 2015-16 and the lower adjudicating authority has confirmed demand of Rs. 22,45,705/- on the basis of Form 26AS and the Value of the Services mentioned in the Financial Report of each year, whichever is higher.

7.3 I find force in the argument of the Appellant-Assessee that there is no provision to demand service tax on higher side as for the purpose of calculation of Service Tax, prior 01.04.2011, the Service Tax was payable only after actual receipt of payment whereas from 01.04.2011 onwards, Rule 3 of Point of Taxation Rules, 2011 provided as below:

Rule 3. **Determination of point of taxation.**- For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be,-

(a) the time when the invoice for the service provided or agreed to be provided is issued: Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation shall be the date of completion of provision of the service.

(b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment.

Provided that for the purposes of clauses (a) and (b),-

- (i) in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service;
- (ii) wherever the provider of taxable service receives a payment up to rupees one thousand in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a).

Explanation .- For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the date of receipt of each such advance.

7.4 I find that as per Rule 3(a) of the Point of Taxation Rules, 2011 liability of payment of Service Tax is to arise when Invoices are issued or advance payment received from the recipient and not on the basis of amount reflected in Form 26AS. The contention of the Appellant-Assessee is that they received payment late on many occasions and hence the demand confirmed by the lower adjudicating authority on the basis of higher value is fallacious and not as per law. I agree to this point and direct lower adjudicating authority to verify this fact and then to arrive at conclusion as to how much demand is required to be confirmed. Hence, I find that this is a fit case to be remanded back to the lower adjudicating authority to verify the facts and to pass well reasoned and speaking order after considering the submissions and documents of the Appellant-Assessee in this regard.

7.5 The Hon'ble CESTAT in the case of Singh Alloys (P) Ltd. reported as 2012(284) ELT 97 (Tri-Del) has held that power to remand in appropriate cases is inbuilt in Section 35A(3) of the Central Excise Act, 1944 even after amendment. The Hon'ble CESTAT in another case of Honda Seil Power Products Ltd. reported as 2013 (287) ELT 353 (Tri-Del) has also held that Commissioner (Appeals) has inherent power to remand a case under the provisions of Section 35A(3) of the Central Excise Act, 1944. The Hon'ble High Court of Gujarat, in Tax Appeal No. 276 of 2014 of Associated Hotels Ltd. has further held that even after amendment in Section 35A(3) of the Central Excise Act, 1944 in 2011, the Commissioner(Appeals) has powers to remand.

8. The Appellant Department has challenged the impugned order on the ground that the lower adjudicating authority did not order recovery of 'late fee' under Section 70 of the Act read with Rule 7C of the Service Tax Rule, 1994 even though the Appellant-Assessee violated the provisions and failed to file ST-3 returns within stipulated time except for Financial Year 2012-13 as detailed at Para 19(iii) of SCN issued vide F. No. VI(A)/6-29/SCN/AC-22/ST/16-17 dated 18.10.2016.

8.1 The late fee has been prescribed under Rule 7C of Service Tax Rules, 1994 subject to a maximum of Rs. 20,000/- per Return w.e.f. 08.04.2011 as prescribed under Section 70 of the Act. It is alleged that the Appellant-

Assessee had not filed mandatory ST-3 returns within stipulated time for the years 2011-12 to 2015-16 except for F.Y. 2012-13. The Appellant-Assessee is directed to submit acknowledgements evidencing date of submission of ST-3 Returns to the lower adjudicating authority to decide this aspect also as per contention of the department during de-novo proceedings.

9. In view of the above facts, I set aside the impugned order and allow both appeals by way of remand to decide all issues raised the SCN in de-novo proceedings and the Appellant-Assessee is directed to submit all contention duly supported by the documents in their favour to the lower adjudicating authority within two months from the date of receipt of this order. The lower adjudicating authority is also directed to pass reasonable and speaking order within further two months from the date of personal hearing and submission of the documents by the Appellant-Assessee.

९.१ अपीलकर्ताओ द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

9.1 The appeals filed by the appellant and Department stand disposed off as above.

सत्यापित,
104/2018
23/05/2018
प्रदीप पोपट
अधीक्षक (अपील)

115/2018
(कुमार संतोष)
आयुक्त (अपील)

BY Speed Post
To,

The Commissioner, Central GST & Central Excise Hq, Rajkot	श्री आयुक्त, सेंट्रल जी. एस. टी. एवं उत्पाद शुल्क मुख्यालय, राजकोट
M/s. Mittal Mandap Service, 4-B, Pancharatna Complex, Near Amrapali Railway Crossing, Raiya Road, Rajkot – 360 007	मेसर्स मितल मंडप सर्विस, ४ - बी, पंचरत्न कॉम्प्लेक्स, आम्रपाली रेलवे क्रॉसिंग के पास, रैया रोड, राजकोट - ३६० ००७

Copy to :-

1. The Chief Commissioner, GST & Central Excise, Ahmedabad. *for kind information.*
2. The Assistant Commissioner, CGST Division-I, Rajkot.
3. Guard File.