



::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

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सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/265/RAJ/2017	DC/JAM/ST/55/2016-17	24.03.2017

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

RAJ-EXCUS-000-APP-074-2018-19

आदेश का दिनांक /
Date of Order: **07.05.2018** जारी करने की तारीख /
Date of issue: **08.05.2018**

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 :-**

I. Gujarat Maritime Board, Saru Section Road, Jamnagar, ,

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 मामलों 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 अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असर्वा अहमदाबाद- 380016 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 माँग, व्याज 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 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 माँग, व्याज 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 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 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 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 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 मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, 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 ड्यूटी 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 समायाविधि पर या बाद में पारित किए गए हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संश्लेषण 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 चाहिये। 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) नियमावली, 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 Gujarat Maritime Board, Saru Section Road, Jamnagar (hereinafter referred to as 'the appellant') has filed the present appeal, against Order-In-Original No. DC/JAM/ST/55/2016-17 dated 24.03.2017 (hereinafter referred to as 'the impugned order') issued by the Deputy Commissioner, Central Excise, Jamnagar (hereinafter referred to as 'the lower adjudicating authority').

2. The brief facts of the case are that audit of the records of the appellant revealed that the appellant was not paying Service Tax on the amount received by them during the period from 01.04.2012 to 30.09.2014 for services like Certification Fee, Registration Fees, Change of Master/Driver/Owner of ship, Vehicle Entry Fee, Tug Barge Survey Fee and Plot Rent Income provided by them. The show cause notice was adjudicated by the lower adjudicating authority vide impugned order wherein he confirmed the demand of service tax on Certification Fee, Vehicle Entry Fee, Tug Barge Survey Fee and Plot Rent Income along with interest and dropped demand of service tax on Registration Fee and Change of Master/Driver/Ownership, considering its to be non-taxable as the said activities were purely in public interest and these were undertaken as sovereign functions. The lower adjudicating authority imposed penalties on the appellant under Section 78 and Section 77 of the Finance Act, 1994 (hereinafter referred to as "the Act").

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

3.1 The lower adjudicating authority has overlooked their submissions and mechanically confirmed the demand by issuing non-speaking order. The Appellant has submitted that the entire dispute is hit by time bar as there is no suppression of facts by the Appellant and there is willful misstatement on their part. However, the lower adjudicating authority has ignored factual position and therefore, the impugned order is not speaking order and liable to be set aside, the appellant relied upon following decisions:

- (i) Cyril Lasardo (Dead) reported as 2004 (7) SCC 431;
- (ii) Shukla & Brothers reported as 2010 (254) ELT 6 (SC)=2011 (22) STR 105 (SC)

3.2 The Appellant is an authority under Entry 31, List II of Seventh Schedule to the Constitution of India for administration of ports other than major ports in the State of Gujarat. The Appellant is constituted by the Government of Gujarat under the powers conferred under the Gujarat Maritime Board Act, 1981 and is a

statutory authority for administration of ports other than major ports in Gujarat. The Appellant has derived its powers to levy supervision fee and scrutiny fee under the constitutional powers therefore, the provisions of the Finance Act, 1994 are not applicable to the Appellant.

3.3 The appellant had collected various charges, like vehicle entry fee, certification fee, Barge/Tug Survey fees, premium for land lease etc. but the functions under taken them can't be treated as services. This issue is also not *res integra* and the same is settled by 5 Member Bench of the Hon'ble Supreme Court in case of Corporation of Calcutta Vs. Liberty Cinema, AIR 1965 SC 1107 wherein the Hon'ble Supreme Court has held that the words "license fee" do not necessarily mean a fee in return for services. The Appellant submitted that they had charged fees in lieu of sovereign functions discharged by them and the same is not taxable under the category of port services and placed reliance on CBEC Circular No. 89/07/2006 dated 18.12.2006, reiterated in Master Circular dated 23.08.2007; in FAQ 2008 dated 04.12.2008 and FAQ 2010 dated 01.09.2010 issued by DGST. The Appellant also placed reliance on the following decisions -

- (i) CMC Limited reported as 2007 (7) STR 702 (Tri.-Bang);
- (ii) CST, Bangalore reported as 2008 (9) STR 494 (Tri.-Bang);
- (iii) CS Software Enterprise Ltd. reported as 2008 (10) STR 367 (Tri.-Bang);
- (iv) Maharashtra Industrial Development Corporation reported as 2014-TIOL-2022-CESTAT-MUM.

3.4 The demand of service tax is also not sustainable as the services are specifically exempted vide Sr. No. 39 of Mega Exemption Notification No.25/2012-ST dated 20.06.2012 (as amended from time to time). The appellant is a Government of Gujarat Authority and has carried out the activity as per functions entrusted to a municipality under Article 243W of the Constitution of India read with 12th Schedule of the Constitution of India and hence it is exempted under Sr. No. 39 of Mega Exemption Notification.

3.5 The appellant has submitted that the payment of lease premium is single payment made towards acquisition of a right and is a capital asset and cannot be considered as rental income. The premium cannot be treated as consideration for the services and hence premium collected for long lease rentals is not taxable. The appellant relied on the following decisions:

- (i) Assam Bengal Cement Co. (1955) 27 ITR 34;
- (ii) Durga Madira Singh reported as (1969) 72 ITR 769;
- (iii) Panbari Tea Co. reported as AIR 1965 SC 1871;

(iv) A R Krishnamurthy reported as (1989) 176 ITR 417 (SC)

3.6 The vehicle entry fee levied by the appellant from the vehicles entering into their port area governed by Entry No. 57 and 59 of List II to 7th Schedule of Constitution of India which is a state subject and therefore, the service tax cannot be levied. The vehicles entry fees are being levied in compliance of THE BOMBAY LANDING & WHARFAGE FEES ACT, 1882 and Rules made thereunder, the Appellant has collected these fees in compliance of the Statutory Obligations that cannot be equated with rendering of services. As per the provisions of Article 246(3) of the Constitution of India, wherever the item is falling in the state subject, the Central Government cannot frame law to tax the same item.

3.7 The lower adjudicating authority has placed reliance on decision of Western Agencies reported as 2011 (22) STR 305 (Tri.-LB) for classification of the alleged service provided by the Appellant under the category of port services and CBEC Circular dated 09.07.2001 to levy service tax on the disputed activities, which are not applicable in the instant case as the decision of the Hon'ble Tribunal is stayed by the Hon'ble Madras High Court as reported in 2011 (24) STR J50 (Mad.) and reliance cannot be placed on CBEC circular dated 09.07.2001 for the reason that the demand in the present period is post 2012 period under which the negative list of services are defined.

3.8 The best judgment assessment as provided under Section 72 of the Finance Act, 1994 cannot be possible as the appellant has regularly filed their periodical ST-3 returns. The allegation of suppression, willful misstatement on the part of the appellant is not sustainable as the financial records of the Appellant are being audited by the service tax authorities regularly. Hence, the entire demand is hit by time bar. The Appellant relied on the following decisions:

- (i) Pragathi Concrete Products reported as 2015 (322) ELT 819 (SC);
- (ii) NRC Ltd. reported as 2007 (5) STR 308;
- (iii) Secretary, Town Hall Committee reposted as 2007 (8) STR 170;
- (iv) Binlas Suplux Limited reported as 2007 (7) STR 561;
- (v) Continental Foundation 2007 (216) ELT 177 (SC);
- (vi) Padmini Products reported as 1989 (43) ELT 195 (SC);
- (vii) Tamil Nadu Housing Board reported as 1994 (74) ELT 9 (SC);
- (viii) Chemphar Drugs 1989 (40) ELT 276 (SC);
- (ix) Jai Prakash Industries Limited reported as 2002 (146) ELT 481 (SC).

3.9 The Appellant was previously served a show cause notice dated 01.12.2014 invoking the extended period of limitation and the present show

cause notice dated 08.06.2016 is issued with same allegations and demanding service tax on same stream of incomes. Therefore, the second show cause notice cannot invoke the extended period of limitation. The Appellant relied on the following decisions:

- (i) Nizām Sugar Factory 2008 (9) STR 314 (SC);
- (ii) ECE Industries 2004 (164) ELT 236 (SC).

3.10 Entire demand is time barred as the facts were known to the department; the computation of liability is incorrect as amount received is to be considered as inclusive of service tax payable. Penalty is not imposable under Section 77 and 78 of the Act; the issue involves bona fide interpretation of law and Section 80 will be applicable in the present case.

4. Personal hearing in the matter was attended by Shri Virk H. P. Singh, Chartered Accountant on behalf of the appellant, who reiterated the ground of Appeal and contended that on all these issues/fees, SCN has already been issued by DGCEI and hence extended period is not applicable; that Plot Rent income does not fall under Renting of Immovable Property; that earlier Order dated 31.03.2016 had held that Tug Barge Survey charge and Plot Rent are non-taxable services; that even in negative list regime they will get benefit for the period from 01.04.2012 to 30.06.2012; that they are doing statutory functions of the Government of Gujarat and hence even if they are collecting some consideration, it is not taxable as has been held by the Hon'ble Bombay High Court in the case of CCE, Nashik Vs. Maharashtra Industrial Development Corporation reported as 2017-TIOL-2629-HC-MUM-ST and by CESTAT in the case of CST Vs. M/s. Ideal Road Builders Pvt. Ltd. & Others reported as 2017 (10) TMI 401 – CESTAT Mumbai.

Findings:

5. I have carefully gone through the facts of the case, impugned order, appeal memorandum and submissions made by the appellant. The issues to be decided are

- (i) whether in the facts and circumstances of the case, the demand is time barred;
- (ii) whether the appellant is liable to pay service tax on 'Certification Fee'; 'Vehicle Entry Fee'; 'Tug Barge Survey Fee' and 'Plot Rent Income' or not;
- (iii) the collection of above referred charges/fee can be considered as non-taxable services on account of discharge of sovereign function or not.

6. The appellant has contended that the department has previously issued a show cause notice dated 01.12.2014 invoking extended period on same allegations and hence the second show cause notice cannot invoke the extended period of limitation. I find substantial force in this contention of the appellant. I find that the department had issued show cause notice on 01.12.2014 demanding service tax on 'Certification Fee'; 'Vehicle Entry Fee'; 'Tug Barge Survey Fees' and 'Plot Rent Income' etc. for the financial year 2011-12 by invoking extended period and has now again issued impugned SCN dated 08.06.2016 demanding service tax on 'Certification Fee'; 'Vehicle Entry Fee'; 'Tug Barge Survey Fee' and 'Plot Rent Income' etc. for the period from April, 2012 to September, 2014 again invoking extended period. I, therefore, find that the department was in the knowledge of the facts in 2014 that the appellant was charging and recovering such fees and thus, the ingredients of suppression of facts with intent to evade payment of service tax are not present in the instant case to be invoked in the present SCN. It is settled legal position that extended period is not available for subsequent SCN dated 08.06.2016 having same set of allegations as held by the Hon'ble Supreme Court in the case of Nizam Sugar factory reported as 2008 (9) STR 314 (SC) as under:

"8. Without going into the question regarding Classification and marketability and leaving the same open, we intend to dispose of the appeals on the point of limitation only. This Court in the case of P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in (2003) 3 SCC 599 = 2003 (153) E.L.T. 14 (S.C.) has taken the view that in a case in which a show cause notice has been issued for the earlier period on certain set of facts, then, on the same set of facts another SCN based on the same/similar set of facts invoking the extended period of limitation on the plea of suppression of facts by the assessee cannot be issued as the facts were already in the knowledge of the department. It was observed in para 14 as follows :

"14. We have indicated above the facts which make it clear that the question whether M/s. Pharmachem Distributors was a related person has been the subject-matter of consideration of the Excise authorities at different stages, when the classification was filed, when the first show cause notice was issued in 1985 and also at the stage when the second and the third show cause notices were issued in 1988. At all these stages, the necessary material was before

the authorities. They had then taken the view that M/s. Pharmachem Distributors was not a related person. If the authorities came to the conclusion subsequently that it was a related person, the same fact could not be treated as a suppression of fact on the part of the assessee so as to saddle with the liability of duty for the larger period by invoking proviso to Section 11A of the Act. So far as the assessee is concerned, it has all along been contending that they were not related persons, so, it cannot be said to be guilty of not filling up the declaration in the prescribed proforma indicating related persons. The necessary facts had been brought to the notice of the authorities at different intervals from 1985 to 1988 and further, they had dropped the proceedings accepting that M/s. Pharmachem Distributors was not a related person. It is, therefore, futile to contend that there has been suppression of fact in regard M/s. Pharmachem Distributors being a related person. On that score, we are unable to uphold the invoking of the proviso to Section 11A of the Act for making the demand for the extended period."

This judgment was followed by this Court in the case of ECE Industries Limited v. Commissioner of Central Excise, New Delhi reported in (2004) 13 SCC 719 = 2004 (164) E.L.T. 236 (S.C.). In para 4, it was observed :

"4. In the case of M/s. P&B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in [2003 (2) SCALE 390], the question was whether the extended period of limitation could be invoked where the Department has earlier issued show cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any wilful suppression or mis-statement and that therefore, the extended period under Section 11A could not be invoked."

Similarly, this judgment was again followed in the case of Hyderabad Polymers (P) Ltd. v. Commissioner of Central Excise, Hyderabad reported in 2004 (166) E.L.T. 151 (S.C.). It was observed in para 6 :

"..... On the ratio laid down in this judgment it must be held that once the earlier Show Cause Notice, on similar issue has been dropped, it can no longer be said that there is any suppression. The extended period of limitation would thus not be available. We are unable to accept the submission that earlier Show Cause Notice was for a subsequent period and/or it cannot be taken into consideration as it is not known when that Show Cause Notice was dropped. If the Department wanted to take up such contentions it is for them to show that that Show Cause Notice was not relevant and was not applicable. The Department has not brought any of those facts on record. Therefore, the Department cannot now urge that findings of the Collector that that Show Cause Notice was on a similar issue and for an identical amount is not correct."

9. Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant."

(Emphasis supplied)

6.1 Therefore, I am of the considered view that the present demand from April, 2012 to September, 2013 invoking extended period is not sustainable at all and is required to be set aside. I do so. Now, I proceed to decide the demand for the normal period i.e. from October, 2013 to September, 2014.

7. The appellant has assailed the impugned order by contending that they are statutory authority for administration of ports other than major ports in the State of Gujarat having been constituted by the Government of Gujarat under the powers conferred under the Gujarat Maritime Board Act, 1981 and accordingly they collected Certification Fee, Vehicle Entry Fee, Tug Barge Survey Fee and Plot Rent Income and these fee cannot be equated with consideration for services and therefore, the service tax is not applicable to them. The lower

adjudicating authority has held that the appellant has collected these fees towards rendering of services in the form of utilization of port premises/facilities by their clients and therefore, they have provided services which are taxable as 'port service', 'technical inspection and certification agency service' and 'renting of immovable property' under the Finance Act, 1994.

7.1 I would like to reproduce the definition of the term 'service' under Section 65B(44) of the Act, which reads as under:-

"service means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

- (a)
- (b)
- (c)

Explanation 1. — For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,—

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member;"

7.2 It can be seen from the definition of 'service' that the functions performed by the members of the local authorities in performing the functions of that office cannot be considered as rendering of service. I find that the Government of Gujarat enacted Gujarat Maritime Board Act, 1981 and powers of administration, control and management of such ports and for matters connected therewith has been conferred to Gujarat Maritime Board and hence it is a statutory body. The appellant has derived power to collect/levy charges/fees for using port facilities under Section 37 and Section 38 of the Chapter VI of the Gujarat Maritime Board Act, 1981, which are reproduced as under:

"Section 37. (1) *The Board shall from time to time frame a scale of rates at which and a statement of the conditions under which any of the services specified hereunder shall be performed by itself or any person authorised, under section 32 at or in relation to the port or port approaches —*

(a) *transshipping of passengers or goods between vessels in the port or port approaches;*

(b) *stevedoring, landing and shipping of passengers or goods from or to such vessels, to or from any wharf, quay, jetty, pier, dock, berth, mooring stage, or erection, land or building in the possession or occupation of the Board or at any place within the limits of the port or port approaches;*

(c) *cranage or portorage of goods on any such place;*

(d) *wharfage, storage or demurrage of goods on any such place;*

(e) *any other service in respect of vessels, passengers or goods excepting the services in respect of vessels for which fees are chargeable under the Indian Ports Act.*

(2) *Different scales of rates and conditions may be framed for different classes of goods and vessels and for different ports."*

"Section 38. (1) *The Board shall, from time to time also frame a scale of rates on payment of which and a statement of conditions under which any property belonging to, or the possession or occupation of, the Board or any place within the limits of the port or port approaches may be used for the purposes specified hereunder: -*

(a) *approaching or lying at or alongside any buoy, mooring, wharf, quay, pier, dock, land, building or place as aforesaid by vessels;*

(b) *entering upon or playing for hire at or on any wharf, quay, pier, dock, land, building, road, bridge, approach or place as aforesaid by animals or vehicles carrying passengers or goods;*

(c) *leasing of land or sheds by owners of goods imported or intended for export or by steamer agents;*

(d) *any other use of any land, building, works, vessels or appliances belonging to or provided by the Board.*

(2) *Different scales of rates and conditions may be framed for different classes of goods and vessels and for different ports."*

(Emphasis supplied)

7.3 I find that the appellant has collected tug/barge survey fee for inspection and examination for fitment of tugs/barges; that the certification fee collected towards issuance of certificates to their various clients, vessel owners, shipping agents etc. for using port facilities or to provide facilities to vessels calling on the

port; that Vehicle Entry Fee is collected for entry of vehicles into port area or exit from port area; that plot rent income is received by the appellant towards renting immovable property i.e. buildings and land to their clients.

7.4 In this context, the Hon'ble CESTAT, Ahmedabad in case of Gujarat Maritime Board reported as 2015 (38) STR 776 (Tri. – Ahmd.) wherein the Hon'ble CESTAT held that any amount collected after 01.04.2008 by Gujarat Maritime Board, can be considered as statutory levy only and Service Tax liability thereon may not arise, if collected as per Section 22A of the Gujarat Maritime Act, 1981. Relevant paras of the order are reproduced as under:

"4.4.1 Article 246 of the Constitution of India prescribes subject matter of laws made by Parliament and by the legislatures of States. Article 246(2) states as under :

"(2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as "Concurrent List")."

4.4.2 Accordingly, vide Entry No. 31 of List III of the Seventh Schedule the State Government is empowered to make laws for ports other than those declared by or under law made by Parliament or existing law to major ports.

4.4.3 The State Government of Gujarat has enacted Gujarat Maritime Board Act, 1981 in view of the power given to it by Entry No. 31 of List III of the Seventh Schedule to the Constitution of India. The appellants are a body constituted under the provisions of Gujarat Maritime Board Act, 1981 to administer minor ports within the State. The shipping and landing fees are collected by the appellants under the provisions of Gujarat Maritime Board Act, 1981.

4.4.4 Hon'ble Supreme Court in the case of appellants itself, reported at 2007 (14) SCC 704, the Hon'ble Supreme Court observed as under :

"7. As can be seen from the preamble of the 1981 Act, it is clear that the Board has been constituted, inter alia, for purposes of development and maintenance of minor ports. Under the said Act, the Maritime Board also renders services like stevedoring, transport of goods, storage, shipping etc. It

is also in charge of upkeepment of jetties, wharfs, roads, lights etc. However, the main object of the said Act is development of minor ports in the State of Gujarat. The income, accruing to the Maritime Board, including reserves and surplus are also required to be deployed and credited to a separate fund to be utilized for development of minor ports within the State. In this connection, we quote Sections 73, 74 and 75 of the 1981 Act herein below which read as under....."

.....

.....

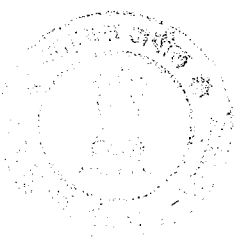
10. *It is also to be mentioned that w.e.f. 1-4-2008, the Govt. of Gujarat has amended the Gujarat Maritime Board Act, 1981, wherein Section 22A has been inserted. The said Section 22A specifically states that any amount provided by Gujarat Maritime Board, the appellant herein, is a State levy and a statutory levy and proceeds of such levy are **credited to the Consolidated Treasury Fund of State of Gujarat.** If that be so, any amount collected after 1-4-2008 by Gujarat Maritime Board, can be considered as statutory levy only and Service Tax liability thereon may not arise."*

(Emphasis supplied)

7.5 The above decision of the Hon'ble CESTAT has been challenged by the Department i.e. Commissioner of Central Excise and Service Tax, Bhavnagar before the Hon'ble Supreme Court of India reported as 2015 (39) STR 529 (SC) wherein the Hon'ble Apex Court dismissed the revenue appeals.

7.6 I would also like to reproduce the relevant text of Section 22A of the said Act, which reads as under:

- "22A. (1) *The State Government shall levy,*
- (i) *Charges for landing and shipping, licence fees, waterfront and lighterage charges at minor ports which are under administration, control and management of the Board; and*
- (ii) *Waterfront royalty as applicable at minor ports in the State of Gujarat, at such rates as the State Government may, by notification in the Official Gazette, specify.*
- (2) *The State charges referred to in sub-section (1) shall be*



collected, in the manner as may be prescribed, by the Board or by an officer as may be authorized by the Board or the State Government and all such moneys shall be credited to the Consolidated Fund of the State."

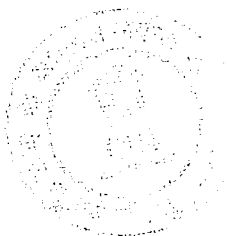
(Emphasis supplied)

7.8 In view of the above, the decision of Hon'ble Supreme Court and provisions of Section 22A of the Gujarat Maritime Act, 1981 specifically stipulate that any amount collected after 01.04.2008 by Gujarat Maritime Board can be considered as statutory levy only and service tax liability thereon may not arise, if such collected amount required to be credited to the Consolidated Treasury Fund of State of Gujarat.

7.9 It is not on record whether Certification Fee, Vehicle Entry Fee, Tug Barge Survey Fee and Plot Rent Income etc. collected by the appellant have been credited to the said Consolidated Treasury Fund of State of Gujarat during the said period. This aspect has neither been raised by the appellant nor by the Department. Hence, I am not in a position to verify at this juncture whether such collected Certification Fee, Vehicle Entry Fee, Tug Barge Survey Fee and Plot Rent Income etc. whether credited to the Consolidated Treasury Fund of State of Gujarat or not. Therefore, it is appropriate to remand this issue to the lower adjudicating authority to verify the factual position.

7.10 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.

7.11 In view of the above factual & legal position, the case is remanded to the lower adjudicating authority to decide the demand of normal period in de-novo proceedings after verifying the facts whether these fees collected had been deposited into Consolidated Fund of State of the Gujarat or not. The appellant is directed to make their submissions along with all relevant documents as per discussions at the foregoing paras including Para 7.9 above and the lower

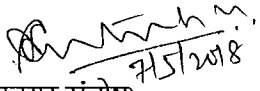


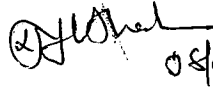
adjudicating authority shall pass a speaking and reasoned order after verifying the facts and offering fair and reasonable opportunities to the appellant to submit the factual position within 2 months of receipt of this order.

8. In view of above, I set aside the impugned order for demand of extended period and remand the matter of normal period back to the lower adjudicating authority to pass a speaking and reasoned order giving fair opportunities to the appellant to submit relevant documents in this regard.

८.१ अपीलकर्ता द्वारा दर्ज की गई उपरोक्त अपीलका निपटारा उपरोक्त तरीके से किया जाता है।

8.1 The appeal filed by the appellant is disposed off as above.


7/5/2018
(कुमार संतोष)
आयुक्त (अपील्स)


08/05/2018

By Regd. Post AD

To,

M/s Gujarat Maritime Board, Saru Section Road, Jamnagar	मे. गुजरात मैरिटाइम बोर्ड, सरु सेक्शन रोड, जामनगर.
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Copy for information and necessary action to:

1. The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad for favour of kind information.
2. The Commissioner, CGST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Assistant Commissioner, CGST & Central Excise Division-I, Jamnagar.
4. Guard File.

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