



::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,

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रजिस्टर्ड डाक ए. डी. द्वारा :-

क अपील / फाइल संख्या /
Appeal / File No.
V2/165/BVR/2017

मूल आदेश सं /
O.I.O. No.
120/AC/S.Tax/Div/2016-17

दिनांक /
Date
31.03.2017

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

BHV-EXCUS-000-APP-047-2018-19

आदेश का दिनांक /
Date of Order: 24.04.2018

जारी करने की तारीख /
Date of issue: 27.04.2018

27.04.2018

Passed by **Dr. Balbir Singh, Additional Director General (Taxpayer Services), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढे बोर्डे ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, डॉ. बलबीर सिंह, अपर महानिदेशक करदाता सेवाएँ, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा ८५, केन्द्रीय 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 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Dr. Balbir Singh, Additional Director General of Taxpayer Services, 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 :-**
M/s Smit Engineering, 301, Xylem Appartment, Nr. Satyanarayan Temple, Bhavnagar

इस आदेश(अपील) से व्यक्ति 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 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 असावा 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) 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 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 भगतान, 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 भगतान, 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 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 नियमावली, 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 भगतान, 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 भगतान, 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 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 नियमावली, 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 प्रतियों 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 अपील 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 भगतान किया जाए, बशर्त 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 हैं

- (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

- बशर्त यह कि इस धारा के प्रावधान वित्तीय (स. 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:

- (ii) 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

- (iii) 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 an excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

- (iii) यदि उत्पाद शुल्क का भगतान 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 भगतान 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 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 भगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भगतान 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 भगतान, उपरोक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पेटी 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-1 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

M/s. Smit Engineering, Block No.301, Xylem Apartment, Near Satyanarayan Temple, Bhavnagar (hereinafter referred to as "the appellant") has filed the present appeal against OIO No.120/AC/STAX/DIV/2016-17 dated 31.03.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner (AE), Central Excise, H.Q.-Bhavnagar (hereinafter referred to as "the adjudicating authority").

2.1 Briefly stated, the facts are that on the basis of an intelligence, an inquiry was initiated under summon proceedings against the appellant on 11.01.2013. During scrutiny of the documents, submitted by the appellant, the department observed that:-

- During the F.Y. 2008-09 to 2012-13, the appellant was providing Manpower Recruitment & Supply Service to various service recipients including some SEZ Units/Developer;
- The appellant had claimed exemption of the services provided to SEZ units under Notification No. 12/2013-ST dated 01.07.2013, but the appellant had failed to follow the procedure as prescribed in Para 3(ii) of Notification ibid;
- On comparing the value, shown in Form 26AS & Invoices issued by the appellant etc. with that shown in ST-3 Returns submitted by the appellant, the department observed that the appellant had not correctly discharged its service tax liability during said period;
- For the first 3 years i.e. F.Y. 2008-09 to 2010-11, being liability to make payment of service tax on receipt basis, the differential amount of service tax was calculated by the department by comparing the data reflected in Form 26AS with the taxable value shown in ST-3 Returns for the relevant period, while for the subsequent 2 years i.e. F.Y. 2011-12 to 2012-13, being liability to make payment of service tax on bill basis, the differential amount of service tax was calculated by the department by comparing the taxable value shown in the invoices issued by the appellant with that shown in ST-3 Returns for the relevant period.

2.2 During the inquiry, a statement of Shri Ranmalbhai G. Vadher, Proprietor of the appellant firm was also recorded on 27.12.2013, wherein he inter alia stated that they had provided Manpower Recruitment & Supply Services to various customers including some SEZ Units/developers; that they had also provided services as a sub-contractor to some contractors viz. M/s. Simplex Infrastructure Ltd., M/s. Vijaya Tank and Vessel P.Ltd., M/s. Thermax Engineering Construction Co.Ltd., M/s. Gannon Dunkerley & Company Ltd. M/s. Afcons Infrastructure Ltd., and M/s. Reliance Petroleum Ltd., who provided services to SEZ Units viz. M/s. Reliance Industries Ltd., Jamnagar; M/s. Pipavav Defence and Offshore Engineering Company Ltd. (previously known as Pipavav Shipyard Ltd.); that they had also provided services directly to some SEZ Units; that they had neither charged service tax from said contractors of SEZ units/SEZ units, nor paid service tax to the government exchequer.

3. Accordingly, a SCN dated 17.04.2014 was issued to the appellant proposing for demand of Service Tax of Rs.36,02,090/- under proviso to Section 73(1) of Finance Act, 1994 along with interest as provided under Section 75 of Finance Act, 1994. Imposition of penalties had also been proposed under Section 77 & 78 of Finance Act, 1994 in the captioned SCN.

4.1 The demand, made in the aforesaid SCN, was confirmed by the adjudicating authority vide impugned order dated 31.03.2017 by confirming the demand of Service Tax of Rs.36,02,090/- under Section 73(2) of Finance, 1994 along with interest thereon under Section 75 of Finance Act, 1994, and by imposing penalties amounting to Rs.10,000/- & Rs.36,02,090/- upon the appellant under Section 77(2) & 78 of Finance Act, 1994, respectively.



4.2 In the aforesaid impugned order, the adjudicating authority has held that:-

- Upto February-2011, according to Notification No. 09/2009-ST dated 03.03.2009, exemption from service tax for the services provided to SEZ unit/developer was not available and the appellant was required to pay such service tax first and then the SEZ Unit/Developer could claim refund of such service tax paid;
- From 01.03.2011, exemption from service tax was available subject to production/submission of the list of services approved by the approval committee for the SEZ Unit/Developer and Declaration in Form A-1 from the SEZ Unit/Developer or Authorisation Letter in Form A-2 from the jurisdictional Deputy/Assistant Commissioner of Central Excise, which the appellant had not produced during the inquiry proceedings, and thus had not followed the procedure laid down under the relevant Notification No.17/2011-ST dated 01.03.2011 & No.40/2012-ST dated 20.06.2012;
- The appellant had produced Authorisation Letters in Form A-2 submitted by M/s. Reliance Industries Ltd. & M/s. Pipavav Defence & Offshore Engineering P.Ltd., which were issued after March, 2013, whereas the period involved in the present case is upto March, 2013. Hence, the appellant cannot claim exemption on the basis of said Authorisation Letters; AND
- The appellant had failed to produce any cogent evidence like Bank Statements or copies of Bank Account Passbooks etc. in support of their claim that they had not received payments as reflected in Form 26As.

5. Feeling aggrieved, the appellant has filed the present appeal on the following grounds:-

- The adjudicating authority has considered the amount of service tax paid through GAR-7 Challans/CENVAT Credit during the F.Y. 2012-13 as Rs.4,80,448/- as against actual payment of Rs. 15,05,800/-. Thus, there is calculation error in raising demand of service tax during the F.Y. 2012-13. The service tax demand would have been given Rs. 25,76,738/- instead of confirmed demand of Rs.36,02,090/- resulting into reduction of demand by Rs. 10,25,352/-
- The difference found on reconciliation is mainly on account of exempt services provided to SEZ units. The adjudicating authority admitted in the order that services were in fact provided to SEZ units but has denied substantial benefit due to procedural lapses as prescribed in related CBEC circulars prevailing in different period;
- In this regard, there are some judgements of Hon'ble High Courts where it is held that substantial benefit cannot be denied because of procedural irregularities. Said judgements have been accepted by the department as clarified by the Board vide Circular No. 1063/2/2018-CX dated 16.02.2018;
- The provisions of SEZ Act, 2005 shall prevail, which specifically provides exemption from Service Tax on taxable service provided to SEZ units/developer.
- The services wholly consumed within SEZ are not covered within the notifications related to procedural compliance referred to in the order passed.
- They had provided Authorisation Letters in Form A-2 submitted by M/s. Reliance Industries Ltd. & M/s. Pipavav Defence & Offshore Engineering P.Ltd., which was compliance of procedure for supply to SEZ units;



- The SCN issued is barred by limitation of time as there is no case of fraud, collusion, suppression of facts or misrepresentation with intend to evade tax and further the extended period invoked is also not in accordance with the recent circular issued by the CBEC related to SCN, adjudication, recovery etc. matters and decided case laws.
- In view of the above, penalties under various provisions cannot be demanded;

6. Personal hearing was also held on 09.03.2018, wherein Shri Jayesh Mehta, CA appeared on behalf of the appellant and requested to consider their written submission in Appeal Proceedings.

7. The appeals were filed before the Commissioner (Appeals), Rajkot. The undersigned has been nominated as Commissioner (Appeals) / Appellate Authority as regards to the case of appellant vide Board's Circular No. 208/6/2017-Service Tax dated 17.10.2017 and Board's Order No. 05/2017-Service Tax dated 16.11.2017 issued by the Under Secretary (Service Tax), G.O.I, M.O.F, Department of Revenue, CBEC, Service Tax Wing.

8. I have carefully gone through the facts of case, the grounds mentioned in the appeal and the submissions made by the appellant. The moot question, to be decided in this appeal, is whether the appellant is eligible for exemption from payment of service tax for the period 2008-09 to 2012-13 on Manpower supplies made to SEZ units and the appellant is liable to pay Service Tax along with interest & penalties as imposed in the impugned order or otherwise.

9.1 I find that the difference found on reconciliation is mainly on account of services provided to SEZ units. In this regard, I find that Notification No. 04/2004-ST dated 31.03.2004 exempts "any taxable service provided to a SEZ unit/Developer of SEZ by any service provider for consumption of the services within such SEZ from the whole of service tax leviable thereon, subject to the following conditions, namely:-

- (i) the developer has been approved by the Board of Approvals to develop, operate and maintain the Special Economic Zone;
- (ii) the unit of the Special Economic Zone has been approved by the Development Commissioner or Board of Approvals, as the case may be, to establish the unit in the Special Economic Zone;
- (iii) the developer or unit of a Special Economic Zone shall maintain proper account of receipt and utilization of the said taxable services.

9.2 I find that the appellant has provided taxable service to SEZ units/developer of SEZ for consumption of the services within such SEZ. However, the appellant had failed to fulfil the aforesaid (i) to (iii) conditions, as shown in said Notification No.04/2004-ST dated 31.03.2004. Hence benefit of exemption on the services provided upto 02.03.2009 (till the date of issuance of subsequent Notification No. 09/2009-ST dated 03.03.2009) is not available to the appellant.

9.3 I also find that Notification No. 09/2009-ST dated 03.03.2009 as amended by Notification No. 15/2009-ST dated 20.05.2009 exempts the taxable services which are provided in relation to the authorised operations in a SEZ, and received by a developer or SEZ units, from the whole of the service tax leviable thereon subject to the following conditions:-

- (a) the developer or SEZ units shall get the list of services as are required in relation to the authorised operations in the SEZ, approved from the Approval Committee (hereinafter referred to as the specified services);
- (b) the developer or SEZ units claiming the exemption actually uses the specified services in relation to the authorised operations in the SEZ;
- (c) the exemption claimed by the developer or SEZ units shall be provided by way of refund of service tax paid on the specified services used in relation to the authorised operations in the Special Economic Zone except for services consumed wholly within the Special Economic Zone;"



9.4 I also find that Notification No. 17/2011-ST dated 01.03.2011 exempts the taxable services which are provided in relation to the authorised operations in a SEZ, and received by a developer or SEZ units, from the whole of the service tax leviable thereon provided that the services received and used for authorised operations are wholly consumed within the SEZ. In the captioned Notification, the provider of such services has an option not to pay the service tax ab initio instead of the Unit or Developer claiming exemption by way of refund in terms of this notification subject to the fulfilment of certain conditions as imposed in the said notification.

9.5 I also find that Notification No. 40 / 2012-ST dated 20.06.2012 exempts the services received by a SEZ unit or Developer of SEZ and used for the authorised operations, from the whole of the service tax, education cess and secondary and higher education cess leviable thereon subject to the following conditions, namely:-

(a) *"the exemption shall be provided by way of refund of service tax paid on the specified services received by a unit located in a SEZ or the developer of SEZ and used for the authorised operations:*

Provided that where the specified services received in SEZ and used for the authorised operations are wholly consumed within the SEZ, the person liable to pay service tax has the option not to pay the service tax ab initio instead of the SEZ unit or the developer claiming exemption by way of refund in terms of this notification.

Explanation.- For the purposes of this notification, the expression "wholly consumed" refers to such specified services received by the unit of a SEZ or the developer and used for the authorised operations, where the place of provision determinable in accordance with the Place of Provision of Services Rules, 2012(hereinafter referred as the POP Rules) is as under:-

- (i) in respect of services specified in rule 4 of the POP Rules, the place where the services are actually performed is within the SEZ; or*
- (ii) in respect of services specified in rule 5 of the POP Rules, the place where the property is located or intended to be located is within the SEZ; or*
- (iii) in respect of services other than those falling under clauses (i) and (ii), the recipient does not own or carry on any business other than the operations in SEZ;*

(b) and

(c) for the purpose of claiming exemption, the Unit of a SEZ or developer shall obtain a list of services that are liable to service tax as are required for the authorised operations approved by the Approval Committee (hereinafter referred to as the specified services) of the concerned SEZ;

(d) for the purpose of claiming ab initio exemption, the unit of a SEZ or developer shall furnish a declaration in Form A-1, verified by the Specified Officer of the SEZ, in addition to the list specified under condition (c); the unit of a SEZ or developer who does not own or carry on any business other than the operations in SEZ, shall declare to that effect in Form A-1;

(e) the unit of a SEZ or developer claiming the exemption shall declare that the specified services on which exemption and/ or refund is claimed, have been used for the authorised operations;"

9.6 In view of the aforesaid (i) Notification Nos. 09/2009-ST dated 03.03.2009 as amended by Notification No. 15/2009-ST dated 20.05.2009; (ii) Notification No. 17/2011-ST dated 01.03.2011; and (iii) Notification No. 40/2012-ST dated 20.06.2012, exempt the services received by a SEZ Unit and used for the authorised operations, from the whole of the service tax leviable thereon by way of refund. However, to avail the ab initio benefit of exemption notification, ibid, the appellant should have followed the following procedures:-



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- (i) The services should be used by the SEZ for the authorised operations, and The appellant should submit a list of services that are required for the authorised operations approved by the Approval Committee for availing the benefit of exemption under said Notification; and
- (ii) The services should be wholly consumed within the SEZ i.e. the SEZ unit does not own or carry on any business other than the operations in SEZ.

9.7 However, I find that the appellant has failed to follow the aforesaid prescribed procedures. Unless, the appellant fulfil the conditions imposed in the aforesaid notifications, and produces any evidence required there under, the ab initio benefit on the services provided cannot be given to the appellant. Accordingly, the service tax liability should have been discharged first by the appellant and the refund might have been claimed subsequently.

9.8 I also find that the appellant had produced Authorisation Letters in Form A-2 submitted by M/s. Reliance Industries Ltd. & M/s. Pipavav Defence & Offshore Engineering P.Ltd., which were issued after March, 2013, whereas the period involved in the present case is upto March, 2013. Further, on going through the A-2 submitted by M/s. Pipavav Defence & Offshore Engineering P.Ltd., I find that said SEZ unit is authorised to procure "Business Auxiliary Services" in terms of declaration furnished by the SEZ Unit/Developer. It means that the Business Auxiliary Service is the specified services to be received from the appellant by said SEZ Unit. Whereas, on going through the present appeal papers, I find that the appellant has provided Manpower Recruitment & Supply Service to said SEZ Unit. Hence, the appellant cannot claim exemption on the basis of said Authorisation Letters. I also find that the appellant has not submitted Authorisation Letters in Form A-2 in respect of remaining SEZ units viz. M/s. Vijjay Tanks and Vessels P.Ltd.; M/s. Pipavav Shipyard Ltd., M/s. Reliance Ports and Terminals Ltd.; & M/s. Reliance Petroleum Ltd. etc. Hence, I do not find any reason to differ with the findings of the adjudicating authority.

10. I also find that the appellant has argued that they had not received payments as reflected in Form 26As. But, the appellant had failed to produce any cogent evidence like Bank Statements or copies of Bank Account Passbooks etc. in support of their said claim. In this regard, I am in the agreement with the findings of the adjudicating authority given in Para 3.3 to 3.3.2 of the OIO.


11. I also find that the appellant has claimed that during the F.Y. 2012-13, they had paid Service Tax totally amounting to Rs.15,05,800/- through GAR-7 Challans/CENVAT Credit Account, whereas Rs.4,80,448/- have been considered as paid in the captioned SCN. Thus, there is calculation error in raising demand of service tax during the F.Y. 2012-13, and the amount of demand should be reduced by Rs.10,25,352/-. In this regard, I find that such adjustment of tax already paid cannot be denied to the appellant. **However, this is subject to verification by the jurisdictional Range Superintendent.**

12. I also find that the appellant should have declared the details of exempted services, provided by them in their ST-3 Returns along with the Notification No., claimed for such exemption, which the appellant had failed. I also find that the appellant had failed to correctly assess and declare the amount of taxable service as well as the amount of service tax payable in ST-3 Returns filed by them. Accordingly, the appellant has suppressed the material facts with the department in contravention of the provisions of the Act with intent to evade payment of Service Tax. Hence, extended period is invocable in the present case. Thus, the appellant is also liable for penalty under the provisions of Section 77(2) & Section 78 of the Finance Act, 1994.

13. In view of the above I pass the following order:-



- (i) I drop the demand to the extent of the amount of Service Tax already paid but not considered during the course of investigation, if any, as discussed in foregoing **Para 11** of this order, subject to the condition that the appellant will produce documentary evidence of payment of Service Tax of Rs.15,05,800/- through GAR-7 Challans/CENVAT Credit during the financial year 2012-13 to the jurisdictional Range Superintendent;
- (ii) I confirm the remaining amount of Service Tax under the provisions of Section 73 of the Act, 1994
- (iii) I confirm interest at the appropriate rate on the confirmed amount, as per this order, under the provisions of Section 75 of the Act, 1994;
- (iv) I impose penalty equal to the amount of Service Tax, confirmed as per this order, under the provisions of Section 78 of Finance Act, 1994;
- (v) I impose penalty of Rs.10,000/- upon the appellant under the provisions of Section 77(2) of the Act, 1994.
14. Accordingly, I dispose-off the appeal filed by the appellant in above terms.


 (DR. BALBIR SINGH)
 ADDITIONAL DIRECTOR GENERAL (DGTS),
 AZU, AHMEDABAD
 Date: 26/05/18

F.No. V2/165/BVR/2017

BY RPAD.

To,
 M/s. Smit Engineering,
 Block No. 301, Xylem Apartment,
 Near Satyanarayan Temple, Bhavnagar, Gujarat

Copy to :

1. The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone.
2. The Commissioner, CGST & Central Excise, Bhavnagar.
3. The Commissioner (Appeals), CGST, Rajkot.
4. The Jurisdictional Deputy / Assistant Commissioner, Bhavnagar Commissionerate.
5. The Additional / Joint Commissioner, Systems, CGST, Rajkot.
6. Guard File.