::प्रधानआयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर 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 – 2477952/2441142Email: cexappealsrajkot@gmail.com

रजिस्टर्डडाकए.डी.द्वारा :- **DIN-20210164SX000092499F**

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेशसं / OIO No.	दिनांक/ Date
	V2/102/RAJ/2019	**AC/JAM-I/ST/05/2019-20**	**27.05.2019**

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

RAJ-EXCUS-000-APP-001-2021

आदेश का दिनांक / Date of Order: **28.01.2021** जारी करने की तारीख / Date of issue: **29.01.2021**

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित/

Passed by **Shri Akhilesh Kumar**, Principal Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, 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/ST / GST,

Rajkot / Jamnagar / Gandhidham :

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

M/s. Sealine Ship Suppliers, 309, Shopping Point, Opp Hotel Fortune Palace, Digjam Circle 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 वित अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखि+त जगह की जा सकती हैं ।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/

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

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

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग , ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी 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 dutydemand/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, वित अधिनियम,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में 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 मॉग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी 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) वित अधिनियम,1994की 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 Commissionerauthorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

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

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

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

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

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

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

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

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

(C) **भारत सरकार कोपुनरीक्षण आवेदन :**
Revision application to Government of India:

इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में,केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर 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 छूट (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 outsideIndia export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए है।/

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील)नियमावली,2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case,if the order covers variousnumbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /

One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। /

Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /

For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

M/s Sealine Ship Suppliers, 207, Panchvati Point, P. N. Marg, Jamnagar - 361002 (*hereinafter referred to as* "Appellant") has filed Appeal No. V2/102/RAJ/2019 against Order-in-Original No. AC/JAM-I/ST/05/2019-20 dated 27.5.2019 (*hereinafter referred to as* 'impugned order') passed by the Assistant Commissioner, CGST and Central Excise, Division-I, Jamnagar (hereinafter referred to as "adjudicating authority").

2. The facts of the case, in brief, are that the Appellant was registered with Service Tax having Registration No. AACPK7853RST001 under the category of Port Service, Ship Management Service, Cleaning Service, Supply of Tangible Goods Service etc. During Audit of the records of the Appellant, it was observed that the Appellant provided service in relation to supply of fresh water and bunker to vessels in port area through tug/barge/tanker, during the period from 2012-13 to 2016-17. It appeared to the Audit that said service provided in port area was classifiable under the category of 'Port Service' and the Appellant was liable to pay service tax on the consideration received by them. On scrutiny of documents, it was found that the Appellant had not discharged service tax during the period from 2012-13 to 2014-15; that the Appellant had paid service tax at abated rate of 30% of value of service during the years 2015-16 and 2016-17, in terms of Notification No. 26/2012-ST dated 20.6.2012, as amended; that the Appellant charged and collected service tax at abated rate of 30% of value of service during the year 2015-16 in respect of service rendered to M/s Reliance Industries Ltd but did not deposit the same to Government account.

2.1 Show Cause Notice No. VI(a)8-189/Circle-III/Gr.19/2017-18 dated 10.8.2018 was issued to the Appellant calling them to explain as to why Service Tax amount of Rs. 18,33,556/- should not be demanded and recovered from them under proviso to Section 73(1) of the Finance Act, 1994 (hereinafter referred to as 'Act') along with interest under Section 75 and proposing imposition of penalty under Sections 76,77 and 78 of the Act.

2.2 The above Show Cause Notice was adjudicated vide the impugned order, which confirmed Service Tax demand of Rs. 18,33,556/- under proviso to Section 73(1) and ordered for its recovery along with interest under Section 75 of the Act and also imposed penalty of Rs. 18,33,556/- under Section 78 of the Act and penalty of Rs. 10,000/- under Section 77 of the Act.

3. Being aggrieved, the Appellant has preferred the present appeal on various grounds, *inter alia*, as under:-

(i) The SCN is time barred; the show cause notice was issued on 10-8-2018 on the basis of Audit of their records for the period from 2012-13 to 2016-17. Since the entire figures pertaining to the sale of water and bunkers were taken from their books of accounts, there is no suppression of facts, and also that the appellant had filed the sales tax returns in time, which also adds to the fact that there is no suppression or collusion as regards to the said sale; that they had also paid appropriate sales tax on the value of the bunker during the relevant period. Therefore, the SCN Issued for the period beyond normal period of 18/30 months backward from October,2018 stands time barred and is therefore not sustainable in terms of Section 73(1) of the Act.

(ii) That the amount received from the buyers of water has been booked in the books of accounts as "income from fresh water sales", "income from bunker sales". Therefore, such sales of water cannot be treated as provision of service so as to charge service tax; that they also charged sales tax / VAT on the sales of bunker on the entire value. Therefore, since the sale of bunker is sale on which sales tax is charged, the same cannot be treated as service for the purpose of charging service tax and attached sample copies of the invoices of sale of bunker is attached. Since the entire bunker is sold on payment of VAT, the entire sales of bunker is sale and not service. Hence, the entire demand on the sale of Bunker is not at all sustainable.

(iii) That the taxable value taken by the audit for supply of water for the period F.Y 2012-13 to 2016-17 was not correct. The amounts taken by the audit officers as mentioned in the Ledger Account was the value of the water sold and not the service charge for supply of water; that payments made by them on behalf of the ship owners and getting it reimbursed, then such amount need not be added to the value of taxable service for calculation of service tax; that they have shown in the vouchers all such reimbursable expenses separately and recovered from the buyers of water.

(iv) That the impugned order has classified the income booked under the head "supply charges income" and "service charges income" under the

taxable category of "Port Service" which is not sustainable in the eyes of law; that as per definition of "Port Service" under Section 65(82) of the Finance Act, 1994, service tax was attracted on any service rendered by a port or other port or any person authorized by such port or other port and such service is should be in relation to a vessel or goods, whereas, in the present case, admittedly, the appellant was neither a port nor other port nor authorized by a Port or other port and therefore, demanding the service tax under the said taxable category was without authority of law; that the entire sale of fresh water was supplied to various vessels at the port itself, and even if it is construed as service, then the entire services can be treated as provided wholly at the port itself. Therefore, as per the proviso to Section 65(105)(zn), the taxability on the value of such sale of fresh water would not arise at all.

(v) That they were under bonafide belief that the sale of water is not at all a taxable service as it amounts to sale under the Gujarat VAT Act, 2005, even though the VAT on sale of water is exempted. Therefore, the appellant did not apply for registration and pay service tax as it was not applicable. The sales of bunker was made only on payment of sales tax on the entire sales value. There was no separate amount charged for supply of bunker or supply of water. Therefore, there is no element of service in the said activity and hence is not chargeable to service tax.

(vi) That they had not contravened any of the provisions of the Finance Act, 1995 as they had not rendered any taxable services on which service tax was not paid. Hence, penalty under Section 77 cannot be imposed.

(vii) That they had declared the amounts of sale of water in their books of accounts and also declared to the income tax department in their balance sheets. Therefore, suppression of value of taxable services cannot be alleged on the appellants. The impugned order has relied on the figures shown in the balance sheet and the profit and loss account for arriving at value of taxable service, which was provided by the appellant on their own volition during the course of audit; Since, there is no suppression, collusion or fraud involved in the present case and the allegation are mainly based on the grounds of interpretation of "sale of water" as "supply of water" and rendering such sale as provision of taxable services, the provision of Section 78 does not apply for invoking

penal action.

(viii) In view of the above, the demand of service tax on the "sale of fresh water" or the "sale of bunkers" is not sustainable both on merits as well as on limitation. Since, the demand itself is not sustainable, the question of imposition of various penalties does not arise.

4. Personal Hearing in the matter was conducted on 3.1.2020. Shri R. Subramanya, Advocate, appeared on behalf of the Appellant and reiterated the submission of appeal memorandum and pleaded that activity is only sale of water and bunker i.e. Diesel and therefore, it cannot be treated as service and requested to allow their appeal.

4.1. The Appellant vide letter dated 10.1.2019 informed that they have applied for Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 and that they withdraw their Appeal No. V2/102/Raj/2019. However, the Appellant vide email dated 29.5.2020 stated that they had not opted for Government scheme in respect of appeal No. V2/102/Raj/2019. Hence, the matter was listed for hearing in virtual mode on 30.6.2020, 10.7.2020, 5.8.2020, 26.8.2020, 11.9.2020 and 29.12.2020. The Appellant vide letter dated 8.9.2020 relied upon Order-in-Appeal No. RAJ-EXCUS-000-APP-26-2020 dated 4.2.2020 passed by the then Commissioner(Appeals), Rajkot in the case of M/s Sea Shipping Services and contended that since the issue involved in their appeal is same, there is no merit in service tax demand confirmed vide the impugned order. The Appellant has not availed the opportunity of hearing despite sufficient opportunities offered to them. I, therefore, take up the appeal for decision on the basis of available records.

5. I have carefully gone through the facts of the case, the impugned order and grounds raised in Appeal Memorandum. The issue to be decided in the present appeal is whether the impugned order confirming service tax demand of Rs. 18,33,556/- on account of supply of fresh water and bunker to the vessel through tug/barges/tankers under Port Services and imposing penalty under Sections 77 and 78 of the Act, is correct, legal and proper or not. The demand pertains to the period FY 2012-13 to FY 2016-17.

6. On going through the records, I find that the Appellant provided service in relation to supply of fresh water and bunker to vessels in port area through

tug/barge/tanker, during the period from 2012-13 to 2016-17. The adjudicating authority confirmed service tax demand on the grounds that service provided in respect of supply of water/bunker to vessels in a port area is classifiable under the category of 'Port Service' in terms of Section 65(82) of the Finance Act, 1994.

7. I find that service tax on 'Port Service' was introduced w.e.f. 16.7.2001. The term 'Port Service' was defined under Section 65(82) of the Act as *"Any service rendered by a Port or any person authorized by the Port, in any manner, in relation to a vessel or goods"*. The said definition was amended w.e.f. 1.7.2010 to read as *"any service rendered within a Port or other Port, in any manner"*.I find that when the Port Service was introduced in 2001, Joint Secretary(TRU), CBEC, New Delhi vide letter F.No.B.11/1/2001-TRU dated 9.7.2001 explained various charges which form part of taxable value of Port Services. I reproduced relevant portion of the said letter as under:

"Port services:

1. As per the section 65(51), the "port services" means any service rendered by a port or any person authorized by the port, in any manner, in relation to a vessel or goods. As per section 65 (72)(zn), taxable service is any service provided to any person by a port or any person authorized by the port, in relation to port services, in any manner.

2. ...

2.1 Some of the specific charges for the services rendered in respect of port services are as follows.

(i) Port and dock charges consisting of berthing and mooring charges, port dues, pilotage and towage, water supply charges, salvage and diver charges, anchorage fee;

(ii) Cargo handling and storage charges consisting of wharfage for general cargo, warehousing charges, cranage charges, ore handling charges, wharfage on petroleum products, weighment charges for lorries, traffic appliance charges, weighment charges for goods;

(iii) Railway haulage charges for rail-borne goods, local haulage and storage;

(iv) Container handling charges consisting of import, export and transshipment wharfage on containers, equipment charges for handling of containers, container storage charges;

(v) Labour charges.

2.2 All these charges form part of taxable value of port services. Demurrage charges are recovered by port authority as a rental for storage of goods. The fact that these charges apply only if the goods overstay a prescribed free period, does not detract from their being in the nature of a charge for providing a service in relation to goods. Accordingly they would form part of taxable value."

(Emphasis supplied)

7.1 In backdrop of above legal provisions and Board's instruction, I find that supply of water/bunker to vessels in port area by the Appellant using tug/barge/tanker is not under dispute. Only dispute is whether such transaction can be termed as sale or service. I find that when water/bunker is supplied to vessels in a port area, such transaction can never be a plain sale transaction for the simple reason that one has to procure water, make arrangement for transportation of water in tanker upto port and from port to vessels through tug/barge. Apparently, consideration received for supply of such water/ bunker would not be limited to cost of water/bunker but it would also include transportation expense of tug/barge/tanker and other related expenses associated with such supply like arranging suitable manpower to handle the operation etc. So, transaction involved in the present case cannot be said to be only sale of water/bunker but it is a composite service which includes procurement of water as well as arrangement of tug/barge/tanker for transportation upto vessels and deploying manpower.It is also pertinent to mention that service related to supply of water when provided within a port or an airport was exempted from payment of service tax during the period from 22.6.2010 to 30.6.2012, in terms of Notification No. 31/2010-S.T., dated 22-6-2010, however, there was no exemption from payment of service tax during the period from April, 2012 to March, 2017 involved in the present case. Further, the instruction issued by the Board vide letter dated 9.7.2001 has persuasive value, in light of the principle of *contemporanea exposito*. After considering the facts of the case and legal position, I am of the opinion that supply of water/bunker to vessels in port area is covered under Port Service and the Appellant has rightly been held liable to pay service tax on the considered received for providing such service.

8. The Appellant referred the definition of "Port service" under Section 65(82) of the Act, and contended that they were neither a port nor other port nor authorized by a Port or other port and therefore, demanding service tax under 'Port Service' was without authority of law. I find that definition of 'Port

Service' under Section 65(82) of the Act was amended w.e.f. 1.7.2010 to read as *"any service rendered within a Port or other Port, in any manner"*. Thus, service tax was attracted on any service rendered within a Port w.e.f. 1.7.2010 and period involved in the present case is from April, 2012 to March,2017. Hence, the Appellant was rightly held liable to pay service tax on supply of water/bunker to vessels in port area, as discussed by me in para *supra*.

9. The appellant has contended that even if it is construed as service, then the entire services can be treated as provided wholly at the port itself and therefore, as per the proviso to Section 65(105)(zn), the taxability on the value of such sale of fresh water would not arise at all. I find it is pertinent to examine the provisions contained in Section 65(105)(zn), which are reproduced as under:

> "(zn) to any person, by any other person, in relation to port services in a port, in any manner :
>
> Provided that the provisions of section 65A shall not apply to any service when the same is rendered wholly within the port;"

9.1 I find that Section 65A of the Act provides manner in which classification of taxable service is to be determined when a taxable service is classifiable under two or more sub-clauses of clause (105) of Section 65. Thus, the proviso contained in Section 65(105)(zn) *supra* ensures that any service provided within port area is classified as 'Port Service', overriding the provisions contained in Section 65A of the Act. In other words, any service provided within port area would get classified under 'Port Service' irrespective of the fact that the same is otherwise fall under sub-clauses of Section 65(105) of the Act. I, therefore, find no merit in the contention of the Appellant.

10. The Appellant has contended that sale of water is not at all a taxable service as it amounts to sale under the Gujarat VAT Act, 2005; that they charged sales tax / VAT on the sales of bunker on the entire value and therefore, it cannot be treated as service for the purpose of charging service tax. I find that the supply of water/bunker to vessels by the Appellant was a composite service as discussed by me in para supra and such transaction cannot be said to be a mere sale transaction and the Appellant cannot take shelter to the fact that water/bunker was assessed to VAT. Further, as per Rule 5(1) of Service Tax(Determination of Value) Rules, 2006, any expenditure or costs incurred by the service provider in the course of providing taxable service is to be treated as consideration for the taxable service provided and is required to be included in the value for the purpose of charging service tax on the said service. Thus, cost

of procurement of water/bunker is required to be considered for the purpose of charging service tax. I also found from records that the Appellant had discharged service tax on supply of water, albeit on 30% of the value of service during the years 2015-16 and 2016-17, by availing abatement under Notification No. 26/2012-ST dated 20.6.2012 as amended. The adjudicating authority correctly denied them the benefit of said notification, since 'Port Service' was not specified service for availing abatement under said notification. Further, as per para 5 of the impugned order, the Appellant charged and collected service tax from service receiver M/s Reliance Industries Ltd but failed to deposit the same in Government account in the year 2015-16. Section 73A of the Act mandates to deposit service tax collected from any person in Government Account.

11. The Appellant has contended that cost incurred by service provider as pure agent of service recipient is required to be excluded from value of taxable service as per Rule 5(2) of Service Tax(Determination of Value) Rules, 2006; that their case is covered by clause (vi) and (vii) of Rule 5(2) and cost of water reimbursed by service recipient is not includible in value of taxable service. I find it pertinent to examine provisions of Rule 5(2) of Service Tax(Determination of Value) Rules, 2006, which are reproduced as under:

"(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service <u>if all the following conditions are satisfied</u>, namely :-

(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;
(ii)the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;
(iii) the recipient of service is liable to make payment to the third party;
(iv) the recipient of service authorises the service provider to make payment on his behalf;
(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;
(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;
(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and
(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

Explanation 1. - For the purposes of sub-rule (2), "pure agent" means a person who -

(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;
(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;
(c) does not use such goods or services so procured; and
(d) receives only the actual amount incurred to procure such goods or services."

(Emphasis supplied)

11.1 I find that cost or expenditure incurred by service provider as pure agent of service recipient is excludible from value of taxable service, if all the conditions specified under clause(i) to (viii) of Rule 5(2) reproduced above are satisfied. So, in order to claim benefit of Rule 5(2) ibid, the Appellant has to prove that they acted as pure agent of service recipient and that they satisfied all the conditions specified under clause(i) to (viii) of Rule 5(2)*supra*. The Appellant has not brought on records any contractual agreement entered with service recipient and also not fulfilled other requirements as envisaged under clause (a) to (d) of explanation 1 above. Further, the Appellant has to satisfy all the conditions specified under clause(i) to (viii) of Rule 5(2) above and not merely clause (vi) and (vii) relied upon by the Appellant. I, therefore, reject this contention of the Appellant as devoid of merit.

12. The Appellant has contended that the Show Cause Notice was issued on 10.8.2018 for the period from 2012-13 to 2016-17on the basis of audit of their records by the Department; that there was no suppression or collusion as the entire figures pertaining to the sale of water and bunkers were taken from their books of accounts and therefore, the Show Cause Notice issued for the period beyond normal period of 18 months prior to October,2018 is barred by limitation and service tax demand to that extent is not sustainable. I find that non payment of service tax by the Appellant on supply of water/ bunker was revealed during audit of the records of the Appellant. Had there been no audit by the Department, the non payment of service tax by the Appellant would have gone unnoticed and hence, ingredients for invoking extended period under Section 73(1) of the Act existed in the present case. I, therefore, hold that the demand is not barred by limitation. I rely on the order passed by the Hon'ble CESTAT, Chennai in the case of Six Sigma Soft Solutions (P) Ltd. reported as 2018 (18) G.S.T.L. 448 (Tri. - Chennai), wherein it has been held that,

"6.5 Ld. Advocate has been at pains to point out that there was no *mala fide* intention on the part of the appellant. He has contended [that] they were under

the impression that the said activities would come within the scope of IT services, hence not taxable. For this reason, Ld. Advocate has contended that extended period of time would not be invocable. However, we find that the adjudicating authority has addressed this aspect in para-10 of the impugned order, where it has been brought to the fold that appellant had not at all disclosed the receipt of income in respect of the activities done by them in respect of services provided by them in their ST-3 returns.

6.6 The facts came to light only when the department conducted scrutiny of the annual reports, possibly during audit. In such circumstances, the department is fully justified in invoking the extended period of limitation of five years."

(Emphasis supplied)

12.1 In view of above, I hold that extended period of limitation was rightly invoked under proviso to Section 73(1) of the Act in the present case. However, it needs to be examined whether entire period from 2012-13 to 2016-17 involved in the present case is covered within period of limitation of five years or not. I find that relevant date for the purpose of Section 73 has been prescribed under Section 73(6) of the Act as under:

"6) For the purposes of this section, "relevant date" means, —

(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid —

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;

... ..."

(Emphasis supplied)

12.2 I find that the Show Cause Notice was issued on 10.8.2018. Hence, service tax demand for the year 2012-13 is beyond limitation period of five years and therefore, not sustainable. As per Annexure-A to Show Cause Notice dated 10.8.2018, service tax demand for the year 2012-13 was Rs. 1,49,958/-, which is barred by limitation. The remaining service tax demand from April, 2013 to March, 2017 falls within limitation period of five years considering that the last date for filing ST-3 Return for the period from April, 2013 to October, 2013 was 25.10.2013.

12.3 In view of above, I set aside the confirmation of service tax demand of Rs. 1,49,958/- along with penalty of Rs. 1,49,958/- imposed under Section 78 of the Act and uphold the confirmation of remaining service tax demand of Rs. 16,83,598/-. Since demand is upheld, it is natural that confirmed demand is required to be discharged along with interest. I, therefore, uphold recovery of interest under Section 75 ibid.

13. I have also gone through the relied upon Order-in-Appeal No. RAJ-EXCUS-000-APP-26-2020 dated 4.2.2020 passed by the then Commissioner(Appeals), Rajkot in the case of M/s Sea Shipping Services. I respectfully disagree with the said Order-in-Appeal for the reasons and findings as recorded by me in this order. I also find that the said Order-in-Appeal has not considered the order passed by the Hon'ble CESTAT, Ahmedabad in the case of Jaisu Shipping Co. Pvt Ltd relied upon by the adjudicating authority, while passing the order.

14. The Appellant has contested imposition of penalty under Section 78 of the Act on the grounds that they had declared the amounts of sale of water in their books of accounts and, therefore, suppression of value of taxable services cannot be alleged against them. I find that there was suppression of facts involved in the present case, as held by me in para supra. Since the Appellant suppressed the facts of non-payment of Service Tax, penalty under Section 78 of the Act is mandatory as has been held by the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) E.L.T. 3 (S.C.), wherein it is held that when there are ingredients for invoking extended period of limitation for demand of duty, imposition of penalty under Section 11AC is mandatory. The ratio of the said judgment applies to the facts of the present case. I, therefore, uphold penalty of Rs. 16,83,598/-imposed under Section 78 of the Act.

15. I find that the adjudicating authority has imposed penalty under Section 77 of the Act on the grounds that the Appellant failed to assess correct service tax liability. I concur with the findings of the adjudicating authority and uphold imposition of penalty of Rs. 10,000/- under Section 77 of the Act.

16. In view of the above, I partially allow the appeal and set aside the impugned order to the extent of confirmation of service tax demand of Rs. 1,49,958/- and imposition of penalty of Rs. 1,49,958/- under Section 78 of the Act. I uphold the remaining portion of the impugned order.

17. अपीलकर्ता द्वारा दर्ज की गईअपील का निपटारा उपरोक्त तरीके से किया जाता है।

17. The appeal filed by the Appellant is disposed off as above.

सत्यापित,

विपुल शाह
अधीक्षक (अपील्स)

28 january, 2021
(Akhilesh Kumar)
Commissioner (Appeals)

By Regd Post A.D.

To,
M/s Sealine Ship Suppliers
309, Shopping Point,
Opp Hotel Fortune Palace,
Digjam Circle Road,
Jamnagar.

प्रतिलिपि :-

1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र,अहमदाबाद को जानकारी हेतु।
2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क,राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क,जामनगर-1 मण्डल, को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।