::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔरकेन्द्रीय 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: commrappl3-cexamd@nic.in

सत्यमेव जयते

रजिस्टर्डडाकए.डी.द्वारा

DIN-20221064SX0000002E6C

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/22/RAJ/2021	**6/D/Supdt/20-21**	**31-12-2020**

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

RAJ-EXCUS-000-APP-066-2021-22

आदेश का दिनांक / Date of Order:	**11.01.2022**	जारी करने की तारीख / Date of issue:	**12.01.2022**

श्रीअखिलेश कुमार, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by **Shri Akhilesh Kumar**,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 theAppellant&Respondent :-

M/s. Seatrade Maritime Private Limited (606, Corporate Levels, 150 ring road), Rajkot, Gujarat, .

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 आधानियम ,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 न 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 असावा अहमदाबाद- ३८००१६की 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 सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of 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, 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 ,ब्याज की माँग और लगाया गया जुर्माना,रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

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

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 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 क्रेडीट 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 समायावधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

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

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । / In case, if the order covers various umbers 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-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 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 है । /
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. Seatrade Maritime Pvt. Ltd., 606, Corporate Levels, 150 Feet Ring Road, Ayodhya Chowk, Rajkot (*hereinafter referred to as* 'Appellant') has filed Appeal No. V2/22/RAJ/2021 against Order-in-Original No. 06/D/Supdt/20-21 dated 31.12.2020 (*hereinafter referred to as* 'impugned order') passed by the Superintendent (Adjudication), Central GST Division, Rajkot-I, Commissionerate-Rajkot (*hereinafter referred to as* 'adjudicating authority').

2. The facts of the case, in brief, are that the Appellant had arranged services to their clients i.e. exporters/shippers, by way of booking space in ship/ocean freight from shipping lines for overseas transportation of export cargo/containers of their clients. The appellant charges the clients more than the amount charged by the shipping lines and accounts for in their books of accounts. They have not paid service tax on this difference between the amount charged from the clients and the amount paid to the shipping lines. The said activity was alleged to be taxable under the category "Business Auxiliary Service" in terms of erstwhile Section 65(19) of the Finance Act, 1994 (hereinafter referred to as 'Act, 1994'). The Adjudicating Authority vide the impugned order has held that services provided by the appellant are taxable under the category of "Business Auxiliary Services" and consideration so received is liable to service tax. Accordingly, the Adjudicating Authority has confirmed the demand of Rs. 4,45,445/- for the period from April, 2016 to June, 2017 vide the impugned order along with interest under Section 75 of the Act, 1994. He has also imposed penalty of Rs.10,000/- under Section 77 and penalty of Rs.44,545/- under Section 76 of the Act, 1994 on the appellant.

3. Being aggrieved by the impugned order, the appellant has preferred the present appeal, inter-alia, contending as under:

(i) The Adjudicating Authority had passed the impugned order in gross violation of judicial discipline and confirmed the demand as the same matter has been decided by the Commissioner (Appeals) in favour of the appellant itself for earlier period i.e. period from July, 2012 to March, 2016 vide OIA No. RAJ-EXCUS-000-APP-005-2020 dated 09.01.2020; that once the issue has been decided in favour of the appellant by the Commissioner (Appeals), the issue must be treated as settled by the subordinate officer which the Adjudicating Authority failed to do so; that they relied upon the following decisions:

(a) Jumbo Bags Limited Vs. Deputy Commr. Of GST & Central Excise, Chennai – 2020 (374) ELT 703 (Mad.)

(b) Ganesh Benzoplast Limited Vs. Union of India – 2020 (374) ELT 552 (Bom.)

(c) Mangalnath Developers Vs. Union of India – 2020 (374) ELT 175 (Bom).
(d) Aries Dyechem Industries Vs. Commissioner of Customs, Ahmedabad – 2020 (372) ELT 602 (Tri. Ahmd.)
(e) Khandwala Enterprise Pvt. Ltd. V/s. Union of India – 2020 (371) ELT 50 (Del.)

(ii) The appellant has undertaken the transportation of goods by sea on their own from their customers; that as a freight forwarder, it is responsibility of the appellant to make proper arrangement of the delivery of goods having regards to the market conditions; that even the customer had after considering the competitive rates from market given the ocean freight to the appellant and therefore, the appellant had undertaken the ocean transportation on principal to principal basis; that simultaneously, the appellant had arranged from container line on their own and not on behalf of the customers; that due to this practice the appellant had incurred losses on particular transaction also; that the appellant had contracted for the space of certain containers from liners even on principal to principal basis; that in absence of any agreement for commission in respect of procurement of service mere charging of ocean freight does not make the appellant agent of the exporters and therefore, the mark up, as arises from trading activity can never be considered as Commission.

(iii) They relied upon the OIA No. RAJ-EXUS-000-APP-005-2020 dated 09.01.2020 passed by the Commissioner (Appeals) in their own case for the period from July, 2012 to March, 2016; that they also relied upon the decision of the Tribunal in the case of Commissioner of Service Tax, New Delhi Vs. Karam Freight Movers reported in 2017 (4) GSTL 215 (Tri. Del.) wherein it has been held that mere sale and purchase of cargo space and earning profit in the process is not a taxable activity under Finance Act, 1994; that they also relied upon the following decisions:

(a) DHL Lemuir Logistics Pvt. Ltd. – 2010 (17) STR 266 (Tri. Bang.)
(b) Gudwin Logistics – 2010 (18) STR 348 (Tri. Ahmd)
(c) Bax Global India Limited – 2008 (09) STR 412 (Tri. Bang.)
(d) Euro RSCG Advertising Ltd.– 2007 (07) STR 277 (Tri. Bang.)
(e) Kerala Publicity Bureau – 2008 (09) STR 101 (Tri. Bang.)
(f) Skylift Cargo Pvt. Ltd. – 2010 (17) STR 075 (Tri. Chen.)
(g) Margadarsi Marketing Pvt. Ltd.– 2020 (20) STR 195 (Tri. Bang.)
(h) Baroda Electric Meters Limited– 1997 (94) ELT 13 (SC)
(i) International Clearing & Shipping Agency–2007 (05) STR 107 (Tri. Chen.)

(iv) That the Tribunal held that the mark up freight values cannot be considered as commission; that they have never acted as agent either to the exporter or to the shipping line; that the entire amount was charged as Ocean

Freight from exporters and no commission was charged for procurement of service and therefore, the Adjudicating Authority has wrongly treated the nature of the income earned by the appellant.

(iv) Penalty under Section 77 cannot be imposed as the appellant had correctly submitted their periodical return and calculated/paid all applicable service tax;

(v) The appellant had never been defaulted the service tax amount and therefore, they are not liable for payment of penalty under the provisions of Section 76 of the Finance Act, 1994

4. Personal hearing in the matter was held on 17.12.2021 in virtual mode through video conferencing. Shri Abhishek Darak, Chartered Accountant, attended the personal hearing. He reiterated submission made in appeal memorandum.

5. I have carefully gone through the facts of the case, the impugned order, grounds of appeal and written as well as oral submissions made by the appellant at the time of personal hearing. The issue to be decided in the present appeal is whether the income earned in the name of Ocean Freight Charges by the appellant was chargeable to service tax under the category of "Business Auxiliary Service" or otherwise. The demand pertains to the period from April, 2016 to June, 2017.

6. I find that the appellant has contended that they had undertaken the ocean transportation on principal to principal basis and not acted as intermediary. It was argued that they undertake the responsibility to deliver the goods in marketable condition and that they had arranged from container line on their own and not on behalf of the customers. It was further contended that due to this practice, they had incurred losses on particular transaction also. They had contracted for the space of certain containers from liners even on principal to principal basis and that in absence of any agreement for commission in respect of procurement of service, mere charging of ocean freight does not make the appellant agent of the exporters and, therefore, the mark up, as arises from trading activity can never be considered as Commission.

6.1 I find that the Board vide Circular No. 197/7/2016-ST dated 12.08.2016 has clarified the taxability of ocean freight. It is pertinent to reproduce the relevant portion of the said Circular dated 12.08.2016, which are as follows:

"2.0 It may be noted that in terms of rule 10 of the Place of Provision of Services Rules 2012, (hereinafter referred to as 'POPS Rules, 2012', for brevity) the place of provision of the service of transportation of goods by air/sea, other than by mail or courier, is the destination of the goods. It follows that the place of

provision of the service of transportation of goods by air/sea from a place in India to a place outside India, will be a place outside the taxable territory and hence not liable to service tax. The provisions of rule 9 of the POPS Rules, 2012, should also be kept in mind wherein the place of provision of intermediary services is the location of the service provider. An intermediary has been defined, *inter alia*, in rule 2(f) of the POPS Rules, 2012, as one who arranges or facilitates the provision of a service or a supply of goods between two or more persons, but does not include a person who provides the main service or supplies the goods on his own account. The contents of the succeeding paragraphs flow from the application of these two rules.

2.1 The freight forwarders may deal with the exporters as an agent of an airline/carrier/ocean liner, as one who merely acts as a sort of booking agent with no responsibility for the actual transportation. It must be noted that in such cases the freight forwarder bears no liability with respect to transportation and any legal proceedings will have to be instituted by the exporters, against the airline/carrier/ ocean liner. The freight forwarder merely charges the rate prescribed by the airline/carrier/ocean liner and cannot vary it unless authorized by them. In such cases the freight forwarder may be considered to be an intermediary under rule 2(f) read with rule 9 of POPS since he is merely facilitating the provision of the service of transportation but not providing it on his own account. When the freight forwarder acts as an agent of an air line/carrier/ocean liner, the service of transportation is provided by the air line/carrier/ocean-liner and the freight forwarder is merely an agent and the service of the freight forwarder will be subjected to tax while the service of actual transportation will not be liable for service tax under Rule 10 of POPS.

2.2 **The freight forwarders may also act as a principal who is providing the service of transportation of goods, where the destination is outside India.** In such cases the freight forwarders are negotiating the terms of freight with the airline/carrier/ocean liner as well as the actual rate with the exporter. **The invoice is raised by the freight forwarder on the exporter.** In such cases where the freight forwarder is undertaking all the legal responsibility for the transportation of the goods and undertakes all the attendant risks, he is providing the service of transportation of goods, from a place in India to a place outside India. He is bearing all the risks and liability for transportation. In such cases they are not covered under the category of intermediary, which by definition excludes a person who provides a service on his account.

3.0 It follows therefore that **a freight forwarder, when acting as a principal, will not be liable to pay service tax when the destination of the goods is from a place in India to a place outside India."**

(Emphasis supplied)

6.2 It is observed from the Circular that when the freight forwarder acts as merely an agent of ocean liner, then the service of the freight forwarder will be liable for service tax. Whereas when the freight forwarder acts as a principal, who is providing transportation service where the destination is outside India and the invoices issued by the freight forwarder to the exporter, then the freight forwarder is not liable for service tax. In the instance case, it appeared that the appellant acted as principal, since they provided service ocean transportation, where the destination is outside India, and they issued invoices in the name of exporters, by adding their mark-up.

6.3 I find that the Adjudicating Authority has confirmed the demand by invoking the

provisions of erstwhile Section 65 (19) of the Act pertaining to Business Auxiliary Service. The findings of the Adjudicating Authority at Para 22.3 of the impugned order are as under:

> "the Noticee were engaged in booking of cargo/container space from shipping lines and providing the same to their clients i.e. exporter/shippers. I find that the cargo/container space in ships was in fact procured for overseas transportation of export cargo / containers of their clients and was not actually undertaken by them but provided by the shipping lines and hence they were not providing ocean freight service. Further, the same service is found to be input for their clients. Therefore, I find that this activity is specifically covered under Section 65(19)(iv) of the Finance Act, 1994..."

I find that the provisions contained under Section 65(19) of the Finance Act, 1994 ceased to exist with effect from 01.07.2012. The demand in this case pertains to the period from April, 2016 to June, 2017. Hence, the adjudicating authority has erred in arriving at conclusion based on legal provisions which has ceased to exist and is accordingly not legally sustainable.

6.4 Further, the appellant has relied upon the decision of the Hon'ble CESTAT, New Delhi in the case of Commissioner of Service Tax, New Delhi V/s. M/s. Karam Freight Movers reported as 2017 (004) GSTL 215 (Tri-Delhi) wherein, it has been held as under:

> **11.** On the second issue regarding the service tax liability of the respondent under BAS, we find that the impugned order examined the issue in detail. It was recorded **that the income earned by the respondent to be considered as taxable under any service category, should be shown to be in lieu of provision of a particular service. Mere sale and purchase of cargo space and earning profit in the process is not a taxable activity under Finance Act, 1994.** We are in agreement with the findings recorded by the original authority. In this connection, we refer to the decision of the Tribunal in *Greenwich Meridian Logistics (I) Pvt. Ltd.* v. *CST, Mumbai* - 2016 (43) S.T.R. 215 (Tri.- Mumbai). The Tribunal examined similar set of fact and held that the appellants often, even in the absence of shippers, contract for space or slots in vessels in anticipation of demand and as a distinct business activity. It is a transaction between principal to principal and the freight charges or consideration for space procured from shipping lines. **The surplus earned by the respondent arising out of purchase and sale of space and not by acting for client who has space or not on a vessel. It cannot be considered that the respondents are engaged in promoting or marketing the services of any "client".**
>
> **12.** In the present case it was recorded that the respondent was already paying service tax on commission received from airlines/shipping lines under business auxiliary service since 10.09.2004. The original authority recorded that the show cause notice did not specify as to who is the client to whom the respondent is providing service. Original authority considered both the scenario, airline/shipping lines as a client or exporter/shipper as a client. In case the respondent is acting on behalf of airlines/shipping lines as client, it was held that they are covered by tax liability under BAS. **Further, examining the issue the original authority viewed that commission amount is necessarily to be obtained out of transaction which is to be provided by the respondent on**

behalf of the client, that is, the exporters. The facts of the case indicated that the mark-up value collected by the respondent from the exporter is an element of profit in the transaction. The respondent when acting as agent on behalf of airlines/shipping lines was discharging service tax w.e.f. 10.09.2004. **However, with reference to amount collected from exporters/shippers the original authority clearly recorded that it is not the case that this amount is a commission earned by the respondent while acting on behalf of the exporter and said mark-up value is of freight charges and are not to be considered as commission.** Based on these findings the demand was dropped. We do not find any impropriety in the said finding. The grounds of appeal did not bring any contrary evidence to change such findings. Accordingly, we find no merit in the appeal by Revenue. The appeal is dismissed.

(Emphasis supplied)

7. It is further observed that the Appellant has contended that the adjudicating authority erred in not following the judicial discipline as the appeal on the same dispute for prior period was decided in their favour by the Commissioner (Appeals), Rajkot and therefore, the adjudicating authority was bound to follow the said order rendered by the Commissioner (Appeals), Rajkot.

7.1. I find that the Appellant had relied upon Order-in-Appeal RAJ-EXCUS-000-APP-005-2020 dated 9.1.2020 passed in their own case for previous period during adjudication proceedings. However, the adjudicating authority discarded their contention by observing at Para 22.7 of the impugned order that the said OIA has been accepted by the Department on monetary ground and hence cannot be said to have attained finality. I do not agree with the findings of the adjudicating authority. Once the Department has accepted the OIA dated 09.01.2020, it has attained finality. Even though the OIA has been accepted by the department on monetary limit, fact remains that said Order-in-Appeal has not been reversed or stayed by higher appellate authority and consequently was binding upon the adjudicating authority. The judicial discipline required the adjudicating authority to have followed the said Order-in-Appeal, in letter and spirit. It is pertinent to mention that when any OIA has been accepted on monetary limit, the Department may agitate the issue in appropriate case in other appeal proceedings, but it is not open for the adjudicating authority to pass order on merit disregarding binding precedent. The adjudicating authority may distinguish relied upon decision, if there is change in facts or change in legal position. However, the adjudicating authority has not brought on record as to how said relied upon Order is not applicable to the facts of the present case. I find that the SCN issued in the case is periodical in nature and that the SCN for previous period has been decided by the Commissioner (Appeals) in the favour of appellant. There is no change in legal provisions or contrary judicial pronouncements to take a view other that those taken by the Commissioner (Appeals) for earlier period. The adjudicating authority has committed

judicial indiscipline in not following the binding precedence of order of Commissioner (Appeals) in the case of appellant.

7.2 I rely on the decision rendered by the Hon'ble Mumbai High Court in the case of Himgiri Buildcon & Industries Limited reported in 2021 (376) ELT 257 (Bom) wherein it has been held that:

> **16.** In *Union of India* v. *Kamlakshi Finance Corporation Limited,* 1992 Supp (1) SCC 443 = 1991 (55) E.L.T. 433 (S.C.), Supreme Court held and reiterated that the principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not acceptable to the department, which in itself is an objectionable phrase, and is the subject matter of an appeal can be no ground for not following the appellate order unless its operation had been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to the assessee and chaos in administration of the tax laws.
>
> **17.** Following the above decision, Supreme Court again in Collector of Customs v. Krishna Sales (P) Ltd., 1994 Supp (3) SCC 73 = 1994 (73) E.L.T. 519 (S.C.), once again reiterated the proposition that mere filing of an appeal does not operate as a stay or suspension of the order appealed against. It was pointed out that if the authorities were of the opinion that the goods ought not to be released pending the appeal, the straight-forward course for them is to obtain an order of stay or other appropriate direction from the Tribunal or the Supreme Court, as the case may be. Without obtaining such an order they cannot refuse to implement the order under appeal.
>
> **18.** In a somewhat identical matter, a Division Bench of this Court in *Ganesh Benzoplast Limited* v. *Union of India,* 2020 (374) E.L.T. 552 referred to the decision of the Supreme Court in Kamlakshi Finance Corporation *Limited* (supra) and held that non-compliance to orders of the appellate authority by the subordinate original authority is disturbing to say the least as it strikes at the very root of administrative discipline and may have the effect of severely undermining the efficacy of the appellate remedy provided to a litigant under the statute. Principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. In the facts and circumstances of that case, respondents were directed to release the goods forthwith and without any delay.

7.3 I also rely on the decision rendered by the Hon'ble Tribunal Kolkata Bench reported in 2021 (375) ELT 361 (Tri. Kolkata) in the case of M/s. Anutham Exim Pvt. Ltd., reported in 2021 (375) ELT 361 (Tri. Kolkata) wherein it has been held that:

> **8.** I find that the Appellant's products are seasonal and competitive in market. As pointed out by the counsel for the Appellant, already substantial part of the season has been lost by the appellant due to the inability to comply with the conditions of provisional assessment put forth by the department, particularly the furnishing of 100% Bank Guarantee. Once the assessment of the identical products has already been decided by the Commissioner (Appeals) in favour of the appellant *vide* the OIA dated 8-6-2020, I see no justification in ordering to

furnish 100% Bank Guarantee. This is judicial indiscipline and squarely covered by the ratio of the Hon'ble Supreme Court in the case of *Kamlakshi Finance Corporation* (Supra), where the Hon'ble Apex Court has observed thus :-

> "..... The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws."

7.4 I also rely on the decision rendered by the Hon'ble Gujarat High Court in the case of Claris Lifesciences Ltd. reported as 2013 (298) E.L.T. 45 (Guj.), wherein it has been held that,

> "8. The adjudicating officer acts as a quasi-judicial authority. He is bound by the law of precedent and binding effect of the order passed by the higher authority or Tribunal of superior jurisdiction. If his order is thought to be erroneous by the Department, the Department can as well prefer appeal in terms of the statutory provisions contained in the Central Excise Act, 1944.
>
> 9. Counsel for the petitioners brought to our notice the decision of the Apex Court in the case of Union of India v. Kamlakshi Finance Corporation Ltd. reported in 1991 (55) E.L.T. 433 (S.C.) in which while approving the criticism of the High Court of the Revenue Authorities not following the binding precedent, the Apex Court observed that :-
>
> "6...It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The more fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.
>
> 7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35D confers adequate powers on the department in this regard. Under sub-section (1), where the Central Board of Excise and Customs (Direct Taxes) comes across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with its legality or

propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under S. 35E(1) or (2) to keep the interests of the department alive. If the officer's view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail."

8. In view of above discussion, I hold that confirmation of service tax demand totally amounting to Rs.4,45,445/- by the is not sustainable and required to be set aside and I do so. Since, demand is set aside, recovery of interest and penalty imposed under Sections 77 and 76 are also set aside.

9. In view of above, I set aside the impugned order and allow the appeal.

10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है ।
10. The appeal filed by Appellant is disposed off as above.

11th January, 2022.

(**AKHILESH KUMAR**)
Commissioner (Appeals)

F. No. V2/22/RAJ/2021
Dated: 11.01.2022

Attested

(Jatin Kundalia)
Superintendent (Appeals)
By Regd Post AD

To, M/s. Seatrade Maritime Pvt. Limited 606, Corporate Levels, 150 Feet Ring Road, Ayodhya Chowk, Rajkot – 360 001 – Gujarat.	सेवा में, मेस्सर्स सीट्रेड मैरिटाइम प्राइवेट लिमिटेड, 606, कॉर्पोरेट लेवेल्स, 150 **Ft**. रिंग रोड, अयोध्या चौक, राजकोट – 360 007 - गुजरात

प्रतिलिपि :-

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