::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 – 2477952/2441142
Email: commrappl3-cexamd@nic.in

रजिस्टर्ड डाक ए.डी.द्वारा:-

DIN-20221164SX000000B4A2

ट: अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
V2/13/GDM /2022	20/JC/RKJ/2021-22	30-12-2021

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

KCH-EXCUS-000-APP-045-2022

आदेश का दिनांक / Date of Order: **28.11.2022**

जारी करने की तारीख / Date of issue: **29.11.2022**

श्री शिव प्रताप सिंह, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Shiv Pratap Singh, 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, Cen Excise/ST / GST, Rajkot / Jamnagar / Gandhidham:

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

M/s Jat Ismail Jusab, Devaliya, Naka,, Anjar.

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 follow way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35E 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 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 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, N 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 न्यायाधिक (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असावी अहमदाबाद- ३८००१६को की जानी चाहिए //

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

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारि 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 मां 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: 1,00 रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपी न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहि संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑ 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 Rul Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least shoul accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of d demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place whe the bench of any nominated public sector bank of the place where the bench of the Tribunal is situate 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 त 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 संल (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 लगाय 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, रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण क के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्रा भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवे 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 fi in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall accompanied by a copy of the order appealed against (one of which shall be certified copy) and should accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is m than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & inte demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribu situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

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

ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा **35**एफ के अंतर्गत, जो की वित्तीय अधिनियम, **1984** 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.

भारत सरकार कोपुनरीक्षण आवेदन :
Revision application to Government of India:

इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो 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 के पश्चात 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 निर्दिष्ट 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।
जेहाँ 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.

vii) 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 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.

viii) 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

ix) 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.

x) 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 Jat Ismail Jusab, (hereinafter referred to as **'appellant'**) has filed present appeal against Order-in-Original No. 20/JC/RKJ/2021-22, dated 30.12.2021 (hereinafter referred to as **'impugned order'**), issued by the Joint Commissioner, Central GST, Kutch, Gandhidham (hereinafter referred to as **'adjudicating authority'**).

2. The facts of the case, in brief, are that the Appellant was engaged in the activities of providing Services and was holding Permanent Account Number ACFPJ01174 with the Income Tax Department. The Appellant was not registered with the Service Tax Department for the purpose of payment of Service tax. On the basis of information regarding value of gross receipts from services shared by the Central Board of Direct Taxes (Income Tax Department), it appeared that the appellant had not disclosed their true and correct gross value of services provided. Since the appellant failed to submit the required clarification and information, the tax liability was calculated on the basis of 'Best Judgement' assessment method under Section 72 of the Finance Act, 1994.

3. It was alleged that the appellant had contravened various provisions of the Service tax Act, 1994 by their failure to obtain Service tax registration and pay Service tax at the material time. They also failed to furnish information and documents as called for by the Jurisdictional Range Officer. Hence based on the information provided by the Income tax department, the adjudicating authority confirmed the demand amounting toRs. 1,69,12,242/- under Section 73(1) of the Finance Act by invoking extended period, along with interest and penalty.

4. Being aggrieved with the impugned order, Appellant has preferred appeal on various grounds, *inter alia*, as below:-

(i) That the impugned order was without jurisdiction, unconstitutional and erroneous as the department failed to comply with the constitutional scheme so applicable after the enactment of the Central Goods and Services Tax Act, 2017 on the following counts :

(a) with effect from 01.07.2017, the provisions of Chapter V of the Act have been omitted vide section 173 of CGST Act, 2017;
(b) with effect from 16.09.2016 Article 268A of the Constitution - 'Service tax levied by Union and collected and appropriated by the Union and the States', was omitted;
(c) consequently, entry 92C of the List I of Seventh schedule of the constitution which reads-'taxes on services', was also omitted with effect from 16.09.2016; thus the levy of Service tax was done away with;
(d) that Chapter V of the Finance Act, 1994 was omitted in view of the saving clause inserted vide Section 173 of the CGST Act;
(e) they have sought reference to the provisions of the General Clauses

Act, 1897 which saves the rights accrued under the prior legislation and empowers the government to initiate proceedings under the repealed legislation;

(f) they submitted that the provisions contained in the General Clauses Act, 1897 saves the rights accrued under the old legislation and gives the power to the legislature to initiate proceedings in respect of liability accrued in the old statute. They further placed reliance on the judgement by Hon'ble Supreme Court in the case of Rayala Corporation Vs Directorate on Enforcement wherein it was held that Section 6 of the General Clauses Act, 1897, applies only to repeals and not omissions.

(g) Since Chapter V of the Finance Act been omitted, provisions of Section 6 of General Clause Act shall not be applicable;

(h) hence the order confirming the demand is bad in law.

(ii) That the impugned order is non-speaking and is passed in gross violation of the principles of Natural justice without considering the submissions of the appellants. They placed reliance upon the following case laws in their support :-

(a) Cyril Lasardo (Dead) V Juliana Maria Lasardo -2004 (7) SCC 431

(b) Asstt. Commr., Commercial Tax Department vs Shukla & Brothers reported in 2010 (254) ELT 6 (SC)

(iii) The activity carried out by the appellants amounts to manufacture, hence the same is outside the purview of Service tax. The appellants have discussed the provisions of the Service tax Act at length and stated that according to Clause (f) of Section 66D any activity that amounts to manufacture, or production of goods, falls within the negative list, hence not liable to Service tax levy. That their activity of crushing of boulders in smaller size stones i.e crushing aggregates, amounts to manufacture hence the same is not liable to service tax. They placed reliance upon the following case laws in their support :

(a) M/s Hindustan Construction Co. Ltd Vs CCE - 2003 (158) ELT 459

(iv) The revenue declared under Income tax cannot be considered as revenue for levy of service tax. That the service tax liability should be attributable to identifiable taxable service provided to another person and income tax return is not the criteria to identify service tax liability. They placed reliance upon the following case laws in their support :-

(a) Deltax Enterprises Vs CCE Delhi - I 2018 (10) GSTL 392 (Tri-Del)

(b) CST, ST, Delhi Vs Convergys India Service Pvt Ltd 2018 (1) TMI 1174 - CESTAT Chandigarh

(c) CCE V Ramesh Studio &Colour labs 2010 (5)n TMI 466

(d) CCE Ludhiana vs Mayfair resorts 2011 (21) STR 589 (Tri-Del.)

(e) Ravi Foods Pvt Ltd Vs CCE Hyderabad - 2011 (266) ELT 399 (Tri-Bang)

(f) CCE Ludhiana Vs Delux Enterprises 2011 (22) STR 203 (Tri-Del)
(g) Kipps Education Centre V CCE Ludhiana 2009 (13) STR 422 (Tri-Del)
(h) Friends Auto Inds Vs CCE Ludhiana 2017 (3) TMI 358.

(v) That the transaction between the Appellants and M/s Sadbhav Engineering Ltd was of purchase and sale and not of any services. In view of provisions contained in Section 65B (44), their activity cannot be treated as provision of services since they had entered into an agreement with M/s Sadbhav Engineering Ltd for transfer of crushed aggregates.

(vi) Service tax cannot be imposed on the grant of Profit a Prendre. That they were engaged in the business of extraction of minerals from the land and crushed them into aggregates. Therefore the appellants are getting the benefit arising out of the land namely the stones which were crushed by them into small stones. Therefore the same shall be treated as Profit a Prendre and same shall be outside the purview of service tax.

(vii) That the Show Cause Notice was issued without giving opportunity for pre-SCN consultation, which is mandatory under the law. They placed reliance on the following case laws wherein it is held that the circulars issued by statutory authorities are binding on all the officers concerned :
(a) K P Varghese V Income Tax Officer, Ernakulam &Anr. 1981 (4) SCC 173
(b) UCO Bank, Tamil Nadu Industrial Corp. Ltd Vs Commissioner of Income tax 1999 (5) TMI 3
(c) Dharamshil Agencies v Union of India 2021 (7) TMI 1064
(d) Back Office IT Solutions Pvt Ltd v Union of India &Ors 2021 (4) TMI 520.

(viii) Confirmation of demand without ascertaining the classification of service and actual tax liability is in itself bad in law and liable to be set aside. They placed reliance upon the following case laws in their support :
(a) Shubham Electricals v CST & ST, Rohtak 2015 (40) STR 1034 (Tri-Del)
(b) M/s Coromandel Infotech India Ltd v Commissioner of GST and CE 2019 (1) TMI 323
(c) M/s Chopra Bros (India) Pvt ltd v CCE & ST 2020 (5) TMI 172

(ix) Extended period cannot be invoked since the demand is based on income tax return which is public document. That the initial burden was on the department to prove that the situation visualized in the proviso existed. They placed reliance upon the decision in the case of Commissioner of Central Excise vs Bajaj Auto Ltd reported in 2010 (260) ELT 17 (SC). They also added that non disclosure of information which was not required to be disclosed or recorded by statutory provisions or prescribed proforma does not amount to suppression or concealment. They placed reliance

upon the following case laws :

(a) Anand Nishikawa Co Ltd vs Commissiosner of Central Excise Appeals, Meerut [2005 (188) ELT 149 (SC)]

(b) Collector of Central Excise, Hydrabad vs M/s Chemphar Drugs & Liniments, Hyderabad [1989 (40) ELT 276 (SC)]

(c) Pahwa Chemicals Pvt Ltd vs Commissioner of Central Excise Appeals, Meerut [2005 (188) ELT 149 (SC)]

(d) Apex Electrical Pvt Ltd Vs Union of India [1992 (61) ELT 413 (Guj)]

(e) Prolite Engineering Co vs Union of India [1995 (75) ELT 257 9Guj)] upheld in Union of India vs Prolite Engineering Co [1994 (70) ELT A153(SC)]

(f) Unique Resin Inds vs Collector of Central Excise, Baroda [1995 (75) ELT 861 (Tri)]

(g) CCE Ahmedabad vs Moti Laminates P Ltd [1997 (96) ELT 191 (Tri)]

The department cannot invoke extended period unless there is established an act of suppression or misdeclaration with intent to evade payment of duty. They place reliance upon the following decisions:

(a) Cosmic Dye Chemicals vs Collector of Central Excise, Bombay 1995 (75) ELT 721 (SC)
(b) Tamil Nadu Housing Board vs Collector 1994 (74) ELT 9 (SC)
(c) Cadila Laboratories Pvt Ltd vs CCE 2003 (152) ELT 262 (SC)
(d) Pushpam Pharmaceuticals Co., vs Collector of Central Excise, Bombay 1995 (78) ELT 401(SC)
(e) M/s Continental Foundation Joint Venture Holding, Naptha H.P. mvs CCE Chandigarh -I 2007 (216) ELT 177 (SC)
(f) AlumecoExtrusin vs CCE 2010 (249) ELT 577
(g) National Rifles vs CCE 1999 (112) ELT 483
(h) SPGC Metal Inds Pvt Ltd vs CCE 1999 (111) ELT 286
(i) Gujarat State Fertilizers vs CCE Vadodara 1996 (84) ELT 539
(j) ITI (TID) Ltd vs CCE 2007 (11) ELT 316 (Tri)
(k) Neyveli Lignite Corp Ltd vs CCE 2007 (209) ELT 310 (Tri)
(l) Commissioner Vs BentexInds 2004 (173) ELT A 079 (SC)
(m) Commr Vs Binny Ltd 2003 (156) ELT A327 (SC)
(n) Collector vs Ganges Soap Works (P) Ltd 2003 (154) ELT A234(SC)

(x) That no interest is leviable as the tax itself is not payable. They placed reliance on the decision of Hon'ble Supreme Court in the case of Pratibha Processors vs Union of India [1996 (88) ELT 12 (SC)].

(xi) They also submitted that as they were not liable to pay service tax, no penalty could be imposed on them. They placed reliance on the decision in the case of Coolade Beverages Ltd (2004) 172 ELT 41 (All).

They also placed reliance on the following case laws in support of their contention that penalty can only be levied of an intentional act is committed and not otherwise :

(a) Tamil Nadu Housing Board vs Collector of Central Excise, Madras [1994 (74) ELT 9 (SC)]

(b) DCW Ltd vs Asstt. Collector of Central Excise [1996 (88) ELT 31(Mad.)]

In view of their above submissions they requested to set aside the impugned order.

4. Personal Hearing in the matter was held on 02.11.2022 in virtual mode. Mr. Sanket Gupta and Mr. Amber Kumbawat, appeared for hearing on behalf of the appellants and reiterated the submissions made in the appeal. They submitted that they were not providing any service but the income in their Income tax returns pertained to supply of materials. They also added that the Show Cause Notice was issued without according mandatory Pre-SCN consultations and the liability was confirmed vide the impugned order without identifying any service rendered by them. They requested to set aside the impugned order.

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and written as well as oral submissions made by the Appellants. The issue to be decided is whether theactivity carried out by the appellant is covered under category of taxable services or under the Negative list and whether the impugned order, in the facts of this case, confirming demand and imposing penalty on the Appellant is correct, legal and proper or not.

6. I find that in the present case, Show Cause Notice was issued on the basis of third party data, invoking provisions of Section 72 of the Finance Act, i.e 'Best Judgement Method'. I find that the appellant has submitted in their appeal memorandum interalia that:-

(i) the impugned order and the proceedings against them were without jurisdiction, unconstitutional and erroneous.
(ii) the impugned order was passed in gross violation of principles of natural justice, without considering the submissions of the appellants
(iii) the activity carried out by the appellant amounts to manufacture, hence the same is outside the purview of service tax
(iv) revenue declared under income tax cannot be considered as revenue for service tax
(v) transaction between the appellants and M/s Sadbhav Engineering Ltd was of purchase and sale and not of any service
(vi) service tax cannot be imposed on the grant of profit a prendre
(vii) demand confirmed without ascertaining the correct classification of service is bad in law
(viii) extended period cannot be invoked, suppression cannot be alleged since demand is based in income tax return which is public document
(ix) no interest or penalty is payable as no service tax is leviable.

I proceed to take up the arguments put forward by the appellants one by one:

7.1 The appellant's allegation that the impugned order was issued without jurisdiction, is absolutely baseless in as much as Section 174(2)(e) of the CGST Act 2017 clearly stipulates that *"the repeal of the said Acts and the amendment of the Finance Act, 1994, to the extent mentioned in the sub-section (1) of section 173 shall not:*

(e) affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed ***as if these Acts had not been*** *so* ***amended or repealed;"***

It has been explicitly concluded by the Hon'ble Gauhati High Court in the case of Laxmi NararyanSahu Vs Union of India & Others in Para 33 that, *"A conjoint reading of the provisions laid down in paragraph 37 of Kolhapur Canesugar Works Ltd. (supra) and Section 173 and 174(2)(e) would lead to a conclusion that although Chapter V of the Finance Act of 1994 stood omitted under Section 173, but the saving clause provided under Section 174(2)(e) will enable the continuation of the investigation, enquiry, verification etc., that were made/to be made under Chapter V of the Finance Act of 1994.".*

Hence the adjudicating authority was righty empowered to initiate the proceedings against the appellant.

7.2 The appellant has contended that the impugned order has been issued without following the principles natural justice. However I find that the adjudicating authority has elaborately dealt with all the submissions made by the appellant. Further it is also on record that the personal hearing in the matter was attended by Shri Ashvin Sheth, Tax consultant and authorized representative on behalf of the appellant and were also granted opportunity to file additional submissions. As regards the allegation that they were not granted the opportunity for Pre-SCN consultation, I find that the matter has been discussed by the adjudicating authority in para 14 of the impugned order. Considering the facts of the case, I fully agree with the observations of the

adjudicating authority that since elements of suppression of facts with intent to evade payment of duty is involved in the present case, there is an element of offence.Hence, as provided in the exclusion in para 5.0 of the Master circular, pre SCN consultation was not mandatory in the present case. Nonetheless, adequate opportunities had been extended to the appellant to defend their case during the adjudication process. Hence there is no merit in the allegation that the principles of natural justice have not been followed by the adjudicating authority.

7.3 The appellants have also alleged that the activity carried out by them amounts to manufacture hence they were not liable to pay Service tax. The appellants submit that they are engaged in the business of crushing of boulders in the smaller size of stones and the process of crushing of boulders in the smaller size stones amount to manufacture. The appellants had entered into an agreement with M/s Sadbhav Engineering Ltd for manufacture of crushed aggregates from boulders and to carry out all the process involved in the same. I have carefully gone through the agreement entered into between the Appellants and M/s Sadbhav Engineering Ltd (hereinafter referred to as "SEL"). It is seen from the said agreement that SEL has been awarded the work of four laning of Rajsamand-Bhilwara Section NH - 758 (from Km. 0.000 to Km. 87.250) in the state of Rajasthan on DBFOT (toll) Basis. For the purpose of execution of said work, they had entrusted the Crushing work at the land provided by them to the appellants. As per the agreement, the appellants had agreed to carry out the mining works at Baghera Crusher Plant, Gangapur and from any other quarry as provided by SEL for accomplishment of works and to carry out required operations for producing Crushed aggregates as required. The activity of mining has been declared as a separate taxable service with effect from 04.06.2007, vide Notification No 23/2007-ST. The activity undertaken by the appellant is the mining of crushed aggregates at the land provided by SEL, and the same is rightly covered under the definition of 'Mining Service' under the Finance Act, 1994.The term 'manufacture' has been defined in the Central Excise Act, 1944 as follows :-

> *" (f) "manufacture" includes any process, -*
> *i) incidental or ancillary to the completion of a manufactured product,*
> *ii) which is specified in relation to any goods in the Section or Chapter notes of [the Fourth Schedule] as amounting to [manufacture;or]*
> *which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or ;*

iii) adoption of any other treatment on the goods to render the product marketable to the consumer;

and the word "manufacture" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;

However, I find that the appellant was carrying out the activity of mining for SEL who had been awarded the contract for four laning of Rajsamand-Bhilwara Section NH - 758 (from Km. 0.000 to Km. 87.250) in the state of Rajasthan. The activity carried out by them is in the nature of service of mining carried out for SEL rather than manufacture. The activity carried out by the appellant rightly qualifies as taxable service of "Mining of mineral services" as defined under Section 65(105)(zzzy) of the Service Tax Act, 1994. CEBC has also clarified the issue vide para 6.2 of Circular No 334/1/2007-TRU dated 28.02.2007 which provides that:-

6.2 MINING SERVICE [section 65(105)(zzzy)]: Presently, geological, geophysical or other prospecting, surface or sub-surface surveying or map-making services relating to location or exploration of deposits of mineral, oil or gas are leviable to service tax under "survey and exploration of mineral service" [section 65(105)(zzv)]. Services such as-

- *site formation and clearance, and excavation and earth moving, drilling wells for production / exploitation of hydrocarbons (development drilling)*
- *well testing and analysis services*
- *sub-contracted services such as deploying workers and machinery for extraction / breaking of rocks into stones, sieving, grading, etc.*
- *outsourced services,*

provided for mining are individually classified under the appropriate taxable service. Services provided in relation to mining of mineral, oil and gas are comprehensively covered under this proposed service. With this, services provided in relation to both exploration and exploitation of mineral, oil or gas will be comprehensively brought under the service tax net.

Hence, it has been clarified the activity carried out by the appellant was taxable service and not a manufacturing activity. Decisions to this effect have also been taken by various tribunals in the cases of :

i) M/s Sadbhav Engineering Ltd Vs Commissioner of ST Ahmedabad as reported at 2016 (43) S.T.R. 288 (Tri-Ahd)

ii) M/s Prahlad Rai & Company Vs Commissioner of Central Excise, Jaipur as reported at 2018 (17) G.S.T.L. 272 (Tri-Del.)

iii) CCE Belgaam Vs SVM Nett Project Solutions Pvt ltd as reported at 2010 (17) S T R 298 (Tri.- Bang)

It has also been held by Hon'ble Supreme Court in the case of Aman Marbles Inds Pvt Ltd as reported at 2003 (157) ELT 393 (SC), that the extraction of stones or further cutting of marbles into slabs will not amount to manufacture. In the instant case also the appellant was merely extracting different minerals and cutting the boulders into smaller stones. Hence following the ratio of the aforesaid judgement also, the activity does not amount to manufacture.

7.4 The appellants have argued that the income figures as reflected in the income tax returns cannot be taken for service tax purpose. However,I find that the audited financial statements are vital statutory records, prepared in statutory formats, reflecting the financial transactions, income & expense and profit and loss for a particular financial period. It is incumbent upon the Auditor (Chartered Accountant) to verify all the relevant bills, vouchers, books of accounts etc before certifying the Profit and loss account and Balance Sheet. Onus is cast on the auditor to verify and make a report on the Balance Sheet and Profit & Loss account that the same are prepared in the manner provided under the statute and that it gives a true and fair view of their affairs. Hence, the income tax returns filed on the basis of financial records as certified by the Chartered Accountants can be relied upon for purpose of deciding the taxability of the Appellant under the Finance Act 1994. Further by virtue of provisions contained in Section 15A of the Central Excise Act, 1944 as made applicable to Service tax vide Section 83 of the Finance Act, 1994, third parties have been made liable to furnish information to the department at regular intervals. Hence, the validity of provisions contained in the Statute cannot be questioned and there is no error on the part of the department in computing the Service tax liability on the basis of such certified income tax returns.

7.5 I find no force in the appellant's argument that the transactions undertaken by them were in the nature of sale of stone and not of any service. The agreement entered into by both parties clearly stipulates the nature of work to be carried out by the appellant. The agreement clearly shows that the appellant was engaged by M/s SEL for supply of crushed aggregates from the mines specified by them. The terms and conditions of the work shows that the activity carried out by the appellant is in the nature of service provided as per the terms and conditions stipulated by SEL. There is no element of sale involved in the transactions.

7.6 As regards the appellants argument that Service tax cannot be imposed on the grant of Profit a Prendre, and the same shall be outside the purview of

Service tax, I find that in the present case, the land has not been transferred to the appellants. They have been entrusted the work or extracting stones, minerals etc from the land which is to be supplied to SEL for use in the work of laying of roads by them. Further, the exclusion in the definition of Service as provided under the Finance Act 1944, is with respect to an activity which involves a transfer of title in goods or immovable property. Since there is no element of transfer of title involved in the present case, the same is not within the purview of the exclusion and is rightly classifiable as a service. Hence the principles of 'Profit a Prendre' does not apply in the instant case.

7.7 I find no force in the appellants argument that the adjudicating authority has confirmed the demand without ascertaining the correct classification of the service. I find that the adjudicating authority has elaborately discussed this aspect in para 12 and 12.1 of the impugned order. The demand has been confirmed after considering all the aspects involved in the correct classification of the service involved.

7.8 I find that the demand had been raised on the basis of information shared by the Income tax department. The appellant did not furnish the required information to the department. Had the CBDT failed to furnish the information, the fact regarding provision of such a service would remain outside the knowledge of the department. Hence the appellants had suppressed the vital information from the department with an intention to evade payment of Service tax. Hence extended period is rightly invokable in the present case and the Service tax demanded is rightly recoverable along with applicable interest and penalty.

8. In view of the above discussion, I find that the demand has been rightly confirmed by the adjudicating authority and there is no merit in any of the arguments/grounds raised by the appellant. Therefore, I uphold the impugned order and reject the appeal filed by M/s JatishmailJusab.

9. अपील कर्ता द्वारा दर्ज कीगई अपील का निपटारा उपरोक्त तरीकेसे किया जाता है।

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

27-11-2022

(SHIV PRATAP SINGH)
Commissioner(Appeals)

सत्यापित / Attested

Superintendent
Central GST (Appeals)
Rajkot

By R.P.A.D.

To,	सेवा मे,
M/s JatIshmailJusab, Devaliya, Naka, Anjar, Kutch - 370 110	मेसर्स जाट इस्माइल जुसाब, देवलिया, नाका, अंजार, कच्छ - 370 110

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,गांधीधाम, आयुक्तालय,गांधीधाम, को आवश्यक कार्यवाही हेतु।

3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क मण्डल अंजार – भचाऊआवश्यक कार्यवाही हेतु।

4) गार्ड फ़ाइल।