::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-20221264SX0000820346

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2 /111 /GDM/2021	03/GST/AC/2020-21	31-08-2020

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

KCH-EXCUS-000-APP-048-2022

आदेश का दिनांक / Date of Order: **09.12.2022** जारी करने की तारीख / Date of issue: **12.12.2022**

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, Central Excise/ST / GST, Rajkot / Jamnagar / Gandhidham:

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

M/s Harilal Manji Sorathia, Plot No. 460-61, Khodiyar Tower, Ward-3B, Adipur.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/

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

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी 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 असावी 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-380016 in.case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की 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 क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम,1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,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 क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied 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 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, **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 समयावधि 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 आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय 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 Harilal Manji Sorathia, Plot No 460 - 461, Khodiyar Tower, Ward - 3B, Adipur, Kutch, Gujarat - 370205 (*hereinafter referred to as* 'Appellant') has filed present appeal against Order-in-Original No. 03/GST/AC/2020-21 dated 31.08.2020 (hereinafter referred to as **'impugned order'**), issued by the Assistant Commissioner, Central GST Urban Division, Gandhidham (Urban) - Kutch (hereinafter referred to as **'adjudicating authority'**).

2. The facts of the case, in brief, are that Appellant were engaged in mining of black trap for which they had obtained mining rights from the Gujarat Government for mining of black trap at Nagalpar, Anjar, Kutch. They were paying Royalty to the Government of Gujarat. With effect from 01.04.2016, the appellant was liable to pay Service tax under Reverse Charge Mechanism for "services, provided by Government or a local authority by way of assignment of right to use any natural resources". However the appellants had neither obtained registration under the provisions of Finance Act, 1994 nor filed the periodical returns as prescribed under the Finance Act, 1994 and Rules made thereunder.

3. Investigation carried out at the premises of the appellants revealed that there were four individual firms/persons who were engaged in mining process, who operated from the same address. During the course of investigation the appellant submitted that as per his understanding, Notification No 22/2016-ST dated 13.04.2016 and CBEC Circular No 192/02/2016-ST dated 13.04.2016,does not apply to him, hence he was not liable to pay Service tax on royalty paid to Gujarat Government. As they failed to pay the Service tax, a Show Cause Notice was issued to them proposing recovery of Service tax amounting to Rs. 4,24,760/- under Section 73(1) of the Finance Act, 1994 along with interest and penalty under Sections 76, 77 and 78 of the Finance Act. Late fees was also proposed to be recovered under Section 70 of Finance Act read with Rule 7C of the Service Tax Rules, 1994 for failure to file ST-3 returns for the period 2016-17 to 2017-18 (Upto June-2017).

4. The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order wherein the demand of Service tax of Rs. 4,24,760/- was confirmed under proviso to Section 73(1) of the Finance Act along with interest under Section 75 of the Act. The impugned order imposed penalty of Rs.4,24,760/- under Section 78(1) of the Act upon Appellant with option of reduced penalty as envisaged under second proviso to Section 78(1) of

the Act. The impugned order also imposed penalty of Rs. 10,000/- upon the Appellant under Section 77 of the Act. The impugned order also confirmed recovery of late fees in terms of Section 70 of the Act read with Rule 7C of the Service Tax Rules, 1994 for non filing of returns.

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

(i) The adjudicating authority has not considered the relevant submissions made by the appellant in the reply and has erred in holding that they were liable to pay service tax on the royalty paid to the Government. That royalty was not paid to State Government as a value of any service received from State Government. That the adjudicating authority has not considered the fact that mining is not a declared service in terms of Section 66E of the Finance Act because obtaining mining rights from the State government does not in any way mean that the state government has rented the property to the appellant. That revenue has not proved any intention to evade payment of service tax, hence invoking extended period of limitation is not justified.

(ii) That the Royalty paid by them to the Government of Gujarat has been reflected in their books of accounts and the payments have been made in accounted manner i.e by crossed cheques drawn in favour of the State Government.

(iii) That the adjudicating authority has not proved beyond a reasonable doubt that a charging event has occurred in the present case; that the adjudicating authority failed to establish that the mining rights granted to the appellant by the State Govt. was a service attracting levy of service tax.

(iv) That the appellant was carrying on Mining activity for its own revenue and profits and not on behalf of the State Government. Hence there is no service involved as defined under Section 65B(44) of the Finance Act. The Adjudicating order does not specify the basis on which granting of mining rights was considered in the nature of renting of immovable property.

(v) That the adjudicating authority failed to consider the most crucial provision of the Finance Act which defines the term "immovable property". However in view of provisions contained in Section 65 (105) (zzzz) of the Finance Act, vacant land solely used for mining purposes has been excluded from service tax net in respect of renting of

immovable property service. They also added that in view of provisions contained in para 6.3 of Circular DF 334/1/2010-TRU dated 28.02.2007 wherein the Government has clarified that vacant land solely used for mining purposes was in the nature of immovable properties excluded from the scope of service of renting of immovable property for use in the course of furtherance of business or commerce.

(vi) That the licence granted by the Govt. to an individual for permitting him mining operations on payment of royalty in accordance with the rate(s) fixed under the statutory provisions is not in the nature of renting of immovable property and hence no a declared service chargeable to service tax. That the mines where mining operations are carried out is never under possession or control of the appellant. They only have the right to carry our mining operations on the vacant lands. Further there is no rent agreement between and state govt and the appellant for the mines. Thus the State Govt has not rented the mines to the appellant.

(vii) That the arrangement for mining rights is under the provisions of the Mines Act and that the said act has not been enacted for renting or letting out or leasing any immovable property (like mines) to any person. The only right or permission granted by virtue of such licence is for the holder or his agents or servants or workmen to enter the lands over which such permit or licence has been granted.

(viii) That Section 65(90a) of the Service tax Act refers to various expressions like renting, letting, leasing, licensing or other similar arrangements for immovable property. But the expression 'licensing' is not used in the sense as contemplated under Section 4 of the Mines Act. This expression is preceded by words like renting, letting and leasing; and therefore by virtue of the principle of *ejusdum generis*, the expression 'licensing' would also take its colour and meaning from three preceding expressions. That the provision of mining licence or mining lease is a statutory provision under the Mines Act, and the only right the holder of such licence gets from the State Govt. is to undertake mining activities over the concerned lands.

(ix) That the Royalty was paid to the State government on advalorem basis and it was the share of the government in the mineral won by the company by extracting minerals from mining operations at the mining area. Hence there is no service involved for demanding service tax. They submitted further that the adjudicating authority has not given any finding on the issue that the grant of mining rights by the State govt. for undertaking mining operations on vacant lands is

service attracting service tax liability. They placed reliance on the following case laws :

a) A V Fernandez v. State of Kerala, AIR 1957 SC 657

b) Murarilal Mahavir Prasad V B.R. VAd, AIR 1976 SC 313,

c) Mathuram Agrawal v State of M.P. , (1999) 8 SCC 667,

d) CWT V Ellis Bridge Gymkhana (1998) 1 SCC 384

e) Commr. Of C. Ex. & Customs Surat-1 Vs Patel Vishnubhai Kantilal & Co. , 2012 (28) STR 113 (Guj.)

(x) That the Royalty paid to the State govt was not a consideration for service and it was charged and collected by the State Govt. in accordance with the provisions of the Mines Act. They placed reliance upon the following case laws in their support :-

a) Navinon Ltd Vs Commissioner of Central Excise, Mumbai-VI reported in 2004 (172) ELT 400

b) India Cement Ltd Vs State of Tamil Nadu reported in AIR 1990 SC 85

(xi) That the adjudicating authority has erred in relying upon the Circulr No 192/02/2016-ST dated 13.04.2016 and Notification 22/2012 ST, since mining rights is not a declared service and therefore, clarification given by the Board at Entry No 9 of the aforesaid circular is totally in applicable to the present case.

(xii) That the adjudicating authority has erred in relying upon the decision of Hon'ble Rajasthan High Court in the case of Udaipur Chambers of Commerce and Inds Vs Union of India reported in 2018 (8) G.S.T.L. 170 (Raj) since the same has been stayed by the Hon'ble Supreme Court .

(xiii) That the adjudicating authority has erred in invoking extended period, since they were under the bonafide impression that there was no service tax liability for the activities undertaken by them. They placed reliance upon the decision of the Appellate Tribunal, Ahmedabad in the case of M/s Surya Offset reported in 2011 (267) ELT 516 in their support.

(xiv) They added further that the mining rights transaction was with the State Govt. and nothing is hidden or suppressed. That the payment of royalty was made to the State Govt. through crossed cheques i.e in fully accounted manner and the same is reflected in their books of accounts and also subject to the State Govt.'s audit. That there was no suppression of facts involved in their case. They place reliance on the following case laws in their support :-

a) Padmini Products and Chemphar Drugs & Liniments reported in 1989 (43) ELT 195 (SC) and 1989 (40) ELT 276 (SC) respectively;

b) Continental Foundation Jt. Venture V/s CCE, Chandigarh reported in 2007 (216) ELT 177 (SC)

c) M/s Jaiprakash Inds. Ltd. Reported in 2002 (146) ELT 481 (SC)

(xv) That the imposition of penalties under the provisions of Section 77 and 78 and recovery of latefees under Section 70 was not justified since there was no cogent and reliable evidence in support of the charges leveled in the Show cause notice. That separate penalties cannot be imposed for the same cause. They placed reliance upon the decision of Hon'ble Supreme Court in the case of M/s Hindustan Steel Ltd. Reported in 1978 ELT (J159).

(xvi) That the recovery of interest under Section 78 of the Finance Act, 1994 is also without any authority , since there is no short levy or short payment of excise duty.

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

6. Personal Hearing in the matter was held on 30.11.2022 virtual mode. Advocate Sudhanshu Bissa appeared for hearing on behalf of the appellants and reiterated the submissions made in the appeal. He referred to the definition of Service under section 65B(44) of the Finance Act, 1944 which is applicable only when an activity is performed for a consideration. In their case royalty was paid on the basis of minerals removed in terms of provisions under Section 9 of the Mines Act and rules framed thereunder. He reiterated that mining cannot be considered as renting of immovable property in view of specific exclusion U/s 65 (105) (zzz). He added further that the judgement of Hon'ble Rajasthan High Court relied upon by the adjudicating authority had been stayed by Hon'ble Supreme Court and that since a significant question of interpretation of law is involved, no fraud or suppression can be alleged and extended period cannot be invoked.

7. 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 the activity 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.

8. I find that the appellant has obtained mining rights from the Gujarat Government for extraction of Black trap. They have been paying royalty to the

Government of Gujarat under the provisions of the Mines and Minerals (Development and Regulations) Act, 1957 for mining lease and mining rights granted to them. The Government of Gujarat has thus granted the mining rights with respect to natural resources and have received consideration in the form of royalty from the appellant. The activity of assignment of rights to use natural resources is treated as taxable service and the licensee is required to pay Service tax on the amount of consideration paid in the form of Royalty under Reverse Charge mechanism. The matter has been clarified by the Board vide Circular No 192/02/2016-ST dated 13.04.2016, wherein it has been elaborated at point no 5 that :-

"It is clarified that any activity undertaken by Government or a local authority against a consideration constitutes a service and the amount charged for performing such activities is liable to Service tax. It is immaterial whether such activities are undertaken as a statutory or mandatory requirement under the law and irrespective of whether the amount charged for such service is laid down in a statute or not. As long as the payment is made (or fee charged) for getting a service in return (i.e, as a quid pro quo for the service received), it has to be regarded as a consideration for that service and taxable irrespective of by what name such payment is called. It is also clarified that Service tax is leviable on any payment in lieu of any permission or license granted by the Government or a local authority."

8.1 It is a fact on record that the appellant was granted mining rights by the Govt. of Gujarat and the appellant has made payment of royalty to the government based on the quantum of minerals extracted. Hence it directly follows that the appellant has been granted some benefit by the govt. in lieu of such payment made by them. It is amply clarified in the circular that any activity undertaken by the Government against a consideration constitutes a service even if the said activity is a mandatory requirement under the law. Hence any payment made for getting a service in return will be considered as a consideration and will be liable to Service tax. I find that it has been further clarified in the aforesaid Circular that where natural resources are assigned before 1st April 2016, the periodical payments for use of such resources (eg spectrum user charges or license fees for spectrum or royalty paid on extracted coal), due after 1st April 2016, will be taxable. It has also be clarified that Service tax will be payable on right to use natural resources in view of Rule 7 of Point of Taxation Rules, 2011 as amended vide Notification No 24/2016-ST dated 13.04.2016 to provide that in case of services provided by Government or a local authority to any business entity, the point of taxation shall be the earlier of the dates on which : (a) any payment, part or full, in respect of such service becomes due, as indicated in the invoice, bill, challan, or any other document issued by Government or a local authority demanding such payment; or (b) such

payment is made. Hence the point of taxation in case of the services of the assignment of right to use natural resources by the Government to a business entity shall be the date on which any payment, including deferred payments, in respect of such assignment becomes due or when such payment is made, whichever is earlier. Hence, in view of the above clarification given in the Circular and the Notification, the requirement of the term 'service' as defined under Section 65B(44) of the Act to the effect that any activity carried out by a person for another for a consideration, is a service, is fulfilled and the Royalty to be paid by the mining lease holder as per the Mines and Minerals (Development and Regulations) Act, 1957 is subject to payment of Service tax.

9. I find that the Government of Gujarat has provided the services of allotment of mining rights in respect of the said property to the appellant. Hence the appellant is the recipient of such services. In terms of provisions contained in Notification 30/2012 ST dated 20.06.2012, the recipient of service i.e the appellant is liable to pay the Service tax.

9.1 The person liable to pay service tax under Reverse charge mechanism has also been stipulated under Rule 2(1)(d) of the Service Tax Rules, 1994 which reads as under :

> *"2 (1)(d) "person liable for paying service tax",-*
> *(i) In respect of taxable services notified under sub-section (2) of section 68 of the Act, means, -*
> *(A) .....*
>
> *(E) in relation to services provided or agreed to be provided by Government of local authority except-*
> *(a) renting of immovable property, and*
> *(b) services specified in clause s (i), (ii) and (iii) of clause (a) of section 66D to any Business entity, located in a taxable territory, the recipient of such service"*

9.2 In terms of provisions contained in Section 68(2) of the Service tax Act read with the provisions contained in Rule 2(1)(d)(i)(E) of the Rules and Notification 30/2012-ST dated 20.06.2012, as amended, the service recipient is liable to pay 100% Service tax in relation to services provided or agreed to be provided by Government or local authority to any business entity located in the taxable territory. In the instant case, the appellants have been granted the mining rights for extraction of black trap from the scheduled land and a consideration on the basis of quantum of black trap extracted has been paid to the Government in the form of Royalty. Hence by virtue of being the recipient of service the appellants are liable to pay Service tax on the royalty paid to the Government. The contention of the appellant that mining cannot be considered

as renting of immovable property, instead of giving any relief, only confirms that the appellant is covered under Rule 2(1)(d) and is liable to pay service ax on reverse charge basis.

10. I find that the appellant has cited the decision of the Apex Court in the case of M/s Indian Cement Ltd & Ors Vs State of Tamilnadu & others, to the effect that levy of service tax on royalty would not sustain. However, I find that the Apex Court held in the case of State of West Bengal V Kesoram Industries Ltd & Ors [(2004) 10 SCC 201], that Royalty in mining rights is not a tax on land but a payment for the user of land. Royalty is paid to the owner of land who may be a private person and may not necessarily be State. A private person owning land is entitled to charge royalty but not tax. The lessor receives royalty as his income and for the lessee the royalty paid is an expenditure incurred. Royalty cannot be tax. In view of the two conflicting decisions rendered in the case of Indian Cement Ltd and Kesoram Inds of the Apex Court, the matter has been referred to the Hon'ble Chief Justice of India to constitute a Nine judge Bench to answer the reference whether royalty is in the nature of tax. The reference has not been answered as yet by the Nine judge Bench and the matter has not been conclusively decided. Hence the matter is res integra and cannot be relied upon.

10.1 Further, I also find that even in the GST Regime, it has been categorically held that GST is leviable on the royalty paid to the Government. While answering the question in the Sectorial FAQ in GST, whether GST is payable on royalty (to be paid to Government) for Mining lease granted by State Govt. ***"Yes, on royalty GST will apply under reverse charge mechanism. Further, such payment of GST under reverse charge mechanism would be eligible as ITC in the hands of the recipient of supply for payment of GST."*** Hence it is amply clear that royalty is not a tax, and Service tax is leviable on the amount paid as Royalty. Service tax demanded is rightly recoverable along with applicable interest and penalty.

11. The appellant has contended that extended period is not invokable as they were under bonafide belief that no Service tax is payable. I find the in the present regime of liberalization, self-assessment and filing of returns on-line, the government has placed full trust on the tax payers and the concept is based on mutual trust and confidence. Such a concept operates on the fundamentals of honesty of the tax payer. Therefore the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on the tax payer. In the instant case the appellant received taxable services from the government without payment of Service tax under Reverse

charge mechanism. They failed to disclose these details in their ST-3 returns and the same has come to light only as a result of investigations carried out by the department. Hence this act by the appellant amounts to willful misstatement and suppression of facts with an intention to evade payment of Service tax. It has been held by the Tribunal in the case of Mahavir Plastics Vs CCE, Mumbai reported in 2010 (255) ELT 241 (T) that if the facts are gathered during subsequent investigation, extended period can be invoked. Further there is no discretion available with the Authorities under the Act with respect to penalty as, penalty under Section 78(1) of the Finance Act, 1994 is a mandatory requirement when the demand is confirmed under proviso to Section 78(1) of the Act, invoking extended period. Since invocation of extended period of limitation on the grounds of suppression of facts is upheld, penalty under Section 78(1) 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 imposed under Section 78(1) of the Act.

12. In view of above, I uphold the impugned order and reject the appeal filed by M/s Harilal Manji Sorathia.

13. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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

सत्यापित / Attested

9.12.21

(SHIV PRATAP SINGH)
Commissioner(Appeals)

Superintendent
Central GST (Appeals)
Rajkot

By R.P.A.D.

To,	सेवा मे,
M/s Harilal Manji Sorathia, Plot No 460-61, Khodiyar Tower, Ward-3B, Adipur, Kachch, Gujarat - 370 205.	मेसरस हरीलाल मंजी सोरठिया, प्लॉट नंबर 460-61, खोडियार टावर, वार्ड – 3 बी, आदिपुर, कच्छ – गुजरात – 370 205।

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 अर्बन मण्डल , गांधीधाम, आवश्यक कार्यवाही हेतु।

4) गार्ड फ़ाइल।