::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-20221264SX00008183E6

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/Date
	V2/89/BVR/2022	134/SERVICE TAX-AUDIT/DEMAND/2022-23	02-12-2022

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

BHV-EXCUS-000-APP-107-2022

आदेश का दिनांक / Date of Order:	30.11.2022	जारी करने की तारीख / Date of issue:	02.12.2022

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. Medinex Speciality Chemical Pvt. Ltd., Plot No. Survey No. 277/1,,Bhavnagar Talaja Raod,Village- Ukharla,Dist- Bhavnagar

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 असावा अहमदाबाद- ३८००१६को की जानी चाहिए ।/

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

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, 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 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 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 **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 **35**EE 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 समायाविधि पर या बाद में पारित किए गए हैं।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

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

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख 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 हैं । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in.

आयुक्त अपील केंद्रीय उत्पाद शुल्क

:: अपील आदेश / ORDER-IN-APPEAL ::

M/s. Medinex Speciality Chemicals Pvt. Ltd., Bhavnagar (hereinafter referred to as "Appellant") has filed the present appeal against Order-in-Original No. 134/Service Tax-Audit/Demand/2022-23 dated 21.04.2022 (hereinafter referred to as 'impugned order') passed by the Assistant Commissioner, CGST Division Bhavnagar-1 (hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that during the course of audit of records/returns for the period from July,2015 to June,2017, it was found that the Appellant has paid following amount to the Directors during the Financial Year 2015-16 & 2016-17:

Year	Date of payment	Commission(Rs.)	Rent (Rs.)	Total
2015-16	31.03.2016	1236414	600000	1836414
2016-17	31.03.2017	918950	600000	1518950
	Total	2155364	1200000	3355364

With the introduction of Negative List w.e.f. 01.07.2012, all services except those mentioned in the list are subject to payment of Service Tax unless and otherwise exempted under any Notification issued in this behalf. As per Notification No. 30/2012-Service Tax, as amended, "in respect of services provided or agreed to be provided by the Director of a company or body corporate to the said company or body corporate", 100% Service Tax is payable by the receiver under the reverse charge mechanism. No distinction has been made in the Notification whether director is executive, whole-time etc. There is no conditional exemption provided from payment of Service Tax if the director is being treated as a normal employee. Thus, the service provided by the director, is liable for payment of Service Tax. Since, the amounts paid to the directors as "Commission" and "Rent" are other than in lieu of their capacity as employee of the company in as much as TDS deducted under Section 194H and 194I(b) of the Income Tax Act, 1961, the same cannot be considered in the course of service provided by an employee to the employer in relation to his employment. Therefore, Service Tax is payable and recoverable from the Appellant under Reverse Charge mechanism towards amounts paid to the Directors as "Commission" and "Rent".

3. These proceedings resulted in issuance of Show Cause Notice dated 15.09.2020 to the Appellant, proposing demand of Service Tax amount of Rs. 4,94,123/- (including all Cesses) under Section 73(1) of the Finance Act, 1994 (hereinafter referred to as "the Act") by invoking extended period along with interest and for imposition of penalty under Sections 76, 77 and 78 of the Act.

Vide impugned order the adjudicating authority has confirmed demand of

service tax amount of Rs. 4,94,123/- (including Cesses) under Section 73(1) of the Act, by invoking extended period, along with interest under Section 75 of the Act; imposed penalty of Rs. 4,94,123/- under Section 78 of the Act; and a penalty of Rs. 10,000/- under Section 77 of the Act.

5. Being aggrieved by the impugned order, the Appellant preferred present appeal contending, *inter-alia*, as under:

5.1 Regarding rent paid to the director for the renting of immovable property service, appellant were liable for the RCM provision or not.

With regard to contention of the department in view of the Notification No.30/2012-ST as amended by the Notification No. 45/2012-S.T. dated 07.08.2012, the Company who receives services from its director is liable to pay service tax to the extent of 100 % of service tax under reverse charge mechanism, the appellant being a Private limited company is the person liable to pay service tax on the rent amount paid by them to the aforesaid directors. It is also observed during the course of audit that the appellant has failed to declare the said taxable value in their ST-3 returns and has also failed to discharge service tax liability thereon. They relied on the basic provision of the finance act as under:

Entry no. 5A of the Notification no. 30/2012-ST dated 20.06.2012 reads as follows:-

Sl. No.	Description of service	% of service tax payable by service provider	% of service tax payable by service receiver
5A	In respect of services provided or agreed to be provided by a director of a company or a body corporate to the said company or the body corporate.	-	100%

5.2 The whole time directors, managing directors and executive directors are engaged in managing day to day functioning of the company or the body corporate and so can be considered as employees of the company. The fact that the TDS is deducted under section 194-I Income Tax Act, 1961 on the rent paid to the director for giving property on rent/lease basis. It is conclusive evidence that the amount paid as rent is nothing but consideration paid for services received of renting of immovable property rendered by such directors in the capacity of property holder of the company.

5.3 The fact that rent received by the whole time directors, managing directors etc. is shown in their Income Tax Returns under the head 'Income from house property' also fortifies the fact that the amount received is in lieu of their owner of property rented to the company. As such, when CBDT, being one of the wing of the government department is accepting the amount paid to the managing directors, whole time directors etc. as rent for the property usages, the other wing of the government department, i.e., CBEC cannot take a contrary stand to levy service tax on the same. Therefore, the consideration received by the directors as a property holder/owner from the company is in fact in the capacity of owner of property and cannot be considered as 'service' as per the definition of service given under section 65B(44) of the Act. When the activity of renting of immovable property service has been separately classified in the service tax, the said activity is outside the purview of the definition of service and consequently no service tax is leviable on the same. When an activity is not within the ambit of 'service', the question of reverse charge mechanism does not arise.

5.4 The serial no. 5A of the Notification No. 30/2012-ST does not makes distinction between different types of directors. Therefore, service tax demands are being raised on payments made to all directors by the company. However, service tax should be demanded on the amount paid to non-executive directors only and other amounts paid to executive directors such as sitting fees, commission etc.

5.5 General Circular No. 24/2012 dated 09.08.2012 issued by Ministry of Corporate Affairs confirms the fact that service tax is payable on the commission/sitting fees payable to the Non-Whole Time Directors of the company and the increase in the quantum of remuneration paid to them on account of service tax will not be considered for the purpose of approval of Central Government under section 309 and 310 of the Companies Act even if it exceeds the limit of 1% or 3% of the profit. This indicates that even the MCA, which is a part of government, believes that service tax is payable only on the sitting fees/commission payable to the directors and not on the renting charges paid to them as an owner of property.

5.6 On the basis of above, the service tax is payable only on the amounts paid to the directors other than in lieu of their capacity as employee of the company & owner of property.

5.7 Regarding Service Tax applicability on the commission income, they submitted that it is not a commission income but it has been reimbursement of employee incentive for the sale of the particular brand so it is not consideration for providing any service. Further, it is being part of the trade

discount, which can be verified from the supporting documents. They rely on decision reported at 2017 (52) S.T.R. 299 (Tri.-Mumbai).

5.8 The Appellant further contested that entire demand is time barred invoking extended period since there is no suppression, willful misstatement on their part -Extended Period. Penalty cannot be imposed under Section 78 of the Act in the present case and they rely on decision in case of Steel Cast Ltd. 2011 (21) STR 500 (Guj.). Penalty cannot be imposed under Section 77 of the Act and they placed reliance on the decision of the Hon'able Supreme Court in the case of Hindustan Steel Ltd. vs The State of Orissa reported in AIR 1970 (SC) 253, followed by the Tribunal in the case of Kellner Pharmaceuticals Ltd. Vs. CCE, reported in 1985 (20) ELT 80, Pushpam Pharmaceuticals Company v CCE 1995 (78) ELT 401 (SC), CCE Vs. Chemphar Drugs and Liniments 1989 (40) ELT 276 (SC), (Supra).

5.9 The issue involved in the present case is of interpretation of statutory Provisions. For that reason also, penalties cannot be imposed and they place reliance on the following case laws:

a) Bharat Wagon & Engg. Co. Ltd. v. Commissioner of C.Ex.Patna, (146) ELT 118 (Tri. - Kolkata),

b) Goenka Woollen Mills Ltd. v. Commissioner of C.Ex, Shillong, 2001 (135) ELT 873 (Tri. - Kolkata)

c) Bhilwara Spinners Ltd. v. Commissioner of Central Excise, Jaipur, 2001 (129) ELT 458 (Tri. - Del.)

They requested for a lenient view and to drop the proceeding.

6. The personal hearing in the matter was held on 10.11.2022. CA Vipul Khandhar appeared for personal hearing in virtual mode. He reiterated the submissions made in the appeal. He submitted that renting of flats by Directors was in their individual capacity and has no connection with their directorship in the company and they are not liable to any Service Tax on the rent amount paid on reverse charge mechanism basis. He submitted that appellant in his additional submissions sent through email has enclosed an Order-In-Original passed by CC(A) Ahmedabad and another order passed by CESTAT where the demands have been set aside under similar situations. Therefore, he requested to set aside the Order-In-Original and allow the appeal.

6.1 The additional submission made by the Appellant is akin to the grounds of appeal submitted by them. They submitted the copy of decision of Hon'ble CESTAT Mumbai in the case of Allied Blenders and Distillers Pvt. Ltd. Vs CCE & S.T., Aurangabad reported at 2019 (24) G.S.T.L. 207 (Tri.-Mumbai). However, he has not submitted copy of the Order-In-Appeal as stated during the personal hearing.

7. I have carefully gone through the facts of the case, the impugned order, the Appeal Memorandum and oral as well as written submission made by the Appellant. The issue to be decided in the present case is as to whether the impugned order confirming demand of Service Tax along with interest and imposition of penalties under Section 76, 77, and 78 of the Act is legally correct or otherwise.

8. The Appellant has submitted that the definition of service as given under Section 65B(44) of the Act envisages that "Service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include provision of service by an employee to the employer in the course of or in relation to his employment. The Appellant further submitted that the whole time directors, managing directors and executive directions are engaged in managing day to day functioning of the company or the body corporate and so can be considered as employees of the company. I find that the consideration received by the directors as a property holder/owner from the company cannot be considered as 'service' as employees. On one hand the Appellant accepts that the directors of the Appellant company received consideration as property holder for renting of immovable property and at the same time submits that the amount thus paid, involves service under employment. I find that the service of 'renting of immovable property' provided by Directors to the Appellant company cannot in any case be considered to be provision of service by an employee to the employer in the course of or in relation to his employment. The Appellant has admittedly deducted the TDS under Section 194I of the Income Tax Act, 1961 on the rent paid to the directors for services of renting of immovable property rendered by such director in the capacity of property holder/ owner of the company. The definition of service under clause (44) of Section 65B of the Act, specifically includes 'declared service' and 'renting of immovable property' is a 'declared service' as per clause (a) of Section 66E of the Act. The same is re-produced below:

> *"**SECTION 66E. Declared services.** – The following shall constitute declared services, namely:–*
> *(a) renting of immovable property"*

8.1 I find that the Appellant had tried to make a misleading argument that the fact of TDS deduction under Section 194I of Income Tax Act, 1961, supports his claim that the consideration received by the director/s as a property holder/ owner cannot be considered as service as per clause (44) of Section 65B of the Act, which excludes provision of service by an employee to the employer in the course of or in relation to his employment, because the whole time director, managing director and executive director engaged in managing day to day functioning of the company and so can be considered as employee of the

company. I have gone through Section 194I ibid, and found that it relates to tax deduction at source (TDS) on payment of rent. I hold that renting of property is not a service in the course of or in relation to employment and rent is not and can never be considered as, a payment of consideration to employee by employer for service as an employee by any stretch of imagination. The payment consideration to employee by employer in the course of or in relation to employment is called salary and TDS on payment of salary is governed by Section 192 of the Income Tax Act, 1961, which is not the case here.

8.2 On plain reading of Section 194I of the Income Tax Act, 1961, it nowhere suggests that payment of rent can be considered as provision of service by an employee to the employer in the course of or in relation to his employment. Section 194I relates to tax deduction at source on payment of Rent. TDS under Section 194I ibid, on payment of rent of immovable property cannot be equated with TDS under Section 192 ibid, on payment of salary.

8.3 The Appellant further submitted that the rent received by the whole time director, managing director etc. is shown in their Income Tax Returns under the head "Income from house property" also fortifies the fact that the amount received is in the capacity of their ownership of property rented to the company. I again find that this submission itself proves that this income of rent is not an income as consideration to employee by employer in the course of or in relation to employment. The said income shown in the Income Tax Returns under the head income from house property is nothing but rent received against the classified service of renting of immovable property provided by the directors to the corporate Appellant. 'Renting of immovable property' is a declared service as per clause (a) of Section 66E of the Act and the definition of service under clause (44) of Section 66B of the Act, specifically includes 'declared service' as discussed in para supra.

8.4 The Appellant also argued that CBDT, being one of the wings of the government department is accepting the amount paid to the director as rent for the property usages, the other wing of the government i.e. CBEC cannot take a contrary stand to levy Service Tax on the same. I find that this argument is baseless. I find that the Appellant has admittedly submitted that they have received services of renting of immovable properties from the director. The same is not a service by employee to the employer in the course of employment. Ordinary employees are under no obligation to extend this service. The Appellant have deducted TDS on the rent paid to the director. They also submitted that the rent income is shown in the ITR filed by the director as 'income from house property'. It clearly indicates that this income is not from salary or House Rent Allowance. I find that charging Service Tax on renting of

immovable property does not contradict the fact that income tax is also chargeable on the income of rent received from renting of property. The service tax is not charged in lieu of income tax but both the taxes are distinct and independent of each other and are charged under different statutes. I find that income is charged on the rental income as it is taxable under the head of 'income from house property' at the same time Service Tax is charged on the consideration of services of 'renting of immovable property'. Since direct and indirect tax statutes are independent and exclusive of each other, the same activity is being taxed separately by CBDT and CBEC under their legitimate authorities. Thus, the arguments advanced by the Appellant are devoid of any merits.

8.5 The Appellant has further argued that when the activity of renting of immovable property service has been separately classified in the Service Tax, the said activity is outside the purview of the definition of service and hence no Service Tax is leviable on the same and when an activity is not within the ambit of 'service' the question of reverse charge mechanism does not arise. It is admittedly accepted by them that services of 'renting of immovable property' has been provided by the director of the Appellant company which is a declared service as under clause (a) of the Act as stated in forgoing paras. I find that the definition of 'service' includes declared service under clause (44) of the Section 65B of the Act. I also find that 'taxable service' means any service on which Service Tax is leviable under Section 66B of the Act. I find that Section 66B of the Act provides for charge of Service Tax on all services except those specified in the negative list. Therefore, I find that the contention of the Appellant is misleading, mischievous and far from the facts. The same is not tenable.

8.6 The Appellant further submitted that serial No. 5A of the Notification No. 30/2012-Service Tax does not makes distinction between different types of directors. Therefore, Service Tax demand raised on payment made to all director by the Appellant. However, Service Tax should be demanded on the amount paid to non executive directors only and other amounts paid to executive directors such as sitting fees, commission etc. The Appellant further relied on Circular No. 24/2012 dated 09.08.2012 issued by the Ministry of Corporate Affairs which confirms the fact that Service Tax is payable on the commission/ sitting fees payable to the non-whole time directors of the company and the increase in the quantum of remuneration paid to them on account of Service Tax will not be considered for the purpose of approval of Central Government under Section 309 and 310 of the Companies Act even if it exceeds the limit of 1% or 3% of the profit. The Appellant argues that this indicates that even the MCA, which is a part of the government, believes that

Service Tax is payable only on the sitting fees/ commission payable to the directors and not on the renting charges paid to them as an owner of property. On this basis, the Appellant believes that the Service Tax is payable only on the amounts paid to the directors other than in lieu of their capacity as employee of the company and owner of property. I have gone through the General Circular No. 24/2012 dated 09.08.2012 issued by the Ministry of Corporate Affairs which pertains to remuneration payable to directors by the company and clarification in respect of approval, of limit of remuneration (inclusive of Service Tax) by the Central Government under Section 309 and 310 of the Companies Act, 1956.

8.7 I find that on plain reading of Circular No. 24/2012, it nowhere supports the claim of the Appellant that Service Tax is payable only on the sitting fees/ commission payable to the directors and not on the renting charges paid to them as an owner of property. I observe that this Circular only confirmed the fact that Service Tax is payable on the commission/ sitting fees payable to the non-whole time directors of the company and clarified that the increase in the quantum of remuneration paid to them on account of Service Tax shall not require prior approval of the Government under Section 309 and 310 of the Companies Act, 1956 even if it exceeds the limit of 1% or 3% of the profit of the company, as the case may be, in the financial year 2012-13. This Circular has nothing to do with taxability of services of 'renting of immovable property', provided by director to the Appellant company and therefore, I hold that this circular is not relevant to charging of Service Tax, on the service of 'renting of immovable property' provided by director to the Appellant company and the contention of Appellant is fallacious and far from facts. Even if it was so, it cannot override or supersede provisions of an Act for Service Tax. It is well settled that a circular is of administrative nature having no statutory value. The same is only administratively binding for employees of Ministry of Corporate Affairs and not to any other Ministry.

8.8 In view of the above, I find that the amount paid as rent is nothing but consideration paid for services received of renting of immovable property rendered by such directors in the capacity of property holders and not as employees of the company. I find that 'renting of immovable property' is a 'declared service' as per clause (a) of Section 66E of the Act and liable for Service Tax under Section 66B of the Act. As per Section 68(2) read with Notification No. 30/2012-Service Tax dated 20.06.2012 as amended vide Notification No. 45/2012-Service Tax dated 07.08.2012, the said Appellant is liable for payment of Service Tax, under the reverse charge mechanism, on the services provided by its director to the said Appellant. The person liable to pay Service Tax under reverse charge mechanism has been stipulated under Rule

2(1)(d) of the Service Tax Rules, 1994, which reads as under:

> *"(d) "person liable for paying service tax", - (i) in respect of the taxable services notified under sub-section (2) of section 68 of the Act, means,-*
>
> *(A) -----*
>
> *(B) -----*
>
> *(EE) in relation to service provided or agreed to be provided by a director of a company or a body corporate to the said company or the body corporate, the recipient of such service;"*

8.9 I find that the language employed in Rule 2(1)(d)(EE) of the Service Tax Rules, 1994 read with Notification No. 30/2012-Service Tax as amended by Notification No. 45/2012-Service Tax, is very clear to the effect that services rendered by a director of a company of the body corporate to the said company or the body corporate is chargeable to Service Tax under the reverse charge mechanism. Plain reading of the above provisions imply that any service rendered by the Director to the company is a taxable service attracting Service Tax under the reverse charge mechanism. The said statutes nowhere stipulate that the services ought to have been provided in the capacity of director and no distinction has been made in the provisions regarding services provided in personal capacity or services provided in the capacity of director.

8.10 Here, it will be relevant to go through the bare wording of the Notification No. 30/2012-Service Tax dated 20.06.2012 as amended by Notification No. 45/2012-Service Tax dated 07.08.2012 and effective at the relevant time wherein the description of services, the person liable to pay Service Tax and the extent of Service Tax payable by such person under the reverse charge mechanism has been specified. The same is re-produced hereunder:

GSR .....(E).-In exercise of the powers conferred by sub-section (2) of section 68 of the Finance Act, 1994 (32 of 1994), ..., the Central Government hereby notifies the following taxable services and the extent of service tax payable thereon by the person liable to pay service tax for the purposes of the said sub-section, namely:-

I. The taxable services,-
(A) (i) .....
(ii) .....
(iva) provided or agreed to be provided by a director of a company to the said company;

TABLE

Sl. No.	Description of service	Percentage of Service Tax payable by the person providing service	Percentage of Service Tax payable by the person receiving the service
5A	in respect of services provided or agreed to be provided by a director of a company to the said company	NIL	100%

8.11 I find that the relevant para of the Notification starts with term 'the taxable service'. The term 'taxable service' has been defined in clause 51 of Section 65B of the Act as 'taxable service' means any service on which service tax is leviable under Section 66B. A conjoint reading of Section 65B(51) and 66B of the Act and the Notification No. 30/2012-Service Tax, as amended, indicates that any services provided or agreed to be provided by a director of a company or a body corporate to the said company or the body corporate is liable to Service Tax under the reverse charge mechanism at the hand of the service recipient.

8.12 I also observe that the statute is silent in respect of the services, provided by a director of the company, whether provided in the capacity of a director or in the capacity of an individual. Therefore, any services provided by a director of the company, whether provided in the capacity of a director or provided in the capacity of an individual service provider, are covered under reverse charge mechanism because the words used are 'by a director of a company to the said company' and not 'as a director of a company to the said company'. Therefore, if director of a company provided service in any capacity, as a director or as an individual service provider, the tax liability would be of the company under reverse charge mechanism in both the cases.

8.13 Renting of immovable property is a 'declared service' as per clause (a) of Section 66E of the Act and liable for Service Tax under Section 66B of the Act. As per Section 68(2) read with Notification No. 30/2012-Service Tax dated 20.06.2012 as amended vide Notification No. 45/2012-Service Tax dated 07.08.2012 and Rule 2(1)(d) of the Service Tax Rules, 1994, the Appellant is liable for payment of Service Tax, under the reverse charge mechanism, on the services provided by its director to the Appellant.

8.14 I find that the Appellant i.e. service recipient is a private limited company registered with the Registrar of Companies and is falling under the category of 'body corporate'. The service provider is director of the Appellant Company. Thus, in terms of the provisions of Section 68(2) of the Act read with Rule 2(1)(d) of the Service Tax Rules, 1994 and Notification No. 30/2012-Service Tax as amended by Notification No. 45/2012-Service Tax, the Appellant is clearly liable to pay 100% of the Service Tax payable in respect of renting of immovable property.

9. The Appellant paid commission to the Director. It is contention of the Appellant that it is not a commission income but it has been reimbursement of the employee incentive for the sale of the particular brand so it is not consideration for providing any service. Further, it is part of the trade discount,

which can be verified from the supporting documents.

9.1 However, I find that the Appellant has not provided any such supporting documents. It is on record that TDS under Section 194H of the Income Tax Act, 1961 has been deducted which is meant for commission or brokerage i.e. any payment received or receivable, by a person acting on behalf of another person for services rendered or for any services in the course of buying or selling of goods. Thus, the incentive accorded by the Appellant squarely falls within the ambit of the term 'service' as defined under Section 66B(44) of the Act.

9.2 The Appellant submitted that it is not a commission income but it is reimbursement of the employee incentive for the sale of the particular brand so it is not consideration for providing any service. However, I find that the incentives, firstly, are not reimbursements. Secondly, even if such incentives are coined as reimbursements, such reimbursements could be excluded from consideration only if the service provider is acting as pure agent of the recipient of the service, subject to fulfillment of conditions stipulated under Sub-Rule (2) of Rule 5 of Service Tax (Determination of Value) Rules, 2006. Having similar views, the CESTAT, WZB, Ahmedabad vide its Final Order No. A/12175/2018-WZB/AHD dated 18.10.2018 in Appeal No. ST/120/2012-DB, in the case of Modern Business Solutation [2019 (24) GSTL 353 (Tri. Ahmd)] has observed that what constitutes reimbursement has to be determined in light of the decision of larger bench in the case of Sri Bhagavathy Traders [2011 (24) S.T.R. 290 (Tribunal-LB)] and all expenses incurred by a service provider cannot be called reimbursable expenses, only the expenses that qualify the test laid down in the decision of Bhagawathy Traders (supra) can be called reimbursable expenses. The Larger Bench had clarified (in para 6.4) that costs for inputs services and inputs used in rendering services cannot be treated as reimbursable costs; and that there is no justification or legal authority to artificially split the cost towards providing services partly as cost of services and the rest as reimbursable expenses.

9.3 From the above, I find that the Appellant has taken contradictory stand by simultaneously claiming the commission as 'Trade Discount' and 'Reimbursement of incentive to employee'. Trade discount and reimbursement of incentive to Director are clearly independent and separate items in books of accounts. The simultaneous claim of the Appellant to state that such commissions constitute both of them is a bare mischievous attempt to evade payment of legitimate amount of Service Tax to the Government. I find that the commission is paid through the Appellant to their Directors and Directors are not free agents. Therefore, it cannot be said that the Director working for the client paid the commission to the Appellant. Hence, the commission is taxable in the

hands of the Appellant. I also find that the Appellant has neither claimed to be pure agent of the service recipient nor furnished any evidences to prove fulfillment of conditions laid down under Sub-Rule (2) of Rule 5 of Service Tax (Determination of Value), Rules, 2006.

9.4 In view of the above, I hold that the contentions of the Appellant regarding the amount being trade discount and reimbursement of incentive are misleading and devoid of merits. Therefore, they are required to pay Service Tax on reverse charge mechanism on such services provided by the Director to the Appellant.

10. The Appellant contested that entire demand is time barred invoking extended period since there is no suppression, willful misstatement on their part. I find that it is on record that the Appellant who is a body corporate, required to maintain high level of compliances, has failed to properly assess the Service Tax liability and also failed to reflect correct information in their S.T.-3 returns. The Appellant liable to pay Service Tax was required to self-assess the tax due on the services provided/received by them and thereafter furnish a return to the jurisdictional officer by disclosing wholly and truly all material facts in their statutory returns. It is on record that the Appellant had not disclosed full, true and correct information about the value of the service received liable for payment under reverse charge mechanism. Thus, there was a deliberate withholding of essential and material information from the Department and all this material information had been concealed from the Department deliberately, consciously and purposefully to evade payment of Service Tax. In the self- assessment regime, the Government has placed full trust on the service provider and accordingly measures like self-assessment etc. based on mutual trust and confidence were in place. Had audit not been conducted by the department, the violation and contravention of law by the Appellant would not have come to the notice of the department. Therefore, extended period has rightly been invoked.

11. In view of above discussions and findings, I uphold the impugned order and reject the appeal filed by the Appellant.

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

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

सत्यापित / Attested

Superintendent
Central GST (Appeals)
Rajkot

(शिव प्रताप सिंह)/(Shiv Pratap Singh),
आयुक्त (अपील)/Commissioner (Appeals)

By R.P.A.D.

To, M/s. Medinex Speciality Chemicals	सेवा में,

Pvt. Ltd., Plot No. 4, Survey No. 277/1, Bhavnagar-Talaja Road, Village: Ukhrala, Dist.:Bhavnagar-364005	मे. मेडिनेक्स स्पेसियालिटी केमिकल्स प्रा। ली।, प्लॉट संख्या 4, सर्वे संख्या 277/1, भावनगर-तलाजा रोड, गाउँ: उखराला, जिल्ला: भावनगर-364005।

प्रतिलिपि :-

1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
3) अपर आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर को आवश्यक कार्यवाही हेतु।
4) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर मण्डल-1 को आवश्यक कार्यवाही हेतु।
5) अधीक्षक, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क रेंज-3, भावनगर मण्डल-1 को आवश्यक कार्यवाही हेतु।
6) गार्ड फ़ाइल।