



:: आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क ::
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

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सत्यमेव जयते

रजिस्टर्ड टैक्स ए.डी. द्वारा :-

DIN-20221164SX0000496E58

क	अपील / फाइल नं./ Appeal / File No.	मूलअदेश नं. / OIO No.	दिनांक/ Date
	V2/521 /RAJ/2021	DC/JAM-1/ST/03/2021-22	22-07-2021
	V2/9 /EA2/RAJ/2021	DC/JAM-1/ST/03/2021-22	22-07-2021

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

RAJ-EXCUS-000-APP-359 TO 360-2022

आदेश का दिनांक /
Date of Order: **31.10.2022** जारी करने की तारीख /
Date of issue: **02.11.2022**

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 एवं सेवाकर,
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. Gujarat State Electricity Corporation Ltd., Admn. Building, GSECL
Colony, Sikka, Jamnagar-361008**

इस आदेश (अपील) से व्यक्ति को नुकानि निम्नलिखित तरीके से 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 मामलों सीमा शुल्क, केन्द्रीय उत्पाद 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 अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की
पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन अमरावा अहमदाबाद- 380016 को 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- I(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 प्रति में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहाँ उत्पाद शुल्क की माँग, व्याज की माँग और
सजाया 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 रजिस्ट्रार 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 जहाँ संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्वयं 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 नियमावली, 1994, के नियम 9(1) के तहत
निर्धारित प्रपत्र S.T.-5 में चार प्रति में की जा सकती है एवं उसके साथ वित्त आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से
एक प्रति प्रामाणिक होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहाँ सेवाकर की माँग, व्याज की माँग और सजाया गया जुर्माना, रुपए 5
लाख या उससे कम, 5 लाख रुपए या 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
रजिस्ट्रार 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 जहाँ संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्वयं 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 fee of Rs. 1000/- 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, सेवार्कर 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 प्रामाणिक होनी चाहिए) और आयुक्त द्वारा संशुद्ध आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवार्कर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रती की 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 Form 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 सेवार्कर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवार्कर 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, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवार्कर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनबेट जमा की ली गई गलत राशि
(iii) सेनबेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं 2) अधिनियम 2014 के अंश से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विधायीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।
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 कोपनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपर्याय 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 पसंस्करण 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 चरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो क्रेडिट केबिट 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 निर्यात की गई तारीख अथवा समायाचिका 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 प्रतियाँ प्रपत्र संख्या EA-8 में जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संश्लेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियाँ 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 OIQ 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 रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 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, उपरोक्त हंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पत्री कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय 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 Appellate 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) यथासंश्लेषित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट 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 सेवार्कर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में बर्णित एवं अन्य संबन्धित मामलों को सम्भलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in



अपील आदेश /ORDER-IN-APPEAL

M/s Gujarat State Electricity Corporation Ltd, Admin Building, GSECL Colony, Sikka, Jamnagar (hereinafter referred to as 'Appellant') has filed Appeal No. V2/521/RAJ/2021 against Order-in-Original No. DC/JAM-I/ST/03/2021-22 dated 22.07.2021 (hereinafter referred to as 'impugned order') passed by the Deputy Commissioner, Central Excise & CGST, Division-I, Jamnagar (hereinafter referred to as 'adjudicating authority'). Another Appeal No.V2/9/EA-2/RAJ/2021 against the same order has also been filed by Assistant Commissioner, CGST, Division-I, Jamnagar (hereinafter referred to as 'the Revenue').

2. The facts of the case, in brief, are that during the course of audit of the records of the appellant, it was observed that income from supervision charges had been shown in the year 2015-16 and 2016-17 under the head of Miscellaneous receipt. The appellant awarded contract to M/s BHEL for setting up and maintenance of thermal power station at Sikka. When M/s BHEL could not complete the task in a particular time and remaining work was carried out by the appellant by engaging manpower and machinery. As they have engaged manpower and machinery on behalf of M/s BHEL, demand letters were issued by the appellant to M/s BHEL towards reimbursement of various services along with additional supervision charges. It was also observed that under the head of Miscellaneous Receipt, 'forfeiture of security deposit' of Rs.1,70,420/- has been shown in the year 2015-16 and 2016-17 which appeared to be a 'Declared Service' under Section 66E(e) of the Finance Act, 1994. However, on scrutiny of ST-3 returns, it was observed that the appellant had not paid service tax on the supervision charges and 'forfeiture of security deposit'. Therefore a show cause notice F.No.VI(a)/8-181/Circle-III/2018-19/Gr.16 dated 14.08.2020 was issued demanding service tax of Rs.19,43,284/- under Section 73(1) of the Finance Act 1994 and to appropriate the amount of Rs.19,43,284/- already paid by them. It was also proposed to charge interest of Rs.17,26,589/- under Section 75 of the Finance Act 1994 and to appropriate the amount of interest of Rs.17,26,589/- already paid by them. The notice also proposed to impose penalty under Section 77 and 78 of the Finance Act 1994. The adjudicating authority, in the impugned order, has confirmed the demand of service tax of Rs.19,43,284/- under Section 73(1) of the Finance Act 1994 and appropriated the amount of Rs.19,43,284/- already paid by them. He has confirmed the demand of interest of Rs.17,26,589/- under Section 75 of the Finance Act 1994 and ordered to appropriate the amount of interest of Rs.17,26,589/- already paid by them. The adjudicating authority has imposed penalty of Rs.2,91,493/- under Section 78



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and Rs.50,000/- under Section 77(2) of the Finance Act 1994.

3.1 Being aggrieved, the Appellant has filed the present appeal contending, *inter alia*, that the show cause notice is void *ab inito* as the same was issued after payment of the applicable taxes along with interest at the time of audit. Even though service tax was not applicable as it was mere re-imbursement of expenses, the tax along with interest was paid to buy peace of mind. It cannot be said that there was any *mala fide* intent of evading payment of service tax by reasons of fraud, mis-statement, suppression etc. on the part of the appellant and hence penalty is not applicable.

3.2 The appellant submitted that the issue involved was of substantial interpretation of the statutory provisions. For operation of extended period of limitation, intention to deliberately default is a mandatory prerequisite and inadvertent non-payment doesn't attract extended period of limitation. The appellant was always under a *bona fide* belief that at material time, no service tax was applicable on reimbursement of expenses incurred and forfeiture of security deposit.

4. The 'Revenue' has filed appeal on the ground that the adjudicating authority ought to have imposed penalty under Section 78 of the Finance Act, 1994 equivalent to the service tax involved.

5. Personal hearing was conducted in virtual mode on 21.10.2022 when Chartered Accountant Neeta V. Lodha appeared and reiterated the submissions made in the grounds of appeal and those in the written arguments submitted subsequently through email. She contended that the appellant is not liable to service tax. Despite this, to be on safer side and to avoid incidence of interest, they had deposited entire amount with interest, before issuance of the show cause notice. Under these circumstance no penalty is leviable, even if their service is considered taxable. Further the maximum amount under Section 77 of the Finance Act 1994 cannot exceed Rs.10,000/- whereas lower authority has imposed a penalty of Rs.50,000/- She further submitted that in the absence of any collusion, wilful suppression, etc. on their part, extended period cannot be invoked in their case. They relied upon case laws cited by them in support of these contentions. She requested to set aside the Order-in-Original and refund the entire amount of tax, interest and pre-deposit amount made at the time of appeal.

6. In the subsequent written arguments submitted by email, the appellant reiterated the submissions already made in the grounds of appeal. The appellant submitted that extended period can be invoked only if the service tax has not been paid by the appellant with *malafide* intentions. The department has failed



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to adduce any such evidence which may entitle the department to invoke extended period in terms of proviso to Section 73(1) of the Finance Act, 1994. They also contended that as per Section 73(3), where any service tax has not been levied or paid and the person chargeable with service tax paid the amount of service tax before service of show cause notice, no show cause notice was required to be served. They contended that the service tax along with interest has been paid by the appellant before the issuance of show cause notice and hence the show cause notice is void *ab initio*. In addition, the appellant relied upon the following case laws:

- (a) Haridwar Roorkee Development Authority (Service Tax Appeal No.514/2019)
- (b) Adecco Flexion E Workforce Solutions Ltd (Karnataka High Court)
- (c) Valenia Construction Pvt. Ltd-2015 (11) TMI 658
- (d) Infinity Infotech Parks Ltd-2014 (36) STR.37 (Cal)
- (e) NRB Bearings Ltd-2015 (322) ELT.599 (SC)
- (f) Gurlein Manchandana-2015 (4) TMI 658-CESTAT-Mum.

7. I have carefully gone through the facts of the case, the impugned order, grounds of appeal in the appeal memorandum of both the appellant and the revenue. In these appeals, the contentious issue is the penalty imposed under Section 78 of the Finance Act, 1994 and 77 of the Finance Act, 1994. While the appellant challenged the taxability and penalty imposed under Section 77 and 78 of the Finance Act 1994, the Revenue only challenged the quantum of penalty imposed under Section 78 *ibid*.

8. At the outset, I would like to get into and discuss technical issues raised by the appellant. The appellant had contended that the show cause notice is *ab initio* void in as much as they have paid service tax and interest before issue of show cause notice. Contention raised by the appellant, against imposing penalty under Section 77 and 78, is that they are Public Sector Unit and there is no intention to evade tax and hence no penalty is imposable on them. They have relied upon the case of BSNL, Junagadh-2009 (15) STR.168 (Tri-Ahmd). In this regard, I find that, the appellant had engaged manpower and machinery on behalf of M/s BHEL, and recovered the charges of various services along with additional supervision charges from M/s BHEL. It is an admitted fact that the amount so recovered were not reflected in the ST-3 return. It needs to be kept in mind that the Government has introduced self-assessment system under a trust based regime which casts the onus of proper assessment and discharging of the service tax on the assessee. The definition of "assessment" available in Rule 2(b) of Service Tax Rules, 1994 is reproduced as under:

"assessment" includes self assessment of service tax by the assessee, re-assessment, provisional assessment, best judgment assessment and any order of assessment in which the tax assessed is nil, determination of the interest on the tax assessed or re-assessed."



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In the instant case the appellant has failed to properly assess the service tax liability and also failed to reflect the correct information in the ST-3 returns. The adjudicating authority has observed that the appellant had provided taxable services, but not paid service tax to the Government exchequer and evaded the same by the way of suppression of facts and contravention of the provisions of the Finance Act, 1994 with an intent to evade payment of service tax. At the time of departmental audit it has come to notice that they have such kind of liabilities and they have deliberately escaped from it. However, later on, when audit team has pointed out the same then only they have paid the due service tax with interest. The adjudicating authority, therefore, observed that this act of appellant clearly established their *malafide* intention to evade payment of service tax by suppressing the material facts from the department. Accordingly, the adjudicating authority has held the appellant liable to penalty under the provisions of Section 78 of the Finance Act, 1994. I do not find any infirmity in the above finding of the adjudicating authority.

9. Regarding contention of the appellant that no show cause notice was required to be issued as they have paid service tax and interest before issue of show cause notice under Section 73(3) *ibid*, I find that as per Section 73(4), provisions of Section 73(3) shall not be applicable in case of non-payment of service tax by way of suppression of facts, fraud, wilful mis-statement etc. I find that the appellant has not-paid service tax by resorting to suppression of facts and contravention of the provisions of law and hence the provisions of Section 73(3) is not applicable in the instant case.

9.1 The appellant had relied upon various case laws in their support. In the case law of BSNL relied upon by the appellant, BSNL was paying service tax on the basis of an estimated amount and there were excess payment in some months and short payment and they had adjusted both an whatever differential amount was available has been paid by them. The department has taken a stand that excess amount cannot be adjusted against shortfall and demand was raised invoking extended period. Hon'ble Tribunal has held that such adjustment can be allowed and extended period cannot be invoked. Thus the case laws relied upon by the appellant are not relevant to the issue in hand and not applicable in the present facts and circumstances. In the case of *Haridwar Roorkee Development Authority*, the issue was taxability of various fees charged by them. The Tribunal held that the party had carried out sovereign activity under the provision of law and hence not taxable. Thus the facts and circumstances of the said case law is different and are not squarely applicable in the instant case. Also the facts and circumstances of the other case laws, *Adecco Flexion E*



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Workforce Solutions Ltd (Karnataka High Court), Valenia Construction Pvt. Ltd-2015 (11) TMI 658, Infinity Infotech Parks Ltd-2014 (36) STR.37 (Cal), NRB Bearings Ltd-2015 (322) ELT.599 (SC) and Gurlein Manchandana-2015 (4) TMI 658-CESTAT-Mum relied upon by the appellant are also different and hence cannot be made applicable in the present appeal.

10. Now coming to the issue of taxability of the service, I find that the appellant had earned income by way of supervision charges and it falls under the definition of 'service' defined under Section 66B(44) of the Finance Act, 1994 which reads as under:

"(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—
(a) an activity which constitutes merely,—
(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or
(iii) a transaction in money or actionable claim;
(b) a provision of service by an employee to the employer in the course of or in relation to his employment;
(c) fees taken in any Court or tribunal established under any law for the time being in force."

Since the activity viz. supervision has been carried out by the appellant on behalf of BHEL for consideration, it squarely falls under the definition of 'service' and the consideration received for the same become taxable under Section 66B *ibid*. Similarly, the forfeiture of security deposit is a consideration received for a declared service as per clause (e) of Section 66E of the Finance Act, 1994 which takes care of situations where service income generated due to non-performance of certain act or tolerating of act as correctly held by the adjudicating authority. As such, there is no dispute on taxability of the service. Even the appellant had accepted the same and paid the service tax with interest.

11. Regarding imposition of penalty under Section 77(2) of the Finance Act, 1994, I find that the appellant has not discharged their service tax liability on the amount received by them as per the provisions of Section 68 *ibid* read with rule 6 of the Service Tax Rules, 1994 and hence adjudicating authority has rightly imposed penalty on them under Section 77(2) *ibid*. However, as correctly contended by appellant, the maximum amount of penalty under Section 77(2) is Rs.10,000/- and, accordingly, the penalty in excess of Rs.10,000/- needs to be set aside.

12. In appeal filed by Revenue, it is contended that adjudicating authority erred in imposing penalty of only 15% of the service tax determined in violation of the provisions of Section 78 *ibid*. The adjudicating authority has imposed penalty of Rs.2,91,493/- which is 15% of the service tax determined



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on the premises that appellant has paid tax and interest before issue of show cause notice. Section 78 of the Finance Act 1994 as it stood at the relevant time read as under:

"78. Penalty for failure to pay service tax for reasons of fraud, etc. — (1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax:

Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined :

Provided further that where service tax and interest is paid within a period of thirty days of—

(i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;

(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined :

Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period:

Explanation. — For the purposes of this sub-section, "specified records" means records including computerised data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of accounts shall be considered as the specified records.

(2) Where the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, modifies the amount of service tax determined under sub-section (2) of section 73, then, the amount of penalty payable under sub-section (1) and the interest payable thereon under section 75 shall stand modified accordingly, and after taking into account the amount of service tax so modified, the person who is liable to pay such amount of service tax, shall also be liable to pay the amount of penalty and interest so modified.

(3) Where the amount of service tax or penalty is increased by the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, over and above the amount as determined under sub-section (2) of section 73, the time within which the interest and the reduced penalty is payable under clause (ii) of the second proviso to sub-section (1) in relation to such increased amount of service tax shall be counted from the date of the order of the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be. "

From perusal of the above statutory provision, it is evident that penalty imposable under this section is hundred percent of the service tax evaded. Reduced amount of penalty of 15% under clause (i) of second proviso to Section 78 of Finance Act, 1994 shall be admissible if the service tax, interest and



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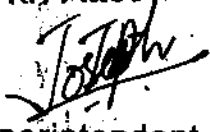
reduced penalty are paid before issue of show cause notice. Hon'ble Supreme Court in the case of *Dharmendra Textile Processors- 2008* (231) E.L.T. 3 (S.C.) and *Rajasthan Spinning 7 Weaving Mills- 2009* (238) E.L.T. 3 (S.C.) clearly spelt out the position of law with regard to imposition of mandatory penalty wherein it is held that payment of tax and interest before issue of show cause notice cannot alter the mandatory penalty. In the present case, appellant has not paid the penalty of 15% of service tax before issue of show cause notice. Therefore, adjudicating authority has erred in imposing penalty of Rs.2,91,493/- under Section 78 *ibid*. He should have imposed penalty of Rs.19,43,284/- and an option to pay the reduced penalty of 25% under clause (ii) of second proviso to Section 78 of Finance Act, 1994, provided reduced penalty also paid within 30 days from the date of receipt of the order.

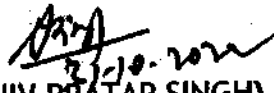
13. In view of discussions and findings as above, I reduce penalty under Section 77(2) of the Finance Act, 1994 from Rs.50,000/- to Rs.10,000/- (Rupees ten thousand only) and enhance penalty under Section 78 of the Finance Act, 1994 from Rs.2,91,493/- to Rs.19,43,284/- (Rupees nineteen lakh forty three thousand two hundred eighty four only). However, in view of clause (ii) of the second proviso to Section 78 (1) of the Finance Act, 1994, as the amount of Service Tax confirmed and interest thereon is already paid the penalty shall get reduced to twenty five percent of the said amount of Rs.19,43,284/-, if such reduced penalty is paid within the period of thirty days from the date of receipt of this Order.

१२. अपीलकर्ता एवं डिपार्टमेंट द्वारा दर्ज की गई दोनों अपील का निपटारा उपरोक्त तरीके से किया जाता है।

12. Appeals filed by appellant and the Revenue are 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.

सेवा में,
मे० गुजरात स्टेट एलेक्ट्रिसिटी कॉर्पोरेशन
लिमिटेड
अडमिन बिल्डिंग, जी एस ई सी एल कॉलोनी
सिक्का, जामनगर।

To
M/s Gujarat State Electricity Corporation
Ltd, Admin Building,
GSECL Colony, Sikka, Jamnagar

प्रतिलिपि :-

- 1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
- 2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।

आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, रमंडल-1, जामनगर को आवश्यक कार्यवाही हेतु।

आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, रमंडल-1, जामनगर को आवश्यक कार्यवाही हेतु।



