रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील-I) का कार्यालय केन्द्रीय उत्पाद शुल्क :
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद– 380015.

क फाइल संख्या : File No : **V2(SAS)12/STC-III/2016/Appeal-I** /588-593

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-253-16-17**
दिनाँक Date **23.02.2017** जारी करने की तारीख Date of Issue _____

श्री उमाशंकर, आयुक्त (अपील-I) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित

Passed by **Shri Uma Shankar** Commissioner (Appeals-I) Central Excise Ahmedabad

ग _____ आयुक्त केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश सं _____
_____ दिनाँक : _____ से सृजित

Arising out of Order-in-Original No **GNR-STX-DEM-DC-02/2016** dated **29.02.2016** Issued by: Deputy Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

ध अपीलकर्ता / प्रतिवादी का नाम एवं पता Name & Address of The **Appellants**/Respondents

M/s. Gujarat Security Guard Services

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:–
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:–
Appeal to Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम,1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:–
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद–380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad – 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9(1)के अंतर्गत निर्धारित फार्म एस.टी– 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरूद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी।

(ii) 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 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.

(iii) वित्तीय अधिनियम,1994 की धारा 86 की उप–धारा (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 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 Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 6.50/– पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjuration authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. 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.

4. **सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो**

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

(i) **धारा 11 डी के अंतर्गत निर्धारित रकम**

(ii) **सेनवैट जमा की ली गई गलत राशि**

(iii) **सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम**

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, 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 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten 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.

(4)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(4)(i) In view of above, 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."

ORDER-IN-APPEAL

M/s Gujarat Security Guard Services, 2, Shankar Estate, Ground Floor, Near Gyatri Temple, Highway, Mehsana (hereinafter referred to as 'the appellant') has preferred the present appeal being aggrieved by the **Order-in-original No.GNR-STX-DEM-DC-02/2016 DATED 29/02/2016** (hereinafter referred to as 'the impugned order') passed by the Deputy Commissioner, Service Tax Division, Gandhinagar (hereinafter referred to as 'the adjudicating authority')

2. Briefly stated, the facts of the case are that the appellant was holding Service Tax registration for Security Agency as defined under Section 65(94) of Finance Act 1994 w.e.f. 14/10/1998 and was providing security services to various clients like M/s O.N.G.C., M/s G.E.B. etc., which is a taxable service as defined under Section 65 (105)(w) of Finance Act, 1994 (hereinafter referred to as 'the said Act'). On the basis of intelligence, the officers of D.G.C.E.I., AZU searched the premises of the appellant on **08/03/2004** and observed that the appellant had entered into agreements with various clients for providing security services and was raising monthly bills for the services provided to such clients. The client companies, after verification of such bills, were making payment through cheque after deducting T.D.S. under the provisions of the Income Tax Act. It appeared that the TDS deducted was not admissible for deduction from the taxable value as per the provisions of Section 67 of the said Act which stipulates that *"The value of any taxable service shall be the gross amount charged by the service provider of such service rendered by him"*. The explanation provided below this section makes it clear that for the purpose of Service Tax, no deduction is allowed on any account from the gross amount charged by the security agency. Also as per Board Circular No.B11/3/98-TRU dated 07/10/1998, it appeared that no statutory deduction towards EPF, ESI, contribution towards labour welfare etc is permitted. Hence it appeared that the appellant was liable to pay Service Tax also on the TDS portion of the gross payment amount. From the scrutiny of seized records and the statements of Shri Rameshbhai Nathubhai Chaudhary, proprietor of the appellant and statement of Shri Kushalsingh Muraliram Rana, Assistant Personnel and Administrative Officer, Security section, O.N.G.C., Mehsana, recorded during the course of investigation, it appeared that during the period of **1999-00 to 2003-04** (up to December-2003), the appellant had failed to declare the correct value of services as collected from the clients in its S.T-3 returns filed under Section 70 of the said Act, resulting in such value escaping assessment. By suppressing the correct value of the taxable service and the correct amount realized towards taxable services provided to its clients, it appeared that the appellant had evaded payment of Service Tax to the tune of **Rs.40,07,737/-**.During the course of investigation, the appellant had willingly paid Rs.6,00,000/- towards part payment in respect of its Service Tax liability.

3. **A Show Cause Notice F.No. DGCEI/AZU/36-81/2004 dated 16/09/2004** (hereinafter referred to as 'the SCN') was issued to the appellant by Deputy Director,

D.G.C.E.I., Zonal Unit, Ahmedabad demanding Service Tax amount of Rs.40,07,737/- under the provisions of Section 73(1)(a) of the Finance Act, 1994 by invoking extended period of 5 years from the date of filing of S.T.-3 returns; proposing to appropriate Rs.6,00,000/- paid by the appellant under the provisions of Section 68 and Section 73(1) of the said Act; demanding interest under Section 75 of the said Act and proposing to impose penalty on the appellant under Section 76 and Section 78 of the said Act. This SCN was adjudicated by Assistant Commissioner, Central Excise, Division-I, Mehsana vide O.I.O.No.01/ST/AC-MEH.I/2005-06 dated 26/05/2005 confirming the demand of Rs.40,07,737/- under Section 73(1)(a) read with Section 66 & 67 of the said Act by invoking extended period; appropriating the Service Tax payment of Rs.6,00,000/- under the provisions of Section 68 and Section 73(1) of the said Act; ordering recovery of interest under Section 75 of the said Act; imposing penalty of Rs.5,00,000/- on the appellant under Section 76 of the said Act and imposing penalty of Rs.40,07,737/- on the appellant for suppressing correct value of taxable services under Section 78 of the said Act. The appellant preferred an appeal against this O.I.O. before Commissioner (Appeals-III), who vide O.I.A. No. 12 /2006 dated 27/02/2006, rejected the appeal.

4. The appellant preferred appeal No.ST/135/2006 before CESTAT, WZB, Ahmedabad against O.I.A. No. 12/2006 dated 27/02/2006, which was disposed vide CESTAT Order No. A/11581/2015 dated 29/10/2015 remanding back O.I.O.No.01/ST/AC-MEH.I/2005-06 dated 26/05/2005 to the adjudicating authority to decide afresh after considering the documents and submissions of the appellant, who undertook to appear before the adjudicating authority within two months from the date of receipt of the CESTAT order.

5. In the impugned order, the adjudicating authority after considering the submissions made by the appellant has confirmed the demand of Rs.40,07,737/- under Section 73(2) read with Section 66 & Section 67 of the said Act by invoking extended period. The amount of Rs.16,00,000/- paid by appellant has been appropriated under the provisions of Section 73(1) of the said Act. The recovery of interest has been confirmed under Section 75 of the said Act. A penalty of Rs.200/- per day or at the rate of two per cent per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of Service Tax, as prevailing at the relevant time, has been imposed under Section 76 of the said Act and a penalty of Rs.40,07,737/- has been imposed on the appellant under Section 78 of the said Act for suppressing correct value of taxable services.

6. The appellant has filed the present appeal invoking the following grounds of appeal:

1) The impugned order passed by the adjudicating authority, in remand proceedings, is in gross violations of the orders of the Hon'ble Tribunal, as also in

complete disregards of the basic legal position as settled by several precedents to date and is thus grossly illegal besides causing unnecessary and unwarranted protracted litigations in this issue and multiplicity of proceedings.

2) The finding of the adjudicating authority, on the first issue about actual gross receipts is based on complete misreading and misinterpretation, in as much as, clear data submitted by the appellant along with balance sheets of the relevant year, which consisted of actual billed amount and the total receipts against the same, after deducting the entire reimbursable expenses available to them was completely misapplied and the findings are de hors the actual and correct legal position. The actual receipts as shown in column 4 of the table under paragraph 17.3.2.3 of the impugned order was the amount in fact received by the appellant, which is not considered at all. On this ground alone the impugned order deserves to be quashed and set aside. The balance sheets and the working of the data base thereupon supplied to the adjudicating authority as per the order of the Hon'ble Tribunal clearly showed that the amounts of the basic salary paid to the security guards and their statutory deductions of provident fund, employees state insurance contribution and statutory bonus and such other expenses under various Labour legislations, which under legal and contractual obligations were to be reimbursed for and on behalf of the service recipient in this case were clearly deductible from the computation of Service tax liability. The adjudicating authority had erred in not understanding the basic fact that firstly the security guards were never the staff or employees of the appellant but were contract labour or contracted employees supplied by differed institutions and organizations whose basic payment was clearly enumerated in the contract, which though payable by the appellant, were clearly to be reimbursed by the principal ONGC under legal and contractual obligation.

3) As regards the findings in paragraph 17.4.3.1 that no abatement can be granted in respect of reimbursable expenses, though incurred under legal and contractual obligations as per the statutory levies in view of board's clarification and Circular issued on 07/10/1998, it is settled legal position that no circular or clarification can override the settled law or statutory provisions. The same has also been misapplied and misinterpreted by the adjudicating authority since it was clearly proved in these cases that these expenses were admittedly incurred for and on behalf of the service recipient under strict legal obligations.

4) The findings contained in paragraphs 17.5 & 17.6 seeking to suggest that there are several judgments in favour of Revenue that Service Tax is payable on gross amount charged by Security Agency is not at all applicable in this case since the period in dispute in this case is from 1999 to January-2004 covered by the statutory provisions of the said Act, mainly Section 65 of the said Act whereby Service Tax liability during this period was on 'Gross Receipts' only and not on 'gross charged amount'.

5) The finding contained I paragraph 17.7 of the impugned order that the appellant was charging and collecting Service Tax on the gross amount charged in the bill and had collected Service Tax from their clients and not on the net amount is also clearly contrary to the record and in ignorance of the clear submission that firstly the Service Tax is not entirely collected from M/s ONGC, in this case, since they were in continuous litigation and arbitration, which covered the issues of Service Tax and its non-payment to the appellant by M/s ONGC. The finding in paragraph 17.8..3 of the adjudicating authority that M/s ONGC, Mehsana had no amount due to the appellant in view of their letter dated 12/03/3015 is absolutely contrary to the records sicne it is an admitted legal position that under both their contracts during the relevant time with ONGC, the appellant was in litigation regarding on-receipt of payments of several amounts, besides their Service Tax liability also.

6) The adjudicating authority had also committed clear legal fallacy in his findings in paragraph 17.9, de hors, the settled legal position that as per CBEC clarification, Service Tax was payable by the appellant on the gross amount charged by them without deducting the legal and statutory expenses of payment of wages, PF contribution, other Labour contributions etc and the same has to be included in the gross assessable value for the purpose of computation Service Tax liability of the appellant during the period 1999 to January-2004. The adjudicating authority had misinterpreted the legal position and misread judicial pronouncements and had reconfirmed the demand, interest and penalties as per the SCN and earlier orders in contempt and gross violation of the Tribunal orders. The appellant had duly deposited the payable amount of tax which was already more than the pre-deposit requirement of 7.5% of the impugned demand in accordance with Section 35F of the Central Excise Act as made applicable to Service Tax.

7. Personal hearing in the matter was held on 17/01/2017. Shri Hirak Ganguly, Advocate appeared for personal hearing on behalf of the appellants. The learned Advocate reiterated the ground of appeal and submitted the following case laws:

a) SRI BHAGAVATHY TADERS vs COMMISSIONER OF CENTRAL EXCISE, COCHIN – 2011 (24) S.T.R. 290 9Tri.-LB).

b) INTERCONTINENTAL CONSULTANTS & TECHNOCRATS PVT. LTD. vs UNION OF INDIA – 2013 (29) S.T.R. 9 (Del.).

c) COMMISSIONER OF SERVICE TAX, CHENNAI vs SANGAMITRA SERVICES AGENCY – 2014 (33) S.T.R. 137 (Mad.)

d) BLOSSOM INDUSTRIES LIMITED vs COMMISSIONER OF CENTRAL EXCISE, CUSTOMS & SERVICE TAX, DAMAN – 2016 (41) S.T.R. 872 (Tri. –Ahmd.).

e) RELIANCE INDUSTRIES LTD. vs COMMISSIONER OF CENTRAL EXCISE, RAJKOT – 2008 (12) S.T.R. 345 (Tri.-Ahmd.).

8. I have gone through the facts of the case and submissions made in the appeal memorandum. The impugned order has been passed by the adjudicating authority in compliance with Order No. A/11581/2015 dated 29/10/2015 passed by CESTAT, WZB, Ahmedabad, remanding back the case to the original authority for fresh decision as it appeared that the reimbursement expenses including salaries and other expenses had been included in the taxable value for Security Agency Service, which is contrary to provisions of law and the decision of the Tribunal.

9. The matter was investigated by officers of D.G.C.E.I. and SCN was issued on the basis that the deduction of TDS from the value for assessment of Service Tax was not proper and by making such deduction the appellant had suppressed the value and evaded payment of Service Tax. In the de novo proceedings, the adjudicating authority has confirmed the original demand of Rs.40,07,737/- by invoking extended period; appropriated an amount of Rs16,00,000/- paid by the appellant; confirmed recovery of interest and imposed penalties on the appellant under Section 76 and Section 78 of the said Act.

10. The primary question decided in the de novo proceedings, having a bearing on the impugned demand, is whether the demand in the SCN was worked out on the basis of actual receipts of payments by the appellant or whether it was on the basis of gross billed amount. The adjudicating authority in paragraph 17.3.1.1 has reproduced the relevant columns of Annexure A to the SCN, indicating that the taxable value has been arrived on the basis of Net amounts received and not on the basis of Billed amounts. Further, in paragraph 17.3.1.2, the details of the ledgers produced by the appellant and the admissions made by Shri Rameshbhai N. Chaudhary, proprietor of the appellant in his statements dated 23/03/2004 and 23/04/2004 have been tabulated in order to arrive at the findings that the duty demand has been worked out on the basis of total amounts received by the appellant and not on the billed amounts or receivable amounts as contended by the appellant. The adjudicating authority has also given a exhaustive verification report based on the Profit & Loss Accounts / Balance Sheets of the appellant as submitted to Income Tax for 1999-2000; 2000-2001; 2001-2002; 2002-2003 & 2003-04 and arrived at the finding that the expenses such as Security service salary, Security Service Kamdar Provident Fund income, Employee leave encashment, Security Guard Bonus expense, Security Guard ESI, office Staff Salary, Bank Guarantee commission, Telephone expense, tender fees, expenses for stationary & printing expenses, electricity expenses, advertisement, donation, postage & telegram and miscellaneous expenses were deducted from the gross profit to arrive at net profit in each year. It has been held in paragraph 17.3.2.7 that the Service tax payable on such net receipts, even without taking into consideration the amount of TDS deducted would work out to Rs.41,09,000.81 whereas the demand raised in the SCN was Rs.40,07,736.94. The adjudicating authority has thus arrived at a well reasoned finding that the investigating officers had calculated Service Tax liability of the appellant only on

the amount received by them from the service recipient. On studying the grounds of appeal, it is seen that the appellant has contested this finding of the adjudicating authority regarding actual gross receipts by stating that it was based on complete misreading and misinterpretation of the clear data submitted by the appellant along with balance-sheets of the relevant year, which consisted of actual billed amount and the total receipts against the same, after deducting the entire reimbursable expenses available to them. The appellant has not provided any factual evidence or numerical data as to how the data provided by them has been misread or misinterpreted by the adjudicating authority. In the grounds of appeal, the appellant has not even quantified the amount of deduction that it was claiming or the amount of Service Tax that it was liable to pay in order to challenge the demand amount confirmed in the impugned order. The contention of the appellant is generic, vague and is in the nature of unsubstantiated criticism. The grounds of appeal clearly fails to challenge and negate the findings in the impugned order that are arrived at by well-quantified verification of the Profit & Loss Account / Balance sheets / Ledgers, for each of the impugned financial years and the corroboration in the form of statements of the proprietor on behalf of the service provider and of Shri Kushalsingh Muraliram Rana, the Manager (F&A), ONGC, Mehsana, on behalf of the service recipient. These statements have not been retracted and remain on record as valid evidence. Accordingly, the findings of the adjudicating authority that the assessment of Service Tax was based on actual gross receipts is sustainable and is liable to be upheld.

11. The appellant has further contended in their grounds of appeal that the findings of the adjudicating authority to the effect that that since the security guards were not the employees of M/s ONGC, the service recipient was not under any legal or contractual obligation to pay such expenses, is vitiated, illegal and based on misreading of the contracts entered between the parties. The question of requirement of such legal / contractual obligation has been decided by Hon'ble Larger Bench of the Tribunal in the case of ***SHRI BHAGAVATHY TRADERS vs CCE, COCHIN – 2011 (24) S.T.R. 290 (Tri.LB)*** in the following terms:

"6.2 Similar is the situation in the transaction between a service provider and the service recipient. **Only when the service recipient has an obligation legal or contractual to pay certain amount to any third party and the said amount is paid by the service provider on behalf of the service recipient, the question of reimbursing the expenses incurred on behalf of the recipient shall arise.** For example, when rent for premises is sought to be claimed as reimbursement, it has to be seen whether there is an agreement between the landlord of the premises and the service recipient and, therefore, the service recipient is under obligation for paying the rent to the landlord and that the service provider has paid the said amount on behalf of the recipient. **The claim for reimbursement of salary to staff, similarly has to be considered as to whether the staff were actually employed by the service recipient at agreed wages and the service recipient was under obligation to**

pay the salary and it was out of expediency, the provider paid the same and sought reimbursement from the service recipient."

The appellant has relied upon this case law in the grounds of appeal and contested that the adjudicating authority had misinterpreted the legal implications. Once again, the appellant has not explained as to how the contract has been mis-read or wrongly interpreted by the adjudicating authority. The appellant has not pointed out any clause in its contract with M/s ONGC to show as to how there was any legal or contractual obligation on M/s ONGC to make the reimbursement. On the other hand, in paragraph 17.4.1.2 of the impugned order, after discussing the aforementioned citation in detail, the adjudicating authority has distinguished the same on the basis of clause 29 & 35 of the contract between the appellant [referred to by the adjudicating authority as 'M/s GSGS'] in the following words:

"I find that in the instant case that the service recipients of M/s GSGS had no obligation legal or contractual to pay certain amount to any third party and no such amount was paid by the service provider on behalf of the service-recipient and therefore the question of reimbursing the expenses incurred on behalf of the recipient doesn't arise in the instant case. As regards the claim for reimbursement of salary to staff, I find that the staff were not actually employed by the service recipient at agreed wages and the service recipient was under obligation to pay the salary and it was not out of expediency, the provider paid the same and sought reimbursement from the service recipient. There is no employer-employee relationship between the staff of M/s GSGS and their Service recipients. The same has been clearly mentioned in Clause 29 (page 18 of the contract entered between M/s GSGS and M/s ONGC, Mehsana. For ease of reference, I reproduce the same as under:-

> *29. The contractor's Security Personnel shall have no right whatsoever to claim any employment in ONGC. There is no employer-employee relationship between ONGC and Security Personnel etc engaged by the contractors. No facility shall be extended to such persons by ONGC. The supervision of work of such persons will only be done by the contractor (s) himself, as per the direction/ requirement of ONGC's authorized representative.*

This is further strengthened by clause 35 (page NO. 20) of the contract entered between M/s GSGS and M/s ONGC, Mehsana. For ease of reference, I reproduce the same as under:-

> *35. All the benefits accruing to the employees of Security Agency like kits & liveries (uniform etc), leave, Group Insurance, PF, Bonus or any other service benefits would be the exclusive responsibility & liability of the contractor and not of ONGC. Such employees will be governed by terms and conditions of service of respective security agency/ contractor and not ONGC. "*

The above findings by the adjudicating authority clearly establishes that the facts of the instant case are at variance with the facts in the case of ***SHRI BHAGAVATHY TRADERS vs CCE, COCHIN – 2011 (24) S.T.R. 290 (Tri.-LB)*** and hence the reliance

placed by the appellant is misplaced. Similarly, the adjudicating authority has distinguished the case law ***GUJARAT INTELLIGENCE SECURITY vs COMMISSIONER OF CENTRAL EXCISE, VADOARA – 2010 (19) S.T.R. 270 (Tri.-Ahmedabad)*** in paragraph 17.4.1.3 of the impugned order on the ground that in that case, unlike the facts of the instant case, the duty payment was not challenged by M/s Gujarat Intelligence Security and they had only challenged the imposition of penalty. The appellant has also relied upon the case laws in the matter of ***INTERCONTINENTAL CONSULTANTS & TECHNOCRATS PVT. LTD. – 2013 (29) S.T.R. 9 (Del.)*** as well as ***BLOSSOM INDUSTRIES LIMITED vs COMMISSIONER OF CENTRAL EXCISE, CUSTOMS & S.T., DAMAN – 2016 (41) S.T.R. 872 (Tri.-Ahmd.)***. In these cases Rule 5(1) of Service Tax (Determination of Value) Rules, 2006 was held to be *ultra vires* Section 67 of the said Act, whereas in the instant case, there is no such contention made by the appellant. In the case of ***RELIANCE INDUSTRIES LTD. vs COMMISSIONER OF CENTRAL EXCISE, RAJKOT – 2008 (12) S.T.R 345 (Tri. – Ahmd.)***, relied upon by the appellant there was a specific Instructions by Board clarifying that expenses incurred on account of reimbursable expenses in Consulting Engineers services were not includible in taxable value. In the instant case, it has been clearly brought out in 17.4.3.1 of the impugned order that as per clarification by C.B.E.C. vide letter F.No. B.11/1/98-TRU dated 07/10/1998, no abatement can be granted in respect of such expenses incurred by Security Agency.

12. The appellant has contested the finding contained in paragraph 17.7 of the impugned order that it was charging and collecting Service Tax on the gross amount charged in the bill and not on the net amount and has submitted in their grounds of appeal that Service Tax was not entirely collected from M/s ONGC, since they were in continuous litigation and arbitration, where one of the aspect was non-payment of Service Tax by the M/s ONGC to the appellant. The mere fact that there was litigation between the appellant and M/s ONGC does not mean that Service Tax billed by the appellant had been rejected by M/s ONGC. In paragraph 17.8.1 and 17.8.2 of the impugned order, it has been clearly brought on the basis of Schedule F of Sundry Debtors in the Balance Sheet for 2003-04 that an amount of Rs.1,77,27,103.99 was shown against the name of M/s ONGC, Mehsana. Thereafter, responding to the inquiry made with M/s ONGC, the Manager (F&A), ONGC, Mehsana had submitted a letter Ref. No. MHN/F&A/PRE-AUDIT/2014-15 dated 12/03/2015 addressed to Assistant Commissioner, Central Excise, Mehsana, informing that as on date no payment was pending to be made by M/s ONGC to the appellant and it was also asserted that the future payments will also be made to the appellant in compliance of Section 87 of the said Act. The appellant has not at all contested the genuineness of any of the documents, scanned and reproduced in the impugned order and on the basis of which the adjudicating authority has arrived at the impugned findings. The contentions of the appellant against the findings are not supported by facts and figures. Therefore, the

contentions fail to negate the findings in the impugned order arrived at on the basis of inquiry at the end of the appellant as well as the service recipient.

13. The salient point in the impugned order are summarized as follows:

a) On the basis of detailed verification of Profit and Loss Account of the appellant for each year, Service Tax worked out on the basis of Net profit after the deductions such as Security Salary expenses, Security Service Kamdar Provident Fund income, Employee leave encashment, Security Guard Bonus expense, Security Guard ESI, office Staff Salary, Bank Guarantee commission, Telephone expense, tender fees, expenses for stationary & printing expenses, electricity expenses, advertisement, donation, postage & telegram and miscellaneous expenses happens to be more than the demand worked out by investigation and confirmed in the impugned order. Therefore, the contention of the appellant that such deductions were not made is factually incorrect.

b) The recipient of Service in the instant case was not under any legal or contractual obligation with the appellant to make reimbursement of all the expenses. Therefore, the reliance placed by the appellant on the citation ***SHRI BHAGAVATHY TRADERS vs CCE, COCHIN – 2011 (24) S.T.R. 290 (Tri.LB)*** is misplaced. Similarly, the case law ***GUJARAT INTELLIGENCE SECURITY vs COMMISSIONER OF CENTRAL EXCISE, VADOARA – 2010 (19) S.T.R. 270 (Tri.-Ahmedabad)*** has been distinguished on the ground that in that case payment of duty was agreed upon and only imposition of penalty was challenged, whereas in the instant case, the dispute pertains to undervaluation and short payment of duty.

c) As per inquiry with M/s ONGC, the service recipient had paid up the Service Tax billed by the appellant and hence there is no merit in the contention of the appellant that the payment of Service Tax was pending at the end of M/s ONGC, Mehsana.

d) The confessional statements made by the proprietor before the investigation providing all the details based on which the demand was worked out are valid as they have not been retracted. The facts confirmed at the end of the service recipient in the statement and letter of the Manager (F&A), ONGC, Mehsana corroborate the findings deduced in the impugned order.

14. In view of the above, the confirmation of demand in the impugned order is correct and sustainable. Therefore, the levy of interest is also justified. The appellant has not challenged the invoking of extended period of demand on the grounds of suppression of facts in the grounds of appeal. The appellant has challenged the levy of interest and the imposition of penalties without the backing of any valid ground. The ingredients for

invoking extended period are similar for imposing penalty under Section 78 of the said Act. Therefore, the same is sustainable. Penalty under Section 76 of the said Act has been imposed for contravention of Section 68 of the said Act read with Rule 6 of the Service Tax Rules, 1994 by failing to pay tax and for contravention of Section 70 of the said Act read with Rule 7 of the said Rules for failure to assess the correct tax and file correct S.T.-3 returns. The imposition of this penalty and the levy of interest are proper and valid and merit no intervention. In view of the above findings, the appeal is rejected.

15. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stand disposed of in above terms.

(उमा शंकर)
आयुक्त (अपील्स - I)

Date: 23/02/2017

Attested

(K.P. Jacob)
Superintendent (Appeal-I)
Central Excise, Ahmedabad

BY R.P.A.D.

To,
M/s Gujarat Security Guard Services,
2,Shankar Estate, Ground Floor,
Near Gayatri Temple Highway, Mehsana.

Copy to:

1. The Chief Commissioner of Central Excise Zone, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III.
3. The Deputy Director, D.G.C.E.I., AZU, 1st Floor, Preema Chambers, Above Central Bank of India, Mithakhali Six Roads, Navrangpura, Ahmedabad – 380 009.
4. The Additional Commissioner (Systems) Central Excise, Ahmedabad - III
5. The Dy./Asstt. Commissioner, Service Tax Division, Gandhinagar.
6. Guard file
7. P. A.