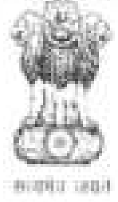
::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,

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: cexappealsrajkot@gmail.com



रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. **V2/235/BVR/ 2017**	मूल आदेश सं / O.I.O. No. **122/AC/Stax/Div/2016-17**	दिनांक / Date **31.03.2017**

3593 to 3595

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

BHV-EXCUS-000-APP-172-2017-18

आदेश का दिनांक / Date of Order:	**23.02.2018**	जारी करने की तारीख / Date of issue:	**14.03.2018**

Passed by **Shri Suresh Nandanwar, Commissioner, Central Goods and Service Tax (Audit), Ahmedabad.**

अधिसूचना संख्या २६.१७दिनांक (.टी.एन) .शु.उ.के-२०१७/१० २०१७.के साथ पढ़े बोर्ड ऑफिस आदेश सं . .१६दिनांक .टी.एस-२०१७/०५११ ,के अनुसरण मे २०१७.श्री सुरेश नंदनवार .आयुक्त , केंद्रीय वस्तु एवं सेवा कर (लेखा परीक्षा)की धारा १९९४अहमदाबाद को वित्त अधिनियम , ८५की १९४४यम केंद्रीय उत्पाद शुल्क अधिनि , के अंतर्गत दर्ज की ३५धारा गई अपीलो के सन्दर्भ मे आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.217 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Suresh Nandanwar, Commissioner ,Central Goods and Service Tax (Audit), Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ 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 / Service Tax, Rajkot / Jamnagar / Gandhidham :

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

M/s Vrindavan Plaza P. Ltd., Plot No. 36, Dharam Palace, Chitranjan Chowk, Vidhyanagar Bhavnagar,

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके मे 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) मे 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- ३८००१६ 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- 1(a) above

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(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 मे दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मॉग ,ब्याज की मॉग 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 सॉर्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा मे होना चाहिए जहा संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 मे चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ मे संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मॉग ,ब्याज की मॉग 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 मे होना चाहिए जहा संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 मे की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलो के मामले मे केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ 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 (स. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/

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.

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

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

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के 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 ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

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

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहां संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए ।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding 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 मामलो को सम्मिलित 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

BRIEF FACT OF THE CASE;

M/s. Vrindavan Plaza Pvt Ltd., Plot No.36,Dharam Palace, Chitranjan Chowk, Vidyanagar, Bhavnagar hereinafter referred to as 'the appellant') has filed the appeal on 07.06.2017 against Order-in-Original No. 122/AC/stax/DIV/2016-17 dated 20.01.2017(hereafter referred to as "the impugned order")passed by the Assistant Commissioner(AE), Central Excise,HQ, Bhavnagar(hereinafter referred to as 'the adjudicating authority').

2. The facts of the case are that the appellant are holding service tax registration No. AABCV3971BST001 dated 13.02.2015 under the category "Mandeep Keper" service' which was changed under "Renting of Immovable property Service" on 21.12.2012 and further under "Other than Negative List'. The appellant in pursuance to guideline vide Board's Circular No. 165/16/2012-ST dated 20.11.2012 further amended the service tax category under "Renting of Immovable property Service" on 19.02.2013. On inquiry with reference to said change, the appellant provided copy of "Management Agreement" dated 19.04.2007 made between them and M/s. Wockhardt Hospitals Pvt Ltd, Mumbai (hereinafter referred to as'WHL'). It revealed from said agreement that: property situated at Plot No. 1139,near Meghani Circle, Bhavnagar owned by the appellant was given on rent to the WHL, that appellant intended to provide health services, agreed for running, operating and managing the hospital in the said property, that appellant was entitled to receive 8% value of net sale of the hospital, that WHL' shall be responsible for running, operating and managing the hospital and to comply with required law/obtain necessary permissions etc, and the appellant shall only be responsible for matters pertaining to hospital land, building, property and equipments if any owned by them. Since the appellant amended the service tax registration on 21.12.2012, from "Mandeep Keper" to "Renting of Immovable property" service, it revealed that the appellant was engaged in providing taxable services falling under category "Renting of Immovable property Service" as defined under erstwhile Section 65(90a) and assessed to taxable under Section 65 (105)(zzzz) of the Finance Act 1994 which was from 01.07.2012 covered under Section 65B (44) and leviable to tax under Section 66B read with 66D of the Finance Act 1994. Therefore, a show cause notice dated 11.10.2013 demanding service tax of Rs.37,51,989/- on the amount of consideration Rs. 3,48,76,112/- received from 'WHL' during the period 2008-09 to 2012-13 (upto 30.06.2012) was issued to the appellant which was decided by the adjudicating authority under the impugned order confirming said demand alongwith interest & imposing penalty holding it taxable under "Renting of Immovable property" service.

3. Aggrieved, the appellants filed this appeal contesting interalia the following:

- Order has been passed without verifying the factual position, no evidence produced on record to prove the allegations raised by the department.
- Demand confirmed without understanding business of the appellant and also overlooking submission made by the appellant.

- Finding in the order not given on the issue i.e. 1. Under agreement the appellant giving away right to manage or operate the hospital premise. 2. Transaction does not amount to "Renting of Immovable property" service. 3. The appellant entitled for cum tax duty benefit as per the judgment in case of Cyril Lasardo (Dead) V/s Juliana Maria Lasardo 2004(7) SSC 431.
- The order has failed in the right to reason which is indispensable part of said judicial system- which has not been followed. Similar view expressed in judgment in case of State of West Bengal v. Atul Krishna Shaw 1991 Supp(1) SSC 414 & Additional Commissioner, Commercial Tax Department Vs. Shukla & Brothers 2010(254) ELT 6(SC).
- The appellants have entered agreement with WHL for giving away right to manage or operate the hospital premises since the same is not a specified category under Finance Act, 1994. The appellant cannot be made liable to pay service tax on the same.
- The company has one of its object under MoA for providing medical service. Since they are not technically competent to start and run hospital, they entered into Management Agreement dated 18.04.2007 with WHL as per which they were entitled to receive agreed percentage of net sale as consideration.
- The agreement is purely for right to conduct, run and operate the hospital and there is no service element.
- Right to conduct, run and operate the hospital is not in the nature of hiring of persons for rendering any service.
- As per the judgment in case of C.K.P Mandal vs CCE, Mumbai IV 2006(4) S.T.R 183(Bom.) there can be no levy of service tax on grant of monopoly rights.
- Prior to negative list regime, there was no such category which can absorb such arrangements of providing right to operate the hospital business under Finance Act, 1994.
- Service category disclosed in service tax returns cannot be considered as acceptance of provision of service under that category.
- The service provided by the appellant are providing right to operate hospital business and taxability should be determined accordingly.
- As per agreement the contract clearly mention right to manage or operate the hospital premise only. Prior to 2012 no service tax were paid as there was no such category under the Finance Act, 1994 which can absorb such arrangements. However post negative list, the appellant was required to pay service tax on consideration received in view of entitling WHL right to operate. Hence, convenience of registration and tax payment, they sought shelter of service tax category Renting of Immovable property and hence in Nov, 2012 they changed it from "Mandap keeper Service" to "Renting of immovable property service".
- Mere discloser shall not be construed as having accepted the provision of service under that category. For the said view the sighted following judgments:
  1. Dunlop India Ltd., 1983 (13) ELT 1566(SC).

2. Bosch Chasis System India Ltd. 2008(232) E.L.T. 622 (Tri.-LB).
3. Mico Ltd. 2001 (136) E.L.T. 649(Tri.- Bang.)
4. Dodsal Pvt. Ltd 2006 (193) E.L.T. 518(Tri.- Mumbai.)

- Finding of the adjudicating authority that appellant have resolved the dispute regarding nature of service is not sustainable in law.
- The actual usage of the property is for providing health care services and not in furtherance of commerce or business. Health care services are specifically exempt from the payment of service tax. The department cannot levy service tax on health care services indirectly by getting the same covered under "Renting of immovable property".
- The property is specifically let out for use of health care service and not for business or commerce purpose.
- Plain reading of the statutory definition of tax entry Section 65 (90a) for Renting of immovable property, Section 65(105)(zzzz)- will make it clear that property should be put to use of business or commerce and in the absence of such usage, the property, can not put to service tax liability. There is no doubt that WHL is using said property for providing health care services which is exempted from service tax by way of notification 30/2011-ST dated 25.11.2011.
- Department is indirectly trying to tax medical service by bringing them under Renting of immovable property service.
- Without prejudice, the department has failed to appreciate that the transaction does not amount to Renting of immovable property service.
- The intention of the agreement is to avail of the professional expertise and competency and experience in running and management of hospital by WHL.
- Provisions of Section 65 (90a) which applied to renting of immovable property service can be invoke/applied only when primary/dominant intension of the parties is to give on rent, lease etc.
- The transaction is entered into for giving away the right to manage or control of the hospital premises and premises have nowhere been rented or lease to WHL. Agreement nowhere says that rent is paid.
- Without prejudice to the above submission the arrangement between the appellants and WHL is one of revenue sharing and not one of provision of any service.
- As per CESTAT decision in case of Nirulas Corner House Pvt. Ltd Vs. CCE 2009(14) STR 131(T), the assessee was not liable to service tax under management consultant service.
- Quantification of the demand is incorrect to the extent it covers the advance amount of refund to WHL.
- Advance payment of Rs.1,02,50,000/- has been refunded by cheque to WHL.

- Amount received should be taken as cum duty price. They relied on following judgment:
  1. Sri Chakra Tyres 1999(108) ELT 361,
  2. CCE vs. Maruti Udyog Limited 2002(49) RLT 1(SC),
  3. CCE &C, Patna Vs. Advantage Media Consultant (2008(10) S.T.R. 449(Tri.-Kol).
- The issue involved in the present case is purely interpretational in nature. Hence, the extended period cannot be invoked. They relied on following judgment:
  1. Continental Foundation V/s. CCE 2007(216) ELT 177(SC),
  2. Padmini Products 1989 (43) ELT 195(SC),
  3. Steel Cast Limited (2009) 14 STR 129.
- The finding of the adjudicating authority that nonpayment of Service tax came to knowledge of the department only during course of inquiry is incorrect.
- Burden is on the department to substantiate that there is intent on part of the appellant to evade payment of duty. No such documents bought on records by the department.
- No penalty imposable on the appellant in the facts and circumstances of the present case under section 77 & 78 of the Finance Act, 1994.
- The question involved in the present case is purely of interpretation of law. Therefore, penalty cannot be imposed under Section 80 of the Act.
- Penalty under Section 77 is not sustainable if assessee were under bonafied belief that they were not liable to service tax. They relied on Tribunal judgment in case of Flyingman Air Courier (P) Ltd. Vs. CCE Jaipur 2004(170) E.L.T. 417(T).
- Penalty under Section 76, 77 & 78 of the Finance Act, 1994 is not mandatory in view of Section 80 as held in the following case of Hon'ble Bombay High Court cases: 1. Vinay Bele & Associates 2008(9) STR 350(Bom.), 2. Ashish Patil 2008(10) STR 8(Bom.).
- It was requested to allow the appeal and quash and set aside the impugned order.

4. PERSONAL HEARING:

Personal hearing was given to the appellant on 16.02.2018 wherein Ms. Madhu Jain, advocate appeared on behalf of the appellant. She reiterated the grounds of appeal and relied upon the decision of CESTAT in the case of Mormugao Port Trust Vs. Commissioner of Customs, Central Excise & Service Tax, Goa in their favor.

5. DISCUSSION AND FINDINGS:

I have carefully gone through the record of the case, appeal memorandum, submissions made by the appellant during personal hearing. The issue to be decided in present appeal is whether the consideration received is chargeable to service tax and whether the same is covered under the purview of service tax category "Renting of Immovable property" service. In order to apprehend the activities undertaken by the appellant for which consideration has been received, it would be essential to sum up the terms of the agreement

(i.e. Management Agreement) dated 19.04.2007 made between the appellant and M/s. Wockhardt Hospitals Pvt Ltd, Mumbai. As per the terms of said agreement, appellant has appointed WHL to establish, run, manage, operate hospital in the name & style of 'Wockhardt Hospital' in said premises which is owned by the appellant;, that WHL shall do all necessary acts deeds and things for the purpose of appointment of doctors, nurses, enter into other contractual agreements, comply with required law and obtain necessary permissions, consents, licenses, approval from government and other authorities; that the appellant shall only be responsible for any matter pertaining to hospital land, building property; that the appellant has no right, title and interest in the said hospital building and land; that as a consideration, the appellant is entitled to receive revenue calculated at 8% of the net sale etc.,

6. It would be appropriate to peruse the statutory provisions related to 'Renting of Immovable property' service. As per erstwhile sub-section (90a) of Section 65 of the Finance Act 1994.

"renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include—

(*i*) renting of immovable property by a religious body or to a religious body; or

(*ii*) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre.

Explanation. [*1*]—For the purposes of this clause, "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings.]

[*Explanation 2.*—For the removal of doubts, it is hereby declared that for the purposes of this clause "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property;]

As per erstwhile clause (zzzz) of sub-section 105 of Section 65 of Finance Act 1994 taxable service means service provided:

- to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or for furtherance of, business or commerce.

Explanation 1.—For the purposes of this sub-clause, "immovable property" includes—

(*i*) building and part of a building, and the land appurtenant thereto;
(*ii*) land incidental to the use of such building or part of a building;
(*iii*) the common or shared areas and facilities relating thereto; and
(*iv*) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,

but does not include—

(*a*) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
(*b*) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
(*c*) land used for educational, sports, circus, entertainment and parking purposes; and
(*d*) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

From the plain reading of the above phrases one can understood that Renting of Immovable property includes renting, letting, leasing, licensing or other arrangements of immovable property. In this regard, definition of 'lease' as per section 105 of the Transfer of Property Act stipulates that "*A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other things of value, to be rendered periodically or on specified occasions to the transferor by the transferee , who accepts the transfer on such terms*". Altogether reading of the above provisions makes it clear that the property i.e. land/building owned by the appellant is nothing but transfer of rights to enjoy the use of the property for certain period of times (here it is for 30 years) against consideration in the form of money/share of revenue etc. The said agreement incorporates all the above ingredients. As such the agreement is nothing but a lease agreement of immovable property and also able to be considered as 'similar other arrangements' as used in the above provisions.

7. The exclusion items under said definition applies to religious body, educational body only. As like educational body or religious body, health care item is not covered under exclusion category specified in the definition which shows that it was never the intention of the government not to tax the income earned from the use of land/building where activities related to health care are performed. In order not to keep out of tax net any activities which were used in its support, the health care services by a clinical establishment/an authorized medical practitioner only were included under the exemption notification no. 25/2012-ST dated 20.06.2012. Further, the explanation clause 2 of said provision also clarifies that use of immovable property without transfer of possession or control is covered under 'Renting of Immovable property' service. Explanation - 1 of definition provided in erstwhile Section 65(105)(zzzz) also clarifies that building and part of a building and the land appurtenant thereto are included in 'Renting of Immovable Property' services.

Above provisions makes it clear that use of building for whatever purpose or arrangements on receipt of consideration are covered under 'Renting of Immovable Property' service unless it falls in the exclusion list mentioned therein. Once the fact of use of immovable property on receipt of specific consideration has been established, the nature of arrangements in whatever name (i.e. rent, revenue share etc.) does not matter and cannot alter its taxability.

8. The contention of the appellant that actual use of the property is for providing health care services which are specifically exempted from service tax – does not holds good for the reasons that health care services provided by WHL to their clients are not the subject matter of the dispute. Any consideration received by M/s. WHL from their clients has not been attempted to be taxed in the present proceedings nor it can be. By taking shelter of said exemption which is provided to health care services under notification no. 25/2012-ST dated 20.06.2012, the appellant cannot escape from their statutory liability which has arisen on account of earning from allowing use of immovable property owned by them. Further, the plea of the appellant that prior to negative list regime, there was no such category which can absorb such arrangement of providing right to operate the hospital business – has also no leg to stand in the background where arrangements between both the parties are made only

because of the availability/existence of immovable property in the hands of the appellant. Whatever consideration in monitory form has been agreed for, the same is for enjoying the use of property for specific tenure. Though it is not recovered in the name of 'rent', the same cannot escape its taxability. The appellant has relied upon mainly on the judgment in case of M/s. Mormugao Port Trust v/s Commissioner of Custom, Central Excise & Service Tax, Goa in support of their claim. I find that the fact of the present case is different in as much as in said case port services were jointly rendered for earning profit, both the parties were jointly controlling the operations of cargo handling berths, relation between both the parties were of co-venture, amount received was under the nomenclature of royalty etc., Therefore, the ratio of said case which has arose out of different facts, cannot be made applicable to the present case.

9. With reference to quantification of the demand the appellant have made a plea that the same is incorrect to the extent it has covered Rs.1,02,50,000/- which has been refunded to WHL and the demand should be on cum duty price. However, in absence of any documentary evidence to support their claim, the same cannot be considered.

10. Further, the Finance Bill 2010 has made an amendment with retrospective effect from 01.06.2007 in the definition of taxable service 'Renting of Immovable Property' to provide explicitly that the activity of 'renting' itself is a taxable service. Constitutional validity of levy of service tax has also been upheld by various courts. In view of the above I find that the service provided by the appellant to WHL falls within the ambit of taxable service as defined under sub-section 65(90a) read with clause (zzzz)of sub section 105 of the Finance Act 1994 and correctly classifiable under 'Renting of Immovable Property' service and liable to service tax on consideration received by them.

11. So far as invocation of extended period of demand is concerned, I find that the fact that the appellant had not taken into account the correct taxable value for the purpose of payment of service tax as applicable to them. It revealed only during the verification of records of the appellant carried out by the department. This act of deliberate defiance of law has to be reprimanded. I, therefore find that extended period has been correctly invoked for demand of service tax. The case laws cited by the appellant are not relevant in the instant case as they had failed to fulfill their legal obligation by assessing the true taxable value and discharging the service tax liability on the same.

The Hon'ble Supreme Court in the case of Commissioner of C. Ex., Aurangabad Versus Bajaj Auto Ltd - 2010 (260) E.L.T. 17 (S.C.) – has held:

> *"12. Section 11A of the Act empowers the central excise officer to initiate proceedings where duty has not been levied or short levied within six months from the relevant date. But the proviso to Section 11A(1), provides an extended period of limitation provided the duty is not levied or paid or which has been short-levied or short-paid or erroneously refunded, if there is fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty. The extended period so provided is of five years instead of six months. Since the proviso extends the period of limitation from six months to five years, it*

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needs to be construed strictly. The initial burden is on the department to prove that the situation visualized by the proviso existed. But the burden shifts on the assessee once the department is able to produce material to show that the appellant is guilty of any of those situations visualized in the Section."

In this case also I find that the department has been able to bring on record that the appellant had failed to pay service tax. The appellant failed to offer any plausible explanation except to cite some judgments, which as discussed supra I have found to be distinguishable in the facts of the present case. Therefore, I find that the extended period for demand of service tax not paid, is rightly invoked in this case. I also find that by acting in the manner as above, the said appellant have rendered themselves liable for penal action under Section 78 of the Finance Act.

12. In view of the above finding, I do not find infirmity in the order of the lower authority. Accordingly I passed the following order.

ORDER

I reject the appeal and uphold the impugned order.

(Suresh Nandanwar)
Commissioner
Central Tax Audit,
Ahmedabad.

F.NO. V2/235/BVR/2017

23.02.2018.

To,

M/s. Vrindavan Plaza Pvt ltd.,
Plot No. 36, Dharam Palace,
Chitranjan Chowk, Vidhyanagar,
Bhavnagar.

Copy to:

1. The Chief Commissioner, CGST, Ahmedabad.
2. The Commissioner, CGST, Bhavnagar.
3. The Assistant Commissioner, CGST, (AE) Bhavnagar.
4. 3. The Assistant Commissioner, CGST, Division-Bhavnagar.
5. The Superintendent, CGST, Range- Bhavnagar.
6. Guard file.

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property" service, 3. The appellant entitled for cum tax duty benefit as per the judgment in case of Cyril Lasardo (Dead) V/s Juliana Maria Lasardo 2004(7) SSC 431.

- The order has failed in the right to reason which is indispensable part of said judicial system- which has not been followed. Similar view expressed in judgment in case of State of West Bengal v. Atul Krishna Shaw 1991 Supp(1) SSC 414 & Additional Commissioner, Commercial Tax Department Vs. Shukla & Brothers 2010(254) ELT 6(SC).
- The appellants have entered agreement with WHL for giving away right to manage or operate the hospital premises since the same is not a specified category under Finance Act, 1994. The appellant cannot be made liable to pay service tax on the same.
- The company has one of its object under MoA for providing medical service. Since they are not technically competent to start and run hospital, they entered into Management Agreement dated 18.04.2007 with WHL as per which they were entitled to received agreed percentage of net sale as consideration.
- The agreement is purely for right to conduct, run and operate the hospital and there is no service element.
- Right to conduct, run and operate the hospital is not in the nature of hiring of persons for rendering any service.
- As per the judgment in case of C.K.P Mandal vs CCE, Mumbai IV 2006(4) S.T.R 183(Bom.) there can be no levy of service tax on grant of monopoly rights.
- Prior to negative list regime, there was no such category which can absorb such arrangements of providing right to operate the hospital business under Finance Act, 1994.
- Service category disclosed in service tax returns cannot be considered as acceptance of provision of service under that category.
- The service provided by the appellant are providing right to operate hospital business and taxability should be determine accordingly.
- As per agreement the contract clearly mention right to manage or operate the hospital premise only. Prior to 2012 no service tax were paid as there was no such category under the Finance Act, 1994 which can absorb such arrangements. However post negative list, the appellant was required to pay service tax on consideration received in view of entitling WHL right to operate. Hence, convenience of registration and tax payment, they sought shelter of service tax category Renting of Immovable property and hence in Nov, 2012 they changed it from "Mandap keeper Service" to "Renting of immovable property service".
- Mere discloser shall not be construed as having accepted the provision of service under that category. For the said view they sighted following judgments:
  1. Dunlop India Ltd., 1983 (13) ELT 1566(SC).
  2. Bosch Chasis System India Ltd. 2008(232) E.L.T. 622 (Tri.-LB).
  3. Mico Ltd. 2001 (136) E.L.T. 649(Tri.- Bang.)
  4. Dodsal Pvt. Ltd 2006 (193) E.L.T. 518(Tri.- Mumbai.)

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- Finding of the adjudicating authority that appellant have resolved the dispute regarding nature of service is not sustainable in law.
- The actual usage of the property is for providing health care services and not in furtherance of commerce or business. Health care services are specifically exempt from the payment of service tax. The department cannot levy service tax on health care services indirectly by getting the same covered under "Renting of immovable property".
- The property is specifically let out for use of health care service and not for business or commerce purpose.
- Plain reading of the statutory definition of tax entry Section 65 (90a) for Renting of immovable property, Section 65(105)(zzzz)- will make it clear that property should be put to use of business or commerce and in the absence of such usage, the property, can not put to service tax liability. There is no doubt that WHL is using said property for providing health care services which is exempted from service tax by way of notification 30/2011-ST dated 25.11.2011.
- Department is indirectly trying to tax medical service by bringing them under Renting of immovable property service.
- Without prejudice, the department has failed to appreciate that the transaction does not amount to Renting of immovable property service.
- The intention of the agreement is to avail of the professional expertise and competency and experience in running and management of hospital by WHL.
- Provisions of Section 65 (90a) which applied to renting of immovable property service can be invoke/applied only when primary/dominant intension of the parties is to give on rent, lease etc.
- The transaction is entered into for giving away the right to manage or control of the hospital premises and premises have nowhere been rented or lease to WHL. Agreement nowhere says that rent is paid.
- Without prejudice to the above submission the arrangement between the appellants and WHL is one of revenue sharing and not one of provision of any service.
- As per CESTAT decision in case of Nirulas Corner House Pvt. Ltd Vs. CCE 2009(14) STR 131(T), the assessee was not liable to service tax under management consultant service.
- Quantification of the demand is incorrect to the extent its covers the advance amount of refund to WHL.
- Advance payment of Rs.1,02,50,000/- has been refunded by cheque to WHL.
- Amount received should be taken as cum duty price. They relied on following judgment:

  1. Sri Chakra Tyres 1999(108) ELT 361,
  2. CCE vs. Maruti Udyog Limited 2002(49) RLT 1(SC),
  3. CCE &C, Patna Vs. Advantage Media Consultant (2008(10) S.T.R. 449(Tri.-Kol).

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- The issue involved in the present case is purely interpretational in nature. Hence, the extended period cannot be invoked. They relied on following judgment:
  1. Continental Foundation V/s. CCE 2007(216) ELT 177(SC).
  2. Padmini Products 1989 (43) ELT 195(SC).
  3. Steel Cast Limited (2009) 14 STR 129.
- The finding of the adjudicating authority that nonpayment of Service tax came to knowledge of the department only during course of inquiry is incorrect.
- Burden is on the department to substantiate that there is intent on part of the appellant to evade payment of duty. No such documents bought on records by the department.
- No penalty imposable on the appellant in the facts and circumstances of the present case under section 77 & 78 of the Finance Act, 1994.
- The question involve in the present case is purely of interpretation of law. Therefore no penalty cannot be imposed under Section 80 of the Act.
- Penalty under Section 77 is not sustainable if assessee were under bonafied belief that they were not liable to service tax. They relied on Tribunal judgment in case of Flyingman Air Courier (P) Ltd. Vs. CCE Jaipur 2004(170) E.L.T. 417(T).
- Penalty under Section 76, 77 & 78 of the Finance Act, 1994 is not mandatory in view of Section 80 as held in the following case of Hon'ble Bombay High Court cases: 1. Vinay Bele & Associates 2008(9) STR 350(Bom.), 2. Ashish Patil 2008(10) STR 8(Bom.).
- It was requested to allow the appeal and quash and set aside the impugned order.

4. PERSONAL HEARING:

Personal hearing was given to the appellants on 16.02.2018 wherein Ms. Madhu Jain, advocate appeared on behalf of the appellant. She reiterated the grounds of appeal and relied upon the decision of CESTAT in the case of Marmugao Port Trust Vs. Commissioner of Customs, Central Excise & Service Tax, Goa in their favor.

5. DISCUSSION AND FINDINGS:

I have carefully gone through the record of the case, appeal memorandum, submissions made by the appellant during personal hearing. The issue to be decided in present appeal is whether the consideration received is chargeable to service tax and whether the same is covered under the purview of service tax category "Renting of Immovable property" service. In order to apprehend the activities undertaken by the appellant for which consideration has been received, it would be essential to sum up the terms of the agreement (i.e. Management Agreement) dated 19.04.2007 made between the appellant and M/s. Wockhardt Hospitals Pvt Ltd, Mumbai. As per the terms of said agreement appellant has appointed WHL to establish, run, manage, operate hospital in the name & style of 'Wockhardt Hospital' in said premises which is owned by the appellant;, that WHL shall do all necessary acts deeds and things for the purpose of appointment of doctors, nurses, enter into other contractual

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agreements, comply with required law and obtain necessary permissions,consents,licenses,approval from government and other authorities; that the appellant shall only be responsible for any matter pertaining to hospital land, building property; that the appellant has no right ,title and interest in the said hospital building and land; that as a consideration, the appellant is entitled to receive revenue calculated at 8% of the net sale etc.,

6. It would be appropriate to peruse the statutory provisions related to 'Renting of Immovable property' service. As per erstwhile sub-section (90a) of Section 65 of the Finance Act 1994.

"renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include—

(*i*) renting of immovable property by a religious body or to a religious body; or

(*ii*) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre.

Explanation. [*1*]—For the purposes of this clause, "for use in the course or furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings.]

[*Explanation 2.*—For the removal of doubts, it is hereby declared that for the purposes of this clause "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property;]

As per erstwhile clause (*zzzz*) of sub-section 105 of Section 65 of Finance Act 1994 taxable service means service provided:

to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or for furtherance of, business or commerce.

Explanation 1.—For the purposes of this sub-clause, "immovable property" includes—

(*i*) building and part of a building, and the land appurtenant thereto;
(*ii*) land incidental to the use of such building or part of a building;
(*iii*) the common or shared areas and facilities relating thereto; and
(*iv*) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,

but does not include—

(*a*) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
(*b*) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
(*c*) land used for educational, sports, circus, entertainment and parking purposes; and
(*d*) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

From the plain reading of the above phrases one can understood that Renting of Immovable property includes renting, letting, leasing, licensing or other arrangements of immovable property. In this regard, definition of 'lease' as per section 105 of the Transfer of Property Act stipulates that "*A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied or in perpetuity, in consideration of a price paid or promised, or*

of money, a share of crops, service or any other things of value, to be rendered periodically or on specified occasions to the transferor by the transferee , who accepts the transfer on such terms". Altogether reading of the above provisions makes it clear that the property i.e. land/building owned by the appellant is nothing but transfer of rights to enjoy the use of the property for certain period of times (here it is for 30 years) against consideration in the form of money/share of revenue etc. The said agreement incorporates all the above ingredients. As such the agreement is nothing but a lease agreement of immovable property and also able to be considered as 'similar other arrangements' as used in the above provisions.

7. The exclusion items under said definition applies to religious body, educational body only. As like educational body or religious body, health care item is not covered under exclusion category specified in the definition which shows that it was never the intention of the government not to tax the income earned from the use of land/building where activities related to health care are performed. In order not to keep out of tax net any activities which were used in its support, the health care services by a clinical establishment/an authorized medical practitioner only were included under the exemption notification no. 25/2012-ST dated 20.06.2012. Further, the explanation clause 2 of said provision also clarifies that use of immovable property without transfer of possession or control is covered under 'Renting of Immovable property' service. Explanation - 1 of definition provided in erstwhile Section 65(105)(zzzz) also clarifies that building and part of a building and the land appurtenant thereto are included in 'Renting of Immovable Property' services.

Above provisions makes it clear that use of building for whatever purpose or arrangements on receipt of consideration are covered under 'Renting of Immovable Property' service unless it falls in the exclusion list mentioned therein. Once the fact of use of immovable property on receipt of specific consideration has been established, the nature of arrangements in whatever name (i.e. rent, revenue share etc.) does not matter and cannot alter its taxability.

8. The contention of the appellant that actual use of the property is for providing health care services which are specifically exempted from service tax – does not holds good for the reasons that health care services provided by WHL to their clients are not the subject matter of the dispute. Any consideration received by M/s. WHL from their clients has not been attempted to be taxed in the present proceedings nor it can be. By taking shelter of said exemption which is provided to health care services under notification no. 25/2012-ST dated 20.06.2012, the appellant cannot escape from their statutory liability which has arisen on account of earning from allowing use of immovable property owned by them. Further, the plea of the appellant that prior to negative list regime, there was no such category which can absorb such arrangement of providing right to operate the hospital business – has also no leg to stand in the background where arrangements between both the parties are made only because of the availability/existence of immovable property in the hands of the appellant. Whatever consideration in monitory form has been agreed for, the same is for enjoying the use of property for specific tenure. Though it is not recovered in the name of 'rent', the same cannot escape its taxability. The appellant has relied upon mainly on the judgment in case of M/s. Mormugao Port Trust v/s Commissioner of Custom, Central Excise & Service Tax, Goa in

support of their claim. I find that the fact of the present case is different in as much as in said case port services were jointly rendered for earning profit, both the parties were jointly controlling the operations of cargo handling berths, relation between both the parties were of co-venture, amount received was under the nomenclature of royalty etc., Therefore, the ratio of said case which has arose out of different facts, cannot be made applicable to the present case.

9. With reference to quantification of the demand the appellant have made a plea that the same is incorrect to the extent it has covered Rs.1,02,50,000/- which has been refunded to WHL and the demand should be on cum duty price. However, in absence of any documentary evidence to support their claim, the same cannot be considered.

10. Further, the Finance Bill 2010 has made an amendment with retrospective effect from 01.06.2007 in the definition of taxable service 'Renting of Immovable Property' to provide explicitly that the activity of 'renting' itself is a taxable service. Constitutional validity of levy of service tax has also been upheld by various courts. In view of the above I find that the service provided by the appellant to WHL falls within the ambit of taxable service as defined under sub-section 65(90a) read with clause (zzzz)of sub section 105 of the Finance Act 1994 and correctly classifiable under 'Renting of Immovable Property' service and liable to service tax on consideration received by them.

11. So far as invocation of extended period of demand is concerned, I find that the fact that the appellant had not taken into account the correct taxable value for the purpose of payment of service tax as applicable to them. It revealed only during the verification of records of the appellant carried out by the department. This act of deliberate defiance of law has to be reprimanded. I, therefore find that extended period has been correctly invoked for demand of service tax. The case laws cited by the appellant are not relevant in the instant case as they had failed to fulfill their legal obligation by assessing the true taxable value and discharging the service tax liability on the same.

The Hon'ble Supreme Court in the case of Commissioner of C. Ex., Aurangabad Versus Bajaj Auto Ltd - 2010 (260) E.L.T. 17 (S.C.) – has held:

> *"12. Section 11A of the Act empowers the central excise officer to initiate proceedings where duty has not been levied or short levied within six months from the relevant date. But the proviso to Section 11A(1), provides an extended period of limitation provided the duty is not levied or paid or which has been short-levied or short-paid or erroneously refunded, if there is fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty. The extended period so provided is of five years instead of six months. Since the proviso extends the period of limitation from six months to five years, it needs to be construed strictly. <u>The initial burden is on the department to prove that the situation visualized by the proviso existed. But the burden shifts on the assessee once the department is able to produce material to show that the appellant is guilty of any of those situations visualized in the Section</u>."*

In this case also I find that the department has been able to bring on record that the appellant had failed to pay service tax. The appellant failed to offer any plausible explanation except to cite some judgments, which as discussed supra I have found to be distinguishable in the facts of the present case. Therefore, I find that the extended period for demand of service tax not paid, is rightly invoked in this case. I also find that by acting in the manner as above, the said appellant have rendered themselves liable for penal action under Section 78 of the Finance Act.

12. In view of the above finding, I do not find infirmity in the order of the lower authority. Accordingly I passed the following order.

ORDER

I reject the appeal and uphold the impugned order.

(Suresh Nandanwar)
Commissioner of CGST,
Audit, Ahmedabad.

F.NO. V2/235/BVR/2017 28.02.2018.

To,

1. M/s. Vrindavan Plaza Pvt ltd.,
   Plot No. 36, Dharam Palace,
   Chitranjan Chowk, Vidhyanagar,
   Bhavnagar.

Copy to:

1. The Chief Commissioner, CGST, Ahmedabad.
2. The Commissioner, CGST, Bhavnagar.
3. The Assistant Commissioner, CGST, (AE) Bhavnagar.
4. 3. The Assistant Commissioner, CGST, Division-Bhavnagar.
5. The Superintendent, CGST, Range- Bhavnagar.
6. Guard file.