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

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142 Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :- 4239 to 4242

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/163 /RAJ/2016	53/ADC/PV/2015-16	31.03.2016

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

RAJ-EXCUS-000-APP-036 -2017-18

आदेश का दिनांक / Date of Order:	30.08.2017	जारी करने की तारीख / Date of issue:	31.08.2017

कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

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 **Appellant &** Respondent :-

M/s. Rajkot Nagrik Sahakari Bank Ltd., Aravindbhai Maniar Sevalay, 150 Feet Ring Road,Rajkot 360 005

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

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

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

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपील सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावी अहमदाबाद- 380016 को की जानी चाहिए ।/

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

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

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

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित फार्म S.T. 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इसमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग ,ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

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

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(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दायर की गयी अपील सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियां 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 दायर करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST-7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो 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 शुल्कादेय का भाग के 10 प्रतिशत (10%), जब शुल्क एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के प्रावधान वहां तक जहां तक वे जमा की जाने वाली अपेक्षित देय राशि इस करोड़ रुपए से अधिक न हो।

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

(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.

Under Central Excise and Service Tax, "Duty Demanded" shall include :

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परांतुक के अंतर्गत वित्त सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, 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 दी गई माल के विनिर्माण में उपयुक्त कच्चे माल पर अदा की 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) तुलिनियन उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो छूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

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

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

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की विभिन्न पक्षों द्वारा से बचने के लिए सम्बन्धित 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 filed 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 सम्बन्धित मामलों को अन्तर्विष्ट करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से सम्बंधित व्यापक, विस्तृत और नवीनतम प्रावधान के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in का देख सकते है । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

M/s. Rajkot Nagarik Sahakari Bank Ltd., Arvindbhai Maniyar Nagarik Sevalay, 150 Ring Road, Near Raiya Circle, Rajkot – 360 005. (hereinafter referred to as "the appellant") have filed the present appeal against the OIO No. 53/ADC/PV/2015-16 dated 31.03.2016 (hereinafter referred to as 'the impugned order') passed by the Additional Commissioner, Central Excise, Rajkot (hereinafter referred to as 'the lower adjudicating authority').

2. The facts of the case are that during the course of audit for the period from April 2009 to March 2012, it was found that the appellant had introduced a scheme viz. Nagarik Free Scheme for opening of demat account. Under the said scheme, if the customer pays Rs. 2,500/- in advance as interest free refundable deposit, then they were exempted from paying the Annual Maintenance Charge (AMC) of Rs. 300/- per annum for the demat account. The appellant did not pay any service tax on this amount of Rs. 2,500/- received as an advance towards the maintenance of the demat account on the ground that the said accounts are maintained free of cost in view of the above said scheme. It appeared that the appellant collected Rs. 2,500/- (which was used by them for their operations related to Banking and other Financial services) and had also earned interest on the said amount, but did not pass it on their customers and no service tax was paid. Thus, the liability to pay applicable service tax on such amount termed by them as 'AMC free Accounts' was on the appellant, which in fact was not 'a free service' as the appellant had collected Rs. 2,500/- (interest free deposits from customers) and used the same in their banking operations and earned the interest i.e. profit thereon. The value of such services remained hidden in their interest profit, which the appellant had generated out of the said amount. The value of said taxable service can be determined under the provisions of Section 67 of the Finance Act, 1994 (hereinafter referred to as "the Act") read with Rule 3 of the Service Tax (Determination of Value) Rules, 2006 (hereinafter referred to as "the Rules"). The value of taxable service in the case on hand was alleged to be equivalent to the gross amount charged by the appellant to provide similar services to their other customers, which is Rs. 300/- per annum for each such account. The following three SCNs have already been issued demanding service tax along with interest and proposal for penal action:

Sr. No.	SCN No. & Date	Period Covered	Service tax demanded (Rs.)
1	V.ST/AR-IV/RJT/46/JC/2013 dated 25.03.13	Apr-09 to Mar-12	20,25,341/-
2	V.ST/AR/RJT/ADC/29/2014-15 dated 22.04.14	Apr-12 to Mar-13	7,99,482/-
3	V.ST/AR-IV,RJT/ADC(PV)/164/2014-15 dated 16.10.2014	Apr-13 to Mar-14	7,77,827/-

2.1. The details for the subsequent period from April – 2014 to March – 2015

vide letter dated 20.07.2015 were submitted by the appellant. During this period, total service taxable income were amounting to Rs. 63,51,600/- as per normal charges of AMC per client is Rs. 300/- per annum as detailed in Para 3 of the SCN. The above observations culminated into issuance of Show Cause Notice No. V.ST/AR-IV,RJT/ADC(PV)/48/2015-16 dated 28.09.2015 wherein it was proposed to recover service tax amounting to Rs.7,85,058/- under provisions of Section 73 of the Act along with interest under Section 75 of the Act and proposed for penalties under Sections 77, 76 and 78 of the Act. The show cause notice was adjudicated by the lower adjudicating authority vide the impugned order wherein the lower adjudicating authority had confirmed the demand of service tax amounting to Rs. 7,85,058/- under proviso to Section 73(1) of the Act along with interest payable under Section 75 of the Act and imposed penalties of Rs. 20,000/- under Section 77 and Rs. 7,85,058/- under Section 78 of the Act with benefit of 25% reduced penalty imposed under Section 78 of the Act and dropped the penalty under Section 76 of the Act.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal on the grounds that the lower adjudicating authority has grievously erred in confirming service tax of Rs. 7,85,058/-, imposing penalty under Section 77 & 78 of the Act; that the lower adjudicating authority erred in failing to appreciate the submissions made by the appellant; that he also erred in computing service tax payable on an exclusive basis instead of an inclusive basis.

4. Shri Gaurang R. Sanghavi, CA appeared on behalf of the appellant in personal hearing and submitted written submission dated 27.06.207 emphasizing all 5 grounds stated therein; that they have not collected service tax on Rs. 2,500/- deposited as refundable security deposit under "Nagarik Free Scheme", which is refunded in full at the time of closure of the scheme (by the clients) to the clients.

4.1 He has also submitted that the order has travelled beyond SCN as proviso to Section 73(1) of the Act has not been raised/alleged in this SCN; that Penalty under Section 78 (1) of the Act is untenable as they have acted under bonafide belief that there is no service tax payable as there is no consideration on the services provided under "Nagarik Free Scheme"; the service tax returns have been correctly filed by them hence penalty under Section 77(2) of the Act is not tenable at all.

4.2 As alternative submission, it has stated that even if service tax is payable, service tax is required to be calculated on inclusive basis as they have not collected any service tax from their customers under this "Nagarik Free Scheme" and hence total

service tax should be demanded Rs. 6,98,699/- and not Rs. 7,85,085/- as held by the lower adjudicating authority, as per settled provisions of law.

4.3 The appellant vide written submission dated 27.06.2016 has made further submissions as under:

4.3.1 That the present issue is in knowledge of the department since audit for the F. Y. 2009 – 10; that the security deposit of Rs. 2,500/- is refundable deposit and hence the same cannot fall within the definition of consideration for rendering a service being taxable service; that the lower adjudicating authority has considered that the appellant has earned the interest on the deposit received, which as such, is an evidence to come to the conclusion that the Nagarik Free Scheme for their customers i.e. demat account holders services are chargeable to service tax at the rate of Rs. 300/- per annum and per demat account; that this observation is improper and unjustified in as much as it is a well settled proposition of charging service tax, in accordance with Section 65B(22) that the service has to be carried out by one person to another person for a 'consideration'; that according to Indian Contract Act, 1872 consideration means something received in monetary or non-monetary terms for rendering of the said services; that the security deposit of Rs. 2,500/- is a refundable deposit and hence the same cannot fall within the ordinary definition of the consideration for rendering a service being taxable service; that in any case, this observation itself proves beyond doubt that the services provided to the person paying Rs. 300/- per annum for demat account cannot be considered as similar to the services given to the person holding interest free deposit account and therefore, the provisions of Rule 3(a) of the Service Tax (Determination of Value) Rules, 2006 cannot be made applicable; that Rule 3 is subject to the provisions of Section 67 and in accordance with Section 67, it is imperative for the adjudicating authority to first establish that the declared service is rendered against any consideration received.

4.3.2 That the lower adjudicating authority has erred in confirming the demand on the ground that even though the deposit is interest free, the interest has been earned from such deposits and kept with the appellant and these earnings are adjusted against the AMC of demat account and therefore it cannot be said that the appellant has provided the service without any charges; that above said money (deposit) under Nagarik Free Scheme has no colour and the lower adjudicating authority is deciding on presumption which is legally unsustainable as how can the earnings of the appellant, which are parts of its business be considered as consideration.

4.3.3 The lower authority cannot travel beyond the SCN and since the said

proviso to section 73(1) has neither been invoked nor referred to in the SCN the same cannot be invoked or referred to in the impugned order. They placed reliance upon the case laws :

(a) Abs India Ltd (2003) 162 ECT 487
(b) Kalyani Sharp India (2005) 187 ELT 315 (CESTAT : Mumbai)
(c) Balherpur Industries Ltd (2007) 215 ECT 489 SC
(d) CAIRN Energy (India) Pvt Ltd (2008) 11 STR 32
(e) CAMCO Corporation Services Ltd (2009) 14 STR 126 (CESTAT : Chennai)
(f) Nobel Moulds Pvt Ltd (2010) 259 ELT 338- Delhi

4.3.4 That they have filed service tax returns but did not pay service tax on Nagarik Free Scheme since it had a bonafide belief that said service was without consideration and hence not liable to service tax, this bonafide belief has been completely brushed aside while invoking penal provisions and therefore penalty should not be imposed on them; that the penalty under Section 78 of the Act should not be imposed on them as these facts are within the knowledge of the department since 01.04.2009 and the appellant is agitating the issue and hence the same cannot be said to be the suppression of facts; they placed reliance upon the following case laws:

(a) PSL Corporation Control Services Ltd (2008) 12 STR 504; (2008) 16 STT 320 (CESTAT: Ahmedabad)
(b) Vipul Motors Pvt Ltd. (2008) 9 STR 220; (2008) 16 STT 84 (CESTAT: Delhi)
(c) Ess Kay Enginering Co. Ltd. (2008) 14 STT 417; (2008) 10 STR 430 (CESTAT: Delhi)
(d) Sheri R. Sukumar 14 STJ 361 (CESTAT: Chennai)
(e) RAC Steels (2010) 18 STR 775; (2010) 23 STT 145 (CESTAT: Chennai)
(f) Nath Cold Retreads (2010) 20 STR 211 (CESTAT: Mumbai)
(g) Chandan Electricals (2010) 20 STR 92; (2010) 25 STT 409 (CESTAT: Delhi)

4.3.5 That the appellant has neither collected service charge nor any amount of service tax from the customers under Nagarik Free Scheme so amount should be considered as inclusive of service tax and accordingly service tax liability should be arrived at considering the provision of Section 67(2) of the Act as per below case laws:

(a) Bhagwati Security Services 2006 (3) STR 762 (Tri- Delhi)
(b) Gen Star Ent. P Ltd 2007 (7) STR 342 (Tri- Bang)
(c) Prompt and Smart security 2008 (9) STR 237 (Tri- Bang)

Findings:

5. I have carefully gone through the impugned order, appeal memorandum, records of personal hearing and written submission dated 27.06.2017. The issues to be decided in the present appeal are:

(i) whether the appellant is liable to pay service tax against the services provided to the customers registered under "Nagarik Free Scheme" ?

(ii) whether demand can be confirmed under proviso to Section 73(1) of the Act;

(iii) whether penalty is imposable on the appellant under Section 76 or under Section 78 of the Act?

(iv) whether penalty is imposable on the appellant under Section 77(2) of the Act;

(v) whether benefit of cum – tax – value is required to be extended in the case or not?

6. I find that the argument made by the appellant is that interest free refundable deposit of Rs. 2,500/- received by them can not be taken as consideration for taxable service provided. On going through impugned order as well as SCN, it is seen that the demand is not on Rs. 2,500/- per account but on AMC charges collected by the appellant from other demat account holders not opting for the above scheme. Therefore, basis to demand is neither Rs. 2,500/- nor the notional interest earned by the appellant on the said deposit but AMC charges of Rs. 300/- collected from customers who are being provided similar services not opting for Nagarik Free Scheme during the relevant period. The arguments put forth by the appellant in this regard are devoid of merits as they have failed to prove as to why AMC charges are not being collected by them from customers under 'Nagarik free Scheme' and as to why Rs. 300/- per annum being collected from other customers who do not made deposit of Rs. 2,500/- in one so like customers under Nagarik Free Scheme. It is true that service tax has not been demanded on interest free deposits collected by the appellant but on AMC charges collected by the appellant from other customers for similar services. The appellant has accepted the material fact that they have utilized these interest free deposits in their banking business. Therefore, I find that service tax is payable on amount equal to AMC charges actually being collected from such demat account holders who one not opting for 'Nagarik Free Scheme' and this is well within the ambit of Section 67 of the Act read with Rule 3 of the Rules.

7. The appellant has assailed impugned order for invoking proviso to Section 73 (1) of the Act stating that the same was neither invoked nor referred in the show cause notice and, in fact, Para 9 of the impugned SCN dated 28.09.2015 explicitly proposed recovery of service tax for the period from April 2014 to March 2015 by invoking Section 73(1) of the Act. I find that the impugned SCN has been issued invoking Section 73 (1) of the Act and not proviso to Section 73(1) of the Act. I also find that this practice of deposit under 'Nagarik Free Scheme' and not paying service tax in such cases by the appellant was in the knowledge of the department since 2009. The lower adjudicating authority vide impugned order has confirmed the demand under proviso to Section 73(1) of the Act, which is not legal and proper as SCN has demanded service tax without invoking proviso to Section 73(1) of the Act. However, I also find that the demand is not time barred but within normal time and hence the allegations levelled in the SCN and confirmation of service tax under Section 73 (1) of the Act would be legal and proper. Thus, the demand of Rs. 7,85,058/- is required to be confirmed under Section 73 (1) of the Act as invoked in the SCN and I do so.

8. The appellant has also assailed impugned order for imposition of the penalty under Section 78 of the Act stating that penalty under Section 78 of the Act can be imposed only when there is mens rea and when circumstances / conditions specified in Section 78 are present. It has been contended that penalty under Section 78 is not imposable in this case as these facts have been within the knowledge of the department since 01.04.2009 and simply because the appellant is agitating the issue at CESTAT, the same cannot be said to be suppression of facts. I find that the impugned SCN is periodical in nature and the department had knowledge of the facts. The deposits under Nagarik Free Scheme have been in the knowledge of the department all along since 2009. Hence, I find that penalty is not imposable under Section 78 of the Act. Accordingly, I set aside the penalty imposed under Section 78 of the Act, however, penalty under Section 76 of the Act is imposable as the same has been invoked in the impugned SCN. The then Section 76 of the Act was as under:

> *"76. Penalty for failure to pay service tax – Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax in accordance with the provisions of section 75, a penalty which shall not be less than one hundred rupees for every day during which such failure continues or at the rate of one per cent of such tax, 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.*
>
> *Provided that the total amount of the penalty payable in terms of this section shall not exceed fifty per cent of the service tax payable."*

8.2 In view of the above, I find that provisions under Section 76 of the Act have been correctly invoked in the impugned SCN, but the lower adjudicating authority erred by dropping the said penalty vide his Order – in – Original dated 31.03.2016 on the ground that with effect from 10.05.2008, penalty under Section 76 of the Act is not leviable, if penalty is imposable under Section 78 of the Act, and penalty under Section 78 alone shall be payable by the appellant. I find that Section 76 and Section 78 of the Act have been amended w.e.f. 14.05.2015. CBEC issued Circular F. No. 334/5/2015-TRU dated 28.02.2015 stating that Section 76 or Section 78 of the Act, as amended w.e.f. 14.05.2015, shall be apply to cases where no notice is served, or notice is served but not yet adjudicated, as the case may be, as per new Section 78B of the Act. In the instant case, there is no suppression of facts etc. by the appellant for the period under consideration, however, even then penalty is imposable under Section 76 of the Act, which w.e.f. 14.05.2015 is as under:

> ***"SECTION 76. Penalty for failure to pay service tax.*** *— (1) Where service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, for any reason, other than the reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty not exceeding ten per cent. of the amount of such service tax :*
>
> *Provided that where service tax and interest is paid within a period of thirty days of —*

(i) the date of service of notice under sub-section (1) of section 73, no penalty shall be payable and proceedings in respect of such service tax and interest shall be deemed to be concluded;

(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the penalty imposed in that order, only if such reduced penalty is also paid within such period."

(Emphasis supplied)

8.3 In view of the above, the appellant is liable to penalty under amended Section 76 of the Act read with Section 78B of the Act @10% of the amount of service tax of Rs. 7,85,058/- (Rs. 78,506/-). Accordingly, penalty of Rs. 78,506/- is imposable on the appellant under Section 76 of the Act already invoked in the impugned SCN and I order so.

8.4 It is a fact that the appellant has not paid service tax along with interest within a period of thirty days from the date of service of the impugned SCN and has also not paid any amount towards penalty. However, payment of full service tax along with interest liability as well as reduced penalty of 25% of the penalty imposed under Section 76 of the Act can be availed by the appellant within 30 days of receipt of this order, as per proviso (ii) to Section 76 of the Act.

9. The appellant has also assailed impugned order for imposition of penalty under Section 77(2) of the Act for failure to correctly assess service tax and for filing incorrect ST-3 returns. The Appellant stated that they have filed returns but did not pay service tax on Nagarik Free Scheme since they had a bonafide belief that said service was without consideration and hence not liable to service tax. I find that there is no reason to such belief more so when the appellant is collecting Rs. 2,500/- deposit interest free from each customer under 'Nagarik Free Scheme' and don't charge for providing demat services whereas they charge Rs. 300/- per annum to provide demat services to customers who don't deposit Rs. 2,500/- interest free deposit with them. The act of non inclusion of service tax on the belief that service tax is not payable does invite penalty under Section 77(2) of the Act. Hence, penalty of Rs. 20,000/- under Section 77(2) of the Act is upheld.

10. As regards, cum duty benefit, it is an admitted fact that the appellants have not collected any amount towards service tax, hence consideration is not inclusive of service tax. Since no service tax has been collected from the customers cum tax price benefit can't be extended to the appellant applying the ratio of the judgement passed by the Hon'ble Supreme Court in the case of Amrit Agro Industries reported as 2007 (210) E. L. T. 183 (SC), relevant para of which is as under:

*"**14.** In our view, the above judgments in the case of Maruti Udyog Ltd. and Snichakra Tyres Ltd. have no application in the facts of the present case. In the case of Asstt.*

Collector of Central Excise v. Bata India Ltd. reported in 1996 (84) E.L.T. 164 this Court held that under section 4(4)(d)(ii) of Central Excises and Salt Act, 1994 the normal wholesale price is the cum-duty price which the wholesseller has to pay to the manufacturer-assessee. The cost of production, estimated profit and taxes on manufacture and sale of goods are usually included in the wholesale price. Because the wholesale price is usually the cum-duty price, the above section 4(4)(d)(ii) lays down that the "value" will not include duty of excise, sales tax and other taxes, if any, payable on the goods. It was further held that if, however, a manufacturer includes in the wholesale price any amount by way of tax, even when no such tax is payable, then he is really including something in the price which is not payable as duty. He is really increasing the profit element in another guise and in such a case there cannot be any question of deduction of duty from the wholesale price because as a matter of fact, no duty has actually been included in the wholesale price. It was further held that the manufacturer has to calculate the value on which the duty would be payable and it is on that value and not the cum-duty price that the duty of excise is paid. Therefore, unless it is shown by the manufacturer that the price of the goods includes excise duty payable by him, no question of exclusion of duty element from the price for determination of value under section 4(4)(d)(ii) will arise."

(Emphasis supplied)

10.1 The said principal laid down by the Hon'ble Supreme Court can also be made applicable to Section 67(2) of the Act regarding matters pertaining to service tax. Thus, I hold that benefit of cum-tax-value cannot be extended to the appellant.

11. The appeal filed by the appellant is disposed off in above terms.

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

30/8/2017

(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D./Speed post

To, M/s. Rajkot Nagarik Sahakari Bank Ltd., Arvindbhai Maniyar Nagarik Sevalay, 150 Ring Road, Near Raiya Circle, Rajkot – 360 005.	प्रति, मे. राजकोट नागरिक सहकारी बैंक लि., अरविंदभाई मनियार नागरिक सेवालय, 150 रिंग रोड, रैया सर्कल के पास, राजकोट - ३६०००५.

Copy to:

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Assistant Commissioner, GST & Central Excise Division – I, Rajkot.
4. Guard File.

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(Emphasis supplied)

10.1 The said principal laid down by the Hon'ble Supreme Court can also be made applicable to Section 67(2) of the Act regarding matters pertaining to service tax. Thus, I hold that benefit of cum-tax-value cannot be extended to the appellant.

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

(कुमार संतोष)
आयुक्त (अपील्स)

By R.P.A.D./Speed post

पवीण पोपट,
अधीक्षक (अपील)

To, M/s. Rajkot Nagarik Sahakari Bank Ltd., Arvindbhai Maniyar Nagarik Sevalay, 150 Ring Road, Near Raiya Circle, Rajkot – 360 005.	प्रति, मे. राजकोट नागरिक सहकारी बैंक लि., अरविंदभाई मणियार नागरिक सेवालय, 150 रिंग रोड, रैया सर्कल के पास, राजकोट - 36००0५.

Copy to:

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Assistant Commissioner, GST & Central Excise Division – I, Rajkot.
4. Guard File.