



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

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

राजकोट / Rajkot - 360 001

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सत्यमेव जयते

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रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/6/RAJ/2017	मूल आदेश नं / O.I.O. No. 25/ADC/RKC/2016-17	दिनांक / Date 11.11.2016
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ख अपील आदेश संख्या (Order-In-Appeal No.):

**RAJ-EXCUS-000-APP-195-2017-18**

आदेश का दिनांक /  
Date of Order: **23.01.2018** जारी करने की तारीख /  
Date of issue: **25.01.2018**

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

ग अपर आयुक्त/संयुक्त आयुक्त/उपसंचालक सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, राजकोट / जामनगर / गंधीधाम द्वारा उपरोक्तित जारी मूल आदेश से सूचित /  
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 :-**  
I.M/s. Viraj Financial Services,, 312- Sarvotam Complex, Opp. Panchnath Temple,Near Linda Chowk,,Rajkot

इस आदेश(अपील) से व्यक्तित 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 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) सर्वोच्च न्यायालय से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए। /

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

(ii) उपरोक्त परिच्छेद 1(a) में बतलाए गए अपील के अलावा सभी अपील सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठ, द्वितीय तल, भृगुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए। /

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> Floor, Bhramali 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) नियमवली, 2001, के नियम 6 के अंतर्गत निर्धारित फीचर एच-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की सीमा, सेवाकर की सीमा और लगाया गया जर्माना, ब्याज 5 लाख या उससे कम, 5 लाख ब्याज या 50 लाख ब्याज तक अथवा 50 लाख ब्याज से अधिक है तो ब्याज: 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 रेकॉर्ड 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। स्थान आदेश (स्टे ऑर्डर) के लिए अर्द्ध-पत्र के साथ 500/- ब्याज 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/-.

(iv) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित फीचर S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ जिन आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की सीमा, ब्याज की सीमा और लगाया गया जर्माना, ब्याज 5 लाख या उससे कम, 5 लाख ब्याज या 50 लाख ब्याज तक अथवा 50 लाख ब्याज से अधिक है तो ब्याज: 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 रेकॉर्ड 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। स्थान आदेश (स्टे ऑर्डर) के लिए अर्द्ध-पत्र के साथ 500/- ब्याज 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) विल अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दंड की गयी अपील, सेवाकर नियमवली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रथम S.T.-7 में की जा सकेगी एवं उसके साथ अपील, केन्द्रीय उत्पाद शुल्क अधिका आयातक (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न की (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपील की न्यायाधिकरण को आवेदन दाने 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 Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सेवा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (सेक्टेट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1994 की धारा 35एक के अंतर्गत, जो की विल अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपील न्यायाधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मात्र के 10 प्रतिशत (10%), जब मात्र एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि इस कथित स्तर से अधिक न हो।  
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "अंग किए गए शुल्क" में निम्न शामिल है:  
(i) धारा 11 डी के अंतर्गत रकम  
(ii) सेक्टेट जमा की गयी राशि  
(iii) सेक्टेट जमा नियमवली के नियम 6 के अंतर्गत देय रकम  
- बशर्त यह कि इस धारा के प्रावधान विलियम (सं. 2) अधिनियम 2014 के अंतर्गत से पूर्व किसी अपील न्यायाधिकरण के समक्ष विचारार्थ स्थापित नहीं एवं अपील को लागू नहीं होगी। / 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 Central Credit taken;  
(iii) amount payable under Rule 6 of the Central 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, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत आयात शेष, भारत सरकार, पुनरीक्षण आवेदन ईकाई, विल न्यायालय, राजस्व विभाग, चौपी स्ट्रीट, जीवन टॉप भवन, शाह जहाँ, 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 मात्र के किसी नुकसान के मामले में, जहां नुकसान किसी मात्र को किसी कारखाने से भंडार गृह के परिवहन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह परिवहन के दौरान, या किसी भंडार गृह में या भंडारण में मात्र के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में मात्र 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 मात्र के विनिर्माण में प्रदत्त कच्चे मात्र पर गरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को मात्र निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (iv) मुद्रित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ह्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा विल अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा सजावधि पर या बाद में पारित किए गए हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (v) उपरोक्त आवेदन की दो प्रतियाँ प्रथम संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संदेश के 3 महीने के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मात्र आदेश व अपील आदेश की दो प्रतियाँ संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35-EE के तहत निर्धारित शुल्क की प्रत्येक की प्रत्येक 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 मात्र आदेशों का समावेश है तो प्रत्येक मात्र आदेश के लिए शुल्क का भुगतान, उपरोक्त दंड से किया जाना चाहिए। इस तथ्य के होते हुए भी की निम्न यही कार्य से बचने के लिए रचयित अपील न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the 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-1 के अनुसार मात्र आदेश एवं समाज आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट अंग 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-1 in terms of the Court Fee Act, 1975, as amended.
- (F) सेवा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (कॉपी विधि) नियमवली, 1982 में उल्लिखित एवं अन्य संबंधित मामलों को सम्बन्धित 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 अपील न्यायाधिकरण को अपील दायित्व करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपील न्यायाधिकरण वेबसाइट [www.cbec.gov.in](http://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](http://www.cbec.gov.in)



**:: ORDER IN APPEAL ::**

M/s. Viraj Financial Services, 312, Sarvottam Complex, Opp. Panchnath Temple, Rajkot – 360 001 (hereinafter referred to as 'appellant') has filed the present appeal, against Order-in-Original No. 25/ADC/RKC/2016-17 dated 11.11.2016 (hereinafter referred to as 'impugned order') passed by the Additional Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as 'lower adjudicating authority').

2. The brief facts of the case are that appellant is engaged in providing taxable services covered under the category of 'Business Auxiliary Service' falling under Section 65 (105) (zzb) of the Finance Act, 1994 (hereinafter referred to as "Act") and having Service Tax Registration No. AFRPK9358RST001 since 28.03.2007. The inquiry revealed that the appellant was working as Direct Sale Associate for auto loan product of various private Banks and was facilitating customers for applying for loan from the Banks as per their guidelines and getting approval thereof; that the appellant was getting commission as per slabs fixed by the private Banks for the aforesaid work; that the appellant did not raise any bill for the services provided by them; that they had filed ST-3 returns upto March, 2008 but after April-2008, they did not pay service tax and did not file ST-3 returns; that they opted VCES, 2013 for the period from April, 2008 to December, 2012 and discharged Service Tax liability of Rs. 20,44,253/- and VCES-3 was issued to them on 10.09.2014. The appellant did not pay service tax for the period from January, 2013 onwards to March, 2015; that the appellant contravened Section 68(1) of the Act read with Rule 6(1) of Service Tax Rules, 1994 and also contravened Section 70(1) of the Act read with Rule 7 of Service Tax Rules, 1994; that the appellant deposited service tax of Rs. 33,54,771/- against the service tax liability of Rs. 35,66,076/- for the period. Show Cause Notice No.V.ST/AR-II/RJT/ADC(BKS)123/2015 dated 31.12.2015 was issued to the appellant demanding service tax of Rs. 35,66,076/- under proviso to Section 73(1) of the Act and to appropriate Rs. 33,54,771/- already paid against proposed demand; to recover interest under Section 75 of the Act and to impose penalties under Section 76, Section 77 and Section 78 of the Act. The SCN was adjudicated by the lower adjudicating authority vide impugned order wherein he confirmed demand of service tax of Rs. 35,30,553/- under Section 73(2) of the Act and ordered to appropriate Rs. 33,54,771/- already paid against the confirmed demand and confirmed recovery of interest under Section 75 of the Act; and appropriated Rs. 5,47,375/- paid by the appellant towards interest liability on late payment of service tax and imposed penalty under Section 70, Section 77(2) and Section 78 of the Act.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal, *inter-alia* on grounds that the impugned order is patently against law, contrary to the facts on record, unjust and erroneous and merits to be quashed. The penalties imposed under Section 78, Section 77(2) and Section 70 are also liable to be set aside.

4. Personal hearing in the matter was attended to by Shri Sanjay K. Mulchandani, Consultant, who reiterated the Grounds of Appeal and submitted that Rs. 1.50 lakhs towards penalty has been deposited in Bank treasury but challan will be given by Bank tomorrow. No one appeared from the department despite P.H. notices issued to the Commissionerate.

4.1 The appellant made written P.H. submissions stating that the lower adjudicating authority has not given the benefit of cum-tax value even if the appellant has not collected any tax from their customers i.e. financial institutions. The appellant had provided copy of certificate of Chartered Accountant certifying that appellant had not collected any tax separately and they have received commission inclusive of tax relying on decisions in the cases of Central Panchayat reported as (2015) 51 GST 314:57 Taxmann.com 170 (CESTAT Mumbai); Radhika Catering Service reported as (2013) 40 STT 88, (2013) 34 taxman.com 99 (CESTAT Mumbai) and Professional Couriers reported as (2013) 32 STR 348.

4.1.1 The appellant has provided all details during the course of investigation and nothing has been suppressed by them, hence there was no suppression of fact on their part.

4.1.2 The appellant has already paid Rs. 33,54,771/- towards service tax liability before issuance of SCN, which is in excess of Rs. 1,80,976/- if benefit of cum-tax price is given to them.

4.1.3 Since entire tax has been paid by them before issuance of SCN and interest has also been paid before issuance of impugned order, the penalty proceedings under Section 78 is required to be dropped. The appellant relied on the following decisions in this regard -

- Cobra Instalaciones Y. Servicios S.A. – 2014 (35) STR 415 (CESTAT Mum.)
- O. P. Sharma – 2014 (36) STR 1258 (Allahabad)
- Indian Coffee Workers Co-Op. Society Ltd. - 2014 (34) STR 546 (Allahabad)
- Busy Bee – 2015 (37) STR 932
- PSL Corporations Control Services Ltd. – 2008 (12) STR 504 (CESTAT Ahmedabad)

#### **FINDINGS:**

5. I have carefully gone through the facts of the case, impugned order, appeal memorandum and written as well as oral submissions made by the appellant. The issue to be decided is whether in the facts and circumstances of the present case, the impugned order passed by the lower adjudicating authority confirming demand of service tax under the category of "Business Auxiliary Service" under Section 65(105) (zzb) of the Act is correct or not.

6. The lower adjudicating authority has categorically held that the appellant has suppressed facts of providing 'Business Auxiliary Service' to various financial institutions and contravened the provisions of Section 67, Section 68, Section 69 and Section 70 of the

Act and Rules framed thereunder with intent to evade payment of service tax, which has not been negated by the appellant. I find that the appellant had discharged their service tax liability for the period from April, 2008 to December, 2012 through VCES and also got registered with Service Tax department. They are well aware with the provisions of Finance Act and Rules framed thereunder from date of filing of VCES, 2013. However, they had neither filed ST-3 returns for the period from January, 2013 to financial year 2014-15 nor paid service tax on the commission income received by them from various financial institutions to whom they have provided 'Business Auxiliary Service' defined under Section 65(19) of the Act and made taxable under Section 65(105) (zxb) of the Act. I find that the appellant has knowingly suppressed the material facts of providing taxable service to various financial institutions with intent to evade payment of service tax. Had the inquiry not been initiated by the department, the evasion of service tax could have continued further. Therefore, I find that the confirmation of demand for extended period in the impugned order is legal and proper.

7. The appellant has contended that the lower adjudicating authority has not given them benefit of cum-tax value in impugned order even though they had not collected any service tax from their customers i.e. financial institutions. I find that the lower adjudicating authority vide Paragraph 25 and Paragraph 25.1 of the impugned order allowed the benefit of cum-tax value in respect of commission amount received from HDFC Bank where the appellant has produced the agreement dated 23.01.2009, which says that the commission amount was inclusive of all taxes. The lower adjudicating authority has also held that no such agreement was produced for services provided and commission received from other financial institutions such as Family Credit Ltd., TVS Credit Services Ltd., HDFC Ergo General Insurance Co. Ltd., ICICI Bank Ltd., Kotak Mahindra Prime Ltd., Mahindra & Mahindra Financial Services Ltd., Reliance Capital Ltd., TATA Capital Financial Services Ltd., Indusind Bank Ltd. and therefore he correctly disallowed benefit of cum-tax value in respect of commission amount received from these financial institutions.

7.1 I find that it is an admitted fact that the appellant has not collected any amount towards Service Tax, hence consideration is not inclusive of Service Tax, thus, benefit of cum-tax-value is not admissible. It is settled legal position that benefit of cum-tax value cannot be extended where service tax is not paid on account of suppression or willful mis-statement of facts as has been held by Hon'ble CESTAT in the case of M/s. Dhillon Kool Drinks and Beverages Ltd. reported as 2011(263) ELT241(T), I further find that while giving the said decision, the CESTAT has observed that, "since, this is a case of deliberate evasion of duty by depressing the assessable value and not a case where short payment is due to some bona fide misunderstandings on the part of the appellant, the judgment of Hon'ble Supreme Court in case of CCE, Delhi Vs. Maruti Udyog Ltd. reported as 2002(141) ELT3(SC) would

not be applicable. Same view has been taken by Hon'ble CESTAT in the case of M/s. Asian Alloys Ltd. reported as 2006(203) ELT252 and M/s. Sarla Polyester Ltd. reported as 2008(222) ELT376. The Hon'ble Supreme Court in the case of Amrit Agro Industries Ltd. reported as 2007(210) ELT-183(SC) after considering the decisions in the matter of Shri Chakra Tyres and Maruti Udyog Ltd. relied upon by the appellant, has held that unless it is shown by the manufacturer that the price of the goods includes the excise duty payable by them, no question of exclusion of duty element from the price for determination of value under section 4(4)(d)(ii) will arise." The said principle is applicable to Section 67(2) of the Act regarding matters pertaining to service tax matters. Thus, I hold that benefit of cum-tax value cannot be extended to the appellant in this case. 50

8. The appellant has contended that they have paid Rs. 33,54,771/- towards service tax liability before issuance of SCN which is in excess of Rs. 1,80,976/- if benefit of cum-tax value is made available to them. I find that as discussed above, the benefit of cum-tax value cannot be allowed to the appellant where they have not produced copy of agreements with service recipients showing that the commission income is inclusive of Service Tax. The lower adjudicating authority has correctly confirmed non-payment of Service Tax of Rs. 35,30,553/- against which the appellant has paid Rs. 33,54,771/-. Therefore, I find that the appellant has not fully discharged the confirmed service tax liability and balance amount of service tax is required to be paid by the appellant along with interest at applicable rate under Section 75 of the Act.

9. The appellant has contended that entire tax has been paid before issuance of SCN and interest has been paid before issuance of the impugned order and hence, the penalty proceedings under Section 78 of the Act is required to be dropped. I do not find any substance in this argument of the appellant. I find that the appellant has not paid full service tax liability and has also not discharged full liability of interest. I find that the benefit under Section 73(3) of the Act is restricted by virtue of provision under Section 73(4) of the Act which is reproduced below: -

- (4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-levied or short paid or erroneously refunded by reason of-*
- (a) fraud; or*
  - (b) collusion; or*
  - (c) willful mis-statement ; or*
  - (d) suppression of facts ; or*
  - (e) Contravention of any of the provisions of this chapter or of the rules made thereunder with intent to evade payment of service tax.*
- (Emphasis supplied)*

9.1 In view of the above, I find that as per proviso (4) of Section 73 of the Act, provisions of Sub-section (3) will not apply where service tax is not paid by reason of suppression of facts with intent to evade payment of service tax. Therefore, benefit of Section 73(3) is not

available to the Appellant.

9.2 I also find that penalty is imposable under amended Section 78 of the Act wherever SCN is issued after 14.05.2015 (by virtue of Section 78 B), wherever service tax has not been paid by reason of suppression of facts with intent to evade payment of Service Tax. In the instant case, the impugned SCN has been issued on 31.12.2015 correctly invoking suppression of facts and hence, penal provisions will be governed under Section 78 of the Act, as amended w.e.f. 14.05.2015, which is reproduced below for ready reference: -

*"SECTION 78. Penalty for failure to pay service tax for reasons of fraud, etc. — (1) Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax. Provided that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined.*

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

- (i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;*
- (ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined.*

*Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period.*  
*Explanation. — For the purposes of this sub-section, "specified records" means records including computerized data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of accounts shall be considered as the specified records.*

*(Emphasis supplied)*

9.3 It is a fact that the appellant has not complied with any of the conditions prescribed under the amended Section 78 of the Act for immunity from penalty. Therefore, I find that though the appellant has paid Service Tax partially before issuance of SCN and also paid part of interest amount before issuance of impugned order but still they failed to pay remaining amount of service tax confirmed along with interest and also failed to pay any amount towards penalty, hence the case laws relied upon by the appellant are not applicable and their said argument is also untenable in view of amended Section 78 of the Act.

10. The appellant has contended that late fee under Section 70 of the Act and penalty under Section 77(2) of the Act are not imposable. I find that the appellant had not filed ST-3 returns during the impugned period declaring taxable value of services provided by them

even though they were registered with service tax and therefore, they are liable for payment of late fee as provided under Section 70 of the Act read with Rule 7C of the Service Tax Rules, 1994. The appellant has failed to correctly assess their service tax liability and have not paid service tax at the applicable rate and therefore, penalty under Section 77(2) of the Act is also justified and I uphold the same. 48

11. In view of above factual and legal position, I uphold the impugned order and reject the appeal filed by the appellant.

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

12. The appeals filed by the appellant stand disposed off in above terms.

*R. P. A. D.*  
(कुमार संतोष)  
आयुक्त (अपील्स)

By R.P.A.D.

To, M/s. Viraj Financial Services, 312, Sarvottam Complex, Opp. Panchnath Temple, Rajkot – 360 001.	प्रति, मे. विराज फाइनेन्सियल सर्विसेस, ३१२, सर्वोत्तम कॉम्प्लेक्स, पंचनाथ मंदिर के सामने, राजकोट – ३६० ००१
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**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.