



::आयुक्त (अपील) 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



सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क अपील / फाइल संख्या /
Appeal / File No.

V2/106 & 107/RAJ/2016

मूल आदेश सं /
O.I.O. No.

27& 28/ADC(BKS)/2015

दिनांक /

Date

26.02.2016

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

RAJ-EXCUS-000-APP-028 to 029 -2017-18

आदेश का दिनांक /
Date of Order:

27.07.2017

जारी करने की तारीख /
Date of issue:

31.07.2017

कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /

Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अथ/अथयुक्त/समुक्त/अथयुक्त/उपायुक्त/सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरोक्तित 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 :-

1. M/s. Marwadi Shares & Finance Ltd., Marwadi Finance Plaza Nana Mava Main Road Near Iskon Mall, 150 Feet Ring Road, Rajkot 360 001

2. M/s Shri Ketan Marwadi Director of M/s Marwadi Shares & Finance Ltd.

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 अपील न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अपील नियम, 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 मुद्दाओं से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील 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 शेष सभी अपील सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहमाली भवन अलावा अहमदाबाद को की जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad in case of appeals other than as mentioned in para- 1(a) above

(iii) अपील न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 6 के अंतर्गत निर्धारित फिएर सट्टे फॉर्म EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की राशि, व्याज की राशि 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/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील 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 अपील न्यायाधिकरण की शाखा स्थित है। स्वयंसेवक अपील (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) अपील न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ जितने आदेश के विरुद्ध अपील की गयी है, उतनी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रामाणिक होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की राशि, व्याज की राशि 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/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील 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 अपील न्यायाधिकरण की शाखा स्थित है। स्वयंसेवक अपील (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is 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/-

(B) अपील न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ जितने आदेश के विरुद्ध अपील की गयी है, उतनी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रामाणिक होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की राशि, व्याज की राशि 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/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील 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 अपील न्यायाधिकरण की शाखा स्थित है। स्वयंसेवक अपील (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/
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- (i) अपील अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म ST-7 में की जा सकती एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा जारी आदेश की प्रतियाँ संलग्न करे (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उप-आयुक्त, 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 Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्कसेवा का मूल के 10 प्रतिशत (10%), जब मूल एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मूल किंम" एवं "शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेलवेट जमा की ली गई मूल राशि
(iii) सेलवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्त यह कि इस धारा के प्राधान्य वित्तीय (स. 2) अधिनियम 2014 के आगम से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचारार्थित प्रस्ताव अर्पित एवं अपील को लागू नहीं होने।
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 be 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, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम पत्रक के अंतर्गत अर्पित किया जा सकता है, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद भवन, 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-35-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 शर्त नई केन्द्रीय उत्पाद शुल्क के छूट (विबेट) के अन्तर्गत 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 an 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 इमुटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत अर्पण की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा केंद्रित अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा निर्यात की गई तरीक अथवा समकालिक पर या बट में जारी किया 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 फॉर्म संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संकेतन 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 रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 - का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त दर में किया जाना चाहिए। इस तथ्य के होते हुए भी की निर्यात नहीं करने से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। /
In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, 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-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट लगा होना चाहिए। /
One copy of application or O.L.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) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कांठ विधि) नियमावली, 1982 में वर्णित एवं अन्य सम्बन्धित मामलों 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 दायित्व करने में संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलकर्ता 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

:: ORDERS IN APPEAL ::

M/s. Marwadi Shares & Finance Ltd, Marwadi Finance Plaza, Nana Mava Main Road, Near Iscon Mega Mall, 3600001 (*hereinafter referred to as "the Appellant"*) and Shri Ketan H Marwari, Director of Appellant No.1, (*hereinafter referred to as "the Appellant no.2"*) have filed separate appeals no. V2/106 / RAJ/ 2016 and V2/107/RAJ/2016 respectively against the Order-in-Original 27& 28/ADC(BKS)/ 2015 dated 26.02.2016 (*hereinafter referred to as "the impugned order"*) issued by the Additional Commissioner, Central Excise & Service Tax, Rajkot (*hereinafter referred to as "the adjudicating authority"*).

2. The brief facts of the case are that appellant is a registered service tax assessee under the category of "Stock Broker's Service, Banking & Financial Services and Business Auxiliary services. During the course of the audit it was found that the appellant is collecting an amount under "interest free deposit scheme" from the clients while opening of "DEMAT" account; that floated five types of Deposit Schemes for their customers/ Demat account holders and collected an amount of Rs.10,000/-, Rs. 4000/-, Rs. 3000/- Rs.2500/- and Rs.1250/- as interest free deposit; that the appellant deducted amount of Rs.1000, Rs.400, Rs.300, Rs. 250 and Rs.125 respectively towards Annual Maintenance Contract ("AMC") Fees and paid service tax on this amount only. However, Rs.9000/-, Rs. 3600/-, Rs.2700/-, Rs.2250/- and Rs.1125/- respectively was retained by the appellant as interest free refundable deposit and no service tax was paid on this amount even in the subsequent years. It was also found that in cases other than the "deposit Scheme" demat account holders, they had collected different amounts towards "Annual Maintenance Charges" per annum and paid service tax on the same at appropriate rate. Whereas, considering that the value of such services remained hidden as the said interest free deposit is available to them at their disposal, show cause notices demanding service tax amount of Rs.11,37,885/- (Rs.5,46,060/- & Rs.5,91,825/- for the periods F.Y. 2013-14 and F.Y.2014-15 respectively) were issued under Section 73 of the Finance Act, 1994 (*hereinafter referred to as "the Act"*) read with Section 67 of the Act and Rule 3 of the Service Tax (Determination of Value) Rules, 2006 and also proposing penalty under Section 78A of the Act upon Appellant No.2. The adjudicating authority confirmed the above demands alongwith interest vide impugned order. Penalty under Section 76, 77 was imposed on the appellant and penalty under Section 78A was imposed on the appellant No.2.



3. Being aggrieved with the impugned order, the appellants have preferred the present appeals, mainly, on the following grounds:-

(i) Observations made by the Adjudicating Authority in Paragraph 17 of the impugned order are contrary to the documentary evidences placed before him as much as they are not engaged in providing any banking & financial services but a registered broking firm with Bombay Stock Exchange; that evidence in form of (i) circular notice No. 80626/01 dated 17.03.2001 issued by Stock Exchange, Mumbai (ii) Certificate of Chartered Accountant establishes that no interest was earned by them on such deposit which were not considered by the adjudicating authority; that the said deposit amount was retained as 'security' by accounting for the same in the balance sheet as 'current liability' and the same was not employed for any financial gain.

(ii) The department has taken dual stand while arriving at service tax liability, as at one hand set off of refund of security deposit is considered against receipt i.e. treating as "deposits" and on other hand its demanding service tax on the said amount treating the same as income and hence demand is not sustainable .

(iii) That the case laws in respect of M/s. Laxmi Machine Tools [1992 (57) ELT 211 (Mad)], M/s. VST Inds Ltd [1998(97) ELT 395 (SC)] and in the case of BSNL 2010(17) STR 322(Commr Appl.) are applicable in their case.

(iv) It was their bona fide belief that amount collected as deposit is not liable to service tax and hence they neither charged nor collected service tax; that therefore 'cum duty' principle for the purpose of computing the service tax liability was applicable in light of the decision in the case of M/s. Advantage Media Consultant [2008(10) STR 449] which is maintained by Supreme Court as reported in 2009(14) STR J49 (SC). They further contended that non-collection and non-payment of service tax has occurred solely on account their bonafide belief and hence no penalty under Section 76 and 77 could be imposed.

(v) It is further contended that no penalty was imposable upon Appellant No.2 under Section 78A as no specific ground or reason is disclosed in the impugned order justifying imposition of penalty as there was no intention to evade tax by the appellant since the appellant has filed appeal before Hon'ble CESTAT against OIA NO. RJT-EXCUS-000-121-14-15 dated 30.07.2014 and



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RJT-EXCUS-000-APP-177-14-15 dated 28.08.2014; that maximum personal penalty amount prescribed under Section 78A is Rs.1,00,000/- whereas adjudicating authority has imposed personal penalty of Rs.11,37,885/- which is equal to the demand of service tax which is illegal and not justifiable

(vi) Limit for imposition of penalty u/s 77(2) is Rs.10,000/- whereas penalty of Rs.40,000/- imposed under impugned order is beyond the monetary limit prescribed under Section 77 and hence impugned order imposing penalty higher than the monetary limit prescribed is not justified. They referred Hon'ble Supreme Court's decision in the case of M/s. Hindustan Steel Ltd reported in 1978 ELT (J159) to contend that penalty should not be imposed merely because it was lawful to do so.

4. Personal Hearing in the matter was held on 25.04.2017 and again on 21.06.2017 for fresh hearing due to change in Appellant Authority, which was attended by Shri Chetan Dethariya and he reiterated grounds of Appeals of both the appeals. He requested to keep these appeal in abeyance as earlier orders passed by Commissioner(Appeals) are in Tribunal and would be hear in near future. He also submitted that no personal penalty on Shri Ketan Marwadi is justified as because all these were in knowledge of department and there is no malafide intent on part of Shri Marwadi, Director; that the department has not been able to substantiate the allegation against Shri Marwadi, Director.

FINDINGS

5. I have carefully gone through the facts of the case, appeal memorandum, submissions and records of personal hearing. The issue involved in the appeals are (1) Whether the Appellant is required to pay service tax on the services offered to their clients under Interest Free Deposit Schemes or not and (2) Whether penalty under Section 78A of the Act was rightly imposed upon Appellant No.2 or otherwise.

6. I find that the appellant has vehemently contended that the said deposits were "interest free deposits" and in lieu of it they have not charged the annual maintenance charges from their clients or waived the same. I find that providing of services by the appellant is not in dispute i.e. appellant has provided services with or without collecting charges as per their business policies. Therefore, taxable event is in existence and appellant is required to pay service



tax on the value of the services provided by them. It can not be said that the services were provided without any consideration inasmuch as waiver of AMC charges were available only when certain amount of sum deposited by the clients with the appellant. The appellant's argument is that the amount collected is 'security deposit' but the same does not hold good as the appellant has deducted certain amount in 1st year and reward is granted to depositor on remaining amount for 2nd year. It is a fact that the depositors of interest free deposits are rewarded by way of waiver of AMC charges and it is an agreed upon business transaction. The appellant has provided services to their clients for a "consideration" in the form of deposits much more than AMC. I find that in terms of Section 67 read with Rule 3 of Service Tax (determination of Valuation) Rules, 2006, the value for the purpose of service tax would be the AMC charges waived i.e. otherwise charged by the appellant from their other clients. I find from Table A and Table B at Para 6 of the impugned order that service tax has been demanded on the basis of number of accounts under the "Deposit Schemes" and value of the services has been taken as per normal AMC charges collected by the appellant from their other demat account holders which is as per provisions of Section 67 of the Act read with Rule 3 of the Service Tax (Determination of Value) Rules, 2006 and hence correct and proper. Thus, there is no legal ground to interfere with the order in this regard.

6.1 I find that the appellant has placed reliance on Stock Exchange Mumbai's Circular 80626/01 dated 17.03.2001 and a chartered accountant's certificate in respect of utilization of amount of deposit and its accounting in the balance sheet. I find that end use of amount is not a basis for assessment of service tax and arriving at correct valuation of services provided by the service provider. The adjudicating authority has correctly relied upon my predecessor's order No. OIA No. 331/2012/Commr (A) /RBT/ RAJ dated 14.06.2012.

6.2 I find that the appellant has relied upon the decision of the Hon'ble High Court of Madras in the case of Laxmi Machine Tools 1992 (57) ELT 211 (Mad) affirmed by the Hon'ble Supreme Court in the case of VST Industries Ltd. 1998 (97) ELT 395 (SC). However, on close examination this case appears on different footing as it is not a case of security deposit and notional interest but waiver of AMC charges being collected from other customers by the appellant but not being collected from depositors for 2nd year onwards under Interest Free Security Deposits.



6.3 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, argument for cum-tax-value or cum-duty-price can't be accepted as a general principle as has been held by the Hon'ble Supreme Court in the case of M/s. Amrit Agro Industries Ltd. Vs. CCE, Ghaziabad reported in 2007(210) ELT-183(SC). The analogy that unless it is shown by the manufacturer that the price of the goods includes the 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 will be applicable in this case of service tax also. For ease of reference relevant para 14 & 15 are reproduced as under:-

"14. *In our view, the above judgments in the case of Maruti Udyog Ltd. and Srichakra 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 wholeseller 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.*

15. *In our view, in the facts and circumstances of the case the judgment of this Court in the case of Bata India Ltd. (supra) on principle would apply. Therefore, in the present case, the assessee will have to show as to how he has determined the value. What the appellant has really done in the instant case has to be examined. Whether the price charged by him to his customers contains profit element or duty element will have to be examined. As stated above, this examination is warranted because, in the present case, one cannot go by general implication that the wholesale price would always mean cum-duty price, particularly when the assessee had cleared the goods during the relevant years on the basis of the above exemption notification dated 1-3-1997."*

(Emphasis supplied)

6.4 Thus, the above said principal laid down by the Hon'ble Supreme Court will be applicable to service tax matters also. Hon'ble CESTAT in the case of M/s. Rudra Galaxy Channel Ltd reported in 2015(38) STR 445 (Tri-Mumbai)



followed the above decision of Hon'ble Supreme Court. Thus, I hold that benefit of cum-tax value can not be extended to the appellant in the instant case.

7. Regarding penalty under Section 77(2), I find that the adjudicating authority at Para 25 of the order, while imposing penalty has specifically discussed non filing of correct ST-3 returns for the Financial Years 2012-13 & 2013-14. Thus, penalty amount of Rs.40,000/- imposed is spread for 4 half yearly returns required to be filed by the appellant. Section 77(2) prescribes for penalty of Rs. 10,000/- on each such failure and hence imposition of penalty of Rs. 40,000/- on the appellant under Section 77 (2) of the Act is justified and hence I do not find force in appellant's argument that the penalty imposed under Section 77(2) is higher than what is prescribed in the law.

7.1. As regards penalty imposed under Section 76, it is a fact that the Appellant failed to pay the service tax payable by them as held in foregoing paras, I do not find any infirmity in adjudicating authority's order for imposition of penalty under Section 76 of the Act as Section 76 of the Act says "who fails to pay such tax, shall pay, in addition to such a penalty which shall not be less than two hundred rupees for every day during which such failure continues"

8. The appellant No.2 has contended that no penalty was imposable upon him under Section 78A on the ground that there was no malafide intent on his part to evade the service tax and also on ground that department has not substantiated the allegation against him. I would like to reproduce Section 78A inserted vide Finance Act, 2013 which reads as under:-

"78A. Where a company has committed any of the following contraventions, namely:—

(a) evasion of service tax; or

(b) issuance of invoice, bill or, as the case may be, a challan without provision of taxable service in violation of the rules made under the provisions of this Chapter; or

(c) availment and utilisation of credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of this Chapter; or

(d) failure to pay any amount collected as service tax to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due.



then any director, manager, secretary or other officer of such company, who at the time of such contravention was in charge of, and was responsible to, the company for the conduct of business of such company and was knowingly concerned with such contravention, shall be liable to a penalty which may extend to one lakh rupees"

(Emphasis supplied)

8.1 Hence, the provisions of Section 78A are attracted when a company evades payment of service tax. The appellant company has not made payment of service tax in the instant case, and it is not in dispute that the appellant no.2 is a director, who was responsible person for the operations of the appellant company. Hence, I do not find the merit in appellant's plea that department has failed to substantiate the allegation. As regards argument advanced by the appellant no. 2 that no penalty was proposed during the earlier proceedings, I find that Section 78A has been inserted in the statute by Finance Act, 2013 w.e.f. 10.05.2013 and hence it could not have been invoked in earlier SCNs for earlier period. The proposal in the SCNs dated 17.12.2014 & dated 07.10.2015 covering the years 2013-14 and 2014-15 is justified. The appellants are established company managed by the professionals. I rely on the Order passed by the Hon'ble CESTAT, Chennai, in the case of TVS Motor Co. Ltd. reported in 2012 (28) S.T.R. 127 (Tri. - Chennai), wherein it has been held that:

"13. So far as ground of no penalty advanced by learned counsel is concerned there is nothing on record to show that the appellant avoided its liability bona fide when it is an established business concern with vast experience in application of provisions of Finance Act, 1994. Its returns did not disclose bona fide omission. Rather facts suggest that knowable breach of law made the appellant to suffer adjudication. Accordingly, no immunity from penalty is possible to be granted on the plea of tax compliances made which was found to be a case no payment of tax on the impugned services provided during the relevant period."

8.2 Thus, I do not find any infirmity in order imposing penalty upon appellant no.2, however, regarding quantum of the penalty I find that phrase used in the provision reads as "... **shall be liable to a penalty which may extend to one lakh rupees**". Thus, provision itself stipulates that the maximum penalty can be upto one lakh rupees only. Therefore, I find merit in the argument of Appellant No.2 that maximum penalty imposable is Rs.1 lakh under Section 78A. Accordingly, I reduce penalty amount to Rupees one lakh only and modify the order to that extent.



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9. In view of the above discussion and findings, I uphold the impugned order with partial modification of penalty on Appellant No.2 is reduced to one lakh rupees as discussed in per Para 8.2 above. Accordingly, I reject the appeal filed by the Appellant and partially allow the appeal filed by the Appellant no.2.

10. The appeals are disposed of in above terms.

१०. दोनों अपीलों का निपटारा उपरोक्त तरीके से किया जाता है.

(Handwritten Signature)
30/11/2016

(कुमार संतोष)

आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s. Marwadi Shares & Finance Ltd, Marwadi Finance Plaza, Nana Mava Main Road, Near Iscon Mega Mall, RAJKOT- 360001	मेसर्स मारवाडी शेयर्स एंड फाइनेंस लिमिटेड मारवाडी फाइनेंस प्लाजा, नाना मवा मेन रोड इस्कॉन मेगा मॉल के नजदीक राजकोट ३६०००१
Shri Ketan Marwadi, Director, M/s. Marwadi Shares & Finance Ltd, Marwadi Finance Plaza, Nana Mava Main Road, Near Iscon Mega Mall, RAJKOT- 360001	श्री केतन मारवाडी, डाइरेक्टर, मेसर्स मारवाडी शेयर्स एंड फाइनेंस लिमिटेड मारवाडी फाइनेंस प्लाजा, नाना मवा मेन रोड इस्कॉन मेगा मॉल के नजदीक राजकोट ३६०००१

Copy to:

1. The Chief Commissioner, CGST & Central Excise, Ahmedabad.
2. The Principal Commissioner, CGST & C. Excise, Rajkot.
3. The Assistant Commissioner, CGST & C. Excise Division (Old -S.TAX Division), Rajkot
4. The Superintendent, CGST & C Ex Range (old - S Tax Range IV), Rajkot.
5. Guard File.

9. In view of the above discussion and findings, I uphold the impugned order with partial modification of penalty on Appellant No 2 is reduced to one lakh rupees as discussed in per Para 8.2 above. Accordingly, I reject the appeal filed by the Appellant and partially allow the appeal filed by the Appellant no.2.

10. The appeals are disposed of in above terms.

१०. दोनों अपीलों का निपटारा उपरोक्त तरीके से किया जाता है.

सत्यापित,

(कुमार संतोष)

आर. एन. मीणा, आयुक्त (अपील्स)
अधीक्षक (अपील)

By R.P.A.D.

To,

M/s. Marwadi Shares & Finance Ltd, Marwadi Finance Plaza, Nana Mava Main Road, Near Iscon Mega Mall, RAJKOT- 360001	मेसर्स मारवाडी शेयर्स एंड फाइनेंस लिमिटेड मारवाडी फाइनेंस प्लाजा, नाना मवा मेन रोड इस्कॉन मेगा मॉल के नजदीक राजकोट ३६०००१
Shri Ketan Marwadi, Director, M/s. Marwadi Shares & Finance Ltd, Marwadi Finance Plaza, Nana Mava Main Road, Near Iscon Mega Mall, RAJKOT- 360001	श्री केतन मारवाडी, डाइरेक्टर, मेसर्स मारवाडी शेयर्स एंड फाइनेंस लिमिटेड मारवाडी फाइनेंस प्लाजा, नाना मवा मेन रोड इस्कॉन मेगा मॉल के नजदीक राजकोट ३६०००१

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2. The Principal Commissioner, CGST & C. Excise, Rajkot.
3. The Assistant Commissioner, CGST & C. Excise Division (Old -S.TAX Division), Rajkot
4. The Superintendent, CGST & C Ex Range (old - S .Tax Range IV), Rajkot.
5. Guard File.