[illegible] (अपील्स) का कार्यालय, वस्तु एवं सेवा और केंद्रीय 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 – [illegible] Email: [illegible]@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए.डी. द्वारा :-

अपील / फाइल संख्या Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
V2/32, 33 & 31/BVR/2019	BHV-EXCUS-000-ADC-16-2018-19	17.05.2019

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

BHV-EXCUS-000-APP-001-TO-003-2020

आदेश का दिनांक / Date of Order:	**09.01.2020**	जारी करने की तारीख / Date of issue:	**09.01.2020**

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Gopi Nath, Commissioner (Appeals), Rajkot

ग [illegible]
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot/Jamnagar/Gandhidham :

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

1. M/s Perfect Auto Services, GIDC-I, Plot No. 81,82 & 91, Dolatpara, Rajkot Road, Junagadh, Bhavnagar.
2. M/s.Shri. Suryakant B. Patel (Director M/s Perfect Auto Services),, GIDC-I, Plot No. 81,82 & 91, Dolatpara, Rajkot Road,, Junagadh, Bhavnagar.
3. M/s.Shri. Keval S. Patel (Director M/s Perfect Auto Services),, GIDC-I, Plot No. 81,82 & 91, Dolatpara, Rajkot Road,, Junagadh, Bhavnagar.

[illegible]
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) [illegible]

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) [illegible]

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) [illegible]

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at [illegible] Floor, [illegible] Ahmedabad [illegible] in case of appeals other than as mentioned in para-(i) above

(iii) [illegible]

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) [illegible]

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) [illegible]

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 [illegible] the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) [illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

[illegible]

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.

[illegible] :

Revision application to Government of India:

[illegible]

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) [illegible]

In case of any loss of goods, where the loss occur 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) [illegible]

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) [illegible]

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) [illegible]

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) [illegible]

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) [illegible]

[illegible]

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved is Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(vii) [illegible]

In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(viii) [illegible]

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.

(ix) [illegible]

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.

(x) [illegible]

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 [illegible]

.. ORDER IN APPEAL ..

The appeals listed below have been filed by the following appellants no. 1 to appellant no. 3(hereinafter referred to as "the appellants") against Orders-In-Original No. BHV EXCUS-001-ADC-16-2018-19 dated 27.03.2019 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner, CGST HQ, Bhavnagar (hereinafter referred to as "the adjudicating authority").

Sr. No.	Appeal File No.	Appellant	Appellant No.
01	V2/32/BVR/2019	M/s. Perfect Auto Services, G.I.D.C. Plot No.81 82,82, Dalchpara, Rajkot Road, Junagadh	Appellant No.1
02	V2/33/BVR/2019	Shri Gunjakant H. Patel, Director of M/s. Perfect Auto Services, G.I.D.C. Plot No.81 82,82, Dalchpara, Rajkot Road, Junagadh	Appellant No.2
03	V2/34/BVR/2019	Shri Anvar S. Pala, Director of M/s. Perfect Auto Services, G.I.D.C. Plot No.81 82,82, Dalchpara, Rajkot Road, Junagadh	Appellant No.3

2. Brief facts of the case are that an inquiry was initiated against the Appellant No.1 by Anti-Evasion Section, Central Excise, HQ, Bhavnagar which revealed that the Appellant No.1 was having "authorized service station" for their principal viz. Maruti Suzuki and Tata etc.; that the Appellant No. 1 was collecting handling charges from their customers to whom they were selling car but was not paying service tax on the cargo handling service rendered in the form of handling charges; that the Appellant No.1 received incentive and discount from their principal for promoting the sale and provided service under the category of Business Auxiliary Services but had not paid service tax; that the Appellant No. 1 paid commission to their Directors i.e. Appellant No. 2 and Appellant No. 3 during the period from 2008-09 to 2012-13, in addition to the remuneration; that the Appellant No. 1 was liable to pay service tax for the year 2012-13, under reverse charge mechanism in terms of Notification No. 30-2012-ST dated 20.06.2012 as amended by Notification No. 45/2012-ST dated 07.09.2012 however, the Appellant No. 1 has not paid service tax; that the Appellant No. 2 and Appellant No. 3, were liable to pay service tax on the commission for the period from 2008-09 to 2011-12, however, the Appellant No. 2 and Appellant No. 3 failed to discharge service tax.

2.1 The Show Cause Notice No. VIII(b)-04/ADC/BM-ST/HQ/2014-15 dated 21.04.2014 was issued for recovery of service tax of Rs. 62,28,604/- from Appellant No.1 under proviso to Section 73(1) of the Finance Act, 1994 (hereinafter referred to as "Act") read with Rule 7(2) of the Service Tax Rules, 1994 (herein after referred to as "Rules") along with interest under Section 75 of the Act and proposing penalty under Section 77, Section 77 (b) and Section 78 of the Act on Appellant No. 1, recovery of service tax Rs. 24,92,500/- each from Appellant No.2 & Appellant No. 3 under proviso to Section 73(1) of the Act read with Rule 7(2) of the Rules along with interest under Section 75 of the Act and proposing penalty under Section 77, Section 77 (a), Section 77 (b), Section 77 (c) and Section 78 of the Act on each of Appellant No. 2 & Appellant No. 3.

2.2 The adjudicating authority vide impugned order has adjudicated the above SCN and confirmed recovery of the demand of service tax of Rs. 65,31,694/- from the Appellant No. 1 under Section 73(2) of the Act read with Rule 7(2) of the Rules by invoking extended period along with interest under Section 75 of the Act, imposed penalty Rs. 10,000/- under Section 77 of the Act, penalty Rs. 10,000/- under Section 77(c) of the Act, penalty Rs. 80,36,824/- under Section 78 of the Act on the Appellant No. 1; confirmed recovery of the demand of service tax of Rs. 24,92,800/- from each of Appellant No. 2 and Appellant No. 3 under proviso to Section 73(1) of the Act along with interest under Section 75 of the Act, imposed penalties on each of them Rs. 10,000/- under Section 77 of the Act, Rs. 10,000/- under Section 77(a) of the Act, Rs. 10,000/- under Section 77 (b) of the Act, Rs. 10,000/- under Section 77(c) of the Act and Rs. 24,92,800/- under Section 78 of the Act.

3. Aggrieved, the appellant preferred these appeals, inter-alia, on the grounds as under:

Appellant No.1

(i) that the handling charges were included in the value of vehicle on which they paid VAT/sales tax; that handling charges are collected for the parts and components used while repairing or servicing of vehicles which are procured from the warehouse depots of their Principal that since the Appellant No. 1 have to incur octroi and other local taxes, freight, loading and unloading charges etc. on procuring such parts and components, they charge handling charges from their customers, that in terms of Master Circular of CBEC bearing No. 96/7/2007-ST no service tax to be levied on transaction value of sale of goods and they placed reliance on decision in case of Kelar Motors Ltd. reported as 2014 (33) STR 155 (Tri. Mum), that since being an authorized service station of automobile companies they can provide services for the vehicles manufactured by a particular automobile company, in view of the above, services provided in respect of the vehicle cannot be held to be taxable services and they placed reliance on case law of Dynamic Motors reported as 2012 (26) STR 145 (Tri-Del.); that the handling charges are collected as part of value of goods in composite activity of sale and services and the invoice issued is for sale of goods as well as for collection of service charges, no service tax can be levied, especially when the goods are made subject to payment of sales tax/VAT on the value inclusive of handling charges that they relied upon the judgment in the case of Automotive Manufacturers Pvt. Ltd. reported 2015 (38) STR 1187 (Tri. Bom.)

(ii) that incentive and discount are in the nature of trade discount given by their Principal for meeting or exceeding sale target set out by them; that in agreement with the Principal, there is no specific provision showing exact quantum of the incentive and discount, that early payment incentive received by the Distributor on distribution of goods of the Principal and remitted by them is not liable to service tax as there is

no service involved; that they relied upon case law of P. Gautam & Co. reported as 2011 (24) STR 447 (Tri-Ahmd.); that the Appellant No. 1 is authorized service center of the manufacturer and the incentives are offered as per rates fixed by such manufacturer. In that case service tax demand on the sale/target incentive on sale of vehicles and spare parts is unsustainable and they placed reliance on the judgment in the case of Sai Service Station Ltd. reported as 2014 (35) STR (625) (Tri-Mumbai);

(iii) that the amounts received by the Directors are their share of profit and not for any service, the same cannot be made liable to service tax; that service tax confirmed on the profit share received by the Directors who are nothing but employees of the Appellant No. 1; that on remuneration paid to directors, no service tax shall be payable if there is employer-employee relationship between the parties. They relied upon the judgment in the case of Allied Blenders & Distillers Pvt. Ltd. reported as 2019 (1) TMI 452-CESTAT, Mumbai; that as per provisions of the Companies Act, 2013 Whole time director of any company is nothing but an employee of the said company and any remuneration / commission etc. paid to them is salary only; that a whole-time director can be compensated by way of not only remuneration but also by way of commission based on net profits of the company; that they placed reliance on the judgment in the case of Ramabhai A. Thanawala vs Jyoti Ltd. & Ors. reported as AIR 1958 Bom 214, (1957) 59 BOMLR 571; that it is a well-settled position in law that the Act would prevail over the Rules or Notifications issued thereunder. When the activity of employment itself is excluded from the definition of 'service' under the Finance Act, 1994, there is no question of taxability of such service under Notification No. 30/2012-S.T. dated 20.06.2012; that the whole-time/managing/executive directors are under a contractual employment. Hence, it cannot be considered as a service and the question of taxability under reverse charge mechanism does not arise.

(iv) that Section 17 (1) of the Income Tax Act, 1961 defines the word 'salary'. In the said sub-section (1) of section 17, at clause (iv), it has been provided that salary includes 'any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages' and therefore, commission paid to any director is nothing but a part of salary only; that in a number of judicial pronouncements under the Income tax law, it has been held that commission paid to directors for the work done in their capacity as whole-time directors is to be treated as an incentive in addition to salary and the same didn't come within the purview of commission for brokerage or fee for professional or technical services; that they relied upon following case laws:

Nashik Metals (P.) Ltd. Vs. Income Tax Officer, Ward 2 (?), Pune - [2014] 50 taxmann.com 183 (Pune - Trib.);
Jahangir Bilt Factory (P.) Ltd. Vs. DCIT [2009] 125 TTJ [illegible] (Kol.);
Ram Works India Pvt. Ltd. v. Commissioner of Central Excise, Mumbai-IV - 2016 (43) S.T.R. 664 (Tri.-Mumbai)

(v) that vide General Circular No. 24/2012 dated 06.08.2012 of the Ministry of Corporate Affairs it was clarified that only in respect of payments made to non-whole

time directors (who are not employees of the company working regularly for the company), service tax liability arises to the companies; that as long as there is an employer employee relationship, mode of payment will not alter the nature of service provided by a director; that they places reliance on Circular No. 115/09/2009-S.T dated 31.07.2009, which clarified that remuneration / commission paid to whole time directors, being compensation for their performance, would not be liable to service tax. This clarification would apply even w.e.f. 01.07.2012 and the impugned order, demanding service tax on the profit share of the Directors, is liable to be set aside, being against the provisions of Section 65B (44) read with Section 66B of the Act.

(vi) that the extended period of limitation is not invokable in the present case as there was no suppression of facts with an intent to evade payment of service tax since, they filed ST-3 returns regularly and the department carried out audit; thus, all the activities carried out by the Appellant No. 1 is well within the knowledge of the department; that it is improper to allege suppression / willful misstatement on the part of the Appellant No. 1. When the assessee is audited by the service tax authorities, suppression etc. cannot be alleged on the assessee. they placed reliance on the following case laws:

- Tirupati Concrete Products Pvt. Ltd. - 2015 (322) ELT 845 (SC)
- Rajkumar Forge Ltd - 2010 (262) ELT 155 (Bom)
- Baldev & Co. Ltd - 2006 (117) ELT 480 (Tri-Bom)
- Rigid Tubes Ltd - 2007 (212) ELT 274 (Tri-Bang)

(vii) that no penalty can be imposed under Section 77 of the Act as none of the conditions specified therein have been met; that the allegation that the Appellant No. 1 failed to provide any information to the department or produce documents or appear before the department on inquiry appears to be not tenable. In fact, there is no allegation in the show cause notice to this effect; that there is also no allegation that the Appellant No.1 has issued invoices not in accordance with the provisions of the Act or the Rules made there under. Thus, clause (e) is also not applicable. Thus, it is clear that none of the conditions of Section 77 are satisfied and therefore the proposal to levy penalty under Section 77 is without basis and does not stand.

(viii) that in view of above submissions penalty under section 78 is not sustainable and they relied on case law of the Hon'ble Supreme Court in case of Akbar Badruddin Jiwani reported as 1990 (047) ELT 0161 SC.

(ix) that there was a bonafide belief on part of the Appellant No. 1 that the activities of loading/unloading and handling do not form part of the GTA service; therefore, there was reasonable cause for failure, if any, on part of the Appellant No. 1 to pay service tax and to file service tax returns; that Section 80 of the Act invokable in the present case and penalties cannot be imposed under Sections 76, 77, 78 of the Act.

Appellant No 2 & 3

(i) that the amounts paid by the Appellant No. 1 to Appellant No. 2 & 3 (Directors) as their share Profit, that service provided by the directors are in the nature of service provided by an employee to the employer and same is excluded from the ambit of service tax act. that even if the service tax is levied, the liability thereof shall be on service recipient under reverse charge mechanism. In the present case, service tax has been confirmed on the profit share received by the Appellant No. 2 & 3 who are employee of the Company. The Appellant No. 2 & 3 submits that on remuneration paid to them, no service tax shall be payable if there is employer employee relationship between the parties. They relied upon the judgment in the case of Allied Blenders & Distillers Pvt. Ltd. vs. CCEST, Aurangabad 2018 (1) TMI 453-CESTAT Mumbai that Appellant No.2 & 3 also contended the allegation of penalty & invocation of extended period on the same ground as submitted above by the Appellant No.1.

4. Personal Hearing in the matter was attended by Shri Sanjot Gupta, Advocate on behalf of the Appellants, he reiterated the submissions of appeal memo and stated that the commission paid to the directors is part of salary under Income Tax also and therefore the service tax is not chargeable and accordingly the penalty and interest on the firm and as well as the directors are not imposable and therefore appeal may be allowed.

5. I have carefully gone through the impugned order, appeal memorandum, records of personal hearing and written as well as oral submissions made by the appellants. The issue to be decided in the present appeals is whether on the facts and circumstances of the case the impugned order passed by the adjudicating authority confirming the demand along with interest and imposing penalty is correct, legal and proper or not.

6. On going through the records, I find that the Appellant No. 1 was authorized dealer and having authorized service station of Maruti Suzuki India Limited (hereinafter referred to as 'MSIL') and purchased vehicles, accessories thereof, parts & components from MSIL on principal to principal basis. I find that the adjudicating authority held that the Appellant No. 1 had collected handling charges from their customer to whom they sold the car and the said handling charges have been shown in the invoices raised by the Appellant No. 1.

6.1 The appellant argued that they collected handling charges for the parts and components used while repairing or servicing of vehicles which ensured from the warehouse/depot of the principal, that since, the Appellant No. 1 has to incur expenses for octroi, other local taxes, freight, loading & unloading etc. on procuring such parts and components, they charged handling charges from the customers. I find that the contention of the Appellant No. 1 appears to be contrary to facts. I find that Shri Hitesh

Kotak, Accounts Manager/Chief Accountant of the Appellant No.1 in his Statement dated 18.4.2014 deposed as under:

> Q.No.5 On going through the profit and loss account of your company for last five years, it has been observed that the company has been charging under heading 'handling charges'. Please clarify what is the meaning of handling charges? What are the broad heads and type of handling charges?
>
> Ans.No.5 We charges as handling charges. Details may be as following handling charges from our customers to whom we are selling the car. Invoices have service Bills issued by our company for selling the cars which shows handling charges.

5.2 Thus, as deposed by the Accounts Manager of the Appellant No. 1, the handling charges collected by the Appellant No. 1 pertained to services rendered in connection with delivery of cars to customers. Thus, the said handling charges were in no way connected with selling of parts and non-warranty jobs for repairing of cars as contended by the Appellant No. 1. Once consideration is charged and recovered over and above price of vehicle, it cannot be said that the activity carried out by them is only for sale of vehicles. I find that the Appellant No. 1 rendered services related to handling of vehicles and collected handling charges from the customers and therefore relation of 'service provider' and 'service receiver' stands established and amount so charged was consideration for providing such services. The Appellant No. 1 is thus, liable to pay service tax on said handling charges under the category of 'Cargo Handling Service' as rightly held in the impugned order.

5.3 The Appellant No.1 has contended that the recovery of handling charges are part of sales and any expenditure incurred by a dealer before sale is part and parcel of the taxable turnover liable to sales tax/VAT. Therefore, no service tax can be levied, especially when the goods are made subject to payment of sales tax/VAT on the value inclusive of handling charges and they relied on case law of M/s. Dynamic Motors reported as 2012 (26) STR 745 (Tri.-Bom.), M/s. Kelan Motors Ltd. reported as 2014 (33) STR 185 (Tri.-Bom.) and M/s. Automotive Manufacturers Pvt. Ltd. reported as 2015 (38) STR 1181 (Tri.-Bom.). I find that the Appellant No. 1 argues that they paid the VAT on entire amount of sale, inclusive of handling charges. I find that the impugned SCN alleged that the Appellant No. 1 had separately mentioned handling charges in their invoice issued to the customer but they have not added handling charges while calculating VAT. I find that the adjudicating authority also held that the Appellant No. 1 failed to produce substantial documents that they are paying VAT on handling charges. I have examined the said case law of M/s. Automotive Manufacturers Pvt. Ltd. wherein the Hon'ble Tribunal relied on case laws of M/s. Dynamic Motors and M/s. Kelan Motors Ltd. After examining the facts and circumstances of the present case, I am of the considered opinion that the facts of the case of M/s. Automotive Manufacturers Pvt. Ltd. are not similar to the facts and circumstance of the present case. I find that the demand of service tax in that case was on 'handling charges' incurred in connection with transhipment of goods, which are included in the value of the goods sold and sales

tax/VAT liability was discharged by the assessee on the value inclusive of the handling charges whereas, in the present case VAT/Sales Tax is not assessed on value inclusive of handling charges recovered by the Appellant No.1.Thus, facts of said case laws are different and distinguishable from the facts of the present case and hence, the said case laws are not applicable.

5.4 In view of the above, I find that the Appellant No. 1 has provided taxable services for which they charged/received consideration in form of handling charges. , therefore, find that the adjudicating authority has correctly held that the Appellant No. 1 is liable to pay service tax on handling charges along with interest.

7 Regarding confirmation of demand on commission paid to Directors on reverse charge basis, the Appellant No. 1 contended that as per Income Tax provisions, commission paid to directors for the work done in their capacity as whole-time directors is to be treated as an incentive in addition to salary and the same didn't come within the purview of commission; that as per provisions of the Companies Act, 2013 the whole-time director is nothing but a whole-time employee of the company and commission remuneration paid to them is salary only. I find that the directors i.e. Appellant No. 2 & 3 of the Appellant No. 1 were whole-time directors of the company, for which remuneration was paid to them by the Appellant No. 1. The Appellant No. 1 also paid commission to the directors during the period from 2008-09 to 2012-13. . I find that the Central Government has expanded the provisions of payment of service tax under reverse charge mechanism to include services rendered by a director vide Notification No. 30/2012-S.T. dated 20.06.2012 as amended by Notification No. 45/2012-S.T. dated 07.08.2012, which is reproduced below:

Sr. No.	Description of service	Percentage of service payable by the person providing the service	Percentage of service payable by the person receiving the service
1	2	3	4
6A	In respect of services provided or agreed to be provided by a director of a company to the said company	Nil	100%

7.1 I find that it is clearly provided in the Notification supra that the services provided or agreed to be provided by a director of a company to the said company is chargeable to service tax on reverse charge mechanism and therefore, the Appellant No. 1 is liable to pay service tax on the commission paid to their Directors on reverse charge basis with effect from 07.08.2012.

8. I find that MSIL has given discount/incentive to the Appellant No. 1 for achieving the sales target, as per dealership agreement. I also find that the discount passed on by MSIL is directly concerned with volume of sale and since the transactions are on principal to principal basis, the discount/incentive received by the Appellant No. 1 from MSIL, cannot be considered as commission/ vicarious and same is not subject matter of levy of Service Tax in view of negative list of services specified under Section 66D(e) of

the Act since this is nothing but trading of goods. Further amount received by the Appellant No. 1 from MSIL in the form of incentive/trade discount in achieving the targeted sale is not to be considered to be amount received towards performing any service as defined under Section 65B (44) of the Act since discount concerned with sale of goods and ownership of the goods transferred from MSIL to the Appellant No. 1 is at the time of sale of goods to the Appellant No. 1. Hence, I am of the considered view that amount received by the Appellant No. 1 in the form of incentive/discount from MSIL as per the contractual terms towards achieving the targeted sales of products of MSIL is considered as trade discount and cannot be considered as amount received towards promotion or marketing of goods on behalf of MSIL and therefore, the Appellant No. 1 is not liable to pay service tax of Rs. 15,89,257/- on the incentive/discount received by the Appellant No. 1 under the category of "Business Auxiliary Service". My views are supported by the Hon'ble CESTAT, Mumbai in similar case of Sai Service Station reported as 2014 (35) STR 325 (Tri. – Mumbai), wherein it has been held as under:

> 14. In respect of the incentive on account of target achievement, incentive on sale of vehicles and incentive on sale of spare parts by the appellant and marketing the products of MSIL, the contention is that these incentives are in the form of trade discount. The assessee-appellant is the authorized dealer of car manufactured by MSIL and are getting certain incentives on account of sale target set out by the manufacturer. These incentives are as per the circular issued by MSIL. Hence these cannot be treated as business auxiliary service.
>
> ... ...
>
> 15. In respect of sales target incentive, the Revenue wants to tax the same under the category of business auxiliary service. We have gone through the circular issued by MSIL which provides certain incentives in respect of cars sold by the assessee-respondent. These incentives are in the form of trade discount. In these circumstances, we find no infirmity in the adjudication order wherein the adjudicating authority dropped the demand. Hence, the appeal filed by the Revenue is dismissed.

(Emphasis supplied)

8.1 In view of above, I have no option but to set aside the impugned order confirming demand of service tax of Rs. 15,89,257/- including order for recovery of interest and imposition of penalty of Rs. 15,89,257/-.

9. The Appellant No. 2 and 3 have contended that amounts received by them is their share Profit; that service provided by the directors are in the nature of service provided by an employee to the employer and same is excluded from the ambit of service tax; and that even if the service tax is levied, the liability thereof shall be on service recipient under reverse charge mechanism.

9.1 I find that the Appellant No. 1 paid commission to their directors during the period from 2008-09 to 2012-13 apart from salary. For the period from 07.08.2012 to March, 2013, the Appellant No. 1 is liable to pay service tax on commission paid to Appellant No. 2 and 3 on reverse charge basis as held by me in para supra. For confirmation of demand on Appellant No. 2 and 3 for the period from 2008-09 to 06.08.2012, I find that the adjudicating authority at para 32.1 of the impugned order has found that the Appellant No. 2 and 3 have provided advisory/consultancy services to the Appellant

No.1. In backdrop of said findings I examine Board's Circular No. 115/09/2009-ST dated 31.07.2009 relied upon by the Appellant No. 2 and 3, relevant para of the said Circular is as under:

> 2. Both the matters have been examined by the Board and the clarifications are as under.
>
> (i) The Managing Director/Directors (Whole time or Independent) being part of Board of Directors perform management function and they do not perform consultancy or advisory function. The definition of management consultant service makes it clear that what is envisaged for a consultancy or advisory service and not for actual performance of the management function. The payments made by Companies to Directors cannot be termed as payments for providing management consultancy service. Therefore, it is clarified that the amount paid to Directors (Whole time or Independent) is not chargeable to service tax under the category 'Management Consultancy service'. <u>However, in case such Directors provide any advice or consultancy to the company, for which they are being compensated separately, such services would become chargeable to service tax.</u>

(Emphasis supplied)

9.2 As can be seen from the above clarification, payment made to Director of a Company for performance of management function is not liable to service tax. However, if any advice or consultancy is provided by such directors to the Company for which they are compensated separately then they are liable to service tax. In the present case, as held by the adjudicating authority, the Appellant No. 2 and 3 provided advisory/consultancy services to the Appellant No. 1. Under the circumstance, I concur with the findings of the adjudicating authority that the Appellant No. 2 & 3 are liable to pay service tax on commission received by them from the Appellant No. 1 during the period from 2008-09 to 06.06.2012 under the category of 'Management Consultancy Service'. I, therefore, uphold confirmation of service tax demand upon Appellant No. 2 and 3.

10. As regards imposition of penalties, I find that the Appellant No. 1 is an established company managed by professionals and always had knowledge by virtue of Income Tax laws that their Directors can work for other companies as well by rendering them their services as Directors and are statutorily treated as distinct persons from the employer employee relationship. I find that negative list regime is very unequivocal, and except the categories mentioned therein, no activity is entitled for exemption from levy of service tax leaving no scope to harbor any doubt whatsoever. Therefore, it transpires that though there was no ambiguity in law, the Appellants on their own interpreted the law and not brought the relevant material facts to the notice of the department at any point of time. Hence required ingredient of suppression of these facts, mis-statement etc. for imposing penalty under Section 78 of the Act is found to be existing in the case of Appellant No. 1 to 3 and such suppression was not without intention to evade the tax. I placed reliance upon case law of the Hon'ble CESTAT, Chennai, in the case of TVS Motor Co. Ltd reported as 2012 (28) S.T.R. 127 (Tri. Chennai.). Thus, in such cases where assessee did not declare the correct facts and deliberately mis-construed the facts, leading to evasion of service tax on their part tantamount to suppression of facts with an intent to evade service tax. Therefore, I find no infirmity in the impugned order invoking extended period and imposing penalty under

Section 78 of the Act on the Appellant No. 1 to 3 along with applicable interest under Section 75 of the Act.

10.1 I find that the Appellant No. 1 failed to declare the correct information in their ST-3 returns and Appellant No. 2 & 3 failed to file their ST-3 returns for taxable services provided by them for the relevant period and therefore imposition of penalty on the Appellants under Section 77 of the Act is also justified.

10.2 I find that the Appellant No. 2 & 3 provided taxable services but failed to obtain registration under Section 69 of the Act, failed to keep and maintain records for such taxable services in terms of Rule 5 of the Service Tax Rules, 1994 and failed to issue invoices for the such taxable services in terms of Rule 4A of the Service Tax Rules, 1994 and therefore imposition of penalties under Section 77(a), 77(b) and 77(c) of the Act on the Appellant No. 2 & 3 are also justified.

11. In view of above, I partially allowed appeal filed by the Appellant No. 1 and set aside the service tax demand of Rs. [illegible]/- and penalty of Rs. 15,98,257/- imposed under Section 78 of the Act and uphold the impugned order to the extent of confirmation of service tax demand of Rs. [illegible]/- along with interest and penalty of Rs. 47,35,347/- imposed under Section 78 of the Act. I also uphold the impugned order in respect of Appellant No. 2 and 3 and reject the appeals filed by the Appellant No. 2 & 3.

11.1 अपीलकर्ता द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

11.1 The appeals filed by the appellants stand disposed off in above terms.

(GOPI NATH)
Commissioner (Appeals)

By Regd. Post AD.

To,

01	M/s. Perfect Auto Services, G.I.D.C.-I, Plot No.81, 82, 92, Dolatpara, Rajkot Road, Junagadh	मेसर्स परफेक्ट ऑटो सर्विसेज, जी आइ.डी.सी.-I, प्लॉट नं. 81, 82, 92, डोलतपरा, राजकोट रोड, जूनागढ़
02	Shri Suryakant H. Patel, Director of M/s. Perfect Auto Services, G.I.D.C.-I, Plot No.81,82,92, Dolatpara, Rajkot Road, Junagadh	श्री सूर्यकांत एच. पटेल, डायरेक्टर, मेसर्स परफेक्ट ऑटो सर्विसेज, जी आइ.डी.सी.-I, प्लॉट नं. 81, 82, 92, डोलतपरा, राजकोट रोड, जूनागढ़
03	Shri Keyur S. Patel, Director of M/s. Perfect Auto Services, G.I.D.C.-I, Plot No.81,82,92, Dolatpara, Rajkot Road, Junagadh	श्री केयुर एस. पटेल, डायरेक्टर, मेसर्स परफेक्ट ऑटो सर्विसेज, जी आइ.डी.सी.-I, प्लॉट नं. 81, 82, 92, डोलतपरा, राजकोट रोड, जूनागढ़

प्रति:

(1) प्रधान मुख्य आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अहमदाबाद क्षेत्र, अहमदाबाद को जानकारी हेतु।

(2) आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर को आवश्यक कार्यवाही हेतु।

(3) सहायक आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर को आवश्यक कार्यवाही हेतु।

(4) गार्ड फ़ाइल

(5) F. No. V2/32/BVR/2019

(6) F. No. V2/33/BVR/2019