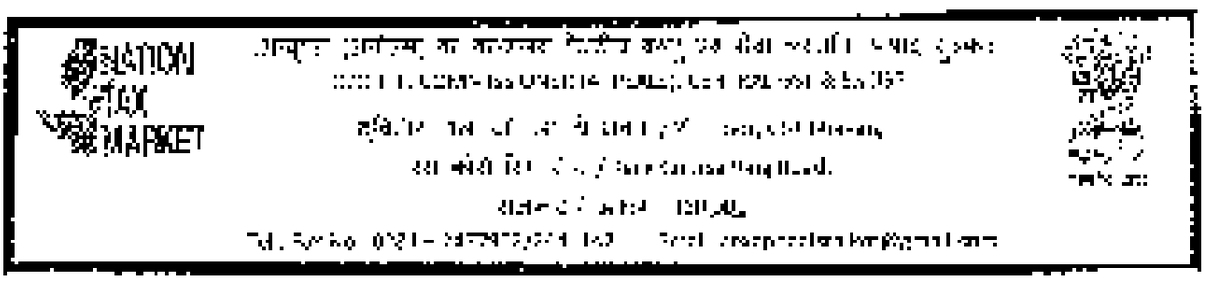

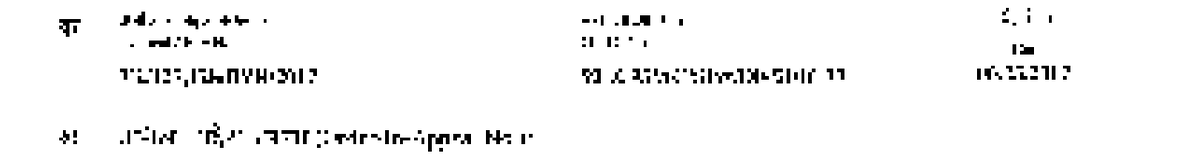

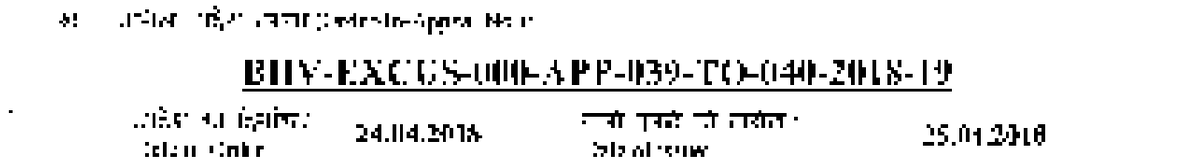

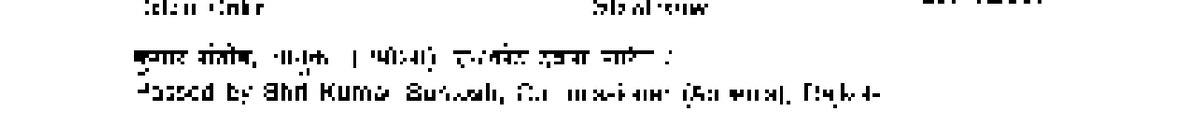

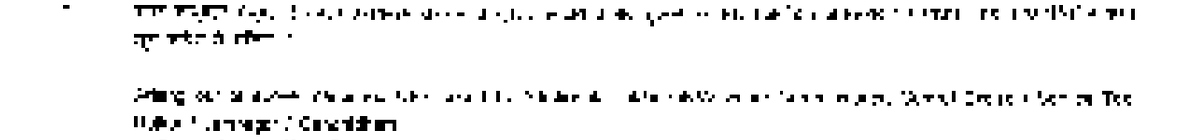

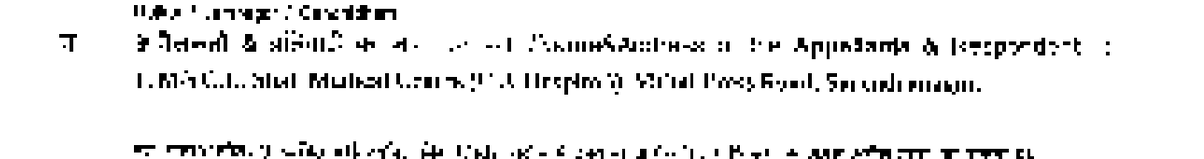

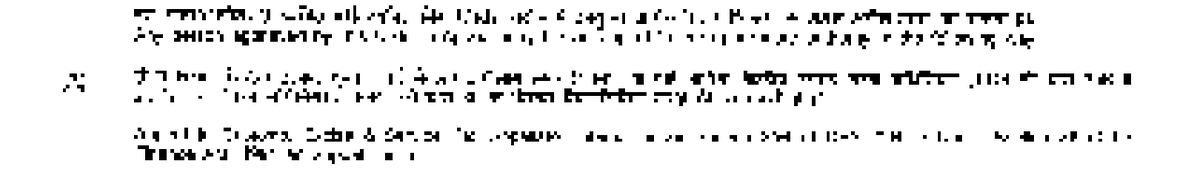

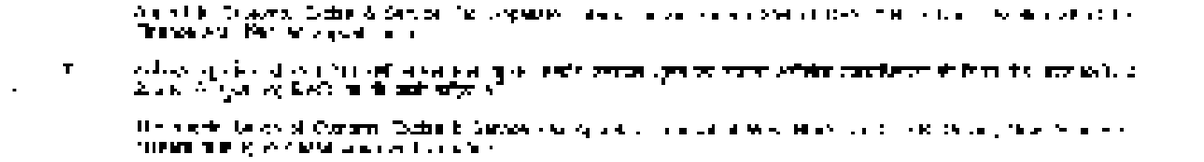

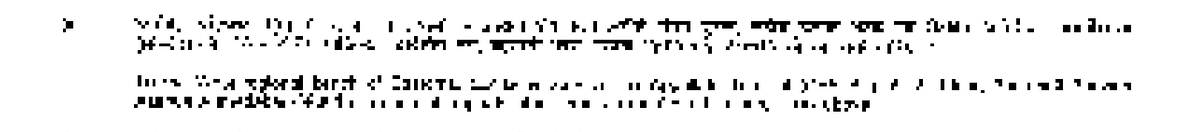

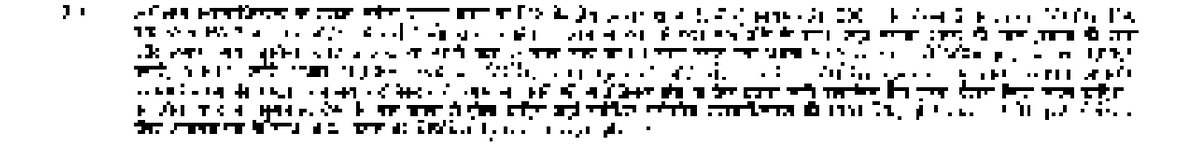

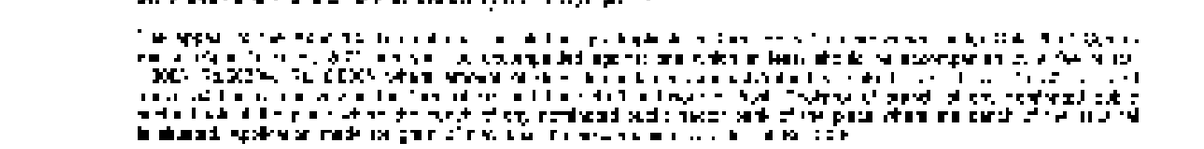

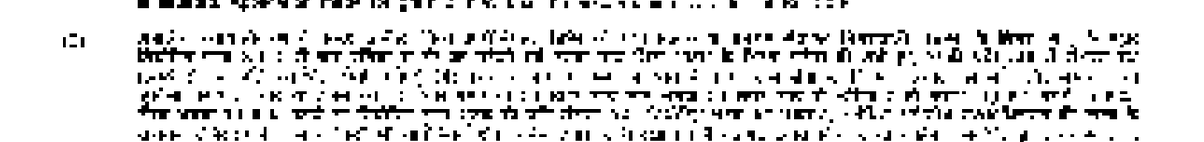

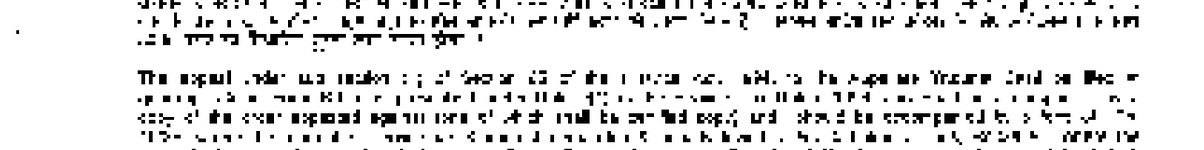

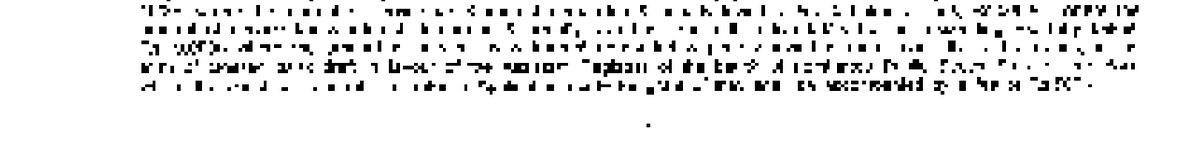

[illegible]

(ii) [illegible]

[illegible] Section 85 of the Finance Act 1994 [illegible] Service Tax Rules [illegible] Commissioner Central Excise [illegible] Commissioner [illegible] Central Excise [illegible]

(2) [illegible]

I [illegible]

II [illegible]

III [illegible]

[illegible]

[illegible] CESTAT [illegible] Section 35 [illegible]

[illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible] Cenvat Credit [illegible]

[illegible]

(C) [illegible]

Revision application to Government of India [illegible]

[illegible]

[illegible] Government of India [illegible] Ministry of Finance [illegible] Department of Revenue [illegible] New Delhi [illegible]

(i) [illegible]

[illegible]

(ii) [illegible]

[illegible]

(iii) [illegible]

[illegible] Central Excise [illegible]

(iv) [illegible]

[illegible] Commissioner (Appeals) [illegible]

(v) [illegible]

[illegible] Central Excise [illegible]

(D) [illegible]

[illegible]

(E) [illegible]

[illegible] Court Fee Act [illegible]

(F) [illegible]

[illegible] Court Fee Act, 1975 [illegible]

(G) [illegible]

[illegible] Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982

(H) [illegible]

[illegible]

:: ORDER-IN-APPEAL ::

M/s. C. U. Shah Medical Centre (Civil Hospital), Vinod Press Road, Surendranagar- 363001 (hereinafter referred to as 'appellant') has filed two appeals against Orders in Original No. 02 & 03/AC/SRN/2017-18 dated 28.03.2017 (hereinafter referred to as the 'impugned order') passed by the Assistant Commissioner, Central Excise, Surendranagar (hereinafter referred to as the 'lower adjudicating authority').

2. The brief facts of the case are that Appellant was engaged in providing taxable services under the category of 'Renting of Immovable Property'. And a search was carried out at the business premises of the Appellant and incriminating documents for letting activities in the premises of Appellant were recovered. Investigation revealed that Appellant had provided services of 'Renting of Immovable Property' during Oct. 2008 to Sep., 2011 and not paid service tax on the value of Rs.3,12,01,2883/- received by them. This culminated into issuance of Show Cause Notice dated 15.04.2015 demanding service tax of Rs.24,80,840/- under proviso to Section 73 (1) of the Finance Act, 1994 (hereinafter referred to as "the Act"). Another Show Cause Notice dated 18.10.2016 was issued demanding service tax of Rs.4,27,631/- for the subsequent period from 01.10.2014 to 30.04.2015. The lower Adjudicating Authority vide impugned order dropped the show cause notices and confirmed service tax demands of Rs.24,80,840/- and Rs.4,27,631/- under Section 73 of the Finance Act, 1994 ordered interest under Section 75 of the Act and imposed penalties under Section 78 as well as Section 76 of the Act as well as under Section 77 (1) (a) & Section 77(2) of the Act.

3. Being aggrieved with the impugned order, the appellant preferred the present appeals contending that

(i) It is not alleged and proved that the appellant is carrying out activity of business or commerce; thus, unless it is proved that appellant is engaged in the activity of business or commerce and has rented the immovable property in the course of furtherance of business, the provisions of Section 65(105) of the Act are not attracted; that

adjudicating authority has not considered provisions of Section 65(44), Section 65B(9) and Section 65 (105) of the Act.

(iii) Appellant is registered as a charitable trust under the provisions of Income tax Act, 1961 and engaged in providing medical services at affordable rates and not carrying out any business or commercial activity and hence, permission given by Appellant to operate medical store in their premises for a limited period is fully covered under the clause of charity and cannot be treated as a renting in the course of furtherance of business or commerce as held by the appellant cannot be said to have provided renting of immovable property services.

(iv) Appellant is also eligible for exemption under Sr. No. 4 of Notification 25/2012- dated 20.06.2012. That it is clarified by the Central Board of Direct Taxes, vide Circular No.2/2/2015 dated 15.7.2015 that lump sum payment which is not adjustable against periodic rent is not a payment in the nature of rent within the meaning of Section 194-I of Income tax Act, 1961. That they relied upon Hon'ble CESTAT's order in the case of Greater Noida Ind Development Authority reported as 2015(38) STR 1062 (Tri-Del) wherein it was held that service tax under Section 65 (105) (zzzz) read with section 66(105) cannot be charged on the "premium" or "salami" paid by the lessee to the lessor and service tax would be chargeable only on the rent that considering the legal position service tax was not payable on one time donation "Sukh" received by the Appellant.

(v) There is no legal provision to demand service tax on "proportionate lumpsum under amount"; that as most maintenance charges received by Appellant on monthly basis can be treated as rent which are below threshold limits specified in the law.

(vi) Appellant was under bonafide belief that being a charitable trust they were not engaged in business or commerce and hence mere act of granting permission to operate a medical store in their premise for a limited duration cannot be treated as renting of immovable property service for levy of service tax. Hence, this is the matter of interpretation and hence extended period cannot be invoked in their case and therefore, penalty under Section 78 was not imposable.

(vii) Section 78 and Section 78 cannot be invoked simultaneously in

view of insertion of proviso to Section 73 with effect from 18.04.2006.

(iv) Appellant has not collected any service tax from, donations as well as monthly maintenance charges, even if treated as rent, for charging service tax are liable to be treated as inclusive of service tax.

4. Personal hearing in the matter was attended by Shri Vikas Mehta, Consultant on behalf of the Appellant. Shri Mehta reiterated the grounds of Appeal and submitted that Appellant is a Trust and hence the amount of Sukhadi (donation) can't be treated as Rent. That Hon'ble CESTAT in the case of Greater Noida Industrial Dev Authority reported as 2015 (38) STR 1162 (Tri-Del) has distinguished said Non Premium Sukhadi as is in their case. That Hon'ble High Court of Kolkata in the case of M/s. Infinity Infotech Parks Ltd reported as 2014 (33) STR 37 (Cal) has held that Salami/ Premium/ Sukhadi is not rent; that it has been also held that no service tax would be chargeable in this case.

4.1 Appellant have additional written submission dated 17.07.2018 to say that donations received by them have nothing to do with rent, that rent prevailing in the area of their premises was Rs.20-30/Sq.ft to Rs.40-50/- only; that they are submitting Govt. case dated 17.02.2015 issued by Shri Dhaiya Patel, Consl. Civil engineer, Gandhinagar certifying that monthly rent of a shop having area of around 150 Sq.Ft was in the range of Rs.20,000/- (+/-10%); per month with an escalation rate of around 5% per annum depending upon demand supply market conditions.

FINDINGS

5. I have 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 in the matter is whether appellant was liable to pay service tax on the amount received by them towards naming of space by them and whether services provided are exempted under Notification 25/2012-ST dated 20.06.2012 or otherwise.

6. I find that Appellant has vehemently argued that the amounts received by them were "premium" or "Sukhdi" from the lessee of the property under a contract. I find that facts not in dispute are that Appellant has published an advertisement for inviting tenders for selling of the space for

the purpose of running a Medical Store in their Hospital premises on payment of lumpsum amount initially for the period of 36 months with upset value of Rs.21,30,000/- and Tenders were called for. That the tender dated 30.01.2012 for Rs.68,88,888/- for the use of space for the period from 25.05.2009 to 22.05.2017 was accepted; that for the next period of 36 months i.e. period from 23.05.2012 to 22.04.2015 tender dated 22.05.2012 for Rs.1,71,00,300/- was accepted by the Appellant. It is also not in dispute that maintenance charges were being collected on monthly basis by the Appellant from the Lessee. Thus, the amount collected by the Appellant are not a lumsum amount as claimed by them but were being collected for pre-decided period and hence were called for periodically. Therefore, argument of one time 'premium' or 'salami' received by them is not tenable.

5.1 It is on the Appellant had published advertisement calling for Tender by setting 'Upset value' of Rs.21,30,000/-. Therefore, tender with an upset value for space to be used for running Medical Store is pure business activity and not an creation as 'donation' offered by the highest bidder at Rs.68,88,888/- for the first period and then Rs.1,71,00,300/- for the next period of 36 months. It is not the case of Appellant that amount paid by the Lessee is treated as donation by the Lessee and taxed annually in terms of Income Tax Act, 1961. From the Appellant's letter dated 05.06.2015 and Show Cause Notice dated 11.10.2018 that from 2015-16 the Appellant showed Lessee Smt. Nayanaben Rajubhai Thakker has made the payment by deducting the TDS. Thus, it is not a donation in terms of Income Tax Act also. Appellant has produced a certificate dated 17.02.2019 from a consulting civil engineer regarding probable rent prevailing during 2010 in the vicinity of the premises of the Appellant. That that certificate is issued in personal capacity on the basis of personal experience and has no legal support to decide the matter of service tax in the present case.

7. Appellant has relied upon Para 42 and Para 44 to Para 77 of the decision of Hon'ble High Court of Calcutta in the case of M/s. Ghosh Infrarch Pvt. Ltd. reported as 2014(36) STR 97(Cal); and also decision of Hon'ble CESTAT in the case of Gregor Nordic Vill Dev. Authority reported as 2015(39) STR 1262 (Tri.-Del.). That Hon'ble High Court was dealing the case of premium or 'salami' and has relied the Hon'ble Supreme Court's decision in case of Commr. of Income Tax Act, 1961

distinguishing one time premium as 'Capital Income' against the periodical 'Rent Income' which is not the case here as lease is not being let for long term of 99 years or even for 10 years for that matter. Also, payment made by the Lessee in this case is for period of 25 months and hence this again is not a capital expense for Lessee as this is a periodic payment to use the space leased by the Appellant. In the facts of this case, it can not be said that the amount paid is 'for obtaining lease' and it is nothing but a payment for 'use and occupation' of the immovable property. Taxing event under Section 5(1)(b)(zzzzj) read with Section 65(91a) is renting of immovable property and service tax would be leviable on the element of rent i.e. the payments made for continuous enjoyment under lease which are in the nature of the rent, recurring or otherwise, which are collected periodically or in advance in a lump sum. I am, therefore, of the considered view that case law relied upon can not be made applicable in the present case.

8. As regards exemption under Sr. No.4 of the Notification 25/2012-ST dated 20.06.2012 claimed by the Appellant, I find that the exemption is available for charitable activities undertaken by a charity registered under Section 12AA of the Income Tax Act, 1961. Exemption at Sr. No.4 and definition of Charitable Activity under Clause (b) of Para 2 of the Notification read as under:

> 4. Services by an entity registered under section 12AA of the Income-tax Act, 1961 (43 of 1961) by way of charitable activities;
>
> ..
>
> (k) "charitable activities" means activities relating to
>
> (i) public health by way of
>
> (a) care or counseling of (i) terminally ill persons or persons with severe physical or mental disability, (ii) persons affected with HIV or AIDS, or (iii) persons addicted to a dependence forming substance such as narcotics drugs or alcohol; or
>
> (b) public awareness of preventive health; family planning or prevention of HIV infection;

8.1 I find that the appellant had provided the space on lease for a consideration and hence, the activity does not qualify to be 'Charitable Activity' as defined in the Notification and hence no exemption is available to the Appellant on this ground.

8. The appellant further contended that the demand was time barred as there was no suppression of facts and no malafide, intent or intention to evade payment of service tax. In an era of self assessment, the onus is on the assessee for compliance of law. In that context the meaning of 'positive act of suppression' also changes. The scheme of levy based on voluntary compliance cannot be reduced to voluntary payment of tax by arguing that there is no positive act of suppression involved and not taking registration. The onus is on the assessee to comply with the regulations, it is their duty to come before the department, declare the activities and seek guidance of the department if required. In this case appellant had not given any information till the investigation was started by the department. Therefore, Appellant failed to prove their bonafide in respect of any communication with the department about their activity and any doubt or taxability. No omission can be justified in the guise of doubt in the mind or taxability. Therefore, suppression of facts and intent to evade the payment of service tax are established in this case and hence invocation of extended period under Section 73 (1) is justified. The penalty under Section 78 imposed by the adjudicating authority is also legal and proper. I rely on Final Order of the Hon'ble CESTAT, in a case of IVS Major Co. Ltd. reported as 2017 (28) S.T.R. 177 (Tri. - Chennai), wherein it is held as under:

> "9.8. So far as grounds of re-quality adopted by learned counsel in convicted item is nothing on record to show that the appellant applied to classify base film when it is an established business concern with vast experience in application of provisions of Finance Act, 1994. The reliance not not decisive base. As mentioned above, there is suggest that considerable period of time made the appellant to settle adjudication. Accordingly, as normally non-penalty is possible to be imposed on the basis of law as it was made when was found to be a case on payment of tax on the taxable services provided during the relevant period."

9.1 As regard Appellant's submission for non imposition of simultaneous penalty under Section 78 as well as under Section 70 of the Act, I find that penalty under Section 78 is imposable in the case and also imposed in respect of confirmed demand of Rs. 24,30,645/- and Penalty under Section 77 is imposed for confirmed demand of Rs.4,77,137/- pertaining to the subsequent period when no suppression of facts alleged by department. Therefore, I find that no simultaneous penalty has been imposed in the impugned order and hence Appellant's argument is not supported by the facts at all.

10. As regards appellant's plea of cum tax benefit, the main ground put forth is that they have not collected any service tax from the service recipient. Thus, consideration received is not inclusive of Service Tax and hence cum tax value is not acceptable. And that the appellant had grossly neglected the provisions of service tax by not applying for registration and suppressed the material facts from the department as discussed in Para supra. In the circumstance I am of the considered view that cum-tax benefit could not be extended to the appellant. I rely on order of the Hon'ble CESTAT in the case of M/s Dhiren Kool Drinks and Beverages Ltd. reported as 2011 (024) ELT 241(T), wherein it has been held that such benefit is not to be extended in cases where the duty/ tax evasion was invited on account of suppression of facts or contravention of the provisions with intent to evade payment of duty/ tax. I therefore, hold that the appellant cannot be extended benefit of cum-tax value.

11. In view of foregoing discussion, I hold the Appeals do not sustain on merit and hence I reject the appeals filed by the Appellant.

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

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

(अजित कुमार)
आयुक्त (अपील्स)

By Regd. Post AD
To,

M/s. C. U. Shah Medical Centre
(C.U.Hospital),
Vihar Three Road,
Surendranagar-363001

मेसर्स सी.यू.शाह मेडिकल सेन्टर
(सी.यू.हॉस्पिटल)
विहार थ्री रोड,
सुरेन्द्रनगर-३६३००१

Copy to:
1) The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad
2) The Commissioner, CGST & Central Excise, Surendranagar Commissionerate, Surendranagar.
3) The Assistant Commissioner, CGST & Central Excise Division, Surendranagar
4) Guard File.