



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

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

राजकोट / Rajkot - 360 001

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सत्यमेव जयते

**रजिस्टर्ड डाक ए. डी. द्वारा :-**

क	अपील / फाइल संख्या / Appeal / File No. V2/65/RAJ/2017	मूल आदेश सं / O.I.O. No. 107/ADC/PV/2016-17	दिनांक / Date 19.12.2016
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ख अपील आदेश संख्या (Order-In-Appeal No.):

**RAJ-EXCUS-000-APP-024-2018-19**

आदेश का दिनांक / Date of Order:	<b>18.04.2018</b>	जारी करने की तारीख / Date of issue:	<b>19.04.2018</b>
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कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /  
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /  
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

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

1. M/s. Y.K. Enterprise, 103, Snehdeep Apartment, Near Digjam Circle, Khodiyar Colony, Airport Road, Jamnagar

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

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

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

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

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

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

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

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

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

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

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



- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन 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 of 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 (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1994 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 शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये से अधिक न हो।  
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है  
(i) धारा 11 डी के अंतर्गत रकम  
(ii) सेनवेट जमा की ली गई गलत राशि  
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम  
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ों एवं अपील को लागू नहीं होगा।  
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 Cenval Credit taken;  
(iii) amount payable under Rule 6 of the Cenval Credit Rules  
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) भारत सरकार को पुनरीक्षण आवेदन :  
Revision application to Government of India:  
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:  
(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse  
(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.  
(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को 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 इयूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.  
(v) उपरोक्त आवेदन की दो प्रतियाँ प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियाँ संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.  
(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। / जहाँ संलग्न रकम एक लाख रुपये या उससे कम 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, उपर्युक्त दंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जात 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 filled 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 टिकिट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित 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 दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट [www.cbec.gov.in](http://www.cbec.gov.in) को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website [www.cbec.gov.in](http://www.cbec.gov.in)

**:: ORDER IN APPEAL ::**

M/s. Y.K. Enterprise, 103, Snehdeep Apartment, Near Digjam Circle, Khodiyar Colony, Air Port Road, Jamnagar, a proprietary firm (hereinafter referred to as 'the Appellant') has filed the present appeal, against Order-In-Original No. 107/ADC/PV/2016-17 dated 19.12.2016 (*hereinafter referred to as 'the impugned order'*) issued by the Additional Commissioner, Central Excise & Customs, Rajkot (hereinafter referred to as 'the lower adjudicating authority').

2. The brief facts of the case are that the Central Excise officers of Rajkot Commissionerate during visit to the office of the Appellant noticed that the Appellant was providing taxable services, and was charging and collecting Service Tax from their customers, but not depositing the amount of the collected Service Tax to the account of Government exchequer. It was also noticed that the Appellant was not filing ST-3 returns for the period from Financial Year 2010-11 to 2014-15.

2.1 Show Cause Notice No. V. Service Tax/AR-I/JMR/ADC(BKS)/ 11/2016-17 dated 18.04.2016 was issued to Appellant raising demands of Service Tax of Rs. 7,95,504/- collected from the customers but not deposited and another demand of Service Tax of Rs. 24,21,822/- under proviso to Section 73(1) of the Finance Act, 1994 (hereinafter referred to as "the Act"); proposing penalty under Sections 76, 77(2) and 78 of the Act. The lower adjudicating authority confirmed demand vide the impugned order by recovering Service Tax of Rs. 7,95,504/- collected by the Appellant from their customers, but not deposited to the account of Government exchequer; confirming demand of Rs. 24,21,822/- under proviso to Section 73(1) of the Act along with interest under Section 75 of Act; imposed penalty of Rs. 7,95,504/- under Section 76 of the Act; imposed penalty of Rs. 90,000/- under Section 77(2) of the Act; imposed penalty of Rs. 12,10,911/- equal to 50 % of Rs. 24,21,822/- under Section 78(1) of the Act.

3. Being aggrieved with the impugned order, the appellant preferred the appeal on the grounds that the lower adjudicating authority has erred in relying upon the oral evidence without establishing that amounts taken as taxable value for demanding service tax were received on account of actual provision of the taxable service; that unless provision of taxable service is positively proved demand of Service Tax cannot be sustained; that the lower adjudicating authority has failed to properly compute the Service Tax liability and hence, the impugned order is not sustainable.

3.1 Personal hearing in the matter was fixed on 14.11.2017 and 16.12.2017. Shri Vikas Mehta, Authorised Representative of the Appellant vide letter dated 05.12.2017 sought adjournment and requested to refix hearing in the 3<sup>rd</sup> week of

January, 2018. Personal hearing in the matter was, accordingly re-fixed on 17.01.2018, however again adjournment was sought by Shri Mehta with request to fix the hearing in the 2<sup>nd</sup> week of February, 2018. Personal hearing was therefore fixed on 06.02.2018 and 20.02.2018, however nothing is heard from the Appellant or his authorized representative. Since sufficient opportunities of personal hearing have been granted I proceed to decide the case *ex parte*.

### **Findings :-**

4. I have carefully gone through the facts of the case, impugned order, appeal memorandum and submissions made by the appellant. More than three opportunities of personal hearing have been afforded to the Appellant which is sufficient compliance of principles of natural justice as laid down under Section 33A of the Central Excise Act, 1944, as made applicable to Service Tax matter vide Section 83 of the Act. I, therefore, proceed to decide the case *ex parte* on merits.

5. The issues to be decided in the present appeal are :-

- (i) Whether Service Tax of Rs. 7,95,504/- collected but not deposited during FY 2010-2011 and interest thereupon of Rs. 2,04,496/-, both paid during the investigation appropriate is correct or not;
- (ii) Whether penalty under Section 76 of the Act for their failure to make the payment of service tax has been correctly imposed or not;
- (iii) Whether demand of Service Tax pertaining to FY 2011-12 to 2014-15 amounting to Rs. 24,21,822/- has been correctly confirmed under proviso to Section 73(1) of the Act along with interest under Section 75 of the Act or not;
- (iv) Whether penalty imposed under Section 78 of the Act on the Appellant is correct or not.
- (v) Whether penalty imposed under Section 77(2) of the Act for incorrect filing of ST-3 returns for the period under dispute, as required under Section 70 of the Act is correct or not;

6. Now, I proceed to decide each issue as under :-

6.1 Regarding issue at Serial No. 5(i) above, I find that Service Tax of Rs. 7,95,504/- pertaining to Financial Year 2010-2011 and interest of Rs. 2,04,496/- have been paid without any protest by Appellant as per their letter dated 23-12-2015 and reworked by adjudicating authority in Para 19 and 21.2 of the impugned order as under :-

"19. *Personal hearing in the matter was held on 20-09-2016 which was attended by Shri Harendranath Mishra wherein he stated that he accepted the quantification of the Service Tax demanded against him and further stated that they have further paid an amount of Rs. 8,00,000/- on 27-07-2016 and produced the copy of challan.*"

"21.2 *As the duty liability was already declared therefore there exists no grounds for invocation of extended period. I also find that it has been agreed by the Noticee that the amount of Rs. 10,00,000/- paid by them vide Cheque No: 592 dated 11-09-2015 of HDFC Bank, Jamnagar, deposited into government account on 22-09-2016 be adjusted against the said short paid Service Tax of Rs. 7,95,504/- and remaining amount be adjusted against the interest liability. Thus, this is voluntarily and unconditional act of the Noticee vide their letter dated 23-12-2015. Therefore, I find that the short paid Service Tax of Rs. 7,95,504/- for the F.Y. 2010-2011 is required to be appropriated from the amount of Rs. 10,00,000/- paid by them vide Cheque No: 592 dated 11-09-2015 of HDFC Bank, Jamnagar, deposited into government account on 22-09-2016 and the balance amount of Rs. 2,04,496/- is required to be adjusted against interest for delayed payment thereon.*"

[Emphasis supplied]

6.1.1 As is evident from above, the Appellant has accepted quantification of Service Tax of Rs. 7,95,504/- by the lower adjudicating authority to be in order and I uphold the demand. As a natural consequence, interest on the aforesaid amount worked by the lower adjudicating authority at Rs. 2,04,496/- is also required to be upheld.

6.2 Regarding issue at Serial No. 5(ii) above, I find that penalty of Rs. 7,95,504/- under Section 76 of the Act has been imposed upon the Appellant for their failure to make the payment of service tax. Let's examine provisions of Section 76 of the Act which is reproduced as under :-

"SECTION 76. Penalty for failure to pay service tax.— (1) Where service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, for any reason, other than the

reason of fraud or collusion or willful mis - statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty not exceeding ten per cent. of the amount of such service tax :

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

- (i) the date of service of notice under sub-section (1) of section 73, no penalty shall be payable and proceedings in respect of such service tax and interest shall be deemed to be concluded;
- (ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the penalty imposed in that order, only if such reduced penalty is also paid within such period."

[Emphasis supplied]

6.2.1 The appellant has paid Rs. 7,95,504/- on 22.09.2015 whereas Show Cause Notice has been issued on 18.04.2016, hence, the appellant has paid Service Tax before issuance of show cause notice, and the same has been proposed to be appropriated in the Show Cause Notice itself. The service tax and interest thereon having been paid before issuance of Show Cause Notice, I find that no penalty is imposable as per Section 76(1)(i) of the Act and therefore, I set aside penalty imposed under Section 76 of the Act.

6.3 Regarding issue at Serial No. 5(iii) above, I find that Service Tax of Rs. 24,21,822/- for F. Y. 2011-12 to 2014-15, has been confirmed under proviso to Section 73(1) of the Act. In the Appeal it is contended that demand of Service Tax has been confirmed based upon oral evidence whereas the lower adjudicating authority while confirming demand has held at Para 22.2 as under : -

"22.2 I find that during the investigations, based on the documents provided by Shri Mishra himself it is clear that Noticee had suppressed the income from the department under the guise of exempted services which was not declared in their periodical statutory returns filed from time to time. Thus, I find that Service Tax of Rs. 24,21,822/- has been short paid by way of resorting to willful

misstatement resulting into suppression of facts. Further, Section 68 of the Finance Act, 1994 clearly lays an onus on the Noticee to pay Service Tax correctly. Likewise, Section 70 *ibid* read with Rule 7 of Service Tax Rules, 1994 clearly mandates that correct returns shall be filed. However, in the instant case the same has not been done so by the Noticee which are in contravention of the provisions of the Finance Act, 1994 and the rules made thereunder. I also find that Noticee during the investigations have confessed that they have suppressed the fact of correct tax liability in their statutory returns and even in the personal hearing Shri Mishra has expressed have accepted the charges.”

[Emphasis supplied]

6.3.1 Para 4 of the impugned order reads as under :-

“4. The Noticee vide their letter dated 23-12-2015 further stated that at the time of visit of their premises by the Central Excise officers, they had voluntarily presented post-dated cheques of Rs. 33.00 lakhs against their outstanding Service Tax liabilities of Rs. 32,17,326/- with a request to deposit the same into the Government exchequer on FIFO basis i.e. the first deposited cheques of Service Tax amount be adjusted against first Service Tax liabilities on chronological basis; that accordingly post dated cheques bearing No. 000592 dated 11-09-2015 of Rs. 10,00,000/- which was credited on 22-09-2015, as per their consent; that he stated that the said recovery of outstanding Service Tax be treated as the recovery of their outstanding Service Tax dues in respect of Financial Year 2010-11 (along with interest thereon); that they have re-assessed their outstanding Service Tax liabilities for the said year and confirmed that an amount of Rs. 7,95,504/- was remained un-paid for the Financial Year 2010-11; that their intention to pay the Service Tax on FIFO basis was just to save the interest amount on old service tax dues; that they made this self assessed payment for the Financial Year 2010-11 voluntarily, unconditionally and without any protest in future since they have charged and collected the said amount of Service Tax from the service recipients.”

[Emphasis supplied]

6.3.2 It may be seen from above, that the Appellant *suo motto* vide their letter dated 23.12.2015 tendered cheques of Rs. 33 lakhs and have also explained modalities of adjustment of Rs. 33 lakhs against their Service Tax liabilities. In the given facts and circumstances of the case I do not see any reason to interfere with the findings of the lower adjudicating authority order confirming Service Tax liabilities of Rs. 24,21,822/- and interest thereupon as a natural consequence.

6.4 Regarding issue at Serial No. 5(iv) above, penalty of Rs. 90,000/- under Section 77(2) of the Act, I find that lower adjudicating authority has imposed penalty for filing incorrect returns during FY 2011-12 to 2014-15. Let's examine relevant provisions of Section 77(2) of the Act which is reproduced as under :-

"SECTION 77. Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere. —

(1) .....

(2) Any person, who contravenes any of the provisions of this Chapter or any rules made there under for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to ten thousand rupees."

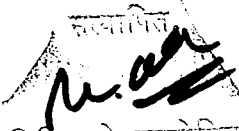
[Emphasis supplied]

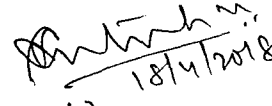
6.4.1 I find that Section 70 provides for penalty for not filing returns but does not provide penalty for filing incorrect returns, whereas Section 77(2) provides to impose penalty if penalty is not provided anywhere else. Section 77(2) do envisage imposition of penalty in such cases. I, therefore, find that imposition of penalty, of Rs. 90,000/- under Section 77(2) is justified, as detailed in Para 25.3 of the impugned order.

6.5 Regarding issue at Serial No. 5(v) above, I find that lower adjudicating authority has imposed penalty @ 50 % of confirmed Service tax demand of Rs. 24,21,822/- as because transactions have been shown in their books of accounts. The Appellant has not made any justification as to why penalty should not be imposed on them under proviso to Section 78(1) of the Act. I, therefore, uphold imposition of penalty under 1<sup>st</sup> proviso to Section 78(1) of the Act.

7. In view of above, I set aside penalty of Rs. 7,95,504/- imposed under Section 76 of the Act and uphold rest of the impugned order and reject appeal in respect of all aspects, except imposition of penalty of Rs. 7,95,504/-.

8. अपीलकर्ता द्वारा दर्ज की गई अपीलका निपटारा उपरोक्त तरीके से किया जाता है।  
8. The appeal filed by the appellant is disposed off as above.

  
निखिल ए. स्वारेजिया  
अधीक्षक (अपील्स)

  
18/4/2018  
(कुमार संतोष)  
आयुक्त (अपील्स)



By Regd. Post A.D.

To,

M/s. Y.K. Enterprise, 103, Snehdeep Apartment, Near Digjam Circle, Khodiyar Colony, Air Port Road, M-9909928245, Jamnagar 361 005.	
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Copy for information and necessary action to:

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for favour of kind information.
2. The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Additional Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Deputy Commissioner, Central Excise, Jamnagar.
- ✓ 4. Guard File.

