[illegible]
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,
[illegible]
[illegible] Race Course Ring Road,
[illegible] Rajkot – 360 001
Tele Fax No. 0281 – 2477952 [illegible] Email: [illegible]

[illegible] :-

क [illegible]

ख [illegible]

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

RAJ-EXCUS-000-APP-065-TO-067-2018-19

आदेश का दिनांक / Date of Order:	01.05.2018	जारी करने की तारीख / Date of issue:	03.05.2018

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

घ [illegible]

[illegible]

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

1. Shri Dhirajlal Ravjibhai Bakad, Pearl Plaza, Near G.T. Sheth School, 150 Feet Ring Road, Rajkot,
2. Smt. Pravinaben Dhirajlal Bakad, Pearl Plaza, Near G.T. Sheth School, 150 Feet Ring Road, Rajkot,
3. Shri Chetankumar Dhirajlal Bakad, Pearl Plaza, Near G.T. Sheth School, 150 Feet Ring Road, Rajkot,

[illegible]

(A) [illegible]

[illegible]

(i) [illegible]

[illegible]

(ii) [illegible]

[illegible]

(iii) [illegible]

[illegible]

(B) [illegible]

[illegible]

[illegible]

(i) [illegible] Section [illegible] of the [illegible] Tribunal Act [illegible] [illegible] order of Commissioner [illegible] copy and copy of the order [illegible] Deputy Commissioner of [illegible]

(ii) [illegible]

For an appeal to be filed before the [illegible] Tribunal [illegible]

"Demand" shall include:

(i) amount determined under Section [illegible]
(ii) amount of [illegible]
(iii) [illegible]

[illegible] and appeals pending before [illegible] Finance (No.2) Act, 2014

(ii) [illegible]

[illegible] Section [illegible] of the [illegible]

(iii) [illegible] during the course of processing of the goods [illegible]

(iv) [illegible]

(v) [illegible]

(vi) [illegible]

(vii) [illegible] accompanied by two copies each of the [illegible] Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan [illegible]

(viii) [illegible]

The revision application shall be accompanied by [illegible] Rupees One lakh or less [illegible]

(ix) [illegible]

(x) [illegible]

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

(xii) [illegible] the higher appellate authority, the appellant may [illegible]

:: ORDER IN APPEAL ::

The present three appeals have been filed by the appellants (*hereinafter referred to as* Appellant No. 1 to Appellant No. 3) as detailed in the Table below against Order in Original No. 61/ST/2016 dated 14.03.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner of Service Tax Division, Rajkot (hereinafter referred to as 'the lower adjudicating authority').

Sr No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/262/RAJ/2017	Appellant No.1	Dhirajlal Ravjibhai Rokad
2	V2/263/RAJ/2017	Appellant No.2	Purulben Dhirajlal Rokad
3	V2/264/RAJ/2017	Appellant No.3	Chetankumar Dhirajlal Rokad

2. The brief facts of the case are that above three appellants (hereinafter referred to as 'Association of Persons' or 'AOP') were joint owner of immovable property and together engaged in providing taxable service of 'renting of immovable property service' jointly and severally, but not registered with Service Tax Department though individually each appellant was registered with Service Tax Department.

2.1 The investigation undertaken by the Department revealed that the AOP rendered services of "Renting of Immovable Property Service" by way of entering into a "Conducting Agreement" in May, 2007 (hereinafter referred to as "the agreement"), for exclusive use, possession of areas with ancillary utilities of the property situated at Ground Floor, Himalaya Mall, Drive in Road, Ahmedabad, with M/s. Hardcastle Restaurants Pvt. Ltd. (hereinafter referred to as "HRPL") without payment of service tax on the same during the period from 2010-11 to 2014-15.

2.2 The said premises owned by AOP was previously owned by M/s. Modi Build-Well Ltd. (hereinafter referred to as "MBWL"), who had originally entered into agreement with HRPL and the premises of HRPL had been sold to AOP by way of registered sale deed. As a

result, ownership of the said premises of HRPL was transferred to AOP and now HRPL was required to pay the contract amount to the AOP. HRPL was paying a monthly rent to all three members of AOP separately towards renting of the said premises as per the said agreement. However, AOP had not paid service tax thereon. On being pointed out, all three members of the AOP deposited service tax individually for the period from 2010-11 to 2014-15 after claiming exemption of threshold limit of Rs. 10 lakhs individually (available as per Notification 33/2012-ST dated 20.06.2012), however, AOP did not pay service tax on the services rendered by them.

2.3 Show Cause Notice No. V.ST/AR-I-RJT/ADC(BKS)/79/2015-16 dated 20.10.2015 was issued to AOP, which was decided by the lower adjudicating authority vide impugned order, who confirmed demand of service tax of Rs. 21,07,429/- under Section 73(2) of the Finance Act, 1994(hereinafter referred to as 'the Act') read with Section 68 of the Act along with interest under Section 75 of the Act, imposed penalty of Rs. 21,07,429/- under Section 78 of the Act and Rs. 10,000/- under Section 77(1)(a) of the Act; Rs. 10,000/- under Section 77(1)(b) of the Act; Rs. 10,000/- under Section 77(1)(e) of the Act; Rs. 10,000/- under Section 77(2) of the Act and also ordered to recover 'late fee' as prescribed under Rule 7C of the Service Tax Rules, 1994 read with Section 70 of the Act.

3. Aggrieved with the impugned order, Appellant No. 1 to Appellant No. 3, preferred these appeals, *inter-alia*, on the following grounds:

3.1 One single SCN as well as single impugned order issued and delivered to Appellant No. 1 to Appellant No. 3 and not to AOP and hence, it cannot be treated that the said SCN and/or the impugned order had been delivered in the matter of AOP.

3.2 It was submitted that the matter was related to three individuals and three separate persons (Appellant No. 1 to Appellant

No. 3) were addressed and hence, the impugned order is exclusively in the matter of individual person and not in the matter of any AOP.

3.3 The rulings established by the Hon'ble Supreme Court, High Courts and Appellate Authorities that the joint owners of properties are to be treated as co-owners of the property and are to be taxed separately and individually; that the SCN/impugned order cannot treat the co-owners as AOP.

3.4 It was also submitted that the impugned order issued to three individuals and tax liability, interest and penalty are required to be worked out for three individuals separately and not on AOP basis, however, the impugned order has done on cumulative basis treating AOP as singular assessee, which is not correct.

3.5 It was submitted that the individual appellant had purchased immovable property independently and jointly with two other family members as co-owners and hence it cannot be treated as purchased by AOP. Individual appellant in his independent capacity but jointly with other co-owners of the properties, entered into an agreement with HRPL in respect of operating a retail outlet with joint efforts, for which individual appellant received conducting fee, it cannot be treated as agreement executed by AOP and conducting fee is share of profit based on percentage of sale amount out of sales carried out at the out-let and hence same cannot be treated as rent of the immovable properties.

3.6 As per the said agreement, 25% of the share of profit as conducting fee paid to Shri Chetankumar Rokad (Appellant No. 3) for providing furniture and various amenities, which did not form part of the immovable properties and hence, cannot be treated as service of renting of immovable property and hence, not taxable.

3.7 The profit share as conducting fee had worked on the basis of the figure of sales at the out-let and hence it an agreement for

sharing the profit and cannot in any way be treated as rent, the same can be verified from HRPL from amount paid by them. They bonafidely believed that the profit share in form of conducting fee and hence not service taxable and hence not reported in ST-3.

3.8 Appellant No. 1 to Appellant No. 3 have paid service tax in individual capacity under protest to avoid litigations ever though they never charged any service tax and hence amount received from HRPL may be treated as inclusive of service tax and benefit of cum-tax value may be given.

3.9 Service tax liability along with interest as per the impugned order have been paid by each appellant i.e. co-owner of the property and same must be considered in calculate out standing demand. The confirmed demand of Rs. 21,07,429/- was required to be re-calculated giving benefit of proportionate exemption available to each appellant and amount received towards furniture and amenities is non-taxable.

3.10 Appellant No. 1 to Appellant No. 3 are individual and independent of each other and had obtained service tax registration individually and there was no existence of any AOP or togetherness of three individual appellants; they individually maintained books of accounts and supporting evidence & extract thereof produced before the department; they individually issued invoices in respect of conducting fee and hence penalty imposed under Section 77(1)(a); 77(1)(b); 77(2)(c) of the Act are not correct.

3.11 Appellant No. 1 to Appellant No. 3 did not pay service tax for bonafide and genuine reasons on the ground that the conducting fee is non taxable and hence not mentioned in ST 3 returns and hence, penalty under Section 77(2) of the Act is not imposable.

3.12 Any AOP not in existence in respect of co-owners of the property and it is not possible/required to file ST-3 returns and

hence, penalty under Section 77 is not required to be imposed.

3.12.1 Each co-owner of the property made payment of service tax along with interest under protest before issue of SCN and hence, penalty under Section 78 of the Act is not required to be imposed.

4. Personal hearing in the matter was attended to by Shri Sanjay Modi, Advocate who reiterated the grounds of appeal and also submitted written P.H submissions stating that the property was owned by three persons and not AOP; that they are not having rent but conducting fee as percentage of sales as share of profit; that service tax is not payable on conducting fee; that impugned order is not correct and needs to be set aside.

4.1 The appellant submitted written P.H. submissions inter-alia reiterating the contentions made in Appeal Memorandum and relied on following case laws:

(i) Ramanlal Bhilal Patel (05.02.2008) Civil Appeal No. 4420 of 2001 (SC)

(ii) Oswal Fats and Oils :(01.01.2010) – Civil Appeal No. 7002 of 2002 (SC)

(iii) Sriram Pusrchia Vs. Jagannath & Others (14.08.1976) (SC)

(iv) Pal Singh Vs. Sunder Singh (10.02.1989) (SC)

(v) Vershuben Bharatbhai Shah (06.02.1996) (HC, Guj.)

(vi) Mohan Goldwater Breweries Ltd. – 2017 (JI) TMI 1011

Findings:

5. I have carefully gone through the impugned order, appeal-memoranda, written as well as oral submissions made by the appellants. The issues to be decided in the present appeal are:

(i) Whether 'conducting fee' can be treated as "Renting of Immovable Property" and is liable to service tax or otherwise;

(ii) Whether three co-owners of the property can be treated as "Association of Persons" and that AOP can be made liable to pay service tax or otherwise;

(iii) Whether benefit of threshold exemption limit as per Notification No. 6/2005-ST dated 01.03.2005, as amended, is available to each of three appellants or otherwise.

6. Appellant No. 1 to Appellant No. 3 argued that they individually and jointly entered into an agreement with HRPL for operating a retail outlet for which they received 'conducting fee' individually as share of profit based on percentage of sales carried out at the outlet and hence 'conducting fee' cannot be treated as rent of the immovable property owned by them and hence, conducting fee is not liable to service tax.

6.1 It is fact that Appellant No. 1 to Appellant No. 3 are co-owners of immovable property situated at Ground Floor, Himalaya Mall, Unit No. 151 and 155, Drive-inn Road, Ahmedabad and the said immovable property had been given to HRPL through a conducting agreement for exclusive use, possession of areas with ancillary facilities of the property and amenities and the said premises used in course of or, for furtherance of, business or commerce by HRPL, for which HRPL paid mutually decided consideration under name of conducting fee to each of three appellants. Para (c) shown at page 14 of the conducting agreement specifies that "..... *for the purpose of Handicastle so establishing, conducting and operating a QSR in, at and from the Scheduled Premises, Madi also agreed to make available to Handicastle, for the period, at the consideration and on the terms and conditions set out hereunder, ...*" Thus, the appellants agreed to make available the said premises for the said period to HRPL for which they received the consideration in form of conducting fee. HRPL paid business conducting fee for supply of immovable property and amenities by three appellants in favour of HRPL for conducting business by HRPL utilising the said immovable properties. I find that the HRPL paid monthly payable amount to each of three appellants after deducting TDS under Section 194 I of the Income Tax Act. Section 194-I of the Income Tax Act specifically stipulates

that "*Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of rent, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rate of (a) two per cent for the use of any machinery or plant or equipment; and (b) ten per cent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings:*" Hence, I find that the conducting fee has been treated by all including three appellants as "Rent" and "Rental income" only and hence, this consideration attracts service tax also under the taxable category of "renting of immovable property service" as defined under Section 65(90a) of the Act and contention of the appellants that conducting fee is not rent is neither true nor legally sustainable.

7. The appellants contended that the said property is co-owned by them as three persons and not as AOP and hence, even if the consideration is treated as rent, rental income is required to be taxed separately for each of the co-owner in the proportion of their individual ownership and not as AOP and the benefit of threshold limit/exemption as per Notification No. 6/2005-ST dated 01.03.2005 as amended is available to each of them as individual and not as AOP.

7.1 I find that the lower adjudicating authority considered above three persons as one legal person treating them as AOP for determining service tax liability. I find that the said property was purchased by all three persons individually and severally and not as "Association of Persons", as is evident from the sale deed and was owned jointly by all the three co-owners through out the period of SCN. The agreement with HRPL was also entered into by each of three appellants in their individual capacity as co-owners of the property, all three co-owners obtained separate Service Tax

Registration Certificates and all three individually paid service tax liability. It is on record that the ownership of the Property was with each of three appellants separately and not with AOP and providing of taxable service of renting of this immovable Property was also done by three appellants in their individual capacity and therefore, I hold that service tax liability shall have to be determined by considering their individual rental receipts and not collective/combined as has been held by the Hon'ble CESTAT in the case of Surajben Khusalchand reported as 2017(4) GSTL 159 (Tri. Ahmd.), Dayaram Vishnubhai Patel reported as 2015(40) STR 1146 (Tri. Mumbai) and Anil Soni reported as 2017(51) STR 38 (Tri. Chan.);

7.2 I find that the issue is no more *res-integra* and the Hon'ble CESTAT has decided this issue, in the case of Surajben Khusalchand reported as 2017 (4) G. S. T. L. 159 (Tri. Ahmd.) as under:

> *"9. We find force in the contention of the ld. Advocate representing the respective appellants inasmuch as 'association of persons' has been considered as a separate legal entity under the Income-tax Act for assessment and provided separate PAN number different from the PAN number possessed by individual co-owners who joined together to form an 'association of persons'. In the present case, the show cause notices were issued in many cases to one person among the joint owners and in other cases to all the persons who had jointly owned the immovable property provided on rent. Needless to mention, the Service Tax Registration of individual assessees for collection of Service Tax is PAN based. Hence, collection of Service Tax from one of the co-owners, against his individual Registration for the total rent received by all co-owners separately, is neither sustained by law nor by said show cause notices. Thus, it is*

difficult to accept the proposition advanced by the Revenue that all the co owners providing the Service of renting of immovable property be considered as an association of persons and the Service Tax on the total rent be collected from one of the co-owners. Another argument of the Revenue is that since the property is indivisible and not earmarked against each of the co-owners, hence the Service Tax is leviable on the total rent received against the said property without apportioning against each of the co owners in proportion to their share. We find falicy in the said argument of the Revenue. Conceptually Service Tax is levied on the service provided which is an intangible thing and hence it is not necessary to be identified with physical demarcation of the immovable property given on rent against individual co-owners. Once the value of service provided by a service provider is ascertainable Service Tax is accordingly charged. This Tribunal in similar facts and circumstances in the cases of Devram Vishrambhai Patel And Sons & Others and Laxmi Chauhan (supra) after considering the issues raised, rejected the contention of the Revenue and allowed the benefit of exemption Notification No. 6/2005-S.T., dt.1.3.2005 as amended to individual co-owners who jointly owned the property and provided the service of renting of immovable property, and received the rent in proportion to the shares in the immovable property."

(Emphasis supplied)

7.3 Similarly, Hon'ble CESTAT in the case of Devram Vishrambhai Patel reported as 2015(40) STR 1146 (Tri. Mumbai) has held that

"6. We have considered the submissions made by both sides and perused the records. The issue that needs to be decided in this case is whether the respondent and his brothers are to be treated as association of persons or otherwise and service tax liability on it arises, should be confirmed without the benefit of the Notification No. 6/2005 S.T.

7. It is undisputed that the property which has been rented out by the respondent and his brothers is jointly owned property. Service Tax liability arises on such renting of property.

8. It can be seen from the above reproduced findings of the first appellate authority, the conclusion arrived at is very correct, as co-owners of the property cannot be considered as liable for a Service Tax jointly or severally as Revenue has look identify the service provider and the service recipient for imposing service tax liability, which in this case, we find our individual. The conclusion arrived at by the first appellate authority is correct and he has confirmed the demand raised on the respondents by extending the benefit of Notification No. 6/2005-S.T. We do not find any reason to interfere in such a detailed order."

7.4 In view of above legal position, the proposition advanced by the department that all the co-owners providing the service of renting of immovable property be considered as Association of persons (AOP) and Service Tax on total rent be collected from one of the co owners is legally not tenable at all. This is proposed only not in view the benefit of exemption Notification No. 6/2005-S.T. dated 01.03.2005, as amended to individual co owners even when they jointly owned the property and not AOP and they individually provided the service of renting of immovable property and also received the rent in proportion to the shares in the immovable property. I also find that the Department has failed in produce any evidence during this proceedings and also failed to bring out any evidence in the SCN and the impugned order that they actually formed AOP or they were registered as AOP and any evidence that it

was AOP which entered into agreement with HRPL and not by them as individual persons as co owners.

7.5 In view of above facts of this case, I hold that service tax liability shall have to be decided in their individual capacity and threshold limit/exemption by virtue of Notification No. 6/2005-ST dated 11.03.2005 shall also be available to each of three appellants. I also hold that penalty of Rs. 21,02,429/- imposed under Section 78 of the Act and Rs. 10,000/- penalty imposed under Section 77(1)(a), 77(1)(b), 77(1)(c) and Section 77(2) of the Act is not imposable and need to be set aside. I further hold that late fee of Rs. 1,80,000/- is also not payable by them under Section 70 of the Act read with Rule 7C of Service Tax Rules, 1994.

8. The appellants raise the issue cum-tax benefit, on the ground that they have not charged service tax to HRPL and hence, the entire amount collected should be treated as cum tax value and cum-tax benefit should be granted to them. It is an admitted fact that the appellants have not collected any amount towards service tax, hence consideration is not inclusive of service tax. Since no service tax has been collected from the customers, cum tax value benefit can't be extended to the appellants as I have no option but to follow the ratio of the judgement of the Hon'ble Supreme Court in the case of Amrit Agro Industries reported as 2007 (210) E. L. T. 183 (SC), relevant para of which is as under:

> *"14. In our view, the above judgments in the case of Maruti Udyog Ltd. and Hindustan Tyres Ltd. have no application in the facts of the present case. In the case of Asstt. Collector of Central Excise v. Sara 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, 1944 the normal wholesale price is the cum-duty price which the wholesaler has to pay to the manufacturer ourselves. 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."

(Emphasis supplied)

8.1 The said principle laid down by the Hon'ble Supreme Court has to be made applicable to Section 67(2) of the Act for the matters pertaining to service tax. Thus, I hold that benefit of cum-tax-value cannot be extended to the appellants.

9. In view of above factual and legal position, I set aside the impugned order and allow all three appeals but without benefit of cum tax value to any of three appellants.

9.1 अपीलकर्ताओं द्वारा दर्ज की गई उपरोक्त अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

9.1. The appeals filed by the appellants are disposed off as above.

(कुमार संतोष)
आयुक्त (अपील)

By Regd. Post AD

To,

Shri Dhirajlal Ravjibhai Rokad, Pearl Plaza, Near G. T. Shroff School, 150 Ft. Ring Road, Rajkot.	श्री धीरजलाल रवजीभाई रोकड, पर्ल प्लाझा, जी. टी. शेठ स्कूल के पास, १५० फीट रिंग रोड, राजकोट.
Smt. Parulben Dhirajlal Rokad, Pearl Plaza, Near G. T. Shroff School, 150 Ft. Ring Road, Rajkot	श्रीमति पारुलबेन धीरजलाल रोकड, पर्ल प्लाझा, जी. टी. शेठ स्कूल के पास, १५० फीट रिंग रोड, राजकोट.
Shri Chetankumar Dhirajlal Rokad, Pearl Plaza, Near G. T. Shroff School, 150 Ft. Ring Road, Rajkot	श्री चेतनकुमार धीरजलाल रोकड, पर्ल प्लाझा, जी. टी. शेठ स्कूल के पास, १५० फीट रिंग रोड, राजकोट.

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 Assistant Commissioner, GST & Central Excise Division-II, Rajkot.
4. F. No. V2/263/RAJ/2017.
5. F. No. V2/264/RAJ/2017.
6. Guard File.