रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील-I) का कार्यालय केन्द्रीय उत्पाद शुल्क :
सैन्टल एक्साइज भवन, सातवीं मंज़िल, पौलिटैक्नीक के पास,
आंबावाडी, अहमदाबाद– 380015.

क फाइल संख्या : File No : **V2(RIP)9/STC-III/2015/Appeal-I** 2461 to 2466

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-010-16-17**
दिनाँक Date **10.05.2016** जारी करने की तारीख Date of Issue 11/5/16

श्री उमाशंकर, आयुक्त (अपील-I) केन्द्रीय उत्पाद शुल्क अहमदाबाद द्वारा पारित

Passed by **Shri Uma Shankar** Commissioner (Appeals-I) Central Excise Ahmedabad

ग _____ आयुक्त केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश सं _____ दिनाँक : _____ से सृजित

Arising out of Order-in-Original No **AHM-STX-003-JC-17-14-15** dated : **27.03.2015** Issued by: Joint Commissioner, Central Excise, Din: Mehsana, A'bad-III.

ध **अपीलकर्ता /** प्रतिवादी का नाम एवं पता Name & Address of The **Appellants**/Respondents

M/s. Mahalaxmi Enterprise

इस अपील आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित प्रकार से कर सकता है:–
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way :-

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील:–
Appeal to Customs Central Excise And Service Tax Appellate Tribunal :-

वित्तीय अधिनियम,1994 की धारा 86 के अंतर्गत अपील को निम्न के पास की जा सकती:–
Under Section 86 of the Finance Act 1994 an appeal lies to :-

पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ.20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेधाणी नगर, अहमदाबाद–380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad – 380 016.

(ii) अपीलीय न्यायाधिकरण को वित्तीय अधिनियम, 1994 की धारा 86 (1) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9(1)के अंतर्गत निर्धारित फार्म एस.टी– 5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरूद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और साथ में जिस स्थान में न्यायाधिकरण का न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्र बैंक के न्यायपीठ के सहायक रजिस्ट्रार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी।

(ii) 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 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.

(iii) वित्तीय अधिनियम,1994 की धारा 86 की उप–धारा (2ए) के अंतर्गत अपील सेवाकर नियमावली, 1994 के नियम 9 (2ए) के अंतर्गत निर्धारित फार्म एस.टी.7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क/ आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश की प्रतियाँ (उसमें से प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप आयुक्त, केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड/ आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

(iii) The appeal under sub section and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 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 Central Board of Excise & Customs / Commissioner or Dy. Commissioner of Central Excise to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तो पर अनुसूची–1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रू 6.50/– पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

2. One copy of application or O.I.O. as the case may be, and the order of the adjuration authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

3. सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 में चर्चित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है।

3. 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.

4. सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत निर्धारित रकम

(ii) सेनवैट जमा की ली गई गलत राशि

(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

4. For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, 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 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten 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.

(4)(i) इस संदर्भ में, इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(4)(i) In view of above, 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."

ORDER-IN-APPEAL

This order arises out of an appeal filed by M/s. Mahalaxmi Enterprise (Movie World), Plot No.4 & 5,City Survey No.14040, Paiki Street No.52, Palanpur, Gujarat (in short 'appellant') against Order-in-Original No.AHM-STX-003-JC-17-14-15 dated 27/30.03.2015 (in short 'impugned order') passed by the Joint Commissioner, Central Excise, Ahmedabad-III (in short 'adjudicating authority').

2. Briefly stated that the adjudicating authority confirmed demand of service tax of Rs.12,94,122/- against the appellant under the category of 'Renting of Immovable Property' during the period from 2008-09 to 2011-12 under proviso to Section 73(1) of the Finance Act, 1994; ordered for recovery of interest u/s 75 ibid, confirmed late fee specified under Rule 7C of the Service Tax Rules, 1994 read with Section 70 ibid; imposed penalty u/s 76 ibid; imposed penalty u/s 77(1)(a) ibid and imposed penalty of Rs.12,94,122/- u/s 78 ibid vide impugned order.

3. Aggrieved with the impugned order, the appellant has filed the present appeal wherein, interalia, contested that:

(a) The adjudicating authority has not considered their arguments submitted in reply to the SCN dated 18.03.2015. Erroneous calculation of liability of service tax as proposed in the SCN is not properly dealt with.

(b) Property is co-owned by several person and hence effectively no service tax is leviable.

(c) The agreement entered into with Reliance Media Works Ltd (in short RM) by the appellant was simply for the reason that RM did not agree to enter into separate individual agreements with all partners.

(d) The SCN have been issued to an incorrect noticee in as much as the rent is received by the individuals whereas the SCN is issued to them which is a partnership firm.

(e) RM was continuously insisting them not to pay service tax since they were to challenge this levy in the respective court since they had taken such property on lease from lessors across the country.

(f) RM has paid only Rs.82,22,255/- towards rent during the period 01.04.2008 to 30.06.2011. No payment is effected on account of rent after 01.07.2011 by RM.

(g) When the rent itself is not received by them, they are not in a position to effect the payment of service tax.

(h) Rent is received by the co-owners and RM has deducted TDS from payment made to individual co-owners.

(i) Individual co-owners are separate service providers and eligible for benefit of SSI exemption limit under Notifn. No.06/2005-ST dated 01.03.2005 as amended and rely upon following case laws:

- Ritaben P. Doshi Vs.CST, Ahd-2014(35)STR.-964(Trl.-Ahd.)
- Khushiram M. Ratanchandani Vs. CST,Ahd-2013(32)STR-964(Tri.Ahd)
- Sanjay K. Motwvani Vs.CST,Ahd-2013(32)STR-445(Tri. Ahd.)
- K.D.Chaudhry Vs.CST,Ahd-2013(32)STR-441(Tri.Ahd.)
- Dilip Parikh Vs.CST,Ahd-2013(32)STR-243(Tri.Ahd)
- Manju Champaklal Bafna Vs.CST,Ahd-2013(31)STR-511(Tri.Ahd)
- Minaxiben J. Thakkar Vs.CST,Ahd-2013(31)STR-329(Tri.Ahd.)
- Pankajbhai Champaklal Parekh Vs.CST,Ahd-2013(31)STR-329(Tri.Ahd.)
- Dineshchandra V. Patel Vs.CST,Ahd-2013(31)STR-296(Tri.Ahd.)
- Vamini Nitinkumar Shah Vs.CST,Ahd-2013(31)STR-239(Tri.Ahd.)

(j) Service tax is tax on activities amounting to service and not property.

(k) Impugned order confirming the levy by concluding the same as tax on property is unlawful.

(l) Discriminative treatment by the department towards co-owners and individual owners of the properties are in gross violation of Article 14 of the Constitution of India.

(m) Service tax becomes payable only if the consideration, if any, received by them. They have not received any consideration towards the subject alleged service. RM has effected payment to individual co-owners and not to the appellant.

(n) In view of provisions contained in Rule 6 of the STR, 1994 as it stood prior to 30.06.2011, they are not liable to pay service tax as they had not received any consideration towards alleged service and hence not liable to pay service tax.

(o) In terms of provisions of Rule 9 of the Point of Taxation Rules, 2011, service tax on those lease rent which became due till 30.06.2011 and not received by that time cannot be demanded. In respect of such lease rent service tax is to be demanded when such amount of such rent realises. Such rent was not realised during the period covered under the SCN hence no demand of service tax can be made on such lease rent. The adjudicating authority confirmed the demand of service tax of Rs.1,43,477/- on such lease rent of Rs.13,92,985/- is bad in law and deserves to be quashed.

(p) The value of services provided by them should be treated as cum tax.

(q) SCN is time barred.

(r) SLP filed against judgement in case of Home Solution India Retail Ltd. Vs. UOI (2009)20-STT-129(Delhi-HC) is still pending before Hon'ble Supreme Court and they were under bonafide belief that no service tax is payable. As such there is no suppression of facts and extended period of limitation cannot be invoked and no penalties are leviable.

(s) As they are not liable to pay service tax, no interest can be leviable under Section 75 of the Finance Act, 1994 and so the penalties imposed under Section76,77 and 78ibid.

4. Personal hearing in the matter was held on 06.04.2016. Shri Ajay Karia, CA, appeared before me and reiterated the grounds of appeal and stated that threshold limit to individual partners should be allowed and there is some mistake in calculation (para 31 of the impugned order).

5. I have carefully gone through the facts of the case, the appellant's grounds of appeal in the appeal memorandum, oral and written submissions made by them at the time of personal hearing and other evidences available on records. I find that the main issue to be decided, interalia, is whether appellant is liable to pay service tax or otherwise.

5.1 At the outset, I find that the appellant is a partnership firm and had taken service tax registration on 13.11.2009 under the category of 'Renting of Immovable Property'. The appellant had given immovable property viz. Movie World built for exhibiting the cinema and was given on lease to Reliance Media Works Ltd.(in short RM). The appellant had entered into an agreement viz. 'Conducting Agreement' with RM on 25.03.2008. RM had also entered into an agreement viz. 'Supplementary Agreement' dated 30.09.2009 with the appellant for full and final settlement of rent charges for the period from March-2008 to Septemebt-2009 @ Rs.3,30,000/- per month and from 01.10.2009 to 30.06.2011 @ Rs.2,70,000/- per month. This is undisputed facts in the appeal. I find that as per the 'supplementary agreement' dated 30.09.2009, RM was paying rent directly to the partners of the appellant firm. Now, the question comes here who is liable to pay service tax? I find that the appellant is a partnership firm and holding said immovable property viz. 'Movie World'. They had entered into lease agreement with RM for a rent agreed upon by them on specific amount stated supra. As such there is no dispute for property given on rent. The levy of service tax on 'Renting of Immovable Property' was introduced w.e.f. 01.06.2007. Taxable service is defined in Section 65(105)(zzzz) of the Finance Act, 1994 which reads as under:

"to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or, for furtherance of, business or commerce"

The appellant has mainly argued that they are not service provider and hence not liable to pay any service tax on such renting of immovable property. In this regard, I find that the 'person' appearing in the definition is not defined in the Finance Act, 1994 but the same is defined under Section 3(42) of the General Clauses Act, 1897 which says that ***"Person shall include any company or association or body of individual, whether incorporated or not."*** In the instant case, I find that the appellant is partnership firm which is nothing but body individual or association of person and has entered into an agreement with the RM. Hence, the appellant is service provider and RM is service receiver. Hence, in terms of definition provided in Section 65(105)(zzzz) of the Finance Act, 1994, the appellant is liable to pay service tax on renting of immovable property to RM.

5.2 It is further argued that the appellant has not received any payment from the service receiver i.e. RM and hence not liable to pay service tax. In this regard, I find that the appellant is a partnership firm having six partners and the service receiver i.e. RM had entered into 'conducting agreement' with the appellant to pay rent as under:

Sr.No.	Period.	Amount of Rent.(Rs.)
1	25.03.2008 to 30.09.2009.	3,30,000/- per month.
2	01.10.2009 to 30.06.2011.	2,70,000/- per month.

It is confirmed by Shri Bharatbhai Dalpatbhai Acharya, partner of the appellant firm, in his statement dated 27.06.2011 that RM has paid rent so fixed equally to the partners. In this regard, I find that the said partnership firm consists of six partners. Any income received by the said firm is ultimately to be divided amongst them as per their share fixed. So, the income i.e. rent received by all the partners is nothing but income received by the said firm. The conducting agreement entered by RM with the appellant is nothing but devise used to escape from the service tax liability. But since all the partners are jointly and severally responsible, unless otherwise specifically provided in the partnership deed, for any act done by the firm as per the provisions of the Indian Partnership Act, 1932, I find that though the amount of rent is received by the partners from RM, it is deemed to have been received by the appellant firm and liable to pay service tax.

6. It is argued that co-owners are separate service providers and eligible for benefit of SSI exemption limit under Notifn. No.06/2005-ST dated 01.03.2005 as

amended. In this regard, I find that The appellant have rented out single screen theatre viz. Movie World, which is owned by six partner collectively, to RM for a rent agreed upon by them as per the said conducting agreement. Renting out of said premises fall under the category of 'Renting of Immovable Property Service' as defined under Section 65(105)(zzzz) of the Finance Act, 1994, taxable w.e.f. 01.06.2007. For the sake of reference, I reproduce the definition of 'Renting of Immovable Property Service' as given under Section 65 (90a):

> ***"renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course of furtherance of business or commerce but does not include (i) renting of immovable property by a religious body or to a religious body; or (ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field than a commercial training or coaching centre."***

6.1 I find that the Govt. vide Notification No. 6/2005-ST dated 01.03.2005 as amended, exempted taxable services of aggregate value not exceeding Rs. 4.00 lakhs in any financial year from the whole of the service tax leviable thereon under Section 66 of the Finance Act, 1994. This threshold limit of ₹ 4.00 lakhs has been raised to ₹ 8.00 laks vide Notification no.4/2007-ST dated 01.03.2007 and further raised to Rs.10.00 lakhs vide Notification No. 8/2008-ST dated 01.03.2008.This exemption is conditional one. According to above notification, a taxable service provider whose gross value is within the limit of ₹ 8.00 lakhs (during the year 2007-08) and ₹ 10.00 lakhs (during the year 2008-09) need not pay any service tax nor obtain service tax registration, provided the service provider should not be under a 'brand name' and not avail any Cenvat Credit for the payment of Service Tax. The appellant has contended that the adjudicating authority has erred in the impugned order and they are individually eligible for the benefit given under the above Notifications. In order to ascertain whether the appellant is liable to pay service tax without availing the benefit of Notification No 6/2005-ST dated 01.03.2005 as amended or whether they are eligible for the threshold exemption, I find that the said property is owned by the appellant having six different individuals i.e. partners who are not appellant in the present appeal and not holding absolute ownership of any identifiable part in the property given on rent viz. Movie World. I find that as per the provisions contained in the Transfer of Property Act, 1882, the three essential conditions required to determine the ownership of any property are (1) right to possess, (2) right to enjoy and (3) right to dispose. In the present case, the individual can enjoy or dispose of the share of the property, but does not possess any identifiable area independently. They possess the property as a whole. Any dealings in the property are subject to the consent of other partners. The co-owners only have

undivided interests in the whole of the property and no divided interest in separate parts of the property. Accordingly, the appellants cannot lease out their share of the property independently to the lessee. Hence, the services of renting of their property provided by them are indivisible in nature and to be treated as a single service. The appellants have provided renting of immovable property for use by the lessee. When a single individual is not the absolute owner of any identifiable area in the property, it can be leased out as a single unit only. I find that the property is one which is rented out and the rent is shared by more than one person and this will not make one immovable property into six different properties. In this case, the immovable property is single screen theatre viz. Movie World which has been rented out to RM and hence, I hold that the service rendered is indivisible and it is to be treated as a single service rendered collectively. So, the benefit of SSI exemption under Notifn. 06/2005-ST dated 01.03.2005 as amended can be availed by the appellant only and not by the partners/co-owners subject to conditions given in the said notification.

6.3 In view of the definition of the service and the nature of service provided by the appellant, I hold that the service of Renting of the property as stated above by the appellant fall under the category of "Renting of Immovable Property Service" and the rent for the said property received by them is taxable under the said service. The rent of the property was fixed at the rate ₹3.30,000/- per month for the period from 25.03.2008 to 30.09.2009 and Rs.2,70,000/- per month for the period 01.10.2009 to 30.06.2011. Accordingly, the total rent received by the appellant is well beyond the threshold limit of exemption and therefore, the appellant is liable to pay service tax on the rent income received by them.

6.4 I have also carefully gone through the case laws relied upon and mentioned in para 3(i) supra. I find that in all the cases, the Hon'ble Tribunal has granted only stay against the recovery of confirmed demand of service tax. None of the case has attained finality till date hence of no help to the appellant at this stage.

7. It is argued that the adjudicating authority has erred in confirming demand of service tax of Rs.1,43,477/- as the same was due till 30.06.2011 but not received till issue of the SCN in terms of Rule 9 of the Point of Taxation Rules, 2011. In this regard, I find that so far amount of Rs.82,22,255/- received towards rent from RM till 30.06.2011 in terms of Rule 6(1) of the Service Tax Rules, 1994 and demand of service tax confirmed to the tune of Rs.8,84,987/- (Rs.8,92,389/- less Rs.7,402/- already paid) under proviso to Section 73(1) of the Finance Act, 1994, there is no dispute. As regards the confirmed demand of service tax of Rs.1,43,477/- on taxable value of Rs.13,92,985/- upto 30.06.2011, I find that prior to introduction of Point of Taxation Rules, 2011, service tax was payable on actual receipt of rent from the service receiver in terms of provisions contained in Rule 6(1)ibid. With the

introduction of Point of Taxation Rules, 2011, I find that Rule 9 clearly provides for transitional arrangement which is reproduced below for the sake of ease:

RULE [9. Transitional provisions. — Nothing contained in [these rules] shall be applicable, -

(i) where the provision of service is completed; or

(ii) where invoices are issued

prior to the date on which these rules come into force :

Provided that services for which provision is completed on or before 30th day of June, 2011 or where the invoices are issued upto the 30th day of June, 2011, the point of taxation shall, at the option of the taxpayer, be the date on which the payment is received or made as the case may be.].

From the above, it is crystal clear the appellant has not received said rent of Rs.13,92,477/-, which was due prior to 30.06.2011, which is shown as receivable in the books of accounts, from RM and has made provisions in the books as account as receivable. I find that this rule gives option to the service provider to pay service tax on amount which was due prior to 30.06.2011. I find that said rule is very clear about its payment. As the said amount of rent is not received by the appellant from the RM and pertains to period prior to 30.6.2011, no service tax can be demanded at this stage. Accordingly, the demand of service tax of Rs.1,43,477/- is set-aside.

8. It is contended that the value of service provided by the appellant should be treated as cum tax. In this regard, I find that there is nothing specified about service tax liability in the agreement entered into with RM except fixed monthly rent to be paid. This implies that service tax liability is on the service provider i.e. appellant in the present appeal even though Shri Bharatbhai Dalpatbhai Acharya, partner, in his statement dated 27.06.2011 has stated that they were of the view that except for municiple tax and property tax, all other taxes were to be borne by RM and hence they have not made any payment of service tax. This also implies that the said agreement is silent about payment of service tax. It is only presumption that the service tax shall be paid by RM. In absence of any specific provisions in the said agreement in this regard, it cannot be accepted that the value of taxable service provided by them should be treated as cum tax. Hence, the plea of the appellant is not tenable.

9. It is contended that the SCN is time-barred. In this regard, I find that though the appellant had given so called premises viz. Movie World on rent to RM and entered into an agreement dated 25.03.2008, they had taken service tax registration on 13.11.2009 i.e. almost after 20 months and not filed any prescribed return with the jurisdictional service tax authority except payment of Rs.7402/- on

25.11.2009. I find that responsibility lies on the service provider to get registration, assess and pay appropriate service tax and file statutory returns under the provisions of Section 69, 70 and 68 of the Finance Act, 1994 respectively. I find that the appellant has totally failed. If they had any doubt, they could have approached the jurisdictional authority for clarification in the matter. I find that there is no evidence on record in this regard. So, it proves their malafide beyond doubt hence extended period of limitation under proviso to Section 73(1) ibid is correctly invoked.

10. It is also contended by the appellant that the levy of service tax on renting of immovable property w.e.f. 01.06.2007 was under dispute and they relied upon the decision given the Hon'ble High Court of Delhi in the case of M/s.Home Solution Retail India Ltd. Vs. UOI reported in 2009(20) STT-129(Delhi HC) and they were under bonafide belief that no service tax is payable. In this regard I find that the said decision of the Delhi High Court has been challenged in the Hon'ble Supreme Court and has been dissented in 2011. If the appellant had any doubt regarding taxability on renting of immovable property they could have approached the jurisdictional service tax authority for clarification of any doubt at the material time. Therefore, their plea of replying upon the said judgement is not acceptable when the same is challenged in the Hon'ble Supreme Court.

11. As regards imposition of penalty under Section 76ibid, I find that w.e.f. 10-05-2008 Section 78 was modified and the proviso – "Provided also that if the penalty is payable under this section, the provisions of section 76 shall not apply" was added. I find that the SCN in this case has been issued on 23.10.2013 i.e. after the date of inserting the proviso under Section 78. The period covered in the SCN is from April-2008 to March-2012. Therefore, after 10-05-2008, charges for contravention of Section 76 and Section 78 cannot be invoked simultaneously. In view of above, I hold that the penalty under Section 76 is not justified for the period after 10.05.2008 and accordingly it is set-aside.

12. As regards imposition of penalty under Section 77ibid, I find the appellant had failed to file the Service Tax returns for the relevant period and also failed to obtain Service Tax registration and for other violations of the provisions of the Act as discussed in the impugned order. Therefore, I find that penalty imposed under section 77(1)(a)ibid is justified.

13. As regards imposition of penalty under Section 78 ibid, I find that the act done by the appellant in the instant case contains all the ingredients elaborated under the said Section. Therefore, I find that penalty imposed under Section 78 ibid is justified. However, out of total penalty of Rs.12,94,122/- imposed u/s 78, an amount of Rs.1,43,477/- is set-aside in terms of Para 7 supra.

14. The appeal is disposed of in above terms.

(Uma Shanker)
Commissioner(Appeals-I)
Central Excise, Ahmedabad.

Attested:

11/05/16

(B.A. Patel)
Superintendent(Appeals-I),
Central Excise, Ahmedabad.

BY SPEED POST/R.P.A.D. TO;

M/s. Mahalaxmi Enterprise (Movie World),
Plot No.4 & 5,City Survey No.14040,
Paiki Street No.52,
Palanpur, Gujarat.

Copy to:

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III.
3. The Joint Commissioner, C. Ex., Ahmedabad-III.
4. The Dy. Commr, C.Ex. , Mehsana Division, Ahmedabad-III.
5. The Dy. Commissioner, Cen. Excise. (Systems), Ahmedabad-III. (for uploading the order on the website).
6. Guard file.
7. P.A. file.