

आयुक्त (अपील - II) का कार्यालय केन्द्रीय उत्पाद शुल्क  
सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास,  
आंबावाडी, अहमदाबाद— 380015.

क फाइल संख्या : File No : V2(ST)102 /A-II/2015-16 / 2681-2686  
ख अपील आदेश संख्या : Order-In-Appeal No. AHM-SVTAX-000-APP-0144 -16-17  
दिनांक Date : 28.10.2016 जारी करने की तारीख Date of Issue 08/11/16  
श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals-II)

ग \_\_\_\_\_ आयुक्त सेवाकर अहमदाबाद : आयुक्तालय द्वारा जारी मूल आदेश सं  
\_\_\_\_\_ दिनांक : \_\_\_\_\_ से सृजित

Arising out of Order-in-Original No SD-05/05/DKJ/AC/2015-16 Dated 27.10.2015

Issued by Assistant Commissioner, Div-V, Service Tax, Ahmedabad

घ अपीलकर्ता का नाम एवं पता Name & Address of The Appellants

M/s. Maniar & Co Ahmedabad

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 :-

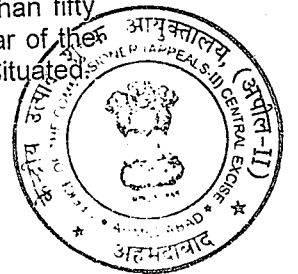
पश्चिम क्षेत्रीय पीठ सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ओ. 20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

The West Regional Bench of Customs, Excise, Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, 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 विरुद्ध 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 और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ 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.

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(iii) वित्तीय अधिनियम, 1994 की धारा 86 की उप-धाराओं एवं (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 (अपील) के आदेश की प्रतियाँ (OIA) (उसमें से प्रमाणित प्रति होगी) और अपर आयुक्त, सहायक / उप आयुक्त अथवा A219k केन्द्रीय उत्पाद शुल्क, अपीलीय न्यायाधिकरण को आवेदन करने के निदेश देते हुए आदेश (OIO) की प्रति भेजनी होगी।

(iii) The appeal under sub section (2A) of the section 86 the Finance Act 1994, shall be filed in Form 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 (Appeals)(OIA)(one of which shall be a certified copy) and copy of the order passed by the Addl. / Joint or Dy. /Asstt. Commissioner or Superintendent of Central Excise & Service Tax (OIO) to apply to the Appellate Tribunal.

2. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार मूल आदेश एवं स्थगन प्राधिकारी के आदेश की प्रति पर रु 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 adjudication 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, 1984 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014) की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1984 की धारा 43 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 अर्जों एवं अपील को लागू नहीं होंगे।

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,

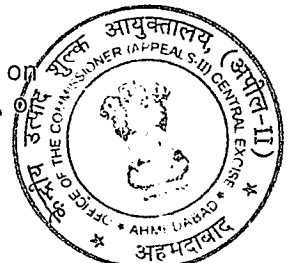
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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(1) 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(1) 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, penalty, where penalty alone is in dispute.



**ORDER IN APPEAL**

1. M/s Maniar & Co., Near Ajit Mill, Maniar-Trailor road, Rakhial, Ahmedabad (hereinafter referred to as 'Appellant') has filed this appeal against against Order-In-Original No. SD-05/05/DKJ/2015-16 dated 27.10.2015 (hereinafter referred to as "impugned order") passed by the Asst. Commissioner, Service Tax Div-V, Ahmedabad (hereinafter referred to as "Adjudicating Authority").

2. The facts of the case are that the Appellant registered with Service Tax and holding Service Tax Registration No. AAFT7279HST001 during 2008-09 to 2012-13 (up to 30.06.2012) paid commission Rs. 42,45,661/- to commission agents located out side India, however they did not paid service tax payable under Business Auxiliary service defined under clause 19 of Section 65(105) of FA 94.

FINANCIAL YEAR	Commission paid to foreign parties	Service Tax Rs.
01.10.2008 to 31.03.2010	23,00,000/-	2,84,280/-
2010-11	9,65,937/-	99,492/-
2011-12	9,79,724/-	1,00,912/-
TOTAL	42,45,661/-	4,84,684/-

3 As per section 66A read with rule 2(1)d (iv) of service tax rule 2006 , Appellant as a recipient of service was liable to pay service tax as such transaction was governed by Taxation Of Service (Provided from outside India and received in India ) Rule 2006. During 2008-09 to 2012-13(up to 30.06.2012) they have not shown any commission paid to foreign agents and also not shown any notification in ST-3 return for claiming exemption. Moreover for relevant demand period they have not filed and EXP returns for claiming exemption and refund.

4. The Appellant was liable to pay service tax of 4,84,684/- hence Show Cause Notice dated 10.04.2014 was issued. Appellant contended that they have filled EXP-3 and EXP-4 on 20.01.2014 for period from 2008-09 to 2012-13(up to 30.06.2012) to avail the benefit of exemption from service tax.

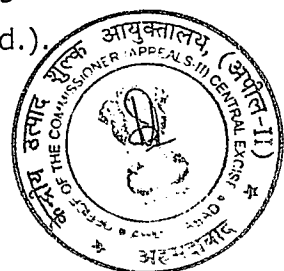


the service availed of foreign commission agents. Said procedure lapse was argued to be overlooked keeping in view various judgments. SCN was adjudicated by the Adjudicating Authority vide impugned OIO wherein extended period was also invoked. Demand was confirmed under section 73(1) with interest payment under section 75 and equal penalty of 4,84,684/- was imposed under section 78. Penalty under section 76 (Rs. 200/- per day) and 77 (Rs. 10,000/-) were also imposed.

5. Being aggrieved by Impugned OIO Appellant filed present appeal on 30.11.2015. They have contended that exemption to specified service i.e. commission paid to foreign agents used in exports of goods was available to them during period of demand vide conditional notification 41/2007-ST dated 6.10.2007 amended vide notification 17/2008/-ST dated 01.04.2008 (by way of refund Noti.) , 18/2009-ST dated 07.07.2009 (straight way exemption) and 42/2012-ST dated 29.06.2012 (straight way exemption).

5.1 Appellant has stated that refund claim was not made under Noti. No. 17/2008-ST for claiming refund of service tax paid on commission given to foreign agents for their service received in export. Exemption from service tax payment vides subsequent conditional Noti. 18/2009-ST dated 07.07.2009 by way of filing EXP-1 and EXP-2 returns was not complied initially but appellant complied belatedly on 20.01.2014 for entire period of demand by way of filing EXP-3 and EXP-4. Appellant has argued that as soon as appellant become aware they have complied by way of filing EXP-3 and EXP-4 on 20.01.2014 for entire period of demand.

5.2 Appellant has further argued that there is no revenue loss (revenue neutrality) to department and it is procedural lapse. Appellant relied on judgment Ind Swift Ltd. V/s Commissioner C.Ex., Chandigarg- 2013 (31) STR 703 (Tri. Del), Tech Mahendra Ltd. V/s Commissioner Cochin- 2012 (ST) STR 344 (Tri. Bang.), Chillies Export House Ltd. V/s Commissioner C.Ex., Madurai- 2011 (24) STR 40 (Tri.- Chennai), Solar Explosive Ltd. V/s Commissioner C. Ex., Nagpur- 2011(21)- STR 448 (Tri.-Mum.) and Dineshchandra R. Agrawal Infracon Pvt. Ltd V/s C.C.E. Ahmedabad- 2010 (18) STR 39 (Tri. -Ahmed.).



6. Broadly based on these arguments appellant pleaded to quash the impugned OIO as issue is revenue neutral. Regarding Penalty it is argued that as there is no intension to evade the service tax payment and section 80 is applicable in present case and therefore penalty under 76, 77 and 78 is not imposable.

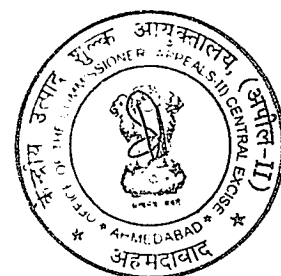
7. Personal Hearing in the matter was held on 05.07.2012, wherein Mr.Vipul Khandhar, C.A. on behalf of the appellant appeared and reiterated the contents of the appeal memorandum stated that EXP-3/EXP-4 returns were filed little late and its procedural lapse. Therefore duty can not be demanded.

#### Discussion and finding

8. I have carefully gone through the facts of the case, impugned order, the grounds of appeals, and the submissions made during the personal hearing and written submission made by Appellant.

9. I find that there is no dispute regarding levy of service tax on commission paid to foreign commission agents. Said services is falling under the category of Business Auxiliary service classifiable under 65(105)(zzb). Appellant is contending that issue is revenue neutral. Appellant has taken shelter under following exemption notification available to them ....

- (i) Conditional exemption notification No. 41/2007-ST dated 6.10.2007 as amended vide 17/2008/-ST dated 01.04.2008 [in force up to 07.07.2009] (by way of quarterly refund in form specified in notification procedure)
- (ii) 18/2009-ST dated 07.07.2009 [in force up to 20.06.2012] (straight way exemption-EXP 1 and EXP-2 procedure) and



- (iii) 42/2012-ST dated 29.06.2012. [in force up to 01.03.2015] (straight way exemption- EXP -3 and EXP-4 procedure)

10. I find that demand is raised as appellant has not made payment of service tax on commission paid to Foreign Service provider. Service tax is payable by appellant as recipient of service as per Rule 2(1)(d)(iv) of service tax rule 1994 read with section 66A of CEA 1994. Appellant has contended that they have paid commission in relation to effecting export/sale of goods in foreign countries. However appellant has not produced any evidence to substantiate that commission paid is in relation to effecting export/sale of goods in foreign countries.

11. I find that SCN demand of Rs. 2,84,280/- for period 01.10.2008 to 31.03.2009 is covered under notification No. 41/2007-ST dated 6.10.2007 as amended vide 17/2008/-ST dated 01.04.2008. During period 01.10.2008 to 31.03.2009 appellant was required to pay the tax first then claim the quarterly refund in prescribed form. Refund was required to be filed within 60 days of end of relevant quarter. I find that for claiming refund, conditions of providing agreement copy, mentioning of commission on shipping bill, submitting documents evidencing export of goods etc. are required as per said notification. Refund of maximum 2% of FO B was admissible. I find that appellant has neither paid tax nor filed quarterly refund. In view of this, I find that conditions of notifications for granting refund are not fulfilled. I am in complete agreement with impugned OIO confirming the demand of Rs. 2,84,280/- and rejecting the EXP-3 /EXP-4 filed for period 01.10.2008 to 31.03.2009.

12. I hold that appellant is not eligible for refund as they have not paid the tax. In case appellant had paid the tax first then also they are not eligible for refund as refund claim is not filed within 60 days of end of relevant quarter. My view is supported by Hon'ble Allahabad High Court judgment in case of M/s Addi Industries Ltd V/s CCE [2014 (36) STR 27] wherein refund application refund of service tax paid on export goods was filed after 60 days of closure of quarter (due date) but before one year of exportation. M/s



Industries Ltd. was contesting that though 60 days time limit is prescribed in notification 18/2009 dt. 07.07.2009 but section 11B prescribes time limit of one year from payment of duty. It is held at para 8 and 9 that .....

"8. However, the contention of the assessee is that once the goods have been exempted by Notification 18/2009 on 7 July 2009, there was no requirement of paying service tax and then applying for a refund and hence, the application which was filed by the assessee ought to have been entertained in that event. It has been submitted, relying on the provisions of Section 11B of the Central Excise Act, 1944 (read with Section 83 of the Finance Act, 1994) and Clause (f) of Explanation-B that the refund application could have been made within one year of the date of payment of duty. Since the duty was paid on 31 August 2009, it has been contended that the application was within limitation.

9. It is not possible to accept that contention. The entire argument pre-supposes that Notification 18/2009 would apply in respect of the taxable services in relation to the exports for the period April 2008 to June 2009. Notification 18/2009 is prospective. Thereafter, the only requirement is that a return should be filed in respect of the exempted taxable service. In respect of the taxable services which were rendered in respect of the export of goods prior to the date of Notification 18/2009, that notification would have no application whatsoever. The assessee had made exports between April 2008 to June 2009. Under the relevant notification, service tax was liable to be paid and then an application for refund was required to be presented within 60 days of the end of the relevant quarter in which the goods had been exported. Once a period of limitation was prescribed in the exemption notification for submitting the refund application, that would necessarily govern....."

13. My view is also supported by Hon' ble CESTAT judgment in case of



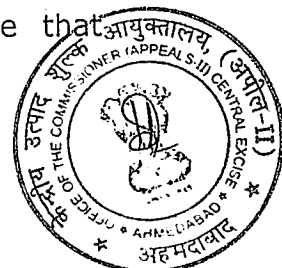
Spark Engg. P. Ltd. V/s CCE Gaziabad [2013 (31) STR 71 (Tri. Del) regarding time bar refund case matter of Notification 41/2007- ST dated 06.10.2007 wherein it is held that ..." As the specified date stands provided in respect of goods exported, the same has to be adopted for the purpose of limitation...."

14. I find that SCN demand of Rs. 99,492/- for period 2010-2011 is covered under notification following two notifications...

- (i) Conditional exemption notification No. 41/2007-ST dated 6.10.2007 as amended vide 17/2008/-ST dated 01.04.2008 [in force up to 07.07.2009] (by way of quarterly refund in form specified in notification procedure)
- (ii) 18/2009-ST dated 07.07.2009 [in force up to 20.06.2012] (straight way exemption-EXP 1 and EXP-2 procedure) and

15. My above findings is applicable for demand worked out of Rs. 99,492/- for period 01.04.2009 to 06.07.2009 as during relevant period notification No. 41/2007-ST dated 6.10.2007 as amended vide 17/2008/-ST dated 01.04.2008 was in force. I hold that refund is not available to appellant for period 01.04.2009 to 06.07.2009 as being time barred and as tax not paid. I am in complete agreement in Adjudicating authority confirming the duty for period 01.04.2009 to 06.07.2009 to be worked out of Rs. 99,492/-.

16. For subsequent period 07.07.2009 to 31.03.2010 also demand is to be worked out of Rs. 99,492/-. For period 01.04.2010 to 31.03.2011 SCN demand is Rs.1,00,912/-. During both the period i.e. (i) 07.07.2009 to 31.03.2010 and (ii) 07.07.2009 to 31.03.2010 exemption notification No.18/2009-ST dated 07.07.2009 [in force up to 20.06.2012] was applicable and was available to appellant. Said notification is straight way exemption for which they were required to file EXP-1, EXP-2 return every six month of financial year within 15 days of end of every six month. Appellant has not filed any EXP-1, EXP-2 return but instead filed EXP-3/EXP-4 return prescribed under notification 42/2012-ST dt.29.06.12. It is pertinent to note that





notification 42/2012-ST dt.29.06.12 is prospective hence it is not applicable for previous period i.e. (i) 07.07.2009 to 31.03.2010 and (ii) 07.07.2009 to 31.03.2010. Exemption notification No.18/2009-ST dated 07.07.2009 was limited to service tax calculated on value of 10% on board value of export and on production of contract copy and original document evidencing payment of commission agents.

17. Conditions of notifications for granting exemption are not fulfilled hence benefits exemption notification No.18/2009-ST dated 07.07.2009 was denied by adjudicating authority. I find that adjudicating authority has not scrutinized the documents presented along with belated EXP-3/EXP-4 return for foreign services used for effecting sale/export if foreign countries and has not extended the exemption benefits.

18. For delay in filing EXP-2 return, the substantive benefit of exemption for which they are eligible cannot be denied. In this regard I wish to place reliance on the decision given by the Apex Court in the case of Mangalore Chemicals & Fertilizers Ltd. Vs. Deputy Commissioner [1991 (55) E.L.T. 437 (S.C.)] wherein it was held that the intention of the legislature is to grant exemption only upon satisfaction of the substantive conditions of the notification and so it is important to distinguish between condition that is procedural and is of technical nature and the condition which is substantive. It was concluded that the benefit of exemption should be given if the substantive conditions have been satisfied and the procedural/technical conditions may be condoned.

19. In the case of M/s Ashima Dyecott Ltd. v/s CCE, Ahmedabad [2011-TIOL-1905-CESTAT-AHM] it has been held that technical reasons cannot defeat legislative intent. It was held as under:

Service Tax –Refund of service tax paid on services utilized for export of final products rejected by lower authorities for minor procedural infractions - Legislative intent is to export only goods and not taxes



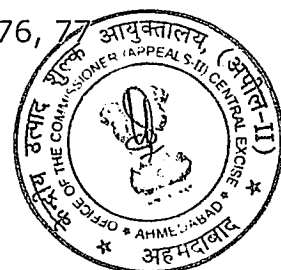
Denial of refunds for technical reasons defeats legislative intent – Matter remanded with direction to original authority to allow appellant to rectify defects wherever possible

20. Therefore, in view of the above decisions, it is very clear that substantive benefit should not be denied for procedural or technical irregularities and the impugned OIO ordering to deny the exemption benefit for the reason of delayed filing of EXP-2 return is not at all tenable and deserves to be remanded back to original adjudicating authority.

21. Case is remanded back for expending the benefits of notification 18/2009-ST dated 07.07.2009 for the period (i) 07.07.2009 to 31.03.2010 and (ii) 07.07.2009 to 31.03.2010 ignoring the limitation period of filing relevant return EXP-1/EXP-2 prescribed under said notification. Appellant shall submit all documentary evidences that may be submitted by appellant to substantiate that foreign agent services used in effecting and in relation to sale/export of export goods and appellant shall also substantiate that exemption notification 18/2009-ST dated 07.07.2009 is available to them. Appellant shall file returns as required under 18/2009-ST. Differential duty worked out i.e. SCN demand raised minus exemption granted for period (i) 07.07.2009 to 31.03.2010 and (ii) 07.07.2009 to 31.03.2010 shall be dealt according to law.

22. Adjudicating authority is directed to pass fresh order. These findings of mine are supported by the decision/order dated 03.04.2014 of the Hon'ble High Court, Gujarat in the Tax appeal No.276//2014 in the case of Commissioner, Service Tax, Ahmedabad V/s Associated Hotels Ltd. and also by the decision of the Hon'ble CESTAT, WZB Mumbai in case of Commissioner of Central Excise, Pune-I Vs. Sai Advantium Ltd and reported in 2012 (27) STR 46 (Tri. – Mumbai).

23. Now I proceed further regarding imposition of penalty under section 76, 77 and 78 and interest provisions section 75. Since case for period (i) 07.07.2009 to 31.03.2010 and (ii) 07.07.2009 to 31.03.2010 is remanded back for fresh adjudication my findings regarding penalty under section 76, 77



and 78 and interest provisions section 75 are for demand of Rs. 2,84,280/- for period 01.10.2008 to 31.03.2010 only.

24. I find that the adjudicating authority has imposed penalty on the appellant under Section 76 of the Finance Act, 1994 for failure to pay Service Tax within the stipulated time. Prior to 10.5.2008, the settled position was that penalties could be imposed under the both Section 76 ibid as well as Section 78 ibid provided that ingredients of both the Sections are present in a case, which nevertheless exist in this case also. However, with effect from 10.5.2008, a proviso has been inserted in Section 78 of the Finance Act, 1994 stipulating that if penalty is payable under Section 78 ibid, the provisions of Section 76 shall not apply. The period involved in impugned the Show Cause Notice is of 01.10.2008 to 31.03.2010 and thus the penal provisions under Section 76 would be contained only till 10.5.2008.

25. As regards the imposition of penalty of Rs. 10,000/- under Section 77 of the Finance Act, 1994, I find that the adjudicating authority has observed that the appellant had been registered with Service Tax department and had been filing the ST-3 returns but had failed to include the value of these Business Auxiliary services under the ST-3 returns of the concerned period, holds good under the provisions of Section 77 of the Finance Act, 1994. Hence I agree with the findings of the adjudicating authority and uphold the penal provisions invoked under Section 77 of the Finance Act, 1994 under the impugned order.

26. Penalty invoked under the impugned order under Section 78 of the Finance Act, 1994 is appropriate in the instant case, as the appellant had suppressed the information related payment of such charges to the foreign commission agents, very well covered under the ambit of taxability under Section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of the Service Tax Rules, 1994. It was only during the course of audit proceedings that the entire event of payment of commission charges to agents located in foreign country had come to the knowledge of department. Had it not been the audit scrutiny of the financial statements of the appellant, the payment of Service



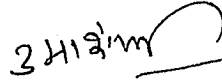
commission charges would have gone unheeded. Hence, I agree with the findings of the adjudicating authority and uphold the penal provisions invoked under Section 78 of the Finance Act, 1994 under the impugned order.

27. Regarding various penalties, the contention of the appellant in terms of the provisions of Section 80 ibid is not sustainable in absence of reasonable cause shown by the appellant.

28. In view of foregoing discussion I up hold the OIO as far it relates to demand of Rs. 2,84,280/- and I remand back as far it relates to rest of subsequent demand. The appeal filed by the appellant is disposed off by way of remand in above terms.

29. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

29. The appeals filed by the appellant stand disposed off in above terms.



(उमा शंकर)

आयुक्त (अपील्स - II)

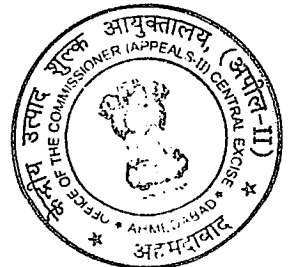
ATTESTED



(R.R. Patel)  
SUPERINTENDENT (APPEAL-II),  
CENTRAL EXCISE,  
AHMEDABAD.

By R.P.AD.

To,  
M/s Maniar & Co.,  
Near Ajit Mill, Maniar-Trailor road,  
Rakhial, Ahmedabad -.



Copy to:

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Commissioner, Service Tax, Ahmedabad.
3. The Additional Commissioner, Service Tax, Ahmedabad.
4. The Assistant Commissioner, Service Tax, Division -V, Ahmedabad.
5. The Assistant Commissioner (Systems), Service Tax (HQ), Ahmedabad.
6. PA to Commissioner (Appeals-IV), Central Excise, Ahmedabad.
7. Guard File.

