

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH**

Dated: 19/01/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. ST/A/53906-53907/2015-CU[DB] dated 04/12/2015

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.


Deputy Asstt. Registrar (CUSTOMS Appeal Branch)

Application	Appeal	Name and Address of Appellant
1	ST/951/2009	AJAY ENTERPRISES PVT. LTD. S-I, AMERICAN PLAZA INTERNATIONAL TRADE TOWER NEHRU PLACE, NEW DELHI-10019

2	ST/952/2009	AJAY ENTERPRISES PVT. LTD. S-I, AMERICAN PLAZA INTERNATIONAL TRADE TOWER NEHRU PLACE, NEW DELHI-10019
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	Name and Address of Respondent
3	-C.S.T. DELHI 17-B, I.P. Estate, IAEA House, New Delhi.
4	-C.S.T. DELHI 17-B, I.P. Estate, IAEA House, New Delhi.

Other Appellants and Respondents as per Annexure

Copy To

5 Advocate(s) / Consultant(s):

**S. K. Pahwa
Marwah & Pahwa, 45,
Aradhana Sector 13, R. K.
Puram,
New Delhi
Delhi-110066**

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P.T.O

6 Additional Party's Name & Address :

7 Bar Association, CESTAT, Delhi

8 Director Publications, Customs, Excise. I.P. Estate, Delhi

9 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

10 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

11 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

12 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

13 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

14 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

15 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad - 38

16 The ICFAI society, 52, Nagarjuna Hill, Punjagutta Hyderabad -500082

17 C.D.R. 18 Office Copy 19 Guard File

 19/11/16
Deputy/Asstt. Registrar(CUSTOMS Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI – 110 066**

Date of Hearing 04.12.2015

For Approval & Signature :

**Hon'ble Hon'ble Justice G. Raghuram, President
Hon'ble Mr. R.K. Singh, Member (Technical)**

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

Appeal Nos. ST/951-952/2009-CU[DB]

[Arising out of Orders-in-Original No.13-14/JM/09, dated 31.08.2009 passed by the C.S.T., Delhi]

M/s. Ajay Enterprises Pvt. Ltd.

Appellant

Vs.

C.S.T., Delhi

Respondent

Appearance

Mr. S.K. Pahwa, Advocate

Mr. Rohan Pahwa, Advocate - for the appellant

Mr. Amresh Jain, DR

- for the respondent

**CORAM: Hon'ble Justice G. Raghuram, President
Hon'ble Mr. R.K. Singh, Member (Technical)**

(2)

Final Order Nos. 53906-53907/2015, dated 04.12.2015

Per Mr. R.K. Singh :

Appeals have been filed against Order-in-Original dated 07.09.2009 in terms of which the following demands were confirmed:-

- (i) Rs. 69,51,824/- for the period April 2004 to March 2008 (Show Cause Notice dated 19.11.2008)
- (ii) Rs. 6,86,467/- for the period April, 2008 to September, 2008 (Show Cause Notice dated 28.01.2008)

The aforesaid demands were confirmed along with interest and penalties on the ground that the appellant provided 'Real Estate Agent' service but did not pay service tax on the administrative charges/transfer charges recovered by it from its clients. These administrative/transfer charges related to the service provided by the appellant for changing the name of the owner (last allottee) in its records whenever any sale/purchase took place prior to execution of sale deed in favour of the buyer.

2. The appellant has contended that (i) these administrative/transfer charges were not in relation to sale, purchase, leasing or renting of real estate and therefore was

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not liable to service tax. (ii) The adjudicating authority vide its order dated 31.08.2009 did not treat such charges to be in relation to Real Estate Agent' service. Indeed the appellant was under *bona fide* belief that these charges were not liable to service taxable under 'Real Estate Agent' service and therefore the extended period is not invocable. It cited Commissioner's order No.49/AKM/CST(Adj)/2012, dated 28.06.2012 in the case of M/s. Vatika Ltd. in its support. (iii) The amount recovered as administrative charges/transfer charges should be treated as cum tax amount for computing the amount of service tax if the same are held liable to service tax.

3. Ld. Department Representative contended that the appellant was a real estate agent and provided service in relation to real estate and therefore the administrative/transfer charges were clearly includible in the assessable value for the purpose of levying service tax under 'Real Estate Agent' service. He also stated that the appellant was registered as a real estate agent and therefore was aware of the provisions of law and hence it was a wilful act on its part not to pay service tax on the impugned amount.

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4. We have considered the contentions of both sides. As per section 65 (88) of Finance Act ,1994 "Real Estate Agent" means *"a person who is engaged in rendering any service in relation to say purchase and leasing or renting of real estate and includes a real estate consultant"*. It is an admitted fact that the appellant was a real estate agent and registered under 'Real Estate Agent' service. It was providing service in relation to sale purchase, leasing or renting of real estate and paying service tax for rendering real estate agent service. The related taxable service is defined in section 65 (105) (v) *ibid* as under:-

"Taxable service means any service provided or to be provided to any person by real estate agent in relation to real estate."

It is evident that the administrative/transfer charges were recovered for rendering service in relation to real estate. Thus, we are of the clear view that the service rendered clearly fell within the purview of 'Real Estate Agent' service and these charges constituted part of the assessable value of 'Real Estate Agent' service.

5. The appellant has strongly contended that it was under *bona fide* belief that these charges being administrative in



nature did not constitute part of the 'Real Estate Agent' service. It is seen that the primary adjudicating authority in the impugned order has clearly noted that the appellant undoubtedly accounted for all the transactions in the statutory records. But the primary adjudicating authority held that the appellant was guilty of wilful misstatement/suppression of facts with intention to evade service tax as it never approached the Department to ascertain the details of their liability to pay service tax and the evasion would have gone undetected but for the investigation by the Department. In this regard it is pertinent to mention that in case of a *bona fide* belief about the non-taxability of certain transactions, the appellant would not approach Revenue for any clarification because clarification is sought only when there is some confusion/doubt. In case of ***CCE Vs. Chemphar Drugs & Liniments [2002-TIOL-266-SC-CX]*** Supreme Court held that *something positive other than mere inaction or failure on the assessee's part or conscious withholding of information when assessee knew otherwise is required for invoking extended period*. In the case of ***Continental Foundation Joint Venture Vs. CCE [2007 (216) ELT 177 (SC)]*** Supreme Court went to the extent of saying that *any incorrect statement by itself cannot be equated with wilful mis-statement*. Indeed

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the fact that even the adjudicating authority [Commissioner (Adjudication), Service Tax, New Delhi] in its order No.49/AKM/CST (Adj)/2012, dated 28.06.2012 in the case of M/s. Vatika Ltd. has held that no service tax is payable under 'Real Estate Agent' service on such administrative/transfer charges is a clear evidence that it was in no way unreasonable on the part of the appellant to entertain such a *bona fide* belief.

6. As regards the contention that cum tax benefit should be extended to the appellant, we find that in the given circumstances, the cum tax benefit can be extended in terms of Explanation 2 to section 67 *ibid* as it existed prior to 18.04.2006 and in terms of sub-section 2 of Section 67 *ibid* as it exists w.e.f. 18.04.2006.

7. In the light of the foregoing analysis we allow the appeal by way of remand to the primary adjudicating authority for *de novo* adjudication with our following directions/findings:-

- (i) Extended period in this case is not invocable and therefore penalty under Section 78 *ibid* is also not sustainable
- (ii) The appellant is eligible for the cum tax benefit.



- (iii) The demand is to be accordingly re-computed.
Needless to say that the penalty under Section 76
ibid will also have to be recomputed.
- (iv) The appellant should be given an opportunity of
being heard before the *de novo* adjudication.


(Justice G. Raghuram)
President


(R.K. Singh)
Member (Technical)

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