केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
वस्तु एवं सेवा कर भवन, सातवीं मंजिल,पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015
GST Building ,7th Floor,, Near Polytechnic, Ambavadi, Ahmedabad-380015

सत्यमेव जयते

☎ : 079-26305065 टेलेफैक्स : 079 - 26305136

क फाइल संख्या : File No : **V2(MRS)37/AHD-III/2016-17/A.I** 316/321

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-071-17-18**

दिनाँक Date :**27.07.2007** जारी करने की तारीख Date of Issue: 31/8/17

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals)Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **AHM-STX-003-ADC-MSC-064-15-16** दिनाँक : **30.03.2016** से सृजित

Arising out of Order-in-Original: **AHM-STX-003-ADC-MSC-064-15-16,** Date: **30.03.2016** Issued by: Additional Commissioner, Central Excise, Div:Gandhinagar, Ahmedabad-III.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. Lotus Gardening

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India; Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनॉक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35– ण्0बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016.

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखाकिंत बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any

nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall beer a court fee stamp of Rs.6.50 paisa as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।
Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) 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।

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.

(6)(i) 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।

(6)(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 appeal has been filed by M/s Lotus Gardening, 990, Shiv Shakti Society, Sector-27, Gandhinagar [hereinafter referred to as"the appellant"] against Order-in-Original No.AHM-STX-003-ADC-MSC-064-15-16 dated 30.03.2016 [hereinafter referred to as "the impugned order"] passed by the Additional Commissioner of Central Excise, Ahmedabad-III [hereinafter referred to as "the adjudicating authority"].

2. Briefly stated, the facts of the case is that the appellant is engaged in providing service viz., beautification of land and spaces like garden and landscape creating, consultancy in relation to setting up of garden and landscape, plantation of plants and maintenance of garden/landscape and plants for various individuals, residential scheme and factories. An offence case was booked against the appellant on the basis of information that the appellant were not paying appropriate service tax for the said services provided by them. On further detailed investigation, it was observed that the service provided by the appellant is falling under the category of "interior decorator service" and "maintenance and repair service"; that they have registered only "maintenance and repair service" and not paying service tax on total value of taxable service received. Accordingly, a show cause notice dated 16.10.2014 was issued to the appellant for a demand of Rs.11,48,553/- with interest for the period of 2009-10 to 2013-14 and imposition of penalty under Section76, 77(1) 77(2) and 78 of the Finance Act, 1994(Act). During the course of investigation and the appellant has paid Rs.2,09,994/- towards the outstanding amount of service tax. Vide the impugned order, the adjudicating authority has confirmed service tax amounting to Rs.11,39,601/- with interest and dropped demand of Rs.8,952/- on the taxable value received towards "interior decorator" service. The adjudicating authority has also imposed penalty of Rs.200/- per day during which they failure to obtain amended service tax registration under Section 77(1); Rs.10,000/- under Section, 77(2); and Rs.11,39,601/- under Section78 of the Finance Act, 1994.

3. Being aggrieved, the appellant has filed the instant appeal on the grounds that:-

- The adjudicating authority has erred in law as well as in facts in rejecting the arguments and plea of the appellant that the activities of the appellant ought to have considered as agriculture and such activities are excluded from the levy of service tax; that the authority was not correct in rejecting the arguments and plea of the appellant that the activity involved supply of goods i.e plants, tree, fertilizers, water and sand etc resulting into a works contract as defined in the Act as applicable for the period involved.
- The authority has failed to extend the benefit of notification No.12/2003-ST for the period involved up to 01.07.2012; that he also not considered the arguments in respect of shifting of liability onto the receiver of services as per provisions of Not.30/2012-ST read with Rule 2(1)(d) of Service Tax Rules.

- The authority has grossly erred in law as well as in facts in demanding amount under Section 73A of Act and failed to consider the argument in denial of service tax collected and not paid;
- The authority has erred in law and in facts in demanding service tax by classifying the activity under Interior Decorator Services for the period upto 01.07.2012 and under taxable service defined under Section 65B(51) for the period from 01.07.2012.
- Invocation of larger period is not applicable to the instant case, hence the demand with interest and penalties are required to be set aside.

4. A personal hearing in the matter was held on 19.04.2017 and Shri Rahul Patel, Chartered Accountant appeared for the same on behalf the appellant. He reiterated the grounds of appeal and further submitted that horticulture is considered as "agriculture" and alternatively it should be treated as "Work Contract" because the appellant is supplying plants etc. He further requested 15 days time for submitting additional submission. However, no such additional submission is submitted till date.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the appeal memorandum as well as at the time of personal hearing. At the outset, I observe that during the relevant period, the appellant was providing service viz., beautification of land and spaces like garden and landscape creating, consultancy in relation to setting up of garden and landscape, plantation of plants and maintenance of garden/landscape and plants to the individuals, residential complex and factories.

6. I observe that the adjudicating authority has confirmed demand of Rs.11,39,601/- towards the said services rendered by the appellant during the relevant period. The adjudicating authority has ordered in the impugned order that :-

[i] the service of creation of garden, landscaping and other structure and consultancy are classified under "Interior Decorator Service" and confirmed the service tax amount to Rs.4,14,075/- on the taxable value/consideration received towards providing the said service;

[ii] Confirmed service tax amounting to Rs.4,72,534/- on the taxable value/consideration received towards providing services viz. "management, maintenance or repair";

[iii] Confirmed Service tax amounting to Rs,2,52,992/-collected and not deposited to Government account towards creation work and consultancy and management, maintenance or repair.

7. The main argument of the appellant that the activities carried out by them are horticulture and should be considered as "agriculture" activities as the activity involves supply of plants, trees, grass, water, fertilizers etc or should be considered as "work contract service" as the activity involves supply goods viz plants and tree etc and the activity involving supply and use of goods and materials fall under definition of "work contract service.

9. Prior to 01.07.2012, as per Section 65(59) of the Act, "Interior Decorator" means *any person engaged, whether directly or indirectly, in the business of providing by way of advice, technical assistant or in any other manner, services related to planning, design or beautification of spaces, whether man-made or otherwise and includes a landscape designer.* As per Section 65(64) of the Act, "Management, maintenance or repair" service *means any service provided by (a) any person under a contract or an agreement; or (b) a manufacturer of any persons authorized by him, in relation to-management of properties, whether immovable or not; maintenance or repair of properties, whether immovable or not; or (c) maintenance or repair including reconditioning or restoration or servicing of any goods, excluding a motor vehicle.* With effect from 01.07.2012, as per Section 66 B of the Act, *Service tax shall be levied on the value of all services, other those specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.*

10. The issue to be decided in the instant case is that whether the activities carried out by the appellant falls under the category of "interior decorator" service and "management, maintenance or repair" as held by the adjudicating authority or "horticulture/agriculture" service as argued by the appellant.

11. Undisputed facts revealed that the scope of activities carried out by the appellant is landscape creation, garden creation, designing of landscape/garden for individuals, residential complex and factories and maintained the space as per agreement. I observe that the word 'Horticulture' means the practice and science cultivating gardens, growing fruits, vegetables, and flowers or ornamental plants; that horticulture is a term that evokes images of plants, gardening and people working in horticulture. Such activities are practiced from the individual level in a garden up to the activities of a multinational corporation. The service related to horticulture includes in plant conservation, landscape restoration, landscape and garden design/construction/maintenance etc. As stated above, it is fact that the appellant is engaged in the activities of landscape creation, garden creation, designing of landscape/garden for individuals, residential complex and factories and maintained the space as per agreement. The appellant argued that their activities ought to have considered as agriculture and such activities are excluded from the levy of service tax. I observe that as definition under Section 65B of the Finance Act, "Agriculture" means cultivation of plants and rearing or breeding of animals and other specifies of life forms for goods, fibre fuel, raw materials or other similar products but does not include rearing of horses. I further observe that the activities covered under definition of agriculture and agriculture produce is the activities such as breeding of fish (pisciculture), rearing of silk worms (sericulture), cultivation of ornamental flowers (floriculture) and horticulture, forestry and these activity covers in negative list since these activities are included in the definition of agriculture. In

the circumstances, I am of the considered view that the adjudicating authority has wrongly classified the activity under "Interior Decorator"

12. I further observe that the Hon'ble Tribunal, Bangalore while deciding a stay application in a similar issue in case of M/s Garden makers [2009 (15) S.T.R. 37 (Tri. - Bang.)] has held that

> *"We have heard both the sides in the matter. Prima facie, there is a merit in the appellant's submission that the activity of gardening under Horticulture activities, such as planting of trees, garden plants, grassy lawn etc. does not fall within the scope of "Interior Decorators".*

13. I further observe that in a similar issue, the Commissioner (Appeal), Ahmedabad vide his OIA No.120/2013 (STC)/SKS/Commr (A)/Ahd dated 17.06.2013 in case of M/s Sanwaliya Seth Gardens Pvt Ltd, has held that such activities are out of ambit of 'Management, Maintenance" service. The Commissioner (Appeals) has relied on Hon'ble Supreme Court's judgment in case of Smt.Kasturi Vs Gaon Sabha [Civil Appeal No.351 of 1974 decided on 27.07.1989]. In para 7 of the said judgment, the Hon'ble Court has stated that

> *"The definition of land in the Act is wide and in paragraph 4(d) the admitted position is 'fuelwood' was being grown on the property. "Horticulture", "Garden" and "Groveland in the absence of statutory definition, would have the common parlance meaning. "Horticulture" means 'the cultivation of garden'. "Garden" means 'an area of land, usually planted with grass, trees, flower beds, etc an area of land used for the cultivation of ornamental plants, herbs, fruit, vegetables, trees, etc."*

The Commissioner (Appeals), in the said OIA, further relied on the judgment of Hon'ble Tribunal, New Delhi, Principal Bench in the case of M/s ANS Construction Ltd [2010 (17) S.T.R. 549 (Tri. - Del.] which states that

> *The respondents were engaged for activities of growing of grass, plants, trees or fruits, vegetable, regular mowing of lawns, pruning and trimming of shrubs and cleaning of garden, would not come within the ambit of "maintenance of immovable property". We have noted that respondent paid tax on construction of walkways and other incidental work in the garden. Therefore, the Commissioner (Appeals) rightly held that no tax is liable on such activity during the relevant period.*

14. In view of above discussion, I find merit consideration in the argument of the appellant that the activities carried out by them are horticulture and should be considered as "agriculture" activities as the activity involves supply of plants, trees, grass, water, fertilizers etc and no tax is leviable on such activities. Hence, the demands mentioned at para 6[i], [ii] are not sustainable.

15. As regards the other issue relating to non deposit of service tax collected by the appellant as mentioned at para 6 [iii] above, I observe that Section 73A was inserted in the Finance Act, 1994 by Finance Act, 2006 w.e.f. 18.04.2006. It provides that Service Tax collected from any person shall be deposited with the Central Government. Accordingly any person who has collected any amount in excess of Service Tax assessed or determined and paid on any taxable service from recipient of Service Tax in any manner as representing Service Tax, shall forthwith pay the amount so collected to the credit of the Central Government. Therefore,

every person who has collected from any other person any amount as representing the tax under this Act, and has not paid the said amount to the Central Government, shall forthwith deposit the said amount to the credit of the Central Government, regardless of whether the supplies in respect of which such amount was collected are taxable or not. As is seen from the above, if a person collects any amount from another person representing the same as Service Tax, the same is required to be paid in to the credit of the Central Government with interest. I find that the appellant has paid an amount of Rs.2,09,994/- during investigation.

16. As regards imposition of penalty, I observe that the adjudicating authority has imposed penalty under Section 77 (1)(a), 77 (2) and 78 of the Finance Act. The penalty imposed under Section 77 (1) (a) and 77 (2) and 78 in respect of demands mentioned at para 6[i] , [ii] above becomes unsustainable as the service rendered by the appellant is not taxable. As regards penalty imposed against the demand in respect of para 6[iii] above, I observe that the adjudicating authority has confirmed the demand under section 73 A of the Finance Act and imposed equal penalty under Section 78 of the Act in respect of tax so collected but not deposited to the Government Account. However, the legal position under Section 73A is read as:-

> *SECTION [73A. Service tax collected from any person to be deposited with Central Government. — (1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made there under, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made there under from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.*
> *(2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.*
> *(3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.*
> *(4).....*

I find that the appellant had deposited an amount of Rs.2,09,994/- during the course of investigation, out of Rs.2,60,302/-so collected. Further, as discussed in para 11 to 14 above, the appellant was not liable to pay service tax for the service rendered by them and once it is found that they were not liable to pay service tax, no penalty can be imposed under section 78 for the delay in deposition of tax mistakenly collected by him, especially the relevant section for recovery of such amount does not spell out such penalty. In this regards, I observe that the Hon'ble Court of Punjab & Haryana in case of Ajay Kumar Gupta Vs CESTAT [2015 (39) STR 736] has held that penalty was not liable to be imposed on account of the fact that the service which he was rendering was not taxable. The relevant portion of the decision is as under:

*"**11.** Once the Service Tax was not leviable under Section 68 at that point of time and the liability was only to deposit the tax under Section 73A(2), which has been done on 15-11-2008, after delay, but due to the service being not taxable at the relevant time when the invoices were raised, we are of the opinion that the case would not fall under the provisions of Section 78 for invoking of the penalty, as has been held by the Tribunal. It was the categorical stand of the appellant before the First Appellate Authority that the Service Tax had been collected by mistake, on account of the new provision and the office of the appellant was not fully acquainted with the interpretation of the statute due to which the default had occurred and therefore, in view of the defence taken, the Tribunal was not justified, in the present facts and circumstances, to hold that there was a wilful suppression of facts, to bring it within the ambit of Section 78."*

By following the above decision, I set aside the penalty imposed under Section 78 of the Finance Act.

17. In view of above discussion, I allow the appeal so far as the issue as per discussion in para 11 to 14, 16 and rejected the appeal so far as the issue as per discussion in para 15. The appeal stand disposed of accordingly.

(उमा शंकर)
आयुक्त (अपील्स - I)
Date: /07/2017

Attested

(Mohanan V.V)
Superintendent (Appeal-I)
Central Excise, Ahmedabad
BY R.P.A.D.

To,
M/s Lotus Gardening,
990, Shiv Shakti Society,
Sector-27, Gandhinagar

Copy to:

1. The Chief Commissioner of Central Excise Zone, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III.
3. The Additional Commissioner(Systems) Central Excise, Ahmedabad - III
4. The Additional Commissioner, Central Excise, Ahmedabad-III
5. The AC/DC, Central Excise, Gandhinagar Division
6. Guard file
7. P. A