	केंद्रीय कर आयुक्त (अपील)	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX	केन्द्रीय कर शुल्क भवन	7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
सत्यम डेव्लपर्स	सतवी मजिल पोलिटेकनिक के पास	आम्बावाडी अहमदाबाद-380015
079-26305065	टेलफेक्स: 079-26305136	

क फाइल संख्या : File No : **V2(STC)101 /North/Appeals/ 17-18** / 2713-47

ख अपील आदेश संख्या : Order-In-Appeal No.. **AHM-EXCUS-002-APP-405-17-18**

दिनांक Date : **26-Mar-2018** जारी करने की तारीख Date of Issue **23/04/18**

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग Arising out of Order-in-Original No **GST/D-VI/O&A/05/AC/KM/17-18** Dated **28-Dec-2017** Issued by **Assistant Commissioner** , Central GST , Div-VI , Ahmedabad North.

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

M/s Satyam Developers

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, मेघाणी 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 accompany ed 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-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 **अधीक्षक** 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, 1994 की धारा 23 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 हैं -

(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 अर्जी एवं अपील को लागू नहीं होगा।

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;

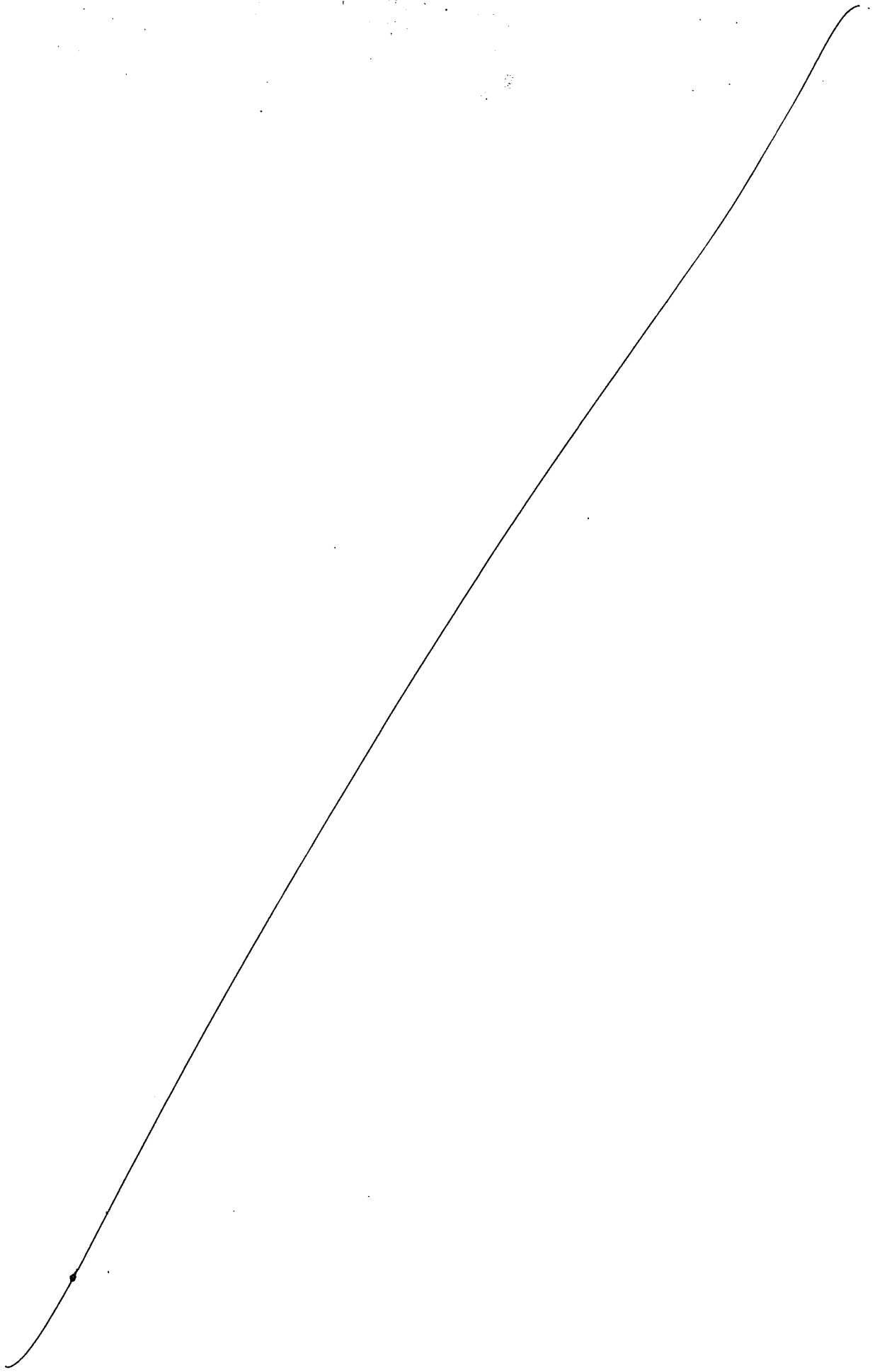
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

⇒ 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, or penalty, where penalty alone is in dispute.





ORDER - IN - APPEAL

M/s. Satyam Developers Limited, Satyam House, B/h Rajpath Club, S G Highway, Ahmedabad 380059 (henceforth, "*appellant*") has filed the present appeal against the Order-in-original No. GST/D-VI/O&A/05/AC/KM/17-18 dated 28.12.2017 (henceforth, "*impugned order*") issued by the Assistant Commissioner, CGST Division-VI, Ahmedabad - North (henceforth, "*adjudicating authority*").

2. The facts giving rise to this appeal are that the appellant, a service provider engaged in construction services, was audited by the departmental officers wherein it was pointed out that the appellant had self assessed the service tax for 2012-13 of Rs.52,32,340/- as shown in their ST-3 returns, however, the payment was made of Rs.52,03,460/- only, resulting in a short payment of Rs.28,880/-. On being pointed out, the appellant paid the difference, however, a show cause notice was issued on 13.06.2017 proposing recovery of the amount short paid (Rs.28,880/-) alongwith interest and penalties under sections 76 and 78 of the Finance Act, 1994. In adjudication, demand raised in the show cause notice was confirmed, alongwith interest, and equal penalty was imposed under section 78 *ibid*.

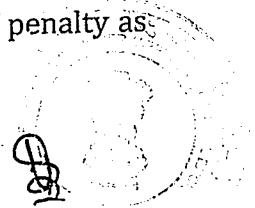
3. The main grounds of appeal, in brief, are as follows-

3.1 Appellant states that as per the income reconciliation of the department, there is no difference, so the demand of service tax is not justified; that still they paid the service tax amount pointed out before the issuance of show cause notice; that when they have paid the service tax, interest cannot be levied and penalty cannot be imposed.

3.2 Appellant refers to CBEC Instruction letter F.No.137/167/2006-CX.4 dated 03.10.2007 and states that when they had paid the service tax and filed ST-3 return *suo motu*, show cause notice was not required to be issued and all proceedings including those for penalties get concluded.

3.3 As per appellant, entire demand is time barred as there was no suppression of facts. Appellant has also objected to imposition of penalties under section 78 and section 77 of the Finance Act, 1994.

4. In the personal hearing held on 15.03.2018, Shri Vipul Khandhar, Chartered Accountant reiterated the grounds of appeal. He requested for waiver of penalty as duty was paid and demand was on the basis of reconciliation of accounts.



5. I have carefully gone through the appeal papers. The issue is very short that the self assessed tax for 2012-13 was short paid by Rs.28,880/- but when pointed out in the audit, the same was paid, and it was paid before issuance of the subject show cause notice. Appellant's submission that demand of service tax itself is not justified in view of reconciliation of income is misleading as the demand is of a difference between the service tax payable as per appellant's own assessment as declared in the ST-3 returns and that actually paid and not due to any mismatch of income declared in the ST-3 returns with that recorded in the books of account. ~~Therefore, the only issue to be decided in the case is whether all proceedings initiated in the show cause notice deserve to be dropped on the ground that short payment detected during audit was paid before the issuance of the show cause notice.~~

5.1 The appellant, however, is more aggrieved with the order of penalty under section 78 of the Finance Act, 1994 and main argument in this regard is that once service tax was paid before issuance of show cause notice, all other proceedings stand concluded. Appellant has relied on CBEC's Letter F.No.137/167/2006-CX.4 dated 03.10.2007 clarifying that section 73(3) of the Finance Act, 1994 provides for conclusion of all adjudication proceedings on payment of service tax and interest, including those for penalties. Thus, appellant wants waiver of penalty by treating the matter under section 73(3) *ibid*, the problem, however, is that provisions of section 73(3) apply where an assessee has paid service tax and interest **both** before issuance of the show cause notice, which is not the case here. Therefore, merely on the basis of payment of service tax, appellant cannot claim the conclusion of proceedings under section 73(3) of the Finance Act, 1994.

5.2 The appellant has further argued that demand is time barred as there is no suppression of facts in the case. In this regard, I find that short payment of service tax was detected from the ST-3 returns filed by the appellant when payment details were reconciled with the tax liability declared. In such circumstances, I agree with the appellant's argument that the allegation of suppression of facts is not justified. As a consequence, penalty provisions of section 78 are not attracted because short payment of service tax is not by reason of suppression of facts. Also, when suppression is not involved, the invocation of extended period becomes wrong and demand of service tax itself fails to sustain under section 73 on limitation. I, however, find that where service tax self assessed is not paid in full or part, the same is recoverable alongwith interest in terms of rule 6(6A) of the Service Tax Rules, 1994 which was in force until omitted by Notification No.05/2015-ST dated 01.03.2015 (w.e.f. 14.05.2015). Even from 14.05.2015, the provisions of rule 6(6A) were retained under sub-section (1B) inserted in section 73 of the Finance Act, 1994. I would like to quote rule 6(6A) for quick reference -

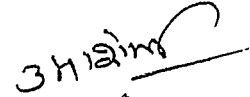
(6A) Where an amount of service tax payable has been self assessed under sub-section (1) of section 70 of the Act, but not paid, either in full or part, the same, shall be recoverable alongwith interest in the manner prescribed under section 87 of the Act.

5.3 Therefore, considering that service tax self assessed but not paid in full or part was recoverable, alongwith interest, even without serving a show cause notice, the appellant has to be held liable to pay the service tax short paid of Rs.28,880/-, alongwith interest. As regards the equal penalty under section 78, the same requires to be set aside as this is not a case where provisions of section 78 are applicable.

6. Accordingly, the appeal is partly allowed.

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

The appeal filed by the appellant stands disposed of in above terms.

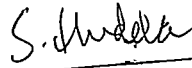


(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date:

Attested



(Sanwormal Hudda)
Superintendent
Central Tax (Appeals)
Ahmedabad



By R.P.A.D.

To,
M/s. Satyam Developers Limited,
Satyam House, B/h Rajpath Club, S G Highway,
Ahmedabad 380059

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, Ahmedabad - North.
3. The Additional Commissioner, Central Tax (System), Ahmedabad South.
4. The Asstt. Commissioner, CGST Division-VI, Ahmedabad- North
5. Guard File.
6. P.A.