
	केन्द्रीय कर आयुक्त (अपील)	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,	केन्द्रीय कर शुल्क भवन	7 th Floor, Central Excise Building,
सत्यम विकास जयन्ते	सतवीं मजिल पॉलिटेक्निक के पास	Near Polytechnic,
	आम्बावाडी, अहमदाबाद-380015	Ambavadi, Ahmedabad-380015
☎ 079-26305065		☎ टेलिफैक्स : 079-26305136

क फाइल संख्या : File No : V2(STC)110 /North/Appeals/ 17-18 | 2753-57
 ख अपील आदेश संख्या : Order-In-Appeal No..AHM-EXCUS-002-APP-406-17-18
 दिनांक Date : 26-Mar-2018 जारी करने की तारीख Date of Issue 23/04/17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals)

ग Arising out of Order-in-Original No GST/D-VII/O&A/03/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 मैनटल हास्पिटल कम्पाउण्ड, मेधाणी 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ 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 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 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 (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 39 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 अर्ज़ी 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:

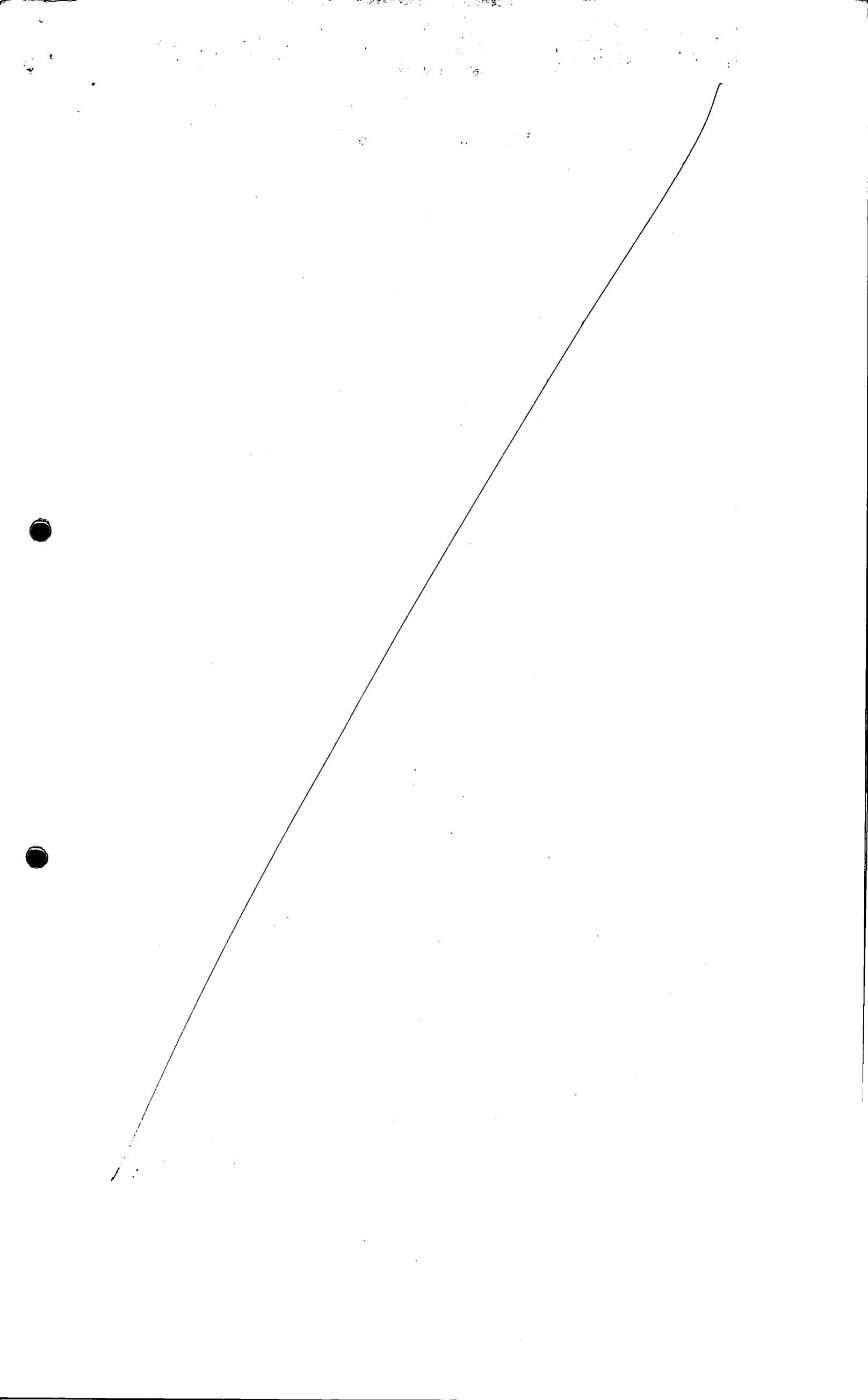
- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

⇒ 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, 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/03/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. To state briefly, the facts giving rise to this appeal are that in auditing by the departmental officers, it was noticed that appellant had taken Cenvat credit amounting of service tax paid on input services used in the construction of two residential projects **after** BU permission was granted for the projects. The BU permission for the project 'Satyam Skyline' was received on 13.03.2012 & 29.06.2012 and for 'Sentossa Neeland', on 29.10.2012, whereas, Cenvat credit was taken and utilized after these dates. Since as per 'deemed service' provision in the case of construction services in terms of Explanation to clauses 105(zzq) and 105(zzzh) of section 65 of the Finance Act, 1994, any transaction after BU permission would not be considered a transaction of service, the availment of Cenvat credit after BU permission was objected to on the ground that once output service ceased to be provided, it was in violation of the provisions of Cenvat Credit Rules, 2004. Thus, Cenvat credit of **Rs.2,52,836/-** taken during the period 2012-13 and 2013-14 after BU permission was granted appeared inadmissible.

2.1 In addition, it was noticed that the appellant had taken Cenvat credit of **Rs.23,107/-** on ineligible services. Also, it was found that the appellant had shown an excess opening balance of Cenvat credit in Apr-2013 to the extent of **Rs.4,61,441/-**.

2.2 Thus, as per audit, the appellant had taken wrongful Cenvat credit of **Rs.7,37,384/-** [2,52,836 + 23,107 + 4,61,441]. A show cause notice was therefore issued for recovery of the said amount and in adjudication, the adjudicating authority confirmed the entire demand of Rs.7,37,384/-, alongwith interest, and imposed equal penalty under section 78 of the Finance Act, 1994 read with rule 15 if the Cenvat Credit Rules, 2004. A penalty of Rs.10,000/- was also imposed under section 77 of the Finance Act, 1994.

3. The main grounds of appeal, in brief, are as follows, and these are **only** in respect of first part of the dispute, i.e., availment of credit after BU permission.

3.1 Appellant states that services were availed before BU permission was granted; that as per rule POP (?), service has to be treated as completed on the day

when it is completed by the service provider; that there is dispute on the fact that service was availed prior to BU permission and utilized for providing taxable service; that accounting of bill in books of account was only done after BU permission. Appellant has relied on the CESTAT decisions in the case of **Dharampal Premchand Ltd v. CCE, Noida** [2017(352) ELT 389(Trib.-All.)] and in the case of **Naini Papers Ltd v. CCE, Meerut-II** [2016(343) ELT 630(Trib.-Del.)].

3.2 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.

4. In the personal hearing held on 15.03.2018, Shri Vipul Khandhar, Chartered Accountant reiterated the grounds of appeal. He stated that services were availed before 01.07.2012 but invoices were raised afterwards. He stated that this is allowable as per POP.

5. With regard to eligibility of a service provider for taking Cenvat credit on input services, rule 3 of the Cenvat Credit Rules, 2004 allows a provider of output service to take Cenvat credit service tax paid on any input service. 'Input service', as per rule 2(1) of the Cenvat Credit Rules, 2004, means *any service used by a provider of output service for providing output service*. Thus, service tax paid on any service used for providing the output service is available as a Cenvat credit to the provider of output service. Here, the dispute is about output service in the sense that the construction services being provided by the appellant came to an end on the day BU permissions were granted for the projects. Therefore, for the project 'Satyam Skyline', there is no output service after 13.03.2012 and 29.06.2012 (dates of BU permissions for different blocks). Similarly, for 'Sentossa Neenland', there is no output service after 29.10.2012. Therefore, if any service is received after these dates, there is no question of allowing Cenvat credit to the appellant since corresponding output service ceased to exist.

5.1 Prior to the dates of BU permissions, however, any service received by the appellant and qualifying as input service would have to be considered as eligible for allowing the Cenvat credit, regardless of the fact that bills were issued at later dates (as permissible in the law) or the bills were accounted for in the books of account at later dates. In other words, the provision of service before the dates of BU permissions is the relevant fact for allowing credit. Thus, theoretically, I agree with the appellant's view point that if input services were provided prior to the dates of BU permissions, Cenvat credit cannot be denied. I also agree with the appellant's submission that Point of Taxation Rules, 2011 (POT Rules) are there to decide the point of taxation, i.e., the point in time when a service shall be deemed to have been

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provided. In short, if the point of taxation falls in the period prior to BU dates, Cenvat credit is admissible.

5.2 Now, as can be seen in Annexure-I to the show cause notice, Cenvat credit of Rs.2,52,836/- has been taken after obtaining the BU permissions. Appellant has argued that services on which credit has been taken were used prior to BU dates, however, there is no evidence to support this contention such as the copies of relevant bills. In absence of any evidence to prove that services were used prior to BU dates, adjudicating authority's conclusion that credit was taken after BU permissions remains uncontested and therefore I find no reason to interfere with that conclusion. The order of the Adjudicating authority in this regard, therefore, deserves to be upheld.

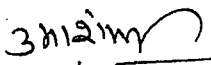
6. In the matter of two other disputes relating to Cenvat credits of Rs.23,107/- and Rs.4,61,441/-, appeal has no mention and hence, I suppose appellant has nothing to contest. Hence, that part also holds good.

7. As regards to invocation of extended period of limitation, I find that Cenvat credit availability in respect of services utilized after completion of construction projects cannot be matter of misinterpretation because when there is no output service to be provided, there cannot be an input service and credit cannot be taken. It seems that appellant willfully went ahead with the availment of credit and had there been no audit by the departmental officers, the act would have gone unnoticed. Therefore, appellant's contention that there is no suppression of facts in the case is not tenable and invocation of extended period is justified. For the same reason, the imposition of penalty under section 78 read with rule 15 of the Cenvat Credit Rules, 2004 also survives. Penalty under section 77 of the Finance Act, 1994, however, has no applicability in case of wrong availment of Cenvat credit and therefore requires to be set aside.

8. Accordingly, appeal is allowed only to the extent of penalty imposed under section 77 of the Finance Act, 1994 and the impugned order stands modified to that extent.

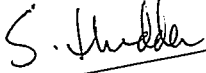
9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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


(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Attested



(Sanwarmal 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.

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