
	<b>केन्द्रीय कर आयुक्त (अपील)</b>	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX	केन्द्रीय कर शुल्क भवन	7 <sup>th</sup> Floor, Central Excise Building
सत्यमेव जयते	सातवीं मंजिल, पोलिटेकनिक के पास	Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015	आम्बावाडी, अहमदाबाद-380015	Ambavadi, Ahmedabad-380015
079-26305065	टेलिफैक्स : 079-26305136	

क फाइल संख्या : File No : V2(STC)94 /North/Appeals/ 17-18 / 2258-62  
 ख अपील आदेश संख्या : Order-In-Appeal No.. AHM-EXCUS-002-APP-415-17-18  
 दिनांक Date : 28-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-IV/O&A/09/Sunblue/AC/KM/17-18  
 Dated 01-Dec-2018 Issued by Assistant Commissioner , Central GST , Div-VI ,  
 Ahmedabad North.

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

### M/s Sanblue Enterprises Pvt. Ltd

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 मेंटल 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 और लगाया गया जुर्माना रूप 5 लाख या उससे कम है वहाँ रूप 1000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूप 5 लाख या 50 लाख तक हो तो रूप 5000/- फीस भेजनी होगी। जहाँ सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना रूप 50 लाख या उससे ज्यादा है वहाँ रूप 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 का 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, 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 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 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,

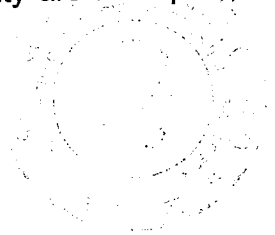
Under Central Excise and Service Tax, "Duty demanded" shall include:

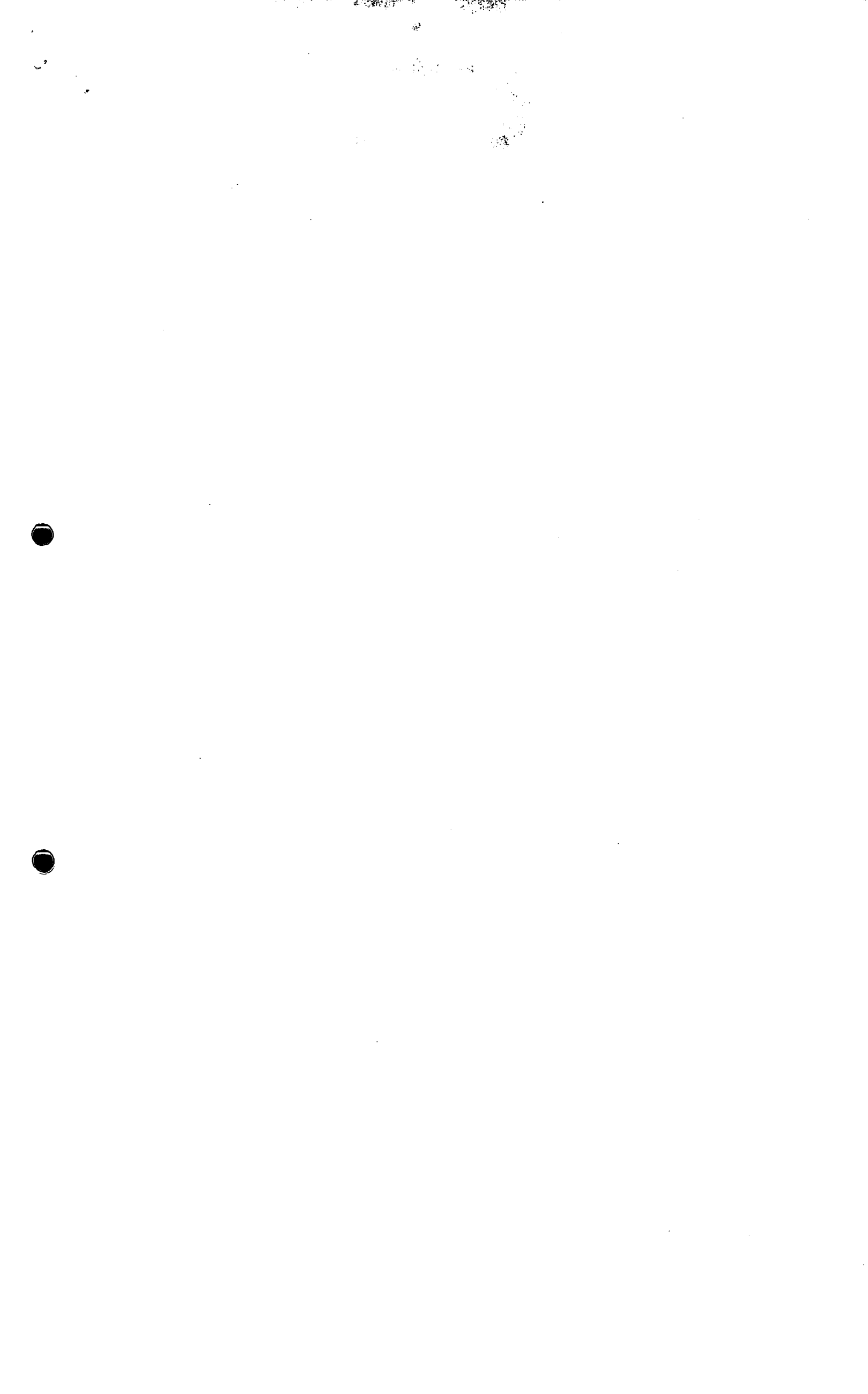
- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

⇒ 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. Sanblue Enterprises Pvt Ltd, B-3, Corporate House, Abhishree Corporate Park, Iskon Ambli Toad, Bopal, Ahmedabad 380058 (henceforth, "appellant") has filed the present appeal against the Order-in-original No. GST/D-VI/O&A/09/Sunblue/AC/KM/17-18 dated 12.01.2018 (henceforth, "impugned order") issued by the Assistant Commissioner, CGST Division-VI, Ahmedabad - North (henceforth, "adjudicating authority").

2. The facts of the case in brief are as follows. During auditing by the departmental officers it was noticed that the appellant, a service tax registrant, had developed customized software for *Network 18 Media and Investments Limited* and had sold the same vide Invoice No.SAN/Soft/1005 dated 02.07.2012. Considering that development of customized software constituted a declared service under clause (d) of section 66E of the Finance Act, 1994, a show cause notice was issued on 25.10.2016 proposing recovery of service tax of Rs.11,77,143/- on the stated transaction. The adjudicating authority confirmed the service tax demand of Rs.11,77,143/-, alongwith interest, and imposed equal penalty under section 78 of the Finance Act, 1994. A penalty of Rs.10,000/- was also imposed under section 77 of the Finance Act, 1994.

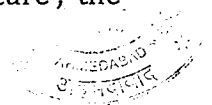
3. The main grounds of appeal, in brief, are as follows-

3.1 Appellant states that passing of impugned order without waiting for their reply in response to a letter dated 27.12.2017 and without considering that customized software was 'goods' and not 'service' was in violation of the principles of natural justice.

3.2 As per appellant, IT software is "excisable goods" specifically classified under sub-heading no.8523 8020; that recording of sound or other phenomena for producing IT software amounts to manufacture by virtue of chapter note 10 of chapter 85 read with the supplementary note of chapter 85 of the Central Excise Tariff Act, 1985 (CETA, 1985). As per appellant, IT software is considered "excisable goods" without any distinction of customised software or pre-packages/ canned software; that therefore, demand of service tax is untenable and unjustified.

3.2.1 As per appellant, the customized software produced by them is also produced by recording of instructions, data, sound or image, etc. in a machine readable form and since these processes are in the nature of 'manufacture', the product emerges is excisable goods.





3.3 Appellant submits that since all goods of chapter 85 are exempted under SSI exemption Notification No.8/2003-CE upto a clearance value of Rs.1.5 Crore in a financial year and considering that except manufacture of software in question they have not manufactured any other goods, they were eligible for the exemption and therefore there was no duty liability in respect of customised software.

3.4 Appellant refers to Supreme Court's decision in the case of **Tata Consultancy Services v. State of A.P.** [2004(178) ELT 22 (SC)] to state that software in a media was goods irrespective of the method how these goods namely software were delivered and transferred to the customer. Appellant adds that adjudicating authority had no jurisdiction to prefer the Education Guide published by the Board over the judgment of Hon'ble Supreme Court.

3.5 According to appellant, the demand is time barred as there is no justifiable ground or reason for upholding invocation of larger period. Appellant also objects to demand of interest and imposition of penalties.

4. In the personal hearing held on 24.03.2018, Smt. Shilpa P Dave, Advocate stated that they have already submitted that their product is excisable and exempted and this legal aspect should have been examined by the adjudicating authority before not accepting their arguments. She reiterated the grounds of appeal and submitted citations. Also, she argued that customization has not been explained.

5. I have carefully gone through the appeal wherein levy of service tax on customized software has been challenged on the ground that customized software is 'goods' and not 'service'. As far as facts of the case are concerned, the only relevant fact is that appellant has developed customised software for Network 18 Media and Investments Limited as per Invoice No.SAN/Soft/1005 dated 02.07.2012. Appellant has paid State VAT on the transaction considering the transaction as sale of goods, whereas, as per impugned order, development of customized software is leviable to service tax as the activity falls under 'declared services' under section 66E of the Finance Act, 1994. The moot point, therefore, is whether development of customized software in this case is a manufacturing activity or a service activity?

5.1 From 01.07.2012, 'service' has been defined under section 65B(44) of the Finance Act, 1994 as an activity carried out by a person for another for a consideration, and includes a declared service. Further, *development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software* is a declared service in terms of entry (d) of section 66E of the Finance Act, 1994. Therefore, development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of

information technology software is a service activity under the Finance Act, 1994. At the same time, however, it is also true that an 'IT Software' is an excisable goods under tariff head 8523 80 20 and further, any customized software, other than packaged or canned software, is exempted from payment of central excise duty as argued by the appellant.

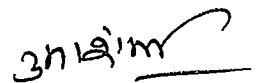
5.2 That IT software in the case on hand was 'goods' and not 'service' is a major argument of the appellant, however, the adjudicating authority while deciding the issue did not consider this argument and noted that appellant's whole defence reply will not be taken into consideration as there was no evidence that appellant had paid central excise duty on the transaction. Undoubtedly, not discussing the main argument of the appellant reflects poorly on the quality of adjudication, but more than that passing an adjudication order without considering the defence submissions is a flagrant violation of natural justice. Appellant's argument that sale of software in this case was a transaction of sale of goods needed to be discussed by the adjudicating authority, regardless of the fact whether appellant had or had not paid any duty of excise thereon.

5.3 Therefore, considering that impugned order is not a speaking order on the submissions made by the defence, I remand the issue back to the adjudicating authority with a direction to pass a fresh order considering all the arguments of the appellant.

6. Accordingly, I set aside the impugned order and allow the appeal by way of remand.

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)

Attested



(Sanwermal Hudda)

Superintendent

Central Tax (Appeals)

Ahmedabad

By R.P.A.D.

To,

M/s. Sanblue Enterprises Pvt Ltd,  
B-3, Corporate House, Abhishree Corporate Park,  
Iskon Ambli Toad, Bopal, Ahmedabad 380058

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, CGST 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.



