आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ 07926305065- टेलेफैक्स07926305136

DIN: 20220364SW0000777F20

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/1514/2021-APPEAL /6900-05

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-81-2021-22**
दिनाँक Date : **17-03-2022** जारी करने की तारीख Date of Issue 21.03.2022

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **68/JC/MT/2020-21** दिनाँक: **31.03.2021**, issued by Joint Commissioner, CGST, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address

1. Appellant

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

2. Respondent

The Joint Commissioner, CGST & Central Excise, Ahmedabad North
1st Floor, Custom House, Navarangpura, Ahmedabad-380009

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 अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन 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.

(क) 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।

(A) 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.

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

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

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।

(c) 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 दिनाँक 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–बी/35–इ के अंतर्गतः–

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

(क) 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 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

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 a court fee stamp of Rs.6.50 paise 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.

(9) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:
(x) amount determined under Section 11 D;
(xi) amount of erroneous Cenvat Credit taken;
(xii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस 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।

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

The present appeal has been filed by M/s. Satyam Developers Ltd., Satyam House, B/h Rajpath Club, S.G.Highway, Ahmedabad-380059 (hereinafter referred to as '***the appellant***') against the OIO No: 68/JC/MT/2020-21 dated 31.03.2021 (in short '*impugned order*') passed by the Joint Commissioner, Central GST, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*').

2. The facts of the case, in brief, are that the appellant, engaged in providing construction service in respect of commercial or industrial buildings, civil structures and construction of residential complex, were availing abatement under Notification No.01/2006-ST dated 01.03.2006 and Notification No.26/2012-ST dated 20.06.2012. During the course of audit of the records of the appellant, conducted by the officers of erstwhile Central Excise & Service Tax Audit-II, Ahmedabad, it was noticed that during the F.Y. 2012-13 (from July, 2012) to F.Y. 2013-14 (upto December, 2013), the appellant have availed cenvat credit amount of Rs.66,53,204/- on the input services received under invoices issued by M/s. Shree Krishna Construction and M/s. Aahir Construction. As these invoices were not serially numbered and did not bear service tax registration number, they were not considered proper documents for taking cenvat credit in terms of Rule 9(1) of the CCR, 2004 read with Rule 4A(1) of the Service Tax Rules, 1994.

2.1 Further, it was also observed that the credit amount of Rs.10,17,791/- availed on the basis of three such invoices, issued by M/s. Shree Krishna Construction on 01.07.2012, was not eligible in terms of the conditions prescribed under Notification No. 01/2006-ST dated 01.3.2006. As per the said notification, for availing abatement from payment of service tax, the cenvat credit of capital goods, inputs and input services used for providing such taxable services, should not been taken. In terms of Rule 4A(1) of the Service Tax Rules(STR), 1994, invoices are to be issued within thirty days from the date of completion of such taxable service or receipt of any payment towards the value of such taxable service, whichever is earlier, by the input service provider. It appeared that though these invoices are shown to be issued on 01.07.2012, but should have been actually issued for the services completed prior to 01.07.2012, as the payment of Rs.90 lakh was made during 01.4.2012 to 26.06.2012 against total bill amount of Rs.92,52,341/- raised vide R.A bills issued. Since the appellant have already received the service and availed the exemption prior to issuance of Notification No.26/2012-ST dated 20.06.2012, effective from 01.07.2012, therefore, condition of Notification No. 01/2006-ST dated 01.3.2006 shall prevail.

3. On the basis of above audit observations, Show Cause Notice (SCN) No. CEA-II/ST/15-27/C-VI/APXXVIII/FAR-607/RP-02&08/16-17 dated 30.03.2017, was issued to the appellant proposing recovery of service tax amount of Rs.66,53,204/- along with interest, u/s 73(1) & u/s 75 respectively. Imposition of penalty under Section 76, Section 77(2) and Section 78 of the F.A., 1994, was also proposed. The said SCN was adjudicated vide O-I-O No.06/JC/2018/GC dated 29.01.2018, wherein the service tax demand of Rs.50,58,161/- was confirmed along with interest and remaining amount was dropped. Penalty under Section 76 was dropped, however, penalty of

Rs.10,000/-u/s 77(2) alongwith penalty of Rs.25,29081/- u/s 78(1) of the F.A., 1994, was imposed.

4. The appellant, being aggrieved with the said O-I-O, filed appeal before the Commissioner(A), Ahmedabad. The then Commissioner (A) vide OIA No.AHM/EXCUS-002-APP-30-18-19 dated 29.06.2018, remanded the matter to the adjudicating authority for re-consideration of the matter on two issues;

a) Causing necessary verification to establish that service tax involved has not been deposited by the service providers in the government account. Also to verify the service tax payment for the 2013-14, accepted on the basis of CA certificate.
b) Determination of point of taxation in terms of Place of Taxation (POT) Rules, 2011. If the point of taxation falls in the period prior to 01.07.2012, then the denial of Cenvat credit on three invoices is justified.

5. As per directives of the remand order, the case was decided afresh by the adjudicating authority vide the impugned order. Based on the verification report submitted by the jurisdictional Assistant Commissioner (JAC for brevity) of Div-VI, Ahmedabad North, vide letter No.GST-06/04-65/Misc/2/2017-18 dated 31.03.2021, the adjudicating authority allowed Cenvat credit amount of Rs.48,21,157/- and rejected the remaining credit to the tune of Rs.2,37,242/- as verification report for this amount was not submitted by the JAC. On the issue of denial of cenvat credit on three invoices involving cenvat credit of Rs.10,17,791/-, it was held that the credit is not admissible as the appellant has not submitted the copy of contract, completion certificate, details of advance received, to consider the date of payment as point of taxation. Consequently, out of the total demand of Rs.66,53,204/-, the demand of Rs.12,53,033/- was confirmed alongwith interest and penalty of Rs.6,27,517/- & Rs.10,000/- was imposed u/s 78 & 77(2) respectively. Penalty u/s 76 of the F.A., 1994, was however dropped.

6. Aggrieved by the impugned order, the appellant has filed the present appeal contending on following grounds;

- The particulars as required vide Rule 9(2) of CCR, 2004 & Rule 4(A)(1) of CCR, 2004, has been fulfilled except the registration no., which can be corrected as both the service providers are registered with the department under Construction service. Though invoice is not serially numbered but these invoices were issued for continuous supply of service having RA bill, which should suffice the purpose for availing credit. They placed reliance on following citations.
  - 2016(42) STR. 81 (Tri-Ahmd)-Meghmani Organics Ltd.
  - 2014 (36) STR 445 (Tri-Del) – BSNL
  - 2011 (23) STR 661 (Tr-Mum)- Imagination Technologies India P. Ltd.
- Denial of credit amount of Rs.10,17,791/- assuming that service was availed prior to 01.07.2012 is not justifiable. The invoice dated 01.07.2012 prove that service was completed on 01.07.2012, hence credit rightly availed. Further, in terms of Rule 3 of POT Rules, 2011, in case of continuous supply,

where provision of whole or part of service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service, thus credit has been rightly availed.

- Since entire facts were in the knowledge of the department right from 2012, suppression cannot be invoked. Hence the SCN covering period July, 2012 to Dec, 2013, issued on 30.03.2017, is time barred.
- Penalty u/s 78 is not imposable as there is no willful suppression or mis-statement. Reliance placed on decision passed in the case of Steel Cast Ltd. – 2011 (21) STR 500 (Guj).
- When the appellant was not liable to pay service tax, question of short payment does not arise hence, penalty u/s 77 is not imposable. Reliance placed on decision passed in the case of Hindustan Steel Ltd.- AIR 1970 (SC) 253, Kellner Pharm Ltd. – 1985 (20) ELT 80, Chemphar Drugs & Liniments- 1989 (40 ELT 276 (SC)

7. Personal hearing in the matter was held on 12.11.2021, through virtual mode. Shri Vipul Khandhar, Chartered Accountant, appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum and also gave additional written submissions reiterating the above contentions.

8. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum, in the additional written submission as well as the submissions made at the time of personal hearing. I have also gone through the earlier OIA dated 29.06.2018, issued in the same matter. The issues to be decided under the present appeal are;

i. Whether the cenvat credit of service tax amount of Rs.2,37,242/- availed by the appellant, on the basis of invoices not bearing service tax registration and not serially number, is admissible or otherwise?

ii. Whether the cenvat credit of service tax amount of Rs.10,17,791/- availed by the appellant on the invoices issued on 01.07.2012 is admissible in terms of Notification No.26/2012-ST dated 20.06.2012, or otherwise?

9. On the first issue, I find that the matter was remanded back to the adjudicating authority for causing necessary verification as to whether service tax involved has been deposited by the service providers in the government account and also to verify the service tax payment for the F.Y. 2013-14, which has been accepted on the basis of CA certificate. The jurisdictional Assistant Commissioner (JAC), after causing necessary verification, submitted his report vide letter dated 19.3.2021, stating that M/s. Shree Krishna Construction and M/s. Aahir Construction have deposited the collected tax into government account; that the counterfoils submitted tallies with the challan details and the CA certificate mentioning the service tax payment for the F.Y. 2012-13 & F.Y. 2013-14 has been verified vis-à-vis ST-3 Returns of the service providers and found to be in order. Since the verification report submitted by the JAC was to the extent of Rs.48,21,157/-only, the adjudicating authority allowed cenvat only to that

extent and rejected the remaining credit of Rs.2,37,242/- on the ground that service provider had not fulfilled the service tax liability and the appellant has availed the Cenvat credit of such tax which was not credited by the service provider in government exchequer. It is significant to mention here that the cenvat credit of Rs.48,21,157/- allowed was purely based on the verification carried out in respect of the invoices, which were not serially numbered, and which did not bear service tax registration. The findings of the adjudicating authority are not disputed. Even if it is assumed that the service tax payment of Rs.2,37,242/- made by the appellant to the service providers was not credited in the government exchequer, then in the given scenario, the demand should have been raised on the service providers and not on the appellant, who took credit on the basis of tax paid documents.

9.1 In terms of Rule 3 of the CCR, 2004, the provider of output service is entitled to take cenvat credit of service tax paid on the input services defined under Rule 2(l) of the CCR, 2004 and received by them. It is not disputed that the input services received under the disputed invoices were neither received nor utilized by the appellant in rendering their taxable output service. As long as invoices had evidence of having borne the incidence of tax on the input services, and such input services were utilized in providing their output services, I find that the credit of the tax paid on such invoices cannot be denied.

9.2 In support of my above argument, I place reliance on the decision of Hon'ble CESTAT, West Zonal Bench, Mumbai passed in the case of Anand Arc Electrodes Pvt. Ltd. - 2010 (252) E.L.T. 411 (Tri. - Mumbai), wherein it was held that;

> *Considering the case laws referred by the ld. Advocate and going through the facts and circumstances of the case,* ***it is well settled that the credit to be taken is the actual duty paid and that the buyers has no responsibility in regard to the ensuring that duty has been correctly paid by the manufacturer of the inputs. The rule permits variation of Modvat credit only on account of a finding in a proceeding against the supplier of the inputs that the duty has not been correctly paid.*** *Thus variation of Modvat credit amount can be consequential only. This is a clear case here. The original assessment of inputs has not been varied.* ***The assessee is not having any responsibility to ensuring that the correct duty paid by the manufacturer of the inputs. The assessee has taken the credit of duty on the duty paid documents and availed, the Cenvat credit on the basis of duty paid documents, which are not disputed. I hold that the assessee is entitled to take the Cenvat credit on the strength of duty paying documents, which was correctly taken by the assessee.*** *In these terms, the appeal of the assessee is allowed and the appeal filed by the Revenue are without merit and the same are dismissed.*

9.3 Similarly, Hon'ble CESTAT, WZB, Mumbai, in the case of Imagination Technologies India P. Ltd.- 2011 (23) S.T.R. 661 (Tri. - Mumbai) held that;

> ***6.*** *As regards the second issue regarding denial of CENVAT Credit on account of not indicating registration number of the input service provider on the invoices, this issue also has been settled by the decision of this Tribunal in the case of Secure Meters Ltd. (supra). In the said order, it was held that* ***credit cannot be denied on the basis of invoices wherein registration numbers were not mentioned so long as the payment of tax was established and the said input service was utilized in the provisions of output service. "***

9.4 In light of above decisions, I find that the cenvat credit of tax paid on input services cannot be denied to the appellant merely because the service provider has failed to deposit the collected tax in government exchequer.

10. As regards the second issue, I find that the cenvat credit amount of Rs.10,17,791/- availed on the basis of three invoices issued on 01.07.2012, was disallowed in terms of the conditions prescribed in Notification No. 01/2006-ST dated 01.3.2006. The matter was, therefore, remanded to the adjudicating authority for determination of point of taxation in terms of POT Rules, 2011. If the point of taxation falls in the period prior to 01.07.2012, then the denial of Cenvat credit on three invoices is justified. The adjudicating authority held that the invoices for R.A No. 1, 2 & 3, involving amount of Rs.10,17,791/- were issued on 01.07.2012, for the services already completed before 01.07.2012. He claims that these invoices were issued for carrying out construction work of cellar slab block, cellar wall etc which would not have been performed or completed in a single day and without completion of service, it is not possible to mention the work done in the R.A. bills. He further observed that the payment of Rs.90 lacs made between 01.04.2012 to 26.06.2012 was against the total payment of Rs.92,52,341/-due vide the said R.A bills, which clearly establish that the work was completed prior to 01.07.2012, on which the R.A. bills were issued.

10.1 The appellant on the other hand have argued that in terms of Notification No.26/2012-ST dated 20.06.2012, cenvat credit on capital goods and input services are available despite availing abatement, therefore, credit on the invoices issued on 01.07.2012, has been rightly availed. Even in terms of Rule 3 of POT Rules, date of invoice has to be treated as completion of service. The three invoices issued were for the continuous supply of service which got completed on the date when the invoice was issued.

10.2 It is observed that as per Rule 3 of the POT Rules, 2011, the point of taxation shall be the time when the invoice for the service provided/ agreed to be provided, is issued. However, in case the invoice is not issued within the time period specified in Rule 4A of the Service Tax Rules, 1994 (i.e. 30 days) of the completion of the provision of the service, then the point of taxation shall be date of such completion. Further, in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service.

10.3 In the present case, I find that the department has not brought out any evidence on record to establish that the invoices issued on 01.7.2012, were not issued within the time period specified in Rule 4A of the Service Tax Rules, 1994, from the completion of service or from the receipt of any payment towards the value of such taxable service. The contention that the construction work of cellar lab block, cellar wall was done over a period of time and running account bills issued on 01.07.2012, were for the services completed prior to 01.07.2012, may not justify the assumption that the invoice should have been actually issued much before 01.07.2012. Mere presumption that the services were completed before 01.07.2012 cannot be a base to consider the date of completion of provision of the service as the point of taxation,

unless supported by concrete evidence, which I find was not discussed in the impugned order. Rule 3 of POT Rules comes into picture only if the invoices were not issued within thirty days from the date of completion of such service or from the receipt of the payment received towards such payment. So far as this criterion is not fulfilled, I find that in terms of Rule 4(A) of the Service tax Rules, 1994, the date of invoice shall be treated as the date of completion of service, which in the present case is 01.07.2012, hence Notification No.26/2012-ST dated 20.06.2012 (effective from 01.07.2012) shall be applicable.

10.4 Further, on examining the Notification No. 01/2006-ST dated 01.3.2006, I find, that 33% abatement is available subject to the proviso prescribed in the said notification, which is reproduced below;

Provided that this notification shall not apply in cases where, -

(i) the CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service, has been taken under the provisions of the CENVAT Credit Rules, 2004; or

(ii) the service provider has availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2003-Service Tax, dated the 20th June, 2003 [G.S.R. 503 (E), dated the 20th June, 2003].

Similarly, in terms of Notification No.26/2012-ST dated 20.06.2012, 25% abatement on construction service was available, only if, cenvat credit on inputs used for providing taxable service has not been taken. The relevant entry of the said notification is reproduced below;

Sl.No.	*Description of taxable service*	*Percent-age*	*Conditions*
(1)	*(2)*	*(3)*	*(4)*
12.	*Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority.*	*25*	*(i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004.* *(ii) The value of land is included in the amount charged from the service receiver.*

Thus, from the wording of the above notifications, exemption is available subject to the fulfillment of the condition prescribed therein. Any violation of the condition of the said notifications would result in disallowing the benefit of exemption under the said notifications. It does not in any way provide for disallowing the cenvat credit. Therefore, denying cenvat credit for failure to fulfill the above condition is an erroneous interpretation of the provisions of the said notification. Every assessee has the liberty to either avail the exemption under the said notification or choose not to avail the exemption and pay full applicable service tax by availing cenvat credit. If the department is of the view that the appellant by availing cenvat credit has violated the conditions prescribed in the said notification, then in that case they should have denied the benefit of exemption and recover the applicable service tax, instead of denying the cenvat credit. I am, therefore, of the considered view that

the condition of the notification for availing exemption cannot be applied to disallow and recover the cenvat credit.

11. Since the credit availed was on the basis of invoices issued on 01.07.2012, I find that the conditions prescribed under Notification No.26/2012-ST dated 20.06.2012 (effective from 01.07.2012) shall apply. In terms of said notification, there is no bar in availing cenvat credit on capital goods and input services, therefore, the cenvat credit of Rs.10,17,791/- availed by the appellant, on the invoices issued on 01.07.2012, is admissible.

12. In view of the discussion held above, I find that the demand of Rs.12,53,033/- is legally not sustainable and is, therefore, set-aside. When the demand is not legally sustainable, question of interest and penalty does not arise.

13. In view of the above, I set-aside the impugned order and allow the appeal filed by the appellant.

अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed off in above terms.

(Akhilesh Kumar)
Commissioner (Appeals)

Date: .3.2022

Attested

(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,
M/s. Satyam Developers Ltd., - **Appellant**
Satyam House, B/h Rajpath Club,
S.G.Highway
Ahmedabad-380059

The Joint Commissioner, - **Respondent**
Central GST,
Ahmedabad North

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North.
   (For uploading the OIA)
4. Guard File.
5. P.A. File