केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, GST Building,
Near Polytechnic,
Ambavadi, Ahmedabad-380015

टेलेफैक्स : 079 - 26305136

: 079-26305065

6326 to 6331

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(ST)/60/Ahd-I/2017-18 V2(ST)/12/North/Appeals/2017-18
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-47&48-2018-19**
दिनाँक Date : **30-08-2018** जारी करने की तारीख Date of Issue 11/9/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **SD-01/08/AC/Shree Siddhi/17-18** दिनाँक: **23/05/2017** issued by Assistant Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s Shree Siddhi Infrabuild Pvt.Ltd
Ahmedabad

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 a 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.

(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।

(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.

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 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 ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016

(a) 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.

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.

(6) 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 .

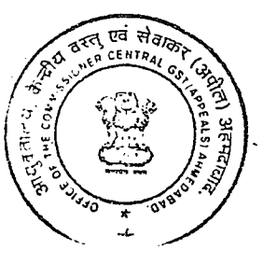
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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:

(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.

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

Two appeals have been filed against OIO No. SD-01/08/AC/Shree Siddhi/17-18 dated 19.5.2017 passed by the Assistant Commissioner, Service Tax Division I, Ahmedabad [*for short – 'adjudicating authority*], the details of which are as follows:

Sr. No.	Name of the appellant	Appeal No.
1	Shree Siddhi Infrabuild P Ltd	V2(ST)60/Ahd-I/2017-18
2	Shri Kalpesh Patel, Director	V2(STC)12/North/Appeals/2017-18

2. Briefly, stated the facts are that based on an intelligence, an investigation was conducted by Directorate General of Central Excise Intelligence, Zonal Unit, Ahmedabad, which culminated in a show cause notice dated 21.10.2015, being issued to the aforementioned two appellants, *inter alia*, alleging that the appellant at Sr. No. 1 of the table supra, had short paid/ evaded service tax of Rs. 46,59,000/- under the category of Works Contract Service during the period from 1.4.2010 to 31.3.2014. The notice, therefore, demanded the service tax short paid along with interest and further proposed penalty on both the aforementioned appellants.

3. This notice was adjudicated vide the aforementioned impugned OIO dated 19.5.2017, wherein the adjudicating authority confirmed the demand along with interest and further imposed penalty on the appellant under sections 77 and 78 of the Finance Act, 1994, on the appellant mentioned at Sr. No.1 and under section 78A on the appellant mentioned at Sr. No. 2 of the table, *supra*.

4. Feeling aggrieved, both the appellants have filed the appeal on the following grounds :

Shree Siddhi Infrabuild P Ltd

- the appellant is a private limited company providing services of construction of commercial complex; that they had undertaken the project of 'Ganesh Meredian' and the commercial units were sold to members; that Ganesh Meredian commercial complex is divided into different blocks constructed on two distinguished land and has three blocks A, B and C; that block A is constructed on land owned by two individual land owners while block C and D is constructed on land owned by a society;

- in block '**A**', the initial agreement was to develop it and transfer the partial possession of the block to the land owners while the remaining portion was to be sold by the appellant; that the agreement was later amended & the appellant was appointed as a contractor to construct the said block on contractual basis and handover the same to landowners for a consideration of Rs. 15 crores; that earlier they were discharging service tax @4.12% on construction portion of total value i.e. after deducting the land value; that after October 2012 they had discharged service tax under *works contract* without taking any abatement towards the value of land; that they had calculated the consideration received for Block A on inclusive of service tax as they had not charged service tax separately but DGCEI did not consider their argument and did not consider & calculated tax exclusively.

- in respect of block '**C**' and '**D**', the land owner [Modinagar Coopeative Society] had transferred development rights to construct two blocks; that they had the rights to construct, market, possess and sell these blocks; that they had paid an amount of Rs. 3.01 crores to Shri Siddhi Corporation towards development & land cost; that the customer who purchased the commercial unit got the construction as well as the land attached to the construction;

- that they had discharged the service tax @ 4,12%/4.944% after deducting land portion on 60% value of total amount received; that from April 2010 to March 2011, they took deduction of land @ 40% of total amount received from members & on remaining 60% value, they discharged

2012 they deducted land value @ 25% of the total amount received and discharged service tax @4.12/4.944 % on remaining 75% value under Works contract service; that from October 2012 they paid service tax on amount received from members under works contract service @ 4.944% without taking deduction of land;

- that they have calculated the consideration received for block 'A' inclusive of service tax;
- that they would like to rely on the case of Sanjevalal & Ors [2015(5)SCC775] & Chaturbhuj Dwarkadas Kapadia [2003(260) ITR 491];
- that where the consideration for the land and the consideration for the building is identified in the sale deed between contracting parties, the department cannot sit in judgement and conclude that there is no bifurcation of value;
- that the scope and ambit of works contract itself is confined to transfer of property in goods in the course of execution of works contract and land is alien and not relevant to the works contract; that if the legislative intent was to include the value of land in the gross amount, the inclusive part of the explanation of Works Contract (Composition Scheme for payments of service tax) Rules, 2007, would have expressly included land;
- that they would like to rely on the case of SPL Developers [2015(39) STR 455], Reddy Structures P Ltd [2014(70) VST 329 and L & T [2013(65) VST 1]; that when the value of land cannot be included in the computation of taxable turnover under works contract for the purpose of VAT, it is not relevant for computing service tax;
- that the bifurcation of value between consideration towards land and consideration towards construction were properly shown in the sale deed executed with ultimate members;
- that development right are rights to transform/change an immovable property by carrying out improvements for constructing building thereon, etc;
- that with regards to an agreement for transfer of development rights whereby such rights are transferred permanently on an irrevocable basis constitutes a sale of immovable property; that an agreement for transfer of development rights constitutes transfer of title in immovable property in terms of section 65B(44)(a)(i) of the Finance Act, 1994;
- that the buyer is having full and due title of the property which includes the land; that the buyer will have right with respect to undivided shares of the land; that selling the property to any other person he does not have to take permission of the society or any person;
- that they have taken land value approximately retrospectively from April 2008 including for the period from April 2010 to March 2011; that the differential tax arising due to change in deduction portion from 40% to 25% has already been paid during the inquiry and was intimated to the inquiry authority; that they have paid Rs. 26.88 lacs vide challan dated 3.7.2012;
- that they have paid Rs. 16.17 lacs towards outstanding tax for the year 2010-11;
- that extended period could not have been invoked;
- that no penalty is imposable under section 78;

Shri Kalpesh Patel, Director

- that none of the conditions were violated since no tax was evaded by appellant mentioned at Sr. No. 1 and therefore, the question of imposition of penalty under Section 78A does not arise.

5. Personal hearing in the case was held on 6.2.2018, wherein Shri Nitesh Jain, CA, appeared on behalf of the appellant. He reiterated the grounds of appeal and explained the case in detail and requested for a further hearing. Thereafter, a further hearing was held on 9.2.2018, wherein the CA took me through the contract. Subsequently, a further hearing was also held on

10.7.2018, wherein against Shri Nitesh Jain, CA reiterated the grounds, once again explained the case and submitted additional submissions raising the following points:

- that in respect of demand of Rs. 3,36,748/-, in respect of Block A, the notice had collected tax on ex tax basis whereas the appellant had calculated & paid tax on cum duty basis;
- that in respect of block C and D- the cost of land is not to be added; that neither the works contract definition, nor rule 2A of the Valuation rules, provide directly or indirectly, that the land value is includible.

6. I have gone through the facts of the case, the grounds of appeal and the oral averments made during the course of personal hearing. The question to be decided is whether the deduction availed towards value of land, by the appellant while discharging service tax under "Works Contract (Composition Scheme for payments of service tax) Rules, 2007" is correct or otherwise.

7. The appellant [Sr. No. 1] engaged in construction of commercial offices, residential apartments, bungalows, etc was registered with the department under the taxable category of 'Works Contract Service'. Investigations by DGCEI revealed that the appellant, while discharging service tax under "*Works Contract (Composition Scheme for payments of service tax) Rules, 2007*", had taken the abatement/deducted 40%/25% towards land value from the *gross amount charged.*

8. I find that the adjudicating authority in his findings after posing two questions viz. [a] *whether land was part of the consideration received from the buyer*; and [b] if yes, *whether deduction of land value is available under composition scheme*, held that land was not a part of the consideration received from the buyer since they did not own the same; that they had received development right in the land and amount received from the buyers towards so called land was not totally paid to the land owners; that as per the sale deed the society would continue to hold the land in its name and the buyer will not become owner of the land; that under the composition scheme no deduction is available on the value of the land.

9. Now, Works Contract service was brought under service tax w.e.f. 1.6.2007. While VAT/sales tax is leviable on transfer of property in goods involved in the execution of the works contract, the taxable value under *works contract service* is that part, which is relatable to the services provided in the execution of the said works contract. However, the service provider(s) have been given an option, to opt for a composition scheme, known as *Works Contract (Composition Scheme for payments of service tax) Rules, 2007*. Service providers who opt for this composition scheme, can pay service tax @ 4.8% [4% prior to 1.4.2012] of the **gross amount charged** for works contract, instead of paying service tax at the rate specified in Section 66 of the Finance Act, 1994. Since, the discussion hinges around, the said Rules, the same, is reproduced below for ease of reference:

[Notification No. 32/2007-S.T., dated 22-5-2007]

Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007

In exercise of the powers conferred by sections 93 and 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules, namely :-

1. Short title and commencement. - (1) These rules may be called the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

(2) They shall come into force with effect from the 1st day of June, 2007.

2. Definitions. - In these rules, unless the context otherwise requires, -

(a) "Act" means the Finance Act, 1994 (32 of 1994);

(b) "section" means the section of the Act;

(c) "works contract service" means services provided in relation to the execution of a works contract referred to in sub-clause (zzzza) of clause (105) of section 65 of the Act;

(d) words and expressions used in these rules and not defined but defined in the Act shall have the meanings respectively assigned to them in the Act.

3(1) Notwithstanding anything contained in section 67 of the Act and rule 2A of the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act, by paying an amount equivalent to two per cent. of the gross amount charged for the works contract.

Explanation. - For the purposes of this rule, gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid on transfer of property in goods involved in the execution of the said works contract.

(2) The provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.

(3) The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract.

Susbequently, vide notification No. 7/2008-S.T., dated 1-3-2008, the rate two percent was changed to four percent and thereafter vide notification No. 10/2012-S.T., dated 17-3-2012, effective from 1.4.2012, it was further amended to 4.8%.

Thereafter, vide notification No. 23/2009-S.T., dated 7-7-2009, the rules were further amended as follows:

2. In the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, in rule 3, -

(A) in sub-rule(l), for the Explanation, the following Explanation shall be substituted, namely :-

"Explanation. - For the purposes of this sub-rule, gross amount charged for the works contract shall be the sum, -

(a) including -

(i) the value of all goods used in or in relation to the execution of the works contract, whether supplied under any other contract for a consideration or otherwise; and

(ii) the value of all the services that are required to be provided for the execution of the works contract;

(b) excluding -

(i) the value added tax or sales tax as the case may be paid on transfer of property in goods involved; and

(ii) the cost of machinery and tools used in the execution of the said works contract except for the charges for obtaining them on hire:

Provided that nothing contained in this Explanation shall apply to a works contract, where the execution under the said contract has commenced or where any payment, except by way of credit or debit to any account, has been made in relation to the said contract on or before the 7th day of July, 2009.";

(B) after sub-rule(3), the following sub-rule shall be added, namely :-

"(4). The option under sub-rule (3) shall be permissible only where the declared value of the works contract is not less than the gross amount charged for such works contract."

The appellant, as is undisputed, was discharging service tax under the Works Contract (Composition Scheme for payments of service tax) Rules, 2007, in respect of three blocks A, C

and D by the name of Ganesh Meredian. Now, gross amount charged, in terms of the rule *supra*, clearly states that gross amount charged would be including

> *(i) the value of all goods used in or in relation to the execution of the works contract, whether supplied under any other contract for a consideration or otherwise; and*
> *(ii) the value of all the services that are required to be provided for the execution of the works contract;*

and excluding –

> *(i) the value added tax or sales tax as the case may be paid on transfer of property in goods involved; and*
> *(ii) the cost of machinery and tools used in the execution of the said works contract except for the charges for obtaining them on hire:*

So it is explicitly clear that only VAT/sales tax paid on transfer of property in goods involved and cost of machinery and tools used in the execution of the said work contract except for the charges for obtaining them on hire are to be excluded from the gross amount charged.

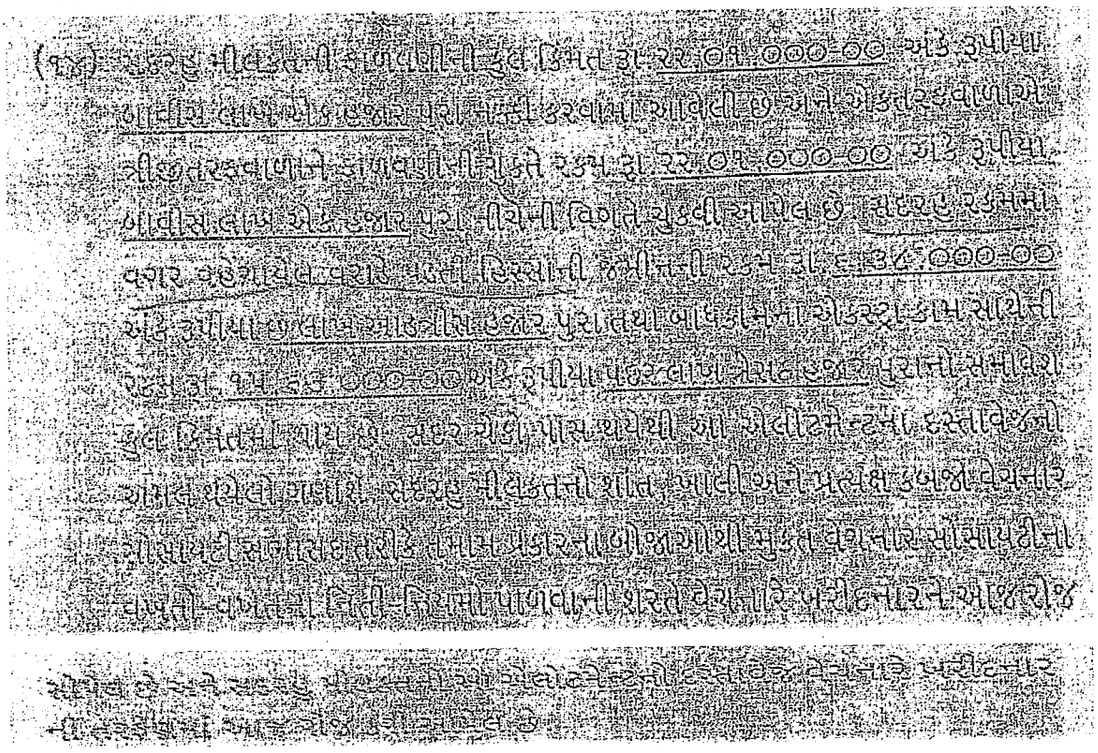
BLOCK A

10. It is in the aforementioned background that I have to examine whether the value of the land is to be excluded from the gross amount charged or otherwise. Of the three blocks of Ganesh Meredian *viz*, A, C and D, the appellant has stated that **block A** was constructed on land owned by two individual land owners; that initially they were given rights to develop the block A and transfer the partial possession of the block to land owners and the remaining portion would be in the possession of the appellant wherein they would have the right to sell it in the open market; that subsequently, the agreement was amended and the appellant was appointed as a **contractor** for Block A, wherein he was supposed to construct Block A on contractual basis and hand over the same to the land owners for a lump sum consideration of Rs. 15 crores. Since the appellant was a contractor [in terms of the amended contract], the question of deduction towards land just simply does not arise, because Rs. 15 crores was the consideration for construction of block A, which was to be subsequently to be handed over to the land owners. I find that as per Annexure C to the show cause notice, the service tax demand in respect of block A is Rs. 3,36,748/-, which has been correctly confirmed by the adjudicating authority. In-fact, the appellant is on record in the grounds of appeal in para 2 where he states that they have already paid the said amount. However, they have disputed the tax confirmed on the ground that they had not collected service tax separately. This does not appear to be a prudent argument simply because the appellant himself is on record that as per the amendment dated 18.10.2011, to the development agreement dated 12.12.2007, he was given a contract to construct block A at the cost of Rs. 15.00 crores. Despite this the appellant continued to wrongly take abatement of land. The appellant now claims that he had not collected service tax. It goes without saying that service tax is to be paid on the contracted amount of Rs. 15 crores. Therefore, now to claim that since no tax was collected benefit of cum duty should be given is not a tenable or just argument and is therefore rejected being without any basis.

BLOCK C AND D

11. In respect of **block C and D**, the appellant is on record stating that it was constructed on the land owned by a society [Modinagar Cooperative Society Limited]; that the society had transferred land development rights to construct these two blocks to M/s. Shree Siddhi Corporation, who vide a development rights and development agreement surrendered/assigned the rights in favour of the appellant; that the appellant had the right to construct, market, posses and sell these blocks and that the appellant had paid Rs. 3.01 crores towards development and land cost to M/s. Shree Siddhi Corporation. However, the adjudicating authority has in his findings in para 23.1 discussed one deed of allotment of unit no. 001 in block D. The adjudicating authority, after going through the deed, has stated that buyers had purchased the unit from the developer for a lump sum of Rs. 2.43 crores; that the buyer was entered into the society as its member; that as per clause no. 2 the society would continue to hold the land in its name and the buyer will not become the owner of the land.

12. Now the appellant has given a copy of allotment deed [*allotment dastavej* in gujarati language], in respect of allotment of C-709 of C block to M/s. Jani Advocates along with the appeal papers. A scanned copy of clause 14 is reproduced below for ease of reference:



Clause 14 of the deed states that of the Rs. 22,01,000/-, Rs. 6,38,000/- is towards the price of undistributed allotted land and Rs. 15,63,000/- is towards extra construction cost. Surely, the appellant has charged Rs. 22,01,000/- from the customers, which includes the cost of land, as per the allotment deed/dastavej. Thus one thing is clear that a portion of the amount taken from the customer was towards land.

13. Now the moot question that needs to be decided is whether land can form a part of the gross amount charged under the Works Contract (Composition Scheme for payment of

Service Tax) Rules, 2007, for the purpose of calculating service tax. The Constitution of India, Seventh Schedule under Article 246, consists of three lists, under which land/property has been dealt with in the lists as follows:

List II—State List

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization;

45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

49. Taxes on lands and buildings.

List III—Concurrent List

6. Transfer of property other than agricultural land; registration of deeds and documents

States, have been dealing with taxation, transfer, registration, collection of land revenue, stamp duty, in respect of sale/purchase of land. Hence, what is not a part of the Union list or has been dealt by with States by virtue of it being mentioned in the State List or the Concurrent List, cannot form a part or be taken into consideration while computing the **value under Section 67**, ibid, for taxing under Finance Act, 1994. Accordingly, I hold that value of the land cannot form a part of the **gross amount charged** under Rule 3(1) for determining tax under Works Contract (Composition Scheme for payments of service tax) Rules, 2007.

13.1 Even otherwise, in terms of Rule 2A of the Service Tax (Determination of Value) Rules, 2006, under which the value of service portion involved in the execution of a works contract is determined, states as follows:

> *2A(1)(i) Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods [or in goods and land or undivided share of land, as the case may be] transferred in the execution of the said works contract.*

Further the proviso to (ii) states as follows:

> ***[Provided** that where the amount charged for works contract includes the value of goods as well as land or undivided share of land, the service tax shall be payable on thirty per cent. of the total amount charged for the works contract.]*

The portion regarding land or undivided share of land was retrospectively added vide Finance Act, 2017, which clearly shows the intent of the Government that land was not to be included. When it is not a part of the value as regard a works contract, surely it would not form a part of the gross amount charged in respect of Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007.

13.2. Therefore, I find that prima facie, the demand of service tax in terms of **Annexure B** to the notice for Rs. 43,22,252/- in respect of abatement taken towards deduction on land, is not tenable and cannot be upheld.

14. Now coming to the appeal filed by Shri Kalpesh Patel, Director of the appellant. I find that penalty has been imposed on the appellant under section 78A of the Finance Act, 1994 on the grounds that he was in charge and was responsible for the conduct of the business and was knowingly concerned with such contravention. The appellant has stated that since none of the conditions were violated no tax was evaded by appellant mentioned at Sr. No. 1 and therefore, the question of penalty under Section 78A does not arise. The contention that no tax was evaded is not a correct contention in view of my findings, in para 10, supra and therefore, the appellant mentioned at Sr. No. 2 is liable for imposition of penalty under Section78 of the Finance Act, 1994. However, in view of the facts mentioned in paras 10 and 13.1 above, I reduce the penalty imposed from Rs. 1,00,000/- to Rs. 10,000/- only.

15. In view of the foregoing, the appeal is decided as follows:

[a] the confirmation of the demand, interest and penalty as far as **annexure A** is concerned, is upheld in terms of para 10 ***supra***;

[b]the demand as far as **annexure B** to the show cause notice is concerned, is set aside in terms of findings at para 13, 13.1 and 13.2., **supra;**

[c] in respect of the appeal filed by appellant mentioned at Sr. no. 2 of the table in para (1) above, the penalty imposed is reduced from Rs. 1,00,000/- to Rs. 10,000/-.

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

16. The appeals filed by the appellants stands disposed of in above terms.

(उमा शंकर)
आयुक्त (अपील्स)

Date :30.8.2018

Attested

(Vinod Lukose)
Superintendent (Appeal),
Central Tax,
Ahmedabad.

By RPAD.

To,

M/s. Shree Siddhi Infrabuild Private Limited, D/1001, Ganesh Meredian, Opp. Amiraj Farm, Nr. Gujarat High Court, S G Highway, Ahmedabad 380 060.	Shri Kalpesh Patel, Director M/s. Shree Siddhi Infrabuild Private Limited, D/1001, Ganesh Meredian, Opp. Amiraj Farm, Nr. Gujarat High Court, S G Highway, Ahmedabad 380 060.

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central Tax, Ahmedabad North.
3. The Deputy/Assistant Commissioner, Central Tax, Division-VI, Ahmedabad North.
4. The Assistant Commissioner, System, Central Tax, Ahmedabad North.
5. Guard File.
6. P.A.