


<p>आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क, अहमदाबाद – उत्तर, कस्टम हाउस, प्रथम तल, नवरंगपुरा, अहमदाबाद- 380009</p>		<p>GST ONE NATION.. ONE TAX.. ONE MARKET</p> <p>OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009</p>
<p>फ़ोन नंबर./ PHONE No.: 079-27544557</p>	<p>फैक्स/ FAX : 079-27544463</p>	<p>E-mail:- oaahmedabad2@gmail.com</p>

निबन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./ F.No. STC/4-45/O&A/Galaxy/Prev/2016-17 आदेश की तारीख/Date of Order:- 31.10.2017
जारी करने की तारीख/Date of Issue :- 31.10.2017

द्वारा पारित/Passed by:- जी. सी. जैन /G. C. Jain
अपर आयुक्त / Joint Commissioner

मूल आदेश संख्या / Order-In-Original No. 07/JC/2017/GCJ

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

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इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरुद्ध अपील, इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क, केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी, अहमदाबाद 380015-को प्रारूप संख्या इ.ए.-1 (E.A.-1) में दाखिल कर सकता है। इस अपील पर रु .2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner (Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.00 only.

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute. (as per amendment in Section 35F of Central Excise Act, 1944 dated 06.08.2014)

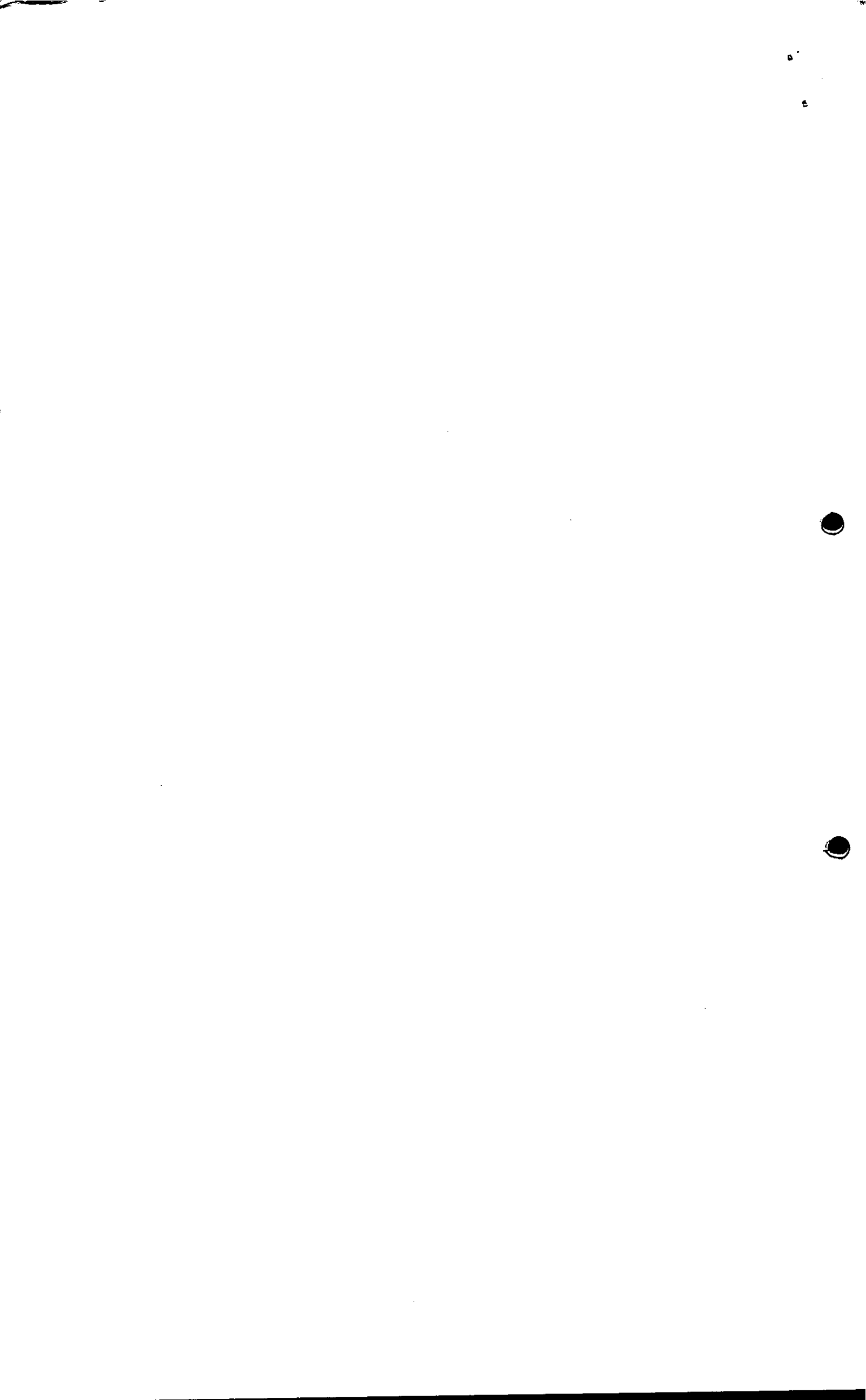
उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या इ.ए.-1 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

- (1) उक्त अपील की प्रति।
- (2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरुद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रु) 2.00 .दो रुपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form EA-1 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

- (1) Copy of accompanied Appeal.
- (2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.2.00.

विषय: -कारण बताओ सूचना/Show Cause Notice F.No. STC/4-45/O&A/Galaxy/Prev/2016-17 dated 06.02.2017 issued to M/s. Galaxy Avenue Private Limited, F/14, Galaxy Complex, opp. Galaxy Cinema, Naroda, Ahmedabad-382330.



Brief Facts of the Case:-

M/s. Galaxy Avenue Private Limited, situated at F/14, **Galaxy Complex, opp. Galaxy Cinema, Naroda, Ahmedabad-382330** (hereinafter referred to as "assessee") is providing/receiving taxable services falling under the taxable category of Works contract Service, Construction Service other than Residential complex Service, including Commercial/ Industrial building or civil structures, Transport of goods by road/goods transport agency service. The assessee was registered with erstwhile Service Tax Commissionerate, Ahmedabad and holding Service Tax Registration No. **AACCG9790LST001** taken on 12.02.2008. Now the assessee falls under the jurisdiction of Central Goods and Service Tax (CGST) & C.Excise, Ahmedabad North Commissionerate since 22.06.2017 as per Notification No. 13/2017-CE (NT) dated 09.06.2017.

2. During the course of reconciliation of the amount of taxable income shown in the revised ST-3 returns filed by the assessee with the amount of income shown in their Books of Accounts during the period 2011-12 to 2015-16, while conducting an inquiry by the erstwhile Service Tax Preventive Wing, it was revealed that an outstanding service tax liability total amounting to Rs.1,32,31,471/- against the assessee in respect of Works Contracts Service, GTA and Security services. It is further observed by the Preventive officers that the assessee is paying Service Tax under Works Contract Services but not paying Service Tax on income of unsold flats received after BU permission and also less paid service tax towards GTA service on reverse charge mechanism (RCM) and not paid service tax towards Security Service on reverse charge mechanism and therefore summons were issued to assessee. Statement of Shri Rohit K. Patel, Director of M/s Galaxy Avenue Private Limited had been recorded on 16.12.2016 and further on 30.01.2017 under Section 14 of the Central Excise Act, 1944 as made applicable to Service Tax matters as per Section 83 of Finance Act, 1994.

3. In the statement recorded on 30.01.2017 wherein it is stated, *inter alia*, by Shri. Rohit Patel that they had paid Service Tax liability under RCM amounting to Rs.62,644/- in respect of Security service and GTA service along with interest of Rs.51,249/- and penalty 15% amounting to Rs.9,397/- and provided challans for the same with their letter dated 13.01.17, but did not agree with their Service Tax liability under Works Contract Service of amount of Rs.1,31,68,827/-.

4. Shri Rohit K. Patel, Director of M/s Galaxy Avenue Private Limited in his statement, recorded on 16.12.2016 under Section 14 of the Central Excise Act, 1944, as made applicable to Service Tax matters as per Section 83 of Finance Act Act, 1994, *inter alia*, stated that M/s Galaxy Avenue Private Limited are engaged in providing Construction Service other than Residential complex Service, including Commercial/ Industrial building or civil structures, Works contract Service, Transport of goods by road/goods transport agency service; that they had 6 projects in between F.Y. 2011-12 to 2015-16, which were Galaxy Heights, Shubham Galaxy, Galaxy B. Park, Galaxy Signature, Galaxy 88 and Galaxy Bungalows; that M/s Galaxy Avenue Private Limited is registered with the Service Tax Department having registration number AACCG9790LST001 since 12.02.2008 and paid service tax and returns regularly, as per their calculation. To a question as to how they discharge their Service Tax liability and pay Service Tax under which Service Tax category, he replied that they discharge Service Tax liability on the basis of advances they get; that they pay Service Tax on Work Contract Service and

Transport of goods by road/goods transport agency service under RCM; that they have taken registration since 2008 under work contract service and at that material time, the present business was not clarified with reference to S.Tax matter, so they have taken registration under work contract service. In respect of a question on the payment of VAT on works contract service, he answered that they are paying VAT on works contract service.

5. To a specific question for specifying as to whom BU permission issued in all their projects, Shri Rohit Patel stated that all BU permission is issued in the name of Shri Rohit K Patel, Director of M/s. Galaxy Avenue Pvt. Ltd. In respect of another question about their submission made in their letter dated 10.04.2015 issued to the Range Superintendent that work contract includes construction relating to immovable property, he replied that that letter was issued by Company's authorized representative. When asked as per above provision made in Section 66E(b) of the Finance Act, 1994, there is only exemption from service tax where the entire consideration is received after issuance of completion certificate by the competent authority and in their case all the advance collected by them are prior to issuance of completion certificate and hence all the advances are liable for Service Tax, Shri Rohit Patel reiterated that the amount received as advance or any payment in reference to booking or sale of unit before BU and its subsequent payment/balance amount of the said unit is liable to tax and they have paid the same accordingly; that they have not paid tax on the unsold units in case after receipt/issuance of BU; that they have not paid Service Tax on the amount received as Land Cost; that they have charged in two ways that is, Construction Cost and Land Cost.

To a specific query as to whether accounts of their company are audited by office of Service Tax Department, he stated that Service Tax Department audited their Accounts for the year 2007-08 to 2010-11, but didn't issue FAR, because their investigation is going on in preventive section.

6. In his statement Shri Rohit Patel has asked for time to verify the calculation. The assessee submitted the reply wherein they have agreed with the difference in service tax of GTA and in case of Security Service assessee provided ledgers, details of taxable value and reconciliation, but in case of Works Contract Service, they didn't agree with the liability, as they think that they are not liable to pay service tax after BU permission.

7. Further statement of Shri Rohit K. Patel, Director of M/s Galaxy Avenue Private Limited was recorded on 30.01.2017 under Section 14 of the Central Excise Act, 1944, as made applicable to Service Tax matters as per Section 83 of Finance Act, 1994; in which he confirmed the contents of his statement earlier recorded on 16.12.2016. He further stated that they had 6 projects in between F.Y. 2011-12 to 2015-16, which were Galaxy Heights, Shubham Galaxy, Galaxy B. Park, Galaxy Signature, Galaxy 88 and Galaxy Bungalows, presently completed and BU permission is received in all these projects. He further answered that they discharge Service Tax liability under category of works contract since its inception and pay service tax on the basis of advances received. To another query as to how they calculated Service tax liability and what was their taxable value for purpose of calculating Service Tax, Shri Patel stated that they calculated service tax on Advances received; that they pay service tax on 40 % of taxable value as per the provisions of Works Contract and they do not add value of land in taxable value. He further answered that the land value is based on costing of land. To a specific question in

respect of their customers and with whom they made contract for the above said projects under works contract. Shri. Rohit Patel stated that they made oral contract with their customers who intended to purchase their flat/shop and they do not have any written contract. He further stated that they pay VAT on Work Contract.

8. He further stated that M/s Galaxy Avenue Pvt. Ltd. is owner of the land; that they are land owner as well as developer also; that they developed all scheme, the land owner is their company and they have also collected advances for the booking of the units. When Shri. Patel was asked to peruse their letter dated 19.09.16 submitted by them along with details of reconciliation statement and as per the Balance sheet of F.Y. 2011-12 to 2015-16 and other documents submitted by them, wherein their total service tax liability comes out to Rs. 1,32,31,471/-, as per the below mentioned reconciliation sheet, he answered that he carefully gone through the said table; that they paid service tax liability under RCM amounting to Rs. 62,644/ in respect of Security and GTA service alongwith interest of Rs. 51,249/ and penalty 15% amounting to Rs.9,397/ and he already submitted copy of challans; that he do not agree with the service tax liability of Rs. 1,31,68,827/ as that liability is calculated on the income which they received only after getting BU permission and the amount received only after BU permission is their sale consideration and hence they are not liable to pay service tax on that amount.

		ST-3				As Per Documents			
Period	Service	Income	Abatement/ Exemption	Taxable Income	S. tax	Income	Abatement/ Exemption	Taxable Income	S. tax
A	B	C	D	E	F	G	H	I	J
	WES	288597524	181848110	106749414	10995190	289664701	173798821	115865880	11934186
2011-12	GTA (RCM)	2789492	2092121	697371	71829	2895633	217172S	723908	74563
	Security (RCM)	0	0	0	0	335859	155215	180644	18606
	WCS	109909935	48822060	32548042	4022938	162636588	97581953	65054635	8040753
2012-13	GTA (RCM)	560345	420260	140085	17315	563445	422584	140861	17410
	Security (RCM;	0	0	0	0	537008	331877	205131	25354
	WCS	65692746	39415648	26277098	3247849	120292829	7217S697	48117132	S947277
2013-14	GTA (RCM)	88142	66107	22035	2724	88542	66407	22136	2736
	Security (RCM)	0	0	0	0	475344	448344	27000	3337
	WCS	38818350	23291010	15527340	1919179	107749279	64649567	43099712	5327124
2014-15	GTA (RCM)	0	0	0	0	4875	3656	1219	151
	Security (RCM)	0	0	0	0	459613	396613	63000	7787
	WCS	0	0	0	0	36286934	21772160	14514774	2104642
2015-16	GTA (RCM)	0	0	0	0	0	0	0	0
	Security (RCM)	0	0	0	0	42000	10500	31500	4568
Total		506456534	295955316	181961385	20277033	722032650	433985119	288047532	33508494
Difference S. Tax payable (Column J - Column F)									13231471

9. Then after persuing the definition of works contract, as per Section 65 (105)(zzzza) of the Finance Act, 1994, Shri. Rohit Patel stated that the books of them for the period 2007-08 to 2010-11 were audited by Service Tax Audit Party - XII on 10.05.2012, 11.05.2012, 15.05.2012

& 17.10.2012; that during the audit period, the Audit Party had verified all the documents and had not raised any issue regarding payment of service tax on the amount received after BU; that the jurisdictional Range Superintendent i.e. Range-II, Division-VI, Service Tax, Ahmedabad had carried out the detailed scrutiny of the ST3 returns and other related documents for the accounting year 2013-14; that the Range Superintendent vide their letter F. No. SD-06/AR-II/Scrutiny-Galaxy Avenue/2014-15 dated 23.01.2015 had called for various details which were submitted by them on 23.02.2015, 25.02.2015, 10.03.2015, 13.03.2015, 27.03.2015 & 10.04.2015 and till date, the Range Superintendent had not raised any issue regarding payment of Service Tax after issuance of BU; that due to verification of our account and Service Tax returns by the respective authority of the Service Tax department and not receiving any adverse findings from them, they believe that they have correctly discharged their due service tax liability; that nowhere they have concealed any particulars, any amount or any details from the Service Tax department.

10. Further, to a specific query as to whether they are paying VAT on income received after getting BU permission on income of unsold flat, Shri. Patel replied that they do not pay VAT on the income received after BU permission (Booked after BU only) as per VAT rules.

11. As per above statement, it is seen that the assessee is paying service tax under Work Contract Service, but taking benefit of Construction of Residential Service and not paying Service Tax on income of unsold flats after BU permission. The assessee had not paid Service Tax liability of Rs.1,31,68,827/- under Work Contract Service for the period from 2011-12 to 2015-16 and also did not accept the same.

12. Prior to 01.07.2012, taxable service in respect of works contract was defined under section 65(105) (zzzza) which is reproduced below:

"Taxable Service" means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation. — For the purposes of this sub-clause, "works contract" means a contract wherein,—

(1) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out,—

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or

(f) commissioning (EPC) projects;

After 01.07.2012, the services provided by the assessee fall under the broad category of 'services-' as defined under Section 65B(54) of the Finance Act, 1994, as amended.

13. On scrutiny of the relevant documents, contents of statements recorded as above, data available as per ACES and on records during the investigation it is seen that :-

13.1 The assessee is a Private Limited Company and registered with Service Tax department having Service Tax Registration No. AACCG9790LST001 taken on 12.02.2008 for providing/receiving taxable service of "Works contract service Construction Service other than Residential complex Service, including Commercial/ Industrial building or civil structures, Transport of goods by road/goods transport agency service".

13.2 The assessee had not filed ST-3 return on time for the F.Y. 2011-12 to 2015-16 & also not paid/short paid the Service Tax liability for the above mentioned period. The assessee filed their ST-3 returns detailed as under;

S. No.	Period	Due date	ST-3 returns filed date
1	April to Sep 2011-12	20.01.2012	08.02.2012
	Oct to Max 2011-12	25.04.2012	07.07.2012
2	April to June 2012-13	25.11.2012	18.04.2013
	July to Sep 2012-13	30.04.2013	17.04.2013
	Oct to Marc2012-13	10.09.2013	12.08.2013
3	April to Sep 2013-14	25.10.2013	27.03.2014
	Oct to Mar 2013-14	25.04.2014	06.11.2014
4	April to Sep 2014-15	14.11.2014	18.05.2016
	Oct to Mar 2014-15	25.04.2015	18.05.2016
5	April to Sep 2015-16	25.10.2015	14.07.2016
	Oct to Mar 2015-16	29.04.2016	14.07.2016

13.3 On verification of documents, reconciliation and ST-3 returns provided by the assessee on 2.8.2016, 16.8.2016 & 19.9.2016 it is found that the assessee is paying Service Tax under Works Contract Services but not paying Service Tax on income of unsold flat received after BU permission and also less paid under GTA (RCM) and did not pay service tax under Security Service (RCM).

13.4 Statement of Shri Rohit K. Patel, Director of M/s Galaxy Avenue Private Limited was recorded on 16.12.2016 under Section 14 of the Central Excise Act, 1944 as made applicable to Service Tax matters as per Section 83 of Finance Act, 1994; in which he clearly stated that they pay under Work Contract Service and GTA. It is also stated that they have not paid service tax on income of unsold flats after BU permission; that they charged in two ways, which are

Construction Cost and Land Cost and pay Service Tax only on Construction Cost.; that the assessee agreed with the difference in service tax on GTA, but in case of Security Service assessee provided ledgers, details of taxable value and reconciliation. However the assessee didn't agree with the liability on Works Contract Service as they think they are not liable to pay Service Tax after BU permission. But as per provision of Works Contract Service, there is no such provision of exemption after BU permission, so after all the calculation the total service tax liability comes to Rs. 1,32,31,471/-.

13.5 The assessee vide the statement dated 30.1.2017 of Shri. Rohit Patel stated that they have paid service tax liability under RCM amounting to Rs. 62,644/- in respect of Security and GTA along with interest of Rs. 51,249/- and penalty 15% amounting to Rs. 9,397/- and provided challans for the same with their letter dated 13.01.17, but did not agree against their service tax liability under Works Contract Service amounting to Rs.1,31,68,827/-. It is also stated that they are paying service tax under Works Contract Service and have only oral contract with their customers who intended to purchase their flat/shop. Assessee also stated that they are not liable to pay VAT after BU permission, as per VAT rules.

13.6 The assessee has not paid service tax on the amount received after BU, however as per the definition of Works Contract Service under section 65B(54) (after July 12) and 65(105)(zzzza) (Prior July'12) there is no provision that assessee is not liable to pay service tax on income after BU permission. But assessee has been taking benefit of section 66E(b), which is for construction services, which says:-

"Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority."

Explanation. - For the purposes of this clause, -

(I) the expression "competent authority" means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—

- (A) Architect registered with the Council of Architecture constituted under the Architects Act, 1972; or*
- (B) chartered engineer registered with the Institution of Engineers (India); or*
- (C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;*

It is thus clear that the assessee is liable to Service Tax in tune of Rs. 1,31,68,827/- involving the period 2011-12 to 2015-16, which is after BU permission, but assessee not willing to pay the same. Further, they are not paying VAT on income received after BU permission of unsold flat.

14. It is seen that with all the above acts of contravention, omissions and commissions on the part of the assessee, they have willfully suppressed the facts, nature and value of service provided by them with an intent to evade the payment of Service Tax for the services provided by them, rendering themselves liable for penalty under provisions of Section 78 of the Finance Act, 1994. Therefore, the said service tax not paid is required to be demanded and recovered

along with interest from them under the proviso to Section 73 (1) of the Finance Act, 1994 by invoking extended period of five years.

15. In view of the foregoing Para's, it appears that the assessee has contravened the provisions of the Act and Rules made there under as below:

15.1 contravened the provisions of Section 67 of the Finance Act, 1994 in as much as they have failed to determine the correct value of taxable services provided, by not mentioning the correct taxable value in ST 3 returns.

15.2 As per the provisions of the Finance Act, 1994 and rules made there under, the assessee was required to assess correct value for the service provided by them as well as to pay Service Tax on the actual amount of income received by them for services rendered/received in due course as prescribed and to follow all the procedure laid down in the Act and Rules. In this case, the assessee has failed to pay due Service Tax leviable on the taxable value charged. It is, therefore, seen that they have failed to make timely payment of Service Tax, as provided in Section 68 of the Act read with Rule 6 of the Rules.

15.3 As per Section 68(1) of the Act that 'every person providing taxable service to any person shall pay Service tax at the rate specified in section 66 in such manner and within such period which is prescribed under Rule 6 of the Service Tax Rules, 1994. The assessee has not paid Service Tax to the tune of Rs.1,31,68,827/- on taxable value received during the period 2011-12 to 2015-16 and thereby contravened the provisions of Section 68(1) of the Act, read with Rule 6 of the Service Tax Rules, 1994.

15.4 As per section 70 of the Finance Act 1994, every person liable to pay service tax, is required to himself assess the tax due on the services provided/received by him and thereafter furnish a return to the jurisdictional Superintendent of service Tax by disclosing wholly & truly all material facts in their service tax returns (ST-3 returns). The form, manner and frequency of return are prescribed under Rule 7 of the Service Tax Rules, 1994. In this case, the assessee has not assessed the tax due, properly, on the services provided by him, as discussed above, and failed to file ST-3 Returns, thereby violated the proviso of Section 70(1) of the act read with Rule 7 of the Service Tax Rules, 1994.

15.5 It is provided under section 73(1) of the Act that "Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the [Central Excise Officer] may, within 'eighteen months' from the relevant date, send notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice"

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of -

(a) fraud; or (b) collusion; or (c) willful mis-statement; or (d) suppression of facts; or (e) contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "eighteen months", the words "five years" had been substituted.

15.6 On account of all the above narrated acts of commission and omissions on the part of the assessee, they have rendered themselves liable to penalty under the following provisions of the Finance Act, 1994, Service Tax Rules, as amended:

15.7 Section 77 of the Finance Act, 1994, in as much as they failed to self assess the tax due properly on the services provided/received and not filed the ST-3 return in time.

15.8 Section 78 of the Finance Act, 1944, knowingly and willfully, not paid the correct amount of Service Tax leviable on such amount by contravention of Section 73(1) of the Finance Act, 1994 as amended, in as much as they failed to pay the Service Tax amount.

16. Shri Rohit K. Patel, Director of M/s. Galaxy Avenue Private Limited, Ahmedabad is the person responsible for business activities of the company relating to services provided and liability to pay service tax. For the above acts of contravention of various provisions of the Finance Act, 1994 and rules made there under, Shri Rohit K. Patel, Director of M/s. Galaxy Avenue Private Limited is liable for penalty under Section 78A of the Finance Act, 1994.

17. Further, as per Section 75 of the Finance Act 1994, every person liable to pay the tax in accordance with the provisions of Section 68, or rules made there under, who fails to credit the tax or any part thereof to the account of the Central Government within the prescribed period is liable to pay the interest at the applicable rate of interest. Since the assessee has failed to pay their Service Tax liabilities in the prescribed time limit, they are liable to pay the said amount along with interest. Thus, the said Service Tax is required to be recovered from the assessee along with interest under Section 75 of the Finance Act, 1994.

18. M/s. Galaxy Avenue Private Limited, situated at F/14, Galaxy Complex, opp. Galaxy Cinema, Naroda, Ahmedabad-382330 was therefore called upon to show cause to the Additional Commissioner of the erstwhile Service Tax Commissionerate having office situated at 1st Floor, Central Excise Bhavan, Panjra Pole, Opp. Govt. Polytechnic, Ambawadi, Ahmedabad -380 015 as to why;

- (i) The non-payment/Short payment of Service Tax amount of Rs.1,32,31,471/- (Rs. 1,31,68,827/- under Works Contracts Services, Rs. 2,992/- under GTA + Rs. 59,652/- under Security Service) calculated on the basis of Balance Sheet for the taxable service "Works contract Service, Transport of goods by road/goods transport agency service & Security services" respectively, for the period 2011-12 to 2015-16 which are not falling under negative list of services under Section 66D of the Finance Act, 2012 should not be demanded and recovered from them under the proviso to section 73(1) read with section 68 of the Finance Act, 1994, as amended, by invoking larger period of five year. Service tax of Rs. 2,992/- under GTA service and Rs. 59,652/- under Security Service, paid during the investigation stage, should not be appropriated against the above demand;
- (ii) Interest, at appropriate rate, should not be charged on the tax amount not paid as mentioned above under section 75 of the Finance Act 1994;
- (iii) Interest liability of Rs. 59,191/- under GTA and Security Service calculated at appropriate rate as per calculation sheet given "Annexure B", to SCN, should not be charged and recovered from them under the proviso to section 75 of the Finance Act

1994. During the investigation the assessee has paid interest of Rs.51,249/- under GTA and Security services and the same should not be appropriated against the above demand;

(iv) Penalty should not be imposed upon them under Section 77, as amended, of Chapter V of the Finance Act, 1994 for failure to self-assess the tax due properly on the services provided/received and for late filing of ST3 return for the period 2011-12 to 2015-16;

(v) Penalty of Rs.9,397/- under GTA and Security Service calculated at 15% as per calculation sheet "Annexure B", to SCN, should not be charged and recovered from them under the proviso to section 78 of the Finance Act 1994. During the investigation the assessee has paid interest of Rs.9,397/- under GTA and Security Services and the same should not be appropriated against the above demand ;

(vi) Penalty under section 78 of the Finance Act 1994 as amended should not be imposed upon them for non-payment of service tax by willfully suppressing the facts from the department with intent to evade the payment of service tax;

19. Shri Rohit K. Patel, Director of M/s. Galaxy Avenue Private Limited, situated at F/14, Galaxy Complex, opp. Galaxy Cinema, Naroda, Ahmedabad-382330 was also called upon to show cause to the Additional Commissioner of erstwhile service Tax having office situated at 1st Floor, Central Excise Bhavan, Panjra Pole, Opp. Govt. Polytechnic, Ambawadi, Ahmedabad - 380 015 as to why;

(i) Personal penalty should not be imposed upon Shri Rohit K. Patel, Director of of M/s. Galaxy Avenue Private Limited under Section 78A of the Finance Act, 1994.

20. However, in pursuance of Notification No. 12/2017 C.Ex (NT) to Notification No. 14/2017-C.Ex (NT) all dated 09.06.2017 issued by the CBEC, the said SCN is to be adjudicated by an Officer in the rank of Additional/Joint Commissioner of Central Goods and Service Tax & C.Excise of Ahmedabad-North Commissionerate and accordingly a corrigendum dated 1.8.2017 is issued to that effect.

Defence reply.

21. Assessee vide letter dated 17/5/2017, *inter alia*, stated that they are engaged in development of construction projects and duly registered with the service tax department since 2008 and paying service tax and filing their returns; that they have constructed various construction schemes; that as property in goods (like steel and cement) also passes during the execution of works, they have classified their services as a Works Contract Services as provided under Section 65B(54) of the Finance Act, 1994 and paying service tax under the category of works contract; that they are also liable to pay local sales tax (Gujarat VAT) on such activity and also paying VAT on it.

22. They further submitted that on all bookings, for which, entire booking amount was received after issuance of completion certificate by competent authority, they are not paying any service tax; that Preventive department started enquiry against them during October, 2011 but show cause notice is issued only on 06/02/2017 i.e. after around 5 and half years.

23. It is further stated that Construction activity is a declared service under clause (b) of the Section 66E and works contract service is a declared service under clause (h) of the said section; that Preventive department had opinion that units sold post completion certificate are excluded from levy only under clause (b) of the Section 66E and not under the Works Contract Service which is specified as declared service under clause (h) of the Section 66E of the Finance Act, 1994 and hence, as they are paying service tax under Works Contract Service, they can't avail benefit of the exclusion provided for the construction service and they had opinion that they shall pay service tax and Show Cause Notice (SCN) dated 06/02/2017 is issued.

24. However, the assessee contended that such interpretation of law is absurd and without application of mind by saying that construction is part of works contract as per Section 65B(54); that from the definition given under Section 65B(54) it is crystal clear that "construction" services are also included in the works contract and thus, "Construction" and "Works Contract" are not mutually exclusive services, but a "Construction" contract can be a works contract; that thus, construction is part of works contract and provisions, including exclusion for post completion certificate sale, as provided under Section 66E(b), are also applicable to the works contract if such works contract is for construction of immovable property; that thus, interpretation of law by preventive department that sale of constructed units after issuance of completion certificate is also subject to service tax, merely because assessee is paying service tax under works contract, is absurd interpretation and without referring to actual provisions of the law.

25. They further stated that sale of property after completion is not subject to VAT and not a works contract; that from the definition of the works contract, as provided under Section 65B(54) of the Finance Act, 1994, it is crystal clear that any contract can be considered as Works Contract only if transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods; that once, the construction of property is completed and there is no agreement to sale before that date, there is no deemed sale of goods involved; that if such property is sold after completion, such transaction is merely a transfer of title in immovable property.

26. They further submitted that transfer of title in immovable property is not subject to local sales tax as there is no sale of goods is involved and as such transaction is not subject to local vat, such transaction is not covered under the Works Contract as defined under Section 65B(54) and question of payment of service tax thereon doesn't arise at all that Gujarat VAT Department has issued a FAQs regarding applicability Amnesty Scheme to builders and civil contractors. Para 2 of such FAQs clarifies applicability of Gujarat VAT on sale of constructed property where in no amount is accepted before issuance of completion certificate which categorically clarifies that such transactions is to be considered as sale of immovable property i.e. it is not subject to Gujarat VAT; that, further, in the statement of director Shri Rohit Patel dated 30/03/2017, at Answer 12 (page number 9 of SCN), it is categorically stated that they do not pay VAT on income received after BU Permission (Booked after BU only). Thus, they stated that, non-payment of VAT on such transaction is undisputed fact. It is further stated by them that from the above it is crystal clear that they are not liable to pay Gujarat VAT on such transactions and in turn it is not covered under the Works Contract.

27. They further contended that sale of property after completion of construction not subject to indirect tax; that in the classic case of K. Raheja Development Corporation Versus State Of Karnataka [2006 (3) S.T.R. 337 (S.C.)], Hon'ble Supreme Court observed that if the agreement is entered into after the flat or unit is already constructed, then there would be no works contract; but so long as the agreement is entered into before the construction is complete it would be a works contract. They also relied upon the case law in the case of Larsen & Toubro Ltd. Versus State Of Karnataka [2014 (34) S.T.R. 481 (S.C.)], wherein it is held that at the time of construction and until the construction was completed, there was no contract for construction of the building with the flat purchaser, the goods used in the construction cannot be deemed to have been sold by the builder since at that time there is no purchaser; that the building is intended for sale ultimately after construction does not make any difference.

28. They further argued that from the above judgments, it is crystal clear that once the immovable property gets constructed and no booking is accepted before that date, such transactions are not a works contract at all and not subject to indirect tax.

29. They continued their contentions by stating that as there is no deemed sale of goods, such transactions are not subject to tax as sale of goods and hence not covered under works contract at all; that, thus, there is no liability to pay service tax on sale of constructed units where entire amount is accepted after completion of the construction and this will be irrespective of the category of the service under which an assessee has opted to pay service tax.

30. They further stated that transfer of immovable property not subject to service tax; that when construction of immovable property is completed and there is no agreement to sale at that time or no money is accepted against that immovable property, such transaction is "merely" a transfer of title in immovable property and specifically excluded from the definition of "service" as provided under Section 65B(44) of the Act and question of levy of service tax doesn't arise at all; that if interpretation adopted by the preventive department is accepted, it will result in absurd interpretation that each and every transfer of immovable property, may be for the first time or subsequent or resale thereof, is covered under Works Contract Service and this is definitely not the intention of the law; that all the services provided by the developer/builder for such immovable property are services provided by the developer to the self and not subject to service tax.

31. On the point of limitation they stated that no suppression of facts and question of interpretation is involved in the case and larger period of limitation cannot be invoked in the case; that at the 2nd paragraph of the SCN itself it is written that inquiry was started by the Preventive Department on October, 2011, however, SCN has been issued on February, 2017 i.e. after around five years from the starting of the inquiry by the department which Shows that department itself was confused about the taxability of such transactions; that when learned officers are at doubt, a layman can't be expected to interpret the law and question of suppression can't be there. They further stated that they filed their return and made payment of service tax; that they have also timely provided all information and documents as required by the Preventive Department, Audit Department and Range offices; that they have also paid service tax short paid as directed by the preventive department along with interest which shows

that they had co-operated with the department and not suppressed anything from the department.

32. They further stated that their records for the period 2007-08 to 2010-11 were audited by service tax audit party during May and October, 2012; however no formal audit report was issued to them; that through RTI, they had received copies of minutes of the meeting of the department wherein all issues raised by the audit party were discussed and the audit party did not raise any objection regarding non-payment of service tax on post completion certificate bookings and thus they argued that they had not suppressed anything and even department, at least from October, 2012 was in knowledge that they were not paying service tax on such transactions and hence question of suppression does not arise. They also provided a copy of said minutes.

33. They then stated that taxability of the construction service is also question of interpretation; that CBEC has also issued number of clarifications and number of cases are reached upto the Supreme Court; that even through Seventh Schedule to the Finance Act, 2017, works contract services are put at par with construction services which shows that issue involved may be of interpretation and in such case extended period should not be invoked.

34. They further stated that in absence of liability to pay service tax, question of payment of interest doesn't arise.

35. In respect of proposal to impose penalty on them they stated that there is no suppression and in absence of it, penalty under section 78 should not be imposed; that further, post completion certificate sale of constructed unit is merely transfer of title in immovable property and they are having bona fide belief that no service tax is required to be paid thereon and no penalties should be imposed.

36. They further stated that amount of Rs. 2992 and Rs. 59652 demanded in SCN is already paid before issuance of SCN along with due interest and penalty @15% as provided under second proviso to Section 78(1) of the Finance Act, 1994 and in terms of the that provision, on payment of penalty @15%, proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded; that as they have already paid that amount along with interest and penalty of 15%, they requested to conclude the proceedings.

37. They stated that SCN has been also issued on Director Shri Rohit Patel and it is proposed to impose personal penalty as provided under Section 78A of the Finance Act, 1994; as the company's reply is signed by Shri Rohit Patel, the same reply shall be considered for the SCN issued to him also and representation made herein should be taken into account for him also; that SCN proposes to impose personal penalty under Section 78A however, in terms of the section 78A, penalty may be imposed only if there is any contraventions as stated in the Section 78A; that only charge against the company and director which can be covered under that is of evasion of service tax; that however, in terms of the section 78A, penalty may be imposed only if director was knowingly concerned with contravention; that first of all, as discussed in the foregoing paragraphs, there is no contravention of the provisions of the law; that further, director has acted accordingly to his bona fide belief and no penalty should be imposed on him, particularly, where question of interpretation is involved; that further, there is not an iota

of evidence which proves that he has acted to evade the service tax or done anything positively to evade the service tax. In such situation, they argued that, no penalty should be imposed on him. They requested for providing an opportunity for hearing them.

Personal Hearing:

38. Hearing took place on 22.09.2017 which was attended by Shri. Punit Prajapathi, Chartered Accountant on behalf of M/s. Galaxy Avenue Private Limited and Shri. Rohit K Patel, Director. During the course of hearing Shri. Punit Prajapathi reiterated the contents of the earlier written submissions dated 17.05.2017, submitted on 26.5.2017. He then requested to drop the show cause notice.

38.1 The assessee, vide letter dated 27/10/2017, submitted some clarifications on the matter of late filing of ST-3 returns and payment of late fee. They submitted that ST-3 returns for the period April, 2011 to September, 2011 and October, 2011 to March, 2012 were originally filed on 04.01.2012 and 24.04.2012 respectively i.e. within the specified time limit, and in the SCN date of filing of revised returns was mentioned. They also provided copy of these returns with the letter. They further stated that as original returns were filed within due date, question of late fee does not arise. They further clarified that for the returns filed during 2012-13, only return pertaining to April to June, 2012 was delayed by 144 days and against this delay they already paid late fee of Rs. 20,000/ which is reflected in the return. Copy of these returns also enclosed with their letter. In respect of returns filed for the year 2013-14, they stated that both returns were delayed and against the delay in filing these returns, they paid late fee of Rs. 20,000/ each which was reflected in the returns. Copy of these returns also enclosed with their letter. For the returns filed during 2014-15 and 2015-16, they stated that it seems that they had not paid the late fees.

Discussions and Findings:

39. I have carefully gone through the show cause notice and written submissions made by the assessee vide their letter dated 17.5.2017. Also given due consideration to the submissions made by their authorized representative during the course of hearing.

40. The inquiry against the assessee started during October, 2011 by the Preventive branch of the erstwhile service tax department is found to have been culminated in issuing of the show cause notice dated 6/2/2017 which is before me for a decision.

41. The assessee was registered with the Service Tax for providing of taxable services under the category of (1) works contract service (2) construction service other than residential complex service including commercial/industrial building or civil structures (3) transport of goods by road/goods transport agency.

42. On verification of the reconciliation of data shown in their documents like balance sheets, ledgers and data declared in their ST-3 returns for the period 2011-12 to 2015-16, Preventive officers unearthed outstanding service tax liability, total amounting to Rs. 1,32,31,471/, on the part of the assessee in the following category of services provided or received by them during the said period.

(i) Service tax of Rs. 2,992/ towards the Goods Transport Agency service

- (ii) Service tax of Rs. 59,652/ towards security service and
- (iii) Service tax of Rs. 1,31,68,827/ towards works contract service.

43. It is seen from the show cause notice that although the assessee was in agreement with the findings of the preventive officers in respect of the tax liability of Rs. 2,992/ and Rs. 59,652/ and accordingly, the said amount of tax, totaling to Rs. 62,644/, was paid along with interest amounting to Rs. 51,249/ and 15% penalty on the tax amount, Rs. 9,397/ vide challans, they did not agree with the service tax liability of Rs. 1,31,68,827/ under works contract service. Hence a dispute arisen between the department and the assessee as to whether service tax is leviable on the said works contract service or otherwise. To demand and recover the said service tax amount from the assessee the current proceedings are initiated by issuing the present show cause notice.

44. Apart from demanding the service tax amount of Rs. 1,32,31,471/ under the proviso to Section 73(1) read with Section 68 of the Finance Act, 1994, along with interest under Section 75 of the Finance Act, 1994, the show cause notice also propose to impose penalty on the assessee under Section 77 and Section 78 of the Finance Act, 1994 for the alleged lapse on their part to file the ST-3 returns within stipulated time and for non-payment of above said service tax amount by way of willfully suppressing the facts from the department. Penalty under Section 78A of the Finance Act, 1994 upon Shri Rohit K Patel, Director of M/s. Galaxy Avenue Private Limited, a co-noticee, is also proposed in this notice.

45. Thus, the moot point for consideration in the present case is as to whether the service tax amount of Rs. 1,31,68,827/ which was pointed out by the preventive team on the basis of the reconciliation of the income data shown in their books of accounts and in their ST-3 returns for the period 2011-12 to 2015-16, is legally payable by the assessee or otherwise. As per the said reconciliation sheet worked out by the investigative officers, it is seen that ST-3 returns filed during the period 2011-12 to 2015-16 shown a total amount of income of Rs. 17,76,16,035/ under the category of Works Contract Service whereas their Books of Accounts shown an income of Rs. 28,66,52,133/ leaving an excess income amount of Rs. 10,90,36,098/ in their Books of Accounts on which payment of service tax, amounting to Rs. 1,31,68,827/ under the category of works contract service, is alleged to have been escaped. It is seen from the notice that the sole reason for the difference in the taxable income shown in their books of accounts and ST 3 returns filed during the said period is due to the dispute in respect of the taxability of the income amount they received against the flats sold after issuance/receipt of BU permission.

46. It is seen from records that the assessee had developed various residential/commercial projects in their own land, collected advances for booking of the units in these projects from customers and 40% taxable value on which service tax was paid under the category of 'works contract service'. On the taxable value of subsequent/balance payment made in respect of such advance amount received also they discharged service tax under the category of 'works contract service'. The assessee had also paid VAT on work contract service. These facts are undisputed. Dispute is only in the matter of payment of service tax on the service tax liability on the income of unsold flats received by them after getting BU permission.

47. It would be seen from above that the dispute in the case is limited to the point as to whether the amount collected from buyers against the flats sold after issuance/receipt of the BU permission is taxable under Service Tax law or otherwise. Notice itself is found to have accepted that the entire consideration received after issuance of completion certificate by the competent authority is not leviable to service tax but this exemption/facility is available only to the service providers of construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly. In the present case, the assessee is paying service tax under Works Contract Service. As per the notice, exemption from payment of service tax on the income of unsold flats after BU permission is not available to the assessee as they providing service under the category of Works Contract Service. Notice allege that there was no provision in 'works contract service' that service tax is not to be paid on income after BU permission and the assessee had taken the benefit of Section 66E(b) of the Finance Act, 1994 which covers the declared service of construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer.

48. Assessee is trying to rebut this issue by pointing out that it is evident from the definition of works contract as given under Section 65B (54) of the Finance Act, 1994 that 'construction' services are also included in the works contract and thus 'construction' and 'works contract' are not mutually exclusive services, but a 'construction' contract can be a works contract; that thus construction is part of works contract and provisions, including exclusion for post completion certificate sale, as provided under Section 66E(b) are also applicable to the works contract if such works contract is for construction of immovable property. Their another contention is that as per the definition of 'works contract' as provided under Section 65B(54) of the Finance Act, 1994, any contract can be considered as works contract only if transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods; that they did not pay VAT on income received after BU permission and such transactions are not covered under the works contract and are not subject to service tax.

49. At this stage, it would be relevant to examine the statutory provisions of works contract service. Period involved in the case is from April, 2011 to March, 2016. Period upto 1.7.2012 covers the pre-negative list regime when "Works contract", as per erstwhile section 65(105)(zzzza), "Taxable Service" means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams and as per Explanation under this sub-clause; a 'works contract' means a contract wherein,- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and (ii) such contract is for the purposes of carrying out,— (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or (c) construction of a new residential complex or a part thereof; or (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to

(b) and (c); or (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects.

50. As per Section 65B(54), inserted with effect from 1.7.2012 in the Finance Act, 1994, 'works contract' means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property.

51. Erstwhile Section 66E of the Finance Act, 1994 was enacted pursuant to the introduction of the negative list regime with effect from 1.7.2012; wherein nine services have been specified as 'declared services'. As per 66E(h) of the Finance Act, 1994, 'service portion in the execution of a works contract' is one of such declared services.

52. As per the Section 65B(44) of the Finance Act, 1994, 'service' means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-(a) an activity which constitutes merely (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or (iii) a transaction in money or actionable claim (b) a provision of service by an employee to the employer in the course of or in relation to his employment (c) fees taken in any Court of Tribunal established under any law for the time being in force.

53. Assessee is found to have argued that as per the definition of 'works contract' given under the Section 65B(54) of the Finance Act, 1994, 'construction' services are also included in the works contract and provisions given under the 'construction' services as per Section 66E(b) of the Finance Act, 1994 are also applicable to the works contract if such works contract is for construction of immovable property.

54. As per Section 66E(b) of the Finance Act, 1994, one of the declared services is the construction of a complex, building, civil structure or part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of Completion Certificate by the competent authority.

55. Notice propose to recover the service tax from the assessee leviable on the income of the unsold flats after issuance/obtaining of the BU permission by denying the claim of the assessee for getting the benefit of the exclusion provision given in the 'construction' services under Section 66E(b) of the Finance Act, 1994, that no service tax is liable on the entire consideration received after issuance of completion certificate by the competent authority by stating that the assessee cannot take the said benefit given under 'construction' service for the service they provided under 'works contract'.

56. It is seen from the written submissions of the assessee that they had been constructing various construction schemes and as property in goods like steel and cement also passes during the execution of works, they classified their services as a 'works contract services' as provided under Section 65B(54) of the Finance Act, 1994.

57. At this stage it is pertinent to see the history of the 'construction' service and 'works contract' service in Service Tax law. 'Commercial or industrial construction' service and 'construction of residential complex' service were introduced in Service Tax with effect from 10.09.2004 and 16.06.2005 respectively. Subsequently, 'works contracts' was introduced as a separate taxable service from 01.06.2007, which also covered construction of complex and commercial or industrial construction activities. It would be seen that prior to 01.06.2007, only pure service activities would be taxable and only from 01.06.2007, composite activities involving supply of goods and services, normally recognized as works contracts would become taxable. But, once works contracts is introduced as a separate taxable service, the construction activities undertaken by builders / contractors, which involves both supply and use of various materials like cement, steel, etc. as well as labour involved in construction would get classified only under works contract service. The taxable services of commercial or industrial construction covered under the then Section 65 (105) (zzq) and construction of complex service covered under the then Section 65 (105) (zzzh) would not cover activities in the nature of works contracts. This has also been conceded by the CBEC in its circular No. 128/10/2010 Dated 24.08.2010, in the following words.

58. As regards the classification, with effect from 1-6-2007 when the new service 'Works Contract service' was made effective, classification of aforesaid services would undergo a change in case of long term contracts even though part of the service was classified under the respective taxable service prior to 1-6-2007. This is because 'works contract' describes the nature of the activity more specifically and, therefore, as per the provisions of Section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date.

59. In the Finance Act, 2010, an Explanation has been added w.e.f. 1-7-2010, to definition of commercial or industrial construction and construction of residential complex, as follows –

'Explanation.' For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer'

Similar explanation is added in case of commercial or industrial construction service, where in place of word 'complex', the words used are 'construction of a new building'.

It is worthwhile to note that scope of the said explanation had been made only in respect of commercial or industrial construction and construction of residential complex service, leaving works contract service unaffected by the change.

60. The effect of the change is that the service tax will not apply only when a builder sells a ready flat or shop after Building completion certificate is obtained from local authority and entire consideration is obtained only after building completion certificate of competent authority is obtained. In all other cases, the builder will be liable to pay the service tax.

61. Thus, the builder will be liable to pay service tax, except in case of selling of flats or shops keeps after obtaining building completion certificate from the competent authority and entire consideration is obtained only after building completion certificate of competent authority is obtained. However, considering that the said explanation is inserted only under the service of commercial or industrial construction and construction of residential complex, I do not think effect of the same will not apply if the contract is covered under works contract service i.e. where Vat/Sales tax is payable on the contract.

62. Moreover, in para 2.6.2 of Education Guide on taxation services of Board published on 20.06.2012 it is stated by giving an example that a builder carrying out an activity for a client wherein a flat is constructed by the builder for the client for which payments are received in installments and on completion of the construction title in the flat is transferred to the client, involves two elements namely provision of construction service and transfer of title in immovable property. The two activities are discernibly separate.

63. The above example displays the intention of the legislature that the Central Government does not treat construction of building intended for sale to prospective buyers as a works contract but a separately declared service. Hence, the provision under the 'construction' service, as per Section 66E(b) of the Finance Act, 1994, that service tax was not liable to be paid on the cases where the entire consideration is received after issuance of completion certificate by the competent authority is applied only to the services coming under 'construction' category and not to the works contract service.

64. Coming to the next argument of the assessee that sale of property after completion is not subject to VAT and not a works contract, it is seen that as per Section 65B(54) of the Finance Act, 1994 any contract is to be considered as works contract only if transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property.

65. It is seen that Shri Rohit Patel in his statement recorded under Section 14 of the Central Excise Act, 1944 deposed before the investigating officers that his company, M/s. Galaxy Avenue, did not pay VAT on income received after BU permission (booked after BU only) as per VAT rules. This submission is not found to have been contested in the subject notice and hence it is undisputed fact that the assessee did not pay VAT on the income amount received after BU permission for the flats. Further, it is also undisputed that the flats are sold by the assessee to buyers after the BU permission (Building use permission) is obtained from the competent authority. The Supreme Court's larger bench in the case of Larsen and Toubro v/s State of Karnataka & Another (Civil Appeal No. 8672 of 2013), in September 2013, as reported in 2014(34) STR.481 (SC), held that any agreement entered into by the builder/developer before completion of construction amounts to works contract and is, hence, liable to VAT. In the case before me, nothing on records to suggest that there was any agreement made by the assessee with the buyers of flats before completion of construction. In fact, the notice itself says that the flats are sold after obtaining BU permission. It thus would be seen that the transactions covered

in the instant case, i.e. income received after the BU permission obtained/issued in respect of flats, do not cover under the purview of 'works contract' service.

66. Another contention of the assessee to rebut the allegation of evasion of service tax on the income of unsold flats received after BU permission, made in the notice, is that when construction of immovable property is completed and there is no agreement to sale at that time or no money is accepted against that Works Contract of immovable property, such transaction is merely a transfer of title in immovable property and specifically excluded from the definition of 'service' as provided under section 65B(44) of the Finance Act, 1994. Works contract is a composite contract for sale of goods and sale of services. In such a contract, sales tax was levied on the value of goods sold, based on the state VAT Act and service tax was levied on the service portion. Transfer of property in goods while execution of a works contract would mean sale of goods while rendering of services under a works contract. If an agreement was made to buy a house before it's construction is completed, then it is a works contract as the contract involves sale of materials as well as sale of services. If the buyer purchases a readymade house, it is not a works contract rather it is a single sale transaction outside the scope of service tax for the simple reason that at the time of agreement or sale house was already constructed and no type of service was involved in that transaction.

67. It would be pertinent to see that as per the Section 65B(44) of the Finance Act, 1994, 'service' means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-(a) an activity which constitutes merely (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or (iii) a transaction in money or actionable claim (b) a provision of service by an employee to the employer in the course of or in relation to his employment (c) fees taken in any Court of Tribunal established under any law for the time being in force.

68. It thus would be concluded that no element of 'service' was in existence in the instant case when the flats were sold to buyers after obtaining/issuing of the concerned BU permission. In a situation where no service was provided or received, question of levying of service tax does not arise at all.

69. Further CBEC vide para No. 2.6.3. of CBEC Education Guide by quoting the order of Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Limited Vs. Union of India (2006(2)STR.161(SC) clarified, among other points, that in case of works contracts and 'service wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as part of the service' the 'dominant nature test' does not apply and service portion is taxable as a 'service' which has also been declared as a service under section 66E of the Act and this principles would, mutatis mutandis, apply to composite transactions involving an element of transfer of title in immovable property or transaction in money or an actionable claim. Thus, only service portion in the execution of a works contract, as per Section 66E(h) of the Act, is liable for service tax. In the instant case, no element of any type of service was present and hence out of the purview of the declared service as mentioned in section 66E(h) of the Act.

70. It is thus to conclude that although the provision under the 'construction service' to the effect that no service tax liability on construction of a complex, building etc where the entire consideration is received after issuance of completion certificate by the competent authority, is not applied to the 'works contract service' considering that the transaction covered in the present case was not coming under the category of any type of 'service' as defined under Section 65(44) of the Finance Act, 1944 and consequently also not under the 'works contract service' under Section 66E(h) of the Act, the assessee is not found to have made any short or non payment of service tax on the matter.

71. It is worth to point out here that no allegation was in the instant notice or on records that the assessee received any consideration before the BU permission in respect of the unsold flats was received from any prospective buyers. In absence of such any allegation or any evidence to substantiate such point, it is to conclude that the assessee was in receipt of the entire income of unsold flats only after the Building Use permission issued. It is the end of the service in a works contract service when the completion certificate of the building is issued by the competent authority. Hence in the case before me, no service was found to have been provided by the assessee and accordingly no service tax liability is found on the part of the assessee on this aspect.

72. Since the proposal for demand and recovery of the service tax on the income of unsold flats after issuance of Building Use permission is not sustainable, the proposal of interest and penalty on the said matter under Section 75 and Section 78 of the erstwhile Finance Act, 1994 respectively does not survive.

73. Similarly, the main allegation of service tax evasion by M/s. Galaxy Avenue Private Limited is not established, proposal for penalizing Shri Rohit Patel, Director of the company under Section 78A of the Finance Act, 1944 is also not sustainable.

74. Another proposal made in the notice is that demand for short paid service tax on the service of Goods Transport Agency service and on security service on reverse charge mechanism is to be confirmed with interest. In the notice itself it is stated that the short paid service tax amounting to Rs. 2992/- in respect of Goods Transport Agency Service and Rs. 59,652/- towards security service was paid along with interest amount of Rs. 51,249/- and penalty of Rs. 9,397/- during investigation stage. Notice does not say any further liability on the part of the assessee in this matter on account of tax, however as per the Annexure B of the show cause notice, interest payable was Rs.59,191/- out of which an amount of Rs.51,248/- was paid by them leaving an amount of Rs.7,943/- as unpaid. This fact is not contested by the assessee in their written or oral submissions. The proposal made in the notice to recover the service tax with interest and penalty on this matter is also not contested by the assessee either through written submissions or during the course of hearing. The service tax liability along with interest and reduced penalty at the rate of fifteen per cent was paid by the assessee at the stage of investigation; but considering their liability towards the interest on the service tax amount was not fully discharged, benefit of reduced penalty at the reduced rate of fifteen percent, as per Section 78 (1) of the Finance Act, 1994, cannot be provided to them. It is thus found that assessee has not fully discharged their liability towards the penalty on the matter.

75. Another proposal of the subject notice was the penal action under Section 77 of the Finance Act, 1944 against the assessee on account of their failure to file the ST-3 returns during the period April, 2011 to March, 2016 within the stipulated time. It is seen from the notice that during the period April, 2011 to March, 2016 where total 11 returns were to be filed, and the notice allege that during this period, 09 returns were filed late by them. In this matter, the assessee vide letter dated 27/10/2017 made certain clarifications on the matter. The assessee is found to have contested that both the returns filed during 2011-12, were originally filed on 04/01/2012 and on 25/04/2012 respectively and the date of revised returns filed was shown in the SCN. From the copy of these returns provided by the assessee along with the said letter, which are placed on records, it is seen that both the returns pertaining to the period April to September, 2011 and October to March, 2012 were originally filed on 4/1/2012 and 25/4/2012 respectively. As per the SCN due date for filing these returns was 20.01.2012 and 25.4.2012 respectively. Thus it is seen that the said returns for the period 2011-12 were filed within the specified time limit. Out of three returns filed during 2012-13, only one return, pertaining to the period April to June, 2012, was filed late. The assessee had clarified that against this delay they already paid the late fee of Rs. 20,000/ which was reflected in the return itself. On going through the copy of this return, which was provided by the assessee, it is seen that payment of an amount of Rs. 20,000/ as penalty was shown in this return and the copy of corresponding e-challan dated 12.4.2013 for Rs.20,000/ was also provided along with this return. Hence, it is seen that their mandatory penal liability towards the late filing of ST-3 return for the year 2012-13, as per Section 70 of the Finance Act, 1994, is discharged by them. In these cases also, from the copy of the returns and corresponding e-challan it is seen that the late fee of Rs. 20,000/ in each case was paid by them. Thus, with the payment of the said amount in each case, the mandatory penal provision under Section 70 of the Finance Act, 1994 is already fulfilled by the assessee. In respect of the late filing of returns filed during 2014-15 & 2015-16, the assessee is found to have stated that they had not paid late fees in these cases. The allegation of late filing of returns during the period 2014-15 & 2015-16, made in the SCN, is not contested by the assessee. It is also seen that the mandatory penal liability as per Section 70 of the Finance Act, 1994 is also not discharged by them. Thus the assessee is required to pay the late fees in respect of late filing of ST-3 returns for the period April, 2014 to September, 2014, October, 2014 to March, 2015, April, 2015 to September, 2015 and October, 2015 to March, 2016, under the provisions of Section 70 of the Finance Act, 1994 read with Rule 7C of the Finance Act, 1994. Section 70 of the Finance Act, 1994 provides that every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of C.Excise, a return in such form and in such manner and at such frequency and with such late fee not exceeding twenty thousand rupees for delayed furnishing of return, as may be furnished. Rule 7 of the erstwhile Service Tax Rules, 1994, prescribes the manner of filing of returns and also mandates that such return was to be filed by the specified date. Similarly, Rule 7C of the erstwhile Service Tax Rules, 1994, prescribed the quantum of amount to be paid in respect of late filing of return according to the number of days of delay made. In the instant case, it is seen that late fee in the case of filing of ST-3 return after the specified date, except the returns pertaining to 2014-15 & 2015-16, as per Section 70 of the Finance Act, 1994, was already paid by them. The specified late fees in respect of four returns pertaining to 2014-15 & 2015-16, as per Section 70 of the Act read with Rule 7C of the Service Tax Rules, 1994, is required to be recovered from the assessee. Out of the seven ST-3 returns filed late, in the

case of three returns, they already deposited late fee of Rs. 20,000/ each (total Rs. 60,000) as per Section 70 of the Finance Act, 1994 and in the remaining four cases, they are required to pay the late fees as per Section 70 of the Act, 1994 read with Rule 7C of the Service Tax Rules, 1994. Rule 7C provides for payment of an amount of five hundred rupees against the delay in filing of return of fifteen days from the prescribed date for submission of such return, an amount of one thousand rupees in the case of delay of beyond fifteen days but not later than thirty days from the date prescribed for submission of such return and if the delay is beyond thirty days from the date prescribed for submission of such return, an amount of one thousand rupees plus One Hundred Rupees for every day from the thirty first day till the date of furnishing the said return is to be paid.

76. In the instant case, notice propose to penalize the assessee under Section 77 of the Finance Act, 1994 for the alleged failure of self assessment of the service tax properly on the services provided/received and for the late filing of ST3 returns for the period 2011-12 to 2015-16. Failure in the proper self assessment in providing/receiving the service of Goods Transport Agency and Security service is established and service tax on which with interest and penalty is also paid by them during investigation. However, the alleged evasion of service tax under the category of works contract service is not proved. For the failure of proper payment of service tax on GTA and Security service within the specified time limit, the assessee had already paid some portion of penalty at the reduced rate as per the provisions of Section 78 of the Finance Act, 1994 and the remaining amount of penalty is separately required to be paid by them under the provisions of Section 78 of the Finance Act, 1994. Hence, for the said failure, no additional penalty is to be imposed on them under Section 77 of the Act. Moreover, Section 77 of the Act provides for penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere. For the failure of payment of service tax on GTA and security service, penal action under Section 78 of the Act is already taken and hence provisions of Section 77 of the Act cannot be applicable for such lapse on the part of the assessee. Further, for the lapse of filing of ST-3 returns within specified time limit, with the payment of amount of Rs. 20,000/ in each case, mandatory penal liability in the case of late filing of three returns, as per Section 70 of the Act, is already fulfilled. In the remaining four cases of late filing of ST-3 returns the assessee is to be ordered to pay the amount of late fee according to the provisions contained in Section 70 of the Act read with Rule 7C of the Service Tax Rules, 1994. Hence, provisions of Section 77 are not applicable in this situation also. Further, as per Rule 7C of the Service Tax Rules, 1994 provided that where the assessee has paid the amount as prescribed under under this rule for late submission of return the proceedings if any in respect of such delayed submission of return shall be deemed to be concluded. Hence, it is to conclude that provision of Section 77 of the Act can not be applied in this case.

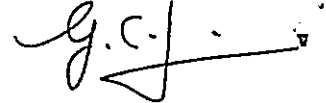
77. Accordingly, I pass the following order.

ORDER

1. I drop the demand made to recover the service tax amount of Rs. 1,31,68,827/ (Rs. One crore thirty one lakh sixty eight thousand eight hundred and twenty seven only) from M/s. Galaxy Avenue Private Limited, F/14, Galaxy Complex, opp. Galaxy Cinema, Naroda, Ahmedabad-382330 under Section 73(2) of the Finance Act, 1944.

2. I confirm the demand made to recover the service tax amounting to Rs. 2,992/ (Rs. Two thousand nine hundred and ninety two only) and Rs. 59,652/ (Rs. Fifty nine thousand six hundred and fifty two only) towards the Goods Transport Service and Security service respectively M/s. Galaxy Avenue Private Limited, F/14, Galaxy Complex, opp. Galaxy Cinema, Naroda, Ahmedabad-382330 under the proviso to Section 73(2) read with section 68 of the Finance Act, 1944.
3. Since the total service tax amounting to Rs. 62,644/ (Rs. Sixty two thousand six hundred and forty four only) was paid during investigation, the said payment is appropriated against the demand confirmed at Sl. No. 2 above.
4. Interest on the service tax liability mentioned at Sl.No.2 is to be charged at appropriate rate and recovered from them under Section 75 of the Finance Act, 1994 and accordingly the assessee has to pay interest of Rs.59,191/ (Rs. Fifty nine thousand one hundred and ninety one only), as worked out at Annexure 'B' of the Show cause notice.
5. Since an amount of Rs. 51,248/ (Rs. Fifty one thousand and two hundred and forty eight only) is paid by them against interest, the said payment is to be appropriated towards the interest liability at Sl. No.4.
6. I impose penalty of Rs. 62,644/ (Rs. Sixty two thousand six hundred and forty four only) upon the assessee under the proviso to Section 78 of the Finance Act, 1994. However, if the service tax with interest, ascertained at Sl.No. 3 & 4 above, is paid within a period of thirty days of receipt of this order, the penalty payable shall be twenty five per cent of the service tax so determined subject to paying the reduced penalty within thirty days of communication of the order.
7. Since an amount of Rs. 9,397/ (Rs. Nine thousand three hundred and ninety seven only) is paid by them, the said amount is appropriated towards the penalty amount mentioned at Sl No. 6
8. Since the demand for the service tax amount of Rs. 1,31,68,827/ is dropped, proposal to penalize them on the alleged service tax evasion under Section 78 of the Finance Act, 1944 and to charge interest on the said amount under Section 75 of the Finance Act, 1944 is also dropped.
9. The assessee is liable to pay the late fees for late filing of ST-3 returns during 2014-15 & 2015-16 as per the provisions contained in Section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994. However, I restrain from imposing penalty upon M/s. Galaxy Avenue Private Limited, F/14, Galaxy Complex, opp. Galaxy Cinema, Naroda, Ahmedabad under Section 77 of the Finance Act, 1994
10. I do not impose any penalty upon Shri. Rohit K. Patel, Director of upon M/s. Galaxy Avenue Private Limited, F/14, Galaxy Complex, opp. Galaxy Cinema, Naroda, Ahmedabad under Section 78A of the Finance Act, 1994

78. Proceedings under the above mentioned provisions are saved by Section 174 of the Central Goods and Service Act, 2017.



(G.C. Jain)

Joint Commissioner
Central Goods & Service Tax & C.Excise
Ahmedabad-North.

FNo. STC/4-45/O&A/Galaxy/Prev/2016-17

Dated 31.10.2017

To

M/s. Galaxy Avenue Private Limited,
F/14, Galaxy Complex,
opp. Galaxy Cinema, Naroda,
Ahmedabad-382330

Shri Rohit K. Patel,
Director of M/s. Galaxy Avenue Private Limited,
F/14, Galaxy Complex, opp. Galaxy Cinema,
Naroda, Ahmedabad-382330

Copy to:

1. The Commissioner, CGST & Central Excise, Ahmedabad-North. (Attn- RRA)
2. The Assistant Commissioner, CGST & Central Excise, Div-I, Ahmedabad-North.
3. The Superintendent, CGST & Central Excise, AR-IV, Div-I, Ahmedabad-North.
- ✓ 4. Guard File.