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

निबन्धित पावती डाक द्वरा/By R.P.A.D

DIN-20210364WT000000C86E

फा.सं./F.No. STC/15-74/OA/2018/Denovo

आदेश की तारीख़/Date of Order :- 31.03.2021

जारी करने की तारीख़/Date of Issue :- 31.03.2021

द्वारा पारित/Passed by:- मारुत त्रिपाठी / *Marut Tripathi*

संयुक्त आयुक्त / Joint *Commissioner*

मूल आदेश संख्या / Order-In-Original No. 68/JC/ MT /2020-21

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

This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरूद्ध 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 एस टी -४ (ST-4) में दाखिल कर सकता है। इस अपील पर रू. 5.00 (पांच 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. 5.00 only.

इस आदेश के विरुद्ध अपील करने के लिए आयुक्त (अपील) के समक्ष नियमानुसार पूर्व जमा के धनराशी का प्रमाण देना आवश्यक है ।

An appeal against this order shall lie before the Commissioner (Appeal) on giving proof of payment of pre deposit as per rules.

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या एस टी -४ (ST-4) 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 विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू .5) 00. पांच रूपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form एस टी -४ (ST-4) 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.5.00.

विषय:- कारण बताओ सूचना/ Proceeding initiated against Show Cause Notice No. CEA-II/ST/15-27/C-VI/ APXXVIII/ FAR-607/RP-02&08/16-17 dated 30.03.2017 issued to M/s. Satyam Developers Ltd, Satyam House, B/h Rajpath Club, S. G. Highway, Ahmedabad-380059.

Brief facts of the case:

M/s. Satyam Developers Ltd, Satyam House, B/h Rajpath Club, S. G. Highway, Ahmedabad-380059 (hereinafter referred to as "the assessee") were engaged in providing taxable service viz. Construction Services in respect of Commercial or industrial buildings and civil structures, Transport of goods by road and Construction of residential complex service falling under Section 65(105) (zzq), (zzp) and (zzzh) of the Finance Act, 1994. They were registered with the erstwhile Service tax department and were holding Service Tax Registration No. AAKCS9247CSD001 dated 02.03.2011. The assessee had availed the benefit of Notifications No.01/2006 dated 01.03.20016 and 26/2012 dated 20.06.2012 effective from 01.07.2012.

2. During the course of audit of the records of the assessee for the period 2012-13 & 2013-14, it was noticed that the assessee had availed Cenvat Credit of service tax paid on various Input services on the invoices issued by M/s Shree Krushna Construction and M/s Aahir Construction. During the scrutiny of Cenvat Credit invoices issued by M/s.Shree Krushna Construction and M/s Aahir Construction, it was observed that the invoices issued by the said service providers were not proper documents for taking Cenvat Credit in terms of Rule 9(1) of the Cenvat Credit Rules, 2004 read with Rule 4A(1) of the Service Tax Rules, 1994.

3. Perusal of the invoices issued by M/s Shree Krushna Construction and M/s Aahir Construction revealed that Service Tax Registration Numbers of both assesses were not mentioned in the invoices and invoices were not serially numbered hence Cenvat Credit availed by the assessee on such ineligible documents was not permissible.

4. During the period 2012-13 and 2013-14 the assessee had availed Cenvat Credit of Rs. 66,53,204/- on ineligible invoices in terms of Rule 9(1) of Cenvat Credit Rules, 2004 read with Rule 4A(1) of Service Tax Rules, 1994 as detailed below:-

Sr. No.	Name of the Input Service provider	RA Bill No.	Date	Value of service (Rs.)	Service Tax/ Cenvat credit involved (Rs.)	Total amount (Rs.)
1	M/s Shree Krushna	1	01.07.2012	6708747	829201	7537948
2	-do-	2	01.07.2012	988516	122181	1110697
3	-do-	3	01.07.2012	537289	66409	603698
4	-do-	4	30.07.2012	759510	93875	853385
5	-do-	5	06.08.2012	2678311	331039	3009350
6	-do-	6	08.08.2012	2082447	257390	2339837
7	-do-	7	08.09.2012	971876	120124	1092000
8	-do-	8	19.09.2012	1425821	176231	1602052
9	-do-	9	24.09.2012	2576796	318492	2895288
10	-do-	10	18.10.2012	1645178	203344	1848522
11	-do-	11	05.11.2012	4730108	584641	5314749
12	-do-	12	12.11.2012	1180136	145865	1326001
13	-do-	13	18.12.2012	1974214	244013	2218227
14	-do-	14	12.02.2013	2568530	317470	2886000
15	-do-	15	08.03.2013	2083892	257569	2341461

16	-do-	16	14.03.2013	4454215	550541	5004756
17	-do-	17	30.06.2013	2782794	343953	3126747
18	-do-	17A	30.06.2013	332439	40813	373252
19	-do-	18	30.09.2013	1334995	165005	1500000
20	M/s Aahir Construction	1	21.03.2013	2572388	317947	2890335
21	-do-	2	26.03.2013	987598	122067	1109665
22	-do-	3	30.09.2013	6674973	825027	7500000
23	-do-	4	31.12.2013	1779993	220007	2000000
Total				**53830766**	**6653204**	**60483970**

5. The assessee was issued a query memo by audit team on 25.05.2015 and 05/12/2016. They in their reply dated 16.12.2016 had supplied copy of service Tax Registration Number of M/s Shree Krushna construction and M/s Aahir Construction. On verification of the said documents it was found that both the input service providers were registered under construction services. However, from the reply it was also not clear that the service providers had paid service tax for the above invoices or not. Therefore, the Cenvat Credit availed on the above invoices appeared to be not admissible to the assessee.

6. Further, Notification No. 1/2006-S.T., dated 1.3.2006, interalia, provided that exemption from payment of Service tax for Commercial or industrial construction service (zzq) and Construction of complex (zzzh), amongst other services, was admissible subject to the condition that the Cenvat Credit of duty on inputs or capital goods or the Cenvat Credit of service tax on input services, used for providing such taxable service, had not been taken under the provisions of the Cenvat Credit Rules, 2004.

7. Further in terms of Notification No. 26/2012 ST dated 20.06.2012, which was effective from 01.07.2012, the condition for availing exemption from payment of Service Tax on the services viz. Construction of a complex, building, civil structure or a part thereof, was modified to read (i) Cenvat Credit on inputs used for providing the taxable service has not been taken under the provisions of the Cenvat Credit Rules, 2004 and (ii) The value of land is included in the amount charged from the service receiver. The relevant text of the said notification is as under:-

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

8. On plain reading of the above notifications it was observed that Cenvat Credit on input services and Capital Goods used for providing services of Construction of a complex, building, civil structure or a part thereof, could be availed only from 01.07.2012, if exemption in terms of the said notification is availed.

9. It was not in dispute that the assessee had availed exemption from payment of Service tax in terms of the aforesaid notifications dated 01.03.2006 and 20.06.2012. Prior to the issuance of notification dated 20.06.2012 effective from 01.07.2012, Cenvat credit of input service, Capital goods and inputs, used for providing the taxable service as mentioned above was not admissible to the assessee, as they had availed exemption from payment of Service Tax in terms notification dated 01.03.2006 above. However post 01.07.2012 the Cenvat Credit on input services and capital goods was available despite of their availing exemption from payment of Service tax under notification dated 20.06.2012 effective from 01.07.2012.

10. On verification of the invoices at serial number 1 to 3 of the table at para 3.1 above, said to have been issued on 01.07.2012, and the ledger of M/s Shree Krushna Construction of Ahmedabad, in the books of assessee for the period 01.04.2012 to 31.03.2014, it was noticed that the R.A. bills were shown to be issued on 01.07.2012 i.e. for completion of the services before 01.07.2012 (as without completion of service it is not possible to mention the work done and RA bills could not be issued) by the service provider and the payment of Rs. 90.00 lacs had also been made between 01.04.2012 to 26.06.2012 as against total amount of Rs. 92,52,341/- due vide the said Bills .

11. It was also seen from the above 3 invoices that the same were issued for various works such as Cellar Slab Block, Cellar wall, etc. work of which would have been performed over a period and completed prior to 01.07.2012, on which date the said R.A. bills were stated to be issued. Hence, also on this count the assessee was not eligible to take the Cenvat Credit for the above mentioned 3 invoices.

12. Further, in view of Rule 4A (1) of the Service Tax Rules ,1994, invoices are to be issued within thirty days from the date of completion of such taxable service or receipt of any payment towards the value of such taxable service, whichever is earlier, by the input service provider.

13. In view thereof, although the aforesaid 3 invoices were shown to be issued on 01.07.2012, they should have been actually issued much before 01.07.2012 in terms of Rule 4A(1) supra. Therefore in view of the fact that the assessee had already received the service and availed exemption prior to issuance of notification dated 20.06.2012 effective from 01.07.2012, they were not entitled for availing the credit in respect of these 3 invoices involving Rs.10,17,791/-.

14. On being pointed out the objection, the assessee disagreed with the objection and not paid/reversed the Cenvat Credit wrongly availed. The assessee contended vide their letter dated 01.06.2015 that they had taken the Cenvat Credit as per Rule 4(7) which reads as under:

Rule 4 Conditions for allowing CENVAT credit:

(7) The Cenvat Credit in respect of input service shall be allowed, on or after the day which payment is made of the value of input service and the Service Tax paid or payable as is indicated in invoice, bill or, as the case may be, challan referred to in rule 9 is received:"

15. The assessee had further stated that "Whereby above rule has been allowed the Cenvat Credit on the date of invoice received as per Rule-9, So there were no question of the wrong availment of the Cenvat Credit".

16. In terms of Boards instructions issued by the Directorate of Legal Affairs from F.No.1080/11/DLA/CCConference/2016 dated 08.07.2016, pre show cause consultation in the matter was held with the representative of the assessee on 01.03.2017 and they submitted their written submissions on 01.03.2017, interalia, reiterating their submissions referred to in paras herein before.

17. The reply of the assessee to the query memos issued, was not acceptable in as much as Rule 4(7) only laid down the condition as to when the Cenvat Credit can be availed and thereby implies that Cenvat credit could not be availed prior to making the payment of the value of input services. This did not imply that Credit can be availed in spite of inadmissibility of Credit prior to the specified date. Moreover, the assessee had made payment as mentioned above for the service provided in respect of above mentioned 3 invoices prior to 01.07.2012, as was clearly shown in their ledgers and without completion of service it was not possible to mention the work done by the service provider. Moreover in terms of proviso to Rule 3 of Point of Taxation Rules, 2011 enumerated above;

"In case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract which required the receiver of service to make any payment to service provider the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service. "

18. Therefore in respect of the aforementioned 3 invoices, the date of completion of service by the service provider of the assessee was prior to 01.07.2012, when the Cenvat credit was not admissible in terms of notification No. 1/2006 dated 01.03.2006.

19. Rule 14 of the Cenvat Credit Rules, 2004 stipulates that:

Rule 14 - Recovery of cenvat credit wrongly taken or erroneously refunded

"Where the cenvat credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of sections 11A and 11AB of the Excise Act or sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries."

20. 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 Central Excise, a return in such form and in such manner and at such frequency as may be prescribed. Rule 7 of the Service Tax Rules, 1994, prescribes that every assessee shall submit a half-yearly return in Form ST-3 or ST-3A as the case may be, along with a copy of the Form TR-6, in triplicate for the months covered in the half-yearly returns. Further sub-rule [2] thereto also provides that every assessee shall submit the half yearly return by the 25th of the month following the particular half-year. The assessee by availing and utilising the inadmissible credit for payment of service tax, had short paid the service tax to that extent. For this reason, they also appeared liable to penalty under Section 77(2) of the

Finance Act, 1994 for failure to assess their tax liability correctly and failure to file ST-3 returns with correct and full details.

21. The assessee by wrongly availing the Cenvat Credit inadmissible to them had contravened the provisions of Rule 4(7) and 9 of the Cenvat Credit Rules 2004 read with Rule 4A(1) of Service Tax Rules, 1994 and the exemption Notifications ibid and thereby had rendered themselves liable for penal action under the provisions of Rule 15 of the Cenvat Credit Rules, 2004 read with Section 76 & 78 of the Finance Act, 1994.

22. In view of the foregoing paras, it appeared that the said assessee had contravened the provisions of the Act and rules made there under as below:

(i) the provision of Section 68 of the said Act read with Rule 6 of the said Rules in as much as they have not discharged their service tax liability properly by the way of availing & utilizing the ineligible Cenvat Credit;

(ii) the provision of Section 70 of the Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994in as much as they had failed to file correct ST-3 Return;

(iii) the provision of Rule 4(7) read with 9(1) of the Cenvat Credit Rules, 2004 by way of wrongly availing ineligible Cenvat Credit and on ineligible documents/invoices.

23. It further appeared that the said assessee at no point of time disclosed the material facts to the department in any manner and evaded the payment of service tax by wrongly availing the ineligible input service credit as discussed above, which was not in accordance with the provisions of law. The assessee had also not declared about the wrong availment in their ST-3 Returns. Moreover in the present regime of liberalization, self-assessment and filing of ST-3 returns online, no documents- whatsoever were submitted by the assessee to the department and therefore the department would come to know about such wrong availment of Cenvat Credit resulting in short payment of service tax only during audit or preventive/other checks. Government in its wisdom had incorporated the provisions of Sub Rule 5 & 6 of Rule 9 of the Cenvat Credit Rules, 2004 to cast upon the burden of proof of admissibility of Cenvat credit on the manufacturer or output service provider taking such credit. Therefore, it appeared that the assessee had deliberately suppressed the material facts from the Department with an intention to evade payment of service tax. Hence, it appeared that this was a fit case for invoking the extended period of limitation of five years under the proviso to Section 73 (1) of the Finance Act, 1994 read with Rule 14 of Cenvat Credit Rules, 2004 to recover the Cenvat credit wrongly availed & utilised along with interest under Section 75 of the Finance Act, 1994 read with Rule 14 of Cenvat Credit Rules, 2004. In the case of Mahavir Plastics versus CCE Mumbai, 2010 (255) ELT 241, it had been held that if facts are gathered by department in subsequent investigation extended period can be invoked. In 2009 (23) STT 275, in case of Lalit Enterprises vs CST Chennai, it was held that extended period can be invoked when department comes to know of Service charges received by appellant on verification of his accounts. Therefore, in this case, all essential ingredients existed to invoke the extended period in terms of proviso to Section 73 (1) of the Finance Act, 1994.

24. Therefore, it appeared that Cenvat credit amounting to Rs.66,53,204/- wrongly availed and utilized, as described above, by the assessee was required to be reversed/recovered from them under

Rule 14 of the Cenvat Credit Rules, 2004 read with the proviso to Section 73(1) along with interest under Rule 14(ii) of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994. The act of contravention of the provisions of the Cenvat Credit Rules, 2004 read with Notifications ibid appeared to be punishable under the provisions of Section 78 of the Finance Act, 1994 read with Rule 15 (3) of the Cenvat Credit Rules, 2004. The assessee was also liable for penal action under Section 76 and 77 of the Finance Act, 1994.

25. The government had from the very beginning placed full trust on the assessee so far service tax is concerned and accordingly measures like Self-assessments etc., based on mutual trust and confidence were in place. Further, a taxable service provider/recipient was not required to maintain any statutory or separate records under the provisions of Service Tax Rules as considerable amount of trust is placed on the service provider/recipient and private records maintained by him for normal business purposes were accepted, practically for all the purpose of Service tax. All these operate on the basis of honesty of the service provider; therefore, the governing statutory provisions create an absolute liability when any provision was contravened or there was a breach of trust placed on the assessee. From the evidence, it appeared that the assessee had availed and utilized Cenvat Credit which was not admissible to them which was availed on incorrect invoices and service received prior to 01.07.2012 and thereby they had kept away themselves from payment of their correct tax liability. The deliberate efforts to suppress the correct facts and taking of Cenvat Credit which was otherwise not admissible to them is in utter disregard to the requirements of law and breach of trust deposed on them. Such outright act in defiance of law appeared to have rendered them liable for penal action as per the provisions of Rule 15 of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act 1994 for suppression of the facts and with intent to avail Cenvat Credit wrongly and thereby evaded the payment of service tax.

26. Therefore, a show cause notice No. CEA-II/ST/15-27/C-VI/APXXVIII/FAR-607/RP-02&08/16-17 dated 30.03.2017 was issued to M/s. Satyam Developers Limited asking them to show cause to the Additional/Joint Commissioner of erstwhile Service tax, Ahmedabad as to why-

(i) the amount of Rs.66,53,204/- (Rupees Sixty Six Lakhs Fifty Three Thousands Two Flundred Four only) of Cenvat Credit availed and utilized wrongly as discussed above should not be recovered from them under the proviso to Section 73(1) of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules 2004 by invoking extended period;

(ii) Interest at prescribed rate should not be demanded and recovered from them under Rule 14(ii) of Cenvat Credit Rules 2004 read with Section 75 of the Finance Act, 1994;

(iii) Penalty should not be imposed upon them under Rule 15(1) of Cenvat Credit Rules, 2004 read with Section 76 of the Finance Act, 1994 as amended as they have failed to pay Service Tax within prescribed time limits as per Section 68 of Finance Act, 1994 read with Rule 6 of Service tax;

(iv) Penalty should not be imposed under Section 77(2) of the Finance Act, 1994 for failure to self assess the tax liability correctly and failure to file ST-3 returns with correct and full details;

(v) Penalty should not be imposed upon them under Rule 15 (3) of Cenvat Credit Rules, 2004 read with Section78 of the Finance Act, 1994.

27. 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 show cause notice 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 28.07.2017 is issued to that effect.

28. After due process of personal hearing, the above show cause notice was adjudicated by the Joint Commissioner, CGST & Central Excise, Ahmedabad, vide Order-in-Original No.06/JC/2018/GCJ dated 09.02.2018 wherein he passed the following orders-

(i) Out of the total demand for the wrongly availed Cenvat Credit of Rs.66,53,204/, confirmed an amount of Rs. 50,58,161/- and ordered to recover the same from M/s. Satyam Developers Limited, under Section 73(2) of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004. Demand made for remaining Cenvat Credit dropped

ii).ordered to charge and recover interest at prescribed rate on the amount of demand confirmed at (i) above, under Rule 14(ii) of Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994.

iii).Did not impose any penalty under Rule 15(1) of Cenvat Credit Rules, 2004 & under Section 76 of the Finance Act, 1994.

iv).Imposed penalty of Rs.10,000/- upon M/s. Satyam Developers Limited, under Section 77(2) of the Finance Act, 1994.

v.)Imposed penalty of Rs. 25,29,081/- upon M/s. Satyam Developers Limited, under Rule 15(3) of Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994.

vi) Option for reduced penalty of 25% was office to the assessee in terms of Section 78 (1) (ii) of the Finance Act, 1994.

29. Above order was issued in terms of Section 174 of the Central Goods and Service Act, 2017.

30. Aggrieved with the aforesaid Order-in-original, the assessee filed appeal before Commissioner (Appeal), Central GST, Ahmedabad who vide Order-in-Appeal No.AHM-EXCUS-002-APP-30-18-19 dated 29.06.2018/ 17.07.2018 remanded back the case to the adjudicating authority and hence this order.

The relevant paras of the above order-in-appeal is reproduced below:-

"5.2. With regard to first issue, I find that credit taken in 2012-13 on the basis of invoices issued by two service providers has been denied because payment of service involved in the invoice to the government is not proved. For 2013-14, the adjudicating authority allowed the credit on the basis of chartered account's certification that service tax was remitted to the government account. Such a certification, however, is not there for the year 2012-13. A similar certificate for 2012-13 would have served the purpose, however, the appellant's unwillingness or inability to produce such a certificate raises doubts about payment of service tax by the service providers. The availment of Cenvat credit in such a situation cannot be held to be valid. I, therefore, consider it proper to remand the issue back to the adjudicating authority for causing necessary verification to establish that Service Tax involved has not been deposited by the service providers in the government account. It would also be prudent that Service Tax payments for the year 2013-14 which has been accepted on the basis of CA certificate, is also verified from the concerned Division".

"5.3.2. The point in time when the services were provided has to be determined in terms of POT Rules. As per rule 3 of POT Rules, the time when the invoice for the service provided or to be provided is issued would be the point of taxation (point in time when service shall be deemed to have been provided), however, where invoice is not issued within the time period specified in Rule 4A of the Service Tax Rules, 1994, the point of taxation would be the date of completion of provision of service. As per adjudicating authority, the provision of services was completed much before 01.07.2012, however, I observe that adjudicating authority's finding in this regard are not clear to prove that impugned three invoices were not issued in time. Therefore, this part of the matter needs to be remanded back for determination of point of taxation in terms of POT Rules. If the point of taxation falls in the period prior to 01.07.2012, the denial of Cenvat Credit on three invoices justified".

Personal Hearing:

31. Personal hearing in this case was fixed on 30.03.2020, 20.07.2020, 22.09.2020, 30.12.2020 and 01.02.2021. As per the oral request of the Consultant, the hearing was postponed to 12.02.2021. Shri Vipul Kandhar, CA appeared on behalf of the assessee on 12.02.2021. He stated this case being a remand case, they intended to produce documentary evidence in support of their claim next week. They requested to get it verified and then adjudicate the case on merits. They produced additional written submission dated 12.02.2021. They had nothing more to add. They stated that they will produce evidence on 18.02.2021.

32. In the written submission dated 12.02.2021, they stated that-

They referred to Rule 9 of the Cenvat Credit Rules, 2004 and Rule 4A(1) of the Service Tax Rules, 1994. They stated that the conditions of the said Rules have been met by them. They relied the following case laws:-

(i) 2016(42) STR 81 (Tri-Ahmd) in the CESTAT, WZB, Ahmedabad, in the case of Commissionioner C.Ex & Service Tax Vs Meghmani Organics Ltd.

(ii) 2014 (36) STR 445 (Tri-Del) in the case of BSNL Vs Commissioner of C.Ex, Lucknow.

(iii) 2011(23) STR 661 (Tri-Mumbai) in the case of Imagination Technologies India (P) Ltd Vs Commissioner of C.Ex, Pune-III .

(iv) 2017(47) STR 58 (Tri-Bang) in the case of Diya Systems (Management) Pvt.Ltd Vs Commissioner of C.Ex, Mangalore.

(v) 2016 (41) STR 80 (Tri-Mumbai) in the case of Toll (I) Logistics Pvt.Ltd Vs Commissioner of Central Excise, Pune-1.

(vi) 2015 (39) STR 670 (Tri-Mum) in the case of Shivraj Cable Network Vs Commissioner of Central Excise, Raigad.

They stated that Notification No.01/2006-ST dated 01.03.2006 provided that exemption from payment of Service Tax for Commercial or Industrial construction service (zzq) and Construction of Complex (zzzh) amongst other services was admissible subject to the condition that the Cenvat Credit of duty on inputs or capital goods or Cenvat Credit of service tax on input services, used for providing such taxable service, has not been taken under the provisions of Cenvat Credit Rules.

34. Similarly Notif.No.26/2012-ST dtd 20.06.2012 which was effective from 01.07.2012, the condition for availing exemption from payment of Service Tax on the above services viz. Construction of a complex, building, civil structure or a part thereof, was modified to read (i) Cenvat Credit on inputs used for providing the taxable service has not been taken under the provisions of the Cenvat Credit Rules, 2004 and (ii) the value of the land is included in the amount charged from the service receiver. If exemption in terms of the said notifications availed post 01.07.2012 the Cenvat Credit on input services and capital goods was available despite their availing exemption from payment of Service Tax under Notification dated 20.06.2012 effective from 01.07.2012. They stated that the Rule 3 of points of Taxation Rules, 2011 states that –

"in case of continues supply where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which required the receiver of service to make any payment to the service provider, the date of completion of each of such event as specified in the contract shall be deemed to be the date of completion of provision of service". They have rightly availed the Cenvat Credit.

35. They stated that the entire demand is time barred, penalty can not be imposed under Section 78 of the Finance Act, 1994 in the present case and relied Gujarat High Court decision in the case of Steel Cast Ltd reported in 2011 (21) STR 500 (Guj). They also stated that penalty under Section 76, 77 of the Finance Act, 1994 can not be imposed .and relied the following case laws-

i) Hindustan Steel Ltd Vs State of Orissa reported in AIR 1970 (SC)253.
ii) Kellner Pharmaceuticals Ltd Vs CCE reported in 1985 (20) ELT 80
iii) Pushpam Pharmaceuticals Company Vs CCE 1995 (78) ELT 401 (SC)
iv) CCE Vs Chemphar Drugs and Liniments 1989 (40) ELT 276 (SC).

36. They requested to drop the recovery of Cenvat Credit of Rs.66,53,204/- and also not to impose penalty under Section 76, 77(2) and 78 of the Finance Act, 1994. They also requested for a personal hearing before taking any decision in the matter.

Discussion and Findings:

37. I have carefully gone through the records of the case, written submission made by the assessee during the course of personal hearing, also gone through the direction given by the Hon'ble Commissioner(A), under which the case was remanded for fresh adjudication.

38. I find that the Hon'ble Commissioner(A), Central Tax, Ahmedabad, vide order No.AHM-EXCUS-002-APP-30-18-19 dated 29.11.2018/17.07.2018 has remanded the matter to the adjudicating authority for –

i) Causing verification to establish that service tax involved has not been deposited by the service providers in the Government account for the year 2012-13.

ii) For determination of point of taxation in terms of POT Rules, if the point of taxation falls in the period prior to 01.07.2012,

The Assistant Commissioner, Division-VI was asked to conduct necessary verification with regard to the observation of the Hon'ble Commissioner(A) under which this case was remanded for

fresh adjudication. Vide letter F.No.GST-06/04-065/Misc/2/2017-18 dated 19.03.2021, the Assistant Commissioner, Division-VI has reported as under:-

"In view of the observations made by the Commissioner(A) in Para 5.2 of the OIA No.AHM-EXCUS-002-APP-30-18-19 dated 29.06.2018, necessary verification has been done and it can be established that Service Tax involved has been deposited by the service providers of M/s.Satyam Developers viz., M/s.Shree Krushna Construction, Ahmedabad and M/s.Aahir Construction, Ahmedabad in the government account. The copy of the Taxpayer's Counter Foil submitted by them has been found tallied with the Challan details of GAR-7 in respect of M/s.Shree Krushna Construction, Ahmedabad & M/s. Aahir Construction, Ahmedabad. Copy of GAR-7 Challan retrieved from the AIO meant for information regarding Service Tax payments towards exchequer is enclosed.

Further the CA Certificate mentioning the details of Service Tax payment for the F.Y.2013-14 in respect of M/s. Shree Krushna Construction, Ahmedabad & M/s.Aahir Construction, Ahmedabad, has been verified vis-à-vis the ST-3 Return filed by them and found in order".

40. Further, vide letter F.No.GST-06/04-65/Misc/2/2017-18 dated 31.03.2021, the Assistant Commissioner, CGST, Division-Vi, Ahmedabad North stated that –
"Please refer to this office letter no. even dataed 19.03.2021 vidw which compliance report on the DC (O&A)'s letter F.No.STC/15-74/OA/2018/Denovo dated 01.03.2021 has been submitted on the above subject.

In continuation of this office letter no. even dated 19.03.2021, please refer to last para wherein F.Y.2013-14 is typed and erroneously F.Y.2012-13 were left out to be typed. The same may now please be read as for the F.Y.2012-13 & 2013-14"

41. The JAC submitted excel work sheet wherein the particulars viz. BSR Code, Tender date, challan sequence No., location code, Major Head, Accounting code, Description of service, amount Education cess, date of payment , amount paid, date of realization and payment mode etc. were mentioned for payment made in the year 2012-13 and 2013-14. On going through the said excel work sheet, I find that the excel sheet contained date of payments made by the service providers to M/s.Satyam Developers viz, M/s.Shree Krushna Construction and Aahir Construction for the year 2012-13 and 2013-14. Further, it is noticed that as per the Show Cause Notice, the amount involved in wrongly availed Cenvat Credit for the year 2012-13 was Rs.50,58,399/- and the JAC has produced verification report to the extent of Rs.48,21,157/- only. The JAC has not sent any categorical report in respect of Rs.2,37,242/- nor any explanation for the difference in figures which shows that Service Tax payment has not been paid by the service providers and the assessee wrongly availed Cenvat Credit to the tune of Rs. 2,37,242/- for the year 2012-13.. The said wrongly availed Cenvat Credit is to be recovered from the assessee along with interest and penalty.

42. In view of the JAC's verification report cited above, it is evident that the service provider had not paid the Service Tax liabilities to the tune of Rs.2,37,242/- for the year 2012-13 and the assessee wrongly availed Cenvat Credit without crediting the Service Tax in the Government account. Therefore, the wrongly availed Cenvat Credit of Rs.2,37,242/- is to be recovered from the assessee along with interest

and penalty as proposed in the show cause notice as they are not entitled to take Cenvat Credit to that extent."

43. In this case, Show Cause Notice was issued for wrong availment of Cenvat Credit to the tune of Rs.66,53,204/- and the previous adjudicating authority had confirmed the amount of Rs.50,58,161/- along with interest and penalty on the wrongly availed Cenvat Credit and dropped the remaining amount of Rs.15,95,043/-. Aggrieved with the above Order-in-original, the assessee filed appeal before Commissioner(Appeals) and the Commissioner (Appeals) remanded back to the adjudicating authority for verification of payment of Service Tax.

44. The relevant paras of the above order-in-appeal is reproduced below:-

"5.2. With regard to first issue, I find that credit taken in 2012-13 on the basis of invoices issued by two service providers has been denied because payment of service involved in the invoice to the government is not proved. For 2013-14, the adjudicating authority allowed the credit on the basis of chartered account's certification that service tax was remitted to the government account. Such a certification, however, is not there for the year 2012-13. A similar certificate for 2012-13 would have served the purpose, however, the appellant's unwillingness or inability to produce such a certificate raises doubts about payment of service tax by the service providers. The availment of Cenvat credit in such a situation can not be held to be valid. I, therefore, consider it proper to remand the issue back to the adjudicating authority for causing necessary verification to establish that Service Tax involved has not been deposited by the service providers in the government account. It would also be prudent that Service Tax payments for the year 2013-14 which has been accepted on the basis of CA certificate, is also verified from the concerned Division.".

"5.3.2. The point in time when the services were provided has to be determined in terms of POT Rules. As per rule 3 of POT Rules, the time when the invoice for the service provided or to be provided is issued would be the point of taxation (point in time when service shall be deemed to have been provided), however, where invoice is not issued within the time period specified in Rule 4A of the Service Tax Rules, 1994, the point of taxation would be the date of completion of provision of service. As per adjudicating authority, the provision of services was completed much before 01.07.2012, however, I observe that adjudicating authority's finding in this regard are not clear to prove that impugned three invoices were not issued in time. Therefore, this part of the matter needs to be remanded back for determination of point of taxation in terms of POT Rules. If the point of taxation falls in the period prior to 01.07.2012, the denial of Cenvat Credit on three invoices justified".

45. As already discussed above, as far as para 5.2 of the Commissioner(A)'s aforesaid order, the jurisdictional Assistant Commissioner was asked for verification. Vide his letter F.No.GST-06/04-65/Misc/2/2017-18 dated 19.03.2021 and 31.03.2021, the Assistant Commissioner, Division-VI, Ahmedabad North has informed that the payment of Service Tax has been verified for the year 2012-13 and 2013-14. He also forwarded an Excel sheet. On going through the said Excel sheet, I find that the JAC has forwarded verification report for the year 2012-13 to the extent of Rs.48,21,157/- instead of Rs.50,58,399/- and the remaining amount of Rs.2,37,242/- has not been verified by him nor any explanation for the less amount has been submitted by the JAC. Therefore, it is clear that the Service Tax of differential amount of Rs.2,37,242/- has not been paid by the service provider. Therefore, the assessee

has wrongly availed Cenvat Credit to the tune of Rs.2,37,242/- since the payment of Service Tax has not been deposited to the Government by the service providers. Therefore, the assessee are not eligible to avail Cenvat Credit and the Cenvat Credit wrongly availed by them is to be recovered along with interest and penalty. Further, one-to-one co-relation with the invoice vis-avis the payment could not be established by the JAC. The dispute also remains in respect of the invoices, RA No.1 dated 01.07.2012, involving Service Tax Credit amounting to Rs.829201, RA No.2 dated 01.07.2012 involving Service Tax Credit amounting to Rs.122181/- and RA No.3 dated 01.07.2012 involving Service Tax amounting to Rs.66409/-, involving total amount of Service Tax Credit to the tune of 10,17,791/-, is in dispute with reference to the Point of Taxation i.e. the date on which the services were provided.

46. With respect to the observation of Hon'ble Commissioner(A)'s order in para 5.3.2 the issue of three invoices issued on 01.07.2012 , is required to be determined in terms of Point of Taxation Rules, 2011. Rule 3 of the Point of Taxation Rules, 2011 is reproduced below:-

47. .Determination of point of taxation.- For the purposes of these rules, unless otherwise provided, 'point of taxation' shall be,- (a) the time when the invoice for the service provided or agreed to be provided is issued: Provided that where the invoice is not issued within the time period specified in rule 4A of the Service Tax Rules,1994, the point of taxation shall be the date of completion of provision of the service. (b) in a case, where the person providing the service, receives a payment before the time specified in clause (a), the time, when he receives such payment, to the extent of such payment. Provided that for the purposes of clauses (a) and (b),- (i) in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service; (ii) wherever the provider of taxable service receives a payment up to rupees one thousand in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be determined in accordance with the provisions of clause (a). Explanation .- For the purpose of this rule, wherever any advance by whatever name known, is received by the service provider towards the provision of taxable service, the point of taxation shall be the date of receipt of each such advance

48. I find that the Audit Officers have already verified the fact the invoices at serial number 1 to 3 of the table at para 3.1 of Show Cause Notice have been issued on 01.07.2012 and the ledger of M/s.Shree Krushna Construction of Ahmedabad, in the books of assessee for the period 01.04.2012 to 31.12.2014, it was noticed that the R.A. bills were shown to be issued on 01.07.2012 i.e. for completion of the services before 01.07.2012 (as without completion of service it is not possible to mention the work done and R.A bills could not be issued) by the service provider and the payments of Rs.90.00 lakhs had also been made between 01.04.2012 to 26.06.2012 as against the total amount of Rs.92,52,341/- due vide the said bills.

49. It was also verified earlier that the above 3 invoices were issued for various works such as Cellar Slab, Block, Cellar Wall, etc. work of which would have been performed over a period and completed prior to 01.07.2012, on which date the said R.A.bills were slated to be issued. Therefore, on this account, the assessee is not entitled to take Cenvat Credit for the aforesaid three invoices.

50. Further, as per Rule 4A(1) of the Service Tax Rules, 1994, invoices are to be issued within 30 days from the date of completion of such taxable service or receipt of any payment towards the value of such taxable service, whichever is earlier by the input service provider. Although the aforesaid three invoices were shown to be issued on 01.07.2012, they should have been actually issued much before 01.07.2012 in terms of Rule 4A(1) of the Service Tax Rules, 1994. Therefore, in view of the fact the assessee have already received the service and availed exemption prior to issuance of notification dated 20.06.2012 effective from 01.07.2012, they were not entitled for availing the Cenvat Credit in respect of these 3 invoices involving of Cenvat Credit to the tune of Rs.10,17,791/-.

51. The Notification No.01/2006-ST dated 01.03.2006 is very clear that if abatement is claimed, the Cenvat Credit of duty of input or capital goods or the Cenvat Credit of input services used for providing specified taxable services should not be taken. Notification No.26/2012-ST which was issued after rescinding the Notification No.01/2006-ST did provide abatement but prohibited the availment of Cenvat Credit only on inputs used for providing taxable service. Thus, it is seen that vide Notification No.26/2012-ST effective from 01.07.2012, the benefit of abatement at specified percentage from the gross value of taxable service provided by the assessee was continued but the earlier condition of non-availment of Cenvat Credit on capital goods and input services was dispensed with and prevention was only for availing Cenvat Credit on inputs used in the taxable services.

52. I find that in the present case, the three invoices referred to above relating to M/s.Shree Krushna Construction were issued on 01.07.2012 for which, the services provided were prior to 01.07.2012 as no construction service would be completed in a day and the invoices are issued on the same day. Further, in cases where advance received, the final invoice is issued after settlement. In the present case, it is not known whether any advances have been received by the assessee. Further, they have not provided copy of contract to establish the commencement of Service and the completion of service. The assessee's argument that the date of payment should be treated as POT is not tenable as in the present case, they have not provided copy of contract, completion certificate of services and also not provided the details of advances received if any. As per the POT, the date of advances payment can also be treated as POT.

53. Accordingly, I find that in the present case, the assessee has availed input service Credit of Rs.10,17,791/- and simultaneously availed abatement under Notification No.01/06-ST dated 01.03.2006 on the invoices shown to have been issued on 01.07.2012 in respect of M/s.Shree Krushna Construction has wrongly availed by them as the services in question were provided prior to 01.07.2012. They have not provided the requisite details such as contract, completion certificate, details of advances received if any. This shows that they have simultaneously availed abatement/exemption in terms of Notification No.01/2006-CE and also availed Cenvat Credit on services. As far as the input Service Credit availed by the assessee, in respect of invoices listed at Sr.No.4 to 23 of para 3.1 of the Table of the Show Cause Notice, I find that the invoices were issued from 30.07.2012 to 31.12.2013. I find that as per Notification No.26/2012-ST effective from 01.07.2012, there is no restriction for availing Cenvat Credit on input services. Therefore, Cenvat Credit can be allowed to the assessee on the invoices listed at in para 3.1 of the Show Cause Notice wherever payment of Service Tax has been made, except the invoices at Sr.No.01 to 03 of Shree Krushna Construction, amounting to Rs.10,17,791/-.. The JAC has verified the

payments made during the year 2012-13 & 2013-14 except Rs.2,37,242/- for the year 2012-13. Therefore, I am of the view that for the invoices issued from 30.07.2012 to December 2013, the assessee is eligible for Cenvat Credit wherever the Service Tax has been deposited into Government account by their service providers and the demand for the remaining amount i.e. Rs.10,17,791/-+2,37,242/-, they are not eligible for the Cenvat Credit as, in view of the Point of Taxation, Rules, the services were provided before 01.07.2012 and non-fulfillment of Service Tax liabilities by the service providers. As such, the said amount is to be recovered from M/s.Satyam Developers Ltd.

54. The assessee in their written submission have relied various case laws in their defense. However, they have not submitted copy of the said case laws for verification. On going through the said case laws, I find that the said case laws are not applicable to the present case as facts and circumstances are different in the present case. Therefore, in the present case, they are not maintainable.

55. In view of the above facts, it is observed that -

(i) Cenvat credit amounting to Rs. 10,17,791/- involved in the Bills issued by M/s. Shree Krushna Construction appearing at Sl.No. 1 to 3 of the table mentioned at the table 3.1 of the Show Cause Notice is to be disallowed as the invoices were issued on 01.07.2012 were, in fact, for the services provided prior to 01.07.2012. Further, the assessee has not produced to prove any details of contract and also advance payment received. In addition to the above, short payment of Rs.237242/- of Service Tax for the year 2012-13, for which no verification report is produced by the JAC is also to be recovered from the assessee as the Cenvat Credit of the said amount has wrongly availed by the assessee.

(ii) Cenvat credit amounting to Rs. 10,17,791/ involved in the Bills all dated 1.7.2012 of M/s. Shree Krushna Construction, listed at Sl.No. 1,2 & 3 of table shown at para 3.1. of SCN is to be disallowed on the ground that services covered in the three invoices were rendered to the assessee much before 1.7.2012 when the assessee was availing exemption/abatement under Notification No. 1/2006-ST. The amount of Rs.237242/- is also to be recovered from the assessee for wrong availment of Cenvat Credit on which payment particulars has not been sent by the JAC.

(iii) Since the bills at Sl.No. 1,2 & 3 of said chart is inadmissible for the purpose of taking Cenvat Credit in view of grounds at above, the total amount of Cenvat Credit is to be disallowed is Rs.10,17,791/-+ Rs.237242/- total Rs.12,55,033/-.

56.. The Show Cause Notice also proposed to recover interest on the wrongly availed and utilized cenvat credit, as described above, under the provisions of Rule 14(ii) of Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994. Rule 14(ii) of Cenvat Credit Rules, 2004 provides that where the Cenvat Credit has been taken and utilized wrongly or has been erroneously refunded, the same shall be recovered along with interest from the provider of output service and the provisions of Section 73 and of the Finance Act, 1994, as the case may be, shall apply mutatis mutandis for effecting such recoveries. Section 75 of the Act provides that every person liable to pay the tax in accordance with the provisions of Section 68 or rules there under, who fails to credit the tax or any part thereof to the account of the central government within the period prescribed, shall pay interest at the specified rate. In the instant case the assessee had wrongly availed and utilized the Cenvat Credit of Rs. 10,17,791/-+237242/-

total Rs.1255033/- on input services involved in the above said bills of M/s Shree Krushna Construction and short payment of Service Tax for the year 2012-13. Thus the interest on the above said wrongly availed and utilized Cenvat Credit amount, at the appropriate rate, is chargeable from the assessee in terms of the Section 75 of the Finance Act, 1994.

57. The SCN further proposes to penalise the assessee (i) under the provisions of Rule 15(1) of Cenvat Credit Rules, 2004 read with Section 76 of the Finance Act, 1944 as they failed to pay service tax within time limit as specified in Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994 (2) under the provisions of Section 77(2) of the Finance Act, 1994 for their failure to self assess tax liability correctly and failure to file ST 3 returns with correct and full details and (3) under the provisions of Rule 15(3) of Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 for taking and utilizing of Cenvat Credit wrongly by way of misstatement and suppression with intent to evade payment of tax.

58. The shortcoming on the part of the assessee is the wrong availment of Cenvat Credit. No charge against the assessee is in the notice in the matter of failure of service tax payment within the time limit. Hence, penalty under Rule 15(1) of Cenvat Credit Rules, 2004 or Section 76 of the Finance Act, 1994, as suggested in the notice, for the allegation of failure in payment of service tax, is not justified.

59. Proposal for penalizing the assessee under Rule 77(2) of the Finance Act, 1994 is for the violation of the provision of Section 68 of the Act as the assessee had not discharged their tax liability properly due to availing and utilizing the ineligible cenvat credit and for the violation of Section 70 of the Act read with Rule 7 of the Service Tax Rules as the assessee failed to file correct ST-3 return . Observations made in previous paras clearly indicate that the assessee intentionally availed and utilized inadmissible cenvat credit of service tax involved in the services rendered before 1.7.2012 on the basis of three bills of an input service provider and on the basis of bills issued during 2012-13 by two input service providers, amount of tax involved in which was in fact not proved to have been paid to government account. Thus, it is clear that by way of availing and utilizing such inadmissible cenvat credit, they made violations of Section 68 & 70 of the Finance Act, 1994 for which no separately penalty is provided in the Finance Act, 1994, and hence the assessee is also liable to face penal action under the provisions of Section 77(2) of the Finance Act, 1994. Assessee's arguments on the matter of imposing of penalty under Section 77 of Finance Act, 1994 that penalty under this section is not imposable as there was no short payment of service tax. This contention is totally wrong as it is already proved that violations of the provisions of Section 68, section 70 of the Act read with Rule 7 of the Service Tax Rules, 1994 etc facilitated them to wrongly avail and utilize cenvat credit on input services and to evade payment of the service tax leviable on the taxable service provided by the assessee. In the present case correct information in respect of the credit availed and utilized was not disclosed by the assessee deliberately only to escape from payment of service tax leviable on the services provided.

60. Now the proposal for invoking the provisions of Rule 15(3) of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 is to be examined. By the introduction of Finance Bill, 2015, with effect from 14.5.2015, Section 78 of Finance Act, 1994 are amended or substituted. Present case of period 2012-13. Hence in present case new Section 78 of the Act effective from 14.5.2015 is

applicable as per the provisions of Section 78B of the Act. Thus, provisions of amended Section 78 w.e.f 14.5.2015 are relevant here. Relevant provisions of the said section is as under-

"(1) 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 collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the Rules made thereunder with intent to evade payment of tax, the person who has been served notice under the proviso to sub-section (1) of section 73, shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent of the amount of such service tax.

Provided that in respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning

with the 8th April, 2011 up to the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent of the service tax so determined.

Provided further that where service tax and interest is paid within a period of thirty days of-

(i) the date of service of notice under the proviso to sub-section (1) of Section 73, the penalty payable shall be fifteen per cent of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded.

(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub section (2) of Section 73, the penalty payable shall be twenty five per cent of the service tax so determined.

Provided also that the benefit of reduced penalty under the second proviso shall be available"

61. Further, Rule 15(3) of Cenvat Credit Rules, 2004, stood at the relevant time is as under-

" In a case, where the Cenvat credit in respect of input or capital goods or input services has been taken or utilized wrongly by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of any of the provisions of these rules or of the Finance Act or of the rules made thereunder with intent to evade payment of service tax, then the provider of output service shall also be liable to pay penalty in terms of the provisions of Section 78 of the Finance Act, 1994."

62. It is clearly evident from above paras that the assessee wrongly availed and utilized cenvat credit on the input services rendered vide three bills of the said input service provider by simultaneously availing the abatement from gross value of taxable services vide Notification No. 1/2006-ST and by way of availing credit on the bills of service provider issued during 2012-13 without ensuring the service tax involved was paid by the service providers into government account which was suppressed from the Department with intent to evade service tax by way of availing inadmissible credit. The assessee is also found to have given mis-declaration in respect of the said three bills and the period when the services rendered therein. Cenvat Credit taken on the said input services was shown in the periodical return filed during the relevant time when the restriction on availing the cenvat credit on input services was gone away. But during the verification of the documents during auditing, it is unearthed that although the said

bills showing date of 1.7.2012 the services involved in these bills were in fact rendered and received by the assessee prior to 1.7.2012 and payment against these bills was also made much before 1.7.2012. Further, payment particulars of Service Tax amounting to Rs.237242/- for the year 2012-13 has not been verified by the JAC as the Tax liabilities had not been fulfilled by the service providers. The assessee is clearly found to have tried to mislead the department by way of taking the cenvat credit on the bills bearing date of 1.7.2012 and the short paid amount when the Notification No. 1/2006-ST ended, but the services involved in the bills were received and utilized by them in providing the output services by claiming the abatement under Notification No. 1/2006-ST. Their intention was to furnish a wrong impression to department that the credit taken under these bills of input service provider while they were working under Notification No. 26/2012-ST which was in effective from 1.7.2012, which do not put any restriction in availing cenvat credit on input services. Similarly, during verification of the credit availed by the assessee during 2012-13 by the audit officers, it was noticed that payment of service tax involved in the bill service providers, on the basis of credit was taken by the assessee, was not proved to be discharged by the service providers into government account. On the other hand, it was verified by the Audit officers that the services were in fact, were provided before 01.07.2012. Therefore, the Point of Taxation, as per Point of Taxation Rules, 2011 is before 01.07.2012. By taking cenvat credit towards service tax mentioned in the bills, but in fact not paid to government account, assessee evaded the payment of service tax. These actions on the part of the assessee invited the penal provisions under Rule 15(3) of Cenvat Credit Rules, 2004 read with Section 78 of the Act against them. Assessee's contention that penalty cannot be imposed under Section 78 of the Finance Act, 1994 in the present case as they had not suppressed any information from the department and there was no willful misstatement on their part cannot be accepted in view of the reason that it is already established that with an intention to evade the payment of service tax they suppressed and given misstatement to the department on the matter of the cenvat credit wrongly taken on input services and simultaneously availed abatement under Notification No.01/2006-ST dated 01.03.2006.

63. Coming to the issue of the quantum of penalty under Section 78 of the Finance Act, 1994 it is seen that under the provisions of Section 78(1) of the Finance Act, 1994 penalty shall be equal to the amount of service tax not paid. However, as per the first proviso to this section, where true and complete details of the transactions are available in the specified records for the period beginning with the 8th April 2011 up to the date on which the Finance Bill 2015 receives the assent of the President, the penalty shall be reduced to fifty per cent of the service tax so determined. It would be recalled from the facts of the case that the notice was originated from the audit objection raised by the Audit officers of the department which covers a period 2012-13 to 2013-14. During verification of the records/documents of the assessee by these officers it is found that benefit of Cenvat Credit was wrongly availed by the assessee in view of the fact that benefits of abatement under Notification No. 1/2006-S.T., dated 1-3-2006 is also simultaneously availed by them. Availment of Cenvat Credit which was not found as paid to government account by the service providers was also unearthed during verification of documents maintained by the assessee during auditing. Thus, benefit of reduced penalty of fifty per cent of the non paid service tax amount, as per the said proviso to Section 78 can be extended to them.

64. Finally, assessee is also found to have pleaded that their case is a fit case to be covered under Section 80 of the Act. I find that Section 80 of the Finance Act, 1994 is omitted by the Finance Act,

2015 with effect from 14.5.2015. However, considering the period covered in the present notice is 2012-13 to 2013-14, the plea of the assessee is to be examined. According to the erstwhile Section 80, no penalty may be imposed under Section 78, 77 or 78(1) of the Act if the assessee is able to prove that there is reasonable cause for such failure. It is clear from the provisions of this section that to get the benefit of no penalty, the assessee has to prove that there is a genuine reason for the failure to follow the service tax provisions and not to pay the service tax. In the present case, the assessee even not accepted the failure to comply the said provisions of Finance Act/Service Tax Rules. Thus to come under the provisions of Section 80 of the Act, firstly the assessee has to admit their tax liability which then should be paid; only then the adjudicating authority may properly consider the plea of the assessee as whether they are entitled to the benefit of Finance Act, 1994. I also observe that Hon'ble Tribunal, Principal Bench at Delhi in the case of Indo Hong Kong Industries Pvt.Ltd Vs CCE & ST, Delhi, reported in 2017 (4) G.S.T.L 257 (Tri-Delhi), held that as the appellant voluntarily made payment of service tax along with interest before issuance of show cause notice, provisions of Section 80 of the Finance Act, 1994 would be applicable and penalties imposed under Section 77 and 78 are dropped. I also observe that by pleading the waiver of penalty under Section 80 of the Act, the assessee is found to have indirectly accepted the charges leveled in the notice against them and their service tax liability which in fact provide much strength to my decision of confirming their tax liability and penal liability.

65. Besides on merits, the assessee contested the notice on the point of limitation also. Argument was that since the fact was in the knowledge of department since 2012 & onwards, show cause notice issued on 30.3.2017 covering a period 1.7.2012 to 31.12.2013 is time barred. This contention is devoid of merit as the wrong availment of Cenvat credit was come to the notice of the department when their documents were verified by the Audit team during April, 2015. Although they had shown the wrongly availed Cenvat Credit amount in their periodical returns, only during the course of auditing it is revealed that the services involved in the bills in question were actually rendered prior to 1.7.2012 when they were also claiming the benefit of abatement from gross value of taxable services provided under the erstwhile Notification No. 1/2006-ST. Similarly, their periodical return might have shown the amount of credit availed, but during verification by audit officers, it was revealed that service tax amount involved in the bills issued by the service provider during 2012-13 was not paid to government account. Thus mis declaration and suppression of facts on the part of assessee with an intent to evade payment of service tax by way of wrongly availing of Cenvat Credit is clearly seen in this case. Hence the demand notice is correctly issued by invoking the extended period of limitation of five years under the proviso to erstwhile Section 73 (1) of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004. In the case of Mahavir Plastics Vs CCE, Mumbai, reported at 2010 (255) ELT 241, it has been held that if facts are gathered by department in subsequent investigation, extended period can be invoked. Also in the case of Lalit Enterprises Vs CST, Chennai, reported at 2010 (17) STR 370, Chennai branch of Tribunal held that extended period can be invoked when department comes to know of service charges received by appellant on verification of his accounts. Hon'ble Supreme Court in the case of CCE, Visakhapatnam Vs. Mehta & Co. reported in 2011(264) ELT 481(SC) held that cause of action arises on the date on which the relevant facts come to the knowledge of the department. In the present case, only after the verification of documents by the Audit, the wrong availment of cenvat credit was noticed. In the era of self assessment, assessee is supposed to be proactive in declaring their activities to the department. Thus it is very clear that all essential ingredients required to apply the proviso to Section 73(1) of the

Finance Act, 1994 are found existing in the case and hence five years period is properly invoked in the notice.

66. In view of the discussion and my findings above, I pass the following orders:-

ORDER

(i) I confirm the demand of Rs.12,53,033/- (Rupees Twelve Lakhs Fifty Three Thousand and Thirty Three only) out of the total demand of the Cenvat Credit of Rs.66,53,204/, as wrongly availed Cenvat Credit and order to recover the same from M/s. Satyam Developers Limited, Satyam House, B/h Rajpath Club, S. G. Highway, Ahmedabad-380059 under the proviso to Section 73(2) of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004. Demand for the remaining amount of Rs.54,00,171/- is dropped.

(ii) I order to charge and recover interest at prescribed rate on the amount of demand confirmed at (i) above, under Rule 14(ii) of Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994.

(iii) I do not impose any penalty upon M/s. Satyam Developers Limited, Satyam House, B/h Rajpath Club, S. G. Highway, Ahmedabad-380059 under Rule 15(1) of Cenvat Credit Rules 2004 and Section 76 of the Finance Act 1994.

(iv) I impose penalty of Rs. 10,000/ (Rs. Ten thousand only) upon M/s. Satyam Developers Limited, Satyam House, B/h Rajpath Club, S. G. Highway, Ahmedabad-380059 under Section 77(2) of the Finance Act, 1994.

(v) I impose penalty of Rs.6,27,517/- (Rupees six lakhs twenty seven thousand five hundred and seventeen only) upon M/s. Satyam Developers Limited, Satyam House, B/h Rajpath Club, S. G. Highway, Ahmedabad-380059 under Rule 15(3) of Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994.

(v) However, if the amount of service tax and interest payable thereon, mentioned at Sl.No. (i) & (ii) above, is paid within thirty days from the date of receipt of this order, the amount of penalty liable to be paid by the assessee shall be twenty five per cent of the service tax amount determined at Sl.No. (i) subject to the payment of the amount of reduced penalty within the period of thirty days from the communication of this order.

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

68. The Show Cause Notice No. CEA-II/ST/15-27/C-VI/ APXXVIII/ FAR-607/RP-02&08/16-17 dated 30.03.2017 is disposed-of in the above manner.

(Maruti Tripathi)
Joint Commissioner
CGST & C.Excise
Ahmedabad-North

FNo. STC/15-74/OA/2018/Denovo

Date: 31.03.2021

By Regd post AD.

To

M/s. Satyam Developers Limited,

Satyam House, B/h Rajpath Club,

S. G. Highway, Ahmedabad-380059

O/C

Copy to:

1. The Commissioner of CGST & C.Excise, Ahmedabad North
2. The Deputy/Assistant Commissioner of CGST & C.Ex., Division VI, Ahmedabad North
3. The Superintendent of CGST & C.Excise, AR.IV/Division VI, Ahmedabad North
4. Guard File.

प्राप्त किया
वस्तु एवं सेवाकर, अहमदाबाद उत्तर
दिनांक: 05.04.2021
हस्ताक्षर:
नाम:

05/04/21