SCN No. 108/2014 dt. 19.9.14 -3,50,521/-

अपील सं : Appeal No. 31/2017 (SC)ST

आयुक्त(अपील-II) जीएसटी, व केन्द्रीय उत्पाद शुल्क का कार्यालय
OFFICE OF THE COMMISSIONER (APPEALS-II), GST & CENTRAL EXCISE
7 वीं मंजिल, जीएसटी भवन, एल बी स्टेडियम रोड
7th FLOOR, GST BHAVAN, L B STADIUM ROAD
बशीर बाग, हैदराबाद, तेलंगाना राज्य-500004 :: BASHEER BAGH, HYDERABAD, TS-500004

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अपील सं : Appeal No: 31 / 2017 (SC) ST

अपील आदेश सं : ORDER-IN-APPEAL NO: HYD-EXCUS-SC-AP2-0021-18-19-ST DATED 27.04.2018

पास करने वाले आधिकारी : श्री. बी.वी.वी.टी. प्रसाद नायक, आयुक्त (अपील-II), हैदराबाद

Passed by : Sri. B.V.V.T PRASAD NAIK, COMMISSIONER (APPEALS-II) HYDERABAD

प्रस्तावना PREAMBLE

1 आदेश जिनके नाम जारी किया गया है उस व्यक्ति के निजी उपयोग के लिए यह प्रति मुफ्त में दी जाती है।

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2.(a) कोई भी निर्धारिती इस आदेश से असहमत हो तो वे वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत सीमाशुल्क, उत्पाद शुल्क व सेवाकर अपील अधिकरण, क्षेत्रीय बेंच, प्रथम तल, **हैदराबाद मेट्रो जल आपूर्ति और सीवरेज बोर्ड इमारत (पीछे के हिस्से), खैरताबाद, हैदराबाद, तेलंगाना-500004** के समक्ष अपील दायर कर सकते हैं।

Any assessee aggrieved by this order may file an appeal under Section 86 of the Finance Act, 1994 to the **Customs, Excise & Service Tax Appellate Tribunal, Regional Bench, 1st Floor, HMWSSB Building (Rear Portion), Khairatabad, Hyderabad, TS-500004**.

2.(b) केन्द्रीय उत्पाद शुल्क अधिनियम,1944 की धारा 35 एफ़ के खंड (iii) के अनुसार, धारा 85 की उप-धारा (5) में संदर्भित आदेश या निर्णय के विरुद्ध अपील के लिए, अपीलकर्ता को निर्णय या जिस आदेश के विरुद्ध अपील की गई हो उसके अनुसरण के लिए कर का, ऐसे मामले में जहां कर या कर और दंड विवादित हो, या दंड का, जहां ऐसा दंड विवादित हो, दस प्रतिशत जमा करना होगा : सेवा कर के मामलों में, एफ़ ए, 1994 की धारा 83 के प्रभाव से अधिनियम की धारा 35 एफ़ लागू है।

As per clause (iii) of Section 35F of the CEA, 1944, the appeal against the decision or order referred to in sub-section (5) of section 85, the appellant has to deposit ten per cent of the tax, in case where tax or tax and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against: Section 35F of the Act is applicable to service tax case by virtue of Section 83 of FA,1994.

3. उप धारा (1) [या उप धारा (2) या उप धारा (2ए)] के अंतर्गत प्रत्येक अपील जिस आदेश के विरुद्ध अपील किया जाना हो उस आदेश के निर्धारिती द्वारा प्राप्त करने की तारीख से तीन महीने के भीतर (मुख्य आयुक्तों या आयुक्तों की समिति] के समक्ष, जैसे भी मामला हो, दायर किया जाना चाहिए।

Every appeal under sub-section(1) [or sub-section(2) or sub-section(2A)] of Section 86 of FA,1994 shall be filed within three months of the date on which the order sought to be appealed against was received by the assessee, the [Committee of the Commissioners], as the case may be.

4. पैरा 2 में उल्लिखित अपील एस टी 5/ एस टी 7 प्रोफॉर्मा में चार प्रतियों में जिस आदेश के विरुद्ध अपील किया जाना हो उस आदेश के निर्धारिती के पास पहुँचने की तारीख से तीन महीने के भीतर किया जा सकता है। जिस आदेश के विरुद्ध अपील किया जाना चाहता हो और अपील करने के लिए लिखित मूल आदेश की उस आदेश की चार प्रतियाँ संलग्न होने चाहिए (जिसमें से एक प्रति प्रमाणित प्रति होने चाहिए)

The appeal, as referred to in Para 2 above, should be filed in S.T.5/S.T.-7 proforma in quadruplicate; within three months from the date on which the order sought to be appealed against was communicated to the party preferring the appeal and should be accompanied by four copies each (of which one should be a certified copy), of the order appealed against and the Order-in-Original which gave rise to the appeal.

5. अपील के साथ ट्रिब्यूनल के दक्षिणी बेंच के सहायक रजिस्ट्रार के पक्ष में जहां ट्रिब्यूनल स्थित है वहाँ के किसी भी राष्ट्रीयकृत बैंक की शाखा से प्राप्त किए गए रेखांकित मांग ड्राफ्ट संलग्न होने चाहिए और अधिनियम की धारा 86 के अंतर्गत विनिर्दिष्ट शुल्क के भुगतान का प्रमाण भी संलग्न होने चाहिए। देय शुल्क निम्नलिखित है।

The appeal should also be accompanied by a crossed bank draft drawn in favour of the Assistant Registrar of the Tribunal, drawn on a branch of any nominated public sector bank at the place where the Tribunal is situated, evidencing payment of fee prescribed in Section 86 of the Act. The fees payable are as under:-

(क) जिस मामले से अपील संबन्धित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड रुपये पाँच लाख या उससे कम हो तो, रुपये एक हज़ार;

(*a*) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

(ख) जिस मामले से अपील संबन्धित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड रुपये पाँच लाख से अधिक, लेकिन रुपये पचास लाख से कम, हो तो, रुपये पाँच हज़ार;

(*b*) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(ग) जिस मामले से अपील संबन्धित हो उस मामले में मांगा गया सेवा कर और व्याज तथा किसी भी केन्द्रीय उत्पाद शुल्क अधिकारी द्वारा लगाया गया दंड, रुपये पचास लाख से अधिक हो तो, रुपये दस हज़ार;

(*c*) where the amount of service tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees:

5.(i) उसी की धारा 86 की उप धारा (4) के अंतर्गत बताए गए कुल आपत्तियों के ज्ञापन के संबंध में कोई शुल्क देय नहीं है।

No fee is payable in respect of the Memorandum of Cross Objections referred to in Sub-Section (4) of Section 86 ibid.

6. अपीलीय ट्रिब्यूनल के समक्ष प्रस्तुत किए गए सभी आवेदनपत्र के साथ: Every application made before the Appellate Tribunal:

(क) रोक की मंजूरी के लिए अपील या गलती को सुधारने के लिए अथवा किसी अन्य प्रयोजन के लिए आवेदन पत्र; या

(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or

(ख) किसी अपील या आदेश को पुन: स्थापित करने के लिए उसके साथ रुपए पाँच सौ का शुल्क होने चाहिए।

(b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees:

6.(i) इस उप धारा के अंतर्गत आयुक्त द्वारा दायर किए गए आवेदन के मामले में कोई शुल्क देय नहीं है।

No fee is payable in case of an application filed by Commissioner this sub-section.

7. केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 और केन्द्रीय उत्पाद शुल्क नियमावली, 2002 तथा सीमाशुल्क, केन्द्रीय उत्पाद शुल्क व सेवा कर अपीलीय ट्रिब्यूनल (प्रक्रिया) नियमावली, 1982 में शामिल इससे और अन्य संबन्धित मामलों को नियंत्रित करने वाले प्रावधानों की ओर ध्यान आकर्षित किया जाता है।

Attention is invited to the provisions governing these and other related matters, contained in the Central Excise Act, 1944 and Central Excise Rules, 2002 and the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982.

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This appeal is filed by M/s Paramount Builders, 5 – 4 – 187/ 3&4, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad - 500003 (herein after referred as **'appellant'**) against **Order-in-Original No. 82 / 2016 – Adjn (ST)(ADC)** dated 09.06.2017 {in O.R. No. 108/2014 – Adjn(ST)ADC} (hereinafter referred to as the **impugned order**) passed by the Additional Commissioner, Service Tax Commissionerate (presently Additional Commissioner, Secunderabad GST Commissionerate, Hyderabad) (hereinafter referred to as **Adjudicating Authority**).

2. The facts of the case in brief are that:

- The appellant is engaged in providing Works Contract Services and are a registered partnership firm and are registered with the Department vide registration number AAHFP4040NST001.
- A notice HQPOR No. 87/2010 – Adjn (ST)(ADC) dated 24.06.2010 was issued for the period September 2006 to December 2009 involving an amount of Rs.11,80,439/-.
- Further periodic notices were issued – for the period January 2010 to December 2010 vide notice dated 23.04.2011 demanding an amount of Rs.4,46,403/-, another for the period January 2011 to

December 2011 vide notice dated 24.04.2012 demanding an amount of Rs.46,81,850/- and for the period January 2012 to June 2012 demanding an amount of Rs.2,92,477/-.

- These notices were issued alleging that the appellant had entered into Sale deed for sale of undivided portion of land together with the semi-finished portion of the flat and thereafter, an agreement for construction with the buyer of the flat. The Department contended in the notices that on execution of the sale deed the right in the property got transferred to their customers and hence the construction service rendered by the appellant thereafter to their customers under agreement was taxable service as there existed service provider to service receiver relationship between them and this service rendered by them after execution of the sale deed against the agreement of construction to each of their customers to whom the land was already sold was taxable under 'Works Contract Service'.
- The present notice was issued for the period 07/2012 to March 2014 alleging the appellant to have rendered taxable services under the category of Works Contract Services for a taxable value of Rs.1,05,35,844/- on which the Service Tax due was Rs.5,20,892/-. The appellant was found to have paid an amount of Rs.1,70,371/- and therefore short paid Rs.3,50,521/-.
- Invoking the provisions of Section 73(1A) of the Finance Act, Section 65B, 66B & 66D and contending that the grounds of the previous notices issued were also applicable to the present case, the status of the service and the corresponding tax liability remaining same, the notice was issued demanding Rs.5,20,892/- on the Works Contract Services rendered and for appropriation of the amount of Rs.1,70,371/-; demand of interest was also made and penalties proposed under Section 76 & 77 of the Act.
- The Adjudicating Authority heard the matter and held that the appellant was liable to pay tax on Works Contract Services discarding the contentions regarding the validity of the notice, non-taxability of the sale of semi-finished flats and the non-taxability of the other amounts received. Regarding the quantification of the service tax demand, the Adjudicating Authority held that the Department had correctly quantified the duty amount and the appellant's claim was not supported by any data. Penalty was levied under Section 76 & 77 of the Act.
- The confirmation of the demand culminated in this appeal.

3. The appeal is on the grounds:

- That the impugned order was illegal and untenable in law;
- That they submit that during the subject period July 2012 onwards, they are liable to discharge Service Tax on construction agreements, thereby accepting Service Tax on the activity as proposed in the SCN (read with previous notices); that the sole allegation of the notice (para 2) is that the construction agreements are subjected to Service Tax under Works Contract Services and no allegation is raised to demand Service Tax on the sale deed value;
- That the statements provided by them made it amply clear that though the allegation was to demand the Service Tax on construction agreements, the quantification was based on gross amounts mentioned for all the activities including the amounts received towards sale deeds;
- That there was an error in quantification of the demand in the notice and was explained through a comparative chart in para 4 of the grounds;
- That once the apparent error was taken to its logical conclusion, the entire demand fails;
- That the finding of the Adjudicating Authority in para 14 regarding the appellant's contention that there was no demand on the sale of semi-finished flats was totally out of context and incorrect for the reason that the demand of Service Tax on sale of semi-finished flat runs beyond the scope of the notice; that the Tribunal Stay order dealt with taxability of construction prior to 01.07.2010 and not taxability of semi-finished flat;

- That the sale deed was executed for the semi-finished flat and represents the construction work already done prior to the booking of the flat by the prospective buyer and the work done until then is work for self on which there is no service tax; that further to a works contract, there should be a contract and any work done prior to entering of such contracts cannot be brought into the realm of the works contract; that reliance was place on the Apex Court judgment in the case of L&T Ltd., vs State of Karnataka [2014 (34) STR 481 (SC)], CHD Developers vs State of Haryana & others [2015 – TIOL – 1521 – HC – P&H – VAT] in this regard;
- That there was no Service Tax levy on sale of semi-finished flat as the same is excluded from the definition of service under Section 65B (44);
- That other non – taxable receipts like corpus fund, Electricity deposit, water charges, service tax etc., were not liable and hence shall not be included in the taxable value and that the impugned order confirmed demand on the same on the ground that the appellant had not provided the proof or evidence of the said amounts pertaining to VAT, registration charges, electricity charges etc.; defining the above mentioned payment heads in their grounds, they submitted that these charges were other non-taxable receipts being statutory charges / deposit and were mere reimbursements of expenses / charges incurred paid on behalf of the customers and does not involve any provision of service and hence the same is to be excluded from the taxable value as per Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006; they rely on the case of ICC Reality & Others vs CCE [2013 (23) STR 427 (Tri Mum)] , Karnataka Trade Promotion Organization vs CST 2016 – TIOL – 1783 – CESTAT – BANG and hence submitted that the demand did not sustain to that extent;
- That the impugned order in para 5 held that the grounds explained in the previous notices were applicable for the present case also; that under the new Service Tax law post 01.07.2012 there were substantial changes with a shift to negative list based taxation; that the Section 65(105) ceased to exist, Section 65A pertaining to classification of service ceased to exist, there was no classification of service, definition of service was introduced under Section 65B (44) containing certain exclusions, new definition of Works Contract Services under Section 65B (90), mega notification 25/2012 – ST, new valuation Rule 2A of the Service Tax (Determination of Value) Rules 2006 for determination of tax liability of Works Contract Services and abatements under Notification 26/2012 – ST; that therefore the allegations in the earlier notices were not applicable for the relevant period and as the impugned order was passed on irrelevant and non-applicable grounds, the same needs to be dropped;
- That once the demand is raised on inapplicable provisions, the same was not sustainable as held in Maharashtra Industrial Development Corporation vs CCE Nasik [2014 (36) STR 1291 (Tri Mum)];
- That there was no evidence placed on record discharging the burden placed on the Department to prove the tax liability under the new Service Tax law; hence the notice was not sustainable;
- That the notice was based on wrong understanding of the information submitted by the appellant as the figures demanded by the notice was different from the information provided by the appellant; that the notice has also not considered the amount of Cenvat credit utilized towards payment of duty;
- That interest and penalties are not imposable / payable; that the Service Tax itself not being payable, question of interest does not arise as held by the Apex Court in the Prathiba Processors case;
- That penalty was proposed under Section 77 but the notice has not provided reasons for the applicability of the same; that as the appellant is already registered with the Department and is filing returns, the same is not applicable; that they rely on the decision in the case of Creative Hotels Pvt. Ltd. Vs CCE, Mumbai [2007 (6) STR (Tri Mumbai)] and Jewel Hotels Pvt Ltd [2007 (6) STR 240 (Tri Mum)];
- That cum tax benefit under Section 67 is required to be extended to them if the demand for sale of semi-finished contract is confirmed under Works Contract Service as the appellant had not collected Service Tax from the customers; that they rely on the case laws cited in this regard;
- That penalty could not be imposed as merely automatic consequence of failure to pay duty; that they were under bonafide belief that the amounts received towards sale deeds were not subject to Service Tax and wish to rely on the decisions cited in this regard;
- That the benefit of Section 80 of the Act is to be extended to them in view of the reasonable causes of the given understanding of law, payment of duty voluntarily on whatever was believed as taxable and the divergent views of the courts on the issue;

- **They request for the setting aside of the order and grant consequential relief.**

4. I have heard the appellant on 15.03.2018, represented by Shri. P. Venkata Prasad, Chartered Accountant, who reiterated the submissions made in their grounds of appeal and had nothing more to add.

FINDINGS:

5. I have carefully perused the notice, impugned order and the submissions made by the appellant. I find that the appeal has been filed with a delay of six (6) days for which the appellant has submitted that they had a problem in interpreting the number of days from the date of reckoning and hence the delay. They regretted the same and requested for condonation. I find the reason to be genuine and satisfactory to condone the same in view of the powers vested in me under Section 85 (3A) of the Act.

6. Perusal of the records show that the appellant is registered with the Department for payment of Service Tax for the services 'Works Contract Services'. Intervention of the Department revealed that the appellant had entered into Sale deed for sale of undivided portion of land together with the semi-finished portion of the flat and thereafter, an agreement for construction with the buyer of the flat.

7. The Department viewed that the construction service rendered by the appellant under agreement was taxable service as there existed service provider to service receiver relationship between them and this service was rendered partly before execution of sale deed (semi-constructed flat) and partly after execution of the sale deed against the agreement of construction (finishing) to each of their customers to whom the semi-constructed flat was already sold was taxable under 'Works Contract Service'. This being the case, Service Tax was arrived at in the notice and the demand raised.

8. The appellant aggrieved by this, protested against the inclusion of the sale deed value for the purpose of demand and made their submissions. They also submitted that the notice was not valid in so far as the applicability of the provisions of the previous notices to the present notice was wrong. The matter was decided by the Adjudicating Authority in Order-in-Original dated 09.06.2017 based on the submissions of the appellant holding that the arguments of the appellant regarding the validity of the notice, the non-taxability of the semi-finished flats etc were unsupported either by finding or by data. Regarding the quantification it was held that the Department had correctly quantified the demand and the appellant had not given any data to support their claim.

9. The appellant in their submissions accept that they are liable to discharge Service Tax on the construction agreements thereby accepting Service Tax on activity as proposed by the impugned notice. It is not in dispute upon examination of the impugned notices that, the demand has been made for the activity after the sale deed has been executed, under the category of Works Contract Service. The Adjudicating Authority however, in the findings, proceeding to decide whether the appellant was liable to pay Service Tax on the flats sold by

them under Works Contract Services held the notice to be in order disposing of the arguments placed by the appellant but has admittedly not given a clear finding regarding the validity of the inclusion of the sale value of the sold semi-finished flats being appropriate. It can be inferred from the Annexure to the Show Cause Notice [Page A62 of appeal book] that the assessment is made in terms of clause 2(A)(ii)(A) of the Service Tax (Determination of Value) Rules, 2006. The cited Rule 2A underwent a retrospective amendment by Section 129 of the Finance Act, 1994 read with the sixth schedule thereunder. In terms of this retrospective amendment, where the composite contracts include the land value, the assessment under this Rule 2(A) [applicable for the material period in dispute in the instant case] would be in terms of Sl. No. 2 of the Table at Schedule VI of the Finance Act, 2017 since there is no dispute that clause (ii) under Rule 2A is to be applied only after exhausting clause (i) and the same has actually been applied in the instant case.

10. The department viewed that the activity carried out by the appellant after the execution of sale deed is taxable under the category of Works contract. Merely because the notice differentiates the activity of the appellant in respect of the sale of the semi-finished flats sold by the appellant and the subsequent activity of Works Contract Services as per the contract agreements; this in itself is insufficient to conclude that the value of semi-finished flats is inconsequential for arriving at the gross receipts for assessment to tax. If the appellant's view is accepted, there would have been no need to issue the Show Cause Notice in the first place since the liability on the finishing contract is undisputed; it is only the inclusion of the value of the sale deed (including unfinished flat built on composite contract of land+unfinished flat) that is disputed in the instant case. I find that the appellant submitted his calculations, which have not been studied or considered by the Adjudicating Authority in his findings; hence the order is non - speaking in this regard. The submissions of the appellant regarding the quantification of the value of the contract supported by proper documentation therefore merits being re-examined by the lower authority. In **the interest of justice, the matter has to be remanded back to the Adjudicating Authority for the express purpose of arriving at the value of the contract under the Works Contract Services undertaken by the appellant to correctly assess the tax liability. The appellant is also directed to submit the details to the Adjudicating Authority for perusal during the hearing granted to them in accordance with the principles of natural justice.** I rely upon the rulings pronounced in the case of CCE, Panchkula vs Goel International Pvt Ltd [2015(39) STR 330 (Tri Del)] and CST vs Associated Hotels Limited [2015 (37) STR 723 (Guj)] in ordering the remand.

11. The appellant submits that the notice issued under Section 73(1A) of the Act was not valid as the law had changed substantially post 01.07.2012 when the negative list based scheme was introduced. They further contended that the Section 65(105) ceased to exist, Section 65A pertaining to classification of service ceased to exist, there was no classification of service, definition of service was introduced under Section 65B (44) containing certain exclusions, new definition of Works Contract Services under Section 65B (90), mega notification 25/2012 – ST, new valuation Rule 2A of the Service Tax (Determination of Value) Rules 2006 for determination of tax liability of Works Contract Services and abatements under Notification

26/2012 – ST; that therefore the allegations in the earlier notices were not applicable for the relevant period and as the impugned order was passed on irrelevant and non-applicable grounds, the same needs to be dropped. In this regard, I find that the activity of the appellant, Works Contract Services, is also agreed upon by the appellant and the only objection to the notices issued was regarding the valuation of the contract undertaken by him. This being the case, when the changes in the law were effected, the basic definitions of the activities were not changed and remained the same though the liability was governed by the new provisions. As submitted by the appellant themselves, Works Contract Services was defined under Section 65B (90) and abatements provided under Notification referred to. Further the grounds mentioned in the earlier periodical notices were also the same demanding tax on the Works Contract Services provided by the appellant. Therefore, I do not find any infirmity in the notice referring to the allegations in the earlier notices and making the same applicable to the present notice in terms of Section 73(1A) of the Act. On this basis the argument of the appellant in this regard is rejected.

12. **In view of the discussions recorded above, para 19(i) of the ORDER portion is set aside and remanded to the Adjudicating Authority who is directed to:**

(a) Examine the sale deeds to vivisect the land value and the value involved in the semi-constructed flats;

(b) Aggregate the value of the semi-constructed flat to the gross value of the finishing works contract in the second construction agreement;

(c) Apply the results of (b) to clause (i) of Rule 2A of the Service Tax (Determination of Value) Rules 2006 to assess the liability

(d) If the assessment is not possible under clause (i) it shall be done in accordance with clause (ii) after allowing abatement prescribed in the sixth schedule to Finance Act, 2017. After deciding on whether clause (i) or (ii) [under Rule 2A of the ST Valuation Rules] is applicable, at the time of quantification of liability, the lower authority shall consider the appellant's plea that the notice did not consider the Cenvat credit utilization toward payment of tax; and cum-tax benefit shall be extended under Sec 67(2) on the value attributable to the semi finished flat in the sale deed.

(e) The appropriation of amount paid is not contested, hence **Para 19(ii) of the impugned order is upheld**; the same stands adjusted against modified liability arising from (c) or (d) supra in the denovo proceedings;

(f) Interest, a quintessential liability accompanying belated payment of tax, is to be computed on such modified tax liability arrived at (c) or (d) supra. **Para 19(iii) of the impugned order stands modified** accordingly.

13. Regarding the protest of the appellant against imposition of penalty on the basis of bonafide belief, the same cannot be considered in view of the appellant being registered with the Department under the category of works contract service and being aware of the contingencies of law. Post 01.07.2012, there has been no doubt regarding the payment of Service Tax under the category of works contract, and the appellant cannot hide behind the excuse of the disputed issue being under litigation. If the appellant has already paid tax on the activity for which the demand is raised, then the penalty would be in accordance to the short paid / not paid demand quantified based on the remand made. Furthermore, I am also restrained from allowing the benefit of Section 80 as the same has been omitted from the statute as on the date of adjudication, without saving / repeal in respect of the existing

impositions, by Section 116 of the Finance Act, 2015. The waiver provision is therefore not available for invocation. The penalty under Sec 76 is specific to non discharge of tax and does not require allegation of gross violations; and is imposable for the malfeasance where the notice is issued for normal period of limitation. **Para 19(iv) of the impugned order stands modified** to the effect that it shall be computed at 10% of tax liability arising in denovo proceedings ordered supra.

14. A penalty of Rs.10,000 has also been imposed under Sec 77 of the FA 1994, which has been contested in the appeal. I find that Para 8(iv) of the Show Cause Notice is vague in making the proposal nor does the impugned order discuss the violations meriting the imposition. When a penalty under Sec 76 squarely covers the malfeasance, there is no call for an imposition under Sec 77 for the same violation. The cited provision has two sub-sections, 77(1) and residuary 77(2). None of the violations listed in Sec 77(1) is alleged in the SCN, and there is no justification for imposition of penalty for a violation which is already covered by Sec 76. There is clearly no justification recorded for taking recourse to the residuary penalty provided under Sec 77(2). The vagueness in proposing penalty has been disapproved in several rulings, particularly SANMAR FOUNDRIES LTD. Versus COMMR. OF C. EX. & CUS., TIRUCHIRAPPALLI [2015 (316) E.L.T. 659 (Mad)], and RAJMAL LAKHICHAND Versus COMMISSIONER OF CUSTOMS, AURANGABAD [2010 (255) E.L.T. 357 (Bom)]. Therefore the penalty imposed under Sec 77 at **Para 19(v) of the impugned order is** legally unsustainable and is **set aside**. In view of the above, the following order is passed.

ORDER

The impugned order stands modified to the extent discussed supra and the appeal is partly allowed by way of remand.

(बी.वी.वी.टी. प्रसाद नायक)
(B.V.V.T PRASAD NAIK)
आयुक्त (अपील-II), हैदराबाद
Commissioner (Appeals-II)
Hyderabad

By SPEEDPOST To

1. **M/s Paramount Builders**, 5 – 4 – 187/ 3&4, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad – 500003.
2. **M/s. Hiregange & Associates**, HIREGANGE & ASSOCIATES, Chartered Accountants, 4th Floor, West Block, Srida Anushka Pride, Opp. Ratnadeep Supermarket, Road Number 12, Banjara Hills, Hyderabad, Telangana 500034.

Copy Submitted to: The **Chief Commissioner**, Central Tax & Customs, Hyderabad Zone, Hyderabad.

Copy to

1. The **Commissioner of Central Tax & GST**, Presently **Secunderabad Commissionerate**, (Erstwhile **Service Tax Commissionerate**) GST Bhavan, L B Stadium Road, Basheerbagh, Hyderabad, TS-500004. **[Jurisdictional Commissioner]**

2. The **Additional Commissioner,** Secunderabad Commissionerate, (Erstwhile **Service Tax Commissionerate**), GST Bhavan, L B Stadium Road, Basheerbagh, Hyderabad, TS-500004. **[Respondent]**

3. Master copy.