IN THE CUSTOMS, CENTRAL EXCISE & SERVICE TAX APPELLATE TRIBUNAL: HYDERABAD

MISC. APPLICATION No ST/...../2024
Appeal No ST/...../2024

MISCELLANEOUS APPLICATION for seeking Condonation of delay in filing appeal by M/s Nilgiri Estates w.r.t. to Order-In-Original No. HYD-EXCUS-003-COM-009-23-24 dated 29.09.2023 passed by Commissioner of Central tax, Secunderabad CGST Commissionerate, Hyderabad.

M/s. Nilgiri Estates,
5-4-187/3 & 4, 2nd Floor,
Soham Mansion, M.G. Road,
Secunderabad -500003 ..... **Appellant**

Vs.

Commissioner of Central Tax,
Secunderabad GST Commissionerate,
GST Bhavan,
Opp. L B Stadium Road,
Hyderabad -500 004 ..... **Respondent**

The Appellant humbly submits before Hon'ble Tribunal as under:

1. Order-In-Original No. HYD-EXCUS-003-COM-009-23-24 dated 29.09.2023 passed by Commissioner of Central tax, Secunderabad CGST Commissionerate, Hyderabad was received by the Appellant on 16.11.2023 by post and the due date to file the appeal before CESTAT was 16.02.2023. The appeal is filed on ____.3.2024 resulting in **___days** delay. The reason for delay in explained herein below:

2. The delay in filing the appeal is because there were multiple notices issued by both Central and State GST department for appellants group companies for the FY 2017-18, 2018-19 and other years. These appellants were occupied with audit conducting officers and were accumulating information/required documents for filing the replies and attending personal hearings which in few cases also resulted in Orders. Further, for period 2018-19 and other years the appellants are still in process of accumulating information/required documents, filing the replies and attending personal hearings. Copy of few orders are attached herewith. Details of department notices/orders are re-produced hereunder for better appreciation as follows:

Year	Group Company	Description of proceedings
July 2017 to March 2020	Nilgiri Estates	Returns based SCN No. V/Audit-II/C-I/28/2021-22/Gr-15 dated 19.05.2023
July 2017 to March 2020	Nilgiri Estates	OIO No. 28/2023-24-SEC-ADJN-ADC (GST) dated 12.10.2023
2018-19	Nilgiri Estates	Returns based SCN No. 46/2023-24 dated 29.12.2023

July 2017- March 2019	Silver Oak Villas LLP	Audit based SCN No. V/01/GST/81/2020-GR. 12/CIR-I dated 12.01.2022
2018-19	Silver Oak Villas LLP	Returns based SCN No. 39/2023-24 dated 28.12.2023
July 2017- March 2019	Villa Orchids LLP	Returns based SCN No. V/01/GST/78/2020-GR.12/CIR-I dated 05.01.2022
July 2017- March 2019	Villa Orchids LLP	OIO No. 33/2023-24-SEC-ADJN-ADC (GST) dated 01.11.2023
2018-19	Villa Orchids LLP	Returns based SCN No. 61/2023-24 dated 29.12.2023
2018-19	Nilgiri Estates	Hearing letter scheduling hearing on 27.02.2024
2018-19	Silver Oak Villas LLP	Hearing letter scheduling hearing on 28.02.2024
2018-19	Villa Orchids LLP	Hearing letter scheduling hearing on 28.02.2024

With this there has been a delay of ____ **days** in filing of Appeal before Hon'ble CESTAT, Hyderabad.

3. The appellant submits that the delay is not intentional and for the reason stated above, if delay is not condoned it could cause them irreparable loss as they have good case on merits and humbly prays before this Hon'ble Tribunal to condone the delay as:

   a. In terms of principles laid down by Apex Court in the case of Commissioner, Land Acquisition v. MST Katiji reported in [1987 (28) ELT 185 (S.C.)], delay may be condoned.

PRAYER

Therefore, it is humbly requested to condone the delay of ____**days**, in filing the appeal before the Hon'ble CESTAT. Further request to accept the appeal filed.

Signature of Appellant

VERIFICATION

I, Soham Modi, Partner of **M/s Nilgiri Estates**, the Appellants herein do declare that what is stated above is true to the best of our information and belief.

Verified today i.e., on _____ day of March 2024

Place: Hyderabad

Signature of Appellant

FORM ST - 5

[See rule 9(1)]

Form of Appeal to the Appellate Tribunal under sub-Section (1) of Section 86 of the Finance Act, 1994

IN THE CUSTOMS, CENTRAL EXCISE & SERVICE TAX APPELLATE TRIBUNAL: HYDERABAD

APPEAL No. ST/..... of 2024

Between:
M/s. Nilgiri Estates,
5-4-187/3 & 4, 2nd Floor,
Soham Mansion, M.G. Road,
Secunderabad -500003 ..... **Appellant**

Vs.

Commissioner of Central Tax,
Secunderabad GST Commissionerate,
GST Bhavan,
Opp. L B Stadium Road,
Hyderabad -500 004 ..... **Respondent**

01(a)	Assessee Code	AAHFN0766FSD001
(b)	Premises Code	
(c)	PAN or UID	AAHFN0766F
(c)	E-mail Address	jayaprakash@modiproperties.com
(f)	Phone Number	9553919781
(g)	Fax Number	-
02.	The Designation and Address of the Authority passing the Order Appealed against.	Commissioner of Central Tax, Secunderabad GST Commissionerate, GST Bhavan ,7th Floor, Opp. L.B Stadium, Basheerbagh, Hyderabad – 500004
03.	Number and Date of the Order appealed against	Order-In-Original No. HYD-EXCUS-003-COM-009-23-24 dated 29.09.2023
04.	Date of Communication of a copy of the Order appealed against	16.11.2023 by hand
05.	State or Union Territory and the Commissionerate in which the order or decision of assessment, penalty, was made	Telangana, Secunderabad GST Commissionerate
06.	If the order appealed against relates to more than one Commissionerate, mention the names of all the Commissionerate, so far as it relates to the Appellant	No
07.	Designation and address of the adjudicating authority in case where the order appealed against is an order of the Commissioner (Appeals)	NA
08.	Address to which notices may be sent to the appellant	**H N A & Co. LLP (Formerly Hiregange & Associates, LLP) Chartered Accountants,**

		4th Floor, West Block, Anushka Pride, R. No.12, Banjara Hills, Hyderabad, Telangana 500034 Email: Venkataprasad@hiregange.com Mob: 89781 14341 **(And also copy to the Appellant)**
09.	Address to which notices may be sent to the Respondent	Commissioner of Central Tax, Secunderabad GST Commissionerate, GST Bhavan, Opp. L B Stadium Road, Hyderabad -500 004
10.	Whether the decision or order appealed against involves any question having a relation to the rate of Service Tax or to the value of goods for the purpose of assessment.	Yes
11.	Description of service and whether in 'negative list'	No
12.	Period of Dispute	April 2015 to June 2017
13(i)	Amount of service tax, if any Demanded for the period of dispute	9,78,671/- under the section 73 of the Finance Act, 1994.
(ii)	Amount of interest involved up to the date of the order appealed against	As applicable u/s 75 of the Finance Act, 1994
(iii)	Amount of refund if any, rejected or disallowed for the period of dispute	NA
(iv)	Amount of penalty imposed	9,78,671/- as per section 78 and 10,000/- under section 77 of the Finance at, 1994.
14(i)	Amount of service tax or penalty or Interest deposited. If so, mention the amount deposited under each head in the box.	An amount of Rs.73,400/- is paid vide challan dated 19.12.2023 towards mandatory pre deposit u/s. 35F of Central Excise Act, 1944. (Copy of challan is attached as **Annexure _____**)
(ii)	If not, whether any application for dispensing with such deposit has been made?	Not applicable
15.	Does the order appealed against also involve any central excise duty demand, and related fine or penalty, so far as the appellant is concerned?	No
16.	Does the order appealed against also involve any customs duty demand, and related penalty, so far as the appellant is concerned?	No
17.	Subject matter of dispute in order of priority (please choose two items from the list below) [i) Taxability – Sl. No. of Negative List. ii) Classification of Services iii)Applicability of Exemption Notification No., iv) Export of Services v) Import of Services	(i) Taxability (ii) Others

	vi) Point of Taxation vii) CENVAT viii) Refund ix) Valuation x) Others]	
18.	Central Excise Assessee Code, if registered with Central Excise	Not Applicable
19.	Give details of Importer/Exporter Code (IEC), if registered with Director General of Foreign Trade	Not Applicable
20.	If the appeal is against an Order-in-appeal of Commissioner (Appeals), the Number of Order-in-original covered by the said Order-in-Appeal.	NA
21.	Whether the respondent has also filed Appeal against the order against which this appeal is made.	No. As per knowledge of the Appellant
22.	If answer to serial number 21 above is 'Yes', furnish details of appeal.	No
23.	Whether the appellant wishes to be Heard in person?	Yes. At the earliest convenience of this Hon'ble Tribunal.
24.	Reliefs claim in appeal	To set aside the impugned order and grant the relief claimed.

Signature of the Appellant

STATEMENT OF FACTS

A. M/s. Nilgiri Estates, Secunderabad (hereinafter referred to as 'Appellant) is a partnership firm *inter alia* engaged in real estate business and registered for service tax vide STC. AAHFN0766FSD001 and migrated to GST vide GSTIN 36AAHFN0766F1ZA w.e.f. 01.07.2017 during the subject period, the appellant has executed the project namely 'Nilgiri Estate' involving the construction & sale of 'Villas'.

B. The appellant had been discharging the applicable service tax after claiming abatement of 75%/70% in terms of Sl. No. 12 of Notification No.26/2012-ST dated 20.06.2012 as amended. This appellant has not availed any CENVAT Credit on inputs materials during the period April 2015 to June 2017 and only availed CENVAT credit on input services. However, appellant has erroneously disclosed the CENVAT Credit availed on input services as CENVAT credit availed on inputs while filing ST-3 returns. CENVAT Credit statement along with corresponding ledgers, invoice copies are enclosed as **Annexure ____**.

C. This appellant collects the following amounts from the customers towards construction & sale of 'Villa' as per the terms of the agreement entered:

Sl. No	**Nature of receipt**	**Collected towards**
1	Villa sale price	Construction & sale of 'Villa'
2	Corpus fund	Deposit towards establishment of housing society with the members of housing society
3	VAT (sales tax)	Sales tax levied on the sale of 'Villa' under A.P VAT Act, 2005
4	Stamp duty	Paid on sale value of villa in accordance with State Stamp Act to the Government at the time of registration
5	Electricity meter connection charges	Payment to 'electricity board' for applying electricity connection to the flat
6	Water connection charges	Payment to 'Hyderabad Metropolitan Water Supply & Sewerage Board (HMWSS)' for taking the water connection

D. The service tax on the amounts shown at Sl. No. 2 to 6 was not paid as the same are mere reimbursement of the expenses/statutory payments made on behalf of the customers. The receipt of the aforesaid amounts was duly disclosed in ST-3 returns.

E. During the financial year 2018-19, the service tax department has scrutinized the ST-3 returns and issued a letter dated 24.09.2018 communicating certain discrepancies. This appellant has filed a detailed reply on 12.10.2018 (Copy is enclosed as **Annexures**____ **&** ___). However, the department has never pointed out the discrepancies pointed out in the present notice.

F. Subsequently, after 2 years in the year 2020 amidst of lockdown, the service tax department had scrutinized the returns one more time covering the period from April 2015 to June 2017 and issued a letter dated 23.07.2020. Subsequently, appellant filed a consolidated reply to the received letter dated 23.07.2020. (Copy is enclosed as **Annexures**____ **&** ___). Furnishing the aforesaid information is followed by the receipt of the Show Cause Notice dated 21.12.2020 (Copy is enclosed as **Annexure** ____) asking to show cause as to why:

i) an amount of Rs. 4,44,30,407/- (Rupees Four Crores Forty Four Lakhs Thirty Thousand Four Hundred and Seven Only) [including Education Cess, Secondary and Higher Education Cess, Swachh Bharat Cess and Krishi Kalyan Cess] should not be demanded towards short payment of Service Tax rendered under construction of residential complex service, in terms of proviso to Section 73(1) of the Finance Act, 1994;

ii) interest at the applicable rates on the above tax amount should not be recovered from them under Section 75 of the Finance Act, 1994;

iii) Penalty should not be imposed on them under Section 78 of the Finance Act, 1994.

iv) Penalty should not be imposed on them under Section 78 of the Finance Act, 1994.

v) Late fee of Rs. 20,000/- (Rupees Twenty Thousand Only) should not be imposed on them under Section 70(1) of the Finance Act, 1994.

G. The Appellant has filed the detailed submissions vide reply dated 17.02.2021 (Copy of reply is enclosed as **Annexure _____**).

H. Subsequently, Appellant has attended the personal hearing on 14.06.2021, 28.9.2021, 22.11.2022 and on 5.9.2023 and also filed additional submissions on 4.9.2021, 24.9.2021, 2.1.2023, 17.01.2023, 27.2.2023, 19.9.2023 and 21.9.2023 and requested to drop the proceedings. (Copies of additional submissions collectively filed as **Annexure ____**).

I. Subsequently appellant has received the Order in Original dated 29.09.2023 confirming the demand to the extent of Rs.9,78,671/- along with applicable interest and equal penalty. (Copy of Order-in-Original is enclosed as **Annexure ____**).

J. Aggrieved by the above impugned order, which is contrary to facts, law, and evidence, apart from being contrary to a catena of judicial decisions and beset with grave and incurable legal infirmities, the Appellant prefers this appeal on the following grounds (which are alternate pleas and without prejudice to one another) amongst those to be urged at the time of hearing of the appeal.

GROUNDS OF APPEAL

1. Appellant submits that the impugned order is ex-facie illegal and untenable in law since the same is contrary to facts and judicial decisions.

2. Without prejudice to any other submissions made hereunder, the Appellant submits that the first appellate authority failed to properly appreciate the submission that present proceedings and the issuance of the impugned Order in Appeal were without authority of the law as the provisions of the Finance Act, 1994 which authorizes the levy and collection of Service tax were repealed in terms of Section 19 of Constitution (one hundred and first amendment) Act, 2016 read with Section 173 of CGST Act, 2017. Further section 174 of CGST Act, 2017 as amended only saves the proceedings already instituted before the enactment of the CGST Act, 2017 (w.e.f. 01.07.2017) whereas the issuance of the impugned SCN was initiated after 01.07.2017. Hence, the impugned order passed should be set aside on this ground alone.

In Re: Impugned Order is not valid

3. The appellant submits that as per C.B.E. & C. Instruction F No. 1080/09/DLA/MISC/15 dated 21st December 2015 and Circular No. **1076/02/2020-CX dated 19.11.2020, pre-show cause notice consultation is mandatory in cases involving duty of more than 50 lakhs.** However, in the instant case the show cause notice was issued without pre-show cause notice consultation even though the demand involved is more than 50 lakhs. Therefore, the impugned notice becomes invalid on this ground alone. In this regard, reliance is placed on

   a. Amadeus India Pvt Ltd Vs CCE 2019 (25) G.S.T.L. 486 (Del.)

   b. Freight Systemns India Pvt Ltd Vs CCE 2019 (368) ELT 506 (Mad)

   c. Hitachi Power Europe GMBH Vs CBIC 2019 (27) GSTL 12 (Mad)

4. The finding of the adjudicating authority at page 38 and 39 of impugned order that there have been various correspondences made with the assessee prior to issuance of SCN satisfies the condition of pre-consulation is incorrect.

5. The above finding of the adjudicating authority is not passed in the spirit for what pre-SCN Consultation was recommended by Tax Administration Reform Commission ('TARC') for issuing the above Circular/s. The extract of recommendation is re-produced hereunder for better appreciation:

"It is desirable to avoid disputes where a collaborative approach can provide a solution. An administrative pre-dispute consultation mechanism may be instituted in both the organizations for resolving tax disputes at the pre-notice stage through an open dialogue with the taxpayer, in which both sides articulate and discuss their respective positions and views on the matter at hand. An amicable resolution would be possible when a common view emerges on the facts and the legal position. It is expected that this process, if followed in proper spirit, would lead to elimination of a large number disputes leaving only a few contentious matters in which mutual agreement is not reached. Such disputes would follow other legal channels."

6. As submitted above, correspondence with assessee will not preclude department from adhering to pre-SCN consultation as correspondence and pre-SCN consultation have different objectives. Further, Pre-SCN consultation is to be done with the SCN issuing authority. On these counts, the findings of the adjudicating authority cannot be accepted. Further, reliance on Board Circular No. 1079 dated 11.11.2021 to say that in cases of fraud issuance of pre-SCN consultation is not required is incorrect as the Circular is issued much later from issuance of SCN in December 2020. Further, the inadvertent declaration of CENVAT credit in column Inputs instead of input services would have come to light during the pre-

consultation only and issue would have been solved at that stage only which did not happen due to not providing the pre-SCN consultation.

In Re: Appellant is eligible for abatement of 75% with respect to 18 Villas as per Notification No. 26/2012-ST dated 20.06.2012 as amended:

7. The adjudicating authority at page 43 though acknowledges the fact that this appellant had not availed CENVAT credit of inputs instead they have availed CENVAT credit of input services goes on to deny the benefit of abatement of 75% for period 2015-16 vide finding at Para No. 22.4 observing that out of 185 villas constructed and sold by the appellants, 18 No's of villas viz., (24, 35,79, 89, 100, 109, 114, 116, 153, 156, 163, 164, 166, 170, 180, 183, 184 and 185) are more than area of 2000 sq. ft which is beyond the allegations made in the show cause notice.

Impugned order is beyond the SCN:

8. That the finding of the adjudicating authority at page 45 of the impugned order that the appellant is not eligible for abatement of 75% as out of 185 villas, 18 villas are in more than area of 2000 sq. ft as per Notification No. 26/2012-ST as amended is incorrect.

9. That the adjudicating authority has passed the impugned order against the settled legal position that unless the foundation of the case is made out in the show cause notice, the revenue department cannot be permitted to build up a new case against the assesse as held in following cases:

   (a) **Commissioner of Customs, Mumbai vs. Toyo Engineering Ltd., reported in (2006) 7 SCC 592,** where the Hon'ble Supreme Court emphasized upon the necessity of specifying the grounds for taking action against the Assesse in the show cause notice.

   (b) **Commissioner of Central Excise, Bhubaneshwar vs. Champdany Industries Ltd., reported in, (2009) 9 SCC 466** where it is held that unless the foundation of the case is made out in the show-

cause notice, the Revenue cannot in Court argue a case not made out in its show-cause notice.

(c) **Commissioner of Central Excise, Chandigarh vs. Shital International, reported in (2011) 1 SCC 109** where it is held that unless the foundation of the case is laid in show-cause notice, the Revenue cannot be permitted to build up a new case against the assessee.

10. Further, this Hon'ble Jurisdictional CESTAT in the case of **M/s. Inox Leisure Ltd. Vs. Commissioner of Service Tax, Hyderabad 2022 (60) G.S.T.L. 326 (Tri. - Hyd.)** had held that the adjudicating authority could not have gone beyond the scope of the show cause notice to confirm the demand. Said decision has been **affirmed by the Hon'ble Supreme Court vide Commissioner of Service Tax Vs. Inox Leisure Ltd. 2022 (61) G.S.T.L. 342 (S.C.).**

11. Accordingly, the demand confirmed by denying the benefit of abatement for FY 2015-16 is incorrect.

12. Without prejudice to the above submissions, it is further submitted that the Notification No. 26/2012-ST dated 20.06.2012 as amended vide Notification No. 2/2013-ST dated 01.03.2013 as amended vide Notification No. 9/2013-ST dated 8.5.2013 prescribes the condition that benefit of abatement of 75% cannot be given if residential unit has carpet area of more than 2000 square feet. In this regard, it is submitted that all of the 18 no's of villas are having carpet area of less than 2000 square feet which is clear from the below table:

Sl.No.	Villa Numbers	Plot Area	Carpet Area (converted total plot area of Square Yard to Square feet
1	24	175 sq. yds.,	1575 sq. fts
2	35		
3	79	175 sq. yds.,	1575 sq. fts
4	89	150 sq. yds.,	1350 sq. fts

5	100	150 sq. yds.,	1350 sq. fts
6	109	150 sq. yds.,	1350 sq. fts
7	114	170 sq. yds.,	1530 sq. fts
8	116	170 sq. yds.,	1530 sq. fts
9	153	164 sq. yds.,	1476 sq. fts
10	156	150 sq. yds.,	1350 sq. fts
11	163	150 sq. yds.,	1350 sq. fts
12	164	150 sq. yds.,	1350 sq. fts
13	166	150 sq. yds.,	1350 sq. fts
14	170	150 sq. yds.,	1350 sq. fts
15	180	193 sq. yds.,	1737 sq. fts
16	183	186 sq. yds.,	1647 sq. fts
17	184	193 sq. yds.,	1737 sq. fts
18	185	200 sq. yds.,	1800 sq. fts

Carpet Area= is actual area refers to the actual usable space within a property excluding thickness of wall.

Built up Area= is the total area of the property, including the carpet area, walls, balconies and other areas such as corridors, lobbies etc.

13. Above calculation of the Carpet area is based on full area of plot, in general carpet area will be less than plot area. The details of plot area are given in sale deeds. Copies of all the 18 no's of sale deeds are attached herewith as **Annexure ____**. The finding of lower authority that all the above 18 no's of villas are more than area of 2000 square feet based on built up area and not of carpet area. Hence, such finding is not correct and the impugned order to that extent needs to be set aside.

In Re: Amounts received as pure agent and other non-taxable receipts (vat, registration charges, stamp duty service tax etc.,) are not liable – hence shall not be included in 'taxable value'

14. The appellant herein submits that the various submissions were made with regards to non-taxability of VAT, Registration charges, Stamp duty and Service tax etc., which were simply ignored by the appellate authority without proper appreciation of the same; the appellant once again re-produces the same hereafter in subsequent paras;

15. Appellant submits that the lower adjudicating authority while confirming the demand vide Para 23.2 stated as follows:

> *"23.2. On examination of the documents along with the Service Tax determination of Value Rules, 2006 and the concept of "pure agent" as discussed above, I find that the assessee being a service provider has not fulfilled the conditions mentioned in above Para in respect of rule 5(2) of the Service Tax (Determination of Value) Rules, so that they have not complied with to claim the benefit of "Pure Agent" in as much as they failed to provide evidence that the recipients of service have authorized him to make such payment to the third party as mentioned in condition (iv) of rule 5(2); that the amount collected is to be separately shown in the invoice raised as per condition (vi) of the said rule; the service provider recovers from the recipient of service only such amount as has been paid by him to the third party as per condition no (vii); that the assessee has collected the actual amount equal to the expenditure he incurred on behalf of the receivers of service as per the explanation 1 of the said rule, etc. In view of the above, the assessee's contention in this regard to the extent of amount of Rs.29,76,388/- claimed in the ST-3 returns under the head of the "Pure Agent" for the period from 2015-16 to 2017-18 (up to June, 2017) is not acceptable as per law."*

16. Appellant submits that the finding of the impugned order that the Appellants have failed to provide evidence that the recipients of service have authorized them to make such payment to the third party as mentioned in condition (iv) of Rule 5(2); whether amount is separately collected; whether appellant has collected only the actual amount etc., are incorrect. As in all most all the agreement of sale and sale deed it is clearly agreed that Registration charges, Stamp duty, VAT and Service Tax have to be paid separately by the customer and same does not form part of actual consideration charged.

17. Appellant submits that the amounts classified as non-taxable receipts includes service tax; registration charges etc. Appellant submits that these receipts towards

(a) Service tax collected & remitted to the Central government as per the provisions of Finance Act, 1994;

(b) Stamp Duty, Registration Charges and VAT Collected as per State Stamp Act and VAT Act, 2005 and remitted the same to the respective department. Appellant has collected the actual amounts incurred for the same and have not added any margin.

As seen from the above, all these charges collected 'other non-taxable receipts' are statutory charges/deposit and received as mere reimbursements of expenses/charges incurred/paid on behalf of customers and does not involve any provision of service. Hence same shall be excluded from the taxable value *inter alia* in terms of Rule 5(2) of Service tax (determination of value) Rules, 2006.

18. Judicially also it was held that above charges are not to be included in taxable value. Reliance is placed on

i) Jurisdictional CESTAT Final Order No.A/30359/2023 dated 18.09.2023 in the case of Alpine Estates (Para- 7)

ii) ICC Reality & Others Vs CCE, 2013 (32) S.T.R. 427 (Tri. - Mumbai);

iii) Karnataka Trade Promotion Organisation v. CST 2016-TIOL-1783-CESTAT-BANG (Para- 2)

19. Further, to evidence the above receipts, Appellant is herewith enclosing the sample copies of ledger accounts of the customers as **Annexure** ___.

In Re: Denial of CENVAT Credit on rent-a-cab services

20. Appellant submits that the impugned order vide Para 22.2 denied ITC of Rs.1,05,965/- on rent-a-cab services. In this regard, Appellant submits

that the Show Cause Notice has not alleged that the CENVAT Credit is not eligible, therefore, the denial of CENVAT Credit in the impugned order is not correct and the same needs to be set aside.

21. That the adjudicating authority has passed the impugned order against the settled legal position that unless the foundation of the case is made out in the show cause notice, the revenue department cannot be permitted to build up a new case against the assesse as held in following cases:

(a) **Commissioner of Customs, Mumbai vs. Toyo Engineering Ltd., reported in (2006) 7 SCC 592,** where the Hon'ble Supreme Court emphasized upon the necessity of specifying the grounds for taking action against the Assesse in the show cause notice.

(b) **Commissioner of Central Excise, Bhubaneshwar vs. Champdany Industries Ltd., reported in, (2009) 9 SCC 466** where it is held that unless the foundation of the case is made out in the show-cause notice, the Revenue cannot in Court argue a case not made out in its show-cause notice.

(c) **Commissioner of Central Excise, Chandigarh vs. Shital International, reported in (2011) 1 SCC 109** where it is held that unless the foundation of the case is laid in show-cause notice, the Revenue cannot be permitted to build up a new case against the assessee.

22. Further, this Hon'ble Jurisdictional CESTAT in the case of **M/s. Inox Leisure Ltd. Vs. Commissioner of Service Tax, Hyderabad 2022 (60) G.S.T.L. 326 (Tri. - Hyd.)** had held that the adjudicating authority could not have gone beyond the scope of the show cause notice to confirm the demand. Said decision has been **affirmed by the Hon'ble Supreme Court vide Commissioner of Service Tax Vs. Inox Leisure Ltd. 2022 (61) G.S.T.L. 342 (S.C.).**

23. Accordingly, the demand confirmed is not correct and the same needs to be set aside.

In Re: Extended Period of Limitation is not invokable

24. Without prejudice to the above, it is submitted that the demand for the period from April 2015 to September 2015 is time barred since show cause notice has been served on the appellant beyond 5 years from the relevant date. The demand for the said period expired on 05.05.2020 whereas SCN was issued on 21.12.2020. Thereby, SCN served is time barred. The averment of impugned order taking the time extension given under Ordinance 2020 do not sustain as it lacks the legislative competence to amend the repealed enactments. In this regard, reliance is placed on the Hon'ble HC decision in case of **Reliance Industries Ltd Vs State Of Gujarat2020-TIOL-837-HC-AHM-VAT.** Though this decision is brought to the notice of the adjudicating authority failed to give any findings on the same.

25. The appellant submits that the impugned order at Para 26.3 gave a finding that since *'the assesse had claimed abatement without fulfilling the conditions* prescribed *in Notification No. 2/2012-ST and claimed deductions without fulfilling the conditions prescribed under Service Tax (Determination of Value) Rules, 2006. Thus they have supressed the facts with intention to avoid payment of duty.'*

26. As submitted above, since availment of abatement and eligible for deductions is already settled vide above decisions and have been subjected to various judicial pronouncements, no suppression of facts with intention to avoid payment of duty can be alleged.

27. Further, with regards to allegation that lapse would not have come to light but for the investigation of department, standing alone cannot be accepted

as a ground for confirming suppression, Misstatement or Mis-declaration of facts. More so considering the fact that the very objective of conducting the Audit of records of an assessee is to ascertain the correctness of payment of duty etc., any shortcomings noticed during the course of Audit, itself cannot be reasoned that the deficiency was due to mala fide intention on the part of assessee. In this regard, relied on LANDIS + GYR LTD Vs CCE 2013 (290) E.L.T. 447 (Tri. - Kolkata).

28. The appellant submits that they have never hidden any information from the department and they have submitted whatever the information required by the department. If the appellant has the intention to suppress the facts, they would not have submitted the information asked by the department and this shows that appellant was under bonafide belief that the compliance made by them is correct.

29. Appellant submits that the details of availment of abatement and deduction as pure agent were disclosed in ST-3 returns. The Authorities have all the information in their hands, the authority can examine the issue as and when the Returns are filed and can conclude the liability of service tax on that itself. Authority has the duty to verify the returns in time and mere inadvertent error in reporting input service as inputs could have been resolved during the pre-scn consultation which was not provided to this appellant. Therefore, invocation of larger period of limitation is not valid and requires to be set aside. In this regard, appellant wishes to rely on the following to support the above view:

1) Sarabhai M. Chemicals v. CCE, Vadodara - 2005 (179) E.L.T. 3 (S.C.)

2) Shree Shree Telecom Pvt Ltd., Vs. CCE Hyderabad [2008 (232) E.L.T. 689 (Tri. - Bang.)

3) Sopariwala exports pvt. Ltd v. CST 2014 (36) S.T.R. 802 (Tri. Ahmd.)

30. Further, appellant submits that department is well aware of the facts which is evident from department letter dated 24.09.2018 wherein it has stated that the department has scrutinised the ST-3 returns of the appellant and observed certain discrepancies. Appellant has also submitted a reply dated 12.10.2018. However, the issue involved in the present show cause notice that the appellant had availed the CENVAT Credit on inputs and claimed deduction under pure agent were never pointed out by the department. This has led to the belief that the compliance made by the appellant is correct (Copy of letter dated 24.09.2018 and 12.10.2018 is enclosed as **Annexure___**). Hence, suppression of facts cannot be attributed to the present case. In this regard reliance is placed on **Nizam Sugar Factory vs. C.C.E**, A.P. 2006 (197) E.L.T. 465 (S.C.) it was held that *"Allegation of suppression of facts against the Noticee cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/ similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/ Noticee."*

31. In this regard, appellant submits that once the department has verified the returns and had not pointed out any discrepancies. But again after expiry of 2 years, the issuance of show cause notice invoking extended period of limitation is not correct and the same needs to be dropped.

32. Appellant submits that the impugned order confirmed demand by the invocation of the extended period of limitation only on the ground that they have suppressed the details to department. In this regard it is submitted that an **extended period of five years applicable only when something**

positive other than mere inaction or failure on the part of manufacturer/service provider is proved - Conscious or deliberate withholding of information by manufacturer/service provider necessary to invoke larger limitation of five years. In this regard wishes to rely on **CCE, Chemphar Drugs & Liniments 1989 (40) E.L.T 276 (S.C).** Therefore the allegation of OIO/SCN is not legal and proper.

33. Intention to evade payment of tax is not mere failure to pay tax. It must be something more i.e. that assessee must be aware that tax was leviable/credit was inadmissible and he must act deliberately to avoid such payment of tax. Evade means defeating the provision of law of paying tax and it is made more stringent by the use of word 'intent'. Where there was scope for doubt whether tax is payable or not, it is not 'intention to evade payment of tax'. reliance is placed on **Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC)**

34. Mere non-payment/short payment of tax per se does not mean that assesse has willfully contravened the provisions with the intent to evade payment of tax. In this regard reliance is placed on **Uniworth Textiles Ltd. v. Commissioner 2013 (288) E.L.T. 161 (S.C.)**

35. The appellant submits that long list of familiar judicial pronouncements holding impugned grounds of non-payment of Service Tax and failure to file correct ST-3 returns by themselves totally inadequate to sustain an allegation of wilful misstatement/suppression of facts. Relied on Punj Lloyd Ltd. V. CCE & ST 2015 (40) S.T.R. 1028 (Tri. - Del.);

36. The appellant submits that all the entries are recorded in books of accounts and financial statements nothing is suppressed hence the extended period of limitation is not applicable. Wishes to place reliance on LEDER FX Vs DCTO 2015-TIOL-2727-HC-MAD-CT; Jindal Vijayanagar Steel Ltd. v. Commissioner — 2005 (192) E.L.T. 415 (Tri-bang);

37. The appellant submits that they are under bonafide belief that they are eligible for abatement and deduction as pure agent as per their legal understanding. It is well settled legal position that suppression of facts cannot be attributed to invoke longer period of limitation if there is bonafide belief. Same was flown from the following:

a. Padmini Products v. Collector —1989 (43) E.L.T. 195 (S.C.)

b. Commissioner v. Surat Textiles Mills Ltd. — 2004 (167) E.L.T. 379 (S.C.)

38. The appellant submits that expression "suppression" has been used in the Section 73(1) of Finance Act, 1994 accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. **Suppression means failure to disclose full information with the intent to evade payment of duty.** Relied on Continental Foundation Jt. Venture CCE, **2007 (216) E.L.T 177 (S.C)**

With the above submissions it is clear that the invocation of the larger period of limitation not sustainable.

39. The appellant submits that the entire period from April 2015 to March 2017 falls beyond normal period of limitation (30 months) as tabulate below. Hence the proposed demand to that extent requires to be dropped on the count of limitation.

S.No.	Period	Return filing date	The date till which SCN can be issued
1	01.04.2015 to 30.09.2015	05-11-2015	05-05-2018
2	01.10.2015 to 31.03.2016	20-07-2016	20-01-2019
3	01.04.2016 to 30.09.2016	15-11-2016	15-05-2019
4	01.10.2016 to 31.03.2017	06-09-2017	06-03-2020

In Re: Interest and Penalties are not imposable

40. Without prejudice to the foregoing, appellant submits that when service tax is not applicable, the question of interest also penalties does not arise. It is a natural corollary that when the principal is not payable there can be no question of paying any interest as held by the Supreme Court in ***Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).***

41. The appellant submits that all the grounds have taken for **"In Re: Extended period of limitation is not invokable"** above is equally applicable for a penalty as well.

42. Appellant submits that no penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bona-fide belief that the offender is not liable to act in the manner prescribed by the statute. Relied on **Hindustan Steel Ltd. v. State of Orissa —1978 (2) E.L.T. (J159) (S.C.)**

43. Appellant submits that this is not the case of will-full evasion of the service tax for the imposition of the penalty under Section 78 of the Finance Act, 1994. The appellant further submits that penalty u/s 78 is imposable when the duty should not have been paid, short levied or short paid or erroneously refunded ***because of*** either fraud, collusion, willful mis-statement, suppression of fact or contravention of any provision or rules. These ingredients postulate a positive act and, therefore, mere failure to pay duty and availing the credit under the bonafide belief does not attract the penalty u/sec 78. In the instant case appellant there is no intention to evade duty, particularly when the information asked for, was made available to the department

44. Appellant submits that the impugned order had not discharged the burden of proof regarding the imposition of the penalty under Section 78 of the Finance Act, 1994. In this regard wishes to rely on the judgment in the case of Indian Coffee Workers' Co-Op. Society LtdVsC.C.E. & S.T.

Allahabad 2014 (34) S.T.R 546 (All) it was held that ***"It is unjustified in absence of discussion on fundamental conditions for the imposition of penalty under Section 78 of Finance Act, 1994".***

45. Appellant submits that Penalty under Section 78, as the word suggests, **is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.** Bonafide belief as to -non-taxability of service cannot be the reason for the imposition of the severe penalty. In this regard wishes to place reliance on **Rajasthan Spinning & Weaving Mills [2009 (238)** E.L.T. **3 (S.C.) & Commissioner Of Central Excise, Vapi Vs Kisan Mouldings Ltd 2010 (260) E.L.T 167 (S.C).**

46. Appellant further submits that the impugned order has merely stated that since the appellant did not provide the information as requested by the department he is liable to penalty under Section 77 of the Finance Act, 1994. In this regard, it is submitted that all of the information as been requested by the department was during first wave of Covid-19 pandemic where almost all the entities were shut and at the least were working with skeletal staff from homes. In such situation expecting huge amounts of information subjecting the staff of the appellant under imminent threat of life and liberty is incorrect and penalty should be dropped considering the peculiar facts during the period.

47. The Appellant craves leave to alter, add to and/or amend the aforesaid grounds.

48. The Appellant wishes to be heard in person before passing any order in this regard.

Signature of the Appellant

PRAYER

Wherefore it is prayed that

a. To set aside the impugned order to the extent aggrieved;
b. To hold that the impugned order has violated the judicial discipline:
c. To hold that impugned order has went beyond SCN;
d. To hold that service tax is not applicable on other non-taxable receipts;
e. To hold that the abatement claimed by the Appellant is rightly eligible;
f. To hold that demand should be re-quantified;
g. To hold that no interest and penalties are leviable;
h. Any other consequential relief shall be granted;

Signature of the Appellant

VERIFICATION

I, Soham Modi, Partner of M/s. Nilgiri Estates, Hyderabad the Appellant herein do declare that what is stated above is true to the best of our information and belief.

Verified today _____ day of March 2024
Place: Hyderabad

Signature of the Appellant

DECLARATION

I/We, Soham Modi, Partner of Appellant firm herein, do hereby declare that subject matter not previously filed or pending before any other legal forum including Hon'ble High Courts/Supreme Court.

The Appellant further declare that they have not previously filed any appeal, writ petition or suit regarding the Order-In-Original No. HYD-EXCUS-003-COM-009-23-24 dated 29.09.2023, before any court or any other authority or any other Bench of the Tribunal."

Declared today the ____ day of March 2024 at Hyderabad

Signature of the Appellant

IN THE CUSTOMS, CENTRAL EXCISE, AND SERVICE TAX APPELLATE TRIBUNAL, 1st FLOOR, REAR PORTION OF HMWSSB BUILDING, KHAIRATABAD, HYDERABAD –500 004.

Sub: Appeal against Order-In-Original No. HYD-EXCUS-003-COM-009-23-24 dated 29.09.2023 pertaining to M/s. Nilgiri Estates.

I, Soham Modi, Partner of M/s. Nilgiri Estates, the appellant herein, do hereby authorize and appoint H N A & Co. LLP, Chartered Accountants, Hyderabad or their partners and qualified staff who are authorized to act as authorized representative under the relevant provisions of the law, to do all or any of the following acts: -

- To act, appear and plead in the above noted proceedings before the above authorities or any other authorities before whom the same may be posted or heard and to file and take back documents.
- To sign, file verify and present pleadings, applications, appeals, cross-objections, revision, restoration, withdrawal and compromise applications, replies, objections and affidavits etc., as may be deemed necessary or proper in the above proceedings from time to time.
- To Sub-delegate all or any of the aforesaid powers to any other representative and I/We do hereby agree to ratify and confirm acts done by our above authorized representative or his substitute in the matter as my/our own acts, as if done by me/us for all intents and purposes.

This authorization will remain in force till it is duly revoked by me/us.

Executed on _____ day of March 2024 at Hyderabad

Signature of Appellant

I the undersigned partner of M/s. H N A & Co. LLP, Chartered Accountants, do hereby declare that the said M/s. H N A & Co. LLP is a registered firm of Chartered Accountants, and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above proceedings. I accept the above-mentioned appointment on behalf of M/s. H N A & Co. LLP. The firm will represent through any one or more of its partners or Staff members who are qualified to represent before the above authorities.

Dated: _____.03.2024

Address for service:

H N A & Co. LLP
(Formerly Hiregange & Associates, LLP)
Chartered Accountants,
4th Floor, West Block,
Anushka Pride,
R. No.12, Banjara Hills,
Hyderabad, Telangana 500034

For H N A & Co. LLP
Chartered Accountants

Lakshman Kumar K
Partner (M.No. 241726)

I Partner/Employee/associate of M/s H N A & Co. LLP duly qualified to represent in above proceedings in terms of the relevant law, also accept the above said authorization and appointment.

Sl.No.	Name	Qualification	Membership No.	Signature
1	Sudhir V S	CA	219109	
2	Venkata Prasad P	LLB	236558	
3	Srimannarayana S	CA		
4	Mohammad Shabaz	BA LLB	TS/2223/2016	
5	Aakash Heda	CA		

AFFIDAVIT

I, Soham Modi, aged about ____ years, S/o. _____,

and Partner of M/s. Nilgiri Estates, the appellant herein, do swear and state on oath that an amount of Rs.73,400/- paid vide challan dated 19.12.2023 is paid towards mandatory pre deposit u/s. 35F of Central Excise Act, against Order-In-Original No. HYD-EXCUS-003-COM-009-23-24 dated 29.09.2023.

I, Soham Modi, state that the above statement is true and correct to the best of my knowledge and belief.

Executed on this ____ March 2024 at Hyderabad

(Soham Modi)

NOTARY PUBLIC