



आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क:
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealsrajkot@gmail.com



सामनेय त्वाये

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/10/RAJ/2017	DC/JAM/ST/02/2016-17	31.10.2016

ख अपील आदेश संख्या (Order-In-Appeal No.):

RAJ-EXCUS-000-APP-159-2017-18

आदेश का दिनांक / Date of Order:	03.01.2018	जारी करने की तारीख / Date of issue:	08.01.2018
------------------------------------	------------	--	------------

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अथ आयुक्त संयुक्त आयुक्त उपायुक्त सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, राजकोट / जामनगर / गन्धिधाम, द्वारा उपरोक्तित जति मूल आदेश से सृजित /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham, :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name&Address of the Appellants & Respondent :-**
M/s. S.Poojari Crane Service,, Plot No. 8, Opp.- I.O.C. Pump, Near Express Hotel, Khambhaliya Highway Sapar patiya, Jamnagar.- 361141

इस आदेश(अपील) से व्यभिक्त कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थ न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है।
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) विशेषकरण मूल्यंकन से सम्बंधित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थ न्यायाधिकरण की विशेष पीठ, 2nd अर. के. पुरम, नई दिल्ली, को की जानी चाहिए।
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बतलाए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थ न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, भृगुमाली भवन अलावा अहमदाबाद- 380016 को की जानी चाहिए।
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलार्थ न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये फॉर्म EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की रंग, स्टाट की रंग और लगाया गया जुर्माना, स्पष्ट 5 लाख या उससे कम, 5 लाख स्पष्ट या 50 लाख स्पष्ट तक अथवा 50 लाख स्पष्ट से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान संबंधित अपीलार्थ न्यायाधिकरण की शाखा के सहायक-रजिस्टार के नाम से किसी भी सर्वोपयुक्त क्षेत्र के बैंक द्वारा जारी रेकॉग्निड बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलार्थ न्यायाधिकरण की शाखा स्थित है। स्पेशन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपये का निर्धारित शुल्क जमा करना होगा।
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(iv) अपीलार्थ न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 3(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती है। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की रंग, स्टाट की रंग और लगाया गया जुर्माना, स्पष्ट 5 लाख या उससे कम, 5 लाख स्पष्ट या 50 लाख स्पष्ट तक अथवा 50 लाख स्पष्ट से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान संबंधित अपीलार्थ न्यायाधिकरण की शाखा के सहायक-रजिस्टार के नाम से किसी भी सर्वोपयुक्त क्षेत्र के बैंक द्वारा जारी रेकॉग्निड बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलार्थ न्यायाधिकरण की शाखा स्थित है। स्पेशन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपये का निर्धारित शुल्क जमा करना होगा।
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5, as prescribed under Rule 3(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is upto Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-

152

- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दूज की गरीबी, सेवाकर, नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म S.T.-7 में की जा सकती एवं उसके साथ आवक, केन्द्रीय उत्पाद शुल्क अधिकांश आवक (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियां संलग्न कर (अपील से एक प्रति प्रमाणित होनी चाहिए) और आवक द्वारा सहायक आवक अथवा उपयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपीलार्थि न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act, 1994, shall be filed in Form S.T.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थि प्राधिकरण (सेन्टेट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35ए के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलार्थि प्राधिकरण में अपील करने समय उत्पाद शुल्क सेवा कर भाग के 10 प्रतिशत (10%), जब भाग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'भाग किए गए शुल्क' में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेन्टेट जमा की गयी गलत राशि
(iii) सेन्टेट जमा निवारावली के नियम 6 के अंतर्गत देय रकम
- बशर्त कि इस धारा के प्राधान्य वित्तीय (सं. 2) अधिनियम 2014 के अंग्रेज में हुई किसी अपीलार्थि प्राधिकारी के समय विचारार्थीन स्थगन अर्जी एवं अपील को लागू नहीं होगी।
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.
Under Central Excise and Service Tax, 'Duty Demanded' shall include:
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) भारत सरकार को पुनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परतक के अंतर्गत अथवा बशर्त, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, पीसी भवन, जीवन-दीप भवन, सफट मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:
(i) यदि ग्राह के किसी नुकसान के मामले में, जहां नुकसान किसी ग्राह को किसी कारखाने से ग्राह गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक ग्राह गृह से दूसरे ग्राह गृह पारगमन के दौरान, या किसी ग्राह गृह में, या ग्राह गृह में ग्राह के प्रसंस्करण के दौरान, किसी कारखाने या किसी ग्राह गृह में ग्राह के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे ग्राह के विनिर्माण में प्रयुक्त कच्चे ग्राह पर भारी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को ग्राह निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ह्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्राधान्यों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा निर्यात की गई तरीक अथवा समावधि पर या बट में पारित किए गए हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
(v) उपरोक्त आवेदन की दो प्रतियां फॉर्म संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमवाली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संश्लेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश का अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साथ के लिए पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-in-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA 1944 under Major Head of Account.
(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। / जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 / का भुगतान किया जाए। / The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved is Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
(D) यदि इस आदेश में कई ग्राह आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त धारा में किया जाना चाहिए। इस लक्ष्य के होने हुए भी की निम्न परत कर से बचने के लिए अस्थायी अपीलार्थि प्राधिकरण को एक अपील का केन्द्रीय सरकार को एक आवेदन किया जाना है। / In case, if the order covers various numbers of order-in-Original, fee for each O.I.D. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriporitic work if excising Rs. 1 lakh fee of Rs. 100/- for each.
(E) अध्यासोपि न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट लगे होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-1 in terms of the Court Fee Act, 1975, as amended.
(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थि न्यायाधिकरण (सर्वे विधि) नियमवाली, 1982 में उल्लिखित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान उपलब्ध किया जाना है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
(G) उच्च अपीलार्थि प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्राधान्यों के लिए, अपीलार्थि विभागीय वेबसाइट www.cbac.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbac.gov.in

:: ORDER IN APPEAL ::

M/s. S. Poojari Crane Service, Plot No. 8, Opp. - I.O.C. Pump, Near Express Hotel, Khambhaliya Highway, Sapar Patia, Jamnagar-361141 (*hereinafter referred to as 'the appellant'*), engaged in providing taxable service of "Supply of Tangible Goods Services" falling under Section 65(105)(zzzzj) of the Finance Act, 1994 (*hereinafter referred to as "Act "*), has filed appeal against Order-in-Original No. DC/JAM/02/2016-17 dated 31.10.2016 (*hereinafter referred to as 'the impugned order'*) passed by the Deputy Commissioner, Central Excise, Division-I, Jamnagar (*hereinafter referred to as 'the lower adjudicating authority'*).

2. Briefly stated the facts of the case are that the appellant provided taxable service of Rs. 25,88,070/- for the period from 2013-14 to 2015-16 (upto September, 2015), however failed to pay Service Tax of Rs. 3,41,066/-. Show Cause Notice issued to them was confirmed vide the impugned order demanding of Service Tax under proviso to Section 73(1) of the Act, along with interest under Section 75 of the Act and Rs. 2,94,488/- and imposing equal penalty of Rs. 3,41,066/- under Section 78 of the Act, however dropped the proposals for imposition of penalty under Sections 76 & 77 of the Act. The appellant had paid Rs. 2,94,468/- during the investigation vide Challan No 8 dated 15.10.2015 which has been appropriated.

3. Being aggrieved with the impugned order the appellant preferred appeal, *inter alia*, submitting that the proprietor of the firm i.e. Shri Sadanand Rama Poojari was undergoing Medical Treatment at Mumbai, and therefore in his absence, the business was handled by son of proprietor, who was new to the business; that he was also busy in looking after his father's health; that serious medical condition of the proprietor resulted into delay in payment of Service Tax; that the appellant submitted related medical reports to substantiate their claim.

3.1 The appellant also submitted that Rs. 2,94,488/- towards demand of Service Tax had been voluntary paid during the investigation before issuance of Show Cause Notice and the same has been appropriated vide the impugned order and remaining Service Tax liability of Rs. 46,578/- has also been paid by them vide Challan serial No. 50211 dated 30.07.2016 and thus the entire liability has been discharged by them.

3.2 Regarding interest under Section 75 of the Act, the appellant submitted that the majority portion of Service Tax liability (i.e. Rs. 2,94,488/-) had been paid before the issuance of Show Cause Notice, therefore, allegations made in the Show Cause Notice are not valid; that levy of the interest thereon is bad in the eyes of law and the same needs to be quashed, as per the decision of Hon'ble CESTAT in the case of Hazi Abdul Razzaque reported as (2006) 5 STT 307 (CESTAT-Kol).

3.3 Regarding imposition of late fee under Section 70 of the Act, the appellant submitted that non-payment on their part was only procedural lapse and they never intended to breach any provisions of the Act, as well as rules & regulations relating to Service Tax; that penalty proceedings are quasi criminal proceedings and it cannot be levied without bringing the fact on record that there is intention to breach the law on their part.

3.4 Regarding imposition of penalty under Section 78 of the Act, the appellant submitted that as per provisions of Section 80, no penalty should be imposed on them for any failure referred to in Section 78, if the appellant proves that there was reasonable cause for the said failure; that the proprietor of the firm was undergoing medical treatment at Mumbai and was facing serious health problems since 4 to 5 years due to which he couldn't manage his business affairs; that the son of the proprietor, handling the business in his absence, was not having appropriate business experiences and was not aware of taxation and procedural matters, which resulted in delay in payment of Service Tax liability; that they relied upon the judgements of the Hon'ble High Court of Chhattisgarh in case of M/s. Mahadev Logistic reported as 2017-81-taxmann.com-409-Chhattisgarh and of the Hon'ble Supreme Court in case Pepsi Foods Ltd. reported as 2011-30-STT-284-SC and Rajasthan Spg. & Wvg. Mills reported as 2008-20-STT-481-SC.

4. Personal hearing in the matter was attended by Shri Sagar Shah, CA who reiterated grounds of appeal and contentions made in their written submission dated 16.10.2017; that he further submitted additional written submission and emphasizing that the proprietor was on dialysis in a Mumbai Hospital since 2013 submitting doctors as well as hospital papers; that they had no intention to evade payment of Service tax, but for his bad health; that entire Service Tax liability has been paid before issuance of the impugned order; that the entire interest has now been paid by them even though they are in bad financial position, which proves their bonafides; that under the given circumstances they

requested to set aside penalty under Section 78 of the Act and relied upon the judgments of Hon'ble High Court in the case of Mahadev Logistics *supra* and to set aside late fee of Rs. 1 lakh also, as proprietor was not in a position to file returns since he was confined to bed owing to dialysis, initially twice a week and subsequently thrice a week; that they requested for their appeal to be allowed and order to be set aside.

FINDINGS:-

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum, as well as oral and written submissions made by the appellant. The issue to be decided in the present appeal is as to whether the impugned order imposing penalties under Section 78 and late fees under Section 70 of the Act is correct or not.

6. It is a fact that the appellant had not paid Service Tax in due months and also not filed Service Tax returns on due dates, however, the appellant paid the entire amount of Service Tax before issuance of the impugned order and interest for delayed payment of Service Tax. Under this appeal they are now contesting imposition of penalty under Section 78 of the Act and payment of late fee under Section 70 of the Act and not payment of Service Tax and interest thereon. The appellant has contended that since the proprietor of the appellant was facing serious kidney related health problems and was undergoing protracted medical treatment at Mumbai since June, 2014, his young son looking after business affairs of the firm was too young and was not well versed with the business affairs as well as taxation matter, which resulted in delay in payment of Service Tax. It is contended by the appellant that their bonafides are apparent from the fact that they paid large chunk of Service Tax before issuance of Show Cause Notice and remaining amount of Service Tax, as well as interest thereupon before issuance of the impugned order.

6.1 I find that the appellant has cited various orders passed by Hon'ble CESTAT and judgments of the Hon'ble High Court to emphasize their contention that no penalty is required to be imposed upon them as they had no malafide intention not to pay Service Tax and interest but could not pay due to circumstances beyond their control. The appellant has raised plea of medical grounds and submitted that the proprietor handling business affairs was on protracted medical treatment and therefore, penalty imposed on them is required to be set aside.

6.2 I find that the appellant had paid Service Tax as well as interest thereon before issuance of the impugned order, however, they did not pay penalty imposed under Section 78 of the Act. I find that the demand of Service Tax has been raised invoking proviso to sub-Section (1) of Section 73 of the Act i.e. the extended period, which has been paid by the appellant without objections. Interest thereupon has also been paid without protest. I find that the appellant had collected Service Tax but could not pay for financial reasons and therefore penalty imposed under Section 78 of the Act has to sustain. I also find that the ingredients for invoking proviso to Section 73(1) and for imposing penalty under Section 78 of the Act are available in this case. The appellant has also accepted liability to pay Service Tax under proviso to Section 73(1) of the Act. The acceptance of this would automatically lead to consenting the provisions of Section 78 of the Act. The Hon'ble CESTAT in the case of M/s. Datamini Technologies (I) Ltd. reported as 2017(51)STR145(T-Mum) has held as follows :-

"27. Proviso to Section 73(1) of Finance Act, 1994 and Section 78 are predicated on the same ingredients and recourse to the proviso, while acknowledging that circumstances do not justify penalty under Section 78, does not appear to bear the hallmark of consistency. I am, therefore, unable to concur with the finding of Hon'ble Member (T) that the extended period has been correctly invoked."

[Emphasis supplied]

6.3 I, therefore, find that imposition of penalty on the appellant under Section 78 of the Act is correct, legal and proper.

6.4 The imposition of late fee under Section 70 of the Act read with Rule 7C of Service Tax Rules, 1994 of Rs. 1,00,000/- at the rate of Rs. 20,000/- per return for failure to file Service Tax-returns has been contested by stating that non filing of ST-3 returns is a procedural lapse without *mens rea* and hence, no penalty is required to be imposed on them under Section 77 of the Act. I find that the provisions of Section 77(2) of the Act need to be examined which read as follows :-

"(1) 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 and with such late fee not exceeding twenty thousand rupees, for delayed furnishing of return, as may be prescribe"

6.4.1 I find that there is no reference to *mens rea* while imposing late fee under Section 70 of the Act and therefore plea of setting aside late fee on


the grounds of *mens rea* is not sustainable. The late fee imposed vide the impugned order is, therefore, upheld.

6.5 The contention of the appellant to take recourse to Section 80 of the Act is not tenable, inasmuch as the said section has been omitted with effect from 14.05.2015 vide the Finance Act, 2015.

7. In view of the above findings, I uphold the impugned order and reject the appeal filed by the appellant.

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

8. The appeal filed by the appellant is disposed off in above terms.


(कुमार संतोष)
आयुक्त (अपील्स)

BY R.P.A.D.

To,

M/s. S. Poojari Crane Service, Plot No. 8, Opp. IOC Pump, Near Express Hotel, Khambaliya Highway, Saparpatia, Jamnagar-361 141.	मेसर्स पूजारी क्रेन सर्विस प्लॉट नं. ८, आई. ओ. सी. पेट्रोल पम्प के सामने, एक्सप्रेस होटल के पास, खम्बालिया हाइवे, सपरपटिया, जामनगर-३६११४१.
---	--

Copy for information and necessary action to :-

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Assistant Commissioner, GST & Central Excise Division, Jamnagar.
4. The Range office, GST & Central Excise, Jamnagar Division
5. Guard File.