OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
PLOT NO. 6776/B-1 "SIDDHI SADAN" BUILDING,
NARAYAN UPADHYAY MARG,
BHAVNAGAR 364 001.

F. No. V /15-46 /DEM-ST /HQ /2010 -11 Date:- 17.2.2012

CORRIGENDUM

Order-in-Original No. 3/ADC/BVR/2011 dated 8.4.2011 passed by Additional Commissioner, Central Excise, Bhavnagar in case of Shri Dolatkumar Devji Jamaria, Porbandar.

Order-in-Appeal No. 71/2011(BVR) COMMR(A)RBT/RAJ dated 23.11.2011 passed by Commissioner (Appeals), Rajkot in case of Shri Dolatkumar Devji Jamaria , Porbandar.

In view of directions contained in Order-in-Appeal No. 71/2011(BVR)COMMR (A)RBT/RAJ dated 25.11.2011 passed by Commissioner (Appeals) Rajkot in para No. 20.2, 20.3 and 21 of the said order, para ii, iii, and iv of Order portion of Order-in-Original No. 03/ADC/BVR/2011 dated 8.4.2011 shall be read as under :

Para ii.

I impose penalty of Rs 200/- for everyday under Section 76 of the Finance Act, 1994 for the period 30.06.2006 to 10.05.2008 during which such failure continued or at the rate of 2 % of Service Tax for the period 30.06.2006 to 10.05.2008 per month whichever is higher provided that the total amount of penalty payable in terms of this Section shall not exceed the Service Tax payable during the said period.

Para iii

I impose penalty of Rs 1,000/- upon the Noticee under Section 77 of the Finance Act, 1994 for the period upto 10.05.2008. I impose penalty of Rs 200/- per day upon the Noticee for failure to obtain registration during which such failure continued starting with the first day after the due date, till the date of actual compliance or Rs five thousand rupees whichever is higher under Section 77 (1) (a) and I impose penalty of Rs 5,000/- under Section 77 (2) of the Finance Act, 1994.

Para iv.

I impose penalty of Rs 6,00,591/- (Rupees six lacs, five hundred and ninety one only) upon the Noticee under Section 78 of Finance Act, 1994 for the Service Tax not levied and paid by reason of suppressing of the facts with intent to evade payment of Service Tax. If the amount as determined under para (i) above is paid within 30 days from the receipt of the order along with the interest payable, then as per proviso to Section 78, the penalty will be only 25 % of the Service Tax determined at para (i) above. The benefit of reduced penalty shall be available only if the amount of penalty so determined has also been paid within the period of thirty days from the receipt of this order.

sd/-

(HARCHARAN SINGH)
ADDL.COMMISSIONER

To,
Shri Dolatkumar Devji Jamaria,
Opposite GEB Office,
Porbandar–360 577.

Copy to :-
1. Commissioner, Central Excise, Bhavnagar.
2. Assistant Commissioner (AE), Central Excise, HQ, Bhavnagar.

3. Assistant Commissioner, Service Tax Division, Bhavnagar.
4. Superintendent, Service Tax Range, Junagadh.
5. Assistant Commissioner, Central Excise, RRA Section, HQ, Bhavnagar.
6. Guard file.

10/2/2012

ADDL.COMMISSIONER

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
PLOT NO. 6776/B-1, "SIDDHI SADAN" BUILDING,
NARAYAN UPADHYAY MARG,
BHAVNAGAR-364001.

F. No. V/15-46/Dem-ST/HQ/2010-11

Date of Order: 08.04.2011
Date of issue : 18.04.2011

Passed by Harcharan Singh, Additional Commissioner

ORDER-IN-ORIGINAL NO: 03/ADC/BVR/2011

Any person(s) deeming himself aggrieved by this Order may appeal against this order to the Commissioner (Appeals-II), Central Excise, Ahmedabad, 7th floor, New Central Excise Building, Near Polytechnic, Ambawadi, Ahmedabad- 380015 within 60 days from the date of its communication. The appeal should bear a court fee stamp of Rs 2.50/- paise only.

The appeal should be filed in form EA 1 in duplicate, as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeal) Rules, 2002.

- It should be accompanied with the following:
- Copy of appeal in duplicate

Copies of the order, one of which shall be certified copy or the other must bear a court fee stamp of Rs 2.50/- paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

Sub :- Non-obtaining of registration under Service Tax by Shri Dolatkumar Devji Jamaria, Opposite G. E. B. Office, Porbandar providing 'Manpower Recruitment or Supply Agency's Service' and non payment of Service Tax during the period 16.6.2005 to 10.3.2010.

Brief Facts:

On the basis of intelligence that the contractors engaged by M/s Orient Abrasives Ltd, GIDC Industrial Area, Porbandar (hereinafter referred to as "Orient") are not paying any Service Tax on the taxable service provided by them, necessary documents were called from M/s Orient Abrasives Ltd, Porbandar. It was observed that Shri Dolatkumar Devji Jamaria, Opposite G. E. B. Office, Porbandar (hereinafter referred to as "noticee") is supplying labourers without paying Service Tax thereon. Therefore, an inquiry was initiated against the noticee and a summons was issued to him on 20.01.2010.

Statement of Shri A. S. Sihag, A. G. M. (Finance), M/s. Orient Abrasives Ltd, Porbandar was recorded before the Superintendent [A.E.] Central Excise HQ, Bhavnagar under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 (hereinafter referred to as "the Act") on 13.01.2010 wherein he *interalia* stated that they have engaged certain contractors for carrying out certain jobs; that they had produced ledger account of noticee for the financial year 2005-06 to 2009-10; that they have not issued any work order/job order in writing to the noticee; that as per verbal instruction, noticee performed their jobs. He produced sample copies of bills issued by the noticee under his dated signature. In his statement, Shri A. S. Sihag stated that they have a rate structure for works carried out by the contractors. Though the rate structure is not available in respect of all the contractors but it is same with similar terms and conditions in respect of all other contractors. Further, he stated that the workers employed by noticee work under the direction and supervision of their technical staff; that the works carried out by the noticee is within the limit of factory of Orient and the said works were accomplished by using the machinery of the company only; that the noticee does not use any goods/tools /equipments of their own; that the payments made to the noticee is reflected in their book of accounts under Heads:- Contractors Wages, RRM Machinery etc.

Statement of Shri Valji Veja Mokaria, duly authorized signatory of the noticee was recorded before the Superintendent (A.E.), Central Excise, HQ, Bhavnagar under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 (Hereinafter referred to as "the Act") on 27.01.2010 in response to summons dated 20.01.2010, wherein he *interalia* stated that he is engaged in supply of labourers for last four years; that he received work orders from Orient for supplying of labourers to carry out loading-unloading work at the finished goods stock Godown of Orient; that on instruction from supervisor of Orient, he is supplying labourers and these labourers are working as per the job assigned by the supervisor of Orient under his supervision; that they have received remuneration per tonne of consignment loaded-unloaded; that though the payment received from Orient on metric ton basis, but the same was calculated as per the number of labourers engaged and this rate was fixed by Orient; that the rate structure provided by Orient is as per the Minimum Wages Act; that after receiving payments for supplying of labourers from Orient, he is paying wages/salary to labourers engaged by him as per The Minimum Wages Act. He produced a copy of Ledger Account for the Financial Year 2005-06 to 2009-10 and a sample copy of bill raised by him to M/s. Orient. He also stated that apart from these documents, no other documents are available with him and that the ledger accounts provided by M/s. Orient are true; that they do not have any other documents. On being asked regarding payment of Service Tax by him for said period, he stated that he had neither paid Service tax to the Government account nor filed ST-3 returns till date. On being asked, he stated that he had no knowledge of Service Tax law and hence he had not paid the same and requested for taking lenient view. He assured that he was ready to pay Service Tax payable for providing this service.

On going through the Revised Rates Structure dated 27-10-2009 of the noticee issued by Orient, the work is found to be mentioned as *"Loading of packed & finished store material (5 MT per workers), Material feeding to Silo (5 MT per workers) & Packing of spent Alumina Nodule dust etc. (5 MT Per Workers)"*. The rates offered/approved for providing these services are Minimum wages Rs.138.70 (1-7-2009 to 30-9-2009), Additional Rs.15.50 & Allowance Rs.1.75 per day and Minimum wages Rs.139.50 (1-10-2009 to 31-3-2010), Additional Rs.15.50 & Allowance Rs.1.75 per day. Therefore, in terms of provisions of Section 65A of the Act, the services provided by the Noticee to Orient would merit classification under Sub-section 68 of Section 65 of the Act i.e. "Manpower Recruitment & Supply Services" since it gives essential characteristics of supplying of manpower.

On perusal of the copy of Ledger Account provided by Orient and submitted during the course of inquiry, it was found that the noticee had received the amount mentioned below towards service provided to Orient.

S. No.	Financial Year	Amount received by the Noticee towards taxable services provided. (in Rs.)
1.	2006-07 (30.6.06 to 31.3.07)	9,63,364/-
2.	2007-08	10,35,145/-
3.	2008-09	18,20,531/-
4	2009-10 (up to 06.01.10)	17,73,293/-
	Total	**55,92,333/-**

The Noticee had totally collected Rs.55,92,333/- for providing taxable services. However, the Noticee was entitled to exemption under Notification No. 6/2005-ST dated 01.03.2005 on the value of taxable service amounting to Rs. 4,00,000/- for the year of 2006-07; therefore total taxable amount for the period 30.06.2006 to 06.01.2010 is Rs. 51,92,333/-.

From the above, it appeared that the Noticee is engaged in providing services to Orient since last 4 years which in terms of section 65 of the Act are classifiable as 'Manpower Recruitment or Supply Agency's Services' as defined under Sub-section 105 of section 65 of Finance Act, 1994 as discussed hereinabove.

In terms of Rule 4 (1) of Service Tax Rules, 1994 (herein after referred to as "Rules"), every person liable for paying the Service Tax shall make an application to the concerned Superintendent of Service Tax Range for registration within thirty days from the date on which the service under Section 66 of Finance Act, 1994 is levied.

Therefore, it appeared that the noticee has provided taxable service without paying Service Tax leviable thereon and without applying for registration under the category of the said service. As per Section 67 of the Act, Service Tax on this service is leviable on the gross amount charged. Therefore, it appeared that Service Tax at the appropriate rate on Rs. 51,92,333/- for the period from 30-06-2006 to 06-01-2010 being gross amount charged and received by the noticee from Orient as described in the Annexure-B to this Notice was liable to be recovered under Section 73 of the Act along with interest under Section 75 of the Act. It also appeared that the noticee had suppressed the facts that they were engaged in providing services of 'Manpower Recruitment or Supply Agency's Service' from the department.

From the above, it also appeared that the Noticee had contravened the following provisions of the Act and the Rules framed there under with an intent to evade payment of service tax:

(i) Section 69 of Finance Act, 1994 read with Rule 4 of Service Tax Rules, 1994 in as much as they failed to apply for Service Tax registration.

(ii) Section 68 of Finance Act, 1994 read with Rule 6 of Service Tax Rules, 1994 in as much as they failed to pay Service Tax at the appropriate rate prescribed under Section 66 of Finance Act, 1994 from time to time on the taxable value recovered by them from their service recipients for the taxable service provided by them during the period from 30-6-2006 to 06-01-2010,

(iii) Section 70 of Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994 in as much as they failed to assess the Service Tax payable on the 'Manpower Recruitment or Supply Agency's Service' provided by them as discussed hereinabove and to submit returns in Form ST-3 duly mentioning the details of taxable services provided during the period from 30-6-2006 to 06-01-2010.

Therefore, extended period as contemplated under proviso to Section 73 (1) of Finance Act, 1994 was invokable for recovery of Service Tax not levied and paid by the Noticee, since the noticee had indulged in suppression of facts and had contravened the statutory provisions.

From the above, it also appeared that the noticee had not paid any Service Tax leviable on taxable services provided by him and he had admitted the fact of non payment of Service Tax on the 'Manpower Recruitment or Supply Agency's Service' provided by him and thereby rendered himself liable to penalty under Section 76 of the Act for non payment of Service Tax. Further, for the act of suppression of material of facts of providing of taxable services under the category of 'Manpower Recruitment or Supply Agency's Service' and contravention of provisions of Finance Act, 1994 and Service Tax Rules, 1994 as discussed hereinabove with an intent to evade payment of Service Tax, the noticee had rendered himself liable to penalty under Section 78 of the Act. Similarly, for the act of not applying for registration under Section 69 of Finance Act, 1994 read with Rule 4 of Service Tax Rules, 1994 and for the act of non submission required details of amount received for providing 'Manpower Recruitment or Supply Agency's Service' in the prescribed returns under Section 70 of Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994 as discussed hereinabove, the noticee have rendered themselves liable to penalty under Section 77 of the Finance Act, 1994.

Therefore, a notice was issued to M/s. Shri Dolatkumar Devji Jamaria, Opposite G. E. B. Office, Porbandar by the Additional Commissioner, Central Excise, Bhavnagar proposing to

I. Recover the Service Tax amounting to Rs.5,83,917/-, Education Cess Rs.11,678/- and Secondary & Higher Education Cess Rs.4,996/- totally amounting to Rs.6,00,591/- (Rupees six lakhs five hundred ninety one only) under proviso to Section 73(1) of Finance Act, 1994.

II. Interest at the appropriate rate as applicable till the date of payment of Service Tax should not be charged under Section 75 of Finance Act, 1994.

III. Impose Penalty upon them under Section 76 of Finance Act, 1994 for the failure to assess Service Tax as required under Section 70 of the said Act and make the payment of Service Tax within the period and in the manner prescribed under Section 68 of the said Act read with Rule 6 of Service Tax Rules, 1994.

IV. Impose Penalty upon them under Section 77 of Finance Act, 1994 for the failure to apply for registration under Section 69 of the said Act read with Rule 4 of Service Tax Rules, 1994 and to file prescribed returns under Section 70 of the said Act read with Rule 7 of the said Rules.

V. Impose penalty upon them under Section 78 of Finance Act, 1994 for the Service Tax not levied and paid by reason of suppressing of the facts with intent to evade payment of Service Tax.

DEFENSE REPLY

The Noticee submitted its reply to the notice vide letter dated 1.12.2010 submitting that various issues arise in this case and therefore each of these issues would have to be considered separately so as to decide whether the proposals levelled in the show cause notice were sustainable in facts as well as in law or not.

The first issue as to whether Sections 65(68) and 65(105)(k) of the said Act were attracted in this case and whether levy of Service Tax under 'Manpower Recruitment or Supply Agency's Service' category was required to be discharged by us or not may now be considered hereunder.

It is an admitted position of fact in these proceedings that the payment has been made to them by M/s. Orient on the basis of the quantum of work done at their factory. The payment for repairing and maintenance work has always been made on the basis of Tonne/Weight of work undertaken at their factory. Though it is suggested in the show cause notice that the consideration was paid on Tonne basis i. e. on the basis of weight, the rate had been structured on the basis of number of labourers, minimum wages etc. but this suggestion is incorrect and invalid because there is no such basis adopted by them while fixing the rate of payment for the work done by them at the factory of M/s. Orient. Their bills clearly establish that the amount was claimed by them and paid by M/s. Orient on the basis of the quantity of work done inasmuch as quantity in terms of Kilogram was always declared by them for the bill of a particular month as regards activities of all types of supporting Roller, Pinion Shaft, welding filling labour work etc.; and thus it is established on record of this case that the payment was made to them by M/s. Orient on the basis of the quantum of work done at their factory.

In the present case, M/s. Orient has not employed any staff from them nor does any of their staff come under the direction of M/s. Orient. Their supervisor would give directions to the concerned labour, and the contracts are also not for supplying manpower for a specified period or for completion of particular projects or tasks. They have not supplied manpower to M/s. Orient for a specified period, because the contracts are for executing a particular work by them and the contracts enjoin upon them to perform the specified work for which they themselves engage their labour. The payments are made by M/s. Orient to them in accordance with the work performed and not with reference to the number of persons engaged by them for the work. M/s. Orient has not received any manpower from them under this arrangement, and the contracts being for specified work and activities for which fixed amounts are paid by M/s. Orient, they are not covered under the taxable category of 'Manpower Recruitment or Supply Agency's Service'. If M/s. Orient made contracts for supplying a particular number of workers or labourers with any agency and M/s. Orient run its factory or any other project utilizing such manpower and if such manpower was directly under control and supervision of M/s. Orient, and M/s. Orient was obliged to pay to the agency supplying such manpower amounts relatable to the number of workers or labourers supplied by the latter, then that type of contract would be taxable under 'Manpower Recruitment or Supply Agency's Service'.

In the above premises, they submit that they are not engaged in rendering manpower recruitment agency service, they have not supplied any labours to M/s. Orient and the work performed by them at the premises of M/s. Orient for which the payments are made to them is not that of manpower recruitment agency's activities nor that of supplying unskilled or skilled labours as assumed by the Revenue. The work performed by them is a series of activities for which they are paid a fixed lump-sum amount and therefore these amounts are not paid to them for supplying any labours as assumed by the Revenue.

Therefore, there is no taxable service rendered by them to M/s. Orient and hence, the proposal to demand service tax of Rs.25,62,875/- does not hold any water.

There is no dispute on the fact that they have deposited Rs.21,09,514/- vide Challan No. 1 on 13.3.2010 and a further sum of Rs.7,13,201/- vide Challan No. 2 on the same date, and thus they have deposited a total sum of Rs.28,22,715/- under these two challans on 13.3.2010 towards the Service Tax liability, thereby honouring the view of the Revenue. The action of depositing this amount without even waiting for a show cause notice and for any adjudication against them shows their bonafide.

Now the above amount paid by them as Service Tax has been taken as Cenvat Credit by M/s. Orient vide RG-23A Part-II Credit Entry No. 726 dated 23.03.2010 inasmuch as the activities undertaken by them were in the nature of their *inputs service if any service tax liability was required to be discharged by us on these activities.* Thus the amount paid as Service Tax by us was fully available as cenvat credit to M/s. Orient and accordingly, the entire transaction was even otherwise revenue neutral. In such cases of revenue neutrality, the Hon'ble Supreme Court has held in cases like Narmada Chemataur Pharmaceuticals Ltd. reported in 2005 (179) ELT 276 (S.C.) and CCE, Pune V/s Coca-Cola India Pvt. Ltd. reported in 2007 (213) ELT 490 (SC) and also by the Hon'ble Tribunal in cases like SRF Ltd. - 2007 (81) RLT 479 & PTC Industries Ltd. – 2003 (159) ELT 1046, that the Revenue cannot initiate proceedings for recovery of duty when the transaction was Revenue neutral and therefore the proceedings initiated against us are not at all permissible in the facts of this case. Even in a case where the department proposes to invoke extended period of limitation, the concept of revenue neutrality would be relevant. It is also held by the Larger Bench of the Hon'ble Tribunal in case of *Jay Yuhshin Ltd. V/s. Commissioner of Central Excise, New Delhi - 2000 (119) ELT 718 (Tri. LB)* that the extended period of limitation was not available to the Revenue when the duties paid were available as cenvat credit to the assessee. Further, suppression of facts, willful mis-statement or such other ill intentions can also not be justified in case of revenue neutrality. Therefore, initiation of proceedings and also invocation of the extended period of limitation is an action wholly without jurisdiction.

Thus in view of the fact that whatever amount paid as Service Tax by them was available fully as cenvat credit to M/s. Orient in whose factory they have undertaken the above activities, the present proceedings are even otherwise unjustified, uncalled for and unwarranted. There cannot be any intention to evade payment of Service Tax when the recipient of the service was in a position to avail and utilize credit of the amount paid as service tax, and therefore the present show cause notice raising the controversy about levy of service tax on them is unwarranted and uncalled for in view of revenue neutrality; and the action of invoking extended period of limitation is also unjustified and illegal in this view of the matter.

The larger period of limitation is even otherwise illegally and unauthorizedly invoked in this case because the facts of this case show that there could never be any intention on their part or also on the part of M/s. Orient in suppressing any facts as regards their activities at their factory.

It is accepted in the show cause notice that they have raised bills to M/s. Orient for claiming payment from them, that all the payments were made by M/s. Orient to them by cheques and all such payments were duly reflected in the books of accounts including ledger and P&L Account of M/s. Orient and also at our end in their books of accounts. When all these activities including the entire payment of Rs.2,26,39,219/- were clearly declared and recorded in the ledger as well as P&L Account, the allegation of suppression of facts with intention to evade payment of tax would not survive. It is also held by the Appellate Tribunal in the cases like Hindalco Industries reported in 2003 (161) ELT 346, Kirloskar Oil Engines Ltd. V/s CCE, Nasik reported in 2004 (178) ELT 998 and Martin & Hariss Laboratories Ltd. V/s Commissioner reported in 2005 (185) ELT 421 that balance-sheet being a public document, any demand raised on the basis of information appearing in the balance-sheet after invoking extended period of limitation was illegal because the allegation of suppression of facts cannot be made when some information was appearing in a public document like the balance-sheet of the assessee. In the present case also, the books of accounts as well as balance-sheets were available with the Central Excise Officers in-charge for the entire period in question, and copies of the balance-sheets and annual books of accounts have also been made available to the Excise Officers as well as the audit parties on regular basis. When the payments made to them were duly shown in the balance-sheets and books of accounts which were open to scrutiny by any person including the Revenue Officers, there was no failure or omission in disclosing this information to the Excise authorities by us. The entire basis of invoking extended period of limitation i.e. non-availability of the relevant information is thus, totally incorrect and hence, the action of invoking extended period of limitation on this basis deserves to be set aside at once.

The law about invocation of extended period of limitation is well settled. Only in a case where the assessee knew that certain information was required to be disclosed and yet the assessee deliberately did not disclose such information, the case would be that of suppression of facts. When the Excise Officers called or certain information and the assessee did not disclose the same or deliberately disclosed wrong information, that would be a case of willful mis-statement. Even in cases where certain information was not disclosed as the assessee was under a bonafide impression that it was not duty bound to disclose such information, it would not be a case of suppression of facts as held by the Hon'ble Supreme Court in the landmark cases of Padmini Products and Chemphar Drugs & Liniments reported in 1989 (43) ELT 195 (SC) and 1989 (40) ELT 276 (SC) respectively.

What is "suppression" is once again considered by the Hon'ble Supreme Court in the case of Continental Foundation Jt. Venture V/s CCE, Chandigarh reported in 2007 (216) ELT 177 (SC), and it is held by the Hon'ble Supreme Court with regard to the proviso to Section 11A of the Central Excise Act, 1944, which is akin to the proviso to Section 73 of the Finance Act, 1994, that mere omission to give correct information was not suppression of facts unless it was deliberate and to stop the payment of duty. In the previous case like Messrs Jaiprakash Industries Ltd. reported in 2002 (146) ELT 481 (SC) also, the Hon'ble Supreme Court has held that a bonafide doubt as to non-dutiability of goods was sufficient for the assessee to challenge the demand on the point of limitation. Thus, it is a totally settled legal position that extended period of limitation by invoking proviso to the main Section for demanding duty or tax beyond the normal period of limitation would be justified only when the assessee knew about the duty/tax liability and still however, he did not pay the tax and deliberately avoided such payment, and it was only in such a situation where suppression of facts on part of the assessee could be justifiably alleged by the Revenue. However, mere failure in giving correct information would not be a case where the Revenue can invoke extended period of limitation.

The proposals for imposing penalties under section 76, 77 and 78 of the said Act also do not hold any water in this case because penalty can be imposed only when a person was guilty of deliberate disobedience of the provisions of law. The matter of penalty is governed by the principles as laid down by the Hon'ble Supreme Court in the land mark case of Messrs Hindustan Steel Limited reported in 1978 ELT (J159) wherein the Hon'ble Supreme Court has held that penalty should not be imposed merely because it was lawful to do so. The Apex Court has further held that only in cases where it was proved that the assessee was guilty to conduct contumacious or dishonest and the error committed by the assessee was not bonafide but was with a knowledge that the assessee was required to act otherwise, penalty might be imposed. It is held by the Hon'ble Supreme Court that in other cases where there were only irregularities or contravention flowing from a bonafide belief; even a token penalty would not be justified.

Now the facts of the present case show that there was no gain to them nor any loss to M/s. Orient if any amount was paid as service tax by us on the activities undertaken at their factory, and therefore there could never be any dishonest or contumacious intention on our part. The fact that they have been raising bills for our activities and payments are received in accounted manner also shows that there could never be any malafide on their part. If there was any liability of service tax on them which was not discharged at the relevant time, that was only because of their bonafide impression that there was no such liability on them. Theiyhave been under a genuine and bonafide impression that their activities at the factory of M/s. Orient were not in the nature of rendering any taxable service because they have been paid on the basis of the quantum of work done; and even otherwise they were ignorant about the provisions of Sections 65(68) and 65(105)(k) of the said Act. Therefore, the present one is not a case where any malafide could be attributed to them and therefore penalty under the above sections would not be justified.

Section 80 of the said Act provides that no penalty under sections 76, 77 or 78 of the said Act shall be impossible for any failure referred to in those provisions if it was proved that there was reasonable cause for failure on part of the concerned person. The facts of the present case show that there was reasonable cause for which they did not discharge the service tax liability, and the fact that they have deposited the entire amount on 10.3.2010 without even waiting for the show cause notice also shows their bonafide as well as the genuine impression on their part that there was no liability for paying service tax on them at the relevant time. In this view of the matter, no penalty may be imposed on them under any of the provisions of the said Act by virtue of the principle contained in Section 80 of the said Act in the interest of justice.

They state that the proposal for imposition of penalty is also bad inasmuch as there is no violation of any nature committed by them. They have not acted dishonestly or contumaciously and therefore, even a token penalty would not be justified. No malafide intention on their part is also alleged in this notice. There is also no specific reason or ground spelt out in the notice for proposing to impose penalty and thus, penalty could not be imposed on hearsay or presumption. In view thereof, the proposal for imposition of penalty under Sections 76, 77 and 78 of the Finance Act also does not hold any water and hence, it deserves to be dropped.

Further, the proposal of imposing penalties under Sections 76, 77 and 78 of the said Act on them is also without jurisdiction because they cannot be penalised under different Sections for the same alleged offence. Since the Constitution of India also prohibits punishing a person more than once for the same offence, proposing penalties on us under different Sections for the same offence is also a punishment more than once for the same alleged offence. The proposal to penalize us twice for the same alleged offence is therefore, illegal and liable to be vacated at once.

In the above premises, they submit that the proposals levelled in the show cause notice are unsustainable in facts as well as in law and therefore, they request to withdraw this show cause notice and oblige.

Noticee vide letter dated 22.01.2011 intimated about deposit of total amount of Service Tax not paid to the government account before the issue of show cause notice and requested to adjudicate the case on the merits as per its reply dated1.012.2010. They did not want personal hearing in the case.

Discussion & Findings:

I have carefully gone through the records of the case and the written submissions made by the noticee.

I find that the impugned notice sought to recover Service Tax on the taxable services provided by the noticee and proposes to impose penalty upon the noticee for failure to pay such tax and comply other formalities as required under the statute. Now, the noticee has contested the notice mainly on grounds that the services rendered by them are not taxable within the meaning of 'Manpower Recruitment or Supply Agency's Service''; that there was no intention to evade payment of tax and that the entire transaction was revenue neutral.

I shall herein after discuss each the grounds put forth by the Noticee in their written reply.

I find that the activities undertaken by the Noticee at Orient has been considered as taxable services **as defined in Section 65(105) (k)** of the Finance Act, 1994, in the notice based on the depositions of Shri A. S. Sihag A. G. M. (Finance), M/s Orient and that Shri Valji Veja Mokaria, authorized signatory of the noticee recorded under Section 14 of the Central Excise Act, 1944 and the documents like 'Rate Structure' submitted during the investigation of the case. In his statement, Shri Valji Veja Mokaria has categorically stated that he is engaged in supply of labourers for last four years; that he received work orders from Orient for supplying of labourers to carry out loading-unloading work at the finished goods stock Godown of Orient; that on instruction from supervisor of Orient, he is supplying labourers and these labourers are working as per the job assigned by the supervisor of Orient under his supervision; that they have received remuneration per tones of consignment loaded-unloaded; that though the payment received from Orient on metric ton basis, but the same was calculated as per the number of labourers engaged and this rate was fixed by Orient; that the number of labourers required for a given work is decided by Orient. I find that Shri Sihag A. G. M.(Finance), M/s Orient has also stated that formal agreement is not available but rate structure of the works carried out by the contractors is available and that the workers employed by the contractors work under direction and supervision of their technical staff. He also stated that though the rate structure is not available in respect of all the contractors, rate structure is same with similar terms and conditions in respect of all other contractors. In addition, the Orient through their P. F. account paid the employer's contribution towards P.F., ESIC, and LWF in respect of all the labourers of the contractors. Moreover, the noticee had produced 'rate structure' during the investigation and is reproduced below for ready reference

"ORIENT ABRASIVES LIMITED. PORBANDAR

Date 27.10.2009

'CONTRACT RATE STRUCTURE OF AMRA RAMA, RANA RAMA & KARA DANA
RATE AS PER AGREEMENT DATED 12.04.1996

S. No.	WORK	Min Wages Rs. 138.70 01.07.2009 to 30.09.2009 Allowance Rs 1.75 per day	Min Wages Rs. 139.50 1.10.2009 to 31.03.2010 Allowance Rs 1.75 per day
1.	Shifting of Packed Material(5 MT Per worker)	Rs. 33.45 PMT	Rs. 33.60 PMT
2.	Material Feeding to Silo(5 MT Per worker)	Rs. 33.45 PMT	Rs. 33.60 PMT
3.	Packing of Spent Alumina Nodules dust etc.(5 MT Per worker)	Rs. 67.30 PMT	Rs. 68.00 PMT

Sd/-
(D. C. KOTHARI)
Asst. G. M. (Personnel)

(A. S. SIHAG)
Asst. G.M (Finance)

Sd/-
(R. K. KHANNA)
PRESIDENT"

A perusal of the above rate structure revealed that the amount paid to the noticee is based on number of workers. The service recipient Orient has determined the work per worker and rate per M.T. is fixed on the basis of minimum wages. It is evident from the above that instead of fixing rate per worker/labourer, the quantity of material to be handled per worker has been fixed and then the rate per quantity(M.T.) of material handled is fixed. In other words, the consideration for the services does not depend upon the quantum of work done but is paid based on the number of labourers engaged. Such kinds of rates are generally employed for ensuring minimum output from the labourers engaged. A perusal of the ledger submitted by the noticee during the investigation revealed that the most of the entries therein are termed "Contractor wages" and "RRRM (Labour Supply)". The noticee's representative has himself deposed that they are supplying labourers for loading and unloading of bauxite, coal etc., The rate structure and the depositions of the concerned persons revealed that the consideration for the work done was paid based on the number of labourers supplied and the amount to be paid per ton or the quantity was arrived based on the number of labourers engaged. .Therefore, merely because the bills show rates per metric ton would not change the essential character of the service. The unretracted statements, which were recorded under section 14 of the Cetral Excise, Act, 1944, are vital evidences and the submissions of the noticee now that the they were not supplying any labourers are after thought.

The noticee further pleaded that the entire transaction was revenue neutral as Orient availed credit of the amount paid by them in their CENVAT credit account. To buttress their plea, noticee have relied upon decisions of Hon'ble Supreme Court in cases of Narmada Chematur Pharmeceuticals Ltd., reported in 2005(179) ELT 276(S.C.) and CCE Pune v/s Coca –Cola India Pvt. Ltd reported in 2007(213)ELT 490 (SC) and the decisions of Hon'ble Tribunal in cases of SRF ltd-2007(8) RLT 479 and PTC Industries Ltd.-2003(159) ELT 1046. I find that in each of the cases, the recovery of duty was held as not warranted on grounds of revenue of neutrality, but in all these cases, the liability to pay duty and consequential beneficiary of credit was either the same assessee or their unit. The law laid down in these cases cannot be stretched to plead revenue neutrality in case where the liability to pay duty is cast upon a person other than the one availing the credit of the duty so paid. Such interpretation would exempt all manufacturers of raw-material and provider of input services from liability to pay excise duty as their customer/client avail credit. Therefore, the ratio of law laid down in the afore mentioned case laws is not applicable in this case where liability to tax is on the noticee and credit is availed by Orient. On similar grounds, the reliance placed on decision of Larger Bench of the Tribunal in case of Jay Yuhshin Ltd v/s Commissioner Central Excise, New Delhi-2000(119) ELT 718 (Tri-LB) to contend that extended period of limitation was not available to the revenue when the duties paid were available as cenvat credit to the aseesee, is also irrelevant and erroneous.

The noticee while contesting the invocation of larger period of limitation have contended that all payments were made to them through cheques and reflected in the books of accounts of Orient, the allegation of suppression of facts with intention to evade payment of tax would not survive. They have placed reliance on decision of Tribunal in cases of Hindalco Industries reported in 2003 (161) ELT 346, Kirloskar Oil Engines Ltd reported in 2004 (178) ELT 998 and Martin & Harris Laboratories reported in 2005 (185) ELT 421 to support their contention that balance sheet being a public document, therfore any demand raised on basis of information appearing in the balance sheet after invoking extended period of limitation was illegal because the allegation of suppression of facts cannot be made when information was appearing in a public document like the balance sheet of the assessee. It is true that the balance sheet is a public document but the central authorities cannot be expected to verify the balance sheet of each person. The excise authorities have access to the balance sheet of their assesses and not of the persons who are not registered with the department. Moreover, it is categorically mentioned in Rule 4 of the Service Tax Rules, 1994 that every person liable for paying Service Tax shall make an application to the concerned Superintendent of Central Excise in Form ST-1 for registration within period of thirty days from the date on which the Service Tax under section 66 of the Finance Act, 1994 is levied. The Noticee has been providing services to Orient since last so many years and the services under 'Manpower Recruitment or Supply Agency's Service' were made taxable with effect from 16.06.2005. Also Orient has been availing credit of the Service Tax paid by their other service providers, hence the plea that the noticee were ignorant of the provisions of law to pay tax is not tenable. The failure on their part to pay tax and comply with other statutory compliance cannot be mitigated by the fact they were receiving payments through cheques and the same is reflected in the accounts of Orient. One should appreciate that the documents like balance sheet of the service recipient do not reflect all the information in respect of the service provider especially the nature of service provided. In view of this, the noticee cannot take shelter under the law laid down in above cited decisions when there is blatant violation on their part to comply with the provisions of law which are statutorily binding on them and in light of the fact that balance sheet of the noticee was never made available to the department.

The Noticee further submits that only in case where the assessee knew that certain information was required to be disclosed and yet the assessee deliberately did not disclose such information, the case would be that of suppression of facts and have cited the decision of Hon'ble Supreme Court in cases of Padmini Products and Chemphar Drugs & Liniments reported in 1989(43) ELT 195 (SC) and 1989 (40)ELT 276 (SC). As discussed in foregoing para, the facts that the noticee were providing services since long and the services provided by them became taxable as back as 2005 and that their service recipient was availing credit input services, do not support the claim of the noticee that there was no deliberate withholding of information. Moreover, there was no doubt whatsoever as regards, the taxability of the services provided. It is hard to digest that the person having turnover to the tune of Rs. 2-3 crores was not aware of his liability pay tax that too for a period as long as five years. Therefore, in view of the above discussion, I find this submission a subterfuge to circumvent from their tax liability. Further, the noticee would be liable to penalty for non-payment of tax for the reasons of such deliberate failure on their part to disclose material facts to the department. The fact that they have paid tax before issue of the notice would not exonerate them from their liability to pay tax. The Hon'ble Supreme Court in case of M/s Rajsthan Spinning & Weaving Mills reported at **2009(238) ELT 3(S.C.)**held "*We completely fail to see how payment of the differential duty, whether before or after the show cause notice is issued, can alter the liability for penalty, the conditions for which are clearly spelled out in Section 11AC of the Act*". The Section 78 of the Finance Act, 1994 is analogous to Section 11AC of the Central Excise Act, 1944, therefore the decision of the Hon'ble Apex Court is squarely applicable in this case as well especially in absence of any reasonable cause put forth by the Noticee for failure to get registered and pay tax. However, I refrain from imposing penalty under Section 76 of the Finance Act, 1994 for the period subsequent to 10.05.2008 as the last proviso to Section 78 of the Act specifically states that if penalty is payable under section 78, the provisions of section 76 shall not apply.

In view of the above discussion, I pass the following order:

ORDER

i. I determine Service Tax amounting to Rs. 5,83,917/-, Education Cess Rs.11,678/- and Secondary & Higher Education Cess Rs.4,996/-, totally amounting to Rs.6,00,591/- (Rupees six lakhs five hundred ninety one only) as the tax not levied and paid and is to be recovered under proviso to Section 73(1) of Finance Act, 1994 alongwith interest at the appropriate rate as applicable till the date of payment of service tax under Section 75 of the said Act.

ii. I impose penalty of Rs.6,00,591/- (Rupees six lakhs five hundred ninety one only) Tax upon Noticee under Section 76 of Finance Act, 1994 for the failure to assess Service Tax as required under Section 70 of the said Act and make the payment of Service Tax within the period and in the manner prescribed under Section 68 of the said Act read with Rule 6 of Service Tax Rules, 1994.

iii. I impose penalty of Rs 2, 67,000/- (Rs two lac and sixty seven thousand only) upon the Noticee under Section 77 of Finance Act, 1994 upon the Noticee for the failure to apply for registration under Section 69 of the said Act read with Rule 4 of Service Tax Rules, 1994.

iv. I impose penalty of Rs.6,00,591/- (Rupees six lakhs five hundred ninety one only) upon the Noticee under Section 78 of Finance Act, 1994 for the Service Tax not levied and paid by reason of suppressing of the facts with intent to evade payment of Service Tax.

The Noticee shall pay the aforesaid amounts forthwith.

Sd/-

(HARCHARAN SINGH)
ADDL. COMMISSIONER

F. No. V/15-46/Dem/HQ/2010-11
-ST

Date:-18.4.2011

By R. P. A. D.

To,
Shri Dolatkumar Devji Jamaria,
Opposite G. E. B. Office,
Porbandar.

Copy to:-

1. Commissioner, Central Excise, Bhavnagar.
2. Assistant Commissioner (AE), Central Excise, HQ, Bhavnagar.
3. Assistant Commissioner, Service Tax Division, Bhavnagar.
4. Superintendent, Service Tax Range, Junagadh.
5. Assistant Commissioner, Central Excise, RRA Section, HQ, Bhavnagar.
6. Guard file

18/4/2011

ADDL. COMMISSIONER