Audit - 2010

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

F. No. V/15-47/Dem/HQ/2010-11

Date of order : 13.09.2011
Date of issue : 23.09.2011

Passed by Shri Harcharan Singh, Additional Commissioner

Order-in-Original No. 10/BVR/ADC/2011

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

Any person(s) deeming himself aggrieved by this Order may appeal against this order to the Commissioner Central Excise(Appeals), Rajkot, Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 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.

Subject:-Show Cause Notice F. No. V/15-47/Dem-ST/HQ/2010-11 dated 11.10.2010 demanding Central Excise duty of Rs.30,30,794/-.

Brief facts :-

M/s. Bharat Earthmovers, Opposite Saurashtra Chemicals Ltd, Divadandi Road, Porbandar–360 576 (hereinafter referred to as the Noticee) is holding Service-Tax Registration No. AAIFB0768NST001 under the category of "Supply of Tangible Goods Services" which is taxable w. e. f. 16.05.2008 and making payment of Service Tax as leviable accordingly.

2. During the course of audit of the records of the Noticee by the Audit Wing of Central Excise, H.Q. Office, Bhavnagar, it was noticed that during the period from April, 2005 to July, 2009, the Noticee had provided services to M/s Saurashtra Chemicals Ltd, Porbandar and M/s GHCL, Sutrapada.

3. It was revealed from the work orders issued by M/s Saurashtra Chemicals Ltd, Porbandar to the Noticee that under head "Description" of these work orders, the jobs to be carried out is described as "TRANSPORTATION INCLUDING UNLOADING OF VARIOUS RAW MATERIALS INSIDE AND OUTSIDE FACTORY PREMISES THROUGH DUMPER", "PAY LOADER CHARGES FOR COAL WORK IN POWER HOUSE", "TRANSPORTATION OF SALT FROM RAILWAY SIDING THROUGH DUMPER", "TRANSPORTATION OF SALT FROM HEAP TO HOPPER THROUGH DUMPER" etc and rates are per trip for jobs involving dumpers and the rates are per day/ hour for jobs involving pay loaders. The Noticee raised invoices/bills to M/s Saurashtra

Chemicals Ltd, Porbandar and worked out the amount on the basis of number of trips in the case of dumpers and on the basis of hours in case of pay loaders.

4. It was found that M/s GHCL, Sutrapada did not issue written work orders to the Noticee. However, on perusal of invoices raised by the Noticee to M/s GHCL, Sutrapada, the particulars of work described as "Loading of limestone for C.C.G.L, Morasa from GHCL yard: during May, 2008", "Loading, shifting, feeding & Housekeeping by one loader & three dumpers during 16/7 to 31/7", etc. and the rate charged for carrying out these works is per M.T.

5. It followed from the above that the Noticee is essentially providing service of loading, transporting and unloading of cargo viz. limestone, salt, coal etc. Thus, it was evident that the service of loading, transporting and unloading provided by the Noticee merits classification under "Cargo Handling Services" taxable under Section 65(23) of the Finance Act, 1994. The Hon'ble Tribunal, in the case of Gajanand Agarwal v. Commissioner reported in 2009 (13) S.T.R. 138 (Tri. - Kolkata), also held "What that appears to be necessity of law for taxation under the class cargo handling service is that the service provided should be relating to or in relation to cargo handling by a cargo handling agency. The service provided should be integrally or inseparably connected with handling of cargo or attributable thereto without being a mere activity of transportation of such cargo since transport service independent of cargo handling is an exception under the scheme of levy by Section 65(23) of the Act. Thus it can be said that loading, unloading, packing or unpacking of cargo and handling of cargo for freight in special containers or non-containerized freight and service provided by container freight terminal or other freight terminal for all modes of transport are subject matter of taxation under the class "cargo handling service". That apart, any activity incidental to freight of cargo is also liable to be taxed under such class. Mode of transport is irrelevant for incidence of levy once the service provided meets the test of handling of cargo in the manner envisaged by law. It is also not necessary that the cargo should only be meant for transport either by vessel in ships or aircrafts."

6. It was found that the Noticee had been providing service of "Cargo Handling Services" taxable under Section 65(23) of the Finance Act, 1994 w.e.f. 16.08.2002 since last many years but is paying Service Tax under "Supply of Tangible Goods Services" since May-2008. Since the Noticee has rendered service of "Cargo Handling Services" to M/s Saurashtra Chemicals Ltd, Porbandar and M/s GHCL, Sutrapada from 2005-06 onwards and received payments thereof, they did not levy and pay Service Tax amounting to Rs.30,30,794/- from April, 2005 to July, 2009.

7. Therefore, it was forthcoming that the Noticee is liable to pay Service Tax amounting to Rs.30,30,794/- as per provision of Section 66 of the Finance Act, 1994 and required to make payment of Service Tax as per Section 68 of the Act read with Rule 6 of Service Tax Rules, 1994 (hereinafter referred to as 'the Rules') and failed to discharge the Service Tax liability on the receipt of the payments towards service of "Cargo Handling Services" to M/s Saurashtra Chemicals Ltd, Porbandar and M/s GHCL, Sutrapada by reason of suppression of facts and contravened the provisions of the Act and the Rules. As such, the Service Tax is recoverable at appropriate rate as per proviso to Section 73(1) of the Act.

8. By acting in the manner, the Noticee has contravened the following provisions of :-

(i) Section 69 of the Finance Act, 1994 read with Rule 4 of Service Tax Rules, 1994 in as much as they failed to apply to the Service Tax Department for registration, though being liable to pay Service Tax under the category of "Cargo Handling Service".

(ii) Section 68 of the Finance Act, 1994 read with Rule 6 of Service Tax Rules, 1994 in as much as they failed to pay appropriate Service Tax on the receipt of the payments towards service of "Cargo Handling Services" provided by them.

(iii) Section 70 of the Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994 in as much as they failed to assess the Service Tax and prescribed Returns in form ST-3 in respect of such services

9. All the above acts of contravention of Finance Act, 1994, (as amended) and rules made there under, on the part of the said Noticee have been committed by way of suppression of facts with an intention to evade payment of Service Tax and, therefore, the said Service Tax not paid was required to be demanded and recovered from them by invoking extended period of five years under the provision of Section 73(1) of the Finance Act, 1994 as amended. All these acts of contravention of the provisions of Section 68, 69 & 70 of the Finance Act, 1994 as amended, read with Rules 6, 4 and 7 of the Service Tax Rules, 1994 were punishable under the provisions of Section 76, 77, 78 of the Finance Act, 1994 as amended from time to time.

10. Therefore, a notice was issued proposing that :-

(i) Demand of Service Tax amounting to Rs.30,30,794/- (Rupees Thirty Lacs, thirty thousand, seven hundred and ninety four only) should not be confirmed under Section 73 (1) of the Finance Act, 1994.

(ii) Penalty should not be imposed upon them under Section 77, 76, 78 of the Finance Act, 1994 and Rule 7 c (iii) of the Service Tax Rules, 1994.

(iii) Interest at the appropriate rate should not be recovered in terms of Section 75 of the Finance act, 1994.

DEFENSE:

11. The Noticee submitted written explanation to Show Cause Notice on 20.01.2011 an stated as under :-

11.1 THE SCN IS VAGUE. BASIS OF CALCULATION OF DEMAND NOT MENTIONED. NO DEMAND OF SERVICE TAX CAN BE CONFIRMED AGAINST THE NOTICEE

The Noticee submitted that the SCN is vague as it did not explain as to why the service provided the nature of the services rendered by the Noticee and also did not mention as to how the tax liability of Rs. 30,30,794/- was determined. While issuing the SCN, the Department has simply relied upon the Audit Report and letter of the Noticee. Merely on the basis of description written in invoice or work order and thus without properly analyzing the nature of the services received by the Noticee, the SCN alleged that the Noticee has rendered the taxable services. The Department, however, without looking into the detail of the contracts, intention of the service provider and the intention of the service receiver also without considering the nature of the services rendered by the Noticee proposed to demand service tax under cargo handling service. It has been submitted that the SCN is basic document for framing any case against the assessee. Hence SCN should be clear about the charges made against the assessee. However, in the present SCN, no analysis has been done as to why the service rendered by the Noticee cannot be considered to be 'Supply of Tangible Goods Service' and further how the demand has been arrived i.e tax payable determined is not mentioned which the Noticee has been asked to pay.

In the case of **Govind Saran Ganga Saran Vs. Commissioner of Sales Tax 1985 (Supp) SCC 205**, the Supreme Court had laid down the ingredients of a taxing statute as follows:

"The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on

whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity."

It is clear from the judgment that the "taxable event", identity of the person "on whom the levy is imposed and who is obliged to pay the tax" at what "rate " and on "what measure or value" has to be "clearly and definitely ascertainable". Unless all the above said elements exist there cannot be any liability of tax. As submitted, in the present case, the SCN fails to state as to how the liability or the tax payable has been calculated. It is therefore submitted that the SCN is vague and deserves to be set aside on this ground itself.

In the letter on which the SCN has relied upon to raise the demand, the Noticee has categorically stated that the demand in the Audit report is vague and has even sought for a clarification as to how the demand has been calculated. The Department has completely ignored the letter of the Noticee and simply proposed to confirm the demand and that to relying on the same letter of the Noticee.

11.2 THE NOTICEE IS NOT ENGAGED IN 'CARGO HANDLING SERVICE'

Noticee and SCL as well as GHCL entered into contracts the basis of which is explained in brief facts at para 2 above. The scope of the work clearly provides that the Noticee was to provide pay loaders and dumpers on hire to undertake loading of Limestone, Limestone chips and dust, Hard Coke, Slack coal, Saltand other Miscellaneous materials and transportation of the same within the factory of SCL and GHCL respectively. It is submitted that the Noticee was engaged in providing the pay loaders and dumpers which were in turn used for various works and loading/unloading of the materials was only one of the activities that was carried out by the Noticee.

Section 65(23) of the Act as amended by Finance Act, 2003, defines 'cargo handling service' as under:

"'cargo handling service' means loading, unloading, packing or unpacking of cargo and includes cargo handling services provided for freight in special container or for non-containerised freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport and cargo handling services incidental to freight, but does not include handling of export cargo or passenger baggage or mere transportation of goods;"

Clause (zr) of section 65 (105) describes the taxable service of 'cargo handling service' as : *"to any person, by a cargo handling agency in relation to cargo handling services"*

The definition of taxable service states that the service to be taxed is the service rendered by a 'cargo handling agency' in relation to 'cargo handling services'. A perusal of the above definition indicates that the definition of cargo handling service is in three parts. The first part gives the meaning of the service which is the "loading, unloading, packing or unpacking of cargo". The second part of the definition relates to the inclusive clause, which follows the first part of the definition. The inclusive part relates to cargo handling services provided for freight in special containers etc; services provided by a freight terminal etc. The third part of the definition refers to certain exclusions from the definition of 'cargo handling' service. The exclusions are:

i) handling of export cargo;
ii) handling of passenger baggage;
iii) mere transportation of goods;

The word 'cargo' is not defined in the Act. The dictionary meaning of the word cargo reads as follows:

Random House Compact Unabridged Dictionary	Cargo 1. the lading or freight of a ship, airplane etc. 2. load
The New Lexicon Webster's Dictionary	Cargo the freight of goods or luggage carried by a ship, aircraft etc.
Chambers English Dictionary	Cargo the goods carried by a ship or aeroplane; any load to be carried.
The Penguin English Dictionary	Cargo the goods conveyed in a ship, aircraft, or vehicle; freight.
Collins Cobuild English Dictionary for Advanced learners	Cargo the cargo of a ship or place is the goods that it is carrying
The Compact edition edition of the oxford english dictionary	Cargo 1. The freight or lading of a ship, a ship-load.

A perusal of the above definitions would indicate that the word 'cargo' relate normally to goods carried by ship but the definition could be extended to the carriage of goods by other forms of transport also viz., air, road and rail.

It has been submitted that the activity of the Noticee was not loading related to cargo but was loading related to the movement of the raw materials within the factory. Such loading for the purpose of movement within a premise can never be said to be loading related to cargo. The Noticee places reliance on the decision of this Hon'ble CESTAT in the case of **S.N. Uppar & Co v. CCE, Belgaum 2008 (11) S.T.R. 34 (Tri. - Bang.)** wherein it is held that movement within the premises is not covered under 'cargo handling service'

7. On a very careful consideration of the matter we find that the appellant was actually supplying labour to M/s. Hindalco and the scope of their work is limited to the work assigned to them by M/s. Hindalco inside the factory premises. The revenue has not produced the contract and shown the relevant provisions to show that the appellants were coming within the ambit of cargo handling service. They had simply enumerated the number of activities supposed to have been carried out by the appellant. That is not sufficient. There is no evidence to show that the appellant had actually handled the cargo. The semi-finished goods inside the factory cannot be considered as cargo. All these details are not available in the impugned order. In these circumstances there is absolutely no merit in the impugned Order-in-appeal.

The Noticee also placed reliance on the following decisions:

(i) Sainik Mining & Allied Services Ltd. v. CCE, Bbsr 2008 (9) S.T.R. 531 (Tri. - Kolkata)

8. We find that the activity undertaken by both the appellants for mechanical transfer of coal from the coal face to tippers and subsequent transportation of the coal within the mining area, does not come under the purview of cargo handing

service. The dominant activities undertaken by the appellants under the contract in question are primarily the movement of coal within mining area and transfer of coal from the coal face to the tippers, if at all, includes loading and unloading which are merely incidental. Cargo in commercial parlance has a definite connotation which is carried as freight in a ship, plane, rail or truck and the activities undertaken by the appellants in terms of the contracts on behalf of M/s. MCL to move coal within mining area do not fall in the category of cargo handling service. Moreover, the activities undertaken are principally the transportation of coal within mining area and hence, the gross amounts received for the same cannot be taxed under the category of cargo handling service. We have, therefore, no hesitation in our mind to hold that the definition of cargo handling service under the Finance Act, 1994, does not include the kind of activities undertaken by the appellants and hence the same are not chargeable to service tax.

(ii) CCE, Bhubaneswar v. Vinshree Coal Carriers(2008) 10 STR 473

(iii) Modi Construction Co. Vs C C E, RANCHI 2008 (12) S.T.R. 34

Even if it is assumed that the aforesaid activity could be considered as cargo even then Service Tax under 'cargo handling service' does not arise as the loading and unloading was done by mechanized means. The Noticee placeed reliance on the decision of the Hon'ble High Court of Rajasthan in the case of **S.B. Construction Company v. Union Of India 2006 (4) S.T.R. 545 (Raj.)** and the decision of this Hon'ble CESTAT in **J & J Enterprises v. CCE, Raipur 2006 (3) S.T.R. 655 (Tri. - Del.)** wherein it was held that loading by mechanical means is not leviable to service tax under 'cargo handling service'.

It is also seen that the definition of 'cargo handling service' covers packing of cargo. In the present case there is no packing is involved and for this reason also this taxable service is not applicable for the present matter. Reliance is placeed on **Circular No. 334/1/2008-TRU, dated 29-2-2008** wherein it is clarified as follows:

2.2 Section 65(23) which defines cargo handling service is being amended so as to include services of packing together with transportation of cargo or goods, with or without one or more other services like loading, unloading, unpacking, under cargo handling service. With this amendment, packing with transportation will be classifiable under cargo handling service only.

In the light of the above, it is submitted that the Show Cause Notice is liable to be dismissed on this ground itself.

It is also seen that the Department has been accepting payment of Service Tax under 'supply of tangible goods for use' during the period 2008 to till date. Therefore issuance of the show cause notice demanding Service Tax on the same transaction under 'Cargo Handling Service' is incorrect in law. It is not the case of the department that the tax paid by the Noticee till date needs to be appropriated against a total demand of tax for the whole period. As whatever tax has been paid so far by the Noticee has been paid under 'Supply of Tangible Goods Service' The Noticee placed reliance on the decision of the Hon'ble Supreme Court in the case of **Tata Tech v. UOI 2008 (11) S.T.R. 449 (S.C.)** wherein it was held that once the Department accepts registration under a particular entry then it is not entitled to raise demand on the same transaction under a separate entry. Hence, the SCN is liable to be set aside on this ground itself.

11.3 RELIANCE PLACED ON JUDGMENT IS INCORRECT.

The Show cause Notice relies on the judgment in the case of **Gajanand Agarwal Vs C C Ex, BBSR 2009 (13) S.T.R. 138** to state that tax is payable. The Noticee submitted that the reliance placed on the above stated case is incorrect. The facts differ in the present case as in the case of Gajanand Agarwal, the Appellant had paid tax under 'Cargo Handling Services' and the activity was inclusive of work like prompt loading of the wagons as soon as the wagons were placed and expenditure towards labour charges. It is not so in the case of the Noticee in the present case. Further considering the fact that time submitted that in the present case the Noticee was only giving the loaders and dumpers was an essence of the contract the Tribunal confirmed the demand. The Noticee on hire and they were not time bound neither were or are they registered under 'cargo handling services'. Hence the judgment cannot be applied to the present case.

11.4 **THE NOTICEE WAS PROVIDING PAY LOADERS AND DUMPERS AND THE SAME FALLS UNDER SUPPLY OF TANGIBLE GOODS SERVICE.**

The Noticee has paid Service Tax under 'Supply of Tangible Goods Service'. The Noticee submitted that even if the contention of the department is closely examined and considered ,even then as far as agreement with GHCL is concerned there can be no confusion as the agreement clearly spells out that the loaders and dumpers are being taken for hire. **Confusion if at all can arise only as far as agreement with SCL is concerned.** In case of agreement with SCL, the part B which refers to payloaders also clearly says that the payloaders are taken on hire and the charges are hire charges. In case of the agreement with SCL, the part which refers to dumpers the agreement states that the scope of work is use of dumpers for transportation (including unloading) of raw material inside the factory. Limited to this activity of dumpers, there can be a slight possibility to say that the same would not fall under supply of tangible goods service.

The Noticee submitted that the scope of the activity would in that case be merely transportation of goods. When there is a possibility of a activity falling under two or more clauses section 65A would apply which states as under.

SECTION 65A. Classification of taxable services. —

(1) For the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of section 65;
(2) When for any reason, a taxable service is, prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-
(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;
(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;
(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration.]

Applying the section 65A for classification of the said service which states that the most specific description would be preferred over a general description than the same would fall under transportation of goods by road service. The Noticee submitted that even if the above transaction is not treated as supply of tangible goods even then at best it can be considered as transportation of goods by road service. If it is considered to be transportation of goods by road service, than the same shall not be taxable as the Noticee has collected an amount less than Rs. 750/- per trip and hence the same would stand exempted under Notification 34/2004-ST

Without prejudice to the above, even if it is assumed that the Noticee was not rendering Transportation of Goods by Road Service, then also the relevant taxable service will be ''Supply of Tangible Goods Service' and not ''Cargo Handling Service'.

The GHCL and SCL entered into contracts with Noticee for hiring of pay loaders and transportation of raw materials within the factory. Agreements dated 15.9.2006 with SCL and dated 1.10.2006 with GHCL entered into clearly show that the objective of the transaction was hiring of pay loaders and dumpers. The parties agreed on the charges which were to be charged on hourly or trip basis or daily basis. The entire work of loading was done as per the instructions of SCL and GHCL. It has been submitted that the only activity of the Noticee was of giving pay loaders and dumpers along with drivers for loading and unloading goods within the factory. Therefore, it was SCL and GHCL who were getting the goods loaded/unloaded. The Noticee was merely provider of loader and dumper along with an operator. The responsibility of the Noticee was only to provide running pay loaders and dumpers with drivers which were in position to execute the work that SCL and GHCL wanted to get done. The Noticee was, therefore, not rendering 'cargo handling service' but was only giving on hire/supplying tangible property and receiving a consideration for the same. The control and possession of the pay loader and dumpers remained with the Noticee. However, loading and dumping was carried out as per the directions and instructions of SCL and GHCL. The certificates issued by SCL and GHCL certifying that control and possession of the pay loader remained with the Noticee was enclosed and marked as Annexure-6.

It has been submitted that supply of tangible goods including machinery, equipment, without transferring right of possession and effective control on such machinery, equipment is inserted by Finance Act, 2008 with effect from 16.05.2008. The said taxable service reads as follows:-

Section 65 (105) taxable service means any service provided or to be provided-

(zzzzj) to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances

Further, reliance is placed on CBEC'S **Circular M.F. (D.R.) Letter D.O.F. No. 334/1/2008-TRU, dated 29-2-2008** wherein it is clarified as follows:

4. Following services are specifically included in the list of taxable services:
   (vi) Services provided in relation to supply of tangible goods, without transferring right of possession and effective control of said tangible goods [Section 65(105)(zzzzj) refers]; and

4.4 Supply of tangible goods for use:

4.4.1 Transfer of the right to use any goods is leviable to sales tax / VAT as deemed sale of goods [Article 366(29A)(d) of the Constitution of India]. Transfer of right to use involves transfer of both possession and control of the goods to the user of the goods.

4.4.2 Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service.

4.4.3 Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT/sales tax as deemed sale of goods, is not covered under the scope of the proposed service. Whether a transaction involves transfer of possession and control is a question of facts and is to be decided based on the terms of the contract and other material facts. This could be ascertainable from the fact whether or not VAT is payable or paid.

As is seen, supply of goods, machinery, equipment without transferring right of possession and effective control has been made a taxable service vide Finance Act, 2008 and such transactions were not leviable to Service Tax prior to this period. Similarly, in the present matter, the Noticee was providing on hire/supplying pay loaders (goods/machinery/equipment) to SCL and GHCL during the period of dispute. It has been submitted that such supply of goods/machinery/equipment was not leviable to Service Tax during the period of dispute as ''Cargo Handling Service'. It is also settled law that consideration does not determine the nature of the transaction. On the contrary, the transaction has to be seen as per the agreement between the parties. The Noticee placed reliance on the following decisions wherein it is held that mode of payment does not determine the nature of the transaction:

(i) Sentinel Rolling Shutters & Eng. Co. (P) Ltd. v. CST, (1978) 4 SCC 260:

7. ...But that does not mean that as soon as the component parts are delivered to the company, the contract is fully executed. The component parts do not constitute a rolling shutter and it is the obligation of the assessee under the contract to fix the component parts in position on the premises and erect and install a rolling shutter. The execution of the contract is not completed until the assessee carries out this obligation imposed upon it under the contract and a rolling shutter is erected and installed at the premises. It is true that clause (12) of the printed terms and conditions provides that 50 per cent of the amount under the contract shall be paid as advance and the balance against delivery of the goods ex-works but this clause is clearly overridden by the special term specifically written out in the contract that 25 per cent of the amount shall be paid by way of advance, 65 per cent against delivery and the remaining 10 per cent after completion of erection and handing over of the rolling shutters to the satisfaction of the company. This provision undoubtedly stipulates that 90 per cent of the amount due under the contract would be paid before erection and installation of the rolling shutters has commenced, but that would not make it a contract for sale of rolling shutters. The true nature of the contract cannot depend on the mode of payment of the amount provided in the contract. The parties may provide by mutual agreement that the amount stipulated in the contract may be paid at different stages of the execution of the contract, but that cannot make the contract one for sale of goods if it is otherwise a contract for work and labour. It may be noted that the contract in State of Madras v. Richardson of Cruddas Ltd. contained a provision that the full amount due under the contract shall be paid in advance even before the execution of the work has started and yet the Madras High Court held, and that view affirmed by this Court, that the contract was a works contract. The payment of the amount due under the contract may be spread over the entire period of the execution of the contract with a view either to put the manufacturer or contractor in possession of funds for the execution of the contract or to secure him against any risk of non-payment by the customer. That cannot have any bearing on the determination of the question whether the contract is one for sale or for work and labour.

[Emphasis supplied]

(ii) Commissioner of Sales Tax Vs. Steel Plant Private Ltd. [1995] 099 STC 0532:

9. We have also considered clause (1) of the contract, pointed out by the learned counsel of the Revenue Ms. Ankalesaria, which provides for payment of 97 per cent of the price of the machinery and equipment as set out in the specifications immediately on delivery of the machinery and equipment at the site. We are, however, of the opinion that it cannot have any bearing on the determination of the question whether the contract is one for sale or for work and labour. The true nature of the contract cannot depend on the mode of payment of the amount provided in the contract. This aspect of the matter came to be considered by the Supreme Court in Sentinel Rolling Shutters & Engineering Company Pvt. Ltd. v. Commissioner of Sales Tax [1978] 42 STC 409 where there was a provision in the contract for fabrication, supply, erection and installation of rolling shutters which stipulated that 90 per cent of the amount due under the contract would be paid before the erection and installation of the rolling shutters had commenced. The Supreme Court held that that would not make it a contract for sale. It was observed:

".....The true nature of the contract cannot depend on the mode of payment of the amount provided in the contract. The parties may provide by mutual agreement that the amount stipulated in the contract may be paid at different stages of the execution of the contract, but that cannot make the contract one for sale of goods if it is otherwise a contract for work and labour."

The Supreme Court also noted the fact that the contract in State of Madras v. Richardson & Cruddas Ltd. [1968] 21 STC 245 contained a provision that the full amount due under the contract shall be paid in advance even before the execution of the work has started, and yet the Madras High Court held, that the contract was works contract which view was affirmed by the Supreme Court. The legal position was summed up by the Supreme Court thus:

".....The payment of the amount due under the contract may be spread over the entire period of the execution of the contract with a view either to put the manufacturer or contractor in possession of funds for the execution of the contract or to secure him against any risk of non-payment by the customer. That cannot have any bearing on the determination of the question whether the contract is one for sale or for work and labour."

10. We are also of the opinion that the nature of the contract would not be affected by the fact that the components of the various contract amount or the price are shown separately. This, in our opinion, is not relevant in deciding whether the contract is a contract for sale of goods or a works contract.

[Emphasis supplied]

Hence, it has been submitted that the Show Cause Notice is liable to be set aside on this ground itself.

11.5 **NEW TAXABLE SERVICE NOT PART OF PRE-EXISTING TAXABLE SERVICE**

Even if it is assumed that Service Tax arises in the instant transaction even then the same will not arise under ''Cargo Handling Service'. Even if it is assumed that any other service arises then the same will be ''Supply of Tangible Goods Service' as the Noticee was giving machinery/equipment on hire to SCL and GHCL and Service Tax is proposed on this transaction for the first time by Finance Act 2008. Such transactions are inserted for the first time vide Finance Act, 2008 effective from 16.05.2008 and were never leviable to Service Tax as ''Cargo Handling Service'. Moreover, the definition of ''Cargo Handling Service' remains the same on the insertion of ''Supply of Tangible Goods Service' which clearly shows that both the entries are independent of each other and cover different transactions. The Noticee places reliance on the decision of this Hon'ble CESTAT in the case of **BCCI v. CST, Mumbai 2007 (7) S.T.R. 384 (Tri. - Mumbai)** wherein it is held as follows:

15. Our above view also gets support from the fact that another head of "sale of space or time for advertisement and sponsorship services" stands created for the purposes of service tax w.e.f. 1-5-06. However, the taxable services in relation to sponsorship services specifically excluded sponsorship of sport events. As such, we find that a subsequent entry having been enacted covering the activity without any change of the existing entry, has to be interpreted as if the earlier existing entry did not cover the subsequently created entry. If the subsequent entry was covered by the earlier entry, there was no reason or scope to create the present entry especially when the rate of tax in respect of both the entries remains unchanged. Certainly, creation of new entries was not by way of bifurcation of the earlier entry inasmuch as the earlier entry relating to advertisement remains unchanged without any change in the tax rate. As such, the introduction of new tariff entry do imply that the coverage in the new tariff for the purposes of tax was an area not covered by the earlier entry. It was so held in case of Glaxo Smithkline Pharmaceutical Ltd. reported in 2006 (3) S.T.R. 711 (T) = 2005 (188) E.L.T. 171 (Tri.-Mumbai) as also in case of M/s. ZEE Telefilms Ltd. & M/s. Star India (P) Ltd. v. CCE, Mumbai reported in 2006 (4) S.T.R. 349 (Tribunal) = 2006-TIOL-945-CESTAT-MUM.

It is settled by this Hon'ble CESTAT that services which are leviable to Service Tax under the new taxable service are not covered under the old taxable service. The Hon'ble CESTAT in the case of **M/s Glaxo Smithkline Pharmaceuticals Ltd. vs. CCE, Mumbai-IV 2006 (3) STR 711** has held that introduction of a new taxable service implies that the coverage under the new entry was not covered by the earlier entry. The Hon'ble CESTAT held as follows:

When an existing Tariff definition remains the same, then the introduction of new Tariff entry would imply that the coverage under the new Tariff for purpose of Tax is an area not covered by the earlier entry. The new entry is extension of the scope of coverage if Service Tax and not carving out of a new entry, from the erstwhile entry of "Management Consultancy Service". Therefore, it has to be held, that in the facts of this case, the levy of Service Tax on Staff Costs defined by BWIL, under the heading' Management Consultancy Service' cannot be upheld. Levy on such costs could be as on Business Auxiliary Service, which was not a Taxable Service prior to 2003 & Appellant is not a service provider as Management Consultant.

The Noticee also relied on the following decisions wherein it was held that a service falling under the new taxable service is not part of the pre-existing taxable service:

(i) CCE, Chennai v. M.R.F. Ltd 2006 (3) S.T.R. 434 (Tri. - Chennai)

5. Ld. Counsel has made another forceful submission. He has contended that "Scientific and Technical Consultancy Service", which was specified for the purpose of levy of Service Tax with effect from 16-7-2001, was not a part of the pre-existing "Consulting Engineer Service" prior to the said date. In other words, "Scientific and Technical Consultancy Service" was a new service introduced on 16-7-2001. Ld. Counsel has referred to Section 137 of the Finance Act, 2001, which provided for the levy of Service Tax on 15 new items. "New Services" is an expression used in Section 137 and the first item in the list of 15 new services is "Scientific and Technical Consultancy Service". Ld. Counsel has convincingly argued that "Scientific and Technical Consultancy Services" having been introduced as a "new service" for the purpose of levy of Service Tax w.e.f. 16-7-2001 only, cannot be treated as part of the pre-existing "Consulting Engineer Service".

(ii) Ankit Consultancy Limited 2007 (6) STR 101
(iii) Waters India Limited v. CCE 2007 (6) STR 8
(iv) Diebold Systems (P) Ltd. v. CST, Chennai 2008 (9) S.T.R. 546

This itself shows that the agreement entered into by the Noticee with SCL and GHCL are not leviable to Service Tax as "Cargo Handling Service' during the disputed period. Hence, the Show Cause Notice is liable to be set aside on this ground itself.

11.6 GROSS AMOUNT PAID BY THE NOTICEE IS TO BE CONSIDERED AS CUM-TAX.

Without prejudice to the above submissions, it has been submitted that even if the Noticee are liable to pay any Service Tax on the amount received from their service receivers, the tax calculation itself is incorrect. The amount received by the Noticee from its service receivers has to be treated as inclusive of the amount of Service Tax payable. In the case of excise duty also, it has been held that the amount received should be taken as cum-duty price and the value should be derived there from, by excluding the duty alleged to be payable as required under section 4(4)(d)(ii) of the Central Excise Act. In support of this the Noticee relied on the Larger Bench decision in the case of ***Sri Chakra Tyres reported in 1999 (108) ELT 361.*** The said decision of the Larger Bench has been affirmed by the Hon'ble Supreme Court as the departmental appeal has been dismissed vide Order dated 26th Feb. 2002 reported in ***2002 (142) ELT A279 (SC)***. We also rely on the Apex Court judgment in the case of ***CCE v. Maruti Udyog Limited reported in 2002 (49) RLT 1 (SC)***, wherein it has been held that the deduction under section 4(4)(d)(ii) is allowable, even in situations where no duty was paid at the time of removal. Thus, for service tax calculation, the amount paid by the service receiver should be considered as cum tax payment and service tax should be calculated accordingly. Reliance is also placed on the **Trade Notice No.20/2002 dated 23.5.2002 of Delhi-II Commissionerate**, which is reproduced below:

"The liability to pay the service tax remains with the service provider in the current scenario. Failure to realise or even charge the 5% service tax does not negate this statutory liability. In event of any such failure, the amounts realised from client in lieu of having rendered the service(s) will be taken to constitute amounts inclusive of service tax. Accordingly, the amount of service tax will be determined and required to be deposited to the credit of the Central Government".

The legislature has further clarified the legal position in respect of the value of the taxable service by incorporating Explanation No. 2 in section 67 of the Act by virtue of the Finance Act, 2004. The said Explanation is reproduced as below:

"Explanation No. 2 Where the gross amount charged by a service provider is inclusive of service tax payable, the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged."

Reliance is placed on the following judgments of the Hon'ble CESTAT:

(a) ***Rajmahal Hotel v CCE 2006 (4) STR 370 (Tri-Del)***
(b) ***Gem Star Enterprises (P) Ltd. v. CCE 2007 (7) STR 342***
(c) ***Panther Detective Services v. CCE 2006 (4) STR 116 (Tri.-Del.)***

Therefore it has been submitted that the gross amount received by the Noticee must be treated as cum tax for the computation of Service Tax.

11.7 INTEREST IS NOT CHARGEABLE AND PENALTY IS NOT IMPOSABLE.

It has been submitted that the SCN imposes interest under section 75 of the Act on the Service Tax allegedly not paid by the Noticee. The SCN has imposed penalty under sections 76, 77 & 78 of the Act. In the instant case, interest on the amount of Service Tax has been demanded under section 75 of the Act in the SCN. It is humbly

submitted by the Noticee that the Noticee was under a bonafide belief that the services rendered by it are not liable to Service Tax in the disputed period. The Noticee was providing loader and dumpers for use and when a new service covering the Noticee was introduced, the Noticee started paying tax under the same. The Noticee submitted that that the Department has been accepting payment of Service Tax under 'Supply of Tangible Goods for use' during the period 2008 to till date. Therefore, issuance of the show cause notice demanding Service Tax on the same transaction under 'Cargo Handling Services' is incorrect in law. It is not the case of the department that the tax paid by the Noticee till date needs to be appropriated against a total demand of tax for the whole period. Whatever tax has been paid so far by the Noticee has been paid under 'Supply of Tangible Goods Service'. Once the Department accepted registration under a particular entry, then it is not entitled to raise demand on the same transaction under a separate entry. Further the nature of activity has never changed in the disputed period. It has remained same through out, hence department was fully aware about the activities right from 2008 when the return was filed and hence extended period cannot be evoked. The SCN dated 11.10.2010 proposing to demand tax for the period April 2005 to July 2009 is time barred and hence the SCN needs to be set aside.

It has been submitted that for imposing penalty, there should be an intention to evade payment of tax, or there should be suppression or concealment. The penal provisions are only a tool to safeguard against contravention of the rules. It is humbly submitted by the Noticee that the Noticee had no intention to evade payment of Service Tax. It is not a case where the Noticee started paying tax under a head and then tried to change the head under which tax was paid. Right from the very beginning Noticee knew that it was providing its dumpers and loaders for use and the same was not taxable under any head. When 'supply of tangible goods' service was introduced, the Noticee started to pay tax under the said head. Therefore, the Noticee had no intention to suppress any information from the department or evade payment of service tax. Hence, no penalty can be imposed on the Noticee.

In support of the above view, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Hindustan Steel Ltd. v The State of Orissa reported in AIR 1970 (SC) 253**. The above decision of the Apex Court, was followed by the Tribunal in the case of **Kellner Pharmaceuticals Ltd. v. CCE, reported in 1985 (20) ELT 80**, and it was held that proceedings under Rule 173Q are quasi-criminal in nature and as there was no intention on the part of the Noticee to evade payment of duty the imposition of penalty cannot be justified. The ratio of these decisions applies in all force to the present case. In the present case, there was no intention to evade payment. In view of the foregoing, no penalty can be imposed on the Noticee.

It has been submitted that penalty under section 78 of the Act can be imposed only for reasons that for the Department for the earlier period has issued the identical show cause notice. Further the present SCN is within normal period of limitation and there is no allegation that the Noticee has suppressed any information with the intention to evade the payment of service tax. Therefore, penalty under section 78 of the Act cannot be imposed.

11.8 PENALTY CANNOT BE IMPOSED UNDER BOTH 76 AND 78

Further, it has been submitted that penalties under section 76 and 78 of the Act cannot be simultaneously imposed. Penalties under section 76 and 78 are mutually exclusive. Section 78 is applicable if the non-payment of service tax is due to reasons specified therein with an intention to evade payment of service tax. Section 76 is applicable in cases other than those covered under section 78 of the Act. Reliance is placed on the case of **The Financers v. CCE, Jaipur - 2007 (8) STR 7** and **Commissioner of**

Central Excise, Ludhiana v. Pannu Property Dealer 2009(14) S.T.R. 635 (Tri. - Del.)

.9 SECTION 80 WILL APPLY IN THE PRESENT CASE

Moreover, section 80 of the Act provides that no penalty shall be imposed on the Noticee for any failure referred to in sections 76, 77 or 78 of the Act, if the Noticee proves that there was reasonable cause for the said failure. Thus, the Act statutorily provides for waiver of penalty. In the present case, there was a bonafide belief on part of the Noticee that their activities are not subject to Service Tax and is not taxable under 'Cargo Handling Services', based on the detailed grounds given above. Further, there are various judicial pronouncements favoring the stand taken by the Noticee. There have been various clarifications regarding what can be covered under 'Cargo Handling Services' and none of them covers the service rendered by the Noticee. Thus, the Noticee submits that there was confusion even within the department and the industry at large as to what would get covered under 'Cargo Handling Services'. Therefore, there was reasonable cause for failure, if any, on part of the Noticee to pay service. Hence, in terms of section 80 of the Act, penalties cannot be imposed under sections 76, 77 and 78 of the Act. In this regard, reliance is placed on the following judgments:

(i) **ETA Engineering Ltd. vs. CCE, Chennai, 2004 (174) E.L.T 19 (Tri-LB)**
(ii) **Flyingman Air Courier Pvt. Ltd. vs. CCE 2004 (170) ELT 417**
(iii) **Star Neon Singh vs. CCE, Chandigarh, 2002 (141) ELT 770**
(iv) **Avian Overseas Pvt. Ltd. v. Commissioner of Central Excise, BBSR – Final Order No. A -103/KOL/09 dated 06.03.2009**

11.10 ISSUE INVOLVES BONA FIDE INTERPRETATION OF LAW

It has been submitted that, as demonstrated above, the present issue involves interpretation of complex legal provisions. Therefore, imposition of penalty is not warranted in the present case.

In this regard, reliance is placed on the following judgments:

(i) **Ispat Industries Ltd. v. CCE 2006 (199) ELT 509 (Tri.-Mum)**
(ii) **Secretary, Town Hall Committee v. CCE 2007 (8) S.T.R. 170**
(iii) **CCE v. Sikar Ex-serviceman Welfare Coop. Society Ltd. 2006 (4) S.T.R. 213 (Tri. - Del.)**
(iv) **Haldia Petrochemicals Ltd. v. CCE 2006 (197) E.L.T. 97 (Tri. - Del.)**
(v) **Siyaram Silk Mills Ltd. v. CCE 2006 (195) E.L.T. 284 (Tri. - Mumbai)**
(vi) **Fibre Foils Ltd. v. CCE 2005 (190) E.L.T. 352 (Tri. - Mumbai)**
(vii) **ITEL Industries Pvt. Ltd. v. CCE 2004 (163) E.L.T. 219 (Tri. - Bang.)**

In view of the foregoing, the noticee prayed that SCN imposing penalty under sections 76, 77 and 78 of the Act may kindly be dropped. The Noticee also desired that in any case, an opportunity of personal hearing be granted before a final decision is taken in the matter.

Personal Hearing :

The Noticee was granted personal hearing on 21.02.2011. Shri Sumit Jain, CA, appeared on behalf of assessee for personal hearing on 21.02.2011 and reiterated the submission made in the written reply. He further stated that penalty u/s 76 & 78 cannot be simultaneously levied.

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 classify the services rendered by the Noticee under "Cargo Handling Services" and proposes to recover Service Tax on the taxable services provided by them since 2005 whereas the Noticee have justified the classification of their services under "Supply of Tangible Goods".

Now, Section 65(105)(zr), states "means any service provided or to be provided to any person, by a cargo handling agency in relation to cargo handling services". In terms of Section 65(23) of the Act "Cargo Handling Service" means loading, unloading, packing or unpacking of cargo and includes –

(a) cargo handling services provided for freight in special containers or for non-containerised freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport, and cargo handling service incidental to freight; and

(b) service of packing together with transportation of cargo or goods, with or without one or more of other services like loading, unloading, unpacking,

but does not include, handling of export cargo or passenger baggage or mere transportation of goods.

The Noticee has been providing these services to mainly to M/s Saurashtra Chemicals Ltd, Ranavav and M/s Gujarat Heavy Chemicals Ltd., Sutrapada. The Noticee has entered into agreement with M/s. Saurashtra Cement Ltd., Ranavav. Therefore, for the purpose of the classification of services for levy of Service Tax, terms and conditions of these agreements would reflect the nature of services provided by the Noticee. The verbatim reproduction of such terms and conditions mentioned in Work Order dated 15.09.2006, copy of which has been produced by the noticee with the defence reply reveals –

A. <u>For use of dumpers.</u>

1. You will have to use your own dumpers for transportation (including unloading) for the following materials inside the factory premises as and when required.

   a) Lime Stone
   b) Limestone chips and dust
   c) Hard coke
   d) Clack coal
   e) Salt
   f) Miscellaneous materials.

This reveals that the jobs undertaken by the Noticee through their equipments were specified in the work orders and these jobs involved activities like unloading, feeding, shifting etc., other than transportation of goods. However, the transportation in most cases was limited to the factory premises. As per Section 65 (23) of the Finance Act, **1994** "Cargo Handling Service" means loading, unloading, packing or unpacking of cargo and includes –

(a) cargo handling services provided for freight in special containers or for non-containerised freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport, and cargo handling service incidental to freight; and

(b) service of packing together with transportation of cargo or goods, with or without one or more of other services like loading, unloading, unpacking,

but does not include, handling of export cargo or passenger baggage or mere transportation of goods.

In case of Gajanand Agarwal Vs. Commissioner – 2009 (13) S.T.R 138 (Tri.-Kolkatta) which was followed in Singh Brothers Vs. Commissioner – 2009 (14) S.T.R 552 (Tri.-Del), it was held that when the agreement provided for hiring of pay loader for transferring coal to wagons with the primary object of contract being performance of service of loading of coal, the same was held as covered under Cargo Handling Service.

In case of Bhagyanagar Services V. CCE, Hyderabad – 2006(4) S.T.R 22 (Tri.-Bang), it has been held that loading and unloading of cement bags on platform of Railways is covered under Service tax net under category of "Cargo Handling Services".

It is clear from the above that the services rendered by the Noticee are taxable as "Cargo Handling Services"

Now, I shall discuss the contentions put forth by the Noticee.

The Noticee submits that the notice is vague and basis of the calculation of the demanded is not mentioned. I find that during the course of the audit, the records including the financial records of the Noticee were scrutinized and amount of the tax payable was discussed with the Noticee and in fact they had agreed to the pay the tax not levied during the period. Therefore, there is no substance in the contention raised and the reliance placed on the decision of Hon'ble Supreme Court in case of Govind Saran Ganga Saran Vs. Commissioner of sales tax 1985 (Supp) SCC 205 is not applicable in this case.

The Noticee further submits that they are not engaged in "Cargo Handling Service" and have cited the agreement entered to with SCL and GHCL to emphasise that they were to provide dumpers and pay loaders on hire. I find that the Noticee have selectively quoted the agreement and have highlighted the terms and conditions favourable to them. The description of work in various work orders as mentioned in the audit report is ""TRANSPORTATION OF SALT FROM RAILWAY SIDING THROUGH DUMPERS", "TRANSPORTATION INCLUDING UNLOADING OF VARIOUS RAW-MATERIALS INSIDE AND OUTSIDE FACTORY PREMISES THOUGH DUMPERS", LOADING, SHIFTING, FEEDING & HOUSEKEEPING BY ONE LOADER & THREE DUMPERS".

Therefore, it amply clear from these work orders and from the discussion in para supra that the services provided by the Noticee is taxable under "Cargo Handling Services." The Noticee have placed reliance on the decision of the CESTAT in case of S. N. Uppar & Co v/s CCE, Belgaum 2008 (11) S.T.R. 34 (Tri-Bang) to contend that movement within the premises is not covered under "Cargo Handling Services'. I find that the definition of Cargo Handling Service doesn't prescribe any minimum distance that the cargo should be handled. Moreover, in the case law cited by the Noticee, the contract and its provisions were not made available to term the services as cargo handling whereas in this case, as discussed earlier, the provisions of the contract clearly indicates that the services provided were Cargo Handling Services.

The Noticee have also relied upon the decision in case of Sainik Mining & Allied Services ltd. V. CCE, Bbsr 2008 (9) S.T.R. 531 (Tri-Kolkata), CCE, Bhubneswar v. Vinshree Coal Carriers (2008) 10 STR 473 and Modi Construction Co. vs. CCE Ranchi 2008 (12) STR 473. In this case, the activities undertaken were transportation in mining area and since these activities are covered under mining services the same were not considered as taxable under "cargo handling Services."