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/15-116/Dem-ST/HQ/2009

Date of order :- 15.11.2011
Date of issue :- 15.11.2011

Passed by Shri Harcharan Singh, Additional Commissioner

Order-in-Original No. 11/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) aggrieved by this Order may file appeal to Commissioner of Central Excise (Appeals), 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.

Sub:- Show Cause Notice Number 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 :

On the basis of intelligence, it was gathered that M/s. Jinny Marine Traders, 1306/1311, G. I. D. C. Estate, Veraval – 362 269 *(hereinafter referred to as 'the Noticee")* is engaged in processing of marine products for exporting the same to the foreign countries. It was also gathered that Factories Act, 1948 is applicable to the fish processing units; therefore, such units are registered under it. They are dispatching their finished goods in the containers from their factory to the port of export and the transportation charges thereof is borne by them, however, neither the transporter nor the Noticee is paying any Service Tax under the category 'Transport of goods by Road Service'.

2.1 Therefore, an inquiry was initiated against the Noticee. Summons was issued on 1-10-2008 calling for the Noticee to remain present and produce copies of Audit Reports along with Balance-Sheets & P & Loss Accounts etc.

2.2 The statement of Shri Hitendra Jayantilal Gaglani, authorised signatory of the Noticee was recorded under Section 14 of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 *(hereinafter referred to as "the Act")* on 17-10-2008 before the Superintendent (A.E.), Central Excise, H.Q., Bhavnagar wherein he produced copies of Balance Sheet, Audit Reports and Expenditure Ledgers etc. for the years 2004-05 to 2007-08 and stated that he was working as Accountant in the factory of the Noticee; that the Noticee is a Proprietorship concern and its proprietor is Mrs. Gracy Thomas; that their firm is engaged in processing and export of marine products and for this purpose, they have a processing unit at Veraval. They procure their raw materials i.e. fish and other marine products from local fishermen who deliver these goods at their factory. The processing of the marine products involves washing of the raw-material to

make it free from foreign objects, then the same is cleaned with fresh water and thereafter marine products are graded as per the sizes and then the products are set in trays of the required weight and thereafter the goods are frozen; that they had obtained Service Tax registration for Goods Transport Agency, however, they had not paid any Service Tax so far and submitted copy of Service Tax Registration Certificate issued by Superintendent, Service Tax, A.R.-Junagadh bearing No. BVN/STAX/ JND/ XX/1/ GTA/ 190/04-05; that they filed self-assessed half yearly Nil returns; that they paid freight charges for outward transportation of their finished goods; that they have not paid Service Tax leviable on the said freight even though they knew that the transporter had not paid the same because they were under impression that they were entitled to avail credit of Service Tax borne by them for the services received by them and the said credit gets set off against the Service Tax liability for GTA; that the expenses shown against commission on sales is the amount which had been paid to various commission agents engaged by them for sale of goods and most of these commission agents are foreign based and they did not have any office or branch in India; that he had not brought bills raised by them but he would submit the same within ten days; that the expenses shown against 'Cartage Outward' (in Profit & Loss Account) was the amount paid towards freight on outward transportation of their finished goods and none of the transporters engaged by them for outward transportation of goods paid Service Tax on the amount of freight charged by them.

2.3. On going through the copies of Balance-sheets submitted under the above mentioned statement dated 17-10-2008, it was observed that the 'Cartage Outward' i.e. amount paid towards freight on outward transportation of their finished goods by the Noticee were as under:

Year	Transportation Charges (in Rs.)
2004-05	31,11,035/-
2005-06	45,14,723/-
2006-07	43,43,873/-
2007-08	39,87,830/-

Further, during the course of investigation, it was came to the notice that the Noticee had paid sales commission to their foreign-based agents on which the Noticee was liable to pay Service Tax for the services received from their foreign sales agents.

2.4. The Noticee vide their letter dated Nil provided copies of the half-yearly Service Tax Returns in form ST-3 filed by them and copies of ledgers of commission paid to various parties and copies of ledgers of other parties who provided various services to them. However, the Noticee did not supply copies of ledgers of foreign-based commission agents as assured under his statement dated 17-10-2008. Therefore, Summons was issued to the Noticee on 7-9-2009 calling for the copies of bills raised by the sales commission agents and also copies of Balance-sheets, Audit Reports, I. T. Returns for the year 2008-09. The Noticee vide letter dated 16-9-2009 requested to give another suitable dated after 20th October-2009. Therefore, another Summons was issued to the Noticee on 23-9-2009 calling them to remain present on 21/22-10-2009 along with the documents as called for under Summons dated 7-9-2009. With reference to the Summons dated 23-9-2009, the Noticee vide letter dated 10-10-2009 submitted copies of Balance-sheet, Profit & Loss Account and Income Tax Return for the year 2008-09, however, as regards commission paid to foreign-based agents, they assured to submit the details within a week time.

2.5 On going through copy of Balance-sheet for 2008-09 submitted under the above mentioned letter dated 10-10-2009, it was found that the 'Cartage Outward' i.e. amount paid towards freight on outward transportation of finished goods by the Noticee was Rs.49,72,659/-. The Noticee vide letter dated 12-10-2009 submitted period-wise bifurcation of the transportation charges paid by them during the period from January-2005 to 31-3-2009 amounting to Rs.1,08,63,373/- which found to be less than the expenses of 'Cartage Outward' mentioned in their Profit & Loss Accounts of the relevant period. Therefore, for the purpose of calculation of Service Tax, the figures mentioned in the Profit & Loss accounts under the head 'Cartage Outward' has been taken into consideration.

2.6. The Noticee vide another letter dated 12-10-2009 submitted details of overseas commission paid by them during the year 2008-09, however, they did not submit the details of overseas commission for the remaining period of last five years. Therefore, one more Summons was issued to the Noticee on 21-12-2009 calling for (i) the bills raised by the foreign based commission agents for the years 2005-06, 2006-07, 2007-08 and 2009-10, (ii) copies of Service Tax Returns filed by them for the year 2009-10. The Noticee vide letter dated 26-12-2009 submitted details of overseas commission paid by them for the years 2005-06, 2006-07, 2007-08 and 1-4-2009 to 30-11-2009 and also submitted copy of License No.102651 issued under the Factories Act, 1948 by the Chief Inspector (Factory), Gujarat State in the name of the Proprietor of the Noticee.

3. From the above, it was revealed that the Noticee engaged foreign based commission agents for sale of their goods and paid commission to them in foreign currency. Such Agents are not having any office or branch in India. Thus, the Noticee was receiving services classifiable under category of 'Business Auxiliary Service' as defined under Sub-section (19) (i) of Section 65 of the Act and thereby received taxable services as prescribed under Section 65 (105) (zzb) of the Act. As per provisions of Section 66A (1) of the Act, where any service specified in clause (105) of Section 65 of the Act is provided by a person who has established a business from which the service is provided or has his permanent address or usual place of residence, in a country other than Indian and such service is received by a person who has his place of business in India, fixed establishment, permanent address or usual place of residence, in India, then such service shall, for the purpose of that Section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of the Act shall apply. Similarly, as per the provisions of Sub-clause (iv) of Rule 2(1)(d) of the Rules prevailing from time to time, a 'person liable for paying Service Tax' in relation to any taxable service provided or to be provided by any person from a country other than India and received by any person in India shall be the person who receives such service in India. Thus, as per provisions of Section 66A (1) of the Act read with provisions of sub-clause (iv) of Rule 2(1)(d) of the Rules as discussed hereinabove, the Noticee was the person liable for paying the Service Tax on the value taxable services received by them under the category of 'Business Auxiliary Service' as defined under Sub-section (19) (i) of Section 65 of the Act from their foreign-based commission agents.

4. Thus, the Noticee received taxable service of 'Business Auxiliary Service' as defined under Sub-section (19) of Section 65 of the Act from the foreign based commission agents and was liable to pay Service Tax on commission paid to such agents as discussed hereinabove, however, they did not include/amend the Service Tax Registration obtained by them for the category of service viz. 'Transport of Goods by road' so as to include the category of service viz. 'Business Auxiliary Service'and also did not declare value of taxable service i. e. commission paid to foreign-based agents in the ST-3 Returns filed by them and thereby suppressed the facts that they were liable to pay Service Tax for the services received under the category of 'Business Auxiliary Service' as per provisions of Section 66A (1) of the Act read with provisions of sub-clause (iv) of Rule 2(1)(d) of the Rules as discussed hereinabove, with an intent to evade payment of Service Tax and thereby attracted the penal provisions laid in Finance Act, 1994 & Rules made there under.

5. The Noticee has contravened the following provisions of the Act and the Rules framed thereunder with intent to evade payment of Service Tax:

i. Section 69 of the Act read with Rule 4 of the Rules in as much as they failed to add 'Business Auxiliary Service' as the category of services received by them in the Service Tax Registration already held by them as discussed hereinabove,

ii. Section 68 (2) of the Act read with Section 66A (1) of the Act and with Rule 6 and sub-clause (iv) of Rule 2(1)(d) of the Rules in as much as they failed to pay Service Tax at the appropriate rate prescribed under Section 66 read with Section 66A (1) of the Act from time to time on the value of the taxable services paid under the category of 'Business Auxiliary Service',

iii. Section 70 of the Act read with Rule 7 of the Rules in as much as they failed to assess the Service Tax payable on the overseas commission paid by them as discussed hereinabove and to include/mention details thereof in ST-3 Returns filed by them.

6. Since, the Noticee have suppressed the facts and contravened various provisions of the Act and the Rules as discussed hereinabove with an intent to evade payment of Service Tax on commission paid to foreign-based commission agents therefore extended period was invokable under proviso to Section 73 (1) of the Act for recovery of Service Tax not levied and paid by the Noticee. As per Section 67 of the Act, Service Tax on the category of 'Business Auxiliary Service' is leviable on the gross amount paid by the service receiver. Consequently, Service Tax amounting to Rs.24,40,768/- calculated at the appropriate rate on the commission paid by the Noticee to their foreign-based commission agents is recoverable from the Noticee under Section 66A read with Section 66 and Sub-clause (iv) of Rule 2(1)(d) of the Rules and the same was liable to be recovered under Section 73 along with interest under Section 75 of the Act.

7.1 The Noticee was receiving services of 'Transport of goods by road' from various 'Goods Transport Agencies' as defined under Sub-section (50b) of Section 65 of the Act and the Noticee have thereby received taxable services as prescribed under Section 65 (105) (zzp) of the Act. Whereas as per the provisions of sub-clause (v) (a) of Rule 2(1)(d) of the Service Tax Rules, 1994 *(hereinafter referred to as the Rules)*, a 'person liable for paying the Service Tax' in relation to taxable service provided by a Goods Transport Agency where the consignor or consignee of goods is any factory registered under or governed by the Factories Act, 1948, is the person who pays or is liable to pay freight for transportation of such goods by road in a goods carriage. In the instant case, the fish & marine products processing unit of the Noticee was a factory governed by the Factories Act, 1948 and they paid freight charges for outward transportation of their finished goods, therefore, as per the provisions of Section 68 (2) of the Act read with Rule 2(1)(d) of the Rules, the Noticee was the person liable for paying the Service Tax for the services received by them under the category of 'Transport of goods by Road'.

7.2. On going through copies of ST-3 Returns filed by the Noticee, it was observed that the Noticee mentioned therein name of taxable service as 'Transportation'; that they availed Cenvat credit on input services without mentioning categories of the services on which credit availed and thereby willfully mis-stated/represented themselves as Service Provider under category of service 'Transportation' i.e. 'Transport of goods by road' because a provider of taxable service is eligible to take Cenvat credit of the Service Tax paid on any input service received as per the provisions of Rule 3 of the Cenvat Credit Rules, 2004 *(hereinafter referred to as the CCR)*. On going through the definitions of "Input Service" and "Output Service" defined under Sub-rules (l) & (p) of Rule 2 of the CCR, respectively it is evident that whatever Cenvat credits taken by the Noticee can not be considered as input services since the Noticee was not a service provider and such credit was not used by the Noticee in providing an Output Service. Further, the Noticee is engaged in manufacture/processing of various marine products like fish etc. falling under Chapter 3 of 1st Schedule to the Central Excise Tariff Act, 1985 attracting Nil rate of duty i.e. the Noticee is engaged in manufacture/processing of exempted goods as defined under Rule 2 (d) of the CCR. Therefore, as per the provisions of Rule 6(1) of the CCR, the Noticee is not eligible to avail Cenvat credit either on input or on input services. Thus, the Noticee have taken Cenvat credit wrongly by willful mis-statement and suppression of facts as discussed hereinabove with an intent to evade payment of Service Tax. Further the Noticee declared the value of the taxable service as Nil in the ST-3 Returns filed by them and yet, they have shown payment of Service Tax through utilization of Cenvat credit, thus, they misstated the value of taxable service received by them with an intent to evade payment of Service Tax payable by them as per the provisions of sub-clause (v) (a) of Rule 2(1)(d) of the Rules under the category of 'Transport of Goods by Road' from 1-1-2005.

7.3. From the above, the Noticee have contravened provisions of Section 68 (2) of the Act read with Rule 6 and sub-clause (v) (a) of Rule 2(1)(d) of the Rules in as much as they failed to pay Service Tax at the appropriate rate prescribed under Section 66 of the Act from time to time on the value of the taxable services paid under the category of 'Transport of Goods by Road' during the period from 1-1-2005 to 31-3-2009 with an intent to evade payment of Service Tax. Since, the Noticee have willfully mis-stated & suppressed the facts and contravened provisions of the Act and the Rules as discussed hereinabove with an intent to evade payment of Service

Tax, the extended period was invoked under proviso to Section 73 (1) of the Act for recovery of Service Tax not levied and paid by the Noticee for the extended period of five years in place of one year.

7.4. The Notification No.6/2005-S.T. dated 1-3-2005 as amended granted exemption in terms of aggregate value of taxable services provided in any financial year from the whole of the Service Tax leviable on such services under Section 66 of the Act and prescribed different limits from time to time in terms of value of taxable services provided. However, as per Proviso (ii) to the Notification, such exemption is not applicable to such value of taxable services in respect of which Service Tax is required to be paid by such person and in such manner as specified under Sub-section (2) of Section 68 of the Act read with the Rules. Therefore, the benefit of the Notification No/6/2005-S.T. dated 1-3-2005 as amended from time to time was not available to the Noticee. Hence, as per Section 67 of the Act, Service Tax on the category of service 'Transport of Goods by Road' was leviable on the gross amount paid by the service receiver after allowing abetment. Consequently, Service Tax amounting to Rs.5,39,587/- was calculated at the appropriate rate on the transportation charges paid by the Noticee on outward transportation of their finished goods as shown in the Annexure-II to the Notice was leviable from the Noticee under Section 66 of the Act read with Sub-clause (v) (a) of Rule 2(1)(d) of the Rules and the same was liable to be recovered under Section 73 of the Act along with interest under Section 75 of the Act.

7.5. From the above, it is evident that the Noticee have taken Cenvat credit of Rs.15,95,595/-, as shown in Annexure-III to the Notice, wrongly by willful mis-statement and suppression of facts as discussed hereinabove and utilized Rs.7,89,820/- towards payment of Service Tax with intend to evade payment of Service Tax. Therefore, Cenvat credit of Rs.15,95,595/- was liable to be recovered from the Noticee along with interest under Rule 14 of the CCR read with Section 73 & 75 of the Act and the Noticee was liable to penalty under Section 78 of the Act read with Rule 15(4) of the CCR.

7.6. The Noticee was liable to penalty under Section 78 of the Act for the acts of (i) suppression of fact of receiving taxable services under the categories of 'Transport of Goods by Road' & 'Business Auxiliary Service' and liability of the Noticee to pay Service Tax thereon it; (ii) contravention of various provisions of the Act and the Rules as discussed hereinabove with an intent to evade payment of Service Tax; and (iii) taking Cenvat credit wrongly & utilizing the same towards payment of Service Tax read with Rule 15(4) of the CCR. Similarly, the Noticee was liable to penalty under Section 77 (1) (a) of the Act for contravention of provisions of Section 69 the Act read with Rule 4 of the Rules as discussed hereinabove & under Section 77(2) of the Act for contravention Section 70 of the Act read with Rule 7 of the Rules as discussed hereinabove. Further, the Noticee was also liable to penalty under Section 76 of the Act for failure to assess Service Tax under Section 70 of the Act and make the payment of Service Tax payable within the period and in the manner prescribed under Section 68 of the Act read with Rule 6 and sub-clause (iv) & (v) of Rule 2(1)(d) of the Rules as discussed hereinabove.

8. Therefore, the Noticee was issued a show cause notice requiring them to show cause as to why: -

i. Service Tax amounting to Rs.29,90,813/- (Rupees Twenty nine lacs, ninety thousand, eight hundred and thirteen only), not levied and paid by them should not be demanded and recovered from them under proviso to Section 73(1) of the Act along with the interest at the appropriate rate as applicable till the date of payment of service tax under Section 75 of the Act;

ii. Cenvat credit of Rs.15,63,087/- (Rupees Fifteen lacs, sixty three thousand and eighty seven only) should not be recovered from the Noticee along with interest under Rule 14 of the CCR read with Section 73 & 75 of the Act;

iii. Penalty should not be imposed upon them under Section 76 of the Act for failure to assess Service Tax under Section 70 of the Act and make the payment of Service Tax payable within the period and in the manner prescribed under Section 68 of the Act read with Rule 6 of the Rules and sub-clause (iv) & (v) of Rule 2(1)(d) of the Rules;

iv. Penalty should not be imposed upon them under 77 (1) (a) for contravention of provisions of Section 69 the Act read with Rule 4 of the Rules & under Section 77(2) for contravention of Section 70 of the Act read with Rule 7 of the Rules;

v. Penalty should not be imposed upon them under Section 78 of the Act for suppression of fact of receiving taxable services under the categories of 'Transport of Goods by Road' & 'Business Auxiliary Service' and liability of the Noticee to pay Service Tax on them and contravention of various provisions of the Act and the Rules with intent to evade payment of Service Tax as well as for taking & utilizing Cenvat credit wrongly by willful mis-statement & suppression of facts with intention to evade payment of Service Tax, as provided under Rule 15(4) of the CCR.

DEFENCE:

9. The Noticee submitted written reply to Show Cause Notice F. No. V/15-116/Dem-ST/HQ/2009 dated 25/02/2010 vide its letter dated 06.01.2011 wherein interalia among other things stated as under :-

10.1 The following facts are not in dispute:

(1) The Noticee is a Proprietary concern registered under Factories Act, 1948.

(2) Marine Products manufactured by the Noticee are meant only for export and entire production was exported.

(3) Since factory of the Noticee is registered under Factories Act, 1948, he is liable to pay Service Tax in terms of Rule 2(v)(a) of Service Rules, 1994 in respect of service provided by a goods transport agency.

(4) Sale price of marine products are on FOB or CIF terms and inclusive of all the expenses upto the place of removal i.e. port of Export.

(5) Marine products manufactured and exported by the Noticee are not subject to payment of excise duty.

(6) The Noticee is duly registered under category of "Goods Transport Agency" under the Finance Act, 1994.

(7) The Noticee has paid commission in foreign exchange to their Foreign Agents based out of India. Amount of Commission has been reflected in relevant Shipping Bill.

(8) The Noticee has filed ST-3 Returns regularly in presoribed period.

(9) No clarification was sought by the Service Tax Department from the Noticee in respect of Cenvat Credit taken and utilized as shown in relevant ST-3 Returns, referred to under ANNEXURE – III to the show cause notice.

10.2 In reply to impugned Show Cause Notice, the Noticee submitted that the following submissions which are without prejudice to one other and the Noticee reserves their rights to make addition to or alteration in the submissions.

10.3 THE NOTICEE HAS EXPORTED THE SERVICES, HENCE NOT LIABLE TO PAY SERVICE TAX

The Noticee submitted that entire demand of Service Tax is devoid of merits as they had exported the goods viz. marine products and service viz. Goods Transport Agency and Commission Agent were used for export of such goods. Therefore, services were also exported with the goods. The value of the goods included the cost of transportation upto the port of export irrespective of terms of sale of goods were FOB or CIF as well as commission paid to agent based outside India. They have received the amount of sale proceed in foreign exchange. As per provisions of Notification No.6/1999-ST dated 09.04.1999 which was rescinded vide Notification No.2/2003-ST date 01.03.2003, no Service Tax was payable on export of services. Similarly as per Notification No.21/2003-ST dated 20.11.2003, taxable services specified in sub-section (105) of Section 65 provided to any person in respect of which payment is received in India in convertible foreign exchange was exempted from the whole of the Service Tax leviable thereon under Section 66 of the Finance Act, 1994. The said notification was rescinded vide Notification No. 10/2005-ST date 03.03.2005. However, thereafter Government has issued Export of Services Rules, 2005. Thus, they are not liable to pay any Service Tax on such services as per the said notifications, clarification issued vide Circular No. ST-56/5/2003 dated 25.4.2003 and Export of Services Rules, 2005.

Central Board of Excise & Customs consequent upon withdrawal of Notification No.6/99-St dated 09.04.1999 vide Notification No.2/2003-ST dated 01.03.2003 issued clarification vide Circular No.56/5/2003 (F. No.245/1/2003-CX-4 dated 25.04.2003) wherein it is clarified that

"2. In this regard, various representations have been received by the Board raising apprehension that because of the withdrawal of the Notification No. 6/99, export of service would be affected as it would be costlier in the international markets.

3. The Board has examined the issue. In this connection I am directed to clarify that the Service Tax is destination based consumption tax and it is not applicable on export of services. Export of services would continue to remain tax free even after withdrawal of Notification No. 6/99, dated 9-4-99. Further it is clarified that service consumed/provided in India in the manufacture of goods which are ultimately exported, no credit of service tax paid can be availed or reimbursed at present as inter-sectoral tax credit between services and goods are not allowed."

It has been clarified in above mentioned Board's Circular that Service Tax is a destination-based consumption tax and it is not applicable on export of service. In short, goods are to be exported and not service tax.

The above circular was in force up 09.05.2007. (Withdrawn vide Circular No.93/04/2007 dated 10.05.2007). Meanwhile, the Government of India had issued Export of Services Rules, 2005 which came into force with effect from 15.3.2005.

Services classifiable under 65(105)(zzb) are covered under clause (iii) of Rule 3 of Export of Services Rules, 2005, whereas services classifiable under 65(105)(zzp) are covered under clause (ii) of Export of Services Rules, 2005. As per Rule 4 of the said Rule, any Service which is taxable under clause (105) of Section 65 of the Act can be exported without payment of service tax. Noticee is also eligible for the benefit of rebate under Rule 5 of the above rules.

The Government of India issued Notification No.11/2005-ST date 19.04.2005 as provided under Rule 5 of the said rule for grant of rebate of Service Tax and cess paid on all taxable services exported in terms of Rule 3 of the said rules.

The Noticee's above contention also gets weightage from the Notification No.18/2009-ST dated 7.7.2009. Commission paid on the services provided by Commission Agent located outside India and transportation of goods by road for the purpose of export of goods are exempted from payment of Service Tax under Notification No: 18/2009-ST dated 7/7/2009. Thus, the Noticee was at all not liable to pay Service Tax on services received by it used for export of goods. In any case, non-payment of Service Tax by the

Noticee can best be attributed to *bona fide* belief that Noticee was not liable to pay Service Tax because of benefits available to export of services.

10.3 EVEN OTHERWISE NO SERVICE TAX PAYABLE ON SERVICES PROVIDED BY COMMISSION AGENT FROM OUTSIDE INDIA

The allegation against the Noticee was that they have received services of commission agent in relation to promotion of sale from foreign based service provider and paid commission to the said foreign based service provider. The said service fall under the category of Business Auxiliary Service as defined under sub-section (19) of Section 65 of the Act, hence as per the provisions of Rule 2(d)(iv) of the Rules read with Section 66A of the Act are liable to pay Service Tax.

The Noticee totally disowns the allegation made in the show cause notice on the following grounds which may please be considered independent and without prejudice to one another.

(1) THERE IS NO RECEIPT OF SERVICE IN INDIA FROM OUTSIDE INDIA – SERVICE WAS PROVIDED OUTSIDE INDIAN TEERITORY AND REMAINED OUTSIDE INDIA

Noticee stated that no services were received by it in relation to promotion of sale from a foreign based service providers as alleged by the department. The Commission Agent has provided services to him abroad and not in India. To be more specific, it is clarified that agent had caused sale of goods in the foreign territory and not in India. It may also be appreciated that government of India cannot charge any taxes on the person who is providing any kind of service outside India. Therefore, his transaction does not fall under any category of Service Tax under the Finance Act, 1994. If the agent would have caused sale in the Indian Territory, he would have taken registration and paid the Service Tax as per the said provision.

Service of Commission Agent is covered under the category of Business Auxiliary Service which is defined under Section 65(19) of the Finance Act, 1994.

Taxable Service is defined under Section 65(105) of the Finance Act, 1994 and as per clause (zzb) taxable service means any service provided or to be provided to a client by any person in relation to business auxiliary service.

Charging of Service tax is under Section 66 ibid. As per the said provision, Service Tax shall be levied at the rate of twelve percent of the value of taxable services referred to in sub-clause of clause 105 of Section 65 and collected in such manner as may be prescribed.

It means it is to be kept in mind that the levy is on rendering of the taxable service and not on the person.

Therefore, for the purpose of levy of Service Tax, taxable event is rendering of service and not person. Thus, if any service is provided outside India, no tax can be levied by the government of India.

It may be appreciated that as per Section 64(1) of the Finance Act, 1994, Chapter V Service Tax extends to the whole of India except the State of Jammu and Kashmir.

Even CBEC vide Circular No. 36/4/2001 dated 08.10.2001 also clarified that

"I am directed to say that question has arisen whether services provided outside the limits of the Indian territorial waters are liable to Service Tax or not.

The matter has been examined. At present, the levy of Service Tax extends to the whole of India except the State of Jammu and Kashmir. The expression "India" includes the territorial waters of India. Indian territorial waters extend up to twelve nautical miles from the Indian land mass. Chapter V of the Finance Act which governs the levy of Service Tax has not extended to the levy to designated areas in the Continental Shelf and the Exclusive Economic Zone of India (as has been done in case of Central Excise vide Notification No. 166/87-C.E., dated 11-6-87 and in case of Customs by Notification Nos. 11/87-Cus., Dated 14-1-87 & 64/97-Cus., dated 1-12-97). It is, therefore, clarified that the services provided beyond the territorial waters of India are not liable to Service Tax as provisions of Service tax have not been extended to such areas so far."

It means at the most that government can include designated areas in the Continental Shelf of the Exclusive Economic Zone of India but in any case not beyond that.

Though the above circular is withdrawn vide Circular No.93/04/2007-ST dated 10.05.2007, it does not alter the meaning and clarification of applicability of levy of Service Tax to the whole of India.

Honourable Tribunal while granting STAY in the case of STERLITE INDUSTRIES (INDIA) LTD. Versus COMMR. OF C. EX., TIRUNELVELI reported in 2008 (11) S.T.R. 375 (Tri. - Chennai) held that *"Stay/Dispensation of pre-deposit - Import of services - Date of effect of liability on recipient - Management Consultant service and Business Auxiliary Services received from abroad - Liability for period prior to introduction of Section 66A of Finance Act, 1994 on 18-4-2006 - Revenue pleading liability right from 16-8-2002 under Rule 2(1)(d)(iv) of Service Tax Rules, 1994 - Also to be examined as to whether any taxable service provided by a person resident abroad can be considered to have been received abroad or in India - For period up to 1-1-2005, substantial issue, pending before Larger Bench, must wait decision thereof - For period thereafter, stay order - Pre-deposit waived and recovery stayed till decision of LB - Section 35F of Central Excise Act, 1944 as applicable to Service tax vide Section 83 of Finance Act, 1994. [2008 (9) S.T.R. 56 (Tribunal) relied on]. [paras 3, 5]*

3. We are further of the view that, in the present cases, it has also to be examined as to whether any taxable service provided by a person resident abroad without any office in India can be considered to have been received abroad or in India by a person resident in India. It appears that a distinction is sought to be made between the expressions "providing of service" and "rendering of service". It appears to us that a person resident in India pays for a service provided by a person resident abroad, upon receipt of such service in India. Such transaction involves receipt of service in India unless it is proved that the person resident in India receives such service through his office situate abroad and that the consideration for such service was also paid by such office. Seemingly, these are ancillary questions which require to be considered when the appeals arise for final hearing."

Thus, in any case, it cannot be considered as receipt of service in India therefore, no tax can be levied and paid by us on the commission paid to agent who has caused sale in foreign country.

1.1 EVEN LANGUAGE USED IN THE ACT/RULES ETC. ALSO TALKING ABOUT RECEIPT OF SERVICE IN INDIA

Section 66A provides to charge of Service Tax on services received from outside India. It means any service provided in India except the state of Jammu and Kashmir whether from India or outside India are chargeable to Service Tax under the Finance Act, 1994. It means services must be provided / received in India.

Noticee's above contention gets weightage from the heading of Section 66A ibid as well as language used in the Section 66A ibid which reads as under:

"Charge of Service Tax on services received from outside India.

66A. (1) Where any service specified in clause (105) of section 65 is,-
(a).....
(b).....

Such service shall, for the purpose of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:"

Similarly, Rules framed under Section 66A viz. Taxation of Services (Provided from outside India and Received in India) Rules, 2006 are also specifically provide that services must be received in India.

Even at the time when the explanation was in force, the CBEC vide Circular No.B1/6/2005-TRU dated 27.07.2005 that

"26.2 According to rule 2(1)(d)(iv) of Service Tax Rules, 1994 taxable services received from a non-resident were taxable in the hands of the recipient receiving such taxable services in India. ....."

Whereas in the instant case, the Commission Agent has provided services to him abroad and not in India. To be more specific, it is clarified that agent had caused the sale of goods in the foreign territory and not in India. It may also be appreciated that government of India cannot charge any taxes on the person who is providing any kind of service outside India. Therefore, the said transactions do not fall under any category of Service Tax under the Finance Act, 1994. If agent would have caused sale in the India territory, he would have taken registration and paid the Service Tax as per the said provision.

(2) PRIOR TO 18.04.2006, THERE WAS NO CHARGING SECTION UNDER THE FINANCE ACT, 1994 FOR LEVY OF SERVICE TAX ON SERVICE PROVIDED FROM OUTSIDE INDIA AND RECEIVED IN INDA

Without prejudice to above and without admitting anything, it is further submitted that before 18.04.2006 there was no such provision under the Finance Act, 1994 to levy Service Tax on the services received from outside India. Only Rule 2(d)(iv) of the Service Tax Rules, 1994 and Explanation to Section 65(105) was providing like that. It is a settled position of law that a rule cannot override the provision of an Act. Similarly, explanation cannot take place of main enactment particularly to enlarge the scope of main Act. Therefore, such provision of rule and explanation was ultra vires. Therefore, said explanation was omitted by the Finance Act, 2006 w.e.f. 01.05.2006.

Without prejudice to above, it is further submitted that prior to insertion of Section 66A of the Finance Act, 1994 with effect from 18.04.2006, there was no charging section for charging the Service Tax on services received from outside India. Without admitting any thing, it is to further submit that as stated in para supra that so called service of commission was also provided in the year 2004-05 (w.e.f. 01.01.2005) and 2005-06 prior to 18.04.2006 and at the material time there was no charging section for levy of Service Tax on service provided from outside India. It may be appreciated that in the SCN, provisions of Section 66A ibid cannot be invoked for the period prior to 18.04.2006. The SCN simply refers provisions of Rule 2(d) of Service Tax Rules, 2004. The said Rule 2(d) ibid is nothing but definition of "person liable for paying the service tax." Liability to pay Service Tax comes into play only when Acts provide for levy of Service Tax. Prior to insertion of Section 66A ibid, there was no provision for levy of Service

Tax on the person who is providing service from outside India. Accordingly, person who had provided service from outside prior to insertion of Section 66A ibid is not liable to pay Service Tax and therefore, question of payment of liability of Service Tax by the receiver of the service as provided under Rule 2(d) does not arise. Thus, provisions of Rule 2(d)(iv) at material time become ultra vires.

In this regard, attention is invited towards explanatory notes to Finance Bill, 2006 which read as under:

"(2) Section 66A is being inserted to levy service tax on taxable services provided or to be provided by a person, who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and received by a person who has his place of business, fixed establishment, permanent address or usual place of residence, in India under reverse charge method."

Before 18.04.2006, Explanation to Section 65(105) of the Finance Act, 1994 was inserted vide Finance Act, 2005 so as to include services provided from outside India to a recipient in India within the purview of service tax. The said Explanation is reproduced below:

"Explanation – For the removal of doubts, it is hereby declared that where any service provided or to be provided by a person, who has established a business or has a fixed establishment from which the service is provided or to be provided, or has his permanent address or usual place of residence, in a country other than India and such service is received or to be received by a person who has place of business, fixed establishment, permanent address or, as the case may be, usual place of residence, in India such service shall be deemed to be taxable service for the purpose of this clause."

The said provision intended to tax the import of service and hence was a substantive provision. However, the same was introduced as an Explanation. The Honourable Supreme Court in the case of Sulochana Amma V. Narayanan Nair reported in 1995 (77) ELT 785 (SC) held that

"It is settled law that explanation to a section is not a substantive provision by itself. It is entitled to explain the meaning of the words contained in the section or clarify certain ambiguities or clear them up. "

Thus, charge of payment of Service Tax cannot be created by inserting explanation to Section 65(105) ibid. For the purpose of levy of Service Tax Section 66 is the charging section.

Honourable High Court of Madras granted Stay in the case of Tamilnadu Spinning Mills Association Vs. UOI reported in 2006(TIOL 28 HC MAD ST) held that

"Service Tax Taxable services received abroad Interim stay granted for 4 weeks of the operation of Explanation under Section 65(105) of the Finance Act, 1994 and Rule 2(1)(d)(iv) of Service Tax Rules, 1994 as introduced by Finance Act, 2005 and Notification 23/2005 ST Dated 07.06.2005 respectively. (Para 2)"

The above situation is akin to the situation of levy of tax from the recipient of service under the provisions of Rule 2(1)(d)(xvii) and (xii) in case of Goods Transport Agency and Clearing and Forwarding Agent which were held ultra vires by Apex Court in the case of Laghu Udyog Bharati & Anr. Vs. UOI and ors reported in 1999 (89) 247(SC). Therefore, the ratio of the said judgment is squarely applicable in the instant case.

To overcome from the above, the Finance Act, 2006 brings about the changes in the broad scheme of taxation of import of service by way of deletion of Explanation to section 65(105) and inserted Section 66A ibid.

Therefore, even between Finance Act, 2005 and Finance Act, 2006 just because of explanation was inserted which creates new levy that too retrospectively cannot be made applicable in the instant case.

On perusal of the above, it clearly transpires that prior to 18.04.2006, there was no charging section and same cannot be created with the help of insertion of explanation to section 65(105) nor by machinery provisions viz. Rule. It appears that the Government realized this lacuna in the Service Tax provisions and to overcome this lacuna, Section 66A, the charging Section for collecting Service Tax in such situation was inserted, but the same was inserted only on 18.04.2006 and any service prior to this date does not come under the purview of the said section. In other words, levy of Service Tax on the service received in India by the person staying outside India is legally leviable w.e.f. 18.04.2006 but in any case, service must be received in India. When services provided outside India are not received in any form in India are still not covered anywhere and cannot be covered, as law of the land is applicable upto Indian borders only and not beyond that. Therefore, demand for the service received prior to 18.04.006 i.e. during the F.Y. 2004-05 and 2005-06 is illegal and liable to be quashed on this score too.
In view of the above, allegation made by the Department is not sustainable and the Noticee is not liable to pay any Service Tax on the Commission paid to the agent who had caused sale from outside India at least for the period prior to 18.04.2006.

The issue is now put to rest by the Hon'ble High Court in the following cases.

INDIAN NATIONAL SHIPOWNERS ASSOCIATION Vs UNION OF INDIA - 2008-TIOL-633-HC-MUM-ST

"Service tax – Service abroad – tax in India – valid only from 18.4.2006 Provisions of Rule 2(1)(d)(iv) clearly invalid – It is further to be seen here that Section 64 gives powers to the Central Government to make rules for carrying out the provisions of the Chapter. The chapter relates to taxing the services which are provided, the taxing on the value of the service and it is only the person who is providing the service can be regarded as an assessee. The rules therefore, cannot be so framed as not to carry the purpose of the Chapter and cannot be conflicted with the provisions in Chapter V of the Act. In other words, as the Act makes the person who is providing the service liable, the provisions in the Rules cannot be made which makes the recipient of the service liable. It is, thus, clear that the provisions of Rule 2(1)(d)(iv) are clearly invalid."

UNITECH LIMITED Vs COMMISSIONER OF SERVICE TAX, DELHI - 2009-TIOL-293-HC-DEL-ST

"ST - Service received from abroad – No tax prior to 18.04.2006 - 2008-TIOL-633-HC-MUM-ST – followed – High Court: in view of **the judgment of the** Division Bench of Bombay High Court passed in *Indian National Shipowners Association vs Union of India* - 2008-TIOL-633-HC-MUM-ST **it stands declared** that the Revenue can collect tax only **upon being invested with due legal** authority; an event which occurred on the **insertion of Section 66A in the Finance** Act, 1994 w.e.f. 18.04.2006 by virtue of the **Finance Act, 2006. This case is** squarely covered by the judgment of the **Bombay High Court in the case of *Indian*** *National Shipowners Association* **with which this High Court is in respectful** agreement."

Hon'ble High Court of Delhi in the case of S. R. Balitoboi & Associates, S. R. Batliboi & Co. versus Union of India & others reported in 2010-TIOL-376-HC-DEL-ST had held that :

"Service Tax – services rendered from abroad – no tax prior to 18.4.2006 – SCN quashed: that it is no longer a debatable issue inasmuch as this Court in the case of Unitech Limited v. Commissioner of Service Tax, Delhi: (*2009-TIOL-293-HC-DEL-ST*) , *following the decision of the Bombay High Court in the case of* Indian National Shipowners Association v. Union of India (UOI (*2008-TIOL-633-HC-MUM-ST*) , *held that the provisions of Section 66A would be applicable only from 18.04.2006 and that prior to that date, services rendered by a non-resident service provider to a resident recipient could not be taxed as a service at the hands of the resident recipient. As the issue stands covered by the decision of this Court in the case of* Unitech Limited, *the impugned show cause notices issued by the Commissioner of Service Tax, Delhi, to the extent they pertain to the period prior to 18.04.2006 and relate to the service in question, stand quashed."*

Commissioner of C. Ex., Ludhiana v/s. Bhandari Hosiery Exports Limited, reported in 2010 (18) S.T.R. 713 (P&H), wherein it was held by the Hon'ble High Court (P&H) as under :-

"Import of services – Liability of recipient – Relevant Date – Services of overseas commission agents availed – Demand of Service Tax under Business Auxiliary Service for period from 09.07.2004 to February, 2006 – No intention of legislature to tax services for received from outside India before 18-4-2006 – Issue settled by Bombay High Court decision in 2009 (13) S.T.R. 385 (Del.) – View expressed in High Court orders agreed with – Appeals against Tribunal order holding service not liable, dismissed. - Section 66A of Finance Act, 1994 – Rule 2(l) (d) of Service Tax Rules, 1994 – Appeal dismissed.

From the above ruling, it is evidently clear that Hon'ble High Court has quashed the Show Cause Notice *per se*, demanding Service Tax under Section 66A of the Finance Act, 1994 for the period prior to 18.04.2006. The above ruling is squarely applicable to the Noticee,

The Noticee would like to draw attention towards the fact that department's appeal against the decision of Hon'ble High Court of Bombay was dismissed by Hon'ble Supreme Court as reported in 2010(17) STR J57(SC). Commissioner (Legal), Central Board of Excise and Customs, New Delhi vide his communication dated 30.06.2010 issued from F.No.275/7/2010-CX.8A has communicated that said legal position has been accepted by the department.

10.4 SERVICE TAX ON GTA IS ALREADY PAID BY WAY OF DEBIT FROM CENVAT CREDIT AVAILED ON INPUT SERVICES

The Noticee further submitted that department has demanded Service Tax of Rs. 5,39,587/- on the Services of Transport of Goods by Road under Section 66 of the Finance Act, 1994 read with sub-clause (v)(a) of Rule 2(1)(d) of the Service Tax Rules, 1994 without verifying the facts on records.

The amount of Services Tax on services of Transport of Goods by Road were already paid by the Noticee by way of debit in CENVAT Credit account and said facts were also submitted in ST-3 returns filed from time to time. It had paid Rs.7,89,820/- by way of debit from CENVAT Credit account and this facts has already been accepted in show cause notice itself in paragraph 15 of the impugned show cause notice.

The Noticee also submits that while submitting return due to ignorance, it had not shown amount of Service Tax payable on GTA in the respective column as amount of CENVAT Credit availed on input services by him were more than Service Tax payable on the GTA.

Therefore, Service Tax payable on GTA was shown only in the column amount utilized. This fact was also deposed by authorized signatory Shri Hitendra J. Gaglani in his statement dated 17.10.2008 (Relied upon document 1 – Paragraph 2 of the SCN) that "They have not paid Service Tax leviable on the said freight .....because they were under impression that they were entitled to avail credit of Service Tax borne by them for the services received by them and the said credit gets set off against the Service Tax liability for GTA."

In support of the above, he enclosed details of Service Tax payable on Transport of Goods by road during the period under dispute and similar amount debited through CENVAT Credit accounts with copy of CENVAT Credit account. He also enclosed photocopy of ST-3 returns for the period January, 2005 to March, 2009.

Noticee further submits that even Hon'ble tribunal and Commissioner (Appeals) in series of decision held as under:

2008 (12) S.T.R. 159 (Tri. - Mumbai)MAHINDRA UGINE STEEL CO. LTD. Versus COMMISSIONER OF C. EX., RAIGAD

Cenvat credit of Service tax - Input service - Service tax paid for Goods Transport Agency service as recipient from Cenvat credit account - Recipient of service considered as provider of taxable service as per statutory definitions during material period - Rule 3(4) of Cenvat Credit Rules, 2004 providing for Cenvat credit utilization by assessee for payment of Service tax on any output service_- Tribunal decisions holding Service tax payable through Cenvat credit in similar cases - Impugned order set aside - Rules 2(p), 2(r), 3 and 14 ibid. [para 5] Appeal allowed

2007 (8) S.T.R. 231 (Tri. - Mumbai)-COMMISSIONER OF C. EX., NAGPUR Versus VISAKA INDUSTRIES LTD.

Payment of Service tax - Goods transport agency - Recipient thereof - Cenvat credit of Service tax - Assessee, a manufacturing unit paying Service tax on goods transport services, hence do fall within definition of "provider of taxable service" under Rule 2(r) of Cenvat Credit Rules, 2004 which includes a personal liability for paying Service tax - Road transport service rendered by Goods Transport Agencies in respect of inputs raw material received in their factory became "output service"- Payment of Service tax through Cenvat credit for impugned period upheld - Rules 2(l), 2(p) and 2(r) ibid - Section 68 of Finance Act, 1994. [para 3] Appeal dismissed.

2008 (9) S.T.R. 53 (Tri. - Del.) AMBATTUR PETROCHEM LTD. Versus COMMISSIONER OF C. EX., RAIPUR

Cenvat credit of Service tax - Goods transport agency service - Utilisation of credit - Service recipient - Service tax paid in regard to transport of materials to factory - Payment of Service tax is a specifically authorized item in regard to Service tax credit - Finding that since appellants are manufacturers of excisable goods they cannot be treated as provider of output service not sustainable - Service tax paid can be utilized for payment of Service tax in relation to tax payable on subsequent transport - Rule 3(4) of Cenvat Credit Rules, 2004 [para 5]

2009 (247) E.L.T. 735 (Tri. - Del.) MOHINI INDUSTRIES Versus COMMISSIONER OF C. EX., RAIPUR

Cenvat/Modvat - Utilization of credit - Cenvat credit can be utilized for payment of Service tax on GTA service - Finding of Commissioner that since appellants are manufacturer of excisable goods they cannot be treated as provider of output service, is not sustainable - Rule 3(4) of Cenvat Credit Rules, 2004. [paras 2, 3] Appeals allowed

2007 (7) S.T.R. 26 (Tri. - Del.)COMMR. OF C. EX., CHANDIGARH Versus NAHAR INDUSTRIAL ENTERPRISES LTD.

Cenvat/Modvat - Utilisation of credit - Goods transport agency - Service recipient - Payment of service tax thereon from Cenvat a/c - Output service provider_- No restriction for utilization of Cenvat credit by manufacturing unit towards payment of service tax as service provider as per C.B.E. & C manual of Supplementary Instructions - Commissioner (Appeals) order that assessee entitled for Cenvat credit of manufacturing activity for utilization towards payment of service tax, upheld - Rule 2(p) of Cenvat Credit Rules, 2004. [para 4]

Cenvat/Modvat - Output service - Goods transport agency - Service recipient - Output service provider includes person liable for paying service tax - Rule 2(p) of Cenvat Credit Rules, 2004. [para 3] Appeal dismissed

2009 (246) E.L.T. 789 (Commr. Appl.)IN RE : SUPER SPINNING MILLS LIMITED

"Cenvat credit of Service tax - Input service - Goods Transport Agency service, recipient of - Service tax paid from April, 2006 to September, 2006 by utilizing Cenvat credit by service recipient_- Appellant is deemed service provider as per Section 68(2) of Finance Act, 1994 - Doubt whether manufacturer/service provider can be treated as service provider under Rule 2(p) of Cenvat Credit Rules, 2004 not relevant when Section 68(2) ibid itself creates legal fiction - Statutory provisions not barring payment of Service tax through Cenvat credit by deemed service provider - Interest not chargeable and penalty not imposable - Section 68 ibid read with Rule 2(1)(d)(v)(a) of Service tax Rules, 1994 - Rules 2(l), 2(p), 3 and 14 ibid. [paras 6, 7, 8] Appeal allowed"

2008 (11) S.T.R. 568 (Commr. Appl.)IN RE : SUPER SPINNING MILLS LIMITED
Cenvat credit of Service tax - Input service - Goods Transport Agency service, recipient of - Service tax paid from April, 2006 to September, 2006 by utilizing Cenvat credit by service recipient -_Appellant is deemed service provider as per Section 68(2) of Finance Act, 1994 - Doubt whether manufacturer/service provider can be treated as service provider under Rule 2(p) of Cenvat Credit Rules, 2004 not relevant when Section 68(2) ibid itself creates legal fiction - Statutory provisions not barring payment of Service tax through Cenvat credit by deemed service provider_- Interest not chargeable and penalty not imposable - Section 68 ibid read with Rule 2(1)(d)(v)(a) of Service tax Rules, 1994 - Rules 2(l), 2(p), 3 and 14 ibid. [paras 6, 7, 8] Appeal allowed

10.5 CENVAT Credit on inputs SERVICES ARE ADMISSIBLE

The Noticee further submitted that he is manufacturer of excisable goods viz. Fish and other marine products etc falling under Chapter 3 of the First Schedule to the Central Excise Tariff Act, 1985. The said goods are chargeable to Nil rate of duty. However, entire goods were exported. In the impugned show cause notice, Service Tax of Rs.24,40,768/- + Rs.5,39,587/- = Rs.29,90,813/- are demanded from the Noticee on the grounds that he has received the services of foreign based commission agent for cause of sale of his goods outside India and Goods Transport Agency for transportation of goods by road upto the port of export i. e. upto the place of removal. Therefore, he is liable to pay Service Tax being receiver of the Service as per the provisions of Section 66A of the Finance Act, 1994 read with Rule 2(d) of the Service Tax Rules, 1994.

Whereas, as per the provisions of Rule 2(q) of the CNEVAT Credit Rules, 2004 "person liable for paying Service Tax" has the meaning as assigned to it in clause (d) of sub-rule (1) of rule 2 of the Service Tax Rules, 1994 and as per Rule 2(r) of the CENVAT Credit Rules, 2004 "provider of taxable service" includes a person liable for paying service tax. The same way "Output service" is defined under Rule 2(p) of the CENVAT Credit Rules, 2004 means any taxable service provided by the provider of taxable service to a customer, client, subscriber, policy holder or any other person as the case may be and the expressions 'provider' and 'provided' shall be construed accordingly. The said definition was amended with effect from 01.03.008 vide Notification No.10/2008-CE(NT) date 01.03.2008 which reads as "Out Service" means any taxable service, excluding the taxable service referred to in sub-clause (105) of section 65 of the Finance Act, 1994

provided by the provider of taxable service, to a customer, client, subscriber, policy holder or any other person, as the case may be, and the expressions 'provider' and 'provided' shall be construed accordingly."

Rule 3(1) of CENVAT Credit Rules, 2004 provides that a provider of taxable service shall be allowed to take credit of the Service Tax leviable under Section 66 of the Finance Act, 1994 paid on any input service received by the provider of output service.

As per provisions of Rule 3(2) of the CENVAT Credit Rules, 2004, the CENVAT Credit may be utilized for payment of Service Tax on any output service.

Thus, the Noticee is entitled for CENVAT Credit on input services and therefore, he has rightly availed CENVAT Credit on various services viz. Inspection & Testing Fees, Clearing & Forwarding, Insurance, Telephone, Postages etc. As per the above provisions, he was entitled to avail CENVAT credit of Service Tax paid on GTA but he had not availed the said amount as CENVAT Credit.

Even if for the sake of argument, it is assumed that he was liable to pay Service Tax on commission paid to foreign agent for selling his goods in foreign territory, then also he was entitled for availment of CENVAT Credit of such amount paid by him.

The Noticee further invites your kind attention to clarification issued by Board's letter F. No. 354/148/2009-TRU dated 16-07-200 that
"The matter has been examined. The provisions under Section 66A state that in case service is provided from abroad and received in India, such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of Chapter V of the Finance Act, 1994 would apply. Therefore, it is clear that section 66A is not a charging section by itself. In fact, it only creates a legal fiction to deem import of service as provision of service within India so that the provisions of Chapter V of the Finance Act, 1994 can be applied to. The charging section remains section 66 even for the services imported. In other words tax collected from the recipient in terms of Section 66A is also tax chargeable under section 66 of the Finance Act, 1994.

In view of the foregoing, it is clear that there is no mistake or omission in the relevant provisions of the CENVAT Credit Rules, 2004 and the credit of tax paid on imported services should be allowed if they are in the nature of input services."

In light of the above Board's Circulars recipient of service is entitled to the benefit of CENVAT Credit.

In terms of Rue 2(p) of Cenvat Credit Rules, 2004, "output service" means any taxable service, excluding the taxable service referred to in sub-clause (zzp) of clause (105) of Section 65 of the Finance Act, 1994 provided by the provider of taxable service to a customer, client, subscriber, policy holder or any other person, as the case may be and the expression provider and provided shall be construed accordingly. Thus, prior to 01.03.2008, taxable output service includes service referred in sub-clause (zzp) of clause (105) of Section 65 and Sub-clause (zzb) of clause (105) of Section 65 of the Finance Act (i.e. Business Auxiliary Service) does not fall under excluding category even after 01.03.2008.

In light of the above facts, the Noticee is eligible to CENVAT Credit of service tax payable under the category of Transport of Goods by Road up to 01.03.2008 and Commission Agent under Section 66A of the Finance Act, 1994.

10.6 <u>CENVAT CREDIT OF SERVICE TAX PAYABLE TO GOODS TRANSPORT AGENCY FOR TRANSPORTATION OF FINAL PRODUCTS FROM THE PREMISES OF FACTORY TO PORT OF EXPORT IS ADMISSIBLE TO THE NOTICEE.</u>