- S.Tax

केन्द्रीय उत्पाद शुल्क एवम सेवा कर आयुक्तालय , भावनगर
OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
प्लॉट नं. 6776–बी / 1, 'सिध्धि सदन' बिल्डिंग,
PLOT NO. 6776/B-1, "SIDDHI SADAN" BUILDING,
नारायण उपाध्याय मार्ग, भावनगर–364001
NARAYAN UPADHYAY MARG, BHAVNAGAR-364 001.
दूरभाष : (0278) 2523627 फैक्स : 0278-2513086

रजिस्टर्ड डाक पावती द्वारा
By R.P.A.D.

फाईल सं. V/15-116/Dem/HQ/2008
F. No.

आदेश की तारीख : 26/05/2011
Date of Order :
जारी करने की तारीख : 27/05/2011
Date of Issue :

पारितकर्ता
Passed by
श्री एन के भुजबल
SHRI N. K. BHUJABAL
आयुक्त, केन्द्रीय उत्पाद शुल्क एवम सेवा कर, भावनगर
Commissioner, Central Excise and Service Tax, Bhavnagar

मूल आदेश संख्या Order-in-Original No : 11/BVR/Commissioner/2011

1. आदेश की यह प्रति जिसको जारी किया गया है उनके व्यक्तिगत उपयोग के लिए निःशुल्क भेजी जा रही है ।

1. This copy of order is granted free of charges for private use of the person(s) to whom it is issued and sent.

2. यदि कोई व्यक्ति इस आदेश से स्वयं को असंतुष्ट अनुभव करता है , तो इस आदेश के विरूद्व सीमा शुल्क , केंद्रीय उत्पाद शुल्क एवं सेवा कर अपीलीय प्राधिकरण , ओ–20 , मेघाणी नगर , नया मानसिक अस्पताल संकुल , अहमदाबाद को केंद्रीय उत्पाद शुल्क अधिनियम की धारा 35–बी की उपधारा 1(a) की शर्तों के आधार पर अपील कर सकता है । धारा 35–बी (1) (परंतुक) (a) से (d) के अंतर्गत मामले जैसे कि हानि ,छूट ,बॉण्ड के अंतर्गत निर्यात , शुल्क क्रेडिट के मामले , आवेदन के पुनरीक्षण के मामलों में आवेदन भारत सरकार के संयुक्त सचिव , राजस्व विभाग , वित्त मंत्रालय , नई दिल्ली को बंधनकर्ता रहेगा ।

2. Any person(s) deeming himself aggrieved by this Order may appeal against this order to The Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad, O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad, in terms of the provision of Section 35B(1)(a) of the Central Excise Act, 1944. If the case covered under the category specified in Section 35B(1) (Proviso) (a) to (d), i.e. Loss, Rebate, Export under Bond, duty credit cases, the Revision application shall lies to the Joint Secretary to the Government of India, Department of Revenue, Ministry of Finance, New Delhi.

3. अपील फॉर्म E.A.-3 में केंद्रीय उत्पाद शुल्क (अपील) नियम , 2001 के नियम 3 के उपनियम 2 में विनिर्दिष्ट व्यक्ति द्वारा की जानी चाहिए ।

3. The Appeal should be filed in form EA.-3. It shall be signed by the person as specified in Rule 3(2) of the Central Excise (Appeals) Rules, 2001.

4. केंद्रीय उत्पाद शुल्क अधिनियम , 1944 की धारा 35–B के अंतर्गत अपील इस आदेश की प्राप्ति के तीन माह के अंदर दर्ज करवानी होगी ।

4. The appeal should be filed within three months from the date of communication of this order. (Section 35B of the Central Excise Act, 1944).

5. यह अपील चार प्रतियों में दाखिल की जाए और जिसके विरूद्व अपील की गई है ,उस आदेश की समान संख्या में प्रतियां संलग्न की जाए (इन में से कम से कम एक प्रति अधिप्रमाणित होनी चाहिए) । उक्त अपील के समर्थक सभी दस्तावेज चार प्रतियों में भेजे जाए । उक्त अपील व्यक्तिगत रूप से रजिस्ट्रार के समक्ष प्रस्तुत की जाए या पंजीयक के नाम से रजिस्ट्री डाक द्वारा भेजी जाए । परन्तु उक्त रजिस्ट्रार के कार्यालय में प्राप्ति की तारीख नियत अवधि में होगी ।

5. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (One of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate. The appeal shall be presented in person to the Register or sent by Registered Post addressed to the Registrar. But the date of receipt in office of the said Registrar in time or otherwise will be the relevant date for the purposes of limitation of time.

6. फीस का भुगतान न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के पक्ष में रेखांकित बैंक ड्राफ्ट द्वारा अधिनियम के प्रावधानों के अंतर्गत करना अपेक्षित है । यह ड्राफ्ट जहाँ पीठ स्थित है , किसी राष्ट्रीयकृत बैंक की किसी शाखा के नाम पर जारी किया जाए और उस उक्त अपील प्रपत्र के साथ डिमाण्ड ड्राफ्ट संलग्न किया जाना चाहिए ।

6. The Fee is required to be paid as under through a cross Bank Draft in favour of the Assistant Registrar of Bench of the Tribunal on a branch of any Nationalized Bank located at the place where the Bench is situated and it shall be attached to the form of appeal.

(क) जहां पर मांगा गया शुल्क ब्याज और दण्ड रूपए 50,00,000/- (रूपए पचास लाख) से ज्यादा हो , रू. 10,000/- (रूपए दस हजार)

(a) Where the amount of duty and interest demanded and penalty is levied is more than ₹50,00,000/- (Rupees Fifty Lakhs), ₹ 10,000/- (Rupees Ten Thousand);

(ख) जहां पर मांगा गया शुल्क ब्याज और दण्ड रूपए 5,00,000/- (रूपए पांच लाख) से अधिक हो लेकिन ; रूपए 50,00,000/- (रूपए पचास लाख) से कम हो 5,000/- (रूपए पांच हजार)

(b) Where the amount of duty and interest demanded and penalty levied is more than ₹5,00,000/- (Rupees Five Lakhs) but not exceeding ₹ 50,00,000/- (Rupees Fifty Lakhs), ₹ 5,000/-(Rupees Five Thousand);

(ग) जहां पर मांगा गया शुल्क ब्याज और दण्ड रूपए 5,00,000/- (रूपए पांच लाख) अथवा कम हो , रूपए 1,000/- (रूपए एक हजार)

(c) Where the amount of duty and interest demanded and penalty levied is ₹ 5,00,000/- (Rupees Five Lakhs) or less, ₹ 1,000/-(Rupees One Thousand);

7. इस आदेश की प्रतिलिपि पर न्यायालय शुल्क मुद्रांक अधिनियम , 1970 की अनुसूची 1 मद 6 के अंतर्गत निर्धारित 50 पैसे का न्यायालय शुल्क मुद्रांक (कोर्ट फी स्टाम्प) लगाया जाना चाहिए ।

7. The Copy of this order attached therein should bear a Court fee stamp of 50 paise as prescribed under schedule 1 of Article 6 of the Court fee stamp Act, 1970.

8. उक्त अपील फॉर्म के साथ शुल्क / दण्ड की अदायगी का प्रमाण संलग्न किया जाना चाहिए ।

8. Proof of payment of duty, penalty etc. should also be attached in original to the form of appeal.

9. अपील पर रू. 5 (रूपए पांच) का न्यायालय शुल्क मुद्रांक (कोर्ट फी स्टाम्प) लगाया जाना चाहिए ।

9. Appeal should bear a Court Fee Stamp ₹ 5/-.

10. पूर्ण जानकारी हेतु केंद्रीय उत्पाद शुल्क (अपील) नियम , 2001 एवम CEGAT (कार्यविधि) नियम 1982 देखें ।

10. Please refer to the Central Excise (Appeals) Rules, 2001 and the CEGAT, Procedure Rules, 1982 for complete details.

To,
M/s. Dhrangadhra Chemical Works Ltd.,
Dhrangadhra
Distt. Surendranagar,
Gujarat – 363 310

विषय : कारण बताओ नोटिस संख्या :

Subject: Show Cause Notice F. No. V/15-116/Dem/HQ/2008 dated 18.03.2009.

BRIEF FACTS :-

M/s Dhrangadhra Chemical Works Ltd., Dhrangadhra, District-Surendranagar (hereinafter referred to as the "said assessee") is a manufacturer of excisable goods having Central Excise Registration No. AAACD 0559 N XM001. In terms of Rule 2(1)(d)(v) of the Service Tax Rules, 1994 (herein after referred to as the "STR, 1994), liability to pay Service Tax has been transferred to certain categories of service recipients in case of Goods Transport Agency (GTA) Service. The said assessee, being a recipient of Goods Transport Agency Service specified under Rule 2(1)(d)(v) of the STR, 1994, are required to pay Service Tax and therefore they are holding Service Tax Registration No. AAACD 0559 N ST005 under Section 69 of the Finance Act, 1994. (herein after referred to as the "said Act").

2. Notification No. 32/2004-ST, dated 03.12.2004 (rescinded on 01.03.2006 vide Notification No. 2/2006-ST, dated 01.03.2006), and Notification No. 1/2006-ST, dated 01.03.2006, exempt the taxable service provided by a goods transport agency to a customer in relation to transport of goods by road, in a goods carriage, from so much of Service Tax leviable thereon under Section 66 the said Act, as is in excess of the Service Tax calculated on a value which is equivalent to twenty-five percent, of the gross amount charged from the customer by such goods transport agency for providing the said taxable service, subject to the following conditions :-

(i) the credit of duty paid on inputs or capital goods used for providing such taxable service has **not** been taken under the provisions of Cenvat Credit Rules, 2004 ;
(ii) the goods transport agency has **not** availed of the benefit under the Notification No. 12/2003-ST, dated 20.06.2003.

Further, vide Rule 2(1)(d) of the STR, 1994, in certain cases, the person who pays or is liable to pay freight, either himself or through his agent, for the transport of goods by road in a goods carriage, has been made liable to pay Service Tax, instead of the service provider, namely the goods transport agency.

3. The Ministry/Board clarified under Circular No. B1/6/2005/TRU dated 27.07.2005 that a declaration from the GTA on the Consignment Note issued, to the effect that neither credit on inputs or capital goods used for provision of service has been taken nor the benefit of Notification No. 12/2003-ST dated 20.06.2003 has been taken by them may suffice for the purpose of availment of exemption/ abatement by the person liable to pay Service Tax.

4. A Show Cause Notice F.No. V/15-116/Dem/HQ/2008 dated 18.03.2009 has been issued to the said assessee. The facts leading to issuance of the said Show Cause Notice are that during the course of audit of the records of the said assessee by the CERA Audit Party, it was noticed that the said assessee had paid freight of ₹ 71,86,94,808/- for the period from January-2005 to February-2008. The assessee being recipient of this service paid Service Tax (including Education Cess and Secondary and Higher Education cess) of ₹ 2,06,55,009/-, under the said category, in terms of provisions of Notification No. 35/2004 -ST dated 03.12.2004. The said assessee availed abatement of 75% of the taxable value of the taxable service for the purpose of payment of Service Tax and paid the Service Tax (including Education Cess and Secondary and Higher Education cess), of ₹ 2,06,55,009/-. The Consignment Notes issued by the concerned transporters did not have declaration to the effect that neither credit on input or

capital goods used for provision of service has been taken by them nor the benefit of Notification No. 12/2003-ST has been taken by them. Therefore, in terms of Circular No. B1/6/2005/TRU dated 27.07.2005, the said assessee was not eligible for abetment of 75% of the taxable value of the service. Therefore this resulted in short levy of Service Tax.

5. The said assessee vide their letter dated 10.10.2008 stated that in the present case both the conditions of Notification No. 32/2004-ST, dated 03.12.2004 are satisfied; that in most of the cases, the concerned transporters have submitted the declarations, and in some cases, the Consignment Notes/ Invoices of the transporters contain the declaration of non availment of Cenvat Credit of duties on inputs or capital goods by them; that such declaration could also be obtained now post ex-facto from the transporters; and that there being no such specific condition laid down under Notification No. 32/2004-ST for the service availer to produce a certificate regarding non-availment of Cenvat credit on inputs/ capital goods by the goods transport agency who is actually rendering the service.

6. It has been alleged in the SCN that Notification No. 32/2004 dated 03.12.2004 and Notification No. 1/2006-ST dated 01.03.2006 require that the abatement of 75% of the taxable value can only be availed on fulfillment of conditions mentioned therein; that it is responsibility of the said assessee as a recipient of the service "transport of goods by Road" to satisfy himself before availing the said abatement that the conditions for availing the benefit of Notification No. 32/2004 dated 03.12.2004 and Notification No. 1/2006-ST dated 01.03.2006 are fulfilled and the modalities to be followed for availing the said abatement has been prescribed under Circular No. B1/6/2005/TRU dated 27.07.2005. Therefore in absence of declarations on the Consignment Notes issued by the GTA, to the effect that neither credit on input or capital goods used for provision of service has been taken by them nor the benefit of Notification No. 12/2003-ST has been taken by them, the abatement of 75% of the taxable value was not available to the said assessee.

7. Therefore, it has been alleged that the said assessee has contravened the provisions of section 70 of the Finance Act, 1994 in as much as they failed to assess the Service Tax correctly. They have also contravened the provisions of Section 68 of the Finance Act, 1994 and Rule 6 of the STR, 1994 as they have failed to make full payment of Service Tax and short paid the Service Tax (including Education Cess and Secondary and Higher Education Cess), amounting to ₹ 6,20,59,155/-. They also contravened the provision of Notification No. 32/2004-ST and 1/2006-ST dated 01.03.2006 and also not fulfilled the procedure laid down under Circular No. B1/6/2005-TRU, dated 27.07.2005 for availing the benefit of Notification No. 32/2004-ST dated 03.12.2004 and Notification No. 1/2006-ST dated 01.03.2006 with intent to evade the payment of Service Tax. It therefore appeared that the said assessee have not declared the correct value of the taxable service in the ST-3 returns filed by them. It appeared that the said assessee have also declared on the each ST-3 returns filed by them for the period January-2005 to February-2008 that they have correctly assessed and paid tax as per the provisions of Finance Act, 1994 and the Rules made thereunder. It further appeared that the assessee made declaration in the self assessment memorandum in the ST-3 returns filed by them for the relevant period that they have assessed and paid the Service Tax correctly as per the provisions of the Finance Act, 1994 and rules made thereunder.

8. In view of the above, it has been alleged that the said assessee suppressed the material fact and mis-stated in the ST-3 returns filed by them for the relevant period that they have correctly assessed the tax and paid the same accordingly. The said assessee also contravened the provisions of Section 70(1) & 70(2) of the Finance Act, 1994, as amended, read with Rule 7 of the STR, 1994 with intent to evade payment of duty, in as much as they failed to self assess the Service Tax due on the service received by them and also contravened the provisions of Section 68 the Finance Act, 1994 and Provisions of Rule 6 of the STR, 1994, with intent to evade payment of duty in as much as they have not determined the correct taxable value and pay the Service Tax leviable on the Goods Transport Agency Service received by them. Therefore, the said Service Tax, including Education Cess and Secondary and Higher Education Cess, not paid was required to be demanded and recovered from them under the proviso to Section 73(1) of the Finance Act, 1994, as amended, by invoking extended period of five years.

9. It has also been alleged that short payment of Service Tax on account of suppression of material and relevant facts and mis-statement on the part of the said assessee, and contravention of the provisions of Section 68 and section 70 of the Finance Act, 1994 and Rule 6 of the STR, 1994 with an intent to evade payment of Service Tax have therefore rendered them liable for penalty under the provisions of Section 76, and 78 of the Finance Act, 1994, as amended.

10. The said assessee have been directed vide aforesaid Show Cause Notice issued from F.No. V/15-116/Dem/HQ/2008 dated 18.03.2009 to show cause to the Commissioner, Central Excise, Bhavanagar as to why:-

(i) Service Tax, including Education Cess and Secondary and Higher Education Cess, amounting to ₹ 6,20,59,155/- (Rupees Six Crore Twenty Lakh Fifty Nine Thousand One Hundred Fifty Five only), (as calculated in Annexure-A to the Show Cause Notice) not paid /short paid by the said assessee during the period from January-2005 to February-2008, should not be demanded and recovered from them under proviso to Section 73(1) of the Finance Act, 1994, as amended, by invoking extended period of five years read with Section 68 of the Finance Act, 1994, as amended;

(ii) interest on the Service Tax amount of ₹ 6,20,59,155/- should not be recovered from them under Section 75 of the Finance Act, 1994, as amended;

(iii) penalty should not be imposed upon them under Section 76 of the Finance Act, 1994 as amended, for failure to pay the tax in time as required under Section 68(2) of the Finance Act, 1994 as amended;

(iv) penalty under Section 78 of the Finance Act, 1994, should not be imposed upon them for suppressing the value of the taxable service to the department with intent to evade the payment of Service Tax.

DEFENCE REPLY :-

11. The said noticee submitted their written reply to the Show Cause Notice vide letter dated 04.04.2009. It is submitted that the show cause notice is wholly illegal and unjustified. There is neither suppression of facts nor any intent to evade payment of Service Tax on their part in this matter. By virtue of the peculiar scheme of Rule 2(1)(d)(v) of the Service Tax Rules, they have been the person liable to pay Service Tax on GTA services, and at the same time, they have also been the person liable to avail Cenvat credit of Service Tax so paid; and

therefore, there could not have been any intent to evade payment of Service Tax on their part even otherwise. Further, there is no contravention or non-fulfillment of condition of these Notifications by them, and it is also an undisputable fact that the transporters who have rendered GTA services to them have not taken credit of inputs or capital goods used by them for providing GTA service to them nor have they availed benefit of Notification No. 12/2003-ST; and therefore also, their action of paying Service Tax on 25% of the taxable value of GTA services has been perfectly legal and valid. They, therefore submitted that the demand for differential Service Tax is unsustainable in law and is also without jurisdiction in facts because extended period of limitation has been illegally and unjustifiably invoked against them, equally illegal is the issue raised against them as regards availment of benefit of Notification No. 32/2004-ST and Notification No. 1/2006-ST only at the instance of the Audit party. These proceedings therefore, deserve to be vacated at once in the interest of justice.

12. They submitted that they are manufacturing goods like Soda Ash and have a factory for this purpose. They have been availing services of Goods Transport Agencies for bringing in their factory various materials, inputs, goods, etc., and they have also been availing services of GTAs for clearing and delivering the goods manufactured by them to their customers. Though levy of Service Tax is on the person rendering a taxable service, by virtue of Rule 2(1)(d)(v) brought into operation from 1.1.2005, the person liable to pay Service Tax in case of GTA services is the person who pays freight if he is one of those categories as specified under Rule 2(1)(d)(v) of the said Rules. As they are a company i.e. a body corporate and are also a registered manufacturer with the Central Excise Department, they are covered under the scheme of Rule 2(1)(d)(v), and accordingly, they are a person liable to pay Service Tax in case of GTA services. Accordingly, they have obtained Service Tax Registration for GTA service also and they have been paying Service Tax on GTA services regularly; and they have also been submitting returns in form ST-3 showing therein the details of Service Tax discharged by them.

13.1 They submitted that they have been paying Service Tax on 25% of the value of service i.e. 25% of freight charged by GTAs in view of the Scheme of Notification No. 32/2004-ST and Notification No. 1/2006-ST. This fact is also well known to the authorities in-charge of their factory, and the fact that they have been availing these Notifications and paying Service Tax only on 25% of value of GTA service is even otherwise clear from the payment of Service Tax made by them on monthly basis, and from the details reflected in their ST-3 returns. However, Range and Divisional Officers who are aware about this practice have never raised any objection of whatsoever nature against them and all their assessments have been finalized by these Officers without any demur.

13.2 They further submitted that it appeared that the CERA HQRs Party that conducted audit and verified their records formed a belief, although totally incorrect, that they were liable to pay Service Tax on the whole amount of freight because they were not eligible for availing exemption of 75% of value of this service under the above Notifications. At the instance of the Audit party, the Superintendent, Service Tax Range, wrote a letter dated 24.9.2008 to them and suggested that there was a short payment of Service Tax of ₹ 6,14,05,333/- for the period from January, 2005 to February, 2008. They promptly replied to the above letter of the Superintendent by their reply/letter dated 10.10.2008 and explained that there was no justification in the view expressed by the Audit party. Reference to this letter dated 10.10.2008 sent by them is also appearing in para 5 of the present show cause notice. After their above reply dated 10.10.2008, no further

development had taken place and the Range/ Divisional office had apparently dropped this issue upon having been satisfied about the explanation tendered by them. Thereafter the show cause notice has been served upon them in March, 2009 for the same period and for the same amount. A natural question that arises in this factual background is whether the present show cause notice served upon them on 27.3.2009 is valid with reference to limitation as prescribed under Section 73 of the said Act? Keeping aside all other facts, it could be emphasized that the complete details of GTA services availed by them, value of GTA service and service paid by them have always been available with the Range and Divisional office; and in any case, these details were verified by the Audit party and an issue of alleged short payment of Service Tax was also raised by the Audit party in September, 2008. Why no recovery proceedings were initiated against them in September/October, 2008 when all the facts, figures and details were available with even the Audit party at that time is therefore, the issue that they are raising for consideration; because, according to them, the show cause notice now served upon them is wholly time barred on this count itself.

13.3 Further, the above referred audit objection was communicated to them in September, 2008 by the Superintendent, Service Tax Range and they have duly replied to the same in October, 2008, and therefore, why the show cause notice has been served upon them in March, 2009 is not clear, nor is any reason coming forth for this delay from October, 2008 till March, 2009 in serving upon them the show cause notice. When all the facts were well within the knowledge of the Department, a show cause notice has to be issued immediately at that time, and if the Department has waited for unduly long time in serving a show cause notice even after gathering all relevant information regarding an assessee, then also the show cause notice would be illegal and extended period of limitation would not be available to the Revenue. After referring to a number of decisions in cases like Lovely Food Industries V/s CCE, Cochin – 2006 (195) ELT 90, Decent Enterprises V/s CCE, Hyderabad – 2006 (73) RLT 262, Jetex Carburetors Pvt. Ltd. V/s CCE, Vadodara – 2007 (5) STR 446, Gammon India Ltd. V/s CCE, Goa – 2002 (146) ELT 173, Nizam Sugar Factory – 2006 (197) ELT 465 (SC) and Prasad Polypack Co. V/s CCE – 2008 (85) RLT 401, the Appellate Tribunal, Ahmedabad has firmly upheld this principle about limitation in case of Neminath Fabrics. In this view of the matter also, the show cause notice now served upon them in March, 2009 though the entire above referred correspondence was exchanged in September/October, 2008 is illegal and barred by limitation.

13.4 It is submitted that the larger period could never be invoked against an assessee only on the basis of observations of the audit party. Although it is suggested in the show cause notice that they have had suppressed the facts from the Department, which facts were suppressed by them is not shown in the show cause notice. The complete details of GTA services availed by them, value of GTA service and Service Tax paid have always been available with the Range and Divisional Office for scrutiny and inspection by these Range/ Divisional Officers, and there is no reason to allege suppression of facts when the audit officers were allowed free access to these documents by them the way free access was always open to the Range and Divisional Officers in-charge of their factory. Therefore also, the proposal of invoking extended period of limitation is wholly illegal.

13.5 They also pointed out that the law regarding invocation of extended period of limitation is well settled. Only in a case where the assessee knew that certain information was required to be disclosed and yet the assessee deliberately did not disclose such information, the case would be that of suppression of facts. When the Excise Officers called for certain information and the assessee did not

disclose the same or deliberately disclosed wrong information, that would be a case of willful mis-statement. Even in cases where certain information was not disclosed as the assessee was under a bonafide impression that it was not duty bound to disclose such information, it would not be a case of suppression of facts as held by the Hon'ble Supreme Court in the landmark cases of Padmini Products and Chemphar Drugs & Liniments reported in 1989 (43) ELT 195 (SC) and 1989 (40) ELT 276 (SC) respectively.

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

13.7 In fact, the present one is a case where all the facts discussed in the show cause notice issued to them have been within the knowledge of the Department right from day one. Under these circumstances, the show cause notice issued to them is barred by limitation and there is no justification in the action of invoking extended period of limitation against them in these facts of the case.

13.8 There being no contravention by way of suppression of facts with intent to evade payment of Service Tax on their part, the extended period of limitation is invoked without any jurisdiction and without any authority in law.

14.1 In respect of the merits of the issue raised by the Revenue as regards alleged non-fulfillment of conditions of the Notifications, the said assessee drew attention to para 5 of the show cause notice wherein explanation tendered by them in October, 2008 is referred to. They submitted that it is clear therefrom that the concerned transporters had submitted the declarations in most of the cases whereas Consignment Notes/ Invoices of transporters contained the declaration of non-availment of CENVAT credit of inputs or capital goods in some cases. No dispute about these facts explained by them in October, 2008 is however, raised in these proceedings. If the documents issued by the transporters thus, contained these declarations, there could not be any quarrel as regards availment of abatement of value by them under the scheme of these Notifications.

14.2 They submitted the documents issued by the transporters to establish that none of the transporters has availed Cenvat credit of inputs and capital goods used in relation to rendering GTA services to them and therefore, the whole issue raised against them in this case has no basis.

14.3 It is submitted that the moot question that would still remain to be considered is whether there was any non-availment or contravention of conditions of the Notifications by them and whether payment of Service Tax on 25% of the gross amount charged by GTAs from them was illegal? In this regard, they referred to the following legal position with reference to peculiar facts of services rendered by GTAs.

14.4 The Central Government has amended Rule 2(1)(d) of the Service Tax Rules, 1994 as regards the definition of "person liable for paying the Service Tax" and thereby entities like them are defined as person liable for paying Service Tax in relation to taxable service provided by a GTA when freight was paid by them. Therefore, there would be no dispute or quarrel about their liability to pay Service Tax on GTA services when freight was paid by them. However, by Notification No. 32/2004-ST dated 3.12.2004, which has come into force on 1.1.2005, the Central Govt. has exempted the taxable service provided by a GTA to a customer as was in excess of the Service Tax calculated on a value which was equivalent to 25% of the gross amount charged from the customer by such GTA for providing the taxable service. Thus, the person liable for paying Service Tax in this case is liable to pay Service Tax only on 25% of the gross amount charged for the taxable service; and since such amount is obviously charged by the GTA from the customer, the customer being the person liable for paying Service Tax in the present case is liable to pay such tax on 25% amount of freight.

14.5 Two conditions are specified under proviso to para 1 of the above Notification No. 32/2004-ST, but both these conditions are also satisfied in the present case. It is not the objection raised by the audit party that credit of duty paid on inputs or capital goods used for providing the taxable service had been taken under the Cenvat Credit Rules, 2004 and therefore, condition (i) is not contravened in this case. It is not the case of the Department that the GTA had availed the benefit under Notification No. 12/2003-ST and therefore, condition (ii) is also not contravened in the present case.

14.6 The issue about non-submission of a declaration from transporters in this regard is raised without any justification. As submitted above, Rule 2(d) of the Rules has been specifically amended to provide that the person paying freight was liable to pay Service Tax in case of service of a goods transport agency, and therefore, the transporter actually providing this service is not a person liable to pay Service Tax. When there was no liability on the person providing such service to pay any Service Tax, there would be no question of such person availing any Cenvat credit of inputs/ capital goods used by them for providing transporters' service.

14.7 It is a salient condition of Cenvat Credit Scheme that Cenvat credit would be available only if the person availing the credit was actually discharging any duty or service liability. If there was no liability of paying any Central Excise duty or Service Tax on a person, such a person cannot avail Cenvat credit. Now, a goods transport operator is obviously not obliged to pay any excise duties and hence, there is no liability of excise duty on a transporter. Similarly, by virtue of Rule 2(1)(d)(v) of Service Tax Rules, 1994, as amended, there is no obligation on part of a goods transporter to pay Service Tax also on the service of transportation by road. Therefore, there is even otherwise no question of a transporter i.e. the person providing this taxable service availing Cenvat credit on inputs/capital goods used in relation to rendering this service. In this view of the matter, the basis on which the audit party has raised the objection is wholly illegal and fallacious.

14.8 Therefore, when the service provider i.e. the transporter could not have availed Cenvat credit of inputs/capital goods in the peculiar facts of this case, the proposal to deny abatement of 75% of the amount of gross value of transportation charges does not survive.

14.9 However, in most of the cases, the concerned transporters have submitted the declarations, and in some cases, the Consignment Notes/ Invoices of the transporters contain the declaration of non-availment of Cenvat credit of duties on inputs or capital goods by them; whereas such declarations could also be obtained now post ex-facto from the transporters. In overall view of the matter, therefore, the issue about availability of benefit of Notification No. 32/2004-ST on this ground does not survive in their case.

14.10 It is a settled legal position that by virtue of the judgments of the Hon'ble Supreme Court in the cases like M.S. Hemraj Gordhandas V/s Collector of Central Excise and Customs, Surat reported in 1978 ELT (J350), Doypack Systems Pvt. Ltd. V/s UOI reported in 1988 (36) ELT 201 (SC) and Commissioner of Wealth Tax V/s Hashmatunnisa Begum reported in 1989 (40) ELT 239 (SC) that a Notification has to be interpreted literally, and no words could be added on the basis of the intention or objective of the legislature behind the Notification. The intention of the legislature has to be gathered from the plain language employed in a Notification, and that is how Notification No. 32/2004-ST is also required to be interpreted.

14.11 However, there being no such specific condition laid down under Notification No. 32/2004-ST for the service availer to produce a certificate regarding non-availment of Cenvat credit on inputs/ capital goods by the goods transport agency who is actually rendering the service, such a requirement cannot be read into any of the terms of the Notification. If the Government wanted the person chargeable to Service Tax in such cases to produce a certificate, then a specific condition to that effect would have been inserted in various Notifications as referred to above. In absence of any such implicit or explicit condition in Notification No. 32/2004-ST, the whole basis of the audit objection about alleged wrongful availment of abatement without producing certificate regarding non-availment of Cenvat credit on inputs/ capital goods is fallacious, and liable to be withdrawn at once.

14.12 A bare perusal of Notification No. 32/2004-ST shows that there is no specific condition about the production of any certificate about non-availment of Cenvat credit on inputs/ capital goods by the service provider. There are various similar Notifications under the Statutes like the Central Excise Act, 1944 thereby providing full exemption or concessional rate of duty on such condition of availment of Cenvat credit. Notification No. 6/2002-CE dated 1.3.2002, as amended from time to time (Sr. No. 275) is one of such Notifications providing for the concessional rate of duty for glazed and ceramic tiles on condition that no credit of duty paid on the inputs used in or in relation to the manufacture of such ceramic tiles had been taken under Rule 3 or Rule 11 of Cenvat Credit Rules, 2002. However, the Excise authorities have never insisted upon production of a certificate from such manufacturers for availing concessional rate of duty for ceramic tiles manufactured by them, and no case for denying the concessional rate of duty of ceramic tiles is also ever made out on the ground of non-submission of a certificate regarding non-availment of Cenvat credit on inputs.

14.13 As aforesaid, there are various similar notifications containing a condition of non-availment of Cenvat credit on inputs and/or capital goods for availing a particular exemption or concession, but the Revenue has never insisted upon submission or production of a specific certificate about such non-availment of Cenvat credit. They emphasized that the Government has always inserted a specific condition in the notification for submission or production of a certificate if such certificate was a condition for availing a particular exemption or concession. In this regard, a judgment of the Hon'ble Bombay High Court in case of Rakesh Enterprises V/s UOI reported in 1986 (25) ELT 906 (Bom) may be referred to wherein the Hon'ble High Court has held that benefit of Notification No. 55/75 was available to Phenol USP being a drug intermediate/drug and it was not necessary to prove by producing a certificate by the importer for availing this benefit that Phenol USP was actually used as a drug or a drug intermediate. In another case of Citric India Ltd. V/s UOI also, the Hon'ble Bombay High Court has held, in the judgment reported in 1993 (66) ELT 566 (Bom) that exemption to goods was not deniable on the ground of non-submission of an end-use certificate when there was no such condition of producing an end-use certificate about the actual use of the goods under the Notification. For the product namely Sorbitol also, the Appellate Tribunal has held in the case of Kashyap Sweeteners Ltd. reported in 2000 (115) ELT 751 that concessional rate of duty meant for bulk drugs was available to Sorbitol also even though no certificate was submitted by the manufacturer for proving that it was actually used as bulk drug.

14.14 Thus, it is a settled legal position that the Government always inserts a condition for submitting a particular type of certificate in a notification if the Government wanted to allow benefit of the notification only on submission of such certificate. When there was no such specific condition put in a notification, the Revenue cannot insist upon submission of any certificate as is being done in the present case. In this view of the matter, the only objection raised by the audit party for denying abatement of 75% amount of the gross value of transportation charges namely non-production of certificate regarding non-availment of Cenvat credit of inputs/ capital goods by the service provider is an action wholly without jurisdiction.

14.15 Recently, a similar case being Service Tax Appeal No. 78/2007 has been decided by the Appellate Tribunal, Ahmedabad and vide Order No. A/3157/WZB/AHD/07 dated 13.12.2007, the Appellate Tribunal has held in respect of the same issue concerning Notification No. 32/2004-ST that the condition of not taking credit of duty paid on inputs and capital goods used for providing such taxable service should necessarily relate to the services actually rendered by the transport agency. While upholding the order of the Commissioner (Appeals), the Tribunal has held in the above order that the decision of the Commissioner (Appeals) that GTA could not avail input/ capital goods credit when the person paying freight was the deemed provider of GTA service was legal and proper.

14.16 It is also appreciated that the twin conditions of Notification No. 32/2004 were actually irrelevant and insignificant in the overall scheme of payment of Service Tax on GTA services, and therefore these conditions have also been deleted by the Central Government while issuing Notification No. 13/2008-ST dated 1.3.2008 in place of the previous Notification No. 32/2004-ST. As GTA could never have availed Cenvat credit for the reasons elaborately discussed herein above which are also taken note of by the Appellate Tribunal while deciding the above appeal of the Commissioner of Central Excise, Rajkot V/s. Sunhill Ceramics Pvt. Ltd. reported in 2008 (9) STR 530 (Tri. Ahd), now the

Government has removed these conditions from the Notification which allows benefit of payment of Service Tax only on 25% of gross amount charged by GTA.

14.17 In view of the above position, it is submitted that they are not liable to pay Service Tax on the entire amount of transportation charges and therefore their action of paying Service Tax under Notification No. 32/2004-ST i.e. on 25% of the value of GTA service has been perfectly legal and valid.

15.1 They submitted that when there is no justification in demand of Service Tax in this case, the proposals to impose penalty and charge interest are also not sustainable.

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

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

16. Interest could be levied and recovered only where any Service Tax had not been levied or paid or had been short levied or short paid or erroneously refunded for the period from the first date of the month succeeding the month in which the Service Tax ought to have been paid under the Act till the date of payment of such duty. However, firstly there is no short levy or short payment of Service Tax in this case. Secondly, they have not paid any Service Tax late as contemplated under the above provision. In this view of the matter, the proposal to recover interest from them under Section 75 of the said Act does not hold any water.

17. In the above premises, they requested to withdraw this show cause notice as demand of Service Tax and further proposals for interest and penalty are unsustainable. They also requested for personal hearing before passing any final order on this show cause notice.

PERSONAL HEARING :-

18. Personal Hearing in this case was fixed on 08.03.2011. However, on the request of the said assessee, the Personal Hearing was re-fixed and held on 15.03.2011. Shri Dhaval K. Shah, Advocate appeared on behalf of the said assessee for Personal Hearing. He submitted that the written reply to show cause notice has already been submitted and he reiterated the submissions made therein. He further submitted verification report from their side that about 93% of the service providers have not availed Cenvat Credit, therefore the abatement availed by them is correct. He submitted copies of judgments showing that the non-

submission of declaration of non-availment of credit by the service provider is not a ground for denial of availment of abatement as it is procedural in nature. He also stated that the SCN is based on Board's clarification which is clarificatory in nature and not mandatory. Since they have met with the conditions of the Notification, they are entitled to the abatement and no amount is recoverable from them. The demand in SCN needs to be dropped. The certificates/ declarations of the transporters submitted by him are taken on record.

DISCUSSION & FINDINGS :-

19. I have carefully gone through the show cause notice, submissions made in written reply as well as during the Personal Hearing and other evidences available on record.

20. I find that the issue involved in this case is whether abatement of 75% of the taxable value of the taxable service 'Transport of goods by Road' for the purpose of payment of Service Tax, as provided under Notification No. 32/2004-ST dated 03.12.2004 and Notification No. 1/2006-ST dated 01.03.2006, is available to the assessee even though the Consignment Notes issued by the concerned transporters (GTA) did not have declaration to the effect that neither credit on input or capital goods used for provision of service has been taken by them nor the benefit of Notification No. 12/2003-ST dated 20.06.2003 has been taken by them.

21.1 I observe that Government vide Notification No. 32/2004-ST dated 03.12.2004 has exempted the taxable service provided by a Goods Transport Agency to a customer, in relation to transport of goods by road in a goods carriage, from so much of the Service Tax leviable thereon under section 66 of the Finance Act, 1994, as is in excess of the Service Tax calculated on a value which is equivalent to twenty-five per cent of the gross amount charged from the customer by such Goods Transport Agency for providing the said taxable service. However, it is provided that this exemption shall not apply in such cases where :-

(i) the credit of duty paid on inputs or capital goods used for providing such taxable service has been taken under the provisions of the Cenvat Credit Rules, 2004; or

(ii) the goods transport agency has availed the benefit under the Notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 12/2003-Service Tax dated the 20th June, 2003 [G.S.R. 503 (E), dated the 20th June, 2003].

21.2 Similarly, the Government, vide Notification No. 1/2006-ST dated 01.03.2006 has exempted the taxable service provided by a Goods Transport Agency to a customer, in relation to transport of goods by road in a goods carriage, from so much of the Service Tax leviable thereon under section 66 of the Finance Act, 1994, as is in excess of the Service Tax calculated on a value which is equivalent to twenty-five per cent of the gross amount charged from the customer by such Goods Transport Agency for providing the said taxable service. However, it is provided that this exemption shall not apply in such cases where-

(i) the CENVAT credit of duty on inputs or capital goods or the CENVAT credit of Service Tax on input services, used for providing such taxable service, has been taken under the provisions of the CENVAT Credit Rules, 2004; or

(ii) the service provider has availed the benefit under the Notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 12/2003-Service Tax dated the 20th June, 2003 [G.S.R. 503 (E), dated the 20th June, 2003].

21.3 It is further observed that CBEC vide Para 31.1 of the letter F.No. B1/6/2005-TRU dated 27.07.2005 has clarified as follows :-

"31.1 An abatement of 75% in taxable service of goods transport by road is available on the condition that the goods transport agency has not availed credit on inputs and capital goods used for providing taxable service and has also not availed benefit of notification No. 12/2003-Service Tax, dated 20.6.2003 (vide Notification No. 32/2004-Service Tax, dated 3.12.2004.) It has been requested that in cases where liability for tax payment is on the consignor or consignee, the procedure as to how it should be confirmed by such consignor or consignee that the goods transport agency has not availed credit or benefit of notification No. 12/2003-Service Tax may be prescribed. In such cases it is clarified that a declaration by the goods transport agency in the consignment note issued, to the effect that neither credit on inputs or capital goods used for provision of service has been taken nor the benefit of notification no. 12/2003-Service Tax has been taken by them may suffice for the purpose of availment of abatement by the person liable to pay Service Tax."

21.4 I find that an abatement of 75% in taxable service of good transport by road is provided on the condition that (i) the goods transport agency has not availed credit on input or capital goods or input service used for providing taxable service and (ii) has also not availed benefit of Notification No. 12/2003-Service Tax, dated 20.06.2003. Thus, unless both these conditions are fulfilled, abatement of 75% in taxable service of good transport by road is not admissible.

21.5 In case where the consignor or consignee of goods is any person specified under Rule 2(1)(d)(v) of STR, 1994, who pays or is liable to pay freight either himself or through his agent for the transportation of such goods by road in a goods carriage, he would be the person liable for paying Service Tax in relation to taxable service provided by a goods transport agency. Therefore, admissibility of abatement of 75% in taxable service of goods transport by road to consignor or consignee who is liable for paying Service Tax, is dependent on fulfillment of the aforesaid two conditions prescribed under the Notifications, by the goods transport agency. Under this peculiar mechanism of payment of Service Tax where admissibility of abatement to one person (consignor or consignee) is dependent on the fulfillment of conditions by the other person (goods transport agency), the C.B.E.C. was requested to prescribe the procedure as to how it should be confirmed by such consignor or consignee that the goods transport agency has not availed credit or benefit of notification No. 12/2003-Service Tax. C.B.E.C. vide Para 31.1 of the aforesaid letter dated 27.07.2005 clarified that in such cases, a declaration by the goods transport agency in the consignment note issued, to the effect that neither credit on inputs or capital goods used for provision of service has been taken nor the benefit of Notification No. 12/2003-Service Tax has been taken by them may suffice for the purpose of availment of abatement by the person liable to pay Service Tax.

22. The Show Cause Notice has been issued alleging that the Consignment Notes issued by the concerned Goods Transport Agencies did not have declaration to the effect that neither credit on input or capital goods used for

provision of service has been taken by them nor the benefit of Notification No. 12/2003-S.T. dated 20.06.2003 has been taken by them. The assessee has submitted declarations on the letter heads of transporters declaring that they have not taken the credit of Excise Duty paid on input or capital goods or Service Tax credit on input services used for providing the 'Transport of Goods by Road' service under the provision of the Cenvat Credit Rules, 2004 during the period from 01.01.2005 to 28.02.2008 and that they have not availed the benefit under Notification No. 12/2003-Service Tax during the period from 01.01.2005 to 28.02.2008. Such declarations on the letter heads of respective transporters have been submitted from Goods Transport Agencies to whom ₹ 67,24,15,486/- i.e. around 93% of the freight has been paid by the said assessee during the period covered by the SCN. However, no such declarations have been submitted from Goods Transport Agencies to whom ₹ 4,62,79,322/- i.e. around 7% of the freight has been paid by the assessee during the period covered by the SCN.

23.1 In this regard, I place reliance on the decision in the case of Commissioner of Central Excise, Vapi V/s. Neral Paper Mills P. Ltd. [2009 (14) S.T.R. 374 (Tri. – Ahmd.)], In the aforesaid decision, Hon'ble CESTAT has referred to Para 7 and 8 of the Commissioner (Appeals) order, wherein he has held as under :-

> *"7. The appellants have mainly argued that declaration made by the GTAs on their letter heads were sufficient to meet the requirement of the notification. In this respect I find that in Notification No. 32/2004-S.T. dt. 3-12-2004, abatement of 75% has been provided to the appellants subject to the condition that Goods Transport agency has not availed credit on inputs and capital goods used for providing taxable service and has also not availed the benefit of Notification No. 12/2003-S.T. dt. 20.6.2003. No procedure or manner has been prescribed in the notification to see whether the said conditions are being complied with or not, however the board has clarified vide its circular No. B1/6/2005-TRU dt. 27-7-2005 (Para 31) that a declaration by the GTA on the body of the consignment note may be suffice in this regard. I find that Board's above circular is only clarificatory in nature and does not prescribe anything not even the procedure / requirement for availing the said credit. It only clarfies that a declaration by the GTA to this effect in consignment note may suffice for the purpose of availment of abatement. It does not mean that the said declaration cannot be given by other means. The said requirement is not mandatory. From the show cause notice itself I find that the unit had the copies of separate declaration on the letter head of GTAs and the same were produced to the Audit party. Thus I find that the appellants can be said to have sufficiently met with the Board's above said clarification.*
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> *8. I also find that exemption is provided by way of notification and the Board can prescribe the procedure for availing the benefit of the said exemption notification. Further in a catena of decisions, Hon'ble Tribunal has held that substantial benefit cannot be denied for minor procedural lapses. Also, I find that nowhere in the impugned order, it has been alleged or held by the adjudicating authority that the GTA in this case has availed credit on inputs and capital goods used for providing taxable service or has availed benefit of Notification No. 12/2003-S.T., dated 20.6.2003. Therefore, I conclude that the impugned order denying the benefit of Notification No. 32/2004-S.T., dated 3-12-2004 is not correct in law."*