



- ERX: Audit-
2010-11

केन्द्रीय उत्पाद शुल्क एवम सेवा कर आयुक्तालय , भावनगर
OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX

प्लॉट नं. 6776-बी/1, 'सिद्धि 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/15-57/Dem-ST/HQ/2009
F. No.

आदेश की तारीख : 03/06/2011

Date of Order :

जारी करने की तारीख : 03/06/2011

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 : 12/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 विरुद्ध सीमा शुल्क , केन्द्रीय उत्पाद शुल्क एवं सेवा कर अपीलीय प्राधिकरण , ओ-20 , मेघानी नगर , नया मानसिक अस्पताल संकुल , अहमदाबाद को केन्द्रीय 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 lie to the Joint Secretary to the Government of India, Department of Revenue, Ministry of Finance, New Delhi.

3. अपील फॉर्म E.A.-3 में केन्द्रीय 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. केन्द्रीय 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 विरुद्ध 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. Gokul Agency,
S. T. Road,
Veraval – 362 266
Distt. Junagadh
Gujarat.

विषय : कारण बताओ नोटिस संख्या :

Subject: Show Cause Notice F. No. V/15-57/Dem-ST/HQ/2009 dated 04.03.2010.

BRIEF FACTS :-

M/s. Gokul Agency, S.T. Road, Veraval - 362266 (herein after referred to as 'the Noticee') is holding Service Tax Registration with effect from March - 2007 for payment of Service Tax as leviable under the category of Manpower Recruitment or Supply Agency Service (herein after referred to as MRA Service).

2. A Show Cause Notice F. No. V/15-57/Dem-ST/HQ/2009 dated 04.03.2010 has been issued to the Noticee. The facts leading to issuance of the said show cause notice are that during the course of audit of the records of the Noticee by the audit wing from Central Excise Commissionerate, Bhavnagar, it was noticed that the Noticee had obtained the Service Tax Registration under the category of MRA service from March-2007 and started paying Service Tax since then. The Noticee did not discharge their Service Tax liability from 16/06/2005 i.e. the date on which the service became taxable, to 28/02/2007 under the category of MRA service. Also the Noticee did not discharge the Service Tax liability on the Provident Fund paid directly by M/s. GHCL Ltd. Sutrapada (herein after referred to as GHCL) which formed part of the taxable value under the category of MRA service from June-2005 to December-2008.

3. Manpower Recruitment or Supply Agency service is defined as per Section 65(68) of the Finance Act, 1994 (herein after referred to as the Act,) with effect from 16-06-2005 as under :-

"Man Power Recruitment or Supply Agency means any commercial concern engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to a client;"

The definition of MRA service has undergone the change with effect from 01/05/2006 which is as under :-

"manpower recruitment or supply agency means any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to a client;"

As per Circular No. 86/4/2006-ST dated: 01/11/2006 issued by the Central Board and Excise and Customs;

"A commercial concern is an institution/ establishment that is primarily engaged in commercial activities, having profit as the primary aim."

4. The Noticee is the Proprietary firm and engaged in supply of labour and its related contracts and the Noticee is doing these commercial activities, having profit as the primary aim.

5. The Noticee has entered into contracts with M/s. GHCL for the Financial year 2004-05 to 2008-09. The contracts/ work orders, dated 04/09/2006 and 04/08/2008 inter-alia stipulate as under :-



"SCOPE OF WORK

Stacking

You will arrange to stack soda ash bags properly in godown in an organized manner under the supervision and guidance of our godown staff. The height of stack will be at our discretion and can go upto minimum of 25 bags height. Stacking will continue round the clock and you will depute experienced and skilled workers for the purpose. Your workers will operate/ handle the stackers and other equipments properly and will not damage them. They will also be responsible for safe custody of connecting cables. Any loss arising from replacement of missing cables will be recovered from you.

Loading :-

You will arrange for loading of soda ash bags into trucks from chute or from stacks as directed by our godown staff. You will deploy adequate number of experienced loading gangs for the purpose.

Loading from direct chute shall be maximized with a daily target of 500 MT.

Jumbo Handling:-

You will arrange for sufficient and properly skilled labour to carry out all the jobs relating to handling of jumbo bags like tying up, stitching the mouths of the jumbo bags after filling, operating the EOT cranes for stacking and loading them on to trucks, etc.

Shifting :-

You will arrange to shift soda ash bags from one godown to another godown or from godown to outside stack, from one stack within the godown to another stack. For carrying out these jobs you will arrange to:

- a) Deploy tractor trailer as and when advised.
- b) Deploy labour and arrange for loading of the tractor trailer as required.
- c) Shift stack manually as and when advised.
- d) Unload and stack soda ash at the designated place.

You will ensure that the labour carry out operation in such a manner so as to minimise damages to bags and equipment in handling or transportation.

Cleaning and Upkeep of Equipment :-

You shall be responsible for ensuring clearing of all the equipments used for the job like stack conveyor, belt, EOT crane, etc. and remove bags thrown during the loading of lorries/tractors, etc. and properly stack them inside the godown. You will also ensure to place all bags fallen from the main godown belts in their proper stacks. No extra payment will be made for such fallen bags.



Supervisory Staff :-

You will depute adequate number of responsible supervisory staff round the clock to coordinate all the above activities, including arranging additional labour gangs/ tractor trailers as required specially when loading hours may need extension.

6. From the afore mentioned contents of the agreement/ work orders entered into with M/s. GHCL, it appeared that the Noticee is "commercial concern" within the definition of MRA service with effect from 16/06/2005 engaged in providing the services for supply of labour/ workers for a specified period and completion of particular projects or tasks. Also they are covered under the changed definition of MRA service with effect from 01/05/2006 of "any person", as "any person" interalia includes the Proprietorship also.

7. The MRA service falls under sub clause (k) of Section 65(105) of the Act, and taxable service as per Section 66 of the Act, and therefore the Noticee were required to discharge his Service Tax liability at the appropriate rate as per Section 68 of the Act, read with Rule 6 of the Service Tax Rules 1994, (herein after referred to as the Rules.)

8.1 It appeared from the contracts/ work order under taken with M/s. GHCL that the Noticee is paid by M/s. GHCL as per contracted rate. The relevant clauses of contract/ work order read as under :-

"RATES:-

Item	Rates ₹ Per Tonne		
	2004-05	2005-06	2006-07
Stacking of bags	18.25	18.59	19.98
Loading of bags	28.29	28.82	30.98
Shifting of jumbo bags	09.99	10.17	10.93
Loading of jumbo bags	11.07	11.27	12.12
Shifting of bags using only manual labour	27.86	28.38	30.51
Shifting of bags using tractors (Bags mean 50 kg/75 kg bags except jumbo)	81.66	83.18	89.42
Unloading of bags	27.86	28.38	30.51
Direct chute loading on following slabs:			
Upto 2500 MT / Month	Nil	Nil	Nil
2500 to 5000 MT / Month	04.00	04.00	06.00
5001 MT and above per month	05.00	05.00	07.00
Loading Guarantee:			
4 MT per person per gang (A & B Shift)	23.99	24.44	26.27
6MT per person per gang (C Shift)	23.99	24.44	26.27
Stacking Guarantee:			
6.85 MT per person per gang (A,B,C Shift)	13.89	14.15	15.21

General:-

In case of supply of unskilled labour for issue of bags/any other work in the bagging godown, you will be paid the prevailing rate and addition 15% service charges on such rate,"

8.2 As per para 22.4 of the Circular F.No. B1/6/2005-TRU, dated 27/07/2005 issued by the Central Board of Excise and Customs :-

"Service tax to be charged on the full amount of consideration for the supply of manpower, whether full-time or part-time. The value includes recovery of staff costs from the recipient e.g. salary and other contributions. Even if the arrangement does not involve the recipient paying these staff costs to the supplier (because the salary is paid directly to the individual or the contributions are paid to the respective authority) these amounts are still part of the consideration and hence form part of the gross amount."

9. It appeared that the Noticee have not included the P.F. amount paid directly by M/s. GHCL from June-2005 to December-2008 in the taxable value of MRA service and failed to pay the Service Tax as leviable. The amount of P.F. form part of the taxable value of MRA service and Service Tax at the appropriate rate is required to be paid by the Noticee.

10. It appeared that the Noticee have failed to discharge the Service Tax liability on the category of MRA Service valued at ₹ 3,80,65,812/- from the period 16/06/2005 to 28/02/2007 as explained at para 5 of the show cause notice and also failed to pay the Service Tax on the P.F. amount of ₹ 63,89,305/- paid directly by M/s. GHCL for the period June-2005 to December-2008 and not included in the taxable gross value as explained at paras 7 and 8 of the show cause notice and there by suppressed the facts from the department and contravened the provisions of the Act and the Rules, with intent to evade payment of Service Tax in as much as:

(i) The Noticee did not apply for registration, with effect from 16/06/2005, though being liable to pay Service Tax to the department under the category of MRA Service.

(ii) The Noticee did not inform the department about the facts of providing of MRA Service from the period 16/06/2005 to 28/02/2007 and did not disclose the fact about non inclusion of P.F. amount paid directly by M/s. GHCL for the period from June-2005 to December-2008 in the taxable value. These facts revealed only by the Audit wing of the H.Q. Office, Bhavnagar during the course of Audit of records maintained by the Noticee.

11. From the above, it appeared that the Noticee did not discharge the Service Tax liability on the category of MRA Service, by reason of suppression of facts and contravened the provisions of the Act and the Rules with intent to evade payment of Service Tax and as such the Service Tax is recoverable at appropriate rate as per proviso to Section 73(1) of the Act.

12. It appeared that by acting in the manner, the Noticee has contravened the provisions of the Act and the Rules in the manner described as under and as such is liable for penal action :-



Sr. No.	Manner of Contravention	Breach of		Liabile of Penal Action	
		Finance Act, Section	Service Tax Rules, Rule	Finance Act, Section	Service Tax Rules, Rule
1	Did not apply for registration under the category of Manpower Recruitment or Supply Service with effect from 16/06/2005 to 28/02/2007	69	4	77	-
2	Did not pay the service tax	68	6	76	-
3	Did not furnish the prescribed Returns	70	7	77	7c(iii)
4	Did not pay the service tax by reason of suppression of facts from department and contravened the provisions of the Act and Rules with intent to evade payment of service tax	Proviso to (1) of 73	-	78	-

13. Therefore, the noticee, vide show cause notice F.No. V/15-57/Dem-ST/HQ/2009 dated 04.03.2010, was required to show cause as to why:-

(1) Service Tax ₹ 49,18,570/- (Rupees Forty Nine Lakhs, Eighteen Thousand, Five Hundred Seventy only/-) + E.Cess ₹ 98,372/- (Rupees Ninety Eight Thousand, Three Hundred, Seventy Two only/- + H.E.Cess ₹ 3,970/- (Rupees Three Thousand Nine Hundred Seventy Only/-) Total ₹ 50,20,912 /- (Rupees Fifty Lakhs, Twenty Thousand, Nine Hundred Twelve only/-) calculated on the basis of taxable value of ₹ 4,44,55,117/- detailed in Annexure A appended to the Show Cause Notice, should not be recovered from them under the proviso to Section 73(1) of Finance Act 1994, as amended;

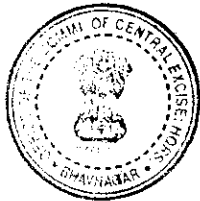
(2) Penalty should not be imposed upon them under Section 77, 78 and 76 of the Finance Act and Rule 7(c) (iii) of the Service Tax Rules, 1994, as amended; and

(3) Interest at the appropriate rate should not be levied as per section 75 of the Finance Act 1994.

DEFENCE REPLY AND PERSONAL HEARING :-

14. The Noticee was requested vide letters dated 11.02.2011, 25.02.2011 and 11.03.2011 to file written reply to the show cause notice. However, the noticee did not file written reply to the show cause notice. Personal Hearing in this case was fixed between 21.03.2011 and 25.03.2011. As the noticee requested for adjournment, the Personal Hearing was again fixed on 11.04.2011. The noticee was also requested to file written reply to the show cause notice on or before the date of Personal Hearing.

15. Shri S. B. Tanna, Chartered Accountant and Shri Rajendra P. Bhatt appeared for Personal Hearing on 11.04.2011 on behalf of the noticee. They submitted written reply to the show cause notice and reiterated their written reply.



16.1 In the written reply submitted vide letter dated 09.04.2011, the noticee stated that he is the contractor of the company M/s. GHCL Limited, Sutrapada, for supply of Man Power to the company. As per their agreement, Service Tax is to be born by the company, and therefore, as per the instructions of the company, he has obtained registration under Service Tax Act on 28.02.2007. He is regularly paying the Service Tax collected by him since then.

16.2 As regards the registration from 16.06.2005, it is submitted that the said services were newly covered w.e.f. 16.06.2005 and he was not aware about the inclusion of such services under Service Tax and hence he could not apply for the same. However, as per the instructions of the GHCL, he has applied for Registration and collected Service Tax on services and paid the taxes regularly since then. Further, he has not collected any Service Tax on any amount before March 2007. Therefore, the said default is not made with any malafide intention to evade the taxes, or for suppression of facts from the department. Service Tax is to be borne by the company and therefore there is no reason for suppression of facts or to evade the Service Tax. However, since the said services were newly covered, he could not apply for registration in time. Further, the Service Tax demanded by the department in respect of services for the period from 16.06.2005 to 28.02.2007 is duly collected from the company and paid by him. Under the circumstances, the delay in getting registration may be condoned.

16.3 As regards the payment of Service Tax for the period from 16.06.2005 to 28.02.2007, it is submitted that as per the instruction from the company GHCL Limited, he applied for Registration in March 2007 and collected and paid the Service Tax since then regularly. However, since he was not aware about the applicability of Service Tax on such services w.e.f. 16.06.2005 and the company also did not instruct him to obtain registration w.e.f. 16.06.2005, he had not collected and paid any Service Tax for such period. Since the Service Tax was not collected by him, he had not paid the Service Tax. As he was not aware about the inclusion of such services w.e.f. 16.06.2005, he had not collected and paid the Service Tax. Therefore, the said default is made without any malafied intention to evade the taxes, or suppression of facts from the department. Service Tax is to be born by the company and therefore there is no reason for suppression of facts or to evade the Service Tax. However, the Service Tax demanded for the said period is duly collected and paid by him. It has been submitted that under the circumstances, penalty proceedings initiated under section 76 may be dropped.

16.4 As regards the furnishing of Service Tax returns for the period 16.06.2005 to 28.02.2007, it is submitted that since the service were newly covered w.e.f. 16.06.2005, he could not obtain the registration in time but registered in March 2007 and collected and paid the taxes since then regularly. The Service Tax returns were also filed in time in prescribed form since then regularly. Since the registration was not obtained and no Service Tax was collected for such period, no returns were filed. Therefore, the said default is made without any malafied intention to evade the taxes or suppression of facts from the department. It has been submitted that under the circumstances, penalty proceedings initiated under section 77 for the said period may be dropped.

16.5 As regards the non payment of Service Tax by reason of suppression of facts from department, and contravention of the provisions of Act and Rules with intent to evade payment of taxes, it is submitted that the Service Tax is ultimately to be born by the service receiver and since the Service Tax is to be



paid by the company (GHCL Limited), there is no reason to believe that the Service Tax is evaded. It is submitted that he was not aware about inclusion of his services in Service Tax from 16.06.2005 and even the company did not instruct him to get registration under Service Tax Act. As and when the company instructed, he immediately got registration and collected and paid the taxes regularly. Therefore, there is no malafied intention or no reason to suppress the facts from department with intent to evade tax, as the taxes are to be born by the company. Further, he has also not collected the taxes from the company for the said period. All the taxes demanded by the GHCL are already paid by him.

16.6 It is further submitted that the Service Tax is to be born by the GHCL Limited, being service receiver. GHCL Limited is also claiming the said Service Tax payment as input tax credit under CENVAT Credit. Therefore, there is no reason to evade tax or to suppress facts from department with intent to evade tax. Service Tax department has also not made any revenue loss on these account, as all the payments made for Service Tax by him are to be born by the company and the company is ultimately claiming all such Service Tax payment as CENVAT Credit against the payment of Excise/ Service Tax by the company. Therefore, the Government has not made any revenue loss on such account. Considering the above facts, it is submitted that he has not suppressed any facts from the department with intent to evade taxes as the taxes are to be born by the company and the company is availing CENVAT credit for such payment. Therefore, the penal proceedings initiated under section 78 may be dropped.

16.7 As regards the non payment of Service Tax on PF amount paid by the Company, it is submitted that the PF amount is directly paid by the company and the said amount were never received by him. Further, he was also not given any intimation by the company for such payment made by them. As he was not knowing the amount of PF paid directly by the company, he has not charged PF in his Bills and accordingly no Service Tax was collected on PF amount. As per his belief, the PF amount is to be born by the company and shall not form part of his billing and therefore no service tax was collected. However, the Service Tax demanded on such amount is duly collected and paid by him.

16.8 Considering the above facts and the facts that the registration could not be obtained from 16.05.2005 for the reasons mentioned herein above and there was no malafied intention behind it and the Government has also not made any revenue loss, it is submitted that he has already collected the Service Tax and made payment of Service Tax demanded for the period from 16.06.2005 to 28.02.2007 and also collected and paid the Service Tax on PF amount paid directly by GHCL Limited, as demanded. As the GHCL Limited is availing CENVAT Credit for the Service Tax collected by him, the Department has not made any revenue loss on such account and therefore on the ground of natural justice, no interest under section 75 of the Finance Act should be charged. As the registration could not be obtained with effective date, without any malafied intentions and the department has not made any revenue loss on such account, since such payment collected as Service Tax by him are duly availed as CENVAT credit by the company, penalty proceedings initiated under section 77, 78 and 76 may be dropped.



16.9 He requested to consider his written submission under the circumstances, and requested to grant relief as requested above.

17. The Noticee vide his letter dated 15.04.2011 has submitted that he has made following payments towards demand of Service Tax.

Sl. No.	Challan No. and Date	Amount Paid (₹)	Remarks
1	78 dated 28.07.2009	43,21,316/-	Service Tax for the period 16.06.2005 to 15.03.2007
2	82 dated 28.07.2009	3,50,023/-	Service Tax on P.F. for the period 16.06.2005 to 15.03.2007
3	71 dated 28.07.2009	4,08,870/-	Service Tax on P.F. for the period 01.05.2007 to 31.12.2008
	TOTAL	50,80,209/-	

DISCUSSION AND FINDINGS :-

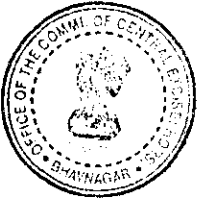
18. I have carefully gone through the subject show cause notice, submissions made during Personal Hearing as well as in the written reply and other evidences available on record.

19. I find that the main issues involved in this case are (i) alleged failure of the Noticee to discharge Service Tax liability on the services in the category of Manpower Recruitment or Supply Agency Service provided from 16.06.2005 to 28.02.2007; (ii) alleged non – inclusion of Provident Fund amount, paid directly by M/s. GHCL (service recipient) for the period June – 2005 to December – 2008, in the gross taxable value for payment of Service Tax; (iii) alleged non obtaining of Service Tax Registration within stipulated time limit and (iv) alleged non furnishing of prescribed returns.

20.1 The definition of Manpower Recruitment or Supply Agency Service as per Section 65(68) of the Finance Act, 1994 with effect from 16.06.2005 is as under :-

“Man Power Recruitment or Supply Agency means any commercial concern engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to a client;”

20.2 From the contract/ Work Order entered into between the Noticee and the service recipient (M/s. GHCL), it is evident that the Noticee is engaged in providing services of supply of manpower for stacking, loading, jumbo handling, shifting, cleaning and upkeep of equipment and providing of supervisory staff etc. to M/s. GHCL. I find that these services provided by the Noticee are covered within the definition of “Manpower Recruitment or Supply Agency Service” with effect from 16.06.2005. The Noticee is a proprietary firm engaged in supply of manpower and doing these commercial activities with a profit as the primary aim. Therefore, the services provided by the noticee are found to be covered within the definition of “Manpower Recruitment or Supply Agency Service” and the noticee is found to be liable to pay Service Tax on such services provided by him with effect from 16.06.2005. The noticee has also not disputed these facts and has informed that he has already paid Service Tax of ₹ 43,21,316/- (Service Tax ₹ 42,36,584/- + Education Cess ₹ 84,732/-) for the period from 16.06.2005 to 15.03.2007 vide Challan No. 78 dated 28.07.2009. The Noticee has obtained Service Tax Registration in March – 2007 and is paying Service Tax since then in the category of “Manpower Recruitment or Supply Agency Service”.



21.1 Another issue pertains to non – inclusion of Provident Fund amount, paid directly by service recipient (M/s. GHCL) for the period June – 2005 to December – 2008, in the gross taxable value of the services provided by the noticee, for payment of Service Tax.

21.2 As per Section 67 of the Finance Act, 1994, the value of any taxable service shall be the gross amount charged by the service provider for such service provided or to be provided by him. This issue has also been clarified vide para 22.4 of the letter F.No. B1/6/2005-TRU dated 27/07/2005 issued by the Central Board of Excise and Customs, as follows :-

“Service tax to be charged on the full amount of consideration for the supply of manpower, whether full-time or part-time. The value includes recovery of staff costs from the recipient e.g. salary and other contributions. Even if the arrangement does not involve the recipient paying these staff costs to the supplier (because the salary is paid directly to the individual or the contributions are paid to the respective authority) these amounts are still part of the consideration and hence form part of the gross amount.”

21.3 Thus, it is evident that the amount of Provident Fund paid directly by M/s. GHCL would form part of the gross amount of the service rendered by the noticee and appropriate Service Tax was required to be paid on such amount. The noticee has also not disputed these facts and has informed that he has already paid Service Tax of ₹ 3,50,023/- (Service Tax ₹ 3,43,160 + Education Cess ₹ 6,863/-) for the period from 16.06.2005 to 30.04.2007 vide Challan No. 82 dated 28.07.2009 and Service Tax of ₹ 4,08,870/- (Service Tax ₹ 3,96,961 + Education and SHE Cess ₹ 11,909/-) for the period from 01.05.2007 to 31.12.2008 vide Challan No. 71 dated 28.07.2009.

22.1 I also find that the said noticee is engaged in providing services of supply of manpower which became leviable to Service Tax with effect from 16.06.2005 under the category of Manpower Recruitment or Supply Agency Service. Under the provision of Section 69 of the Finance Act, 1994 read with Rule 4 of Service Tax Rules, 1994, the person liable for paying Service Tax is required to make an application for registration within a period of thirty days from the date on which the service tax under Section 66 of the Finance Act, 1994 was levied. Therefore, the said noticee was required to make an application for registration before 15.07.2005. However, I find that the said noticee did not make application for Service Tax Registration within prescribed time limit, thereby contravened the provisions of Section 69 of the Finance Act, 1994 and Rule 4 of Service Tax Rules, 1994.

22.2 Further, the noticee is engaged in providing services of supply of manpower which became leviable to Service Tax with effect from 16.06.2005 under the category of Manpower Recruitment or Supply Agency Service. Under the provision of Section 70 of the Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994, the person liable to pay service tax is required to himself assess the tax due on the services provided by him and furnish a return in the prescribed Form ST-3 on half yearly basis. Therefore, the said noticee was required to himself assess the tax due on the services provided by him from 16.06.2005 and furnish the half yearly returns in the prescribed form. However, I find that the said noticee did not furnish prescribed returns containing the details of service

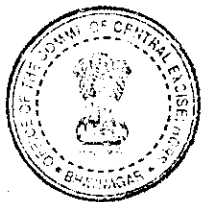


provided by him from 16.06.2005 to 28.02.2007 and thereby contravened the provisions of Section 70 of the finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994.

23.1 The Noticee has contended that he was not aware about the inclusion of services provided by him w.e.f. 16.06.2005, hence he did not collect and paid the Service Tax and therefore the said default is made without any malafied intention to evade the taxes or suppression of facts from the department. It is also contended that as per his belief, the Provident Fund amount is to be born by the company (GHCL) and shall not form part of his billing and therefore no Service Tax was collected.

23.2 In this regard, I find that as discussed above, the services rendered by the noticee became leviable to Service Tax with effect from 16.06.2005. However, the noticee did not obtain Service Tax Registration, did not start paying Service Tax and did not furnish the prescribed return. I find that the Noticee has obtained Service Tax Registration in March – 2007 and started paying Service Tax in the category of Manpower Recruitment or Supply Agency. However, even at this stage, the noticee did not pay Service Tax for the earlier period i.e. from 16.06.2005 till they obtained Service Tax Registration in March – 2007. It is only after the non payment of Service Tax by the noticee for the period from 16.06.2005 to 28.02.2007 pointed out by the officers of Central Excise, H.Q. (Audit), Bhavnagar, during the course of audit of records of the noticee, that the noticee paid the amount of Service Tax for the period from 16.06.2005 to 28.02.2007. Therefore, non payment of Service Tax for the period from 16.06.2005 to 28.02.2007 by the noticee is not found to be due to reasonable cause or with bonafide belief. I, therefore hold that the non payment of Service Tax for the period from 16.06.2005 to 28.02.2007 by the noticee is by reason of suppression of facts and by contravention of the provisions of Finance Act, 1994 and Rules made there under with intent to evade payment of Service Tax.

23.3 It is also observed that the issue of inclusion of Provident Fund amount paid directly by M/s. GHCL in the gross value of service rendered by the noticee, has been clarified vide para 22.4 of the letter F.No. B1/6/2005-TRU dated 27/07/2005 issued by the Central Board of Excise and Customs. With the clarification issued by the C.B.E.C., there was no scope for entertaining belief that the amount of Provident Fund paid directly by M/s. GHCL is not includible in the gross value of service rendered by the noticee. However, the noticee did not include the said amount of Provident Fund paid directly by M/s. GHCL in the gross value of service rendered by him for the purpose of payment of Service Tax. It is only after the issue of non inclusion of amount of Provident Fund paid directly by M/s. GHCL in the gross value of service rendered by the noticee pointed out by the officers of Central Excise, H.Q. (Audit), Bhavnagar, during the course of audit of records of the noticee, that the noticee paid the amount of Service Tax after including the said amount of Provident Fund in the gross value of service rendered. Non inclusion of the said Provident Fund amount in the gross value of service rendered by the noticee is therefore not found to be due to reasonable cause or due to bonafide belief. I, therefore hold that the non-inclusion of Provident Fund amount in the gross value of service rendered by the noticee and non payment of Service Tax on such amount by the noticee is by reason of suppression of facts and by contravention of the provisions of Finance Act, 1994 and Rules made there under with intent to evade payment of Service Tax.



23.4 As the noticee did not pay Service Tax for the period from 16.06.2005 to 28.02.2007 and did not include amount of Provident Fund in the gross value of service rendered by him for the period from June 2005 to December 2008 and did not pay Service Tax on such amount by reason of suppression of facts and by contravention of the provisions of Finance Act, 1994 and Rules made there under with intent to evade payment of Service Tax, the extended period of five years as per proviso to section 73 (1) of the Finance Act, 1994 for demanding Service Tax, instead of normal period of one year, is found to be correctly invoked in this case.

24.1 The noticee has also contended that the Service Tax department has not made any revenue loss as all the payments made by the noticee for Service Tax are claimed by M/s. GHCL (service recipient) as Cenvat Credit which is used towards payment of Central Excise/ Service Tax by M/s. GHCL. It is therefore contended that there is no suppression of facts with intent to evade taxes as the service recipient is availing CENVAT credit for payment of Service Tax made by the noticee.

24.2.1 It is observed that the issue of revenue neutrality has been decided by the Larger Bench of Hon'ble CESTAT in the case of Jay Yuhshin Ltd. V/s. Commissioner of Central Excise, New Delhi [2000 (119) E.L.T. 718 (Tribunal - LB)] wherein it has been held at Para 13 (c) that "with particular reference to Modvat scheme (which has occasioned this reference) it has to be shown that the Revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods".

24.2.2 Though the aforesaid decision has been rendered in the context of Central Excise case, the ratio laid down therein is equally applicable in the Service Tax matters. In the present case also the revenue neutral situation does not come about in relation to the credit available to the noticee himself but come about by way of availability of credit to the recipient of the noticee's services.

24.3 It has been further observed that Hon'ble Supreme Court in the case of Commissioner of Central Excise, Mumbai V/s. Mahindra & Mahindra Ltd. [2005 (179) E.L.T. 21 (S.C.)] has held that availability of Modvat credit by itself was not the decisive consideration for invocation or otherwise of extended period of limitation. Para 4 of the said judgment is reproduced below :-

"4. There can be number of eventualities where extended period of limitation in terms of proviso to section 11A may be available to the Department despite availability of Modvat credit to an assessee. The availability of Modvat credit to an assessee by itself is not conclusive or decisive consideration. It may be one of the relevant consideration. How much weight is to be attached thereto would depend upon the facts of each case."

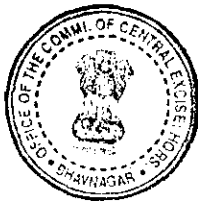
24.4 Similarly, Hon'ble CESTAT in the case of ABB Ltd. V/s. Commissioner of Central Excise, Bangalore [2010 (18) S.T.R. 433 (Tri.-Bang.)] has also held that plea of limitation on the ground of revenue - neutrality due to Cenvat Credit entitlement is not acceptable. Relevant portion of the said decision is reproduced below :-



"8. We have examined the plea of limitation raised by ABB in respect of demand for the period April, 2006 to June, 2006. The case law relating to revenue neutrality and limitation dealt with in the judicial authorities cited are to the effect that demanding duty or cenvat credit, as the case may be, resulted in a revenue neutral situation if the assessee was entitled to equal amount of Cenvat credit or duty exemption of the same amount as credit taken. There was no reason for the appellant to suppress (liability to excise duty) as it was entitled to have facility of modvat scheme. Extended period of limitation under proviso to Section 11A(1) of the Central Excise Act was not invocable. We note that this ratio was examined by a three member bench of the Supreme Court in CCE, Mumbai v. Mahindra & Mahindra Ltd. - 2005 (179) E.L.T. 21 (S.C.). The Apex Court held that the observation that the appellant was entitled to get the benefit of modvat scheme, therefore, there was no justifiable reason for appellant to suppress any fact which appeared in the Supreme Court's decision in Amco Batteries Ltd. v. CCE - 2003 (153) E.L.T. 7 (S.C.) had to be read in the context of facts and circumstances noticed in earlier paragraphs, in addition to assessee being entitled to benefit of Modvat credit. It was held that availability of Modvat credit to an assessee by itself was not conclusive or decisive consideration; it may be one of the relevant considerations for deciding applicability of proviso to Section 11A(1) of Central Excise Act, 1944. We find that the above ratio applied equally to invocation of larger period for demand of Service tax not paid under Section 73(1) of the Act. Since we cannot hold that ABB's liability to tax on the services it received from foreign companies during the period April, 2006 to June, 2006 was not known to it in view of the express provisions contained in Section 66A of the Act and Rule 2(1)(d)(iv), the plea of limitation on the ground of revenue neutrality advanced cannot be accepted."

24.5 Therefore, the contention of the noticee that there could not have been any suppression of facts with intent to evade payment of Service Tax on their part as recipient of service (GHCL) is availing CENVAT Credit, is not found tenable.

25.1 In view of the above discussion, I find that the demand of ₹ 42,62,018/- (Service Tax ₹ 41,78,449/- + Education Cess ₹ 44,624/-) in respect of services in the category of Manpower Recruitment or Supply Agency Service provided by the noticee from 16.06.2005 to 28.02.2007 is required to be confirmed by invoking the extended period of five years under proviso to Section 73(1) of the Finance Act, 1994, along with interest at appropriate rate under Section 75 of the Finance Act, 1994. The said amount is required to be adjusted from the amount of ₹ 43,21,316/- (Service Tax ₹ 42,36,584/- + Education Cess ₹ 84,732/-) already paid by the said noticee vide Challan No. 78 dated 28.07.2009 for the period from 16.06.2005 to 15.03.2007.



25.2 I also find that the amount of Provident Fund of ₹ 63,89,305/- paid directly by M/s. GHCL during the period from June - 2005 to December - 2008 will form part of the gross amount of Services in the category of "Manpower Recruitment or Supply Agency Service" provided by the noticee and demand of taxes of ₹ 7,58,894/- (Service Tax ₹ 7,40,121 + Education Cess ₹ 14,803/- and SHE Cess ₹ 3,970/-) on the said amount is required to be confirmed by invoking the extended period of five years under proviso to Section 73(1) of the Finance Act, 1994, along with interest at appropriate rate under Section 75 of the Finance Act, 1994. The amount of ₹ 3,50,023/- (Service Tax ₹ 3,43,160 + Education Cess

₹ 6,863/-) for the period from 16.06.2005 to 30.04.2007 already paid by the said noticee vide Challan No. 82 dated 28.07.2009 and amount of ₹ 4,08,870/- (Service Tax ₹ 3,96,961 + Education and SHE Cess ₹ 11,909/-) for the period from 01.05.2007 to 31.12.2008 already paid by the noticee vide Challan No. 71 dated 28.07.2009, is required to be adjusted against the aforesaid demand.

26.1 Further, as already discussed, the said noticee is found to have not paid / short paid the amount of tax on account of suppression of material and relevant facts and contravention of the provisions of Finance Act, 1994 and rules made thereunder with intent to evade payment of tax, therefore penalty under Section 78 of the Finance Act, 1994 is mandatorily imposable as has been held by Hon'ble Supreme Court in the case of M/s. Dharmendra Textile Mills Ltd. [2008 (231) E.L.T. 3 (SC)] and in the case of M/s. Rajasthan Spinning & Weaving Mills Ltd. [2009 (238) E.L.T. 3 (SC)]. Therefore, I hold the said assessee liable for penalty as provided under Section 78 of the Finance Act, 1994.

26.2 As regards the issue of imposition of penalty under Section 76 of the Finance Act, 1994, I find that the penalty under Section 76 of the said Act is a penalty for failure to pay Service Tax. As discussed in the foregoing paras, the said noticee was required to pay Service Tax in respect of services in the category of "Manpower Recruitment or Supply Agency Service" provided by the noticee from 16.06.2005 to 28.02.2007. The said noticee was also required to include the amount of Provident Fund directly paid by M/s. GHCL during the period from June - 2005 to December - 2008 in the gross amount of Services in the category of "Manpower Recruitment or Supply Agency Service" provided by the noticee and pay appropriate Service Tax on the said amount. However, the said noticee failed to pay the aforesaid amount of Service Tax in accordance with the provisions of section 68 of the Finance Act, 1994 and Rule 6 of the Service Tax Rules, 1994 and thereby rendered himself liable to penalty as provided under Section 76 of the Finance Act, 1994. However, I observe that in terms of the proviso inserted w.e.f. 10.5.2008 in Section 78, penalty under Section 76 and 78 of the Finance Act, 1994 are mutually exclusive and once penalty under Section 78 is imposed, no penalty under Section 76 can be imposed w.e.f. 10.5.2008. Therefore, I hold the noticee liable to penalty as provided under Section 76 of the Finance Act, 1994 up to 09.05.2008.

26.3 As regards imposition of simultaneous penalty under Section 76 and Section 78 of the Finance Act, 1994, I place reliance on the judgment of Hon'ble High Court of Kerala in the case of Assistant Commissioner of Central Excise V/s. Krishna Poduval [2006 (1) S.T.R. 185 (Ker.)] wherein it is held that incidents of imposition of penalty are distinct and separate under two provisions and even if offences are committed in course of same transaction or arise out of same act, penalty is imposable for ingredients of both offences. Thus, imposition of penalty under sections 76 of the Act is for non payment of Service Tax and under section 78 of the Act is for suppression of facts, willful mis-statement or contraventions of provisions of Finance Act, 1994 or rules made thereunder with intent to evade payment of Service Tax, which are two distinct and separate offences attracting separate penalties. I find that the said noticee has committed both the offences and therefore penalties under section 76 and 78 of the Finance Act, 1994 are imposable on him.

26.4 As regards not applying for Service Tax-Registration, I find that the said noticee did not make application for Service Tax Registration within prescribed time limit, thereby contravened the provisions of Section 69 of the



Finance Act, 1994 and Rule 4 of Service Tax Rules, 1994 and thus rendered himself liable for penalty as provided under Section 77 of the Finance Act, 1994.

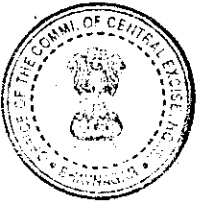
26.5 As regards non furnishing of the prescribed Returns, I find that the said noticee did not furnish prescribed returns at specified periodicity containing the details of service provided by him from 16.06.2005 to 28.02.2007 and thereby contravened the provisions of Section 70 of the finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994 and thus rendered himself liable for penalty as provided under Section 77 of the Finance Act, 1994.

27. In view of the foregoing discussion, I pass the following order.

ORDER

- (i) I confirm the demand of ₹ 42,62,018/- (Service Tax ₹ 41,78,449/- + Education Cess ₹ 44,624/-) from M/s. Gokul Agency, in respect of services in the category of Manpower Recruitment or Supply Agency Service provided by him from 16.06.2005 to 28.02.2007, under Section 73(2) of the Finance Act, 1994 by invoking extended period of five years under proviso to Section 73(1) of the Finance Act, 1994. This amount is ordered to be adjusted from ₹ 43,21,316/- (Service Tax ₹ 42,36,584/- + Education Cess ₹ 84,732/-) already paid by the said noticee vide Challan No. 78 dated 28.07.2009 for the period from 16.06.2005 to 15.03.2007.
- (ii) I confirm the demand of ₹ 7,58,894/- (Service Tax ₹ 7,40,121 + Education Cess ₹ 14,803/- and SHE Cess ₹ 3,970/-) from M/s. Gokul Agency under Section 73(2) of the Finance Act, 1994 by invoking extended period of five years under proviso to Section 73(1) of the Finance Act, 1994 by holding that amount of Provident Fund paid directly by the service recipient during the period from June – 2005 to December – 2008 will form part of the gross amount of Services in the category of Manpower Recruitment or Supply Agency Service. The amount of ₹ 3,50,023/- (Service Tax ₹ 3,43,160 + Education Cess ₹ 6,863/-) for the period from 16.06.2005 to 30.04.2007 already paid by the said noticee vide Challan No. 82 dated 28.07.2009 and amount of ₹ 4,08,870/- (Service Tax ₹ 3,96,961 + Education and SHE Cess ₹ 11,909/-) for the period from 01.05.2007 to 31.12.2008 already paid by the noticee vide Challan No. 71 dated 28.07.2009 is ordered to be adjusted against the aforesaid demand.
- (iii) M/s. Gokul Agency are ordered to pay interest at appropriate rate under Section 75 of the Finance Act, 1994 on the amount mentioned at (i) and (ii) above.
- (iv) I impose penalty of ₹ 200/- (Rupees Two Hundred Only) per day for the period during which failure to pay the tax continued, upon M/s. Gokul Agency under Section 76 of the Finance Act, 1994, for the period upto 17.4.2006;

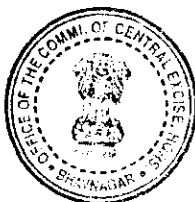
I impose penalty of ₹ 200/- (Rupees Two hundred only) per day for the period during which failure to pay the tax continued, or at the rate of 2% of such tax, per month, whichever is higher, starting with



the first day after the due date till the date of actual payment of the outstanding amount of Service Tax, upon M/s Gokul Agency, under Section 76 of the Finance Act, 1994, for the period from 18.4.2006 to 09.5.2008;

provided the total amount of penalty payable in terms of this section shall not exceed ₹ 50,20,912/- i.e. the amount of Service Tax recoverable from M/s Gokul Agency.

- (v) I impose penalty of ₹ 1,000/- on M/s. Gokul Agency under Section 77 of the Finance Act, 1994 for failure to make application for Service Tax Registration within prescribed time limit.
- (vi) I impose penalty of ₹ 1,000/- on M/s. Gokul Agency under Section 77 of the Finance Act, 1994 for failure to furnish prescribed returns.
- (vii) I impose penalty of ₹ 50,20,912/- on M/s. Gokul Agency under Section 78 of the Finance Act, 1994. In the event of the said assessee opting to pay the amount of Service Tax along with all other dues as confirmed and ordered to be recovered, within thirty days from the date of communication of this order, the amount of penalty liable to be paid by them under section 78 of the Finance Act, 1994 shall be 25% of the said amount. However, the benefit of reduced penalty shall be available only if the amount of penalty is also paid within the period of thirty days from the communication of this order, otherwise full penalty shall be paid as imposed in the above order.



N.K. Bhujabal
(N.K. BHUJABAL)
Commissioner

F.No:V/ 15-57/ Dem-ST/ HQ/ 2009

Date: 03/06/2011.

BY REGD. POST A.D./ HAND DELIVERY

To,
M/s. Gokul Agency,
S.T. Road, Veraval - 362266

Copy to:

1. The Chief Commissioner, Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Assistant Commissioner, Service Tax Division, Bhavnagar.
3. The Superintendent, Service Tax, Range Junagadh.
4. Guard File.