



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/15-119/Dem-ST/HQ/2009

F. No.

आदेश की तारीख : 07/12/2011

Date of Order :

जारी करने की तारीख : 07/12/2011

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 : 40/BVR/Commissioner/2011

1. यह प्रति उस व्यक्ति को, जिसके लिए यह आदेश जारी किया गया है, उसके व्यक्तिगत उपयोग के लिए निःशुल्क प्रदान की जाती है।
2. इस मूल आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित ढंग से कर सकता है :-
सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलाय न्यायाधिकरण को अपील :-
3. वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत अपील निम्न को की जा सकती है।
 - 1। पश्चिम क्षेत्रीय पीठ, सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) ओ-20, न्यू मेन्टल अस्पताल कंपाउन्ड, मेघाणीनगर, अहमदाबाद-380016।
 - 2। अपीलीय न्यायाधिकरण का वित्त अधिनियम, 1994 की धारा 86 की उप- धारा (1) के अंतर्गत अपील, सेवाकर नियमावली, 1994 के नियम 9(1) के अंतर्गत निर्धारित एस.टी.5 में, चार प्रतियों में आदेश प्राप्त के दिनांक से तीन माह के भीतर की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निर्धारित किए अनुसार शुल्क लगा होना चाहिए। जिस स्थान पर न्यायाधिकरण की न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्रा बैंक के न्यायापीठ के सहायक रजिस्ट्रार के नाम से निर्धारित फीस रेखांकित बैंक ड्राफ्ट के रुप में भेजनी होगी।



- 3। वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2ए) के अंतर्गत सेवाकर नियमावली, 1994 के नियम 9(2) के अंतर्गत निर्धारित किए गए फॉर्म एस.टी.7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क या आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश के प्रति (उनमें से एक प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उप-आयुक्त, केन्द्रीय उत्पाद शुल्क को अपीलीय न्यायाधिकरण में आवेदन करने के आदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड / आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।
4. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार यथास्थिति मूल आदेश या न्यायनिर्णयनकर्ता प्राधिकारी के आदेश की प्रति पर रुपये 6.50/- का न्यायालय टिकट लगा होना चाहिए।
5. ब्यौरापूर्ण करने हेतु सीमाशुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 की ओर ध्यान आकर्षित किया जाता है।

To,
M/s. Gopal Suppliers,
Opp. Pipavav Port Main Gate,
Pipavav, Tal. Kovaya,
Distt. Amreli
Gujarat.

विषय : कारण बताओ नोटिस संख्या :

Subject: Show Cause Notice F. No. V/15-119/Dem-ST/HQ/2009 dated 19.03.2010.



BRIEF FACTS :-

A Show Cause Notice F. No.V/15-119/Dem-ST/HQ/2009 dated 19.03.2010 has been issued to M/s. Gopal Suppliers Opposite Pipavav Port Main Gate, Pipavav, Taluka – Rajula, District- Amreli (hereinafter referred to as “the Noticee”) proposing to demand Service Tax of ₹ 80,91,235/- along with interest from the Noticee and also proposing penalty upon the Noticee.

2. Briefly stated, the facts leading to the issuance of said SCN are that based on an intelligence that the contractors engaged by M/s. Pipavav Shipyard Limited, Pipavav port, Post- Uchhaiya, Taluka – Rajula, District- Amreli (hereinafter referred to as “PSL”) are not paying any Service Tax on the taxable service, necessary documents were called for from PSL. On going through the documents, it was observed that “the Noticee” was supplying manpower without paying Service Tax thereon. Therefore an inquiry was initiated against the Noticee and Summons dated 9-1-2008, 22-1-2008, 22-2-2008 and 25-6-2008 were issued. However, the Noticee neither remained present for giving evidence nor gave any reply for their absence. Thereafter, a search was carried out at the office premises of the Noticee on 21.10.2008 under Panchnama and several documents as listed in Annexure to the said panchnama dated 21-10-2008 were placed under seizure.

3. A statement of Shri Sumrabhai Mulubhai Vagh, proprietor of the Noticee was recorded under Section 14 of the Central Excise Act, 1944 (herein after referred to as “CEA, 1944”) read with Section 83 of the Finance Act, 1994 (hereinafter also referred to as “the Act”) on 24-10-2008, wherein he interalia stated that he is carrying on business since last 5-6 years; that his Permanent Account Number is ADFPV6978C; that he has been shown the Panchnama dated 21-10-2008 drawn during the course of search of his office and he agreed with the contents of the said panchnama; that he is supplying labourers and is engaged in cargo handling, that is to say loading and unloading in the vicinity of Pipavav Port; that he was not doing any other business anywhere; that he had not obtained any registration certificate as required under the Service Tax Law. The clarifications given by him regarding various documents seized during the course of search of his office are as under :

Sr.	Document Sr. No.	Explanation/ Clarification given
i.	File at Sr. No.1 :	The bills lying in this file were of his firm and the same were issued by him for providing labour for loading and unloading of goods at Pipavav port to M/s. Gujarat Pipavav Port Limited, Pipavav (hereinafter referred to as “GPPL”); that these bills related to the period from start of labour supply by him up to the month of March-2008; that he had received the payment for amounts shown in these bills; that he never collected Service Tax and hence never paid the same.
ii.	File at Sr. No. 2 :	this file contained the bills, as stated in explanation for file at Sr. No. 1, for the financial year 2008-09 up to September-2008.

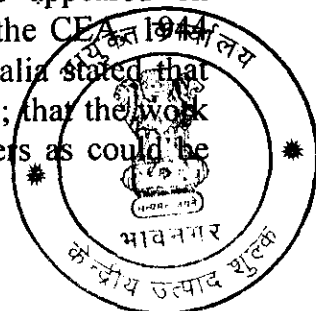


- iii File at Sr. No. 3 : this file contained the copies of the Work Orders allotted to him by GPPL.
- iv File at Sr. No.4 : the bills lying in this file were of his firm and the same were issued by him to M/s. Afcons Infrastructure Limited, C/o PSL, Pipavav (hereinafter referred to as "Afcons") for the trip of water tanker, supply of guards, supply of vehicles for transportation of goods and construction work done by him; that he received the amount shown in these bills; that these bills pertained to the financial year 2007-08 and for the month of April-2008.
- v File at sr. no.5 : this file contained the papers of TDS recovered from the payment of his bills; that page no. 1 to 35 was copy of the return of Income Tax and copy of audited Balance-Sheet for the financial year 2004-05, page no. 36 to 43 are copy of Form no. 16A issued by GPPL to the Noticee for the financial year 2006-07 and page no. 44 to 51 are copy of Form no. 16A issued by M/s. Gujarat Sidhee Cement Limited, Sidheeagram (hereinafter referred to as "GSCL") to the Noticee for the financial year 2006-07 and page no. 52 to 89 was copy of the return of Income Tax and copy of audited Balance-Sheet for the financial year 2005-06 and page nos. 90 to 103 were letters received from Income Tax office.
- vi File at sr. no.6 : this file pertain to his brother namely Shri Laxmanbhai M. Vagh and he (Laxmanbhai M Vagh) alone can explain this.
- vii File at sr. no.7 : page nos. 106 to 167 were the lorry receipt or chits for the trips of dumper made from jetty to yard or jetty to yard of Fairdeal for coal; that remaining pages are the chits for the trip of dumper on similar way; that he had collected the charges for the trips from respective party but he had neither collected the Service Tax nor paid.
- viii File at sr. no.8 : this file contained the bills which are same as his reply for file at Sr. No. 4 and for bills issued for the period from April-08 to August-2008 to Afcons.
- ix File at sr. no. 9 : this file contained the papers of quotations of works offered to various companies.



- x File at sr. no. 10 : out of the pages contained in this file, page nos. 1 to 33 were audit report for the financial year 2006-07 of his firm; that page nos. 34 to 47 were income calculation, ledger of accounts and balance-sheet etc. for the financial year 2006-07; that page no. 48 to 51 was copy of the above said audit report and page no. 52 to 93 were papers pertaining to return of Income Tax for the financial year 2006-07 and copy of the said return.
- xi File at Sr. No. 11 : out of the pages contained in this file, page no. 1 to 43 were copy of the work orders allotted to his firm by GPPL and page no. 44 to 57 were summons received by him and his brother Laxmanbhai M. Vagh from this office and page no. 58 to 69 were the copy of the work orders received by his brother Laxmanbhai M. Vagh from GPPL and page no. 70 to 73 were the copy of his PAN card and PAN card of his brother.
- xii File at Sr. no.12 : he had done the stuffing work of cement of GSCL during the financial year 2006-07 and this file contained the papers related to this work such as correspondence letters, Form 16A for TDS etc.; that he neither collected the Service Tax in the bills raised by him nor paid the same for this work.
- xiii File at Sr. no.16 : this file contained the bills of his firm for the work of cargo handling of Urea at Pipavav port; that he neither collected the Service Tax nor paid the same for this work.
- xiv File at sr. no.17 : page no. 1 to 271 of this file were the work orders of the works allotted by PSL to him and page no. 272 to 287 were the copy of the work orders of the works allotted by PSL to his brother Laxmanbhai M. Vagh. On being further asked, he stated that the work of cargo handling of cement, soyabean and stuffing of containers at CFS which were done by him, were all for export only and he had done the work of cargo handling as a sub-contractor of GPPL.

4. In response to summons dated 21.10.2008 and 26.11.2008 issued to GPPL, they submitted the copy of ledger account for the period 2004 to 20/10/2008 and the copies of the Work Orders issued to the Noticee, vide their letter dated 19-12-2008. Again summons were issued to GPPL to ascertain the nature of services provided to them by the Noticee. In response to one such summons, Ms. Purva Maheshwari, Accounts Officer of GPPL appeared on 05.02.2010 and her statement was recorded under Section 14 of the CEA, 1944 read with Section 83 of the Finance Act, 1994 wherein she inter alia stated that GPPL are outsourcing stevedoring related work to various persons; that the work orders provided to the Noticee were mostly for supply of labourers as could be



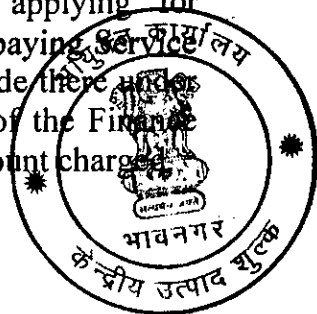
seen from the description & scope of work therein and that wherever in such work orders the scope of work is not expressly mentioned as supply of labourers, they were also essentially orders for supply of manpower; that rate quoted in the work orders are inclusive of all liabilities of provident fund, workmen compensation etc.

5. A further statement of Shri Sumrabhai Mulubhai Vagh, proprietor of the Noticee was recorded under Section 14 of the CEA, 1944 read with Section 83 of the Finance Act, 1994 on 11.02.2010 wherein he interalia stated that he agreed with the deposition of Ms. Purva Maheshwari of GPPL in her statement dated 05.02.2010 which was explained to him in Gujarati; that he had supplied labours to GPPL under various work orders allotted to him and the consideration received is reflected in his financial records but no Service Tax has been paid on such services; that he has obtained Service Tax registration in November 2008 and was paying Service Tax accordingly; that he has provided services only to PSL, GPPL, AFCONS and GSCL and not to any other company or person and has not paid any Service Tax on the consideration received from these companies; that he accepted his liability to pay tax on the services provided to these companies and that the income mentioned in the audit reports of the Noticee submitted by him do not include all the considerations received by them from all the persons/firms.

6. A statement of Senior Officer accounts, duly authorized person of M/s Afcons was recorded on 24.02.2010 under Section 14 of the CEA, 1944 read with Section 83 of the Finance Act, 1994 wherein he interalia stated that they had awarded contract to the Noticee for supply of drinking water for their workers and for hiring of vehicle for travel by their staff; that PSL awarded contract for construction of labour colony to the Noticee and that the Noticee did not undertake any work for them during the period prior to 2007-08.

7. In response to Summons dated 25.01.2010 and 12.02.10, M/s. Gujarat Sidhee Cement Ltd. vide their letter dated 05.02.10 submitted ledger account in respect of the Noticee for the period from 01.04.2006 to 30.09.2009 and M/s. Pipavav Shipyard Ltd. vide their letter 25.02.10 submitted ledger account in respect of the Noticee for the period from 01.04.07 to 15.02.2010.

8. On the basis of the foregoing, it has been alleged in the SCN that the Noticee is engaged in activities of providing workers for stevedoring related work, construction of labour colony, renting of vehicle for travel by the employees of the recipient and supply of trailers on hire basis to M/s GPPL, GSCL, Afcons and PSL etc. which in terms of Section 65A of the Finance Act 1994 are liable to be classified within the ambit of Manpower Recruitment and Supply Agency's Service, Rent a cab scheme operator's service, Supply of Tangible Goods service and Commercial or Industrial Construction Service as defined under Section 65(105)(k), 65(105)(o), 65(105)(zzzj) and 65(105)(zzq), respectively of the Finance Act, 1994. The service of supply of labourers and construction of a civil structure or part thereof to be used primarily for commerce or industry became taxable w.e.f. 16.06.2005. Similarly, the scope of service of Rent a cab scheme operator's service was widened to include any person engaged in the business of renting of cabs in 1998 and the Supply of Tangible Goods service became taxable w.e.f. 16.05.2008. It has been further alleged that the noticee has provided the various taxable services as discussed herein above without applying for registration under any of the category of said services and without paying Service Tax leviable thereon under the Finance Act 1994 and the Rules made thereunder with intent to evade payment of Service Tax. As per Section 67 of the Finance Act, 1994, Service Tax on these services is leviable on the gross amount charged.



9. It has also been alleged in the SCN that the financial records viz. Balance Sheet and Profit and Loss account of the Noticee do not include considerations received from all their service recipients. This has been admitted by the Proprietor of the Noticee and has confirmed that ledgers submitted by the various service recipients correctly show the payments made by them for the services rendered by the Noticee. Therefore, the ledgers have been the documents relied upon for the purpose of calculation of Service Tax liability of the Noticee.

10. The Noticee has allegedly provided taxable Service totally valued at ₹ 6,81,79,517/- during the period from 16-6-2005 to 31-3-2009 and has suppressed the fact that they are engaged in providing taxable service, with intent to evade payment of Service Tax leviable on said services and never submitted the details in spite of repeated summons issued to him and appeared for statement only after the search of their office and detection of case against them, hence extended period contemplated under 1st proviso of Section 73(1) of the Finance Act, 1994 has been invoked for recovery of Service Tax not paid.

11. From the foregoing paras, the Noticee has allegedly contravened the following provisions of chapter V of the Finance Act, 1994 and Rules related to Service Tax matter:

- i] Section 69 of the Finance Act, 1994 read with rule 4 of the Service Tax Rules, 1994 in as much as they failed to apply to the Service Tax department for Registration under any of the category of taxable Services which were provided by him.
- ii] Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994 in as much as he has failed to pay Service Tax at appropriate rate on the taxable value recovered by him from his customers such as GPPL, PSL, GSCL etc. for the taxable services rendered by him.

12. The Noticee suppressed the fact that he is engaged in providing taxable services and did not take Service Tax registration, thereby contravened the provisions of Section 69 with intention to evade payment of Service Tax. Therefore the Noticee has rendered himself liable for penalty under Section 78 of the Finance Act, 1994.

13. Accordingly, the Noticee has been called upon vide show cause notice F.No. V/15-119/Dem-ST/HQ/2009 dated 19.03.2010 to show cause as to why: -

- (i) The Service Tax amounting to ₹ 80,91,235/-, (Rupees Eighty Lakhs Ninety One Thousand Two Hundred Thirty Five only) (calculated as per Annexure - A attached with the Show Cause Notice) should not be demanded and recovered under proviso to Section 73(1) of the Act. The interest at the appropriate rate as applicable till the date of payment of Service Tax should not be charged under Section 75 of the Act.
- (ii) Penalty should not be imposed upon them under Section 76 of the Act for the failure to assess Service Tax as required under Section 70 of the Act and make the payment of Service Tax within the period and in the manner prescribed under Section 68 of the Act read with rule 6 of the Rules.



- (iii) Penalty should not be imposed upon them under Section 77 of the Act for failure to apply for Registration under Section 69 of the Act read with Rule 4 of the Rules.
- (iv) Penalty should not be imposed upon them under Section 78 of the Act for the Service Tax not levied and paid by reason of suppressing of the facts with intent to evade payment of Service Tax.

14.1 The Noticee vide letter dated 26.10.2010 submitted that he had handed over the said SCN to his Advocate who returned the case file as he is not well conversant with the Service Tax matters and stated that he would submit defense reply to the said SCN as soon as he find out a consultant.

14.2 As no reply was received from the Noticee, he was requested vide letters dated 11.02.2011 and 25.02.2011 to file written submission to the SCN.

14.3 The Personal Hearing in this case was fixed between 21.03.2011 and 25.03.2011 and the Noticee was directed to appear for Personal Hearing on any day between 21.03.2011 and 25.03.2011. The Noticee was also requested to file written submission to the SCN.

14.4 The Noticee vide letter dated 25.03.2011 submitted that he would require copies of certain documents seized by the department and requested to grant extension for further period of two months to file defence reply.

14.5 The Noticee was requested vide letter dated 29.03.2011 to complete the inspection of records seized under Panchnama dated 21.10.2008 within one week and to file reply to SCN by 15.04.2011.

14.6 Shri B.B. Velani, Advocate appointed by the Noticee vide letter dated 07.04.2011 submitted that they want to have inspection of seized records and obtain the Xerox copies of necessary documents and requested to grant one month's time for preparation of reply to show cause notice.

14.7 Thereafter, the Noticee was requested vide letter dated 26.04.2011 to inspect the records relied upon in the SCN on any day between 02.05.2011 to 06.05.2011. However, the noticee did not avail the opportunity for inspection of records. Therefore, he was again requested vide letter dated 09.06.2011 to complete inspection of relied upon records on any day between 13.06.2011 to 17.06.2011.

14.8 Shri B.B. Velani, Advocate appointed by the Noticee completed the inspection of all the records relied upon in the SCN and requested to provide Xerox copies of several documents as mentioned in his letter dated 16.06.2011. Accordingly, legible Xerox copies of relied upon documents requested by him was supplied on 13.07.2011 which has been acknowledged vide letter dated 13.07.2011.

14.9 Since the Noticee did not file written submission, he was again requested vide letter dated 29.08.2011 to submit written reply latest by 09.09.2011.



14.10 Shri B.B. Velani, Advocate appointed by the Noticee, vide his letter dated 08.09.2011 submitted that he has to obtain the copies of Accounts for the period from 01.04.2005 to 31.03.2009 from his client for preparation of reply to SCN and requested to grant 20 days more time for submission of reply to SCN.

14.11 As the Noticee did not submit reply to SCN, Personal Hearing was fixed on 28.09.2011 and the Noticee was requested to submit written reply to SCN on or before the date of Personal Hearing. However, none appeared for Personal Hearing.

14.12 Shri B.B. Velani, Advocate appointed by the Noticee vide his letter dated 28.09.2011 requested for 15 days time for preparation of written submission. Accordingly, another opportunity of Personal Hearing was granted on 19/20.10.2011. It was also requested to file written reply on or before the date of Personal Hearing.

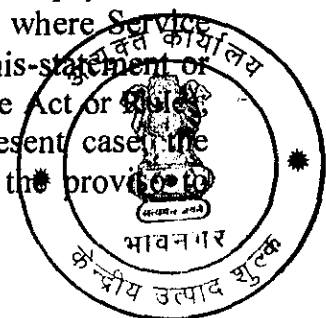
PERSONAL HEARING AND WRITTEN SUBMISSION :-

15. Personal Hearing has been held on 19.10.2011 wherein Shri B.B. Velani, Advocate appeared on behalf of Noticee. He submitted written reply dated 18.10.2011 and reiterated the same.

16.1 In the written reply dated 18.10.2011 submitted by the Noticee, it has been submitted that he is an illiterate villager from village Pipavav (Tal. Rajula) and doing the labour contract business with the companies at Pipavav. For doing business, various types of contracts have been made with these companies, which are in English. While signing these contracts, he was unaware about the Rules and Regulations of Service Tax. Moreover, companies have also never instructed/ guided him to collect Service Tax from them. He submitted that Service Tax is to be collected and paid to Government. He had to collect it from these companies and paid to the Government account. But due to ignorance and non – guidance from these big companies, the fact is the present show cause notice.

16.2 It is further submitted that in the Works Contracts, it is clearly mentioned that the rates are inclusive of all the taxes, except Service Tax. This clearly stipulates that the liability of the Service Tax is on these companies to pay to him (Noticee). But as narrated above, it was not collected by him while issuing bills, hence were not paid to him which resulted in non-payment of Service Tax to the Government Account. He submitted that non – obtaining of Registration and non - payment of Service Tax is only due to his ignorance and non – guidance from these big companies. There is no mens rea or any mala fide intention behind it.

16.3 He submitted that as can be seen from Para 3 of the SCN, his statement was recorded wherein it is clearly mentioned that he had never collected the Service Tax. No evidence was found from the files / bills seized during search of his office showing that the Service Tax was collected by him. Hence, from the above, it can be easily concluded that there was no intention to evade payment of Service Tax. The proviso to Section 73(1) can only be applicable where Service Tax is not levied or paid by reason of fraud, collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of the Act or Rules with the intention to evade duty. It is submitted that in the present case, the intention to evade duty is not proved by the Department hence the proviso to



Section 73(1) is not applicable to the present case and the demand raised against him can be justifiably dropped on this very point as there was no intention to evade payment of Service Tax. Hence, it is requested to drop the SCN on this very ground.

16.4 It is further submitted that as per section 67 of the Act, Service Tax is to be charged on the amount received and not on the billed amount. Department has erroneously calculated Service Tax on amount received, which means that full amount received + Service Tax on it. Actually, the amount received by him is to be considered as the gross amount charged and is inclusive of Service Tax payable.

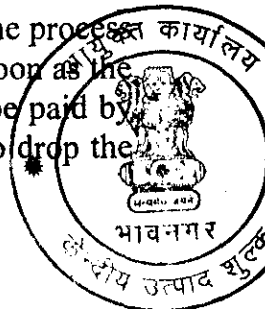
16.5 It is also submitted that the threshold exemption of ₹ 4,00,000/- in terms of Notification No. 6/2005-S.Tax dated 01.03.2005 is also not made available to them in the calculation shown in Annexure – A attached to the SCN. It is also submitted that there is calculation error in services provided to M/s. Afcons. The amount of service provided is ₹ 71962/- and not ₹ 1,73,237/-.

16.6 On the basis of above, the calculation of Service Tax payable has been submitted as follows :-

Period	Party	Amount (₹)	Abatement/Exemption (₹)	Total (₹)	Rate	Service Tax payable (₹)
01.04.05 to 17.04.06	GPPL	1,39,96,098	4,00,000	1,35,96,098	10.20%	12,58,441
18.04.06 to 10.05.07	GPPL	2,74,79,791	0	2,74,79,791	12.24%	30,38,718
11.05.07 to 23.02.09	GPPL	2,17,50,317	0	2,17,50,317	12.36%	
	PSL	55,54,979	37,21,836	18,33,143	12.36%	
	PSL	26,33,529	0	26,33,529	12.36%	
	Afcons	71,962	28785	43177	12.36%	
	GSCL	32,290	0	32,290	12.36%	
	TOTAL			2,62,92,456	12.36%	28,92,264
	TOTAL					71,89,423

16.7 It is submitted that once they came to know that the services provided by them are taxable in nature, they obtained Service Tax Registration on 18.11.2008. Subsequently, they paid Service Tax for the period from 01.11.2008 to 28.02.2009 to the tune of ₹ 3,00,118/-. Copies of Registration Certificate and Challans have been enclosed and it is submitted that this amount should also be deducted from the Service Tax demand of ₹ 71,89,423/-, which will come to ₹ 68,89,305/-.

16.8 Moreover, since it is now learnt that the aforementioned services are taxable and Service Tax is levied on it but as it is not collected, he is in the process of raising the bills to these companies for collection of Service Tax. As soon as the Service Tax amount is collected from them, the same would definitely be paid by him to the Government Account. In view of the above, it is requested to drop the



demand raised against him as the Service Tax is not collected / received by him till date. As it is not received, the question of non – payment and confirmation thereof does not arise.

16.9 He referred to and relied upon the decisions in the case of Smitha Shetty V/s. CCE [2003 (156) ELT 84 (CESTAT – Bang.)], CCE V/s. Impress Ad – Aids & Displays [2005 1 (II) ITP (Ser-Tax) 35 (Rep), Cestat Bangalore = 2004 (173) E.L.T. 137 (Tri. - Bang.)] and Super Security Service V/s. CCE [2003 (157) ELT (433 (Tri. – Chennai))] and requested that lenient view may be taken and no penalty be imposed.

17.1 The Noticee vide letter dated 25.11.2011 submitted that they have already prepared and supplied the Service Tax demand bills to the service recipient companies for collection of Service Tax and as soon as the Service Tax amount will be recovered from the said companies, the same would be immediately paid to the Government Account.

17.2 The Noticee also submitted copies of said bills issued to service recipients the details of which are as follows :-

Sr. No.	Name of Service Recipient companies to whom Bills have been issued	Bill No.	Bill Date	Period	Amount (₹)	Rate	Service Tax Amount (₹)
1	Gujarat Pipavav Port Ltd.	101	18.10.2011	01.04.2005 to 17.04.2006	1,39,96,098/-	10.20	14,27,602/-
2		104	18.10.2011	18.04.2006 to 10.05.2007	2,74,79,791/-	12.24	33,63,526/-
3		103	18.10.2011	11.05.2007 to 23.02.2009	2,17,50,317/-	12.36	26,88,340/-
4	Afcons	107	18.10.2001	11.05.2007 to 23.02.2009	69,295/- (Value after abatement)	12.36	8,565/-
5	Gujarat Siddhi Cement Ltd.	108	18.10.2011	18.04.2006 to 15.05.2007	3,85,054/-	12.24	47,130/-
				11.05.2007 to 23.02.2009	32,290/-	12.36	3,991/-
6	Pipavav Shipyard Ltd.	106	18.10.2011	11.05.2007 to 23.02.2009	18,33,143/- (Value after abatement)	12.36	2,26,576/-
							26,33,529/-
	TOTAL				6,81,79,517/-		80,91,235/-

DISCUSSION AND FINDINGS :-

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



19. It has been alleged in the show cause notice that the noticee has been engaged in providing services falling under the categories of 'Manpower Recruitment or Supply Agency's service', 'Rent A Cab Operator's service', 'Supply of Tangible Goods service' and 'Commercial or Industrial Construction Service' as defined under section 65(105)(k), 65(105)(o), 65(105)(zzzj) and 65(105)(zzq) respectively of the Finance Act, 1994, without obtaining Service Tax Registration and without paying applicable Service Tax leviable on such services.

20.1.1 'Manpower Recruitment Agency' as defined in the Act was liable to pay service tax with effect from 07.07.1997. The Finance Act, 2005 has rechristened this service as 'Manpower Recruitment or Supply Agency'. The definition of 'Manpower Recruitment or Supply Agency' as per Section 65(68) of the Act, with effect from 16.06.2005 is as under :-

"manpower 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;";

20.1.2 The definition of taxable service as per Section 65(105)(k) of the Act, with effect from 16.06.2005 is as under :-

"(105) 'Taxable service' means any service provided or to be provided,-

"(k) to a client, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner;";

20.1.3 I have perused sample Work Orders issued to the Noticee. In Work Order No. GPPL/OPS/WO/015/2008 dated 20.02.2008 issued by GPPL, scope and location of work has been mentioned as 'supply of manpower for CFS operations' and description has been mentioned as 'Supply of Labourers for Custom Gate, Pre Gate, Stevedoring/ CFS related jobs'. Ms. Purva Maheshwari, Accounts Officer of GPPL in her statement dated 05.02.2010 has stated that the Work Orders provided to the Noticee were mostly for supply of labourers as could be seen from the description and scope of work therein and that wherever in such Work Orders the scope of work is not expressly mentioned as supply of labourers, they are also essentially orders for supply of manpower. Shri Sumrabhai M. Vagh, Proprietor of the Noticee in his statement has also confirmed that he had supplied labours to GPPL under various Work Orders allotted to him. I, therefore find that the Noticee is covered within the definition of 'Manpower Recruitment or Supply Agency' as defined under Section 65(68) of the Act and aforesaid activities of the Noticee clearly falls under the definition of taxable service as provided under Section 65(105)(k) of the Act, which is leviable to Service Tax.

20.2.1 The Service Tax was levied on Rent-a-Cab service with effect from 16.7.1997. The definition of 'Cab' as per Section 65(20) of the Act, as substituted vide Finance Act, 2007, is as follows :-

"Cab" means –

- (i) a motorcab, or
- (ii) a maxicab, or
- (iii) any motor vehicle constructed or adapted to carry more than twelve passengers, excluding the driver, for hire or reward :



Provided that the maxicab referred to in sub-clause (ii) or motor vehicle referred to in sub-clause (iii) which is rented for use by an educational body imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre, shall not be included within the meaning of cab.

20.2.2 The definition of 'maxicab' as per Section 65(70) of the Act, is as follows :-

"Maxicab" has the meaning assigned to it in clause (22) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988)"

20.2.3 The definition of "motorcab" as per Section 65(71) of the Act, is as follows :-

"Motorcab" has the meaning assigned to it in clause (25) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988)".

20.2.4 The definition of 'Rent-a-Cab Scheme operator' as per Section 65(91) of the Act is as follows :-

"Rent-a-cab scheme operator" means any person engaged in the business of renting of cabs."

20.2.5 The definition of taxable service as per Section 65(105)(o) of the Act, is as under :-

"(105) 'Taxable service' means any service provided or to be provided,-

"(o) to any person, by a rent-a-cab scheme operator in relation to the renting of cab;";

20.2.6 I have perused sample Work Order issued to the Noticee. Work Order No. AFC/2248/KR/WO dated 29.04.2008 issued by M/s. Afcons Infrastructure Limited is for hire of vehicle GJ-14-E 4250 (Scorpio) and description of work is mentioned as "Hire Charge with driver for 24 hrs (Maximum running of 4000 km) for the month, including taxi passing charges – ₹ 22,000/- per month for Extra Driver 3000/- per Month, Fuel/ Diesel cost by AFCONS considering average 10 KM per ltrs. – As Applicable, Running of Vehicle above 4000 Km, extra charges per Km – ₹ 5/- per KM, Lube oil charge @ 1.5 ltrs per 1000 km upto 4000 Km – As Applicable, Holiday Charge (Sunday) – 400/-". Shri Ranbir Santra, Senior Officer Accounts of M/s. Afcons Infrastructure Ltd. in his statement dated 24.02.2010 has interalia stated that they had awarded contract to the Noticee for hiring of vehicle for travel by their staff. I, therefore find that the Noticee is covered within the definition of 'Rent-a-cab scheme operator' as defined under Section 65(91) of the Act and aforesaid activities of the Noticee falls under the definition of taxable service as provided under Section 65(105)(o) of the Act, which is leviable to Service Tax.

20.3.1 Service Tax on 'Supply of Tangible Goods Service' has been levied from 16.05.2008. The definition of taxable service as per Section 65 of the Act, is as under :-



“(105) ‘Taxable service’ means any service provided or to be provided,-

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

20.3.2 I have perused sample Work Order No. 08-09/PS/000016 dated 09.09.2008 issued by M/s. Pipavav Shipyard Limited – Export Oriented Unit to Noticee, wherein it is mentioned as “Service Description – Trailer Hire Charges, Qty – 7, UOM – Numbers, Rate – 70000/- , Amount – 4,90,000/-, 40 MT Capacity Tractor with Horse on monthly hire for 24 hours with two drivers, Above rates for transportation only, Diesel and Oil will be provided by PSL, Diesel 2 Kmpl additional to be paid, 2 Driver expenses paid by supplier, etc.” From the nature of services provided, I find that the same are provided in relation to supply of tangible goods without transferring right of possession and effective control and hence are covered under the definition of taxable service as provided under Section 65(105)(zzzzj) of the Act, which is leviable to Service Tax.

20.4.1 The definition of ‘Commercial or Industrial Construction service’ as per Section 65(25b) of the Act is as follows :-

“commercial or industrial construction service” means –

- (a) construction of a new building or a civil structure or a part thereof; or*
- (b) construction of pipeline or conduit; or*
- (c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or*
- (d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit,*

which is –

- (i) used, or to be used, primarily for; or*
- (ii) occupied, or to be occupied, primarily with; or*
- (iii) engaged, or to be engaged, primarily in,*

commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;

20.4.2 The definition of taxable service as per Section 65(105)(zzq) of the Act, is as under :-

“(105) ‘Taxable service’ means any service provided or to be provided,-

“(zzq) to any person, by any other person in relation to commercial or industrial construction.



20.4.3 I have perused sample Work Orders issued to the Noticee which includes work of execution of soil, brick masonry, White Wash (in 2 coats), providing distemper 2 coats, providing and lying MS pipe support etc. I find that the activities carried out by the Noticee falls under the definition of "Commercial or Industrial Construction Service" and under the definition of taxable service as provided under Section 65(105)(zzq) of the Act, which is leviable to Service Tax.

20.5 I, therefore find that the Noticee has provided taxable services of 'Manpower Recruitment or Supply Agency's Service', 'Rent-a-cab Scheme Operator's service', 'Supply of Tangible Goods Service' and 'Commercial or Industrial Construction Service' as defined under Section 65(105)(k), 65(105)(o), 65(105)(zzzj) and 65(105)(zzq) respectively of the Finance Act, 1994. Shri Sumrabhai M. Vagh in his statement dated 11.02.2010 has accepted his liability to pay tax on these services provides to PSL, GPPL, AFCONS and GSCL. The Noticee has also not disputed or denied these facts in their written submission or during the course of personal hearing. In fact, the Noticee has issued the Bills to service recipient companies wherein period of service rendered, category of service, value of service rendered and amount of Service Tax receivable from the service recipient companies have been mentioned which are exactly in accordance with the details shown in show cause notice and Annexure A attached therewith. Therefore, the noticee is liable to pay Service Tax on the value of aforesaid taxable services provided by him.

21.1 The Noticee has contended that it is clearly mentioned in Work Orders that the rates are inclusive of all the taxes, except Service Tax which clearly stipulates that the liability of the Service Tax is on these companies to pay to him.

21.2 I find that as per Section 68 of the Act, every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed. In the present case, the Noticee is the person who has provided taxable services to service recipients and therefore the Noticee is required to pay service tax at specified rate in the prescribed manner.

22.1 As per Section 67 of the Act, 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. I find that the ledger accounts submitted by service recipients have been relied upon in the SCN for the purpose of calculation of Service Tax liability of the Noticee. Shri Sumrabhai M. Vagh in his statement dated 11.02.2010 has stated that he has provided services only to PSL, GPPL, AFCONS and GSCL and not to any other company or person and has not paid any Service Tax on the consideration received from these companies. He also confessed that the income mentioned in the audit reports of the Noticee submitted by him do not include all the considerations received by him from all the persons/firm and has confirmed that ledgers submitted by various service recipients correctly show the payments made by them for the services rendered by the Noticee.

22.2.1 The Noticee has contended that the department has erroneously calculated Service Tax on amount received, which means that full amount received + Service Tax on it. Actually, the amount received is to be considered as the gross amount charged and is inclusive of Service Tax payable.



22.2.2 On perusal of sample Work Orders, I find that there is a specific clause mentioning that 'the rates are inclusive of all taxes except Service Tax/ Sales Tax, which are prevailing on the date of issue of work order, or imposed later on by Government/ statutory body. Service Tax / Sales Tax will be paid extra as applicable'. In fact, the Noticee in his written reply has submitted that it is clearly mentioned in the Work Orders that the rates are inclusive of all the taxes except Service Tax.

22.2.3 I also find that the Noticee in his written submission has stated that since the services provided by him are taxable and Service Tax is levied on it but not collected by him, he is in the process of raising the bills to these companies for collection of Service Tax. The Noticee, vide letter dated 25.11.2011, has submitted copies of Bills issued to service recipient companies for the amount of Service Tax. While issuing such Bills, the Noticee has separately shown the amount of Services rendered and amount of Service Tax leviable on such service over and above the amount of services rendered, which are exactly as alleged in the SCN. Though the Noticee has claimed the benefit of cum service tax price, he himself has not considered the amount of services rendered as cum service tax price.

22.2.4 I therefore hold that when the Work Orders clearly mention that 'Service Tax will be paid extra as applicable' and when the Noticee himself has issued the bills for collection of Service Tax over and above the amount of services rendered, the benefit of cum service tax price can not be extended to the Noticee and the amount charged and received by the Noticee needs to be taken as value under Section 67 of the Act for the purpose of charging Service Tax.

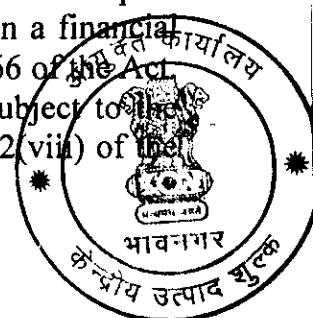
22.3.1 The Noticee has submitted that there is calculation error in the services provided to AFCONS. The amount of Service provided is ₹ 71,962/- and not ₹ 1,73,237/-.

22.3.2 I find that the amount of 'Rent-a-Cab Operator's service' rendered by the Noticee to M/s. AFCONS has been taken as ₹ 1,73,237/- and the value after allowable deduction has been taken as ₹ 69,295/- in the SCN. The amount of Service Tax payable has been calculated in the SCN on the said value of ₹ 69,295/-.

22.3.3 The Noticee, while contending that there is calculation error in the SCN has not provided any calculation how he has worked out the amount of ₹ 71,962/-. The Noticee has submitted copy of Bill No. 107 dated 18.10.2011 issued to M/s. AFCONS wherein value of service rendered after allowable abatement has been shown as ₹ 69,295/-, Rate of Service Tax has been shown as 12.36% and amount of Service Tax has been shown as ₹ 8,565/- which are exactly as shown in Annexure A to the show cause notice. Therefore, the contention of the Noticee is not found tenable.

22.4.1 The Noticee has pointed out that the threshold exemption of ₹ 4,00,000/- in terms of Notification No. 6/2005-Service Tax dated 01.03.2005 should have been allowed to him.

22.4.2 Notification No. 6/2005-Service Tax dated 01.03.2005 exempted taxable services of aggregate value not exceeding four lakh rupees in a financial year from the whole of the service tax leviable thereon under section 66 of the Act. The exemption contained in the said Notification was admissible subject to the conditions mentioned at Para 2 of the said Notification. As per Para 2 (vii) of the



said Notification, exemption contained in the said notification was admissible if the aggregate value of taxable services rendered by a provider of taxable service from one or more premises does not exceed rupees four lakhs in the preceding financial year.

22.4.3 The Noticee has claimed threshold exemption of ₹ 4,00,000/- in terms of Notification No. 6/2005-Service Tax dated 01.03.2005, however he has not submitted any documentary or other evidence in support of his claim. From the documents available on record, I find that income of ₹ 15,59,589/- towards 'Labour Supply Contract Income' has been shown in the Trading Account for the year ended 31.03.2005 of Sumrabhai M. Wagh. Though, Shri Sumrabhai M. Vagh, has deposed in his statement dated 11.02.2010 that the income mentioned in the audit reports of the Noticee submitted by him do not include all the considerations received by them from all the persons/ firm, even if the amount of income as ₹ 15,59,589/- shown in the Trading Account for the year ended 31.03.2005 is considered correct, the same is more than the threshold limit of Rupees Four Lakhs. Further, the Noticee has been engaged in providing various taxable services, some of which were taxable in the financial year 2004-05 as well. The Noticee has not submitted any evidence proving that taxable services rendered by him did not exceed rupees four lakhs in the financial year 2004-05.

22.4.4 In the show cause notice, the amount of services rendered to M/s. Gujarat Pipavav Port Ltd. during the period from 16.06.2005 to 17.04.2006 as ₹ 1,39,96,098/-, Rate of Service Tax as 10.20% and amount of service tax payable as ₹ 14,27,602/- has been shown. It is against this amount of services of ₹ 1,39,96,098/- that the Noticee has claimed exemption of ₹ 4,00,000/-. However, I find that the Noticee has issued Bill No. 101 dated 18.10.2011 to M/s. Gujarat Pipavav Port Ltd. for 01.04.2005 to 17.04.2006 showing amount of services rendered as ₹ 1,39,96,098/-, Rate of Service Tax as 10.20% and amount of Service Tax as ₹ 14,27,602/-. Thus, in the Bill issued to the service recipient, the Noticee has not availed the exemption as provided under Notification No. 6/2005-Service Tax dated 01.03.2005 but has charged the Service Tax on the taxable service provided by him from the beginning.

22.4.5 Taking these facts into consideration, I hold that the benefit of exemption as provided under Notification No. 6/2005-Service Tax dated 01.03.2005 is not admissible to the Noticee in the Financial Year 2005-06. In subsequent years, the value of taxable services rendered by the Noticee has been more than the amount prescribed at Para 2(viii) of the said Notification, hence the exemption provided therein is not admissible to the Noticee.

23. I find that the said Noticee has been engaged in providing various taxable services including 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 Act 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 Act 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 Act and Rule 4 of Service Tax Rules, 1994.



24.1 The Noticee has submitted that while signing various types of contracts with different companies at Pipavav, he was unaware about the Rules and Regulations of Service Tax. He has also contended that he has never collected Service Tax hence there was no intention to evade payment of Service Tax. The proviso to section 73(1) can only be applied where any service tax has not been levied or paid or has been short levied or short paid by reason of fraud or, collusion or, willful mis-statement or suppression of facts or contravention of any of the provision of the Act with intent to evade payment of service tax. It is submitted that in the present case, the intention to evade service tax is not proved by the department hence the proviso to section 73(1) is not applicable and the demand raised against him can be justifiably dropped on this very ground as there was no intention to evade payment of Service Tax.

24.2 In this regard, I find that the Noticee has been engaged in providing various services. Service Tax has been levied on Rent-a-Cab service with effect from 16.7.1997. Service Tax on 'Manpower Recruitment Agency' has been levied since 07.07.1997 and its scope was widened with effect from 16.06.2005 so as to include services provided in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner. However, the noticee did not obtain Service Tax Registration, did not start paying Service Tax and did not furnish prescribed return. I also find that Summons dated 09.01.2008, 22.01.2008, 22.02.2008 and 25.06.2008 were issued to the Noticee. However, in spite of receiving repeated summons from the department, the Noticee neither submitted the documents called for vide those summons, nor remained present for giving evidence nor gave any reply in respect of those summons. This clearly show deliberate defiance of law by the Noticee. It was only after the search carried out at the premises of the said Noticee on 21.10.2008 that the Noticee applied for and obtained Service Tax Registration on 18.11.2008 and thereafter remained present for giving statement. The Noticee has also not correctly maintained his financial records viz. Balance Sheet and Profit & Loss Account. Shri Sumrabhai M. Vagh has in his statement admitted that the income mentioned in the audit reports of the Noticee submitted by him do not include all the considerations received by him from all the persons/ firms. Thus, it is only on account of investigation carried out by the Central Excise department that the amount of services rendered by the Noticee to various service recipients could be ascertained as financial records viz. Balance Sheet and Profit & Loss Account would not have provided correct details of services rendered by the Noticee. Further, even though not disputing the leviability of Service Tax on the services rendered by him, the Noticee has not paid the amount of Service Tax and maintained that he would pay the amount of Service Tax on receipt from service recipients. Therefore, non payment of Service Tax by the Noticee is not found to be due to reasonable cause or with bonafide belief. Taking all these facts into consideration, I have no hesitation in holding that the Noticee has intentionally not paid Service Tax leviable on the taxable services provided by him, suppressed the facts from department even when called upon to do so and the Noticee contravened the provisions of Finance Act, 1994 and Service Tax Rules, 1994 with intent to evade payment of Service Tax.

24.3 As the Noticee did not pay Service Tax on the value of service rendered by him by reason of suppression of facts and by contravention of the provisions of Act 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 Act for demanding Service Tax, instead of normal period of one year is found to be correctly invoked in this case.



25. In view of the above discussion, I find that the said Noticee has rendered taxable services of ₹ 6,81,79,517/- under the category of 'Manpower Recruitment or Supply Agency's Service', 'Rent-a-cab Scheme Operator's service', 'Supply of Tangible Goods Service' and 'Commercial or Industrial Construction Service' during the period from 16.06.2005 to 23.02.2009. I find that the Service Tax (along with Education Cess and SHE Cess) of ₹ 80,91,235/- payable on the aforesaid value of taxable service is required to be confirmed by invoking extended period of five years under proviso to Section 73(1) of the Act along with interest at appropriate rate under Section 75 of the Act.

26.1 The Noticee has submitted that no penalty be imposed on him and he has relied upon the following decisions of Hon'ble CESTAT. In the case of *Smitha Shetty V/s. Commissioner of Central Excise, Bangalore* [2003 (156) ELT 84 (CESTAT – Bang.)], it was held that discretion to impose penalty to be exercised judicially after considering the relevant circumstances. Even if a minimum penalty is prescribed, the competent authority will be justified in refusing to impose penalty, when there is technical or judicial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender not liable to act in the manner prescribed by the statute. I find that the said decision of the Hon'ble CESTAT is not applicable in the facts of present case in as much as the Noticee has contravened the provisions of the Act and rules framed there under with intent to evade payment of service tax and these contraventions are not technical in nature or due to bonafide belief. The Noticee has also relied upon the decision of Hon'ble CESTAT in the case of *Commissioner of Central Excise, Bangalore-III V/s. Impress Ad-AIDS & Displays* [2004 (173) E.L.T. 137 (Tri. – Bang.)] wherein the assessee deposited the amount of service tax for the period April 1997 to June 1997 along with interest and in view of this fact, the action of the assessee was found to be bona fide. However, in the present case, the Noticee has not paid Service Tax leviable on taxable services rendered by him and such non payment of Service Tax by the Noticee is not found to be due to reasonable cause or with bonafide belief. The Noticee has also relied upon the decision in the case of *Super Security Service V/s. Commissioner of Central Excise, Trichy* [2003 (157) E.L.T. 433 (Tri. – Chennai) and contended that before imposing penalty on the assessee, the department has to prove malafide intention on the part of the assessee to evade tax. In the present case, as already discussed, the Noticee has intentionally not paid Service Tax leviable on the taxable services provided by him, suppressed the facts from department even when called upon to do so and the Noticee contravened the provisions of Act and Service Tax Rules with intent to evade payment of Service Tax.

26.2 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.

26.3 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 para, the said noticee was required to pay Service Tax in respect of services in the category

