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

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

फाईल सं. V/15-19/Dem-ST/HQ/2011-12
F. No.

आदेश की तारीख : 30/01/2013.
Date of Order :
जारी करने की तारीख : 30/01/2013.
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 : 03 / BVR / Commissioner / 2013

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 अपीलीय 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) ओ20, 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 प्राप्ति के दिनांक से तीन माह के भीतर की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियॉ 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, वहॉ 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 उपधाराओं (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 उपआयुक्त, 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 शर्तो पर अनुसूची1 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. व्यौरापूर्ण करने हेतु सीमाशुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 की ओर ध्यान आकर्षित किया जाता है।

To,

(1) The Port Officer,
Gujarat Maritime Board,
Jafrabad.

(2) M/s. State Charges GoG,
C/o. The Port Officer,
Gujarat Maritime Board,
Jafrabad.

Subject: Show Cause Notice F. No. V/15-19/Dem-ST/HQ/2011-12 dated 21.10.2011.

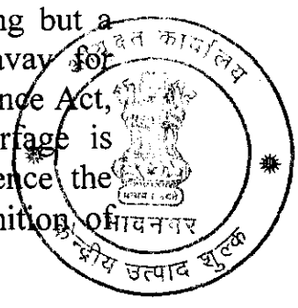
BRIEF FACTS OF THE CASE :-

1. M/s. Gujarat Maritime Board, Jafrabad for the period 2006-07 to February-2009 renamed as M/s. State Charges GOG , Jafarabad Port for the period from March-2009 to March-2010 (hereinafter referred to as "the Noticee") are holding Service Tax Registration certificate in form ST-2 No. TMPAX8547DST001 under section 69 of chapter V of the Finance Act, 1994 for providing services under the category of "Port Services" and have undertaken to comply with the conditions prescribed in the Service Tax Rules, 1994.

2. During the course of Audit conducted by the HQ Audit, Bhavnagar, it was noticed that the noticee have been regularly paying service tax on the taxable amount received by them from M/s. GPPL, Pipavav towards water front royalty / wharfage charges. On further verification, it was observed by the Audit that the noticee had started the payment of service tax on the amount of water front royalty charges considering it as "port service" since April-2010 but have not paid the service tax on the taxable amount received by them during the period from 2006-07 to 2009-10 towards water front royalty charges / wharfages. On being asked by the audit as to how and why the service tax has not been paid by the noticee for the taxable amount received by them during past period i.e. 2006-07 to 2009-10 towards water front royalty charges / wharfages, the noticee replied that they are not ready to pay the service tax on the taxable amount received towards water front royalty charges from M/s GPPL, Pipavav for the period prior to April-2010 as the amendment in the definition of "port service", as defined under Section 65(82) of the Finance Act, 1994, has been made by the Government with effect from 01.07.2010 by section 76 of the Finance Act, 2010 and they claimed that before the amendment of definition of "port service" they were not falling in the category of "port service". Before the amendment, the "Port Service" was defined as *"any service rendered by a port or any person authorized by the port, in any manner, in relation to a vessel or goods"*. After the amendments, "Port Service" has been defined as "*any service rendered within a port or other port, in any manner"*. From the above definition of "port service", it can be seen that words "vessel or goods" have been deleted in the amended definition of "Port Service".

3. Further, on going through the information provided by the noticee vide their letter dated 27.09.2011 (Annexure-A to the show cause notice), it was seen that the noticee have collected an amount of Rs. 13,34,54,202/- as water front royalty/ wharfage charges for the period from 2006-07 to 2009-10 from M/s. GPPL, Pipavav.

3.1 The meaning of the word "wharf" as per Oxford Dictionary is a level quayside (platform) area to which a ship may be moored to load and unload. It means wharfage charges / water front royalty charges is nothing but a charges being recovered by the noticee from M/s. GPPL, Pipavav for providing "port service" as defined under section 65(82) of the Finance Act, 1994. In other words, the water front royalty charges or wharfage is recovered for providing a service in relation to "vessel" and hence the services provided by the noticee squarely fall in the earlier definition, of



"port service". Before the amendment in the definition of "port service", the port service was defined as "*any service rendered by a port or any person authorized by the port, in any manner, in relation to a vessel or goods*"

3.2 Whereas, it further appeared that on going through the contract dated 30.09.1998 (Annexure –C to the show cause notice) made between noticee and M/s GPPL Pipavav, it has been observed that the noticee have issued a license to M/s GPPL Pipavav for providing a port service. At para No. 2.1 (49) of the contract, it has been mentioned that water front royalty means the amount payable by the licensee to the licensor, per ton of cargo handled at the port, based on the actual cargo throughputs achieved and to be paid in accordance with clause 11.3 for the various option given therein. At para 11.3 of the said contract, it has been mentioned that the licensee (GPPL Pipavav) shall pay water front royalty payment on last day of each month. It means the M/s GPPL shall recover the wharefage charges from the vessel arrived at the Pipavav Port and deposit in the account of noticee. Further, on going through the Sample statement (Annexure-D to the show cause notice) made by the GPPL Pipavav showing the recovery of wharfage charges / waterfront charges, at column No. 6, it has been mentioned that how much wharfage charges have been recovered. At column No. 15 of the Annexure-D, the amount received by the noticee from M/s GPPL Pipavav has been shown. At column No. 16, the amount refunded to GPPL by the noticee has been shown. Further, on being asked to the concerned officer of M/s GPPL Pipavav regarding payment of Service tax, they clarified that collection of wharfage charges is being made by them and deposited in the account of noticee and make payment of service tax on the amount shown in column No. 16 of Annexure-D as per condition of contract. As regards payment of service tax on the amount mentioned at column No.15, service tax is being paid by the noticee. .

3.3. In view of the above facts, it appeared that the noticee have provided a taxable service of "port service" as defined under Section 65(82) of the Finance Act, 1994 and have collected an amount of Rs. 13,34,54,202/- from M/s. GPPL, Pipavav and have not paid the service tax of Rs. 1,52,52,812/- as calculated in Annexure-B to the show cause notice.

4. Whereas Section 67 of the Finance Act, 1994 provides that - *(I) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,—*

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation.—For the purposes of this section,—

(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;

(b) "money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travellers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value;

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.

Whereas, it appeared that the noticee have received gross amount of Rs.13,34,54,202/- from M/s. GPPL, Pipavav for providing "port service" and have not paid the service tax as provided under section 68 of the Finance Act, 1994 and thereby have contravened the provisions of section 68 of the Act and rendered themselves liable to penalty as provided under section 78 of the Finance Act, 1994.

5. Whereas in terms of Section 78 of the Act –

Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of—

(a) fraud; or
(b) collusion; or
(c) wilful mis-statement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of Chapter V or of the rules made thereunder with intent to evade payment of service tax,

the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall be equal to the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded.

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From the above para, it appeared that the noticee have collected an amount of Rs. 13,34,54,202/- from M/s. GPPL, Pipavav for providing "port service" but have failed to disclose the said amount in the ST-3 returns filed by them from time to time and thereby suppressed the material facts. The noticee had never disclosed regarding receipt of the wharfage charges/ waterfront royalty charges from M/s GPPL Pipavav, during the period from 2006-07 to 2009-10. It has come to the notice of the department only during the course of audit. Such acts and omission on the part of the noticee shows suppression of material facts from the department with a view to evade the service tax and thereby the noticee appeared to have contravened the provisions of Section 78 of the Finance Act, 1994 and rendered themselves liable to penalty as provided under section 78 of the Finance Act, 1994.

6. Whereas Section *73 of the Finance Act, 1994 provides that – (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :*

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted.

Explanation. — Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be.

Whereas, in the present case, the noticee have collected an amount of Rs.13,34,54,202/- during the year 2006-07 to 2009-10 from M/s. GPPL, Pipavav for providing a "port service" but have failed to disclose the said amount in the ST-3 returns filed by them from time to time and thereby suppressed the material facts from the department with a view to evade the service tax and hence the amount of service tax of Rs. 1,52,52,812/- not been paid by the noticee is required to be recovered by invoking extended period.

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as provided in the first proviso of sub-section (1) of section 73 of the Finance Act, 1994.

7. Whereas Section 75 of the Finance Act, 1994 provides that every person, liable to pay the service tax in accordance with the provisions of section 68 or rules made there under, who fails to credit the tax or any part thereof to the account of Central Government within the period prescribed, shall pay simple interest at such rate not below ten percent and not exceeding thirty per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette for the period by which such crediting of the tax or any part thereof is delayed. Whereas, it appeared that the noticee has not paid the service tax of Rs.1,52,52,812/- on the taxable amount of Rs.13,34,53,202/- received by them from M/s.GPPL, Pipavav during the period from 2006-07 to 2009-10 and the noticee is required to pay the said amount along with interest as provided under section 75 of the Finance Act, 1994.

8. Whereas in terms of Section 76 of the Act --

Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax amount in accordance with the provisions of section 75, a penalty which shall not be less than two hundred rupees for every day during which such failure continues or at the rate of two per cent. 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 e tax:

Provided that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable.

9. Whereas, Section 70 of the Act provides that --

(1) Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee not exceeding two thousand rupees, for delayed furnishing of return, as may be prescribed.

and Rule 7 of the Rules provides that—

(1) Every assessee shall submit a half-yearly return in Form 'ST-3' or 'ST-3A', as the case may be, along with copy of the Form TR-6, in triplicate for the months covered in the half-yearly return.

(2) Every assessee shall submit the half yearly return by the 25th of the month following the particular half-year.

Whereas, it appeared that the noticee has failed to assess and pay the tax due on the taxable amount for port services received by them from M/s. GPPL, Pipavav and thereby contravened the provisions of section 70 of the Finance Act, 1994 and rendered themselves liable to penalty under the provisions of Section 76 and Section 77 of the Finance Act, 1994.

10. From the above paras, it appeared that the noticee have contravened the provisions of section 68, 78 and 70 of the Finance Act, 1994 and Rules

made there under and rendered themselves liable to penalty as provided under section 78, 76 and 77 of the Finance Act, 1994. As the noticee have not paid the service tax as provided under section 68, the same is required to be recovered under the provisions of section 73 and 75 of the Finance Act, 1994.

11. Therefore, M/s. State Charges GoG Jafarabad (for the period from March-2009 to March-2010) and M/s. Gujarat Maritime Board, Jafrabad (for the period 2006-07 to February-2009) were issued show cause notice No. V/15-10/Dem-ST/HQ/2011-12 dated 21/10/2011 by the Commissioner, Central Excise & Service Tax, Bhavnagar to show cause as to why;

(i) the service tax amounting to Rs. 1,52,52,812/- (Rs. One Crore Fifty Two Lakhs Fifty Two Thousand Eight Hundred and Twelve only) as calculated in Annexure-B should not be confirmed and recovered under the provisions of Section 73 of the Finance Act, 1994 from both the noticees for the respective period ;

(ii) interest at applicable rate on the amount of Service Tax liability of Rs.1,52,52,812/- should not be demanded and recovered from both the noticees under the provisions of Section 75 of the Finance Act, 1994;

(iii) penalty should not be imposed upon them under Section 77 of the Finance Act, 1994 for the failure to disclose their taxable value and to make assessment of duty in ST-3 return filed to the department and for not following procedures as laid down in the Service Tax Rules, 1994 (As amended).

(iv) penalty should not be imposed upon them under Section 76 & 78 of the Finance Act, 1994 for suppression of the facts of receipt of taxable amount by them and for failure to make the payment of Service Tax payable by them .

DEFENCE REPLY:-

12. The Noticee did not file reply to the show cause notice within the time limit specified in the show cause notice and even no extension for filing reply was ever applied for. Therefore, the Noticee was required to file reply to the show cause notice immediately vide letter dated 08.10.2012.

PERSONAL HEARING :

13. In absence of any reply to the aforesaid communication, the matter was posted for hearing on 26.11.2012. In response, Shri Virk H. P. Singh, Proprietor of M/s. Virk H. P. Singh & Co., Chartered Accountant, vide his letter dated 22.11.2012 submitted Letter of Authority issued by the Noticee in his favour to represent the Noticee in the present proceedings and requested for adjournment to any time after 20.12.2012. Accordingly, personal hearing was re-fixed on 31.12.2012. The said authorized

representative, vide his letter dated 29.12.2012, sought for further adjournment to any time after 20.01.2013 and therefore, personal hearing was re-fixed on 21.01.2013. The said authorized representative appeared for personal hearing on 21.01.2013 and submitted written submission dated 21.01.2013 reiterated the same.

14.1 In written submission dated 21.01.2013, the above named authorized representative submitted as under.

14.2 PORT OFFICE JAFARABAD operates under administration, control and management of the GUJARAT MARITIME BOARD – a state government entity – local authority – constituted under the Gujarat Maritime Board Act, 1981. The said control is granted to State Government by virtue of CONSTITUTION OF INDIA. *[Item 31, List III, Seventh Schedule]*

14.3 FURTHER, FOUR SUB PORTS VICTOR, MAHUVA, RAJPARA AND KOVAYA operate under administration, control and management of PORT OFFICER – JAFARABAD. All, Five, i.e. Port Jafarabad and its Four Sub-ports are individually / separately registered with Service Tax Department since 01.07.2003.

14.4 The State Government of Gujarat has and exercises sovereign right over the water front in Gujarat. In view of such sovereign right of the State Government, *inter alia* certain private ports have been allowed to be developed in its jurisdiction.

14.5 GUJARAT PIPAVAV PORT LIMITED, PIPAVAV [GPPL] is one such private port which has been allowed to operate as such and is authorised to operate independently and provide Port Services etc. within its jurisdiction as per the relevant agreement(s) with Government of Gujarat in compliance of the BOOT Policy Government of Gujarat Resolution dated 29.07.1997 *[ANNEXURE 1 : 10 PAGES]* ;

14.6 On perusal of BOOT Policy, your goodself will be able to confirm that the operation of the concerned port was envisaged to be responsibility of concerned Port Developer *i.e.* GPPL in this case.

14.7 Thereafter, on 30.09.1998 a Concession Agreement was executed between GMB and GPPL with State Government as confirming party. *[ANNEXURE 2 : 35 PAGES]* Please note that the said agreement supposedly forms part of SCN in question as ANNEXURE C as a relied upon Document but in view of the fact that the same was not annexed to SCN provided to GMB, the same has been submitted herewith for ready reference.

14.8 SCN in its para 3.2 refers to TWO clauses of the above agreement. *Viz.* 2.1(49) and 11.3. Both are reproduced below for immediate recapitulation :

"2.1(49) "Waterfront Royalty" means the amount payable by the Licensee to the Licensor per ton of cargo handled at the Port based on the actual cargo throughputs achieved and to be paid in accordance with Clause 11.3 for the various options given therein."

"*11.3 Waterfront Royalty Payments*

(a) From the effective Date, the Licensee shall pay the Licensor a monthly Waterfront Royalty per ton of cargo handled at the Leased Premises. Such Waterfront Royalty payment shall be based on the actual cargo throughputs achieved, which shall be determined on the basis of customs and other statutory declarations.

(b) The Licensee shall submit for verification to the Licensor every month, the cargo wise throughput achieved in that month.

(c) The total royalty payable by the Licensee shall be the aggregate sum in respect of all types of cargo, of the applicable per ton royalty for each particular type of cargo multiplied by the actual throughput of that particular cargo in the month.

(d) The Licensee shall pay Waterfront Royalty payments by cash and/or negotiable instrument on the last day of each month."

14.9 In terms of the aforesaid agreement, as laid down in Clause 10 on its pages 13 to 15, the total aspects encompassing Pilotage, Operations & Services, Priority Services, Sub-Contracting, Leasing, Personnel, Security and Maintenance were responsibilities of Port Developer *i.e.* GPPL and GMB/State Government had no role, whatsoever, in any of the said aspects.

14.10 Further, Licensee *i.e.* GPPL, in terms of clause 11.2.1(a) and (b) is *"entitled to fix and collect fees for all the services rendered or performed at the Port and authorised under the above Agreement in accordance with applicable law, duly complying with the provisions of the Indian Ports Act relating to tariff."*

14.11 Further, in terms of clause 11.2.1(c) of the same agreement *"GPPL is also permitted by law to structure the tariff at its discretion and the currency of denomination of tariff."*

14.12 Further, in terms of clause 11.2.2(b), *"notification of comprehensive tariff schedule to public was to be responsibility of GPPL along with power to customise separate service and tariff package for specific users form time to time."*

14.13 In view of above factual / legal reality, it can be observed that the total port operations including complete port operations were total responsibility of GPPL.

14.14 Please note that State Government and / or GMB had/has no role to play in the administration, finances and / or operations of GPPL and all operations / logistics / provisions of services etc. are entirely at risk, cost and control of GPPL.

14.15 In terms of its agreement with State Government / GMB, GPPL had/has to pay WATER FRONT ROYALTY [WFR] to GMB till 28.02.2009 and thereafter w.e.f. 01.03.2009 DIRECTLY to STATE GOVERNMENT at a prespecified and agreed rate(s) in terms of above facts / stipulations.

14.16 Prior to 1st April 2008, such WATER FRONT ROYALTY was collected/levied by GMB in exercise of powers under the Gujarat Maritime Board Act 1981 and with effect from 1st April 2008, the same is levied by the State Government itself under Section 22A of the said Act. *[ANNEXURE 3 : 48 PAGES]*

14.17 Having clarified the facts about the port operations in the port premises handled by GPPL, We, now seek to describe the accounting / financial procedure adopted for collection of Waterfront Royalty by GMB.

14.18 With a view to comply the provisions of Indian Ports Act, 1908 and the Gujarat Maritime Board Act, 1981, the total proceeds collected by GPPL were supposed to be deposited by GPPL first in a separately opened PLD (personal ledger deposit) bank account (similar to escrow account maintained in similar transactions) and then, on computation of Waterfront Royalty payable to GMB / State Government, residual amount would be transferred to GPPL and the amount of Waterfront Royalty arrived at would be transferred to GMB / State Government account.

14.19 For arriving at the amount of Waterfront Royalty receivable by GMB / State Government and residual amount belonging to GPPL, a periodical bill would be prepared by GMB under the nomenclature "Waterfront Royalty Bill" which would have a statement annexed to it duly enumerating vessel wise account of financial transaction (similar to the one attached as Annexure-D to SCN). Thereafter, on crystallisation of specific amount of WFR, a cheque of residual amount would be issued in favour of GPPL with simultaneous issue of WFR amount to GMB / State Government. For your kind perusal, records and complete view of all transactions, a complete set of relevant documents, for financial year 2006-2007, are being submitted hereinafter :

ANNEXURE 4 : 52 PAGES: PLD Ledger account maintained at GMB level in vernacular.

ANNEXURE 5 : 20 PAGES : Relevant Bank Statement.

ANNEXURE 6 : 90 *PAGES*: WFR Bill and statement

ANNEXURE 7 : 01 *PAGE*: Annual Reconciliation Statement

14.20 Thus in the revenue (income) accounts of GMB / State Government, the actual amount of WFR and TDS thereon would be credited and at no point of time the total income (Port Dues and Wharfage) earned by GPPL on provision of services would pass through in GMB's / State Government's revenue accounts.

14.21 Further, right from creation of port infrastructure for port user(s) to actual provision of various port services in the port premises of PIPAVAV PORT of GPPL, GMB/State Government has/had no role to play and only collection of proceeds thereof would be routed through PLD account which was/is basically to ensure foolproof computation of WFR to ensure that no loss occurred to Government exchequer.

14.22 All the relevant facts as narrated above are / were on record and apparent on *prima facie* perusal and in vogue since October 1998.

14.23 Apart from the fact that Port Office Jafarabad of GMB and its four subports had got itself registered under Service Tax w.e.f. 01.07.2003, GPPL was also registered as such in view of the fact that they were providing port services [AAACG6975BST001].

14.24 Since 01.07.2003, various audits / inspections, of the records of GMB and GPPL, have been conducted by Service Tax Division of Excise department and nowhere in past, any objection / para was ever raised in this context about non levy/collection of Service Tax on the WFR received by GMB / State Government.

14.25 In para 2 of SCN it is stated that *"During the course of Audit conducted by the HQ Audit, Bhavnagar, it has come to the notice of the Audit Party.....that the noticee had started the payment of service tax on the amount of water front royalty charges considering it as "port services" since April-2010 but have not paid the service tax on the taxable amount received by them during the period from 2006-07 to 2009-10 "* whereas the fact is that all along since 01.07.2003 during various departmental audits of GMB PO JAFARABAD and other subports under its jurisdiction and/or GPPL the fact was known to Department. Further, DGCEI of AZU had initiated inquiry *vide* its communication no. DGCEI/AZU/12(4)5/2008-09/1939 dated 03.09.2009 for the period 01.04.2004 to 2008-2009 and concluded with final submission of PO JAFARABAD on 19.02.2010 during which PO was called personally and statement taken on all pertinent aspects. A copy of his statement may please be called from the file of DGCEI-AZU and also given to us. All this goes on to substantiate that it was not that the fact came to notice of HQ Audit first without being known to Department earlier but that HQ Audit NOW chose to interpret it differently and against the stance / interpretation of GMB. At this juncture, We are submitting herewith synopsis of all audits / litigations and proceedings of DGCEI etc. as *[ANNEXURE 8: 02 PAGES]* to substantiate our stance about Department, all along, having knowledge of all the relevant facts and how HQ Audit ignored ground realities to arrive at a predetermined conclusion.

14.26 Even, the issue raised in present SCN dated 21.10.2011 (received at GMB on 15.11.2011) seemingly has its origin in Final Audit Report No. 20/ST/11-12 dated 31.10.2011 *ANNEXURE 9 : 02 PAGES.*

14.27 As given to understand by our Port Officer, We have been informed that after commencing collection of service tax on WFR since April, 2011, service tax was collected and paid along with applicable interest for the perid April, 2010 to March, 2011. This fact is confirmed in present SCN' para 2 and is not in dispute at all.

14.28 The commencement of levy/collection of service tax by GMB was initiated by way of letter no. PO/JFD/AC/44 dated 20.04.2011 *[ANNEXURE 10 : 01 PAGE]* addressing it to Chief Operating Officer and Accounts Officer of GPPL.

14.29 We presume that at that time or some time thereafter, Audit Staff of Service Tax Division while conducting audit of GPPL came across the said letter of PO Jafarabad dated 20.04.2011 and wrote a letter dated

29.06.2011 *[ANNEXURE 11 : 01 PAGE]* addressing it to PO Jafarabad with a copy to GPPL. The said letter in its para 2 stated that

"

2. *.....the Service Tax on warfage charges is from April 2010 is incorrect. In this connection, your attention is invited to the fact that Water front Royalty Charges are nothing but Wharfage Charges and M/s. GPPL., Pipavav collect the Service tax right from the beginning. The applicability of Service Tax on said warfage charges is very well in the knowledge of M/s. GPPL.*

3. *It is therefore informed that the Service Tax is applicable on the said charges collected by you from M/s. GPPL. The Service Tax on it is not paid prior to April, 2010. It is required to be paid for the prior period to April 2010.....*

"

14.30 The natural question arising at this juncture would be that; If, as per statement in para 2 of Supdt.'s letter dated 29.06.2011, GPPL had been collecting Service Tax right from the beginning, then WHERE IS/WAS THE QUESTION OF LEVYING SERVICE TAX AGAIN ON SAME AMOUNT, WHEN ONLY A PART OF IT WAS BEING PAID BY GPPL TO GMB / STATE GOVERNMENT AS "WATER FRONT ROYALTY" as one of the items of its expenditure?

14.31 It is interesting to note that, in the same breath, the para 2 of the same communication stated that "*It is therefore informed that the Service Tax is applicable on the said charges collected by you from M/s. GPPL. The Service Tax on it is not paid prior to April, 2010. It is required to be paid for the prior period to April 2010.....*" without clarifying or specifying HOW AND WHY?

14.32 Thereafter, pursuing the issue again, a communication dated 01.08.2011 was received *[ANNEXURE 12 : 01 PAGE]* from Supdt., Bhavnagar.

14.33 At this juncture, PO Jafarabad replied *vide* letter dated 06.09.2011 *[ANNEXURE 13 : 02 PAGES]* clarifying the entire issue *inter alia* that

Please refer to item 1 sent by your goodself subsequent to our letter no. PO/JFD/AC/44 dated 20.04.2011 questioning our interpretation of "taxable port services".

GMB since 01.07.2003, has always collected and paid applicable Service Tax on "Wharfage Charge(s)" collected by it on its own ports. Liberally interpreting and mainly for buying peace, GMB has also collected and paid Service Tax on jetties etc. wherein it was not providing any service whatsoever, in context and/or for vessel and/or cargo and legally speaking, service tax was neither leviable nor payable to your department for cargo handled by respective party wherein GMB was not providing any port service in terms of Finance Act, 1994.

In present case raised by you, "Waterfront Royalty" is being received from Gujarat Pipavav Port Limited [GPPL] on cargo

discharged/handled by it. Please note that GPPL is a private port and separately registered with your department and must be collecting/paying applicable service tax on its "taxable port services" and out of its revenue thus raised, it is also paying service tax on "Water Front Royalty" as above.

Further, as per our understanding the service tax being paid to GMB must have been claimed by GPPL as service tax/cenvat credit against the amount arrived at as payable by it. Thus the same, even if hypothetically considered as taxable would give rise to a revenue neutral situation.

Even subsequent to Finance Act, 2010, in our humble interpretation, the same is neither collectible from GPPL nor payable to your department as being done by GMB BUT as submitted above GMB has been liberally interpreting the stipulation as also for buying peace by avoiding litigation, GMB started collecting and paying the same since April, 2010.
At this juncture, We also wish to draw your kind attention to the fact that unlike the contention taken by you in para 2 of your above letter that "Water Front Royalty Charges are nothing but Wharfage Charge" factually and legally both cannot be and are not synonymous, as sought to be conveyed by you.

As regards, your query raised in para 4 in your letter dated 29.06.2011, We seek to inform that GMB has neither collected nor paid Service Tax on "Water Front Royalty" prior to 01.04.2010 for reasons stated above.

"

14.34 On 27.09.2011, Supdt., (Audit) visited PO Jafarabad and issued letter F. NO. VI/8(a)-196/EA-2000/10-11/AP-VI *[ANNEXURE 14 : 01 PAGE]* based on the records produced for audit and asked for confirmation of the data contained therein *[ANNEXURE 15 : 01 PAGE]* which now forms part of present SCN as Annexure A.

CONTENTIONS IN THE NOTICE
and GMB's refutation / submission on same (right aligned):

14.35 It has been contended in the above mentioned show cause notice that State Charges GOG Port Jafarabad had

i. Para 1 *"M/s. Gujarat Maritime Board, Jafarabad for the period 2006-07 to February 2009 renamed as M/s. State Charges GOG, Jafarabad Port for the period from Mach 2009 to March 2010*

PLEASE REFER TO PARA 16 OF THIS SUBMISSION

ii. *Para 2* *"...During the course of Audit conducted by the HQ Audit, Bhavnagar, it has come to the notice of the Audit Party that the noticee have been regularly paying service tax on the taxable amount received by them from M/s. GPPL..."*

PLEASE REFER TO PARA 25 OF THIS SUBMISSION

iii. *Para 2* *".... It has been observed by the Audit that the noticee had started the payment of service tax on the amount of water front royalty charges considering it as "port service" since April-2010 but have not paid the service tax on the taxable amount received by them during the period from 2006-07 to 2009-10 towards water front royalty charges / wharfages."*

THIS IS STATEMENT OF FACT

iv. *Para 3.1* *"... It means wharefage charges / water front royalty charges is nothing but a charges being recoverd by the noticee from M/s. GPPL, Pipavav for providing "port service" as defined under sectoin 65(82) of the Finance Act, 1994. In other words, the water front royalty charges or wharfage is recovered for providng a service in relation to "vessel" and hence the services provided byteh noticee squarely fall in the earlier definition of "port services"*

PLEASE REFER TO OUR PRESENT SUBMISSION *in toto* SUBSTANTIATING THAT NO SERVICE WHATSOEVER IS/WAS PROVIDED TO GPPL. IT IS/WAS GPPL WHO COLLECTS WHARFAGE AND/OR PORT DUES FROM PORT USERS.

THEREAFTER, SIMILAR TO ANY OTHER ITEM OF ITS EXPENDITURE WFR IS/WAS PAID BY GPPL TO GMB / STATE GOVERNMENT.

v. *Para 3.2* *"... the noticee have issued a license to M/s. GPPL for providing a port service....."*

THIS IS STATEMENT OF FACT

vi. *Para 3.3* *"... it appears that the noticee have provided a taxable service of "port service"*

HOW DOES IT SO APPEAR

WHEN THE FACTUAL / LEGAL REALITY POINTS TO SOMETHING COMPLETELY CONTRARY.

vii.	*Para 5*	*"... ... but have failed to disclose the said amount in the ST-3 returns filed by them from time to time and thereby suppressed the material facts..."*
		&
viii.	*Para 6*	*".... Failed to disclose the said amount in the ST-3 returns...."*

PLEASE REFER TO PARA 68 OF PRESENT SUBMISSION

14.36 It is submitted that the demands so raised are liable to fail on merits as also on the ground of being barred by limitation as explained hereunder.

14.37 At this juncture, before proceeding any further, We wish to clarify certain pertinent facts which have vital bearing on the present case.

i. The SCN has been issued on STATE CHARGES GoG – JAFARABAD PORT having its Service Tax Registration no. TMPAX8547DST001 w.e.f. 01.04.2006 whereas in view of statutory changes in the GMB Act, 1981 w.e.f. 01.04.2008 the said Registration no. TMPAX8643PST001 was applied for on 11.02.2009 and obtained in name of "STATE CHARGES GOG, PO JAFARABAD". *[ANNEXURE 16 : 05 PAGES]*

ii. Further, for the period 01.04.2006 TO 28.02.2009 covered under the SCN, it was GMB PO JAFARABAD having registration no. AABCG6676LST013 and for subsequent period STATE CHARGES GoG PO JAFARABAD under its Registration no. TMPAAX8547DST001 whrein the proceeds of all revenue items' service tax including Waterfront Royalty were paid.

iii. Hence, till 28.02.2009 the service tax on wharfage was collected and paid under Service Tax Registration AABCG6676LST022 BUT from 01.03.2009 onwards the same was collected and paid under Service Tax Registration TMPAX8547DST001. This fact is known to the department and in our humble understanding and belief, the SCN should have been issued for respective period on respective recipient and till such modification / revision is carried out as per applicable statutory provisions, SCN would be null and void.

iv. Hence, the generalisation sought to be conveyed in the first line of present SCN as *"M/s. Gujarat Maritime Board, Jafrabad for the period 2006-07 to February-2009 (renamed as M/s. State Charges GOG, Jafarabad Port for the period from March-2009 to March-2010"* is not only LEGALLY WRONG but also seeks to convey a FALSE IMPRESSION as if erstwhile "GMB PO Jafarabad" closed down and then either it was taken over or new office commenced as "State Charges GOG PO Jafarabad"

14.38 It is submitted that there is no taxable service rendered by GMB and consequently even the service tax paid on the WFR collected from GPPL was not payable in the first place.

14.39 As stated herein above, the State Government of Gujarat has and exercises sovereign right over the water front in Gujarat. In view of such sovereign right of the State Government, the Gujarat Maritime Board Act 1981 provides for levy of *inter alia* "WFR" / "WHARFAGE" / "PORT DUES" in respect of goods landed at / shipped from the minor ports, and the rates at which such ROYALTY / CHARGES / DUES are levied are statutorily fixed in exercise of powers under the Gujarat Maritime Board Act 1981. Prior to 1st April 2008, the wharfage was levied by GMB in exercise of powers under the Gujarat Maritime Board Act 1981 and with effect from 1st April 2008, the wharfage is levied by the State Government itself under Section 22A of the said Act.

14.40 It is thus clear that the WFR which was charged and recovered from GPPL is a statutory levy in respect of sovereign activity/ statutory function of a sovereign / public authority. It is submitted that the performance of such sovereign activity / statutory function for which a statutory levy is recovered cannot and does not amount to performance of a service which is taxable under the Finance Act 1994. We place reliance in this behalf on the following Circulars/ clarifications issued by the Central Board of Excise and Customs from time to time:

(a) Circular No. 89/7/2006-S.T., dated 18-12-2006,
(b) Frequently Asked Questions on Service Tax issued by CBEC and DGST in December 2007 – Question 7.
(c) Circular No. 96/7/2007-S.T., dated 23-8-2007- reference code 999.01/ 23-8-07
(d) FAQ, 4th Edition, December 2008 issued by D.G.S.T – Para 8.6.2
(e) FAQ on Service Tax, 5th Edition, September, 2010-Para 8.6.2.

By the aforesaid clarifications, the Board has repeatedly clarified that where a sovereign/ public authority performs a statutory function for which a statutory levy is recovered, the same is not a taxable service and no service tax can be levied in respect thereof.

14.41 We also rely on the following decisions which lay down that a sovereign activity undertaken by a Government or its organ / department cannot amount to rendering of a taxable service:

CC v CMC Ltd – 2007 (7) STR 702
Electrical Inspectorate v CST – 2008 (9) STR 494
CC v CS Software Enterprises Ltd- 2008 (10) STR 367

14.42 In the circumstances, in the very first place, the WFR charged by GMB/ State Government of Gujarat which is a statutory levy under the Gujarat Maritime Board Act 1981 for a sovereign/ statutory activity/function, was not at all liable to service tax. Consequently even the service tax paid by GMB / State Government on the WFR collected from

GPPL was not payable in the first place. Since no service tax at all is payable on the WFR, the question its undervaluation and recovery of service tax does not arise at all. On this ground alone the demand for service tax must fail.

14.43. Further, as per Section 22A (2) of the Gujarat Maritime Board Act 1981, the landing and shipping fees (wharfage) are to be credited to the Consolidated Fund of the State. The same are therefore in the nature of tax levied by the State Government in exercise of its sovereign powers and consequently the same cannot be subjected to service tax by treating the said sovereign function as performance of a taxable service.

14.44 We also submit that the WFR and landing and shipping charges are levied by the Government of the State of Gujarat under the said Section 22A and consequently in the absence of the State of Gujarat being made a party to the Show Cause Notice, the same is not maintainable in law.

14.45 We submit that it is settled law that the question of taxability goes to the very root of the matter and can be raised at any stage. The mere fact that GMB / State Government has started collecting / paying service tax on the WFR collected does not bar GMB from raising the contention that no service tax at all is payable in the first instance. When a demand for service tax is issued under Section 73(1) of the Finance Act 1994, it has in law the effect of opening up the assessment and in such proceedings it is open to contend that no service tax at all is payable since the activity in question is not taxable at all in the first place. We place reliance in this behalf on the following judgments:

Madura Coats Ltd v CCE – 2000 (124) ELT 274 (upheld in 2005 (183) ELT 238 (SC))
Madura Coats Ltd v CCE – 2003 (156) ELT 1030
Atita Traders v CCE – 1998 (101) ELT 321
Lili Foam Industries (P) Ltd v CCE – 1990 (46) ELT 462

14.46 Without prejudice to the aforesaid submissions and assuming while denying that the provisions of Section 67 (ii) of the Finance Act 1994 are attracted and consequently resort could be made to Rule 3(a) of the Service Tax (Determination of Value) Rules 2006, even so, it is totally incorrect to proceed on the basis that levy / collection of WFR (assuming while denying that the same is taxable service) from private port is similar to the service rendered to its own port users. It is submitted that the WFR and landing/ shipping in case of licensees who are given license to construct and use the private port against payment of license fee / other Royalty(ies) cannot be held to be similar to landing and shipping in case of persons who are not such licensees. The licensees who are given license to construct and use the private port against payment of license fee constitute a separate and distinct class different from those who are not such licensees. Accordingly the service rendered to non-licensees is not similar to service rendered to those who have been given license to construct and use against payment of license fee and hence the WFR / wharfage charged in the former case cannot be applied to the latter and similarly the transaction cannot be equated in both the cases to be termed as "taxable port service".

14.47 Without prejudice to the aforesaid submissions, it is submitted that the Notice is liable to fail as being barred by limitation. The Notice is dated 21.10.2011 and is issued for the period 2006-2007 to 2009-2010. Thus except for the period April 2010 onwards for which the Notice is within one year from the "relevant date" as defined in Section 73 of the Finance Act 1994, the same is otherwise issued beyond the period of limitation of one year specified in Section 73(1) and is accordingly barred by time. We submit that the larger period of limitation of five years prescribed in the Proviso to Section 73(1) is not applicable in the present case. For invoking the larger period of limitation prescribed under the said Proviso it must be shown that there is fraud, willful mis-statement or suppression of facts or contravention with intent to evade duty. It is impossible to suggest that a State Government which is exercising sovereign and statutory functions is guilty of fraud, willful mis-statement or suppression of facts or contravention with intent to evade duty. The Supreme Court in the case of CCE v Chennai Petroleum Corporation Ltd – 2007 (211) ELT 193 held that in the case of a company which is owned by the Government, the question of willful suppression of facts or intention to evade payment of duty does not arise.

14.48 It is settled law as laid down by the Supreme Court in the following decisions that to invoke the larger period of limitation it must be shown that there was some deliberate and positive act of concealment of facts with the dishonest intention of evade tax and mere inaction to disclose something does not justify invoking the larger period of limitation:

CCE v Chemphar Drugs and Liniments – 1989 (40) ELT 276
Pushpam Pharmacueticals Co v CCE -1995 (78) ELT 401
Pahwa Chemicals v CCE – 2005 (189) ELT 257.

The Government of Gujarat and GMB are performing statutory and sovereign functions in levying WFR / wharfage under the Gujarat Maritime Board Act 1981 and complete records of the WFR / wharfage levied are maintained in the normal course. It would be preposterous to suggest that there could be any deliberate and positive act of concealment of facts by the Government with regard to the wharfage so levied. GMB has been filing ST-3 Returns regularly and the different scale of rates that GMB charges are statutorily fixed and information of the same is in public domain and hence there can be no question of any willful suppression of the same.

14.49 GMB which is a statutory body under the said Act has been paying service tax on the wharfage collected by it based on its understanding of the relevant provisions. At the same time, WFR levied on and received from private ports is "ROYALTY" in nature and has no service element, leave aside "taxable port service", in it. Merely because the service tax department holds a different view on the issue it cannot and does not mean that there is a positive and deliberate act of concealment of facts on the part of GMB. That apart, the service tax department has from time to time audited the records of GMB and the service tax department has also from time to time examined the agreements entered into by the GMB with licensee of various captive jetties amd private port(s). The question therefore of invoking the larger period of limitation does not arise at all.