



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 फॅक्स : 0278-2513086

रजिस्टर्ड डाक पावती द्वारा

By R.P.A.D.

फाईल सं. VI/15-24/Dem-ST/HQ/2011-12

F. No.

आदेश की तारीख: 21/02/2013.

Date of Order :

जारी करने की तारीख: 21/02/2013.

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 : 04/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 :
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 कंपाउण्ड, 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 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 क्षेत्र बैंक के न्यायापीठ के सहायक रजिस्ट्रार के नाम से निर्धारित फीस रेखांकित बैंक ड्राफ्ट के रूप 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 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।

BYRPAD

To,
M/s. Kuber Construction,
Shop No.11, Kailash Shopping Centre,
N.H.No.8E, Hindorana Chowkdi,
Rajula, Distt-Amreli (Guj.)

Subject: Show Cause Notice F. No. V/15-24/Dem-ST/HQ/2011-12 dated
21.10.2011.



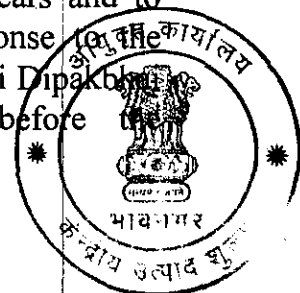
BRIEF FACTS OF THE CASE:

M/s. Kuber Construction, Shop No.11, Kailash Shopping Centre, Hindorana Chowkadi, Mahuva-Rajula National Highway, Rajula, District-Amreli (hereinafter referred to as the "Noticee") are holding Service Tax Registration No. AHUPS1212KST001.

2. A show cause notice F. No. V/15-24/Dem-ST/HQ/2011-12 dated 21.10.2011 has been issued to the Noticee proposing demand of Service Tax of Rs.1,09,68,041/- [including Education cesses] under Section 73(1) of Chapter V of Finance Act, 1994 (herein after referred to as the "Act"), along with Interest at the appropriate rate as applicable till the date of payment of Service tax under Section 75 of the Act and also to impose penalty under Section 76, 77 and 78 of the Act.

3.1 The facts leading to issuance of aforesaid show cause notice are that an intelligence was gathered that the Noticee is engaged in providing taxable service viz. supply of tangible goods service to M/s. Pipavav Shipyard Limited (Now known as M/s. Pipavav Defence and offshore Engineering Company Limited) (100% EOU) (hereinafter referred to as 'PSL') without paying service tax thereon. Therefore, a summons was issued to the Noticee on 9-9-2010 to remain present and produce copies of (1) Invoices issued to PSL from 16-5-2008 to till date, (2) work orders/Agreement with PSL, (3) Bank statements from 16-5-2008 to till date and ledger of PSL. However, the Noticee did not provide the required documents called for under the Summons. Therefore, further summons were issued on 22/23-9-2010 and 12-10-2010 to the Noticee. In pursuance to the above summons, the Noticee submitted letters dated 17-9-2010 and 21-10-2010 and informed that their consultant was busy and they were also busy with pre-occupation; they did not attend the summons and did not provide the required documents called for under the Summons. Therefore, a search was carried out at the office premises of the Noticee on 13-11-2010. During the course of search at the premises of the Noticee, some incriminating documents were recovered for further scrutiny under Panchnama dated 13-11-2010; that Inquiry was extended to the service recipient 'PSL' by calling for documents like invoices issued by the Noticee from 16-5-2008 to till date, work orders/Agreement with the Noticee and ledger in respect of the Noticee from 16-5-2008 to till date, under summons dated 9-9-2010. In response to summons dated 9-9-2010, PSL vide their letter ref.: F&A/0001/2010-11 dated 17-9-2010 submitted the copies of work order and ledger account of the Noticee.

3.2 A summons dated 30-11-2010 was issued to the Noticee by the Superintendent (A.E), Central Excise Bhavnagar, asking them to produce copies of (1) Invoices issued to PSL from 16-5-2008 to till date, (2) work orders/Agreement with PSL, (3) bank statements from 16-5-2008 to till date (4) Ledger of PSL (5) Income tax returns for the last five years and to remain present for giving evidence in the inquiry. In response to the summons dated 30-11-2010, a statement dated 8-12-2010 of Shri Dipakbhai Nagjibhai Parmar, Authorised Signatory was recorded before the



Superintendent (A.E), Central Excise Bhavnagar under Section-14 of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 (herein after referred to as the "Act"), wherein he interalia stated that he was serving with the Noticee and M/s. Sai Enterprise, Rajula since last two years as a supervisor; that both these firms are proprietorship firms and Ritaben Chimanlal Savani and Kishorbhai Jaisukhbhai Khalpada are the proprietors respectively; that they are providers of DG sets, welding machines, Hydra, air compressor etc. to PSL. On being asked regarding the terms and conditions of their business with PSL, he stated that PSL issued work orders to them based on their requirement and they supplied the equipments as per the same. On being asked to produce the copies of the work orders, he stated that the copies of the work orders were not readily available with them as the same had been seized by the Assistant Commissioner (Investigation), Commercial Taxes, Division-6, Bhavnagar and produced the copy of the receipt dated 18-2-2010 issued by the said officer. On being asked who supplies the fuel, operator and maintenance for the working of the said equipments, he stated that PSL used to supply the fuel for the working of the DG Set, Air Compressor and Hydra; that they used to supply the operator for the same who used to also look after the maintenance of the equipment. He also deposed that only the right to use was conferred upon PSL but the legal right of possession and effective control was not transferred to PSL under the agreement; that they had obtained the Service Tax registration in respect of the Noticee in 2008 and in respect of M/s Sai Constructions in the year 2009; that during the year 2008- 09 they had not charged Service Tax but in the later part of 2008-09 they had charged Service Tax in respect of the Noticee only; that in the year 2009-10 they had collected the Service Tax from the service recipients but they had not deposited the same with the Government. However, in the case of the Noticee they had paid Rs.7,25,124/- as Service Tax for the year 2009-10 and he produced copies of the challans evidencing payment of the same. On being asked to state the reasons for non collection and payment of Service Tax for 2008-09 in respect of the Noticee and M/s Sai Constructions and collection and payment of Service Tax in respect of the Noticee in the year 2009-10, he stated that earlier they were ignorant of the levy of Service Tax and still now they are confused whether the VAT is chargeable or Service Tax is chargeable; that PSL deducted an amount of Rs.9,86,902 towards payment of VAT and he produced a copy of the challan and the letter dated 23.11.2010 from PSL to them evidencing the same.

4. On going through the work orders issued by PSL in the name of the Noticee which are listed in the Annexure-C to the Notice, the Scope of the work is found to be mentioned as shown in the said Annexure-C to the Notice. It further appeared that the Noticee was awarded various contracts for hiring of various machineries. It appeared that the conditions are almost identical in all the work orders allotted to the Noticee. It appeared from the said work orders that for carrying out certain works in their shipyard site, PSL have awarded contract to the Noticee for hiring of Trailer, D. G. set, Welding Rectifier, Dumper, Hydra, TC-HYVA, JCB, Vibro Roller, Transit Mixer, Loader H. M. and Tractor with Breaker etc.. Apparently, conditions in the work orders are to hire these equipments with operator, mechanic, other helpers for carrying out the activities of those machineries,



without fuel and electricity. It appeared from the terms & conditions of the work orders produced by PSL and as stated in the statement dated 8-12-2010 by the authorized signatory of the Noticee that only the right to use was conferred upon PSL but the legal right of possession and effective control was not transferred to PSL.

5. Copies of documents like audited Balance Sheet and Profit & Loss account, Ledgers of their income and Work Orders/Agreement for the financial year 2006-07 & 2007-08 were called for from the Noticee vide letter F. No. V.ST/12-68/2010 dated 3-2-2011, which were submitted by the Noticee on 15-2-2011. On going through copy of Profit and Loss account for the financial year 2006-07, it is found that the construction income shown under the Construction Work Account is Rs. 12,79,674/-. On going through the ledger of the said Construction Work Account and copy of the Work Orders No. GCW:WOPO:40035198:HJJ:142496 dated 31-8-2006 and Work Order No. GCW:WOPO:40035423:HJJ:aj:178320 dated 8-9-2006, it appears that the Noticee had constructed compound wall at New Thermal Power Plant of Gujarat Cement Works Plant-2, Ultra Tech Cement Limited, Kovaya. It appeared that the conditions are almost identical in both these Work Orders allotted to the Noticee. It appeared from the said work orders that for carrying out construction of compound wall in their new thermal power plant, Ultra Tech Cement Limited (hereinafter referred to as "UTCL") have awarded contract to the Noticee and the said works had been allotted to the Noticee with free supply of cement and Reinforcement steel by UTCL. Also, on going through the ledger of the said Construction Work Account and copy of the Work Order No. GCW:WOPO:40035174:HJJ:AJ:176517 dated 30-8-2006, it appeared that the Noticee had provided services for cutting of Babbol & small tree at Thermal Power Project site of UTCL and excavation work for M/s. Prasanna Associates. The quantum of work shown in the said order is - "Removal of Babbol tree, shrub cutting, shifting and disposal and leveling and dressing of site land". It was also found that the Subcontract Work Income shown under the Construction Work Account is Rs. 3,63,593/- and on going through the ledger of the said Subcontract Work Account, it appeared that the Noticee had done Sub construction work of Spiral Construction Corporation, Keshod.

6. On going through copy of Profit and Loss account for the financial year 2007-08, it was found that the Construction Work income shown under the Trading account is Rs. 44,144/- and on going through the ledger of the said Construction Work account and copy of the Work Order No. GCW:WOPO:40035174:HJJ:AJ:176517 dated 30-8-2006, it appeared that the Noticee had provided services for cutting of Babbol & small tree at Thermal Power Project site of UTCL. It was also found that the Machinery Vehicle Rent income shown under the trading account is Rs. 1,45,18,468/- and on going through the ledger of the said Machinery Vehicle Rent account, it appeared that PSL, Gujarat Pipavav Port Ltd., E-Complex Pvt. Ltd. (hereinafter referred to as "E-Complex"), T.T. Ltd., Trishul Roadways, C.C.S.P.L. and Box Trans Logistics have awarded contracts to the Noticee for hiring of Trailer, D. G. set, Welding Rectifier, Dumper, HYVA, JCB, Vibro Roller, Transit Mixer, Loader H. M. and Tractor with Breaker etc..



7. On going through copy of Profit and Loss account for the financial year 2008-09, it is found that the income shown under the Work Trading account is Rs. 60,12,908/- and on going through copy of the said Trading account, it is found that the Jeep Rent income is Rs. 21,30,938/-, Machinery Equipment Hire service income is Rs. 1,07,02,427/-, Machinery & Vehicle Hire Service income is Rs. 1,23,59,746/-, Machinery Contract Service income is Rs. 70,15,832/- and Transport work income is Rs. 1,04,85,775/- shown under the said trading account. Whereas, in spite of repeated summons, the Noticee has not submitted the copy of the ledgers of the above said income. The Noticee has not provided the copies of the invoices/ bills even though repeatedly asked for in the summons. Therefore, it appeared that the Noticee is intentionally suppressing the service provided by them.

8. On going through copy of Profit and Loss account for the financial year 2009-10, it is found that the income shown under the Work account is Rs. 33,26,534/-. On going through copy of the said Work account, it is found that the Contract Work income is Rs. 3,50,535/-, Machinery Hire Service income is Rs. 1,02,42,781/-, Transport Work income is Rs. 2,88,299/- and Vehicle Hire income is Rs. 5,95,704/- shown under the said work account. Whereas, in spite of repeated summons, the Noticee has not submitted the copy of the ledgers of the above said income. The Noticee has not provided the copies of the invoices/bills even though repeatedly asked for in the summons. Therefore, it appeared that the Noticee is intentionally suppressing the service provided by them.

9. Whereas, on scrutiny of the documents seized under the Panchnama dated 13-11-2010 and as per the statement of the authorized signatory, it is found that the Noticee has collected the Service Tax but not deposited in the treasury of the Government. Hence, to calculate the amount collected by the Noticee under the head of Service Tax, records seized by the Assistant Commissioner of Commercial Tax (Investigation)-VI, Bhavnagar were called from them and they have provided a copy of the following documents vide their letter no. AC/Investigation/V-6/Kuber Construction/2010-1/918 dated 07-3-2011:

- (i) File at sr. no. 2 containing pages from 1 to 53 for the F. Y. 2008-09,
- (ii) File at sr. no. 6 containing pages from 1 to 455 for the F. Y. 2009-10,
- (iii) File at sr. no. 8 containing pages from 1 to 45 for the F. Y. 2008-09,

Only these three files contained the invoices issued by the Noticee.

10. A summons dated 15-3-2011 was issued to the Noticee by the Superintendent (A.E), Central Excise Bhavnagar, asking them to produce copies of (1) Bank statement for the period from 1-4-2008 to 31-3-2010, (2) Ledger of Service Tax collected by them, (3) Bill no. 1 to 600 issued by them and to remain present for giving evidence in the inquiry. However, the Noticee did not provide the required documents called for under the Summons. Therefore, further summons was issued on 31-3-2011 to the Noticee. In response to the summons dated 31-3-2011, a statement dated 4-4-2011 of Shri Dipakbhai Nagjibhai Parmar, Authorised Signatory, was



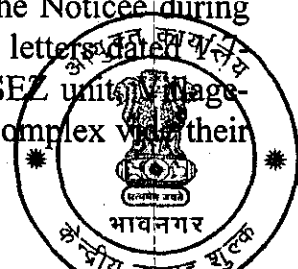
recorded before Superintendent (A.E), Central Excise Bhavnagar under Section-14 of Central Excise Act, 1944 read with Section 83 of the Act under which he produced the copies of the following documents:

- (i) Bank statement of account no. CA GEN 100651 of Dena Bank, Rajula Branch for the period from 5-4-2008 to 13-6-2009
- (ii) Bank statement of account no. 039311002888 of Dena Bank, Rajula Branch for the period from 6-4-2009 to 23-5-2010
- (iii) Bank statement of account no. 66017847346 of State Bank of India, Pipavav Branch for the period from 21-4-2008 to 28-3-2011
- (iv) Bank statement of account no. 30781740486 of State Bank of India, Rajula Main Branch for the period from 3-6-2009 to 31-3-2010
- (v) Bank statement of account no. 30086486144 of State Bank of India, L & T Cement factory (Kovaya) Branch for the period from 3-4-2008 to 15-6-2010
- (vi) Invoice no. 041, 102, 186 to 187, 190 to 191, 194, 201, 281, 284 to 286, 290, 293, 298, 299 to 301, 304, 307, 314, 319 to 323, 325 to 327, 330, 334 to 348, 350 to 360, 362 to 373, 375 to 383, 385 to 386, 388, 381, 390 to 393, 395 to 404, 407 to 429, 432 to 437, 439, 441 to 506, 508 to 524, 530 to 546, 554 to 578, 580 to 583

On being asked regarding missing invoices, he stated that the same were not available with them and he was not able to produce the same now. However, the same would be produced within a week. He had been shown a ledger produced by M/s. PSL and after perusing the same he put his dated signature on it. As per the above said ledger, their firm had been paid Rs. 1,35,79,972/- during the period from 1-4-2008 to 31-3-2009 and Rs. 1,56,95,989/- during the period from 1-4-2009 to 31-3-2010. However, figures of income shown under their Profit & Loss account for the said period are not tallied with these figures. On being asked regarding this difference, he did not want to say anything and informed that he would inform the reasons after consulting his accountant.

11. A summons dated 16-5-2011 was issued to the Noticee by the Superintendent (A.E), Central Excise Bhavnagar, asking them to produce copies of the remaining bills issued by them and to remain present for giving evidence in the inquiry. However, the Noticee did not provide the required documents called for under the Summons. Therefore, further summons were issued on 17-6-2011 and 29-6-2011 to the Noticee. The Noticee had not provided the copies of the invoices/bills even though repeatedly asked in the summons. Therefore, it appeared that the Noticee is intentionally suppressing the service provided by them.

12. Inquiry was extended under letters dated 1-7-2011 and 30-8-2011 to the service recipient PSL, M/s. Pipavav Shipyard Ltd., SEZ unit, Village-Rampara-II, taluka- Rajula, District- Amreli and M/s. E Complex by calling for documents like details of payment made by them to the Noticee during the period from 2006-07 to 2010-11. In response to these letters dated 1-7-2011 and 30-8-2011, PSL, M/s. Pipavav Shipyard Ltd., SEZ unit, Village-Rampara-II, taluka- Rajula, District- Amreli and M/s. E Complex via their



letters dated 16-9-2011 submitted the copies of ledger account of the Noticee.

13. Whereas, the Work Income of the works, which have been discussed herein above at para 5 to 8 has been taken from the Profit & Loss account and the ledgers submitted by the service recipient of the Noticee and the same is as mentioned in Annexure-B1 to this Notice. The said income is not tallied with each other. These figures have been discussed for calculation of service tax leviable from the Noticee and the same is as mentioned in Annexure-B2 to this Notice.

14. From the investigation carried out, it appeared that the Noticee provided one or more of the following services during last five years i.e. from 2006-07 to 2010-11 to PSL, UTCL, E-Complex and others and received payment from them as mentioned in the Annexure-B1 to this Notice. Also, the Noticee might have provided similar type of services to the various authorities and parties of which work orders/agreements and bills/invoices has neither been submitted nor provided:

15. Whereas Section 65A of the Act provides as follows :-

Classification of taxable services. — (1) For the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of section 65;

(2) When for any reason, a taxable service is, prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-

(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;

(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration.

16. Sub-section (25b) of Section 65 of the said Act provides that "commercial or industrial construction" 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,*

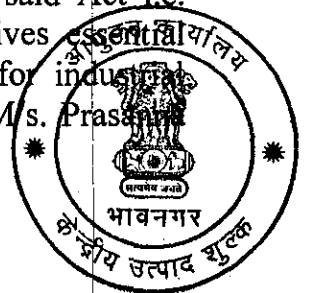
commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;

17. Sub-section (97a) of Section 65 of the said Act provides that "site formation and clearance, excavation and earthmoving and demolition" includes, —

- (i) drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or*
- (ii) soil stabilization; or*
- (iii) horizontal drilling for the passage of cables or drain pipes; or*
- (iv) land reclamation work; or*
- (v) contaminated top soil stripping work; or*
- (vi) demolition and wrecking of building, structure or road,*

but does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies;

18. Therefore, it appeared that in terms of provisions of Section 65A of the Act, the services provided by the Noticee to various agencies and parties viz. PSL, UTCL, E-Complex and others would merit classification under Section 65 of the said Act i.e. "Supply of Tangible goods Service" since it gives essential characteristics of supply of Trailer, D.G. set, Welding Rectifier, Dumper, Hydra, TC-HYVA, JCB, Vibro Roller, Transit Mixer, Loader H.M. and high value machineries for use, with no legal right of possession and effective control. Similarly, the services provided by the Noticee to UTCL and Spiral Construction Corporation, Keshod would merit classification under Sub-section (25b) of Section 65 of the said Act i.e. "Commercial or Industrial Construction Service" since it gives essential characteristics of civil construction of compound wall etc. for industrial purpose. Similarly, the services provided by the Noticee to M/s. Prasan



Associates would merit classification under Sub-section (97a) of Section 65 of the said Act i.e. "Site formation and clearance, excavation and earthmoving and demolition Service" since it gives essential characteristics of excavation for industrial construction purpose.

19. Whereas Section 65(105) (zzzzj) of the Act defines the taxable service as under: *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;*

From the above, it appeared that the Noticee was providing taxable service of Supply of Tangible goods Service as defined under Section 65 (105) (zzzzj) of the Act to various agencies and parties viz. PSL, UTCL, E-Complex and others, without payment of service tax leviable thereon under the Act and the Rules framed thereunder.

20. Whereas Section 65(105) (zzq) of the Act defines the taxable service as under: *to any person, by any other person, in relation to commercial or industrial construction*

From the above, it appeared that the Noticee was also providing taxable services of civil construction of compound wall etc., classifiable as 'Commercial or Industrial Construction Service' as defined under Section 65 (105) (zzq) of the Act, to UTCL and Spiral Construction Corporation, Keshod, without payment of service tax leviable thereon under the Act and the Rules framed thereunder.

21. Whereas Section 65(105) (zzza) of the Act defines the taxable service as under: *to any person, by any other person, in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities;*

From the above, it appeared that the Noticee was also providing taxable services of site formation and clearance work classifiable as 'Site formation and clearance, excavation and earthmoving and demolition Service' as defined under Section 65 (105) (zzza) of the Act, to M/s. Prasanna Associates, without payment of service tax leviable thereon under the Act and the Rules framed there under.

22. Whereas Section 68 of the Act provides that - *Payment of service tax — (1) 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.*

(2) *Notwithstanding anything contained in sub-section (1), in respect of any taxable service notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the*



provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

Therefore, it appeared that as per the provisions of Section 68 of the Act, the Noticee is the person liable for paying the service tax for the services provided by them.

23. Whereas Section 67 of the Act provides that - **Valuation of taxable services for charging service tax.** — (1) *Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such 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 as, 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.*

24. Whereas the relevant portion of Section 73 of the Act provides that - **Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.** — (1) *Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded,*



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 thereunder 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.*

(1A) *Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Chapter or the rules made thereunder, with intent to evade payment of service tax, by such person or his agent, to whom a notice is served under the proviso to sub-section (1) by the Central Excise Officer, such person or agent may pay service tax in full or in part as may be accepted by him, and the interest payable thereon under section 75 and penalty equal to twenty-five per cent of the service tax specified in the notice or the service tax so accepted by such person within thirty days of the receipt of the notice.*

- (2) *The Central Excise Officer shall, -----*
- (3) *Where any service tax has not been levied or paid -----*
- (4) *Nothing contained in sub-section (3) shall apply to a case 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 thereunder with intent to evade payment of service tax.*

(5) *The provisions of sub-section (3) shall not apply to any case where the service tax had become payable or ought to have been paid before the 14th day of May, 2003.*

(6) *For the purposes of this section, "relevant date" means, -----*

25. Whereas the relevant portion of Section 75 of the Act provides that - ***Interest on delayed payment of service tax*** — *Every person, liable to pay the tax in accordance with the provisions of section 68 or rules made thereunder, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest at such rate not below ten per cent. and not exceeding thirty-six 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.*

26. From the above, it appeared that as per Section 67 of the Act, service tax on these services is leviable on the gross amount charged by the service provider. It also appeared that the Noticee has shown the amount of Service Tax in their Invoices, collected the said amount from the service recipients but not paid the said amount to the credit of the Central Government. Though, copies of all the Invoices/ Bills issued by the noticee have not been provided by the noticee, the amount of Service Tax shown and collected from the service recipients in the available Invoices is Rs. 30,15,890/-, as shown in Annexure-A to the notice. The said amount of Service Tax has been collected by the noticee from service recipients but has not been paid to the credit of the Central Government. Therefore, it appears that service tax at the appropriate rate on the services provided by the Noticee, amounting to Rs.1,09,68,041/- as calculated & described in the Annexure-B to the Notice is liable to be recovered under Section 73 of the Act along with interest under Section 75 of the Act. It also appeared that the Noticee has suppressed the facts that they were engaged in providing services of 'Supply of Tangible goods Service', 'Commercial or Industrial Construction Service' and 'Site formation and clearance, excavation and earthmoving and demolition Service' from the department by not mentioning the same in their ST-3 Returns filed from time to time for the services provided by them under the category of 'Supply of Tangible goods Service', with an intent to evade payment of Service Tax. It also appeared that the Noticee has suppressed the facts that they have collected service tax from their service recipient from the department and not paid the same to the credit of the Central Government by not mentioning the same in their ST-3 Returns filed from time to time for the services provided by them under the category of 'Supply of Tangible goods Service' with an intent to evade payment of Service Tax.



27. Whereas Rule 7 of the Service Tax Rules, 1994 ("hereinafter referred to as 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 a 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.*

From the above, it also appeared that the Noticee did not file any ST-3 Returns for the period from 2006-07 to 2010-11 as prescribed under Rule 7 of the Rules for the Service Tax registration obtained by them and thereby suppressed the facts that they were liable for paying the service tax for the services provided under the categories of 'Supply of Tangible goods Service', 'Commercial or Industrial Construction Service' and 'Site formation and clearance, excavation and earthmoving and demolition Service', which appeared to have been done with an intent to evade payment of Service Tax.

28. Whereas Section 77 of the Act provides that — ***Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere.*** — (1) *Any person, —*

(a) *who is liable to pay service tax, or required to take registration, fails to take registration in accordance with the provisions of section 69 or rules made under this Chapter shall be liable to pay a penalty which may extend to five thousand rupees or two hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance;*

(b) *who fails to keep, maintain or retain books of account and other documents as required in accordance with the provisions of this Chapter or the rules made thereunder, shall be liable to a penalty which may extend to five thousand rupees;*

(c) *who fails to —*

(i) *furnish information called by an officer in accordance with the provisions of this Chapter or rules made thereunder; or*

(ii) *produce documents called for by a Central Excise Officer in accordance with the provisions of this Chapter or rules made thereunder; or*

(iii) *appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry,*

shall be liable to a penalty which may extend to five thousand rupees or two hundred rupees for everyday during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance;



(d) who is required to pay tax electronically, through internet banking, fails to pay the tax electronically, shall be liable to a penalty which may extend to five thousand rupees;

(e) who issues invoice in accordance with the provisions of the Act or rules made thereunder, with incorrect or incomplete details or fails to account for an invoice in his books of account, shall be liable to a penalty which may extend to five thousand rupees.

(2) Any person, who contravenes any of the provisions of this Chapter or any rules made thereunder for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to five thousand rupees.]

29. It also appeared that the summons were issued on 9-9-2010, 23-9-2010, 12-10-2010, 30-11-2010, 15-3-2011, 31-3-2011, 16-5-2011, 17-6-2011 and 5-7-2011. In response to these summons, the authorized signatory of the Noticee had appeared only on two occasions for giving his statement, that too with inadequate documents and insufficient information. The Noticee reneged from his promises to produce documents and to provide required information. Therefore, it appeared that the Noticee have rendered themselves liable for penalty under Section 77(1) (C) of the Act.

30. From the above, it also appeared that the Noticee have contravened the following provisions of the Finance Act, 1994 Act and the Rules framed there under with an intent to evade payment of service tax:

- (i) Section 69 of the Act read with Rule 4 of the Rules in as much as they failed to apply for registration / add 'Commercial or Industrial Construction Service' and 'Site formation and clearance, excavation and earthmoving and demolition Service' as the category of services provided by them in the Service Tax Registration already held by them,
- (ii) Section 68 of the Act read with Rule 6 in as much as they failed to pay service tax at the appropriate rate prescribed under Section 66 of the Act from time to time on the value of the taxable services provided by them during the period from 2006-07 to 2010-11,
- (iii) Section 70 of the Act read with Rule 7 of the Rules in as much as they failed to assess the Service Tax payable on the value of taxable services received for providing various services as discussed hereinabove and to furnish Returns in Form ST-3 duly mentioning the details of taxable services provided by them during the period from 2006-07 to 2010-11.
- (iv) Section 14 of the Central Excise Act, 1944 read with Section 83 of the Act in as much as they failed to furnish information called by an officer and produce documents called for by the investigating officer and appear before the investigating officer.



31. Therefore, it appeared that since the Noticee have suppressed the facts and contravened various provisions of the Act and the Rules as discussed hereinabove with an intent to evade payment of service tax, extended period as contemplated under proviso to Section 73 (1) of the Act is invocable for recovery of Service Tax not levied and not paid by the Noticee.

32. From the above, it appeared that for the acts of suppression of facts of providing taxable services as mentioned hereinabove & liability of the Noticee to pay service tax on it and contravening various provisions of the Act and the Rules as discussed hereinabove with an intent to evade payment of service tax, the Noticee have rendered themselves liable to penalty under Section 78 of the Act. Similarly, for the act of non furnishing of ST-3 Returns prescribed under Section 70 of the Act read with Rule 7 of the Rules as discussed hereinabove, the Noticee have rendered themselves liable to penalty under Section 77 of the Act.

33. From the above, it also appeared that the Noticee admitted the facts of non payment of Service Tax payable by them as per the provisions of Section 68 of the Act on the taxable services provided by them. Thus, it appeared that the Noticee is also liable to penalty under Section 76 of the Act for non payment of Service Tax.

34. The Noticee was therefore called upon to show cause as to why: -

- (i) The Service Tax total amounting to **Rs.1,09,68,041/- (Rupees One Crore Nine Lacs Sixty Eight Thousand Forty One only)** (calculation as shown in the Annexure-B to the Notice) should not be demanded and recovered under proviso to Section 73(1) of the Finance Act, 1994 along with the interest at the appropriate rate as applicable till the date of payment of service tax under Section 75 of the said Act.
- (ii) Penalty should not be imposed upon them under Section 76 of the Act for failure to assess service tax under Section 70 of the Act and make the payment of service tax payable within the period and in the manner prescribed under Section 68 of the Act read with Rule 6 of the Rules.
- (iii) Penalty should not be imposed upon them under Section 77 of the Act for failure to file prescribed returns under Section 70 of the Act read with Rule 7 of the Rules and for failure to apply for registration/ add category of service provided by them in Service Tax Registration.
- (iv) Penalty should not be imposed upon them under Section 77(1) (C) of the Act for failure to furnish information called by an officer and produce documents called for by the investigating officer and appear before the investigating officer.
- (v) Penalty should not be imposed upon them under Section 78 of the Act for suppression of fact of providing taxable services as mentioned hereinabove & liability of the Noticee to pay service tax on it and contravention of various provisions of the Act and the Rules.



Rules as discussed hereinabove with intent to evade payment of service tax.

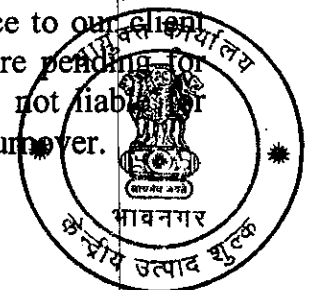
WRITTEN SUBMISSION :-

35.1 The Noticee did not file any reply to the show cause notice within the specified time limit and was reminded for the same vide letter dated 24.07.2012. The Noticee requested for extension for two for filing reply to the show cause notice vide letter dated 06.08.2012. Thereafter, personal hearing was fixed on 07.09.2012 and the Noticee was required to file reply immediately. M/s. S.S.M. & Co., Chartered Accountant vide letter dated 07.09.2012 submitted Letter of Authorisation executed by the Noticee appointing them as authorised representative and requested to re-fix personal hearing after 30.09.2012. Accordingly, personal hearing was re-fixed on 01.10.2012 and further adjourned to 22.10.2012 on request of the Noticee through the said Authorised Representative. The said authorised representative vide their letter dated 22/10/2012 submitted defence reply to the Notice, on behalf of the Noticee, in which they submitted that :

35.2 Show Cause Notice has alleged that our client viz. Kuber Construction, Rajula had failed to pay service tax at the appropriate rate on the taxable amount earned for providing various taxable services during the period from 2006-07 to 2010-11 and thereby they had contravened the provisions of Section 68, 69 and 70 of the Finance Act, 1994 (hereinafter referred to as 'the Act') read with Rule 6, 4 and 7 of the Service Tax Rules, 1994 (hereinafter referred to as 'the Rules') respectively and accordingly rendered themselves liable to penalty under section 76, 77 and 78 of the Act. The reply to the above said show cause notice is as under

35.3 The services provided are not taxable services"

35.3.1 that our client is registered with the Commercial Tax Department and having registration no. 24131300623 as a dealer under the Gujarat Value Added Tax Act, 2003. Noticee was awarded various contracts for executing work of construction of compound wall at New Thermal Power Plant of Gujarat Cement Works Plant-2, Ultra Tech Cement Limited, Kovaya and cutting babul & small tree at the site of Ultra Tech Cement Limited etc. in the financial year 2006-07. The Commercial Tax Officer-1, Unit-83, Amreli has assessed the tax on the total turnover of Rs.29,80,499/- and issued the order on 1-1-2010. Similarly, the Commercial Tax Officer-1, Amreli has assessed the tax on the total turnover of Rs.2,27,67,456/- and issued an order on 28-3-2012. A copy of both the above said orders is enclosed herewith. Therefore, Noticee was not liable for service tax as the value of taxable turnover was not taxable under the Act. Similarly, the Commercial Tax Officer-1, Unit-83, Amreli has issued notice to our client for the financial year 2008-09 and onwards and the same are pending for adjudication with them. Therefore, we submit that they are not liable for service tax as he has to pay the Commercial Tax on the total turnover.



35.3.2 The authorized signatory of the Noticee had also stated in his statement dated 8-12-2010 that they were confused whether the VAT is chargeable or service tax is chargeable. Both the department has issued show cause notice for demanding their tax from the Noticee. Therefore, we request that since the Commercial Tax Officer was asking to pay the VAT on the entire turnover of the Noticee, that they were not liable to pay the service tax.

35.4 Abatement may please be allowed.

35.4.1 Without prejudice to the above submission, we submit that if our above said request will not be considered then the demand of service tax may please be re-calculate as the abatement has not been allowed to our client on Commercial & Industrial Construction service. Our client has provided the said services with the material and the same can be ascertained from work orders issued to our clients. Therefore, it is requested to abatement as provided under the Notification No. 1/2006-ST dated 1-3-2006 may please be allowed on the gross amount received by them.

35.5 The principle of cum-tax value has to be accepted,

35.5.1 Without prejudice to the above submission, we hereby submit that they are not aware that the services being provided by them to M/s. PSL (SEZ/EOU units), Pipavav, M/s. E-Complex Pvt. Ltd. and M/s. Ultra Tech Cement Limited, Kovaya are taxable service as the same is provided to SEZ units or to EOU units which were exempted. Hence, they have neither collected nor received any service tax from their service receiver. Therefore, it is to submit that the demand of service tax was made on the gross amount received by them from the service receiver is not proper and correct. It is very much clear that they have not collected any service tax from their service receiver. Therefore, the amount received by them ought to have treated the transaction value as cum-tax value and, accordingly, the tax element should have been deducted for the purpose of arriving at the taxable value of the service. In this connection, we rely on *CCE, Patna v. Advantage Media Consultant - 2008 (10) S.T.R. 449* (Tri.-Kolkata) affirmed by the Supreme Court in *CCE v. Advantage Media Consultant - 2009 (14) S.T.R. 499* (S.C.). On the strength of the cited case law, we claim the benefit of Section 67(2) of the Act for the period of dispute involved in the present case.

35.5.2 We also want to rely on the following cases in this context:

- (i) *Robot Detective & Security Agency v. CCE, Chennai, 2009 (14) S.T.R. 689* (Tri.-Chennai),
- (ii) *Rampur Engg. Co. Ltd. vls. CCE, Jaipur-I, 2006 (3) S.T.R. 650* (Tri.-Del.),
- (iii) *Gem Star Enterprises (P) Ltd. v. CCE, Calicut, 2007 (7) S.T.R. 342* (Tri.-Bang.).

We submit that the service recipient has not paid the Service tax amount separately. Therefore, our client is entitled to assessment treating



value received as cum-tax value and therefore, the demand amount would have to be reduced.

35.6 Our client is not liable for penalty:

35.6.1 We further submit that the service tax was not being paid on account of a *bona fide* belief that the same was not payable as the Commercial Tax Officer has demanded the tax on the entire turnover and also they were not known the service tax law; that they were also never advised by the service receivers to pay service tax. Hence, it is request that the penalty should not be imposed upon them, by invoking Section 80 of the Act. Therefore, we are of the view that notwithstanding anything contained in Sections 76 and 77 of the Act, they are entitled for the benefit of Section 80 of the Act and accordingly, no penalty should be imposed on them.

35.6.2 We also submit that mere detection by the department does not mean that non-payment was with intention to evade unless the department brings out clear facts that they were having the knowledge that service tax was payable on such services but still chose not to pay the tax in order to evade the same. No such fact has been narrated in the show cause notice or forthcoming during the investigation. It is to further submit that their *bona fide* cannot be out rightly rejected unless some circumstance is shown to establish that they were in the knowledge that service tax is payable on such activity. When no such evidence are recovered there can be *bona fide* doubt whether service tax is payable in such situation. Therefore, it is requested that no penalty should be imposed on them and grant immunity from imposing the penalty.

35.6.3 We also pray to grant leave to add, amend, alter, modify, amplify, emphasis, and/or, withdraw all or any of our submission either before or during proceeding, if so advised.

35.7 Further the Noticee vide letter dated 22/10/2012 submitted that the documents which are relied upon by the department were either seized by the Commercial tax department or not lying with them as they have closed the firm and the accounts of the firm are with old accountant who has left the job; that they may please be provided copy of documents relied upon for the Notice as mentioned in Annexure-D to the Notice, and further requested to grant new date of personal hearing after 27.11.2012. The Noticee vide their letter dated 05/11/2012 submitted that they have received photocopy of the documents and need some time to study the above documents and personal hearing date may be re-fixed on 05/12/2012

PERSONAL HEARING :

36.1 Personal hearing in the matter was finally adjourned for third time and re-fixed on 05.12.2012. The Noticee through its authorized representative Shri Sarju S. Mehta, Chartered Accountant, Partner of M/s. S.S.Mehta & Co. Chartered Accountants, appeared for personal hearing on 06/12/2012 and reiterated their



written submission dated 22/10/2012 and submitted further written reply dated 06/12/2012 in the matter in which they submitted as under.

36.2 Duty calculation sheet is not correct; that the figures shown under the Annexure-B1 are not correct; that there are mistakes in the said figures and the same are as under:

(i) During the financial year 2006-07, the value taken for taxable income in Annexure-B1, B2 and B is Rs.33,40,840/-. In this regard, it is to submit that the income of Rs.7,10,064/- shown in the ledger of M/s. Spiral Construction Corporation, Keshod was received for the construction work of roads as a sub-contractor of M/s. Spiral Construction Corporation, Keshod. Therefore, service tax cannot be levied on the value of construction or maintenance & repairs of Roads. It is to submit that as provided under Section 97 of the Act, no service tax shall be levied or collected in respect of management, maintenance or repair of roads during the period on and from the 16th day of June, 2005 to the 26th day of July, 2009. Hence, the maintenance or repairs work of road is outside the purview of service tax. Secondly, the value received under the head of Transport Income of Rs.9,90,458/- and the same was received for transportation. Since, the credit of duty paid on inputs or capital goods used for providing this taxable service has not been taken by our client, he is entitled for exemption provided under the Notification no. 1/2006-ST dated 1/3/2006 (sr. no.6).

(ii) During the financial year 2007-08, the value taken for taxable income in Annexure-B1, B2 and B is Rs.1,45,89,980/-. In this regard, it is to submit that the same figure is not correct. The correct income figure shown in Profit & Loss Account of our client is Rs.1,45,62,612/- and not Rs.1,45,89,980/- as shown in the show cause notice. Further, the service tax is leviable/payable on the value which is received for providing the services. Hence, the amount of sundry debtors of Rs.17,63,056/- shown in the Audit report of our client should be deducted from the income amount shown in Profit & Loss Account of our client as the said amount was not received by our client. Thus, after deducting the same, the total income received by our client during the financial year 2007-08 is Rs.1,27,99,556/-.

(iii) During the financial year 2008-09, the value taken for taxable income in Annexure-B1, B2 and B is Rs.4,26,94,718/-. In this regard, it is to submit that the service tax is leviable/payable on the value which is received for providing the services. Hence, the amount of sundry debtors of Rs.1,77,99,012/- shown in the Audit report of our client should be deducted from the income amount shown in Profit & Loss Account of our client as the said amount was not received by our client. Thus, after deducting the same, the total income received by our client during the financial year 2008-09 is Rs.2,66,58,762/- [Rs.4,26,94,718 - Rs.1,77,99,012 + Rs. 17,63,056].

(iv) The correct figures are as per the annexure-A attached with this reply and the same can be verified from the audit reports of our client, on which the department has relied.

