



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

प्लॉट नं. 6776-बी/1, 'सिद्धि सदन' बिल्डिंग,  
PLOT NO. 6776/B-1, "SIDDHI SADAN" BUILDING,

नारायण उपाध्याय मार्ग, भावनगर-364001

NARAYAN UPADHYAY MARG, BHAVNAGAR-364 001.

दूरभाष : (0278) 2523627 फैक्स : 0278-2513086

रजिस्टर्ड डाक पावती द्वारा

By R.P.A.D.

फाईल सं. V/15-13/Dem-ST/HQ/2010-11

F. No.

आदेश की तारीख : 15/04/2013.

Date of Order :

जारी करने की तारीख: 15/04/2013.

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 : 06/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 प्राप्त के दिनांक से तीन माह के भीतर की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निर्धारित किए अनुसार शुल्क लगा होना चाहिए। जिस स्थान पर न्यायाधिकरण की न्यायापीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्रा बैंक के न्यायापीठ के सहायक रजिस्ट्रार के नाम से निर्धारित फीस रेखांकित बैंक ड्राफ्ट के रुप में भेजनी होगी।



- 3। वित्त अधिनियम, 1994 की धारा 86 की 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 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. ब्यौरापूर्ण करने हेतु सीमाशुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 की ओर ध्यान आकर्षित किया जाता है।

**BY RPAD**

To,

M/s. Modest Infrastructure Ltd.,  
Ramsar Yard, Old Port, Ferry Road,  
Near Lakadia Pool, Takhteshwar,  
Bhavnagar – 364 002

Subject: Show Cause Notice F. No. V/15-13/Dem-ST/HQ/2010-11 dated 05.10.2010.



**BRIEF FACTS OF THE CASE :-**

M/s. Modest Infrastructure Limited, Ramsar Yard, Old Port, Bhavnagar (hereinafter referred to as "the Noticee") is holding Service Tax Registration bearing No AADCM1665KST002. During the course of Audit of the said Service Provider by the officers of Central Excise, Bhavnagar, it was noticed that the Service Provider had shown "Income Charter Hire" amounting to Rs. 1,20,66,184/-, Rs. 3,13,31,626/- and Rs. 74,45,312/- in the Balance Sheet for the Financial Years 2004-05, 2005-06 & 2006-07 respectively. Further, as per Form No. 3CD furnished to the Income Tax Department, it was revealed that the said Service Provider was engaged in the business of (i) Executive Infrastructure and Other projects including chartering of the vessels and rendering of related services, (ii) Ship building, Ship fabrications, Ship repairs and related activities.

2.1 The provision of sub-clause (i) of Section 65 (105) of the Finance Act, 1994 reads as – "taxable service" means "any service provided or to be provided to a shipping line, by a steamer agent in relation to a ship's husbandry or dispatch or any administrative work related thereto as well as the booking, advertising or canvassing of cargo including container feeder services".

2.2 The word 'shipping line' has been defined under Section 65(97) of the Finance Act, 1994 as – "shipping line" means "any person who owns or charters a ship and includes an enterprise which operates or manages the business of shipping".

2.3 The "Ship" means "sea going vessel and includes a sailing vessel" as per provision of Section 65(96) of the Finance Act, 1994.

2.4 In view of the above definition, it was apparently clear that the activities of chartering vessel and providing related service by the said Noticee were taxable under "Steamer Agent Services" as they had rendered services of Ship Husbandry or dispatch service to charter vessels by incurring the operation expenses and by earning an income from the charter vessels.

2.5 It was further observed that earlier the said Noticee were known as Modest Offshore Service Pvt. Ltd. (up to 2004-05) and were holding Service Tax Registration No. AADCM1665KST001 issued by the Bombay Service Tax Office for the services of "Maintenance & Repair service" and not for the "Steamer Agent Service". The Noticee appeared to have paid Service Tax on service of "Maintenance & Repair Service" for the year 2005-06, however, not paid Service Tax on the services rendered towards charter vessels falling under the category of "Steamer Agent Service".

2.6 The details of 'Operation Expenses' on charter vessels, 'Income from charter / hire' and Service Tax applicable / payable thereon are as under :-



Sr. No.	Financial Year	Operation of Expenses on Charter vessels (Rs.)	Total Income from Charter hire	Applicable Service Tax
1	2005-06	2,96,65,907/-	3,13,31,626/-	38,34,991/-
2	2006-07	70,76,959/-	74,45,312/-	9,11,306
		<b>Total</b>	<b>3,87,76,938/-</b>	<b>47,46,297/-</b>

3.1 It was also observed, during the course of scrutiny of the Balance Sheet for the Financial Year 2008-09 by the Audit, that the Noticee had shown income from "Ship Repair" amounting to Rs. 1,97,51,603/-.

3.2 The provision of Section 65(96a) of the Finance Act, 1994 defines "Ship Management Service" as (i) supervision of maintenance, survey and repair of ship. Therefore, the said Noticee was liable to Service Tax under Ship Management Service. The said Noticee clarified that they had paid Service Tax under "Management and Maintenance Repairs Service" for which they are holding Service Tax Registration No. AADCM1665KST002 in respect of services viz. (1) Goods transport by Road (zpz) and (2) Management, Maintenance and Repairs service (zgz).

3.3 It was observed that the said Noticee had paid Service Tax on total value of Rs. 1,15,82,380/- in the head of "Management, Maintenance and Repairs Service" as against the Balance sheet for Financial Year 2008-09 shows the total income received from Ship Repair Service as Rs. 1,97,51,603/-. The details of service tax payable on remaining amount of Rs. 81,69,223/- [ Rs. 1,97,51,603/- (-) Rs. 1,15,82,380/-] is as under :-

Total Taxable Income	Service Tax @ 12%	Edu. Cess @ 2% of S/Tax	Sec. & Higher Edu. Cess @ 1% of S/Tax	Total Service Tax recoverable.
Rs. 81,69,223/-	Rs. 9,80,307/-	Rs.19,606/-	Rs. 9,804/-	Rs.10,09,717/-

4.1 Therefore, it appeared that the Noticee had collected an amount of Rs. 3,87,76,938/- as income towards Charter Hire during the period from 2005 to 2007 and were required to pay Service Tax of Rs. 47,46,297/- at the prevailing rate along with interest. Similarly, the Noticee had collected an amount of Rs. 81,69,223/- as income towards "Ship Repairs" during the period from 2008-09 and were required to pay Service Tax of Rs. 10,09,717/- at the prevailing rate alongwith interest. However, the Noticee failed to pay due Service Tax at the material time by suppressing the facts only with an intent to evade the said Service Tax. As such, the said Noticee was required to be demanded / recoverable under the proviso of Section 73(1) of the Finance Act, 1994 along with due interest thereon under the provisions of Section 75 of the said Finance Act, 1994.

4.2 The said Noticee appeared to had contravened the various provisions of Section 68, 69 & 70 of the Finance Act, 1994 and made



themselves liable for penal action under Section 76, 77 & 78 of the said Finance Act read with various provisions of Service Tax Rules, 1994.

5. Accordingly a Show Cause Notice F.No.V/15-13/Dem-ST/HQ/2010-11 dated 05.10.2010 was issued to the said Noticee asking them to show cause as to why :-

- (a) the Service Tax of Rs. 57,56,014/- should not be recovered from them under Section 73 of the Finance Act, 1994 by invoking the extended period of limitation as per proviso to sub-section (1) of Section 73.
- (b) Interest should not be recovered under section 75 of the Finance Act, 1994 at the appropriate rate on the above mentioned amount of Service Tax, till the actual payment of Service Tax;
- (c) Penalty should not be imposed under Section 76, 77 & 78 of the Finance Act, 1994.

#### **DEFENCE REPLY :-**

6. The Noticee vide their letter dated 11<sup>th</sup> July, 2011 submitted written reply to Show Cause Notice dated 05.10.2010 wherein they denied the allegations made in the SCN and its liability to pay the service tax as alleged in the SCN and stated that allegations leveled in the SCN are misconceived in facts and in law as they did not contravene any provisions of the Act or the Rules as has been alleged or otherwise. It was also stated that the SCN is issued without jurisdiction & deserves to be dropped.

#### **7.1 Charter Hire Income:-**

The Noticee submitted that they had provided Ships, Tugs etc. on hire after receiving the same on hire from the owners and earned Rs. 3,13,31,626/- as Charter Hire Income during the F.Y. 2005-06 and paid Rs. 2,96,65,907/- as Charter Hire Expenses. Similarly, they earned Rs. 74,45,312/- as Charter Hire Income during F.Y. 2006-07 and paid Rs. 70,76,959/- as Charter Hire Expense. In nutshell, the activity was purely in the nature of trading [pass-through] activity and not in any manner in the nature of provision of 'service'.

7.2 As regards allegation in the SCN to pay Service Tax on the amounts received/due in respect of the Charter Hire Income during the stated period, it was explained that in view of definitions of "Steamer agent - Section 65(100)", "Shipping line - Section 65(97)" and "Taxable Service - Section 65(105)(i)", the liability to pay service tax would arise only -

- a. when a person acts as an agent of or for a shipping line,
- b. provides or undertakes to provide any service,
- c. to a shipping line who is principal for the steamer agent,
- d. in relation to a ship's husbandry etc.



Thus, the person acting as "steamer agent" has to be an agent of a shipping line who is engaged in the business of shipping i.e. transport of goods by sea route. The shipping line may own a ship or may manage a ship hired by them. These shipping lines in turn may appoint an agent at different ports in different countries. These agents are appointed either for booking cargo for ships for transportation or provide services for ships in relation to husbandry of the ship. The services of steamer agents were brought within the tax net with effect from 15-06-1997. The trade notice issued at such time clarified the scope and coverage as follows:

*"The taxable service provided by a steamer agent to a shipping line, is the service provided by a Steamer Agent in relation to a ship's husbandry or dispatch or any other administrative work related thereto as well as booking, advertising or canvassing of cargo, including container feeder services. The value of taxable service .....*

And, as a consequence, any other person acting as an agent of a shipping line [and not the Noticee]:

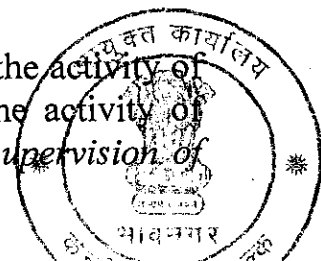
- a) who would get covered by the term 'Steamer Agent', and
- b) who would provide services,
- c) in relation to a ships' husbandry etc. or booking freight with exporters

would be liable to pay service tax under steamer agency service.

7.3 It was reiterated that at no point of time, they were acting as an agent of a shipping line to provide the specified services such as ship's husbandry etc. and, therefore, they cannot be termed as a steamer agent. Further, they were not engaged in the business of shipping i.e. transport of goods by sea route and, therefore, cannot be termed as a shipping line also. The SCN had made a futile and baseless attempt to establish that they fall within the definition of the term "Steamer Agent", and were providing service in relation to ship's husbandry etc. as a steamer agent to a shipping line. As regards charter hire income, they stated that they have neither provided any 'service', leave apart taxable service as a steamer agent, nor provided any service in relation to ship's husbandry or dispatch or any administrative work related thereto as well as freight booking, advertising or canvassing of cargo, including container feeder services. Therefore, on facts, in the circumstances of the case and in law the allegation in the SCN that they are a steamer agent providing taxable service to a shipping line failed and as a result the demand of Rs. 47,46,297/- being Service Tax on Rs. 3,87,76,938/- is illegal, misconceived and unsustainable.

### 8.1 Ship Repairs service:

The Noticee submitted that they were engaged in the activity of repairing ships on contract basis and were not engaged in the activity of "Ship Management Service" which, *interalia*, includes "the supervision of



*the maintenance, survey and repair of ship*". Further, they were not engaged in providing any other service which is enumerated as "Ship Management Service".

8.2 The Noticee narrated the definition of "management, maintenance or repair" service as provided under Section 65(64) of the Finance Act, 1994 and stated that in view of global trade and movements of goods by ships, the shipping lines outsource various services in relation to ship management at various ports which are visited by the ships from time to time. They were at no time engaged in this activity of Ship Management and were wholly engaged in repairs of ships under contract / arrangement basis and no other specified activity. The SCN erred in terming the same as "Ship Management Service".

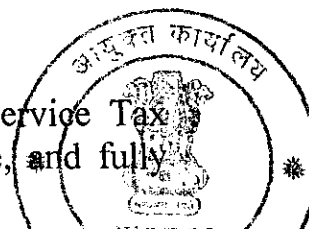
8.3 The SCN alleged that the value of taxable service was Rs. 1,97,51,603/- whereas Service Tax was paid on Rs. 1,15,82,380/- thereby they have short paid service tax on Rs. 81,69,223/-. In this regard, they submitted that :-

- a. The liability to pay Service Tax during the relevant period was on receipt basis,
- b. The bills for repairs of ships may be raised either from Bhavnagar office or from Head Office at Mumbai. But, in the P&L A/c, income shown is combined figure of bills raised from the stated two locations,
- c. Being a corporate body, income from Ship Repair as mentioned in the Profit & Loss A/c of Rs. 1,97,51,603.00 is accounted on mercantile/ accrual system of accounting,
- d. Therefore, the amount received towards billed figure may or may not be the same on which Service Tax is payable in terms of section 67 of the Act.

8.4 They further submitted that during the relevant period, they had paid Service Tax under the category "management, maintenance or repair service" as under:

- i. On Rs.1,22,86,129/- being amounts received in respect of bills raised from Bhavnagar office, and
- ii. On Rs. 82,17,427/- being amounts received in respect of bills raised from Mumbai head office.
- iii. Thus, they paid service tax on an aggregate value of 2,05,03,556/-.
- iv. This is evident from the returns filed in the prescribed ST-3 form in respect of the relevant period. They craved leave to produce the same at the time of personal hearing along with copies of challans in support thereof.

The Noticee submitted that they correctly paid Service Tax under the category management, maintenance or repair service, and fully



discharged liability to pay Service Tax on an aggregate value of Rs. 2,05,03,556/-. As such, there was no short payment of service tax on an amount of Rs. 81,69,223/- as alleged in the SCN and submitted that the allegations leveled are unsustainable and the consequential demand raised of Rs. 10,09,717/- is without any basis, illegal and misconceived.

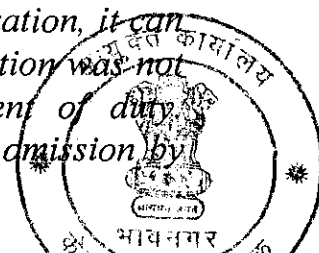
#### 9.1 Extended Period of Limitation:

The Noticee submitted that the SCN proposed to invoke the extended period of limitation without any jurisdiction to do so purportedly based on the presumption that they had willfully suppressed material information with an intent to evade the payment of Service Tax and the allegation made is bald and unsubstantiated.

9.2 They submitted that they were always of the view that they are not liable to pay any service tax as not providing any taxable service on Charter Hire Income and they fully discharged the liability to pay service tax under the category of management, maintenance or repair service. Thus the SCN had invoked the extended period of limitation without making out any case that they had resorted to contumacious or dishonest conduct with a deliberate intention to evade duty or defy the law. They relied on the following judicial views/pronouncements:

- (a) It is settled law by the judgment of the Hon'ble Supreme Court in PUSHPAM PHARMACEUTICALS CO. v/s COLLECTOR- [1995-(78)-ELT-401] that "suppression" is not a mere omission or failure to disclose some information that an assessee might have disclosed but is an omission or failure to disclose information that the assessee was statutorily bound to disclose. To constitute "suppression" an assessee who knows he is liable to pay tax, must consciously or deliberately withhold information with a view to evade tax. The relevant portion of the judgment is set out hereunder.

*"The meaning of word both in law and even otherwise is well known. In normal understanding it is not different than what is explained in the various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in the company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be constructed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by*





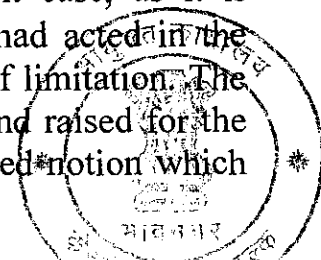
*one to do what he might have done and not that he must have done, does not render it suppression”.*

(b) It is settled law that when there is confusion and uncertainty as to scope of taxing entry resulting in a divergence of views and assessment practices within the department as to the scope of an entry, the longer period of limitation cannot be invoked. In this regard, reliance is placed on the ratio of the following judgments:

- *Ugamchand Bhandari Vs. CCE-Madras-2004-(167)-ELT-491-(S.C.)*.
- *Mentha & Allied Products Ltd. Vs. CCE Meerut-2004-(167)-ELT-494-(S.C.)*
- *Tata Iron and Steel Co. Ltd. Vs. CCE Patna-2004-(167)-ELT-497-(S.C.)*
- *Dolphine Detective Agency vs. CCE, Belgaum-2006 TIOL 1238 CESTAT-Bang.*
- *Nizam Sugar Factory vs. CCE, AP 2006 – 197-ELT-465-SC.*

9.3 The Noticee stated and submitted that they were registered with the service tax authorities and were filing ST-3 Returns. The Show Cause Notice has not brought on record any ingredient of invoking extended period of limitation except baldly alleging that they suppressed the value of taxable service. It is more than clear that the issue involved is that interpretation or applicability under the appropriate classification, extended period cannot be invoked as they were under a bonafide belief. There was no evidence to show that they suppressed any information with an intent to evade payment of tax.

9.4 The Noticee further submitted that the ingredients of omission or failure referred to in section 73(1)(a) of the Act for invoking the longer period of limitation, when read in the context of the other provisions of section 73 and the subsequent amendments thereto, clearly requires that the omission or failure must be actuated by a desire to evade which an entity knows is payable. In the present case, there is no sustainable basis made out or evidence led that despite its knowledge that it is liable to tax has deliberately omitted or failed to do so. The longer period of limitation cannot be invoked in the facts and circumstances of the present case, as it is unsustainable. The SCN has failed to establish that they had acted in the above manner so as to warrant invoking of longer period of limitation. The SCN is barred by limitation period and therefore the demand raised for the service tax amount itself is false and based on misconceived notion which



renders the SCN void ab initio and therefore on this ground also, the same is required to be set aside. The Noticee also relies on the following decisions:

- *Continental Foundation Jt. Venture vs. CCE 2007 TIOL 152 SC-CX*
- *Camphor Drugs & Liniments 1989 – 40 ELT 276 – SC*
- *LSG Sky Chefs (India) Pvt. Ltd. vs. CST 2008 TIOL CESTAT-BANG*
- *Mangal Wardhini Travels vs. CCE 2008 TIOL 1532 CESTAT-DEL*
- *Kilburn Engg. Ltd. vs. CCE 2008 TIOL 1814 CESTAT-AHM*
- *Vijay Television P. Ltd. vs. CST 2008 TIOL 2127 CESTAT-Mad*
- *Cairn Energy (I) P. Ltd. vs. CCE 2008 TIOL 1326 CESTAT-BANG.*

9.5 The Noticee submitted that without prejudice to the merits, the SCN has failed to carve out/ adduce any plausible reasons or ingredients for invoking the longer period of limitation. They stated that there is no provision in the law that even when there is a bonafide belief as to non-taxability of one's activity, the person is required to intimate to the department. The Noticee also relies on the following judicial pronouncements on the subject:

- *CCE vs. HMV Ltd., (1995(76) ELT 497 (SC)*
- *Kaur Singh vs. CCE (1997 (94) ELT 289 (SC)*
- *T. N. Dadha Pharmaceuticals vs. CCE (2003 (152) ELT 251 (SC)*
- *Cosmic Dye Chemicals vs. CCE (1995 (75) ELT 721 (SC)*
- *Aban Lloyd Chiles Offshore Ltd. vs. CCE (2006 (200) ELT 370 (SC)*
- *Bridgestone Financial Services vs. Comm. of Service Tax, Bangalore. [2007-TIOL-810-CESTAT-BANG]*
- *CCE, Mumbai vs. DSP Merrill Lynch Ltd. [2007-TIOL-584-CESTAT- Mum.]*
- *LSG Sky Chefs vs. CST, Bangalore [2008-TIOL-1410-CESTAT-BANG.]*

#### 10.1 PENALTY:

The Noticee submitted that no amount of penalty can be upheld against them as there was a bonafide belief that there is no liability to pay service tax in respect of various demands raised in the SCN. In this regard, they relied on the following judicial pronouncements:

- *Hindustan Steel vs. State of Orissa 1978 ELT CJ 159-SC*
- *ETA Eng. Ltd. vs. CCE. 2004(174) ELT 19 [Tri.-LB]*



- *Smitha Shetty and Co. vs. CCE 2003(57) RLT 543 (CEGAT)*
- *Nestle India Ltd. vs. CCE Goa. 2004 (061) RLT 0572 (T)*

10.2 As regards proposal to impose penalty u/s.76 of the Act for failure to pay service tax, the Noticee submitted that in facts and circumstances of the case, no service tax is payable as submitted in submission herein above and in absence of the same no penalty can be imposed for failure to do so. Further, in absence of circumstances postulated in section 76, no penalty is warranted. The show cause notice has not provided any reasons for proposed levy of penalty. The penalty provisions may be invoked using discretion, as they are not mandatory. The Noticee relied on the following decisions:

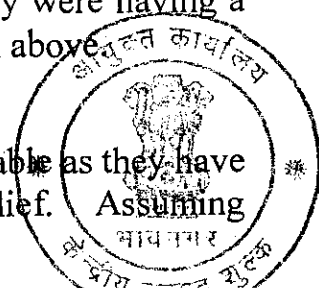
- *Commissioner Vs. Milan Tent Palace 2001 (131) ELT-274(T)*
- *State of Madhya Pradesh Vs. Bharat Heavy Electricals 1997 (99) ELT.33 (S.C.)*
- *Zuunjar Rao Bhikaji Nagarkar. Vs. UOI 1999 (112) ELT. 772(S.C)*

#### 11.1 INTEREST :

The Noticee submitted that provisions for imposition of interest under Section 75 were inapplicable in the present case as there was been no failure to pay service tax in accordance with the provisions of section 68. Consequently no provisions of delay apply in this case and in this regard they relied on the ratio of the decision in case of Pratibha Processor vs. UOI. 1996(88) ELT.12 (S.C.). They further stated that it was a clear belief that no liability of service tax existed (as stated above), both while computing the service tax payable and also while filing periodic returns as assumed to be required by law and in view thereof, there would be no liability towards penalty and interest.

11.2 They submitted that it is a settled law that dispute in the present case is a genuine dispute and requires interpretation of law, as such, no penalty is leviable u/s. 78, as the case is not one of suppression or evasion as amply analyzed and submitted above. They further submitted that in case of Flyingman Air Courier. Pvt. Ltd Vs. CCE.2004 (170) ELT.417 (T), the Tribunal set aside imposition of penalty as the appellant's bonafide belief was upheld. Hence, no penalty was leviable on them as they were having a bonafide belief that no service tax is payable as stated herein above.

11.3 The Noticee submitted that no penalty was leviable as they have established that they always acted under a bonafide belief.



without admitting that there was any liability to pay tax, it is the most fit and proper case to invoke section 80 of the Act.

11.4 It has been submitted that there was no case for levying service tax, interest thereon and penalties for various alleged contraventions in the SCN as the provisions of sections 76, 77 and 78 of the Act do not apply to them by any parameters. The SCN has not adduced any evidence to justify invoking of penalty provision. Therefore, the proceedings initiated are untenable in law and for that they relied on the following decisions:

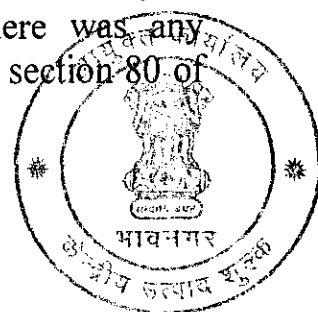
- *G S Financials and others v. CCE, Nasik* [2007-TIOL-1233-CESTAT-MUM.] in which case it was held that as the assesses who were engaged in processing of loans for bank had bonafide belief penalty enhanced was not justified.
- *Modern Machinery Store v. CCE, Jaipur* [2007-TIOL-1240-CESTAT-DEL.] in which case it was held that in the matter of taxability of finance commission received from bank since there was confusion as to its taxability and the assessee had paid tax with interest before issuance of SCN, it was a fit case for application of section 80 of the Act.
- *Majestic Mobikes P. Ltd. v. CST, Bang.* [[2008-TIOL-1670-CESTAT-BANG.] in which case it was held that since there was genuine doubt in trade circles as to taxability of finance commission received from banks and the Board had, therefore, to issue a clarification, no malafide can be attributed and waiver of penalty by invoking section 80 was justified.
- *Raj Auto Centre v. CCE, Ahmedabad* [2008-TIOL- 1720-CESTAT-AHM.] in which case it was held that since there was confusion about taxability of finance commission received by a car dealer from banks, penalty set aside by invoking section 80 was proper.
- *Industrial Security Agency vs. CCE 2008 TIOL 960 CESTAT-Del*  
Quantification of penalty depends on discretion of the authorities - penalties under sections 76, 77 and 88.
- *CCE vs. Shree Soap & Chemical Ind.* 2008 TIOL 950 CESTAT-Ahm  
Section 80 invoked – penalty deleted
- *Elecon Cargo Pvt. Ltd. vs. CST 2008 TIOL 905 CESTAT DEL.*  
Penalty deleted by invoking section 80 approved
- *R. R. Construction Co. vs. CCE 2008 TIOL 881CESTAT-Del*  
Since no suppression was made, penalty under section 78 deleted.
- *N. D. Mazumdar & Co. vs. CCE 2008 TIOL 2118 CESTAT-Kol*  
Section 80 invoked – penalty deleted
- *LIC vs. CCE, Jaipur 2008 TIOL 2091 CESTAT-Del*  
Section 80 invoked – penalty deleted
- *CCE vs. Vijay Laxmi 2008 TIOL 2027 CESTAT-Del*  
Section 80 invoked – penalty deleted
- *Remac Marketing P. Ltd. vs. CST 2008 TIOL 2050 CESTAT-Kol*  
Double penalty cannot be imposed under sections 76 and 78 in view of decisions in cases of the Financiers vs. CCE (2007 TIOL



- 1778 CESTAT-Del) and Opus Media & Entertainment vs. CCE (2007-TIOL-1802 CESTAT-Del
- *Prodorite Anticorrosive Ltd. vs. CCE 2008 TIOL 2020 CESTAT-Mad*  
Section 80 invoked – penalty deleted
  - *Bank of Baroda vs. CST 2008 TIOL 1915 CESTAT-Ahm.*  
Section 80 invoked – penalty deleted
  - *Dixon Electronics vs. CCE – 2008 TIOL 1971 CESTAT Del.*  
Section 80 invoked – penalty deleted
  - *Punjab Ex-Servicemen Corp. vs. CCE 2008 TIOL 1972 CESTAT-Del*  
Appellant being a corp. set up by the State of Punjab, it cannot be said there is a deliberate act with intention to evade the service tax.
  - *Toyota Kirloskar Motor P. Ltd. vs. CCE 2008 TIOL 1872 CESTAT-Bang*  
Allegation of intention to evade duty or willful suppression of facts not explicitly brought out in SCN – Demands hit by limitation.
  - *CCE vs. Louis Berger International 2008 TIOL 1758 CESTAT-Del*  
Penalty is not imposable as it is a matter of interpretation of law.
  - *CCE vs. Pannu Property Dealers 2008 TIOL 1750 CESTAT-Del*  
- Mens rea essential to levy penalty under section 78  
- Imposing penalty both under sections 76 and 78 is harsh and if penalty is levied under section 78, it does not call for penalty under section 76.
  - *Majestic Mobikes P. Ltd. vs. CST 2008 TIOL 1670 CESTAT-Bang*  
When there is a genuine doubt and the Board issues a clarification, no malafide can be attributed.
  - *HP State Forest Corp. Ltd. vs. CCE 2008 TIOL 1569 CESTAT-Del*  
Since the assessee is a State Govt. undertaking and was not aware of the levy, suppression cannot be alleged.
  - *Krishna Satellite Cable vs. CCE 2008 TIOL 1536 CESTAT-Del*  
As the assessee was under a bonafide belief – penalty deleted
  - *Sharvin vs. CCE, Bhopal 2008 TIOL 1167 CESTAT-Del*

11.5 It was also stated that allegations in the SCN are built on shaky foundations bereft of legality and appeared to have been issued with intent to fasten a demand one way or another on the Service Provider and is therefore bad in law. They denied, refuted and rebutted all the allegations in the SCN as the same were false, framed without any basis in support thereof and against the scheme of law and are therefore legally untenable.

11.6 The Noticee submitted without prejudice to the aforesaid that they had always acted under a bonafide belief that they were not liable for service tax and therefore, they denied that they had suppressed any fact with intent to evade the payment of service tax leviable, if any. Hence, no penalty was leviable. Assuming without admitting that there was any liability to pay tax, it is the most fit and proper case to invoke section 80 of the Act for condonation and non-levy of the penalty.



### 11.7 Penalty under sections 78 and 76 cannot be imposed simultaneously:

Without prejudice, the Noticee submitted that section 78 as amended effective from May 10, 2008 provides that when section 78 is invoked, no penalty under section 76 is payable. Hence, for this reason also, it is not only unjust and unfair but without authority of law to invoke penalties under both the sections. The Noticee relies on the following decision:

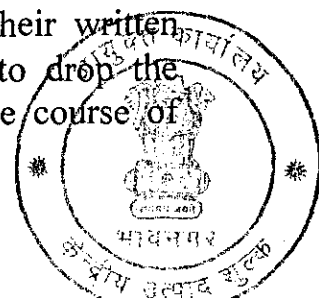
- *CCE, Lucknow vs. M/s. Orbit Travels*  
Demand raised and assessee pay tax with interest and 25% penalty u/s. 78. Revenue imposed penalty u/s.76 by issuing a corrigendum to SCN. The Commissioner (appeal) has taken a view that when penalty is imposed u/s.78, penalty under section 76 is not called for. It was held that since the revenue has not challenged the imposition of penalty by issuing corrigendum to SCN, the Commissioner (A) order is upheld.

11.8 The Noticee further relied on the following decisions:

- *The Financers vs. Commissioner of Central Excise, Jaipur 2007(8) STR 7 (Tri.-Del)*
- *Kamal Photo Studio And Colour Lab vs. Commr. Of C. Ex Mumbai-I 2007 (7) STR 307 (Tri. Mumbai)*
- *CCE vs. Silver Oak Gardens Resort 2008 (9) STR 481 (Tri.-Del)*
- *Lawson Travel & Tours India Pvt. Ltd. CCC&E – Appeals 2006 (1) STR 101 (Tr.-Kol)*
- *Jewel Hotel Pvt. Ltd. vs. CCE (Mum) 2007 (6) STER 240 (Tri.-Mum)*
- *CCE Kol vs. Sujata Star Tele Club 2006 (4) STR 194 (Tri.-Kol)*
- *CCE Ludhiana vs. Pannu Property Dealers & Others 2008 TIOL 1750 CESTAT-DEL*

### PERSONAL HEARING :-

12. The personal hearing in the matter was held on 03.11.2011 wherein Ms. Puloma Dalal and Shri Rajesh P. Langalia, Chartered Accountants along with Shri M. M. Sarvaiya, Assistant Manager of the Noticee appeared and submitted further written submission dated 02.11.2011 along with certain documents and citations. They reiterated their written submission dated 11.06.2011 and 02.11.2011 and requested to drop the demand. They have submitted following documents during the course of personal hearing :-



- (i) Copy of Ledger A/c of Charter Hire Income,
- (ii) Balance Sheet for 2005-06, 2006-07 and 2007-08,
- (iii) Copies of Half Yearly Returns filed by Mumbai Office during 2008-09 and Service Tax Registration Certificate,
- (iv) Reconciliation statement along with proof of payment of service Tax by Bhavnagar Office for 2008-09.

13. The Noticee in their further written submission dated 02.11.2011 made following submission :-

#### 13.1 Jurisdiction:

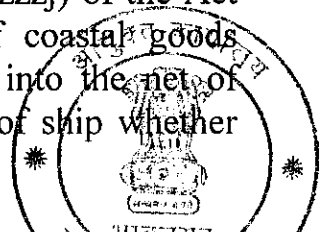
The impugned SCN is issued with total non-application of mind inasmuch as it is issued without jurisdiction, territorial as well as otherwise. Their Mumbai office was separately registered with the jurisdictional office of the service tax authorities ( They attached copy of the registration certificate) and separately filed half yearly ST-3 Returns for their Mumbai office transactions i.e. for the invoices issued by the Mumbai office. The service tax department at Bhavnagar was aware of the same as consolidated balance sheet of the company was verified by the auditors of the department. As such, the SCN issued for all the transactions carried out by the Mumbai office and the invoices issued at Mumbai office would be held invalid and illegal. The activity of charter hiring of ships during the impugned period of 2005-06 and 2006-07 and partial ship repair service during F. Y. 2008-09 was carried out by the Mumbai office of the company.

13.2 On the ground of merits, the activity of charter hiring of ships is not covered under steamer agent's service as stated at point no.3.2 in their reply dated July 11, 2011. They relied on the following decisions wherein to state that the adjudicating authority cannot determine the liability relating to another jurisdiction:

- *CCE, Guntur vs. Integral Construction Co. 2010 (17) STR 380 (Tri.-Bang)*
- *CCE, Indore vs. Detective & Security Service 2010 (20) STR 87 (Tri.-Del)*

#### 14. Classification of charter hiring of ship: Non-taxable during the period under SCN:

14.1 The Noticee submitted without prejudice to their submissions on merits as to why charter hiring of ships cannot be covered as steamer agent's service that the activity of providing equipment on hire is covered under a specific category of service under section 65(105(zzzzj)) of the Act with effect from 16/05/2008. Further, transportation of coastal goods through inland water or national waterways was brought into the net of service tax with effect from September 01, 2009. Hiring of ship whether



under net lease or otherwise; depending on the terms and facts of contract would fall under section 65(105)(zzzzj) only with effect from 16/05/2008. If the contract relates to freight for transportation, the liability would arise under (zzzzl) from 01/09/2009. In view of this, the charter hiring of ship was not liable for service tax prior to 16/05/2008 under any scenario. They also relied on the Circular of the Board Dy. No.20/Comm. (ST)2009 dated February 09, 2009 in this regard and stated that the Board's circular is binding on the department in terms of the Supreme Court's decisions in *Ranade Micro Nutrients vs. CCE (1996) 10 SCC 387 (SC)* and *Paper Products Ltd. vs. CCE (1999) 7 SCC 84*. The income from the activity of charter hiring under any stretch of imagination would not be taxed as steamer agent's service as stipulated by the SCN. The new taxing entry of providing equipment on hire (under the conditions of the definition) was not carved out from the taxing entry of steamer agent's service. Relying on various Tribunal decisions in this regard, including that of the Punjab & Haryana High Court in the case of *Dr. Lal Path Laboratories 2007 (8) STR 337 (P&H)*, it was stated that the service of charter hiring could not be taxed as steamer agent's service. The reliance was also placed on the ratio of the decision of the Mumbai High Court in case of *Indian National Ship Owners' Association 2009 (14) STR 289 (Bom)* wherein it was held that services of chartering of vessels are not covered by service under 65(105)(zzzy) of the Act but are covered by entry 65(105)(zzzzj). The said ratio being squarely applicable to them and the impugned SCN may be set aside.

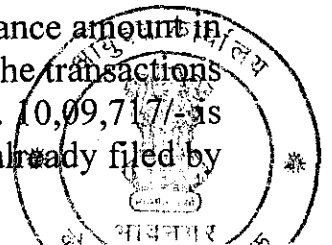
#### 15. Burden of proof on the department:

15.1 The Noticee submitted that it is a settled law that the SCN issued without any tangible evidence and based only on inferences including unwarranted assumption is vitiated by an error of law. The classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the revenue. If the department intends to classify the goods (or services) under a particular head or sub-head different from that claimed by the assessee, the department has to adduce proper evidence and discharge the burden of proof. They relied on the following decisions and submitted that it is more than evident that the revenue has failed to discharge such obligation and therefore, the SCN is required to be set aside.

- *HPL Chemicals Ltd. vs. CCE, Chandigarh 2006 (197) ELT 324 (SC)*
- *CC, Calcutta vs. Hindalco Industries Ltd. 2007 (217) ELT 343 (Cal)*

#### 15.2 Classification issue: Ship repair service:

The SCN contended that ship repair service is classifiable as ship management service and not as management and maintenance repair service. However, the SCN has recognized the service tax paid by the Noticee on the value of taxable service of Rs.1,15,82,380/-. Nevertheless and assuming without admitting, it was submitted that the balance amount in the amount reflected in the Profit & Loss Account represents the transactions of Mumbai office. Thus, SCN to the extent of demand of Rs. 10,09,717/- is without jurisdiction and is unsustainable as ST-3 Return was already filed by





the Mumbai office in respect of transactions carried out from Mumbai location. The department has not carried out any independent investigation to ascertain the correctness of the audit observation nor has disproved the Return filed by the Noticee. As regards to the extent that the issue of classification raised in the SCN is erroneous inasmuch as the fact that they have provided repair services in relation to ships and not ship management service. Further, assuming without admitting that the claim of the department as to the classification is correct, the rate of service tax applicable to both the taxing entries being identical, there is zero revenue implication and therefore the SCN is rendered redundant.

#### 16. SCN based on conjectures / assumptions: Without fact finding:

16.1 The Noticee stated and submitted that the SCN is issued and demand is raised by purely relying on the figures reflected by them in the Profit & Loss A/c. and balance sheet without doing any fact finding exercise. They relied on the following decisions to states that the SCN cannot be held valid as the demand cannot be made or is justified, when it is based on assumptions and presumptions.

- *TIL Ltd. vs. CST, Kolkata 2008 TIOL 181 CESTAT-KOL*
- *Synergy Audio Visual Workshop Ltd. vs. CST, Bangalore 2008 (10) STR (Bang)*
- *Indo Nippon Chemicals Co. Ltd. vs. CCE, Vadodara 2009 (16) STR 639 (Tri.-Ahm)*

#### 17. Extended period of limitation:

##### 17.1 Interpretational Issue:

The Noticee stated and submitted that they had a bonafide belief in their contention that under no circumstances the activity of charter hiring of ships was liable for service tax as steamer agent's service. This being an issue involved in the interpretation of statutory provisions of law, the extended period of limitation is not invocable. The Noticee relied on the following decisions:

- *Vaspar Concepts (P) Ltd. vs. CCE, Bangalore 2006 (199) ELT 711 (Tri.-Bang)*
- *CCE, Delhi vs. Ishaan Research Lab. P. Ltd. 2008 (230) ELT 7 (SC)*

17.2 Without prejudice, the Noticee further stated and submitted that the impugned SCN has displayed in abundant terms that the department has issued the SCN with complete non-application of mind and without doing any independent investigation consequent upon the department audit. In the following decisions, the Tribunals have held that when the SCN is issued consequent upon the audit, the extended period of limitation is inapplicable.



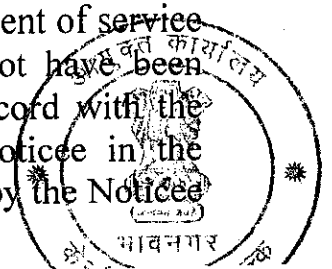
- *Aditya College of Competitive Exam vs. CCE, Visakhapatnam 2009 (16) STR 154 (Tri.-Bang)*
- *Supea Sesh General Insurance Services & Brokers P. Ltd. vs. CST, Chennai 2009 (13) STR 641 (Tri.-Chennai)*
- *Indian Petrochem Corp. Ltd. vs. CCE, Vadodara 2000 (125) ELT 1048 (Tri.)*
- *CCE, Kolkata vs. Mohan Bakers 2009 (241) ELT A23 (Cal)*
- *Kirloskar Pneumatic Co. Ltd. vs. Commissioner of C.Ex, Pune III 2010 (254) ELT 328 (Tri.-Mumbai)*

### **DISCUSSION AND FINDINGS :-**

18. I have carefully gone through the show cause notice, submissions made by the Noticee in their written reply dated 11.07.2011 and 02.11.2011 as well as oral submission made during the course of personal hearing held on 03.11.2011 reiterating their aforesaid written submissions and evidences available on record.

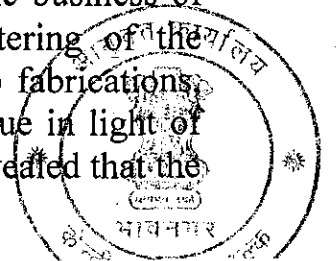
19. I find from the case records that the issue involved in the show cause notice is based on the outcome of the audit of the records of the Noticee conducted by the department. I find that the Noticee was registered under Section 69 of the Finance Act, 1994 for taxable service under the category of Maintenance & Repair service. As per the practice and procedure to verify whether an assessee registered under Service Tax has complied with the statutory requirements under the Finance Act, 1994, which inter alia, includes accounting the transactions in the financial records, maintenance of records reflecting the nature and volume of services rendered, etc., periodical audit is conducted by the Central Excise and Service Tax Department. As per facts on record, during the course of audit, scrutiny and verification of the information reflected in the Balance Sheet of the Noticee revealed that there is variation in the volume of transactions for the registered taxable service reflected in the Balance Sheet as compared to the details declared in the periodical returns filed by the Noticee with the department under Section 70 of the Finance Act, 1994. It was further revealed that the Balance Sheet also reflected the transactions and income for other services rendered by the Noticee. As per show cause notice, scrutiny of the Balance Sheet of the Noticee revealed that there was short payment of service tax amounting to Rs. 10,09,717/- in respect of the taxable service for which the Noticee was registered and the noticee provided other taxable service for which no registration was obtained and consequential non-payment of service tax amounting to Rs. 47,46,297/- on such service.

20. I therefore find that the short-payment / non-payment of service tax was detected during the course of audit which could not have been otherwise detected based on the information available on record with the department in the form of information declared by the Noticee in the application for Registration and in the periodical returns filed by the Noticee



from time to time. I further find that whether the Noticee correctly assessed and paid service tax on the value of registered taxable service or otherwise could be verified and ascertained only when the financial records maintained by the Noticee are scrutinized and audited. On the other hand, it can be only on the scrutiny and audit of the financial records of the Noticee, fact of rendering any other taxable service, for which no registration was obtained, could be revealed and made known to the department as till such time, these facts remain suppressed and lead to evasion of payment of service tax by non-obtaining registration, failure to assess and pay appropriate service tax, non-filing of periodical returns, etc.. I therefore find that show cause notice under reference having been issued by invoking extended period of limitation in terms of the provisions of Section 73 (1) of the Finance Act, 1994 on the ground of suppression of facts is in order. I have also gone through submission of the Noticee on this ground including the judgments relied upon narrated in the foregoing paras but in the facts and circumstances of the case of the Noticee discussed herein, the same are found unsustainable. I also find that the Noticee argued about filing of periodical returns in Form ST-3 from time to time by them and thereby pleaded absence of suppression of facts but the said argument is not tenable in law as the ST-3 Returns would reveal the information of value of taxable service rendered as declared by an assessee in the said Return and the amount of service tax payable / paid but the value of taxable service which has escaped assessment remain undisclosed and unknown to the department which could be verified and detected only during the course of audit. Further, for the unregistered taxable service, there could be no disclosure in the ST-3 Return and the facts of having rendered taxable service for which no registration was obtained and consequential non-assessment to service tax, non-payment of service tax and non-filing of periodical return pertaining to such unregistered taxable service could be detected only through the action of audit / anti-evasion and in view of the matter, suppression of facts and contravention of the provisions of the Finance Act, 1994 and the rules framed there under with intent to evade payment of service tax is always justified and extended period of limitation under Section 73(1) of the Finance Act, 1994 is correctly available for effecting recovery of short-paid / non-paid service tax. I therefore find that extended period of limitation is correctly available and properly invoked to issue show cause notice under Section 73(1) of the Finance Act, 1994 in the facts and circumstances of the case discussed hereinabove.

21.1 I further find that while contesting the issue of non-payment of service tax for Rs. 47,46,297/- narrated in the show cause notice, the Noticee has advanced different arguments. At the first instance, the Noticee went on contesting that the amount does not pertain to the taxable service at all and that the service yielding income to the noticee is not taxable. I find that as per show cause notice, the Noticee collected income towards Charter Hire as recorded in the Balance Sheet for different Financial Years and scrutiny of financial records revealed that the Noticee was engaged in the business of Executive Infrastructure and Other projects including chartering of the vessels and rendering of related services, Ship building, Ship fabrications, Ship repairs and related activities, etc.. On scrutiny of the issue in light of the statutory provisions under the Finance Act, 1994, it was revealed that the



activities of chartering vessel and providing related services by the said Noticee were taxable under the category of "Steamer Agent Services". Undisputed facts also reveal that the Noticee had never got itself registered under Section 69 of the Finance Act, 1994 under the said category of taxable service and did not discharge service tax liability for the said category of taxable service. I also find that the Noticee got itself registered for the only taxable service under the category of "Maintenance & Repair Service" and when scrutiny and verification of the financial records showing charter hire income were taken up by the audit, the Noticee tried to explain that the said income is not taxable despite admitting that "Steamer Agent Service" attract service tax way back from the year 1997.

21.2 I further find that while contesting the issue, the Noticee has argued that the services rendered by the Noticee yielding income under the head Charter Hire reflected in the Balance Sheet do not fall under the category of Steamer Agent's Services in light of the definition of the said service in the Finance Act, 1994 on the ground that they are not agents. I find that the said argument is not tenable in law as the Noticee carried out the activities of chartering the vessels and providing related services to its clients / service receivers. I further find that the Noticee provided the said services to the clients / service recipients who are acting in the shipping line and therefore, the services rendered by the Noticee correctly fall under the category of "Steamer Agent Services". On going through further submission of the notice, I find that the noticee has argued about classification of service under different categories and levy of service tax thereon from different period which lead to show that the Noticee has attempted to plead that the service rendered by them were covered under the service tax net during subsequent period. I find such arguments as untenable and unsustainable in the facts of the case as the same amount to an attempt to mis-lead the adjudication proceedings. I further find that the Noticee has referred to a Trade Notice issued at the time when Steamer Agent's Service was brought under service tax net. On going through the text of the same narrated in the written submission filed by the Noticee, I find that the same only clarifies the said taxable service newly brought into the service tax net in 1997 so as to indicate the categories of activities broadly covered therein and can not be held conclusive and exhaustive. I therefore find that the statutory provisions have overriding effect over the clarifications issued through trade notices and hence, argument of the Noticee on this count is not entertainable. I further find that the Noticee has taken recourse of some judicial pronouncements including that of High Court of Punjab & Haryana and Mumbai to plead that the services rendered were not under the head of Steamer Agent's Service. On going through all these judgments, I find that the same discussed different facts of other assesseees / appellants which can not be squarely applied to the facts of the Noticee, particularly when nothing is flowing from the case records that law position in this regard is finally settled.

21.3 I further find that in addition to the submission made by the noticee towards reply to the show cause notice on the taxability of the services under the category of Steamer Agent's service, the Noticee raised the issue of jurisdiction at the time of filing further written submission dated

