



कार्यालय आयुक्त केंद्रीय उत्पाद शुल्क एवं सेवाकर
 OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
 प्लॉट न.६७-७६ / बी-१ "सिद्धि सदन" बिल्डिंग
 PLOT NO. 6776/B-1, "SIDDHI SADAN" BUILDING,
 नारायणभाई उपाध्याय मार्ग, भावनगर - ३६४ - ००१
 NARAYAN UPADHYAY MARG, BHAVNAGAR-364 001.

फ़ोन : (0278) 2523627

फैक्स : 0278-2513086

रजिस्टर्ड डाक पावती द्वारा
 By Regd. Post A. D.

फ़ाइल स. - V/15-16/Dem-ST/HQ/2012-13
 F. No. - V/15-16/Dem-ST/HQ/2012-13

आदेश की तारीख : 20.02.2014.

Date of Order : 20.02.2014.

जारी करने की तारीख : 24.02.2014.

Date of Issue : 24.02.2014

पारितकर्ता,

श्री नवनीत गोयल.

आयुक्त केंद्रीय उत्पाद शुल्क एवं सेवाकर, भावनगर

Passed by,

SHRI NAVNEET GOEL

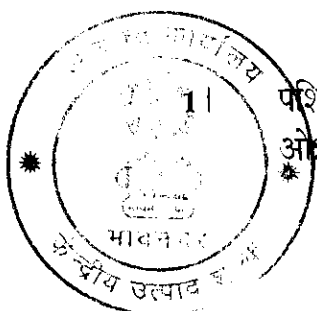
Commissioner, Central Excise and Service Tax, Bhavnagar

मूल आदेश स.: 01/BVR/Commissioner/2014
 Order-in-Original No. 01/BVR/Commissioner/2014

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।



पश्चिम क्षेत्रीय पीठ, सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)
 ओ२०, न्यू मेन्टल अस्पताल कंपाउन्ड, मेघाणीनगर, अहमदाबाद 380016।

- 2। अपीलीय न्यायाधिकरण का वित्त अधिनियम, 1994 की धारा 86 की उप धारा (1) के अंतर्गत अपील, सेवाकर नियमावली, 1994 के नियम 9(1) के अंतर्गत निर्धारित एस.टी.5 में, चार प्रतियों में आदेश प्राप्त के दिनांक से तीन माह के भीतर की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निर्धारित किए अनुसार शुल्क लगा होना चाहिए। जिस स्थान पर न्यायाधिकरण की न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्रा बैंक के न्यायापीठ के सहायक रजिस्ट्रार के नाम से निर्धारित फीस रेखांकित बैंक ड्राफ्ट के रुप में भेजनी होगी।
- 3। वित्त अधिनियम, 1994 की धारा 86 की 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. व्यौरापूर्ण करने हेतु सीमाशुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 की ओर ध्यान आकर्षित किया जाता है।

BY RPAD

To,
M/s.
J. K. Construction & Company,
Plot No. 399, Street No. 4,
Vijayraj Nagar, Bhavnagar

Subject: Show Cause Notice : V/15-16/Dem-ST/HQ/2012-13 dated 20.04.2012



Brief Facts of the case:

On the basis of Intelligence that **M/s. J. K. Construction Co.**, Plot No.399, Street No.4, Vijayrajnagar, Bhavanagar, (*hereinafter referred to as "J. K. Cons."*) were providing the taxable services of "Construction of Residential Complex", "Commercial & Industrial Construction services", "Management, Maintenance & Repair Service" and "Works Contract Services" and not paying Service Tax properly, inquiry was conducted by issuing summons.

2. A statement of Shri Mukesh Ratilal Patel, Partner of J. K. Cons. was recorded under Section-14 of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 (*hereinafter referred to as "the Act"*) on 17.04.2012 before the Superintendent (A.E.), Central Excise, H.Q., Bhavnagar which was in question-answer form as reproduced below:

Q. No. 1: *What kinds of services are provided by your firm?*

Answer: *Our firm M/s J.K.Construction Co. is a civil construction company. We provide our construction services to various departments of State as well as Central Governments. During the last five years we have provided our services for construction of various Government buildings such staff quarters for employees of various Government departments, Government office buildings, etc. Apart of this we have also undertaken work of maintenance & repair of various Government buildings. We do not provide our services to private sector.*

Q. No. 2: *When did your firm start and at present how many partners are there in your firm?*

Answer: *Our firm was started in the year 1988 and at present there are two partners in our firm namely Smt. Mitaben Mukeshbhai Patel who is my wife, and myself.*

Q. No. 3: *Have you taken Service Tax registration for the services provided by your firm? If yes then please produce the certificate.*

Answer: *Yes, we have taken Service Tax registration in the category of Works Contract Service on 26.03.2009. Our Service Tax registration No. is AABFJ5861HST001.*

Q. No. 4: *Have you paid any Service Tax for providing this type of services? If no then give the reasons for not paying any Service Tax.*

Answer: *No; we have not paid any Service Tax till date on the services provided by our firm. As we provide our services to Government departments only and as per our knowledge no Service Tax is levied on the services provided to Government Departments.*

Q. No. 5: *Please give year wise details of the amount received by your firm against the services provided to various recipients from the financial year 2006-07 onwards along with type of service provided.*

Answer: *The details as per Annexure attached with this Statement*

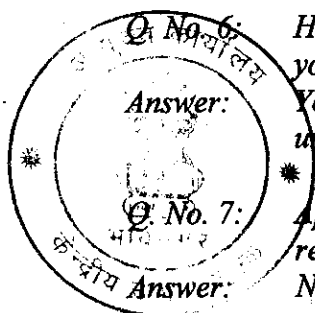
I undertake to produce the work orders/ contracts of the work undertaken by our firm wherever the same is not available, within one week.

Q. No. 6: *Have you utilized your own material for construction of Civil Structure as stated by you above?*

Answer: *Yes we have utilized our own construction material for all the construction work undertaken by us and we have paid VAT on the said material.*

Q. No. 7: *Apart of above, have your firm provided construction or other services to any other recipient also? If yes then please provide the details.*

Answer: *No.*



Q. No. 8: Apart of above, have your firm provided any other service to the above said recipients which have not been included in the Annexure attached with this statement? If yes then please provide details.

Answer: No.

Q. No. 10: Apart of above do you want to add something else in the matter?

Answer: No.

3. From scrutiny of Contracts/Agreement and Audit Report for the financial year 2006-07 provided by J. K. Cons., it was found that they had provided taxable service to the C.S.M.C.R.I, Bhavnagar, Civil Hospital-Surat, Civil hospital-Valsad, Samaldas College renovation work- Bhavnagar, Painting work to Port Colony-Bhavnagar, Sir T-Hospital-Bhavnagar, GSPHCL Jilla Jail repairing work, Bhavnagar which fall under the category of "Management, Maintenance or Repair Services for Goods, Equipments or Properties and this service is Classifiable under Section 65 (105) (zcg) of the Act as amended. The details of "**Management, Maintenance or Repair Services**" provided and consideration received for providing this service during the financial year 2006-07 to 2010-11 was as under:

Name of the Service Recipient	2006-07	2007-08	2008-09	2009-10	2010-11	Type of Service Provided/ Nature of Work done
Replacing water proofing on terrace by china . mosaic flooring	1344743	0	0	0	0	Cons. of Repairing for Water Proofing and China Mosaic Flooring in Terrace at C.S.M.C.R.I, Bhavnagar.
Renovation of lab no.20&21 in main building (Civil & Electrical works)	396813	433212	628556	0	0	The renovation work of Laboratory at C.S.M.C.R.I. Bhavnagar.
Renovation of Toilets block in various wards, OPD hall, renovation of staff quarters and providing Trimix roads in Hostel area @ Civil Hospital Surat.	1290609	11663793	0	0	0	The renovation work of hostel at civil hospital, Surat
Samaldas College Renovation work at Bhavnagar.	630873	0	0	0	0	Renovation Work Samaldas College at Bhavnagar
Samaldas College Building Work at Bhavnagar	671228	0	0	0	0	Renovation Work Samaldas College at Bhavnagar
Painting to the port colony no.2 at Bhavnagar.	0	243140	621526	0	0	The Painting work to the Port Colony No.2 at Bhavnagar.
Renovation Of Civil Hospital at Valsad	0	0	8408648	14818148	2941422	The work of Renovation of Civil Hospital at Valsad.

Repairing to OPD Building at Sir T. Hospital	0	0	3052480	85449	0	Repairing work for Sir T Hospital, Bhavnagar
Cons. Of Airport C.A. Work	0	0	637080	1232948		Miscellaneous Repairs work
Cons. Of G.S.P.H.C. Jilla Jail Repairing work Bhavnagar.	0	0	0	6496127	3914555	The repairing work of Jail in Bhavnagar.
Cons. Of Misilias Repairs and Maintenance work.	0	0	0	1375691	0	Cons. Of Repairing work.
Cons. Of Selected Residencial Building work at Bhavnagar	0	0	0	0	11353067	The work of addition, alteration, up-gradation strengthening landscaping and modernization with beautification of selected residential building at Bhavnagar for R&B Division.
TOTAL	4334266	12340145	13348290	24008363	18209044	

4. From scrutiny of Contracts/Agreement and Audit Report for the financial year 2006-07 provided by J. K. Cons., it appeared that they had also provided service to Nadiad Nagarpalika for construction of Sports Complex, construction of Shopping Complex for Ahmedabad Urban Development Authority (AUDA), ONGC, etc.. It appeared that the said service were under the category of "Commercial or Industrial Construction Service" as defined under Section 65 (105) (zzq) read with Section 65(25b) of the Act. The details of "Commercial or Industrial Construction Service" provided and consideration received for providing this service during the financial year 2006-07 to 2007-08 was as under-

Name of the Service Recipient	2006-07	2007-08	2008-09	2009-10	2010-11	Type of Service Provided/ Nature of Work done
Development of Sports Complex Building at Nadiad	825600	10130003	8335361	7726837	1372512	Development Of Sports Complex Building work at Nadiad.
Construction of Shopping Complex for AUDA.	0	8293991.0 0	0	0	8648882	Construction of Shopping Complex at Vejalpur in Ahmedabad
Cons. Of Marketing Yard Compound Hall Relling Work.	0	305010	0	0	0	Cons. Of Relling Work
Cons. Of Oil And Natural Gas Corporation Ltd. At Ahmedabad	0	0	0	537532	0	Cons. Of Office Building work.
Cons. Of Vishram Gruh work at Botad (peta work P.R.Patel & Co.)	0	0	0	8331995	18724706	Cons. Of Building Work.

Swimming Pool B.M.C. work at Bhavnagar.	0	0	0	0	480901	The extension and alteration work of swimming pool for Bhavnagar Mahanagarpalika
TOTAL	825600	18729004	8335361	16596364	29227001	

5. From scrutiny of Contracts/Agreement and Audit Report for the financial year 2007-08 to 2010-11 provided by M/s J. K. Cons., it appeared that they had provided service in relation to "Works Contract Service". M/s J. K. Cons. had utilized their own construction material for all the construction work and had paid VAT on said material. The details of "Works Contract Service" provided and consideration received for providing this service during the financial year 2007-08 to 2010-11 was as under:

Name of the Service Recipient	2009-10	2010-11	Type of Service Provided/ Nature of Work done
Cons. Of G.S.P.H.C. Paldi Quarters Work.	16351544	2245391	Constructed staff quarters for employees of Gujarat Police in Pardi in Valsad District.

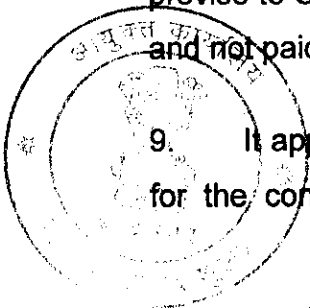
6. From the above it appeared the J.K. Cons. had not paid service tax on Management, Maintenance & repair service on the value of Rs.7,22,40,108/-, Works contract service on the value of Rs.1,85,96,935/- and on Industrial or Commercial Construction service on the value of Rs.7,37,13,330/- as detailed respectively in Annexure-A1, A-2 and A-3 of the notice.

7. From the above, it appeared that J. K. Cons. had contravened the following provisions of the Act, and the Rules framed thereunder with 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.
- (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 October-2006 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 October-2006 to March-2011.

8. Therefore, it appeared that J. K. Cons. had 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 was invocable for recovery of Service Tax not levied and not paid by J. K. Cons..

9. It appeared that for the acts of suppression of facts of providing taxable services for the contravention of various provisions of the Act and the Rules as discussed



hereinabove with an intent to evade payment of service tax, J. K. Cons. had rendered themselves liable to penalty under Section 78 of the Act. Similarly, it appeared that, 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, J. K. Cons. had rendered themselves liable to penalty under Section 77 of the Act.

10. It also appeared that J. K. Cons. 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 and also liable to penalty under Section 76 of the Act for non-payment of Service Tax.

11. Therefore, J. K. Cons. were called upon to show cause to the Commissioner, Central Excise, Bhavnagar as to why: -

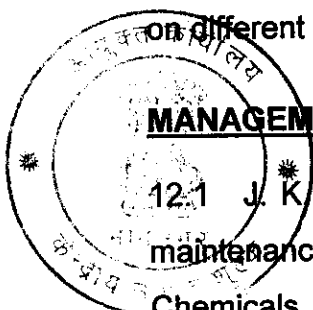
- (i) The Service Tax total amounting to **Rs.1,15,14,977/-** as shown in the **ANNEXURE-A** to the Notice should not be demanded and recovered under proviso to Section 73(1) of the Finance Act, 1994 along with the interest at the appropriate rate as applicable till the date of payment of service tax 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 Service Tax Rules, 1994.
- (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 said Rules.
- (iv) 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 J. K. Cons. to pay service tax on it and contravention of various provisions of the Act and the Rules as discussed hereinabove with intent to evade payment of service tax.

DEFENCE REPLY :

12. J.K. Cons. has filed defence reply vide letter dated 26.07.2012. Their arguments on different issues are as under:

MANAGEMENT, MAINTENANCE OR REPAIR SERVICES:

12.1 J. K. Cons. Submitted that they had provided services in relation to repair and maintenance work to various Government Agencies, viz. Central Salt & Marine Chemicals Research Institute (C.S.M.C.R.I), Commissionerate of Health for Civil



Hospitals and their hostels, Government Colleges, Air Port authority, G.S.P.H.C. for the repairing work of Jilla Jail, R & B (Roads and Buildings) Division etc. It was clear from various contracts and document provided to department that the services provided by the Government Agencies, to which J. K. Cons. had provided the repair and maintenance services were ^{for} not profit motive.

12.2 In the current case, J. K. Cons. had executed the following contracts; —→

1. C.S.M.C.R.I for replacement of Water proofing flooring and renovation of laboratory.
2. Renovation work of hostel at Civil Hospital, Surat
3. Renovation and construction work of Government College, Bhavnagar
4. Renovation of various Government Hospitals,
5. Repairing work at Air Port,
6. Painting to the port colony, Bhavnagar
7. Repairing work of G.S.P.H.C. Jilla Jail, Bhavnagar
8. R & B (Roads and Buildings) Division , Bhavnagar for Reparation work

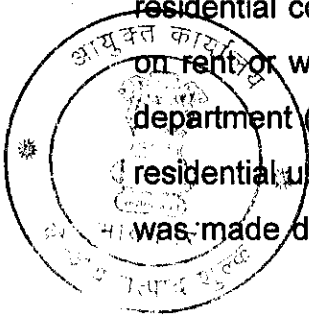
12.3 They submitted that J. K. Cons. had provided services for non commercial purpose and for civil amenities to various Government Organizations and by Section 97 and 98 of Finance Act 2012 maintenance and repair service provided to any non-commercial Government Organization and in relation to road were excluded with retrospective effect from 16th June 2005 from purview of service tax. It was submitted that as per above retrospective amendment, the maintenance or repairs work of non-commercial Government Building was outside the purview of service tax since the date the management, maintenance or repair service came into force i.e. 16-06-2005.

Repair and Maintenance of Air Port

12.4 In the current case, J. K. Cons. had earned the total income of Rs. 18, 70,028/- for the repair and maintenance of Air Port at Bhavnagar. They submitted that the repair and maintenance of is exempted Vide Notification No. 24/2009-Service Tax dated 27.07.2009 further substituted by Notification No. 54/2010 - Service Tax dated 21.10.2010.

WORKS CONTRACT SERVICE:

12.5 They submitted that the contract was in relation to "Construction of Residential Staff Quarters for the Employee of Gujarat Police to GSPHCL". As per the clause (iii) of the definition of "residential complex" under section 65 (105) (91a) , if a residential unit was intended for **PERSONAL USE**, then it should be excluded from the service tax chargeability. Further, the term "personal use" was defined in explanation to definition of residential complex as permitting the complex for use as residence by another person on rent or without consideration. In instant case, the land was provided by the police department (GSPHCL) for the construction and then residential quarters were used for residential use of officers of police department. Hence it was clear that the construction was made directly by engaging another person (noticee) and the construction of such



complex was intended for personal use as residence by such person as per the explanation - (a). Hence, it was quite clear that construction of residential police quarters was very well covered by the exclusion of definition of "Residential Complex" and hence, service tax was not applicable at all. They relied upon the case of **M/s. Khurana Engineering Ltd - 2011 (21) S.T.R. 115 (Tri. Ahmd.)**, **Sima Engg Constructions -2010-TIOL-1734-CESTAT-MAD**, **M/s Senthil Constructions, Southupakkam -2010-PST-187-(Commr. Appl.)-MAD** and **M/s. Nitesh Estates Ltd-2012- TIOL-283(CES. BANG)** in support of their contention.

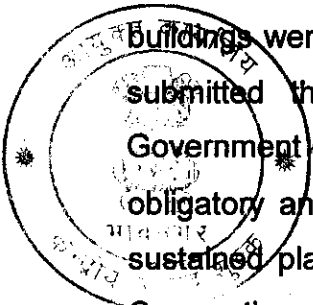
Commercial or Industrial Construction Service:

12.6 J. K. Cons. has undertaken the work of Construction for Nadiad Nagarpalika, Bhavnagar Mahanagar Palika (B.M.C), Ahmadabad Urban Development Authority (AUDA), ONGC, and Construction of Vishram Gruh at Botad. The services provided by J. K. Cons. were directly or indirectly to the Government Agencies or to others were for providing civic amenities and for the benefit of public at large. On the basis of data provided by noticee, the department had raised demand under "Commercial and Industrial Construction Service" considering the following contracts as mentioned below:

1. Construction of Sports Complex for Nadiad Nagarpalika.
2. Construction of Shopping Complex for AUDA.
3. Construction of office building for ONGC.
4. Construction of Vishram Gruh at Botad.
5. Construction of Railing Work
6. Construction of Swimming pool for Bhavnagar Mahanagarpalika

12.7 As per sub-clause (i) of section 65(25b), service tax would be chargeable only if it was for construction of new building or civil structure **PRIMARILY FOR THE PURPOSES OF COMMERCE OR INDUSTRY**. Hence, applicability of service tax under this category depends on the nature of use of the constructed building or civil structure. If such constructed civil structure or building was used for providing services primarily for commerce and industry then service tax would be chargeable. Thus the essence of the definition was that the construction activity was chargeable to service tax if it was used, occupied or engaged either wholly or primarily for the furtherance of commerce or industry.

12.8 The noticee submitted that they had executed the contracts for the construction of various complexes and civil structures for Bhavnagar Mahanagarpalica, Nadiad Nagarpalica and AUDA. Further noticee had also constructed Vishram Gruh at Botad. It was a fact that all the above buildings not used for any commercial purposes, but these buildings were for civic amenities and used for serving public at large. Further, it was submitted that Nagarpalica, Mahanagarpalica and AUDA were created by the Government of Gujarat. Mahanagarpalica and Nagarpalica were responsible for certain obligatory and discretionary services for respective City. AUDA was to carry out the sustained planned development of the area falling outside the periphery of Municipal Corporation. Hence, it was understood that all the above said bodies were not a



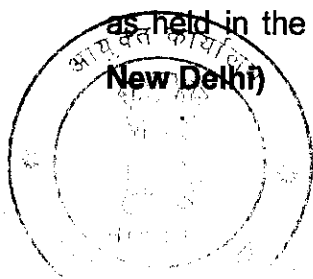
commercial concern. The objects of all above said project were for public facilities. Therefore, by no stretch of imagination, such civil structures or building could be termed as used for commerce or industry and hence, service tax would not be chargeable on these construction activities conducted by noticee. They submitted that Central Board of Excise and Customs at para 13.2 of circular no. 79/9/2004-ST dated 17-09-2004 had clarified regarding non-taxability of buildings or civil structures used for non-commercial or Government purposes.

12.9 Without prejudice to above the noticee submitted that the notice did not make any attempt to show how and why the transactions were covered within definition of respective services. In the notice merely referred the definition of services and alleged that the services provided by the noticee were fall under the category of respective Taxable Services. The noticee submitted that mere reference of definition without examining elementary facts was not sufficient to show chargeability of transaction to tax. It was submitted that unless and until there were evidences to show that the receipt were taxable there could not be any charge for tax. In the present case there was not even remote evidence substantiating the allegation that the receipt were taxable receipts.

12.10 It was submitted that there was no burden on the noticee to prove the negative. The onus, to prove shifted on the noticee only after initial burden was discharged by the department, with some positive evidence. Mere presumption was not sufficient for this purpose.

12.11 The noticee claimed benefit under section 67(2) of the Finance Act, 1994 where it provided that the gross amount charged by a service provider, for the service provided or to be provided was inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, was equal to gross amount charged.

12.12 The noticee submitted that when no tax was payable, the question of penalty did not arise and interest could not be demanded. Further, according to Section 80, no penalty under Section 76, 77 or 78 could be imposed if the noticee proved that there was a reasonable cause for default or failure under these sections. The noticee relied upon the decision of Karnataka High Court in case of **Motor World and other - 2012-TIOL-418-HC-KAR-ST** in this regard. The noticee submitted that Section 80 provided that notwithstanding anything contained in sections 76, 77, 78 or 79 no penalty should be imposed for any failure if it proved that there was reasonable cause for said failure as held in the case of **On Dot Couriers & Cargo Ltd. (2006) 6 STJ 337 (CESTAT,**

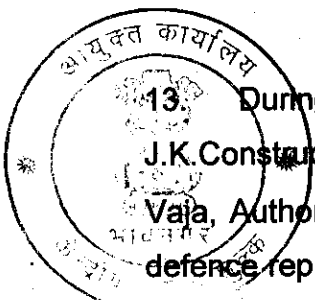


12.13 The noticee submitted that though reasonable cause had not been defined, it had been interpreted by various courts. In **Municipal Corporation of Delhi v. Jagannath Ashok Kumar, (1987) AIR 2316 (Supreme Court)**, Apex Court observed that the reasons given by the Arbitrator were cogent and based on materials on record. In **Commissioner of Wealth Tax v. Jagdish Prasad Choudhary, (1996) AIR 58 (Patna)**, it was held that the context of penalty provision, the word, 'reasonable cause' would mean a cause which was beyond the control of the noticee. 'Reasonable cause' obviously means a cause which prevents a reasonable man of an ordinary prudence acting under normal circumstances, **without negligence or inaction or want of bona fide** from furnishing the return in time. In **Gujarat Water Supply & Sewerage Board v. Unique Erectors (Gujarat) Pvt. Ltd. (1989) AIR 973 (Supreme Court)**, it was held that it was difficult to give an exact definition of the word, 'reasonable'. In **Ram Krishna Travels Pvt. Ltd. v. CCE, Vadodara, [2007 -TMI - 977 - CESTAT, MUMBAI]** it was held that bonafide belief was a reasonable cause under section 80 and as such, penalty was set aside following **ETA Engineering Ltd. v. CCE [2005 -TMI - 165 - CESTAT, NEW DELHI]**.

12.14 The noticee submitted that penalty under section 78 could be imposed only if there was a fraud; collusion; willful mis-statement; suppression of facts or contravention of any provisions with intend to evade payment of service tax and it could be imposed by invoking larger period or extended period for issue of show-cause notice. Only in unusual circumstances, demands for extended period were to be invoked, with a very serious allegation of suppression of facts and intention to evade payment of service tax. Such serious allegations of suppression could be invoked only if the noticee had deliberately done an action with an intention to hide certain facts from the department and department hds confirmed it beyond doubt with aid of corroborative evidence that there was a deliberate act on part of noticee to evade tax. The noticee submitted that **there was no finding in impugned SCN which could allege that noticee had intended to evade payment of tax. In the absence of any finding of "intend to evade" demand could not be sustained and the demand raised was barred by limitation.**

12.15 The noticee submitted that it was on record that the noticee was under bonafide belief regarding non taxability of the services, therefore the onus was on department to prove it otherwise and mere reference of Section 78 could not prove that the noticee had an intention to evade the tax and had willfully suppressed the facts.

13. During the personal hearing held on 23.8.12 Shri Mukesh Patel, Partner of J.K.Construction, Shri Amish Kandhar, Authorised representative and Shri Rashmin Vaja, Authorised representative appeared on behalf of the Noticee they reiterated the defence reply already filed by them and also requested 15 days time for submissions of other records/evidences in support of reply filed by them. In their further reply dated



11.09.12 the Notice enclosed list of work orders in Annexure A to their letter alongwith copies of work orders for the years 2006-07 to 2010-11. Due to change in Adjudication authority fresh personal hearing was conducted on 27.01.14 when Shri Amish Khandar and CA Rashmin Vaja appeared on behalf of the noticee. They reiterated the written submissions and also submitted copies of CESTAT order in the case of D.H. Patel and S. Kadirvel.

DISCUSSION AND FINDINGS

13. I have carefully gone through the facts of the case on record and various submissions of the noticee. On recapitulating the issue I find that demand has been made on three different services and on the income disclosed before Income Tax department as tabulated below:

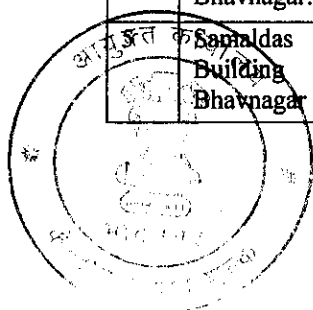
Sl.#	Type of service	Taxable value	Service tax demanded
1.	Management, Maintenance & repair	72240108	8053996
2.	Works Contract	18596935	766194
3.	Industrial or Commercial Construction service	73713330	2694787
	Total	164550373	11514977

14. In the following paragraphs I am discussing each service and its taxability on its merits based on the documents made available on record.

Management, Maintenance & Repair:

14.1 The services purported to be provided by the noticee as alleged in the notice are as under:

Sl. #	Name of the Service Recipient	2006-07	2007-08	2008-09	2009-10	2010-11	Type of Service Provided/ Nature of Work done
1	Replacing water proofing on terrace by china mosaic flooring	1344743	0	0	0	0	Cons. of Repairing for Water Proofing and China Mosaic Flooring in Terrace at C.S.M.C.R.I, Bhavnagar.
2	Renovation of lab no.20&21 in main building (Civil & Electrical works)	396813	433212	628556	0	0	The renovation work of Laboratory at C.S.M.C.R.I. Bhavnagar.
3	Renovation of Toilets block in various wards, OPD hall, renovation of staff quarters and providing Trimix roads in Hostel area @ Civil Hospital Surat.	1290609	11663793	0	0	0	The renovation work of hostel at civil hospital, Surat
4	Samaldas College Renovation work at Bhavnagar.	630873	0	0	0	0	Renovation Work Samaldas College at Bhavnagar
	Samaldas College Building Work at Bhavnagar	671228	0	0	0	0	Renovation Work Samaldas College at Bhavnagar



6	Painting to the port colony no.2 at Bhavnagar.	0	243140	621526	0	0	The Painting work to the Port Colony No.2 at Bhavnagar.
7	Renovation Of Civil Hospital at Valsad	0	0	8408648	14818148	2941422	The work of Renovation of Civil Hospital at Valsad.
8	Reparing to OPD Building at Sir T. Hospital	0	0	3052480	85449	0	Reparing work for Sir T Hospital, Bhavnagar
9	Cons. Of Air port C.A. Work	0	0	637080	1232948		Miscellaneous Repairs work
10	Cons. Of G.S.P.H.C. Jilla Jail Reparing work Bhavnagar.	0	0	0	6496127	3914555	The reparing work of Jail in Bhavnagar.
11	Cons. Of Misc. Repairs and Maintenance work.	0	0	0	1375691	0	Reparing work of Bhavnagar Airport.
12	Cons. Of Selected Residencial Building work at Bhavnagar	0	0	0	0	11353067	The work of addition, alteration, up-gradation strengthening landscaping and modernization with beautification of selected residencial building at Bhavnagar for R&B Division.
	TOTAL	4334266	12340145	13348290	24008363	18209044	

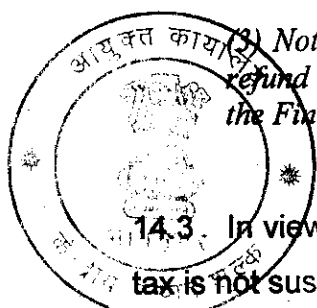
14.2 From the above table itself it is evident that the service provided, except that at Sl. No.6, was in relation to renovation and repair of office building of Central Salt and Marine Chemical Research Institute (CSMCRI), hospital, jail, airport etc. These buildings are Government Buildings and therefore are not commercial. The college viz. Samaldas College, Bhavnagar is under Bhavnagar University and the work has been granted by University only. Therefore the college can also be treated as non-commercial government building. I find that 'Management Maintenance or repair services' in relation to non-commercial government building are exempted from service tax by virtue of retrospective Amendment in the Union Budget of 2012-13, vide Section 98 to the Finance Act, 2012 which reads as under:

98. (1) Notwithstanding anything contained in section 66, no service tax shall be levied or collected in respect of management, maintenance or repair of non-commercial Government buildings, during the period on and from the 16th day of June, 2005 till the date on which section 66B comes into force.

(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times.

(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2012 receives the assent of the President."

14.3. In view of the above retrospective amendment, I hold that the demand of service tax is not sustainable on repair and maintenance of government buildings.



14.4 With regard to the service provided to Port colony as mentioned at Sl.No.6 of the table, I find that port is managed by Gujarat Maritime Board and it a profit making organization, though it is an undertaking of Gujarat Government. Therefore the service provided to this commercial organization cannot be equated as Government Building and hence I hold that the service is taxable. The service tax payable on this service is as under:

Year	Gross Value	Taxable Value	S.Tax @ 12%	E.Cess	SHE Cess
2007-08	243140	216394	25967	519	260
2008-09	621526	553156	66379	1328	664
Total	864666	769550	92346	1847	923
					95116

Works Contract:

15.1 The services provided as mentioned at paragraph 6 of the notice are as under:

Name of the Service Recipient	2009-10	2010-11	Type of Service Provided/ Nature of Work done
Cons. Of G.S.P.H.C. Paldi Quarters Work.	16351544	2245391	Constructed staff quarters for employees of Gujarat Police in Pardi in Valsad District.

15.2 From the above table itself it is evident that the services are provided for construction of non-commercial buildings as they are staff quarters for Gujarat Police. By no stretch of imagination the said construction would construe as industrial or commercial purpose. As per the definition of 'taxable Service' under Section 65(105)(zzzza) of the Finance Act 1994 service provided in relation to the execution of a works contract for the purpose of carrying out construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, **primarily for the purposes of commerce or industry** is taxable. The said definition is reproduced below:

Section 65 (105) (zzzza) of the Finance Act, 1994

Taxable service means any service provided or to be provided:-

to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation.—for the purposes of this sub-clause, "works contract" means a contract wherein,—

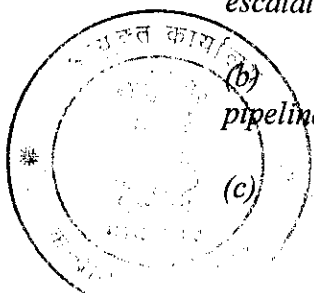
(i) *transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and*

(ii) *such contract is for the purposes of carrying out,—*

(a) *erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or*

(b) *Construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or*

(c) *Construction of a new residential complex or a part thereof; or*



(d) Completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) Turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

15.3 The Board by its Circular No. 80/10/2004-S.T., dated 17-9-2004 clarified that;

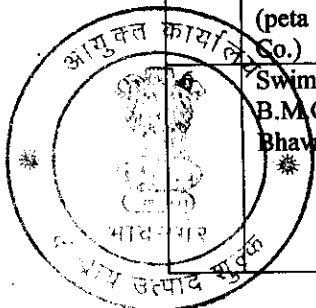
13.2 The leviability of service tax would depend primarily upon whether the building or civil structure is "used, or to be used" for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature. Generally, government buildings or civil constructions are used for residential, office purposes or for providing civic amenities. Thus, normally government constructions would not be taxable. However, if such constructions are for commercial purposes like local government bodies getting shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax.

15.4 From the above clarification also it is evident that constructions used for educational, religious, charitable and health purposes are not taxable being non-commercial in nature. The above clarification is applicable in the instant case also and accordingly I drop the demand on the said service.

Industrial or Commercial Construction service

16.1 The details of service provided under this category as provided at paragraph 3 of the notice are as under:

Sl. #	Name of the Service Recipient	2006-07	2007-08	2008-09	2009-10	2010-11	Type of Service Provided/ Nature of Work done
1	Development of Sports Complex Building at Nadiad	825600	10130003	8335361	7726837	1372512	Development Of Sports Complex Building work at Nadiad.
2	Construction of Shopping Complex for AUDA.	0	8293991.00	0	0	8648882	Construction of Shopping Complex at Vejalpur in Ahmedabad
3	Cons. Of Marketing Yard Compound Hall Relling Work.	0	305010	0	0	0	Cons. Of Relling Work
4	Cons. Of Oil And Natural Gas Corporation Ltd. At Ahmedabad	0	0	0	537532	0	Cons. Of Office Building work.
5	Cons. Of Vishram Gruh work at Botad (peta work P.R.Patel & Co.)	0	0	0	8331995	18724706	Cons. Of Building Work.
	Swimming Pool B.M.C. work at Bhavnagar.	0	0	0	0	480901	The extension and alteration work of swimming pool for Bhavnagar Mahanagarpalika



TOTAL	825600	18729004	8335361	16596364	29227001
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16.2 From the above table I find that except for the services provided at Sl. No.2 & 4 all are non-commercial concerns. The service under the category of commercial or industrial construction is taxed, as the name suggests, is on buildings, civil structures etc which are used or to be used, occupied or to be occupied, engaged or to be engaged primarily in commerce or industry or work intended for commerce or industry. The definition of 'taxable service' in relation of commercial or industrial construction is as under:

Section 65 (105) (zzq) of the Finance Act, 1994

"Taxable Service" means any service provided or to be provided to any person, by any other person, in relation to commercial or industrial construction.

As Per Section 65(25b) of the Finance Act, 1994,

Definition and scope of service:

"Commercial or Industrial Construction" means —

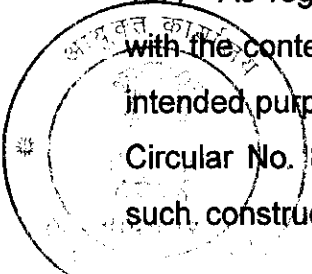
- (a) Construction of a new building or a civil structure or a part thereof; or*
- (b) Construction of pipeline or conduit; or*
- (c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, 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.*

16.3 From the plain reading of the said definition it is evident that main object is to tax the work related to commerce or industry and the building constructed should be used for commercial purpose. In the present case the service provided in construction of sport complex, market yard and swimming pool are for Nagarpalika and hence they are not for commercial purpose. Therefore these services cannot be considered as used for commercial purpose. Therefore I am of the considered view that the service provided in relation to construction of sports complex, swimming pool and market yard is not taxable under 'Commercial or Industrial Construction' service.

16.4 As regarding services appearing at Sl.No.2 of the above table, I do not agree with the contentions of the noticee. Even though the service was provided to AUDA, the intended purpose of shopping complex is commercial. As per clarification of Board vide Circular No. 80/10/2004-S.T., dated 17-9-2004, as reproduced at para 15.3 above, if such constructions are for commercial purposes like local government bodies getting



shops constructed for letting them out, such activity would be commercial and builders would be subjected to service tax.

16.5 Similarly the service at Sl.No.4 is provided to ONGC which is commercial concern. Therefore the service provided to such commercial concern would be taxable as the intended use of such construction is always commercial.

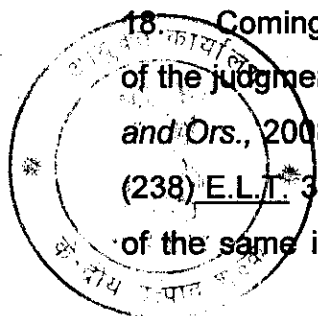
16.6 Therefore I confirm the demand of Rs.6,35,046/- after extending the benefit of cum-tax value in terms of Section 67(2) as under:

Year	Gross Value	Value with tax after abatement (33%)	Taxable value	Rate	S.Tax	E.Cess	S&HE Cess	Total
2007-08	8293991	2737017	2435935	12.36	292312	5846	29231	327390
2008-09	0	0	0	12.36	0	0	0	0
2009-10	537532	177386	160734	10.30	16073	321	1607	18002
2010-11	8648882	2854131	2586201	10.30	258620	5172	25862	289654
Total	17480405	5768534	5182870		567006	11340	56701	635046

Limitation

17. The noticee has contested the demand on the grounds of limitation also. Their contention is that only in unusual circumstances, demands for extended period are to be invoked, with a very serious allegation of suppression of facts and intention to evade payment of service tax. Such serious allegations of suppression can be invoked only if the noticee has deliberately done an action with an intention to hide certain facts from the department and department has confirmed it beyond doubt with aid of corroborative evidence that there was a deliberate act on part of noticee to evade tax. In this regard it is a fact that the noticee had neither obtained Service tax registration nor paid service tax on the services provided. Their argument that they were providing services to Government departments only and as per their knowledge no service tax levied on the services provided to Government Departments is not tenable. There is no exemption provided in the statute in respect of the services provided to a Government Department. Therefore the inference drawn by the noticee in this regard that as per their knowledge no service tax levied on the service provided to government is only an after thought and such excuses do not absolve them from the non-payment of service tax. At no point of time they informed the department about their activities of providing taxable service. The instance of providing taxable service came to the knowledge of the department only after initiating inquiry against them. Thus the extended period is invocable in the present case.

18. Coming to the issue of imposing penalty, this issue is no more *res integra* in view of the judgments of the Supreme Court in the case of *Dharamendra Textile Processors and Ors.*, 2008 (231) E.L.T. 3 (S.C.) and *Rajasthan Spinning and Weaving Mills - 2009 (238) E.L.T. 3 (S.C.)*. The Apex Court has held that penalty is civil liability and the ratio of the same is applicable in all case of tax evasion. In the present case it is proved



beyond doubt that the noticee has deliberately evaded payment of service tax and therefore they are liable for penalty under Section 78 of the Finance Act 1994.

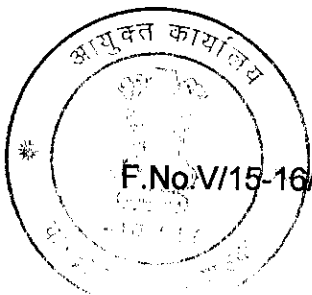
19. Since the noticee had failed to assess service tax under Section 70 and make the payment of service tax within the period and in the manner prescribed under Section 68 of the Finance Act 1944 they are liable for penalty under Section 76 *ibid*. However this penalty will be on the service tax payable upto 10.05.2008 as a proviso to Section 78 was inserted with effect from 10.05.2008 which provided that '*if the penalty is payable under Section 78, the provisions of Section 76 shall not apply*'.

20. Section 77 of the Finance Act 1994 provides to impose penalty for failure of the assessee to furnish information to the department and to obtain registration. Since the noticee failed to obtain registration during the relevant time I hold that they are liable for penalty under Section 77 *ibid*.

21. In the above premises I pass the following order.

ORDER

- (i) I confirm the demand of service tax of **Rs.95,116/-** (Rupees ninety five thousand one hundred sixteen only) under the category of Management Maintenance or Repair service under Section 73(1) of the Finance Act 1994.
- (ii) I confirm the demand of service tax of **Rs.6,35,046/-** (Rupees six lakh thirty five thousand forty six only) under the category of 'Commercial or Industrial Construction Service' under Section 73(1) of the Finance Act 1994.
- (iii) I impose penalty of **Rs.7,30,162/-** (Rupees seven lakh thirty thousand one hundred sixty two only) under Section 78 of the Finance Act 1994. However, In terms of proviso to Section 78 as it stood at the relevant time, the penalty shall be reduced to 25% of the confirmed demand if the service tax, interest and penalty are paid within 30 days from the date of communication of the order.
- (iv) I impose penalty of Rs.100 per day or 2 per cent per month, whichever is higher, from the due date upto 7.4.2011 and Rs.200 per day or one percent per month, whichever is higher, from 8.4.2011 till the date of actual payment of the tax under Section 76 of the Finance Act, 1994.
- (v) I impose penalty of Rs.5,000/- (Rupees five thousand only) under Section 77 of the Finance Act 1994.
- (vii) I order for recovery of interest on Rs.7,30,162/- under Section 75 of the Finance Act, 1994.



Navneet Goel
(NAVNEET GOEL)
Commissioner
Central Excise, Bhavnagar.

Date : 20.02.2014.

By Registered Post A.D./Hand Delivery

To,
M/s. J. K. Construction Co.,
Plot No.399, Street No.4,
Vijayrajnagar, Bhavanagar

Copy to:-

- (1) The Chief Commissioner, Central Excise, Ahmedabad Zone
- (2) The Assistant Commissioner, Service Tax Division, Bhavnagar.
- (3) The Superintendent, City Service Tax Range, Bhavnagar.
- (4) Guard file.

