



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. 67-76/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 नं. - V/15-03/Dem-ST/HQ/2012-13
F. No. - V/15-03/Dem-ST/HQ/2012-13

आदेश की तारीख : 22.07.2014
Date of Order : 22.07.2014.

जारी करने की तारीख : 30.07.2014.
Date of Issue : 30.07.2014

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 नं.: BHV-EXCUS-000-COM-001-14-15 DT 22-07-2014

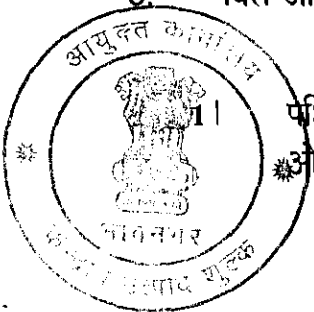
Order-in-Original No.: BHV-EXCUS-000-COM-001-14-15 DT 22-07-2014

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 की जा सकती है।



पश्चिम क्षेत्रीय पीठ, सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)
आ/20, न्यू मेन्टल अस्पताल कंपाउन्ड, मेघाणीनगर, अहमदाबाद 380016।

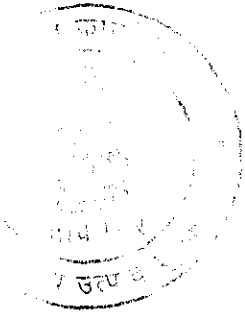
- 2। अपीलीय न्यायाधिकरण का वित्त अधिनियम, 1994 की धारा 86 की उप धारा (1) के अंतर्गत अपील, सेवाकर नियमावली, 1994 के नियम 9(1) के अंतर्गत निर्धारित एस.टी.-5 में, चार प्रतियों में आदेश प्राप्ति के दिनांक से तीन माह के भीतर की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निर्धारित किए अनुसार शुल्क लगा होना चाहिए। जिस स्थान पर न्यायाधिकरण की 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 उर्ष आयुक्त, केन्द्रीय उत्पाद शुल्क को अपीलीय न्यायाधिकरण में आवेदन करने के आदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड / आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।
4. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तों पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार यथास्थिति मूल आदेश या न्यायनिर्णयनकर्ता प्राधिकारी के आदेश की प्रति पर रुपये 6.50/ का न्यायालय टिकट लगा होना चाहिए।
5. ब्यौरापूर्ण करने हेतु सीमाशुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 की ओर ध्यान आकर्षित किया जाता है।

BY Regd. Post AD

To,

M/s. Alcock Ashdown Gujarat Limited,
Ramsar Yard, Old Port,
Bhavnagar.

Subject: Show Cause Notice: V/15-03/Dem-ST/HQ/2012-13 dated 20.04.2012.



BRIEF FACTS OF THE CASE :

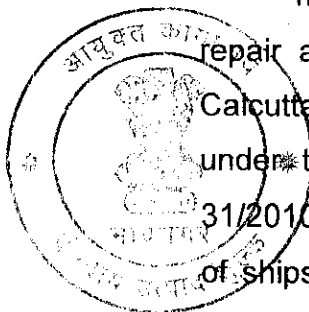
M/s Alcock Ashdown Gujarat Limited, Ramsar Yard, Old Port, Bhavnagar (hereinafter referred to as "the said party") was holding Service Tax Registration bearing No. **AABCA7983JST001** as per the provisions of Section 69 of Chapter V of the Finance Act, 1994 (32 of 1994), under the service category "Transport of Goods by roads" and had undertaken to comply with the conditions prescribed under the Act read with the Service Tax Rules, 1994 framed there under. The Service Provider had been authorized by the Port Officer, Gujarat Maritime Board, Bhavnagar to undertake the work related to Ship Building and related activities thereof, within the port area. The Port Officer, Gujarat Maritime Board, Bhavnagar vide lease agreement with the said party permitted him to utilize the land given on lease exclusively for the purpose of shipbuilding and for other purposes connected therewith.

2. During the course of Audit of the said party it was noticed that the said party has not paid service tax payable by them in respect of the taxable services provided by the as well as various services received from the service providers located in foreign countries.

2.1 The audit officers has observed that the said party had undertaken the Repairing, Rectification and Strengthening work of crane column in respect of Crane Barge "Veer Avighna" of M/s J. M. Baxi, Jamnagar. It was observed that the said party was a person authorized by the Port to undertake ship building and its related activities and accordingly the said party had provided the services namely "**Other Port Services**" and rendered themselves liable to pay Service Tax. In terms of the provisions of Section 65 (105)(zzl) of the Finance Act 1994, "taxable service" means any service provided or to be provided to any person, by other port or a person authorized by that port, in relation to port service, in any manner". Further, Section 65 (82) of the said Act "Port Services" means any service provided by a port, or other port, or any person authorized by such port or other port, in any manner, in relation to a vessel or goods. The details of the service rendered as above and service tax payable as worked out by the officers thereon are as under-

| Sr. No. | Financial Year | Total income from repairing of crane barge | Applicable service Tax due |
|---------|----------------|--|----------------------------|
| 1. | 2008-2009 | 12,78,975/- | 1,58,081/- |

It was further observed by the Audit Cell that the said party had undertaken 'Ship repair activity' for (1) M/s GMB Bhavnagar, (2) Commander Coast Guard, and (3) Calcutta Port Trust during F.Y. 2007-08 to F. Y. 2009-10. The said service was covered under taxable category of "other Port Services". However, under Notification No. 31/2010-ST dated 22.06.2010, exemption was granted to the services relating to repair of ships or boats or vessels belonging to the Government of India including Navy or



Therefore, before 01-07-2010, the said activity i.e. 'Ship Repair activity' was taxable in respect of all ships or boats or vessels, including those belonging to the Government of India. So, for the services of 'Ship Repair Activity' rendered by the said party during the period from 2007-08 to 2009-10, were taxable under the definition of "Other Port services" and they were required to pay Service tax, on the taxable value received by them, the calculation of which was as under :

| Sr. No | Financial year | Taxable value | Applicable service Tax due |
|--------|----------------|----------------|----------------------------|
| 1 | 2007-08 | 4718603 | 583219 |
| 2 | 2008-09 | 1106717 | 136790 |
| 3 | 2009-10 | 992700 | 102248 |
| | Total | 6818020 | 822257 |

2.2 It was also observed by the Audit Cell that the said party had obtained and utilised the 'Design Services' for designing of Ships from M/s Sea Transport Solution Pvt. Ltd. (an Australia based company). The "Designing Service" have been taxable w.e.f. 01.06.2007 under Section 65(105)[zzzzd] of the Finance Act 1994. However, since the services received by M/s Alcock Ashdown (Guj.) Ltd. from a business establishment, which was in a country other than India; it was taxable under Section 66A. (i) of the Finance Act, 1994 (effective from 18.04.2006) read with "Taxation of Services (provided from outside of India & received in India) Rules, 2006. Thus, it was observed that the said party being recipient of service was required to pay the Service Tax on such service received by them. The details of amount paid by the said party to a foreign based company for ships design and Service tax payable thereon was calculated as under-

| Sr No | Date of Payment | Amount/Gross Value | Service Tax due |
|-------|-----------------|--------------------|-----------------|
| 1 | 27.06.2007 | 2156500 | 266543 |
| 2 | 06.09.2007 | 2039900 | 252132 |
| 3 | 30.09.2007 | 7806500 | 964883 |
| 4 | 19.10.2007 | 2300000 | 284280 |
| 5 | 28.11.2007 | 2000000 | 247200 |
| 6 | 20.03.2008 | 4738500 | 585679 |
| 7 | 31.03.2008 | 2300000 | 284280 |
| 8 | 30.12.2008 | 2604274 | 321888 |
| 9 | 12.01.2009 | 111237 | 13749 |
| 10 | 31.03.2009 | 2913885 | 300130 |
| 11 | 04.09.2009 | 2005014 | 206516 |
| 12 | 13.11.2009 | 2527726 | 260356 |
| 13 | 14.11.2011 | 100965 | 10399 |
| 14 | 31.12.2011 | 111240 | 11458 |
| | Total | 33715741 | 4009494 |

2.3 The Audit Cell had further observed that the Service provider had received the various services of Consultancy, Valuation of Vessels/Hull, Testing & Drawing from, (1)

M/s Ship tech PTE Ltd., (2) M/s Galbraith's Ltd, (3) M/s J E Hyde and (4) M/s Force technology, which were all Foreign based companies. It appeared that the said services fall under 'Technical Testing and Analysis', as per Section 65(105)[zzh] and/or 'Consulting Engineer' service as per Section 65(105)[g] and taxable w.e.f 01.07.2003 and 07.07.1997 respectively. Since, the services received by the said party from the business establishments, which were in a countries other than India; the services are taxable under Section 66A (i) of the Finance Act, 1994(effective from 18.04.2006) read with "Taxation of Services (provided from outside of India & received in India) Rules, 2006. Thus, it appeared that the Service Provider being recipient of services was required to pay the Service Tax on such services received by them. The details of amount paid by the Service Provider to a foreign based company for 'Technical Testing and Analysis' service and 'Consulting Engineer' Service and Service tax payable thereon has been calculated as under-

| Sr No | Date of Payment | Amount/Gross Value | Service Tax Payable |
|-------|-----------------|--------------------|---------------------|
| 1 | 31.10.2006 | 4359579 | 538844 |
| 2 | 24.05.2007 | 1603476 | 198190 |
| 3 | 24.05.2007 | 4410098 | 545088 |
| 4 | 02.06.2007 | 80294 | 9924 |
| 5 | 02.06.2007 | 105650 | 13058 |
| 6 | 29.01.2008 | 1087031 | 134357 |
| | Total | 11646128 | 1439461 |

3. It was further observed that the said party had contravened the various provisions of **section 68, Section 69 & Section 70** of the Finance Act, 1994 for which they were liable for penal action under **Section 76, Section 77, Section 78** of the said Act, read with the various provisions made under the Service Tax Rules, 1994 as detailed below ;

a) The said party had failed to register themselves for the services provided by them and thereby contravened the provisions of section 69 of the said Act, rendering themselves liable for penalty as provided under section 77 of the said Act. As per Section 69 of the said Act read with Rule 4 of the said Rules, every person liable for paying the Service Tax was required to make an application for registration to the Superintendent of Central Excise, within a period of 30 days from the date on which the Service Tax under Section 66 of the said Act was levied or from the date of commencement of business.

b) The said party had not paid the service tax on the services provided by them and thereby contravened the provisions of section 68 of the said Act, rendering themselves liable for penalty as provided under section 76 of the said Act. As per the provisions of Section 68 of the said Act read with Rule 6 of the Service Tax Rules 1994 every

specified in Section 66 of the said Act in such manner and within such period as may be prescribed.

c) The said party had not filed returns for the services provided by them during the period under reference and had contravened the provisions of section 70 of the said Act, thereby rendered themselves liable to pay late fee as provided under section 70 of said Act as well as liable for penalty under Section 77 of the said Act. As per the provisions of Section 70 of the said Act read with Rule 7 of the said Rules, every person liable to pay Service Tax shall himself assess the tax due on the services provided by them and shall furnish to the Superintendent of Central excise, a return in the prescribed form ST-3 by 25th of the month following the particular half year.

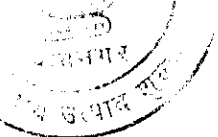
d) The said party had suppressed the material fact with intent to evade payment of Service Tax and has contravened the provisions of section 67 of the said Act rendering themselves liable to penalty as provided under section 76 & 78 of the said Act. As per the provisions of Section 67 of the said Act, every person liable to pay Service Tax himself shows the correct value of the services for charging service tax. The said party was failed to do so during the material time and did not pay the Service Tax due as such under provisions of the Finance Act 1994.

e) The said party had not paid the service tax as provided under section 68 of the Act and therefore required to pay the interest as provided under section 75 of the Act. As per the provisions of Section 75 of the said Act, if any person liable to pay the service tax as per Section 68 or rules made thereunder and fails to credit the service tax in time, the said person was required to pay simple interest for the period by which such crediting of tax was delayed.

f) The said Service Provider had failed to pay the due Service Tax during the material time by suppressing the facts only with an intent to evade the said Service Tax which was required to be demanded under the proviso of Section 73 of the said Act along with due interest thereon under the provisions of Section 75 of the said Act. In view of the above, it was clear case for invoking the provisions of Section 73(1) which provides to invoke extended period of five years from the relevant date.

4. In view of the above the said party was called upon to show cause to this notice to the Commissioner, Central Excise, HQ, Bhavnagar as to why :-

- (i) the Service Tax for the amount of **64,29,293/- (Rs Sixty four lacks, twenty nine thousand two hundred and ninety three only)** should not be demanded under proviso to Section 73 (1) of the said Act .



- (ii) **Interest** at the appropriate rate as provided under Section 75 of the said Act, on the above amount of Service Tax should not be recovered from them till the actual payment.
- (iii) **Penalty** should not be imposed upon them under Section 76, Section 77 & Section 78 of the said Act.

DEFENCE REPLY :

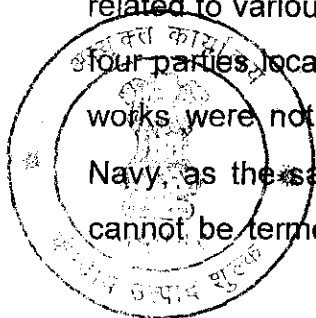
5. The said party had not submitted any written submissions, even after lapse of more than one year period from issuance of the show cause notice and letter dated 24-07-2012 and 21-01-2013. So, the personal hearing in the matter was fixed on 10-02-2014/12-02-2014 and 05-03-2014/06-03-2014, however, the said party had sought extension. The next opportunity of personal hearing was provided on 13-03-2014 and Shri Jay M. Rajyaguru, Commercial Officer of said party appeared for personal hearing and also submitted the written submission during the personal hearing.

5.1. In their written submission, with regard to the Para 2.1 of the show cause notice for demand of Service Tax amounting to **Rs. 1,58,081/-**, the said party submitted that the taxable value in respect of repairing of Crane of Barge of M/s J. M. Baxi was including materials namely angles, channels, nut bolts, etc and cost of these materials, if purchased from open market was not taxable.

5.2. Further, as regard to Service Tax demand of **Rs. 8,22,257/-**, made in Para 2.2. of the subject show cause notice, the said Service party had submitted that for the activity of 'Ship Repairing' carried out under a Warehouse, registered for Ship/vessel, as like them, the items, accessories, fuel, etc. manufactured indigenously and supplied, is exempted from payment of Central Excise duty. The same logic should be applicable in case of Service Tax, in their case.

5.3. With reference to the demand of **Rs. 40,09,494/-** made under Para 3.1. of the show cause notice in respect of the Design services received by them, the said party has submitted that the Design Services received by them was nothing but the basic material for manufacturing of Ship under the provision of Chapter IX of the Customs Act, 1962. So, the Design Service cannot be defined under Section 65 (105) zzzzd of the Finance Act. Further, they submitted that 'Design Services', were for the purpose of manufacturing of a Secret Design Vessel for the Indian Navy Warship they enclosed a Certificate dated 04-05-2012 issued by the Integrated Headquarters, Ministry of Defence (Navy), New Delhi.

5.4. As regards, the demand of Service Tax of **Rs. 14,39,461/-** made under Para 3.2 related to various consultancy, Valuation Vessels/Hull, Testing & Drawing, etc from the four parties located in foreign countries, the Service provider submitted that the subject works were not directly under the control of them, but in the direct control of Indian Navy, as the same were carried out on "INS-Warship". So, the said Service provider cannot be termed as "Service provider or recipient of Service" Further "



duty was leviable on the value of ships manufactured by them and sold to Indian Navy, so Service Tax could not be demanded.

5.5. In general they have contended that they were working under the provisions of Chapter IX of the Customs Act, 1962. Further, they had submitted that in their premises they had also carried the Ship repairing works. They have further submitted that their Customs/Central Excise records had been audited several times, so extended period invoked in the demand notice issued to them was not tenable. It was also contended by the said party that the demand had been time barred, as nowhere in the show cause notice, it had been mentioned that they had suppressed the facts. Their contention was also that no suppression if figures were disclosed in the balance sheet. They had further submitted that as the demand was not sustainable, they were not liable to penalty under Section 77 of the Finance Act, 1994 and also under the provision of Section 76 and Section 78 of the Finance Act, 1994, as well as they are not liable to pay interest as demanded.

5.6. The said party vide their above letter requested for time to submit further written submission. However, even after lapse of considerable time, the Service provider did not submit any further submission, so the same was reminded to him vide letter dtd. 16-04-2014 and 23-05-2014. Further, personal hearing in the matter was refixed on 10/11-06-2014, however, on 09-06-2014, the said party submitted a written submission under which they have submitted that their unit was a warehouse unit under the provisions of Section 58 of the Customs Act, 1962 and in bond manufacturing activities had been carried out in it. They further submitted that the show cause notice to their unit could be issued by the Warehouse licencing authority and under the provisions of Customs Act, 1962. As regards the "Ship repair activity" carried out by them, they submitted that such work was carried out by them for Government agencies, therefore, the proposed demand in the show cause notice was not sustainable. They further submitted that, as regards the ships manufactured for Indian Navy, they had to carry out the work as per the design of a vessel supplied by the Indian Navy. They submitted that the contracted price in case of Indian Navy was always inclusive of "design and development charges" and in this regard, they had submitted a specimen contract copy, wherein contract had been made with Indian Navy. They had cited the following judgments in support of their contention that they had disclosed all the facts to the department and their was no suppression from their side :

- a) Union Carbide India Ltd. V/s Collector – 1985 (22) ELT 102 (Tri.)
- b) Sivom Ply – N- Wood V/s CCE – 2001 (133) ELT 435 (CEGAT)
- c) PGO Processors V/s CCE – (2000) 122 ELT 26 (Raj) HC – DB.
- d) CCE V/s CMS Computers – 2005 (182) ELT 20 (SC – 3 Member Bench)
- e) Hindalco Ind. V/s CCE – 2003 (161) ELT 346 (CEGAT)

5.7. Finally, they requested for further time till first week of July 2014 and also requested for being heard in person. The personal hearing was fixed on 25-06-2014, wherein Shri U. H. Qureshi, Consultant and Shri Jay Rajyaguru, Commercial Officer of

M/s Alcock Ashdown (Guj) Ltd. appeared for hearing., who submitted another written submission, in which they promised to submit the documents required, within one week and requested to decide the show cause notice considering the written submissions given by them. Further, the written submissions given by them contained the same contentions, which they submitted in their written submission, given on 09-06-2014. Further, In their written submission dtd. 25-06-2014, the Service provider promised to furnish the documents within one week, but they failed to do so.

DISCUSSION AND FINDINGS:

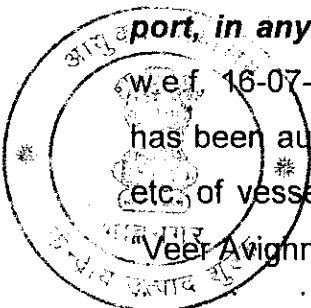
6. I have carefully gone through the facts of the case on record and various submissions of the noticee. The present show cause notice, involves following issues to be decided ;

- i) One of the issue is related to taxability of 'Ship Repair Activity' and other related services carried out by the said party, which is proposed to be covered in the Show Cause Notice under the definitions of '**Other Port Services**' under section 65(82) of the Finance Act, 1994;
- ii) The other issue is relating to the taxability in respect of various services received by the said party from the other Service providers located in foreign countries, which are taxable services covered under the definitions of (1) '**Design Services**' under Section 65(105)[zzzzd], (2) '**Technical Testing and Analysis**' service, under section 65(105)[zzh] and (3) '**Consulting Engineer service**' under section 65(105)[g] of the Finance Act, 1994 readwith the provisions of Section 66-A of the Finance Act, 1994, as contended in the show cause notice.

7. I, now, discuss the services and its taxability on merits ;

OTHER PORT SERVICES :

7.1 The said party is a person authorized by the Port to undertake ship building and its related activities. During the financial year 2008-09, the said party had undertaken the Repairing, Rectification and Strengthening work of crane column in respect of Crane Barge "Veer Avighna", belonging to M/s J. M. Baxi, Jamnagar. The said activity is covered under Clause (82) of Section 65, which defines 'Port service' as '**any service rendered by a port or other port or any person authorized by such port or other port, in any manner, in relation to a vessel or goods**'. The said service is taxable w.e.f. 16-07-2001. The facts of the case indicate that M/s Alcock Ashdown (Guj) Ltd. has been authorized by Port to carry out activities of Building, Repairing, Rectification, etc. of vessels. Further, they had provided repair service in respect of Crane Barge "Veer Avighna", which is a water vessel. Therefore the repair of such vessel provided by



65 (82) and Section 65 (105)(zzl) of the Finance Act 1994. Accordingly the amount of **Service Tax of Rs. 1,58,081/-** is taxable under the category of 'Port Service', which was later redefined as 'Other port service w.e.f. 01-07-2003.

As regards, the services for undertaking 'ship repair activity' for (1) M/s GMB Bhavnagar, (2) Commander Coast Guard, and (3) Calcutta Port Trust during F.Y. 2007-08 to F. Y. 2009-10. I find that w.e.f. 01.07.2003, the taxable service of "port service was redefined to 'Other Port service'. The substituted clause defines 'Port service' to mean 'Any service rendered within a port or other port, in any manner'. So, the Services of "Ship Repairing" carried out by the Service Provider for the above three parties, was covered under the definition of "Other Port Services". The amount received by the said party, for providing the above-mentioned service, was liable to Service Tax. However, vide Notification No. 31/2010-ST dated 22.06.2010, exemption was granted to the service relating to repair of ships or boats or vessels belonging to the Government of India including Navy or Cost Guard, or Customs, from levy of Service Tax, with effect from 01.07.2010. Therefore, till 30-06-2010, the above-mentioned service provided by the said party to the three Service receivers, was liable to Service Tax. Accordingly I find that the said party is liable to pay service tax in respect of the services provided by them to the above said three parties under the category of "Other Port Services" amounting to **Rs. 8,22,257/-** as worked out in the show cause notice.

Thus, I find that the party is liable to pay service tax under the category of '**Other Port Services**' total amounting to **Rs. 9,80,338/- (Rs. 1,58,081/- + Rs. 8,22,257/-)**.

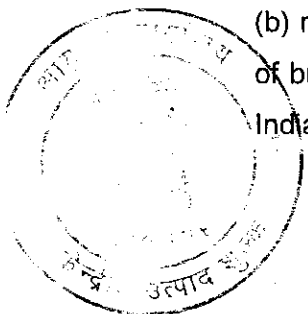
SERVICES RECEIVED FROM THE OTHER SERVICE PROVIDERS LOCATED IN FOREIGN COUNTRIES:

8. The second issue arises from the Show Cause Notice is regarding service tax liability in respect of three service i.e. (1) '**Design Services**', (2) '**Technical Testing and Analysis**' and (3) '**Consulting Engineer service**' received by the said party from the service providers located in the foreign countries. Before proceeding further, we needs to examine the applicability of Section 66A of the Finance Act, 1994, which is a common issue in respect of all above three services received by the said party from the countries other than India, which is under;

66A. (1) Where any service specified in clause (105) of section 65 is,—

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India,



such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1.— A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2.—Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.;

From the above, it can be seen that as per Section 66A a person who has his place of business, fixed establishment, permanent address or usual place of residence, in India has received services from a provider who has established a business or has fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, the liability to pay service tax is on the recipient of service. In this case, undisputedly, the said party has received 'Design Service', Consultancy Service and Technical Testing and Analysis Service from providers who have established a business or has fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India. Therefore, in view of the above provisions of Section 66A *ibid*, the liability of pay service tax is on M/s Alcock Ashdown (Guj) Ltd who had received such service. However, before reaching to the final conclusion these issues are categorically discussed hereunder in context with the provisions of the law ;

DESIGN SERVICE

8.1 The said party had received 'Design Services' for designing of Ships from M/s Sea Transport Solution Pvt. Ltd., an Australia based company. M/s Sea Transport Solution Pvt. Ltd., did not have any office or business establishment in India. M/s Alcock Ashdown (Guj) Ltd. had received the Design Services, from the above-mentioned Australia based company during the period from July'2007 to December'2011. The "Designing Service" were made taxable w.e.f. 01.06.2007 under the provisions of

Section 65 (36b) read with Section 65(105)[zzzzd] of the Finance Act 1994. Section 65 (36b) of the Act defines 'Design Services' as follows:

"Design Services" includes services provided in relation to designing of furniture, consumer products, industrial products, packages, logos, graphics, websites and corporate identity, designing of production of three dimensional models".

Further, Clause (zzzzd) of Section 65 (105) of the Finance Act defines its taxability where any services provided or to be provided to any person, by any other person in relation to design services, is a taxable service.

The said party has submitted that the Design Services received by them was nothing but the basic material for manufacturing of Ship under the provision of Chapter IX of the Customs Act, 1962. So, the Design Service cannot be defined under Section 65 (105) (zzzzd) of the Finance Act. They have further submitted that 'Design Services', were for the purpose of manufacturing of a Secret Design Vessel for the Indian Navy Warship and have mentioned of enclosing a Certificate dated 04-05-2012 issued by the Integrated Headquarters, Ministry of Defence (Navy), New Delhi. I do not find any substance in the said arguments. Manufacturing of ship under the provisions of Chapter IX of Customs Act does not make any difference in the taxability of a service. The service has been received by M/s Alcock Ashdown (Guj) Ltd and not by Indian Navy. Therefore the liability to pay service tax is on M/s Alcock Ashdown (Guj) Ltd as per Section 66A ibid read with Rule 3 of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006. Therefore, the 'Design Services' received by the said party has to be treated as if the recipient himself had provided the service in India and they were liable to pay Service Tax on the payments made by them to M/s Sea Transport Solutions Pvt. Ltd. The amount of Service Tax worked out in the Show cause notice and payable by M/s Alcock under Design Services is **Rs.40,09,494/-**.

CONSULTING ENGINEER SERVICE:

8.2. During the period 2006-07 to 2007-08, the said party had received the services of Consultancy, Valuation of Vessels, Drawing, etc. from, (1) M/s Ship tech PTE Ltd., (2) M/s Galbraith's Ltd. and (3) M/s J E Hyde, which are located abroad and having their usual place of business out of India. The above-mentioned companies have provided consultancy related to Valuation and drawing of vessels/hull to the said party. The details of which are as under:

| Name of the Company & location | Invoice / Debit Note No. & Date | Description of service | Value of services received as per Account ledger submitted | Service Tax payable as worked out in SCN |
|-----------------------------------|---------------------------------|--|--|--|
| M/s Shiptech Pte. Ltd., Singapore | 006/06 dated 23-01-2006 | RE ST 1436-12, 800 DWT IMO II Product Carriers | 4359579.00 | 538844 |
| Do | 78/06 dated 15-08-2006 | -do- | 1603470.00 | 198190 |
| Do. | 29/07 dated 31-03-2007 | RE ST 1436-12, 800 DWT IMO II Product | 4410098.00 | 545088 |

| | | | | |
|-------------------------------|---|---|-------------------------|-----------------------|
| | | Carriers – Being claim for 33 \$ on completion of batch 1 drawings | | |
| M/s Galbraith/'s Ltd., London | F-3354 dated 01-12-2006 | Supplying Valuation letter in respect of Hull Nos. Y-No. 251-254 on Charterfree basis | 80294.00 | 9924 |
| J E. Hyde Shipbrokers, London | 19835 dated 29 th March'2007 | IMO II Chemical Tankers – Hull No. 251 Hull No. 252 Hull No. 253 Hull No. 254 Our fee re. valuation of the above vessels. | 105650.00 | 13058 |
| | | | Rs.1,05,59,091/- | Rs.13,05,104/- |

8.2.1. The consulting engineer's service has been made taxable w.e.f. 07-07-1997 and the definition given under Clause (31) of Section 35 of the Finance Act, 1994, as amended w.e.f. 16-05-2008 is :

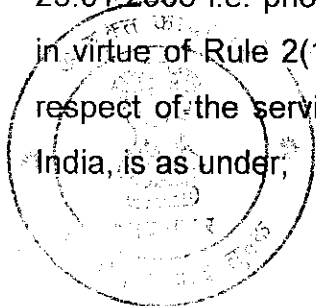
“Consulting Engineer’s means any professionally qualified engineer or any body corporate or any other firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to any person in one or more disciplines of engineering”.

Further, the taxability of the said service has been defined in sub-clause (g) of Section 65 (105) of the Finance Act, as under :

“Taxable Service’ means any service provided or to be provided to a client , by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering; including the discipline of computer hardware engineering but excluding the discipline of computer software engineering,”

8.2.2 In the invoices mentioned in the table above, the noticee has received taxable services in respect of the vessels built by them and these services are covered under the definition of 'Consulting Engineer's Service. Further, the above-mentioned companies have been located outside India, which is evident from the invoices issued by them and not having their usual place of business in India. So, as per the provisions of section 66 A, discussed in para 10.2.1 above, the 'Consulting Engineer's Services' received by the said party had to be treated as if the recipient himself had provided the service in India and they were liable to pay Service Tax on the payments made by them during the period mentioned above.

8.2.3. However, so far as leviability of the service tax on services received by the said party is concerned I find that service valued at Rs. 43,59,579.00 was received on 23.01.2006 i.e. prior to insertion of Section 66A (*supra*) w.e.f 18.04.2006 . Before that in virtue of Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 service tax was leviable in respect of the services provided by the service provider from the country other than India, is as under,



"(iv) in relation to any taxable service provided or to be provided by a person, who has established a business or has a fixed establishment from which the service is provided or to be provided, or has his permanent address or usual place of residence, in country other than India, and such service provider does not have any office India, the person who receives such service and has his place of business, fixed establishment, permanent address or, as the case may be, usual place of residence in India."

With regard to the provisions of above rule it will be pertinent to note that prior the period to 18.04.2006 there were no provision in the Act to take care of such situation. Section 66A of the Finance Act, 1994 came into force from 18.04.2006. In this regard, it is now settled law that the liability to pay service tax by recipient of service will be considered from date of introduction of Section 66A of the Finance Act 1994. Hon'ble Gujarat High Court in the case of **Quintiles Data Processing Centre (I) P. Ltd-2011 (23) STR.15 (Guj)** in this regard Hon'ble Gujarat High Court held that;

Import of Services - Liability of recipient prior to 18-4-2006 - Management Consultant Services received from foreign service provider - Department relying on Rule 2(1)(d)(iv) of Service Tax Rules, 1994 - Major shift introduced on 18-4-2006 for collection of Service tax - Bombay High Court in case of Indian National Shipowners Association [2009 (13) S.T.R. 235 (Bom.)] relying on earlier decision of Apex Court in Laghu Udyog Bharati [2006 (2) S.T.R. 276 (S.C.)] held that in absence of any charging section, merely by virtue of Rule 2(1)(d)(iv) ibid recipient cannot be made liable - Charging section i.e. Section 66A of Finance Act, 1994 introduced w.e.f. 18-4-2006, demand prior to 18-4-2006, relying on Rule ibid wholly impermissible. [paras 9, 10, 17]

In the case of **Indian National Shipowners Association, 2008(12)LCX0014** Hon'ble High Court of Bombay has held as under;

"20. It appears that a similar provision in the rules was made applicable by the Government in relation to the Clearing Agents by making customers of the Clearing Agent liable for levy of the service tax. That question has been decided by the Supreme Court by its judgment in the case of Laghu Udyog Bharati (supra) and the Supreme Court has clearly laid down that the imposition of the service tax is on the persons rendering the services and by making a provision in the Rules, levy of tax cannot be shifted to the recipients of the services and the rule framed which brought about this situation has been declared by the Supreme Court to be invalid. The law laid down by the Supreme Court in its judgement in Laghu Udyog (supra) is squarely applicable to Rule 2(1)(d)(iv), which is relied on in this case. It appears that it is first time when the Act was amended and Section 66A was inserted by Finance Act, 2006 w.e.f. 18-4-2006, the Respondents got legal authority to levy service tax on the recipients of the taxable service. Now, because of the enactment of Section 66A, a person who is resident in India or business in India becomes liable to be levied service tax when he receives service outside India from a person who is non-resident or is from outside India. Before enactment of Section 66A it is apparent that there was no authority vested by law in the Respondents to levy service tax on a person who is resident in India, but who receives services outside India. In that case till Section 66A was enacted a person liable was the one who rendered the services. In other words, it is only after enactment of Section 66A that taxable services received from abroad by a person belonging to India are taxed in the hands of the Indian residents. In such cases, the Indian recipient of the taxable services is deemed to be a service provider. Before enactment of Section 66A, there was no such provision in the Act and therefore, the Respondents had no authority to levy service tax on the members of the petitioners-association."

Also Hon'ble High Court of Gujarat in case of **Quintiles Data Processing Centre India Pvt. Ltd., 2011(104)LCX0066**, relying on the decision of **Indian National Shipowners Association, (supra)** of the Hon'ble High Court of Bombay has held as under;

"in view of the above judicial pronouncement and in view of the facts on record, we do not find that the Tribunal committed any error in setting aside the service tax demand. When we find that the charging Section making service recipient liable to pay service tax, in certain circumstances was introduced by virtue of Section 66A of the Finance Act,

1994 with effect from 18.04.2006, any demand of service tax prior to the said period, merely relying on Rule 2(1)(d)(iv) of the service tax Rules was wholly impermissible. Tribunal correctly ruled in favour of assessee."

The above decision has been accepted by the Department.

In view of the above citations and in view of the facts of record, I drop the demand of service tax to the tune of **Rs. 5,38,844/-** in respect of the subject services received prior to 18.04.2006.

8.2.4. Thus, the said party is liable to pay service tax of total **Rs.7.66.260/-** (Rs.13,05,104/- minus Rs.5,38,844/-) under the category of '**Consulting Engineer Services**' on the services so received from the service providers located in the country other than India in view of the provision of 66A *ibid*.

TECHNICAL TESTING AND ANALYSIS SERVICE

8.3.1 Similarly, the said party had received the Testing services from M/s Force technology, Brondby, Denmark under the following invoice.

| Name of the Company & location | Invoice / Debit Note No. & Date | Description of service | Value of services provided as per Account ledger submitted | Service Tax payable as worked out in SCN |
|--|---------------------------------|---|--|--|
| M/s Force Technology, Brondby, Denmark | 1012295 dtd. 31-05-2007 | Additional model testing on 12800 dwt IMO II Product Tankers. 1. Retrieval of model from storage Hull Model modification, re-jigging of Model. 2. Lines review & CFD analysis. 3. Still water performance test (Resistance one (1) condition), self propulsion (One (1) condition) open water test. 4. 3D Wake measurement. | 1087031.00 | 134357.00 |
| Total | | | | Rs 1,34,357/- |

8.3.2. In this regard, the Section 65 (106) defines 'Technical Testing and analysis' as follows :

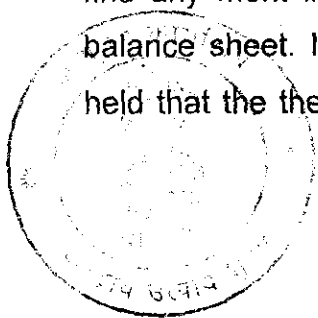
"technical testing and analysis" means any service in relation to physical, chemical, biological or any other scientific testing or analysis of goods or material or information technology software or any immovable property, but does not include any testing service provided in relation to human being or animals."

The words 'or information technology software were added by the Finance Act, 2008, with effect from 16-05-2008. Further, the term 'technical testing and analysis agency' is defined in section 65 (107) of the Act, as 'any agency or person engaged in providing service in relation to technical testing and analysis'. W. e. f. 16-06-2005, the taxable service is defined under sub-clause (zzh) of section 65 (105) of the Act, as the service provided or to be provided to any person, by a technical testing and analysis agency, in

8.3.3. In the present case, the Service provider has received the Technical Testing of the vessel build by them, which was their final product, therefore, it is covered under the words "**Physical or any scientific testing of goods or material**" given in the above-mentioned definition of 'Technical Testing and Analysis' service. Further, M/s Force Technology, from whom the services have been received by the Service provider, are located in Denmark and they do not have any office or business establishment in India. Therefore, as per the provision of Section 66 A of the Finance Act, 1994, discussed in para 10.2.1 above, the 'Technical Testing and Analysis Services' received by the Service provider had to be treated as if the recipient had himself provided the service in India and they were liable to pay Service Tax on the payments made by them. Thus, the said party is liable to pay **service tax of total Rs.1,34,357/-** under the category of '**Technical Testing and Analysis Service**' on the such services received from the service providers located in the country other than India in view of the provision of 66A *ibid.*

Limitation

9. 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 I find that so far as above taxable services are concerned, the said noticee has not added the subject taxable services in their Service Tax Registration. Their argument that they were providing services to Government agencies or Indian Navy only and no service tax levied on the services provided to Government agencies is not tenable. Further, it has been clearly found the said Service provider had received taxable services from Service provider located abroad, however, they had not paid Service tax on it, on the ground that, they have obtained the services in respect of vessels build for Government Agencies. There is no such exemption provided in the statute in respect of such services. 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 or obtained Service tax registration in respect of the above taxable services. In this case, it is clear that the instance of providing taxable service came to the knowledge of the department only after completion of Audit by the department. I don't find any merit in the argument that no suppression, if figures were disclosed in the balance sheet. In the case of *M/s Maruti Udyog Ltd., [2001(134)ELT.269]* the Tribunal held that the theory of universal knowledge cannot be attributed to the department in the



absence of any declaration. Thus, I find that the extended period is invocable in the present case.

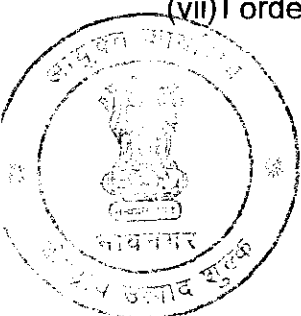
9.1. Coming to the issue of imposing penalty, this issue is no more *res integra* in view of the judgments of the Supreme Court in the case of *Dharamendra Textile Processors and Ors.*, 2008 (231) E.L.T. 3 (S.C.) and *Rajasthan Spinning and Weaving Mills - 2009* (238) E.L.T. 3 (S.C.). The Apex Court 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.

9.2. 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 provides that '*if the penalty is payable under Section 78, the provisions of Section 76 shall not apply*'. 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.*

10. In view of the above discussion and findings I pass the following order:

ORDER

- (i) Out of total demand of **Rs. 64,29,293/- (Rupees Sixty Four Lac Twenty Nine Thousand Two Hundred and Ninety Three Only)** I confirm the demand of **Rs.58,90,449/- (Rupees Fifty Eight Lakhs Ninty Thousand and Four Hundred Forty Nine Only)** under Section 73(1) of the Finance Act 1994, however, I drop the remaining demand of **Rs. 5,38,844/-**, as discussed above.
- (ii) I impose penalty of **Rs. 58,90,449/- (Rupees Fifty Eight Lakh Ninety Thousand Four Hundred and Forty Nine only)** under Section 78 of the Finance Act 1994.
- (iii) I impose penalty of Rs. 200/- per day or two per cent per month, whichever is higher, from the due date till 09-05-2008, under Section 76 of the Finance Act, 1994.
- (iv) I impose penalty of Rs. 10,000/- (Rupees Ten thousand only) under Section 77 of the Finance Act 1994.
- (vii) I order for recovery of interest under Section 75 of the Finance Act, 1994.



Navneet Goel
(NAVNEET GOEL)
Commissioner

F.No.V/15-03/Dem-ST/HQ/2012-13

Date :22.07.2014.

By Registered Post A.D./Hand Delivery

To,
M/s. Alcock Ashdown (Guj) Ltd.,
Ramsar Yard, Old Port Bhavnagar,
Bhavnagar.

Copy to:-

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

