

कार्यालय आयुक्त केंद्रीय उत्पाद शुल्क एवं सेवाकर
 OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
 प्लॉट नं. 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/15-08/Dem-ST/HQ/2012-13
 F. No. - V/15-08/Dem-ST/HQ/2012-13

आदेश की तारीख : 28.02.2014
 Date of Order : 28.02.2014.

जारी करने की तारीख : 13.03.2014
 Date of Issue : 13.03.2014

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-004-13-14 DT 28-02-2014

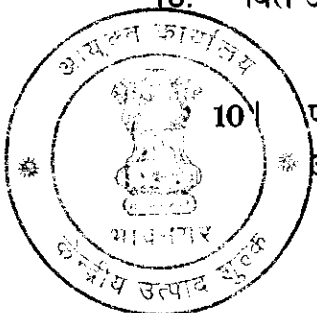
Order-in-Original No.: BHV-EXCUS-000-COM-004-13-14 DT 28-02-2014

16. यह प्रति उस व्यक्ति को, जिसके लिए यह आदेश जारी किया गया है, उसके व्यक्तिगत उपयोग के लिए निःशुल्क प्रदान की जाती है।
17. 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 :

18. 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)
 ओ20, न्यू मेन्टल अस्पताल कंपाउन्ड, मेघाणीनगर, अहमदाबाद 380016।



- 11। अपीलीय न्यायाधिकरण का वित्त अधिनियम, 1994 की धारा 86 की उप धारा (1) के अंतर्गत अपील, सेवाकर नियमावली, 1994 के नियम 9(1) के अंतर्गत निर्धारित एस.टी.-5 में, चार प्रतियों में आदेश प्राप्ति के दिनांक से तीन माह के भीतर की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए (उनमें से एक प्रमाणित प्रति होगी) और वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निर्धारित किए अनुसार शुल्क लगा होना चाहिए। जिस स्थान पर न्यायाधिकरण की न्यायपीठ स्थित है, वहाँ के नामित सार्वजनिक क्षेत्रा बैंक के न्यायापीठ के सहायक रजिस्ट्रार के नाम से निर्धारित फीस रेखांकित बैंक ड्राफ्ट के रुप में भेजनी होगी।
- 12। 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।
19. 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।
20. ब्यौरापूर्ण करने हेतु सीमाशुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 की ओर ध्यान आकर्षित किया जाता है।

BY RPAD

To,
M/s. V.K.Enterprise,
110, Axardeep Complex,
Shastrinagar,
Bhavnagar – 364 003.

Subject: Show Cause Notice : V/15-08/Dem-ST/HQ/2012-13 dated 20.04.2012



BRIEF FACTS OF THE CASE:

On the basis of information received that M/s. V. K. Enterprise, 110-Akshardeep Complex, Shashtrinagar, Bhavnagar, (hereinafter referred to as 'the Noticee') was providing taxable services to the Gujarat State Police Housing Corporation Limited, Gandhinagar (hereinafter referred to as "GSPHCL") and not paying appropriate Service Tax, inquiry was conducted by issuing summons.

2. Statement of Shri Pradipsinh Vanrajsinh Gohil, Partner of the Noticee 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 14.03.2012 before the Superintendent (A.E.), Central Excise, H.Q., Bhavnagar in question-answer form as reproduced below :-

Q. No. 1: What is your business and what kinds of services are provided by your firm?

Answer: Our firm viz. M/s V. K. Enterprise is a civil construction company. We provide Construction services to various departments of State as well as Central Government. During the last five years, we have provided our services of construction of various Government buildings. We have also undertaken work of maintenance & repair of various Government buildings as well as water pipelines. We never provided 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 2004 and at present there are three partners in our firm namely Shri Vanrajsinh Keshubha Gohil who is my father, Shri Kiritsinh Jambha Jadeja and myself.

Q. No. 3: Have you taken Service Tax registration for the services provided by your firm?

Answer: Yes, we have taken Service Tax registration in the category of Maintenance & Repairs Services on 5-12-2005. Our Service Tax registration No. is AAEFV7073QST001.

Q. No. 4: Please give year wise details of the amount received by your firm against the services provided to various service recipients from the financial year 2006-07 onwards alongwith type of service provided.

Answer: I submit herewith the details as desired by you in Annexure-A and the same is attached to this statement.

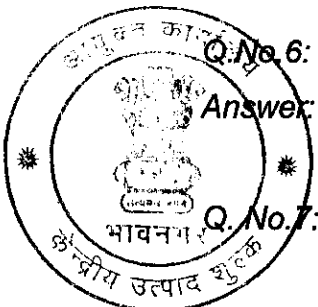
Q.No.5: Please peruse the ST-3 returns filed by you for the year 2010-11 in which you have mentioned 'MRS Service' i.e. Management, Maintenance & Repairs service against column No.3A1 of the said returns and you have mentioned sub-clause (zzb) of clause (105) of Section 65 against column No. 3B of the said returns. Please explain on which category of service, you have paid the S. Tax as this sub clause mentioned by you is for the category of Business Auxiliary Service.

Answer: I state that we have paid service tax on the category of Management, Maintenance & Repairs service. However, due to typographical mistake at the time of online filing of the Returns, the sub clause was wrongly mentioned.

Q.No.6: Please inform have you availed benefit of any exemption Notification No.?

Answer: No.

Q. No.7: There is a difference between the amount received by your firm which is shown in your profit-loss account and shown in the ST-3 returns. Why this difference is there? Please explain.



Answer: We are paying service tax on the amount received for the maintenance and repairing work after availing the benefit of the abatement. In brief, I state that we are paying service tax on 30% of the amount received by us for the maintenance and repairing work and we have shown that abated value only in our returns. We have not paid service tax on the remaining amount and also not shown as exempted amount or as abatement amount in our ST-3 returns. Therefore, there is difference between the amount received by our firm which is shown in our profit-loss account and shown in the ST-3 returns.

Q.No.8: Do you registered with the Commercial Tax Department or VAT and the paying the VAT under which category?

Answer: Yes, we have obtained the registration under the category of 'Works Contract' from the Commercial Tax Department and also paying VAT. However, at present, I am not confirmed that on which amount we are paying VAT. However, I shall check-up the same and shall inform you within a week.

Q.No.9: In your civil work, any material has been provided by the service recipients to free of cost to you or otherwise?

Answer: No. We have utilized our own construction material.

Q. No.10: 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. 11: Apart of above, have your firm provided any other service to the above said recipients which have not been included in the Annexure produced by you? If yes then please provide details.

Answer: No.

Q. No. 12: Apart of above do you want to add something else in the matter?

Answer: No.

3. From the statement dated 14.03.2012 of Shri Pradipsinh Vanrajsinh Gohil, Partner of the Noticee, and Work Orders submitted during the statement, it appeared that Noticee has obtained registration for supply of taxable service under the category of 'Management, Maintenance and Repair Service' (Section 65(105)(zzg) of the Act) and paid service tax on 30% of the amount received by them after availing abatement of 70% on gross amount received by them from the recipient. Whereas, no such abatement was prescribed under the Finance Act, 1994 and it therefore appeared that, the Noticee has short paid Service Tax on this service during the Financial Year 2006-07 to 2010-11. It was also observed that the Noticee had not mentioned correct amount of value of services received from their clients and had suppressed and mis-declared the value of the services provided by them with an intent to evade payment of Service Tax. It also appeared that the Noticee had provided three other services mentioned herein below (Commercial or Industrial Construction Service, Transport of goods by road in a goods carriage Service and Works Contract Service), to their clients without payment of Service Tax and without obtaining prescribed registration. Thus, they have evaded payment of Service Tax on these services. On scrutiny of the ST-3 returns filed by the Noticee, it appeared that the Noticee had also availed the benefit of the Cenvat Credit taken and utilized the same for the payment of service tax.

4. It appeared that Notification No. 1/2006-ST forbids simultaneous availment of abatement and CENVAT. The noticee had availed credit on inputs and capital goods, therefore it appeared that they were not entitled for availing abatement from the consideration received for the provision of service.

5. It appeared that the Noticee had provided services of Management, Maintenance and Repair Service as detailed under:-

- 1) services provided to the R & B Division, Bhavnagar vide work order No. 400/06 dated 21.03.2006
- 2) Services provided to the Gujarat Water Supply and Sewerage Board vide work order No. AB-TC 1701 dated 27/28.06.2006
- 3) Services provided to the Gujarat Water Infrastructure Limited vide work order No. GWIL/Work Order/O&M/NC Project/114 dated 16.03.2006
- 4) Services provided to Gadhula Gram Panchayat regarding PCC & RCC work as mentioned in the Sr.No.2 of the Annexure submitted for the period of July-06 to Sep-06.
- 5) Services provided to the Gujarat Water Supply and Sewage Board as a sub-contractor for the work order No. AB/N.C.-9/O&M/Work Order/4590 dated 17.11.2005 issued to M/s Maruti Trading Private Ltd., Ahmedabad
- 6) Services provided to the Gujarat Water Supply and Sewerage Board as a sub-contractor for the work order No.AB/Tender/N.C.-6/M&R/2085 and AB/Tender/N.C.-7/M&R/2086 dated 17.08.2005 issued to M/s Maruti Trading Pvt. Ltd. Ahmedabad.
- 7) Services provided to the Public Health works department, Bhavnagar as a sub-contractor for the work order No. 1610 dated 16.06.2005 issued to M/s Maruti Trading Pvt. Ltd., Ahmedabad
- 8) Services provided to the Gujarat Water Infrastructure Limited as a sub-contractor for the work order No.GWIL/Work Order/O&M/NC Project/295 dated 30.07.2005 issued to M/s Maruti Trading Pvt. Ltd, Ahmedabad
- 9) Services provided to the M/s IVRCL Infrastructures & Pvt Ltd. vide work order No.IVRCL/AMB/Jam/5037/1479 dated 05.01.2007
- 10) Services provided to the Bhavnagar Sinchay department vide work order no.AB-3/Tender/Ranghola/4227 dated 06.11.2006
- 11) Services provided Ex. Engineer (Monpara) for the work of repairs of school at village Monpar, Ta-Vallabhipur.
- 12) Services provided to the Public Health Works department, Bhavnagar vide work order No.Store/M&R/Budhel-Bhadi/V.K./Bhavnagar/424 dated 21.02.2007
- 13) Services provided to the Gujarat Water Infrastructure Limited vide work order No.GWIL/Work Order/O&M/NC-12/Project/1951,1952,1953&1954/ dated 27.09.2007
- 14) Services provided to the Gujarat Water Supply and Sewerage Board vide work order No. SAC/Rapar ARP-03/O &M dated 22.01.2007.
- 15) Services provided to the Public Health Works department, Bhavnagar vide work order No.Store/M&R/Tansa/V.K/1558 dated 25.06.2007.
- 16) Services provided to the Gujarat Water Infrastructure Limited vide work order No.GWIL/Work Order/O&M/NC-18/Project/2590/ dated 10.11.2008.
- 17) Services provided to the Gujarat Water Infrastructure Limited vide work order No.GWIL/Work Order/O&M/NC-4&5/Project/1428 dated 25.06.2008
- 18) Services provided to the Public Health works department, Bhavnagar vide work order No.Store/O&M/Panch tobra-Anandpar-Mandvi/LOA/1304 dated 04.06.2009
- 19) Services provided for repairing work of drainage at Alang.
- 20) Services provided for the work of Operation & Maintenance repairs of civil, electro mech, civil structures, M.S. pipelines, storage structures etc as a sub contractor of M/s Maruti Trading Pvt.Ltd.
- 21) Services provided for the work of Operation & Maintenance of Pumphouse and water pipe line at Khadiyali.
- 22) Services provided for the work of operation and maintenance of headworks (Pumphouse) vide work order No.AB/workorder/1658 Dated 27.08.2009.
- 23) Services provided for the work of Operation & Maintenance repairs of civil, Electro Mech, civil structures, M.S. Pipelines, storage structures etc for Piyaj-Dharoi Pipeline vide work order No.AB/TC/Work Order/2532/2010 Dated 02.08.2010.
- 24) Services provided for the work of Operation and repairs of Head works (Pumphouse) at Rozaki-Beda vide work order No.Store/M&N/Nava Rozaki and Beda/12/E-Tender Dated 02.01.2010.
- 25) Repairs work of PGVCL office at Mamsa, Dist-Bhavnagar



5.2 In view of the facts discussed in the sub-paras above, it appeared that the Noticee had rendered "Management, Maintenance or Repair Services for Goods, Equipments or Properties". On the scrutiny of the ST-3 returns filed by the Noticee with the department, it appeared that the Noticee had not mentioned correct amount of value of services received from their clients and thus suppressed and mis-declared the value of the services provided by them with an intent to evade payment of Service Tax. The comparison between amount mentioned in ST-3 returns and actual payment receipt by the Noticee for providing this service is as under-

Year	Amount received as per ST-3 return	Amount received as per Annexure submitted by the Noticee during his Statement dated 14.03.2012
2006-07	23,95,638	1,09,70,561
2007-08	29,17,445	1,61,71,159
2008-09	33,34,103	2,90,03,003
2009-10	22,73,445	1,67,72,161
2010-11	31,41,183	1,54,18,620
TOTAL	1,40,61,814	8,83,35,504

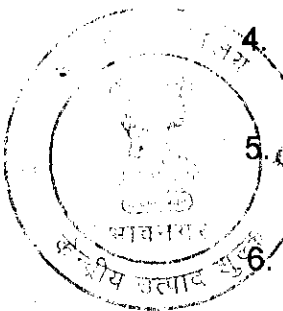
5.3 The Noticee has paid Service Tax on this service, provided by them during the Financial year 2006-07 to 2010-11. The amount of Service Tax Paid in cash is as under-

Services provided	2006-07	2007-08	2008-09	2009-10	2010-11
'Management, Maintenance and Repair Service'	210944	196431	293235	253458	323544
Commercial and Industrial construction Service	nil	nil	nil	nil	nil
Works Contract Services	nil	nil	nil	nil	nil
GTA Service	nil	nil	nil	nil	nil

6. On the basis of details of income available in the books of account, the details of year wise "Management, Maintenance or Repair Services" provided by the Noticee was as per **Annexure-A1** and Service Tax liability was Rs.89,64,360 as discussed in the **Annexure-B1** to the Notice.

7. From the statement dated 14.03.2012 of Shri Pradipsinh Vanrajsinh Gohil, Partner of the Noticee, and Work Orders submitted during the statement it appeared that the Noticee had provided services of Works Contract service to various service recipient as detailed below:-

1. The Civil work of water treatment plant at Kalol Dist-Godhara. Work order allotted vide letter No. PFI/SUJ-SUF/IVR/PM3B/06-07/2 Dated 30.01.2008 in this regard.
2. Construction of work Treatment Plant at Khirasara. Work Order No. hcg-206505-cpg-505004 Dated 20.08.2007 in this regard
3. Construction work of Residential Quarters for Police at Navapara and also construct Coastal Police station at Navabandar, Bhavnagar. Work Order No. GPH/TAK/Tender/MD/3593 & 3584/7591 & 6912/2008 Dated 23.10.2008 and 26.09.2008 in this regard.
4. Construction work of staff quarters for Medical Staff at Botad. Copy of letter of acceptance No.PIU/A/cs/CHC/Bhavnagar/5483-86/09 Dated 20-25/05/2009 in this regard.
5. Construction of intake Well at Santhalpur RWSS Project as a sub-contractor of IVRCL Infrastructures & Project Limited. Work Order No.IVRCL/AMB/SRWSS/5042/2210 dated 18.05.2009.
6. Under this contract they had undertaken the work of lowering the level of Inlet Channel in pumphouse at Maliya village. Work Order No.Hisha/Tender/2074 Dated 19.09.2009 in this regard.



7. The work of lowering the level of Mahi pipeline. Work order No.AB/-TC:148 Dated 16.01.2009 in this regard.
8. The work of upgradation of Seven Regional Water supply Scheme based on Vallabhipur Branch Canal (Jalia Off take point) and Mahi Pipeline (Based on Pipli Head Works) as a sub contractor of M/s Classic Network P.Ltd, Rajkot. Work order NoAB/TC/2191-2193 dated 29.03.2010 in this regard.
9. The construction work of under ground Sump, Overhead RCC Tank and Water Distribution system for BECL at village Padva, Ta-Ghogha. Work order No. DP/MMV/Tender Dated 21.06.2006 in this regard

8. In view of the facts discussed in the sub-paras above, it appeared that the Noticee had provided Works Contract service. On the basis of details of income available in the books of account, the details of year wise "Works Contract Services" provided by the Noticee was as per **Annexure-A2** and Service Tax liability of Rs.99,46,655 worked out as detailed in the **Annexure-B2** to the Notice.

9. From the statement dated 14.03.2012 made by Shri Pradipsinh Vanrajsinh Gohil, Partner of the Noticee, and Work Orders submitted during the statement it appeared that the Noticee had provided services of Commercial or Industrial Construction services as detailed under:

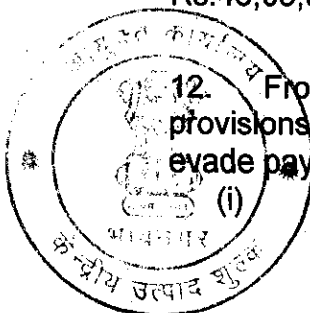
1. Services provided regarding RCC work in compound of Water Treatment Plant of Gadhula Gram Panchayat.
2. Services provided for the Civil Work of Water Treatment Plant at Kuvadara as a sub-contractor of M/s Maruti Trading Pvt. Ltd., vide work order No.MTPL/WO dated 05.04.2005.
3. Services provided for construction of Water Treatment Plant at Modasa as a sub-contractor of M/s Maruti Trading Pvt. Ltd., vide work order No. MTPL/WO dated 05.01.2007.
4. Services provided for the construction work of HGLR, U.S. Sump etc., at different location of Mahuva Taluka as a sub contractor of M/s Petron Civil Engineering Pvt. Ltd vide work order No.SNG/Mahuva/CC-269/177A/04 dated 25.02.2004.
5. Services provided for the work of construction of Water Treatment Plant at Laxminagar and Kadadara for Surendranagar as a sub contractor of M/s Patel Filters vide work order No.PFC/KE/06-07/3 dated 25.06.2006 and ECC/ECL/KE/05-06/1 dated 22.10.2005
6. Services provided for laying of D.I. and PVC Pipe Line at Sidsar Road, Bhavnagar vide W.O.No.AB/TC/3810 dated 14.11.2006
7. The work of foundation of Tower for GTL Company.
8. Services provided for the construction of Time Office, Rest Shelter and Toilet Block at lignite mines, GMDC, Bhavnagar

10. From the above work orders it appeared that the Noticee had provided Commercial or Industrial construction service. On the basis of details of income available in the books of account, the details of year wise "Commercial or Industrial Construction Service" provided by the Noticee was as per **Annexure-A3** and Service Tax liability worked out to **Rs.29,84,872/-** as detailed in the **Annexure-B3** to the notice.

11. From the statement dated 14.03.2012 made by Shri Pradipsinh Vanrajsinh Gohil, Partner of the Noticee, and Work Orders submitted it appeared that the Noticee had provided services of Transport of Goods by Road services to M/s GHCL during the financial year 2007-08 to 2010-11. On the basis of details of income available in the books of account, the details of year wise "Transport of Goods by Road Service" provided by the Noticee as per **Annexure-A4** and Service Tax liability worked out to Rs.46,06,987 as detailed in **Annexure-B4** to the Notice.

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

- (i) Section 69 of the Act read with Rule 4 of the Rules in as much as they failed to apply for registration / add 'Commercial or Industrial Construction Services' and 'Transport of Goods by Road Service, and 'Works Contract as the



- category of services provided by them in the Service Tax Registration already held by them,
- (ii) They had contravened the provisions of section 67 in as much as they had suppressed the value of taxable services rendered.
 - (iii) They had contravened the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 in as much as they have not paid service tax on the taxable services provided by them. In case of Management, Maintenance and Repair service, they have not paid correct amount of Service Tax.
 - (iv) They have not correctly self assessed their service tax liability and have not furnished periodical Return in prescribed format for the services provided by them, (other than Management, Maintenance and Repair service) thus, have contravened the provisions of Section 70 and Section 72 of the Finance Act, 1994 read with Section 68 of the Finance Act, 1994 read with rule 7 of the Service Tax Rules, 1994.

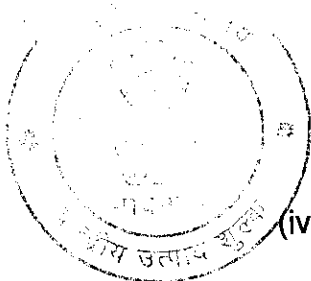
13. Therefore, it appears that since the Noticee have suppressed the facts and contravened various provisions of the Act and the Rules as discussed hereinabove with an intent to evade payment of Service Tax, extended period as contemplated under proviso to Section 73 (1) of the Act is invocable for recovery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

14. From the above, it appeared that for the acts of suppression of facts of providing taxable services as mentioned hereinabove & liability of the Noticee to pay service tax on it and contravening various provisions of the Act and the Rules as discussed hereinabove with an intent to evade payment of service tax, the Noticee had rendered themselves liable to penalty under Section 78 of the Act. Similarly, for the act of failure to apply for registration/ add 'Commercial or Industrial Construction Services', 'Transport of Goods by Road Service, and 'Works Contract' as the category of services provided by them as required under the provisions of Section 69 of the Act read with Rule 4 of the Rules and for the act of non furnishing of ST-3 Returns prescribed under Section 70 of the Act read with Rule 7 of the Rules as discussed hereinabove, the Noticee had rendered themselves liable to penalty under Section 77 of the Act.

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

16. Therefore, the Noticee was called upon to show cause to the Commissioner, Central Excise and Service Tax, Bhavnagar by notice No.V.15-08/Dem-ST/2012-13 dated 20.04.2012 as to why: -

- (i) The Service Tax total amounting to **Rs. 2,65,02,874/- (Rupees Two Crore Sixty Five Lakhs Two Thousands Eight Hundred Seventy Four Only) (Including Edu.Cess and S.H.Cess)** (calculation as shown in the **ANNEXURE-A** to this 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 apply for registration/ add 'Commercial or Industrial Construction Services', 'Transport of Goods by Road Service, and 'Works Contract' as the category of services provided by them as required under the provisions of Section 69 of the Act read with Rule 4 of the Rules and 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 the Noticee 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.

- (v) Service Tax amounting to Rs.12,77,612/- (Rupees Twelve Lakhs Seventy Seven Thousand Six hundred & Twelve only) (as detailed in paragraph 5.2 of this notice) already deposited towards Service Tax liability under "Management, Maintenance & Repair" services should not be appropriated against the said Service Tax liability under Section 68 & 73 of the said Act read with Rule 6(1) & (2) of Service Tax Rules, 1994;

DEFENCE REPLY :

17. The noticee filed defence reply vide letter dated 19.06.2012. Their arguments on different issues were as under:

MANAGEMENT, MAINTENANCE OR REPAIR SERVICES:

18.1 The noticee submitted that they had provided service of repair and maintenance work provided to various Government Agencies, viz., Gujarat Water Supply and Sewerage Board, Gujarat Water Infrastructure Limited, Gujarat Gram Panchayat, Public Health Works Department, etc. The noticee was providing materials as well as labour, for the purpose of Repair and Maintenance service. The combined bill of material as well as labour was raised by the noticee. The services provided by the noticee were generally in relation to the Government Buildings used for Government office purposes or residential purposes of Government Staff or for providing civic amenities and non-commercial in nature.

18.2 The noticee submitted that as per the above definition of "Management, Maintenance or Repair Service" and notification no. 12/2003-ST, they were liable to pay service tax only on service part and Service Tax could not be charged on material portion. They submitted that as per Section 67 of Finance Act 1994 the amount charged by the service provider for TAXABLE SERVICE was taken for purposes of calculating service tax. Hence, by availing the benefit of the notification 12/2003, the noticee was required to pay service tax only on the amount of labour and not on material portion.

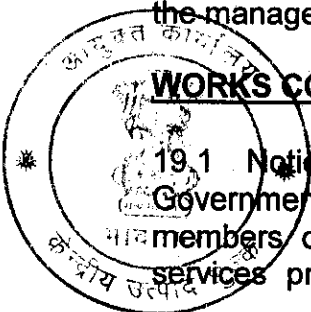
18.3 The noticee further submitted that they had also paid VAT on the material portion and filed the VAT return. As per condition of Notification 12/2003-ST, there should be adequate evidence specifically indicating the value of the material. In the instant case, noticee had filed VAT returns with State authorities, which were adequate documentary proof that the noticee had paid VAT on the value of material portion. They relied upon the decision in case of Shilpa Colour Lab Vs. Commissioner of C. Ex. Calicut 2007 (5) S.T.R. 423 (Tri. - Bang.) which was maintained by Supreme Court

18.4 The noticee submitted that they had not claimed abatement as per notification no 01/2006-ST and hence rightly taken and utilized the Cenvat Credit on input services. It was stated while recording the statement that about 70% of the total amount received pertains to material portion and hence only 30% of the amount was shown in the service tax return.

18.5 The noticee submitted that they 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.

WORKS CONTRACT SERVICE:

19.1 Noticee submitted that the service provided was for construction of various Government buildings, Residential Quarters for police (GSPHCL) as well as for staff members of Commissionerate of Health and for other Government Agencies. The services provided directly or indirectly to the Government building were used for



residential purposes or Government office purposes or for providing civic amenities and non-commercial in nature. On the basis of data provided by noticee, the department had raised demand under "Works Contract Service" considering the following contracts as mentioned below:

- 1) Construction of water treatment plant at Kalol and at Khirasara.
- 2) Construction of Police Residential quarters at Navrangpura.
- 3) Construction of coastal Police station at Navabandar in Bhavnagar.
- 4) Construction of Staff quarters for medical staff at Botad.
- 5) Construction of intake well at Santhalpur RWSS Project.
- 6) Work of lowering the level of Mahi Pipeline.
- 7) Work of up gradation of Seven Regional Water Supply Scheme.
- 8) Work of lowering the level of inlet Channel in pump house at Maliya village.
- 9) Construction work of underground pump, Overhead RCC Tank and Water Distribution System at Padva village.

Construction of Residential Quarters

19.2 The noticee submitted that out of nine contracts specified above, two contracts i.e. sr. no. 2 and 4 were in relation to construction of Police Residential Quarters and staff quarters for the Commissionerate of Health respectively. Hence, they submitted that that clause no (c) as specified under would be applicable:

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

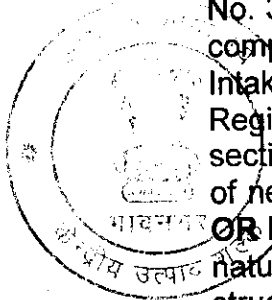
As per the clause (iii) of defined in section 65 (105) (91a) if a residential unit was intended for **PERSONAL USE**, then it should be excluded from the service tax chargeability. Further, the term "personal use" was defined in explanation to definition of residential complex as permitting the complex for use as residence by another person on rent or without consideration.

19.3 In the instant case, the noticee submitted that, the land was provided by the police department for the construction and then residential quarters were used for residential use of officers of police department and in case of construction of staff quarters the land was provided by the Commissionerate of Health for the construction to noticee and then residential quarters were used for residential use of Staff of Commissionerate of Health.

19.4 In both the cases the construction was for personal use as residence by such person as per the explanation - (a). Hence, they submitted that, construction of residential police quarters as well as residential quarters for Commissionerate of Health was covered by the exclusion of definition of "residential complex" and hence, service tax was not applicable at all.

19.5 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.

19.6 The noticee further submitted that out of total nine contracts, one contract i.e. Sr. No. 3 was in relation to construction of police station, two were in relation to Residential complex and the rest six were in relation to Construction of Water treatment Plant, Intake Well and up gradation or lowering the level of Inlet Channel, Pipe Lines and Regional Water Supply Scheme for M/s. GWSSB. As per clause (b) to Explanation to section 65 (105) (zzzza), 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 depended 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, The noticee submitted that Police



Stations were not used for any commercial purposes, were used for serving public at large. In case of Construction of Water Treatment House, as earlier discussed the work was directly or indirectly for Government Agencies (M/s. GWSSB) for the civic amenities. The Primary intention behind the construction of Water Treatment House was for the benefit of general public at large. Since the applicability of service tax under this category depended on the nature of use of the constructed building or civil structure, the service tax would not be charged in the instant case. Further the contract of lowering the level of Mahi Pipe Line, lowering the level of Inlet Channel, Intake Well construction and up gradation of Seven Regional Water supply scheme were primarily done for civil amenities for M/s. GWSSB. The noticee submitted that GWSSB was created by the Government of Gujarat to plan and implement the drinking water supply and sanitation policy and to operate and maintain the water supply schemes to develop human resources for the effective implementation of programs among others. It was submitted that GWSSB was not a commercial concern. The object of all above said projects were for public facilities and hence non – commercial. They relied upon the decisions in the case of **Nagarjuna Construction Company Ltd. – 2010 (19) S.T.R. 259 (Tri. - Bang.)**, **M/s. Dinesh Chandra Agarwal Infracon Pvt. Ltd. - 2011 (21) S.T.R. 41 (Tri. - Ahmd.)**, and **Indian Hume Pipe Co. Ltd. - 2008 (12) S.T.R. 363 (Tri.-Chennai)**.

19.7 The noticee further submitted that the infrastructure activities were concerned with welfare activity of the citizens and hence excluded from the liability of service tax as clarified vide Circular No.79/9/2004-ST dated 17. 09. 2004 at Para 13.2 as under:

“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.”

Composition Scheme under Works Contract Service

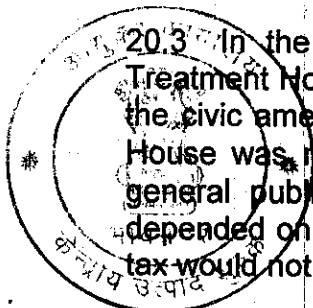
19.8 The noticee further submitted as per the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 the applicable rate of service tax was 4.12%. However, the department had calculated service tax @ full rate of service tax i.e. 12.36% or 10.30%.

Commercial or Industrial Construction Service:

20.1 The noticee submitted that the eight contracts for the construction of various water treatment plants, rest shelter, toilet block, Foundation of Tower, lying down Pipe Lines. Out of total eight contracts, noticee had mainly constructed water treatment plants for civic amenities. Further, the constructions done by the noticee were directly or indirectly related to government buildings and for the benefit of public at large.

20.2 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.

20.3 In the current case, the noticee submitted that, the Construction of Water Treatment House was directly or indirectly for Government Agencies (M/s. GWSSB) for the civic amenities. The Primary intention behind the construction of Water Treatment House was not for the Commerce or Industry. These plants were for the benefit of general public at large. Since the applicability of service tax under this category depended on the nature of use of the constructed building or civil structure, the service tax would not be charged in the instant case.



20.4 Further the contract of lying down of Pipe Line at Sirdar Road, Bhavnagar was also primarily done for civil amenities for M/s. GWSSB. The noticee submitted that Board had clarified in circular No.79/9/2004-ST dated 17.09.2004 that any construction of Government building used for residential purposes or Government office purposes or for providing civic amenities and **non-commercial in nature** then service tax would not be levied on the construction services or repair services of such superstructure.

4) TRANSPORT OF GOODS BY ROAD SERVICE

21. The noticee submitted that they had undertaken the work of transportation of salt from Gujarat Heavy Chemicals Ltd (here after referred to as GHCL) to Soda Ash Plant at Sutrapada by road. As per the Work Orders, the job of the noticee was to transport the salt by road through authorized / valid conventional trucks, Taurus, dumpers or tippers at their own cost. The noticee submitted that as per Rule 2(d) (v) of the Service Tax Rules, 1994, if consignor or consignee (**Service Receiver**) of goods belongs to any of above mentioned ((a) to (g)) category, the liability to pay Service Tax in respect of "Transportation of Goods by Road Service" was of the person who pays or was liable to pay freight either himself or through his agent (**Service Receiver**) for the transportation of such goods by road in a goods carriage. In the instant case, the service was provided to GHCL, a company registered under Companies Act. Moreover, freight for the transportation of goods by road in a goods carriage was borne by the GHCL and hence the liability to disburse service tax for the transportation service was on the GHCL and not of the noticee. Further, GHCL had already paid Service Tax on the income received by noticee for the transportation service as certified by GHCL. They attached copy of the said certificate along with copy of invoice issued by noticee mentioning that Service Tax was Payable by GHCL.

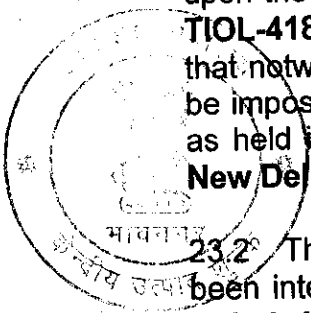
22.1 Without prejudice to above the noticee submitted that the notice did not make any attempt to show how and why the transactions were covered within definition of respective services. In the notice merely referred the definition of services and alleged that the services provided by the noticee were 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.

22.2 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.

22.3 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.

23.1 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, New Delhi)**

23.2 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]**.

23.3 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 had 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.**

23.4 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.

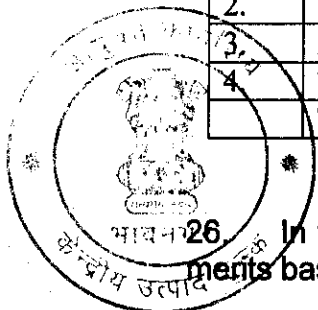
24. During the personal hearing held on 23.8.12 Shri Pradip Singh Gohil, Partner of V.K. Enterprise, Shri Amish Kandhar, Authorised representative and Shri Rashmin Vaja, Authorised representative appeared on behalf of the Noticee they reiterated the defence reply already filed by them and also requested 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 Noticee 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:

25. 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	88335504	8964360
2.	Works Contract	90353556	9946655
3.	Industrial or Commercial Construction service	25932332	2984872
4.	Transportation of Goods by Road	20938911	4606987
	Total	218888638	26502874

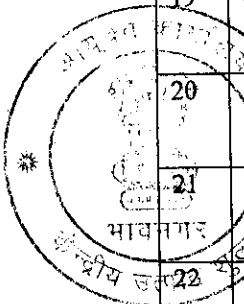
26. In the following paragraphs I am discussing each service and its taxability on its merits based on the documents made available on record.



Management, Maintenance & Repair:

26.1 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	Executive Engineer, Panchayat Road & Buildings Division, Bhavnagar	1093257	31210	0	0	0	RCC work of drainage line under various roads
2	Gujarat Water Supply & Sewerage Board, Bhavnagar	754947	1102545	996307	463256	0	Operation & Maintenance of water pipeline
3	Gujarat Water Infrastructure Ltd.	1356992	1550847	1443331	1111658	1111658	Operation & Maintenance of Narmada water distribution system
4	Gujarat Water Supply & Sewerage Board, Jamnagar	2149712	751121	0	0	0	-do-
5	Gujarat Water Supply & Sewerage Board, Morbi	3202356	2323050	3519700	3396299	2643356	-do-
6	Gujarat Water Supply & Sewerage Board, Bhavnagar	566440	473010	360419	327568	398799	Operation & maintenance of water filter plant
7	Gujarat Water Infrastructure Ltd.	1328504	1235498	1210940	1210942	1019842	Operation & maintenance of water pipeline
8	Gujarat Water Supply & Sewerage Board (Contractor-Hindustan DORR-Oliver Ltd)	300000	2065598	14132214	3614103	388283	Laying & joining of pipeline
9	R & B Division, Bhavnagar	105589	0	0	0	0	Repair of school
10	EE, Irrigation Dept., Bhavnagar	112764	0	0	0	0	Jungle cutting and vegetation removal from water canal
11	Gujarat Water Supply & Sewerage Board, Bhavnagar	0	497643	259641	206280	0	Operation & maintenance of water pipeline
12	Gujarat Water Infrastructure Ltd.	0	1146559	2381147	2316156	2131974	Operation & maintenance of water pipeline
13	Gujarat Water Supply & Sewerage Board, Kutchh	0	3700839	4341848	417660	0	Maintenance of water distributor system
14	Gujarat Maritime Board, Alanag	0	1293239	0	0	0	Repairing work of drainage at Alang
15	Gujarat Water Infrastructure Ltd.	0	0	357546	1310671	1610935	Operation & maintenance of water pipeline
16	Gujarat Water Supply & Sewerage Board, Bhavnagar	0	0	0	71186	398789	Operation & maintenance of water pipeline
17	Gujarat Water Supply & Sewerage Board, Bhavnagar (Contractor Maruti Trading Pvt. Ltd)	0	0	0	2033278	1960319	Operation & maintenance of water pipeline
18	Gujarat Water Supply & Sewerage Board, Bhavnagar	0	0	0	293104	161207	Operation & maintenance of water pump
19	Gujarat Water Supply & Sewerage Board, Jamnagar	0	0	0	0	529399	Operation & maintenance of water pump
20	Executive Engineer, Drainage Division, Gandhinagar	0	0	0	0	2277676	Operation & maintenance of pipeline
21	Gujarat Water Supply & Sewerage Board, Bhavnagar	0	0	0	0	473544	Operation & maintenance of water pump
22	Paschim Gujarat Vij Co. Ltd.	0	0	0	0	312839	Repair of PGVC office



	Total	10970561	16171159	29003003	16772161	15418620	
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26.2 From the above table itself it is evident that the service provided, except at Sl. No.14 & 22, was in relation to Operation & Maintenance of office water pipe line, water pump & water treatment plant. In this regard I find that the services in respect of construction, repair, alteration, renovation or restoration of pipelines are classifiable under 'commercial or industrial construction' and as per Circular No. 116/10/09-ST dated 15.9.09. The said Board's Circular reads as under:

1. As per section 65 (25b) of the Finance Act, 1994 "commercial or industrial construction service" 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.

2. Thus the essence of the definition is that the "commercial or industrial construction service" is chargeable to service tax if it is used, occupied or engaged either wholly or primarily for the furtherance of commerce or industry. As the canal system built by the Government or under Government projects, is not falling under commercial activity, the canal system built by the Government will not be chargeable to service tax. However, if the canal system is built by private agencies and is developed as a revenue generating measure, then such construction should be charged to service tax.

26.3 From the above clarification it is evident that repair, renovation, restoration or similar activities in relation to pipeline or conduit is a service falling under 'commercial or industrial construction'. The services provided by the noticee were in relation to water distribution project of Government of Gujarat implemented through Gujarat Water Supply & Sewerage Board or Gujarat Water Infrastructure Ltd. Since the object of these projects are for distribution of water for public use, the construction of these pipes, operation and maintenance of water pump, water treatment plants etc cannot be considered as for the purpose of 'commerce or industry'. The intention of the Government to charge service tax on 'commercial or industrial construction' service is, as the name suggests, on those used in commercial and industrial purpose. As the use of these pipelines were for the public, the same cannot be considered as 'commercial or industrial construction' and hence not taxable. I find that the noticee had provided service as a sub-contractor in certain cases. Board in its Circular No. 147/16/2011-S.T., dated 21-10-2011 clarified as under;

