भारत सरकार
आयुक्त कार्यालय, केंद्रीय उत्पाद शुल्क
सिद्धी सदन, नारायणभाई उपाध्य रोड, प्लाट नो. ६७-७६, बी-१, भावनगर-३६४००१
Phone No. : 0278- 2523627 E-mail- adjbhavnagar@gmail.com
Fax No.: 0278-2513086

F. No. V/15-94/Dem-ST/HQ/2012-13 Date of Order: 28/11/2014
Date of Issue: 08/12/2014

Passed by : Shri V. PADMANABHAN,
Commissioner, Central Excise & Service Tax, Bhavnagar.

ORDER IN ORIGINAL NO. : BHV-EXCUS-000-COM-004-14-15 DT. 28-11-2014

1. This copy of order is granted free of charges for private use of the person(s) to whom it is issued and sent.

2. Any person(s) deeming himself aggrieved by this Order may appeal against this order to The Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad, O-20, Meghani Nagar, New Mental Hospital Compound, Ahmedabad, in terms of the provision of Section 35B(1)(a) of the Central Excise Act, 1944. If the case covered under the category specified in Section 35B(1) (Proviso) (a) to (d), i.e. Loss, Rebate, Export under Bond, duty credit cases, the Revision application shall lies to the Joint Secretary to the Government of India, Department of Revenue, Ministry of Finance, New Delhi.

3. The Appeal should be filed in form EA-3. It shall be signed by the person as specified in Rule 3(2) of the Central Excise (Appeals) Rules, 2001.

4. The appeal should be filed within three months from the date of communication of this order. (Section 35B of the Central Excise Act, 1944).

5. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (One of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate. The appeal shall be presented in person to the Register or sent by Registered Post addressed to the Registrar. But the date of receipt in office of the said Registrar in time or otherwise will be the relevant date for the purposes of limitation of time.

6. The Fee is required to be paid as under through a cross Bank Draft in favour of the Assistant Registrar of Bench of the Tribunal on a branch of any Nationalized Bank located at the place where the Bench is situated and it shall be attached to the form of appeal.

(a) Where the amount of duty and interest demanded and penalty is levied is more than ₹50,00,000/- (Rupees Fifty Lakhs), ₹ 10,000/- (Rupees Ten Thousand);

(b) Where the amount of duty and interest demanded and penalty levied is more than ₹5,00,000/- (Rupees Five Lakhs) but not exceeding ₹ 50,00,000/- (Rupees Fifty Lakhs), ₹ 5,000/-(Rupees Five Thousand);

(c) Where the amount of duty and interest demanded and penalty levied is ₹ 5,00,000/- (Rupees Five Lakhs) or less, ₹ 1,000/-(Rupees One Thousand);

7. The Copy of this order attached therein should bear a Court fee stamp of 50 paise as prescribed under schedule 1 of Article 6 of the Court fee stamp Act, 1970.

8. Proof of payment of duty, penalty etc. should also be attached in original to the form of appeal.

9. Appeal should bear a Court Fee Stamp ₹ 5/-.

10. Please refer to the Central Excise (Appeals) Rules, 2001 and the CEGAT, Procedure Rules, 1982 for complete details.

To,
M/s Shree Bileshwar Khand Udyog Khedut Sahkari Mandali Limited,
Kodinar, Distt. Junagadh – 362 150

Sub: Show Cause Notice F. No. V/15-94/Dem-ST/HQ/2012-13 dated 30.03.2013 issued to M/s Shree Bileshwar Khand Udyog Khedut Sahkari Mandali Limited, Kodinar, Distt. Junagadh – 362 150.

Subject: Show Cause Notice F. No. V/15-94/Dem-ST/HQ/2012-13 dated 30.03.2013

BRIEF FACTS :-

1.1 M/s Shree Bileshwar Khand Udyog Khedut Sahkari Mandali Limited, Kodinar Distt. Junagadh – 362 150 (hereinafter referred to as the "noticee") are engaged in manufacturing of sugar and having Central Excise Registration as manufacturer. The noticee is also having Service Tax Registration No. **AAAAB0936HST002** under the category of "Transportation of goods by Road" and paying Service Tax. They are also providing labour to the farmers for sugar cane cutting and pay labour charges per M.T. on behalf of the farmers. After cutting, sugar cane is supplied to the noticee.

1.2 The facts leading to issuance of the subject show cause notice are that during the course inquiry against the noticee by the Anti-Evasion Section Bhavnagar, it was found that the Noticee was providing labour to the farmers for sugarcane cutting & other purposes and was not paying Service Tax on the said taxable service which are defined under 'Manpower Recruitment or Supply Agency's Service'. Accordingly, the subject show cause notice was issued by the Commissioner Of Central Excise & Service Tax, Bhavnagar-364 001 proposing as to why an amount of Service Tax of **Rs. 76,20,638/-**, should not be recovered, under Section 73(1) of the Finance Act, 1994, an amount of interest in terms of the provisions of Section 75 of the Finance Act, 1994 should not be recovered and penalty under Section 77 and 78 of the Finance Act, 1994, should not be imposed for the alleged contraventions mentioned in the SCN.

1.3 Now, I have taken up the show cause notice F. No. V/15-94/Dem-ST/HQ/2012-13 dated 30.03.2013 for adjudication.

Personal Hearing:

2.1 Personal hearing in the matter was held on 25.11.2014. Shri Kuntal Parikh, an advocate of the noticee appeared in personal hearing and requested to keep this case pending as the identical issue is pending before the Tribunal. He also submitted a written defense reply dated 24th November,2014.

Defense:

3.1 Defense reply dated 7th May,2013filed by the noticee is reproduced here:

1. This has reference to the above referred Show Cause Notice issued to us, i.e. M/s. Shri Bileshwar Khand Udyog Khedut Sahakari Mandali Limited, District Junagadh. We are called upon to show cause to you as to why service tax amounting to Rs.76,20,638/- should not be demanded and recovered from us under Section 73(1) of the Finance Act, 1994 as amended from time to time; and further proposals for recovering interest under Section 75 of the said Act and imposing penalties on us under Sections 76, 77 and 78 of the said Act are also raised in this Show Cause Notice. The proposals are levelled on the basis that we were engaged in providing services of Man Power Recruitment or Supply Agency's service as defined under Section 65(105)(k) of the said Act to farmers (who were the members of our organization and some of them were not members also), and it is suggested in this regard that the above taxable service was rendered by us without applying for registration and without payment of service tax, and thereby we have contravened the provisions of the said Act.

The above issue of having allegedly rendered Man Power Recruitment or Supply Agency service to various farmers (who may or may not be the members) during F.Y. 2011-12 is raised on the premise that we had provided labour for harvesting of sugarcane for the farmers at the fields of the farmers, that we were paying harvesting charges as per the rates fixed/prescribed by them, that we in the guise of the Samiti were providing labours to the farmers for harvesting of sugarcane and paying the labour charges to the labours and that this activity fell under the category of Man Power Recruitment or Supply Agency service. It is also suggested in the Show Cause Notice that sugarcane harvesting bill proved beyond any doubt that we were providing the above taxable service and on this basis, the above proposals are levelled against us.

For arriving at the value of the taxable service allegedly rendered by us, the total amount, described as "combined fixed amount", collected by us is taken as the basis and payment made towards transportation of sugarcane shown in the profit and loss account of the Samiti is deducted therefrom, and accordingly a total sum of Rs. 7,39,86,773/- is arrived at as gross

amount charged by us from the farmers and this amount is proposed to be treated as the value of the taxable service allegedly rendered by us to the farmers.

At the outset, the above allegations are denied; and it is emphasized that we are is a Cooperative Society of farmers that can never have any intention to evade payment of legitimate taxes. We have never rendered any taxable service, much less the taxable service of Man Power Recruitment or Supply Agency service, and therefore the entire controversy raised in this case is without any justification and sanctity. There is no liability or obligation to pay any service tax on us as regards the activities questioned in this proceedings and therefore we request you to withdraw this Show Cause Notice in the interest of justice.

3. We submit that the belief of the Revenue that we have provided Man Power Recruitment or Supply Agency service is even otherwise fallacious and incorrect. We may briefly refer to the illegality of this belief of the Revenue and submit hereunder as to how the proposals leveled in the show cause notice are unsustainable in facts as well as in law.

(i) Firstly, the farmers to whom the labour was allegedly provided by us are members of our organization though a very marginal class of farmers may not be our members. If any taxable service was actually provided, there has to be two entities, one providing service and the other receiving service. One cannot provide service to his own self. In the present case, the farmers to whom the labours were allegedly provided by us are members of our organization and thus these farmers have formed the Cooperative Society i.e. our organization. When we and the farmers being our members are not two separate entitles, there is no question of we having provided any service to any other person.

In this regard, we may bring to your kind notice 3 judgments of the Hon'ble High Court of Gujarat wherein the Hon'ble High Court has held that the basic feature common in transactions of sale of goods and transactions of providing service was that existence of two parties was required; in the matter of sale, the seller and buyer, and in the matter of service, service provider and service receiver. In the cases like (1) M/s. Sports Club of Gujarat in Special Civil Application Nos. 13654/2005, 13655/2005 and 13656/2005, (2) Sports Club of Gujarat V/s. Union of India 2010 (20) STR 17 (Guj.) and (3) Karnavati Club of Gujarat V/s. Union of India 2010 (20) STR 169 (Guj.), the Hon'ble High Court has examined the scheme of Mandap Keeper Service and Club and Association Service in respect of a Club and Members of the Club, and it is held that a Member was not a client because there was mutuality in case of a Club and its Members. The Hon'ble High Court has also held that a Member of the Club was not a client and hence it could not be held that any taxable service was provided by the Club to a client when the Members of the Club availed facilities in the Club. This principle is applicable in the present case also because we i.e. our Cooperative Society and the farmers who are Members of the Cooperative Society are not two different entities, and there is no service provider nor a service receiver in view of mutuality of the Farmer's Cooperative and the Member Farmers. Even if we have arranged for farm labour for our Members, there is no service that we have provided to the Farmers and hence there is no levy of service tax in this activity.

(ii) The second issue that arises in this case is that the activities of cutting of sugarcane etc. have been activities directly connected with agriculture and harvesting. If there was any supply of labour, it was in the nature of farm labour for agricultural activities. All activities related to agriculture and harvesting are outside the purview of the service tax law and therefore, there can never be any liability of service tax with regard to farm labour.

In this regard we may refer to Section 66 D of the Finance Act, 2012 which provides for the negative list of services. Services relating to agriculture or agricultural produce by way of supply of farm labour are specified at clause (d) (ii) of Section 66 D of the said Finance Act and therefore it is clear from this part of the negative list of services that the legislature has never intended to bring under the service tax net the activities relating to agriculture or agricultural produce including the activity of supply of farm labour. It is a matter of common knowledge that negative list under Section 66 D of the said Finance Act comprises of those services which the legislature never wanted to bring under the service tax net, and therefore the fact of supply of farm labour having been specifically

covered under Section 66 D now clarifies that such activity/ service never attracted any service tax liability under the Finance Act. Therefore also, proposal to recover service tax on supply of farm labour is untenable.

(iii) The third and most vital issue arising in this case is whether the activities involved in this case fell under the category of Man Power Recruitment and Supply Agency's Service at all? It is an admitted position of fact in this case that payment was made to the farm labours on the basis of the quantum of work performed by them. In other words, the payments were made to the farm labours on the basis of the quantity of sugarcane cut and handled by them. Payments to the farm labour have never been made by us or by the farmers on the basis of the number of labourers engaged for a particular farmer or on the basis of man-hour or man-day basis. Keeping in view this admitted factual position, it would have to be considered in this proceedings whether any taxable service in the nature of man power recruitment and supply agency was rendered by us or not.

The Government has clarified vide Circular dated 27.7.2005 that man power recruitment or supply agency service was attracted when the staff come under the direction of the recipient, but the facts of the present case are totally different inasmuch as the farmers have not employed any staff of our clients nor did our clients come under the direction or control of the farmers. Taxable service contemplated under Section 65(105) (k) of the Act comes into play when payment is to be made by the service receiver on the basis of number of employees or workers supplied by the man power supply agency, but this service is not attracted in case of works performed on job work basis for which the job worker was paid in accordance with the quantities or quantum of work and not on the basis of number of labour employed by him.

It is held by the Hon'ble Tribunal in cases like K. Damodara Reddy **2010 (19) STR 593,** Ritesh Enterprises **2010 (18) STR 17** and Divya Enterprises **2010 (19) STR 370** that a case where work was carried out as a contractor employing its own labour for which charges for labour provided were not recovered on man-day basis or man-hour basis and where the execution of work formed an essence of the contract, service tax under man power recruitment or supply agency service was not attracted in such cases.

There may be agreements where a person supplying labourers is paid on the basis of number of labourers supplied or on man-day basis or man-hour basis, but there are also contracts where the essence of contract is execution of works and payment was made on lumpsum basis in accordance with the quantities or quantum of work executed. In latter types of contracts, man power recruitment or supply agency service is not attracted. The Hon'ble Tribunal has examined the scope of Section 65 (105) (k) of the Act in cases like K. Damodara Reddy (supra), Ritesh Enterprises (supra) and Divya Enterprises (supra) and held that when there was no agreement for utilization of services of an individual but the execution of work formed essence of contract, and when the payment was not made for the labour on man-day basis or man-hour basis, such an activity was not classifiable as man power recruitment or supply agency. In the present case also, admittedly, we are not obliged to supply employees or a specified number of labourers nor was the payment agreed on man-hour basis or man-day basis, but the essence of the contract was execution of the works of processing and cutting of sugarcane for which lumpsum payment based on the quantities processed by our clients was made. Therefore, the principle laid down by the Hon'ble Tribunal in these cases is squarely applicable in the facts of this case.

(iv) One more issue arising in this case is that Value Added Tax has been paid on the total amount paid for the works in question and thus the amount which is considered to be the gross value of man power recruitment and supply agency service by the Revenue in the Show Cause Notice has suffered the incidence of VAT signifying that the transaction was that of purchase and sale, and not of any taxable service. In this regard, we may draw your attention to the fact that if the total amount for this sugarcane was Rs.37,500/-, and the sum of Rs.7500 was deducted for being paid to the labours for cutting and transportation and therefore the farmer was paid the net amount of Rs.30,000/- for 25 tons of sugarcane; however, VAT on the entire amount of Rs.37,500/- stands paid for this transaction, and it thus emerges from this factual background that the entire amount of Rs.37,500/- inclusive of the amount of Rs.7,500/- which is being considered as the value of taxable service by the Revenue in this case was subjected to levy of VAT, and thus on the entire sale price of 25 tons of sugarcane VAT stands paid. It is thus clear that the

transaction between us and the farmers was that of purchase and sale of sugarcane, but no taxable service was involved therein. If service tax is recovered on the element of Rs.300 per ton of sugar cane, then it would result in double taxation because the element of Rs.300 per ton of sugar cane being cutting and transportation expenses has already suffered incidence of VAT because this element was also a part of the sale price of sugarcane. Therefore also, demand of service tax in this case is unauthorized and without jurisdiction.

(v) Further, no proceedings of the present nature have been initiated against any of the Cooperative Societies like us. There are a number of similar Cooperative Societies in the State of Gujarat and also elsewhere like in the States like Maharashtra where similar modus operandi has been operating for years. All such organizations have also been assisting their members by providing labours for cutting and other processes for sugarcane, and payments as well as adjustments for cutting and transportation charges are being made on the same basis by all such organizations. However, no Show Cause Notice for demanding any service tax is issued to any other Co-op. Societies like us on allegation that their activities resulted in supply of labour or man power attracting service tax liability under Man Power Recruitment and Supply Agency Service category. Singling out us for demanding service tax is a gross case of injustice and discrimination, and therefore also this case deserves to be vacated at once in the interest of justice.

In this regard, we enclose a list of various sugar cooperatives operating in the States like Gujarat, Karnataka, Maharashtra and Uttar Pradesh; and we submit that none of these sugar cooperatives has received any show cause notice for recovery of service tax though they are also arranging farm labour for working in the fields and farms of their members and also other farmers under their area: and no proceedings are initiated against any of these sugar cooperatives though their Constitution and incorporation/ registration as farmers cooperative society have been similar to us and they are also operating sugar factories where sugarcane purchased from the farmers in similar manner are used. When the service tax and central excise authorities incharge of all these sugar cooperatives of farmers operating in other areas of the State of Gujarat and also in other States have accepted that no service tax was leviable on supply of farm labour by such cooperatives, there is no reason why service tax demand should be made from us. In this regard, we refer to and rely upon a recent judgment of the Hon'ble Gujarat High Court in case of Darshan Boardlam Ltd. 2013 (287) ELT 401 (Guj.) wherein the Hon'ble High Court has set aside such discriminatory treatment of Excise Authorities.

4. When there is no justification in demand of service tax in this case, the proposals to impose penalty and charge interest are also not sustainable.

We state that the proposal for imposition of penalty is also bad inasmuch as there is no violation of any nature committed by us. We have not acted dishonestly or contumaciously and therefore, even a token penalty would not be justified. No malafide intention on our part is also alleged in this notice. There is also no specific reason or ground spelt out in the notice for proposing to impose penalty and thus, penalty could not be imposed on hearsay or presumption. In view thereof, the proposal for imposition of penalty under Sections 77 and 78 of the Finance Act also does not hold any water and hence, it deserves to be dropped.

Further, the proposal of imposing penalties under Sections 77 and 78 of the said Act on us is also without jurisdiction because we cannot be penalised under different Sections for the same alleged offence. Since the Constitution of India also prohibits punishing a person more than once for the same offence, proposing penalties on us under different Sections for the same offence is also a punishment more than once for the same alleged offence. The proposal to penalize us twice for the same alleged offence is therefore, illegal and liable to be vacated at once.

5. The proposal regarding payment of interest on the service tax amount under section 75 of the Finance Act is also without any authority in law inasmuch as the provision of section 75 is not attracted in the instant case. Section 75 provides for interest in addition to tax where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded with an intent to evade payment of service tax. In the instant case,

there is no short levy or short payment or on-levy or non-payment of any service tax. The action of proposing to order payment of interest under Section 75 of the Act is also bad and illegal and hence, liable to be withdrawn.

6. In the above premises, we submit that the show cause notice deserves to be withdrawn with all proposal leveled therein, and therefore we request you to do so. We also request you for granting personal hearing to us before passing any final order on this Show Cause Notice, and oblige.

4. Discussion and Findings:

4.1 I have carefully gone through the subject Show Cause Notice, submissions made by the noticee in their written replies as well as during the course of Personal Hearing and other evidences available on record. The issue to be decided in the subject show cause notice is whether the activity of providing labour to the farmers for sugarcane cutting undertaken by the noticee falls in the definition of 'Manpower Recruitment or Supply Agency's Service' as defined under Section 65 (105) (k).

4.2. In the subject case, I find undisputed facts emerging on record that the Noticee is a unit in co-operative sector and engaged in the activity of manufacture of sugar. The Noticee is also registered under the Finance Act, 1994 for Service under category of "Transportation of Goods by Road". Sugarcane is a basic and primary raw material required for the said manufacturing activity. Further the Noticee is required to procure the said raw material at ex-factory price at the Statutory Minimum Price (SMP) approved by the Directorate of Sugar Control, F & DP, Ministry of Consumer Affairs, Government of India from time to time. I therefore find from these undisputed facts that the supplier(farmers) of the said raw material i.e. sugarcane are required to deliver the same at the ex-factory price fixed in the above manner and all the incidental and ancillary expenses for delivery of the sugarcane is to be borne by the supplier i.e. sugarcane growers / farmer. So, all the expenses incurred up to the factory of noticee are required to be borne by the farmers.

4.3. In the instant case, I find from the record and documents relied upon while issuing the Show Cause Notice that the Noticee had made an arrangement by way of passing a resolution in the Board of Directors to fix actual purchase price of sugarcane at ex-farm and fixed the price considering the Statutory Minimum Price. The arrangements so made reveals that the noticee shall provide labour to the farmers for sugarcane cutting at the farms and transportation of sugarcane from the farms to factory and deduct the labour cost from the account of farmers at the time of making payment of sugarcane. . Accordingly, the price of raw material i.e. sugarcane was fixed so as to include the cost of sugarcane cutting and transportation of sugarcane as per Statutory Minimum Price discussed hereinabove.

4.4. From the above admitted facts on record, I find that the Noticee has expressly undertaken to provide the service of supply of labour for sugarcane cutting to the sugarcane growers (farmers) at their farms and that of transportation of the said goods from the farms to the factory. I further find that as per the above arrangement, the Noticee agreed and undertaken to purchase the sugarcane at ex-farms price and while making the payment to the sugarcane growers for the consideration of supply of sugarcane, the Noticee deducted the cost of labour supply and other expenses and accordingly, recorded the transactions in the books of account to reflect the above economic activities as per accounting norms.

4.5. I further find that the Noticee has recorded the transaction of value of service of supply of labour for sugarcane cutting rendered to the sugarcane growers in the Profit and Loss Account as "expenditure" and while submitting reply to the show cause notice, the Noticee has contended that the transaction / activity is an expense to the Noticee and not income and hence, the proposal for recovery of service tax on the said amount is not proper and valid. In this connection, I find that the said contention is an attempt to mislead the proceedings in as much as the same is contrary to the admitted facts of fixation of price discussed above. I find that when the price is fixed ex-farm inclusive of all expenses, necessary accounting effects are required to be given in order to record the transaction of cost / price of the material in the instant case i.e. sugarcane, and corresponding transaction of the payment of the cost of material to the supplier of material. In the instant case, as per the scheme of arrangement discussed hereinabove, I find that cost of

labour for sugarcane cutting would be an expense at the end of supplier of sugarcane (farmers), being recipient of service. As the said activity (sugarcane cutting activity) would have been required to be carried out by the supplier of sugarcane (farmers) by making arrangement of labour by themselves but in the instant case, the price is fixed ex-farm as per resolution of Board of Directors and therefore, the sugarcane growers were required to avail the services of supply of labour and transportation arranged for and provided by the Noticee. It is for this reason that when the account of the supplier of sugarcane was debited with the ex-farm price, the cost of services was required to be deducted from the same so as to arrive at the cost / price of material i.e. of the sugarcane to be paid to the supplier. I therefore find that the cost of supply of labour required to be borne by the farmers when deducted by the Noticee from the ex-farm price on account of providing the said service is an income at the end of the Noticee, received from the service recipient i.e. farmers/sugarcane growers. Accordingly, I find that the amount shown in the profit and loss account under the head "SHERDI KATAI EXPENDITURE" is an accounting entry to record the transaction as per accounting norms which actually represents the value of service of supply of labour rendered by the Noticee to the service recipients i.e. sugarcane growers. I therefore find that the said expenses shown in the Books of account as an expense is a transaction of payment of such charges paid to the labours whereas the said amount was recovered from the farmers for providing the services of the labour by way of adjustment from the amount payable for supply of sugarcane. I therefore find that the Noticee in this case has adopted an alternative method of accounting and paid the price of sugarcane to the farmers for cutting charges and other ancillary expenses in the form of transportation charges and paid the charges so deducted to the labours for the service of sugarcane cutting provided to the farmers. In view of the matter, I find that the contention of the Noticee that the said charges are expenses and not income is not tenable and such charges shown towards expenses in the books of account is an amount of taxable service rendered by the Noticee to the farmers for which the Noticee was required to discharge their service tax liability. I further find that while contending the plea of expenses, the Noticee has contended that they never earned anything against incurring such expenses but I find that liability to discharge service tax is not on earning (profit/gain) but on the value of service rendered and the said contention is mis-placed in view of the peculiar facts and circumstances of the present case discussed above. In the instant case, the Noticee rendered the service of supply of labour to the farmers in connection with their activity of procurement of raw material and arranged the mechanism in such a way that the sugarcane growers(farmers) are compulsorily required to avail the services of labour supplied by the Noticee only. I therefore find that the above contentions are mis-placed and misleading and hence not tenable.

4.6. Now, I come to the discussion as to how the Noticee is proposed to have rendered the service of "Manpower Recruitment or Supply Agency". I find that as per the documentary evidences brought on record, the Noticee arranged for the labours and entered into agreements with the labourers that they are engaged for providing the services of sugarcane cutting to the sugarcane growers at their farms for which they will be paid specified amount of remuneration. The Noticee undertook the task of recruiting the work force through an intermediate person who arranged for such work force for the Noticee and the work force, so recruited by the Noticee was supplied by the Noticee to the sugarcane growers for the desired service of sugarcane cutting. The evidences brought on record also reveals that the Noticee paid the remuneration to the labourers as per agreement, and charged and recovered the said amount from the sugarcane growers by deducting the cost / value of the service of supply of labour from the purchase price of sugarcane.

4.7 *While submitting reply to the show cause notice, the noticee has stated that Firstly, the farmers to whom the labourers allegedly provided were members of their organization though a very marginal class of farmers may not be their members. If any taxable service was actually provided, there has to be two entities, one providing service and the other receiving service. One cannot provide service to self. In the present case, the farmers to whom the labourers were allegedly provided are members of our organization and thus these farmers have formed the Cooperative Society i.e. our organization. When we and the farmers being our members are not two separate entitles, there is no question of we having provided any service to any other person. In this regard, we may bring to your kind notice 3 judgments of the Hon'ble High Court of Gujarat wherein the Hon'ble High Court has held that the basic feature common in transactions of sale of goods and transactions of providing service was that existence of two parties was required; in the matter of sale, the seller and buyer, and in the matter of service, service provider and service receiver. In the cases like (1) M/s. Sports Club of Gujarat in Special Civil Application Nos. 13654/2005, 13655/2005 and 13656/2005, (2) Sports Club of*

Gujarat V/s. Union of India 2010 (20) STR 17 (Guj.) and (3) Karnavati Club of Gujarat V/s. Union of India 2010 (20) STR 169 (Guj.), the Hon'ble High Court has examined the scheme of Mandap Keeper Service and Club and Association Service in respect of a Club and Members of the Club, and it is held that a Member was not a client because there was mutuality in case of a Club and its Members. The Hon'ble High Court has also held that a Member of the Club was not a client and hence it could not be held that any taxable service was provided by the Club to a client when the Members of the Club availed facilities in the Club. This principle is applicable in the present case also because we i.e. our Cooperative Society and the farmers who are Members of the Cooperative Society are not two different entities, and there is no service provider nor a service receiver in view of mutuality of the Farmer's Cooperative and the Member Farmers. Even if we have arranged for farm labour for our Members, there is no service that we have provided to the Farmers and hence there is no levy of service tax in this activity.

With regards to above contention, I find that the noticee were providing labour to their farmers and growers of sugarcane; that they were paying labour charge per M.T. to individual labour; that they were engaging the individual labour for this work by making agreement with the concerned individual labour. Further during the course of investigation, the Noticee also produced "Sherdi Katai" bill books pertaining to payment made to labourers in respect of sugarcane cutting charges and that these bills contain the details such as name of the labour to whom the Noticee have paid the labour charges towards sugarcane cutting charges, number of slips, weight, rate per tonne, amount payable etc. I find from the documentary evidences that the Noticee had engaged the labour by express agreement for specified work of supply of labour for sugarcane cutting and therefore employer-employee relationship exists between the Noticee and the farmers and that the payments to labour are being made by the Noticee. I therefore find that since the Noticee has acted as labour supply agency, they fall within the scope of definition of *the taxable service of "Manpower recruitment or supply Agency" as defined under [section 65(105)(k)] read with [section 65(68)] and are liable to service tax.*

Further I find that the contention of the noticee is not tenable for the reason that if there is no service provider and service recipient then why the noticee makes arrangement for supply of manpower to the farmers for consideration. I found that the noticee is the service provider and farmers are the service recipient and for providing service to the farmers, the consideration is being paid by the noticee to the labourers on behalf of the farmers. Farmers and the noticee both are separate entities and both have their commercial interest. Farmers provides raw material (sugarcane) to the noticee for manufacture of sugar at the specified rate and gets consideration of sugarcane from the noticee. The relation between the farmers and the noticee is not for the welfare or for charitable purpose. The noticee is a commercial concern. So, I hold that the noticee is a service provider and has to pay the service tax as demanded under the subject SCN. In view of the facts discussed herein above, the cases relied upon by the noticee are not applicable.

4.8 *The second issue contested by the noticee is that the activities of cutting of sugarcane etc. have been activities directly connected with agriculture and harvesting. If there was any supply of labour, it was in the nature of farm labour for agricultural activities. All activities related to agriculture and harvesting are outside the purview of the service tax law and therefore, there can never be any liability of service tax with regard to farm labour. In this regard we may refer to Section 66 D of the Finance Act, 2012 which provides for the negative list of services. Services relating to agriculture or agricultural produce by way of supply of farm labour are specified at clause (d) (ii) of Section 66 D of the said Finance Act and therefore it is clear from this part of the negative list of services that the legislature has never intended to bring under the service tax net the activities relating to agriculture or agricultural produce including the activity of supply of farm labour. It is a matter of common knowledge that negative list under Section 66 D of the said Finance Act comprises of those services which the legislature never wanted to bring under the service tax net, and therefore the fact of supply of farm labour having been specifically covered under Section 66 D now clarifies that such activity/ service never attracted any service tax liability under the Finance Act. Therefore also, proposal to recover service tax on supply of farm labour is untenable.*

The contention of the noticee is not tenable for the reason that at the relevant period (period referred in the subject SCN), there was no specific notification allowing exemption to the services of "manpower recruitment or supply agency" services provided to the agriculture sector for sugarcane cutting. Further, I have seen that the noticee has contended that service tax is not

levied on the services provided to agriculture sector, but has not produced/mentioned under which notification such exemption is provided. In the case of Commissioner of C.Ex.New Delhi V/S HariChand Shri Gopal [2010(260) ELT-3 (S.C.)] the Hon,ble Supreme Court at para No.22 has held that the law is well settled that a person who claims exemption or concession has to establish that he is entitle to that exemption or concession. In view of the above discussion, I hold that the "manpower recruitment or supply agency" services provided by the noticee to the farmers for sugarcane cutting is a taxable service and the noticee is required to pay the service tax as demanded in the present show cause notice.

4.9. With regards to the third issue contested by the noticee that whether the activities involved in this case fell under the category of Man Power Recruitment and Supply Agency's Service at all, I would like examine the issue in detail.

Statutory definition of Man Power Recruitment Agency service prior to 16.06.2005

Section 65 (68):"manpower recruitment agency" means any commercial concern engaged in providing any service, directly or indirectly, in any manner for recruitment of manpower, to a client;

Statutory definition of Man Power Recruitment or supply Agency service from 16.06.2005

Section 65 (68):"manpower recruitment or supply agency" means any commercial concern engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to a client;

Thus, the scope of the service has been expanded so as to cover, apart from recruitment of manpower, the supply of manpower also.

Statutory definition of Man Power Recruitment or supply Agency service w.e.f. from 16.05.2008

Section 65 (68) :"manpower recruitment or supply agency" means any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to any other person;

With effect from 16.05.2008, in the definition of "manpower recruitment or supply agency" the words "to any other person" were substituted for the words "to a client". The effect of this amendment is that, in respect of services provided or to be on or after the aforesaid date, the service receiver need not necessarily be a "client", but can be "any person" other than the service provider. Earlier with effect from 01.05.2006, the term "commercial concern" was substituted by the term "any person". Consequently, the effect was that for the period prior to 01.05.2006, only services provided or to be provided by a commercial concern (and not by any other person) were liable to pay service tax. With effect from 01.05.2006, services provided or to be provided by any person will be liable to pay service tax. In view of this legal provision, it can be concluded that the noticee is a commercial concern and have provided services of supply of man power to the farmers for sugarcane cutting which is taxable service as defined under Section 65 (68) :"manpower recruitment or supply agency" of the Finance act,1994.

4.10. The noticee further contended that Value Added Tax has been paid on the total amount paid for the works in question and thus the amount which is considered to be the gross value of man power recruitment and supply agency service by the Revenue in the Show Cause Notice has suffered the incidence of VAT signifying that the transaction was that of purchase and sale, and not of any taxable service. In this regard, we may draw your attention to the fact that if the total amount for this sugarcane was Rs.37,500/-, and the sum of Rs.7500 was deducted for being paid to the labours for cutting and transportation and therefore the farmer was paid the net amount of Rs.30,000/- for 25 tons of sugarcane; however, VAT on the entire amount of Rs.37,500/- stands paid for this transaction, and it thus emerges from this factual background that the entire amount of Rs.37,500/- inclusive of the amount of Rs.7,500/- which is being considered as the value of taxable service by the Revenue in this case was subjected to levy of VAT, and thus on the entire sale price of 25 tons of sugarcane VAT stands paid. It is thus clear that the transaction between us and the farmers was that of purchase and sale of sugarcane, but no taxable service was involved therein. If service tax is recovered on the element of Rs.300 per ton of sugar cane, then

it would result in double taxation because the element of Rs.300 per ton of sugar cane being cutting and transportation expenses has already suffered incidence of VAT because this element was also a part of the sale price of sugarcane. Therefore also, demand of service tax in this case is unauthorized and without jurisdiction.

With regards to the above contention, I found that the noticee has not produced any evidences showing that the taxable value taken for the purpose of calculation of service tax includes VAT portion. In fact evidences brought on record reveals that the taxable amount taken for the purpose of calculation service tax is whatever expenditure shown by the noticee in their books of account towards "sheradi Katai Kharch" (sugarcane cutting expenditure). So, the contention of the noticee is not tenable.

4.11 The noticee further contended that, no proceedings of the present nature have been initiated against any of the Co-operative Societies like us. There are a number of similar Co-operative Societies in the State of Gujarat and also elsewhere like in the States like Maharashtra where similar modus operandi has been operating for years. All such organizations have also been assisting their members by providing labours for cutting and other processes for sugarcane, and payments as well as adjustments for cutting and transportation charges are being made on the same basis by all such organizations. However, no Show Cause Notice for demanding any service tax is issued to any other Co-op. Societies like us on allegation that their activities resulted in supply of labour or man power attracting service tax liability under Man Power Recruitment and Supply Agency Service category.

The above contention of the noticee that in the other state no such SCN have been issued to the Co-operative sugar factory hence they are not required to pay the service tax is legally not tenable as the law does not having any such provisions which provides that if some one has not paid tax in the other area of the country under that circumstances noticee is not required to pay the service tax for the services provided by them. So, the contention is legally not tenable.

4.12 The noticee has contended that when there is no justification in demand of service tax in this case, the proposals to impose penalty and charge interest are also not sustainable. We state that the proposal for imposition of penalty is also bad inasmuch as there is no violation of any nature committed by us. We have not acted dishonestly or contumaciously and therefore, even a token penalty would not be justified. No malafide intention on our part is also alleged in this notice. There is also no specific reason or ground spelt out in the notice for proposing to impose penalty and thus, penalty could not be imposed on hearsay or presumption. In view thereof, the proposal for imposition of penalty under Sections 77 and 78 of the Finance Act also does not hold proper and hence, it deserves to be dropped.

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, as discussed above, 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. With regards to the penalty under section 77 of the Finance Act,1994, I find that Section 77 (1) (a) of the Finance Act 1994 provides to impose penalty for failure to take registration in accordance with the provisions of Section 69 of the Finance Act, 1994 or the rule framed there under shall be liable to pay a penalty which may extend to [ten thousand rupees] or two hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance. In the subject case, I hold to impose a penalty under Section 77 (1) (a) of the Finance Act,1994 as the noticee has failed to obtain the service tax registration in accordance with the provisions of Section 69 of the Finance Act,1994.Further, I find that section 77 (2) of the Finance Act 1994 provides that any person, who contravenes any of the provisions of this chapter or any Rules made there under for which no penalty is separately provided in this chapter, shall be liable to penalty which may extend to [ten thousand rupees]. Section 70 of the Finance Act, 1994 provides that every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, **a return** in such form and in such manner and at such frequency [and with such late fee not exceeding [twenty thousand rupees,] for delayed furnishing of return, as may be prescribed.]. In the subject case, as the noticee has not filed ST-3 return showing self assessed service tax due

as provided under section 70 of the Act, I hold to impose a penalty under Section 77(2) for contravention of section 70 of the Finance Act,1994.

4.13 In view of above discussion and findings, I pass the following order:

ORDER

(i) I confirm the demand of Service Tax totally amounting to **Rs. 76,20,638/-** (Rupees Seventy six lakhs twenty Thousand six hundred thirty eight only) under the provisions of Section 73(2) of the Finance Act,1994 which should be paid by / recovered from the noticee forthwith.

(ii) I order to charge and recover interest at the appropriate rate as per the provisions of Section 75 of the Finance Act,1994 on the amount of service tax confirmed as above which should be paid by / recovered from noticee forthwith.

(iii) I impose a penalty of **Rs. 76,20,638/-** under the provisions of **Section 78** of the Finance Act, 1994 which should be paid by / recovered from noticee forthwith.

(iv) I impose a penalty under Section 77 (1) (a) of the Finance Act 1994 for failure to take registration of Rs.10,000/- (Rupees ten thousand only) or Rs.200/- for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance which should be paid by / recovered from noticee forthwith.

(v) I impose a penalty of **Rs. 10,000/-**(Rupees ten thousand only) under **Section 77** (2) of the Finance Act,1994 for failure on the part of the noticee to assess the tax due on the services provided by them and to file ST-3 Returns as provided under Section 70 of the Finance Act,1994 which should be paid by / recovered from noticee forthwith.

This order is issued without prejudice to any other action that may be taken against the noticee under the provisions of the Finance Act,1994 or the Rules, framed there under or under the provisions of any other law for the time being in force.

(V. Padmanabhan)
Commissioner
Central Excise
Bhavnagar

F. No. V/15-94/Dem-ST/HQ/2012-13 Bhavnagar, Date:- 28.11.2014

By Registered Post A.D.:
To,
M/s Shree Bileshwar Khand Udyog Khedut Sahkari Mandali Limited,
Kodinar
Distt. Junagadh – 362 150

Copy to:
(1) Assistant Commissioner, Service Tax Division, Bhavnagar
(2) Superintendent of Service Tax Rage, Junagadh with a direction to ensure that the noticee has received the subject Order in Original.
(3) RRA Section, H.Q. Bhavnagar
(4) Guard file