कार्यालय आयुक्त केंद्रीय उत्पाद शुल्क एवं सेवाकर
OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
प्लाट न. ६७-७६ / बी-१ "सिद्धि सदन" बिल्डिंग
PLOT NO. 67-76/B-1, "SIDDHI SADAN" BUILDING,
नारायणभाई उपाध्याय मार्ग, भावनगर - ३६४ - ००१
NARAYAN UPADHYAY MARG, BHAVNAGAR-364 001.

फ़ोन : (0278) 2523627 फैक्स : 0278-2513086

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

फ़ाइल् स. - V/15-61/Dem-ST/HQ/2012-13 आदेश की तारीख : 24.03.2014.
F. No. - V/15-61/Dem-ST/HQ/2012-13 Date of Order : 24.03.2014.

जारी करने की तारीख : 31.03.2014.
Date of Issue : 31.03.2014

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 स.: **BHV-EXCUS-000-COM-010-13-14 DT 24-03-2014**
Order-in-Original No.: BHV-EXCUS-000-COM-010-13-14 DT 24-03-2014

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

2. इस मूल आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित ढंग से कर सकता है ः

सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण को अपील ः

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।

आयुक्त कार्यालय 1 भावनगर केंद्रीय उत्पाद शुल्क

2। अपीलीय न्यायाधिकरण का वित्त अधिनियम, 1994 की धारा 86 की उप धारा (1) के अंतर्गत अपील, सेवाकर नियमावली, 1994 के नियम 9(1) के अंतर्गत निर्धारित **एस.टी.-5** में, चार प्रतियों में आदेश प्राप्ति के दिनांक से तीन माह के भीतर की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उसकी प्रतियॉ 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, वहॉ के नामित सार्वजनिक क्षेत्रा बैंक के न्यायापीठ के सहायक रजिस्ट्रार के नाम से निर्धारित फीस रेखांकित बैंक ड्राफ्ट के रुप में भेजनी होगी।

3। वित्त अधिनियम, 1994 की धारा 86 की उपधाराओं (2) एवं (2ए) के अंतर्गत सेवाकर नियमावली, 1994 के नियम 9(2) के अंतर्गत निर्धारित किए गए फॉर्म **एस.टी.-7** में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क या आयुक्त, केन्द्रीय उत्पाद शुल्क (अपील) के आदेश के प्रति (उनमें से एक प्रमाणित प्रति होगी) और आयुक्त/सहायक आयुक्त अथवा उर्प आयुक्त, केन्द्रीय उत्पाद शुल्क को अपीलीय न्यायाधिकरण में आवेदन करने के आदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड / आयुक्त, केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी।

4. यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 की शर्तो पर अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार यथास्थिति मूल आदेश या न्यायनिर्णयनकर्ता प्राधिकारी के आदेश की प्रति पर रुपये 6.50/ का न्यायालय टिकट लगा होना चाहिए।

5. ब्यौरापूर्ण करने हेतु सीमाशुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यविधि) नियमावली, 1982 की ओर ध्यान आकर्षित किया जाता है।

BY Regd. Post AD

To,

M/s. Navdurga Mines Works,
Opp. GHCL Parking,
Sutrapada,
Dist.-Junagadh-362 275

Subject: Show Cause Notice : V/15-61/Dem-ST/HQ/2012-13 dated 22.10.2012.

BRIEF FACTS OF THE CASE

M/s. Navdurga Mines Works, Opp. GHCL Parking, Sutrapada, District : Junagadh (hereinafter referred to as the Noticee) were engaged in raising, breaking, sizing of Limestone at captive mine of M/s. GHCL Ltd., Sutrapada and holder of Service Tax Registration bearing No. AAFFN1166MSD001 under the category of providing services on "other than in the negative list i.e. Mining of mineral services " issued under Section 69 of Chapter V of the Finance Act, 1994 (32 of 1994).

2. A search was conducted at the office premises of the noticee on 16.10.2012 but no documents relevant to the inquiry could be found at the premises of the Noticee. Even after issue of Summon dated 19.09.2012 the noticee did not submit the required details. Since the Noticee was providing taxable services to GHCL, the relevant financial records including copy of contract and Work Orders issued by GHCL to such Contractors for the Financial Year 2007-08 to 2011-12 were called for from M/s. GHCL vide Summons dated 17.10.2012.

3. A statement of Shri Deepak Singhal, Sr.Manager, Indirect Taxation, M/s. GHCL Ltd., Sutrapada was recorded under which he submitted details viz. copies of Work Orders and Ledger showing payments made to mining Contractors including the Noticee. He stated that the scope of the work in respect of contractors engaged by M/s. G.H.C.L. for supply of limestone from their captive mines includes raising, breaking/sizing, loading and transportation of manually sized limestone of specific size; that the blasting was carried out by the company however the cost of explosives etc. were recovered from the contractors; that the entire operations thereafter as stated above were carried out by the contractors; that the scope of work in respect of contractors engaged in supply of Lime Stone from their captive mines was identical for entire period from 2007-08 to 2011-12; that certain payments shown in ledgers of the contractors were on account of miscellaneous casual works carried out at mines which were beyond the scope of work mentioned in work orders but were incidental to mining activities.

4. It revealed, from the details submitted by Shri Deepak Singhal, that the consideration received towards providing services was aggregate of the figures/amounts shown in debit side of the ledgers of the Noticee submitted by GHCL. Thus, the ledger of the Noticee submitted by GHCL showed the gross amount charged by the Noticee for the period 2007-08 to 2011-12 as detailed below;

Sr. No.	PERIOD	Gross amt received for providing service to M/s. GHCL Ltd. (Rs.)
1	01.06.2007 TO 31.03.2008	75,26,592/-
2	01.04.2008 TO 23.02.2009	1,27,68,656/-
3	24.02.2009 TO 31.03.2009	17,49,071/-
4	01.04.2009 TO 31.03.2010	2,63,11,787/-
5	01.04.2010 TO 31.03.2011	22,99,731/-
	TOTAL	**5,06,55,837/-**

5. On scrutiny of the documents submitted by M/s. GHCL Ltd., it appeared that :-

a) the Noticee was awarded contract for carrying out Raising, Breaking and Sizing activities at the captive mines of GHCL, Loading of manually sized limestone of specific size and transportation thereof to factory (plant) of GHCL.

b) the blasting in the mine was done by M/s. GHCL but the cost of explosives for blasting etc. was recovered by GHCL from the Noticee.

c) the activities undertaken by the Noticee were in relation to the Mining of Limestone from the mines of GHCL.

d) the Noticee carried out Mining of Limestone till 01.04.2011, in terms of the conditions stipulated in the work orders,

e) the Noticee had also been paid for the casual miscellaneous activities which were incidental to mining of Limestone
f) the Noticee was not registered for payment of Service Tax and had not levied and paid any Service Tax for the activities undertaken by them, in relation to mining of Limestone.

6. From the definition of taxable service under the provisions of Section 65 (105) (zzzy) of the Finance Act, 1994 it appeared that the service provided by the noticee would fall under Mining Service. It appeared that the Noticee had not followed any statutory procedure of obtaining Service Tax registration, filing of return and payment of Service Tax to the tune of Rs. 56,35,634/-. Accordingly, a Show cause bearing no V/15-61/Dem-St/Hq/2012-13 dtd 22.10.2012 was issued to M/s. Navdurga Mines Works, Opp. GHCL Parking, Sutrapada, District : Junagadh asking them as to why: -

(i) the Service Tax totally amounting to Rs 56,35,634/- (Rupees Fifty Six Lakh Thirty Five thousand Six hundred Thirty Four only) including Service Tax of Rs 54,71,489/- Education Cess of Rs 1,09,430/- plus Secondary & Higher Education Cess of Rs 54,715/- should not be demanded and recovered under proviso to Section 73(1) of the Act by invoking extended period of 5 years;
(ii) interest at appropriate rate on delayed payment of Service Tax from the due date of payment of Service Tax to the actual payment of the same should not be charged and recovered under Section 75 of the Act;
(iii) penalty should not be imposed upon them under Section 76 of the Act for the failure to assess service tax as required under Section 70 of the Act and make the payment of Service Tax within the period and in the manner prescribed under Section 68 of the Act read with rule 6 of the Rules;
(iv) penalty should not be imposed upon them under section 77(1)(a) of the Finance Act, 1994, for failure to obtain Service Tax registration in terms of the provisions of Rule 4 of the Service Tax Rules, 1994;
(v) penalty should not be imposed upon them under section 77 of the Finance Act, 1994, for they failed to file the prescribed ST-3 returns under Section 70 of the Act in respect of above said services rendered by them within the stipulated time in terms of the provisions of Rule 7 of the Service Tax Rules, 1994;
(vi) penalty should not be imposed upon them under Section 78 of the Act for the Service Tax not levied and not paid by them by suppressing the facts and the contravention of the provisions of the Act and the Rules made thereunder with intent to evade payment of Service Tax.

DEFENSE SUBMISSION

7.1 The Noticee had submitted their defense replies vide letter dated 15.11.2012 and 05.03.2014 wherein they submitted that the department had not followed the principles of natural justice since they approached the department requesting to provide them materials facts and reasonable causes on which department relied on as the issued summons were not self speaking and bad in law and illegal in nature; that their application filed under RTI was also not complied on technical grounds; that in absence of material facts, reasonable reasons and causes, the department made them Noticee liable illegally instead of M/s. GHCL.

7.2 The Noticee further added that M/s GHCL was supposed to pay service tax on such activities; that the services contracted for were not taxable in nature; that upon receipt of the said show cause notice, they approached M/s. GHCL and requested them to clear out the legal position and their legal obligations towards the service tax which they had been agreed and accepted their liabilities towards service tax; that on receipt of the payments towards the service tax from M/s. GHCL, they immediately paid all amount of service tax as demanded in

show cause notice with clarification of material facts and written representation for not to impose any penal action.

7.3 The Noticee further added that they were uneducated labor contractor and not presumed to be understood the actual interpretation of terms and condition laid down in the work order issued by M/s. GHCL and they purely relied upon M/s. GHCL who strongly believed that such types of activities were non taxable in nature and issued work order accordingly; that from the points discussed in the above referred notice itself that investigation against them was started simply on the concurrent routine audit of M/s. GHCL conducted by the department ; that through the audit only, the department came to know that GHCL was recipient of such type of services from the different contractors and their was no condition for charging service tax in their work order given by M/s. GHCL and by this way, M/s. GHCL intended to evade service tax and therefore such inquiry was initiated and not by the default of the contractors; that every year routine audit had been conducted by the department but no intelligence for investigation were asked for in the relevant concurrent audit assessment of GHCL being the recipient of the taxable services and therefore the ground for invocation of extended period beyond one year for recovery was illegal and bad in law.

7.4 The Noticee further submitted that they had never collected any service tax from M/s. GHCL; that the details shown in show cause notice was not correct; that against the Service Tax payment, M/s. GHCL might have availed CENVAT; that they had also often drawn attention to M/s. GHCL officials regarding tax liabilities but M/s. GHCL never tried to clear out their tax liability on such portion of services and thus might be evasion from their side.

7.5 The Noticee further contested that there was no intention to suppress/evade material facts/tax; that the actions and proceeding initiated in show cause notice were illegal; that the details shown in para 20 to 24 of show cause notice was not true and seemed illusive and presumptive; that they made no fault u/s 69,70, 73,75,76,77,78 with any of their sub sec. and therefore not to initiate any penal proceedings or not to impose any penalty or interest in the interest of principles of natural justice and proviso of the act.

PERSONAL HEARING

8.1 Personal hearing was held on 13.03.2014 when Shri S.B. Tanna, Advocate and Shri K.K. Barad, Partner of the Noticee appeared on behalf of the Noticee and requested to allow them to submit additional written submission. The same was filed on 18.03.2014 wherein they submitted that the show cause notice did not indicate as to how the activity undertaken by them fell under the definition of 'Mining of natural resource services" service; that the show cause notice merely proceeded on the assumption; that no evidence was produced on record by the department to prove the allegations contained in the show cause notice.

8.2 The Noticee placed reliance upon decision of the followings Hon'ble Supreme Court in the case of ***Amrit Foods V/s CCE 2005 (190) ELT 433 (SC),*** wherein the Hon'ble Supreme Court held that the assessee had to be put on notice as to the exact nature of contravention for which he was liable. The noticee submitted that activity of cutting, breaking and sizing of limestone in a particular size and description could not be considered as mining activity. The noticee reproduced dictionary meaning of the term mining as under:

Black's Law Dictionary : "The process of extracting ore or minerals from the ground; the working of mine; this term also encompasses oil and gas drilling" ; Oxford Advance Learner Dictionary' Seventh Editions: "The process of getting coal and other minerals from under the ground".

The noticee submitted that clause (d) of section 3 defined the term mining operation to mean "any operation undertaken for the purpose of winning any

minerals. In the collocation of words "work and win", the expression "win" might be construed to mean some activity preparatory to the working and excavation of the mineral." The noticee submitted that from the various definitions, as referred above, the mining activity widely covers all activities relating to extraction of minerals from mines; that thus, under section 65 (105) (zzzy) of the Finance Act, 1994, any services provided relating to extraction of minerals fell under the definition of mining service; that in the present case, they were awarded work order from M/s GHCL for supply of limestone of the specified quality and size of from the leased mines of M/s GHCL and for that they had carried out various activities like raising, breaking, cutting, sizing of limestone and loading of the same for transportation.

8.3 The Noticee further submitted that the activity of blasting and raising of the limestone were carried out by M/s GHCL; that they did activities of breaking, sizing and cutting of limestone in to specified size as per the specification provided by M/s GHCL; that they had not carried out activities like drilling, blasting, excavation and raising limestone from mines owned by M/s GHCL which were directly or indirectly in relation to mining activity.

8.4 The Noticee submitted that the crushing of lime stone was a process of manufacture; and the crushed lime stone chips were a different commercial commodity than the lime stone lumps. Process in this case was `manufacture' of lime stone chips liable for duty under Chapter 25 of the Central Excise Tariff Act, 1985 at the rate of Nil. The noticee submitted that in the case of ***S.N. Sunderson (Minerals) Ltd 1995 (75) ELT 273 (M.P)*** affirmed by the Hon'ble Supreme Court, held that the activity of crushing of limestone chips amounted to manufacture. The Noticees further submitted that mere fact that the Lime stone chip attracted NIL rate of duty would not make it non-excisable goods.

8.5 The notice, without admitting that their activities were mining activity, submitted that demand under mining service could not be raised as the definition of mining services included services provided in relation to mining services and not mining itself. The noticee contended that the taxable service of 'Renting of Immovable property' was introduced on 01.06.2007 defining under section 65 (105) (zzzz) meant any services provided in relation to Renting of Immovable property; that in case of Home Solution Retails India Ltd Vs Union of India (2009), the Hon'ble Delhi High Court held that under the definition of renting of immovable property services the services provided in relation to renting of immovable property were eligible to service tax and activity of renting of immovable property itself was not taxable and accordingly, said section 65 (105) (zzzz) was amended retrospectively w.e.f 01.06.2007 onwards and as per the amended definition the activity of renting of immovable property itself was made taxable; that thus under the definition of ' mining services' the services provided in relation to mining were taxable and not mining itself.

8.6 Further, the Noticee submitted that the present demand had been proposed by the department on the basis of information gained from the service recipient i.e. M/s GHCL to whom they are providing services prior to 2007, during the course of audit; that the audit of M/s GHCL was conducted by department regularly; thus, the department was well aware about the fact that M/s GHCL were receiving services from the Noticee and so that the department could have raised the objection earlier also which was now raised in the year 2012 only and therefore, the allegation made in the show cause notice that there was suppression of material facts on the part of the Noticee is baseless and so as, the impugned show cause notice is liable to be set aside on this ground as well.

8.7 The Noticee further submitted that Show Cause Notice issued on 22.10.2012 proposing to demand service tax for the period 2007-08 to 2010-11 was time barred. The noticee submitted that they did not file service tax returns for the disputed period from 01.04.2007 to 31.03.2011 and therefore clause (b) of sub section 6 of Section 73 of the Finance Act, 1994 would be applicable for

determining the relevant date for issuance of the show cause notice. Therefore relevant date for the issue of show cause notice covering the period from 01.04.2007 to 31.03.2011 was due date of Filling of returns i.e. 25.04.2011 and the time limit should be reckoned from said relevant date i.e. 25.04.2011, hence the time limit i.e. one year from relevant date, for serving of show cause notice under section 73(1) expired on 24.04.2012.

8.8 The noticee requested to incorporate explanation No. 2 in section 67 of the Act by virtue of the Finance Act, 2004 and accordingly, the consideration received for the services provided should be considered cum tax and the tax liability calculated by the department was not correct as they did not receive amount of tax in addition to that.

8.9 Further the noticee submitted that interest was not recoverable and penalty was not imposable under Section 75 and penalty under Section 78 and 77 of the Finance Act, 1994.

8.10 They further added that in the present case the issue involved was purely interpretational and legal in nature and that they had a bonafide belief that they were not liable to pay service tax for the aforesaid reasons; that they had been carrying on the activities in the very same manner prior to and even after introduction of service tax; that there were several decisions in favour of them; that there being no positive act on part of them to suppress any facts from the department and there being no evidence for such allegation, no penalty could be imposed on them under section 80 of the Finance act, 1994 relying on the judgments; Tribunal in the case of Flyingman Air Courier (P) Ltd - 2004 (170) E.L.T 417 (T), Gamma Consultancy (P) Limited - 2006 (4) STR 591 (T). The noticee submitted that Hon'ble Bombay High Court had held that penalty under section 77 and 78 was not mandatory in view of section 80 of the Finance Act, 1994 in the cases of Vinay Bele & Associates 2008 (9) STR 350 (Bom) and Ashish Patil 2008 (10) STR 8 (Bom).

8.11 The Noticee further stated that being a quasi-criminal proceeding, penalty would not be ordinarily imposed unless and until "mens rea" on the part of the defaulter is proved; that the show cause notice had failed to bring out the essential "mens-rea" or guilty mind of them; that there was no intention to evade payment of service tax on part of them; They submitted that in Hindustan Steel Ltd. V/s The State of Orissa {1969 (2) SCC 627}, the Hon'ble Apex Court has observed that *".....Penalty will not be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose penalty will be justified in refusing to impose penalty, where there is a technical or venial breach of the provisions of the act or where the breach flows form the bonafide belief that the offender is not liable to act in the manner prescribed in the statute."*

8.12 Further the noticee submitted that to avoid unnecessary litigation, they had applied for service tax registration under the category of "Mining of mineral services". Further, vide their letter dated 27.11.2012, they also submitted that they had totally paid Rs. 59,13,139/- in three challans all dated 23.11.2012 and enclosed the copy of challans.

DISCUSSION AND FINDINGS :

9. I have carefully gone through the facts of the case on record and the various submissions of the noticee. The moot point to be decided is whether the activities done by the noticee during the period 01.06.2007 to 31.03.2011 attracts the levy of Service Tax under the category of Mining Service defined under the provisions of Section 65 (105) (zzzy) of the Finance Act, 1994 or otherwise.

9.1 The agreement/contract between the Noticee and M/s. G.H.C.L. specified activities to be done by the Noticee at the mines owned by M/s. G.H.C.L. The contract/agreement has been made on financial year basis deciding the activities to be undertaken, the rate of the respective activity, the order quantity, period of contract, and the other terms and conditions to be followed by both the parties. On scrutiny of the contract, I find that the Noticee agreed to do the following activities at the mines of various places owned by M/s. G.H.C.L.;

(a) Raising, breaking, sizing and loading;
(b) Transportation;
(c) Excavation/dislodging;
(d) Incidental & other expenses relevant to

9.2 I find that the service tax has been imposed on Mining Services i.e., services outsourced for mining of minerals, oil or gas by the Finance Act, 2007 as a separate taxable service with effect from a 1st June, 2007 vide Notification No. 23/2007-ST dated 22.05.2007. Further, I find that the term 'mining' has not been specifically defined in Finance Act, 1994 (as amended) but according to section 12(1)(e) of Mines Act, 1952, mining means the process or business of making or working of mines.

9.3 I further find that the term taxable service under the category of "Mining of mineral services" has been defined in Section 65(105)(zzzy) to mean any service provided or to be provided to any person, by any other person in relation to mining of mineral, oil or gas. According to the aforesaid definition, the services of mining in relation to mineral, oil or gas is taxable. Thus, the essential conditions for being a taxable service in relation to mining of mineral, oil or gas are as follows —

(a) Service should be provided or to be provided by any person to any other person.
(b) Service should be of mining or in relation thereto.
(c) Service of mining should be of mineral, oil or gas (and nothing else).
(d) Service will include exploitation of mineral, oil or gas (post exploration activities).

Since the service provided by the noticee is in relation to mining of lime stone, the said activity is appropriately classifiable under 'mining service'. I also find that CBEC *vide* Circular No. 334/1/2007-TRU dated 28.2.2007 clarified as follows:

> *6.2 Mining Service [section 65(105)(zzzy)]: Presently, geological, geophysical or other prospecting, surface or sub-surface surveying or map-making services relating to location or exploration of deposits of mineral, oil or gas are leviable to service tax under "survey and exploration of mineral service" [section 65(105)(zzv)]. Services such as —*
> - *site formation and clearance, and excavation and earth moving, drilling wells for production/exploitation of hydrocarbons (development drilling)*
> - *well testing and analysis services*
> - *Sub-contracted services such as deploying workers and machinery for extraction/breaking of rocks into stones, sieving, grading, etc.*
> - *outsourced services,*
>
> *Provided for mining are individually classified under the appropriate taxable service. Services provided in relation to mining of mineral, oil and gas are comprehensively covered under this proposed service. With this, services provided in relation to both exploration and exploitation of mineral, oil or gas will be comprehensively brought under the service tax net.*

From the above clarification it becomes as clear as day light that the activities carried out by the notice like braking of rocks into stones, crushing etc are activities of mining only.

9.4 In the case of CCE, *Belgaum v SVM Nett Project Solutions Pvt Ltd* 2009 - TMI - 75385 – (CESTAT, BANGALORE), it is held that raising of iron ore from

mines, processing and supply of ores to the principal is an activity undertaken under mining service brought under service tax w.e.f. 1.6.2007 and service tax is not payable under business auxiliary services,. Thus, the entire activities of raising, breaking, sizing , loading, transportation, excavation, blasting etc. are the process to be carried out on behalf of the principal and to supply the same to the principal and accordingly, squarely covered under the Mining Services w.e.f. 01.06.2007.

9.5 In view of the above I hold that the activities done by the Noticee viz. Raising, breaking, sizing and loading, excavation etc. falls under the purview of definition as discussed above since these activities are comprehensively covered under the service tax net under the category of "Mining Services" as defined under Section 65 (105) (zzzy) of the Finance Act, 1994 (As amended).

9.6 Furthermore, I find that Shri Deepak Singhal, Sr. Manager of M/s. GHCL in his statement dated 17.10.2012, *inter alia,* admitted that even though the blasting is carried out by M/s. GHCL the cost of explosives etc are recovered from the said Noticee. Had it been the mining activity carried out by GHCL, then there was no need to recover the charges for blasting from the noticee. Thus it is evident that the blasting has been carried out on behalf of the noticee and thus it can be safely concluded that the entire activity of mining is carried out by the noticee. More, the Ministry has also clarified that any such book adjustment seems between the service provider and service recipient so far as any services related to mining are concerned then the value of such book adjustments are also to be added in the taxable value of Mining Services. Therefore, I find that on this count also, the services provided by the said Noticee are nothing but the services in relation to "Mining" only and attracts the service tax.

9.7 Further, I find that as per the Section 67 of the Finance act, "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and 'book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise. Further, as per Rule 5(1) of Service Tax (Determination of Value) Rules,2006, inclusion in or Exclusion from value of certain expenditure or cost: (1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service. When the valuation rules clarifies to add such value into the total taxable value of the service provider then the activities done on behalf of the service provider also become inclusive and deems the same have been provided by the service provider only. I therefore reject the Noticee's plea that they have not carried out any activity like drilling, blasting, excavation and raising limestone which are directly or indirectly in relation to mining activity and hold that the bunch of activities in relation to mining have been provided by them to M/s. GHCL which clearly falls under the definition of services under 'Mining of Mineral, Oil or Gas Service' as specified under Section 65(105)(zzzy) of the Act.

9.8 I find that the show cause notice clearly speaks about the activities done by the Noticee and it covers all the aspects related to contract with the service recipient, the statement of the authorized person of said service recipient and the related records such are evidencing the activities done by the said Noticee and all the facts have been covered in the said show cause notice by the revenue. Thus, I do not agree with the allegation that the show cause notice is preceded on assumptions/presumptions.

9.9 I find that the noticee made a vain attempt to prove that they are engaged in manufacturing of limestone chips falling under Chapter 25.21 of the Central Excise Tariff Act, 1985 and accordingly relied on the various judgments related

to. In view of the discussions in the foregoing paragraphs, I hold that the activities carried out by the noticee are service of mining and not a manufacturing activity as defined under Section 2 (f) of the Central Excise Act, 1944. I find that there is no need to discuss the judgments quoted by the Noticee on the following facts;

(i) The relevant contract has been made clearly for specific period and doing specific activities on behalf of owner of the Mine viz. M/s. GHCL related to Mining Services;
(ii) The base concept of the contractual terminology relates to "Service Provider" and the "Service Recipient" and so as, the said Noticee have acted accordingly;

(iii) The noticee has never followed the Central Excise Provisions as the manufacturer under the Central Excise Act is supposed to even if the goods attract NIL rate of duty.

(iv) The noticee did follow none of the formalities relevant to sales tax/VAT.

(v) The noticee does not hold the lease rights on the subject mine but is just engaged by the mine owner for doing specific activities.

10. I find that the activities done by the said noticee are blasting, drilling, excavation, raising, breaking, sizing, cutting and loading etc. These activities clearly fall under the definition service related to Mining Services and thus the status of the Noticee is of service provider. The Noticee relied on the various judgments of High court wherein it held that the activity of crushing of limestone chips amounts to manufacture but the base difference between establishing the activity of crushing of limestone differs the status of the processor by whom the activity done. I have examined the case law relied upon by the noticee and observed that the said decision was delivered in a different situation. Hon'ble High Court has delivered the decision on the basis of erstwhile chapter note 2 under Chapter 25 which particularly covered heading Nos. 25.01, 25.03 and 25.05. The ratio of the same cannot be made applicable in the instant case as the limestone is falling under chapter head 2521 and there is no such chapter note stipulating that crushing of lime stone would amount to manufacture. In absence of any chapter note specifically mentioning the process amounts to manufacture, it cannot be held that the process carried out by the noticee amounted to manufacture. Further the said decision was delivered when no service tax was levied on mining activity. In the present case the service tax is levied on mining activity and therefore the noticee cannot escape from the liability of service tax imposed under the statute. I find that in the case of Balaji Mines & Minerals Ltd- 2010 (20) S.T.R. 189 (Tri. - Bang.), Hon'ble Tribunal taken price facie view that the impugned activities of surveying, drilling, blasting excavation and raising iron ore, transporting them for the purpose of sorting into iron ore lumps and iron ore fines, crushing, grading, etc. are mining service brought under the service tax net from 1-6-2007.

11. Regarding the request of the noticee to consider the value as inclusive of tax, I find that after the receipt of the show cause notice, the said Noticee have approached M/s. GHCL and vide their letter dated 27.11.2012 informed the department that M/s. GHCL agreed and accepted their liabilities towards service tax and on receiving the payments towards the service tax from GHCL, they immediately paid all amount of service tax as demanded in show cause notice Thus, I find from the record that it is evident that the noticee has paid Rs. 59,41,348/- against the demand of Rs. 56,35,634/- as collected from M/s. GHCL. Therefore, the request of the notice to consider the gross value as inclusive of tax under sub-section (2) of the Section 67 of the Act is not acceded to.

12. Further, I do not find any merit in the submissions made by the Noticee such as GHCL is supposed to pay service tax on such activities; they are uneducated labor contractor; that every year routine audit by the department have been conducted on periodical basis but there was no intelligence for

investigation were asked for in the relevant concurrent audit assessment of GHCL; they have never collected any service tax from GHCL which is supposed to be paid and bared by GHCL itself etc. Further, I also hold that the principles of natural justice have been followed by the revenue since the Noticee was given ample opportunities of producing the records. The Noticee was also provided the relied upon documents with the show cause notice itself. The Noticee was granted opportunity to appear in person before the adjudicating authority and more their request during the personal hearing held on 13.03.2014 to allow them additional written submission was also accepted. Thus, the act of the revenue clearly establishes that the Noticee was given sufficient time as well as opportunities to represent their case.

13. Regarding the issue of limitation, I find that as the liabilities of the Noticee could be ascertained during the course of investigation only. The noticee never imparted the information to the department and the department had to take recourse to obtain the same from the recipient of service i.e. M/s GHCL. Thus the attitude of the noticee was non-cooperation and willful suppression of facts from the department. In such circumstances the department has taken righteous action of invoking extended period of limitation as envisaged under Section 73(1) of the Finance Act 1994. So far as the relevant date is concerned, I find that clause (b) of Section 73 of the Act is clearly applicable to the said which reads as " where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules". In the present cast, since the investigation had determined the service tax liabilities for the period 01.04.2007 onwards and no periodically returns have been filed by the Noticee for the disputed period, as per Clause (b) of Section 73, the relevant date would be the last date on which such return was to be filed which was 25.10.2007 (i.e. for the half year ending 30.09.2007) and from the relevant date, the demand of service tax was required to be made within five years i.e. by 24.10.2012 whereas, the show cause notice demanding the service tax for the disputed period was served to the said Noticee on 23.10.2012 and thus not hit by limitation. The Himachal Pradesh High Court in the case of ***Him Chemicals and Fertilizers Ltd. -2010 (256) E.L.T. 363 (H.P.)and Ruchira Papers Ltd. -2010 (251) E.L.T. 502 (H.P.)*** held that mere deposit prior to issuance of show cause notice under Section 11A ibid will not necessarily negate the situation mentioned in the said section. Thus, when the bona fide of the Noticee is in doubt, extended period is invokable as held by the Gujarat High Court in the case of Neminath Fabrics [2010 (256) E.L.T. 369 (Guj.)]. Further, the Supreme Court in the case of M/s. Mehta &. Co. [2011-TIOL-17-SC-CX. = 2011 (264) E.L.T. 481 (S.C.)] has held that "though the respondent has pleaded that it was done out of ignorance but there appears to be an intention to evade Excise duty and contravention of the provisions of the Act. Therefore, proviso of Section 11A(1) of the Act would get attracted to the facts and circumstances of the present case - Show Cause Notice issued within five years from the date of knowledge of the Department is valid". Thus, the show cause has been issued well within the time limit invoking period of five years.

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

15. Section 77 of the Finance Act 1994 provides to impose penalty for failure of the assessee to furnish information to the department and to obtain registration. Since the noticee failed to obtain registration during the relevant time I hold that he is liable for penalty under Section 77 ibid. Further, I also find from the provisions of the Section 68 of the Act that every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed.

16. 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. 56,35,634/- (Rupees Fifty Six lakh Thirty Five thousand Six hundred Thirty Four only) under proviso to Section 73(1) of the Act. However, the entire confirmed amount have already been paid by the said Noticee vide challans dated 22.11.2012, the same stand appropriated against the total service tax liability.

(ii) I order for levy of interest under Section 75 of the Finance Act, 1994 on the amount of service tax.

(iii) I impose the Penalty Rs. 200/- (Rupees Two hundred only) per day for the period during which failure to pay the tax continued or at the rate of 2% of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of Service Tax for the period from 01.06.2007 to 09.05.2008 under Section 76 of the Act.

(iv) I impose penalty of Rs. 5,000/-, under Section 77(1)(a) ibid for failure to take registration in terms of the provisions of Rule 4 of the Service Tax Rules, 1994;

(v) I impose penalty of Rs 10,000/- under Section 77 for failure to furnish ST-3 return to the department.

(vi) I impose penalty of Rs. 56,35,634/- under Section 78 of the Finance Act, 1994. However, as provided in proviso to section 78 ibid, if they pay the amount of service tax confirmed along with interest thereon, within thirty days from the communication of this order, the amount of penalty shall be twenty-five per cent of the penalty imposed above. The benefit of reduced penalty shall be available only if the amount of penalty so determined has also been paid within thirty days from the receipt of this order.

(NAVNEET GOEL)
Commissioner, Central Excise
Bhavnagar

By Regd. Post AD

F. No. : V/15-61/DEM-ST/HQ/2012-13 Date: 24 .03.2014.

To
M/s. Navdurga Mines Works,
Opp. G.H.C.L. Parking,
Sutrapada – 362 275
Dist. Junagadh

Copy to :-

(i) The Chief Commissioner, Central Excise, Ahmedabad.
(ii) The Deputy Commissioner, Service Tax Division, Bhavnagar.
(iii) The Superintendent, Service Tax, A.R.- Junagadh.
(vi) Guard File.
(v) The D.C.-(TRC), CEE, HQ; BVR