



S. Tax

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By R.P.A.D.

F. No. V/15-86/Dem-ST/HQ/2010-11.

Date of Order: 27/12/2011

Date of Issue: 27/12/2011

Passed by

IMAMUDDIN AHMED
Joint Commissioner
Central Excise
Bhavnagar

Order-in-Original No: 45 / BVR / Jt.Commr / 2011

This copy is granted free of charge for private use of the person(s) to whom it is sent.

Any person(s) deeming himself aggrieved by this Order may appeal against this order under Section 85 of Finance Act, 1994 to the Commissioner, Central Excise(Appeals), Rajkot, Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 within three months from the date of its communication. The appeal should bear a court fee stamp of Rs 2.50/- paise only.

The appeal should be filed in form ST-4 in duplicate, as per the provisions of Section 85 of the Finance Act, 1994 read with Rule 8 of the Service Tax Rules, 1994. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeal) Rules, 2002.

It should be accompanied with the following:

- Copy of appeal in duplicate
- Copies of the order, one of which shall be certified copy **OR** the other must bear a court fee stamp of Rs 2.50/- paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

BY R.P.A.D.

To,
Shri Laxmanbhai Mulubhai Vagh.
Pipavav Gate No. 2,
Pipavav Port, Post Ucchaiya,
Taluka : Rajula.

Subject: Show Cause Notice Number No. V/15-86/Dem-ST/HQ/2010-11 dated 21.07.2011 issued to Shri Laxmanbhai Mulubhai Vagh, Pipavav demanding Service Tax of Rs. 42,86,340/-.

Brief facts :

01. On the basis of intelligence that some of the service providers of M/s. Pipavav Shipyard Limited, Pipavav (hereinafter referred to as "PSL") are not paying any Service Tax on the taxable service provided by them, investigation was initiated during which necessary documents were called from PSL. On scrutiny of these documents it was observed that Shri Laxmanbhai M. Vagh (hereinafter referred to as "the Noticee") is providing taxable services without paying service tax. Therefore, a Summons was issued to the Noticee on 09.01.2008 to remain present and produce copies of (1) the Service Tax Registration Certificate, if any, (2) Income Tax Returns for the last five years and (3) Audited Balance-sheet for the last five years. However, the Noticee did not provide the required documents called for under the Summons. Therefore, further Summons were issued on 22.01.2008 and 25.06.2008 to the Noticee. In pursuance to the above Summons, the Noticee submitted a letter dated 19.09.2008 and informed that he was supplying labors to the Pipavav Port and he had not received any service tax from them, and hence in his opinion he was not liable for service tax. However, he did not provide the required documents called for under the Summons. Therefore, further Summons was issued on 29.06.2009, but the Noticee did not provide the required documents called for under the Summons. Therefore, summons were issued to M/s. Gujarat Pipavav Port Limited, Port of Pipavav (hereinafter referred to as "GPPL").

02. During investigation summons were issued to various persons and their statements were recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of Finance Act, 1994 (hereinafter referred to as "the Act"). Statement of Ms. Purva Maheshwari, Daughter of Shri Mohankumar Maheshwari, Accounts Officer (Port Finance) & Authorised Signatory of GPPL was recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Act on 05.02.2010. She produced copies of Work Orders given to M/s. Gopal Suppliers, Pipavav and to the Noticee during last five years along with details of payments made to them for services provided to their company. In her statement she deposed that they were outsourcing stevedoring related works to various persons/firms; that the Work Orders provided to M/s Gopal Suppliers and the Noticee are mostly for supply of labors for stevedoring related jobs, as can be seen from the 'Description & Scope' of the Work Orders; that wherever in such Work Orders, the scope of work is not expressly mentioned for supply of labors, they are essentially orders for supply of sufficient men power or specific number of minimum workers in a shift etc, as mentioned in the Column 'Unit' of such work orders; that as per the terms and conditions of the Work Orders, all liabilities under the statutes like Provident Fund, Workmen Compensation, Factories Act etc. vested with the service providers and the rate quoted in the Work Orders were inclusive of all such liabilities. She further stated that no payment over and above the rates quoted in such Work Orders has been made to the service providers; that M/s Gopal Suppliers and the Noticee were not charging Service Tax in the Bills raised during the period from 2004-05 probably up to Dec.2008.

03. Statement of Shri Laxmanbhai Mulubhai Vagh, Proprietor of the Noticee was recorded on 18.03.2010 under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Act, wherein he deposed that he was engaged in supplying labors and he was doing his business in the port area of Pipavav and not in any other area; that he was supplying labors mainly in the name of Laxmanbhai M. Vagh or Laxmanbhai Mulubhai Vagh and he was the sole proprietor of this firm; that he was supplying labors to GPPL as per their requirement for work such as rake handling, stevedoring etc. in the port area and he got remuneration on the basis of number of labors supplied by him; that similarly, he provided services to PSL for construction of Labor Colony. On being shown Work Orders and Ledger Accounts for the financial year 2005-06 to 2009-10 of GPPL he put his dated signature in token of its correctness. He produced Audit Report for the year 2007-08 and 2008-09 and Bank Statement from February-2008 to February-2010. He also deposed that he did not know that his activity of supplying of labors was taxable service and hence he had not paid service tax on it; that he had come to know in the year 2008 at the time of search of office of his brother namely M/s. Gopal Suppliers, that he has to pay service tax for his work and accordingly he had obtained Service Tax Registration in the month of November-2008 and started to pay service tax; that it was his mistake to not to pay service tax on the services such as labor supply and construction, provided by him and accepted that his services are taxable services.

04. On going through the Work Order Nos. GPPL/OPS/WO/006/2008 dated 01.01.2008 & GPPL/OPS/WO/015/2009 dated 01.02.2009 issued by GPPL in the name of the Noticee, the Scope & Location of the work was mentioned as "Rake Loading at Pipavav". Further, the Noticee were awarded contract for providing sufficient manpower as required to handle the rake with railway free time (Minimum 300 labors). These conditions are almost identical in all the work orders allotted to the Noticee. It is very clear from the said work orders that GPPL for carrying out certain works in the port area have awarded contract to the Noticee for supply of suitable labors. Apparently certain conditions in the work orders are for the purpose of achieving desired output(dispatch) whereas certain conditions are to ensure that the Noticee discharge their liability of Provident Fund contribution, Bonus, Gratuity etc. towards their employees.

05. On going through the Bank Statement produced by the Noticee, it appeared that the Noticee has received more amount than the amount shown in his Profit & Loss Account in the financial year 2009-10. Therefore, further statement dated 25.02.2011 of Shri Laxmanbhai Mulubhai Vagh, Proprietor of the Noticee was recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Act, wherein he deposed that it is true that the amount of Rs.2,17,98,763/- shown as received during the financial year 2009-10 in the Bank Statement, and it does not tally with his Profit & Loss Account; that he had provided the services to GPPL and M/s. Kailash Enterprises, Vadodara (hereinafter referred to as "Kailash") at Pipavav Port during the financial year 2009-10 and he produced their ledgers. He also confirmed that he received the amount including service tax for Rs.67,71,194/- from GPPL and Rs.1,35,79,220/- from Kailash.

06. From investigation it was found that the Noticee supplied laborers during last three years i.e. from 2007-08 to 2009-10 to PSL, GPPL and Kailash and received payment from them as mentioned in Annexure-A to the notice. On perusing the ledgers provided by GPPL and produced by the Noticee and Profit & Loss Accounts provided by the Noticee, it is found that the same did not tally with their Bank Statement and also the Noticee could not explain properly the reasons thereof. As per ledger accounts, the Noticee has received amount aggregating to Rs.4,26,43,816/- from service recipients. In terms of Section 65A of the Act, the services provided by the Noticee to PSL, GPPL and Kailash would merit classification under Manpower Recruitment or Supply Agency's Service as defined under Section 65(68) & 65 (105) (k) of the Act since it gives essential characteristics of supply of manpower (labour).

07. As per clause pertaining to taxes in the Work Orders, the rates are inclusive of all taxes, which were prevailing on the date of issue of work order. Therefore, the amount paid to the Noticee by the service recipients is inclusive of service tax and that reimbursements are also inclusive of service tax. Hence, for the purpose of calculating service tax not levied and not paid the aggregate amount shown as received by the Noticee is to be considered as service tax. Accordingly, service tax not levied and not paid by the Noticee on the value of taxable services suppressed by them is calculated and attached to the notice as mentioned in Annexure-A.

08. The Noticee has not obtained registration under Service Tax Law and not paid service tax on the taxable services under the category of "Manpower Recruitment or Supply Agency Service" provided by them to PSL, GPPL and Kailash with intent to evade payment of service tax and therefore, have violated the provisions of Section 69 of the Act read with rule 4 of the Rules, Section 68 of the Act, they have not paid Service Tax amounting to Rs.2585342/- on the above services provided to their clients from the period from 11.05.2007 to 31.03.2010 therefore, they have violated the provisions of Section 68 of the Act read with rule 6 of the Rules. They have not submitted periodical Returns in prescribed form with the jurisdictional Superintendent of Service Tax therefore, they have violated the provisions of Section 70 of the Act read with rule 7 of the Rules. The Noticee has suppressed the facts of providing the taxable services to its clients and have contravened the above provisions of the Service Tax Law with an intention to evade the payment of Service Tax therefore, the amount of service tax is required to be recovered from them by invoking provisions of proviso to Section 73 (1) of the Act.

09. Therefore a show cause notice F. No. V/15-86/Dem-ST/HQ/2010-11 dated 21.07.2011 was issued to Shri Laxmanbhai M. Vagh, Pipavav Gate No. 2, Pipavav Port, Post-Ucchaiya, Taluka Rajula, as to why:-

(1) The Service Tax total amounting to Rs.42,86,340/- (Rupees Forty two lakh eighty six thousand three hundred forty only) as per Annexure-A attached with the Show Cause Notice should not be demanded and recovered under

proviso to Section 73(1) of the Act along with the interest at the appropriate rate as applicable till the date of payment of service tax under Section 75 of the Act. The amount of Rs. 17,00,998/- have been subsequently paid as mentioned in Annexure- B to the notice, should not be confirmed and appropriated towards Service Tax payable by them under Section 68 of the Act, read with Rule 6 of the Rules.

- (2) 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 Rules.
- (3) Penalty should not be imposed upon them under Section 77 of the Act for failure to file prescribed returns under Section 70 of the Act read with rule 7 of the Rules.
- (4) Penalty should not be imposed upon them under Section 77(1) (C) of the Act for failure to furnish information called by an officer and produce documents called for by the investigating officer and appear before the investigating officer.
- (5) Penalty should not be imposed upon them under Section 78 of the Act for suppression of fact of providing taxable services as mentioned hereinabove and 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.

Personal Hearing :

10. Shri B. B. Velani, Advocate, appeared for personal hearing on behalf of the Noticee on 26.12.2011 and produced a written submission dated 10.12.2011 and re-iterated the same. He further submitted that as per their calculation the ST payable should be Rs.38,19,848/- only out of which they have already paid an amount of Rs.32,50,912/-. He requested for waiver of penalty since the service provider is an illiterate person and was not aware of the provisions of S.T.

Defence :

11. The advocate of the Noticee, during personal hearing on 26.12.2011 produced reply to the said show cause notice dated 10.12.2011. In the said reply they submitted that the Proprietor (the Noticee) is an illiterate villager and doing the labour contract business with the companies at Pipavav; that for doing business various types of contracts have been made with these companies, which are in English; that while signing these contracts he was unaware about the Rules and Regulations of Service Tax. Moreover, Companies have also never instructed / guided him to collect and paid tax from them; that he had to collect it from these companies and paid to the Government account but due to his ignorance and non-guidance from these big companies. He further submitted

that in the Work Contracts it is clearly mentioned that the rates are inclusive of all the taxes except Service Tax; that this clearly stipulate that the liability of the Service Tax is on these companies; that as the Service Tax is not collected by him while issuing bills, hence were not paid to him which resulted in non-payment of the same to the Government; that non-obtaining of registration and non-payment of Service Tax is due to his ignorance and non-guidance from these companies.

11.1 He has further submitted that it is mentioned in the show cause notice that statement of his brother was recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 on 21.07.2011 wherein he has deposed that they (the Noticee) have never collected Service Tax; that his work place was raided by the Central Excise Officers and the bills raised to various companies were seized under panchnama; that no evidence was found from the files / bills seized that the service tax was collected by them; that even it was sufficient to prove from his confirmatory statement that they have never collected service tax hence, it can be easily concluded that there was no intention to evade payment of service tax; that proviso to section 73 (1) can only be applicable when the intention to evade duty by reason of fraud, collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Act or Rules is present; that in the present case, the intention to evade duty is not proved by the department hence the proviso to section 73 (1) of the Act is not be applicable and the demand raised against them can be justifiably dropped.

11.2 He has further submitted that without prejudice to the fact that the proviso to section 73(1) cannot be applied and the entire demand gets vitiated, the department has wrongly calculated service tax; that as per section 67 the service tax is to be charged on the amount received and not on the billed amount; that the department has erroneously calculated service tax on amount received, which means that full amount received + service tax on it; that the amount received by them is to be considered as the gross amount charged and is inclusive of service tax payable; that moreover the threshold exemption of Rs. 4,00,000/- in terms of Notification No.6/2005-S.Tax dated 01.03.2005 is also not made applicable to them in the calculation shown in annexure 'A' attached to the SCN; that on the basis of above, the actual calculation is as under (Figures in Rs.) :

period	Amount	Abetment exemption	Total	S.T. 12%/10%	Edu. Cess 2%	S. H. Edu. Cess 1%	Total
11.05.07 to 23.02.09	16287349	4,00,000	15887349	1702216	34044	17022	1753282
24.02.09 to 31.03.1	22070128	nil	22070128	2006376	40127	20063	2066566

0							
Total	3835747 7	4,00,000	3795747 7	370859 2	7417 1	3708 5	381984 8
			Ann-B	Less Total tax paid			325091 2
							568936

11.3 He has further submitted that once they came to know that the services provided by them are taxable in nature, they obtained service tax registration on 18.11.2008 subsequently paid service tax from the period from 01.11.2008 to 31.03.2010 to the tune of Rs.3250912/- hence, this amount should also be deducted from Rs.3819848/- which comes to Rs.564936/-. He relied upon the following judgments regarding non imposition of penalty :

- (1) Smitha Shetty Vs. CCE – 2003 (156) ELT 84 (CESTAT – Bang.),
- (2) CCE Vs. Impress Ad-Aida & Displays – 2005 (1(ii) ITP (Ser-Tax) 35 (Rep.) CESTAT, Bangalore.
- (3) Super Security Service Vs. CCE (2003) 157 ELT 433.

Findings :

12. I have carefully gone through the facts of the case available on record and the submissions made by the Noticee in writing and orally. The issue to be decided in this case is whether the Noticee has evaded payment of Service Tax amounting to Rs.42,86,340/- by providing taxable services falling under the category of 'Manpower Recruitment or Supply Agency', without obtaining registration and without following the procedure prescribed under the Service Tax Law as alleged in the impugned show cause notice.

12.1 Further as per Section 65(68) of the Finance Act, "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, temporary or otherwise,[to any other person]. The Finance Act, 2005 w.e.f. 16.06.2005 enhanced the scope of Manpower Recruitment Services by including temporary supply of manpower therein and renamed the manpower recruitment agency as "Manpower Recruitment or Supply Agency"

12.2 The Board has further clarified the issue under consideration, vide master circular No.96/7/2007-ST dated 23.08.2007 that "in the case of supply of manpower, individuals are contractually employed by the manpower recruitment or supply agency". The agency agrees for use of the services of individuals, employed by him, to another person for a consideration. Employer-employee relationship in such case exists between the agency and the individual and not between the individual and the person who uses the services of the individual. Such cases are covered within the scope of the definition of the taxable service [Section 65(105)(k) and, since they act as supply agency, they fall within the

definition of "Manpower, Recruitment or Supply Agency" (Section 65(68) and are liable to service tax. As far as the taxability of the service is concerned it is employee relationship, and they are not on the pay-roll of the manufacturer. The role of the contractor is to provide the service just by using the manpower of the workers employed by him.

12.3 I find that during investigation statement of Ms. Purva Maheshwari, Daughter of Shri Mohankumar Maheshwari, Accounts Officer (Port Finance) & Authorised Signatory of GPPL was recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Act on 05.02.2010. She has confirmed the fact that their company has received taxable service of labour supply from the Noticee. She produced Work Orders signed by the Noticee with their company for this purpose during the period from 2004-05 onwards. She has also confirmed that the Noticee were not charging Service Tax in the Bills raised during the period from 2004-05 probably up to Dec.2008. I further find that Shri Laxmanbhai Mulubhai Vagh, Proprietor of the Noticee in his statement dated 18.03.2010, recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Act has admitted that he was engaged in supplying labours to GPPL and PSL and was getting remuneration on the basis of number of labours supplied by him; that he had not paid service tax on it and he had obtained Service Tax Registration in the month of November-2008 and started to pay service tax thereafter. He categorically admitted that his services are taxable services. Thus, there cannot be any doubt that the Noticee has been engaged in providing taxable service of 'Manpower Recruitment or Supply Agency' to GPPL and PSL. Also from the Work-Orders signed by the Noticee and both its clients i.e. GPPL and PSL it is clear that the Noticee has supplied labours to these two clients. It is a fact on record that the Noticee has obtained registration in the month of November, 2008 therefore, upto that period they suppressed the fact of providing taxable service without paying service tax and without following prescribed procedure under the Finance Act, 1994 and the Rules framed there under.

12.4 Thus, I find that the Noticee has provided taxable services under category of 'Manpower Recruitment and Supply Agency' without obtaining registration and without paying service tax. It is further found that the Noticee has suppressed the fact of supply of taxable service of "Manpower, Recruitment or Supply Agency" to its clients with an intention to evade payment of service tax therefore, the amount of service tax on the value of services provided by the Noticee to the company during the period from 15.05.2007 to 31.03.2009 is required to be recovered from them by invoking proviso to Section 73(1) of the Finance Act, 1994 alongwith interest at applicable rates under Section 75 of the Finance Act, 1994.

13. The main contention of the Noticee is that he being an illiterate villager, was unaware about the Rules and Regulations of Service Tax. Moreover, Companies have also never instructed / guided him to collect and paid tax from them; that as the Service Tax is not collected by him while issuing bills, hence were not paid to him which resulted in non-payment of the same to the

Government; that non-obtaining of registration and non-payment of Service Tax is due to his ignorance and non-guidance from these companies.

13.1 These contentions cannot be accepted. Ignorance of law can not become an instrument to evade payment of Government taxes. It is found that the Noticee has signed contracts (Work-Orders) with its clients. In his defence reply also he has mentioned that "in Work Contracts it is clearly mentioned that the rates are inclusive of all the taxes except Service Tax; that this clearly stipulate that the liability of the Service Tax is on these companies". Thus, I find that the Noticee is aware of the taxability of services provided by him and he has accepted the work order considering the fact that the service tax is included in the amount offered to him by the client. Further in his statement dated 25.02.2011, which was recorded under Section 14 of the Central Excise Act, 1944 he has deposed that for accounts and other purposes he take advise from Consultant and Advocate. Therefore, all type of legal advice was available to him from experts like Advocate and Legal Advisor. Moreover, liability to pay service tax in this case is on the service provider, the gross amount received by them is inclusive of service tax as per condition of work order signed by both the parties. Therefore, there is no force in contentions of the Noticee.

13.2 The Noticee has further contended that the department has erroneously calculated service tax on amount received, which means that full amount received + service tax on it; that the amount received by them is to be considered as the gross amount charged and is inclusive of service tax payable; that moreover the threshold exemption of Rs.4,00,000/- in terms of Notification No.6/2005-S.Tax dated 01.03.2005 is also not made applicable to them in the calculation shown in annexure 'A' attached to the SCN. According to him after considering abetment and cum-tax value total service tax comes to Rs.3819848/- for the period from 11.05.2007 to 31.03.2010 and since they obtained service tax registration on 18.11.2008 subsequently paid service tax for the period from 01.11.2008 to 31.03.2010 to the tune of Rs.3250912/- hence, this amount should also be deducted from Rs.3819848/- which comes to Rs.564936/-.

13.3 In this regard I find that as per Work - Order the gross amount is inclusive of service tax. On perusal of Annexure - A to the impugned show cause notice, it is found that the assessable value for the purpose of levy of service tax has been arrived at by considering the gross amount as inclusive of the service tax and the service tax has been calculated accordingly. Therefore, this contention of the Noticee is without any basis and required to be rejected. Regarding other contention of allowing abetment of threshold exemption, I agree with the Noticee and allow them the threshold exemption as requested by them in their reply. Regarding payment of service tax by the Noticee after obtaining registration in November, 2008 it is found that the already paid service tax upto August, 2010 has been mentioned in Annexure-B of the impugned show cause notice. In addition to this amount I find that the Noticee has also paid Rs.779885/- (service tax Rs.757170/- + Education cess Rs. 15143/- + S. & H. Education cess Rs.7572/-) on 15.12.2010 and Rs.680371/- (service tax Rs.660555/- + Education cess Rs.13211/- + S. & H. Education cess Rs.6605/-) on 28.09.2011 as per copy

of challans submitted by them. Out of these two payments, the payment dated 28.09.2011 is made after issue of the show cause notice therefore, it can not be included in the calculation of net demand to be confirmed against the Noticee. However, the payment made on 15.12.2010 is required to be included in the calculation. It is also found that the amount of service tax paid is not equal to the amount payable during this period. They have not paid full amount of service tax even after obtaining registration in the month of November, 2008 by suppressing correct amount received from their clients. The correct amount received from the clients is mentioned in Annexure – A to the show cause notice and the amount of service tax on it is accordingly calculated in next para, after allowing thresh hold exemption. Therefore, the amount already paid by the Noticee is required to be appropriated and adjusted against the total payable service tax. The amount of Rs.32,50,912/- mentioned by the Noticee in their reply is not correct as some of the figures are inclusive of payments made by them under account head "other payments" and not under "service tax", "Education cess" or "S. & H. Education cess".

13.4 After considering the amount paid by the Noticee before issue of the show cause notice, the amount to be confirmed is as under :

(i) **11.05.2007 to 23.02.2009** – Gross amount received Rs.18300465/-, A.V. Rs.15931350/- (after allowing abetment and considering cum-tax price), Total Service Tax Rs.1969115/- (S.T. Rs.19,11,762/- + Edu. Cess Rs.38235/- + S. & H. Edu. cess Rs.19118/-).

(ii) **24.02.2009 to 31.03.2010** - Gross amount received Rs.24343351/- A.V. Rs.22070128/- (after considering cum-tax price), Total service tax Rs.2273223/- (S. T. Rs.2207013/- + Edu. Cess Rs.44,140/- + S. & H. Edu. Cess Rs.22,070/-).

(iii) Total Service Tax Rs.42,42,338/- (S.T. Rs.41,18,775/- + Education cess Rs.82,375/- + S. & H. Education cess Rs.41,188/-) less amount already paid before issue of show cause notice Rs.24,80,883/- (S.T. Rs.24,08,445/- + Education cess Rs.49,165/- + S. & H. Education cess Rs.23,273/-) and the amount of Service Tax remained to be paid by the Noticee is Rs.17,61,466/- (S.T. Rs.17,10,330/- + Education cess Rs.33,210/- + S. & H. Education cess Rs.17,915/-). This amount is required to be recovered from the Noticee under proviso to Section 73 (1) of the Finance Act, 1994 alongwith interest under Section 75 of the Finance Act, 1994. The Noticee has further deposited an amount of Rs.680371/- (service tax Rs.660555/- + Education cess Rs.13211/- + S. & H. Education cess Rs.6605/-) on 28.09.2011 against Service Tax for the period from 01.01.2010 to 31.03.2010, after issue of show cause notice which is required to be appropriated and adjusted against the outstanding demand of Rs.17,61,466/- (S.T. Rs.17,10,330/- + Education cess Rs.33,210/- + S. & H. Education cess Rs.17,915/-).

14. Regarding imposition of penalty under Section 76, 77 and 78 of the Finance Act, 1994 for not complying with the statutory provisions of law, I find that the Noticee has contravened the provisions of Section 68 of the Finance Act,

1994 (the Act) and rule 6 of the Service Tax Rules, 1994 (the Rules) as they have failed to pay Service Tax at appropriate rate on the value of taxable services provided by them during the period from 11.05.2007. They have also contravened the provisions of Section 70 of the Act and rule 7 of the Rules as they have failed to assess the service tax payable on the value of taxable services received from their clients. Section 76 of the Finance Act, 1994 reads as under:

“Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax in accordance with the provisions of section 75, a penalty which shall not be less than two hundred rupees for every day during which such failure continues or at the rate of two per cent. 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:

Provided that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable.”

15.1 The service tax demanded in the Show Cause Notice ought to have been deposited by the Noticee within the stipulated time, having failed to do so they are liable to penalty under the provisions of Section 76 of the Finance Act, 1994. Hence, penalty under Section 76 of the said Act is imposable on the Noticee for failure to make timely payment of Service Tax.

15.2. The Section 77 of the Finance Act, 1994 read as under :

“(1) Any person,—

(a) who is liable to pay service tax, or required to take registration, fails to take registration in accordance with the provisions of section 69 or rules made under this Chapter shall be liable to pay a penalty which may extend to five 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;

(b) who fails to keep, maintain or retain books of account and other documents as required in accordance with the provisions of this Chapter or the rules made thereunder, shall be liable to a penalty which may extend to five thousand rupees;

(c) who fails to —

(i) furnish information called by an officer in accordance with the provisions of this Chapter or rules made thereunder; or

- (ii) produce documents called for by a Central Excise Officer in accordance with the provisions of this Chapter or rules made thereunder; or
- (iii) appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry,

shall be liable to a penalty which may extend to five 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”

15.3 Since, the noticee has failed to pay service tax, to take registration, to keep/ maintain books of accounts and other documents as required under the law, failed to furnish information and produce documents called for by a Central Excise Officer and also failed to appear before the Central Excise Officer, when issued with a summon for appearance to give evidence during investigation of the matter. Therefore, they have become liable for penal action under provisions of Section 77(1) (a), (b) and (c) of the Act. They have also become liable for penal action under Section 77(2) of the Act.

15.4 I find that the Noticee has failed to obtain registration upto November, 2008 under the category of Manpower Recruitment or Supply Agency having failed to do so they failed to make payment of service tax and subsequent filing of Service Tax Return within the prescribed time limit. It is also a fact that they have suppressed the fact of providing taxable service to company with an intention to evade payment of Service Tax. As the Noticee has suppressed the vital facts with an intention to evade service tax and violated the provisions of Acts / Rules of Service Tax, they are liable for penal actions under Section 78 of the Finance Act, 1994.


15.5 The Noticee has relied upon three judgments regarding imposition of penalty however, the findings of these judgments are not applicable in the present case as the suppression of facts with an intention to evade payment of Service Tax is clear in this case. Also the Noticee did not produce demanded records and did not respond to the summons issued to them during the investigation of the case therefore penal provisions are invocable in this case.

16. In view of the provisions of law and the facts of the case, as discussed herein above I hold that the Noticee has provided service under category of “Manpower Recruitment and Supply Agency” from May, 2007 and suppressed this fact from the department upto November, 2008 with an intention to evade payment of Service Tax on this service. The Noticee is required to pay service tax as calculated hereinabove alongwith interest. For the act of not obtaining registration and for not paying amount of service tax they have rendered themselves liable for penalty under Section 76, 77 and 78 of the Finance Act, 1994. In view of findings above, I pass the following order:

ORDER

17. (i) I confirm the demand of Rs.17,61,466/- (Rupees seventeen lakh sixty one thousand four hundred sixty six only) (Service Tax Rs.17,10,330/- + Education cess Rs.33,210/- + S. & H. Education cess Rs.17,915/-) under proviso to Section 73(1) of the Finance Act, 1994 alongwith interest at appropriate rate under Section 75 of the Finance Act, 1994. The amount of Rs.680371/- (service tax Rs.660555/- + Education cess Rs.13211/- + S. & H. Education cess Rs.6605/-) paid by the Noticee on 28.09.2011 is ordered to be appropriated and adjusted against the confirmed demand. I drop the demand of Rs.25,24,874/- out of total demand of Rs.42,86,340/- raised under show cause notice dated 21.07.2011 as the Noticee has paid this amount as service tax after obtaining registration in the month of November, 2008.
- (ii) I impose penalty of Rs.200/- (Rupees two hundred only) per day or 2 (two) percent per month whichever is higher, under Section 76 of the Finance Act, 1994 starting with the first day after the due date till the date of actual payment of Service Tax amount, provided that the total amount of the penalty payable in terms of this account shall not exceed the service tax payable.
- (iii) I impose penalty of Rs.5,000/- (rupees five thousand only) or Rs.200/- (rupees two hundred only) per day whichever is higher, under Section 77 (1) (a) of the Finance Act, 1994 starting with the first day after the due date till the date of actual payment of Service Tax amount.
- (iv) I impose penalty of Rs.5000/- (rupees five thousand only) under section 77 (1) (b) of the Finance Act, 1994.
- (v) I impose penalty of Rs.5,000/- (rupees five thousand only) or Rs.200/- (rupees two hundred only) per day whichever is higher, under Section 77 (1) (c) of the Finance Act, 1994 starting with 09.01.2008, the first day when the Noticee was Summoned to give evidence by the investigating officer, till 18.03.2010 when the Noticee appeared before the investigating officer to produce documents.
- (vi) I impose penalty of Rs.5000/- (rupees five thousand only) under section 77 (2) of the Finance Act, 1994.
- (vii) I impose penalty of Rs.17,61,466/- (Rupees seventeen lakh sixty one thousand four hundred sixty six only) under Section 78 of the Finance Act, 1994. If the amount as determined under serial number (i) above is paid within 30 days from the receipt of the order alongwith the interest payable then as per proviso to section 78 of

the Finance Act, 1994, the penalty will be only 25% of the Service Tax determined at serial number (i) above. The benefit of reduced penalty shall be available only if the amount of penalty so determined has also been paid within the period of thirty days from the receipt of this order.


27/12/11
(Imamuddin Ahmed)
Joint Commissioner
Central Excise
Bhavnagar.

F.NO.V/15-86/Dem-ST/HQ./2010-11..

Date : 27.12.2011.

By Registered Post A. D.

To,
Shri Laxmanbhai Mulubhai Vagh,
Pipavav Gate No.-2,
Pipavav Port, Post Ucchaiya
Taluka- Rajula.

Copy to:-

- 01) The Commissioner, Central Excise, Bhavnagar (RRA Section).
- 02) The Assistant Commissioner (AE), Central Excise, HQ, Bhavnagar.
- 03) The Assistant Commissioner, Service Tax Division, Bhavnagar.
- 04) The Assistant Commissioner (Recovery), C.Ex., Hdqrs., Bhavnagar.
- 05) The Superintendent, Service Tax, Rural Range, Bhavnagar.
- 06) Guard File.

