



S. Tax

Govt. of India
Office of the Commissioner of Central Excise
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By R.P.A.D.

F. No. V/15-29/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: 48 / 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,

M/s. Sunny Construction, (Prop. Shri K. V. Limbadia),
63, Old Housing Board, Surendranagar.

New Address : 9, Rajavir Shopping Mall,
S. T. Road, Near Surekha Vadi,
Surendranagar - 363 002.

Subject: Show Cause Notice Number No. V/15-29/Dem-ST/HQ/2010-11 dated 23.09.2010 issued to M/s. Sunny Construction, Surendranagar demanding Service Tax of Rs. 9,18,786/-.

BRIEF FACTS :

- 01.** An intelligence regarding evasion of Service Tax was collected and during investigation it was found that for transmission of electricity, M/s. Gujarat Energy Transmission Corporation Ltd; (herein after referred to as "GETCO") is required to undertake various types of activities like construction activities, erection and commissioning of plant i.e. 66 KV/220 KV Sub-stations for storage and distribution of electricity, maintenance and repairing of 66 KV/220KV Sub-stations. Without such infrastructure, it is not possible for the GETCO to store and transmit the electricity.
- 02.** For undertaking such works, GETCO is not having their own man power/ infrastructure, but, all such works are entrusted to various contractors. The works entrusted to various contractors by GETCO are falling in the different categories of Taxable Services i.e. Industrial & Commercial Construction Service as defined under Section 65(25b) and 65(105)(zzq), Erection, Commissioning or Installation Services as defined under Section 65(29), 65(39a) and 65(105)(zzd), Execution of Work Contract Services as defined under Section 65(105)(zzzza) and Management, Maintenance & Repair Services as defined under Section 65(105)(zzg) of the Finance Act, 1994.
- 03.** During further investigation, letters were written to the Executive Engineer, GETCO, Amreli / Junagadh / Surendranagar. As the information was not provided by the GETCO, reminders were issued to the Superintending Engineer (TR), GETCO, Circle Office Amreli / Junagadh / Surendranagar requesting to provide the details of the Service Providers. Resultantly, the required information was provided by GETCO vide their letter dated 24.12.2009 (GETCO, Junagadh)/17.8.2009 (GETCO, Amreli)/12.03.2010 (GETCO, Surendranagar).
- 04.** On the basis of information received, it was found that M/s. Sunny Construction, Surendranagar (herein after referred to as the "Service Provider") had provided Taxable Service to M/s. Gujarat Energy Transmission Corporation Ltd. Therefore, Summons was issued to the said Service Provider. A statement of Shri Uttambhai Veljibhai Pokia, Accountant of the service provider was recorded under Section 14 of the Central Excise Act, 1944 as made applicable in the Service Tax matter by virtue of Section 83 of the Finance Act, 1994 wherein he *inter alia* deposed that he was dealing with all day to day work of the firm for the last 15 years; that his firm has provided various services to the GETCO for the period 2005-06 to 2009-10; that their firm obtained Service Tax Registration No. AANPO3932D001 dated 23.01.2009; that he was not aware of the provisions of the Service Tax law and even he was not informed by the GETCO about it; that since 23.01.2009 the firm has regularly started payment of Service Tax from 2009.
- 05.** During the course of further scrutiny of the documents, it was found that the unit provided the Taxable Services of Commercial construction services/Installation services at Halvad and Dhangadhra during the year 2005-06 for Rs. 17,75,976, during the year 2006-07 for Rs.12,68,702 and during the year 2007-08 for Rs.1,98,03,913/-.
- 06.** It was also found from the information provided by GETCO, Surendranagar /Junagadh /Amreli that the Service Provider have provided the Work of Industrial & Commercial Construction Service as defined under Section 65(25b) and 65(105)(zzq), Erection, Commissioning or Installation Services as defined under Section 65(29), 65(39a) and 65(105)(zzd), Execution of work Contract Services as defined under Section 65(105)(zzzza) and Management, Maintenance & Repair Services as defined under Section 65(105)(zzg) of the Finance Act, 1994. The details in respect of the work undertaken by the Service Provider, period of work, amount of contract, description of work undertaken and place at which the work undertaken has been provided by GETCO vide their letter dated 24.12.2009 (GETCO, Junagadh) / 17.08.2009 (GETCO, Amreli) / 12.3.2010 (GETCO, Surendranagar) and from the list furnished by GETCO,

the 'relevant statement' of services provided by the Service Provider was prepared, showing the name of Service Provider (Contractor), their address, description of the services provided by the Contractor, name of the place where services provided, period of work contract and amount of contract and duty calculation and the same is as per ANN-A to the show cause notice.

07. From the information provided by GETCO, it appeared that the work executed / undertaken by M/s.Sunny Construction, Surendranagar is under the category of Taxable Service of Industrial & Commercial Construction Service as defined under Section 65(25b) and 65(105)(zzq), Erection, Commissioning or Installation Services as defined under Section 65(29), 65(39a) and 65(105)(zzd), Execution of Work Contract Services as defined under Section 65(105)(zzza) and Management, Maintenance & Repair Services as defined under Section 65(105)(zzg) of the Finance Act, 1994 and while providing these services, the Service Provider has not followed the procedure prescribed under the Finance Act, 1994 and Rules/Regulations issued there under and also have not paid Service Tax amounting to Rs.9,18,786/-.

08. Since the Service Provider has suppressed the material facts of providing taxable service, in particular by not obtaining registration, by not filing ST-3 returns and not showing the value of taxable service in returns with an intention to evade payment of Service Tax of Rs.9,18,786/-. Therefore, this amount of service tax is required to be recovered from the service provider by invoking extended period of five years under the Proviso to Section 73(1) of the Finance Act, 1994.

09. Thus, from the above it appeared that the Service Provider has not paid the Service Tax and also have not followed the procedure in violation of the provisions of section 68, 69 and 70 of the Finance Act, 1994 read with rule 4, 6 and 7 of the Service Tax Rules, 1994. Therefore a show cause notice F. No. V/15-29/DEM-ST/HQ/2010-11 dt.23.09.2010 was issued to the Service provider as to why :

- 1 Service Tax of Rs.9,18,786/- should not be confirmed under Section 73(2) of the Finance Act, 1994 and recovered.
- 2 Penalty should not be imposed under Section 76, 77(1)(a) , 77(2) and 78 of Finance Act, 1994.
- 3 Interest in terms of Section 75 of the Finance Act, 1994 should not be recovered.

DEFENCE :

10. The Service Provider, filed reply to the impugned show cause notice vide their letter dated 01.11.2010 stating as under :

1. they are possessing required Service Tax Registration Certificate bearing No. AANPO3932D001 DATED 23.01.2009 as they are engaged in providing taxable service viz. erection, commercial or industrial construction etc. that is a Composite taxable service.
- 2 they started to pay due service tax from January, 2009 and to file periodically half yearly statement with the Service Tax Department. Accordingly have already filed the half yearly statement (1) ended as on 31.03.2009 and second on 30.09.2009 along with receipted Challans with the Department, duly self assessed and nothing adverse communication has been received so far.
- 3 They enclosed photo copies of the works contract made with M/s GETCO and submitted that from this works contract it can be seen that they have

undertaken the work of erection, commissioning or installation of plant, equipments or structures whether pre-fabricated or otherwise, taxable services relating to erection of commercial or industrial construction etc, which is nothing but a Composite service.

4 As per the contract, they have done construction for office building etc. The materials viz. steel, cement, bricks etc. have been purchased by them from the local market and used the same in providing the said service. These materials used in the said service are not the goods for the purpose of levy of service tax. Therefore, they are not liable to pay service tax for the year 2005-06 and 2006-07. The service tax is leviable only on the taxable service. They have handed over the complete building to GETCO and not the said materials. These materials are always duly tax paid. Whereas, the erection of building has come into new character of the goods. Therefore, they are not liable to service tax for the year 2005-06 and 2006-07.

5 After completion of the works contract, they have transferred the property in the name of GETCO which resulted into sale and accordingly they pay the required VAT/Sales Tax as applicable. They submitted proof to this which is bearing No. GETCO/CE(PROJ)SE@/WO/NDD/220KVDhangdhra/1824 dated 22.03.2007. This works contract is a Projected Contract. Being projected work order, they are liable to pay service tax on the taxable value being arrived after deduction of cost of various materials etc.

6 They are falling under the category of works contract classified under Section 65 (105) (zzza) of the Finance Act, 1994 which has come into effect with effect from 01.06.2007. Before 01.06.2007 they are not liable for service tax as whatever the goods/service provided to the GETCO are subject to transfer of property and liable to VAT/ Sales Tax.

7 A composite works contract is vivisected and (i) VAT/ Sales Tax is leviable on transfer of property in goods involved in the execution of works contract (Article 366 (29) (a) (b) of the constitution of India) and (ii) Service tax will be leviable on services provided in relation to the execution of works contract. In view of this situation of the legal status, they have provided the taxable service which is classifiable under the head of "works contract service".

8 From the various definition of the services as shown above and as shown in the show cause notice, it is clearly found that if VAT/Sales Tax is payable on works contract of erection, commissioning or installation service, commercial or industrial construction service or construction of complex service, it will be classified under new head of service tax being complete works as discussed above. In view of this legal position of service provided to the GETCO, the

service provided to the GETCO is / was nothing but falling under the per-view of 'Works Contract Service' which has come into effect from 01.06.2007.

9 They relied upon the decision of Hon'ble Tribunal in the case of **SEPCO Electric Power Construction Co. Vs. CC (2007) 8 SIT 327 = 7STR 229 (CESTAT), Prince Foundations Vs. CST (2009) 22 SIT 240 (CESTAT)** and submitted that in the present case, it is not true that they have provided various services as mentioned in paragraph 2 of the captioned show cause notice dtd. 23.09.2010 i.e. they have not provided individual taxable service viz. industrial and commercial structural service, erection, commissioning or installation services or management, maintenance and repairs service to M/s GETCO in view of the terms and conditions of the contract made with the GETCO.

10 Notwithstanding containing anything in foregoing paras, the department should not ignore their legitimate rights to avail General Exemption to small services providers. The exemption limit was 04 lakhs of the taxable value during the period from 01.04.2005 to 31.03.2007 and Rs. 08 lakhs for the period from 01.04.2007 to 31.03.2008. They were entitled to avail benefit of Rs. 04 lakhs during the year 2005-06 and Rs.08 lakhs for the period from 01.04.2007 to 31.03.2008. While deciding the case this aspects may be considered to arrive the amount of service tax payable if their above contentions are not applicable in toto.

11 The submissions made in para 10 above are required to be taken into consideration only for their saving clause. In fact, the service provided by them to the GETCO is falling under the purview of taxable service viz, works contract service imposed with effect from 01.07.2007. They being the person, not well conversant with day to day change of service tax law. They have now come to know that their taxable service fall under the category of works contract service and requested to decide case accordingly.

PERSONAL HEARING :

11. Shri N. K. Maru and Shri U.H. Qureshi, Consultants on behalf of the Service Provider appeared for personal hearing which was finally held on 26.12.2011. The Consultants submitted that reply to the SCN has been filed vide their letter dated 01.11.2010. They re-iterated the same. Further they also claimed the exemption under General exemption to small service providers.

FINDINGS :

12. I have carefully gone through the facts of the case available on record and the submissions made by the Service provider in writing and orally. The issue to be decided in this case is whether the Service Provider has provided taxable services to GETCO without obtaining registration under Service Tax law, without payment of Service Tax

and that service tax amounting to Rs.9,18,786/- is required to be demanded and recovered from them.

12.1 I find that during investigation of the case statement of the Proprietor of the Service Provider firm has been recorded on 26.05.2010 under Section 14 of the Central Excise Act, 1944 in which he has categorically admitted to have provided taxable services to GETCO since 2005-06. He has also confirmed that they obtained registration for providing taxable services on 23.01.2009 only and that they started paying service tax from that date. Thus, it is clear that the Service Provider did not obtain registration for providing taxable services prior to 23.01.2009; that they were providing taxable service to GETCO right from 2005-06 and did not pay service tax on the services provided by them during the period from 2005-06 to 22.01.2009. They have submitted details of services provided to GETCO during this period and the amount received from GETCO (the service recipient) which is given in Annexure to the impugned SCN.

12.2 The Service Provider has contended that they have provided service of Work Contract which became taxable with effect from 01.07.2007 only. In this regard I find that the SCN has proposed the services to be classified under Construction of Commercial / Industrial Building Services and Installation Services. I find that the Service Provider has submitted a copy of the Contract they have signed with the GETCO. The said Contract has given full details of the work offered to the Service Provider by the GETCO. The Contract start with the word ".....GETCO is pleased to place the order on you for the work of **construction of C. R. building foundation, compound wall, WBM road, water supply & drainage system & other ancillary civil works**". The rate and amount of the Contract has nowhere described the transfer of property which the Service Provider has claimed in para 5 of their reply. In-fact there is no sale of property as per the contract. Moreover in case of sale of property, stamp duty is required to be paid. The Service Provider has failed to submit any evidence to show that their contract was for construction / erection of building and other civil work on their land and thereafter sale of it to GETCO.

12.3 The services provided by the Service Provider appropriately fall under the category of 'Construction or Renovation of Commercial / Industrial Building/Pipelines/Conduits Services' as per provisions of Section 65(25b) & 65 (105) (zzq) of Finance Act, 1994. The said service became taxable with effect from 10.09.2004. Whereas for a service to fall under the category of 'Work Contract Service' it has to fulfill condition of transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods. Since in this case the Service provider has failed to provide any evidence to prove that there was sale of property which is levied with tax as sale of goods, it cannot be considered as 'Work Contract Service'.

12.4 Other contention of the Service Provider is that they are eligible for exemption of threshold limit of Rs.4 lakhs and Rs.8 lakhs available to small service providers. I find substance in this contention to some extent. They are eligible for exemption in the first

year i.e. the year 2005-06 only as thereafter they had crossed the exemption limit in every year. Therefore, the service tax for the year 2005-06 shall be as under :

(i) Gross Amount received	: Rs.17,75,976/-
(ii) Threshold exemption	: Rs.4,00,000/-
(iii) Amount for calculation of S.T.	: Rs.13,75,976/-
(iv) Net taxable value @33% of above	: Rs.4,54,072/-
(v) Service Tax @ 10.20%	: Rs.46,315/-

12.5 Thus, the total amount of service tax which is required to be recovered under Section 73(2) of the Finance Act, 1994 alongwith interest at appropriate rate under Section 75 of the Finance Act, 1994 from the Service Provider comes to Rs.9,05,322/-, as under :

(i) Year 2005-06	: Rs.46,315/-
(ii) Year 2006-07	: Rs.51,245/-
(iii) Year 2007-08	: Rs.8,07,762/-

13. The Service Provider has relied upon decision of Hon'ble Tribunal in the case of SEPCO Electric Power Construction Co. Vs. CC (2007) 8 SIT 327 = 7STR 229 (CESTAT), Prince Foundations Vs. CST (2009) 22 SIT 240 (CESTAT) in support of their contention. However I find that the facts of the relied upon case and that of the present case are different therefore, the ratio of the relied upon judgments are not applicable in the present case.

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 Service Provider 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 2005-06. 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."

14.1 The service tax demanded in the Show Cause Notice ought to have been deposited by the Service Provider 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 Service Provider for failure to make timely payment of Service Tax.

14.2. 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”

14.3 Since, the Service Provider has failed to pay service tax, to take registration, to keep / maintain books of accounts and other documents as required under the law. Therefore, they have become liable for penal action under provisions of Section 77(1) (a) of the Act. They have also become liable for penal action under Section 77(2) of the Act.

14.4 I find that the Service Provider has failed to obtain registration upto 23.01.2009 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 Service Provider 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. In view of the provisions of law and the facts of the case, as discussed herein above I hold that the Service Provider has provided service under category of “Construction or Renovation of Commercial / Industrial Building/Pipelines/Conduits Services” from 2005-06 and suppressed this fact from the department upto 23.01.2009 with an intention to evade payment of Service Tax on this service. The Service Provider 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

16. (i) I confirm the demand of Rs.9,05,322/- (Rupees nine lakh five thousand three hundred twenty two only) (including Education cess) and order to recover from M/s. Sunny Construction, 63, Old Housing Bopard, Surendranagar under Section 73(2) of the Finance Act, 1994 alongwith interest at appropriate rate under Section 75 of the Finance Act, 1994. I drop the demand of Rs.13,464/- (Rupees thirteen thousand four hundred sixty four only) out of total demand of Rs.9,18,786/- raised under show cause notice dated 23.09.2010.

- (ii) I impose penalty of Rs.200/- (Rupees two hundred only) per day or 2 (two) percent of the tax confirmed in (i) above, 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 section shall not exceed the service tax payable.
- (iii) I impose penalty of Rs.1,000/- (rupees one thousand only) upon M/s. Sunny Construction, 63, Old Housing Bopard, Surendranagar under Section 77 of the Finance Act, for the period upto 10.05.2008. For the period after 10.05.2008 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 (2) of the Finance Act, 1994 63, upon M/s. Sunny Construction, 63, Old Housing Board, Surendranagar.
- (iv) I impose penalty of Rs.9,05,322/- (Rupees nine lakh five thousand three hundred twenty two only) under Section 78 of the Finance Act, 1994 upon M/s. Sunny Construction, 63, Old Housing Board, Surendranagar. 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 under this section 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.

Imamuddin Ahmed
27/12/11

(Imamuddin Ahmed)
Joint Commissioner
Central Excise
Bhavnagar.

F.NO.V/15-29/Dem-ST/HQ./2010-11..

Date : 27/12/2011.

By Registered Post A. D.

To,
M/s. Sunny Construction,
Prop. Shri K. V. Limbadia,
63, Old Housing Bopard, Surendranagar

New address :

9, Rajavir Shopping Mall,
S. T. road, Nr. Surekha Vadi,
Surendranagar – 363 002

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), Central Excise, HQ, Bhavnagar.
05. The Superintendent, Service Tax, Jurisdictional Range, Surendranagar.
06. Guard File.