


S. T. K.

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By R.P.A.D.

F. No. V/15-63/Dem-ST/HQ/2010-11.

Date of Order: 13/01/2012

Date of Issue: 06/02/2012

Passed by

IMAMUDDIN AHMED
Joint Commissioner
Central Excise
Bhavnagar

Order-in-Original No: 10 / BVR / Jt.Commr / 2012

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. Chhattar & Company,
Siddhi Vinayak Park,
Near Geeta Vidyalaya,
Veraval-362 266.

Subject: Show Cause Notice Number No. V/15-63/Dem-ST/HQ/2010-11 Dated 18.10.2011 issued to M/s. Chhattar & Company, Veraval demanding Service Tax of Rs.21,21,903/-.

BRIEF FACTS OF THE CASE

1 An intelligence was collected from the reliable sources by the Assistant Commissioner, Service Tax Division, Bhavnagar and Superintendent, Service Tax (Preventive and Survey) , Bhavnagar that Maintenance or repairs contractors engaged by M/s Aditya Birla Nuvo Ltd., Unit-Indian Rayon, Veraval (Hereinafter referred to as "M/s Indian Rayon ") are not paying any service tax on the taxable service provided by them. Therefore necessary documents were called from M/s Indian Rayon wherein it was observed that M/s Chattar and Company, Siddhi Vinayak Park, Near Geeta Vidyalaya, Veraval (Hereinafter referred to as the 'Noticee') has been engaged in carrying out erection, commissioning or installation works for the last twelve years without obtaining Service Tax Registration and without paying Service Tax.

2 For undertaking such works, M/s Indian rayon is not having their own man power but all such works are entrusted to various contractors. The works entrusted to various contractors by M/s Indian Rayon are falling in the category of **Taxable Services** i.e Erection, commissioning or installation service as defined under Section 65 (105) (zzd) and Section 65 (29), 65 (39a) of the Finance Act, 1994.

3 On the basis of such primary intelligence and on going through a copy of work order dtd. 22.11.2009 issued by M/s Indian Rayon to the Noticee it was revealed that the subject work order had been issued for " Cable Laying Work", that under this contract, the Noticee had accepted the works order and accordingly carried out such type of Electrical works in factory of M/s Indian Rayon . Therefore, it appeared that the service provided by the Noticee viz., " Management, Maintenance or Repairs Services" to M/s Indian Rayon merit classification under sub-Section (64) of Section 65 of the Finance Act, 1994.

4 Detailed investigation was carried out by issuing Summons dtd. 22.02.2010 and 05.04.2010 to the said Service Provider. During the course of inquiry, Shri Abhilash Rajkumar Atrey, Proprietor of the Noticee firm, appeared on 13.04.2010 and his statement 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, stated that they have been engaged in providing electrical maintenance and repairs services to M/s Indian Rayon for the last twelve years; that they have provided electrical maintenance service to other companies also; that for carrying out above mentioned works they have not entered into any agreement with M/s Indian Rayon ; that as and when such type of work arose M/s Indian Rayon issued work order to them ; that under these work orders they had carried out electrical house wiring and industrial wiring in the plant site and colony area of M/s Indian Rayon ; that M/s Indian Rayon provided all materials for such works ; that after completion of works assigned to them, they raised bills to M/s Indian Rayon ; that they have obtained Service Tax Registration in the month of July 2009 and have paid Service Tax for the period from August-09 to March -10. Further, he promised to produce the documents related to service tax matter viz., copies of work orders, copies of Income Tax Returns, copies of Balance Sheet etc.

5 During the course of investigation, the Noticee had submitted copy of Service Tax Registration certificate, copies of GAR-7 challan dt.31.12.2009, copy of ledger account obtained from M/s Indian Rayon for 2008-09, copy of Income Tax return for the years 2008-09, ledger account for the period from 01.07.2005 to 30.12.2008 obtained from M/s Ambuja Cements Ltd., and M/s Gaj Ambuja Cement, copy of bank statement for the period from 15.12.2005 to 31.08.2008 and from 09.12.2008 to 28.02.2010.

On going through the work order dt. 22.11.2009 issued by M/s Indian Rayon to the Noticee, it is revealed that subject work order has been issued for "Cable Laying Work"; and that the Noticee has accepted the work order and accordingly carried out such type of electrical works in the factory of M/s Indian Rayon. Further on perusing of ledger account of the Noticee

produced by M/s Ambuja Cements Ltd and M/s Gaj Ambuja Cements Ltd it appeared that the description of works found to be mentioned as "Light fitting, fixing of electrical switch boards, electrical earthing, wire checking, removing existing old and open wiring, maintenance and modification of electrical related works."

6 From above, it appeared that the Noticee has provided services to M/s Indian Rayon, M/s Ambuja Cements Ltd, and M/s Gaj Ambuja Cements Ltd, for the last twelve years and according to work orders issued by above mentioned companies they have carried the work of electrical maintenance of electrical machinery, equipments, industrial wiring, house wiring, cabling etc., in the factory as well as residential areas. Therefore, in terms of provisions of Section 65A of the Finance Act, 1994 the services provided by the Noticee to the said companies merit classification under sub-Section 64 of Section of the Section 65 of the Act, e.i "Management, maintenance or Repairs Services" since it gives essential characteristics of repairing and maintenance in the factory and building of M/s Indian Rayon, M/s Ambuja Cements Ltd and M/s Gaj Ambuja Cements Ltd.

7 Section 65 (105) (zzg) of Finance Act, 1994 reads "taxable service means any service provided or to be provided to a customer, by any person in relation to (Management, Maintenance or Repair) Section 65(64) of Finance Act, 1994 reads

"Management, Maintenance or Repair" means any service provided by-

- (i) Any person under a contract or an agreement; or
- (ii) A manufacturer or any person authorised by him, in relation to,-
 - (a) management of properties, whether immovable or not;
 - (b) maintenance or repair of properties, whether immovable or not; or
 - (c) maintenance or repair including reconditioning or restoration or servicing of any goods, excluding o motor vehicle; "

From the ledger account provided by M/s. Indian Rayon, M/s. Ambuja Cements Ltd. And M/s. Gaj Ambuja Cements Ltd. and other documents, it appeared that Noticee had received amount towards Services provided to the said companies as under :-

Sr	Financial Year	Amount received from M/s Indian Rayon, Veraval	Amount received from M/s Ambuja cements	Amount received from M/s Gaj Ambuja Cements	Amount received from M/s GSC Ltd.	Total amount received by Noticee towards Taxable service provided
	2005-06	1545440	Nil	Nil	Nil	1545440
	2006-07	2316235	846199	21795	Nil	3184229
	2007-08	262220	2379358	175257	819000	5995815
	2008-09	3309378	899183	537200	Nil	4745761
	2009-10	2862407	Nil	Nil	Nil	2862407
		1,26,55,660	41,24,740	7,34,252	8,19,000	1,83,33,652

8 From the above, it appeared that the service provided by the Noticee to the above service recipient which in terms of Section 65A of the Finance Act, 1994 is classifiable as "Management, Maintenance or Repairs Services" as defined under Section 65(64) of the said Act and Noticee has thereby rendered taxable services as defined under Section 65(105)(zzg) of the

said Act without applying for registration and without payment of Service Tax leviable thereon under the Act and the Rules made thereunder. As per Section 67 of the Act, Service Tax on these services is leviable on the gross amount charged and the Service Tax at the appropriate rate on Rs. 1,83,33,652/- for the period from 01.04.2005 to 31.03.2010 being the gross amount charged and received by the Noticee from the service recipient was liable to be recovered under Section 73 of the Act along with interest under Section 75 of the Act. Further, Noticee has not furnished complete documents before Central Excise officer and therefore has rendered themselves liable for penal action under Section 77 of the Act and the Noticee has suppressed the facts that they were engaged in providing said taxable services from Department, therefore, extended period as contemplated under Section 73(1) of the Act is invokable for recovery of Service Tax not paid.

9 After carrying out the investigation in the services provided by **M/s Chattar and Company, Veraval, Dist. Junagadh**, a Show cause Notice No.V/15-63/ST/DEM/HQ/2010-11 dtd. 18.10.2010 was issued by the Additional Commissioner, Central Excise and Service Tax, Bhavnagar to the Noticee proposing the following actions :

- (1) Demanding Service Tax of Rs.21,21,903/- under Section 73(1) alongwith interest at appropriate rate till the date of payment of Service Tax under Section 75 of the Act and appropriation of Rs. 4,64,804/- paid towards service tax under Section 73(1) of the Finance Act, 1994 ;
- (2) Imposing penalty under Section 76 of the Finance Act, 1994 for failure to assess Service Tax as required under Section 70 of the Act and failure to make payment within the period and in the manner prescribed under Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994 ;
- (3) Imposing penalty under Section 77 of the Finance Act, 1994 for failure to apply for registration under Section 69 of the Finance Act, 1994 read with Rule 4 of the Service Tax Rules 1994
- (4) Imposing penalty under Section 77 of the Finance Act, 1994 for failure to produce the documents as called for by the Central Excise Officer in accordance with the provisions of the Finance Act, 1994 and the Rules made thereunder.

DEFENCE REPLY

10 **M/s Chattar and Company, Veraval** filed a written reply dtd.06.01.2012 to Show Cause Notice dtd.18.10.2010 mainly submitting as under :

- (1) They are providing electrical as well as erection, commissioning and installation service to M/s Indian Rayon and M/s Ambuja Cements as per their requirement and are not providing repair and maintenance work to the said company so they are not covered under the head "Management, Maintenance or Repair". They are doing installation work like making earthing pits etc., as well electrical work in which they use their own materials.

As per Chapter 7, para 9.2.2 alternate options - Pre Works Contract Services :-

A Composite Contract involves both the provision of services as well as supply of goods. To the extent of supply of goods, the transaction is also deemed to be a sale and therefore is also liable for state level VAT. In order to ensure compliance with the allocated tax jurisdictions, the service tax law provides for two alternative concessional notifications in cases where goods are also supplied in the composite contract. The same is as under :

- a) Actual Abatement of the value of goods sold ;
- b) Presumptive Abatement towards the value of goods sold to the extent of a specified percentage of the gross contract value. Both the above alternatives are optional. As per Chapter 7, para 9.2.5 no service tax on

sale of goods- Notification No. 12/2003. There may be many situations wherein the service provider may also sell certain goods (whether directly as a sale or indirectly). If the service provider supplies goods and material while providing the service, value of goods and materials has to be excluded for purpose of payment of service tax. The benefit of Not o.12/2003-ST is also available in the case of deemed sales subject to the existence of necessary documentary evidence.

- (2) They are not able to produce all bills for that period as majority of bills and other documents are destroyed in flood in 2009 (Report attached), but they have some purchase bills as well as work orders of the company which shows installation of electrode pits with materials.
- (3) They are doing installation as well as electrical work with materials in M/s Indian Rayon as well as M/s Ambuja Cements so they are not able to pay service tax under "Management, Maintenance and Repair".
- (4) As shown in Show Cause Notice that M/s Indian Rayon and M/s Ambuja Cements etc., are providing materials to them for repairing work and they are covered under Management, Maintenance and Repair head is not correct because they are doing installation as well as electrical work with material charges further their service tax head is under "Erection, Commissioning and Installation. So your SCN is not as per Service Tax law and is not sustainable in law.
- (5) From the above discussion they bona fidely believe that they are not liable to pay service tax.
- (6)
 - (i) On the basis of discussion in point no.1 above they bona fidely believe that they are not covered under service tax so they have not taken registration no. And not liable under section 69 of the Act read with Rule 4 of Rules.
 - (ii) They have not collected service tax on the basis of above bona fide belief so they are not liable under Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994
 - (iii) They are not liable to pay service tax, they have not filed ST-3.
- (7) They acted on the bona fide belief as discussed above so they are not liable for any penalty under Section 76, Section 78 or any other Section of the Service Tax Act, 1994.
- (8) Even if they were liable to pay service tax, their service should be under the head "Erection, Commissioning and Installation or under Works Contract"

Works contract : As per Notification No. 23/2007-ST dated 22.05.2007 with effect from 01.06.2007 taxable service defined u/s 65 (105)(zzzz) as under :

Taxable service means any service provided or to be provided to any person by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation- For the purpose of this sub-clause, "works contract" means a contract wherein,-

- i) Transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

- ii) Such contract is for the purposes of carrying out,-
- a) Erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound work, and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators ; or
 - b) Construction of a new building or a civil structure or a part thereof or of a pipeline or conduit, primarily for the purposes of commerce or industry or
 - c) Construction of a new residential complex or a part thereof ; or
 - d) Completion and finishing services, repair, alteration, renovation or restoration of , or similar services in relation to (b) and (c); or
 - e) Turnkey projects including engineering, procurement and construction or commissioning (EPC) projects ;

Erection, Commissioning and Installation

As per Notification No.7/2003-ST, dated 20.06.2003, with effect from 01.07.2003 Taxable service defined under Section 65(105)(zzd) as under ;

Taxable Service any service provided or to be provided (to any person), by a commissioning and installation agency in relation to (erection) commissioning or installation ;

Service defined under Section 65 (39a)

“Erection, commissioning or installation” means any service provided by a commissioning and installation agency, in relation to,-

- (i) Erection, commissioning or installation of plant, (machinery, equipment or structures whether pre-fabricated or otherwise); or
- (ii) **Installation of –**
 - a) **Electrical and electronic devices, including wirings or fittings thereof ; or**
 - b) Plumbing, drain laying or other installations for transport of fluids ; or
 - c) Heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work ; or
 - d) Thermal insulation, sound insulation, fire proofing or water proofing ; or
 - e) Lift and escalator, fire escape staircases or travelators ; or
 - f) Such other similar services ;

(9) They are enclosing herewith few work order showing work done with materials.

(10) As per your Notice they are liable to pay Rs.21,21,903/- but as they do not come under the head “Management, Maintenance and Repair” they are not liable to pay any service tax. Even if they would have been liable to pay service tax, it would come under the head “Erection, commissioning and Installation” and according to Notification No.1/2006-ST dated 01.03.2006 for composite contract, only on 33 % of the gross

amount service tax could be charged or liable under works contract in which 2 % or 4 % tax on gross amount is payable.

Blue Star Ltd, V/s CC Ex, Hyderabad –II

Appellants entered into work contract for supply, erection, installation and commissioning of air conditioning plant. 80 % to 90 % of the work contract value attributed to the goods supplied by the appellants. The demand of service tax on the entire amount received under the contract is not at all justified. Issue decided in favour of the appellants by the Tribunal earlier, Bench bound to follow the ratio of its earlier Order. Demand set aside. On the basis of above, they requested to drop the above demand.

PERSONAL HEARING

11 A personal hearing was granted on dt.19.10.2011 wherein Shri Abhilash Rajkumar Atrey, proprietor of the Noticee firm appeared on 18.10.2011 before the adjudicating authority and requested some period to file the defence reply, his request was acceded to and next date for hearing was fixed on 15.11.2011 so that they could file defence reply. He also submitted that they want to pay the service tax as demanded in the Show Cause Notice. On 15.11.2011 Shri R.C.Padiya, Chartered Accountant, on behalf of the Noticee firm appeared and filed a written reply dt.14.11.2011 to the Show Cause Notice and reiterated the same, he further added that out of the demand of Service Tax raised on gross amount of Rs. 1.83 Crores approx., only 8-10 % are his job/labour charges and major amount is related to the cost of materials, he however, was not able to produce any documentary evidence about his claim. He requested for a week's time to produce the bills etc., accordingly next date of 24/25.11.2011 was fixed for hearing. On 09.01.2012, Shri R.C. Padiya, Chartered Accountant, appeared for personal hearing and produced a detailed written submission and reiterated the same. He requested to decide the matter on the basis of his written submission.

DISCUSSION & FINDINGS:

12. I have carefully gone through the notice, case records, written reply to the notice and submissions made at the time of personal hearing.

13. The impugned notice has been issued demanding service tax on the taxable services classifiable under Management, Maintenance and Repair service rendered by the Noticee and proposing to impose penalty under section 76, 77 and 78 of the Act. The Noticee have disputed the classification of the service provided by them, proposed in the notice and have also challenged the quantum of demand on the grounds that abatement on account of cost of materials used has not been extended in the notice.

14. I find that the inquiry for non-payment of service tax was commenced by recording a statement of Proprietor of the Noticee dated 13.04.2010 before Superintendent of Central Excise, Bhavnagar. In the statement recorded in Hindi under Section 14 of Central Excise Act, 1944 Shri Abhilash Rajkumar Atery, Proprietor of the Noticee has interalia deposed that they are engaged in maintenance and repair relating electrical installations; that the company (service recipient) issues work orders to them and the materials required for carrying out such repairing and maintenance are provided by the company. This statement has never been retracted; therefore the deposition made before the central excise officer under Section 14 of the Central excise Act is valid and substantial evidence. I also find that the Noticee was issued registration certificate by the Superintendent Central Excise in Form ST-2 on 6.07.2009 and against the "Taxable service offered" it is mentioned as "MANAGEMENT MAINTENANCE AND REPAIR". It is pertinent to note that registration certificate is issued on application being made by the concerned person to the jurisdictional Superintendent of Central Excise mentioning therein the nature of service among other details.

15. In view of the above discussion it is clear that the Noticee has been providing taxable services classifiable under "Management, Maintenance and Repair" and upon their making application to the department the registration for payment of service tax for providing "Management, Maintenance and Repair" was issued and the inquiry conducted also revealed that they have been providing the same service. Therefore, the taxable services provided by the Noticee has been rightly classified under "Management, Maintenance and Repair" in the notice for demanding the service tax not levied and paid by the Noticee. Hence the contention of the Noticee that they are not providing "Management, Maintenance and Repair" and their services are classifiable under Works Contract service is not only contrary to their own version but also contrary to the facts on record and afterthought. In view of this the case laws cited by the Noticee are not relevant looking to the facts of the case.

16. The value for the purpose of service tax is governed by Section 67 of the Act and in terms of Notification No. 12/2003-S.T. the value of goods and materials sold by the service provider to the service receiver is exempt from service tax. This exemption is available subject to non-availment of CENVAT credit on such goods and materials and maintenance of documentary proof which specifically indicates the value of goods and materials as clarified by CBEC vide circular No, 233/2/2003-CX-4 dated 3.03.2006 (this circular was withdrawn vide circular no. 96/7/2007-S.T. dated 23.08.2007 but this has not affected the condition of production of documentary evidence). The Noticee has contended that they are not able to produce any bills as they are destroyed in flood, I find that the Noticee had not produced any documents whatsoever during the course of the inquiry for this very reason. However, they have produced certain documents like ledgers, work orders which were obtained from the service recipient. Therefore it is hard to believe that the Noticee could not procure bills submitted to the service recipient or any other document or certificate from the service recipient that the consideration paid to the Noticee includes value of goods and material sold to them. Moreover, the Noticee have been selective in producing the copies of work orders and have not produced copies of work orders which are not convenient to them. In fact the very heading of the work orders the copies of which have been produced in defence reads "SERVICE JOB ORDER". In view of this the claim for abatement from the value does not survive.

17. I find that the noticee has evaded tax by wilfully suppressing their tax liability for which they are liable for penal action under the provisions of Section 76, 77 and 78 of the Act. The noticee has contravened the provisions of the Act and the Rules in as much as they have not paid service tax on the services of "Management, Maintenance and Repair" Service. Hence, penalty under Section 76 of the Finance Act, 1994 is imposable on the noticee for failure to make timely payment of Service Tax.

Regarding penalty under Section 77 of the Finance Act, 1994 I find that the noticee has failed to obtain registration for the taxable services provided by in accordance with the provisions of section 69 of the Finance Act, 1994 therefore, they are liable for penalty under section 77 of the Finance Act, 1994.

The noticee has failed to make payment of service tax and subsequent filing of Service Tax Return within prescribed time limit. It is also a fact that they have suppressed the facts of having received taxable services with an intent to evade payment of Service Tax. As the noticee has suppressed the vital facts with an intent to evade payment of Service Tax they are liable for penal action under Section 78 of the Finance Act, 1994.

In view of the above, I pass the following order.


ORDER

- (i) I determine Rs.21,21,903/-(Rupees Twenty one lakhs Twenty one thousands None hundred and three only) as the amount of service tax not levied and paid by the Noticee under Section 73 (2) of the Finance Act, 1994 and the same shall be recovered from them. The Notice shall also

pay interest at appropriate rate on the above confirmed demand under Section 75 of the Finance Act, 1994.

- (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 for failure to 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, during the period in which such failure continued during 01.04.2005 to 10.05.2008, provided that the total amount of penalty payable in terms of this account shall not exceed the service tax payable upto 10.05.2008.
- (iii) I impose penalty of Rs. 1,000/- (Rupees One Thousand only) under Section 77 of the Act, for failure to obtain registration during the period upto 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, for failure to obtain registration during the period from 10.05.2008 till the date of actual compliance.
- (iv) I impose penalty of Rs.5,000/- (Rupees Five Thousand only) under Section 77(2) of the Finance Act, 1994 upon Noticee, for failure to file prescribed return, under section 70 of the Finance Act, 1994 read with Rule 7 of the Rules.
- (v) I impose penalty of Rs.21,21,903/- (Rupees Twenty one lakhs Twenty one thousands Nine hundred and three only) under Section 78 of the Finance Act, 1994. If the amount is determined under Sr. No.(i) above is paid within 30 days from the receipt of this order alongwith the interest payable than as per proviso to Section 78 the penalty will be only 25% of the Service Tax determined at Sr. No.(i) above. Further, 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.

The Noticee shall forthwith pay the aforementioned amount.


(Imaruddin Ahmed)
Joint Commissioner
Bhavnagar.

F.No.V/15-63/DEM-ST/HQ/2010-11

Date : 06.02.2012

To
M/s CHATTAR AND COMPANY,
Siddhi Vinayak Park,
Near Geeta Vidyalaya,
Veraval- 362 266.

Copy to:

- (1) The Commissioner, Central Excise, Bhavnagar (RRA Section).
- (2) The Assistant Commissioner (AE), Central Excise, HQ, Bhavnagar.
- (3) The Assistant Commissioner, Service Tax Division, Bhavnagar
- (4) The Superintendent, Service Tax Range, Junagadh
- (5) Guard file.