

S. Rao

Govt. of India  
Office of the Commissioner of Central Excise  
'Siddhi Sadan', Plot No.6776/B-1, Narayan Upadhyay Road, Off Waghawadi Road,  
Bhavnagar

Ph.No. : 0278- 2523627  
Fax No.: 0278-2513086

E-mail- adjbhavnagar.gmail.com

**By R.P.A.D.**

F. No. V/15-61/Dem-ST/HQ/2010-11.

Date of Order: 30/01/2012

Date of Issue: 10/02/2012

Passed by

IMAMUDDIN AHMED

Joint Commissioner

Central Excise

Bhavnagar

**Order-in-Original No: 13 / 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. Universal Associates,

(Proprietor, Shri Gani Husen Jikani),

Opp. Teachers' Colony, Octroi Naka,

Veraval, Dist-Junagadh.

Subject: Show Cause Notice Number No. V/15-61/Dem-ST/HQ/2010-11

Dated 18.10.2010 issued to M/s. Universal Associates, Veraval  
demanding Service Tax of Rs.42,65,833/-.

**BRIEF FACTS OF THE CASE :**

1 On the basis of intelligence that the Civil contractors / Maintenance contractors engaged by M/s Aditya Birla Nuvo Ltd., Unit-Indian Rayon, Veraval (Herein referred to as the "M/s Indian Rayon") are not paying any Service Tax on the taxable service provided by them, necessary documents were called from M/s Indian Rayon. It was observed therefrom that M/s Universal Associates, Opp. Teachers' Colony, Octroi Naka, Veraval, Dist-Junagadh (Hereinafter referred to as the "Noticee") has been engaged in carrying out civil construction works since about last six years without obtaining Service Tax Registration and without paying Service Tax. An inquiry was initiated against the Noticee and Summons were issued to the Noticee on dt. 22.02.2010 and 05.04.2010.

2 A statement of Shri Gani Husen Jikani, Proprietor of the Noticee was recorded before the Superintendent (A.E), Central Excise HQ, Bhavnagar under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 (Hereinafter referred to as the "Act".) on 13.04.2010 wherein he , inter alia, stated that he is running a firm Namely M/s Universal Associates; that they have been engaged in providing painting , coloring, maintenance, renovation/restoration services in relation to civil structure and buildings to M/s Indian Rayon, Veraval for the last six years; that they have not entered into any contract with M/s Indian Rayon; that as and when necessity arose M/s Indian Rayon issued work order for carrying out the said works such as plastering of wall, floor repairing, renovation and color/painting work, renovation services as per work order (SOR) issued to them by M/s Indian Rayon; that under this work order they have carried out painting, maintenance, repairs, renovation etc., of civil structure in plant and painting , flooring, maintenance, repairs of residential areas and buildings; that after completion of works assigned to them, they raised bills to M/s Indian Rayon and received payments; he stated that they had neither obtained Service Tax registration nor paid any Service Tax for the taxable services provided by them; that they have not provided any taxable services to anybody else except to M/s Indian Rayon; further he promised to submit the documents such as payment details, bills, copies of work orders, copies of Income Tax Returns etc, within 15 days .

3 During the course of investigation, on perusing the copy of Ledger Account provided by M/s Indian Rayon, it appeared that the Noticee had received the amount towards services provided to M/s Indian Rayon as under :

Sr No	Financial Year	Gross amount received by the Noticee towards taxable services provided in Rs.
1	2005-06	28,75,227/-
2	2006-07	1,11,87,758/-
3	2007-08	1,52,01,207/-
4	2008-09	43,09,637/-
5	2009-10	23,20,678/-
6	<b>Total</b>	<b>3,58,94,507/-</b>

4 From the above, it appeared that the services provided by the Noticee to M/s Indian Rayon which in terms of Section 65A of the Act are classified as "Construction or Renovation of Commercial / industrial Buildings/ Pipelines/ Conduits services" as defined under Section 65(25b) , 65(105)(zzq) of

the Finance Act, 1994 without applying for registration under the category of the said service and without payment of Service Tax leviable thereon under the Act and Rules made thereunder. As per Section 67 of the Act, Service Tax on these services is leviable on the gross amount charged. Therefore, it appeared that service Tax at the appropriate rate on **Rs.3,58,94,507/-** for the period from 2005-06 to 2009-10 being the gross amount charged and received by the Noticee from M/s Indian Rayon as described in the **Annuxure-B** to the Notice was liable to be recovered under Section 73 of the Act alongwith interest under Section 75 of the Act. It also appeared that the Noticee have suppressed the facts that they were engaged in providing taxable services of "Commercial or Industrial Construction / Renovation of Buildings " from the Department.

5 It appeared from the foregoing paras that the Noticee had contravened the following provisions of Chapter V of the Act and Service Tax Rules, 1994 (Hereinafter referred to as "the Rules") related to Service Tax matter :

- i) Section 69 of the Act read with Rule 4 of the Rules inasmuch as they failed to apply to the Service Tax Department for registration under the category of "Construction or Renovation of Commercial/Industrial Buildings/Pipelines/Conduits services" ;
- ii) Section 68 of the Act read with Rule 6 of the service Tax Rules, 1994 inasmuch as they have failed to pay Service Tax at the appropriate rate on the taxable value recovered by them from M/s Indian Rayon for the taxable services provided by them during the period from 01.04.2005 to 31.03.2010 ;
- iii) Section 70 of the Act read with Rule 7 of the Service Tax Rules, 1994 inasmuch as they have failed to assess the Service Tax and file returns in form ST-3 in respect of taxable services rendered for the period from 01.04.2005 to 31.03.2010 ;
- iv) Section 77 of the Act read with Rule 5 of the Service Tax Rules, 1994 inasmuch as they have failed to produce the documents as called for by a Central Excise officer and also as promised to produce such called for documents by the Noticee in his statement dtd. 13.04.2010 in accordance with the provision of Chapter V and Rules made thereunder.

6 From the above, it also appeared the Noticee under statement admitted the facts of non-payment of Service Tax on the "Construction or Renovation of Commercial/Industrial Buildings/Pipelines/Conduits services" provided by them and thereby have rendered themselves liable to penalty under Section 76 of the Act for non-payment of Service Tax. Further, for the act of suppression of facts of providing taxable services under the category of "Construction or Renovation of Commercial/Industrial Buildings/Pipe lines/Conduits Services" and contravention of provisions of the Act, and the Rules as discussed hereinabove with an intent to evade payment of Service Tax, the Noticee have rendered themselves liable to penalty under Section 78 of the Act. Similarly, for the act of non-payment and for non applying for registration under Section 69 of the Act read with Rule 4 of the Rules and for the act of non submission of required details of amount received for "Construction or Renovation of Commercial/Industrial Buildings/Pipe lines/Conduits Services" in the prescribed return under Section 70 of the Act read with Rule 7 of the Rules as discussed

hereinabove, the Noticee have rendered themselves liable for penalty under Section 77 of the Act.

7 Therefore, a Show Cause Notice No V/15-61/ST/DEM/HQ/2010-11 dated 18.10.2010 was issued to the Noticee asking them to show cause as to why :

- (i) The Service Tax amounting to Rs.41,58,118/- + Education Cess Rs.83,162/- and Higher and Secondary Education Cess Rs.24,553/- Total **Rs.42,65,833/-** (Rupees forty two lakhs, sixty five thousand eight hundred and thirty three only) should not be demanded and recovered under proviso to Section 73(1) of the Act and interest at the appropriate rate as applicable upto the date of payment of Service Tax should not be charged under Section 75 of the Act ;
- (ii) Penalty should not be imposed upon them under Section 76 of the Act for the failure to assess Service Tax tax within the period and in the manner prescribed under Section 68 of the Act read with Rule 6 of the Rules;
- (iii) Penalty should not be imposed upon them under Section 77 of the Act for the failure to apply for registration under Section 69 of the Act read with Rule 4 of the Rules and to file prescribed returns under Section 70 of the Act read with Rule 7 of the Rules ;
- (iv) Penalty should not be imposed upon them under Section 78 of the Act for the Service Tax not levied and paid by reason of suppressing of the facts with intent to evade payment of Service Tax and having contravened the provisions of the Act and Rules made thereunder ;
- (v) Penalty should not be imposed upon them under Section 77 of the Act for the failure to produce the documents called by a Central Excise officer in accordance with the provisions of the Act and Rules made thereunder.

#### **DEFENCE REPLY :**

8 The Noticee vide letters dated 24.11.2011 and 13.12.2011 submitted defence reply to the Show Cause Notice and stated as under :

8.1 Assessee is engaged in providing painting, coloring, maintenance and renovation/restoration services in relation to civil structure and buildings to M/s Indian Rayon, Veraval. As and when required, M/s Indian Rayon issued work order for carrying out the said works such as plastering of walls, floor repairing, renovation and color, painting work etc., and accordingly assessee has provided maintenance, coloring, flooring, renovation services as per work order issued by M/s Indian Rayon. After completing the work, assessee used to issue invoices and received payment for the same.

#### **8.2 DEFINITION OF COMMERCIAL OR INDUSTRIAL CONSTRUCTION SERVICE**

As per section 65 (105) (zzq) taxable service means

"Any service provided or to be provided to any person by any person, in relation to commercial or industrial construction"

As per Section 65 (25b)

"Commercial or industrial construction "means -

- (a) Construction of a new building or a civil structure or a part thereof; or
- (b) Construction of pipeline or conduit; or
- (c) Completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure ; or
- (d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure; or
  - (i) used, or to be used, primarily for; or
  - (ii) occupied, or to be occupied, primarily with; or
  - (iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;

As per the clause (d) of definition above, service tax would be applicable on services provided for construction of a building or civil structure which is :

- 1) Used, or to be used PRIMARILY for-; or
- 2) Occupied, or to be occupied, PRIMARILY with ; or
- 3) Engaged, or to be engaged, PRIMARILY in,

### 8.3 COMMERCE OR INDUSTRY, OR WORK INTENDED FOR COMMERCE OR INDUSTRY

Hence, construction service provided by any person to any person shall be chargeable to tax only if that building or civil structure is intended for commerce or industry. In the instant case, as per work orders, the assessee has provided services for construction of school building as under:

Sr No.	Year	AMOUNT Rs.
1	2006-07	54,89,469
2	2007-08	2,45,594
3	2008-09	3,49,243
4	2009-10	14,215
		<b>60,98,521</b>

- 8.4 Further, as per para 13.2 of departmental Circular F.No.B2/8/2004-TRU dated 10.09.2004, it is clarified that in case of commercial or industrial construction services, if services are provided for educational purposes, then Service Tax would not be applicable, Relevant extract of the said Circular is as under :

13.2 The levability of service tax would depend primarily upon whether the building or civil structure is "used , or to be used" for commerce or industry. The information about this has to be gathered from the approved plan of the building or civil

construction. Such constructions which are for the use of organizations or institutions being established solely for educational, religious, charitable, health, sanitation or philanthropic purposes and not for the purposes of profit are not taxable, being non-commercial in nature".

Hence, out of total taxable services provided by the assessee, amount of Rs.60,98,521/- should be reduced as this pertains to constructions of school building and therefore it is not taxable.

#### 8.5 **WITH MATERIAL CONTRACTS AND HENCE ABATEMENT AVAILABLE**

The demand raised in Show Cause Notice is based on Gross amount received by assessee which includes amount received towards service provided with material in which the benefit of abatement under Notification No.1/2006-ST dated 01.03.2006 is required to be given. As per contract received from Indian Rayon most of the work orders are construction contracts with materials and hence abatement of 67% as per Notification N. 01/2006-ST is available to the assessee. Hence, the correct Taxable amount on which Service Tax is required to be paid and amount of Service Tax is as per **Annexure-A** attached herewith.

#### 8.6 **Waiver of interest**

Furthermore, as the assessee was not having knowledge regarding applicability of Service Tax, it prays for waiver of interest. If the assessee was having knowledge then it might not have any impediment for payment of Service Tax. As discussion and negotiation is going on with the company and company is ready to reimburse the Service Tax amount and if the service tax amount is reimbursed the assessee is ready to pay the Service Tax and purchase peace of mind. Looking towards the facts of the case, the assessee humbly requests to waive the interest raised in the said Show Cause Notice.

#### 8.7 **As regards Penalty under Section 76, 77 and 78**

According to Section 80, no penalty under Section 76, 77 or 78 can be imposed if the assessee proves that there was a reasonable cause or default or failure under these Sections. This Section provides relief to an assessee from imposition of penalty under Section 76, 77 or 78, if the assessee is able to prove that failure on his part to collect or pay Service Tax or to furnish prescribed return or suppressing or furnishing inaccurate value of taxable service was not intentional and that there was reasonable cause for such failure.

8.8 Section 80 provides notwithstanding anything contained in Sections 76,77,78 or 79; no penalty shall be imposable on assessee for any failure referred to in the said provisions if assessee proves that there was reasonable cause for said failure. [**CCE, Meerut-II V/s On Dot Couriers & Cargo Ltd. (2006) 6 STJ 337 (CESTAT, New Delhi)**]

#### 8.9 **Reasonable Cause**

Though reasonable cause has not been defined, it has been interpreted by various courts. In **Municipal Corporation of Delhi V/s Jagannath Ashok Kumar, (1987) AIR 2316 (Supreme Court)**, Apex Court observed that the reasons given by the Arbitrator are cogent and based on materials on record. Reason varies in its conclusions according to

the idiosyncrasy of the individual, and time and circumstances in which he thinks.

In **Commissioner of Wealth Tax V/s Jagdish Prasad Choudhary, (1996) AIR 58 (Patna)**, it was held that the context of penalty provision, the word, 'reasonable cause' would mean a cause which is beyond the control of the assessee. 'Reasonable cause' obviously means a cause which prevents a reasonable man of an ordinary prudence acting under normal circumstances, **without negligence or inaction or want of bona fide** from furnishing the return in time.

In **Gujarat Water Supply & Sewerage Board V/s Unique Erectors (Gujarat) Pt. Ltd. (1989) AIR 973 (Supreme Court)**, it was held that it is difficult to give an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual and the times and the circumstances of which the actor, called upon to act reasonably, know or ought to know.

In **Ram Krishna Travels Pvt. Ltd. V/s CCE, Vadodara, [2007-TMI-977-CESTAT, MUMBAI]** it was held that bonafide belief is reasonable cause under Section 80 and such, penalty was set aside following **ETA Engineering Ltd. V CCE [2005-TMI-165-CESTAT, NEW DELHI]**.

#### 8.10 DEMAND BARRED BY LIMITATION

##### Section 78 is applicable -

"Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of -

- (a) Fraud ; or
- (b) Collusion ; or
- (c) Wilful mis-statement ; or
- (d) Suppression of facts ; or
- (e) Contravention of any of the provisions of this Chapter or of the Rules made thereunder with intent to evade payment of Service Tax, the person, liable to pay such Service Tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay a penalty, in addition to such Service Tax and interest thereon, if any, payable by him, which shall not be less than, but which shall not exceed twice, the amount of Service Tax so not levied or paid or short-levied or short-paid or erroneously refunded :"

Penalty under Section 78 can be levied only if there is a fraud; collusion; wilful mis-statement; suppression of facts or contravention of any provisions with intent to evade payment of Service Tax and it can be imposed by invoking larger period or extended period for issue of show cause notice.

Only in unusual circumstances, demands for extended period are to be invoked, with a very serious allegation of suppression of facts and intention to evade payment of Service Tax. Such serious allegations of suppression can be invoked only if the assessee has deliberately done an action with an intention to hide certain facts from the Department and Department has confirmation, has confirmed it beyond doubt with aid of corroborative evidence that there was a deliberate act on part of assessee to evade tax. **There is no finding in impugned SCN which can allege**

**that assessee has intended to evade payment of tax. In the absence of any finding of "intend to evade" demand cannot be sustained and the demand raised is barred by limitation.**

Finally, they requested to give an opportunity of being heard before adjudicating authority.

**8.11 M/s Universal Associates, Veraval** , in their additional written submission dated 13.12.2011 to Show Cause Notice stated as under :

- 1 Annexure attached with detailed revised calculation of Service Tax payable by us in our case.
- 2 We can avail the basic exemption limit of Rs.4,00,000/- in the year 2005-06
- 3 We are herewith attaching the copy of invoice in relation to construction of the school building as submitted with the company. As this construction activity is non commercial in nature, service tax is not attracted. The same was clarified by the CBEC in Circular F.No.B/2/8/2004-TRU dated 10.09.2004 which was already submitted by us in our SCN reply earlier.
4. In this case the contractor having an composite contract with the company all the materials as well as labours was provided by the contractor, so we can avail the abatement and same is claimed by us in the calculation.
- 5 As we received from the company net payment after deduction TDS and P.F. and canteen coupon, Department wrongly taken all the amount in gross tax liability, we annexed herewith detailed copy of calculations for all the year for your ready reference.
6. Department had taken a total figure of Debit side from the ledger of the company and calculated tax liability from the same which is totally wrong because as we mention in earlier point that we raise the bill to the company and company make us payment after making necessary deductions and some times we have received the advance payment from the company which knock off by the company whenever we raise the bill and for the same company recorded twice or thrice all this passing the JV's for the same as per the policy of the company and Department taken all this entries in total for calculating the tax liability and for the same we annexed herewith detailed copy of calculations with bill amount for all the year for your ready reference.
7. We have relied on the record available with you and calculated the amount from the ledger of the company from which Department raise the liability.

In view of all the above submissions which are alternate to each other, your good selves are kindly requested to consider the above additional submission before adjudicating the case.



## 9 PERSONAL HEARING :

A personal hearing was fixed on 15.11.2011 wherein Shri Deepak L.Vaja, Chartered Accountant on behalf of Noticee firm appeared and requested one week's time to file reply to Show cause Notice which was considered and accordingly next date for hearing was fixed on 24/25.12.2011. On dt. 15.12.2011 Shri Deepak L. Vaja, a Chartered Accountant, on behalf of **M/s Universal Associates, Veraval** appeared before the adjudicating authority and he reiterated the written submissions dt. 13.12.2011. He further stated that the Service Tax demanded in the Show Cause Notice is wrongly calculated and as per their calculations their liability to pay Service Tax should be **Rs.5,73,281/-**. He stated that the abatement has not been provided to them and further in one case a Bill related to construction of educational building has been added and Service Tax has been demanded on this amount also.

## DISCUSSION AND FINDINGS :

10. I have carefully gone through the Notice, records of the case and the submissions made by the Noticee.

11. The impugned Notice demands Service Tax on the activities of "Construction or Renovation of Commercial/ Industrial Buildings/Pipelines / Conduits Services" in M/s Indian Rayon plant undertaken by the Noticee and seeks to impose penalty for non-payment of Service Tax. The Noticee on the other hand have contested the very classification of taxable service resorted in the Notice and also challenged the calculations of liability to pay Service Tax and have raised the issue of abatement and issue of a bill in one case which is related to construction of Educational building which is wrongly included in the demand Notice.

12. I find that the inquiry for non-payment of Service Tax was commenced by the issuance of summons dated 22.02.2010 and 05.04.2010 and in response thereof a statement of Shri Gani Husen Jikani, Proprietor of the Noticee was recorded on dt. 13.04.2010 before Superintendent of Central Excise, Bhavnagar. In the statement recorded under Section 14 of Central Excise Act, 1944 Shri Gani Husen Jikani, proprietor of the Noticee firm has deposed that they are engaged in providing painting, coloring, maintenance, renovation/restoration services in relation to civil structure and buildings to M/s Indian Rayon, Veraval since last six years; that they have never entered into contract with M/s Indian Rayon but as and when necessity arose M/s Indian Rayon issued work order for carrying out the said work such as Oplastering of walls, floor repairing, renovation and colour/painting works etc., and accordingly they have provided these services to M/s Indian Rayon, Veraval. This statement has never been retracted, therefore the deposition made before the Central Excise officer under Section 14 of the Central Excise Act, 1944 is valid and substantial evidence. I also find that the Noticee had neither obtained Service Tax registration nor paid any Service Tax for the taxable service provided by them and that the Noticee had not provided any taxable services to anybody except to M/s Indian Rayon, Veraval.

13. In view of the above discussion it is clear that the Noticee has been providing taxable services classifiable under "**Construction or Renovation of Commercial/Industrial Buildings/Pipelines/Conduits Services**" as defined under sub-Section (25b) of Section of the Finance Act, 1994 and have rendered taxable services as defined under Section 65 (105)(zzq) of the

Act *ibid* without applying for registration and without payment of Service Tax leviable thereon under the Act and the Rules made thereunder.

14. The Noticee has provided taxable services from the period 2005-06 to 2009-2010 to M/s Indian Rayon and have undertaken only labour work involved in the services provided by them without supplying materials and goods. 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 provider 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, 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. Therefore in terms of Section 67 of the Act, the gross amount of **Rs.3,58,94,507/-** received during the period from 01.04.2005 to 31.03.2010 shall be the value for the purpose of levy of tax. Hence the Service Tax at appropriate rate has been rightly demanded from the Noticee after considering the basic exemption limit of Rs. 4,00,000/- for the year 2005-06 as contained in Notification No.6/2005-ST dt.01.03.2005 as per Annexure -B to the Notice.

15. The Noticee have also claimed deduction of TDS, P.F. and canteen coupon from the value taken in the notice. I find that TDS is the statutory liability of the Noticee and can be claimed as refund from their ultimate tax liability therefore it cannot be claimed as deduction from the consideration for the services provided. The contribution towards P.F. reimbursed or paid separately can also be not deducted as the contribution towards Provident fund of the labourers or the employees of the Noticee is the liability of the Noticee and therefore forms the part of their cost for providing service. Similarly any benefit or perks enjoyed by their employees and charged by the service recipient is the cost towards provision of service and is part of the consideration received from the service recipient in terms of section 67 of the Act.

16. The Noticee have contended that out of total amount of taxable services provided by the Noticee and amount of Rs. 60,98,521/- for the period 2006-07 to 2009-10 pertain the construction of School buildings and in terms of Departmental Circular No B2/8/2004-TRU dated 10.09.2004, para 13.2 the same is not taxable. The Noticee, however, has not come forth with documentary evidences/proof in this regard; I therefore, am not in a position to accept their claim on this point.

17. I find that the Noticee have evaded Service Tax by wilfully suppressing their Tax liability for which they are liable for penal action under the provisions of Section 76 and 78 of the Act. The Noticee has contravened the provisions of the Act and the Rules inasmuch as they have not paid Service Tax on the services of "Construction or Renovation of Commercial/ Industrial Buildings / Pipelines / Conduits Services". Hence, penalty under Section 76 of the Finance

Act, 1994 is imposable on the Noticee for failure to make timely payment of Service Tax.

18. The Noticee have 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 consideration/gross value for providing taxable services during the period 2005-06 to 2009-10 with an intent to evade payment of Service Tax. As the Noticee have 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.

19. I also find that the Noticee have failed to apply for registration at the material time as required under Section 69 of the Act read with Rule 4 of the Service Tax Rules, 1994 penalty is imposable on this account.

20. I find that the Noticee have raised the point of waiver of interest on the ground that they were not having knowledge regarding applicability of Service Tax. Interest on the delayed payment of service Tax is leviable under Section 75 of the Finance Act, 1994 which provides that every person, liable to pay the tax in accordance with the provisions of Section 68 or rules made thereunder, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest as is fixed by the Central Government for the period by which such crediting of the tax or any part thereof is delayed. Therefore, the Contention of the Noticee for waiver of interest on the Service Tax is rejected.

21. I find that the Noticee have raised that according to Section 80 of Finance Act, 1994 no penalty under Section 76, 77, or 78 can be imposed if the assessee proves that there was a reasonable cause or default or failure under these Sections on his part to collect or pay Service Tax or to furnish prescribed return or suppressing or furnishing inaccurate value of taxable service and there was a reasonable cause for such failure.

22. I find that Section 76,77 and 78 of the Finance Act, 1994 have been invoked in the Notice dt. 18.10.2010. I find that the Noticee have evaded Service Tax by suppressing their tax liability for which they are liable for penal action under the provision of Section 76 of the Act. The Noticee have contravened the provisions of the Act and the Rules inasmuch as they have not paid service Tax on the Services of "Construction or Renovation of Commercial/Industrial Buildings/Pipelines /Conduit Services. Hence , penalty under Section 76 is imposable for failure to make timely payment of service Tax.

23. I find that the Noticee have 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 the taxable services with an intent to evade payment of Service Tax, they are liable for penal action under section 78 of the Finance Act, 1994.

23 (a) In case of **Dharmendra Textile Processors** as reported in **2008(231) E.L.T 3 (S.C)**, the Hon'ble Supreme Court has held that lesser amount of penalty is not impossable, there is no discretion available on quantum of penalty under Section 11 AC of Central Excise Act, 1944. In Union Budget of 1996-97, the position was made clear that there is no scope of discretion under Section 11 AC and the levy of penalty is mandatory penalty. Section 11AC of Central Excise Act, 1994 is pari-materia with Section 73 of the Finance Act, 1944 as such penalty which is mandatory under Section 78 of the Finance Act, 1994.

- (b) In case of **CCE Delhi III V/s Machino Montell (I) Ltd.**, as decided by the Hon'ble High Court of Punjab and Haryana it has been held that penal liability arises in situation mentioned in Section 11 AC of Central Excise Act, 1994 and mere deposit of duty prior to issue of show cause notice does negate the situations mentioned in Section 11 AC ibid. Section 11 AC of Central Excise Act, 1994 is pari materia with the provisions of Section 78 of the Finance Act, 1994.
- (c) The High Court of Karnataka in case of **M/s United Communication, Udupi Vs. CCE, Manglore** reported in **2011-TIOL-802-HC-KAR-ST** has held that before issue of SCN, penalty is leviable for non-payment of Service Tax when liability is known.

In view of above discussions, Noticee's contention regarding penalty under Section 76, 77, or 78 under provisions of Section 80 of Finance Act, 1994 is not imposable is rejected.

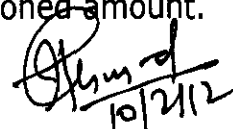
24. In view of the above discussion, I pass the following order .

### ORDER

- 24.1 I determine **Rs. 42,65,833/-** ( Rupees forty two lakhs sixty five thousand and eight hundred and thirty three only) as the amount of Service Tax not levied and not paid by the Noticee under Section 73(2) of the Finance Act, 1994 and the same shall be recovered from them. The Noticee shall also pay interest at appropriate rate on the above confirmed demand under Section 75 of the Finance Act, 1994.
- 24.2 I Impose a penalty at the rate of Rs.200/- per day or two per cent per month whichever is higher under the provisions of 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 from 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 during the period.
- 24.3 I impose penalty of Rs. 1000/- (Rupees one thousand only) under Section 77 of the Finance Act, 1994 for the period upto 10.05.2008 . For the period after 10.05.2008, I impose penalty of Rs. 5000/- ( Rupees Five Thousand Only) or Rs. 200/- (Rupees two hundred only) per day whichever is higher under Section 69 of the Act read with Rule 4 of the Rules starting with the first day after the due date till the date of actual compliance.
- 24.4 I impose penalty of Rs.5000/-(Rupees five thousand only) under Section 77 (2) of the Finance Act, 1994 upon the Noticee for failure to file prescribed return under Section of the Act, read with Rule 7 of the Rules.
- 24.5 I impose penalty of **Rs. 42,65,833/-** (Rupees forty two lakhs sixty five thousand eight hundred and thirty three only) under Section 78 of the Finance Act, 1994. If the amount determined under para

21.1 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 para 21.1 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 abovementioned amount.



(IMAMUDDIN AHMED)  
JOINT COMMISSIONER  
Central Excise & Service Tax  
Bhavnagar

F.No.V/15-61/DEM-ST/HQ/2010-11

Date :- 10.02.2012.

**To,**  
**M/s Universal Associates,**  
**(Proprietor, Shri Gani Husen Jikani)**  
**Opp. Teachers' Colony, Octroi Naka,**  
**Veraval, Dist- Junagadh.**

Copy to:

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

