



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

F. No. V/15-95/Dem-ST/HQ/2009.

Date of Order: 15/02/2012

Date of Issue: 09/03/2012

Passed by

IMAMUDDIN AHMED
Joint Commissioner
Central Excise
Bhavnagar

Order-in-Original No: 18 / 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. Singh Construction,
Old LIG No. 583, Near Jain Derasar,
Anandnagar,
Bhavnagar.

Subject: Show Cause Notice Number No. V/15-95/Dem-ST/HQ/2009 Dated 11.02.2010 issued to M/s. Singh Construction, Bhavnagar demanding Service Tax of Rs.13,65,583/-.

Brief facts of the case

On the basis of intelligence that the labour contractors engaged by M/s Nirma Limited, Kalatalab, Bhavnagar were not paying any Service Tax on the taxable service classifiable under 'Manpower Recruitment And supply Agency's Service', an inquiry was initiated against **M/s Singh Construction, Old LIG No.583, Near Jain Derasar, Anandnagar, Bhavnagar (hereinafter referred to as the Noticee)** which was engaged in supply of manpower to M/s Nirma Limited. A Summons was issued on 11-11-2008 to the Proprietor of the Noticee calling upon him to remain present and produce copies of Audit Reports along with Balance-Sheets & P & Loss Accounts, ST-3 Returns and Income Tax Returns etc.

2. Statement of Shri Satyendra Narayan Singh, Proprietor of the Noticee was recorded under Section-14 of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 (*hereinafter referred to as "the Act"*) on 19-11-2008 before the Superintendent (A.E.), Central Excise, H.Q., Bhavnagar wherein he produced copies of Income Tax Returns along with Balance Sheet & Audit Reports etc. for the last five years and stated that his office is situated at Nirma Soda Ash Plant, Kalatalav, Bhavnagar and he was proprietor of the firm; **that** he was engaged in manpower supply since December-2001, however, he obtained Service Tax Registration on 9-3-2006 for the category of 'Manpower Recruitment Agency', 'Maintenance Or Repair Service' and 'Construction Service in respect of Commercial or Industrial Building and Civil Structures' and its no. is ASBPS1423QST001; **that** he had no contract or agreement with M/s Nirma Limited and he was providing labours to them for which he got the payment from them and then he was paying wages/salary etc. to the labours; **that** he was not providing any service to anyone for maintenance and repairs; **that** he had neither paid any Service Tax for any category nor filed any self-assessed half-yearly return (ST-3) till date; **that** after mentioning income for the last five financial years, he stated that he was not in a position to state at that time about earning of income from different types of work, however, he would submit the bifurcation of income within two days; **that** he admitted that he had suppressed the amount received against service provided to circumvent from service tax liability and assured that he was ready to pay service tax payable for providing the services.

3. A further statement of Shri Satyendra Narayan Singh, Proprietor of the Noticee was recorded under Section-14 of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 on 25-11-2008 before the Superintendent (A.E.), Central Excise, H.Q., Bhavnagar wherein he interalia stated that during the financial year **2005-06** he had done work for cutting, welding, shering, staightning, bending, fabricating & erecting of structural steel works of Terminal 1B at Chhatrapati Shivaji International Airport, Mumbai and for that work he had received Rs.5,37,307/- and produced a copy of the Work Order dated 8-3-2005 issued by M/s Magnum Infraprojects Limited, Mumbai along with a copy of the bill dated 25-10-2005; **that** during the financial year **2005-06** he had done work for Catewalk Bridge for Tansa Dam site and for that work he had received Rs.6,89,709/- and produced copy of the Work Order dated 25-9-2004 issued by M/s Backbone Construction Pvt. Ltd., Mumbai along with a copy of the bill

dated 15-7-2005 and stated that the remaining amount of his income for the financial year 2005-06 i.e. Rs.15,25,669/- was earned by him towards manpower supply service to M/s Nirma Limited and confirmed that he had not paid any service tax on that amount; **that** during the financial year 2006-07 he had done work of fabrication, rod cutting & bending, bolt cutting & fixing etc. and labour supply to M/s Unity Infraprojects Limited, Mumbai and got Rs.7,03,578/- & Rs.49,962/- respectively towards these service from them and he produced a copy of R.A. Bill No.5 dated 15-2-2007 in that regard and stated that the remaining amount of his income for the financial year 2006-07 i.e. Rs.14,98,177/- was earned by him towards the manpower supply service to M/s Nirma Limited; **that** during the financial year 2007-08 he had done work of fabrication and erection, dismantling of steel etc and labour supply to M/s Ashapura Valclay Limited, Bhuj-Kutch and got Rs.3,70,815/- towards this service from them and produced a copy of R.A.Bill No.02/07 dated 26-10-2007 and stated that the remaining amount of his income for the financial year 2007-08 i.e. Rs.36,26,490/- was earned by him towards the manpower supply service to M/s Nirma Limited; **that** he had collected the amount of service tax from M/s Nirma Limited against service provided to them from August-2006, however, he had not deposited the same in treasury of the Government to circumvent from service tax liability.

4. On going through copy of the Work Order dated 25-9-2004 given by M/s Backbone Projects Ltd., Mumbai to the Noticee, it appeared that out of the project of construction of New Catwalk Bridge at Tansa Dam Site, the Noticee were given the work of 'Fabrication & Erecting Structural Steel Wall' to be fabricated from steel angels, gusset plates on two sides connected with channels & cross beams to supports, chequered plate flooring as per detail Design & drawing including, base plate, nuts & bolts, welding wherever required inclusive of one coat of red oxide & two coats of oil painting complete with all leads & lifts as directed. Further, it appeared that the Work Order was only for Labour Work and all required material was to be provided by M/s Backbone Projects Ltd.

5. On going through copy of the Work Order dated 8-3-2005 of M/s Magnum Infraprojects Pvt. Ltd. given to the Noticee, it appeared that out of the project of 'Construction of Expansion & Modification to Terminal - 1B at Chhatrapati Shivaji International Airport, Mumbai, the Noticee were given the Work Order the scope of which was cutting, welding, shearing, straightening, bending, fabricating & erecting of structural steel works as per the details given. Further, it appeared that the materials were either supplied to the Noticee by M/s Magnum Infraprojects Pvt. Ltd. or its cost is reimbursed by them.

6. On going through copy of RA Bill No. No.02/07 dated 26-10-2007 raised by the Noticee on M/s Ashapura Valclay Ltd., Bhuj-Kutch, it appeared that the Noticee have carried out 'Fabrication and Erection of structural work at GCL Site for them and the bill raised by them is solely for the services provided i.e. it do not include bill for supply of any material.

7. On going through copy of RA Bill-5 dated 15-2-2007 raised by the Noticee on M/s Unity Infraprojects Ltd., it appeared that the Noticee have provided services for carrying out works viz. rod cutting & bending, plate cutting & welding, foundation bolt fixing, fabrication work, G.I. sheet fixing etc. and the bill raised by them is solely for the services provided i.e. it do not include bill for supply of any material.

8. A further statement of Shri Satyendra Narayan Singh, Proprietor of the Noticee was recorded under Section-14 of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 on 17-11-2009 before the Superintendent (A.E.), Central Excise, H.Q., Bhavnagar wherein he interalia submitted Profit & Loss Account and Balance Sheet for the year 2008-09 and stated that the whole of their income for the year 2008-09 was for the labour supply to M/s Nirma Ltd., Kala Talav Plant near Bhavnagar & Vadodara Plant; that during the year 2008-09, he had no income from providing any other services other than the above mentioned labour supply service; that during the year 2008-09, he had received Service Tax from M/s Nirma Ltd. on the bills raised by him for supply of labour to them and he started charging Service Tax in the bills raised by him to M/s Nirma Ltd. after he obtained Service Tax Registration from March-2006, however, he had not deposited the same to the Govt. and accepted his mistake and assured to pay the same with interest.

9. From the above, it appeared that the Noticee was providing taxable service of labour supply to M/s Nirma Limited which in terms of section 65A of the Act are classifiable as 'Manpower Recruitment And Supply Agency's Service' as defined under Section 65 (105) (k) of the Act without payment of service tax leviable thereon under the Act and the Rules framed thereunder. Similarly, the Noticee was also providing taxable services of fabrication and erection of structures to various companies which in terms of section 65A of the Act are classifiable as 'Erection, Commissioning or Installation Service' as defined under Section 65 (105) (zzd) of the Act without payment of service tax leviable thereon under the Act and the Rules framed thereunder. Therefore, it appeared that as per the provisions of Section 68 of the Act, the Noticee is the person liable for paying the service tax for the services provided by them. Further, it appeared that as per Section 67 of the Act, service tax on these services is leviable on the gross amount charged by the service provider. Therefore, it appeared that service tax at the appropriate rate on the services provided by the Noticee amounting to Rs.13,65,583/- as calculated & described in the Annexure-I to the Notice is liable to be recovered under Section 73 of the Act along with interest under Section 75 of the Act.

10. It also appeared that the Noticee did not file any ST-3 Returns as prescribed under Rule 7 of the Service Tax Rules, 1994 (hereinafter referred to as the Rules) for the service tax registration obtained by them and thereby suppressed the facts that they were liable for paying the service tax for the services provided under the categories of 'Manpower Recruitment And Supply Agency's Service' and 'Erection, Commissioning or Installation Service', which appeared to have been done with an intent to evade payment of Service Tax.

11. From the above, it also appeared that the Noticee have contravened the following provisions of the Act and the Rules framed thereunder with an intent to evade payment of service tax:

- (i) Section 68 of the Act read with Rule 6 in as much as they failed to pay service tax at the appropriate rate prescribed under Section 66 of the Act from time to time on the value of the taxable services provided by them during the period from 16-6-2005 to 31-3-2009,
- (ii) Section 70 of the Act read with Rule 7 of the Rules in as much as they failed to assess the Service Tax payable on the value of taxable services received for providing various services as discussed hereinabove and to furnish Returns in Form ST-3 duly mentioning the details of taxable services provided by them during the period from 16-6-2005 to 31-3-2009.

12. Therefore, it appeared that since the Noticee have suppressed the facts and contravened various provisions of the Act and the Rules as discussed hereinabove with an intent to evade payment of service tax, extended period as contemplated under proviso to Section 73 (1) of the Act is invocable for recovery of Service Tax not levied and paid by the Noticee.

13. From the above, it appeared that for the acts of suppression of facts of providing taxable services as mentioned hereinabove & liability of the Noticee to pay service tax on it and contravening various 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 furnishing of ST-3 Returns prescribed under Section 70 of the Act read with Rule 7 of the Rules as discussed hereinabove, the Noticee have rendered themselves liable to penalty under Section 77 of the Act.

14. From the above, it also appeared that the Noticee admitted the facts of non-payment of Service Tax payable by them as per the provisions of Section 68 of the Act on the taxable services provided by them. Thus, it appeared that the Noticee is also liable to penalty under Section 76 of the Act for non payment of Service Tax.

15. Therefore, the Noticee was issued Show Cause Notice F. No:V/15-95/Dem-ST/HQ/2009 dated 11.02.2010 to show cause to the Additional Commissioner, Central Excise, Bhavnagar as to why: -

- (i) The Service Tax total amounting to **Rs. 13,65,583/- (Rupees Thirteen Lacs Sixty Five Thousand Five Hundred Eighty Three only)** (calculation as shown in the Annexure-I to this Notice) should not be demanded and recovered under proviso to Section 73(1) of the Act along with the interest at the appropriate rate as applicable till the date of payment of service tax under Section 75 of the Act.
- (ii) Penalty should not be imposed upon them under Section 76 of the Act for failure to assess service tax under Section 70 of the Act and make the payment of service tax

payable within the period and in the manner prescribed under Section 68 of the Act read with Rule 6 of the Rules.

- (iii) Penalty should not be imposed upon them under Section 77 of the Act for failure to file prescribed returns under Section 70 of the Act read with Rule 7 of the Rules.
- (iv) Penalty should not be imposed upon them under Section 78 of the Act for suppression of fact of providing taxable services as mentioned hereinabove & liability of the Noticee to pay service tax on it and contravention of various provisions of the Act and the Rules as discussed hereinabove with intent to evade payment of service tax.

Defense Reply and Personal Hearing

16. Since the noticee did not file any reply, they were requested vide a letter dated 29.06.2011 to submit defense reply at the earliest and again vide letter dated 14.09.2011 were informed that P.H. was fixed on 29.09.2011, for which no body turned up and another P.H. was granted on 02.11.2011 vide letter dated 20.10.2011 and Sh.S.N.Singh, Proprietor appeared for P.H. on 15.11.2011 and he explained the reasons for not attending the earlier P.H. and he expressed his willingness to pay up the Govt. dues and sought for some time to do so and to file defense reply and his request was considered and one month's time was granted and another P.H. was fixed on 15/16.12.2011 as against which the noticee has vide a letter dated 15.12.2011 requested for further extension and vide a letter dated 19.12.2011, another P.H. was fixed on 11/12.01.2012.

17. Sh.M.A.Patel, Consultant Excise and Service Tax, C/O Nirma Ltd., Nirma House, Ashram Road, Ahmedabad has submitted a letter dated 30.12.2011 on behalf of the Noticee wherein he requested for further extension of 2 months' time stating the reasons for non-payment by the noticee. Another P.H. was fixed on 24/25.01.2012 and the noticee requested for further adjournment and accordingly P.H. was fixed on 07/08/09.02.2012 and the P.H. was held on 07.02.2012 and was attended by Sh.M.A.Patel, Consultant wherein he submitted that they accept the liability of payment of service tax in respect of services provided to M/S Nirma Ltd. and that the services provided to Airport and Construction of Dam/bridge as a sub-contractor are exempted. He also requested to extend the benefit of cum-duty price to the noticee since the S.T. was not charged and recovered from the service recipient and they will file defense reply within 02/03 days.

18. The noticee filed a defense reply vide their letter dated 09.02.2012 wherein they submitted as under :

18.1 During personal hearing held on 7.12.12, they have explained about the legality of the Service Tax liability by the noticee and also requested to file written submission shortly. The Show Cause Notice demanding Service Tax has been issued pertaining to the activities carried

out by the noticee during the period from 2005-06 to 2008- 09 for Rs.13,65,5831- alongwith interest and proposed penal actions.

18.2. The undisputed fact is that the service provider is a proprietary concern. The liability to pay the Service Tax is on the service provider who is a commercial concern. Therefore, the services provided by the proprietary concern is outside the levy of Service Tax. Therefore, the noticee is not liable to pay the Service Tax prior to the period from 1.5.06. It is further submitted that in some cases the contention of the Department is that if the services are related to charity institutions as well as no profit or loss basis, the exemption is available, it means that if services are provided with profit motive, exemption is not available. This is not correct and legal in as much as that there is no such conditions in the Service Tax Act or Rules prevailing during the material period. Therefore, the available benefits are required to be given in the present case and to drop the demand pertaining to the period prior to 1.5.06.

18.3. 2005-06

It is further submitted that it is undisputed fact that during the year 2005-06, provided the services as sub-contractor to the main contractors namely M/s. Magnum Infra projects and Back Bone Construction Pvt. Ltd. Both the main contractors entered into contract for providing the services for expansion and modification of terminal 1B International Airport, Bombay and Cat work, Bridge, Dam for TANSa Dam of the Govt. Therefore, as per prevailing provisions during the martial period in the Service Tax Act and Rules and the clarifications made by the Board, vide circular No. 147/16/2011-ST dated 21.10.11 in both the cases the service provided by the noticee as sub-contractor are exempted from Service Tax. Therefore, the Service Tax demanded on the value of Rs.5,37,307/- + Rs.6,89,709/- totaling Rs.12,27,016/- is required to be dropped.

As regards to the Service Tax liability on the balance amount of Rs.15,25,669/- received from M/s. Nirma Ltd., it is submitted that as stated earlier, the services provided by the noticee as proprietary concerned there is no liability to pay the Service Tax. However, if the same is not considered and rejected the claim of the noticee presuming without admitting even if the demand of Service Tax confirmed the benefit of available exemption of Rs.4 lacs shall have to be allowed. Further it is undisputed fact that the noticee has neither charged nor recovered the Service Tax amount from the customers and the Service Tax demanded is to be paid the gross amount received from the client is to be considered as cum tax price. Accordingly the Service tax liability will be as under for the year 2005-06:

Gross Amount = Rs.15,25,669/-

Less: 4 lacs exemption Rs.11,25,669/-

Assessable Value = Rs. 10,21,478/-

ST @ 10.20% = **Rs. 1,04,191/-**

18.4. 2006-07

They submitted that the Service Tax is demanded for the services provided to Unity Infra Projects Ltd., Mumbai and M/s. Nirma Ltd. The services provided to M/s. Unity Infra Projects Ltd., are for the activities of cutting, bolting, fabrication for structural work etc. from steel

articles. The activities carried out on job work is amounting to manufacture. Therefore, as per the provisions under the Service Tax Act prevailing during the material period there was no liability to pay the Service Tax by the job worker as exempted under the notification. Therefore, the Service Tax demanded on the value of Rs.7,53,540/- is not sustainable in law and required to be dropped. If this is not considered and not accepted. Presuming without admitting if the Service Tax is demanded the value to be considered as cum-tax price and Service Tax to be demanded after deducting the elements of Service Tax for allowing the assessable value. Accordingly the Service tax liability will be as below on the ground that the noticee has not charged and recovered the Service Tax amount from the customers.

Gross Amount = Rs.7,53,540/-
 Assessable Value = Rs. 6,71,364/-
 ST@12.24% = Rs. 82,175/-

Similarly, Service Tax demanded on the gross amount of Rs.14,98,177/- received from M/s. Nirma Ltd., submitted that the noticee has not charged and recovered the Service Tax amount from the customer. Therefore, from the value of Rs.14,98,177/- the elements of Service Tax required to be deducted and to ascertain the value in the purpose of tax liability. Accordingly it is as below:

Gross Amount Rs.14,98,177/-
 Assessable Value = Rs. 13,34,797/-
 ST @ 12.24% = Rs. 1,63,379/-

18.5. 2007-08 .

As regards to the demand of Service Tax for the year 2007-08, it is submitted that Service Tax has been demanded on value of Rs.3,70,815/- for the services rendered to M/s. Ashapura Valclay Ltd. to carry out the job of fabrication work on steel items, structural work and its erection etc. It is submitted that the activities carried out to manufacture fabrication and structural work is amounting to manufacture. Therefore, as per the existing provisions during the material period liability to pay the Service Tax is exempted under the notification. Therefore, the Service Tax demanded on the value of Rs.370815 is required to be dropped.

If the above views are not accepted and rejected and Service Tax is demanded, presuming without admitting, submitted that the amount of Rs.3,70,815/- to be considered as cum-tax price on the ground that the noticee has neither charged nor recovered any Service Tax amount separately from the client and tax to be paid now. Accordingly the liability of Service Tax is as below:

Gross Amount = Rs.3,70,815/-
 Assessable Value Rs. 3,30,024/-
 ST @ 12.36% = Rs. 40,791/-

18.6. As regards to Service Tax demanded on the amount of Rs.36,26,490/- received from M/s. Nirma Ltd. pertaining to supply of man power. The noticee has no dispute and accepted the liability for the Service Tax without any protest. It is also a fact that the noticee has neither charged nor recovered any Service Tax amount from the customers. Therefore, the amount is required to be considered as cum-tax price as provided in the Service Tax Act as well as several decisions of the appellate authorities. Since the noticee has willingly accepted the

Service Tax liability even for a period beyond limitation and so it could be very well considered that there is no malafide intension on the part of the noticee. Therefore, the benefit of cum-tax price are required to be allowed. Accordingly amount of Service Tax will be as below:

Gross Amount = Rs. 36,26,490/-
 Assessable Value = Rs. 32,27,563/-
 ST@12.36% = Rs. 3,98,926/-

18.7. 2008-09

During the year 2008-09 Service Tax demanded for the services of supply of man-power to M/s. Nirma Ltd., Kalatalav, Bhavnagar on verification of the invoices and the ledger account, it is noticed that the noticee has charged and recovered the Service Tax amount from the client. However, he has not deposited the Service Tax to the Government. It is also noticed that on which Service Tax demanded is inclusive of Service Tax amount. Therefore, as stated earlier the amount of Rs.2549614 required to be demanded on the value after deducting the elements of Service Tax amount to be paid now. Accordingly the liability for Service Tax is as below:

Gross Amount = Rs.25,49,614/-
 Assessable Value = Rs. 22,69,147/-
 ST@12.36% = Rs. 2,80,466/-

18.8. It is now submitted that in view of all the above the Service Tax liability by the noticee will be in two ways as below:

1. If the services provided are treated as services provided by Proprietor exempted as well as services treated amounting to manufacture the liability to pay the Service Tax will be as below after considering value cum-tax price.

2005-06 - Nil
 2006-07 - Nil - Unity Infra Projects
 Rs. 1,63,379/- - Nirma Ltd
 2007-08 - Nil - Ashapura
 Rs.3,98,926/- - Nirma Ltd.
 2008-09 - Rs.2,80466/- - Nirma Ltd
 Rs.8,42,771/-

2. If the services are not considered as proprietary concern as well as amounting to manufacture the liability will be as below:

2005-06 - Rs. 1,04,191/-
 2006-07 - Rs.82,175/- - Unity
 Rs.1,63,379/- - Nirma Ltd
 2007-08 - Rs.40,791/- - Ashapura
 Rs. 3,98,926/- - Nirma Ltd.
 2008-09 - Rs. 2,80,466/- - Nirma Ltd
 Rs.10,69,928/-

The noticee has already deposited the Rs.30,000/- under challan dated 19.01.12.

18.9. As regards to proposed penal action u/s 76 & 78, it is submitted that the noticee is a labour contractor and not well educated and so not conversant with the Service Tax liability. He acted bonafidely under the impression that he is not required to pay the Service Tax. Not only that but he was not properly guided by the officers nor any other person. The amount received by him is under the bills and the payments are also made by cheques. Major amount received for

services is from M/s. Nirma Ltd., Kalatalav, Bhavnagar. All the transactions are reflected in the account books of M/s. Nirma Ltd. Bhavnagar which were inspected and audited by the audit parties of the Department every year. It is a known fact and general practice by the audit that the payment of job charges are being enquired for the purpose of Service Tax liability on such job work bills and after ascertaining the details from the job work invoices they inform the job workers to pay the Service Tax if not paid. In the present case, unfortunately this has not been pointed at any time though the ledger accounts and the invoices are issued by the job worker are checked by the officers. Further when non-payment of Service Tax pointed out by the Preventive Officers and statements recorded by the officers, he has admitted the Service Tax liability and promised to pay the Service Tax amount willingly without any protest in due course. He being only a labour contractor and due to short of funds he could not made payments immediately. Due to monitory hardships he requested to give some time to deposit the entire amount of Service Tax alongwith interest in installments within a period of 5-6 months. He has deposited the amount of Rs.30,000/- under challan on 19.01.2012.

18.10. This very fact proves that there is no malafide intention to evade the tax, but he assured for payment of outstanding amount shortly. Had it been not so he would have denied the charges and contested for demand for a longer period instead of that he accepted liability willingly and promised to make payments with interest. Therefore lenient views may be taken and benefit u/s 80 of the Finance Act may be given. Therefore, in absence of any evidence on record for malafide act on the part of the noticee proposed penal action are required to be dropped in light of several decisions of the higher Appellate authorities and Hon'ble Supreme Courts.

18.11. It is further submitted that mostly Adjudicating officers are imposing the penalty u/s 76 & 78 of the Finance Act on the grounds that the demand is confirmed by invoking the longer period and so penalty imposed. This is not correct and legal in the eyes of law. Mandatory penalty can be imposed only in such type of cases where there is a fraud, misstatement, suppression of facts and intentions to evade the tax knowingly. This is not the case of this type. When the liability of tax is not disputed and showed his willingness to pay the Service Tax amount the lenient views to be taken and proposed penal actions may be dropped. From what have been submitted above, requested to modify the demand and to pass a speaking order and oblige and to grant a period of 5-6 months for payment of balance amount of the Service Tax and oblige.

Discussions and Findings

19. I have carefully gone through the records of the case, defense reply filed by the noticee and the submissions made during the personal hearing by them. I find that the Departmental Officers gathered an intelligence that the labour contractors engaged by M/s Nirma Limited, Kalatalab, Bhavnagar were not paying any Service Tax on the taxable service classifiable under 'Manpower Recruitment And supply Agency's Service', and investigated the

matter and detected that M/s Singh Construction, Old LIG No.583, Near Jain Derasar, Anandnagar, Bhavnagar engaged in supply of manpower to M/s Nirma Limited was not paying the service tax and after completion of investigation, issued SCN for demand of service tax and interest and for invoking of penal provisions.

20. I find that the noticee has admitted the fact of non-payment of service tax in their defense reply, but tried to reduce their liability to pay service tax and requested not to impose penalty and put forth various arguments which are summarized in brief as under :

1. Since the noticee is proprietorship firm, S.T. cannot be demanded for the period prior to 01.05.2006,
2. Benefit of cum-duty should be given,
3. the services provided to Airport and Construction of Dam/bridge as a sub-contractor are exempted.
4. the benefit of available exemption of Rs.4 lacs shall have to be allowed for 2005-06.
5. They carried out various activities on job work which is amounting to manufacture and therefore, there was no liability to pay the Service Tax by the job worker.
6. There was no suppression on the part of noticee and the learned consultant tried to shift the onus on departmental officers and claimed exemption from imposition of penalty and sought for benefit u/s 80 of the Finance Act.
7. They should be given time to pay up the dues and in installments.

21. I find that during investigation, Summons were issued and Statement of Shri Satyendra Narayan Singh, Proprietor of the Noticee was recorded under Section-14 of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 on 19-11-2008 and again on 25-11-2008 and again on 17-11-2009 before the Superintendent (A.E.), Central Excise, H.Q., Bhavnagar wherein he produced copies of Income Tax Returns along with Balance Sheet & Audit Reports etc. for the last five years and gave the details of his activities and the income earned and stated that he was engaged in manpower supply since December-2001, however, he obtained Service Tax Registration on 9-3-2006 for the category of 'Manpower Recruitment Agency', 'Maintenance Or Repair Service' and 'Construction Service in respect of Commercial or Industrial Building and Civil Structures' and that he had neither paid any Service Tax for any category nor filed any self-assessed half-yearly return (ST-3) till date and that he admitted that he had suppressed the amount received against service provided to circumvent from service tax liability and assured that he was ready to pay service tax payable for providing the services and that he had collected the amount of service tax from M/s Nirma Limited against service provided to them from August-2006, however, he had not deposited the same in treasury of the Government to circumvent from service tax liability.

22. On going through copy of the Work Order dated 25-9-2004 given by M/s Backbone Projects Ltd., Mumbai to the Noticee, I find that out of the project of construction of New Catwalk Bridge at Tansa Dam Site, the Noticee were given the work of 'Fabrication &

Erecting Structural Steel Wall' to be fabricated from steel angels, gusset plates on two sides connected with channels & cross beams to supports, chequered plate flooring as per detail Design & drawing including, base plate, nuts & bolts, welding wherever required inclusive of one coat of red oxide & two coats of oil painting complete with all leads & lifts as directed. Further, I find that the Work Order was only for Labour Work and all required material was to be provided by M/s Backbone Projects Ltd.

23. On going through copy of the Work Order dated 8-3-2005 of M/s Magnum Infraprojects Pvt. Ltd. given to the Noticee, I find that out of the project of 'Construction of Expansion & Modification to Terminal - 1B at Chhatrapati Shivaji International Airport, Mumbai, the Noticee were given the Work Order the scope of which was cutting, welding, shearing, straightening, bending, fabricating & erecting of structural steel works as per the details given. Further, I find that the materials were either supplied to the Noticee by M/s Magnum Infraprojects Pvt. Ltd. or its cost is reimbursed by them.

24. On going through copy of RA Bill No. No.02/07 dated 26-10-2007 raised by the Noticee on M/s Ashapura Valclay Ltd., Bhuj-Kutch, I find that the Noticee have carried out 'Fabrication and Erection of structural work at GCL Site for them and the bill raised by them is solely for the services provided i.e. it do not include bill for supply of any material.

25. On going through copy of RA Bill-5 dated 15-2-2007 raised by the Noticee on M/s Unity Infraprojects Ltd., I find that the Noticee have provided services for carrying out works viz. rod cutting & bending, plate cutting & welding, foundation bolt fixing, fabrication work, G.I. sheet fixing etc. and the bill raised by them is solely for the services provided i.e. it do not include bill for supply of any material.

26. I find that the Noticee was providing taxable service of labour supply to M/s Nirma Limited which in terms of section 65A of the Act are classifiable as 'Manpower Recruitment And Supply Agency's Service' as defined under Section 65 (105) (k) of the Act without payment of service tax leviable thereon under the Act and the Rules framed thereunder. Similarly, the Noticee was also providing taxable services of fabrication and erection of structures to various companies which in terms of section 65A of the Act are classifiable as 'Erection, Commissioning or Installation Service' as defined under Section 65 (105) (zzd) of the Act without payment of service tax leviable thereon under the Act and the Rules framed thereunder. Therefore, as per the provisions of Section 68 of the Act, the Noticee is the person liable for paying the service tax for the services provided by them. Further, it appeared that as per Section 67 of the Act, service tax on these services is leviable on the gross amount charged by the service provider. Therefore, service tax at the appropriate rate on the services provided by the Noticee amounting to Rs.13,65,583/- as calculated & described in the Annexure-I to the Show Cause Notice is liable to be recovered under Section 73 of the Act along with interest under Section 75 of the Act.

27. I find that the Noticee did not file any ST-3 Returns as prescribed under Rule 7 of the Service Tax Rules, 1994 for the service tax registration obtained by them and thereby suppressed the facts that they were liable for paying the service tax for the services provided under the categories of 'Manpower Recruitment And Supply Agency's Service' and 'Erection, Commissioning or Installation Service', and I find that it was done with an intent to evade payment of Service Tax.

28. Regarding the various submissions made by the noticee as discussed herein above, I find that the noticee firm is a commercial concern as it was doing the various activities with the profit motive only and therefore, it was very well obligatory for them to discharge the statutory obligations of paying the service tax even prior to 01.05.2006. I further find that the benefit of exemption notification No.06/2005-ST dated 01.03.2005 for the year 2005-2006 for first clearance upto Rs.4.00 lakh is not available to them for the reason that during the previous year (2004-2005), the income of the noticee was Rs.26.79 lakhs as per the Statement dated 19.11.2008 of Sh.Satyendra Narayan Singh, Proprietor of the noticee firm and therefore, the limit of Rs.4.00 lakhs was already crossed and the benefit of exemption is not available during 2005-06. Further, I find that the Noticee was well aware of the service tax laws and they obtained Registration in the year 2006 itself and charged and recovered the service tax from M/S Nirma Ltd. from August 2006 onwards, as admitted in their statement 25.11.2008, but did not pay any tax to the Govt. I find that the said statement was recorded u/s 14 of the Central Excise Act, 1944 which is made applicable to Service Tax matters vide Section 83 of the Finance Act, 1994. The Statements recorded u/s 14 of the Central Excise Act, 1944 were never retracted by the noticee, therefore, I find that the same have been voluntarily given and contains true facts, hence, having evidential value.

29. Regarding the noticee's request for the benefit of cum duty, I find that in the instant case, the Noticee had not disclosed before the department that they were providing taxable service thereby suppressed vital fact and contravened provisions of Finance Act, 1994 and Service Tax Rules, 1994 by not assessing appropriate Service Tax, payment thereof and filing of prescribed return. I find that the benefit of cum-tax-price should be allowed in bona fide case only and it should not be extended in Central Excise and Service Tax cases involving the elements of fraud, collusion, willful mis-statement, suppression of facts or contravention of any of the provisions of the Act or Rules made thereunder with intent to evade payment of duty. In this regard, I rely on the judgment of the Hon'ble Supreme Court in the case of M/s Amit Agro Industries Ltd. v/s CCE, Ghaziabad [2007(210) ELT 183 (SC)] and the decision of Hon'ble CESTAT, Principal Bench, New Delhi in the Case of Dhillon Kool Drinks and Beverages Ltd. V/s CCE Jalandhar [2011 (263) ELT 241 (Tri. Del.)]. Since, the Noticee has evaded the payment of Service Tax by way of suppression of facts and with intent to evade payment of duty, as discussed in the subsequent part of the order, is not entitled to benefit of cum-tax-value. It was only after Department initiated enquiry, the evasion of service tax by the noticee came to surface and therefore, they are not entitled for any relief whatsoever.

30. Regarding the noticee's contention that their's work was manufacture and accordingly there is no liability to pay service tax and that they are sub-contractor and are exempted from service tax and cited the Board's Circular No.147/16/2011-ST dated 21.10.2011 in their defense, I find that the claim of job work is an after thought as the Proprietor of the Noticee firm had already admitted in their Statements and even promised to pay the service tax and that the said circular provided that that exemption to sub-contractors is available only if they are providing the "Works Contract Service" to the main contractor and not for other services. I find it is nowhere forthcoming from the records of the case that the noticee has provided the "Works Contract Service" to the main contractors providing the said services and Therefore, I find that the benefit of exemption is not available to them. Further, the Noticee has voluntarily applied for Registration in form ST-1 on 07.03.2006 for the category of Manpower Recruitment Agency', 'Maintenance Or Repair Service' and 'Construction Service in respect of Commercial or Industrial Building and Civil Structures'. Accordingly, Service Tax Registration No. was ASBPS1423QST001 allotted to them on 9-3-2006 for the said categories. They never disputed the classification of services since they obtained the registration. Hence, the contention of the Noticee that they carried out various activities on job work basis which amounted to manufacturing is an afterthought and needs to be rejected.

31. Regarding their request to pay the dues in installments, I find that there is no provision in the law and accordingly, I reject their request.

32. In view of the above findings, I hereby reject all the submissions of the noticee.

33. From the above, I find that the Noticee have contravened the following provisions of the Act and the Rules framed thereunder with an intent to evade payment of service tax:

- a) Section 68 of the Act read with Rule 6 in as much as they failed to pay service tax at the appropriate rate prescribed under Section 66 of the Act from time to time on the value of the taxable services provided by them during the period from 16-6-2005 to 31-3-2009,
- b) Section 70 of the Act read with Rule 7 of the Rules in as much as they failed to assess the Service Tax payable on the value of taxable services received for providing various services as discussed hereinabove and to furnish Returns in Form ST-3 duly mentioning the details of taxable services provided by them during the period from 16-6-2005 to 31-3-2009.

34. Therefore, I find that since the Noticee have suppressed the facts and contravened various provisions of the Act and the Rules as discussed hereinabove with an intent to evade payment of service tax, extended period as contemplated under proviso to Section 73 (1) of the Act is invocable for recovery of Service Tax not levied and paid by the Noticee.

35. I further find that for the acts of suppression of facts of providing taxable services as mentioned hereinabove & liability of the Noticee to pay service tax on it and contravening

various 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 furnishing of ST-3 Returns prescribed under Section 70 of the Act read with Rule 7 of the Rules as discussed hereinabove, the Noticee have rendered themselves liable to penalty under Section 77 of the Act.

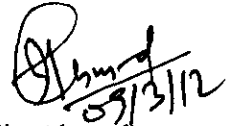
36. I further find that the Noticee admitted the facts of non-payment of Service Tax payable by them as per the provisions of Section 68 of the Act on the taxable services provided by them. Thus, the Noticee is also liable to penalty under Section 76 of the Act for non payment of Service Tax. I find that, besides the penalty under Section 78 of the Act, simultaneous the penalty under can be imposed under Section 76 of the Act upto the period 28.05.2008 and not thereafter when penalty under Section 78 is imposed. I find that in case of Assistant Commissioner of Central Excise Vs. Krishna Poduval, Hon'ble High Court of Kerala while setting aside order of single Judge withdrawing penalty, has held that incidents of imposition of penalty are distinct and separate under two provisions and even if offences are committed in course of same transaction or arise out of the same act, penalty is imposable for ingredients of both offences and that person w ho is guilty of suppression deserve no penalty under Section 80 of the Act. Relying upon this judgement, I hold that the Noticee are liable for penalty both under Section 76 and Section 78 of the Act and since there was suppression of facts as discussed earlier, I am not inclined to invoke Section 80 in this case.

37. In view of the above, I pass the following Order :

ORDER

- (i) I confirm the demand of Service Tax total amounting to **Rs.13,65,583/- (Rupees Thirteen Lacs Sixty Five Thousand Five Hundred Eighty Three only)** under proviso to Section 73(2) of the Act against the Noticee. I find that the Noticee has informed that they have paid Rs.30,000/- on 19.01.2012, I order for appropriation of said amount and remaining amount is required to be recovered.
- (ii) I order for recovery of interest at the appropriate rate as applicable till the date of payment of service tax under Section 75 of the Act.
- (iii) I impose upon them Penalty under Section 76 of the Act @ Rs.200/- per day for the period upto 18.04.2006 (subject to the maximum ceiling of the amount of service tax confirmed upon them) and for the period upto 10.05.2008, @ Rs.200 per day or @2% p.m. whichever is higher, subject to the maximum ceiling of the amount of service tax confirmed upon them.

- (iv) I impose Penalty of R.5,000/- upon them under Section 77 of the Act for failure to file prescribed returns under Section 70 of the Act read with Rule 7 of the Rules.
- (v) I impose Penalty of Rs.13,65,583/- (**Rupees Thirteen Lacs Sixty Five Thousand Five Hundred Eighty Three only**) upon them under Section 78 of the Act for suppression of fact of providing taxable services as mentioned hereinabove & liability of the Noticee to pay service tax on it and contravention of various provisions of the Act and the Rules as discussed hereinabove with intent to evade payment of service tax. However, the amount of penalty shall be reduced to 25% if the service tax as confirmed hereinabove, interest and reduced penalty is paid within one months of communication of this order.


 (Imamuddin Ahmad)
 Joint Commissioner
 Central Excise, Bhavnagar

F. No:V/15-95/Dem-ST /HQ/2009

Date:09/03/2012

To,
 M/s. Singh Construction,
 Old LIG No.583,
 Near Jain Derasar,
 Anandnagar,
 Bhavnagar

Copy to:-

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