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By R.P.A.D.

F. No. V/15-12/Dem-ST/HQ/2011-12.

Date of Order: 09/02/2012

Date of Issue: 09/03/2012

Passed by

IMAMUDDIN AHMED

Joint Commissioner

Central Excise

Bhavnagar

Order-in-Original No: 20 / 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. Inducto Steel Ltd.,
Plot No. 45, Ship Breaking Yard,
Alang. (Distt. Bhavnagar)

Subject: Show Cause Notice Number No. V/15-12/Dem-ST/HQ/2011-12
Dated 17.10.2011 issued to M/s. Inducto Steel Ltd., Alang, Bhavnagar
demanding Service Tax of Rs.29,66,400/-.

BRIEF FACTS OF THE CASE :

M/s. Inducto Steel Ltd, Plot No.45, Ship Breaking Yard, Alang, Bhavnagar (hereinafter referred to as the 'noticee') are engaged in the activities of ship breaking and other business of money lending etc. and registered under Central Excise Act, 1944 but are not registered under Service Tax laws.

2. During the course of Central Excise audit of the said noticee under EA-2000 scheme by Audit Team of HQ, Central Excise, Bhavnagar; it was noticed that the noticee had received an amount of Rs. 2,40,00,000/- towards Lease Right Compensation as 'other income' in the Balance Sheet for the Financial year 2008-09. An inquiry was initiated in the matter and relevant information/documents were called from the noticee. The noticee, vide their letter dated 06.06.2011, produced following documents:-

- (A). Copy of ledger account showing receipt of sum of Rs. 2,40,00,000/- from M/s Acme Shelters Pvt. Ltd. (hereinafter referred to as "ASPL")
- (B). Copy of Option Agreement dated 06.01.2004 entered between the noticee and M/s Acme Shelters Pvt. Ltd.
- (C). Copy of Revised Option Agreement dated 15.06.2006 entered between the noticee and M/s Acme Shelters Pvt. Ltd.
- (D). Copy of Interim Award dated 25.11.2008 granted by Shri Bharat Chhaganlal Raghani, the Sole Arbitrator, appointed by the noticee and M/s Acme Shelters Pvt. Ltd. (ASPL), in the matter of dispute relating to the Option Agreement dated 6th January, 2004 read with the revised Agreement dated 15.06.2006 and in the matter of Agreement of Reference to Arbitration dated 3rd October, 2008.
- (E). Copy of Final Award dated 29.03.2009 granted by Shri Bharat Chhaganlal Raghani, the Sole Arbitrator, appointed by the noticee and M/s Acme Shelters Pvt. Ltd. (ASPL), in the matter of dispute relating to the Option Agreement dated 6th January, 2004 read with the revised Agreement dated 15.06.2006 and in the matter of Agreement of Reference to Arbitration dated 3rd October, 2008.

3. On going through the above said documents, it was found that the noticee approached M/s Acme Shelters Pvt. Ltd., Acme Ghar, 19, K. D. Road, Vile Parle (West), Mumbai – 400 056 (hereinafter referred to as 'ASPL') with the proposal where under the noticee would introduce the owner/seller of a land described as "plot no. 3, TPS VI, Santacruz (W) at Swami Vivekanand Road, Santacruz (West) bearing CTS no. 1622, 1622/1, survey no. 295, Vile Parle" (hereinafter referred to as the 'said land') to ASPL as well as bring about the sale deal to ASPL and the noticee may acquire from ASPL a part of constructed area that it may be interested in. After detailed negotiations, the noticee entered into an agreement with ASPL vide Option Agreement dated 06.01.2004.

4.1 Para (e) on page 2 of the above said Option Agreement dated 06.01.2004 entered between ASPL and the noticee (referred to in the said agreement as ISL), is as under:-

".....ISL introduced the sellers/owners of the said land to ASPL as well as the sale deal to ASPL and accordingly ASPL agreed to enter into a Development Rights Agreement with the sellers/owners of the said land for the development of the said land. Further in consideration of ISL introducing the seller/owner of the said land to ASPL as well as the sale deal to ASPL, ASPL agreed to grant an option to ISL to acquire from ASPL upto 8,000/- square feet of saleable area as defined herein in the building that shall be constructed by ASPL on the said Land on the terms and conditions mutually agreed upon. The saleable area of upto 8,000 square feet in the building/s that may be constructed by ASPL on the said land is hereinafter referred to as 'the option property'."

4.2. As per Para 2 on page 3 of the above said Option Agreement dated 06.01.2004, it is agreed between ASPL and the noticee (referred to in the said agreement as ISL) as under:-

"In consideration of ISL introducing the seller/owner of the said land to ASPL as well as the sale deal to ASPL, ASPL hereby grants an option to acquire the said option property i.e. an area of upto 8,000/- square feet of saleable area in the building that may be constructed by ASPL on the said Land....."

4.3. Further, as per Para 6 on page 5 of the above said Option Agreement dated 06.01.2004, it is agreed between ASPL and the noticee (referred to in the said agreement as ISL) as under:-

“The consideration, for ISL introducing the sellers/owners of the said land to ASPL as well as bringing about the sale deal of the said land by ASPL pursuant to which ASPL would be able to develop the said land by constructing building/s thereon, is the grant of the option in respect of the said option property herein contained. The parties hereto agree that for the purpose of this Option Agreement, this aforesaid consideration is mutual, fair, adequate and reasonable.”

5.1 On going through the above said Option Agreement dated 06.01.2004 and Revised Option Agreement dated 15.06.2006, it was found that the noticee introduced the sellers/owners of the said land to ASPL as well as the sale deal to ASPL and accordingly ASPL agreed to enter into a Development Rights Agreement with the sellers/owners of the said land for the development of the said land and pursuant to the Development Agreement dated 16.01.2004, executed between ASPL and the owners/sellers of the said land, ASPL was able to develop said land by constructing building/s thereon, comprising of tenements etc. Further the noticee had, till 15.06.2006, not exercised the option available to it under the above said Option Agreement dated 06.01.2004, in respect of the said original option property. ASPL represented to the noticee that one party had expressed a desire to acquire the whole of constructed area on the said land and ASPL had been negotiating with the said party for the sale of the entire area. In such circumstances, ASPL approached the noticee for arriving at an alternative arrangement in lieu of the arrangement stated in the said Option Agreement dated 06.01.2004 and ASPL offered to grant an option to the noticee to acquire from ASPL an aggregate of upto 8,000/- square feet of saleable area, in any other one or more of the project/s of ASPL and/or other companies of the Acme Group, referred to in the agreements between the noticee and ASPL as the said revised option property. The noticee accepted the above said offer of ASPL and entered into an agreement with ASPL vide Revised Option Agreement dated 15.06.2006.

5.2. As per Para 1 on page 3 of the above said Revised Option Agreement dated 15.06.2006, it is agreed between ASPL and the noticee (referred to in the said agreement as ISL) as under:-

“.....the said Option Agreement dated 06.01.2004 shall stand substituted by this Revised Option Agreement, and accordingly, the terms and provisions of the said option agreement dated 06.01.2004 are substituted by the arrangement contained in this Revised Option Agreement.”

5.3. Further, as per Para 3 on page 3 of the above said Revised Option Agreement dated 15.06.2006, it is agreed between ASPL and the noticee (referred to in the said agreement as ISL) as under:-

“It is hereby expressly provided that this Option Agreement is for the option to acquire the said Revised Option Property, i.e. an aggregate of upto 8,000/- square feet of saleable area in any other one or more project/s of ASPL/other companies of the Acme Group, as may be offered by the Acme Group to ISL.”

5.4. Moreover, as mentioned at Para 7 on page 4 of the above said Revised Option Agreement dated 15.06.2006, it is agreed between ASPL and the noticee (referred to in the said agreement as ISL) as under:-

“The consideration for the grant of the option in respect of the said Revised Option property herein contained is ISL introducing the sellers/owners of the said land to ASPL and bringing about the sale deal of the said land by ASPL, pursuant to which ASPL would be able to develop the said land by constructing building/s thereon. The parties hereto agree that for the purpose of this Option Agreement, the aforesaid consideration is fair, adequate and reasonable.”

6.1 The noticee (referred to in the said Awards as the Claimant) and ASPL (referred to in the said Awards as the Opponent) have appointed Shri Bharat Chhaganlal Raghani, the Sole Arbitrator under the Agreement of Reference to Arbitration dated 3rd October, 2008 granted Interim Award dated 25.11.2008 and Final Award dated 29.03.2009. While going through the above said Interim Award dated 25.11.2008 and Final Award dated 29.03.2009, it was found that the noticee decided to get a monetary compensation against the said option property and claimed a sum of Rs. 3,72,85,767/-.

6.2. As per Para 4 on page 3 of the above said Interim Award dated 29.03.2009 and Para IV on page 3 of the above said Final Award dated 29.03.2009, both granted by Shri Bharat Chhaganlal Raghani, the Sole Arbitrator appointed by the noticee (referred to in the said Awards as the Claimant) and ASPL (referred to in the said Awards as the Opponent), it is mentioned as under:-

"The Opponent having admitted the right of the Claimant to exercise the option to take the said 8,000 square feet of saleable area as defined therein, expressed its inability to provide the same and in lieu thereof showed the willingness and readiness to pay the amount of compensation as may be determined by the Arbitrator pursuant to the Arbitration Clause contained in the said Agreement and reflected in the Arbitration Agreement between the parties".

6.3. As per Para marked as 1 on page 5 of the above said Final Award dated 29.03.2009, by Shri Bharat Chhaganlal Raghani, the Sole Arbitrator appointed by the noticee (referred to in the said Awards as the Claimant) and ASPL (referred to in the said Awards as the Opponent), the Final Award is published as under:-

"The opponent do pay to the Claimant the sum of Rs. 2,40,00,000/- (Rupees Two Crore Forty Lakhs Only) as against the sum of Rs. 3,72,85,767/- (Rupees Three Crore Seventy Two Lakhs Eighty Five Thousand Seven Hundred Sixty Seven Only) claimed by the Claimant and as against a sum of Rs. 1,62,73,430/- (Rupees One Crore Sixty Two Lakhs Seventy Three Thousand Four Hundred Thirty Only) as was offered without prejudice in the course of the arbitration by the Opponent".

7. Thus, it appeared that a sum of Rs. 2,40,00,000/- have been received by the noticee from M/s. Acme Shelters Pvt. Ltd. and shown as 'other income' in the Ledger Account of the Noticee for the financial year 2008-09. In this regard, a statement of Shri Vijay D. Vaghani, Accountant and Authorized Signatory of the Noticee was recorded on 10.08.2011 under Section 14 of the Central Excise Act, 1944 as made applicable to service tax matters by virtue of Section 83 of the Finance Act, 1994 (hereinafter referred to as the Act), wherein he inter alia stated as under:-

(a) *"I hereby produce the copies of my company's ledger of the account of "Other Income" for the financial year 2008-2009, wherein an income of Rs. 2,40,00,000/- has been shown as received in the month of March 2009. I also produce the copy of the Receipt issued to M/s. Acme Shelters Pvt. Ltd., Mumbai, for Rs.2,40,00,000/- in this connection. In addition, I produce the authenticated copy of the Option Agreement dtd. 06.01.2004 and Revised Option Agreement dtd. 15.06.2006 entered into between my company and M/s. Acme Shelters Pvt. Ltd. I also produce copies of concerned Interim Arbitration Award dtd. 25.11.2008 and Final Arbitration Award dtd. 29.03.2009".*

(b) *"my company had received Rs. 2,40,00,000/- during the month of March 2009 as shown in ledger account discussed above from M/s. Acme Shelters Pvt. Ltd., Mumbai through Arbitration Award dated 29.03.2009 discussed above. I further state that this amount is received by my company in compensation to relinquish the right of my company to acquire a saleable area of 8000 sq. ft. at the rate of Rs.3000/- per sq. ft. in a building to be constructed by M/s. Acme Shelters Pvt. Ltd. This right arose to my company pursuant to the "Option Agreement" dtd. 06.01.2004 and "Revised Option Agreement" dtd. 15.06.2006 entered into with M/s. Acme Shelters Pvt. Ltd., Mumbai".*

(c) *"I am shown the above said option agreement dated 06.01.2004, entered into by my company with M/s. Acme Shelters Pvt. Ltd., Mumbai whereby it was agreed vide Para (d) on Page 2 that Inducto Steel Ltd. would introduce the owner/seller of the land discussed in this agreement as well as the sale deal to M/s. Acme Shelters Pvt. Ltd., Mumbai and I am asked to comment on it. In reply of above paragraph I state that, we found one land which was actually for sale but land was big in size compared to our own requirement so we approached M/s. Acme Shelters Pvt. Ltd. They were ready to purchase the whole land and agree to sale the 8000 sq. ft. of saleable area from building to be constructed by M/s Acme Shelters Pvt. Ltd on the said land".*

(d) *"I am also shown Para (e) on Page 2 of above said agreement, vide which M/s Acme Shelters Pvt. Ltd. agreed to grant an option to M/s. Inducto Steel Ltd. to acquire from M/s. Acme Shelters Pvt. Ltd, the saleable area upto 8000 Sq. Ft., in the building to be constructed by M/s Acme Shelters Pvt. Ltd on the said land at the rate of Rs.3,000/-*

per Sq. Ft., in consideration of M/s. Inducto Steel Ltd. introducing the seller/owner of the said Land to M/s. Acme Shelters Pvt. Ltd as well as assisting in the sale deal/developments rights agreement between the seller/owner and M/s. Acme Shelters Pvt. Ltd and I am asked to comment on it. In reply of above paragraph I state that, as I replied above in this statement we found one land which was actually for sale but land was big in size compared to our own requirement so we approached M/s. Acme Shelters Pvt. Ltd. they were ready to purchase the whole land and agree to sale the 8000 sq. ft. of saleable area from building to be constructed by M/s Acme Shelters Pvt. Ltd on the said land and M/s. ACME can dispose of balance area of the said to be constructed building in the manner as it likes”.

(e) “I am asked that through the agreement dtd. 06.01.2004 my company got a right of option to acquire from M/s. Acme Shelters Pvt. Ltd. the saleable area upto 8000 Sq. Ft., in the building to be constructed by M/s Acme Shelters Pvt. Ltd on the said land at the rate of Rs.3,000/- per Sq. Ft. and ultimately my company received an amount of Rs.2,40,00,000/- in March 2009 instead of acquiring the said saleable area. How the events of en-cashing the right occur? In reply of above paragraph I state that since option agreement dtd. 06.01.2004 could not be fulfilled by M/s Acme Shelters Pvt. Ltd., the option agreement dated 06.01.2004 was revised vide agreement dtd. 15.06.2006 in terms that Inducto Steel Ltd. can avail this option in other projects / schemes of M/s. Acme Shelters Pvt. Ltd. instead of the project agreed on 06.01.2004. The right of option under the revised option agreement dated 15.06.2006 was also not made available to my company and therefore my company finally claimed Rs.3,72,85,767/- from M/s Acme Shelters Pvt. Ltd and M/s Acme Shelters Pvt. Ltd. offered to pay Rs.1,62,73,430/- only against this claim. My company and M/s Acme shelters Pvt. Ltd. finally agreed to approach Arbitrator to settle the claim amount and my company finally received Rs.2,40,00,000/- through Arbitration Interim Award dtd. 25.11.2008 and subsequently through Arbitration Final Award dated 29.03.2009 made by Shri Bharat Chhaganlal Raghani, the sole Arbitrator in this matter mutually appointed under Agreement of Reference to Arbitration dated 03.10.2008 against compensation of relinquishing our right and claim over the saleable area confirmed to us by ACME.”

(f) “In response to the question, whether my company is registered under service tax, I state that my company is not registered under service tax. In response to the question, as to why my company did not get service tax registration when it provided taxable services of Real Estate Agent, I state that my company is not in the business of providing services of Real Estate Agent so we are not required to be registered with Service Tax.”

(g) “I am asked that my company has introduced the seller/owner of the said Land to M/s. Acme Shelters Pvt. Ltd as well as assisted in the sale deal/developments rights agreement between the seller/owner and M/s. Acme Shelters Pvt. Ltd. as discussed in Option Agreement dtd. 06.01.2004 and this kind of services is a part of Real Estate Agent service, in view of Section 65 (105) (v) read with Section 65 (88) of the Finance Act, 1994. In reply to the above question, I state that, as I replied earlier also that we found one land which was for sale but big in size compared to our own requirement so we approached M/s. Acme Shelters Pvt. Ltd., Mumbai and ultimately they purchased the whole land directly from owner/seller. As I told earlier, I repeat again that my company has not given any services”.

(h) “In response to the question, whether the ST-3 returns have been filed by my company, I state that no such returns are filed by my company.”

8. STATUTORY PROVISION RELATING TO SERVICE RENDERED BY THE NOTICEE AND ITS LIABILITY TO PAY SERVICE TAX

8.1. REAL ESTATE AGENT’S SERVICE:

Service tax on Real Estate Agents’ Service was introduced from 16.10.1998. The definition of the said Service under section 65 (88) of the Finance Act, 1994 as amended has been as under:

“Real estate agent” means a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate and includes a real estate consultant.

8.2 The statutory definitions of some of the relevant terms related to 'Real Estate Agent' service, as defined under the provisions of the Finance Act, 1994 are as under:

Section 65(105)(v)

"taxable service" means any service provided or to be provided, to any person, by a real estate agent in relation to real estate.

Section 65(89)

"Real estate consultant" means a person who renders in any manner, either directly or indirectly, advice, consultancy or technical assistance, in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management, or real estate.

8.3 In view of the foregoing paras, it appeared that the noticee introduced the sellers/owners of a land to ASPL and assisted in bringing about the sale deal of the said land between the sellers/owners of the said land and ASPL, in the form of Development Right Agreement on 16.01.2004, between the sellers/owners of the said land and ASPL, pursuant to which ASPL was able to develop the said land by constructing building/s thereon. In consideration thereof the noticee was granted by ASPL, a right of option to acquire the said option property, as discussed in the above said Option Agreement dated 06.01.2004. This right of option was relinquished by the noticee for Rs. 2,40,00,000/- in March, 2009 and the noticee received an amount of Rs. 2,40,00,000/-, which was shown by the noticee towards Lease Right Compensation as other income, in its Balance sheet for the Financial year 2008-09.

8.4 From the above, it appeared that the noticee had rendered services in relation to sale and purchase of real estate as to introduction of seller/owner of the land and assisted in bringing about the sale deal of the said land between the sellers/owners of the said land and ASPL whereby acted as classifiable as Real Estate Agent as provided under Section 65(88) of the Act. Thus, the service so provided by the noticee was classifiable as a Real Estate Agent' Service and is taxable in view of sub-clause (v) of clause (105) of Section 65 of the Act.

9. It is settled position of law that activity of introducing the prospective buyers of plot and arranging sale thereof is covered under the definition of "Real Estate Agent" as per Section 65(88) of the Act and commission received for said activity is taxable under "Real Estate Agent Service" as per Section 65(105)(v) of the Act. As such, the noticee is liable to pay appropriate Service Tax as per provisions of Finance Act, 1994. Thus, it appears that the noticee had provided taxable services and in consideration thereof received Rs. 2,40,00,000/- from ASPL. The service tax not paid by the Noticee on the value of taxable service of Rs. 2,40,00,000/- suppressed by them has been calculated in subsequent para.

10. The noticee had provided taxable service of Real Estate Agent to ASPL and in consideration therefore received a sum of Rs. 2,40,00,000/- from ASPL, therefore, the noticee was liable to follow due procedures for providing taxable services viz.

- (a) to obtain registration under service tax as per provisions of Section 69 of the Act read with Rule 4 of Service Tax Rules, 1994,
- (b) to file service tax returns as per the provisions of Section 70 of the Act read with Rule 7 of the Rules, and
- (c) to make payment of service tax @ 12% leviable thereon by 31st day of March, 2009, as per the provisions of Section 68 of the Act read with section 66 of the Act and Rule 6 of the Rules along with due amount of Education Cess and Secondary and Higher Education Cess.

11. The noticee received an amount of Rs. 2,40,00,000/- against the value of taxable service during March, 2009. Accordingly, the noticee was required to self assess and pay the amount of Service tax by 31.03.2009, as per details given in table below, and was required to submit the half yearly return for the period ending 31.03.2009 by 25th April, 2009 showing particulars of payments received against the value of taxable service provided or to be provided and particulars of service tax payments made by the Noticee. The noticee did not follow the due procedure as

mentioned hereinabove and contravened the various provisions of Finance Act, 1994 and rules made thereunder.

Particulars	Rate of tax/cess	Amount
Payment received towards the value of taxable services	-----	2,40,00,000/-
Service Tax leviable	12%	28,80,000/-
Education Cess leviable	2%	57,600/-
Secondary and Higher Education Cess leviable	1%	28,800/-
Total amount of Service Tax and Cesses	12.36%	29,66,400/-

12. It appeared that the noticee had provided the taxable services but did not apply for registration under service tax and did not file service tax returns and **thus suppressed the facts** as to provision of taxable service and receipt of an amount of Rs. 2,40,00,000/- against the value of taxable service and evaded the payment of service tax leviable thereon along with due amount of Education Cess and Secondary and Higher education Cess and therefore rendered itself liable for recovery of service tax along with Education Cess and Secondary and Higher Education Cess not paid by the noticee, under the proviso to sub-section (1) of Section 73 of the Act along with interest under Section 75 of the Act.

13. It also appeared that the noticee had provided the taxable services but did not apply for registration under service tax and did not file service tax returns and **thus suppressed the material facts** as to provision of taxable service and receipt of an amount of Rs. 2,40,00,000/- against the value of taxable service and thus evaded the payment of service tax leviable thereon along with due amount of Education Cess and Secondary and Higher Education Cess and therefore rendered itself liable for penalty under Section 78 of the Act.

14. It further appeared that the noticee has failed to follow due procedures to be followed for providing taxable services in as much as failed to take registration under service tax and thus rendered itself liable for penalty under Section 77 of the Act. Moreover, it appeared that the noticee has failed to follow due procedures for providing taxable services as to filing service tax returns and thus rendered itself liable for late-fees under Section 70 of the Act read with Rule 7C of the Rules.

15. Accordingly, Show cause Notice No. V/15-12/Dem-ST/HQ/2011-12 dated 17.10.2011 was issued to the Noticee asking them to show cause as to why:-

- (i) The Service tax totally amounting to Rs. **29,66,400/-** (Rs. Twenty Nine Lacs, Sixty Six Thousands and Four Hundreds Only) as discussed herein above, should not be demanded/recovered from them under the proviso to sub-section (1) of Section 73 of the Act;
- (ii) Interest at the appropriate rate as applicable should not be recovered from them, till the date of payment of Service tax, under section 75 of the Act;
- (iii) Penalty should not be imposed upon them under Section 78 of the Act for suppression of fact of providing taxable service as mentioned hereinabove and failure to make payment of 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;
- (iv) Penalty should not be imposed upon them under provision of clause (a) of sub-section (1) of section 77 of the Act; for not obtaining the service tax registration as provided under Section 69 of the Act read with Rule 4 of the Rules;
- (v) Penalty should not be imposed / Late fees should not be charged from them under the provisions of section 70 of the Act read with Rule 7(C) of the Rules for non submission of service tax return should not be recovered from them

PERSONAL HEARING :

16. The Noticee was granted personal hearing on 10/11.01.2012 vide letter dated 23.12.2011 which was adjourned at the request of the Noticee vide their letter dated 09.01.2012. The Noticee

also submitted vide their letter dated 09.01.2012 that they will submit the reply to show cause notice within 15 days. The personal hearing was again fixed on 24/25.01.2012 vide letter dated 11.01.2012. In the meantime, the Noticee submitted written submission vide their letter dated 09.01.2012 which was received on 23.01.2012. The Noticee did not avail this opportunity of personal hearing, hence, the next date of personal hearing was fixed on 09/10.02.2012 and was informed vide letter dated 31.01.2012. The Noticee instead of availing the opportunity of personal hearing informed vide their letter dated 04.02.2012 that they had already filed written submission on 23.01.2012 which may be considered as their personal appearance and requested to decide the case on merit.

WRITTEN SUBMISSION :

17.1 The Noticee submitted written submission vide their communication referred as REF:MRD/Inducto Steel/F-1137/070 dated 09.01.2012 and stated as under :-

17.2 Their company was having business of Ship Breaking at Plot No. 45, Ship Breaking Yard, Alang, Bhavnagar and carried on shipbreaking activities as per Central Excise Registrtrion Certificate issued under Section 6 of the Central Excise Act, 1944 read with Rule 9 of Central Excise Rules, 2002. During the course of Audit by EA-2000 Audit Team, it was noticed that they had received an amount of R s. 2,40,00,000/- towards Lease Right Compensation as "other income" in the Balance Sheet for the Financial Year 2008-09. They vide their letter dated 08.03.2011 lucidly explained that they had surrendered or possession right permanently in favour of Builder and accordingly they could purchase the vacant land from the Owner of the Vaccant Land. They received payment from the Lease Rights Builder which is a sale of an Intellectual Property and the payment received by them on outright sale of Intellectual Property cannot be taxed in view of Circular No. 80/2001-ST dated 17.09.2004. The monetary fund received by them is given as a Fixed Deposit to Builders to earn interest on it and therefore, is not taxable under any Head.

17.3 They submitted that they had not provided Taxable Service in relation to "Real Estate Agent Service" and thereby neithr suppressed any facts nor liable to pay any Service Tax or file Service Tax Return and accordingly no interest is payable and no penalty is imposable on them.

17.4 It is a fact that they had received amount of Rs. 2,40,00,000/- towards Lease Right compensation and showed in their Balance Sheet in the Financial Year 2008-09 under the Head of "Other Income". The amount was received by them from M/s. Acme Shelters P. Ltd. (ASPL). They had entered into an oral agreement, with the owner of a Vaccant Land, several years back and accordingly they acquired Possession or Lease Rights, for the said Vaccant Land, in the Financial Year 2008-09. A Builder or Developer approached them with expression of their interst, in purchasing the said Vaccant Land, from its owner and they agreed with the said Builder & surrendered permanently their Possession or Lease Right, in favour of the Builder and he could purchased the said Vaccant Land, from its owner. Against the outright sale of the said Possession or Lease Rights, they received payment from the Lease Rights Purchaser or Builder.

17.5 It was also submitted that an outright sale of Lease Rights, for the said Vaccant Land, amounts to sale of an Intellectual Property. Being outright sale of an Intellectual Property, the payment received by them under the aforesaid transaction cannot be taxed to Service Tax, under the Intellectual Property Service falling under Section 65(105)(zr) of the Finance Act, 1994. It is very clear from the Circular No. 80/2004-ST.

17.6 It was further submitted that so far as it relates, mobilization of our Monetary Funds, they lent them out & accordingly invested them with Builders & Developers, with a view to earn interest. This was like putting some Monetary Deposits with the Builders or Developers. They were of confirmed view that this activity did not constitute any taxable service, under the Finance Act, 1994, being equivalent to depositing Money, in Bank under a given Fixed Deposit Schemes, to earn interest from the Bank. No specific procedure was being designed by them for offering their Monetary Funds to the Builders or Developer nor any Agreements have drawn for the same as the Money was offered only to such Builders or Developers who had closed relations with them and the Money offered did not experience any risk of loss.

17.7 They submitted without prejudice to the above submission that this was not a case of Suppression of Facts or Willful mis-statement or Collusion or Fraud on their part with intent to evade payment of Service Tax. There was also no intentional contravention of any provisions of Service Tax Law and Rules framed there under.

17.8 The impugned Show Cause Notice was proposed to impose penalty under Section 78 of the Finance Act for failure to make payment of Service Tax on "Real Estate Agent's Services" and contravention of various provisions of the Act and Rules made there under with intent to evade payment of Service tax. In this regard, it was submitted that Penalty under Section 78 is a harsh provision and has a broader effect as it takes into consideration fraud, collusion, willful mis-statement or suppression of facts or contravention of any of the provisions and rules made there under with intent to evade payment of Service Tax. In the present case, as can be seen from the above submission, they had outright sold their Lease Rights for the said Vacant Land which amounts to sale of an Intellectual Property. Being outright sale of an Intellectual Property, the payment received by them under the aforesaid transaction cannot be taxed to Service Tax under Intellectual Property Service as held in the Circular No. 80/2004-ST dated 17.09.2004. Therefore, under the circumstances, imposition of penalty u/s 78 does not arise as there was no question of suppression of facts or mis-statement, fraud, collusion etc. with intent to evade payment of Service Tax. When there was no Service Tax, any question of imposition of penalty under Section 77 or 78 does not arise. Accordingly, question of any payment of Service Tax and imposition of late payment fees under Section 70 read with Rule 7(c) of Service Tax Rules, 1994 does not arise.

17.9 They further submitted that the issue of one of interpretation of the statute "Finance Act, 1994" as to whether their services are covered under the taxable service under the category of "Real Estate Agent's Services" or not, it is well settled question of law that when the issue related to interpretation of law, or classification of a product or a services, penalty cannot be imposed and no interest can be demanded. They referred and rely upon on following decisions in this regard :-

- (a) Orient Packaging Ltd Vs CCE, Meerut-I [2011 (23) STR 167 (Tri. Del.)]
- (b) CCE, Raipur Vs. Ajanta Color Labs [2009 (14) STR 468 (Tri. Del.)]

DISCUSSION & FINDINGS :

18. I have gone through the show cause notice, record of the case and written submission made by the Noticee.

19.1 The Notice dated 17.10.2011 proposed to recover service tax amounting to Rs. 29,66,400/- on taxable value of Rs. 2,40,00,000/- received for providing taxable service of Real Estate Agent's Service classifiable under Section 65 (105) (v) of the Finance Act, 1994. It has been alleged that the Noticee rendered the services in relation to sale and purchase of real estate by introducing M/s. Acme Shelters Pvt. Ltd., Mumbai (ASPL) with Seller / Owner of a land situated at "Plot No. 3, TPS VI, Swami Vivekanand Road, Santacruz (W), bearing CTS No. 1622, 1622/1, Survey No. 295, Vile Parle and assisted in bringing about the sale deal of land to M/s. ASPL, in consideration of 8000 square feet of saleable part of constructed area in the building to be constructed by ASPL on the said land. This fact is clearly depicted from the language Option Agreement dated 06.01.2004. The relevant portion of said Option Agreement dated 06.01.2001 is reproduced hereinbelow for sake of convenience :-

Para (e) at Page No. 2:

".....ISL introduced the sellers/owners of the said land to ASPL as well as the sale deal to ASPL and accordingly ASPL agreed to enter into a Development Rights Agreement with the sellers/owners of the said land for the development of the said land. Further in consideration of ISL introducing the seller/owner of the said land to ASPL as well as the sale deal to ASPL, ASPL agreed to grant an option to ISL to acquire from ASPL upto 8,000/- square feet of saleable area as defined herein in the building that shall be constructed by ASPL on the said Land on the terms and conditions mutually agreed upon. The saleable area of upto 8,000 square feet in the building/s that may be constructed by ASPL on the said land is hereinafter referred to as 'the option property'."

Para (2) at Page No. 3 :

"In consideration of ISL introducing the seller/owner of the said land to ASPL as well as the sale deal to ASPL, ASPL hereby grants an option to acquire the said option property i.e. an area of upto 8,000/- square feet of saleable area in the building that may be constructed by ASPL on the said Land....."

Para 6 at Page No. 5

"The consideration, for ISL introducing the sellers/owners of the said land to ASPL as well as bringing about the sale deal of the said land by ASPL pursuant to which ASPL would be able to develop the said land by constructing building/s thereon, is the grant of the option in respect of the said option property herein contained. The parties hereto agree that for the purpose of this Option Agreement, this aforesaid consideration is mutual, fair, adequate and reasonable."

19.2 It is also seen that the Noticee did not exercise the option available to them under said Option Agreement dated 06.01.2004 and arrived at an alternative agreement in lieu of the said Option Agreement dated 06.01.2004 vide Revised Option Agreement dated 15.06.2006. Accordingly, ASPL agreed to give to the Noticee an aggregate of upto 8,000/- square feet of saleable area in any other one or more project/s of ASPL / Other companies of the Acme Group, as consideration for the deal brought about by the Noticee in favour of ASPL. The relevant clause of the said Revised Option Agreement dated 15.06.2006 is reproduced hereinbelow for the sake of convenience :-

Para 1 at Page NO. 3 :

".....the said Option Agreement dated 06.01.2004 shall stand substituted by this Revised Option Agreement, and accordingly, the terms and provisions of the said option agreement dated 06.01.2004 are substituted by the arrangement contained in this Revised Option Agreement."

Para 3 at Page No. 3 :

"It is hereby expressly provided that this Option Agreement is for the option to acquire the said Revised Option Property, i.e. an aggregate of upto 8,000/- square feet of saleable area in any other one or more project/s of ASPL/other companies of the Acme Group, as may be offered by the Acme Group to ISL."

Para 7 at Page No.4 :

"The consideration for the grant of the option in respect of the said Revised Option property herein contained is ISL introducing the sellers/owners of the said land to ASPL and bringing about the sale deal of the said land by ASPL, pursuant to which ASPL would be able to develop the said land by constructing building/s thereon. The parties hereto agree that for the purpose of this Option Agreement, the aforesaid consideration is fair, adequate and reasonable."

19.3 It is also evident from the records of the case that the Noticee and ASPL had appointed Arbitrator in order to resolve the dispute of consideration. The Arbitrator vide Interim Award dated 25.11.2008 and Final Award dated 29.03.2009 decided to grant monetary compensation as consideration against the said "Option Property" and "Revised Option Property". Accordingly, a sum of R s. 2,40,00,000/- have been received by the Noticee from M/s. Acme Shelters Pvt. Ltd. . The relevant extract in this regard of Interim Award dated 25.11.2008 and Final Award dated 29.03.2009 is reproduced below for the sake of convenience :-

Para 4 at Page 3 of Interim Award dated 25.11.2008 :

"The Opponent having admitted the right of the Claimant to exercise the option to take the said 8,000 square feet of saleable area as defined therein, expressed its inability to provide the same and in lieu thereof showed the willingness and readiness to pay the amount of compensation as may be determined by the Arbitrator pursuant to the Arbitration Clause contained in the said Agreement and reflected in the Arbitration Agreement between the parties".

Para 1 at Page 5 of Final Award dated 29.03.2009 :

"The opponent do pay to the Claimant the sum of Rs. 2,40,00,000/- (Rupees Two Crore Forty Lakhs Only) as against the sum of Rs. 3,72,85,767/- (Rupees Three Crore Seventy Two Lakhs Eighty Five Thousand Seven Hundred Sixty Seven Only) claimed by the Claimant and as against a sum of Rs. 1,62,73,430/- (Rupees

One Crore Sixty Two Lakhs Seventy Three Thousand Four Hundred Thirty Only) as was offered without prejudice in the course of the arbitration by the Opponent”.

20. I find from the above facts that the Noticee introduced ASPL with the Owner / Seller of land and assisted to materialize the sale deal between ASPL and the Seller / Owner of the land. It is also forthcoming from the facts that the Noticee agreed to acquire 8000/- square feet of saleable constructed area as consideration towards assisting and bringing out the said deal, however, could not acquire the same and received a ~~sum~~ of Rs. 2,40,00,000/- as consideration at the end. Thus, it is unambiguous that the Noticee had provided the service in relation to sale of land which fall under the provisions of Section 65 (88) of the Finance Act, 1994 and service so provided is classifiable as taxable service by virtue of Section 65 (105)(v) of the Finance Act, 1994. Thus, I hold that the Noticee rightly classified the service provided by the Noticee under the category of “Real Estate Agent’s Service”.

21.1 The Noticee submitted that they had surrendered their possession right permanently in favour of Builder and accordingly they (builder) could purchase the vacant land from the Owner of the Vacant Land. The payment received by them is towards the Lease Rights Compensation from Builder which is a sale of an Intellectual Property for outright sale of Intellectual Property which is not a taxable service as per Circular No. 80/2001-ST dated 17.09.2004. In this regard, I find that the ‘Intellectual Property Right’ have been defined under Section 65(55a) of the Finance Act, 1994 according to which right to intangible property like trademarks, designs, patents or any other similar intangible property is covered therein and transfer of such right temporarily or for the use or enjoyment is considered as provision of “Intellectual Property Service. The service provided by the Noticee by no stretch of imagination is having intangible nature and not convincing to have been classified as Intellectual Property Right service.

21.2 It is also the submission of the Noticee that they had received amount of Rs. 2,40,00,000/- from M/s. Acme Shelters P. Ltd. (ASPL) towards Lease Right compensation and showed in their Balance Sheet in the Financial Year 2008-09 under the Head of “Other Income”. They had entered into an oral agreement, with the owner of a Vacant Land, several years back and accordingly they acquired Possession or Lease Rights, for the said Vacant Land, in the Financial Year 2008-09. A Builder or Developer approached them with expression of their interest, in purchasing the said Vacant Land, from its owner and they agreed with the said Builder & surrendered permanently their Possession or Lease Right, in favour of the Builder and he could purchased the said Vacant Land, from its owner. Against the outright sale of the said Possession or Lease Rights, they received payment from the Lease Rights Purchaser or Builder. In this regard, I find that the Noticee did not produce any cogent evidence in support of his claim regarding Lease Right acquired by them from the owner of the vacant land. Even otherwise, it is presumed that the amount received is towards Lease Right Compensation than the amount should have been received from the owner of the vacant land which is not the case here as the amount have been received from the Buyer of the vacant land.

21.3 The Noticee also submitted that the monetary fund received by them was given as a Fixed Deposit to Builders to earn interest on it and therefore not taxable is contradictory to their own submission of a sale of Intellectual Property and is another feeble attempt to circumvent from the liability of Service accrued for providing Real Estate Agent Service. In fact, the Noticee had provided Taxable Service in relation to “Real Estate Agent Service” and shown the income / consideration in the Balance Sheet as “Other Income” in order to suppress the fact of providing taxable service.

21.4 From the above, I find and hold that the Noticee had provided taxable service of “Real Estate Agent’s service” to M/s. Acme Shelters Pvt. Ltd., Mumbai and received an amount of Rs. 2,40,00,000/- in the year 2008-09 towards consideration thereof. Thus, the amount received by the Noticee is subject to service tax.

22. I also find that amount of Rs. 2,40,00,000/- received by the Noticee towards consideration for providing Real Estate Agent’s service have been shown as “Other Income” in the Balance Sheet to circumvent from the service tax liability accrued in this regard. Thus, they suppressed the material facts with intent to evade payment of Service Tax. This fact is further strengthened in as much as the amount received has not been shown as receipt of Interest / Dividend / Principle, as against their plea that monetary fund received by them was given as a Fixed Deposit to Builders to earn interest. Thus, I hold that the Noticee mis-interpreted the service provided by them under the category of Real Estate Agent’s Service as provision of

Intellectual Property Right Service for payment of the service tax liability and penal liabilities arising out of this in the guise of dispute of classification and interpretation of law. As such, the case laws referred by the Notice is of no help to them. I, therefore, hold that the Noticee is liable for penal action for suppression of facts with regard provision of taxable service of Real Estate Agent.

23. I also find that the Noticee neither obtained Service Tax Registration nor filed any ST-3 Returns as prescribed under Rule 4 and Rule 7 of the Service Tax Rules, 1994 (hereinafter referred to as the Rules) respectively for the taxable services provided by them and thereby suppressed the facts that they were liable to pay Service Tax for the services provided under the categories of 'Real Estate Agent's Service', with an intent to evade payment of Service Tax. As such, they contravened the following provisions of the Act and the Rules framed thereunder with an intent to evade payment of service tax:

- (i) Section 69 of the Act read with Rule 4 of the Rules in as much as they failed to apply for registration for the category of service viz. 'Real Estate Agent's Service' provided by them as discussed hereinabove,
- (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 services of "Real Estate Agent's Service" as discussed hereinabove and to furnish Returns in Form ST-3 duly mentioning the details of taxable services provided by them.
- (iii) Section 68 of the Act read with Rule 6 in as much as they failed to pay service tax of Rs. 29,66,400/- at prescribed rate on taxable value of Rs. 2,40,00,000/- received by them on in March-2009,

24 Since the Noticee has 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, I find that the instant is the appropriate case to invoke proviso to Section 73 (1) of the Act for recovery of Service Tax not levied and paid by the Noticee for the extended period of five years in place of one year prescribed under Section 73 (1) of the Act.

25. I also 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 has rendered himself liable to penalty under Section 78 of the Act. Similarly, the Noticee is liable to penalty under Section 77 (1) (a) of the Act for contravention of provisions of Section 69 the Act read with Rule 4 of the Rules as discussed hereinabove & under Section 77(2) of the Act for contravention of Section 70 of the Act read with Rule 7 of the Rules as discussed hereinabove. Further, it appeared that the Noticee is also liable to penalty under Section 76 of the Act 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 as discussed hereinabove.

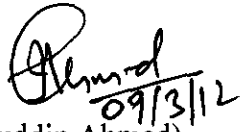
26. In view of the above findings, I pass the following order :-

ORDER

- (i) I confirm the demand of Rs.29,66,400/- (Rupees Twenty Nine lakh Sixty Six Thousand Four Hundred only) (including Education cess) and order to recover from M/s. Inducto Steel Ltd., Alang, Bhavnagar under Section 73(2) of the Finance Act, 1994 alongwith interest at appropriate rate under Section 75 of the Finance Act, 1994.
- (ii) 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 upon M/s. Inducto Steel Ltd., Alang, Bhavnagar for not

obtaining the service tax registration, starting with the first day after the due date till the date of actual compliance.

- (iii) I impose penalty of Rs.5000/- (rupees five thousand only) under section 77 (2) of the Finance Act, 1994, upon M/s. Inducto Steel Ltd., Alang, Bhavnagar, for non-submission of Service Tax return.
- (iv) I impose penalty of Rs.29,66,400/- (Rupees Twenty Nine lakh Sixty Six Thousand Four Hundred only) under Section 78 of the Finance Act, 1994 upon M/s. Inducto Steel Ltd., Alang, Bhavnagar. If the amount as determined under serial number (i) above is paid within 30 days from the receipt of the order alongwith the interest payable, then as per proviso to section 78 of the Finance Act, 1994, the penalty under this section will be only 25% of the Service Tax determined at serial number (i) above. The benefit of reduced penalty shall be available only if the amount of penalty so determined has also been paid within the period of thirty days from the receipt of this order.


 (Imamuddin Ahmad)
 Joint Commissioner,
 Central Excise,
 Bhavnagr

By Regd. Post. A.D.

F. No. V/15-12/Dem-ST/HQ/2011-12.

Bhavnagar, Date :- 09.03.2012

To,
 M/s. Inducto steel Ltd,
 Plot No.45, Ship Breaking Yard, Alang,
 Bhavnagar.

Copy to :

- (1) The Deputy Commissioner, Central Excise, HQ, Audit, Bhavnagar
- (2) The Assistant Commissioner, Service Tax Divn. Bhavnagar.
- (3) The Assistant Commissioner, (Recovery / Prosecution), C.Ex., Bhavnagar.
- (4) The Superintendent Service Tax, Rural Range, Bhavnagar.
- (5) Guard File.