	<p>Govt. of India</p> <p>Office of the Commissioner of Central Excise</p> <p>'Siddhi Sadan', Plot No.6776/B-1, Narayan Upadhyay Road, Off Waghawadi Road, Bhavnagar</p>
	<p>Ph.No. : 0278- 2523627 adjbhavnagar@gmail.com Fax No.: 0278-2513086</p> <p style="text-align: right;">E-mail-</p>

By R.P.A.D.

F.No.V/15-22/Dem-ST/HQ/2011-12

Date of Order: 27/02/2012

Date of Issue: 27/03/2012

Passed by

IMAMUDDIN AHMED
Joint Commissioner
Central Excise
Bhavnagar

Order-in-Original No: 23 / 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. R. K. Caterers,
Block No. 5, Room No. 98,
New 3 Storied Building,
Anandnagar, Bhavnagar.

Subject: Show Cause Notice Number No. V/15-22/Dem-ST/HQ/2011-12
Dated 19.10.2011 issued to M/s. R. K. Caterers, Bhavnagar
demanding Service Tax of Rs.25,49,619/-.

BRIEF FACTS OF THE CASE :

M/s. R. K. Caterers, Block No. 5, Room No. 98, New Three Storied Building, Anandnagar, Bhavnagar (hereinafter referred to as "the Noticee") is a proprietorship firm (Prop. Shri Hector Alexander Rego alias Shri Yogeshbhai, Anandnagar) and engaged in providing service of outdoor catering to various recipient.

2. On the basis of Intelligence that the Noticee were engaged in providing taxable service of outdoor catering to M/s Excel Crop Care Limited, Bhavnagar and others for last several years without payment of Service Tax on the said service, an Anti Evasion team of Central Excise, HQ, Bhavnagar visited the office premises of M/s Excel Crop Care Limited, Bhavnagar on 21.03.2011 and collected documents such as (1) copy of contract awarded to the Noticee to carry out the outdoor catering activity in their premises, (2) sample invoices raised by the Noticee, and (3) the ledger account of Noticee maintained by M/s Excel Crop Care Ltd., in their books of account.

3. Investigation was initiated and accordingly summons was issued to the Noticee on 21-3-2011 to remain present and produce copies of (1) Ledger Account of M/s Excel Crop Care Limited, for the period from 2005-06 to 20.03.2011, (2) Contract made with M/s Excel Crop Care Limited, Bhavnagar, (3) Invoices raised against outdoor catering service provided to M/s Excel Crop Care Limited or any other Company, (4) Income-Tax return filed during the year 2005-06 to 2010-11 and (5) Balance Sheet and Profit & Loss account from the year 2005-06 to 2010-11.

4. In response to the summons dated 21-3-2011, Shri Hector Alexander Rego, Proprietor of the Noticee appeared before the Superintendent (A.E), Central Excise, HQ, Bhavnagar on 21.03.2011 and his statement dated 21-3-2011 was recorded before the Superintendent (A.E.), Central Excise, HQ, Bhavnagar under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 (Hereinafter referred to as "the Act") wherein he interalia stated that he is a proprietor of M/s R.K. Caterers, Block No. 5, Room No. 98, New 3 Storied Building, Anandnagar, Bhavnagar, which was established on 01.10.2006 and since then providing services of catering to M/s Excel Crop Care Limited, Bhavnagar. A statement of Shri Hector Alexander Rego, Proprietor of M/s R.K. Caterers, Bhavnagar was recorded on 21.03.2011 in question-answer form and the questions asked for and answers given by him are reproduced below:-

Q. No. 1: - Please explain the business activities carried out by your firm M/s R. K. Caterers, Bhavnagar.

Answer: - My firm M/s R. K. Caterers is an Outdoor Caterers which has been providing catering services such as supply of tea, coffee, lunch, dinner etc. to M/s Excel Crop Care Limited. As I have deposed above, my firm was established in the year October-2006 and since then I have been providing the services of serving tea, lunch/dinner, snacks etc. to the employees/guests of the company/employees of contractors working with the company at the canteen premises located at the factory premises of M/s Excel. For this business activity, I had entered into a contract with M/s Excel Crop Care Limited, Bhavnagar. This contract is available at my office and I'll produce the same tomorrow. There are 38 employees working in my outdoor catering firm whose services are being utilized by my firm to provide outdoor catering services at the premises of M/s Excel Crop Care Limited.

Q. No. 2: - Except M/s Excel Crop Care Limited, name the other service recipients to whom you provide/have provided your catering services?

Answer: Except M/s Excel Crop Care Limited, I have provided catering services through my firm M/s R. K. Caterers to M/s LIC of India, Division Office, Neelambaag, Bhavnagar during the past period during their seminars. I have provided services of serving tea, coffee, snacks, breakfast/lunch etc. during seminars and such other programmes organized by LIC of India, Division Office, Neelambaag, Bhavnagar in the past. In recent time, I have provided

the above services on regular basis to them. Earlier, there was not any contract for providing the above said services but now I have also gone into a contract with LIC of India, Division Office, Bhavnagar for providing the catering services, a copy of which I'll produce tomorrow as the same is available in my office.

Q. No. 3: - Have you paid Service Tax on the catering services rendered by your firm M/s R. K. Caterers in the past years?

Answer:- No, I have never paid any Service Tax on the catering services rendered by my firm for the reasons that I was not aware of the fact that the services rendered by firm are taxable under the law. Recently I came to know about this fact and immediately applied service tax registration for my firm M/s R. K. Caterers, on 16/03/2011 under the category of outdoor caterers under application No.AHAPR3051KSD001, a photocopy of which I produce for your reference. I am ready to pay the Service Tax on the total amount of services rendered by my firm right from the beginning of my firm M/s R. K. Caterers at the applicable rates.

Q. No. 4: - Please produce the Balance Sheet, Profit & Loss Account, Ledger Account of M/s Excel Crop Care Limited and M/s LIC of India, Division Office, Bhavnagar maintained in your books of account, Invoices raised against the services rendered, IT Return of your firm, all from the year 2005-06 to till date.

Answer: - All the above documents are lying in my office and I promise to produce the same by tomorrow in your office.

Q. No. 5: - Please peruse the documents submitted by M/s Excel Crop Care Limited in respect of your firm viz. contract, ledger accounts and sample invoices in a file containing pages from 1 to 77. In these invoices it is seen that the first invoice which was raised on 01/10/2006 is bearing the serial No. 104, then please explain the whereabouts of the invoice No. 1 to 103.

Answer: - I peruse the above said documents from page No. 1 to 77 and in token of having seen the same I put my dated signature on all of them. Regarding the invoice No. 1 to 103 I can not tell anything at this point in time but I'll check the same with my Manager because this issue is quiet old and I will explain it tomorrow.

5. The Noticee paid Service Tax including Education Cess and Secondary & Higher Education Cess amounting of Rs. 19,98,200/- in State Bank of India, Diwanpara Branch, Bhavnagar towards Service Tax liability for the Outdoor Caterer's Services rendered by them to M/s Excel Crop Care Limited, Bhavnagar and submitted copy of GAR-7 Challan dated 28.03.2011 vide his letter dated 29.03.2011. The Noticee submitted the Profit & Loss Account for the period 2006-07 to 2010-11 vide his letter dated 23.09.2011. Later on he also produced the ledger account of M/s. Excel Crop Care Ltd., Bhavnagar.

6. Subsequently, a second summons dtd. 07.10.2011 was issued to the Noticee requesting to remain present and produce copies of (1) Ledger Account of other parties other than M/s Excel Crop Care Ltd., Bhavnagar and (2) Income Tax returns filed during the year 2005-06 to 2010-11. In response to said summons dated 07.10.2011, Shri Hector Alexander Rego, Proprietor of M/s R.K. Caterers, Bhavnagar remained present on 08.10.2011 and his statement was recorded before the Superintendent (A.E.), Central Excise, HQ, Bhavnagar wherein he interalia stated that he is not in a position to produce the Ledger Account of other parties (other than M/s Excel Crop Care Ltd., Bhavnagar) and had submitted the income tax returns for the period 2006-07 to 2010-11.

7. On scrutiny of the Contract / Agreement dated 04.10.2007 entered between M/s. Excel Crop Care Limited, Bhavnagar (Company) and the Noticee for the period from 01.10.2006 to 30.09.2009 as well as renewal of contract for the period 01.10.2009 to 30.09.2014, it revealed that: -

- (a) the jobs of Noticee involved procurement of raw material, cooking and serving Lunch / Dinner, Tea, Snacks to the Employees / Guests of the Company / Employees of the Contractors at the time and place decided by the management of the company.
- (b) the Noticee will serve buttermilk to the company for which milk will be provided by the company. The Noticee will prepare curd and butter milk for which company shall pay Rs. 2,000/- p.m. to the Noticee.
- (c) the Noticee will serve one piece of Banana to the Employees of the Company at the time of Lunch and Dinner for which Banana will be provided by the Company.
- (d) the Noticee will serve Ukala and flavored milk supplied by the Company for which company shall pay Rs. 1000/- p. m.

8. STATUTORY PROVISIONS RELATING TO THE SERVICES RENDERED BY M/S R. K. CATRERS, BHAVNAGAR AND ITS LIABILITY TO PAY SERVICE TAX:

8.1. Outdoor Caterer's Service:

Service tax on Outdoor Caterer's service was introduced from 10.09.2004. The definition of the said Service under section 65 (76a) of the Finance Act, 1994 as amended has been as under:

"Outdoor Caterer" means a caterer engaged in providing services in connection with catering at a place other than his own but including a place provided by way of tenancy or otherwise by the person receiving such service.

8.2 The statutory definitions of some of the relevant terms related to 'Outdoor Caterer's' service, as defined under the provisions of the Finance Act, 1994 are as under:

Section 65(105)(ztt)

"taxable service" means any service provided or to be provided to any person, by an outdoor caterer's

Section 65(24)

"caterer" means any person who supplies, either directly or indirectly, any food, edible preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accoutrements for any purpose or occasion.

8.3 Notification No. 20/2004-ST dated 10/9/2004 has been issued from F. No. B2/08/2004-TRU under the provisions of Section 93(1) of the Finance Act, 1994. The text of the said Notification is as under:

"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts taxable service provided by an outdoor caterer from so much of the service tax leviable thereon under section 66 of the said Act, as is in excess of the amount of service tax calculated on a value which is equivalent to fifty per cent. of the gross amount charged from the client by such caterer for the services provided in relation to catering:

Provided that the said exemption shall apply in such cases where,-

- (a) *such outdoor caterer also provides food and the invoice, bill or challan issued for this purpose indicates that it is inclusive of charges for supply of food; and*
- (b) *no credit of duty paid on inputs or capital goods has been taken under the provisions of the Cenvat Credit Rules, 2004; and*
- (c) *such outdoor caterer has not availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2003-Service Tax, dated the 20th June, 2003 [G.S.R. 503 (E), dated the 20th June, 2003];*

Explanation.- For the purposes of this notification, the expression "food" means a substantial and satisfying meal.

In view of the above mentioned Notification No. 20/2004-ST, abatement of 50% of the value can be allowed to the Noticee subject to fulfillment of condition laid down therein. A new Notification No. 1/2006-ST dated 1.3.2006 has been issued, which also grants abatement of 50% for the services provided in relation to outdoor caterer subject to the conditions that the outdoor caterer also provides foods and the invoice, bill or challan issued indicates that it is inclusive of charges for supply of food;

8.4 The Noticee have been engaged in preparing / cooking of foods viz. Lunch / Dinner, Tea, Snacks etc. and catering the same as per the requirement at the premises of various persons like (1) M/s. Excel Crop Care Ltd., Bhavnagar, (2) LIC of India, Divisional Office, Neelambaug, Bhavnagar (3) LIC Divisional Office, Rajkot, (4) Vivekanand Homeopethic College, etc.. at the time and place of their convenience. Thus, the services provided by the Noticee was classifiable under category of "Outdoor caterer's service" as defined under Section 65 (76a) of the Finance Act, 1994 and is taxable under Section 65(105)(ztt) of the Finance Act, 1994. Accordingly, the Noticee was required to pay Service Tax on the value of taxable services realized by them.

9.1 The Noticee entered into a contract / agreement dated 04.10.2007 with M/s. Excel Crop Care Ltd., Bhavnagar for the period from 01.10.2006 to 30.09.2009 which was further renewed for the period from 01.10.2009 to 30.09.2014. On scrutiny of the said contract / agreement dated 04.10.2007 submitted by M/s. Excel Crop Care Ltd., Bhavnagar, it revealed that the noticee had provided outdoor catering service to them inclusive of charges for supply of food to the service recipient except Milk and Banana which was provided by the company to the Noticee. The gross amount paid by M/s. Excel Crop Care Ltd., Bhavnagar to the Noticee on account of above, as revealed on scrutiny of the Ledger of M/s. Excel Crop Care Ltd., Bhavnagar, is as under :-

Period	Amount in Rs.
2006-07 (from 01.10.2007 to 31.03.2008)	2465810/-
2007-08	6223412/-
2008-09	7464869/-
2009-10	8393199/-
2010-11	8485657/-
TOTAL	33032947/-

It appeared from the documents such as Copies of contracts / agreement, ledger accounts, Invoices etc. in respect of M/s Excel Crop Care Ltd., Bhavnagar provided by the Noticee that they had rendered the service of outdoor catering inclusive of charges for food except in case of Curd, Buttermilk, Banana, Ukala and flavoured milk.

9.2 The Noticee had prepared curd and buttermilk (out of milk provided by the company) and served to the employees of the company in consideration of Rs. 2000/- p.m.. Similarly, they served Ukala and flavoured milk provided by the company to their employees in consideration of Rs. 1000/- p. m. The Noticee received an amount of Rs. 1,62,000/- towards serving of Curd, Buttermilk, Banana, Ukala and flavoured milk to the employees of the company. Further, Curd, Buttermilk, Banana, Ukala and flavoured milk etc. served by the Noticee was supplied by the company.

Period	Amount in Rs.
2006-07 (from 01.10.2007 to 31.03.2008)	18000/-
2007-08	36000/-
2008-09	36000/-
2009-10	36000/-
2010-11	36000/-
TOTAL	162000/-

Thus, amount of Rs. 1,62,000/- received in this regard was not inclusive of charges for food and as such abatement, as provided under Notification No. 1/2006-ST, would not be admissible to it for the purpose of payment of Service tax.

9.3 From the above, it appeared that the Noticee received an amount of Rs. 3,30,32,947/- from M/s. Excel Crop Care Ltd., Bhavnagar towards rendering the service of "outdoor catering" during the period from 2006-07 to 2010-11, out of which, abatement for the purpose of payment of service tax was not admissible on an amount of Rs. 1,62,000/- received towards serving of food provided by the company as discussed above. Thus, Noticee was entitling for abatement towards payment of Service tax on a sum of Rs. 3,28,70,947/- (Rs. 3,30,32,947- Rs. 1,62,000/-).

9.4 Apart from the above, the Noticee had provided outdoor catering service to various other recipient viz. (1) LIC of India, Divisional Office, Neelambaug, Bhavnagar (2) LIC Divisional Office, Rajkot, (3) Vivekanand Homeopethic College, etc. However, the noticee did not produce documents such as Contracts / Agreement, Ledger Accounts, Invoices etc. to establish that they had rendered outdoor catering service to those recipient inclusive of charges for food. As such, the Noticee was not entitled for any abatement against consideration received for the services provided to them.

10. The value of taxable services for charging service tax is governed by Section 67 of the Act, the relevant portion thereof is reproduced below.

Valuation of taxable services for charging Service tax

(1) *Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,—*

- (i) *in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;*
- (ii) *in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;*
- (iii) *in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.*

(2) *Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.*

(3) *The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.*

(4) *Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.*

Explanation.—For the purposes of this section,—

- (a) *"consideration" includes any amount that is payable for the taxable services provided or to be provided;*

- (b) "money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travellers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value;
- (c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.

11. The Noticee submitted Profit & Loss account for the years 2006-07 to 2010-11 on 23.09.2011. On perusal of same, it appeared that Noticee had provided Catering Services during last five years i.e. from 2006-07 to 2010-11 to (1) M/s. Excel Crop Care Ltd., Bhavnagar, (2) LIC of India, Divisional Office, Neelambaug, Bhavnagar (3) LIC Divisional Office, Rajkot, (4) Vivekanand Homeopethic College, etc. The year-wise gross amount received by the Noticee for rendering Catering Service, as per Profit & Loss Account submitted by the Noticee, is as under :-

Sr. No.	Period	Gross Amount received for rendering Catering Services in Rs.
1.	2006-07	3086260/-
2.	2007-08	6888826/-
3.	2008-09	90110972/-
4.	2009-10	9169661/-
5.	2010-11	10864229/-
6	TOTAL	39019948/-

Thus, the Noticee received gross income amounting to Rs. 3,90,19,948/- (Rupee Three Crore Ninety Lacs Nineteen Thousand Nine Hundred Fourty Eight only) for services rendered by them. Out of which, amount of Rs. 3,28,70,947/- received towards service rendered to M/s. Excel Crop Care Ltd., Bhavnagr is inclusive of charges for food, as discussed above, and entitling for abatement as provided under Notification No. 01/2006-ST. Thus, Noticee was liable for payment of Service tax according to duty calculation sheet attached as Annexure-A to the Notice. Accordingly, the Noticee was not entitled for abatement on a sum of Rs. 61,49,001/- [Rs. 3,90,19,948/- (-) Rs. 3,28,70,947/-] and duty calculated thereon was attached as per duty calculation sheet at Annexure - A-1 to the Notice.

12. Further, it also appeared that the Noticee had contravened the following provisions of the Act and the Rules framed there under with intent to evade payment of service tax; as discussed herein below:

12.1 Section 69 of Act provides that –

(1) Every person liable to pay the service tax under this Chapter or the rules made thereunder shall, within such time and in such manner and in such form as may be prescribed, make an application for registration to the Superintendent of Central Excise.

(2) The Central Government may, by notification in the Official Gazette, specify such other person or class of persons, who shall make an application for registration within such time and in such manner and in such form as may be prescribed

and Rule 4 of Service Tax Rules, 1994 (hereinafter referred to as 'rules') provide that –

(1) Every person liable for paying the service tax shall make an application to the concerned Superintendent of Central Excise in Form ST-1 for registration within a period of thirty days from the date on which the service tax under section 66 of the Finance Act, 1994 (32 of 1994) is levied:

Provided that where a person commences business of providing a taxable service after such service has been levied, he shall make an application for registration within a period of thirty days from the date of such commencement.

The noticee was engaged in providing service of "outdoor catering" since 2006 and failed to apply to the Service Tax Department for Registration under the category of "Outdoor Catering Service" with a period of thirty days from the date of commencement of service. They obtained Registration for the same at much later stage on 16.03.2011 thereby they had contravened Section 69 of the Act read with Rule 4 of the Rules.

12.2 Section 68 of the Act provides that -

(1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed

and Rule 6 of the Rules provides that—

- (1) The service tax shall be paid to the credit of the Central Government,-*
- (i) by the 6th day of the month, if the duty is deposited electronically through internet banking; and*
 - (ii) by the 5th day of the month, in any other case, immediately following the calendar month in which the service is deemed to be provided as per the rules framed in this regard:*

Provided that where the assessee is an individual or proprietary firm or partnership firm, the service tax shall be paid to the credit of the Central Government by the 6th day of the month if the duty is deposited electronically through internet banking, or in any other case, the 5th day of the month, as the case may be, immediately following the quarter in which the service is deemed to be provided as per the rules framed in this regard:

Since, the noticee failed to pay Service Tax at the appropriate rate on the taxable value received by them for providing service of 'outdoor catering', thereby they had contravened Section 68 of the Act read with Rule 6 of the Rules.

12.3 Section 70 of the Act provides that -

(1) Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee not exceeding two thousand rupees, for delayed furnishing of return, as may be prescribed

and Rule 7 of the Rules provides that—

- (1) Every assessee shall submit a half-yearly return in Form 'ST-3' or 'ST-3A', as the case may be, along with copy of the Form TR-6, in triplicate for the months covered in the half-yearly return.*
- (2) Every assessee shall submit the half yearly return by the 25th of the month following the particular half-year.*

Since, the noticee failed to assess the Service Tax payable on the taxable service of "Outdoor Catering" provided by them and did not file prescribed returns in Form ST-3 in respect of such services, thereby they had contravened Section 70 of the Act read with Rule 7 of the Rules.

13. It appeared that the Noticee had provided taxable service of 'outdoor catering' to various service recipient during the period from 2006-07 to 2010-11 and failed to

discharge the service tax liability on the receipt of the payments towards providing of said service. Further, the Noticee suppressed the material facts from the department by not obtaining registration for providing taxable service of 'outdoor catering' and not filing ST-3 / ST-3A return as discussed hereinabove. Since, the Noticee had 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, for the purpose of recovery of Service Tax not levied and not paid by the Noticee for the period from 2006-07 to 2010-11 as per calculation sheet annexed at Annexure- A, Annexure- A-1 and Annexure- B to this notice, extended period as contemplated under proviso to Section 73 (1) of the Act was invokable

73. Recovery of Service tax not levied or paid or short levied or short paid or erroneously refunded –

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—

- (a) fraud; or*
- (b) collusion; or*
- (c) wilful mis-statement; or*
- (d) suppression of facts; or*
- (e) contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax,*

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted.

Explanation. — Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be.

14 Section 75 of the Act provides that –

Every person, liable to pay the tax in accordance with the provisions of section 68 or rules made thereunder, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest at such rate not below ten per cent and not exceeding thirty-six per cent per annum as is for the time being fixed by the Central Government, by Notification in the Official Gazette for the period by which such crediting of the tax or any part thereof is delayed.

Provided that in the case of a service provider, whose value of taxable services provided in a financial year does not exceed sixty lakh rupees during any of the financial years covered by the notice or during the last preceding financial year, as the case may be, such rate of interest, shall be reduced by three percent per annum.

Since, the noticee failed to pay Service Tax; they were liable to pay interest at the appropriate rate under Section 75 of the Act.

15.1. Section 77 of the Act provides that –

(1) Any person, --

- (a) who is liable to pay service tax, or required to take registration, fails to take registration in accordance with the provisions of section 69 or rules made under this Chapter shall be liable to pay a penalty which may extend to five thousand rupees or two*

hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance;

- (b)
- (c) who fails to –
 - (i) furnish information called by an officer in accordance with the provisions of this Chapter or rules made thereunder; or
 - (ii) produce documents called for by a Central Excise Officer in accordance with the provisions of this Chapter or rules made thereunder; or
 - (iii) appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry, shall be liable to a penalty which may extend to five thousand rupees or two hundred rupees for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance.

Since, the noticee failed to pay service tax as well as take registration as provided under Section 69 of the Act read with Rule 4 of the Rules, failed to furnish information called by an officer, to produce documents called for by a Central Excise Officer and to appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry. Accordingly rendered themselves liable for penalty under Section 77 of the Act.

15.2. Section 78 of the Act provides that --

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

- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of Chapter V or of the rules made thereunder with intent to evade payment of service tax,

the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall be equal to the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded.

... ..

(2)

... ..

Provided further that if the penalty is payable under this section, the provisions of section 76 shall not apply.

Since, the noticee failed to discharge the service tax liability by reason of suppression of facts from the department with intent to evade the payment of service tax they were liable for penalty under Section 78 of the Act.

15.3 Section 76 of the Act provides that ---

Whereas in terms of Section 76 of the Act -- Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax amount in accordance with the provisions of section 75, a penalty which shall not be less than two hundred rupees for every day during which such failure continues or at the rate of two per cent. of such tax, per month,

whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax:

Provided that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable.

Since, the Noticee failed to pay Service Tax at the appropriate rate on taxable value received by them for providing service of outdoor catering; they were liable for penalty under Section 76 of the Act.

16.1 From the above, it also appeared that the Noticee under his statement admitted the facts of non-payment of Service Tax on the "Outdoor Catering Services" provided by him and thereby rendered themselves liable to penalty under Section 76 of the Act for non-payment of Service Tax. Further, for the act of suppression of fact of providing taxable services under the category of 'Outdoor Catering Activity Services' and contravention of provisions of the Act and the Rules as discussed hereinabove with an intent to evade payment of service tax, the Noticee had rendered themselves liable to penalty under Section 78 of the Act. Similarly, for the act of not applying for registration under Section 69 of the Act read with Rule 4 of the Rules and for the act of non-submission required details of amount received for providing "Outdoor catering Activity Services" in the prescribed returns under Section 70 of the Act read with Rule 7 of the Rules as discussed hereinabove, the Noticee had rendered themselves liable to penalty under Section 77 of the Act.

16.2 The Noticee had paid Rs.19,98,200/- (Rupees Nineteen Lacs Ninety Eight Thousands Two Hundred only) through GAR- 7 Challans dated 28.03.2011. It was apparent that this payment of Service Tax is required to be confirmed and appropriated towards payment of Service Tax payable by them under Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994.

17. Accordingly, a Show Cause Notice No. V/15-22/Dem-ST/HQ/2011-12 Dated 19.10.2011 was issued to the Noticee asking them to show cause as to why: -

- (i) Service Tax totally amounting to Rs.2549619/- (Rupees Twenty Five Lacs Forty Nine Thousands Six Hundred Nineteen only) (Calculated as per **Annexure - B** attached with this Notice) [Service Tax - Rs.2477528/-, Education Cess - Rs.49551/- and Secondary & Higher Education Cess - Rs.22540/-] should not be demanded and recovered under proviso to Section 73(1) of the Act.
- (ii) Interest at the appropriate rate as applicable till the date of payment of Service Tax should not be charged under Section 75 of the Act.
- (iii) Service Tax of Rs.19,98,200/- already paid by the notice should not be confirmed and appropriated towards Service Tax payable by them under Section 68 of the Act read with Rule 6 of the Rules.
- (iv) Penalty should not be imposed upon them under Section 76 of the Act for the failure to assess Service Tax as required under Section 70 of the Act and make the payment of Service Tax within the period and in the manner prescribed under Section 68 of the Act read with Rule 6 of the Rules.
- (v) 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.
- (vi) Penalty should not be imposed upon them under Section 77(1) (C) of the Act for failure to furnish information called by an officer and produce documents called for by the investigating officer and appear before the investigating officer.
- (vii) 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.

18. Alternatively the Noticee was informed that they may pay the amount demanded as above in full and the interest payable thereon under section 75 and penalty equal to twenty-five per cent of the above said dues, within thirty days of the receipt of this notice under the provisions of sub-section (1A) of section 73 of the Act and upon such payment together with interest and penalty as discussed in this Para, the proceedings under this notice in respect of clause (i) to (iii) of above Para shall be deemed to be concluded. The relevant provisions are reproduced hereunder:-

SECTION [73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. —

(1)

(1A) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Chapter or the rules made there under, with intent to evade payment of service tax, by such person or his agent, to whom a notice is served under the proviso to sub-section (1) by the Central Excise Officer, such person or agent may pay service tax in full or in part as may be accepted by him, and the interest payable thereon under section 75 and penalty equal to twenty-five per cent of the service tax specified in the notice or the service tax so accepted by such person within thirty days of the receipt of the notice.

(2) The [Central Excise Officer] shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined :

[Provided that where such person has paid the service tax in full together with interest and penalty under sub-section (1A), the proceedings in respect of such person and other persons to whom notices are served under sub-section (1) shall be deemed to be concluded :”

PERSONAL HEARING :

19. The Noticee was granted an opportunity of personal hearing on 27.02.2012. Shri Sarju Mehta, Chartered Accountant appeared for personal hearing and submitted a Letter of Authority issued by the Noticee in his favour. He also produced a written submission and additional written submission and reiterated the same during the course of personal hearing. He further added that they have already paid R s. 19,98,200/- and requested for waiver of penalty u/s 76, 77 and 78 of the Finance Act, 1994. He further requested to extend the benefit of cum-duty price since they have not received any tax from the service receivers.

WRITTEN SUBMISSION :

20. The Noticee vide his letter dated 27.02.2012 submitted reply to the Notice and submitted as under :-

THE PRINCIPLE OF CUM-TAX VALUE HAS TO BE ACCEPTED.

20.1 They submitted that they were not aware that the services being provided by them were taxable service and it was came to know after receiving summons dated 21.03.2011 and they immediately obtained the Service Tax Registration. Hence, they had neither collected nor received any service tax from the service receiver except M/s. Excel Crop Care Ltd., Bhavnagar. The demand of Service Tax was made on the gross amount received by them from the other service receiver except M/s. Excel Crop Care Ltd. was not proper and correct. It is very much clear that they had not collected any service tax from their service receiver. Even, M/s. Excel Crop Care Ltd. had paid Service Tax after

inquiry against them. Therefore, the amount received by them ought to have treated the transaction value as cum-tax value and the tax element should have been deducted for the purpose of arriving at the taxable value of the service.

In this connection, they relied on case law of CCE, Patna Vs. Advantage Media Consultant [2008 (10) STR 449 (Tri. Kolkata)] affirmed by the Supreme Court in CCE Vs. Advantage Media Consultant [2009 (14) STR J49 (SC)]. On the strength of the said case law, they claimed the benefit of Section 67(2) of the Act for the period of dispute involved in the present case.

20.2 The Noticee also placed reliance on following case in this context –

- (i) Robot Detective & Security Agency Vs. CCE, Chennai [2009 (14) ST 689 (Tri. Chennai)]
- (ii) Rampur Egg. Co. Ltd. Vs. CCE, Jaipur-I [2006 (3) STR 650 (Tri.-Del)]
- (iii) Gem Star Enterprises (P) Ltd. Vs. CCE, Calicut [2007 (7) STGR 342 (Tri. Bang)]

They also submitted that the service recipient except M/s. Excel Crop Care Ltd. has not paid the Service Tax amount separately. Therefore, they are entitled to assessment treating the value received as cum-tax value and therefore the demand amount would have to be reduced.

DUTY CALCULATION SHEET IS NOT CORRECT :

21. The figures shown under the column “Gross Taxable Amount Received by the Assessee” is not correct as the same had been taken from their Profit & Loss account on annual basis. The correct figures are as per the annexure attached with this notice and the same can be verified from their ledger which is also enclosed. Therefore, the demand of Service tax may please be corrected as per the annexure attached with this notice.

THEY ARE NOT LIABLE FOR PENALTY :

22.1 They further submitted that the service tax was not being paid on account of a bona fide belief that the same was not payable and they were not known the service tax law which was also stated in the statement dated 21.03.2011 of the Proprietor. They were also never advised by the service receivers to pay service tax. But, they had facilitated and cooperated with the Department by immediately depositing the Service Tax of Rs. 19,98,200/- vide GAR-7 dated 28.03.2011, the penalty should not be imposed upon them, by invoking Section 80 of the Finance Act, 1994. They had not contested the levy of service tax. They had cooperated with the Investigating Officers. Since they were under bona fide doubt regarding their activity falls under service tax or not, therefore, there was a reasonable cause on their part in not depositing the service tax in time. They were of the view that notwithstanding anything contained in Section 76 and 77 of the Finance Act, 1994, they were entitled for the benefit of Section 80 of the Finance Act and accordingly no penalty should be imposed upon them.

22.2 They also submitted that mere detection by the department does not mean that non-payment was with intention to evade unless the department brings out clear facts that they were having the knowledge that service tax was payable on such services but still they chosen not to pay the tax in order to evade the same. No such fact has been narrated in the show cause notice or forthcoming during the investigation. It was further submitted that bona fide belief on the part of them cannot be out rightly rejected unless some circumstance is shown to establish that they were in the knowledge that service tax was payable on such activity. When no such evidence were recovered the can be bona fide doubt whether service tax was payable in such situation. It was therefore requested that no penalty should be imposed on them and grant immunity from imposing penalty.

ADDITIONAL WRITTEN SUBMISSION :

23. The Noticee vide their letter dated 27.02.2012 submitted additional written submission and stated that the Tribunal in the case of Financerse Vs. CCE, Jaipur [2007

(8) STR 7 (Tri. Del)] had held that penalty not simultaneously imposable under Section 76 and 78 of the Finance Act, 1994 – Section 76 and 78 ibid mutually exclusive. Further, in Paragraph 19 of the judgment by the Hon'ble Supreme Court in Union of India Vs. Rajasthan Spinning and Weaving Mills [reported in 2009 (238) ELT 3 (SC)] that the penalty under Section 11AC as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty for adopting any of the means mentioned in the Section. Section 78 of the Finance Act, 1994 and Section 11AC of the Central Excise Act, 1994 are pari material provisions. The decision of the Apex Court holding that penalty is punishment for an act of deliberate deception with intent to evade would legitimately govern cases of this nature. Since, in this case, their client has no intention to evade tax, penalty cannot be imposed. They requested not to impose the penalties under Section 76 & 78 of the Finance Act, 1994 by invoking the provisions of Section 80 of the Finance Act, 1994.

DISCUSSION & FINDINGS :

24. I have carefully gone through the facts of the case and written as well as oral submissions made by the Noticee. The issues to be decided in this case are :-

- (a) Whether the amount received by the Notice should be considered as cum-tax value and the benefit of Section 67(2) of the Act should be allowed by way of deducting the element of Service Tax for the purpose of arriving at the taxable value ?
- (b) Whether the benefit under Section 80 of the Finance Act, 1994 is extendable so far as imposition of penalty u/s 76, 77 & 78 of the Finance Act, 1994 is concerned ?
- (c) Whether simultaneous penalty under Section 76 & 78 of the Finance Act, 1994 is imposable ?

25. I find that the Noticee was engaged in preparing / cooking of foods (Lunch / Dinner / Tea / Snacks etc.) and catering the same as per the requirement of the client (1) M/s. Excel Crop Care Ltd., Bhavnagar, (2) LIC of India, Divisional Office, Neelambaug, Bhavnagar (3) LIC Divisional Office, Rajkot, (4) Vivekanand Homeopethic College, etc. at their premises at the time and place of their convenience. Thus, the services provided by the Noticee has been rightly classifiable under category of "Outdoor caterer's service" as defined under Section 65 (76a) of the Finance Act, 1994 and is taxable under Section 65(105)(zzt) of the Finance Act, 1994. Shri Hector Alexander Rego, Proprietor of the Noticee in his statement dated 21.03.2011 recorded before the Superintendent (A.E), Central Excise, HQ, Bhavnagar u/s 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 confessed that his firm was engaged in providing services of catering to M/s. Excel Crop Care Limited since 01.10.2006 and shown the readiness to pay the Service Tax on the total amount of services rendered by his firm right from the beginning. The Noticee also not disputed the classification of the service provide by them and hence levy of Service Tax is also not in dispute.

26.1 The Noticee has claimed that the benefit of cum-tax value should be allowed by way of deducting the element of Service Tax from the gross amount received by them for the purpose of arriving at the taxable value. In this regard, the Noticee has placed reliance on following judgements :-

- (i) CCE, Patna Vs. Advantage Media Consultant [2008 (10) STR 449(Tri.Kolkata)] affirmed by the Supreme Court in CCE Vs. Advantage Media Consultant [2009 (14) STR J49 (SC)]
- (ii) Robbot Detective & Security Agency Vs CCE, Chennai [2009 (14) STR 689 (Tri. Chennai)]
- (iii) Rampur Engg. Co. Ltd. Vs CCE, Jaipur-I [2006 (3) STR 650 (Tri.-Del.)]
- (iv) Gem Star Enterprises (P) Ltd. Vs. CCE, Calicut [2007 (7) STR 342 (Tri. Bang.)]

26.2 Section 67 deals with the Valuation of taxable services for charging service tax and sub-section (2) of Section 67 provides that "Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged". The provision of this section suggests that the benefit of cum-tax value is available where the gross amount charged by a service provider is inclusive of Service Tax payable. The Noticee did not produce any evidence to this effect.

26.3 Further, 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 judgement of the Hon'ble Supreme Court in the case of M/s. Amrit Agro Industries Ltd Vs. 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 Vs. 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. The case laws relied upon by the Noticee are not applicable in this case.

27. As regards claim of the Noticee that duty calculation sheet is not correct. It has been contended by the Noticee that the figures shown under the Column "Gross Taxable Amount Received by the Assessee" was not correct as the same was taken from their Profit & Loss account on annual basis. They submitted the revised calculation sheet showing correct figures prepared on the basis of Ledger and stated that Ledger is enclosed herewith. I find that Ledger on the basis of which correct figures have been arrived at by the Noticee are neither found enclosed alongwith their submission dated 27.02.2012 / during the course of personal hearing nor vide their letter dated 23.09.2011. Therefore, the benefit as claimed by the Noticee cannot be extended in absence of any documentary evidences in this regard.

28.1 I find that the Noticee has contravened the provisions of Section 68 of the Finance Act, 1994 (the Act) and rule 6 of the Service Tax Rules, 1994 (the Rules) as they have failed to pay Service Tax at appropriate rate on the value of taxable services provided by them from 01.04.2006. They have also contravened the provisions of Section 70 of the Act and rule 7 of the Rules as they have failed to assess the service tax payable on the value of taxable services received from their clients.

28.2 The service tax demanded in the Show Cause Notice ought to have been deposited by the Noticee within the stipulated time, having failed to do so they are liable to penalty under the provisions of Section 76 of the Finance Act, 1994. Hence, penalty under Section 76 of the said Act is imposable on the Noticee for failure to make timely payment of Service Tax.

28.3 I also find that the noticee has failed to pay service tax and to take registration as required under the law. Therefore, they have become liable for penal action under provisions of Section 77(1) (a) of the Act. Further, the Noticee has failed to get themselves registered and subsequent filing of Service Tax Return within prescribed time limit. Thus, they have suppressed the fact of providing taxable service to company with an intention to evade payment of Service Tax. As the Noticee has suppressed the vital facts with an intention to evade service tax and violated the provisions of Acts / Rules of Service Tax, they are liable for penal actions under Section 78 of the Finance Act, 1994.

29. I do not agree with the contention of the Noticee that Service Tax was not paid on account of bona fide belief that same was not payable and they were not aware about Service Tax law in as much as they were providing this services since long back (i.e. 2006) and that too to the reputed service recipients. Moreover, the Service Tax become leviable on this service long back and it is not convincing that they were not aware of it for five years. I, therefore, find that the Service Tax was not paid with intent to evade the same. Therefore, the Noticee is not entitled for waiver of penalty u/s 76, 77 & 78 as contemplated and claimed by the Noticee by virtue of Section 80 of the Finance Act, 1994. The Noticee has not proved that there was a reasonable cause for failure to get registration, payment of Service Tax and filing of prescribed return and mere ignorance of law cannot be the excuse to avail benefit of this Section.

30. In view of the provisions of law and the facts of the case, I hold that the Noticee has provided service under category of **“Outdoor caterer’s service”** from 01.04.2006 and suppressed this fact from the department till a case has been booked against them by the department, with an intention to evade payment of Service Tax on this service. The Noticee is, therefore, required to pay service tax as calculated in Notice alongwith interest and for the act of not obtaining registration and for not paying amount of service tax they have rendered themselves liable for penalty under Section 76, 77 and 78 of the Finance Act, 1994.

31.1 The Noticee have also contested proposed imposition of penalty under Section 76 and Section 78 of the Act taking recourse of judgement passed by the Tribunal in case of The Financerse Vs. CCE, Jaipur [2007 (8) STR 7 (Tri. Del)]. The reliance have also been placed in this regard on judgment of Hon’ble Supreme Court in case of Union of India Vs. Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (S.C)] wherein it was observed that penalty u/s 11AC is punishment for act of deliberate deception with intent to evade duty and Section 78 of the Finance Act, 1994 is pari materia thereof. Since, the Notice had no intention to evade tax, penalty cannot be imposed upon them. The ratio of these two judgements is not applicable as facts of the matter before hand is different from the two judgement cited by the Noticee. Further, I find that in case of Assistant Commissioner of Central Excise vs. Krishna Poduval [2006 (1) STR (185) Ker.], 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 who is guilty of suppression deserve no sympathy under section 80 of the Act.

31.2 The Noticee has suppressed the material facts of providing taxable service as discussed in paras supra, with a sole intention to evade the payment of Service tax. Thus, the contention of the noticee that they are not liable to penalty by taking shelter of Section 80 of the Finance Act, 1994 is not sustainable. I place the reliance in this regard on the decisions of Hon’ble High Court of Karnataka in the cases of (1) M/s. World View Vision [2011-TIOL-801-HC-KAR-ST] and (2) M/s. United Communications Udupi [2011-TIOL-802-HC-KAR-ST].

31.3 The Hon’ble Supreme Court in the case of Dharmendra Textile Processors [2008 (231) ELT 3 (SC)] has held that lesser amount of penalty is not imposable. There is no discretion available on quantum of penalty under Section 11AC of C.Ex. Act, 1944. In union budget of 1996-97 the position was made clear that there is no scope of discretion under Section 11AC and the levy of penalty is mandatory penalty. Section 11AC of C.Ex. Act, 1944 is pari-materia with Section 78 of the Finance Act, 1944 as such penalty which is mandatory under Section 78 of the Finance Act, 1944.

31.4 Further, it has been held by the Hon’ble High Court of Punjab & Haryana in the case of CCE, Delhi III Vs. Machino Montell (I) Ltd. that penal liability arises in a situation mentioned in Section 11AC of C.Ex. Act, 1944 and mere deposit of duty prior to issue of Show Cause Notice does not negates the situations mentioned in Section 11AC ibid. Section 11AC of Central Excise Act, 1944 is pari material with the provisions of Section 78 of the Finance Act, 1994.

31.5 Hon'ble Tribunal, Delhi in case of CCE, Ludhiyana Vs. City Cable [2011 (23) STR 155 (Tri. Del)] has held that short payment of tax is enough to impose penalty under Section 78 of the Finance Act, 1944 even though the respondent was co-operative to the investigation as the penalty proceedings being independent of adjudication. Also, the High Court of Karnataka in the case of M/s. United Communication, Udupi Vs. CCE, Mangalore [2011-TIOL-802-HC-KAR-ST] has held that before issue of SCN penalty is leviable for non-payment of Service Tax when liability is known. Relying upon these judgements, I hold that the Noticee are liable for penalty both under Section 76 and Section 78 of the Act.

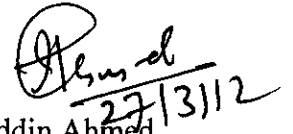
32. I also find that the Noticee has already paid Service Tax of Rs. 19,98,200/- against demand of Rs. 25,49,619-. The Noticee was made aware of the facts that in the event of payment of service tax demanded in this notice in full alongwith interest penalty equal to twenty-five per cent of the service tax demanded in this notice, within thirty days of receipt of this notice, the proceedings under this notice shall be deemed to be concluded. In spite of this, the Noticee failed to avail this opportunity provided under the provisions of sub-section (1A) of Section 73 of the Finance Act, 1994. This act of the Noticee also deserves no sympathy for waiver of penalty. In view of this, I am not inclined to invoke Section 80 in this case.

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

ORDER

- (i) I determine the demand of Service Tax of Rs.25,49,619/- (Rupees Twenty Five Lakh Forty Nine Thousand Six Hundred Nineteen only) under proviso to Section 73(2) of the Finance Act, 1994 alongwith interest at appropriate rate under Section 75 of the Finance Act, 1994. I appropriate the amount of Service Tax of Rs. 19,98,200/- already paid towards the Service Tax determined.
- (ii) I impose penalty of Rs.200/- (Rupees two hundred only) per day under Section 76 of the Finance Act, 1994 for failure to make the payment of Service Tax within the period and in the manner prescribed under Section 68 of the Act read with Rule 6 of the Rules, during the period in which such failure continued during 01.04.2006 to 18.04.2008 and penalty of Rs.200/- (Rupees two hundred only) per day or 2 (two) percent per month whichever is higher, under Section 76 of the Finance Act, 1994 for failure to make the payment of Service Tax within the period and in the manner prescribed under Section 68 of the Act read with Rule 6 of the Rules, during the period in which such failure continued during 19.04.2006 to 10.05.2008, provided that the total amount of penalty payable in terms of this account shall not exceed the service tax payable.
- (iii) I impose penalty of Rs. 1,000/- (Rupees One Thousand only) under Section 77 of the Act, for failure to obtain registration during the period upto 10.05.2008. I impose penalty of Rs.5,000/- (rupees five thousand only) or Rs.200/- (rupees two hundred only) per day whichever is higher, under Section 77 (1) (a) of the Finance Act, 1994, for failure to obtain registration during the period from 10.05.2008 till the date of actual compliance.
- (iv) I impose penalty of Rs. Rs.5,000/- (rupees five thousand only) or Rs.200/- (rupees two hundred only) per day whichever is higher, under Section 77 (1) (c) (iii) of the Finance Act, 1994, for failure to furnish information called for by a Central Excise Officer, to produce documents called for by the investigating officer and to appear before the investigating officer, for the period during which such failure continues till the date of actual compliance.

- (v) I impose penalty of Rs.5,000/- (Rupees Five Thousand only) under Section 77(2) of the Finance Act, 1994 upon Noticee, for failure to file prescribed return, under section 70 of the Finance Act, 1994 read with Rule 7 of the Rules.
- (vi) I impose penalty of Rs.25,49,619/- (Rupees Twenty Five Lakh Forty Nine Thousand Six Hundred Nineteen only) under Section 78 of the Finance Act, 1994. 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 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.


27/3/12

Imamuddin Ahmed
Joint Commissioner
Central Excise, Bhavnagar

F. NO. V/15-22/DEM-ST/HQ/2011-12.

Date :- 27.03.2012.

By Registered Post A. D.

To,
M/s. R.K. Caterers,
Block No. 5, Room No. 98,
New 3 Storied Building,
Ananadnagar,
Bhavnagar

Copy to:-

- (i) The Commissioner, Central Excise, Bhavnagar (RRA Section)
- (ii) The Assistant Commissioner, Service Tax Division, Bhavnagar
- (iii) The Assistant Commissioner (AE),, C.Ex. HQ, Bhavnagar
- (iv) The Assistant Commissioner (Recovery Cell), C.Ex., HQ, Bhavnagar.
- (v) The Assistant Commissioner (Prosecution Cell), C.Ex., HQ, Bhavnagar.
- (vi) The Superintendent, Service Tax City Range, Bhavnagar
- (vii) Guard file.