


<p>आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क, अहमदाबाद- उत्तर, कस्टम हाउस, प्रथम तल, नवरंगपुरा, अहमदाबाद- 380009</p>		 <p>OFFICE OF COMMISSIONER CENTRAL GST &amp; CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1<sup>ST</sup> FLOOR, NAVRANGPURA, AHMEDABAD-380009</p>
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निबन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./F.No. STC-38/O&A/SCN/PPPL/16-17

आदेश की तारीख/Date of Order:- 30.11.2017

जारी करने की तारीख/Date of Issue :- 30.11.2017

द्वारा पारित/Passed by:-

जी. सी. जैन IG. C. Jain

अपर आयुक्त / Joint Commissioner

मूल आदेश संख्या / Order-In-Original No. 16/JC/2017/GCJ

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरुद्ध अपील, इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क, केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी, अहमदाबाद 380015-को प्रारूप संख्या इ.ए.-1 (E.A.-1) में दाखिल कर सकता है। इस अपील पर रु .2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.00 only.

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute. (as per amendment in Section 35F of Central Excise Act, 1944 dated 06.08.2014)

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या इ.ए.-1 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्त अपील की प्रति।

(2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरुद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रु) 2.00 .दो रुपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form EA-1 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(1) Copy of accompanied Appeal.

(2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.2.00.

विषय: -कारण बताओ सूचना/Show Cause Notice F.No. CEA-II/ST/15-25/C-VI/APXXII/FAR-45/RP-02/16-17 dated 20.03.2017 issued to M/s. PSP Projects Pvt. Ltd., Opp. Celesta Courtyard, PSP House, ISCON-Ambli Road, Ambli, Ahmedabad-380 058.

5



**Brief facts of the case:-**

M/s. PSP Projects Pvt. Ltd, Opp Celesta Courtyard, PSP House, Opp. Lane of Vikram Nagar colony, ISCON Ambli Road, Ambli, Ahmedabad-380058 (hereinafter referred to as "the said assessee") are engaged in providing the service under the category of Construction Services Other than residential Complex including Commercial / Industrial Buildings or Civil Structure under the erstwhile section (65)(105)(zzq) and section (65) (105) (zzzza) respectively of Finance Act, 1994 and were holding Service tax registration No. AAACP7961LST 001.

2. During the course of audit of the records of the said assessee and as detailed at Revenue Para No. 2 of the FAR No. 45/2016-17 dated 22.8.2016 issued by the Assistant Commissioner, Circle-V of the erstwhile Central Excise & Service Tax, Audit-II, Ahmedabad, it was noticed that during the period from 01.07.2012 to 10.07.2014, the said assessee had provided construction services under works contract to M/s. Gujarat Cancer Society, for construction of Medical college campus under the works order No.GCS-C/WO/psp/66/0910 dated 01.12.2009; but not paid service tax on the value of the said services provided by them during the said period.

3. On verification of the ST-3 returns filed by the said assessee, it was noticed that the exemption had been claimed by them under Serial No. 9 of the table in the Notification No. 30/2012-ST dtd 20.6.2012, whereas the said Notification notified some taxable services listed therein and the extent of service tax payable thereon by the person providing service and receiving service respectively which were not relevant for the services provided to M/s Gujarat Cancer Society. However, during the course of audit, the said assessee filed a declaration i.e. party wise exempt service details for the year 2014-15; wherein against the services provided to Gujarat Cancer Society under Works Contract Service they have mentioned the project details as "GCS Medical College, Educational" and claiming exemption under Sr. No. 9(a) of the Notification No. 25/2012-ST dated 20.06.2012.

4. A query memo dated 11.07.2016 was issued to the said assessee seeking clarification/compliance in the matter. The assessee vide their letters received by the auditors on dated 13.07.2016 and 28.07.2016, submitted that they had carried out the construction work for M/s. Gujarat Cancer Society and that they were eligible for exemption from the service tax on the services provided to the education institute as per Serial no. 9(a) of the mega exemption Notification No. 25/2012 dated 20.6.2012; that they had carried out the construction for the education institute relating to the education development, which had been outsourced to them by the education institute. By referring to the Board's clarification vide circular No. 172/7/2013-

ST dated 19.9.2013 they had also submitted that as per the said circular the list of services mentioned was not exhaustive but elaborative, i.e any service provided to the educational institute was exempt from the service tax prior to 09.07.2014 which had been evident from the amendment w.e.f 10.07.2014 (Notification No.6/2014 dated 11.07.2014).

5. Further, the said assessee vide above letter had provided the details of the value of services provided to M/s. Gujarat Cancer Society for the period 2012-13 (01.07.2012 to 31.03.2013) to 2014-15 (upto 10.07.2014). The service tax liability for the said period during which exemption had been availed is calculated as under:

Year	Amount Received (Rs.)	Taxable Value (40% of col 2) (Rs.)	Service tax (@12% of col 3) (Rs)	Ed cess(@ 2% of col 4) (Rs.)	S&HEd cess (@1% of col 4) (Rs)	Total (5+6+7) (Rs.)
1	2	3	4	5	6	7
2012-13 (01.07.2012 to 31.03.2013)	120180657	48072263	5768672	115373	57687	5941732
2013-14	30095214	12038086	1444570	28891	14446	1487907
2014-15 (01.04.2014 to 10.07.2014)	63697551	25479020	3057482	61150	30575	3149207
<b>Total</b>	<b>213973422</b>	<b>85589369</b>	<b>10270724</b>	<b>205414</b>	<b>102707</b>	<b>10578846</b>

5.1 In terms of Board's instructions issued by the Directorate of Legal Affairs from F.No.1080/11/DLA/CCConference/2016 dated 08.07.2016, Joint Commissioner of the erstwhile Central Excise & Service Tax, Audit-II, Ahmedabad made a pre show cause consultation in the matter with the representatives of the assessee on 27.12.2016 and they submitted their written submissions on 27.12.2016, reiterating their submissions referred to in para 4 above.

5.2 It appeared that the said assessee had wrongly availed the benefit of exemption from payment of service tax under Serial Number 9(a) of the Notification No. 25/2012 dated 20.6.2012 from 01.07.2012 to 10.07.2014.

6. The relevant legal provisions of the notifications issued under the Finance Act and the rules made there under and Board's clarifications relied upon by the assessee are as under:

6.1. Sr.No. 9 of the notification No. 25/2012-ST dtd.20.06.2012, provides for exemption from service tax as under:

*9. Services provided to or by an educational institution in respect of education exempted from service tax, by way of,-*

- (a) **auxiliary educational services;**
- (b) **renting of immovable property;**

6.2 The definition of "auxiliary educational services as given at Para no. 2(f) of the said notification was as under :-

*(f) "auxiliary educational services" means any services relating to imparting any skill, knowledge, education or development of course content or any other knowledge - enhancement activity, whether for the students or the faculty, or any other services*

which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Government, or transportation of students, faculty or staff of such institution;

6.3 Further, as per Board's circular No. 172/7/2013-ST, Dated: September 19, 2013, the clarifications issued are as under:-

"2. The matter is covered by two provisions of the Finance Act, 1994. Section 66D of the Finance Act contains a negative list of services and clause (I) thereof reads as under: "services by way of-

- (i) pre-school education and education upto higher secondary school or equivalent;
- (ii) education as a part of a curriculum for obtaining a qualification recognized by any law for the time being in force;
- (iii) education as a part of an approved vocational education course;"

Further section 93(1) of the Finance Act, 1994, enables the Government to exempt generally or subject to such conditions taxable service of specified description. By virtue of the said power, Government has issued a notification No.25/2012-ST dated 20<sup>th</sup> June, 2012, exempting certain services. Sl. no. 9 thereof reads as follows:

"Services provided to an educational institution in respect of education exempted from service tax, by way of, -

- (a) auxiliary educational services; or
- (b) renting of immovable property;"

As defined in the said notification, "auxiliary educational services" means any services relating to imparting any skill, knowledge, education or development of course content or any other knowledge-enhancement activity, whether for the students or the faculty, or any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Government, or transportation of students, faculty or staff of such institution.

3. By virtue of the entry in the negative list and by virtue of the portion of the exemption notification, it will be clear that all services relating to education are exempt from service tax. There are many services provided to an educational institution. These have been described as "auxiliary educational services" and they have been defined in the exemption notification. Such services provided to an educational institution are exempt from service tax. For example, if a school hires a bus from a transport operator in order to ferry students to and from school, the transport services provided by the transport operator to the school are exempt by virtue of the exemption notification.

4. In addition to the services mentioned in the definition of "auxiliary educational services", other examples would be hostels, housekeeping, security services, canteen, etc. "

6.4 Further, vide notification No.6/2014 dated 11.07.2014, the notification No. 25/2012 dated 20.06.2012 was amended as under:-

" (1) In the said notification ,in the opening paragraph-

- (iii) for Serial 9, the following entry shall be substituted, namely:-
- 9. Services provided,-
- (a) by an educational institution to its students, faculty and staff;
- (b) to an educational institution, by way of,-
- (i) transportation of students, faculty and staff;

(ii) catering, including any mid-day meals scheme sponsored by the Government;

iii) security or cleaning or house-keeping services performed in such educational institution.

(iv) services relating to admission to, or conduct of examination by, such institution; ;

(2) In the said notification, in paragraph 2 relating to definitions- (a) clause (f) shall be omitted"

7. From the above, it appeared that the services provided by the said assessee does not qualify for the exemption under the notification *ibid* in as much as the construction activity undertaken by them under works contract service for construction of medical college, does not appear to fall under the definition of "auxiliary educational service". This is all the more so, as the educational institutes do not ordinarily carry out the construction services by themselves and hence construction service does not fall under the purview of "auxiliary educational services". When construction service is not treated as auxiliary educational service, the question of outsourcing the same does not arise.

7.1 The legislative intent of the Government for providing exemption for Serial No. 9 of the notification No. 25/2012 dated 20.6.2012 is also forthcoming from the notification No. 6/2014 dated 11.07.2014, amending the Notification No. 25/2012 *ibid*, whereby the exemption was limited to only four categories specified in sub clause (i) to (iv) of sub clause (b) of Sr. No. 9 of the said notification. Further, clause (f) which defined "auxiliary educational services" was omitted.

7.2 The Board's clarification vide circular dated 19.9.2013 makes it clear that all services relating to education are exempt from service tax. The auxiliary educational services defined in the notification as well as examples given in the above circular nowhere includes construction services as exempted which implies that construction service is not related to auxiliary educational services. It therefore appeared that the said assessee by wrongly claiming the exemption under the Auxiliary educational service has availed the benefit of the Notification *ibid* for the period from 01.07.2012 to 10.07.2014 which otherwise is not admissible to them as per the said notification. It is pertinent to mention here that said assessee started paying the service tax w.e.f. 11.07.2014 on the same services provided to Gujarat Cancer Society. Thus the service tax not paid by wrongly availing the exemption from payment of service tax for the period from 01.07.2012 to 10.07.2014 is required to be recovered from them along with interest.

8. Further, on verification of the said works contract, it is found that M/s. Gujarat Cancer Society is registered as public charitable trust bearing registration no. F.170 as mentioned on their letter head. Hence the service receiver is a trust and not a Government, a local authority or a governmental authority to whom the said services if provided are exempted vide Serial Number 12 of the Notification No.25/2012 dated 20.06.2012. The relevant text of the said Notification is reproduced here under:

12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of-

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

- (b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);
- (c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (Hi) an art or cultural establishment;
- (d) canal, dam or other irrigation works;
- (e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (Hi) sewerage treatment or disposal; or
- (f) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65 B of the said Act.

8.1 Thus the said assessee is also not eligible for the exemption as provided at serial number 12 of the notification *ibid*.

9. With the introduction of negative list w.e.f 01.07.2012 under Section 66 D of the Finance Act, 1994, the Trust working as educational institute is not covered under the said list. Hence it appeared that the services provided by the assessee neither fallen under negative list nor were exempted by any notification.

10. Further in the education guide dated 20.06.2012 released by the TRU, Central Board of Excise & Customs, New Delhi, at para 7.9.4.1 it was very clearly mentioned that if the services are provided for constructions of hospitals and educational institutes, other than for Government, a local authority or a governmental authority, the same are taxable. The text of the same is reproduced here under:

*"7.9.4 I am engaged in construction of hospitals and educational institutes. Am I required to pay service tax?"*

*If you are constructing such structures for the government, a local authority or a governmental authority, you are not required to pay service tax. If you are constructing for others, you are required to pay tax".*

11. From the above, it appeared that the services provided by the said assessee are taxable as they had provided the services to a Trust and not to the Government, a local authority or a governmental authority.

12. Thus, from the foregoing, it appeared that the exemption claimed by the said assessee is not admissible to them. Hence the service tax as calculated above in the table at para 5 above amounting to Rs. 1,05,78,846/- ( including Ed.Cess & S&HEd cess) on the taxable value of Rs.8,55,89,369/- {40% of Rs.21,39,73,422/- under Works contract as per Service Tax (Determination of Value Rules, 2006)} is required to be recovered from them under proviso to Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of the said Act.

13. As per provisions of Section 68(1) of the Finance Act, 1994 read with Rule 6 of Service Tax Rule 1994 as amended, every person receiving taxable service from any person is liable to pay service tax at the rate prescribed in 66B of the said Act to Central Government by the 5th of the month / quarter immediately following the calendar month / quarter in which the service is deemed to be provided as per the rules framed in this regard, towards the value of taxable services; (except for the month of March which is required to be paid on 31st March). It appeared that the said assessee had failed to determine the value of taxable services provided as detailed in the foregoing paras and failed to pay the Service Tax amounting to

Rs.1,05,78,846/- (including Education Cess & H.S. Edu Cess) for the period 01.07.2012 to 10.07.2014 thereby violated the provisions of Section 67, 68(1) read with Rule 6 of the Service Tax Rules, 1994 in respect of Works Contract Services provided to M/s. Gujarat Cancer Society, Ahmedabad.

14. It is provided under Section 70 of the Finance Act, 1994, that 'every person liable to pay the service tax shall himself assess the tax due on the service provided by them and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and as such frequency'. The form, manner and frequency are prescribed in Rule 7 of the Service Tax Rules, 1994. The said assessee had failed to self-assess the tax liability which was in fact due upon them, thereby contravening the said provisions of the section 70 of the Finance Act, 1994, read with Rule 7 of the Service Tax Rules, 1994. For this reason, they also liable to penalty under Section 77(2) of the Finance Act, 1994 for failure to assess their tax liability correctly and failure to file ST-3 returns with correct and full details.

15. As per proviso to erstwhile Section 73(1) of Finance Act 1994, 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 thirty months 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 as to 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 erroneously refunded by reason of fraud or collusion; or willful mis-statement; or suppression of facts; or 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 'thirty months', the words ' five years' had been substituted.

16. It further appeared that the said assessee at no point of time disclosed the material facts to the department in any manner as well as they had not disclosed correct taxable income in ST-3 Returns, which was not in accordance with the provisions as discussed above. The said assessee failed to declare the exemption notification which they intent to avail in the ST-3 returns filed under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service tax Rules, 1994 . On verification of ST- 3 returns for the period July-Sep-2012-13, Oct-March-2012-13, April-Sep-2013-14 and Oct-March-2013-14, it was observed that under Sr. No. A11.1 of the ST-3 Return under the category of "Work Contract Service" classified under sub clause (zzzza) to clause 105 of Section 65 of the Finance Act, 1994 the question was asked whether said assessee has availed benefit of any exemption notification and assessee replied "yes". Further at Sr. No. A11.2, the said assessee quoted Sr. No, 9 to the notification No. 30/2012 to avail the benefit of said notification. But the said entry specifies about the percentage of liability of the service provider and service receiver in case of works contract service. The said assessee therefore intentionally did not mention Sr. No. 9(a) of Notification No.25/2012- ST dtd. 20.6.2012 in the ST-3 returns, which they claimed during auditing and therefore that wilful omission amounts to mis-statement and suppression of fact. From the evidence, it appeared that the said assessee had provided the service to M/s Gujarat Cancer Society for construction of medical college, without payment of Service Tax by wrongly claiming the benefit of exemption Notification No.25/2012-ST as discussed supra. Moreover in the present regime of liberalization,



self assessment and filing of ST-3 returns online, no documents whatsoever are submitted by the assessee to the department and therefore the department would come to know about such non-payment of service tax and wrong availment of Cenvat credit only during audit or preventive/other checks. Therefore, it appeared that the said assessee had deliberately suppressed the material facts from the Department with an intention to evade payment of service tax. Hence, it appeared that this is a fit case for invoking the extended period of limitation of five years under the proviso to Section 73 (1) of the Finance Act, 1994 to recover the service tax not paid along with interest under Section 75 of the Finance Act, 1994. In the case of Mahavir Plastics versus CCE Mumbai , 2010 (255) ELT 241, in which it had been held that if facts are gathered by department in subsequent investigation extended period can be invoked. In 2009 23 STT 275 , in case of Lalit Enterprises v CST Chennai, it was held that extended period is evocable when department came to know of Service charges received by appellant on verification of his accounts. Therefore, in this case, all essential ingredients exist to invoke the extended period in terms of proviso to Section 73(1) of the Finance Act, 1994. Hence the service tax amounting to Rs.1,05,78,846/- is required to be recovered under proviso to Section 73(1) of the Finance Act, 1994 along with the interest leviable thereon.

17. As per section 75 of the Act, every person, liable to pay the tax in accordance with the provisions of section 68 or rules made there under, 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 rate prescribed by the Central Government by notification issued from time to time. Since the said assessee had failed to make payment of service tax in the prescribed time limit framed under the rules and provisions Finance Act, 1994, they are liable to pay interest on the Service Tax of Rs.1,05,78,846/- (including Education Cess & H.S. Edu Cess) for the period 01.07.2012 to 10.07.2014.

18. The government from the very beginning placed full trust on the service providers so far as service tax is concerned and accordingly measures like Self-assessments etc., based on mutual trust and confidence are in place. Further, a taxable service provider is not required to maintain any statutory or separate records under the provisions of Service Tax Rules as considerable amount of trust is placed on the service provider and private records maintained by them for normal business purposes are accepted, practically for all the purpose of Service tax. Moreover in the present regime of liberalization, self assessment and filing of returns online, no documents whatsoever are submitted by the assessee to the department and therefore the department would come to know about such wrong availment of exemption only during audit or preventive/other checks. All these operate on the basis of integrity of the service provider; therefore, the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on the service provider. From the evidence, it appeared that the said assessee had not taken into account the value of services received by them as narrated in the foregoing paras for rendering taxable services for the purpose of payment of service tax and thereby evaded service tax to the tune of Rs.1,05,78,846/- The deliberate efforts to mis-declare the value of taxable service in ST-3 Returns and not paying the correct amount of service tax in utter disregard to the requirements of law and breach of trust deposited on them was certainly not in tune with government's efforts in the direction to create a voluntary tax compliance regime. Such outright act in defiance of law and particularly in the present case where the assessee is fully aware of the provisions and liabilities placed upon

them by the statute. Therefore, it appeared that their acts of omission and commission of violation of the provisions discussed supra had rendered them liable for penal action under the provisions of Section 76, 77 & Section 78 of Finance Act 1994.

19 Therefore, a show cause notice No. CEA-II/ST/15-25/C-V/APXXII/FAR-45/RP-02/16-17 dated 20.03.2017 was issued to M/s. PSP Projects Pvt. Ltd, opp Celesta Courtyard, PSP House, Opp. Lane of Vikram Nagar colony, ISCON Ambli Road, Ambli, Ahmedabad-380058; asking thereunder to show cause to the Additional/Joint Commissioner of erstwhile Service tax, Ahmedabad as to why the exemptions claimed by them under Sr. No. 9(a) of Notification No.25/2012-ST dtd. 20.6.2012, as declared during the course of audit should not be denied to them; Service tax amounting to 1,05,78,846 /- ( One Crore five Lacs seventy eight thousand eight hundred forty six only) as detailed in the table at para 05 of the notice, under the "Works contracts Service" should not be demanded and recovered from them under the proviso to Section 73 (1) of the Finance Act, 1994, invoking the larger period of five years as discussed herein before; Interest on the amount of service tax of Rs.1,05,78,846/- as above should not be demanded and recovered from them under Section 75 of the Finance Act, 1994; Penalty should not be imposed upon them under Section 76 of the Finance Act, 1994, as amended, as they had failed to pay Service Tax within prescribed time limits as per Section 68 of Finance Act, 1994 read with Rule 6 of Service tax rules,1994; Penalty should not be imposed under Section 77(2) of the Finance Act, 1994 for failure to self assess the tax liability correctly and failure to file ST-3 returns with correct and full details; Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 for misstatement and suppressing the value of taxable service provided by them before the Department with intent to evade payment of Service Tax.

19.1 However, in pursuance of Notification No. 12/2017 C.Ex (NT) to Notification No. 14/2017-C.Ex (NT) all dated 09.06.2017 issued by the CBEC, the said show cause notice is to be adjudicated by an Officer in the rank of Additional/Joint Commissioner of Central Goods and Service Tax & C.Excise of Ahmedabad-North Commissionerate and accordingly a corrigendum dated 1.8.2017 is issued to that effect

#### **WRITTEN SUBMISSIONS:**

20 The said assessee vide letter dated nil, filed on 5/6/2017, submitted reply to the show cause notice; wherein they given the facts of the case in brief and denied all the allegations/observations raised in the show cause notice. Regarding the issue of availment of exemption for service provided to educational institution registered trust under 12AA of Income Tax Act for the period prior to 10.07.2014, it is stated by them that they had provided construction services under works contract to M/s. Gujarat Cancer Society, for construction of Medical college campus under the works order No. GCS- MC/WO/psp/66/0910 dated 01.12.2009 but not paid service tax on the value of the services provided by them during the said period by claiming the exemption vide sr. no. 9 of mega exemption notification no. 25/2012; that prior to 10.07.2014, they had been eligible for the exemption from the service tax on the service provided to the education institute as per mega exemption notification 25/2012-ST; that it was undisputed fact that, they had carried out construction work for the education institute registered trust under 12AA of income tax act, during the period 01.04.2014 to 09.07.2014. Then they reiterated relevant para of exemption notification no. 25/2012 and drawn attention

towards the provision & clarification issued by the Board vide circular No. 172/7/2013-ST dated 19.9.2013 during the impugned period 01.4.2014 to 09.07.2014. They submitted that as defined in the said notification, "auxiliary educational services" means any services relating to imparting any skill, knowledge, education or development of course content or any other knowledge-enhancement activity, whether for the students or the faculty, or any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Government, or transportation of students, faculty or staff of such institution. They stated further that by virtue of the entry in the negative list and by virtue of the portion of the exemption notification, it will be clear that all services relating to education were exempt from service tax; that there were many services provided to an educational institution and that had been described as "auxiliary educational services" and they had been defined in the exemption notification and such services provided to an educational institution were exempt from Service Tax; They stated further that if a school hires a bus from a transport operator in order to ferry students to and from school, the transport services provided by the transport operator to the school were exempt by virtue of the exemption notification; that in addition to the services mentioned in the definition of "auxiliary educational services", other examples would be hostels, housekeeping, security services, canteen, etc"; They stated that "auxiliary educational services" define the following-

- any services relating to imparting any skill, knowledge, education or development of course content or any other knowledge-enhancement activity,
- It is for or to the students or the faculty,
- Or any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person,

20.1 They further contended that they had carried out the construction for the education institute relating to the education development, which had been outsourced to them by the education institute during the impugned period and so the claim of exemption from service was tenable; that further from the above circular it clear that, list of services had been mentioned is not exhaustive, but elaborative, i.e. any service provided to the educational institute were exempt from the service tax prior to the 09.07.2014 which had been evident from the amendment w.e.f. 10.07.2014 and they reproduced the contents at para 2.2.2 of D.O. Letter F. No. 334/15/2014-TRU, dated 10-7-2014 of Board and stated that it is clear that govt. wants to restrict the exemption to the above four listed service only, describing the complete & exhaustive list of service; that prior to the amendment of exemption notification, they had been eligible from the exemption on the payment of service up to 09.07.2014 and accordingly they had availed the exemption from the service tax.

20.2 They further argued that the entire show cause notice was time barred which covers the period of 01.07.2012 to 10.07.2014 and it was issued on 20.03.2017 whereas fact in the knowledge of the dept's since 2012 & onwards and thus, the show cause notice had invoked extended period of limitation based on the allegation that they had suppressed the information from the department.

20.3 They further argued that penalty cannot be imposed under Section 78 of the Finance Act, 1994 in their case; that the show cause notice had proposed to impose penalty under Section 78 of the Finance Act, 1994; that they had not suppressed any information from the department and there was no wilful misstatement on their part; that it was therefore clear from the statutory provisions that for imposing penalty under Section 78 of the Act, it was to be established that there was a short payment of service tax by reason of fraud, collusion, wilful mis-statement, suppression of facts or contravention of any provisions of the Act or rules made there under with intent to evade payment of service tax.

20.4 They further contended that the Show Cause Notice has not given any reason whatsoever for imposing the penalty under Section 78 of the Act; that the shows cause notice merely alleging badly that there was suppression on their part; that show cause notice had not brought any evidence / fact which can establish that they had suppressed anything from the department and hence no case had been made out on the ground of suppression of facts or willful misstatement of facts with the intention to evade the payment of service tax and therefore the present case was not the case of fraud, suppression, wilful mis-statement of facts, etc and hence they argued that penalty under Section 78 of the Act cannot be imposed; that the show cause notice was liable to be dropped on this ground also. They relied on Hon'able Gujarat High Court decision in case of Steel Cast Ltd. 2011 (21) STR 500 (Guj).

20.5 They argued that the penalty under Section 76 & 77 was not imposable since there was no short payment of service tax; that as per the merits of the case, they were not liable for payment of Service tax; that for imposing penalty, there should be an intention to evade payment of service tax on their part; that the penal provisions are only a tool to safeguard against contravention of the rules; that they had always been and were still under the bonafide belief that they were not liable for payment of service tax and such bonafide belief was based on the grounds given above; that there was no intention to evade payment of service tax as mentioned in the ground above and therefore, no penalty is imposable in the present case. In support of the above view, they placed reliance on the decision of the Hon'able Supreme Court in the case of Hindustan Steel Ltd. v The State of Orissa reported in AIR 1970 (SC) 253. The above decision of the Apex Court, was followed by the Tribunal in the case of Kellner Pharmaceuticals Ltd. Vs. CCE, reported in 1985 (20) ELT 80 . They further argued that even if there was any contravention of provisions the same was solely on account of their bona-fide belief and such bona-fide belief was based on the reasons stated above; that the contraventions, if any, were not with the intention to wilfully evade of payment of service tax. They also placed reliance on the judgment of the Hon'able Supreme Court in the case of Pushpam Pharmaceuticals Company v CCE 1995 (78) ELT 401 (SC) and CCE Vs. Chemphar Drugs and Liniments 1989 (40) ELT 276 (SC), (Supra) and stated that the ratio of both the above - cited cases is squarely applicable to their case and hence no penalty under Section 76 of the Act is sustainable in the present case. The said assessee further submitted that the present case was a fit case to be covered under Section 80 of the Act, which expressly provides that no penalty shall be imposed under Section 76 and 79 if the assessee had a reasonable cause for default. They, then, without prejudice to the above submission, submitted that no case had been made out by the Department that the present demand of service tax is on account of fraud, collusion, wilful mis-statement, suppression of facts or contravention of any of the provisions of Act or rules made hereunder with intention to evade payment of service tax and

hence no interest or penalty under Section 77 and 78 of the Act can be imposed on this ground itself and the Show Cause Notice is liable to be dropped on this ground also.

20.6 They further stated that penalties under Section 77 and 78 of the Act cannot be simultaneously imposed; that penalties under Section 77 and 78 are mutually exclusive and Section 78 is applicable if the non-payment of service tax is due to reasons specified therein with an intention to evade payment of service tax; Section 77 is applicable in cases other than those covered under Section 78 of the Act. They quoted case laws in the cases of *The Financers v. CCE, Jaipur - 2007 (8) STR 7 (Tri. Dei)*, *Commissioner of Central Excise, Ludhiana v. Pannu Property Dealer — 2009 (14) S.T.R. 687 (Tri. Del)*, *COMMISSIONER OF C. EX., CHANDIGARH Vs CITY MOTORS 2010 (19) S.T.R. 486 (P & H)*, *CCEC, Chandigarh Vs M/s Cool Tech. Corporation (Service Tax Appeal No 47 of 2010) (P & H)* and *CCE, Commissionerate Vs M/s FIRST FLIGHT COURIER LTD 2011 (22) STR 622 (P & H)*.

20.7 Without prejudice to the above submissions, the said assessee further submitted that, it is a settled principle of law that if a dispute is arising out of interpretation of the provisions of statute or exemption notification, no penalty can be levied; If at all it is held that the service tax is payable as demanded by the Show Cause Notice, then also it can be said that it is a dispute arising out of interpretation of the provisions of the law and not because of any intentional avoidance of tax and they placed reliance on some case laws.

20.8 They further stated that Section 80 of the Act provides that no penalty shall be imposed on the assessee for any failure referred to in Sections 76 or 78 of the Act, if the assessee proves that there was reasonable cause for the said failure and thus,, the Act statutorily provides for waiver of penalty; that in the present case, there was a bonafide belief on part of them that the activities carried out by them are not taxable and therefore, there was reasonable cause for failure, if any, on their part to pay service tax and to file service tax return and hence, in terms of Section 80 of the Act, penalties cannot be imposed under Section 76 and 78 of the Act. In this regard also they placed reliance on some judgments:

20.9 They finally requested to take a lenient view and the proceeding may be dropped in the interest of justice. They also requested to be heard in person before taking any decision in the matter.

#### **PERSONAL HEARING:**

21. The case was initially posted for hearing on 22.09.2017 but nobody representing the said assessee was turned up for hearing. Hence, hearing date was again fixed and on 02.11.2017, Shri. Vipul Khandhar, Chartered Accountant appeared for hearing on behalf of the assessee. During the course of hearing, Shri. Vipul Khandhar reiterated the contents of the written submissions made on 5.6.2017 and made a request to drop the show cause notice.

**FINDINGS:**

22. I have carefully gone through the facts of the case, and the submissions advanced by M/s. PSP Projects Pvt. Ltd, Ambli, Ahmedabad in their reply to the present show cause notice and during the course of hearing.

23. I find that the basic issue that is required to be decided by this order is as follows-

Whether the construction of medical college building of the Gujarat Cancer Society done by the assessee under works contract service is to be considered as 'auxiliary educational service' and accordingly that service provided by the assessee can be considered for service tax exemption as per Serial No. 9(a) of mega exemption Notification No. 25/2012-ST dated 20.06.2012 or not.

23.1 It is seen that the dispute on the admissibility of service tax exemption as provided at Sl.No. 9(a) of Notification No.25/2012-ST dated 20.06.2012 in providing the works contract service by the assessee to the Gujarat Cancer Society has arisen between the Service Tax Audit team and the assessee which was then culminated in issuing the present show cause notice.

24. Apart from examination of allegations made in the notice and the reply given by the assessee, relevant notification and Board's circulars issued on the subject matter are also required to be examined in order to conclude the matter. Firstly, I would like to have a look at the Notification No. 25/2012-ST dated 20.06.2012, which was a mega exemption notification. The relevant provisions were at Sl.No. 9(a) of this notification which are as under-

- "9. Services provided to or by an educational institution in respect of education exempted from service tax, by way of,-*
- (a) auxiliary educational services; or*
  - (b) renting of immovable property;"*

The definition of "auxiliary educational services" was also given in such notification to mean "any services relating to imparting any skill, knowledge, education or development of course content or any other knowledge-enhancement activity, whether for the students or the faculty, or any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Govt., or transportation of students, faculty or staff of such institution'

24.1. CBEC in its Letter No. 334/3/2013-TRU dated 28/02/2013, had clarified that exemption by way of auxiliary educational services and renting of immovable property by (and not to) specified educational institutes under S.No. 9 will not be available w.e.f. 1.4.2013.

24.2 CBEC vide Circular No. 172/7/2013-ST dated 19.09.2013 had further clarified that -

*"By virtue of the entry in the negative list and by virtue of the portion of the exemption notification, it will be clear that all services relating to education are exempt from service tax. There are many services provided to an educational institution. These have been described as "auxiliary educational services" and they have been defined in the exemption notification. Such services provided to an educational institution are exempt from service tax. For example, if a school hires a bus from a transport operator in order*

*to ferry students to and from school, the transport services provided by the transport operator to the school are exempt by virtue of the exemption notification.*

*It is also clarified that in addition to the services mentioned in the definition of "auxiliary educational services", other examples would be hostels, housekeeping, security services, canteen, etc."*

24.3 Serial No. 9 of Notification No. 25/2012-ST dated 20.06.2012 was substituted vide Notification No. 06/2014-ST dated 11.07.2014 and accordingly the exemption entry read as follows -

*"9. Services provided, -*

*(a) by an educational institution to its students, faculty and staff;*

*(b) to an educational institution, by way of,-*

*(i) transportation of students, faculty and staff;*

*(ii) catering, including any mid-day meals scheme sponsored by the Government;*

*(iii) security or cleaning or house-keeping services performed in such educational institution;*

*(iv) services relating to admission to, or conduct of examination by, such institution;"*

25. It would be seen from above that, originally, services provided to or by an educational institution in respect of education were exempted from service tax, by way of auxiliary educational services; or by renting of immovable property. It is relevant to first understand the scope of the phrase 'auxiliary educational services' as defined in Notification No. 25/2012-ST dated 20.06.2012. The term 'auxiliary education services' is found to have been covered a whole gamut of services which are necessary and normally received by educational institutions for, and in relation to, imparting skill, knowledge, education etc. to students and teachers. The definition is also found have specifically covered certain services like services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meal scheme sponsored by the government, or transportation of students, faculty or staff of such institution.

25.1 It would also be seen that in response to the representation of some educational institutions for getting clarification on the matter of availability of service tax exemption to certain services relating to education sector, Board vide Circular No. 172/7/2013-ST dated 19.09.2013 clarified that all the services provided in respect of education are exempted from service tax. Board also mentioned few services in the said circular as examples for the auxiliary educational services which were under exemption under the said notification. The services mentioned by the Board included hostel services, housekeeping services, security services, canteen etc.

25.2 By substituting Serial No. 9 of Notification No. 25/2012-ST dated 20.06.2012 vide the Notification No. 6/2014-ST dated 11.07.2014, the entire scheme of exemption in respect of education services was modified. Hence, w.e.f. 11.07.2014, exemption was available, as per Serial No. 9(a), to all services provided by an educational institution (as defined) to its students, faculty and staff and, as per Serial 9(b), to services provided to an educational institution, by way of transportation of students, faculty and staff; catering, including any mid-day meals scheme sponsored by the Government; security or cleaning or house-keeping services performed in such educational institution; services relating to admission to, or conduct of examination by, such institution

26. It thus would be seen that Notification No. 25/2012-ST dated 20.06.2012, as amended, provided exemption to services provided to or by, among other services, an educational institution in respect of education. The dispute in the case before me is the availability of exemption from service tax on the services provided by the assessee to the Gujarat Cancer Society. Hence, only the aspect of services provided to an educational institution in respect of education, covered at Serial No. 9 of the Notification No. 25/2012-ST, is needed for verification in the present matter.

27. Show cause notice alleges that the service of construction of civil works provided by the assessee to the Gujarat Cancer Society does not qualify for the exemption under Notification No. 25/2012-ST as the construction activity undertaken by them under works contract service for construction of medical college not coming under the definition of 'auxiliary educational service'. Notice is found to have taken this stand mostly on the basis of the clarification given by Board vide circular dated 19.9.2013 and the notification No. 6/2014-ST dated 11.7.2014 which amended the Notification No. 25/2012-ST. Assessee's contention on this point is that as per Board's clarification issued during the period 01.04.2014 to 09.07.2014, it would be clear that all services relating to education were exempt from service tax. Assessee is also found to have argued that by amending the Serial No. 9 at Notification No. 25/2012-ST w.e.f 10.7.2014 government wanted to restrict the exemption to four listed services only and therefore prior to the amendment of the exemption notification, they were eligible for the exemption on the payment of service up to 09.07.2014.

28. It would be evident from the above that the bone of contention in the present case is that as to whether the construction of medical college building of the Gujarat Cancer Society done by the assessee under works contract service is to be considered as 'auxiliary educational service' and accordingly that service provided by the assessee can be considered for service tax exemption as per Serial No. 9(a) of mega exemption Notification No. 25/2012-ST dated 20.06.2012.

28.1. At this stage it is pertinent to understand the scope of the phrase, 'auxiliary educational services', as defined in Notification No. 25/2012-ST. The term 'auxiliary educational services' covers a whole gamut of services which are necessary and usually received by educational institutions for, and in relation to, imparting skill, knowledge, education, etc. to both students and teachers. This definition also specifically includes certain services like services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meal scheme sponsored by the government, or transportation of students, faculty or staff of such institution.

28.2. A deep examination of the definition of the auxiliary educational institutions shows that although various services used for or in relation to imparting education were covered within its ambit it did not cover all the services received by an educational institution. Thus it is seen that all the services received by an educational institution do not qualify for the exemption as per Serial No 9(a) of Notification No. 25/2012-ST. Only the services which are qualified as 'auxiliary educational services' or renting of immovable property services were eligible for getting the exemption under the said mega exemption notification. It is thus evident that there were certain other services which are not considered as 'auxiliary educational services' and not to be considered for exemption as per the said exemption notification.



28.3. Assessee's contention is that all services relating to education were exempt from service tax. If the intention of the legislature was indeed to grant exemption to all services rendered to the educational institutions then there was no need for inserting the term-'auxiliary educational services'- in the said mega exemption notification. This indicates that the disputed exemption was restrictive in nature and was not meant to cover all services provided to the educational institutions. If all services were to be exempted then the definition of auxiliary educational service would become meaningless.

28.4. Assessee's contention that the circular No. 172/7/2013-ST dated 19.9.2013 of Board made it clear that any service provided to the educational institute was exempt from the service tax prior to 09.07.2014 is not to be accepted. As already stated Serial No. 9(a) of Notification No. 25/2012-ST provided exemption from payment of service tax only to the services included under the definition of 'auxiliary educational services'. A close perusal of the said circular indicate that Board wanted to clarify that all services relating to education, described as 'auxiliary educational services' as defined in the disputed notification, were exempt from service tax. Thus, by this circular, in fact, the Board confirmed the intention of the exemption clause given at Serial No. 9(a) of Notification No. 25/2012-ST, that in order to avail the benefit of the exemption granted to the services provided to the educational institutions, such services should first qualify as auxiliary educational services. Board's said circular mentioned few services provided to educational institutions covered under 'auxiliary educational services' which were transportation service provided by the transport operator to ferry students to and from the school, hostels, housekeeping, security services, canteen etc. Examining the nature of all these services it can be seen that such services which have been provided by the educational institute directly to students but outsourced from other agencies/service providers. Such services are found in the category of 'auxiliary educational services' as these services are provided in respect of education and incidental to education only. But the works contract service provided to an educational institution is for construction of building and any other works for setting up an institution and such service is not found in respect of education.

28.5 Serial No. 9 of Notification No. 25/2012-ST starts from 'services provided to educational institutions in respect of education exempted by way of...'. It is seen that the phrase, in respect of education, is very important point while examining the service tax liability. Hence educational services provided only in respect of education, which are in the category of auxiliary education services, are exempted. Works contract service received by an educational institution cannot be said as provided in respect of education and hence cannot be eligible for benefit of Serial No. 9 of Notification No. 25/2012-ST.

28.6 In the case at hand, the assessee constructed civil structures for Gujarat Cancer Society under works contract service. As per the Work Order No. GCS-MC/WO/psp/66/09 10 dated 01/12/2009 given by the Gujarat Cancer Society to the assessee, copy of which is available on records, it is seen that the scope of the work includes the construction work of phase-I & II consisting of (a) medical college building (b) teaching hospital building (c) residential blocks etc (d) utility (services) buildings etc (e) underground and over head water tanks (f) ancillary buildings and infrastructures etc. It is thus apparent that the construction made is not solely for any educational institution run by the Gujarat Cancer Society. Thus the argument of the assessee is not even factually correct.

28.7. Assessee is also found to have argued that before restricting the exemption to four listed services vide Board's letter No. 334/15/2014-TRU dated 10.07.2014, they were eligible for the exemption on the payment of service tax up to 09.07.2014. No merit is found in this contention also as Board in this clarification specifically stated that scope of exemption remains the same as earlier in the case of services provided by eligible educational institutions; in the case of services received by the eligible educational institutions, exemption will be available only in respect of the services specified. Besides, from this letter it is also seen that for the purpose of getting clarity, the concept of 'auxiliary educational services' is omitted from the disputed Serial number of the said mega exemption notification and specified four services which will be exempt when received by the eligible educational institutions. Thus the said Board's letter at any way not giving any indication that prior to 09.07.2014, all educational services were exempted. This letter, in fact, indicates that only the educational services specifically mentioned in the definition of 'auxiliary educational services' and in Board's Circular No. 172/7/2013-ST dated 19.9.2013 are continued in the amended notification. Thus, contention of the assessee on this aspect does not merit for any consideration.

29. It is clearly evident from the facts discussed above that the construction of medical college for Gujarat Cancer Society undertaken by the assessee under works contract service does not fit into the definition of 'auxiliary educational services' as shown at Serial No. 9(a) of Notification No. 25/2012-ST so service tax is leviable on such services provided.

30. Although the assessee not claimed the benefit of exemption as per the provision contained in serial No. 12 of Notification 25/2012-ST dated 20.06.2012 through their ST3 returns, the notice is found to have explored the chances of getting the benefit of said clause to the assessee. As per the Serial Number 12 of the said exemption notification services provided to the government, a local authority or a governmental authority by way of construction, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of specified items are exempted from service tax. Thus the pre-condition for getting eligible for the said exemption, service receiver must be government, a local authority or a governmental authority. But, notice alleges that service receiver, Gujarat Cancer Society, is registered as public charitable trust and not a government, local authority or a governmental authority and accordingly benefit of exemption as per said clause of Notification No. 25/2012-ST is also not available to the assessee. Notice further quoted the explanation given by Board at point No.7.9.4 of Education Guide dated 20.06.2012 to deny the exemption as per said clause to the assessee. However, the assessee opted to remain silent on these allegations made against them by way of not giving any reply on this point in their defense reply which indicates that whatever charges leveled against them on the said point are true. In such a situation, I do not want to discuss the said point further and I am inclined to accept the view of the notice that the assessee is not able to claim the benefit of exemption from payment of service tax under the provisions contained at Serial No. 12 of said mega exemption notification.

31. It is thus to conclude that the assessee had wrongly availed the service tax exemption leviable on the value of construction services provided to Gujarat Cancer Society under works contract service and the so escaped tax is liable to be recovered from them under the provisions of Section 73(2) of Finance Act, 1994 alongwith interest at the applicable rate under Section 75 of the Finance Act, 1994.

32. Now I would like to go into the further contention of the assessee that the present demand notice is time barred. It is a fact that the notice dated 20.3.2017 covers a period 1.7.2012 to 10.7.2014. Assessee merely stated that the fact of availing of exemption on the said matter was in the knowledge of the department since 2012 and onwards and hence no suppression was made by them from the department. The facts of the case says clearly that in the ST-3 returns filed by the assessee during the relevant period exemption was claimed under Serial Number 9 of the table in Notification No. 30/2012-ST dated 20.6.2012. During the course of audit after verification by the audit officers it was revealed that the said notification was not relevant in the case of the assessee and accordingly, during the time of audit, they filed a declaration claiming thereunder the exemption under Serial No. 9(a) of Notification No. 25/2012-ST for the services provided to Gujarat Cancer Society for works contract service. This type of mis-declaration on the part of the assessee demonstrates their intention to mislead the department and to avail the exemption illegally i.e. without support of any proper notification. During the course of verification of documents of the assessee by the audit officers such mis-declaration was noticed and then wrongly claimed the notification No. 25/2012-ST. The show cause notice is issued within one year from the date of auditing by invoking the extended period from July, 2012 to 10.7.2014. Thus the contention that notice is time barred is devoid of merit.

33. Notice also proposes to recover interest on the unpaid service tax amount on the value of taxable service provided to Gujarat Cancer Society under works contract service from the assessee under the provisions contained in Section 75 of the Finance Act, 1994. Section 75 of the Act provides that every person liable to pay the tax in accordance with the provisions of Section 68 or rules there under, who fails to credit the tax or any part thereof to the account of the central government within the period prescribed, shall pay interest at the specified rate. In the instant case the assessee had not paid service tax on the value of works contract service provided to Gujarat Cancer Society by way of wrongly claiming exemption notification. Thus the interest at the appropriate rate, as was in existence at the relevant time, is chargeable from the assessee in terms of the Section 75 of the Finance Act, 1994.

34. Notice further proposes to penalise the assessee (i) under the provisions of Section 76 of the Finance Act, 1944 as they failed to pay service tax within time limit as specified in Section 68 of the Act read with Rule 6 of the Service Tax Rules, 1994 (2) under the provisions of Section 77(2) of the Finance Act, 1994 for their failure to self assess tax liability correctly and failure to file ST 3 returns with correct and full details and (3) under the provisions of Section 78 of the Finance Act, 1994 for misstatement and suppressing the value of taxable service provided with intent to evade payment of tax.

34.1 Period involved in the present case is from 01.07.2012 to 10.07.2014. Hence penal provisions which were existence at that period in the Finance Act, 1994 are required to be examined. It is seen that by the introduction of Finance Bill, 2015, with effect from 14.5.2015, Section 76 and 78 of Finance Act, 1994 are amended or substituted. Thus, provisions of these sections stood prior to 14.5.2015 are relevant here. Prior to Budget 2015, Section 78 was as under-

*"(1) 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 (b) collusion (c) willful mis-statement (d) suppression of facts or (e) contravention of any of the provisions of the Act or Rules made thereunder with intent to evade payment of 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 the service tax and interest thereon, if any payable by him, which shall be equal to the service tax so not levied or paid or erroneously refunded.*

*Provided that where true and complete details of the transactions are available in the specified records, penalty shall be reduced to fifty per cent. of the service tax so not levied or paid or short-levied or short-paid or erroneously refunded :*

*Provided further that where such service tax and the interest payable thereon is paid within thirty days from the date of communication of order of the Central Excise Officer determining such service tax, the amount of penalty liable to be paid by such person under the first proviso shall be twenty-five per cent. of such service tax :*

*Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount penalty so determined has also been paid within the period of thirty days referred to in that proviso:*

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

34.2 Assessee is found to have tried to escape from the clutches of penalty by relying on some judgments/orders of Courts and Tribunals. Main argument on the proposal of penal provision under Section 78 against them was that there was no fraud, suppression, willful mis-statement of facts etc on their part. Since it is clearly evident from above paras that the assessee made mis-statement of availing one exemption notification through their statutory returns filed before the department and suppressed the material facts and claimed another exemption notification, which is also not available to them, when the officers of audit started verifying the admissibility of notification declared in their returns. These actions on the part of the assessee invited the penal provisions under Section 78 of the Act against them. The case law, reported at 2011 (21) STR 500 (Guj.), is not relevant in the instant case as by that order, Hon'ble High Court of Gujarat dismissed the appeal of Revenue by observing that it was apparent that adjudicating officer had not recorded any specific finding as regards suppression except for holding that the assessee had suppressed the fact that it was providing management consultancy services and had suppressed the value of taxable service provided and the Tribunal upon appreciation of the evidence on record and considering the submissions advanced by the assessee had found as a matter of fact that there was no suppression on the part of the assessee and on behalf of the revenue nothing had been pointed out to the contrary to dislodge the findings recorded by the Tribunal so as to persuade the court to take another view and in the circumstances, it was not possible to state that the Tribunal had committed any legal error so as to warrant interference. It is to reiterate here that element of mis-statement and suppression of facts by the assessee is clearly visible in the case at hands.

34.3 As per assessee, penalty under Section 76 & 77(2) of the Finance Act, 1994 is also not imposable as there was no short payment of service tax and no contravention of any Act or rules. It would be appropriate to examine the relevant provisions of these penal provisions, as it stood at the relevant time, which is also reproduced below for ready reference.

*“Section 76 (1) : 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 in accordance with the provisions of section 75, a penalty which shall not be less than [one hundred rupees] for every day*

*during which such failure continues or at the rate of one 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 fifty per cent of the service tax payable."*

*"Section 77(2) : Any person, who contravenes any of the provisions of this Chapter or any rules made thereunder for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to ten thousand rupees."*

34.4 It would be apparent from above that as per the last proviso to Section 78 of the Act, if the penalty is payable under Section 78, the provisions of Section 76 shall not apply. Considering the nature of service tax evasion done by the assessee, it is already concluded that penalty under the provisions of Section 78 is imposable on the assessee. In such a situation, by virtue of the above said proviso to Section 78, no separate penalty under Section 76 of the Act is warranted.

34.5 Besides, the notice also suggested invoking the provisions of the Section 77(2) of the Act by alleging that the assessee violated the provisions of (i) Section 68(1) of the Finance Act, 1994 read with Rule 6 of Service Tax Rules, 1994 and (ii) Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994. Section 68(1) of the Act read with Rule 6 of the Service Tax Rules, 1994 provides the payment of service tax by the service provider in such manner and within such period as prescribed. In the present case, it is established that the assessee failed to determine the value of taxable service and service tax payable and not paid the service tax by wrongly availing the exemption Notification. Similarly, Section 70 of the Act read with Rule 7 of the Service Tax Rules provides for assessing the tax due on the services provided by him and for filing of return in prescribed form within the specified time limit. In this case, it is already concluded that the assessee failed to determine and assess their tax liability on the services rendered during the period in question by way of wrongly availing the exemption notification. Provisions of Section 77(2) of the Act provided that any person, who contravenes any of the provisions of the Chapter V of the Finance Act, 1994 or any rules made thereunder for which no penalty is separately provided in the Chapter, shall be liable to a penalty which may extend to ten thousand rupees. I observe that for the above discussed contraventions of the provisions of the Sections of Finance Act, 1994 and Service Tax Rules, 1994, no separate penalty is prescribed in any Sections of the Chapter V of the Finance Act, 1994 and in such a situation, provisions of Section 77(2) are applicable in the present case.

34.5 Coming to the issue of the quantum of penalty under Section 78 of the Finance Act, 1994 it is seen that under the provisions of Section 78(1) of the Finance Act, 1994 penalty shall be equal to the amount of service tax not paid. However, as per the first proviso to this section, where true and complete details of the transactions are available in the specified records, penalty shall be reduced to fifty per cent of the service tax so not paid. It would be recalled from the facts of the case that the notice was originated from the audit objection raised by the Audit officers of the department. During verification of the records/documents of the assessee by these officers, the non-payment of service tax on the taxable service provided was noticed by the department. Thus, benefit of reduced penalty of fifty per cent of the non paid service tax amount, as per the said proviso to Section 78 can be extended to them.

35. In view of above, I pass following order-

**ORDER**

(i) The exemption claimed by M/s. PSP Projects Pvt. Ltd, Opp Celesta Courtyard, PSP House, Opp. Lane of Vikram Nagar colony, ISCON Ambli Road, Ambli, Ahmedabad-380058 under Serial No. 9(a) of Notification No. 25/2012-ST dated 20.06.2012 on the value of Works Contract Service provided to the Gujarat Cancer Society during the period from 01.07.2012 to 10.07.2014, as declared by them during the course of audit, is denied to them.

(ii) Accordingly, I confirm the demand of the Service Tax amounting to Rs. 1,05,78,846/ (Rs. One Crore Five Lakh Seventy Eight Thousand Eight Hundred and Forty Six only under the provisions of Section 73(2) of the Finance Act, 1994.

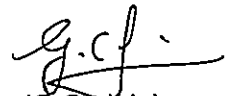
(iii) Interest at appropriate rate should be charged from M/s. PSP Projects Pvt. Ltd, Opp Celesta Courtyard, PSP House, Opp. Lane of Vikram Nagar colony, ISCON Ambli Road, Ambli, Ahmedabad-380058 on the amount of service tax determined at Sl No.(ii) above under Section 75 of the Finance Act, 1994.

(iv) I impose penalty of Rs. 10,000/ (Rs. Ten Thousand only) under Section 77(2) of the Finance Act, 1994. However, I do not impose penalty under Section 76 of the Finance Act, 1994.

(iv) I impose a penalty of Rs. 52,89,423/ (Rs. Fifty Two Lakh Eighty Nine Thousand Four Hundred and Twenty Three only) under Section 78 of the Finance Act, 1944.

However, if the amount of service tax and interest payable thereon, mentioned at Sl.No. (ii) & (iii) above, is paid within thirty days from the date of communication of this order, the amount of penalty liable to be paid by the assessee shall be twenty five per cent of the service tax amount determined at Sl.No. (ii) subject to the payment of the amount of reduced penalty within the period of thirty days from the communication of this order.

36. Proceedings under the above mentioned provisions are saved by Section 174 of the Central Goods and Service Act, 2017.

  
(G.C. Jain)

Joint Commissioner  
Central Goods & Service Tax & C.Excise  
Ahmedabad-North

FNo. STC-38/O&A/SCN/PPPL/16-17

Dated 30.11.2017

To

M/s. PSP Projects Pvt. Ltd,  
Opp Celesta Courtyard, PSP House,  
Lane of Vikram Nagar colony,  
ISCON Ambli Road, Ambli,  
Ahmedabad-380058

Copy to:

1. The Commissioner of CGST & C.Excise, Ahmedabad-North (RRA Section)
2. The Deputy/Assistant Commissioner of CGST & C.Ex., Division VI, Ahmedabad North
3. The Superintendent of CGST & C.Excise, AR.IV, Division VI, Ahmedabad North
- ✓ 4. Guard File.

12

