आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर, कस्टम हॉउस, प्रथम तल, नवरंगपुरा ,अहमदाबाद- 380009		OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009
फ़ोन नंबर./ PHONE No.: 079-27544557	फैक्स/ FAX : 079-27544463	E-mail:- oaahmedabad2@gmail.com

निबन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं. STC/4-55/O&A/DGCEI/AZU/36-144/2013-14 आदेश की तारीख़/Date of Order: - 06.02.2018

जारी करने की तारीख़/Date of Issue :- 07.02.2018

द्वारा पारित/Passed by:- आर. ऍम. गौतम / ***R.M.Gautam***

अपर आयुक्त / Additional *Commissioner*

मूल आदेश संख्या / Order-In-Original No. 03/ADC/2018/RMG

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

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इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरूद्ध 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 रू .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।

(15) उक्त अपील की प्रति।

(16) निर्णय की प्रतियाँ अथवा जिस आदेश के विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू) 2.00 .दो रूपये (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:

(15) Copy of accompanied Appeal.

(16) 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. **DGCEI/AZU/36-144/2013-14** dated **19.10.2013** issued to **M/s. Maruti Enterprises.,** 205, Satyam Complex,opposite JBR arcade,Science City Road, Sola, Ahmedabad, Gujarat-380005

BRIEF FACTS OF THE CASE

On the basis of an intelligence, gathered by the Directorate General of Central Excise Intelligence, Regional Unit, Vadodara (hereinafter referred to as 'DGCEI') to the effect that M/s. Maruti Enterprise, 205, Satyam Complex, Opposite JBR Arcade, Science City Road, Sola, Ahmedabad-380060 (hereinafter referred to as "M/s. Maruti"), a proprietorship firm registered with Service Tax Commissionerate, Ahmedabad (Reg. No. AHCPJ8807FST001 dt. 04.05.2009) under the service categories viz. "Cargo Handling Services" and "Packaging Services" , mainly providing "Cargo Handling Services" to various parties at Pipavav Port, Gujarat, were charging and collecting Service Tax but were not depositing the Service Tax collected to the Government Account , case was taken up for investigation .

2. The preliminary scrutiny of the documents withdrawn under summons on 03.11.2012 revealed that M/s. Maruti is registered with Service Tax Department with a different Reg.No.AHCPJ8807FST001 (and not 'AHKPJ3837FST001' as mentioned on invoices) from residential premises situated at U/137, Upendra Park, Someshwar Park, Part-III, Nr. Tulab Towers, Sola Road, Thaltej, Ahmedabad-380009 and that M/s. Maruti had provided "Cargo Handling Service" to number of clients and also received payments from them.

3. From the scrutiny of various documents withdrawn under summons proceedings on 03.11.2012 and the documents resumed by the Investigating Officers of DGCEI from various sources during the investigations, the statements of Shri Gautambhai N. Joshi, Proprietor of M/s. Maruti, as well as, that of the representatives of various clients recorded, it appeared that M/s. Maruti was providing "Cargo Handling Services" of Urea /Muriate Of Potash / Di-Ammonium- Phosphate , etc. They neither applied for Service Tax Registration nor filed the Service Tax returns under the taxable service category viz. "Cargo Handling Service" during the year 2008-09. Till March, 2009,they have not charged Service Tax in their invoices. They obtained Service Tax registration under "Cargo Handling Services" and "Packaging Services" vide Registration Certificate dt. 04.05.009 and even prior to registration, for the services rendered to clients viz. M/s. GPPL, M/s. Kailash Enterprise and M/s. Kailash Bulk Handling Pvt. Ltd., they had charged Service Tax but for remaining customers they have not charged Service Tax. These facts have been confirmed by Shri Gautambhai N. Joshi in his statement dt. 12.10.2013. M/s. Maruti had failed to keep, maintain or retain books of accounts and other documents as required in accordance with the provisions of the Chapter-V of the Finance Act, 1994 or the rules made there-under. They had filed only one ST-3 Return for the 1st half of 2009-10 (April-Sept). After obtaining registration on 04.05.2009, they had paid Service Tax to the tune of

₹ 3,48,667/- along with interest of ₹ 3733/- on 12.8.2009 and Service Tax of ₹ 9,29,123/- along with interest of ₹ 74,610/- on 7.5.2010 however after that they stopped paying Service tax deliberately .

4. On scrutiny of their Balance Sheets, Sales Registers/Ledgers and Sundry Debtors Ledgers for the period 2008-09 to 2011-12, the taxable value for the period 2008-09 to 2011-12 has been worked out to ₹ 17,29,43,126/- and the Service Tax liability thereon has been worked out to ₹ 1,83,06,145/- (including Ed. Cess and Secondary & Higher Secondary Education Cess is). M/s. Maruti has already paid the Service Tax to the tune of ₹ 12,77,790/- before starting the investigation and reflected the same in their ST-3 Return filed by them for the period April to September,2009. After considering the above payment and deducting the said amount from the total service tax liability, the recoverable service tax from M/s. Maruti has been quantified to **₹ 1,70,28,355/-** under Cargo Handling Service**.** It also appeared that M/s. Maruti have paid Service Tax (including Ed. Cess an Sec. & Higher Sec. Ed. Cess) to the tune of ₹ 2,35,000/- under "Cargo Handling Service", which is required to be appropriated against the total demand being raised in the SCN. M/s. Maruti has rendered taxable service without payment of appropriate service tax. Even after initiation of investigations , Shri Gautambhai N. Joshi, Proprietor of M/s. Maruti appeared to have mis-led and delayed the investigation process.

5. In spite of being fully aware of their obligation to discharge their Service Tax liability, M/s. Maruti appears to have resorted to non-payment of Service Tax. Therefore, it appeared that M/s. Maruti have willfully and deliberately withheld the information regarding the Service Tax liability from the department with sole intention to evade payment of Service Tax. From the documents collected through various sources, it was noticed that in most of the cases they were charging service tax over and above the value of the service in the bills, raised to their clients and thus appeared to have recovered the element of Service Tax separately from the clients. M/s Maruti had charged and received service tax to the tune of ₹ 1,04,32,260/- from M/s GPPL, M/s Kailash Enterprises and M/s Kailash Bulk Handling Pvt Ltd . Yet, M/s. Maruti have not deposited the same to the Govt. Account as required under the Finance Act, 1994.

6. All these acts of contravention on the part of M/s. Maruti appeared to have been committed by way of suppression of facts, deliberate and willful mis-statement and by resorting to contravention of the provisions of Sections 68, 69, 70 & 75 of the Finance Act, 1994 and Rules 4, 6 & 7 of Service Tax Rules, 1994 with an intent to evade the payment of Service Tax, which constituted offence with consequences .

7. M/s. Maruti Enterprise, were therefore, called upon to show cause to the

Commissioner of Service Tax, Ahmedabad as to why: -

(i) Services provided by them should not be classified under "Cargo Handling Services" as provided under clause (zr) of Section 65(105) of the Finance Act, 1994.

(ii) Service tax of ₹ **1,70,28,355/-** (Rupees one crore seventy lakh twenty eight thousand three hundred and fifty five Only), including Education Cess and Secondary & Higher Secondary/ Education Cess not paid by them, on the taxable services of "Cargo Handling Services" as worked out in ANNEXURE-B to the impugned show cause notice for the period 2008-09 to 2011-12 should not be demanded and recovered from them under Proviso to Section 73(1) of the Finance Act, 1994, by invoking extended period of limitation;

(iii) The Service Tax amounting to ₹ **2,35,000/-** already paid by the applicant during investigation should not be appropriated against the demand of Service Tax made herein above;

(iv) Appropriate Interest on the amount of service-tax short-paid by them during the period 2008-09 to 2011-12 should not be charged and recovered from them under Section 75 of the Finance Act, 1994;

(v) Separate penalties should not be imposed upon them under each of the clauses (a), (b) and (c) of Section 77 (1) of the Finance Act, 1994;

(vi) Penalty should not be imposed under Section 77(2) ibid for failing to file ST-3 returns for each period; and

(vii) Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994.

8. Against the said notice, M/s. Maruti filed an application before the Settlement Commission on 03.09.2015 on following grounds, that :-

a) The demand raised under 'Cargo Handling service' needs to be set-aside as the services provided to clients like J.M. Bakshi and co, GPPL, SKS Logistics, Kailash Enterprise, Kailash Bulk Private Limited were rendered within the port areas hence are classifiable under 'port services' and not under 'Cargo Handling service'.

b) The services provided to M/s. Alpha Enterprise and M/s. Shree Balaji Enterprise is nothing but cargo handling service for export cargo which is outside the scope of definition of Cargo Handling service.

c) During the disputed period Service tax liability arises only when consideration has been received by the service provider. Except the services rendered to M/s. Shree Balaji Enterprise and M/s. Alpha Enterprise, all other services were

provided prior to the introduction of Point of Taxation Rules, 2011. Since they have an outstanding amount of ₹ 40,57,966/- from M/s. Kailash Enterprise; ₹ 15,95,930/- from M/s. Krishna Engineering & Project Works; ₹ 4,97,187/- from M/s. SKS Logistics Ltd., Mumbai and ₹ 3,52,660/- from M/s. J.M.Baxi & Co., Kutch, they are not liable to pay service tax.

d) They undertook cargo handling work for KRIBHKO where M/s SKS Logistics Ltd. was the main contractor and M/s. Maruti was the sub-contractor. Since the work undertaken was in relation to imported Urea, they were informed by M/s SKS Logistics Limited, that they were not liable to pay Service Tax as they are sub-contractors.

e) For the demand pertaining to the year 2008-09, they were not registered and were working for M/s Gujarat Pipavav Port Limited. M/s GPPL has paid Service Tax on the entire amount as they being sub-contractor has not charged the Service Tax. It is to submit that if the demand is not reduced then it would result in double payment of tax to the Government as on the same value, first the service tax has already been paid by the main contractors on the entire value, and secondly the tax is being demanded by the department now.

f) That they have written off bad debts of ₹ 18,26,574/-. The bad debts have been written off during 2008-09 to 2011-12. Hence, such amount should have been deducted while arriving at the amount on which they are liable to pay Service Tax. The service tax provisions before the Point of Taxation Rules, 2011 clearly stated that the service tax was payable only on the taxable amount received, as this value has not been received by the applicant, no service tax can be demanded on such amounts.

g) They sought cum-tax benefit assuming that they are liable to pay Service Tax, in cases where they have not charged the same, the quantum of Service Tax demanded should be reduced by ₹ 7,11,714/- as the applicant has not charged Service Tax to parties (listed in the table of para 2.11). Thus, the cum-tax benefit should be extended for the year 2008-09. Further as regards services provided to M/s Alpha Enterprise and M/s Shree Balaji Enterprise, the applicant has not charged the Service Tax as the same is related to export of wheat and it being in relation to export, the service tax was not charged. M/s. Maruti has also not charged Service Tax to M/s SKS Logistics Limited as M/s SKS were main contractor of KRIBHCO and they were sub-contractor.

h) They submitted that by mistake the sales of M/s Shree Balaji Enterprise to M/s. Kailash Enterprise to the tune of ₹ 68,50,000/- has been reflected as their sales.

However, correct entry has been made and debited the account of Kailash Enterprise and credited the account of M/s Shree Balaji Enterprise.

i) However they have adm+3itted the allegations contained against them in the notice so far as they have charged and collected the Service Tax. They accepted the amount payable by them as ₹ 1,00,53,320/- and interest amount on service tax paid as ₹ 63,95,131/-. They claimed to have paid ₹ 40,77,790/- against the admitted amount and that they were in the process of making further payment.

9. With respect to above application made before the Hon' Settlement Commission, Hon'ble Settlement Commission vide Order No.199/Final Order/ST/KNA/2015 dated 07.09.2015 held that the application is liable for rejection for non- fulfillment of condition of Section 32E(1) of the Central Excise Act, 1944 as made applicable to Service tax matters under Section 83 of the Finance Act, 1994 as the applicant though admitted their service tax liability of ₹ 1,00,53,320/- and interest of ₹ 63,95,131/- on the service tax paid, however they have paid an amount of ₹ 40,77,790/- only; that the applicant vide their letter dated 11.09.2014 withdrew their claim for classification of service under 'Port services' w.e.f. 08.05.2010 but did not quantify their revised liability of service tax, which would be acceptable to them consequentially; that the applicant filed only one service tax return which was for the period of 1st half of the year 2009-10 out of the total period of demand from 2008-09 to 2011-12.

9.1 The Hon' Bench has observed that the applicant (M/s. Maruti) requested the Bench that their application would require a detailed verification of facts and examination of legal issues by the Revenue hence requested the Bench to allow them to go back to the adjudicating authority and present all evidence before them for a judicious decision. The Bench held that the applicant has not co-operated for the settlement of their case and accordingly remanded the case back to the adjudicating authority for adjudication in accordance with the law.

10. Meanwhile CBEC vide Notif.No.44/2016-S.T dated 28.09.2016 & Cir.No.1049/37/2016-CX dated 29.09.2016, revised the monetary limit of adjudication. The instant case therefore got transferred within the competency of Additional Commissioner/Joint Commissioner, Service Tax. A corrigendum to this effect was issued on 29.11.2016 intimating the above change.

11. However , before this case could be taken up for adjudication by the Additional

Commissioner, Service Tax, Ahmedabad , the CBEC vide Notification No.12/2017-CE (NT) dated 9.6.2017, dismantled the Service Tax formations and merged the same with jurisdictional Central Excise Commissionerate, now known as GST Commissionerate. The CBEC appointed officers of Central Excise Department as Central Excise Officers and vested them with the power under the Central Excise Act, 1944 (1 of 1944) and the rules made there under, with respect to the jurisdiction specified in the notification issued under Rule-3 of the Central Excise Rules 2002. The said notification was made effective from 22.6.2017 vide Notification No.16/2017-CE (NT) dated 19.06.2017. With the Amendment of Act 32 of Finance Act, 1944, Chapter V (Service Tax) of the Finance Act, 1994 has been omitted hence all the service tax cases have been transferred to concerned jurisdictional Central Excise & Central GST Commissionerate. The present case accordingly got transferred to Central Excise & Central GST Commissionerate Ahmedabad North. Consequent to this, a fresh corrigendum dated 1.8.2017 was issued vide F.No: STC/4-55/O&A/DGCEI/AZU/36-144/2013-14 under which M/s. Maruti was informed the transfer of this case to Additional Commissioner, Central Excise & Central GST Commissionerate Ahmedabad North.

12. Hence personal hearing was granted to M/s. Maruti on 29.08.2017. In response to which M/s. Maruti vide letter dated 29.08.2017 requested to adjourn the hearing. Next hearing dates were granted on 20.09.2017, 30.10.2017, 20.12.2017, however they vide letter dated 18.9.2017, 28.9.2017 and 20.12.2017 requested another date citing reasons that the consultant being new needs time to examine their case and requested a date in January, 2018. Considering their request, final date for personal hearing was granted on 04.01.2018. Shri Vikas Mehta, Consultant appeared and sought five days time to submit the written submission on behalf of M/s. Maruti as the Relied Upon Documents , that too in the CD form, were handed over by their earlier advocate only yesterday. The same was granted .

13. In response to above notice, M/s. Maruti vide their letter dated 11.01.2018 submitted written submission. Their submission are similar to the submissions made vide letter dated 8.7.2014 wherein they *inter alia* submitted that;

- The show cause notice relies upon statements of undersigned, being the proprietor of M/s. Maruti Enterprise as well as various service recipients of M/s. Maruti Enterprise. In the statement dated 26.04.2013, it is stated that service provided to M/s. GPPL port (APM Terminal), M/s. SKS Logistics Ltd., M/s. Kailash Bulk Handling Pvt. Ltd., M/s. Kailash Enterprise and other clients was within port area.

- Further, reliance is placed in the show cause notice on evidences gathered from the service recipients also. According to this, M/s. J.M. Baxi & Co. have informed DGCEI that M/s. Maruti Enterprise have provided service at Kandla port. Shri Deven Bansal, Senior General Manager (Finance), GPPL have stated in his statement recorded by DGCEI on 10.10.2013 that M/s. Maruti Enterprise have provided service at jetty. Shri Pradeep Bhajanshankar Jha, Proprietor of M/s. Kailash Enterprise and Authorized Signatory of M/s. Kailash Bulk Handling Pvt. Ltd. have also stated in his statement recorded by DGCEI on 10.10.2013 that M/s. Maruti Enterprise have provided service to M/s. Kailash Enterprise and M/s. Kailash Bulk Handling Pvt. Ltd. at Pipavav port.
- Insofar as other service recipients are concerned, documentary evidence in the form of contracts, sample invoices, etc. gathered by DGCEI in the course of investigation are part of relied upon documents clearly establish that M/s. Maruti Enterprise had provided service within the port area.
- Prior to 1.7.2010, "port service" was defined as any service rendered by a port or other port or any person authorized by such port or other port, in any manner, in relation to a vessel or goods. By Finance Act,2010 (Act No. 14 of 2010), dated 8.5.2010, w.e.f. 1.7.2010 vide Notification No. 24/2010- ST, dated 22.6.2010, the definition was substituted to read as "port service" means any service rendered within a port or other port, in any manner. The CBEC have issued circulars bearing Nos. 334/1/2010-TRU, dated 26.02.2010 and 334/3/2010-TRU, dated 1.7.2010 clarifying that all services provided entirely within the port/airport premises would fall under these services. It is a settled law that circulars issued by CBEC are binding on departmental authorities. There is a series of decisions of Hon'ble Supreme Court, including in Ranadey Micronutrients etc v Collector of Central Excise, 1996 (87) E.L.T. 19 (S.C.), Paper Products Ltd. v CCE, 1999 (112) E.L.T. 765 (S.C.) Union of India v Arviva Industries (I) Ltd., 2007 (209) E.L.T. 5 (S.C.) to this effect.
- Therefore, the demand of service tax for the period 2010-11 (₹ 71,02,883/-) and 2011-12 (₹ 36,15,234/-) totally amounting to ₹ 1,07,18,117/- under the category of cargo handling service (as proposed in para 16(i) of the show cause notice), is not tenable in the eyes of law being contrary to CBEC circulars cited at above and hence, the same is liable to be dropped.
- In as much as demand of service tax of ₹ 1,07,18,117/- is not tenable in the eyes of law, they are not liable to pay interest on the said amount and hence, the demand of interest on the aforesaid amount is also liable to be dropped.

- In as much as demand of service tax of ₹ 1,07,18,117/- is not tenable, no penalty can be lawfully imposed on M/s. Maruti Enterprise under the provisions of Section 78 of Finance Act, 1994.
- In so far as the demand of service tax under the category of "cargo handling service" for the period prior to 1.7.2010 is concerned, it is submitted that during this period also, they had provided service within port area only and hence, the show cause notice is not tenable in the eyes of law.
- Hon'ble Tribunal in the case of Western Agencies Pvt. Ltd. vs Commissioner of Service, Chennai, 2008 (12) S.T.R.739 (T) has held that cargo handling service provided within limits of major or minor port is covered under port service. The Larger Bench of Hon'ble Tribunal, to which reference was made, has also upheld this view, as reported at 2011 (22) S.T.R. 305 (Tri.-LB).
- Even prior to 1.7.2010, the show cause notice has erred in demanding service tax under the category of "Cargo Handling service". Accordingly, demand of service tax for the period 01.04.2008 to 23.02.2009 (₹ 29,58,021/-), 24.02.2009 to 31.03.2009 (₹ 4,36,107/-) and 2009-10 (₹ 41,93,901/-) totally amounting to ₹ 75,88,029/- under the category of cargo handling service (as proposed in para 16(i) of the show cause notice), is contrary to CBEC circulars cited above hence, the same is liable to be dropped.
- During FY 2008-09, we had provided urea bagging, packing and loading work to M/s. Gujarat Pipavav Port Ltd. ("GPPL"). On the instructions of M/s. GPPL, we had not charged any service tax from them. Service tax, if payable was paid by them directly to the government treasury. This fact is duly certified by them under their certificate dated 19.05.2015. As per the said certificate the service was provided in the capacity of sub-contractor to M/s. GPPL and the said main contractor has already discharged the service liability.
- In as much as the main contractor did not pay any service tax to us and have paid the same directly to the government, it was our *bona fide* belief that no service tax would be separately payable by us to government. Similarly, M/s. SKS Logistics Ltd. vide their letter dated 04.01.2011 have informed us that they were the main contractor to M/s.KRIBHCO and being sub-contractor to them, we were not liable to pay Service tax. Accordingly, they had advised us not to charge service tax. A copy of their letter is enclosed. Hence, it cannot be alleged that we harbored any intention to evade payment of service tax and hence, demand of service tax of ₹ 29,05,336/- and ₹ 4,36,107/- (total Service tax amount of ***₹33,41,443/-)*** on taxable value of ₹ 2,35,05,957/- and ₹ 42,34,049/-

respectively attributed to M/s. GPPL and Service tax amount of ₹ ***15,82,223/-*** on taxable value of ₹ 1,53,61,388/- attributed to M/s. SKS Logistics Ltd. is time barred.

- We had provided services to M/s. Alpha Enterprise and M/s. Shree Balaji Enterprise in connection with export of wheat and sesame seeds. Copies of bills issued to M/s. Alpha Enterprise for a total amount of Rs. ₹ 33,28,000/- and to M/s Shree Balaji Enterprise for a total amount of Rs. ₹ 1,15,70,000/- are enclosed for the ease of ready reference. M/s. Alpha have also issued a separate certificate in this regard and the same is enclosed.
- The definition of cargo handling service given in Section 65(23) of the Finance Act, 1994 that handling of export cargo is specifically excluded from the definition of cargo handling and hence, demand of service tax totally amounting to ₹ ***3,76,135/-*** on taxable value of ₹ 33,28,000/- in relation to service provided to M/s. Alpha Enterprise and service tax amounting to ₹ ***11,91,710/-*** on taxable value of ₹ 1,15,70,000/- in relation to service provided to M/s. Shree Balaji Enterprise is not tenable hence, the same is liable to be quashed and set aside.
- As per proviso to Rule 9 of Point of Taxation Rules, 2011, in a situation where service is provided on or before 30.06.2011 or where the invoice was issued up to 30.06.2011, the Point of Taxation shall be the date on which the payment is received. We have not received payment from the following service recipients named in the notice:

S.L	Client	Amount ₹	Remarks
1	M/s. Kailash Enterprise	40,57,966	Duly noted on page 10 of the show cause notice.
2	M/s. SKS Logistics Ltd.	4,97,187	
3	M/s. J. M. Baxi & Co.	3,52,660	
4	M/s. Krishna Engineering & Project Works	15,95,930	Duly noted on page 20 of the show cause notice
5	Bad debt	18,26,674	Duly noted on page 22 of the show cause notice
	Total	**₹ 83,30,417**	

- A copy of account pertaining to M/s. Kailash Enterprise and audited balance sheet for F.Y 2011-12 is enclosed. In view of above, it is submitted that demand of service tax amounting to ₹ **8,58,033/-** on the aforesaid amount of ₹ 83,30,417/- is contrary to the provisions of Rule 9 of the Point of Taxation

Rules,2011 and hence, the same is liable to be quashed and set aside.

- M/s. Maruti Enterprise has further submitted that by mistake, the sales of M/s. Shree Balaji Enterprise to M/s. Kailash Enterprise to the tune of ₹ 68,50,000/- has been reflected as the sales of M/s. Maruti Enterprise. M/s. Maruti Enterprise has passed the correction entry and debited the account of M/s. Kailash Enterprise and credited the account of M/s. Shree Balaji Enterprise to the tune of ₹ 68,50,000/-. Copy of ledger account and CA certificate in this regard is enclosed. Service to M/s. Kailash Enterprise was not provided hence, no service tax is payable. In view of above, it is submitted that demand of service tax amounting to ***₹7,05,550/-*** on the aforesaid amount of ₹ 68,50,000/- is not tenable in the eyes of law and hence, the same is liable to be quashed and set aside.

- Inasmuch as demand of service tax of ₹ 80,55,094/- is not tenable in the eyes of law, M/s. Maruti Enterprise is not liable to pay interest on the said amount and hence, the demand of interest on the aforesaid amount is also liable to be dropped.

- As demand of service tax of ₹ 80,55,094/- is not tenable in the eyes of law, no penalty can be lawfully imposed on M/s. Maruti Enterprise under the provisions of section 78 of Finance Act, 1994. In the facts and circumstances where M/s. Maruti Enterprise have neither charged nor collected service tax from the following clients, cum-tax value must be adopted for computing the tax demand. Reliance is placed on the decision of Hon'ble Tribunal in the case of M/s. Advantage Media Consultant, 2008 (10) S.T.R. 449 (Tri.-Kolkata), which is duly affirmed by Hon'ble Supreme Court, as reported at 2009 (14) S.T.R. J49 (S.C.). Copies of these decisions are enclosed. The details of service recipients to whom M/s. Maruti Enterprise have not charged service tax, is as under, hence the demand of service tax is further deductible by ₹ 7,11,714/-.

Sl.No.	*Service Recipient*	*Period*	*Value of Service* ₹	*Rate of ST*	*ST payable (as per SCN)*	*ST payable on cum-tax value*	*Difference*
1.	GPPL	(1.4.08 to 23.2.09)	23932208	12.36	2958021	2632628	325393
2.	GPPL	(23.2.09 to 31.3.09)	4234049	10.3	436107	395383	40724
3.	Alpha Enterprise	2009-10	1823000	10.3	187769	170235	17534
4.	As above	2010-11	95000	10.3	9785	8871	914

5.	As above	2011-12	1355785	10.3	139646	126605	13040
6.	Shri Balaji	2011-12	11685700	10.3	1203627	1091230	112397
7.	J. M. Baxi	2009-10	22400	10.3	2307	2092	215
8.	As above	2010-11	3367409	10.3	346843	314454	32389
9.	As above	2011-12	337540	10.3	34767	31520	3247
10.	Krishna Engi	2011-12	1882930	10.3	193942	175831	18111
11.	SKS Logistics	2010-11	11355615	To.3	1169628	1060406	109222
12.	SKS Logistics	2011-12	4005773	10.3	412595	374066	38529
	Total:-		**64097409**		**7095037**	**6383322**	**₹ 711714**

- M/s. Maruti Enterprise have already deposited the amount of service tax that was collected from the clients. The amount of service tax collected and deposited by us with the government is ₹ ***1,04,32,260/-.*** We have also deposited interest totally amounting to ₹ ***63,95,131/-.*** We shall produce copies of challans within a week as the same are lying with earlier counsel.

Discussion & Findings:

14. I have carefully gone through the facts of the case on record, submissions made vide defense replies dated 8.7.2014, 28.07.2014 and 11.01.2018 and also the case laws relied upon by M/s. Maruti. The issue before me to decide is whether the service rendered by M/s. Maruti during the period 2008-09 to 2011-12 is classifiable under Cargo Handling Service.

15. Under present service tax law, there is no concept of classification of taxable services however since the period involved is prior to the introduction of negative list, I will look into the old law to determine the scope of Cargo Handling service and Port services. The Cargo Handling Service was brought under Service tax net w.e.f. 16.8.2002 vide Notification No. 8/2002-ST, dated 01.08.2002 and has been defined in Section 65(105)(zr) of the Finance Act, 1994 as under:-

[(23) "cargo handling service" means loading, unloading, packing or unpacking of cargo and includes, —

(a) cargo handling services provided for freight in special containers or for non-containerised freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport, and cargo handling service incidental to freight; and

(b) service of packing together with transportation of cargo or goods, with or without one or more of other services like loading, unloading, unpacking,

but does not include, handling of export cargo or passenger baggage or mere or transportation of goods;]

16. As per Section 65(105)(zr) "**Taxable Service**" means any service provided or to be provided to any person, by a cargo handling agency, in relation to cargo handling services. The gross amount charged by the service provider for such services rendered by him shall be the taxable value in terms of Section 67 of Finance Act, 1994 and the liability to pay service tax is on the service provider i.e. Cargo Handling Agency. As far as the scope of Cargo Handling service is concerned, it covers any service provided to any person, in relation to handling of cargo such as loading, unloading, stacking, handling stuffing and de-stuffing of containers, storage, dispatch and delivery of containers and cargo etc. It includes cargo handling services provided for freight in special containers or for non-containerized freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport i.e., truck, rail, ship or aircraft. Cargo handling service covers the services provided by the Airport Authority, Inland Container Depot, Container Corporation of India and other similar service providers. Cargo handling services provided in relation to export cargo or passenger baggage or mere transportation of goods by road not pertaining to export cargo are not covered under this category. Cargo handling services provided in relation to storage of agricultural produce or goods meant to be stored in cold storage are exempted vide Notification No. 10/2002 dated 1.8.2002 which was subsequently rescinded vide Notification No. 34/2012 dated 20.6.2012 effective from 1.7.2012.

17. Further, in terms of CBEC Circular F.No.334/1/2008-TRU dated 29/2/2008 packing and transportation of cargo with or without loading, unloading, unpacking shall be under cargo handling service. Relevant extract is reproduced below:-

"5.2.1 Cargo handling service does not cover mere transportation of goods. Mere transportation of goods by road is covered under 'Goods transport agency service'. Service providers, commonly known as packers and movers provide services of packing together with transportation, with or without other services like unpacking, loading, unloading etc. Such composite services, at present, are classifiable under cargo handling service or goods transport agency service depending upon their essential or predominant character of the services provided.

5.2.2 Section 65(23) which defines cargo handling service is being amended so as to include services of packing together with transportation of cargo or goods, with or without one or more other services like loading, unloading, unpacking, under cargo handling service. With this amendment, packing with transportation will be classifiable under cargo handling service only."

18. I find that M/s. Maruti were mainly providing Bagging, Stitching, stacking, stack loading for truck, cleaning of go-down, loading & unloading of filled bags and empty bags to various clients. All these services would fall under Cargo Handling

service. M/s. Maruti on the other hand is contending that since the entire services were provided within port area, the demand under Cargo Handling service is not sustainable in terms of CBEC Circular No. 334/1/2010-TRU, dated 26.02.2010 and 334/3/2010-TRU, dated 1.7.2010. I have gone through both the Circulars. Board in Circular No. 334/1/2010-TRU, dated 26.02.2010 amended the definitions of the Port services and Airport service to clarify that all services provided *entirely* within the port/airport premises would fall under these services. Specific authorisation from the port/airport authority would now not be a pre-condition for the levy. Further, in Circular No. 334/3/2010-TRU, dated 1.7.2010, Board further clarified that other than the services mentioned at sr.no.(i) to (vi) of para 4.3 of the circular, all other services carried out within a port or other port or an airport would be subjected to service tax under the category of port/other port/airport services.

19. 'Port service' as defined in Section 65(82) of Finance Act, 1994 -'*means any service rendered by a port or other port or any person authorised by such port or other port, in any manner, in relation to a vessel or goods*'. This definition was amended with effect from 1st July, 2010 to- '*any service rendered within a port or other port, in any manner*'. 'Port' in this definition as per Section 65(81) is a major port and 'other port' as per Section 65(76) is a minor port under the Central Government or a State Government respectively. Thus with the change in definition in 2010, the scope of activities covered by Section 65(105)(zn) and Section 65(105)(zzl) of Finance Act, 1994 altered substantially to include services other than those that were statutorily or conventionally rendered by a port authority, by whatever name called. Ports are statutorily required to handle goods and vessels; to that extent they provide a safe harbour for ships with berths for holding them fast. These are generally presented as piloting and berth hire. In relation to goods, ports provide space for storage - either in the open or in covered go-downs - and ports collect wharf age. Handling of cargo is not a part of the core activities of the port. Even if the port authority in a major port does handle it, it is performed through the Dock Labour Board which is an official stevedore. Thus ports licenses entities to interact with them and with others in relation to vessels and cargo, steamer agents, stevedores, ship chandlers, etc., which are not in the nature of authorization to perform such activities that the port otherwise undertakes.

20. In the instant case, investigation revealed, M/s. Maruti has provided Cargo Handling service to various clients viz. M/s.GPPL, M/s. Kailash Enterprises, M/s. Kailash Bulk Handling Pvt. Ltd etc. Till March, 2009, they have not charged Service tax in their

invoices but since April, 2009, they charged Service tax in the case of above customers. They obtained service tax registration under 'Cargo Handling service' & 'Packing services' on 04.05.2009. Further, certificate issued by APM Terminal (M/s. GPPL) also mentions that M/s. Maruti was undertaking Urea Bagging, Packing & Loading work for them as a sub-contractor with regard to the contract entered into between M/s. GPPL & Fertilizer Company; that M/s. GPPL has paid the service tax for the value of services provided by them to the Fertilizer Company under the said Contract hence M/s. Maruti was not required to charge service tax. However, the terms & conditions of the Work Order No. GPPL/OPS/WO/07/2009 dtd 15.01.2009, awarded by GPPL mentioned that the rates are inclusive of all taxes except Service tax/Sales tax prevailing on the date of issue of work order; that the Service Tax/Sales tax will be paid extra as applicable. In this regard, M/s. Maruti claimed that the service tax was not charged in 2008-09 due to lack of knowledge. Similarly, M/s.SKS Logistics Ltd vide their letter dated 04.01.2011 has clarified that they being main contractor for KRIBHCO are not liable to service tax for bagging, standardization & forwarding work and advised M/s. Maruti that they being sub-contractor are not required to charge Service Tax. A plain reading of the above certificates establish that M/s. Maruti was rendering services as a sub-contractor and since none of the main contractors were rendering Port services, the services of urea bagging, packing & loading work done as a sub-contractor of M/s. GPPL or the work of bagging, standardization & forwarding work done as a sub-contractor of M/s. SKS Logistics Ltd shall not fall within the ambit of Port service as such the activities are not performed by the ports within the port area. Shri Deven Bansal, Sr. G.M. (Finance), GPPL in his statement dated 10.10.2013 also deposed that M/s. Maruti was providing Cargo Handling Service for which they have made the payment along with TDS deducted and Service Tax.

21. Further, Shri Gautam Joshi, Proprietor of M/s. Maruti in his statement recorded on 12.10.2013 also accepted the fact that they have charged & collected service tax to the tune of ₹ 1,04,32,260/- from M/s. GPPL, M/s. Kailash Enterprises, M/s. Kailash Bulk Handling Pvt. Ltd under Cargo Handling service which itself prove that M/s. Maruti was rendering Cargo Handling Services, the fact which even the above service recipients have agreed to during the investigation. This is also evident from the work order dated 20.10.2010 entered with M/s. J.M.Baxi, wherein M/s. Maruti were required to provide labour for handling operations i.e. bagging, stitching, spillage collection, sweeping, stacking etc inside and outside the Kandla Port and Gandhidham. M/s. J.M.Baxi & Co. vide their letter dated 26.3.2013 also agreed to the fact that M/s. Maruti were

providing Cargo Handling Services to them. From the definition of port service, it is clear that till 30.6.2010, the services rendered by Port or other port or by a person authorized by the Port in relation to vessel or goods, shall be classified under Port service. M/s. Maruti has rendered services to various clients prior to 30.6.2010, for which neither they nor their main contractors were authorized by the Port to perform the above activities hence their services cannot be classified under Port service. For the period subsequent to the amendment w.e.f. 01.07.2010, I find that precondition for the service to be classified under Port service is that the service should have been rendered with the Port area. From the invoices and work contract it is explicit that the services provided by M/s. Maruti were not within the Port area as the tax collected was under Cargo Handling Services. Since M/s. Maruti during the period 2009-10 to 2011-12 has collected service tax to the tune of **₹ 1,04,32,260/-**, they cannot escape the liability to deposit the collected tax to the government account along with interest.

22. M/s. Maruti has contended that they were under the *bona fide* belief that they were not liable to pay service tax as the main contractor was not liable to pay tax or has advised not to pay service tax hence ignorance of law shall not attract extended period and imposition of penalty. The argument that as sub-contractor they are not liable to pay service tax since the liability is on the main contractor is unjustifiable. I find that a sub-contractor is essentially a taxable service provider. The fact that services provided by such sub-contractors are used by the main service provider for completion of his work does not in any way alter the fact of provision of taxable service by the sub-contractor. Services provided by sub-contractors are in the nature of input services. Service tax is, therefore, leviable on any taxable services provided, whether or not the services are provided by a person in his capacity as a sub-contractor and whether or not such services are used as input services. The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provided. I place reliance on the decision of Hon'ble CESTAT Principal Bench New Delhi, in the case of Max Tech Oil & Gas Services Pvt. Ltd. (*2017 (52) S.T.R. 508 (Tri. - Del.)*) wherein it was held that;

> *"Regarding the contention of the appellant that they have acted only as a sub-contractor and demanding service tax from them will amount to double taxation as the main contractor also is rendering similar service to ONGC, we find no legal basis for the contention of the appellant. The service tax leviable at the hands of each service provider is decided by nature of activities undertaken by them. If the same is covered by scope of the taxable entry under Finance Act, 1994 tax liability arises. The said service becomes part of final service rendered by main contractor is of no consequence to determine the tax liability of each and every service provider. At all, the service tax paid by a sub-contractor which becomes part of service further provided by the main contractor, the scheme of credit as envisaged by the*

Cenvat Credit Rules, 2004 will come into play subject to fulfillment of conditions therein. It is nobody's case that the sub-contractors per se are not liable to service tax even if they rendered taxable service."

23. In light of above discussion, M/s. Maruti is liable to discharge their service tax liability irrespective of the fact whether their main contractor has paid the tax or not. Service tax is leviable at the hands of each service provider and the main contractor can take the credit of tax paid by the sub-contractor. I also place reliance on the decision passed by Special Bench of Hon'ble Tribunal New Delhi in the case of R.G. NAGORI & SONS (1989 (39) E.L.T. 303 (Tribunal)) wherein it is held that *"Every manufacturer of excisable goods, no matter where he is undertaking the production, must keep himself fully informed of Excise Tariff, Notifications, Law and Procedure, and, in the event of any lapse or default in this regard, be prepared to pay the price for it. Location in a remote place will not effect his liability to duty and to penal action for non-payment thereof, or for failure to comply with statutory requirements."*

In the instant case, M/s. Maruti though aware that they were rendering taxable services did not collect service tax, which establish their *malafide* intention behind purposely not charging service tax hence the demand is also sustainable on limitation.

24. Another argument put forth by M/s. Maruti is that the services rendered to M/s. Alpha Enterprise and M/s. Shree Balaji Enterprise were in connection with export of wheat and sesame seeds hence not taxable. I find that in the bills issued to M/s. Alpha Enterprise, the charges collected are for truck loading & container stuffing and in the bills raised to M/s. Shree Balaji Enterprise, the charges collected is for rack unloading, cutting for wheat bags in Go-down pertaining to wheat, sesame & rape seeds. It is not forthcoming from the bills that the services of rack unloading, cutting for wheat bags in go-down are the service pertaining to export of wheat. Shri Pradeep Bhajanshankar Jha, Authorised Signatory in his statement recorded on 10.10.2013 stated that they are the main contractor of M/s. GPPL and have sub-contracted some cargo handling services to M/s. Shree Balaji Enterprises wherein they are required to provide cargo handling services viz packing of imported urea in bags, stitching, stacking, repacking, rake loading, loading & unloading of filled bags and empty bags. He also stated that M/s. Shree Balaji Enterprises have not provided any work related to food grains (wheat) till date. Since M/s. Maruti is a sub-contractor to M/s. Shree Balaji Enterprises and in absence of any work order specifying that they have provided handling of food grains/agro products to M/s. Shree Balaji Enterprises, it is obvious that the services rendered by M/s. Maruti was not in relation to export of wheat hence not eligible for

exemption. In respect of services rendered to M/s. Alpha, M/s. Maruti has produced a certificate issued by M/s. Alpha which self-certifies that the handling of agricultural product relates to export of wheat. The certificate does not specify the period during which the services of M/s. Maruti were utilized for handling agricultural products which were exported. Further documents evidencing export of wheat were not submitted to substantiate their above claim. I therefore find that the cargo handling services rendered to M/s. Alpha also cannot be treated as exempted services hence service tax to that extent is also sustainable.

25. M/s. Maruti further argued for the invoices issued till 30.06.2011, they have not received the payment hence the demand of ₹ 8,58,033/- is contrary in terms of proviso to Rule 9 of Point of Taxation Rules, 2011. I find that Rule 9 is a transitional provision wherein the provisions of said rules shall not be applicable, where the provision of service is completed or where invoices are issued prior to the date on which these rules come into force; provided that services for which provision is completed on or before 30th day of June, 2011 or where the invoices are issued up to the 30th day of June, 2011, the point of taxation shall, at the option of the taxpayer, be the date on which the payment is received or made as the case may be. M/s. Maruti claims that they are not liable to pay service tax on the outstanding amount of ₹40,57,966/- from M/s. Kailash Enterprise, in support of their claim they produced copies of account pertaining to M/s. Kailash Enterprise and audited balance sheet for the F.Y. 2011-12. On going through the ledger account of M/s. Kailash Enterprise, I find that ₹ 40,57,966/-is shown in credit entry which shows that the said amount has been recovered by M/s. Maruti. Moreover the invoices issued up 30.6.2011 in respect of which the aforesaid payment stated to be outstanding have not been produced. In absence of any documentary evidence, I cannot entertain the above argument. Further there is no entry in the balance sheet showing outstanding dues from M/s. SKS Logistics Ltd & J. M. Baxi & Co. nor the amount of ₹ 18,26,674/- is reflected as bad debt. Thus the entire demand is sustainable on above ground also.

26. Regarding sales of M/s. Shree Balaji Enterprise to M/s. Kailash Enterprise to the tune of ₹ 68,50,000/- mistakenly reflected as the sales of M/s. Maruti Enterprise, I could not find any C.A. certificate stated to have enclosed with their submission certifying the above facts. Hence the demand of service tax on the aforesaid amount of ₹ 68,50,000/- is also sustainable.

27. On the issue of cum-tax benefit, they relied on the decision of Hon'ble Tribunal

in the case of M/s. Advantage Media Consultant, 2008 (10) S.T.R. 449 (Tri.-Kolkata), duly affirmed by Hon'ble Supreme Court, as reported at 2009 (14) S.T.R. J49 (S.C.) and argued that the value must be adopted for computing the tax demand. Section 67(2) provides that where the gross amount charged by the service provider for the taxable services provided or to be provided is inclusive of service tax payable, the value of taxable service in such case shall be the amount as with the addition of service tax payable, is equal to the gross amount charged i.e., value shall be considered as inclusive of service tax. In such cases, gross value of taxable service shall be considered as inclusive of service tax. Also, as per Section 67(3), gross amount charged for taxable service shall include any amount received towards the taxable service before, during or after the rendering of such service.

28. M/s. Maruti has charged and received service tax to the tune of ₹ 1,04,32,260/- from M/s. GPPL, M/s. Kailash Enterprise & M/s. Kailash Bulk Handling Pvt. Ltd. together hence on said amount cum tax benefit cannot be extended. However, on the amount where the service tax was not collected or charged by M/s. Maruti, the service tax liability has to be worked out considering such amount as gross value of service inclusive of service tax. The Service Tax liability, if not charged on the bill, the amount received needs to be considered as cum-tax as Service Tax. Accordingly, I rely on the ratio of decision of the Tribunal in the case of *M/s. Indian Coffee Workers Co-Operative Society Ltd.* v. *Commissioner of Central Excise, Allahabad* - 2013-TIOL-1440-CESTAT-DEL = 2014 (33) S.T.R. 266 (T) and judgment of Hon'ble High Court of Madras in the case of *Tamil Nadu Hotels Association* v. *Union of India* - 2001 (133) E.L.T. 265 (Mad.) = 2006 (2) S.T.R. 513 (Mad.). However I find that other than the calculation details in para I-2 of their reply, M/s. Maruti has not produced any documentary invoices to prove that on the value of ₹ 6,40,97,409/- ,service tax was not collected hence they are eligible for cum tax benefit. Sufficient time was available to produce the invoices before the department but in the absence of such documentary invoices, I cannot extend the benefit of cum tax benefit to M/s. Maruti.

29. In light of above discussions, I find that this is a clear cut case of tax evasion with willful suppression as M/s. Maruti in their invoice mentioned address as 10, Tirupati Complex, Jafrabad Road, Rajula City-365560 but for registration purpose they gave a different address as U/137, Upendra Park, Someshwar Part-III, Nr. Gulab Towers, Sola Road, Thaltej, Ahmedabad-380059. Further investigation revealed that they presently were operating from 205, Satyam Complex, Sola –Science City Road, Sola ,

A'bad -3800610 and none of these address were intimated to the department. Though they provided services to many clients they revealed only name of M/s. Kailash Enterprise, M/s. SKS Logistics Ltd. & M/s. J.M.Baxi & Co. They also failed to submit copies of relevant invoices before me to support their contention. They tried to mislead the department by providing the ledger account of M/s. GPPL from 29.05.2009 to 31.03.2013 whereas the investigation revealed that M/s. Maruti was providing services to M/s. GPPL since 2008-09 and the total turnover was ₹ 4.04 Crore and not ₹ 1.29 Crore. In most of the cases, they charged & collected service tax over and above the value of the service in the bills raised to their client yet they did not deposit the same to the government account. All these acts of commission & omissions constitute suppression of facts and willful misstatement with intention to evade payment of Service Tax. I also find that they have contravened the provisions of Section 68, Section 69, Section 70 & Section 75 of the Finance Act, 1994 and the provisions of Rule 6, Rule 4 and Rule 7 of the Service Tax Rules, 1994 with intent to evade payment of service tax. In view of the above discussion I find that the extended period of five years is correctly invoked under the proviso to Section 73 (1) of the Finance Act, 1994 for issue of the notice.

30. As per para-9.8 of the SCN, the total service tax liability worked out was ₹ 1,83,06,145/-. However after considering the service tax of ₹ 12,77,790/- paid by M/s. Maruti before starting the investigation and reflected in their ST-3 returns filed between April-September, 2009 and deducting the same from their total service tax liability, the balance Service tax recoverable from M/s. Maruti has been quantified to the tune of ₹ 1,70,28,355/-. Further, M/s. Maruti has also paid Service Tax to the tune of ₹ 2,35,000/- under Cargo Handling service during the investigation, which I find is required to be appropriated against the demand of ₹ 1,70,28,355/-.

31. Thus in light of above findings, I determine the amount of service tax to **₹ 1,70,28,355/-** under Section 73(2) of the Finance Act, 1944 during ***2008-09 to 2011-12*** under 'Cargo Handling Service' which M/s. Maruti failed to pay. As the demand is sustainable on above grounds the same shall be recovered along with interest under Section 75 of the Finance Act, 1994 for the delayed payment.

32. Regarding penalty under Section 77(1) & under Section 77(2), I find that M/s. Maruti neither obtained registration nor filed Service tax returns under taxable service category of "Cargo Handling Service" during the year 2008-09, thereby violating the

provisions of Rule 4 of the Service Tax Rules, 1994 read with Section 69 of the Finance Act, 1994. They neither paid the service tax nor filed ST-3 returns from 2nd half of 2009-10 to 2012-13 thereby violating the provisions of Rule 6 & 7 and Section 68 & 70 of the Finance Act, 1994. They also failed to keep, maintain or retain books of accounts and other documents as required in accordance with the provisions of Finance Act, 1994 and failed to produce the documents to the investigating officers. In view of the above, they are liable for imposition of appropriate penalty under clause (a), (b) & (c) of Section 77. M/s. Maruti had filed ST-3 return for the 1st half of 2009-10 (April – Sept) and failed to file the ST-3 return for the subsequent period within stipulated period hence are liable for penalty under Section 77(2) of the Finance Act, 1944.

33. As regards imposition of penalty under Section 78, I find that charge of suppression is justified as discussed above, and as M/s. Maruti failed to pay service tax on the correct taxable value of services provided by them. It cannot be said that it was a new levy and a person providing such services was unaware of his service tax liability. It is, thus, clear that omission did not occur due to any misunderstanding of law or ignorance of law but non-payment of service tax was with intent of tax evasion. The present show cause notice is based on the intelligence gathered by the DGCEI officers which otherwise would have gone unnoticed as M/s. Maruti had not filed ST-3 returns. The circumstances of the case establish that the said service provider did not discharge their statutory obligations deliberately, with the intent to avoid payment of service tax.

34. As it is already proved that M/s. Maruti had suppressed the facts, the consequences shall automatically follow. Hon'ble Supreme Court has settled this issue in the case of **U.O.I Vs Dharmendra Textile** Processors reported in **2008 (231) ELT 3 (S.C)** and further clarified in the case of **U.O.I Vs R S W M** reported in **2009 (238) ELT 3 (S.C).** Hon'ble Supreme Court has said that the presence of *mala fide* intention is not relevant for imposing penalty and *mens rea* is not an essential ingredient for penalty for tax delinquency which is a civil obligation. Further, Hon'ble High Court of Karnataka at Bangalore in the case of **Motor World (2012 (27) S.T.R. 225 (Kar.))** held that

> *"Section 78 applies to a case where a person has registered himself under the Act and failed to file the prescribed return and in such return filed, he has suppressed or concealed the value of taxable service or has furnished inaccurate value of such taxable service. .....*
>
> *....Therefore, the argument that once acts of suppression, concealment and furnishing inaccurate particulars are established, the penalty follows as a matter of*

course or in other words is automatic, is without any substance as it runs counter to the express provision contained in Sections 78 and 80 of the Act. When once it is held that there is no reasonable cause, then he authority is empowered to impose penalty as prescribed under Section 78, for such failure. Here the penalty prescribed is penalty which shall not be less than but which shall not exceed twice the amount of Service tax sought to be evaded by reason of suppression or concealment of the value of taxable service or the furnishing of inaccurate value of such taxable service.

21. When once the ingredients of Section 78 are established and there is no reasonable cause for failure, Section 80 is not attracted. Then the authority has to impose a minimum penalty of the amount of Service tax sought to be evaded and the maximum is double the said amount. Here, there is no discretion, which is vested with the authority. The discretion is only confined to impose a penalty above the minimum and less than the maximum provided for under the Act. ....."

35. Thus penalty under **Section 78**, is attracted wherever any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded by the reasons of fraud, suppression of facts, willful mis-statement or contravention of any provisions of Finance Act, 1994 or of the rules made there under with intent to evade the payment of service tax and this penalty shall not be less than the duty evaded. However, as per the first proviso to Section 78, if the transactions are available in the specified records, penalty shall be 50% of the service tax short paid. Further where such service tax along with interest is paid within 30 days from the date of communication of the order, penalty would be further reduced to 25% of the service tax so determined. The benefit of reduced penalty shall be available only if such penalty is also paid within 30 days referred to above. Thus M/s. Maruti have rendered themselves liable to penalty under Section 78 of the Finance Act, 1994, as they were not paying service tax in spite of the facts that they were providing the taxable service.

36. In view of the above discussions and findings, I pass the following orders:

ORDER

(i) I classify the services provided by M/s. Maruti under **'Cargo Handling services'** under clause (zr) of Section 65(105) of the Finance Act, 1994.

(ii) I determine the Service Tax to the tune of ₹ **1,70,28,355/-** *[* Rupees *One Crore Seventy Lakh Twenty Eight Thousand Three Hundred Fifty Five only]* (includes education cess and secondary & higher education cess), not paid under Cargo Handling Service during the period from 2008-09 to 2011-12, under Section 73(2) of the Finance Act, 1944.

(iii) I appropriate an amount of ₹ **2,35,000/-**(Rupees Two Lakh Thirty Five Thousand only) voluntarily deposited by them against present service tax liability vide challans during 16.2.2013 to 09.07.2013 as detailed in Page-21 of the show cause notice.

(iv) I order to pay the interest at the appropriate rate on the amount of service tax not paid / short paid by them during the period 2008-09 to 2011-12, for the period of delay of payment of service tax under Section 75 of the Finance Act, 1994.

(v) I impose a penalty of ₹ **50,000/** (Rupees Fifty Thousand Only) under provisions of Section 77 of the Finance Act, 1994, for contravention of provisions of the Finance Act, 1994 as explained herein above.

(vi) I impose a penalty of ₹ **1,70,28,355/-** *[* Rupees *One Crore Seventy Lakh Twenty Eight Thousand Three Hundred Fifty Five only]* under Section 78 of the Finance Act, 1994, for suppressing the full value of taxable services and material facts from the department resulting into non-payment/late payment of Service Tax as explained herein above.

(vii) The penalty imposed under (vi) above stand reduced to 25% only, if the entire amount of service tax confirmed above and interest is paid along with the reduced penalty within one month of issue of this order.

6-2-18

[R. M. GAUTAM]
Additional Commissioner
C.Ex. & CGST, Ahmedabad-North

F.No: STC/4-55/DGCEI/AZU/36-144/2013-14 Date: 06.02.2018

By Regd. Post A. D./Hand Delivery

To,
M/s. Maruti Enterprise,
205, Satyam Complex,
Opposite JBR Arcade,
Science City Road, Sola,
Ahmedabad-380060

Copy to:

1. The Commissioner, C.Ex.& CGST, Ahmedabad-North.
2. The Additional Director General , DGCEI , AZU.
3. The Deputy Commissioner, C.Ex.& CGST, Division-VII, Ahmedabad- North.
4. The Assistant Commissioner (RRA), C.Ex.& CGST, Ahmedabad-North.
5. The Superintendent, C.Ex.& CGST, AR-II, Division-VII, Ahmedabad-North.
6. Guard File.

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