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 : 079-275444	E-mail:- *oaahmedabad2@gmail.com*

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. F.No.STC/4-113/O&A/2015-16

आदेश की तारीख़	/	Date of Order : 26.12.2018
जारी करने की तारीख़	/	Date of Issue : 26.12.2018
द्वारा पारित/Passed by -		
श्री जे. ए. खान	/	**SHRI J. A. KHAN**
आयुक्त	/	**COMMISSIONER**

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR –1/2018-19

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

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

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति -इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,O-20, मेघाणीनगर ,न्यु मेन्टल हॉस्पीटल कम्पाउन्ड ,अहमदाबाद -380016 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, O-20, Meghani Nagar, Mental Hospital Compound, Ahmedabad-380 016.

2.1 इस आदेश के विरुद्ध अपील न्यायाधिकरण में अपील करने से पहले मांगे गये शुल्क के 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 Tribunal 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)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो ,उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ)उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए(। अपील से संबन्धित सभी दस्तावेज भी चार

प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैं तथा जाएगी की दाखिल में प्रतियों चार , कम से उनमें) जाएंगी की संलगन प्रतियाँ ही उतनी भी उसकी ,हो गई की अपील विरुद्ध के आदेश जिस साथ उसके क सेम एक प्रमाणित प्रति होगी।(

The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम 1970 ,की अनुसूची ,1-मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु 4.00 .का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

विषयः -कारण बताओ सूचनाः

Sub- Proceedings initiated vide Show Cause Notice bearing No. CEA-II/ST/15-02/C-IV/APXV/RP-05 DAR/2016-17, dated 21.04.2016 issued to M/s. East West Freight Carriers Ltd., 9/A, Vikram Nagar Society,opp Ambika Society, Near Usmanpura Garden, Usmanpura. Ahmedabad-380013

BRIEF FACTS OF THE CASE:

M/s. East West Freight Carriers Ltd., situated at 9/A, Vikram Nagar Society, opp Ambika Society, near Usmanpura Garden, Usmanpura. Ahmedabad-380013 *(hereinafter referred to as "the assessee/service provider')* is holding Service Tax Registration No.AAACE0996JST001 and is registered under the categories of Business Auxiliary Service, Business Support Services, Transport of goods by Road and Custom House Agent Service. They are availing the facility of Cenvat credit on input services.

2. During the course of verification of records of the assessee by the Audit officers, it was noticed that:

(i) The assessee is a freight forwarder providing end to end logistics solutions to the Exporter/Importers, Shipping lines & Airlines.

(ii) The activities include buying cargo space from airlines/Shipping lines; filing Import General Manifest: arranging transport for picking cargo from factory/ shipment site; getting containers cleaned; filing of Bill of Entry, loading, unloading, fumigating the container, preparing/obtaining various documents viz. Bill of Lading, handling the cargo, Customs clearance of import/export cargo etc.

(iii) On scrutiny of the Invoices, it was revealed that the **assessee had split the consideration into taxable and non-taxable portions**. They had categorized "Freight Charges/Air Freight, Customs EDI charges, War surcharges, X Ray Charges, Fuel Surcharge etc. recovered from the clients **as non-taxable** and some other charges such as Agency Charges, Customs Clearance Charges, Documentation charges, Handling charges, Delivery Order Charges **as taxable**.

(iv) On further scrutiny of the documents recovered from them on Ocean/Air Freight, it was observed that the assessee themselves were not engaged in transportation of goods in the ocean-going vessels/aircrafts, which was actually done by the shipping lines/airlines. The role of the assessee was that of facilitating booking of freight/space on ocean-going vessels/aircrafts.

(v) It was observed that the exporters and importers do not directly go to the airlines/shipping lines for booking of freight/cargo space booking on ocean-going vessels/aircrafts but approach the assessee for getting the said work done. In this situation, the system followed by the assessee is that they ask the shipping line/airline to provide space in the ocean going vessels, which they had booked in advance anticipating such customers. **Thus, it appears that the said assessee has supported the business of their clients i.e. importers & exporters, Shipping lines & Airlines by acting as a facilitator in arranging and managing the space in the ocean/air going vessels for them for international transportation of cargo.**

(vi) Hence, the assessee would be required to pay the service tax on the gross amount received by them from their clients i.e. importers & exporters, under the category of **"Business Support Services" (BSS)** till 30.06.2012 and as a "service' as defined under section 65B (44) of the Finance Act, 1994, from 01.07.2012 onwards.

(vii) On scrutiny on the records of the assessee, it appears that they had charged their customers for various services like Air/Ocean freight, filing Import General Manifest, for arranging transport for picking cargo from factory/ shipment site, Bill of Entry, loading, unloading, preparing/obtaining various documents viz. Bill of Lading, Handling the cargo, Customs clearance for import/export cargo, etc. **The assessee being a freight forwarder, had purchased and sold space in Airways as well as in Shipping Lines and received/paid Ocean Freight,/Air Freight, Air Commission etc. from concerned Agencies.**

(viii) Scrutiny of sample invoices revealed that they were engaged in providing a chain of services to various exporters/importers as well as to Custom House Agents etc. These invoices had been issued for aforesaid services. From the scrutiny of the invoices, **it was observed that the assessee had undertaken to do all services in relation to movement of cargo from the customers premises to the premises desired by the customer and one bill was raised for the service**. The essential nature of this service is one of business support. **That being the case there is no justification to split the**

amount billed to the customers into freight component and other charges.

(ix) Further, on scrutiny of ledger abstracts provided by the assessee, it was noticed that in most of the cases they had received higher amounts from their customers as reflected at credit side than that of the expenditure shown in debit side of the respective ledgers, and they had carried forward the said income to their financial accounts under the Head **'Sale of services- Freight and Forwarding Charges".**

(x) The assessee has not agreed with the objection on the grounds that prior to 01.07.2012, for air freight, they were to be treated at par with 'Air Craft Operator' **and by virtue of Notification No. 29/2005-ST, they were exempt from Service Tax; that International Ocean Freight was not taxable service during the period prior to 01.07.2012** and hence the taxability of the corresponding Ocean Freight Income does not even arise; that post 1.7 2012, the Education Guide issued by CBEC has clarified that the freight forwarder should be treated as principal and therefore Rule 10 of Place of Provision Rules. 2012 will have to be accepted.

(xi) The case of the assessee involves the period before and after 1.07.2012. Whereas for the period prior to 1.07.2012, Section 65A of the Finance Act, 1994 provided for principles for classification of service specified in erstwhile Section 65,while during the period after 01/07/2012, by virtue of Notification 21/2012-ST, dated 5th June, 2012, all the services have become taxable except those specified in the Negative List.

(xii) The assessee in their written reply dated 18.10.2015, stated that they were freight forwarders and **that they book cargo space in Air Line/Shipping Line and offer the same to exporters thereby making a margin on the transaction.**

(xiii) From the above facts, it appeared that the assessee while performing the various activities including above mentioned activities supported the business of exporters, importers. Shipping lines, Airlines, CHAs, etc. and had provided "support services of business or commerce" as defined in **Section** 65(104c) of the Finance Act, 1994, which was a taxable service. **That without support of assessee the business of export and import of their clients cannot be completed**.

3. PROVISIONS FOR THE PERIOD **UPTO 30.06.2012**

The relevant definition of the said service is reproduced below:

Definition of Business Support Service as defined under Section 65(104c) of The Finance Act,1994.

"Support Services of Business or Commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

3.1 The definition of support services of business or commerce, that it includes a particular activity managing distribution and logistics. **whereas the activity undertaken by the assessee appears to squarely fall within the purview of managing distribution and logistics, and information and tracking of delivery schedules.**

4. Further, it also appears that as per provisions contained in Rule 5(1) of Service Tax (Determination of Value) Rules, 2006. **any expenditure or costs that are incurred by a service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service.** Whereas the provisions under Rule 5(2) of the above Rule, do provide exclusions as a "pure agent', the assessee has neither claimed that they were a pure agent, nor do they fall under the purview of a pure agent, as revealed on verification of records. **Accordingly, all the amounts recovered by them from their clients are to be included in the taxable value for the purpose of charging service tax as specified in Rule 5(1) of Service Tax (Determination of Value) Rules, 2006.**

5. Therefore, it appears that the services provided by the assessee is classifiable most appropriately in the manner as mentioned in proviso 2 (b) of Section 65A of Finance Act 1994 under the category of **"Business Support Services" (BSS)** as these services give essential characters of the said taxable service.

6. **PROVISIONS FOR THE PERIOD FROM 1.07.2012 ONWARDS**

6.1. Whereas for the period post 30.06.2012, Rule 10 of the Place of Provision of Service Rules, 2012, provides as under:

10. Place of provision of goods transportation services:

The place *of provision of services of transportation of goods, other than by way of mail or courier; shall be the place of destination of the goods:*

***Provided** that the place of provision of services of goods transportation agency shall be the location of the person liable to pay tax.*

7. Whereas for the freight charges recovered on imported Goods, the place of destination of the imported goods is in the taxable territory i.e. India. Further by the principle of bundling of the services provided in Section 66F(3)(a) of the Finance Act, 1994 which provides that if the various elements of such services are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character.

8. Therefore, service tax amounting to **Rs.2,87,39,073/-** was demanded from the assessee under the proviso to Section 73(1) along with interest under Section 75 of the Finance Act, 1994, for the period from April 2010 to June 2012 under the category of **"Business Support Services" (BSS).**

9. CBEC vide para 5.9.6 of the Education Guide, has given an illustration relating to the subject issue of Freight Forwarders which reads as under:

"Illustration"

A freight forwarder arranges for export and import shipments.There could be two possible situations here- one when he acts on his own account, and the other, when he acts as an intermediary.

When the freight forwarder acts on his own account (say, for an export shipment)
A freight forwarder provides domestic transportation within taxable territory (say, from the exporter's factory located in Pune to Mumbai port) as well as international freight service (say, from Mumbai port to the international destination), under a single contract, on his own account (i.e. he buys-in and sells freight transport as a principal), and charges a consolidated amount to the exporter. This is a service of transportation of goods for which the place of supply is the destination of goods. Since the destination of goods is outside taxable territory, this service will not attract service tax. Here, it is presumed that ancillary freight services (i.e. services ancillary to transportation-loading, unloading, handling etc) are "bundled" with the principal service owing to a single contract or a single price (consideration).

On an import shipment with similar conditions, the place of supply will be in taxable territory, and so the service tax will be attracted."

10. Therefore, the service provided by the Freight Forwarders in case of imported goods gets bundled with the service of transportation of goods and falls under the definition of a "service" as defined under Section 65B(44) of the Finance Act, 1994. Further, it appears that under the provisions of Rule 10 of Place of Provision Rules 2012, the place of provision of this service is the place of destination of goods and therefore Service Tax would be leviable on the gross amount charged by the Freight Forwarders from its clients, for the period from 1.07.2012 to 31.03.2015.

11. **For the period from 1.07.2012 to 31.03.2015**, the assessee has recovered ocean freight/air freight amounting to Rs1,50,108/- in respect of imported goods detailed in **Table B** of the Show Cause Notice.

12. Hence, service tax amounting to **Rs. 18,553/-** was demanded from the assessee under the proviso to Section 73(1) along with interest under Section 75 of the Finance Act, 1994, on the freight income of import cargo, from 1.07.2012 onwards.

13. In view of the above, a Show Cause Notice was issued to the assessee demanding service tax amounting to **Rs. 2,87,39,073/-** for the period from April 2010 to June 2012 **and Rs.18,553/-** (from 1.07.2012 to 31.03.2015) **totally amounting to Rs. 2,87,57,626/-** under Section 73 of the Finance Act, 1994 along with applicable interest and penalty.

PERSONAL HEARING AND WRITTEN SUBMISSION OF THE ASSESSEE:

14. Personal hearing in this matter was held on 4.4.2018, wherein Shri Akshay Arvind, Partner of DAA and Mrs. Mital Patel appeared on behalf of the assessee. They contended that the assessee is acting as freight forwarder on Principal to Principal basis. Hence, in terms of Circular No. 197/7/2016-ST, the assessee is not liable to Service Tax. They also placed reliance on Notification No. 29/2005-ST, dated 15.07.2005 for the period prior to 1.7.2012.They submitted their written submissions vide letter dated 18.05.2018, which is as under:

(i) The Show Cause Notice very clearly states that they book cargo space in advance anticipating customers to approach them for transporting of cargo from India to a place outside India. This has come out very clearly from **Para 2.2 of the Show Cause Notice.** Further in Para 8 it has been alleged that they have been buying cargo space from the airline/shipping line and selling to the exporter/importer.

(ii) In Para 10.4 of the Show Cause Notice it is alleged that the other services provided by them gets bundled with the service of transportation of goods.

(iii) However while admitting that the other services such as documentation, port clearance, handling of cargo, customs clearance etc. are bundled with the service of transportation of goods as stated in Para 10.4 of the Show Cause Notice, yet the Show Cause Notice bundles the principal service i.e. the transportation into other services and makes an attempt to categorize all the bundled services as Business Support Service instead of transportation service.

(iv) This is contrary to the illustration contained in Para 5.9.6 of the Education Guide which has been reproduced in Para 10.3.3 of the SCN itself wherein it has been categorically stated that such bundled services when it includes transportation undertaken by a freight forwarder attains the character of transportation and accordingly the destination of goods would determine taxability of such transaction.

(v) In the given case undisputedly the destination of goods is outside India and consequently not liable to tax in terms of Rule 10 of Place of Provision of Service Tax Rules.

(vi) The Show Cause Notice is again making an attempt without any legal basis and categorizing the bundled service where transportation is the predominant nature of service as Business Support Service. The notice has conveniently forgotten that there is no such category of service post 01.07.2012 and therefore placing reliance on a definition that is not applicable to the facts and circumstances of the current case is legally not sustainable.

(vii) The notice is making an attempt to demand Service Tax as if they have rendered Business Support Service because they don't do the actual transportation which is done by the airlines/shipping lines.

(viii) The government is aware that the freight forwarders are not engaged in actual transportation of goods but still recognized them on par with a transporter as could be seen not only in the education guide which has been reproduced in Para 10.3 of the Show Cause Notice but also in Para 2.2 of the circular issued by CBEC specifically for clarifying taxability of service rendered by freight forwarders vide circular No. 137/54/2016 dated 12.08.2016.

(ix) When a freight forwarder negotiates rate with ocean lines/airlines as well with the customers to earn margin, he Is doing it on his own account to earn profit. This is particularly true when he issues his own transport documents which include House Bill of Lading, liable to pay airlines regardless of recoveries from the customers or selling at

a price lesser than the price at which space is purchased from the carriers.

(x) They undertake the risk of transportation and that is why they have taken insurance policy and hence they satisfy all the conditions mentioned in Para 2.2 of the circular referred above to be treated on par with a transporter and the service tax rendered by them is nothing but transportation service which is outside the purview of Service tax when the destination of goods is outside India.

(xi) When the very same point as to whether the freight forwarder can be treated as rendering transportation services when he is not owning any vessel or when he is doing actual transportation came up before three member bench in Global Transport Services Pvt. Ltd., as reported in AIT-2016-62-AAR, wherein the revenue contended that the Applicant therein rendered single indivisible bundled service which is liable to tax as non transportation service, the court rejected the argument of the revenue stating that the rules are wide enough to cover not only the actual transportation but also a person who arranges for transport to come under the purview of Rule 10 of POP Rules, 2012.

(xii) It was also submitted that the matter involved is no more res-integra and clearly covered by following case laws in Assessee's favour

a. DHL Logistics Pvt Ltd Vs. CGE Mumbai-II: 2017 (6) GSTL 85 (Tri.-Mumbai)
b. Skylift Cargo Pvt Ltd Vs. Commr. of ST: Final Order No. 42242-42244/2017.
c. La Freight Lift Pvt Ltd Vs. CCE, Chennai: Final Order No. 40464-40467/2018
d. DHL Lemuir Logistics Pvt Ltd Vs. CCE Thane-I: 2016 TIOL 1455 CESTAT MUM
e. Phoenix International Freight Services Pvt Ltd Vs. Commr. of ST, Mumbai-II: 2016-TIOL-2353-CESTAT-MUM
f. Commr. of ST, New Delhi Vs. Karam Freight Movers: 2017(4) GSTL 215 (Tri.-Del.)
g. Bax Global India Ltd Vs. Commr. of ST, Chennai: Final Order No.42113/2017

(xiii) It was further submitted that extended period cannot be invoked when the issue involved is of legal interpretation and the bonafide belief of them has been vindicated by several tribunal judgments relied herein above and most importantly the global transportation judgment relied in Para 11 of this written submissions.

(xiv) Further any information recorded in books of accounts and income tax returns etc which are public documents, based on which this notice has been issued cannot lead to suppression of facts with an intent to evade duty. In this context they relied upon the following case laws:.

a. Smiel A Unit of Motherson Sumi Vs. Commr. of Cus, CE & ST, Noida: 2016 (342) ELT 446 (Tri.-All)
b. Jubilant Organosys Ltd Vs. CCE Meerut-II: 2016 (342) ELT 449(Tri.-All.')

(xv) Thus mere suppression of information in returns cannot lead to a situation of an act with intent to evade duty when not only they but so many others in the industry entertained the same bona fide belief that freight difference made on account of buying and selling of cargo space is not liable to Service Tax.

DISCUSSION AND FINDINGS:

15. I have carefully gone through the facts of the case and the written and oral submissions made by the assessee during the course of the proceedings.

16. I find that the issue to be decided in the present proceedings is whether the assessee is required to pay the service tax on the gross amount received by them from their clients i.e. importers & exporters, under the category of 'Business Support Service till 30.06.2012 and as a "service' as defined under Section 65B(44) of the Finance Act, 1994, from 01.07.2012 onwards.

17. I find that the gist of the issue is that the assessee is facilitating booking of freight/space on ocean going vessels/aircrafts for its clients, but the assessee themselves were not engaged in transportation of goods in the ocean going vessels/aircrafts. The actual transportation was done by the shipping lines/airlines. The exporters and importers do not directly go to the airlines/shipping lines for booking of freight/cargo space booking on ocean going vessels/aircrafts but approach the assessee for getting the said work done. In this situation, the system followed by the assessee is that they ask the shipping lines/airline to provide space in the ocean going vessels, which they book in advance anticipating such customers.

18. Scrutiny of sample invoices has also revealed that they were engaged in providing a chain of services to various exporters/importers as well as to Custom House Agents etc. These invoices had been issued for providing the aforesaid services. **It is observed that the assessee undertakes to do all services in relation to movement of cargo from the customers premises to the premises as desired by the customer and one bill is raised for the service.** The assessee undertakes to provide end-to-end logistics solutions to the Exporters/Importers, Shipping lines & Airlines. The activities include buying cargo space from airliness/shippinglines; filing Import General Manifest: arranging transport for picking cargo from factory/shipment site; getting containers cleaned; filing of Bill of Entry, loading, unloading, fumigating the container, preparing/obtaining various documents viz. Bill of Lading, handling the cargo, Customs clearance of import/export cargo etc. On scrutiny of the Invoices, it was revealed that the assessee had spilt its consideration received into taxable and non taxable portions They had categorized "Freight Charges/Air Freight, Customs EDI charges, War surcharges, X Ray Charges, Fuel Surcharge etc. recovered from the clients as nontaxable and other charges such as Agency Charges, Customs Clearance Charges, Documentation charges, Handling charges, Delivery Order Charges as being taxable portion.

19. Thus, it appeared that the said assessee has supported the business of their clients i.e. importers & exporters, Shipping lines & Airlines by acting as a facilitator in arranging and managing the space in the ocean/air going vessels for them for international transportation of cargo and a Show Cause Notice was issued to the assessee demanding Service Tax on such services.

20. I find that the assessee has provided a bouquet of services to the exporters and importers. From the scrutiny of the invoices, there is no doubt that the assessee has provided a single indivisible bundled service in terms of Section 66F of the Finance Act, 1994. Explanation to Section 66F interalia states that the expression "bundled service" means a bundle of provision of various services, wherein an element of provision of one service is combined with an element or elements of provision of any other service or services. The assessee is paying service tax on certain services by splitting the invoices into taxable and non taxable services and is not paying service tax on international air/ocean freight. The ledger abstracts provided by the assessee also revealed that in most of the cases **they had received higher amounts from their customers as reflected at credit side than that of the expenditure shown in debit side** of the respective ledgers, and they had carried forward the said income to their financial accounts under the Head **'Sale of services- Freight and Forwarding Charges**".

21. I have carefully considered the facts on record and all the submissions made by the said service provider. The Point for determination in this case is whether the said service provider, who is a Freight Forwarder, and has provided various categories of services to its clients on recovery of charges for such services can be said to have provided services under the category of **"Business Support Services" (BSS)** .

22. The basic allegation in the show cause notice is that the said service provider has split the consideration received by them from their clients, who are importers/exporters/CHAs, etc into taxable and non taxable portion; for example, they have categorized "Ocean Freight" recovered from their client as non taxable portion by showing it as **a sale of service** and during the relevant period of the Show Cause Notice, they have recovered the amount under the head **"Ocean Freight"**. They had received higher amounts from their customers as reflected in credit side than that of the expenditure shown in debit side of the respective ledgers. They had carried forward the said income to their financial accounts under the **Head "Sale of services- Freight and Forwarding Charges"** It was found that the value representing receipts in credit side reflected in their ledgers was higher than that of the value declared by the assessee in the respective ST-3 returns.

23. The main contention of the assessee in this regard is that there is no levy of service tax on "Ocean Freight" and "Air freight". The said service provider had arranged the space in Airways as well as in Shipping Lines and paid Ocean Freight, Air Freight and other charges in relation to Ocean Freight and Air Freight, In this regard, I find that issue of classification is raising its head as the Show Cause Notice demands Service Tax under Business Support Service and the assessee has not paid Service Tax on the collective bundled services presuming that service provided by them is only Air/Ocean freight Service. In fact, the assessee was already registered with the department **under Business Support Service** and the department has only demanded

service tax on those charges, which the assessee has considered as non-taxable. Therefore, the only question is whether the charges, which the assessee had treated as non-taxable, are in fact taxable under Business Support Service. In this regard, as referred in the show cause notice the provisions of the Finance Act, 1994 and the Service Tax Rules clearly provide for discharging service tax on the gross value and no abatement can be claimed. The said service provider of their own accrued paid service tax on certain charges and considered the other charges as non-taxable, excluding the amount received towards ocean freight and air freight and the expenses relating thereto.

24. The said service provider has also relied upon certain case laws discussed in the paras above and I find from that there is no service tax on Ocean Freight and Air Freight and the charges related to these services.

25. The assessee was involved in activities including buying cargo space from airlines/Shipping lines; filing Import General Manifest: arranging transport for picking cargo from factory/ shipment site; getting containers cleaned; filing of Bill of Entry, loading, unloading, fumigating the container, preparing/obtaining various documents viz. Bill of Lading, handling the cargo, Customs clearance of import/export cargo etc. for its customers, who were exporters and importers. Instead of doing all the above activities on their own, the exporters/importers entrusted all these jobs collectively to the assessee. It is not that the service receivers are only buying cargo space from the assessee, but the assessee is providing all the services to each of its customers **as a bouquet of services**. Further, though the assessee has used the term "Sale of services- Freight and Forwarding Charges", there is no "Sale" in these transactions, as there is no transfer of right of the cargo space, **but simply renting of cargo space**. Whereas "Service" has been defined under Section 65B(44) in the Finance Act, 2012, which reads as follows-

"Service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

1. *an activity which constitutes merely,—*
2. *a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
3. *such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or*
4. *A transaction in money or actionable claim.*
5. *a provision of service by an employee to the employer in the course of or in relation to his employment;*
6. *Fees taken in any Court or tribunal established under any law for the time being in force.*

26. Notwithstanding the above facts, I find that the assessee have provided services to support the business of their clients. They have charged amounts from their clients in excess of what they pay to the shipping lines in the category of container ocean fright. I find that ocean freight is the actual freight incurred towards transportation of cargo by sea and therefore the amount paid by the assessee to the shipping lines qualifies as ocean freight. I find that the extra amount collected as mark-up over the basic ocean freight by the assessee, is not an element of ocean freight, as it pertains to the service element over and above the actual cost of transportation/freight. The assessee is providing services to the exporters, including the service of procurement of bulk space to support the business of clients/exporters. It is also found that the extra amount collected by the assessee from their clients, viz. exporters and importers, is the consideration which they received in lieu of services provided by them and the said consideration they received is the value of taxable service provided by them.

27. The fact that bulk space has been booked on shipping lines by the assessee for the purpose of transportation, would not in any way affect the integral nature of services rendered by the assessee. For example, even if the assessee books the cargo/container space on behalf of the client, without any pre-booking by him, and subsequently charges the extra consideration for booking such space from the client, the service provider would earn extra consideration, which would be nothing but commission earned by him for facilitating the booking of space for the transportation. This consideration cannot be considered as ocean freight. Thus, here the assessee has pre-booked space, and in the process secured the commission margin or mark-up in advance from the prospective clients/exporters. I therefore, find that such additional mark-up money recovered by the assessee from its clients is in the nature of consideration, which the assessee

may choose to call by any nomenclature, be it 'profit' or 'trading activity'. However, the fact remains that in the process of rendering such service, the assessee has earned consideration, which is chargeable to service tax under the category of **"Business Support Services" (BSS).**

28. 'Bundled service' means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services. An example of 'bundled service' would be air transport services provided by airlines wherein an element of transportation of passenger by air is combined with an element of provision of catering service on board. Each service involves differential treatment as a manner of determination of value of two services for the purpose of charging service tax.
Two rules have been prescribed for determining the taxability of such services in clause (3) of Section 66F of the Act. These rules, which are explained below, are subject to the provisions of the rule contained in sub-section (2) of Section 66F, *viz* a specific description will be preferred over a general description as explained above.

1. Services which are naturally bundled in the ordinary course of business

The rule is – 'If various elements of a bundled service are naturally bundled in the ordinary course of business, it shall be treated as provision of a single service which gives such bundle its essential character'.

Illustrations –

• A 5-star hotel provides a 4-D/3-N package with the facility of breakfast. This is a natural bundling of services in the ordinary course of business. The service of hotel accommodation gives the bundle the essential character and would, therefore, be treated as service of providing hotel accommodation.

2. Services which are not naturally bundled in the ordinary course of business

The rule is – **If various elements of a bundled service are not naturally bundled in the ordinary course of business, it shall be treated as provision of a service which attracts the highest amount of service tax.**

Illustration:

A house is given on rent one floor of which is to be used as residence and the other as a show room. Such renting for two different purposes is not naturally bundled in the ordinary course of business. Therefore, if a single rent deed is executed, it will be treated as a service comprising entirely of such service which attracts highest liability of service tax.In this case, renting for use as residence is a negative list service, while renting for non residence use is chargeable to service tax. Since the latter category attracts highest liability of service tax amongs the two services bundled together, the entire bundle would be treated as renting of commercial property.

3. Significance of the condition that the rule relating to "bundled service' is subject to the provisions of sub-section (2) of Section 66F.

Sub-section (2) of Section 66F stipulates that where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description. This rule predominates the rule laid down in sub section (3) relating to 'bundles services'. In other words, if a bundled service falls under a service specified by way of a description then such service would be covered by the description so specified.

29. Section 66F of the Finance Act, 1994: Principles of interpretation of specified descriptions of services or bundled service, stipulates as under:

> *(1) Unless otherwise specified, reference to a service (herein referred to as main service) shall not include reference to a service which is used for providing main service.*

*2 [**Illustration** – The services by the Reserve Bank of India, being the main service within the meaning of clause (b) of Section 66D, does not include any agency service provided or agreed to be provided by any bank to the Reserve Bank of India. Such agency service, being input service, used by the Reserve Bank of India for providing the main service, for which the consideration by way of fee or commission or any other amount is received by the agent bank, does not get excluded from the levy of service tax by virtue of inclusion of the main service in clause (b) of the negative list in Section 66D and hence, such service is leviable to service tax.]*

(2) Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.

(3) Subject to the provisions of sub-section (2), the taxability of a bundled service shall be determined in the following manner, namely:–

(a) if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character;

(b) if various elements of such service are not naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which results in highest liability of service tax.

***Explanation.**- For the purposes of sub-section (3), the expression "bundled service" means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services.]*

30. Determination of bundling of services depends upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business is ascertained from several indicators; such as if a large number of service providers of such bundle of services provide such services as a package, then such a package is treated as naturally bundled in the ordinary course of business. Majority of service providers in a particular area of business provide similar bundle of services. For example, bundle of catering on board and transport by air is a bundle offered by a majority of airlines. The nature of the various services in a bundle of services also helps in determining whether the services are bundled in the ordinary course of business, If the nature of services is such that one of the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service. The different elements are integral to one overall supply. If one or more is removed, the nature of supply would be affected.

31. The assessee was engaged in the business wherein they rendered services to importers & exporters and the nature of service rendered depended on the requirement of the customers.

31.1. In respect of services relating to export of goods:
- Liasoning /booking of cargo space with the Shipping/Airlines for the customer.
- Arranging pick up of the consignment from the Customer's premises.
- Transportation of the same to the port/Airport.
- Ensuring consignment is loaded on the Ship & delivering documentary proof of the same.
- Tracking the consignment and even insuring the cargo for its safety.

31.2. In respect of services relating to import cargo:
- Liasoning /booking of cargo space with the Shipping/Airlines for the customer
- Tracking the same.
- After the goods arrive, taking care of all the procedures of clearance of the goods as per the requirement of the customer.
- Transportation of the consignment from port/Airport to the customer's premises.

31.3. The customer may avail of all or only part of the aforesaid services.The asssessee was engaged in the activities of arranging of all facilities such as handling, loading and unloading, transportation, warehousing, stuffing and destuffing etc. and also compliance of statutory formalities with Customs and other Container Terminals for both importers and exporters. Thus even in the case of importers, it cannot be interpreted that the services were provided in a non taxable territory. Thus the assessee is also liable to pay Service Tax for the services provided to importers for handling their import cargo. For the above said activities they charge their clients towards various expenses incurred on behalf of their clients which are accounted on various revenue heads such as Freight Charges/Air Freight, Customs EDI charges, War surcharges, X Ray Charges, Fuel charges,Agency Charges, Customs Clearance Charges, Documentation charges, Handling charges, Delivery Order Charges and charges for the movement of the cargo from the premises to the required destination and vice versa and taking care of all procedures involved in doing the same.

32. In view of the above, I find that the para 5.9.6 of the Education Guide, cited in the Show Cause Notice is not much relevant here, as this para relates to Freight forwarders who act on their own and others who act as an intermediary. The case of the assessee does not pertain to

Freight Forwarding charges but providing of collective services to the exporters and importers right from pick-up of goods from the doorstep of the customers and delivery of imported goods to their premises.

33. In view of the above and from the activities of the assessee, it is very clear that the essential nature of the service provided by the assessee is one of business support. That being the case there is no justification to split the amount billed to the customers into freight component and other charges.

34. Further, on scrutiny of ledger abstracts provided by the assessee, it was noticed that in most of the cases they had received higher amounts from their customers as reflected at credit side than that of the expenditure shown in debit side of the respective ledgers; and they had carried forward the said income to their financial accounts under the Head 'Sale of services-Freight and Forwarding Charges".

35. From the above also it is clear that the assessee had facilitated the exporters to run their business smoothly and without hindrances and as such they have provided support to their businesses. Therefore, it is concluded that the said charges recovered by the said service provider and shown in their income side are the taxable values received by them for providing various services falling under stand alone classification, but since these were provided as a composite service as for supporting the business of their clients, the same are classifiable under Business Support Service. Therefore the Service Tax amounting to Rs. **Rs.2,87,57,626/-** is required to be recovered and confirmed under Section 73(1) of the Finance Act, 1994, against the assessee, under Business Support Service, along with interest payable in terms of Section 75 of the Finance Act, 1994.

36. Thus, it is found that the said assessee has supported the business of their clients i.e. importers & exporters, Shipping lines & Airlines by acting as a facilitator in arranging and managing the space in the ocean/air going vessels for them for international transportation of cargo.

37. Regarding non-payment of service tax on the above said charges, the said service provider has mainly contended that these charges are not taxable under Business Support Service and in this regard they have mainly placed reliance on Bax Global and other related case laws. I have studied all these case laws and I find that in these cases the demands were raised for the inclusion of certain expenses incurred by the assessee in relation to services like CHA service, Steamer Agent service or C&F agent service etc. Hence, CESTAT has in all those cases held that these expenses cannot be included in the taxable value of the services primarily provided by the assessees. In this case, the show cause notice is demanding service tax from the said service provider on these expenses/recoveries from their clients treating them as taxable value for having provided Business Support Service (BSS for brevity) and not under "Freight Forwarder Agent Service" or any similar service. Hence, the ratios of the case laws cited by the said service provider are not applicable to the facts of the present case. Moreover, the assessee has themselves got registered with the department under Business Support Service and paid service tax on various recoveries made by them from their clients under various heads which were also stand alone services, classifiable under individual categories. Having registered under BSS, itself is an indicator that the assessee also believed that by providing all such services to their clients, which were apart from the freight forwarding services, they were supporting their clients in their business and therefore these services were classified under BSS.

38. I find that in the case of **DHL LEMUIR LOGISTICS PVT. LTD. Vs COMMR. OF SERVICE TAX, BANGALORE : 2010 (17) S.T.R. 266 (Tri. - Bang.)** it is held that such rebate generated by trading in cargo space cannot by any stretch of imagination be said to be a consideration for rendering CHA service. The above case law is mentioned in the defence reply filed by the assessee but as per the above observation in the decision, such service is not taxable under the category of CHA service, but it is not held whether such activity is liable to service tax, or not. The service provided by the assessee to the exporters is not in the nature of the category of services provided by CHA and hence the case law is not applicable to the present case.

39. I find that it is clear in the present matter that the demand is not raised for the element of container space fright/ ocean freight as the same has been paid to the shipping line for transporting export cargo, the service tax is demanded only on the differential amount which has been retained by the assessee after making payment for ocean freight to the shipping line as extra

consideration which is taxable under the category of **"Business Support Services" (BSS)**.

40. I find that the assessee has cited various circulars and case law also, however looking to the facts and discussion hereinabove, they have no relevancy to the matter on hand inasmuch as they mostly pertain to payment of Service Tax on freight charges, where as the bone of contention in the Show Cause Notice is that the assessee has provided a plethora of services, as described in the paras above, under the category of **Business Support Services** and not **Freight services** alone.

41. The assessee has also relied upon on Notification No. 29/2005-ST, dated 15.07.2005 for the period prior to 1.7.2012.They have submitted that prior to 01.07.2012, for air freight, they were to be treated at par with Air Craft Operator' **and by virtue of Notification No. 29/2005-ST, they were exempt from Service Tax; that whereas International Ocean Freight was not taxable service during the period prior to 01.07.2012** and hence the taxability of the corresponding Ocean Freight Income does not even arise; whereas post 1.7 2012, the education guide issued by CBEC has clarified that the freight forwarder should be treated as principal and therefore Rule 10 of Place of Provision Rules, 2012 will have to be accepted.

42. I hereby state that Notification No. 29/2005-ST dated 15.07.2005 exempted the taxable service provided by an 'aircraft operator' to any person in relation to transport of export cargo by aircraft from the whole of the service tax leviable thereon. As per Section 65 (3b) of the Finance Act,1994, "aircraft operator" means any person who provides the service of transport of goods or passengers by aircraft. **Thus it appears that only when the service of transport of goods is provided by an aircraft operator, then it is exempted**. In this case, the assessee is not providing the service of transportation of goods himself, but is buying the cargo space from the airline shipping line and selling it to the exporters/importers, thus supporting the business of their customers, **which is fundamentally distinct from the services provided as envisioned under Notification in No. 29/2005-ST**.

43. In view of above, it is found that the assessee had artificially split its consideration into taxable and nontaxable portion i.e. they had categorized Ocean freight/ Air freight recovered from the clients as nontaxable portion by showing it as sale of service and which have been recovered by them under the head **"Sale of Services (Freight & Forwarding charges)"** as shown in their Balance Sheets. Thus, it found that the said service provider had vivisected the composite activity into various activities resulting into artificial fragmentation of value with an intention to evade the payment of service tax on the amounts recovered as Air/Ocean Freight. Thus, it is found that they had not discharged their service tax liability properly by suppressing the facts from the department regarding the value of their taxable service. The total service tax liability short paid, for the period from April .2010 to June.2012 comes to **Rs.2,87,57,626/-** under the category of '**"Business Support Services" (BSS)** and is required to be recovered from them under the Section 73(2) along with interest under Section 75 of the Finance Act, 1994, as detailed in the Show Cause Notice.

44. It appears that the assessee had not disclosed full, true and correct information about the value of the service provided by them. Thus, it appears that there is a deliberate withholding of essential material information from the department about service provided and value realized by them. It appears that all these information have been concealed from the department deliberately, consciously and purposefully to evade payment of service tax. Therefore, in this case all essential ingredients exist to invoke the extended period under the proviso to Section 73 (1) of Finance Act. 1994 to demand the service tax not paid. It is held that extended period can be invoked as department came to know of Service charges received by the assessee on verification of their accounts only. Therefore, in this case, all essential ingredients exist to invoke the extended period in terms of proviso to Section 73(1) of Finance Act, 1994.

45. Further, I find that the Service Tax statute provides for self assessment and it was the responsibility of the assessee to calculate service tax liability and to discharge it. However, as discussed above, the assessee had rendered services which are correctly classifiable under the category of Business Support Service. The services, which they had rendered, are correctly chargeable to service tax. The assessee suppressed the fact of receipt of amounts and the same was disguised and mentioned as **"Sale of services- Freight and Forwarding Charges"** towards rendering of services. The fact of rendering the taxable services to their various customers came to the knowledge of the department during the audit of books of account. Therefore, I find that the assessee has knowingly suppressed the facts involved in the present case. Thus, I do not find any *bonafide belief* on their part in the instant case. Thus they have

evaded the Service Tax on the consideration charged/received for the service as mentioned hereinabove.

46. In view of the above, I find that the assessee had not discharged their service tax liability correctly under the service category of **"Business Support Services" (BSS)** for the period from 2010-11 till 30.06.2012, and under the 'service as defined under Section 65B(44) from 01.07.2012 onwards by not declaring the correct value of service in periodical ST-3 returns and thereby, they have contravened the provisions of Section 67 of Finance Act, 1994 inasmuch that they failed to determine the correct value of taxable service provided by them, Section 68 of Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, inasmuch as that they failed to determine and pay the correct amount of Service tax and the provisions of Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 inasmuch as they have failed to correctly assess their service tax liability and file correct ST-3 Returns.

47. The assessee has evaded the payment of the above amounts of service tax. Hence as per the provisions of Section 75 of the Finance Act, 1994, the assessee are required to pay interest on the amount of service tax, from the date they were required to make the payment till the date they deposit the service tax amount in the Government exchequer.

Section 75 of the Finance Act 1994, as it then stood, states that-

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

48. As regards imposition of penalty under Section 76, 77 and 78 of the Act. I have already held that the demand under the notice is recoverable by invoking the extended period of time under Section 73 of the Act and Section 75 of the Act mandates levy of interest on delayed payment of Service Tax. Therefore, the demand is recoverable alongwith interest under the said Section. Further, I find that, Section 78 of the Act provides as follows:

SECTION 78. Penalty for failure to pay service tax for reasons of fraud, etc. —

(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 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 thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of Section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent of the amount of such service tax :

***Provided** that in respect of the cases where the details relating to such transactions are recorded in the specified records for the period beginning with the 8th April, 2011 upto the 24 date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the service tax so determined :*
***Provided further** that where service tax and interest is paid within a period of thirty days of — the date of service of notice under the proviso to*

(i) sub-section (1) of section 73, the penalty payable shall be fifteen per cent. of such service tax and proceedings in respect of such service tax, interest and penalty shall be deemed to be concluded;

(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined :

***Provided** also that the benefit of reduced penalty under the second proviso shall be available only if the amount of such reduced penalty is also paid within such period :*

***Explanation.** - For the purposes of this sub-section, "specified records" means records including computerized data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement; the invoices recorded by the assessee in the books of accounts shall be considered as the specified records.*

(2) Where the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, modifies the amount of service tax determined under sub-section (2) of section 73, then, the amount of penalty payable under sub-section (1) and the interest payable thereon under section 75 shall stand modified accordingly, and after taking into account the amount of service tax so modified, the person who is liable to pay such amount of service tax, shall also be liable to pay the amount of penalty and interest so modified.

(3) Where the amount of service tax or penalty is increased by the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, over and above the amount as determined under sub-section (2) of section 73, the time within which the interest and the reduced penalty is payable under clause (ii) of the second proviso to sub-section (1) in relation to such increased amount of service tax shall be counted from the date of the order of the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be.

49. It is observed that where any Service Tax has not been levied or paid or has been short-levied or short-paid by the reason of suppression of facts or fraud or collusion or wilful mis-statement or contravention of any of the Act or the Rules made thereunder with intent to evade payment of Service Tax, Section 78 of the Act provides for mandatory penalty and the person, liable to pay such Service Tax, shall also be liable to pay a penalty in addition to such Service Tax and interest thereon. The amount of penalty leviable under this section is equal to hundred percent of the amount of Service Tax evaded. In view of the findings given in foregoing paras, as extended period of time for demand under proviso to Section 73 of the Act is invokable in the present case, I find that the assessee has rendered themselves liable for penalty under Section 78 of the Act for the various acts/commission committed by them, as discussed in foregoing paras. Penalty under Section 78 of the Finance Act, 1994 is mandatorily imposable as has been held by the Apex Court in the case of Dharmendra Textile Mills Ltd-2008 (231) ELT 3 (SC) and Rajasthan Spinning & Weaving Mills Ltd-2009 (238) ELT 3 (SC).

50. Further, as the penalty is payable under Section 78 of Finance Act 1994, hence the penalty under 76 will not apply.

51. As regards imposition of penalty under Section 77 of the Finance Act, 1994, I observe that in the present case the assessee had failed to comply with provisions of the Act/Rules inasmuch as they have failed to self-assess the correct taxable value and not showed the same in their statutory returns. Hence, they are liable to penalty under this Section 77 of the Finance Act also.

52. In view of the foregoing discussion, I pass the following order:

ORDER

(a) I order to classify the Services rendered by the assessee during the period from April 2010 to June 2012 under the category of "Business Support Service", as defined under Section 65 of the Finance Act, 1994, as amended and confirm the demand of the Service Tax amounting to **Rs. 2,87,39,073/- (Rupees Two Crore Eighty Seven Lakh Thirty nine Thousand Seventy Three Only)** leviable thereon and recover the same henceforth from them, under sub-section (2) of Section 73 of the Finance Act, 1994 ;

(b) I order to classify the Services rendered by the assessee during the period from 01.07.2012 to 31.03.2015 as 'service' as defined under section 65B(44) of the Finance Act and confirm the demand of the Service Tax amounting to **Rs. 18,553/- (Rupees Eighteen Thousand Five Hundred Fifty three only)** leviable thereon and recover the same henceforth from them, under sub-section (2) of Section 73 of the Finance Act, 1994 ;

(c) I order to recover interest on the above amount of Service tax of **Rs.2,87,57,626/- (Rs.2,87,39,073/- + Rs.18,553/-) (Rupees Two Crore Eighty Seven Lakh Fifty Seven Thousand Six Hundred Twenty Six only)** on the above confirmed demand at the prescribed rate from the said service provider under Section 75 of the Finance Act, 1994;

(d) I impose Penalty of **Rs 10,000 (Rupees Ten Thousand only)** on the assessee under Section 77 of the Finance Act, 1994 for the failure to self-assess the correct taxable value and not showing the same in the statutory ST -3 returns;

(e) I impose penalty on the assessee equal to the amount of service tax evaded i.e

Rs.2,87,57,626/- (Rs.2,87,39,073/- + Rs.18,553/-) (Rupees Two Crore Eighty Seven Lakh Fifty Seven Thousand Six Hundred Twenty Six only), under Section 78 of the Finance Act, 1994 for suppressing the value of taxable services provided by them from the department with an intent to evade payment of Service Tax. If the service tax amount is paid along with appropriate interest as applicable, within 30 days from the date of receipt of this order, then the amount of penalty under Section 78 shall be reduced to 25% of the service tax amount, provided such penalty is also paid within such period of 30 days.

57. The Show Cause Notice No. CEA-II/ST/15-02/C-IV/APXV/RP-05 DAR/2016-17, dated 21.04.2016 issued by Commissioner, Central Excise & Service Tax, Audit-II, Ahmedabad, is decided and disposed of in above terms.

(J.A.KHAN)
Commissioner,
CGST & C.EX.,
Ahmedabad-North

F.No.STC/4-113/O&A/15-16

Date 26.12.2018

By RPAD.
To
M/s. East West Freight Carriers Ltd.,
9/A, Vikram Nagar Society,
opp Ambika Society,
Near Usmanpura Garden,
Usmanpura. Ahmedabad-380013

Copy to:

1. The Principal Chief Commissioner, CGST, Ahmedabad Zone, Ahmedabad.
2. The Assistant Commissioner, CGST, Division-VII, C.G.S.T, Ahmedabad-North.
3. The Superintendent, Range-I, Division-VII, CGST, Ahmedabad-North.
4. Guard file.