आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009		Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009
फ़ोन नंबर./ PHONE No.: 079-2754 4599	फैक्स/ FAX : 079-2754 4463	E-mail:- oaahmedabad2@gmail.com

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. F.NO. STC/15-206/O&A/2020 -Denovo DIN : 20230364WT000000ABDE

आदेश की तारीख / Date of Order : 31.03.2023

जारी करने की तारीख / Date of Issue : 31.03.2023

द्वारा पारित/Passed by -

उपेन्द्र सिंह यादव / UPENDRA SINGH YADAV

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR– 53 /2022-23

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

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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 , द्वितीय तल, बाहुमली भवन असरवा, गिरधर नगर पुल के पास, गिरधर नगर, अहमदाबाद, गुजरात 380004 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, 2nd Floor, Bahumali Bhavan Asarwa, Near Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad, Gujarat 380004.

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 हैंचार प्रतियों में दाखिल , उसकी भी उतनी ही ,की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो उनमें से कम से क) प्रतियाँ संलगन की जाएंगीम 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

Subject- Proceedings initiated vide Show Cause Notices No. STC/SCN/Sheldia-163/2005-06 dated 05.06.2006 (As remanded by Hon'ble CESTAT vide CESTAT Order No. A/875/WZB/AHD/2011 dated 12.05.2011 arising out of OIO No. STC/01/Commr/Ahd/2008 dated 29.02.2008) against M/s Sai Consulting Engineers Pvt Ltd. (Formerly known as "Sheladia Associates & Consultants (India) Pvt. ltd."), 4, Kuldip Society, Near Ishwar Bhuvan, Navrangpura, Ahmedabad

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR– 53 /2022-23

M/s Sai Consulting Engineers Pvt Ltd. (Formerly known as "Sheladia Associates & Consultants (India) Pvt. ltd."), 4, Kuldip Society, Near Ishwar Bhuvan, Navrangpura, Ahmedabad, were issued SCN F. No. STC/SCN/Sheldia-163/2005-06 dated 05.06.2006 by the then Commissioner, Service Tax, Ahmedabad. The said SCN was adjudicated by the then Commissioner of Service Tax vide Order In Original No. STC/01/Commr/Ahd/2008 dated 29.02.2008. The demand of Service Tax of Rs. 206.70 Lakhs was confirmed under section 73 of the Finance Act, 1994. However, aggrieved by the Order In Original confirming the demand of service tax of Rs. 206.70 Lakhs passed by the Commissioner, the assessee had preferred an appeal against the same in CESTAT. The Hon'ble Tribunal vide its Order No. A/875/WZB/AHD/2011 dated 12.05.2011 read with Order No. M/123/WZB/AHD/2012 dated 09.01.2012, has remanded the matter back to the adjudicating authority for passing a fresh order in light of evidences produced by M/s. SAI by giving them an opportunity to contest their case.

BRIEF FACTS OF THE CASE PERTAINING TO THE SCN ISSUED TO M/s SAI CONSULTING ENGINEERS PVT LTD, ARE AS FOLLOWS:

M/s Sai Consulting Engineers Pvt Ltd. (Formerly known as "Sheladia Associates & Consultants (India) Pvt. ltd."), 4, Kuldip Society, Near Ishwar Bhuvan, Navrangpura, Ahmedabad [Hereinafter referred to as "the said assessee"] were engaged in the providing technical consultancy service for preparation of detailed project report for rehabilitation and preparation of feasibility report, project management services for long term needs covered under the category of Consulting Engineering Services as defined under Section 65 of the Finance Act, 1994, for which they were having Service Tax Registration No. AADCS0481PST001. The assessee was also engaged in rendering taxable services as an independent Consulting Engineer in the individual capacity acting as "Associated Consultant " in association with other consultants after execution of necessary association agreements for various projects undertaken in India.

2. At the time of reconciliation of the Professional Income recorded in the audited Profit and Loss Account and Balance sheets for the Financial Year from 2000-2001 to 2004-05, with the value of the taxable services so rendered by them, reflected in their ST-3 returns covering the said period, filed by them in terms of Rule 7 of Service Tax Rules, 1994, it was noticed that the assessee had not discharged their Service Tax liability on the differential amount of realized professional income of Rs. 29.25 Crores, as mentioned herein below in respect to the Consulting services provided by them, for which the assessee had clarified that the said difference was of Professional Income received under sub-consultancy and the amount considered as reimbursement of essential

expenses incurred for rendering i.e taxable services on the various projects in India.

(Figures in '000')

Year	2000-01	2001-02	2002-03	2003-04	2004-05	Total	Ratio Analysis
Professional Income shown in P&L A/c	31978	59513	91122	109055	110244	401912	
Add: Op. Debtors	6422	13829	13938	19453	22508	76150	
Less: Cl. Debtors	13829	13938	19453	22508	31654	101382	
Total Income realised	24571	59404	85607	106000	101094	376680	93.72%
Less:							
ST-3 Value	3804	8588	14809	27304	22956	77461	19.27%
Income in Foreign currency	--	1625	944	2070	2055	6694	1.66%
Total Difference of realised professional Income on which Service tax is due	20767	49191	69854	76626	76087	292525	72.78%

3 A statement of Shri Sanat V. Desai, Deputy General Manager (Commercial) of the assessee was recorded on 27-03-2006 under Section 14 of the Central Excise Act, 1944, wherein he had interalia stated that the company had executed sub-consultancy agreements with the foreign lead consultants having their offices and establishment in India to provide certain part of the consultancy services; that among the five foreign lead consultants with whom the sub-consultancy, agreements so executed by their company to provide such services were (a) M/s. DHV Consultants BV, Netherlands [Delhi] (b) M/s. PELL Frishmann consultants limited U.K (Mumbai) (c) M/s Louis Berger Group Inc, USA (Mumbai & Delhi] (d) M/s. Dorsch Consultants, Germany (Mumbai) and (e) M/s. SNC Lavaline, Canada. He was asked whether the company had charged service tax or not in respect to the taxable services rendered by their company in the capacity of sub-consultants and if so, whether such payments were deposited in the Government Account or not, to which he had stated that their company had not charged the service tax to the foreign lead consultants and had also not deposited the same in the Government Account. Further, when asked whether the foreign lead consultants had discharged the service tax liabilities in respect to the taxable services rendered by their company in the capacity of sub-consultants or otherwise, he had stated that their foreign lead consultants having office in India had discharged the Service tax liabilities for the services rendered in association on behalf of their company. Shri Sanat Vinodchandra Desai had promised to appear on 28.03.2006 for giving his statement and the required details. However he neither appeared for recording the statement nor furnished any details.

4. In his statement dtd. 27.03.06, he had produced the year wise details of the sub consultancy income as enclosed in Annexure-"A" to the statement dtd. 27.03.06, which was duly certified by him after due reconciliation of all the records, wherein he had stated that the Company had received Rs. 9,15,31,690/- as income realized on part of "the services provided as sub-consultant during the period from 01.04.2000 to 31.03.2005", and he had stated that the following income recorded in their Balance Sheets and Profit & Loss Account as income received under sub-consultancy Services as under:

Sr. No.	Year	Differential value of Income realised claimed as sub-consultancy
1	2000-01	1,66,61,656
2	2001-02	1,93,85,528
3	2002-03	1,89,77,659
4	2003-04	1,84,71,288
5	2004-05	1,80,35,559
Total Differential value of Income realised claimed as Sub-consultancy		Rs. 9,15,31,690

5. The assessee had earlier submitted the worksheet during the course of audit under letter No. SAI/ACCT-GEN/0506-Q4/032 dtd. 03.02.06, wherein they had clarified that they had received Rs. 13.69 Crores under sub-consultancy income, out of which the detail breakup of Rs. 7.16 Crores was only provided and they had remained silent for the balance amount of Rs. 6.53 Crores as described herein below without giving any explanation/justification. Subsequently, they had claimed that the Service Tax liability was being discharged by the other Consultants in respect to the services rendered by them in the capacity of sub-consultant in terms of the contract agreements executed with them for the various projects, however, no satisfactory documentary evidences were furnished to the department to prove that the Service Tax liability had been fully discharged by the other associated consultants as per their contention made by them. The following table represents the details revealed by the party in their initial work sheet dated 13.01.06,

(Figures in '000')

Year	2000-01	2001-02	2002-03	2003-04	2004-05	Total
Break up provided as per the worksheet dated 13.01.06 as income from sub consultancy	4865	14972	17987	15926	17826	71578
Differential amount for which no explanation/justification provided as income from sub consultancy	5999	7610	11274	17639	22833	65355
Total Differential value of income realised claimed as sub consultancy	10864	22584	29261	33565	40659	136933

6. A summons was issued to Shri Hemant I Modi [Director] to appear on 29.03.06 for recording the statement and for producing all the relevant documents, but Shri Hemant I. Modi also did not appear. Therefore, the registered premises of the assessee was searched vide Search Warrant No.114/2005-06 dated 30-03-2006 and the incriminating documents/records listed in Annexure-A to the panchnama dated 30- 03-2006 were withdrawn for further verification.

7. A further Statement of Shri Sanat Vinodchandra Desai, Deputy General Manager (Commercial) of the assessee was recorded on 30.03.06 under Section 14 of the Central Excise Act, 1944, wherein he was shown his own statement dtd. 27.03.06; Shri Sanat V Desai stated that he had produced the copies of the association agreements executed with the foreign based consultants namely: [a] M/s. DHV Consultant BV, [b] M/s Dorsch Consultant and [c] M/s SNC Lavain INC Canada as per his promise given under statement dtd. 27.03.2006; that he had produced the copies of the invoices raised in the capacity of the associated Consultant during the period 01.04.2000 to 31.03.2005 which were not traceable on 27.03.06; that he was also shown all

the invoices and agreed that in certain invoices, they had charged and collected service tax for which contention had been raised by them as the income received under sub consultancy; when asked whether the payment of services provided in the capacity of the associated consultant was received from the lead consultants or from the clients directly with whom the agreement was executed jointly, he had replied that they had not received the payment directly from the clients with whom the association agreement was executed, but they had received the payment from their lead consultants for a particular share in the project, on which service tax had already been paid by the foreign lead consultants.

8. The assessee had executed the association agreement on 10.01.2000 with the foreign based Consultant namely M/s. DHV Consultant BV, Netherlands for providing the technical consultancy services for development of adequate road connectivity to major parts in India for package of Jawaharlal Nehru Port and Mumbai Port in Maharastra (Project Code 9921), wherein it was mentioned in Schedule 4 of the said agreement that against written statements from the Associate Consultant of the amounts due to them, calculated in accordance with the payment provision in Schedule 4 and any other provision of this Agreement, shall be released by the employer/ client. *Such payment shall be deemed to be inclusive payment for the Sub-Consultancy Services and for all taxes, duties, levies, costs, expenses and overhead of every kind incurred by the associate Consultant* in *the performance of the services."* In *the said association agreement, it is clarified at clause* S *4.1.8* in *Schedule 4 to the General condition of the said Association Agreement under the head of payment of services of the Associates Consultants that "Service tax* @ of 5% *on payments* made *under the provisions of clause S.4.1.1 to S 4.1.7 will be paid to the Associates Consultants by the clients. At clause* S *4.3, it* is *also stated that payments to the* Associates Consultants *shall be made* in *INR (Indian Rupees)".*

9. In his statement dtd. 27.03.06 Shri Sanat Vinodchandra Desai had produced certain invoices appearing at Sr. No. 215 to 226 of the Annexure-A to the how cause Notice, raised in favour of foreign based consultant M/s. DHV Consultants BV, New Delhi and they had claimed that they had not discharged the Service Tax for the services rendered by them as sub-consultant and their lead consultant had fulfilled the Service Tax liability on their behalf. It was found on detailed scrutiny of the said invoices that they had rendered the services as "Associated Consultant" in terms of the Association Agreements dtd.10.01.2000 for the said projects and they had charged and and collected the Service Tax under the said invoices. Hence, he was further questioned on 30.03.06 for making fictious sub-consultancy claim, wherein surprised he turned up that the company had inadvertently charged and collected the Service Tax. Moreover, it appeared that the claim made by the said Company under the sub-consultancy appeared to be not plausible, tenable and sustainable in law, in view of the material facts that on one side they were strenuously claiming that they had not charged and collected Service Tax on account of acting as sub-consultant under the said invoices. Appearing at Sr. No. 201 to 203 of the Annexure- A to the Show Cause Notice, while on other sides, it was revealed after due verification of the invoices that they had charged and also collected the Service Tax under the invoices appearing at <u>Sr. No. 215 to 226 of the Annexure - A</u> to the Show Cause Notice issued in favour of the

Associated consultant in terms of the said Association Agreement even for the same project [Project code No. 9921].

10. The assessee had also executed Association agreement on 04/07/2001 with Road and Buildings Department, Government of Gujarat in association with other consultant namely M/s. Louis Berger Group INC, for providing the consultancy services for restoration of bridges in earthquakes affected areas under World Bank Aided Emergency Earthquakes Reconstruction programme [Project Code 2101], wherein *at* Article 20 of the said agreement regarding the taxes, it is apparently mentioned that *"The PARTIES agrees that each is responsible for paying any-taxes, levies or duties levied related to their services under the CONTRACT. No PARTY will be responsible for another's tax liability and will indemnify all PARTIES as necessary". Further, it is also found from Appendix H -- Summary of Cost in local currency of the said Association agreement that the local currency payable would be paid to M/s. Sheladia Associates & Consultants (India) Pvt. Ltd., directly as per Special Condition 1.10 of the contract on authorization from the lead consultant M/s Louis Berger Group INC, U.S.A.*

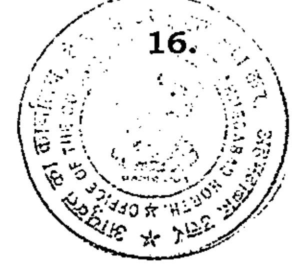
11. In his statement dtd. 27.03.06. Shi Sanat Vinodchandra Desai, had produced the invoices appearing at Sr. No. 127 to 129 and 189 to 200 of the Annexure-"A" *to* the Show Cause Notice, raised in favour of M/s. Louis Berger Group INC, New Delhi, and they had claimed that they had not paid the Service Tax in respect to the services rendered by them as sub-consultant and M/s. Louis Berger Group INC, New Delhi, had discharged the Service Tax on their behalf. However, on detailed scrutiny of the said invoices, it was found that they had rendered the taxable services in the capacity of the Associate consultant in terms of the Association Agreement dtd. 04.07.2001 for said project [Project Code 2101] and they had also charged and collected the Service Tax under the said invoices. Hence, he was further questioned on 30.3.2006 for making fictitious claim and he had again turned up that the company had inadvertently charged and collected the Service Tax. It also appeared that sub consultancy claim appeared to be not plausible, tenable and sustainable in law. In view of the material facts that on one side they were claiming that they had not charged and collected Service Tax on account of considering themselves as sub-consultant for the invoices appearing at Sr. No. 16, 104 to 106, 130 to137 of the Annexure- "A" to the Show Cause Notice, while on other sides, it was revealed after due verification of the invoices that they had charged and also collected the Service Tax under the invoices appearing at Sr. No. 127to 129 and 189 to 200 of the Annexure-'A" to the Show Cause Notice raised to the Associate Consultant in terms of the said Association Agreement for the same project (Project code No. 2101).

12. The said assessee had entered the contract agreement on 17.01.2002 with the National Highways Authority of India in association with the other consultants namely M/s. Louis Berger International INC, New Delhi and M/s. Roughton International, and Consulting Engineers Group, in joint venture for construction, supervision of Tumkur project in the State of Karnataka (Project Code 2126) wherein at cause 16(c) of the Appendix F - Minutes of Meeting for contract negotiation for taxes end duties, it was specifically mentioned that Service Tax as applicable for Indian and Foreign currency was to be paid/ reimbursed by the employers i.e. National Highway Authority of India.

13. In his statement dtd. 27.03.06 Shri Sanat Vinodchandra Desai, had produced the invoices appeared at Sr. No. 115 and 116 of the Annexure -A to the Show Cause Notice which were raised in favour of M/s Louis Berger Group INC, New Delhi, and they had claimed that they had not charged and collected the Service Tax in respect to the services rendered by them in the capacity of the sub-consultant and the associated consultant i.e. M/s. Louis Berger Group INC, New Deth had discharged the Service Tax. However, on detailed scrutiny of the said invoices, it was found that they had rendered the services in the capacity of the associated consultants as per the Association Agreement dated 17.01.2002 for the said project in Karnataka [Project Code 2126] and on which they had also charged and collected the Service Tax on the partial amount of the invoices raised for the taxable services rendered as an Associated Consultants in association with the other consultants. Hence, Shri Sanat V. Desai was further questioned on 30.03.06, but he had tuned up saying that the company had inadvertently charged and collected the Service Tax from the lead consultants. Moreover, it appeared that the claim made by the assessee under the sub consultancy appeared to be not plausible and tenable in view of the material facts that at one side they were claiming that they had not charged and collected Service Tax on account of considering themselves as sub consultant for the invoices appearing at Sr. 01 to 13, 74 to 85 and 117 to 126 of the Annexure- “A" to the Show Cause Notice, while on other side, it was revealed atter due verification of the invoices that they had charged and also collected the Service Tax under the invoices appearing at Sr. No. 115 to 116 of the Annexure-A to the Show Cause Notice raised to the Associate consultant in terms of the said Association Agreement for the same project (Project code No. 2126).

14. It was also observed that no uniform practice was being followed by the assessee even for the same project in terms of the specific terms and condition on tax liability in association agreement. It was also revealed that they had charged and collected the service tax on random basis and suppressed the material facts deliberately that they had received the payment of the services rendered in the individual capacity acting as associated consultant, which was inclusive of Service Tax. They had also failed to deposit it in the government account within the stipulated period under wrong contention and incorrect claim without adducing corroborative evidence to indicate that the payment of service tax had been made by the other associated consultant on their behalf.

15. The assessee had also executed the association agreement on 07.10.2003 with the foreign based consultant namely M/s Louis Berger Group INC, Mumbai, for providing the consultancy services for construction supervision of Civil Works for Mumbai Urban Transport project (Project Code 2307), wherein at Article 20 of the said agreement regarding the taxes, it was specifically mentioned that "The PARTIES agrees that each is responsible for paying any taxes, levies or duties levied related to their services under the CONTRACT. No PARTY will be responsible for another's tax liability and will indemnify all PARTIES as necessary".



16. The assessee had also executed the sub-consultancy Agreements

on 21.09.1999 with the foreign based consultant namely M/s Louise Berger International, INC, New Delhi for providing the consultancy services for the World Bank Funded Andhra Pradesh Economic Restructuring Project Rural Road Component (Project code 9903), wherein in accordance with the Schedule 4 of, General Condition of the said agreement, it was mentioned that the payments was to be made against written statements from the Sub-Consultant of the amount due, calculated in accordance with the payment provision in Schedule 4 and any other provisions of this Agreement. "*Such payment shall be deemed to be inclusive of payment for the Sub-Consultancy Services and for all taxes, duties, levies, costs, expenses and overhead of every kind incurred by the Sub-Consultant in the performance of the services. In the said agreement dtd. 21.09.1999, at clause 1.10* of *Special Condition of the Contract under the head of taxes and duties - for a domestic consultant /personnel and foreign consultants/personnel who are permanent residence in India that the consultant and the personnel shall pay the* taxes, *duties, fees, levies and other imposition levied under the existence, amended or enacted laws during life of this contract and the clients shall perform such duties in regards to the deduction of such tax* as may be lawfully *imposed".*

17. The assessee had also executed the Association Agreement on 28.09.2000 with the foreign based consultant namely M/s. SNC Lavalin International Inc, Canada for providing the consultancy services for the contract package -III-B for the project of National Highway-5 in Andhra Pradesh (Project Code 2006),), wherein in at sub clause 9 of the Memorandum of the agreement, it was mentioned that *"SAC being a local associate to SLI shall be liable to pay all applicable taxes imposed by Government of India. In case of any TDS Tax, Indian Income Tax and/or any other tax such* as *Value Added Tax, Service Tax or Import Duties or Levies etc. deducted by our client, National Highway Authority of India, the same amount will be deducted from payment to SAC's invoices."*

18. The assessee had also executed the Association Agreement on 02.08.2000, with the foreign based consultants namely M/s. PELL Frischmann Consultants Ltd. and M/s. DHV Consultant and their client M/s. National Highway Authority of India, for providing the consultancy services for the Contract package P(V) for the New Managalore Port project of National Highway (Project Code 2004), *wherein in at clause 1.10 of Special Condition of the said agreement, it is mentioned that that The Consultants and the personnel shall pay the taxes, duties, fees, levies and other imposition levied under the existing, amended or enacted laws during life of this contract and the client shall perform such duties in regard to the deduction of such tax as may be lawfully imposed.*

19. The assessee had also executed the Association Agreement on 2.9.2002, with the foreign based consultants namely M/s. Dorsch Consultant, for providing the consultancy services for the National Highway -2 in the state of West, Bengal (Project Code 2209/2309), *wherein in at clause 6.1 of the said agreement, it is mentioned that the associates shall be responsible to pay all taxes and duties in as applicable to them by applicable law.*

20. Despite specific terms and conditions enumerated in the said agreement, they had failed to discharge their Service Tax liability in respect

to the taxable service rendered as Associated Consultant for which the invoices were raised appearing at [a] Sr. No. 43 to 57 and 99 to 103 [Project Code No. 2307], [bl Sr. No. 34 to 42, 86 to 98, 141 to 167, 169 to 179,206, 230 to 239 [Project Code No. 9903), [c] Sr.No.185 to 187, 207 to 211 [Project Code No. 2006], [d] Sr. No. 14 to 15, 183 to 184 and 212 to 214 [Project Code No. 2004] [e] Sr. No. 22 to 23, 26 to 27 and 110 to 111 [Project Code No. 2209/2309] of the Annexure "A" to the Show Cause Notice.

21. During the course of scrutiny of the invoices appearing at Sr. No. 168, 32, 55, 57 to 60, 63,65,67 to 69, 73, 109, 112 and 180 to 182, of the Annexure -A to the Show Cause Notice, wherein they had made the contention that no Service Tax had been discharged under the said invoices raised to the foreign based consultants namely, M/s. Louis Berger international Inc, Hyderabad and M/s. Dorsch Consultant., Germany, in respect to the various projects, for which project code were allotted as 2115 and 2105, 2003, Ku1 /Ku2, Adani Port, Ahmedabad to Viramgam Road respectively, as per the invoices mentioned above, from which it appeared that no such associated agreements had been executed so far with the foreign based consultant as no records or any relevant documents for the said projects had been produced or submitted by them. In his statement dated 17.04.06, Shri Sanat V. Desai had seen the said invoices and he had admitted that the project incorporated were other than the project undertaken, as sub-consultant on the said invoices, under which the claim of sub-consultancy was made in the statement dtd. 27.03.06 and 30.03.06 and under letter dtd. 07.03.06, and he had stated that they would verify their records and revert back with the justification. Hence, it appeared that they had made forfeited claim just to adjust the differential income.

22. The assessee had submitted the invoices appearing at Sr. No. 17 to 21, 24, 25, 28 to 33, 56 and 107 of the Annexure -A to the Show Cause Notice with the contention that no Service Tax had been discharged under the said invoices raised to the foreign based consultant M/s. Dorsch Consultant, Germany, in respect to the services provided in association for the project of Gujarat Emergency Earthquake Reconstruction [Project Code: 2305], however on detailed scrutiny of the said invoices and association agreement dated 26.08.2003 executed between Government of Gujarat and M/s. Dorsch Consultant, Germany with M/s. Dorsch Consultant (India) Pvt. Ltd, Mumbai, withdrawn under the Panchnama dated 30.03.2006, it was revealed that no such agreement in association with M/s. Sheladia Associates & Consultant Pvt. Ltd, had been executed so far for undertaking the work as mentioned in the said invoices under which the claim was made, in terms of the said agreement and it appeared that they had made baseless claim, that they had rendered the services as a sub-consultant and Service Tax had been discharged by their Lead Consultants.

23. It was observed that the assessee had executed the various association agreements with the foreign based consultants to provide the taxable services in joint venture, from which it was noticed that the assessee had rendered the taxable services for the various projects in India in the capacity of the "Associated Consultant" and it can never be said that the services so rendered by them was in the capacity of sub-consultants, in order to refrain themselves from discharging their Service Tax liability. Hence, the

contention made by the assessee that they had not discharged Service Tax for the services provided at various projects on account of sub-consultancy appeared to be not tenable in view of the facts so ascertained from terms and condition of each association agreements that they had rendered the services in the individual capacity as "Associated Consultant" acting as an "independent Consulting Engineer".

24. Further, it was revealed from the terms and conditions of the association agreements that payment was to be made by the employer/client with whom main association agreements had executed in association, for the particular share/ work to be done, by each associated consultant in the project. Also, it was also revealed that there was uniform terms and conditions in each association agreements executed as regards to payment on the Services. rendered by them in individual capacity and the tax liability that *"Each is responsible for paying any taxes, levies or duties related to their services under the contract and no party will be responsible for another's tax liability and will indemnify all parties as necessary".* Also, there was uniform clause in each association agreements that *"Such payments shall be deemed to be inclusive of payments for the service and for all taxes, duties, levies, costs, expenses and overhead of every kind incurred by the consultants in the performance of the services".*

25 It appeared that there was uniform clause appearing in all association agreements, with regard to the Bank Guarantee to be furnished by each associates consultants that they were required to give performance Bank Guarantee, against their respective share in the project, to the employer/client and also for advanced payment received from the client.

26 It was observed from the association agreements as regards to the payments of the services rendered in the capacity of the Associated Agreement in joint venture that the stage wise payments in respect to the services so provided, having individual share in the projects, would be released by the employer/client for undertaking such project in association, on the basis of invoices prepared on monthly basis by the associated consultant, after due review and counter signed by the team leader in the relevant project, for which services were provided in individual capacity of Consulting Engineer.

27. In view of specific terms and conditions with regard to payment of taxes, duties, levies etc. by each Associated Consultants as clearly mentioned in each association agreements discussed herein above, the contention raised by the assessee that their foreign based consultants had fulfilled their tax liability on behalf of them for the services rendered by them appeared to be not tenable following their failure to adduce any corroborative or satisfactory documentary evidences which could clearly indicate that the payment had been fully discharged by the foreign based consultants and under the circumstances it was found that the said assessee had failed to pay the service lax in respect to the Invoices appearing at Sr. No. 1 to 55, 57 to 114, 117 to 126, 130 to 188, 201 to 214, 218 and 230 to 239, of the Annexure-A to the Show Cause Notice.

28. Moreover, it was also observed that the payments received by the said assessee in local currency after deduction of TDS @ 5.13% at the rate

applicable to the Indian party that payments were received by them from the clients/employer directly and not from the foreign based consultant to avoid double taxation under the Income Tax Act,1961, in view of the fact that if the client/employer had made the payment to the foreign based consultant, TDS would have been deducted @ 15.75% under the Income Tax Act, 1961 and then after if the said payment had been transferred to M/s. Sheldia Associates & Consultants (I) Pvt. Ltd. by the foreign based consultant against the services provided in association, and so under that circumstances, TDS would have been again deducted @ 5.25%, with actual effective rate of TDS @ 21%.

29. A further statement of Shri Sanat Vinodchandra Desai, Deputy General Manager (Commercial) was recorded under Section 14 of the Central Excise Act,1944 on 17.04.2006 wherein he was shown the letter dtd. 12.04.2016 under which they had enclosed the photocopies of certificate of payment of service tax by their lead consultant M/s Louise Berger Group, INC (SCLR), Mumbai for the services provided by them as a sub-consultant, that he was asked to co-relate the invoices raised by the assessee to M/s. Louise Berger Group, Mumbai, (SCLR), M/s Louise Berger, Tumkur, M/s Louise Berger, Hyderabad, M/s. Dorsch Consultant India, Mumbai, M/s. Frishmann Prabhu India Pvt. Ltd, Mumbai under which the sub-consultancy claim was made, with the payment particulars of the Service Tax received from their lead consultants, but he had failed to co-relate it and had only stated that they had submitted those photocopies of the certificates received from the lead consultants as it was, along with the letter dtd. 12.04.06 and for remaining certificates as an proof of payment of the Service Tax would be provided as and when received from the lead consultants in due course.

30. On detailed scrutiny of the invoices bearing nos. RA/162 dtd. 26.11.04 and RA/109 dtd. 10.03.05, amounting to Rs. 1125140/- and 935298/- issued to M/s Louise Berger International, INC, New Delhi and M/s. Louise Berger international, INC, Gurgaon, respectively covered under the sub-consultancy claim, it was observed that they had rendered the consultancy services for construction contract supervision in Andhra Pradesh for which the said invoices were raised in Indian currency, however it had been verified from the records that the payment was received in foreign currency. In his statement dated 17.04.06, Shri Sanat V. Desai was shown the said invoices and was asked whether the services provided to the lead Consultant had been utilized in India or otherwise, for which he stated that he would have to verify the particulars with the concerned authority of his assessee and they would revert back in due course; he had also stated that against the said invoices, they had not received any income on account of sub-consultancy in Indian currency, but by mistake and through oversight they had included this income of Rs.20,60,438/- in the total claim of Rs. 9.15 Crores which would be revised and resubmitted in due course as per his statement dtd. 30.03.06.

31. On detailed scrutiny of the invoices bearing no. 01/068 dtd. 02.07.02 and P-197 dtd. 31.03.02 amounting to Rs. 9,43,800/- and Rs. 16,25,364/- issued to M/s. Dorsch Consultant and SNC Lavalin International Inc, respectively, covered under the sub consultancy claim, it was observed that they had rendered the consultancy services for construction contract supervision for the project of NH-79 in Rajasthan [Contract Package KU/1 &

KU/2) for which the said invoices were raised in Indian currency, however it has been verified from the records that the payment was received in foreign currency. In his statement dated 17.04.06, he was shown the said invoices and he was asked whether the said services were utilized in India for the project of construction and supervision of NH 79 in state of Rajasthan in India or otherwise, for which he had stated that he would have to verify the particulars with the concerned authority of his company and they would revert back in due course.

32 In his statement dated 17.04.06 Shri Sanat Vinodchandra Desai, was shown the invoices mentioned herein above and accordingly he had stated that they had recorded the income of Rs.46.28 lakhs under the said invoices received in foreign currencies against the export services, which was included by mistake and through oversight in their sub consultancy claim of Rs 9.15 crore. In his statement he had expressed his inability to clarify whether the services for which payment received in foreign currency was rendered and utilized out side India or otherwise and he was also asked under which ground, the said income was included by them in their sub-consultancy claim of Rs 9.15 crore for which he had only stated that he would revert back after due verification of the particulars with the concerned authority of his company. Hence, it appeared that they had not verified the particulars before making legitimate claim of Rs 9.15 crore including such income of Rs 46.28 lakhs, thus, by giving such mis-statement frequently and misleading the department just to get the relief by any means, from payment of Service Tax liability arising on account of false self assessment made, which was not in accordance with the provision of Section 67 or the Finance Act, 1994 as discussed in detail herein below.

33 On detailed scrutiny of the invoices bearing nos. RA/157 dtd 25.09.03 and RA/150 dad. 12.09.03 amounting to Rs. 13,71,600/- and Rs. 6,98,436/- issued to M/s. Louise Berger International, INC, New Delhi and M/s. SNC Lavalin International, Inc, however it was observed that they had rendered the consultancy services for the project of World Bank Funded Andhra Pradesh Economic Restructuring Project Rural Road Component [Project Code 9903), for which the said invoice were raised in Indian currency, however it was verified from the record that the payment was received in foreign currency from the above client.

34. It was found that it was an admitted fact & the same was recorded under section 14 of the Central Excise Act, 1944 based on documentary evidence that the taxable services was rendered, and utilized in India for which the payment was received in foreign currency. In view of above, service tax was to be paid on the said service rendered and utilized in India.

35. In view of terms and conditions as mentioned in associated agreements as described herein above, inquiry in regard to confirmation of payment of service tax as claimed by the assessee, was extended to each foreign based consultants having office in India namely (a) M/s. DHV Consultants BV, Netherlands(Delhi) (b) M/s. PELL Frischhmann consultants limited U.K (Mumbai] (c) M/s. Louis Berger Group Inc, USA [Mumbai & Delhi] (d) M/s Dorsch Consultants, Germany [Mumbai] and (e) M/s. SNC Lavaline Canada as per the invoices submitted by the said assessee as

detailed in Annexure-"D" to the Show Cause Notice, by sending them letters with full particulars of the related project and details of the respective invoices issued in favour of them with a request to intimate this office immediately whether any service tax had been paid by them as per the contention made by M/s. Sheladia Associates & Consultants (India] Pvt. Ltd and if so, to produce documentary evidence indicating the payment of service tax as per the invoices. In pursuance to the request made, letters dated 10.05.06 and 18.04.06 were received only from M/s. Dorsch Consultants [India] Pvt, Ltd and M/s. Frischamann Prabhu [India] Pvt. ltd, however it is observed that they had simply written a letter without making any co-relation of the particulars of the project, invoices, payments made for the services rendered and service tax paid, which could corroborate that the payment of service tax had been discharged in respect to the taxable services rendered by M/s. Sheladia Associates & Consultants (India] Pvt. ltd.

36. The assessee's claim that they were sub-consultant appeared to be not entertainable on the following grounds (a) the services had been rendered by them on the projects in the individual capacity as independent Consulting Engineer with other associated consultants (i.e. in joint venture), [b] in terms of the association agreements, it was the responsibility of the each associated consultant to pay the service tax as applicable in law, (c) Each associated consultant was to submit a Bank Guarantee separately to employer/ client for the performance of the work and against advanced payment for their respective share, (d) the payments were received directly from the client/employer for the services rendered by each associated consultant in individual, capacity for particular work so under taken on the project, which was inclusive of service tax in terms of the main agreement so executed, [e] they had failed to produce any satisfactory documentary evidences indicating the payment of the Service Tax made by the other associated consultants on their behalf as per their contention.

37. There was an explanation clause to Section 67 of the Finance Act, 1994, wherein it is specified that certain expenses (i to viii) are not included in the value of the taxable service rendered by certain service provider. If the service provider has incurred certain petty expenses on behalf of the client which are not related to proximate services for rendering the taxable services, do not become the part of the value of the taxable services for the purpose of tax liability under Section 67 of the Finance Act, 1994. During the course of investigation of the case it was revealed that the assessee had self-assessed their duty liability on random basis after deduction/reimbursement of inadmissible expenses such as Professional charges, Work charges and Office & Administration expenses which appeared to be not covered under the excluded category to the Section 67 of the Finance Act, 1994.

38. The assessee had submitted the worksheet in the month of September,2004 and further under letter No. SAI/ACCt-GEN/0506-Q4/032 dtd. 03.02.06, wherein they had clarified that they had self assessed their duty liability after deduction of Rs.15.56 Crores as reimbursement expenses from the value of the taxable services in terms of Section 67 of the Finance Act, 1994, towards Professional Charges, Works Charges and Office & Administrative. Expense. Subsequent to that they had further clarified under letter dated

07.03.2006 that they had self assessed the duly liability after deduction of Rs. 20.14 crores instead of Rs. 15.56 Crore.

39. In his statement dated 27.03.06 Shri Sanat V Desai was asked certain questions based on self-assessment made by them during the period from 01.04.2000 to 31.03.2005; that the company had determined the tax liability on the basis of the invoices certified by project expenses as per bill after deducting reimbursement of actual expenses that the expenses usually incurred by them were as per agreed terms of agreement i.e. specific technical experts, hiring of project specific vehicles travelling expenses related to the project, geo-technical testing, topography, other related survey expenses and other direct/indirect project related expenses; that these expenses were incurred on behalf of their client and these expenses were essential to provide such taxable service; that he could not provide the desired details; that the expenses claimed were on the basis of documentary evidences; that the assessment was not finalized on lump sum basis; that no excess or short payment of service tax was noticed on account of assessment of duty.

40. In terms of Section 67 of the Finance Act, 1994, "the value of any taxable service shall be the gross amount charged by the service provider for such services rendered by him". There was also an explanation clause to Section 67 of the Finance Act, 1994, wherein it was specified that certain expenses (i to viii) were to be not included in the value of the taxable service rendered by certain service provider. In the present case, it appeared that the expenses incurred by the said assessee on which the reimbursement was claimed for determination of the value of the taxable service for the purpose of tax liability appeared to be not covered under excluded category of the expenses as specified in explanation clause to the Section 67 of the Finance Act, 1994.

41. During the course of scrutiny of the Profit and Loss Accounts, ledger accounts, invoices/bill raised, Monthly Bank Realization statements, documents withdrawn under Panchnama dtd. 30.03.06 and ST-3 returns filed by the assessee covering the period 2000-01 to 2004-05, it was observed that the said assessee had self assessed their duty liability on random basis, taking into consideration only 19% to 22% of the amount so realized during the particular month, for determining the value of taxable services, for the purpose of tax liability under the presumption that the remaining amount of the value of the taxable services would be their reimbursement expenses, which did not become part of the value of taxable service, which was not in accordance with the provision of Section 67 of the Finance Act, 1994.

42. It was observed from the calculation sheet (month-wise) of the realized amount for the financial year 2002-03 and 2003-04 submitted by the assessee on the basis of which they had deposited the service tax after assessing the duty liability which is exactly 20% of the realized amount, that is merely Profit before Interest & Taxation (PBIT) which appeared to be not in accordance with the provision of Section 67 of the Finance Act, 1994. Thus, it was clear evidence against them that they had not assessed their duty liability

correctly by suppressing the correct value of the taxable services and had escaped the self- assessment with an intention to evade the payment of the Service Tax. Also, it appeared from the calculation sheet for the financial year 2004-05 provided by the assessee on the basis of which Service Tax was paid on realization amount which is on the approximate amount of realization (19% to 22%], after deduction of the expenses on proximate services as reimbursement [78% to 81%], on presumption basis that no service tax would be leviable on the amount of such essential expenses incurred for rendering taxable service, which appeared to be not in accordance with the Section 67 of the Finance Act, 1994.

43. During the course of recording of statement dtd. 30.03.06, Shri Sanat V. Desai, was asked to produce the calculation sheet, if any prepared for estimation of tax liability before depositing the same in the designated bank, which could clearly indicate that against the particular invoice, wherein gross amount charged/billed by the assessee to the clients, which was subsequently realized in a particular month and against that realized amount, what types of actual expenses incurred towards rendering the taxable service, which are deducted/ reimbursed from the value of the taxable services under the category of "reimbursement expenses" as defined under section 67 of the Finance Act, 1994. However, he was clueless and remained silent on that particular aspect and he had expressed his inability to explain it. The assessee was not in position to explain it as to how the self-assessment was made by them under section 70of Finance Act, 1994 and remained silent on the critical issue.

44. For test checks of the self-assessment finalized by the assessee for the month of April 2004, while recording the statement on 30.03.06, under Section 14 of the Central Excise Act, 1944, the assessee was asked specifically to produce those invoices raised by them, under which the amount charged/billed towards the service provided, which was subsequently realized latter and to state that what expenses are incurred by the assessee considered as reimbursement for computation of the tax liability, for which they were having no clarification/justification as to how the self assessment was finalized for that particular month/years.

45. However, the assessee was not in position to admit the material facts revealed to the department that they had finalized false self-assessment on fictitious value of the taxable services realized in the particular month, on the presumption basis that the remaining amount of the value of the taxable services would be reimbursement of the expenses without any statutory abatement and as a result of which, substantial amount of difference noticed on reconciliation of the professional income, on which no Service Tax had been discharged and on which exorbitant claim of reimbursement of expenses that is 272% of the value shown in ST-3 returns which was strictly not in accordance with the provision of Section 67 of Finance Act, 1994. In other words, no one could say that the value of the expenses incurred to provide the services would be more than the value of the taxable services so rendered to the clients. Thus, it appeared that they had made fictitious claim of reimbursement expenses, which appeared to be not allowable in terms of the provisions of Section 67 of the Finance Act, 1994.

46. The said assessee had submitted the worksheet in the month of September, 2004 and further under letter- No SAI/ACCt-GEN/0506-Q4/032 dtd 03.02.06 wherein they had clarified that they had self assessed their duty liability after deduction of Rs 15.56 Crore as reimbursement expenses from the value of the taxable services in terms of Section 67 of the Finance Act, 1994 as described herein below towards Professional Charges, Works Charges and Office & Administrative Expense. Subsequent to that they had further clarified under letter dated 07.03.2006 that they had self -assessed the duty liability after deduction of Rs. 20.14 Crores instead of Rs. 15.56 crores, that is, increasing the amount of reimbursement expenses, following the adjustment of the claim in respect to the sub-consultancy from Rs 13.69 crore to Rs. 9.15 crore out of differential amount of income of Rs. 29.25 Crores, on which Service Tax was short paid by the assessee, without any justification for the differential amount of claim, increased to the tune of Rs. 4.55 crores as reimbursement of expenses, merely by adjusting the figure of differential amount of Rs. 4.55 crore by increasing the claim of reimbursement on one side and simultaneously decreasing the claim of sub-consultancy which was claimed in phase manner.

(Figures in '000')

Year	2000-01	2001-02	2002-03	2003-04	2004-05	Total
Professional Charges (100%)	297	6097	11833	12255	12561	45043
Work Charges (100%)	5655	10516	7141	12543	9853	45708
Office & Adm. (69.62%)	1951	9994	21619	18263	13014	64841
Total Diff. value of realised income claimed as reimbursement	(-)9903	(-)26607	(-)40593	(-)43061	(-)35428	(-)155592
Service Tax Due	495	1330	2030	3445	3189	10489

47. A statement was recorded on 17.04.2006 under section 14 of the Central excise Act, 1944, wherein Shri Sanat V Desai. Deputy General Manager (Commercial) of the assessee, was asked regarding the income difference of Rs. 4.55 Crores, following the further claim of Rs. 20.10 Crores made under their letter dated 07.03.06 wherein it had been clarified that the company had reimbursed the expenses under the head of Professional Charges (100%), Works Charges (100%), Office and Administrative Expenses (70%), whereas it was revealed that on the basis of the records, total expenses incurred comes to Rs. 15.55 Crore in respective years as shown in the profit and loss account from 2000-01 to 2004-05, for which he had admitted in his statement dtd. 30.03.06, that expenses incurred by the company were recorded in the P&L a/c's for rendering the consultancy service claiming to be sub-consultancy which were also wrongly taken into consideration while determination of the tax liability for the purpose of assessment, that the revised worksheet and reconciliation of figures would be submitted with clarification for such difference in due course.

48. In his statement dated 17.04.06, he was made to peruse his letter dtd. 12.04.06, wherein request of extension of lime limit was made, for submission of required details as mentioned in their dtd. 30.03.06, he stated that the details of the reimbursement of expenses of the company would be re-submitted within two weeks, however, in his letter dtd 12.04.06 sent by post, in which it was requested, that due to closure of the financial year they needed some

more time to prepare and submit the required details with a request to further time of thirty days. The assessee was provided sufficient time and reasonable opportunity to disclose the method adopted for computation of the tax liability particularly in respect of claim made as reimbursement of expenses under section 67 of the Finance Act, 1994, but on every occasion they had failed to provide the utmost required details as to how they had finalized the self assessment and requesting every time for extension of time for preparation of worksheet and reconciliation of figures.

49. In absence of statutory abatement, according to the provision of Section 67 of the Finance Act, 1994, Service Tax ought to have been charged on the relevant gross amount billed by the assessee for rendering such services which would be aggregate of all the expenses incurred on proximate services viz. [a] Professional Charges, [b] Work Charges i.e Computer job work charge, Survey expenses, Testing charges, Project sub consultancy charges, Project site charges, Labour charges, R & D expenses, [c] Office & Administrative Expense i.e. Office expenses, Stationery & Drawing expenses, Advertisement expenses, Post & Telegram expenses, Electric charges, House Rent charges, Office Rent charges, Guest House/ Hotel Charges, Service & Maintenance (office) expenses, Travelling expenses, Vehicle Hire charges(Rent), Vehicle Maintenance expenses, Auditors Remuneration (audit fees), Conveyance expenses, Municipal Tax and Other Tax, Miscellaneous expenses (Tender Fee, Legal charges, Registration, Insurance charges etc.), Other Rent Subscription & Membership Fees and Business Development expenses, recorded in Profit & Loss a/c. under the head of Professional charges, Work charges, Office & Adm. Expenses. Thus, for computation of tax liability, the service rendered by the service provider was the most relevant factor to determine the tax liability and hence the expenses incurred or the essential activities, which were part and parcel of the taxable service rendered, has no bearing to compute the service tax liability.

50. Further, the claim made by the assessee that Service tax should not be charged on value of the expenses incurred towards rendering the taxable services is not tenable, as all these Expenses were incurred for the proximate services which appeared so relevant and essential to render the technical consultancy services and therefore, the value of such expenses incurred which were the part and parcel of such services rendered by them, which appeared to be includible in the value of the taxable services received for the purpose of tax liability without claiming any reimbursement of expenses for correct finalization of their self-assessment and accordingly, Service Tax appeared to be chargeable in accordance with Section 67 of the Finance Act, 1994.

51 It was observed that the self-assessment had not been finalized in accordance with the provision of Section 67 of the Finance Act. 1994 and the assessee had suppressed the correct value of the taxable service to avoid payment of service tax. The assessee had discharged their tax liability, not on gross amount charged to the clients towards tendering the taxable services in terms of Sec. 67 of the Finance Act, 1994, but merely on Net Income, after deducting exorbitant expenses, on presumption basis, taking into consideration the fictitious value, without having statutory abatement for the same expenses,

for determination of value of taxable service in terms of Section 67 of the Finance Act 1994.

52. The contention made by the assessee for the differential amount of professional income on account of reimbursement of expenses, for providing services appeared to be not tenable, plausible and also not sustainable in law on the following grounds [a] There was no statutory abatement for such expenses incurred for providing the taxable service of Consulting Engineering service under the provision of Section 67 of the Finance Act, 1994, [b] they had finalized the self assessment on random and arbitrary basis after determination of fictitious value of the taxable service, on presumption basis that such expanses are reimbursable, on which no Service Tax was leviable, [c] the expenses incurred on proximate/essential services, which were the part and parcel of the services rendered in the capacity of consulting engineering which cannot be considered as reimbursement having no statutory abatement, [d] the terms and condition mutually agreed upon by the service provider and client, if any, for rendering the taxable services to client, having no relevancy for the purpose of determining the value of taxable service provided , towards charging the Service Tax in accordance with Section 67 and 68 of the Finance Act 1994, as the same was to be applicable to them, [e] The amount for reimbursement claimed on the proximate services, the income invoices were raised and booked in the income ledger a/c which was shown as professional Income in the Profit & Loss A/c, so it can not be considered as reimbursement of expenses, [f] Hence the assessee had discharged their tax liability, not on gross amount charged to the clients towards rendering the taxable services in terms of Sec. 67, of the Finance Act, 1994, but merely on net income [profit before interest, tax and depreciation] after deducting exorbitant expenses, on presumption basis, arriving at the fictitious value, without having statutory abatement for the same expenses, for determination of value of taxable service in terms of Section -67 of the Finance Act, 1994.

53. On due verification of the records, it was found that the assessee had wrongly raised the contention that they had rendered the taxable services as sub-consultant, hiding the facts that such services were rendered by them as associated consultant in joint venture in terms of the associated agreements under the invoices as described in Annexure- "A" to the Show Cause Notice and it was also revealed that the assessee had incorrectly assessed the duty liability after deduction of inadmissible reimbursement expenses which were recorded as the income in their ledger a/c, which appeared to be not permissible for computation of service lax liability under Section 67 of the Financial Act, 1994 and accordingly, Service tax amounting to Rs. 206.70 lacks appeared to have been short paid as per below mentioned table representing the value of the taxable services and Service Tax payable, by the assessee under the provision of Section 67 of the Finance Act, 1994 and accordingly, they were required to assess their duty liability under Section 70 of the Finance Act, 1994.

(Figures in '000')

Recovery of short payment of Service Tax on the differential value of the taxable services received not taken into consideration for determination of value of taxable services for the purpose of charging the service tax during the period 01.04.2000 to 31.03.2005.						
Year	2000-01	2001-02	2002-03	2003-04	2004-05	Total
Professional Income shown in P&L A/c	31978	59513	91122	109055	110244	401912
Add: Op. Debtors	6422	13829	13938	19453	22508	76150

Less: Cl. Debtors	13829	13938	19453	22508	31654	101382
Total Income realised	24571	59404	85607	106000	101094	376680
Less:						
ST-3 Value	3804	8588	14809	27304	22956	77461
Total difference of value of taxable services received on which service tax is payable	20767	50816	70798	78696	78142	299219
Short Payment of Service Tax required to be recovered	1038	2541	3540	6296	7255	20670

54. In terms of Section 70 of the Finance Act, 1994, every person liable to pay Service Tax shall himself assess the tax due on the service provided by him and shall furnish to the Superintendent, Central Excise, a return in such form and in such manner and at such frequency as may be prescribed. The Said service provider had failed to assess the tax due on the services provided within the stipulated period and also failed to file the ST- 3 returns in the prescribed format within the stipulated period and they have escaped the assessment for a particular period without making any reasonable cause and violated the provision of the Service Tax rules with an intent to evade the Service tax.

55. In view of the above discussion, it appeared that they had contravened the provisions of-

a) Section 67 of the Finance Act, 1994 in as much as they had failed to determine correct value of the taxable service on the gross amount charged for the services rendered by them,

(b) Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules 1994 in as much as they had short paid the service tax to the tune of Rs 206.70 lakhs on the differential value of the taxable service to the tune of Rs, 2992.19 lakhs as per Annexure- "B" to the Show Cause Notice.

(c) Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules 1994 in as much as they had failed to assess correct duty liability themselves as discussed herein above.

56. All the above facts of contravention on the part of the assessee appeared to have been committed by way of Suppression of facts with an intent to evade Payment of service tax and, therefore service tax short-paid by them, which was not deposited as discussed by them, was required to be demanded and recoverable from them under the proviso to Section 73(1) of the Finance Act,1994 by invoking extended period of five years. All these acts of contravention of the provisions of section 67, 68, and 70 of the Finance Act, 1994 read with Rules 4,6, and 7 of the Service Tax Rules 1994 appeared to be punishable under the provisions of Section 76,77, and 78 of the Finance Acct, 1994 for violation of the said rules.

57. The failure on the part of the said assessee to pay service tax, appeared to have rendered them liable for penalty under Section 76 in addition to the interest payable under Section 75 of the said Act and the failure on their part to access incorrect value of taxable service, appeared to have rendered them liable for penalty under Section 77 and 78 of the said Act.

58. It was ascertained from the records that the assessee had filed their ST-3 returns for the following half year ending on the following date.

Sr. No.	Period	Half Year Ending	Return Filed on
01	01.04.2000 to 30.09.2000	30.09.2000	11.06.2001
02	01.10.2000 to 31.03.2001	31.03.2001	11.06.2001
03	01.04.2001 to 30.09.2001	30.09.2001	29.07.2002
04	01.10.2001 to 31.03.2002	31.03.2002	29.07.2002
05	01.04.2002 to 30.09.2002	30.09.2002	24.07.2003
06	01.10.2002 to 31.03.2003	31.03.2003	24.07.2003
07	01.04.2003 to 30.09.2003	30.09.2003	20.07.2004
08	01.10.2003 to 31.03.2004	31.03.2004	20.07.2004
09	01.04.2004 to 30.09.2004	30.09.2004	16.05.2005
10	01.10.2004 to 31.03.2005	31.03.2005	16.05.2005

59. During the course of scrutiny of the ST 3 returns filed by the said service provider as per details mentioned in Annexure "C-1 & C-2" to the SCN, it was noticed that the service provider had failed to discharge their tax liability within the stipulated period in terms of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules 1994. The details of the delayed payments of the Service Tax and consequence to that, the numbers of days delayed payment of Service tax made by them was shown in Annexure "C-1" attached to the Show Cause Notice.

60. Rule 6 of Service Tax Rules, 1994 envisages that the Service Tax on the value of taxable service received during any calendar month shall be paid to the credit of the Central Government by the 25th of the month or quarter immediately following the said calendar month or quarter as the case may be. In the present case, the assessee, a Private Limited Company incorporated under the Companies Act, 1956, was required to make their payments of Service Tax on or before 25th of the following month, however, it appeared that the assessee had not discharged their Service Tax liability within the stipulated period as shown in Annexure- "C-2" to the Show Cause Notice and they had contravened the provision of Rule 6 of the Service Tax Rules 1994 read with Sec. 66 of the Finance Act, 1994, for which they appeared liable for penal action under Sec. 76 of the Finance Act, 1994.

61. Therefore, a show cause notice No. STC/SCN/Sheladia-163/Div-II/2005-06 dated 5-06-2006 was issued to M/s SAI Consulting Engineers Pvt Ltd (Formerly known as M/s Sheladia Associates & Consultants (India) Pvt Ltd), Ahmedabad asking them to show cause as to why:

(i) service tax amounting to Rs.206.70 lakhs short paid on the differential amount of Rs. 2992.19 lakhs as detailed in Annexure-B to the show cause notice, should not be demanded and recovered from them under Section 73 of the Finance Act,1994 by invoking extended period of five years;

(ii) Interest at the applicable rate should not be charged upon them under Section 75 of the Finance Act,1994;

(iii) Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994, for suppressing the real value of taxable services realized for the service rendered by them and for their failure to declare the same in their ST-3 Returns for the said period;

(iv) Penalty should not be imposed upon them under Section 76 of the Finance Act, 1994, for their failure to make the payment of service tax payable in terms of Section 68 of the Finance Act, 1994;

(v) Penalty should not be imposed upon them under Section 77 of the Finance Act, 1994, for the contravention of Rule 7 of Service Tax Rules 1994 read with Section 70 of the Finance Act, 1994.

62. The assessee vide letter dated 26-06-2006 had requested to provide Xerox copies of the relied upon documents withdrawn vide panchnama dated 30-03-2006. The assessee was informed vide letter dated 22-08-2006 to take out the Xerox copies of the documents on 28-08-2006 during office hours. The representative of the assessee had visited the office on 8-09-06, 12-09-06, 14-09-06, 25-09-06, 16-10-06, 1-11- 06, 14-11-06, 24-11-06, 27-11-06, 29-11-06, 4-01-07 and Xerox copies of documents were provided as desired by them. The assessee vide their letter dated 5-05-2007 informed that still some of the copies of sub-consultancy agreements are pending to be obtained from the department and requested to provide Xerox copies of the same. The assessee was informed vide letter dated 28-06-2007 to take out the Xerox copies of the balance documents latest by 03-07-2007 and to file defense reply immediately and appear for personal hearing on 10-07-2007 at 11.00 hrs. The representative of the assessee visited the office on 03-07-2007 and Xerox copies of the required balance documents was provided to him. Again the assessee vide their latter dated 9-07-2007 had requested to provide photo copies of the balance documents. The assessee was provided photo copies of the balance documents on 17-07-2007. Personal hearing was fixed on 24-07-2007.

(Defence Reply and Personal Hearing at the time of adjudication proceedings held before the then adjudicating authority) :

63. The assessee vide letter dated 24-07-2007 had filed reply to show cause notice, wherein they had inter alia submitted that the definition of consulting engineer has been given under clause (31) of Section 65, which read as:

> "Consulting Engineer means any professionally qualified engineer or engineering firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to a client in one or more disciplines of engineering".

64. They had worked out the reconciliation of income for the period 01.04.2000 to 31.03.2005 as under:

	Particulars	2000-01	2001-02	2002-03	2003-04	2004-05
	Income as per Profit & Loss A/c	31978	57888	90178	109055	110239
Less	Income received in foreign currency				2070	2055
	Gross Billing as per P&L	31978	57888	90178	106985	108184
Add	Opening debtors	6422	13829	13938	19453	22508
Less	Closing debtors	13829	13938	19453	22508	31654
	Gross Receipts	24571	57779	84663	103930	99038
Less	Income as sub-consultancy	16661	19385	18978	18471	18036
	Receipt	7910	38394	65685	85459	81002
Less	Service tax on ST-3 receipt	190	429	740	2184	2066

Less	Receipt as per ST-3 returns	3804	8588	14809	27304	22956
	Difference	3916	29377	50136	55971	55980

A/c Head Group	Reimbursement Expenses	2000-01	2001-02	2002-03	2003-04	2004-05
Professional Exps.	Professional fess	1984	6097	11833	12256	11683
Empl. Exps	Payment to Project Staff	540	1015	1050	3075	9675
Works Charges	Material Purchase	137	192	399	138	982
Works Charges	Survey expenses	466	2218	1137	6096	6362
Works Charges	Testing charges	2094	3390	869	3447	1048
Works Charges	Project works charges	1802	4316	3171	1879	995
Works Charges	Project site expenses	547	128	201	156	429
Works Charges	Laboratory charges	608	269	65	829	333
Off. & Adm Ex.	Site Office & Employee stay	270	417	1801	5108	6530
Off. & Adm Ex.	Travelling expenses	1932	2189	3168	3021	3977
Off. & Adm Ex.	Vehicle & Equipment hire charges	708	2525	5772	6724	5760
Off. & Adm Ex.	Conveyance Expenses	114	360	736	576	785
Off. & Adm Ex.	Profession risk insurance & Project software	133	1286	4945	2377	3421
Off. & Adm Ex.	Site electricity reimbursement	339	377	627	196	963
Off. & Adm Ex.	Site Communication expenses	631	109	3644	393	1075

65. They had raised the points (i) whether sub consultancy income of Rs. 9,15,31,000/- realized from the principal consultant during the period 1-4-2000 to 31-03-2005 were liable to service tax ? (ii) whether the reimbursement of expenses on actual basis amounting to Rs. 17,69,00,000- were liable to tax or includible for calculating gross value under Section 67? (iii) whether extended period of five years can be invoked under Section 73?.

66. They had referred to relevant extracts of C.B.E & C Circular F.No. 43/5/97-TRU, dated 2-07-1997 reproduced as under:

> "3.4 The services should be rendered to a client directly, and not in the capacity of a sub-consultant/associate consultant to another consulting engineer, who is the prime consulting engineer. In case services are rendered to the prime consultant, the levy of Service tax does not fall on the sub-consultant but is on the prime or main consulting engineer who raises a bill on his client (which includes the charge for service rendered by the sub consultant).
>
> 3.5 As in the case of manpower recruitment agencies, service tax on consulting engineers shall be the gross amount charged for the client for services rendered in relation to (the recruitment of manpower) excluding the amount incurred by the (manpower recruitment agency) on behalf of the client towards expenses which are reimbursed on actual basis and in

case the client is billed on a lump sum basis, any deduction from the same on account of reimbursable expenses, for the purposes of determining the value of taxable service shall be permitted on the basis of documentary evidence adduced by the (agency),

3.6. Normally the consulting engineer receives remuneration services from the client for the rendered by him as per the stipulations in the contract/agreement between them. The payment from the client is received at different stages, based on the completion of work at each stage. The consulting engineers shall be required to pay service tax on the payment received at each stage from the client by the 15th of the month succeeding month. Subsequent modifications, if any, in the bills raised to the client at the time of final payment may be allowed after verification.

67. They had stated that from the above, service tax was leviable from the prime consultant/ main consultant and not from the sub-consultant/associate consultant.

68. They had further submitted that in para 2.4 of Trade Notice 7/97 dated 04-07-1997 of Mumbai Commissionerate, it was clarified that *"the services should be rendered to a client direct/ and not in the capacity of a consultant associate consultant to another consulting engineer who is the prime consultant. In case services are rendered to the prime consultant the levy of service tax does not fall on the sub consultant but is on the prime or main consulting engineer who raises a bill on his client (which include the charge for services rendered by the sub-consultant)."*

69. They had further submitted that the intention to exempt sub-contractors from the ambit appeared to be on the ground that the client relationship was missing in such situations. The service provider and client relationship was recently examined by the Hon'ble Tribunal in the case of BBR (India) Ltd Vs. CCE -2006 (4) STR 269 (Tri) wherein it was held that *"In respect of Consulting Engineer, taxable service means any service provided to a client by a consulting engineer. Therefore, there should be a nexus between the client and the service provider. In the present case even if the service provider is taken as the appellant, the client is Southern Railway and there is no direct nexus between the appellant and the client...In these circumstances the liability to pay service tax is on the prime consultant .....and not on the sub-consultant who is the appellant."*

70. They had further submitted that in the following situations it was clarified that the sub-contractors are not liable to pay service tax, provided the main contractors' discharges tax liability including that of the sub-contractor (Para 4.6 - Trade Notice No.7/98¬Service Tax, dated 13-10-98 of Mumbai Commissionerate).

Architect Service : Further, in cases where an architect/ interior decorator sub-contracts part/whole of his work to another architect/interior decorator, it is clarified that no service tax is required to be paid by the sub-contractor provided that the principal architect/interior decorator has paid the service tax on the services rendered by him to the client and provided that sub-contracting is in respect of the same service category. In other words, work is sub-contracted by one architect to another

architect. In such cases, if the principal architect pays the service tax on services rendered by him to his client, the sub-contracting architect is not required to pay the service tax. However, service tax would be required to be paid in a case where sub-contracting is to a different service category.

They had also relied on the following case laws in support of their contents:

(a) Crompton Greaves Ltd Vs. CCE,·Mumbai- III -2006 (2) STR 67 (Tri- Mum.)
(b) Semac Pvt Ltd Vs. Commissioner, Service Tax, Banglore- 2006(4) STR 475

71. They had submitted that the allegation that they had charged and collected service tax to the principal consultant was untenable as due to unawareness and non clarification from principal consultant, their account people had charged the same but at the time of finalizing bill by principal consultant it was disallowed and was not paid to them which is verifiable from payment ledger copy and final bill passed copy of which was attached. They had not charged and collected service tax from principal consultant.

72. They had further submitted that they had claimed reimbursement of expenses for the period 1-4-2000 to 31-03-2005 on actual basis as per agreed terms and collection thereof on documentary basis amounting to Rs. 17,69,00,000/-. They had placed reliance on C.B.E.C Circular No. B.43/5/97-TRU dated 2-07-1997. They had submitted that they had entered into the agreement with the client for consultancy charges and reimbursement of expenses separately, which was verifiable from summaries of all projects break up of contracted/ agreed price pre-decided at the time of finalizing work order. On the basis of the break up of contracted/agreed price each project they had claimed expenses as a reimbursement from the gross value received from the clients/customers. They had placed reliance on the following case laws :

(a) Scott Wilson Kirkpatrick (I) Pvt Ltd vs. CCE — 2007 (7) STR 149 (Tri-Del)
(b) Scott Wilson Kirkpatrick (I) Pvt Ltd Vs. Commissioner, Service Tax, Banglore — 2007(5) STR 118 (Tri-Bang)
(c) Indian Register of Shipping Vs CCE (Appeals), Vadodara — 2007 (5) STR 191 (I1n-Ahmd.)

73. They had further submitted that the extended period of five years under Section 73 has been invoked on the ground that they have suppressed the material facts of realisation of value of service. The Hon'ble Supreme Court in the case of Pushpam Pharmaceuticals Company Vs. CCE, Bombay -1993 (3)SCC 462, while dealing with the meaning of expression "suppression of facts" in proviso to section 11A of the Act, held that the term must be used strictly, it does not mean any omission and the act must be deliberate and wilful to evade payment of duty. The Court further held that:

"In taxation (suppression of facts) can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known both the parties, the omission by one to do

what he might have done and not that he must have done, does not render it suppression".

74. They had submitted that they had not paid service tax as claimed in the SCN due to interpretation of law and general trade practice and there was no deliberate defiance on their part and hence extended period under Section 73(1) of the Finance Act,. 1994 cannot be invoked and consequently provisions of Section 78 of Act for imposing penalty are not applicable.

75 They had further submitted that while deciding the similar type of cases, the Hon'ble CESTAT as well as Commissioner (Appeals) had taken lenient view and had not imposed any penalty under Section 76,77 and 78 of the Finance Act, 1994 and had given relief under Section 80 of the Act. They had relied on the following case laws:

(a) Ashwini Associates Vs. CCE, New Delhi -1999(105) ELT 40(Tri.)
(b) M.P. Ramani Vs. CCE, Mumbai-I-2001 (132)ELT 304 (Tri-Mumbai)
(c) Mukund K Roongta Vs. CCE Jaipur- 1999(10) ELT 38(T)
(d) Rajinder Kumar Somani Vs. CCE, Kanpur- 1999 (113) ELT 111(Tri.)
(e) Ashok Ratogi Vs. CCE, Kanpur-1998(104) ELT 480(T)
(f) Shri Sajjankumar Kariwal Vs. CCE Allahabad-1997 (20) RLT 885
(g) George Thomas Vs. CCE Kanput -2006(1)STR 116(Tri-Bang)
(h) Shree Jayant Maruti Shinde Vs. CCE, Pune-II -2007 8 STJ 468 (CESTAT)
(i) CCE, Riagad Vs. Shield Security Force -2007(5)STR 97 (Tri.-Mum).

76. They had further submitted that the proceeding for imposing penally was a proceedings which was quasi-criminal in nature. The question of imposition of penalty in ordinary course came for scrutiny before the Hon'ble Supreme Court in the case of Hindustan Steel Vs. State of Orissa - AIR 1970 SC 253. The Hon'ble Supreme Court observed that penalty should not be imposed in ordinary course unless the party acted deliberately in defiance of law. Penalty will not also be imposed merely because it is lawful to do so. Applying the ratio of the above decision in the present case, it would be seen that there is no allegation of deliberate defiance on their part as such no penalty can be imposed and the proceedings initiated vide subject notice may be dropped.

77. Personal hearing was held on 24-07-2007 before the then adjudicating authority and which was attended by Shri Vipul Khandhar, Consultant, on behalf of M/s. SAI Consulting Engg. (P) Ltd, who had made the following submissions :

1) The. total service revenue on which service tax is being demanded is Rs.29.92 crore. Out of this, the following service revenue should not be included:

(i) An amount of approximately Rs. 9.15 crores was received by the noticee for rendering services as sub-consultant to the main consultants who were service provider to their clients. The main consultants have paid service tax on the entire amount received by them, including payments made to the noticee as their sub-

consultant. The main consultants are firms like M/s. PELL Frishmann Consultants Ltd, U.K.(Mumbai), M/s Louis Berger Group Inc., USA (Mumbai & Delhi), etc. The noticee has submitted certificate from these main consultants to the effect that they have paid service tax on the full amount received by them including the amount which they paid to M/s SAI Consulting Engg. (P) ltd.

ii) An amount of Rs. 17.60 crores should be excluded being the actual reimbursements of expenses incurred on behalf of their clients and recovered from them. They have submitted the detailed account of such reimbursable expenditure in respect of four sample projects (Total number of projects is 104 and accounts vouchers and other relevant documents are available with them in respect of all the projects).

(2) For the remaining amount of service revenue, the noticee submitted that they would pay the service tax along with interest shortly.

78. The then adjudicating authority vide OIO NO. STC/01/COMMR/AHD/2008 dated 29.02.2008 had decided the SCN No. STC/SCN/Sheladia-163/Div-II/ 2005-06 dated 18.11.2009. The adjudicating authority had ordered as under:

i) Confirmed the demand of Rs.206.70 lacks under section 73 of the Finance Act, 1994;,

ii) Ordered for recovery of interest from M/s. SAI Consulting Engineers Pvt., at appropriate rate under section 75 of the Finance Act, 1994;

iii) Imposed penalty of Rs.413.40 lacks under section 78 of the Finance Act, 1994;

iv) Imposed penalty of Rs.200/- per day from the date when the service tax was due until the date of payment of the same or 2% of such tax per month, whichever was higher, uptil the date of payment of the demanded amount by M/s. SAI Consulting Engineers Pvt ltd., subject to a ceiling of Rs.206.70 lacks, under section 76 of the Finance Act, 1994. Since M/s. SAL Consulting Engineers Pvt. Ltd. had paid the differential amount, the actual amount of penalty was to be computed only on the date of payment.

v) Imposed penalty of Rs.1,29,236- (Rupees one lac twenty nine thousand two hundred thirty six only) under section 76 of the Finance Act, 1994, with respect to the service tax paid by M/s. SAI Consulting Engineers Pvt. Ltd. but not within the due date.

vi) Ordered for recovery of Interest thereon amounting to Rs.13,062/. (Rupees Thirteen thousand sixty two only) from M/s. SAI Consulting Engineers Pvt Ltd under section 75 of the Finance Act, 1994.

vii) Imposed penalty of Rs.12,000/- (Rupees Twelve thousand only) on M/s. SAI Consulting Engineers Pvt Ltd. under Section 77 of the Finance Act, 1994 as it existed during relevant period.

79. The assessee being aggrieved with the above OIO, had filed an appeal before Tribunal and Tribunal vide its Final Order No. A/875/WZB/AHD/2011 dated 12.05.2011 has remanded back the matter to the adjudicating authority for reconsidering the matter as regard to the actual date of service provided by the assessee. Primarily, the grounds on which the matter has been remanded back is that the assessee had tendered the arguments before the Tribunal that they have now a detailed certificate issued by main contractor, which would satisfy the objection raised by the Commissioner. In respect of deduction of reimbursable expenses, they had stated that the department it self had allowed the same for subsequent periods. Considering these arguments, the Tribunal remanded the matter for fresh decision in light of the evidences available with them and by giving an opportunity to contest their case.

79.1 The assessee had also filed ROM before the Tribunal and Tribunal vide its order No. M/123/WZB/AHD2012 dated 09.01.2012 ordered to examine aspect of time-bar also.

Defence Reply :

80. The assessee vide their letter dated 06.03.2023 have forwarded their written submission, wherein they have interalia stated that:

- The subject has been remanded for denovo adjudication by order of the Hon'ble Tribunal being order No. A/875/WZB/AHD/2011 dated 12.05.2011.

- The Hon'ble Tribunal remanded the matter for the purpose of considering certificates issued by the main consultants that service tax had been discharged by the main consultant on the overall value of the contract.

- After the Tribunal passed the order on 12.05.2011, the adjudication was not conducted and they have received the personal hearing notice only in the year 2022 in November. They have not been given any reasons for deferring the matter from 2011 to 2022.

- They had sent letter on 12.10.2012 in connection with denovo adjudication and had requested to withdraw the SCN. They had again written a letter dated 14.08.2018 with request to drop the proceedings in view of the decision of the Hon'ble Apex Court in the case of M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. [2018(10)GSTL 401]. However, the matter was not taken up for adjudication even after two letters over a span of 5 years.

- Meanwhile, their company was taken over by M/s. Systra, which is a French company and the entire management and personnel underwent restructuring. Furthermore, the promotors of the company who were aware of the proceedings of the SCN were no longer with the company. The delayed adjudication of the SCN has caused gross prejudice to the noticee, when they had addressed a letter to the department in 2012 and also in 2018, they had not received any response from the department. They were under an impression that the proceedings of the show cause notice have been closed in view of the decision of the Hon'ble Apex Court in the case of M/s. Intercontinental Consultant and Technocrats P ltd. and in view of the decision of the CESTAT Ahmedabad in their own case (order No. A/12878/2017 dated 06.10.2017).

- When the notice for PH was received by them, they were having no papers viz. SCN,OIO, and other relevant documents with them. They had to approach the registry of the Tribunal for obtaining the papers. They had obtained such papers but other paper are not available with them.

- The Hon'ble Gujarat High Court has in the case of M/s. Siddhi Vinayak Syntex Pvt. Ltd. categorically held that delayed adjudication vitiates the entire proceedings in as much as after a long lapse of time, a lot of changes may have happened and many of the persons and papers pertaining to the case may not be available. The Hon'ble High Court while making such observations in paragraph 26 had quashed and set aside the Order-In-Original as well as the show cause notice on the ground that delayed adjudication causes immense prejudice to the assessee and is in violation of the principles of natural justice. Vide the said order of the Hon'ble Gujarat High Court has also held that the Department has no power to keep the cases in abeyance for awaiting the outcome of some other case of some another party which may be having similar facts. It is further held that when the department keeps such proceedings in abeyance for such a long time, the entire proceedings become vitiated in the eyes of law and such proceedings are required to be dropped in the interest of justice and that when the department does not inform the assessee about putting the case in call book , then the assessee gets a bonafide impression that such proceedings are dropped.

- This judgment of the Hon'ble High Court has been followed in several subsequent cases before the Gujarat High Court as under :
    - Aalidhara Textiles Engineers- 2018 (360) ELT 493,
    - Parimal Textiles-2018(8) GSTL 361.
    - Adani Wilmar- SCA No. 9573/2018,
    - M/s. Apollo Tyres Ltd- SCA No. 16157/2018.

- They have stated that in the case of M/s. Suraj Karan Baradia, the Gujarat High Court has quashed the order in original for not following the ratio of decision of the High Court.

- Hon'ble Gujarat High court in the case of Adani Ports and SEZ in SPECIAL CIVIL APPLICATION NO. 9671 of 2019, has quashed a SCN taken up for adjudication after 11 years.

- The appeal filed by the department against the said judgment stands dismissed by the Hon'ble Supreme Court vide its decision reported at 2022 (379) ELT 553. Therefore the show cause notice is liable to be withdrawn in the interest of justice.

- the de-nova adjudication for the show cause notice covering a period from 2000 to 2005 is being undertaken in the year 2023, gross prejudice is caused to the noticee in as much as due to the change of management and various persons, limited information is available with regards to the issue covered in the show cause notice. Further more no papers other than the ones submitted to the Hon'ble Tribunal are available with the noticee. The noticee is hence not in a position to give a proper defense in the present case and is constrained to rely upon the papers available from the CESTAT registry. Therefore, on this ground alone the proceedings of the show cause notice are liable to be dropped in the interest of justice.

- The main consultants have provided certificates stating that they have discharged service tax liability on the entire contract value including the value sub-contracted to the noticee. A copy of these certificates is available at Page No.472 to 475 of the paper book. Furthermore in view of such certificates the Hon'ble Tribunal vide its Order No. A/12878/2017 dated 06.10.2017 decided the issue in favor of the Noticee for the subsequent period of November 2005 to August 2007. Therefore, it is a settled legal position by virtue of the decision in the Noticee own case that when the main consultant/contractor has discharged the service tax liability on the entire value, again charging Service Tax on the sub-contracted value is not permissible in as much as it amounts to double taxation and hence not sustainable. The Hon'ble Tribunal vide its order dated 12.05.2011 hence had remanded the matter only to examine this point and the certificates issued by the main consultants.

- The second point of remand was deduction of reimbursable expenses which the noticee incurred while rendering the service. The reply dated 24.07.2007 on Page No.432 to 434 of the paper book in detail explains the correlation in between the amount received for the service and towards reimbursable expenditure.

- The Hon'ble Apex Court, in the case of M/s. Intercontinental Consultants and Technocrats Pvt. Ltd reported at 2018 (10) GSTL 401, has struck down Rule 5 of the Service Tax Rules, 2006 and while interpreting Section 6, has held that the High Court was right in interpreting Sections 66 and 67 to say that the value of the taxable service cannot be anything more than the consideration paid for rendering such service and hence cannot include the essential expenses which the service provider incurs on behalf of the service recipient and receives reimbursement at a subsequent stage. Furthermore, the Hon'ble Supreme Court also noted that w.e.f. May 14, 2015 Section 67 was amended to include reimbursable expenditure or costs as a part and parcel of the valuation of taxable service and hence prior to 14.05.2015 reimbursable expenditure or costs for providing the services would not form the part of the taxable value of the service..

- They have further contested that since the Hon'ble Apex Court has held that Section 67 as it stood prior to amendment in 2015, cannot include the value of reimbursable expenses and costs as a part of the value of service, the demand is liable to be dropped in the interest of justice.

- They were of firm belief that the sub-contractors is not liable to pay service tax when main contractor has discharged the service tax liability and reimbursable expenses do not form part of gross value of service. This views has been confirmed by various decisions delivered by the Tribunal and Courts. Hence, there is no suppression with an intention to evade the payment of tax, nor has there been any mala-fide intention not to pay tax and hence the demand under the extended period of limitation is not sustainable.

They have submitted the following documents alongwith their written submission :

1. Paper Book containing relevant documents
2. Compilation of Case Law
3. Reply letter dated 12.10.2012
4. Letter dated 14.08.2018

The assessee vide letter dated 12.10.2012 had submitted the written submission to the then adjudicating authority. The submission made therein was similar to the submission dated 06.03.2023. The assessee vide letter dated 14.08.2018 had requested to take up the matter in light of the Hon'ble Supreme Court Decision in the case of M/s. Intercontinental Consultants and Technocrats Pvt Ltd. [2018 (10)GSTL 401 SC].

PERSONAL HEARING:

81. The assessee were granted personal hearings on 28.11.2022 11.01.2023, 03.02.2023, 20.02.2023 and 06.03.2023. The assessee vide their letters 09.01.2023 and 18.02.2013, had responded to the communication sent with reference to the PH granted on 11.01.2023 and 20.02.2023. They vide their letter dated 09.01.2023 had sought extension of time of eight weeks and vide their letter dated 20.02.2023 had requested to give another date of hearing. Therefore, they were granted another dates of hearing on 03.02.2023 and 06.03.2023. The hearing granted on 06.03.2023 was attended by Shri Amal Dave Advocate, as authorised by the assessee. During the personal hearing, he stated that unduly long delay in proceedings has vitiated the entire proceedings. He has further stated that the assessee was not liable to pay service tax as the main contractor had paid the service tax . Lasty, as regard tax on reimbursable expenses, he had stated that the Hon'ble Supreme Court has settled the matter

in the case of M/s. Intracontinental Consultant & Tech P Ltd. He has requested to drop the proceedings in light of various submissions provided by them.

DISCUSSION AND FINDINGS:

82. I have carefully gone through the facts of the case, material on record and the submissions made by the assessee. I have also gone through CESTAT's Order No. A/875/WZB/AHD/2011 dated 12.05.2011, and the Order In Original No. STC/01/COMMR/AHD/2008 dated 29.02.2008, which has been remanded back to the adjudicating authority vide above referred CESTAT's Order.

83. I find that the then adjudicating authority had vide Order in Original No. STC/01/COMMR/AHD/2008 dated 29.02.2008, had confirmed the demand of service tax amounting to Rs. 206.70 lacks by denying the deductions claimed by the assessee on account of services provided as subconsultant/associate consultant. The adjudicating authority had observed with respect to claim of the assessee for having provided service as subconsultant, that the documents produced by the assessee were not convincing to hold them to be subconsultant and as regards claim of deduction of reimbursable expenses by the assessee, the adjudicating authority had observed that the assessee had not maintained any separate account for such reimbursable expenses. The assessee had filed an appeal before the Hon'ble Tribunal against the impugned OIO. The Hon'ble Tribunal vide its Order No. A/875/WZB/AHD/2011 dated 12.05.2011 had remanded the matter for passing a fresh order in light of the evidences available with the assessee by giving an opportunity to the assessee to contest their case.

84. To proceed further in the matter it is absolutely essential to comprehend the rationale behind CESTAT's decision to remand the impugned OIO to the adjudicating authority. On going through the Tribunal's order, it can be seen from para 3, 4 and 5 of the Tribunal's order that the arguments tendered by the representative of the assessee and subsequent production of records before the Tribunal, are the main grounds/ reasons for CESTAT remanding back the matter to the original adjudicating authority for re-consideration of the matter. The said para 3, 4 and 5 are also reproduced hereinunder for ready reference.

> *"3. The appellants are engaged in the rendering taxable services as an independent Consulting Engineers and are liable to service tax. They are registered with the service tax department. The said tax stand confirmed against the appellants on the ground that they have under valued the said services by claiming deductions on account of various reimbursable expenses in respect of remuneration for local staff, transportation, office rent, office furniture and equipments, miscellaneous cost, accommodation cost for consultant, communication and various other factors. The adjudicating authority has also not accepted the*

*appellant's stand that in respect of part services which are being granted by them as sub consultant, the main consultant has already discharged their service tax liability in respect of that part of the contract. It is seen that, though the appellants have placed on record the certificates by the main consultant, the adjudicating authority has not accepted the same on the ground of the same being fake and cryptic. It is seen that the learned advocate appearing for the appellants during the stay hearings and subsequently at the time of modification application, **had submitted that they have now a detailed certificate issued by the main consultant**, which would satisfy the objections raised: by the Commissioner. If the same are taken into consideration, their duty liability would get wiped out to the extent of around Rs. 33 Lakhs.*

4. Similarly, during the course of hearing of the modification application, learned advocate had submitted that duty was confirmed against the appellants in respect of 9 (nine) various reimbursable claims, and by denying the deduction of the same. He submits that out of the total 18 (eighteen) deductions so claimed by the appellants, the department has subsequently themselves allowed 7 (seven) deductions at the time of quantifying their duty liabilities for the subsequent periods. He has submitted that the demand on the above count would come down to around Rs. 45 Lakhs.

*5. As the above fact, i.e. **production of subsequent detailed certificates by the main consultant as also the fact of allowing the deductions on account of various reimbursable expenses is relatable to the facts and is required to be verified at the original level**, we are of the view that the appeal be remanded to the original adjudicating authority for examining the above aspect and fixing the appellant's duty liability. We accordingly set aside the impugned order and remand the matter to Commissioner **for fresh decision in the light of above evidences, which the appellants producing before him. Needless to say that appellants would be given an opportunity contest their case**. Appeal is thus allowed by way of remand."*

Thus, I find that as per the direction of the Tribunal, the matter has to be decided afresh in light of the subsequent evidences which the assessee claims to be having as affirmed by them before the Hon'ble Tribunal and by giving a fair opportunity to the assessee, to enable them to lay down the evidence which they have claimed to possess, before the adjudicating authority.

85. Before moving ahead to decide the matter, it is also imperative to understand the basic issue involved in the matter. On going through the impugned SCN and the Order in Original issued dated 29.02.2008, I find that the departmental officers had carried out the reconciliation and comparison of professional income of the assessee, appearing in the their audited P&L accounts for FY 2000-01 to 2004-05, with the taxable value of services as declared in ST-3 Returns filed by them. The reconciliation/comparison had led to the discovery of there being a huge difference/anomaly in the figures. The difference noticed was of Rs. 29.92 crores for FY 2000-01 to 2004-05. The assessee was accordingly directed to explain as to how such huge difference had arisen. The assessee while answering the query raised by the department, had clarified that the difference existing in value was on account of (i) certain part of the income

being earned by them as sub-consultant of the main consultant which they were not liable to pay service tax and (ii) they reimbursing some of expenses incurred on behalf of their main consultants/clients, to them and accordingly the same were not includible in the value of taxable service. Not satisfied by the explanation offered by the assessee, necessary investigation was conducted against the assessee and service tax of Rs. 206.70 lacks appeared liable to be paid by the assessee. Therefore, the Show Cause Notice No. STC/SCN/Sheldia-163/2005-06 dated 05.06.2006 demanding the service tax of Rs. 206.70 lacks, was issued to the assessee. As mentioned hereinabove, the said SCN was adjudicated by the adjudicated authority vide Order in Original NO. STC/01/COMMR/AHD/2008 dated 29.02.2008 vide F.No. STC/SCN/Sheldia-163/Div-II/2005-06, wherein the adjudicating authority had confirmed the demand of service tax of Rs.206.70 Lakhs. As already discussed, the OIO dated 29.02.2008 issued by the adjudicating authority, Commissioner of Service Tax Ahmedabad has been remanded back for denovo adjudication by the Hon'ble CESTAT vide Order No. A/875/WZB/AHD/2011 dated 12.05.2011.

(Amt in '000')

Recovery of short payment of Service Tax on the differential value of the taxable services received not taken into consideration for determination of value of taxable services for the purpose of charging the service tax during the period 01.04.2000 to 31.03.2005.

Year	2000-01	2001-02	2002-03	2003-04	2004-05	Total
Professional Income shown in P&L A/c	31978	59513	91122	109055	110244	401912
Add: Op. Debtors	6422	13829	13938	19453	22508	76150
Less: Cl. Debtors	13829	13938	19453	22508	31654	101382
Total Income realised	24571	59404	85607	106000	101094	376680
Less:						
ST-3 Value	3804	8588	14809	27304	22956	77461
Total difference of value of taxable services received on which service tax is payable	20767	50816	70798	78696	78142	299219
Short Payment of Service Tax required to be recovered	1038	2541	3540	6296	7255	20670

86. As per the direction of the Tribunal, the matter has to be decided on the basis of evidences i.e. detailed certificates issued by the main consultant and the fact of allowing the deductions of reimbursable expenses by the department for subsequent period. In support of their defence, the assessee vide their defence reply dated 06.03.2023, has submitted the copy of paper book, which they had submitted before the Tribunal. The assessee has contested that the main consultants have provided certificates stating that they have discharged service tax liability on the entire contract value including the value sub-contracted to the noticee. They have further stated that a copy of these certificates is available at Page No.472 to 475 of the paper book.

86.1 On going through the said certificates, it is discerned that that the amount shown to have paid to the sub-consultant as per the certificate dated 10.04.2006 issued by M/s. Louis Berger International Inc., Hyderabad (for Rs. 20 Lakh only) and certificate dated Nil issued by M/s. SNC Lavlin International (for Rs. 7.01 Lakh only), is almost negligible/miniscule as compared to the quantum of payment received by the assessee. Further, it is also discerned from the certificate dated 07.04.2006 issued by M/s. Frishchman Prabhu (India) Pvt Ltd. and certificate dated 30.03.2006 issued by M/s. Louis Berger Group, Gurgaon, wherein it has been mentioned that the service tax has been paid by them including the service tax of sub-consultant M/s. Sheldia Associates Consultants Pvt Ltd, but no details of payments made to the sub-consultants (assessee) against the services received from them and service tax paid by them are available in the certificates. I also find that there are two more documents available in the paper book viz. a copy of fax dated 06.04.2006 of letter issued by The Louis Berger Group Inc. to M/s. Sai Consultant with regard to payment of service tax and Certificate dated 06.04.2006 issued by the Dorsch Consult (India) Pvt Ltd., which the assessee has not mentioned in their reply. However, on going through the same, it is apparent that no details of payment made to the sub consultant are available in the said letter/certificate.

86.2 I also find the assessee vide their letter No. SAI/2906/07 dated 26.12.07 had submitted these certificates/letter alongwith year wise consultancy receipt. Accordingly they had received the payments as under:

Amount in Lakh

Lead contractor	2000-01	2001-02	2002-03	2003-04	2004-05	Total
Louis Berger Intl. Inc.-TUMKUR HAVERI	0	0	70.88	95.12	82.94	248.94
PELL Frischmann Consultant Ltd, UK	5.13	9.33	10.49	2.92	4.25	32.12
SNC Lavlin International	1.0	18.89	11.03	0	0	30.92
Louis Berger Intl. Inc-APRED	28.2	80.88	55.58	74.07	38.09	276.82
DORSCH	0	3.5	11.4	5.84	10.77	31.51
Louis Berger Intl. Inc.-SCLR	0	0	0	0	50.1	50.1
DHV Bhubneshwar	4.59	1.71	1.41	0	0	7.71
DHV-JN Port	63.38	37.79	13.34	0	0	114.51
Louis Berger Intl. Inc.-Bridge	59.31	41.29	2.18	4.99	0	107.77
	161.61	193.39	176.31	182.94	186.15	900.4

86.3 However, regrettably, theses certificates do not give complete details of payment received by the main consultants and part /portion of the same further given to the subconsultant and payment of service tax made on behalf of the sub consultant. The said certificates/letters do not corelate the payment

received by the subconsultant as above and payment of service tax made by the main consultant. I also find that the claim of the assessee, having detailed certificates made before the Hon'ble Tribunal by the assessee, is evidently not correct. It is quite evident that the assessee has failed to prove with certainty /surety that the main consultants have discharged their service tax liability. To enable better appreciation of the facts of the case and the obvious shortcomings/lacunas of the assertion of the assessee, the scanned images of the certificates as given by the assessee are reproduced below.

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FAX NO.

DORSCH CONSULT (INDIA) PRIVATE LIMITED
Off New Link Road, Goregaon (West),
Mumbai – 400 104

DORSCH CONSULT
(India) Private Limited

Tel: +91 22 677 9012 / 676 2138
Fax: +91 22 677 6548
E-mail: dcindia@vsnl.com
Date: 6th April 2005

TO WHOMSOEVER IT MAY CONCERN

This is to certify that, we Dorsch Consult, Germany (DCG) in association with Dorsch Consult (India) Private Limited (DCI), have been awarded the consultancy services for Technical Audit and Quality Assurance for State Buildings for Roads and Building Department

DCI have appointed Sai Consulting Engineers Pvt. Ltd. 4, Kuldip Society, Near Ishwar Bhuvan, Navrangpura, Ahmedabad – 380 009 as Sub Consultant for the said project.

As per the Agreement, all bills being raised by us for the services rendered including the services of sub Consultant & the service tax on the combined bill amount is being collected from our client & deposited with the Central Excise, Service Tax cell at Mumbai. Our Service Tax Registration Number is AAAAD2918DST001

Yours faithfully,
For Dorsch Consult (India) Private Limited

Nirmal G. Humbad
Managing Director

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Home Office
400, Halsted Street,
East Orange, New Jersey 07019
USA
Tel (973) 678-1960
Fax (973) 678-5905

LOUIS BERGER INTERNATIONAL, INC.

Country Office
8-2-684/3/30, Banjara Green,
Road # 12, Banjara Hills,
Mega City # 1443
Hyderabad - 34.
Telefax : + 91-40-23313559

10th April 2006
Ref : Subs / 046

To
Sai Consulting Engineers Pvt. Ltd.
4, Kuldip Society, Near Idhwir banner
Navrangpura,
Ahmedabad - 380 009.

Attn : Sanat V Desai (DGM – Commercial)

Sub: Certification for Service Tax Payment for F.Y. 2000 – 01 & 2002 – 03 .
Ref: Your Letter No. SAI/KG6/2006 Dated 03.04.06

Dear Sir,

With reference to your above letter, we wish to inform you that our Client paid consolidated Cheque for Service Tax for entire Invoice Amount, which includes your Invoice amount also. We have paid Service Tax on full Invoice amount which includes your share. Details of your payments are given below :

Date of Payment	Date of Payment Received from Client	Chq No	Gross Amount	Service Tax	ST Paid Date
09.11.01 (Advance)	15.02.02	728628	117,044	5,852	05.03.02
15.12.01 (Advance)	15.02.02	728637	94,900	4,745	05.03.02
07.01.02 (Advance)	15.02.02	728642	72,757	3,638	05.03.02
19.04.02 (Advance)	31.05.02	728650	278,373	13,919	18.06.02
12.07.02 (Advance)	07.08.02	728654	154,758	7,738	07.09.02
22.10.02	05.10.02	99403	276,386	13,819	08.10.02
20.12.02	05.12.02	99411	183,180	9,159	12.12.02
07.02.03	01.02.03	99432	191,700	9,585	24.02.03
02.04.03	25.03.03	91579	202,350	10,118	27.03.03
20.06.03	25.05.03	91600	181,050	14,481	07.06.03
03.09.03	25.08.03	579988	255,600	20,448	03.09.03

for Louis Berger International, Inc.

[signature]
Venkat S. Hari
Country Accountant

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SNC-LAVALIN International

SNC-LAVALIN
INTERNATIONAL Inc.
2200 Lake Shore Blvd West
Toronto Ontario
Canada M8V 1A4

Telephone: (416) 252-4255
Fax: (416) 201-5923

CERTIFICATE

This is to certify that SNC-Lavalin International Inc. was awarded a contract by National Highways Authority of India for Consultancy Package – IIIB for Rehabilitation and Upgrading of 2-Lane Road to 4-/6- Lane divided Carriageway Configuration from Gondugulu near Eluru (Km 80) to Rajahmundry (km 200) in Vijayawada – Vishakapatnam Section of NH-5 in Andhra Pradesh. For the purpose of execution of our contract we had hired a sub-contractor M/s. Sheladia Associates & Consultants (I) Pvt. Ltd

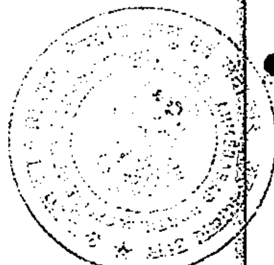
The following contractual payments were released to them against their invoices –

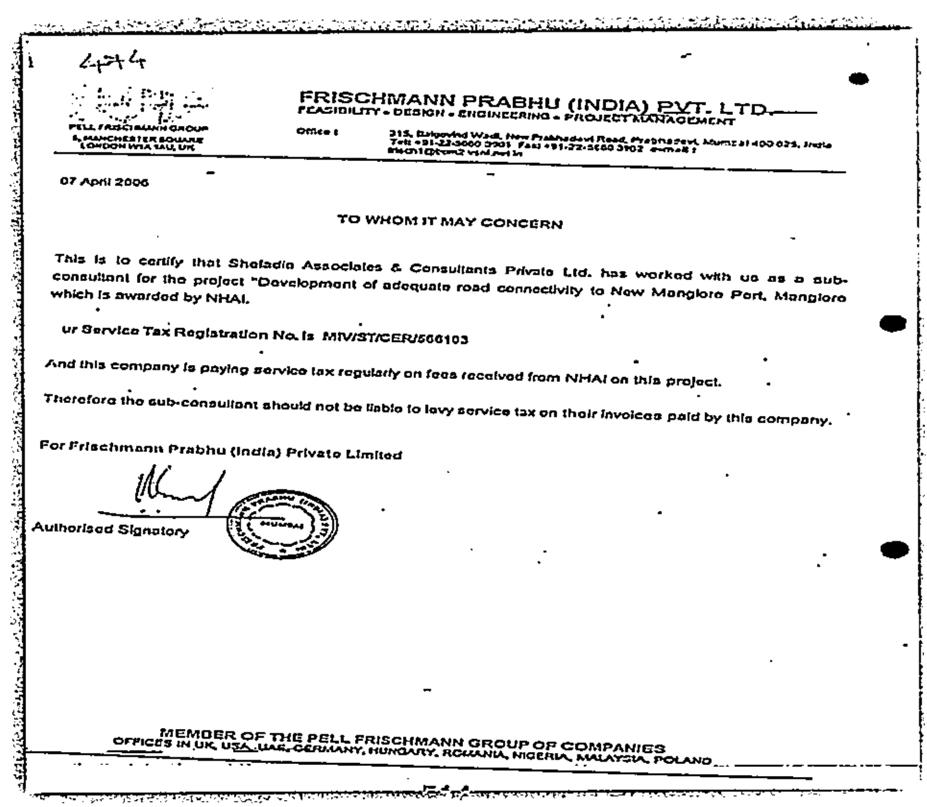
Invoice No:	Gross Invoice Amount	Date of Payment
1/061	Rs. 58,500	2001 02 03
1/072	Rs 54,825	2001 02 03
3/054	Rs 58,500	2001 05 02
4/094	Rs 58,500	2001 10 01
5/108	Rs 117,009	2001 10 01
Jan 2001	Rs 58,500	2003 12 09
Feb 2001	Rs 58,500	2003 12 09
Dec 00-Mar 01	Rs 105,153	2003 12 09
Apr-June, 2001	Rs 102,140	2003 12 09
Sub-Total	Rs. 701,618	

We further certify that as a main consultant we had discharged our liability of payment of service tax for invoices raised and received from NHAI for which the services of our afore-stated sub-consultant were obtained and paid for.

for SNC Lavalin International Inc.

[signature]
Inder Dev Bhasin, P Eng.
Senior Director
SNC-LAVALIN International, Inc





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FRISCHMANN PRABHU (INDIA) PVT. LTD.
FEASIBILITY • DESIGN • ENGINEERING • PROJECT MANAGEMENT

07 April 2006

TO WHOM IT MAY CONCERN

This is to certify that Sheladia Associates & Consultants Private Ltd. has worked with us as a sub-consultant for the project "Development of adequate road connectivity to New Manglore Port, Manglore which is awarded by NHAI.

ur Service Tax Registration No. is MIV/ST/CER/566103

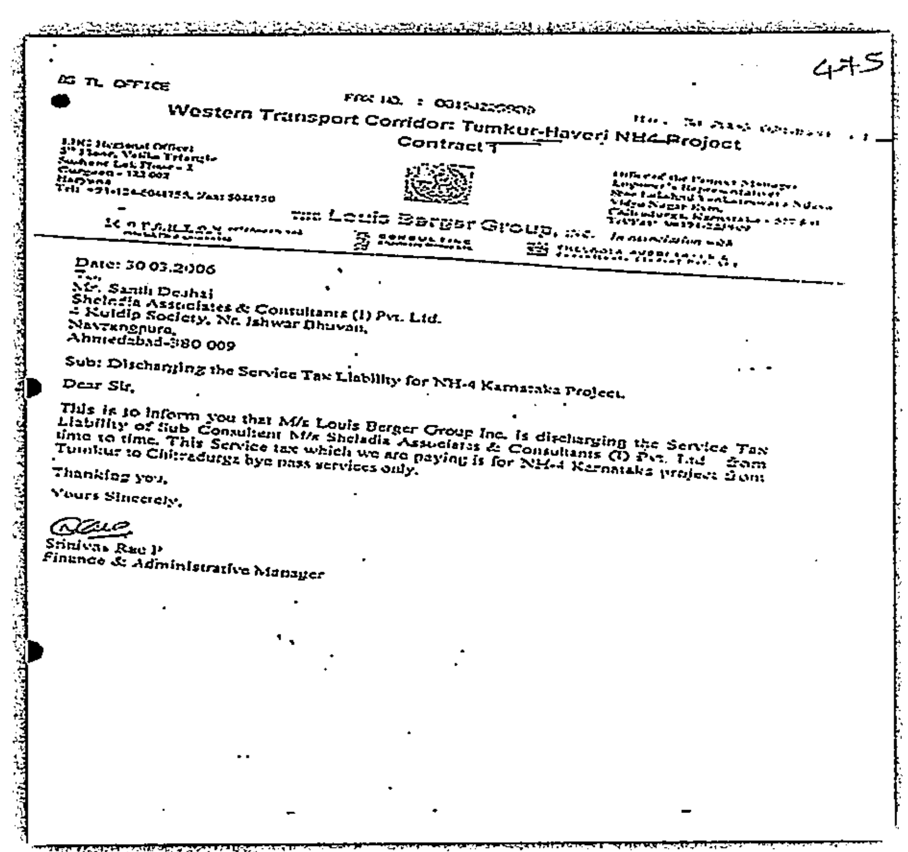
And this company is paying service tax regularly on fees received from NHAI on this project.

Therefore the sub-consultant should not be liable to levy service tax on their invoices paid by this company.

For Frischmann Prabhu (India) Private Limited

Authorised Signatory

MEMBER OF THE PELL FRISCHMANN GROUP OF COMPANIES



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Western Transport Corridor: Tumkur-Haveri NH4 Project
Contract 1

The Louis Berger Group, Inc.

Date: 30.03.2006

To,
Mr. Santh Desai
Sheladia Associates & Consultants (I) Pvt. Ltd.
4 Kuldip Society, Nr. Ishwar Bhuvan,
Navrangpura,
Ahmedabad-380 009

Sub: Discharging the Service Tax Liability for NH-4 Karnataka Project.

Dear Sir,

This is to inform you that M/s Louis Berger Group Inc. is discharging the Service Tax Liability of Sub Consultant M/s Sheladia Associates & Consultants (I) Pvt. Ltd from time to time. This Service tax which we are paying is for NH-4 Karnataka project from Tumkur to Chitradurga bye pass services only.

Thanking you,

Yours Sincerely,

Srinivas Rao P
Finance & Administrative Manager

86.4 The assessee has also contested that the Hon'ble Tribunal vide its Order No. A/12878/2017 dated 06.10.2017 has decided the issue in their favour for the subsequent period of November 2005 to August 2007. They have further pleaded that it is a settled legal position by virtue of these decision in their own case that when the main consultant/contractor has discharged the service tax

liability on the entire value, again charging Service Tax on the sub-contracted value is not permissible in as much as it amounts to double taxation and hence the same is not sustainable.

86.5 On perusing the decision of the Hon'ble Tribunal, it can be discerned that it was established before the Hon'ble Tribunal that the payment of service tax liability of the assessee was discharged by the main consultant for the subsequent period. Here, as discussed hereinabove, the discharging of the service tax liability of the assessee by the main consultants, is not established from the documentary evidences produced by the assessee. Accordingly, the decision of the Tribunal will not come to help of the assessee in the instant case, as they have failed to establish the discharging of their service tax liability by the main consultants. Thus, I hold that the assessee is liable to pay service tax on the payment received by them, which they had claimed to be sub consultancy income.

87. As regard the claim of deduction of reimbursable expenses, I find that the assessee have claimed certain part of their income as reimbursement of expenses and have not paid service tax on it. In this regard, the assessee in their defence reply dated 06.03.2023, has referred to their earlier letter dated 24.07.2007 and has stated that the said letter explains the correlation between the amount received for the service and towards reimbursable expenditure. They have also relied on the decision of the Hon'ble Supreme Court in the case of M/s. Intercontinental Consultants and Technocrats Pvt. Ltd reported at [2018 (10) GSTL 401], where in the Supreme Court has held that *"the value of the taxable service cannot be anything more than the consideration paid for rendering such service and hence cannot include the essential expenses which the service provider incurs on behalf of the service recipient and receives reimbursement at a subsequent stage."*

87.1 I find that the assessee has not submitted any further documentary evidences in support of their claim for deduction of reimbursable expenses. I find that the assessee in their letter dated 24.07.2007, had provided the reconciliation income for the period 01.04.2000 to 31.03.2005 as under:

Rs. In "000"

	Particulars	2000-01	2001-02	2002-03	2003-04	2004-05	Total
	Income as per Profit & Loss A/c	31978	57888	90178	109055	110239	
Less	Income received in foreign currency				2070	2055	
	Gross Billing as per P&L	31978	57888	90178	106985	108184	
Add	Opening debtors	6422	13829	13938	19453	22508	
Less	Closing debtors	13829	13938	19453	22508	31654	
	Gross Receipts	24571	57779	84663	103930	99038	369981
Less	Income as sub-consultancy	16661	19385	18978	18471	18036	91531

	Receipt	7910	38394	65685	85459	81002	278450
Less	Service tax on ST-3 receipt	190	429	740	2184	2066	5609
Less	Receipt as per ST-3 returns	3804	8588	14809	27304	22956	77461
	Difference	3916	29377	50136	55971	55980	195380

A/c Head Group	Reimbursement Expenses	2000-01	2001-02	2002-03	2003-04	2004-05	Total
Professional Exps.	Professional fess	1984	6097	11833	12256	11683	
Empl. Exps	Payment to Project Staff	540	1015	1050	3075	9675	
Works Charges	Material Purchase	137	192	399	138	982	
Works Charges	Survey expenses	466	2218	1137	6096	6362	
Works Charges	Testing charges	2094	3390	869	3447	1048	
Works Charges	Project works charges	1802	4316	3171	1879	995	
Works Charges	Project site expenses	547	128	201	156	429	
Works Charges	Laboratory charges	608	269	65	829	333	
Off. & Adm Ex.	Site Office & Employee stay (GH)	270	417	1801	5108	6530	
Off. & Adm Ex.	Travelling expenses	1932	2189	3168	3021	3977	
Off. & Adm Ex.	Vehicle & Equipment hire charges	708	2525	5772	6724	5760	
Off. & Adm Ex.	Conveyance Expenses	114	360	736	576	785	
Off. & Adm Ex.	Profession risk insurance & Project software	133	1286	4945	2377	3421	
Off. & Adm Ex.	Site electricity reimbursement	339	377	627	196	963	
Off. & Adm Ex.	Site Communication expenses	631	109	3644	393	1075	
		12305	24888	39418	46271	54018	176900
		-8389	4489	10718	9700	1962	18480

87.3 On going through the OIO and SCN, I find that they have never come up with documentary evidences to show that the consideration received was not for the provision of the services. From the above tabular information, it is seen that they had simply deducted some part of the expenses from the income, but they had not explained as to how they had arrived/quantified at the figures with supporting documents. It was also observed & alleged that the assessee had made the payment of service tax randomly on 19% - 22% of the total amount realised by them while filing the ST-3 Returns. It was also alleged that they have not kept separate accounts for reimbursable expenses. Since the assessee has failed to prove the exact quantification of reimbursable expenses with supporting documents, these allegations appear to be prima facie correct and justifiable. These allegation are strengthened by the fact that they have not provided documentary/evidences like invoices /vouchers raised to the clients/ consultants for reimbursement of expenses incurred by them or any agreement entered with clients to incur reimbursable expenses on their behalf, to establish that the certain part of income was reimbursed by the clients/consultants. Therefore, in absence of the documentary/tangible evidences, I am unable to examine the applicability of the decision of the Supreme Court in the case of M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. in the present case. Thus, I am constrained to hold that the deduction of expenses is not available to the assessee as they have failed to establish that the same was reimbursable expenses, accordingly, they are liable to pay service tax as sought in the subject SCN.

88. As regard the penalty under section 77 of the Finance Act, 1994 for late filing of Returns and penalty under section 76 of the Finance Act, 1994for

not paying service tax within time prescribed, they have not stated anything. Accordingly, I refrain from discussing the same and hold that they are liable to penalty of Rs. 12,000/- under section 77 of the Finance Act, 1994 and they are also liable to Penalty of Rs. 1,29,236/- under Section 76 of the Finance Act, 1994.

Penalty under Section 77 for late filing of Return:

Sr. No.	ST-3 Returns for Half year Ending	Due date for filing return	Date of filing Return	No. of days delay in filing return	Penalty imposable under Section 77
1	30-09-2000	25-10-2000	11-06-2001	229	2000
2	31-03-2001	25-04-2001	11-06-2001	47	2000
3	30-09-2001	25-10-2001	29-07-2002	277	1000
4	31-03-2002	25-04-2002	29-07-2002	95	1000
5	30-09-2002	25-10-2002	24-07-2003	272	1000
6	31-03-2003	25-04-2003	24-07-2003	90	1000
7	30-09-2003	25-10-2003	20-07-2004	269	1000
8	31-03-2004	25-04-2004	20-07-2004	86	1000
9	30-09-2004	25-10-2004	16-05-2005	203	1000
10	31-03-2005	25-04-2005	16-05-2005	21	1000
				Total	12000

Penalty imposable under section 76 for not paying service tax within time prescribed

Sr. No	Month	Service Tax Payable	Due Date of payment	Date of payment	Delayed days	Penalty imposable @ of Rs. 200 -per day	Maximum penalty imposable not exceeding service tax payable
1	Apr-00	3359	25/05/00	24/06/00	30	6000	3359
2	May-00	10652	25/06/00	31/05/01	340	68000	10652
3	Jul-00	12666	25/08/00	31/05/01	279	55800	12666
4	Aug-00	22021	25/09/00	31/05/01	248	49600	22021
5	Sep-00	12575	25/10/00	31/05/01	218	43600	12575
6	Oct-00	9425	25/11/00	31/05/01	187	37400	9425
7	Nov-00	2175	25/12/00	31/05/01	157	31400	2175
8	Dec-00	31166	25/01/01	31/05/01	126	25200	25200
9	Jan-01	10563	25/02/01	31/05/01	95	19000	10563
10	Feb-01	30148	25/03/01	31/05/01	67	13400	13400
11	Mar-01	54816	25/04/01	31/05/01	36	7200	7200
		199566				356600	129236

89. The assessee has further contended that delayed adjudication vitiates the entire proceedings in as much as after a long lapse of time, a lot of changes may have happened and many of the persons and papers pertaining to the case may not be available. They have requested to drop the proceedings in light of decision of The Hon'ble Gujarat High Court has in the case of M/s. Siddhi Vinayak Syntex Pvt. Ltd. I find that the present case was kept in Call Book by the then adjudicating authority till 17.06.2019 as in the similar matter, the departmental appeal in the case of Louis Berger International Inc. (CA No. 002007/2010) was pending before Hon'ble Supreme Court. Thereafter, the case was transferred to CGST North Commissionerate on 03.12.2020, on account of change of jurisdiction on account of reorganisation of jurisdiction of the Commissionerates. The file transferred to the North Commissoinerate was not

complete and thus the same was needed to be recast and that is the reason that the case could not be taken up for adjudication immediately. I find from the letter dated 14.08.2018 of the assessee that they were very much aware of keeping of the case in abeyance by the department in view of litigation pending before Hon'ble Supreme Court. It is also seen that the department had also written letter F.No. STC/04-39/O&A/Denovo/11-12 dated 13.09.2019 to the assessee requesting them to avail the benefit of Sabka Vishwas (legacy Dispute Resolution) Scheme, if they so desired. In view of the same, it is very much evident that the case could not be adjudicated earlier because of unavoidable circumstances and the assessee was very much aware of the fact that their case was alive and was definitely not closed at the end of the department.

90. From the above discussion, documentary evidence and factual matrix, I find that the assessee has failed to prove the discharging of their service tax liability by the consultant, on the payment received from so called sub consultancy. Further, the assessee has also failed to show that they were reimbursed expenses over and above the consideration received for providing the service, thus the deduction of expenses from payment of service as claimed by the assessee is not justifiable and sustainable in law as settled by the Supreme Court. In other words, the expenses can not be excluded from gross value of services unless such expenses are shown to be not part of the consideration of service. In view of the same, I hold that the assessee is liable to pay service tax of Rs. 206.70 laks as demanded under the SCN under the provisions of Section 73 of the Finance Act, 1994.

91. Based on above facts and discussion, I find that the assessee has contravened the provisions of (i) Section 67 of the Finance Act, 1994 in as much as they have failed to determine the correct value of the taxable services for services rendered (ii) Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 in as much as they have short paid the service to the tune of Rs. 206.70 lakh on the differential value of service to the tune of Rs. 2992.19 lakh (iii) Section 70 of Finance Act, 1994 read with 7 of the Service Tax Rules, 1994 in as much as they have failed to assess their correct service tax liability.

92. I also find that Section 75 of Finance Act,1994 mandates that any person who is liable to pay service tax, shall, in addition to the tax, be liable to pay interest at the appropriate rate for the period by which crediting of tax or part thereof is delayed. I thus hold that the assessee is also liable to pay the interest on the demand of service Tax of Rs. 206.70 lakh.

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93. From the facts and discussion aforementioned, I find that in the instant case the assessee had short paid service tax of Rs. 206.70 lakh, on account of false claim made by the assessee that they being subconsultant, their service tax liability has been discharged by the main consultant and by raising false claim of reimbursement of expenses. The assessee had not disclosed such deduction made from the actual income received by them, in their service tax returns filed by them. This demonstrates the malafide intention of the assessee for escaping the legitimate service tax payable by them. This short payment of service tax would not have come to the notice of the department if the inquiry had not been initiated. Various Courts including the Apex Court have clearly laid down the principle that tax liability is a civil obligation and therefore, the intent to evade payment of tax cannot be established by peering into the minds of the tax payer, but has to be established through evaluation of tax payers' behaviour. The responsibility on the tax payer to voluntarily make information disclosures is much greater in the system of self-assessment. The omission or commission on the part of the assessee has clearly demonstrated their intention to evade payment of service tax, as they were very much aware of the unambiguous provisions of Finance Act, 1994 and Rules made there under. They have failed to disclose to the department at any point of time, the fact regarding their actual income and deduction made form it while filing ST-3 Returns. These facts would not have come to light if the department had not initiated inquiry against the assessee. Moreover, the government has from the very beginning placed full trust on the assessee, accordingly measures like self assessment etc. based on mutual trust and confidence have been put in place. Further, the assessees are not required to maintain any statutory or separate records under the Excise / service tax law as considerable amount of trust is placed on the assessee and private records maintained by them for normal business purposes are accepted for purpose of excise & Service tax laws. Moreover, returns are also filed online without any supporting documents. All these operates on the basic and fundamental premise of honesty of the assessee; therefore, the governing statutory provisions create an absolute liability on the assessee when any provision is contravened or there is breach of trust placed on them. Such contravention on the part of the assessee tantamounts to willful misstatement and suppression of facts with an intent to evade the payment of the duty/ tax. It is also evident that such fact of contravention and not paying the service tax by not declaring taxable value of the service provided, as discussed earlier, on the part of the assessee came to the notice of the department only when the inquiry was initiated by the department. In the case *of Mahavir Plastics versus CCE Mumbai, 2010 (255) ELT 241,* it has been held that if facts are gathered by department in subsequent investigation extended period can be invoked. In *2009*

(23) STT 275, in case of Lalit Enterprises vs. CST Chennai, it is held that extended period can be invoked when department comes to know of service charges received by appellant on verification of his accounts. Therefore, I find that all essential ingredients exist in this case to invoke the extended period under proviso to Section 73(1) of the Finance Act, 1994. By invoking the extended period of 5 years, service tax totally amounting to Rs. 206.70 lakhs is required to be recovered along with applicable interest under Section 75 of the Finance Act, 1994 from the assessee.

94. Thus, for the same reasons as discussed above, I find that the assessee have not paid the service tax by resorting to suppression of facts and contravention of the provisions of law with intent to evade payment of the tax. The Hon'ble Supreme Court has settled the issue in the case of UOI Vs. Dharmendra Textiles Processors reported in [2008(231) ELT 3(SC)] and further clarified in the case of UOI vs. RAJASTHAN SPINNING & WEAVING MILLS reported in [2009 (238) E.L.T. 3 (S.C.)]. The Hon'ble Supreme Court has held that the presence of malafied intention is not relevant for imposing penalty and *mens rea* is not an essential ingredient for imposition of penalty for tax delinquency which is a civil obligation. Accordingly, I hold that the assessee have rendered themselves liable for penalty in terms of the provision of Section 78 of the Finance Act, 1994.

95. As discussed in the foregoing paras, the assessee has failed to pay service tax of Rs. 206.70 lakhs as prescribed under Section 68 of the Finance Act, 1994 read with Rule 6 Service Tax Rules 1994. This makes the assessee liable to penalty under Section 76 of the Finance Act, 1994.

96. In view of the above discussion and findings, I pass the following order:

i) I hereby confirm the demand of Rs.206.70 lakhs and order to recover the same from the assessee under the proviso to section 73 of the Finance Act, 1994;,

ii) I order to charge interest on Service tax of Rs. 206.70 lakhs and order to recover the same from the assessee under section 75 of the Finance Act, 1994;

iii) I impose penalty of Rs. 206.70 lakhs on the assessee under section 78 of the Finance Act, 1994;

In the event of the said assessee opting to pay the amount of service tax along with all other dues as confirmed and ordered to be recovered, within

thirty days from the date of communication of this order, the amount of penalty liable to be paid by them under Section 78 of the Finance Act, 1994 shall be 25% of the said amount. However, the benefit of reduced penalty shall be available only if the amount of penalty is also paid within the period of thirty days from the date of communication of this order, otherwise full payment of penalty shall be paid.

iv) I impose penalty of Rs.200/- per day on the assessee, from the date when the service tax was due until the date of payment of the same or 2% of such tax per month, whichever is higher, uptil the date of payment of the demanded amount by the assessee, subject to a ceiling of Rs.206.70 lacks, under section 76 of the Finance Act, 1994.

v) I impose penalty of Rs.1,29,236- (Rupees one lac twenty nine thousand two hundred thirty six only) under section 76 of the Finance Act, 1994, with respect to the service tax paid by the assessee but not within the due date.

vi) I order to recover Interest thereon amounting to Rs.13,062/. (Rupees Thirteen thousand sixty two only) from the assessee under section 75 of the Finance Act, 1994.

vii) I impose penalty of Rs.12,000/- (Rupees Twelve thousand only) on M/s. SAI Consulting Engineers Pvt Ltd. under Section 77 of the Finance Act, 1994 as it existed during relevant period.

(Upendra Singh Yadav)
Commissioner,
Central Excise & CGST,
Ahmedabad North.

By Regd. Post AD./Hand Delivery
F.No. STC/15-206/O&A/2020 -Denovo

Date: .03.2023.

To

M/s Sai Consulting Engineers Pvt Ltd.
4, Kuldip Society,
Near Ishwar Bhuvan,
Navrangpura,
Ahmedabad.

Copy to:

1 The Principal Chief Commissioner of CGST & C. Ex., Ahmedabad Zone.
2 The Deputy/Assistant Commissioner, CGST & C.Ex., Division- VI, Ahmedabad North.
3 The Superintendent, Range-I, Division-VI, Ahmedabad North.
4 The Superintendent (System), CGST, Ahmedabad North for uploading on website.
5. Guard File.