CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70219 of 2019

(Arising out of Order-in-Original No.30/COMMR/NOIDA/18-19 dated 20.12.2018 of the Principal Commissioner, Central Goods and Service Tax, Noida)

M/s Fox Mandal and Company, **.....Appellant**
(FM House, A-9, Sector-9, Noida)

VERSUS

Commissioner of Central Excise, Noida **....Respondent**

(C-56/42, Renu Tower, Sector-62, Noida)

APPEARANCE:

Shri Sanjay Kumar, Advocate for the Appellant
Shri Santosh Kumar, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70968/2024

DATE OF HEARING : 11 December, 2024
DATE OF DECISION : 11 December, 2024

SANJIV SRIVASTAVA:

This appeal is directed against order in original 30/COMMR/NOIDA/18-19 dated 20.12.2018 of the Principal Commissioner, Central Goods and Service Tax, Noida. By the impugned order following has been held:

ORDER

(i) I confirm the demand of the CENVAT credit amounting to Rs.89,63,694/- (Rupees Eighty Nine Lakhs Sixty Three Thousand Six Hundred Ninety Four only) against the party, which was irregularly availed and utilized by them during the period 2010-11 to 2014-15 under the provisions of Rule 14 of the CENVAT Credit Rules, 2004

read with the proviso to Section 73(1) of the Finance Act, 1994

(ii) I confirm the demand of the Interest, at the applicable rates, against the party e on the amount of CENVAT credit, mentioned at (i) above, under the provisions of Rule 14 of the CENVAT Credit Rules, 2004 read with Section 75 of the Finance Act, 1994;

(iii) I impose a penalty of Rs.89,63,694/- (Rupees Eighty Nine Lakhs Sixty Three Thousand Six Hundred Ninety Four only) upon the party under the provisions of Rule 15 of the CENVAT Credit Rules, 2004 read with Section 78 of the Finance Act,1994 for the above said amount of irregular availment of CENVAT credit and related contraventions

(iv) I confirm the demand of the service tax total amounting to Rs.2,99,38,158/- (Rs. Two Crores Ninety Nine Lakhs Thirty Eight Thousand One Hundred Fifty Eight only) [Rs. 18,19,544/- (as per para 5.3 & its sub-para 5.3.3 above) + Rs. 7 ,80, ,46, 267/- (as per para 5.5 & its sub-para 5.5.7 above) + Rs.61,800/- (as per para 5.8 & its sub-para 5.8.3 above) + Rs.1,00,10,547/- (as per para 5.9 & its sub-para 5.9.4 above)], out of total demand of the service tax of Rs.6,00,94,195/- proposed in the show cause notice, against the party in terms of the proviso to Section 73(1) of the Finance Act, 1994.

(v) I drop the demand of the service tax amounting to Rs.3,01,56,037/- (Rs. Three Crores One Lakh Fifty Six Thousand Thirty Seven only) against the party [Rs.1,34,82,891/- (as per para 5.3 &'its sub-para 5.3.3 above) + Rs. 1,64,97,099/- (as per para 5.6 & its sub-para 5.6.4 above) + Rs.66,485/-+ Rs.1,09,562/- (as per para 5.7 & its sub-paras 5.7.3 & 5.7.4 above)]

(vi) I confirm the demand of the interest at applicable rates against the party on the amount of the service tax mentioned at (iv) above, under the provisions of Section 75 of the Finance Act, 1994;

(vii) I impose a penalty of Rs.2,99,38,158/- (Rs. Two Crores Ninety Nine Lakhs Thirty Eight Thousand One Hundred Fifty Eight only) upon the party under the provisions of Section 78 of the Finance Act, 1994 for the above short/non payment of service tax and related contraventions

(viii) I impose late fee / penalty in total amounting to Rs. 95,900/- (Rupees Ninety Five Thousand Nine Hundred only), upon the party for late filing of ST-3 Returns of the period 2010-11 to 2014-15, under the provisions of Section 70 (1) of Finance Act 1994.

The above adjudged dues against the party shall be paid forthwith

2.1 Appellant is a Law Firm engaged in providing all kind of legal services in different fields of various laws to their client. They are registered with the service tax authorities for providing taxable services under the category of 'rent a cab scheme operator service" 'renting of immovable property service and legal consultancy services"

2.2 During course of audit of the records of the appellant during the period 20.03.2014 to 21.03.2014 certain discrepancies were noticed which were detailed in audit report IAR 9SAP) No 423/2013-14 (ST) and were communicated to the appellant on 15.07.2014. After further enquiries and correspondences made it was observed that:

(i) late fees on late filing of the ST-3 returns for the period 2010-11 to 2014-15 amounting to Rs.95,900/- (Rupees Ninety Five Thousand Nine Hundred Only) is liable to be demanded and recovered from them under the provisions of Rule 7C of the Service Tax Rules, 1994 read with Section 70 (1) of Finance Act, 1994;

(ii) the service tax amounting to Rs. 61,800/- (Rupees Sixty One Thousand Eight Hundred Only) is liable to be demanded and recovered from them along with accrued amount of interest, respectively under the

provisions of Section 73 and Section 75 of the Finance Act, 1994;

(iii) the service tax amounting to Rs. 1,53,02,435/- (Rupees One Crore Fifty Three Lakhs Two Thousand Four Hundred Thirty Five Only) for the period 2010-11 to 2014-15 is liable to be demanded and recovered from the said party, along with accrued amount of interest, respectively under the provisions of Section 73 and Section 75 of the Finance Act, 1994;

(iv) the CENVAT credit in total amounting to Rs. 49,33,808/- (Rupees Forty Nine Lakhs Thirty Three Thousand Eight Hundred Eight Only), so wrongly availed and utilized by the party during 2010-11 to 2014-15, is liable to be demanded and recovered from them, along with accrued amount of interest under the provisions of Rule 14 of the CENVAT Credit Rules, 2004 read with provisions of Section 73 and Section 75 of the Finance Act, 1994;

(v) the CENVAT credit in total amounting to Rs.40,29,886/- (Rupees Forty Lakhs Twenty Nine Thousand Eight Hundred Eighty Six Only), so wrongly utilized by the party during 2010-11 to 2014-15, is liable to be demanded and recovered from them, along with accrued amount of interest, under the provisions of Rule 14 of the CENVAT Credit Rules, 2004 read with provisions of Section 73 and Section 75 of the Finance Act, 1994;

(vi) the service tax amounting to Rs, 1,80,46,2674- (Rupees One Crore Eighty Lakhs Forty Six Thousand Two Hundred Sixty Seven Only) is liable to be demanded and recovered from them on the services claimed to beer exported by the party during 2010-11 to 2014-15, along with accrued amount of interest;

(vii) Service tax amounting to Rs. 1,64,97,099/- (Rupees One Crore Sixty Four Lakhs Ninety Seven Thousand & Ninety Nine Only) is liable to be demanded and

recovered from them on the exemptions from service tax availed by them during 2013-14 to 2014-15, along with accrued amount of interest, respectively under the provisions of Section 73 and Section 75 of the Finance Act, 1994;

(viii) service tax amounting to Rs. 66,485/- (Rupees Sixty Six Thousand Four Hundred Eighty Five Only) for legal expenses incurred by the party for the period 2010-11 to 2014-15 and the service tax amounting to Rs. 1,09,562/- (Rupees One Lakh Nine Thousand Five Hundred Sixty Two Only) for Car Hire expenses incurred by the party for the period 2010-11 to 2014-15 is liable to be demanded and recovered from the said party, along with accrued amount of interest , respectively under the provisions of Section 73 and Section 75 of the Finance Act, 1994: and

(ix) the service tax amounting to Rs, 1,00,10,547/- (Rupees One Crore Ten Thousand Five Hundred Forty Seven Only) is liable to be demanded and recovered from them under the provisions of Section 73 and Section 75 of the Finance Act, 1994 by invoking extended time period under the proviso to Section 73(1) of the Act, ibid. Party is also liable for penal action as envisaged under Section 78 of the Act for the said short payment of service tax.

2.3 The extended period of time limitation, in terms of proviso to sub-section (1) of Section 73 of the Finance Act, 1994, is invokable in the instant case owing to the fact that the fact leading to short payment of service tax by

- not paying service tax admitted as service tax liability in their Balance Sheet and Profit & Loss Accounts (Rs 1,53,02,435/-)
- suppression of value in the ST- 3 returns in comparison to Balance Sheet (Rs. 1,00,10,547/-);

- taking inadmissible CENVAT Credit (Rs. 49,33,808/-), and utilization of CENVAT credit (Rs. 40,29,886/-) which was never reflected in the ST-3 returns;
- claiming certain services to be exported (Rs 1,80,46,267/-);
- wrongly claiming the benefit of exemptions which was not available to them (Rs 1,64,97,099);
- not paying service tax on legal expenses (Rs. 66,485) and car hire expenses (Rs. 1,09,562/-)
- not paying service tax on sponsorship services (Rs. 61,800/-)

came to the knowledge of the department only during the course of the subject detailed scrutiny of returns and said fact was never revealed by the said party on their own accord. As is obviously evident, this willful suppression on the part of them was with their sole intention to contravene the said relevant provisions of the said Rules and the Act and consequently to not pay the said amount of the service tax and accordingly the provisions of extended period of time limitation are appropriately invokable in the instant case. It is further apparent on record that the periodical ST-3 returns for the period 2010-11 have been filed on 22.01.2013 while the ST-3 return for the period April, 2011 to September, 2011 has been filed on 22.12.2011 for the purpose of calculation of period of limitation in this case.

2.4 A pre-consultation meeting was held with the appellant on 19.12.2016 in terms of the guidelines contained in the Directorate of Legal Affair, dated 8th July, 2016. Mrs. Anjali Sharma, C.A. appeared on behalf of the party and submitted that the party has been facing financial problems and they would prefer that show cause notice be issued to them.

2.5 A show cause notice dated 19.12.2016 was issued to appellant asking them to show cause as to why:-

(i) the CENVAT credit amounting to Rs.89,63,694/- (Rupees Eighty Nine Lakhs Sixty Three Thousand Six

Hundred Ninety Four only), so irregularly availed and utilized during the period 2010-11 to 2014-15, should not be demanded and recovered from them under the provisions of Rule 14 of the CENVAT Credit Rules, 2004 read with Section 73(1) of the Finance Act, 1994, by invoking the extended period of time limitation under proviso to Section 73(1) of the Act, ibid,

(ii) Interest on the above amount as at para (i) above, calculated at the applicable rates, should not be demanded and recovered from them under the provisions of Rule 14 of the CENVAT Credit Rules, 2004 read with Section 75 of the Finance Act, 1994;

(iii) Penalty should not be imposed upon them under the provisions of Rule 15 of the CENVAT Credit Rules, 2004 read with Section 78 of the Finance Act,1994 for the above said amount of irregular availment of CENVAT redit and related contraventions;

(iv) Service tax, in total amounting Rs.6,00,94,195/- (Rupees Six Crores Ninety Four Thousand One Hundred Ninety Five only), so not paid by the party during the period, should not be demanded and recovered from them under the provisions of Section 73(1) of the Finance Act, 1994, by invoking the extended period of time limitation under proviso to Section 73(1) ibid;

(v) Interest on the above amount of service tax as at para (iv) above, calculated at the applicable rate(s), should not be demanded and recovered from them, under the provisions of Section 75 of the Finance Act, 1994; and

(vi) Penalty should not be imposed upon them under the provisions of Section 78 of the Finance Act, 1994 for the above short payment of service tax and related contraventions

(vii) Penalty in total amounting to Rs. 95,900/- (Rupees Ninety Five Thousand Nine Hundred Only), so not paid by the party during the period 2010-11 to 2014-15, should not be demanded and recovered from them

under the provisions of Section 70 (1) of Finance Act, 1994.

2.6 The show cause notice has been adjudicated as per the impugned order. Aggrieved appellant have filed this appeal.

3.1 We have heard Shri Sanjay Kumar, Advocate for the appellant and Shri Santosh Kumar, Authorized Representaive for the revenue.

3.2 Arguing for the appellant learned counsel submits that;-

- Details of the demand confirmed and dropped by the impugned order is as in table below:

	Service tax/ CENVAT Credit demand			
Particulars	Period	Proposed	Dropped	Confirmed
Late filing fees: for late filing of various ST-3 Returns (a)	2010-11 to 2014-15	95,900		95,900
Service Tax payable (Statutory liability, shown as payable in Balance Sheet)		1,53,02,435	1,34,82,891	18,19,544*
Exports made by the appellant (due to non-production of documentary evidence)		1,80,46,267		1,80,46,267
Exempted services (due to non-production of documentary evidence)		1,64,97,099	1,64,97,099	
Reconciliation difference (value as per ST-3 return and Profit & Loss A/c)		1,00,10,547		1,00,10,547
Non-payment of Service Tax under Reverse Charge Mechanism				
Car hire charges		1,09,562		1,09,562
Legal Expenses		66,485		66,485
Sponsorship Services	2010-11 to 2011-12	61,800		61,800
Sub-Total (b)		6,00,94,195	3,01,56,037	2,99,38,158
CENVAT Credit related issues (c)				
Cenvatable documents not produced before the department	2011-12 & July 2012 to March 2013	49,33,808		49,33,808
Detail of CENVAT Credit not provided in ST-3 returns	2010-11 & April 2012 to June 2012	40,29,886		40,29,886
Sub-Total (c)		89,63,694		89,63,694

Total (b+c)		6,90,57,889	3,01,56,037	3,89,01,852
Grand total (a+b+c)		6,91,53,789	3,01,56,037	3,89,97,752

* The appellant has deposited Rs. 18,19,544/- in respect of Service Tax Payable and the challans for the same are enclosed as Annexure I (page no. 597-599), thus the same is liable to be appropriated against the confirmed demand.

- The appellant was previously served with SCN dated 19.10.2012 which was adjudicated vide OIO dated 12.11.2013. The appellant filed the appeal before the Hon'ble Tribunal against the said order and the said appeal was decided vide Final order no.- 70315/2024 dated 06.06.2024 and the appeal was partly allowed by way of remand.
- The appellant has rightly claimed the benefit of Cenvat Credit in accordance with the provisions of CCR, 2004. The subject demand has been confirmed alleging that the appellant has not submitted documents for verification. They submitted all the necessary documents along with the reply to SCN and the same was also again submitted with the present appeal. The relevant documents could not be produced at the time of audit and the same because the appellant has shifted its office at the time of audit.
- The exports made by the appellant are not liable to be taxed under the provisions of the Finance Act, 1994. The appellant has provided legal services to the clients outside India and has received payment in convertible foreign exchange. Accordingly, the appellant has considered the services as export and has neither charged nor paid service tax on the same. Hence, the service tax liability of Rs. 1,80,46,267/- is liable to be dropped on this ground alone.
- A reconciliation of the gross receipts in the financial statements with the ST-3 receipts reveals no discrepancy/ difference in the financial statements with the ST-3 receipts is on account of miscellaneous/ other income which is not subject to service tax. The detailed reconciliation along with the nature of such income

supported by a Chartered Accountant's (CA) certificate, verifying the nature of income is enclosed. Consequently, the alleged service tax shortfall of Rs. 1,00,10,547/- is unfounded and should be dropped.

- Service tax under reverse charge is inapplicable to the expenses categorized as sponsorship, since these constitute financial assistance rather than event sponsorship. The intent of the parties is paramount in ascertaining the transaction's true character. Given that the principal aim here is to extend financial assistance, the transaction falls outside the purview of service tax. Appellant has not provided any sponsorship service rather it has provided financial aid in the form of donation.
- the tax discharged by the appellant under RCM, the same would be available as credit to the appellant, leading to less payment in cash towards the output tax liability. Thus, the situation being revenue neutral, the demand is not sustainable. Reliance is placed on the following decisions.
    - Jet Airways (1) Ltd [2016 (44) STR 465 (Tri-Mumbai)] affirmed by the Hon'ble Apex Court as reported at [2017 (7) G.S.T.L. J35 (S.C.)]
    - Vedanta Limited, [2019 (5) TMI 266 - CESTAT Chennai]
    - Sarover Hotels Pvt Ltd [2017 (9) TMI 893- CESTAT Mumbai]
- Extended period of limitation could not have been invoked.
- Cum tax benefit should be extended.
- No interest/ penalty can be charged/ imposed.
- Penalties under section 77 & 78 not imposable where the default is on account of reasonable cause.

3.3 Authorized representative re-iterated the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 From the submissions made by the appellant at the time of hearing it is evident that they are disputing the demands confirmed against them,

(i) with regards to denial of CENVAT credit and utilization thereof;
(ii) demand made against exports;
(iii) demand made by reconciliation of ST-3 returns with the Financial Statements of the Appellant.
(iv) Sponsor ship services.

They do not dispute the levy of late filing fees and demand made against admitted liability. In fact they submit that they have deposited the entire amount confirmed against demand confirmed under the category of admitted liability.

4.3 In respect of the demands confirmed, with regards to the denial of CENVAT Credit and utilization thereof, following findings have been recorded in the impugned order:

"5.4. As regards allegation levelled in the show cause notice regarding wrong availment and utilization of the CENVAT credit of input services total amounting to Rs. 89, ,63,694/- (Rs. 49,33,808/- + Rs.40,29,886/-), it has been alleged that the party has shown an amount of Rs.49,33,808/- as input CENVAT credit availed/taken in their ST-3 returns of the period 04/2011 to 03/2013 and the same has also shown as utilized towards payment of duty therein, but they failed to produce/provide any documentary evidence as regard to the availment and utilization of such CENVAT credit in the relevant ST-3 returns. It was further alleged that the party had paid part of its service tax liability amounting to Rs.40,29,886/- from the CENVAT credit in spite of having no CENVAT credit in their balance as shown in the ST-3 returns for the period 04/2010 to 06/2012. Moreover, they also failed to produce/provide any documentary evidence as regards to the availment & utilization to the said amount of CENVAT credit shown as utilized despite having no balance in their CENVAT account.

In this regard, I find that the party has failed to provide documentary evidences in respect of availment and utilization of such CENVAT credit despite repeatedly requested by the department

5.4.1. The party in their defence reply has contended that the department has rejected the CENVAT Credit on the ground that Cenvatable invoices were not produced before the audit and in this regard, they submitted that at the time of audit they had shifted their office, due to which they were not able to produce the relevant documents; however, the same are now submitted for verification. They further contended that it is only a procedural lapse, and substantive benefit cannot be denied due to procedural lapse; the issue is no longer res integra that substantive benefit cannot be denied on a procedural or technical ground where the beneficiary has satisfied the essential conditions for availment of CENVAT Credit. In the present case, the department has not questioned the admissibility of the CENVAT Credit, only the availment by assessee is under dispute that too based on a technical ground that the detail of availment was not included in the Service Tax return of the assessee. There are catena of judgments wherein it is held that substantial benefit under law should not be rejected on procedural infractions

5.4.2. I find that it is evident from the records/documents placed on record before me that the party has failed to produce the prescribed documentary evidences in respect of availment and utilization of CENVAT credit in question not only before the audit but also before the department for verification despite several correspondences made with the party in this regard by the department till the issuance of the show cause notice. It was only while submitting the defence reply, the party have submitted the photocopies of the CENVAT documents and not the original copy of the CENVAT documents

5.4.3 I find that the Rule 9(1) of the CENVAT Credit Rules, 2004 prescribes the documents on the basis of which the CENVAT credit of input, input services/capital goods can be availed by a manufacturer or provider of output service. For the sake of convenience, the provisions of the Rule 9(1) of the CENVAT Credit Rules, 2004 has been reproduced below:

Rule 9 (1). The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely :-

(b) an invoice issued by-

(i) a manufacturer or a service provider for clearance of-

(i) inputs or capital goods from his factory or depot or from the premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by on behalf or of the said manufacturer,;

(ii) inputs or capital goods as such;

(ii) an importer,

(iii) an importer from his depot or from the premises of the consignment agent of the said importer if the said depot or the premises, as the case may be, is registered in terms of the provisions of Central Excise Rules,2002;

(iv) a first stage dealer or a second stage dealer, as the case may be, in (i) terms of the provisions of Central Excise Rules, 2002; or

(c) a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002 .....

(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax become recoverable from the provider of service .....

(d) bill of entry; or a certificate issued by an appraiser of customs in respect of goods imported through

(e) a Foreign Post Office; or as the case may be, an Authorised Courier, registered with the Principal Commissioner of Customs or

(f) a challan evidencing payment of service tax by the service recipient as the person liable to pay service tax; or

(g) an invoice, a bill or challan issued by a provider of input service on or after the 10th day of, September, 2004; or

(h) a service tax certificate for transportation of goods by rail (hereinafter referred to as (fa) STTG Certificate) issued by the Indian Railway alongwith the photocopies of the railway receipt mentioned in the STTG certificate; or an invoice, bill or challan issued by an input service distributor under rule 4A of the Service Tax Rules, 1994.

Provided that the credit of additional duties of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975) shall not be allowed if the invoice or the supplementary invoice, as the case may be, bears an indication to the effect that no credit of the said additional duty shall be admissible,.

In view of the above, it is apparent that the CENVAT credit in respect of inputs/ input service can be taken on the basis of above-mentioned prescribed documents only. In other words, in any case, the CENVAT credit cannot be allowed to take on the basis of any documents other than those

prescribed under Rule 9(1) of the CENVAT Credit Rules, 2004 and certainly not on the photocopies of the documents

5.4.4. In the instant case, I find that the party had availed CENVAT credit total amounting to Rs.89,63,694/- for which they failed to produce original copy of the documents, as prescribed under the Rule 9(1) of the CENVAT Credit Rules 2004, on the basis of which the same had been availed.

5.4.5. As already discussed supra, the party had failed to produced documentary evidences in respect of availment and utilization of the CENVAT credit in question not only before the audit but also before the department for verification despite several correspondences made with the party in this regard by the department till the issuance of the show cause notice. Further opportunity was also granted to the party to produce original CENVAT documents on the basis of which they had claimed to avail and utilize the impugned CENVAT credit for verification during the course of adjudication proceedings by the jurisdictional Range Superintendent as he was assigned the job of verification of the same. In this regard, the jurisdictional Range Superintendent at para (iv) of his report dated 27.11.2018 reported as under:

> *"(iv) As per the SCN, the party had not produced the cenvat credit documents involving an amount of Rs. 49,33,808/- and Rs.40,29,886. However, the party alongwith their defence reply has submitted the photocopy of the cenvat credit documents. As the photocopy is not a valid document for claiming cenvat credit as per Rule 9(1) of the Cenvat Credit Rules, 2004, a letter dated 17.10.2018 was written to the party to produce the original documents on which the said cenvat credit has been availed. However the party failed to produce the same, as such the verification of the same cannot be done at this end."*

5.4.6. In view of the above, it is apparent that the party has failed to produce the original CENVAT documents on the basis of which they have claimed to avail and utilized the CENVAT credit of Rs.89,63,694/- (Rs. 49,33,808/- + Rs.40,29,886/-). find that there are catena of judgments of the various legal foras, which pronounce that the photocopy of the CENVAT documents are not the valid documents for availing CENVAT credit under the CENVAT Credit Rules,2004. The Hon'ble CESTAT in the case of Century Rayan vs CCE [2014 (309) ELT 524 (CESTAT)], where the credit was taken on the strength of photo copies/extra copies of invoices, has held that no vested right accruing to assessee for taking credit if documents prescribed statutorily for availing credit not submitted - Credit not available for procedural infraction of statutory mandates. The Hon'ble High Court, Madras, in the case of CPRM Steels Vs CESTAT Chennai [2014 (310) ELT 859 (Madras HC DB)], held that Cenvat credit cannot be taken on the basis of photocopy of invoice. In the light of the above, the judgements cited by the party in support of their contention do not hold good as the party has failed to satisfy the essential condition for availment of the CENVAT credit in question i.e. not submitting the documents prescribed statutorily for availing the CENVAT credit

5.4.7. In view of the above, it is crystal clear that that the photocopy of the CENVAT document is not a valid document for availing the CENVAT credit under Rule 9(1) of the CENVAT Credit Rules, 2004. 1 further find that there is not any procedure prescribed under the CENVAT Credit Rule, 2004 to allow CENVAT credit of inputs / input services on the basis of photocopies of the prescribed CENVAT documents. Therefore, in absence of valid documents as prescribed under Rule 9(1) of the CENVAT Credit Rules, 2004, the impugned CENVAT credit availed by the party on input services is not admissible to the party.

*5.4,8. In view of the above, I hold that that CENVAT Credit amounting to ₹s.89,63,694/- (Rs.49,33,808/- * Rs40,29,886/) has been wrongly and illegitimately taken and utilized by the party and they have willfully availed such inadmissible CENVAT credit in contravention of the provisions of Rule 9(1) of the Central Excise Rules, 2004 by resorting to suppression of the material facts from the department with the intent to evade payment of duty by the way of earning the inadmissible CENVAT Credit for utilization towards payment of service tax on their output services/other liability. Therefore, the same is liable to be recovered from them alongwith applicable interest in terms of Rule 14 of the CENVAT Credit Rules, 2004 read with provisions of Section 73 and Section 75 of the Finance Act, 1994 respectively.*

4.4 Hon'ble Jammu and Kashmir High Court has in the case of Shivam Electrical [2018 (359) E.L.T. 46 (J & K)] observed as follows:

6.*We have considered the submissions made by learned counsel for the parties and have perused the record. The relevant extract of Rule 9 of the Cenvat Credit Rules, 2004 reads as under :*

The "(1) Cenvat credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely.-

An invoice issued by :

(a)

(i) -----

Explanation. - For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing payment of additional

amount of additional duty leviable under Section 3 of the Customs Tariff Act;"

From perusal of the explanation, it is evident that the expression supplementary invoice used in the rules shall also include challan or any other document evidencing payment of additional amount of additional duty leviable under Section 3 of the Customs Tariff Act.

7.*The aforesaid rule in our considered opinion nowhere provides that Cenvat credit cannot be availed on the basis of photocopy of the documents especially when the respondents have not disputed the correctness of the contents of the photocopies of the invoices produced by the petitioner. From the perusal of the certificate issued by the Superintendent, Customs and Central Excise, Range-III, Division-I, Ghaziabad, it is evident that the excise duty has been duly paid by the petitioner.*

4.5 The CENVAT credit has been sought to be denied only for the reason that appellant was not able to produce the original copy of invoices/ documents against which the credit has been taken by the appellant. However undisputedly it has been recorded that photocopies were produced before the range superintendent for verification after issuance of show cause notice. In case of IDEA MOBILE COMMUNICATION LTD. [2010 (20) STR 775 (T-Del)] Delhi bench held as follows:

"6. *The Rule 9(2) of Cenvat Credit Rules, 2004 reads thus :*

"The Cenvat Credit shall not be denied on the grounds that any of the documents mentioned in sub-rule (1) does not contain all the particulars required to be contained therein under these rules, if such document contains details of payment of duty or service tax, description of the goods or taxable service, assessable value, name and address of the factory or warehouse or provider of input service;

Provided that the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, having jurisdiction over the factory of a manufacturer or provider of output service intending to take Cenvat credit, or the input service distributor distributing Cenvat credit on input service, is satisfied that the duty of excise or service tax due on the input or input service has been paid and such input or input service has actually been used or is to be used in the manufacture of final products or in providing output service, then, such Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, shall record the reasons for not denying the credit in each case."

7. *Rule 9(2) apparently gives discretion to the adjudication authority to ascertain whether tax due on inputs and input service has actually been paid and such input or input service has actually be used or is to be used in the manufacture of final products or in providing output service as the case may be, and if satisfied in this regard, to give necessary concession to the assessee in relation to any procedural irregularity in relation to maintenance of documents on the basis of which cenvat credit can be availed. Obviously before ascertaining the liability of the assessee under Cenvat Credit Rules, the adjudicating authority is expected to apply its mind to this aspect of the matter and thereafter to arrive at the final conclusion about liability of the assessee in this regard. The impugned order does not disclose any such exercise having been done by the adjudicating authority. In the result, in view of the same, the impugned order is liable to be set aside and the matter to be remanded to the adjudicating authority to decide the same afresh."*

4.6 In case of JMC Projects India Ltd [(2023) 4 Centax 321 (Tri.-Ahmd)] Ahmedabad bench has observed as follows:

> ***"4.*** *We have considered the submissions made by both the sides and perused the records. The allegation against the appellant in the present case as per the show cause notice is that they have failed to produce any of the original input service invoices for verification by audit officers and has chosen to submit randomly selected photocopies of input services invoices on which they have availed Cenvat credit. Therefore appellant has violated provisions of Rule 5A (2) of the Service tax Rules, 1994. Further they had availed Cenvat credit amounting to Rs. 7,10,60,401/- by making some consolidated entries in their Cenvat credit register during the period June 2014 to March 2015, which involves hundreds of input service invoices of 2007-2008 to 2013-14. The Cenvat credit has been availed without any proof of having valid documents as prescribed under Rule 9 of the Cenvat Credit Rules, 2004. They have not fulfilled the conditions of Rule 6(3A) of Cenvat Credit Rules 2004. The Ld. Commissioner in the impugned order also upheld the said allegations. On the contrary the appellant submitted here that the impugned order has been passed by Ld. Commissioner without appreciating the facts and submission of appellant. There is no manipulation in Cenvat credit register and all the documents and information has been provided to the department. All the original invoices are always available at their respective regional office where the input service is received. In this circumstance we are of the view that the matter should go back to the adjudicating Authority for verification of the invoices/documents and Cenvat credit register maintained by the appellant. We remand this matter to the adjudicating authority to give another opportunity to the appellant to establish its entitlement."*

4.7 In view of the above decisions we find it fit to remand the matter in this respect to cause verification of the documents produced by the appellant for availing the disputed credit and on

basis of objective discretion allow or disallow the credit after recording specific finding in this respect.

4.8 On the issue of confirmation of demand on the services claimed to have been exported impugned order records as follows:

"5.5. On the issue of non-payment of service tax amounting to Rs.1,80,46,267/- on the services claimed to have been exported by the party during 2010-11 to 2014-15, it has been alleged in the show cause notice that the party has not provided/produced any documentary evidence in respect of claiming exemption on the exported services neither to the audit team at the time of audit of their unit nor to the jurisdictional Range Superintendent despite repeatedly requested by him through several correspondences. The details of export of services for the period 2010-11 to 2014-15 as claimed by the party in their ST-3 returns of the relevant period as per the show cause notice are as under:

Period	*Exports*	*Rate Of Service Tax*	*Service Tax Payable*
04/2010-09/2010	*3,05,18,443/-*	*10.30%*	*31,43,400/-*
10/2010-03/2011	*3,81,83,716/-*	*10.30%*	*39,32,923/-*
04/2011-09/2011	*2,59,01,241/-*	*10.30%*	*26.67,828/-*
10/2011 03/2012	*1,53,89,586/-*	*10.30%*	*15,85,127/-*
04/2012 06/2012	*4,28,293/-*	*12.36%*	*52,937/-*
07/2012 09/2012	*0*	*12.36%*	*0*
10/2012 03/2013	*0*	*12.36%*	*0*
04/2013-09/2013	*1,44,72,944/-*	*12.36%*	*17,88,856/-*
10/2013 03/2014	*81,17,354/-*	*12.36%*	*10,03,305/-*
04/2014 09/2014	*1,32,08,818/-*	*12.36%*	*16,32,610/-*
10/2014 03/2015	*1,81,17,161/-*	*12.36%*	*22,39,281/-*
Total			*1,80,46,267/-*

5.5.1. In their defence, the party has contended that the exports made by them are not liable to be taxed under the provisions of Finance Act, 1994; in the instant case, they had provided certain legal services to the clients outside India and have received payment in convertible foreign exchange accordingly they claimed exemption on such export of services; however, the department has denied the

benefit solely on the ground that the relevant documents could not be produced at the time of Audit; as stated earlier, due to office shifting they could not produce the documents; the invoices for clients outside India and the FIRC's are now have been produced and therefore, benefit of export is available to them.

5.5.2. I find that it is an admitted fact the party has failed to produce any documentary evidence in respect of exemption of service tax amounting to RS 1,80,46,267/- claimed by them on account of export of services for the period 2010-11 to 2014-15 not only before the audit but also before the department for verification despite several correspondences made with the party in this regard by the department till the issuance of the show cause notice. Further the party has submitted some documents relating to export of services Viz. copy of invoices bank statements for the period 2012-13 to 2014-15 only under their defence reply. However, no documents pertaining to the period 2010-11 to 2011-12 were submitted by the party relating to export of services claimed by them during the said period by taking the plea that for the period 2010-11 to 2011-12, a show cause notice had already been issued and they had already submitted the copies of invoices in reply to above show cause notice.

5.5.3. As regards party's claim that they had already been issued a show cause notice on the issue of export of services for the period 2010-11 to 2011-12 and they had already submitted the export documents relating to that period in reply to the said show cause notice, the jurisdictional Range office in his verification report dated 27.11.2018 reported as under:

> *"(i) A show cause notice dated 20.02.2015 was issued to the party demanding Service Tax on service provided as 'Due Diligence Report of Project documents etc. by treating it as 'Legal Consultancy Service' during the*

period 2010-12. AS per this office records, no SCN has been issued to the party on the exemption claimed on account of export of services by them during the year 2010 to 2012. Accordingly, a letter dated 17.10.2018 was written to the party to produce export related documents for the year 2010-11 and 2011-12 which - were not-submitted earlier. Till date the party has not submitted the required documents, as such the verification of the same cannot be done at this end."

In view of the above report, it is apparent that no show cause notice as regard to the exemption on account of export of services claimed by the party for the period 2010-11 to 2011-12 has ever been issued to them by the department. Moreover, the party has neither provided the detail of any such show cause notice nor provided the acknowledged copy of the said defence reply in support of their claim. Therefore, the party's claim that they had already provided the export documents relating to export of input services during the period 2010-11 to 2011- 12 to the department is a false premise and thus clearly an afterthought in order to cover up their wrongdoing. Therefore, I hold that they have wrongly and illegitimately availed the said exemption of service tax amounting to Rs.1,13,29,278/- on the value of services of Rs.10,99,92,986/- declared in their ST-3 Returns of the period 2010-11 and 2011-12 as exempted receipts on account of export of services, under Rule 6A of the Service Tax Rules, 1994 by resorting to mis-declaration and suppression of the fact.

5.5.4. As regards to the period 2012-13, 2013-14 and 2014-15, the documents provided by the party viz copy of invoices and bank statements, under their defence reply have been scrutinized & verifiled by the jurisdictional Range Superintendent as regard to their correctness and eligibility for exemption claimed on account of export of services. The

jurisdictional Range Superintendent in his report dated 27.11.2018 reported as under:

(ii) A letter dated 23. 10.2018 was written to the party to inform the reasons for difference of the export value shown in ST-3 returns for the year 2012-13 and the value of the export invoices submitted by them. No reply has been received from the party till date. However, the party has submitted the copies of the export invoices and bank statement made during the year 2012-13 with their defence reply alongwith a chart of details of export. The relevant Bank Realisation certificates/ Foreign Inward Remittance Advice were not submitted by the party. On scrutiny of the documents submitted by the party, it has been noticed that the party has provided legal consultancy service in India to foreign clients. On the basis of the chart provided by the party, details enclosed as Annexure `A` has been prepared and found that:-

a) *The detail of the clients from whom the payment was received has not been mentioned in the bank statement.*
b) *The invoice nos. against which the payments have been received is not mentioned.*
c) *The amount of bill raised in foreign currency does not tally with the amount of foreign currency received as shown in their bank statement.*
d) *In many cases either the export invoice or the payment receipt details are not made available by the party.*
e) *In some cases, payment received is more than billed amount.*

In view of the above and non availability of Bank Realisation statements/Foreign Inward Remittance Advice, these documents cannot be considered as evidencing receipt of payment against taxable services exported as per Export of Services Rules, 2005. Further, it is apparent

from the chart that a co-relation between export invoice and export realization cannot be done

(iii) The party had submitted the copies of the export invoices and bank statement made during the year 2013-14& 2014-15 with their defence reply alongwith a chart of details of export. The relevant Bank Realisation certificates/Foreign Inward Remittance Advice were not submitted by the party. On scrutiny of the documents submitted by the party, it has been noticed that the party has provided legal consultancy service in India to foreign clients. On the basis of the chart provided by the party, details enclosed as Annexure `B` and 'C` have been prepared and found that:

b) *The detail of the clients from whom the payment was received has not been mentioned in the bank statement.*
c) *The invoice nos. against which the payment has been received are not mentioned.*
d) *The amount of bill raised in foreign currency does not tally with the amount of foreign currency received as shown in their bank statement.*
e) *In many cases either the export invoice or the payment receipt details are not made available by the party.*
f) *In some cases, payment received is more than billed amount.*
g) *The party has charged Service Tax amounting to USD 841.82 in three bills during the year 2013-14 as shown at S.No. 75 of the Annexure 'B`.*

In view of the above and non availability of Bank Realisation statements/Foreign Inward Remittance Advice, these documents cannot be considered as evidencing receipt of payment against taxable services exported as per Export of Services Rules, 2005. Further, it is apparent from the chart that a

co-relation between export invoice and export realization cannot be done.

In view of the above report of the jurisdictional Range Superintendent, it is apparent that apart from various discrepancies found in details/documents submitted by the party as pointed out above, there is also no correlation between the export invoices and the export realization against these export invoices. The party has not only failed to provide the details/documents sought from them in the course of verification by the Range Superintendent but also failed to clarify the doubt/infirmity pointed out by him as regards to diference in the figures of value of export as per their ST-3 returns and the documents submitted and also correlation between export invoices and export realization opportunities, first at the time of Audit, secondly when the jurisdictional Range find that the party has been given ample - Superintendent called for the complete details/documents in this regard after Audit through various correspondences from them and thirdly during the course of adjudication proceedings, but they did not pay any heed to it and has intentionally provided incomplete documents/information to misled the department, which clearly show malafide on their part. It is, therefore, clear that the party has failed to submit proper documentary evidences in order to substantiate their claim in respect of exemption of service tax on account of export of services claimed in their ST-3 Returns for the period 2012-13 to 2014-15 on the value of services amounting to Rs.5,43,44,570/- involving service tax of Rs. 67,16,989/- Therefore, they have wrongly availed the said exemption of service tax amounting to Rs.67,16,989/- under Rule 6A of the Service Tax Rules, 1994 for the period 2012-13 to 2014-15 by resorting to misdeclaration and suppression of the fact.

5.5.7. In view of the above discussion, it is clear that the party is failed to pay the service tax amounting to Rs.1,80,46,267/- (Rs.1,13,29,278/- + Rs.67,16,989/-) on the value of output services of Rs.16,43,37,556/- declared in the ST-3 Returns for the period 2010-11 to 2014-15 as export of services, for which they failed to substantiate their claim of export with proper documentary evidences. I, therefore, hold that the party is liable to pay service tax amounting to Rs.1,80,46,267/- on the value of output services of Rs.16,43,37,556/- during the period 2010-11 to 2014-15 in terms of provisions of Rule-6 of the Service Tax Rules, 1994 read with Section 68-of the Finance Act, 1994 and accordingly, the same is liable to be recovered from them with interest in terms of the provisions of Section 73 and Section 75 of the Finance Act, 1994 respectively.

4.9 From the above it is evident that benefit of 'Export of Service' has been sought to be denied on the basis of verification report given by the range officer to the adjudicating authority. The entire benefit as claimed is sought to be denied for the reason that co-relation cannot be established between invoices with FIRC's. Appellant claim that they have submitted all the documents before the adjudicating authority and the range superintendent. We do not find anything in the impugned order to support that the report of the range officer which has been made the basis for denial of the benefit of "export of services" was made available to the appellant. Though we agree with the finding recorded in the impugned order to the effect that ample opportunity has been given to the appellant for establishing their claim to the "Export of Service" but still in our view the report of range officer should have been disclosed by the adjudicating authority to the appellant before relying solely on the same. Further it is not even the case that no FIRC's were produced. Range officer has recorded that some FIRC's were produced evidencing the receipt of payments in foreign exchange. Benefit of export of services should have been allowed to the extent of receipts in foreign exchange. Thus we find it fit that on this

account the matter needs to be remanded back to original authority be reconsideration after disclosing the report of the range officer to the appellant.

4.10 In respect of "sponsorship services" impugned order records the findings as follows:

> *"5.8 As regards to proposed demand of service tax amounting to Rs 61,800/-, it has been alleged that the party had incurred expenses on Sponsorship, which is taxable in terms of Rule 2 (d) (vii) of the Service Tax Rules, 1994 as amended and according to which the person liable for paying the service tax on such service is the body corporate or firm receiving such service. Therefore, the entire service tax liability on the sponsorship expenses so incurred by the party, which is a firm, is to be paid solely by service receiver viz. the party.*
>
> *5.8.1. In their defence the party has contended that during the period 2010-11 and 2011-12, they booked an expense under the head sponsorship, on which department has raised a service tax demand of Rs. 61,800/-; they have not provided any sponsorship service rather it has provided financial aid in the form of donation; as per the provisions of Section 65(105)(zzzn) and Section 65(99a) of the Finance Act, 1994, service tax is not leviable on such payments.*
>
> *5.8.2. In this regard, I find that the sponsorship service was taxable under Section 65(105)(zzzn) of the Finance Act,1994 during the period 2010-11 and 2011- 12 which reads as under:*
>
> > *"Taxable service means any service provided or to be provided to any person, by any other person receiving sponsorship, in relation to such sponsorship, in any manner"*

Further, the Section 65(99a) of the Finance Act, 1994, applicable during the relevant period define the term 'sponsorship' as under:

> *'Sponsorship" includes naming an event after the sponsor, displaying the sponsor's company logo or trading name, giving the sponsor exclusive or priority booking rights, sponsoring prizes or trophies for competition; but does not include any financial or other support in the form of donations or gifts, given by the donors subject to the condition that the service provider is under no obligation to provide anything in return to such donors.*

Further, Rule 2(d)(vii) of the Service Tax Rules, 1994, as applicable during the relevant period reads as under:

> *"(d) person liable for paying the service tax means*
>
> *(vii) in relation to sponsorship service provided to any body corporate or firm located in India, the body corporate or, as the case may be the firm who receives such sponsorship service;'*

In view of the above, in respect of 'sponsorship service`, the person liable to pay service tax is the body corporate or the firm, who receives such service.

5.8.3. The party has disputed the nature of service by contending that the amount booked by them under the head sponsorship does not pertain to any sponsorship service rather it was a financial aid provided in form of donation. In this regard, the jurisdictional Range Superintendent in his report dated 14.03.2018, inter alia, reported as under:

> *During the period 2010-11 and 2011-12, party had booked an expense under the head sponsorship, on which department has raised a service tax demand of Rs 61,800/-.*
>
> *In this regard it is submitted that the party has submitted that they have not provided any sponsorship service and*

rather have provided financial aid in the form of donation. However, party has not provided any documentary evidences in support of their defence. Therefore, same is liable to be confirmed.

In view of the above report, it is apparent that the party has failed to provide any documentary evidence to the effect that they have incurred the said expenses, booked under the head sponsorship, towards financial aid in form of donation not on account of sponsorship. I, therefore, hold that the party has evaded payment of service tax amounting t Rs.61,800/- on the expenses incurred on account of sponsorship services during 2010-11 to 2011-12 in contravention of provisions of Rule 2(d)(vii) and Rule 6 of the Service Tax Rules, 1994 read with Section 68 of the Finance Act,1994, as applicable during the relevant period. Accordingly, the same is liable to be recovered from them with interest in terms of provisions of Section 73 and Section 75 of the Finance Act, 1994 respectively."

4.11 Appellant do not very seriously challenge this demand. There only submission is that the amount paid by them was a donation and not consideration for the service received. However we do not find any merits in the submission for the reason that appellant have themselves booked said expense in their book of accounts as sponsorship expense. Further they have not produced any document at any stage either before the audit, or the adjudicating authority or before us to negate the same and show that this amount was towards donation. We uphold the demand made on this account.

4.12 In respect of demand made on account of reconciliation made between the entries in the Financial Records with the entries in ST-3 return the impugned order records the findings as follows:

5.9. It has been further alleged in the show cause notice that the party has evaded payment of service tax amounting to Rs.1,00, 10,547/- involved on the differential

amount of receipts amounting to Rs. 8,18,12,038/- as shown in the ST-3 Returns and as reflected in the Balance Sheets for the period 2010-11 to 2014-15 by suppressing actual the value of services in their ST-3 Returns of the said period as detailed below:

Period	*ST-3 Returns (Half Yearly)*	*ST-3 Returns (Financial Year wise)*	*As per Balance sheet and Profit and Loss account*	*Difference between Gross Receipts as shown in ST-3 return and as being reflected in Balance sheet*	*Service Tax Rate*	*Service Tax payable on differential amount*
04/2010 - 09/2010	*9,84,06,461*	*18,33,19,328*	*18,82,42,705*	*49,23,377*	*10.3*	*5,07,108*
10/2010 - 03/2011	*8,49,12,867*					
04/2012 - 06/2012	*2,50,92,840*	*6,06,26,614*	*11,90,73,196*	*5,84,46,582*	*12.36*	*72,23,998*
07/2012 - 09/2012	*1,97,90,396*					
10/2012 - 03/2013	*1,57,43,378*					
04/2013 - 09/2013	*3,53,82,631*	*7,44,60,632*	*8,86,84,753*	*1,42,24,121*	*12.36*	*17,58,101*
10/2013 - 03/2014	*3,90,78,001*					
04/2014 - 09/2014	*3,12,68,202*	*6,79,75,151*	*7,21,93,109*	*42,17,958*	*12.36*	*5,21,340*
10/2014 - 03/2015	*3,67,06,949*					
TOTAL	*38,63,81,725*	*38,63,81,725*	*46,81,93,763*	*8,18,12,038*		*1,00,10,547*

Further the financial year-wise receipts made by the party as reflected in the Balance Sheets and Profit & Loss Account of the financial year 2010-11, 2012- 13, 2013-14 and 2014-15 are as under:

(In Rs.)

	2010-2011	2012-2013	2013-2014	2014-2015
Professional Receipt	18,82,42,705/-	11,85,81,750/-	7,44,60,632/-	6,62,84,473/-
Client Adjustments			1,42,24,121/-	59,08,636/-
Prior Period Adjustments		4,91,446/-		
Total	18,82,42,705/-	11,90,73,196/-	8,86,84,753/-	7,21,93,109/-

5.9.1. The party has not submitted any defence in this regard in their reply dated 23.05.2017. However, they under their subsequent defence reply vide letter dated 18.07.2017, followed by the letter dated 18.12.2018, contended that the differential amount of Rs.7,68,88 681/- between the balance sheet and the service tax returns for the F.Y. 2012-13 to 2014-15 is pertaining to exported exempted services which was not duly reflected in the service tax returns for the said period.

5.9.2. I find that party has shown the receipt of money on account of their business activities in their Balance Sheets/Profit & Loss Accounts under the head 'Professional Receipt', 'Client Adjustment" and 'Prior Period Adjustments'. I further find that the party vide their earlier letter dated 06.12.2016 has given a reply on the taxability of the said components of receipts shown in the Balance Sheet/Profit & Loss Account for the said period. As per the submission made by the party in the said letter, the 'Professional Receipt' includes export services, exempted revenue and taxable non/legal service provided and received during the year, but the same is not supported by any cogent documentary evidence as the figures for the such exports and the exempted services have already been shown by the party in their ST-3 returns. Therefore, if the said receipts reflected in their balance sheet is varied from the Gross receipt figures as provided by the party in their ST-3 return, it should be supported by proper documentary evidences, which the party has failed to provide. Further, the submission made by the party in the said letter that 'Client Adjustments' and 'Prior Period Adjustment includes

previous year's adjustments towards revenue earned/ received for services provided in relation to export of services, exempted services and legal (domestic) and miscellaneous services provided by them, is also not supported by any documentary evidence to challenge the taxability of the said receipts so received by them. In any case, such Gross Receipt figures reflected in their Balance sheet should also be reflected in their ST-3 returns irrespective of whether such receipts where in relation to export of services, exempted services and legal (domestic) and miscellaneous services provided by them and if they did not do that, they should have provided valid reasons duly supported by the proper documentary evidences, which they failed to do in the instant case.

5.9.3. In view of the above discussion, I find that the contentions put forth by the party in respect of the said differences in value i.e. short depiction of value in the ST-3 returns vis-a-vis the value depicted in the Balance Sheet (s) do not hold valid statutory grounds and therefore, not sustainable. Moreover, the party did not produce any cogent documentary evidence in support of their aforesaid contentions made in the defence reply and the letter dated 06.12.2016, neither at the time of Audit nor before the jurisdictional Range Superintendent despite repeatedly requested by him before the issuance of the show cause notice. It is on record that even during the course of adjudication proceedings they were asked by the jurisdictional Range Superintendent vide his office letter dated 23.10.2018 to submit the reasons of difference between the revenue figures shown in the balance sheet and the ST-3 returns during the period 2010-11 to 2014-15 duly certified by the auditors, but they again failed to provide the same.

5.9.4. In view of the above discussion, the aforesaid differential amount of RS. 8,18,12,038/- between the ST-3

returns and the Balance Sheets for the period 2010-11 to 2014-15 is to be treated as the gross amount charged/receipt or consideration towards the provision of service by the party. In this regard, the sub-section (3) of Section 67 of the Finance Act, 1994 provides that the gross amount charged for the taxable services shall include any amount received towards the taxable service before, during or after provision of such service. Explanation (a) appended to the said Section 67 stipulates that 'consideration', inter alia, includes (i) any amount that is payable for the taxable services provided or to be provided; and (ii) any reimbursable expenditure or cost incurred by the service provider and charged, in course of providing or agreeing to provide a taxable service. Further, sub rule (1) of the Rule 5 of the Service Tax (Determination of Value) Rules, 2006 provides that where any expenditure of costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be included in the value for the purpose of charging the service tax on the said service. Therefore, the aforesaid differential amount received by the party, which was not declared by them in the ST-3 returns of the relevant period, is the consideration received by then in the course of provision of taxable service and hence liable to service tax in terms of the provisions of Rule 6 of the Service Tax Rules, 1994 read with Section 68 of the Finance Act, 1994. I, therefore, find that the party has evaded payment of service tax amounting to Rs.1,00,10,547/- by contravening the provisions of Rule 6 of the Service Tax Rules, 1994 read with Section 68 of the Finance Act, 1994. Accordingly, I hold that the service tax amounting to Rs.1,00,10,547/- is liable to be recovered from them with interest in terms of provisions of Section 73 and Section 75 of the Finance Act, 1994 respectively.

4.13 Appellant have contested this demand stating that they have along with the appeal filed an Annexure F, a detailed

reconciliation chart along with the nature of income duly supported by a Chartered Accountant Certificate (Annexure G). However no such document is available in the file. In absence of any such document to explain the differences between the figures in ST-3 return we do not find any merits in the submissions made by the appellant. Impugned order has carefully analyzed the nature of the receipts which were not reflected in the ST-3 returns. These receipts have been put under the categories of "professional receipts", "client adjustment" and "prior period adjustments". All three receipts are in respect of the services provided by the appellant to their clients, and would be covered by the definition of services under Section 65B (44) of the Finance Act, 1994. In absence of any explanation in respect of these services we find merits in the confirmation of this demand.

4.14 Appellant has claimed the cum tax benefit for determining the value of tax able service. Impugned order records the findings as follows:

> *5.11. I further find that the party has claimed benefit of cum duty price in terms of Section 67(2) of the Finance Act, 1994. In this regard, the party has contended that the gross amount received by them from their clients (against exports & exemptions) has to be treated as inclusive of the amount of service tax payable in terms of provisions of Section 67(2) of the Finance Act, 1994; the amount received should be taken as cum duty price and the value should be derived therefrom; in the instant case, the department has treated the gross amount received by them itself as the value of taxable service, without making any adjustments for service tax included in it*
>
> *5.11.1. In this regard, I have carefully considered the request of the party. I find that on the one hand the party is disputing the levy of service tax by claiming exemption on account of export and other exempted services on the other hand the party is claiming the benefit of cum duty price.*

This is a paradox and mutual contradiction in the party's stand. The party is not paying service tax on the pretext that they were providing exempted export services and other exempted services which they failed to prove to before the department

5.11.2. I find that the Section 67 (2) of the Finance Act, 1994 provides that:

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

In view of the above provision, it is clear that if the gross amount does not inclusive of service tax, it cannot be treated as cum service tax price. In the instant case it is not disputed that the party had claimed exemption of service tax in respect of export and other exemptions, therefore, it is apparent that the gross value of such exempted services declared by the party in the invoices and the ST-3 returns do not include the service tax. Thus, in terms of the aforesaid provisions of Section 67(2) of the Act, ibid, such value cannot be treated as the cum service tax price.

5.11.3. In support of my above contention, I would like to place reliance on the judgement of the Hon'ble Tribunal passed in the case of Shakti Motors Vs Commissioner, Service Tax, Ahmedabad [2008 (12) STR 710 (Tri. Ahmad.) wherein the Hon'ble Tribunal has observed that ***"if the invoice does not specifically say that the gross amount charged includes service tax, it cannot be treated as cum-service tax-price. Therefore, in the-absence of any-evidence to-show that -invoices had indeed been prepared in this manner, cum tax value benefit cannot be extended"****. Further the Hon'ble Apex Court in the case of M/s Amrit Agro Industries Ltd. Vs. CCE. Ghaziabad [2007 (2010) ELT 183 (SC)] has held that unless*

it is shown by the manufacturer that price of goods includes excise duty payable by him, no question of exclusion of duty element from price will arise for determination of value under section 4(4)(d)(ii) of the Central Excise Act,1994. Moreover, in the case of CCE Pune-I Vs Thermax Ltd. [2009 (235) ELT 737 (Tri-Mumbai)], the Hon'ble Tribunal has made the following observations

"33.2 As per facts of the case, we find that during the relevant period June, 1991 to September, 1997, the assessee was paying concessional rate of duty as applicable to heat pumps under various notifications, such as, Notification No. 155/86-C.E., Notification No. 54/93-C.E., etc. In the case of Srichakra Tyres Ltd., there was no exemption notification involved. In view of this, Larger Bench decision in Srichakra Tyres Ltd. is not relevant for the present purpose. In the facts of this case, the Apex Court decision in Amrit Agro Industries Ltd. is more appropriate. Para 14 of this judgment which is relevant is reproduced below:

"14. In our view, the above judgments in the case of Maruti Udyog Ltd. and Srichakra Tyres Ltd. have no application in the facts of the present case. In the case of Asstt Collector of Central Excise v. Bata India Ltd. reported in 1996 (84) E.L.T. 164 this Court held that under section 4(4)(d)(i) of Central Excises and Salt Act, 1944 the normal wholesale price is the cum-duty price which the wholeseller has to pay to the nanufacturer-assessee. The cost of production, estimated profit and taxes on manufacture and sale of goods are usually included in the wholesale price. Because the wholesale price is usually the cur-duty price, the above section 4(4)(d)(i) lays down that the "value" will not include duty of excise, sales tax and other taxes, if any, payable on the goods. It was further held that if,

however, a manufacturer includes in the wholesale price any amount by way of tax, even when no such tax is payable, then he is really including something in the price which is not payable as duty. He is really increasing the profit element in another guise and in such a case there cannot be any question of deduction of duty from the wholesale price because as a matter of fact, no duty has actually been included in the wholesale price It was further held that the manufacturer has to calculate the value on which the duty would be payable and it is on that value and not the cum-duty price that the duty of excise is paid. Therefore, unless it is shown by the manufacturer that the price of the goods includes excise duty payable by him, no question of exclusion of duty element from the price for determination of value under section 4(4)(d)(ii) will arise."

5.11.4. In view of the above discussion, the ratio of judgement of Hon'ble Apex Court in the case of CCE Vs Maruti Udyog Ltd., reported in 2002 (49) RLT1 (SC) and Sri Chakra Tyres reported in 1999 (108) ELT 361 and the other judgements relied upon the party in support of their contention is clearly distinguished in the instant case as the factual position and circumstances of the case involved in these judgements are entirely different from the facts & circumstances involved in the present case. It is a settled position in law that facts of a decision relied upon have to be shown to fit the factual situation of a given case and without such discussion reliance could not be placed on a decision. The Hon'ble Apex Court in the case of Ambica Quarry Works v. State of Gujarat & others reported in 1987 (1) SCC 213, observed that ***"the ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it"****.*

5.11.5. I, therefore, hold that the benefit of cum duty price, as claimed by the party cannot be extended to them. The attempt of the party is only an afterthought to gain inadmissible benefit.

4.15 Though based on certain decisions of tribunal and other authorities, we are not in position to uphold the order denying the cum tax benefit. The cum tax benefit/ cum duty benefit etc., needs to be allowed in the case where the person has collected the gross amount without indicating the quantum of tax/ duty separately in the documents of transaction. That is the ratio of the decision of the Apex Court in the case of Sri-Chakra Tyres and other similar decisions. If the person was collecting the amounts towards tax/ duty in the gross value then the same would have been automatically be reflected in the documents of transaction. The basic reason for extending such a benefit is the nature of indirect taxes i.e. the tax which is to be borne by the client of the appellant and the appellant is merely conduit for depositing the same with the exchequer. In case of finalized transactions, the appellant would have no opportunity to recover these from his clients, and would be paying these amounts to the exchequer as direct tax. To overcome such a situation allowing such a benefit has been envisaged in the statute. The gross value is treated to be inclusive of the taxes payable. In case of demands based on the financial records, it is apparent that the amounts shown as receipts would be final and complete settlement of transaction between the appellant and the service recipient. Thus we do not find any merits in the findings recorded in the impugned order. Even in the case of Thermax relied in the impugned order, the benefit was not denied outright, but the matter was remanded to the original authority for re-examining the issue on this account. Mumbai bench held as follows:

"33.3 *However, as the revenue has not placed on record any documentary evidence to show that the total price realised by the assessee is not the cum-duty price, the*

matter requires re-examination by the original authority with reference to the relevant records and for this limited purpose, we deem it fit to remand the matter to the original authority by setting aside this part of the order of Commissioner (Appeals). The original authority shall give adequate opportunity of hearing to the assessee and consider the relevant records which may be produced by the assessee before passing the order afresh in this regard."

Thus in view of the above the benefit of cum tax can be denied when it can be established that the gross amount was not inclusive of service tax payable. For the purpose of ascertaining the same the matter needs to be remanded back to original authority.

4.16 Impugned order records findings as follows on limitation:

5.12. I now take up the issue of extended period of demand, which was proposed to be invoked in the impugned show cause notice. In this regard the party has contended that invoking of larger period, under the proviso to Section 73 (1) of the Finance Act, 1994 is not at all warranted in the present case and the present SCN is time barred; the proviso of Section 73(1) of the Act ibid during the referred period is not applicable in the present case as there was no willful suppression of facts on the part of assessee, even, the department was very well aware of the activities of the assessee as already a show cause notice was issued on the assessee.

5.12.1. I find that the subject issue is essentially based on facts. In order to decide upon this issue, it is imperative to analyze the legal provisions of the erstwhile Section 73 of the Finance Act, 1994 bid, which are reproduced below: -

Section 73. Recovery of Service tax not levied or paid or short-levied or short-paid or erroneously refunded:-

(1) Where any Service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Assistant Commissioner of Central Excise or as the case may be, the Deputy Commissioner of Central Excise may, within one year from the relevant date, serve notice on the person chargeable with the Service tax which has not been levied or paid or which has been short-levied or short-paid)r the person to whom such tax refund has erroneously been made, requiring him "to show cause why he should not the amount specified in the notice:

provided that where any Service tax has not been levied or paid or has been short levied or short-paid or erroneously refunded by reason of-

(a) fraud; or

(b) collusion ;or

(c) willful mis-statement; or

(d) suppression of facts; or

(e) Contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of Service tax (emphasis supplied)

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

Explanation: - Where the service of the notice is stayed by an order of a court, the nod of such stay shall be excluded in computing the aforesaid period of five years or six months, as the case may be.

5.12.2. A perusal of the above framed provisions of Section 73 (1) of the Act, ibid stipulates that where any Service tax has not been levied or paid by reason of (a) fraud; or (b) collusion; or (c) willful mis-statement; or (d) suppression of facts; or (e) contravention of any of the provisions of this

Chapter or of the rules made there under with the intent to evade payment of the service tax, show cause notice may be served upon a person chargeable with the Service tax within five year from the relevant date

5.12.3. Further, as alleged in the impugned show cause notice that the said willful and deliberate non-payment of due amount of service tax and wrong availment of the CENVAT credit come to the knowledge of the department only during the course audit of records of the party and evidently the same was never revealed by the party on their own accord. Therefore, the provisions of extended period of five years as provided for under the proviso to Section 73 of the Finance Act, 1994 is invokable in this case for suppressing the material facts from the department. The Section 73 of the Finance Act, 1994, as amended provides that, where any service tax has not been levied or paid or has been short-levied or short-paid by reasons of fraud, collusion, willful misstatement, suppression of facts, or contravention of any of the provisions of this Chapter or of the rules made there-under with the intent to evade payment of the service tax, the Central Excise Officer may, within a period of 5 years from the relevant date serve notice on the person chargeable with the Service tax, which has not been levied or paid. The various case laws referred by the party are not applicable to the present case as the facts and circumstances are different. It is needless to recapitulate that this case has arisen out only after the audit of records of the party by the officials of the Department. Thus, it is evident that the party has intentionally and wilfully suppressed the actual value of taxable services provided by them and did not disclose the material facts by itself through the prescribed statutory ST-3 returns, whereby the said values have escaped appropriate assessment for levy and payment of the service tax

5.12.4. I find that even during the course of audit and subsequent follow up by the jurisdictional Range Superintendent, the party tried to mis- lead the department by way of non-submission requisite documents/ information despite repeatedly requested by the department through various correspondences made in this regard, which shows their malafide intention to evade their due service tax liability Thus, the party has contravened Rule 6 and Rule 7 of the Service Tax Rules 1994 read with Sections 67, 68 and 70 of the Finance Act, 1994. Further the party has willfully contravened the provisions of Rule 9(1) of the CENVAT Credit Rules, 2004 as they have not only availed the inadmissible CENVAT credit on the basis of invalid documents but also deliberately utilized the same for payment of service tax with the intent to evade the service tax. As regards the party's plea that the department was very well aware of the activities of the assessee as already a show cause notice was issued on the assessee, I do not find any force in the same as I find that said show cause notice was issued to the party on entirely different issue and that has no co-relation, in any manner, with the issues involved in the instant show cause notice. Moreover, it is on record that the party has suppressed the vital information and material fact regarding their true value of the taxable services and leviability of the service tax thereon as they have never co-operated with the department and deliberately did not provide complete information/documents requested from them by the Audit and subsequently by the jurisdictional Range Superintendent. The party was trying to hoodwink the department and at the same time was making false and misleading pleading. It is, therefore, clear that the party has suppressed the facts from the department by not disclosing all the material facts required for verification with the intention to evade payment of the service tax. Accordingly, I hold that the extended period of limitation is applicable in

terms of proviso to Section 73(1) of the Finance Act, 1994.

5.13. The party has further contended that the demand of the service tax for the period 01.04.2010 to 31.03.2013 is time barred. In this regard, I find that the impugned notice was issued to them on 20.12.2016 subsequent to audit of their records in March, 2014. As per proviso to Section 73(1) of the Finance Act, 1994, the department has- time limit of five years for issue of show cause notice from the "relevant date" in case the provisions of the Act, ibid have been contravened with the intent to evade payment of tax. The provisions defining "relevant date" are contained in Clause (6) of the Section 73 of the Finance Act, 1994, which reads as under:

"(6) For the purposes of this section, "relevant date" means,

(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid -

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules,

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder,

(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made there under, the date of adjustment of the service tax after the final assessment thereof;

(iii)in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund.]"

5.13.1. In the instant case, I find that the party had filed the periodical half yearly ST-3 returns for the period 2010-11 on 22.01.2013 while the ST-3 return for the period April,2011 to September,2011 was filed on 22.12.2011. In view of the above clause (6)(i)(a) of the Section 73 of the Finance Act,1994 the notice can be served within 5 years from the date of filing of ST-3 return. Since the ST-3 return for the period April,2011 to September,201 1 was filed on 22.12.2011 (being earliest date), it was taken for the purpose of calculation of period of limitation of 5 years in terms of clause (6)(i)(a) of the Section 73 of the Finance Act,1994 and accordingly, the impugned show cause notice can be served upon the party on or before 21.12.2016, I find that the impugned show cause notice was served upon the party on 20.12.2016, which is very well within the limitation of 5 years as prescribed under the proviso to Section 73(1) of the Finance Act,1994. Therefore, the contention of the party that the show cause notice for the period 01.04.2010 to 31.03.2013 is time barred by limitation is not sustainable.

4.17 The appellant has challenged the invocation of extended period of limitation. They contend that the demand is revenue neutral as the amount paid by them would be available as cenvat credit. The argument so advanced by the appellant was discarded by the larger bench of tribunal in case of Jay Yushin Ltd. [2000 (119) E.L.T. 718 (Tribunal - LB)]

13. *In the light of the above discussion, we answer the reference as under:*

(a) Revenue neutrality being a question of fact, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme;

(b) Where the scheme opted for by the assessee is found to have been misused (in contradistinction to mere deviation

or failure to observe all the conditions) the existence of an alternate scheme would not be an acceptable defence;

(c) ***With particular reference to Modvat scheme (which has occasioned this reference) it has to be shown that the Revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods;***

(d) We express our opinion in favour of the view taken in the case of M/s. International Auto Products (P) Ltd. (supra) and endorse the proposition that once an assessee has chosen to pay duty, he has to take all the consequences of payment of duty.

4.18 The demand of interest will follow the confirmation of the demand. Impugned order records plethora of case law which hold so and we do not have any reason to hold to the contrary. Thus demand of interest in terms of Section 75 is justified and upheld.

4.19 Appellant have challenged the penalties imposed upon them. Impugned order records the findings as follows:

5.15. I find that the party has contravened the provisions of Section 67, 68 & 70 of the Finance Act, 1994, Rule 6 and Rule 7 of Service Tax Rules, 1994 as they knowingly and deliberately did not pay the due service tax with the intent to evade payment of service tax by resorting to suppression and mis-declaration and this fact was revealed and came to the knowledge of the department only when the records/documents were subjected to detailed scrutiny by the departmental Audit. I further find that by not filing the prescribed service tax returns on due dates and by not declaring the true value of the services being rendered, they suppressed the vital information from the knowledge of the department. I, therefore, find that the party acted on their own, failed to file prescribed service tax returns on due

dates, failed to declare the true value of services rendered, failed to pay due service tax. This being conduct of the party not only the mens-rea but also actus-reus is proved. More so the party being the law firm, the tenet of ignorance of law cannot be pleaded. Thus, by their aforesaid acts of various omission and commission, they indulged in evasion of huge payment of the service tax and this way rendered themselves liable to penal action under Section 78 of the Finance Act, 1994.I further observe that in the present system of self-assessment documents like invoices and other transaction details are not supplied to the Department, the intention will have to be believed as that of evasion by way of suppression or mis-declaration. Once the details are not submitted to the Department, it amounts to mis-declaration or suppression which is rightly invoked in the case before me. I, therefore, conclude that the element of suppression with the intent to evade payment of service tax is conspicuous by the peculiar facts and circumstances of the case as discussed above.

5.15.1. My above view with reference to penalty under Section 78 of the Finance Act, 1994 gets support from below mentioned case laws also,:

Shiv Network Vs CCE, Daman reported in 2009 (014) STR 680 (Tri. Ahmd.) *wherein it has been held that* ***"3.2 In view of the Hon'ble Supreme Court judgment with regard to Section 11AC of Central Excise Act, which is similar to Section 78 under Finance Act, 1994, penalty under Section 78 is mandatory unless duty, interest and penalty to he extent of 25% have been paid. (UOI vs. M/s Dharmendra Textile Processors reported in 2008 (89) RLT103 (SC-LB) =2008-TIOL-192-SC-CX- LB.). Therefore penalty under Section 78 is also mandatory and appellants have not made out a case for exercise of discretionary power under Section 80 of Finance Act, 1994".***

CCE, Vapi VS Ajay Sales Agencies reported in 2009 (013) STR 0040 (Tri. Ahmd.)*, wherein it has been held that in Para 3 of the judgment* ***" .... I find considerable force in the arguments advanced by learned SDR on behalf of the Revenue and I also find that the judgment of Larger Bench ETA Engineering Ltd, v. CCE, Chennai, 2006 (003) STR 429 = 2004 (174) ELT 19 cited by leared SDR in support of his argument about the penalty under Section 76 is relevant and therefore, the penalty under Section 76 has to be enhanced to Rs. 3,26,329/-. As regards mandatory penalty under Section 78, penalty of 100% is minimum and mandatory and therefore the penalty of Rs. 1,000/- imposed and upheld by the lower authority has to be enhanced to Rs. 3,26,329/-. However, in terms of provisions of Section 78, if the respondent pay the penalty within 30 days of the receipt of this order, the same shall be 25%."***

The Hon'ble High Court of Punjab & Haryana, in the case of ***CCE Vs Haryana Industrial Security Services reported at 2011 (021) STR 0210 (P&H)****, has also upheld the penalty equal to the service tax imposed under Section 78 of the Finance Act, 1994. The Hon'ble Karnataka High Court has also taken similar view in the case of* ***CCE, Mangalore Vs K Vijaya C Rai reported at 2011 (021) STR 0224 (Kar.)****.*

5.15.2. I n the light of above discussion, I hold that the penalty under section 78 of the Finance Act, 1994 is imposable upon the party. am also placing reliance on the case of Union of India Versus Dharamendra Textile Processors & Ors. (2008 (231) ELT 0003 (SC)] wherein the Hon'ble Supreme Court of India [Larger Bench] affirmed the findings of the case of Chairman, SEBL y. Shriram Mutual Fund - (2006 (5) SCC 361). In Para- 33 of the

Chairman, SEBI's case (supra), the Hon'ble Supreme Court observed that

"in a catena of decisions it has been held that mens rea is not an essential element for imposing penalty for breach of civil obligations. Some of the case laws referred therein are reproduced below:-

In Corpus Juris Secundum, Vol. 85, at p. 580, Para 1023 it is stated thus: 4 penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws

R.S. Joshi v. Ajit Mills Ltd.: (SCC p. 110, Para 19)

Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by mens rea. The classical view that 'no mens rea, no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Section 37(1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty.

5.15.3. I, further find that once it is established that ingredients to attract operation of Section 78 of the Finance Act, 1994 are present in a case, the discretion to quantify the amount of penalty ends. I am placing reliance upon the case of Union of India Versus Rajasthan Spinning & Weaving Mills (2009(238) ELT 0003(SC)) wherein the apex court held ***"….. though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the Section, once the***

Section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under Sub-section (2) of Section 11A."

5.15.4. Accordingly the case laws cited by the party in support of their contentions have lost their relevancy in view of the above facts Further, - would like to place reliance in the case of Collector of Central Excise, Calcutta Vs M/s Alnoori Tobacco Products 2004 (170) ELT 135 (S.C).) decided by the Hon'ble Supreme Court of India wherein it was held that courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. The relevant paras of the said case are reproduced below for sake of reference

"11. Courts should not place reliance on decisions without discussing as to how the factual situation fits n with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton (1951 AC 737 at p. 761), Lord Mac Dermot observed:

"The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract

from the great weight to be given-to-the language-actually-used-by that most distinguished judge.

13. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

In view of the above, I hold that penalty under the Section 78 of the Finance Act, 1994 is imposable in this case for the entire period of dispute as mentioned in the notice to show cause.

5.15.5. In respect of the penalty proposed in the show cause notice under the Rule 15 of the CENVAT Credit Rules, 2004 for irregular availment and utilization of CENVAT credit and contravention of related provisions of law, it is clear from the facts discussed supra that that the party has availed and utilized irregular CENVAT credit amounting to Rs.89,63,694/- in contravention of the Rule 9(1) of the CENVAT Credit Rules, 2004 by resorting to suppression and this fact of availment and utilization of the irregular CENVAT credit came to the notice of the department only when records of the party was audited by the departmental Auditors. It is therefore, established that the party had availed and utilized irregular CENVAT credit with the intent to evade payment of service tax and accordingly, I hold that they are also liable to penal action under the Rule 15 of the CENVAT Credit Rules 2004

5.16. The party has also contended that as per the provisions of the Section 80 of the Finance Act,1994, no penalty shall be imposed under Section 76, Section 77 or Section 78 if the assessee proves that there was reasonable cause for said failure, in context of the penalty provisions the term reasonable cause would mean a cause which is beyond the control of assessee. In this regard, As discussed supra that there are ample evidences against the party, which is going to prove that they knowingly and deliberately

did not pay the due service tax with the intent to evade payment of the service tax by resorting to suppression and mis-declaration. They have intentionally and willfully suppressed the actual value of taxable services provided by them and did not disclose the material facts by itself through the prescribed statutory ST-3 returns, whereby the said values have escaped appropriate assessment for levy and payment of the service tax. I further find that even during the course of audit and subsequent follow up by the jurisdictional Range Superintendent, the party tried to mis-lead the department by way of non-submission of requisite documents/information despite repeatedly requested by the department through various correspondences made in this regard, which shows their malafide intention to evade their due service tax liability. In view of the above, the claim made by the party from waiver of penalty under Section 78 of the Finance Act, 1994 in terms of provisions of the Section 80 of the Finance Act,1994 is not maintainable.

4.20 As we have held in favour of invocation of the extended period of limitation, the penalty under section 78 will follow as has been held by Hon'ble Supreme Court in case of Rajasthan Spinning and weaving mills referred in the impugned order. We would also like to point out that appellant being a renowned legal/ law firm is well aware of the law and procedures. They should act as torch bearers for implementation of the same whereas we find that they have deliberately not declared the entire receipts in the returns filed by them. They have also not been filing their returns at the prescribed intervals and have sought to escape the proper scrutiny of their records in time bound manner with evade payment of due taxes. Such conduct of the appellant needs to be dealt severely within the four corners of law.

4.21 Summarizing our findings

(i) with regards to denial of CENVAT credit and utilization thereof matter remanded to the original authority (para 4.7)

(ii) demand made against exports, matter remanded (para 4.9)

(iii) Sponsor ship services, demand upheld (para 4.11)

(iv) demand made by reconciliation of ST-3 returns with the Financial Statements of the Appellant, demand upheld (para 4.13)

(v) benefit of cum tax benefit should be allowed in respect of demand at (ii) and (iv)

(vi) Extended period of limitation is invokable (para 4.17)

(vii) Demand of interest is upheld. (para 4.18)

(viii) Penalties imposed are upheld but need to be re-determined (para 4.20)

5.1 Appeal is partly allowed and the matter remanded back to original authority

(i) redetermination of the quantum of tax payable as per our observations summarized in para 4.21.

(ii) penalty under Section 78, on the basis of re-determined quantum of tax as per (i).

5.2 As the matter is substantially old the adjudicating authority should in remand proceedings decide the matter within three months of the receipt of this order.

(Operative part of the order pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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