

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL No. ST/87164/2016

(Arising out of Order-in-Original No. 35-36/STC-IV/MRRR/16-17 dated 19.5.2016 passed by Commissioner of Service Tax, Mumbai)

Commissioner of Service Tax, Mumbai-IV

Appellant

Vs.

Sasan Power Ltd.

Respondent

Appearance:

Shri Roopam Kapur, Commissioner (AR), for appellant
Shri Vipin Jain, Advocate, for respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)

Hon'ble Mr. Raju, Member (Technical)

Date of Hearing: 15.3.2018

Date of Decision: 22.5.2018

ORDER NO. **A/86503/2018**

Per: Ramesh Nair

This appeal has been filed by the Commissioner of Service Tax, Mumbai – IV against Order-in-original No. 35-36/STC-IV/MRRR/16 – 17 dt. 19.05.2016. The brief facts of the case are that the Respondent had set up an Ultra-mega power project at Singrauli in the State of Madhya Pradesh and for the purpose of raising finance for this project, they availed External Commercial Borrowings (ECBs for short)

from several overseas lenders abroad of which the following four entities were also involved:

Sr. No.	Month & Year, in which the ECBs in foreign currency has been availed by your company	Name of the lender	Amount of ECB Loans (in Million USD)
1	July, 2009	India Infrastructure Finance Company (UK) Limited, London	486
2	December, 2011	Export Import Bank of the United States	650
3	December, 2011	The Export-Import Bank of China, China Development Bank and Bank of China Limited, All of Shanghai	1109
4	March, 2012	Standard Chartered Bank, Mizuho Corporate Bank Ltd & DBS Bank Ltd	150
		Total	2395

2. The revenue initiated investigations against the Respondent with respect to foreign exchange remittances made by the Respondent towards various expenses and fees incurred for raising External Commercial Borrowings (ECB) from various banks and institutions referred to above. Revenue was of the view that all the fee, charges paid by the Respondent to the foreign Banks fall under the category of taxable services of “Banking & Financial Services” and “Legal Consultancy Services” received by them from the Banks/ institutions/ companies based outside India and the

Respondent is liable to discharge the service tax liability on the same under reverse charge mechanism. It was alleged that the services have been specified under section 65 (105) (zm) of the Finance Act, 1994 and under Section 65 (105) (zzzzm) of the Finance Act, 1994 respectively which fall under clause (iii) of Rule 3 of the Taxation of Services (provided from outside India and Received in India) Rules, 2006 (effective till 30.06.2012) or under the provisions of Rule 3 of the Place of Provision of Services Rules, 2012 (w.e.f 01.07.2012) wherein import criteria is based on location of recipient of service. Thus, the "Banking & Financial Services" and "Legal Consultancy Services", provided by a person from outside India to a person in India is taxable in the hands of service recipient under reverse charge mechanism and hence the service receiver was required to pay service tax on such services. Hence the Respondent shall be treated as they themselves have provided service in India and accordingly is liable to pay the Service Tax on the amount equivalent to the amount remitted in foreign currency under reverse charge mechanism under the provisions of clause (iii) of Rule 3 of the Taxation of Services (provided from outside India and Received in India) Rules, 2006 (effective till 30.06.2012) and erstwhile Rule 2 (1) (d) (iv) of the Service Tax Rules, 1994 (in force till 30.06.2012) read with Section 66A of the Finance Act, 1994 (in force till 30.06.2012) and/ or the provisions of Rule 3 of the Place of Provision of Services Rules, 2012 (w.e.f

01.07.2012) and Rule 2 (1) (d) (i) (G) of the Service Tax Rules, 2012 (w.e.f 01.07.2012) read with Section 66C of the Finance Act, 1994 (w.e.f 01.07.2012).

3. The Respondent deposited the service tax liability of Rs.13,53,35,469/- together with interest of Rs.3,64,97,050/- on all expenses and fees, except exposure fees charged by various overseas banks and institutions who had lent loan to the Respondent. However they were of the view that "exposure fees" of 6.747% i.e. USD 41,083,590 charged by the US Ex-Im Bank is an element of 'interest' and they relied upon letters issued by the Bank confirming that no services had been rendered by the said US Ex-Im Bank to the Respondent in lieu of such exposure fee.

4. The Respondent were issued Show Cause Notice dated 18.10.2014 proposing to recover service tax of Rs.30,66,06,734/- on fees and charges remitted or incurred by the Respondent during the period 01.04.2008 to 31.03.2014 for raising ECBs and also proposing to appropriate against the above referred demand, the amount of Rs.13,53,35,469/- already deposited in the course of investigation. It was also proposed to recover interest and impose penalty for failure to discharge service tax liability by due dates under various provisions of the Finance Act, 1994. Another Show Cause Notice dated 04.04.2016 was issued

demanding service tax of Rs. 5,17,22,752/- on the exposure fees liability of the Respondent for the financial year 2014 to 2015. The demands were made on the ground that the Respondent being recipient of services from outside India is liable for tax .

5. The adjudicating authority vide the impugned order confirmed demand of service tax on services on other charges, fee and expenses and on which the service tax was paid by the Respondent. However he set aside the demand of service tax on "Exposure Fee" and also waived the penalty u/s 78 of the Finance Act, 1994. Hence the present appeal by the revenue.

6. Shri Roopam Kapur, Id. Commissioner (AR) appearing for the revenue submits that "Exposure Fee" is collected by Export Import Bank of United States. He submits that the definition of Exposure Fees and Interest Rates as per the "The Export-Import Bank of the United States (Ex-Im Bank) Policy and Planning Division Policy Handbook, June 2005 is as under :

EXPOSURE FEES FOR MEDIUM- AND LONG-TERM FINANCING (PRF.MIA, MINIMUM PREMIUM RATES)

Definition - Exposure fees, also known as risk premia, are charged on financing packages as compensation for the repayment risk assumed by the lender, insurer, or guarantor.

INTEREST RATES

(DIRECT LENDING, COMMERCIAL INTEREST REFERENCE RATE-CIRR)

Definition - Commercial Interest Reference Rates (CIRRs) are the minimum lending rate Export Credit Agencies must charge when providing official financing support for fixed rate loans (through, for example, direct loans or interest makeup).

Relevant portions of Section 1, 5 & 6 from the 'CREDIT AGREEMENT' dated 30.09.2011 among SASAN POWER LIMITED as Borrower. DEUTSCHE BANK TRUST COMPANY AMERICAS, as Ex-Im Facility Agent and EXPORT - IMPORT BANK OF THE UNITED STATES (Ex-Im Bank Transaction No. AP08S392XX India (hereinafter referred to as the "Said Agreement") is reproduced below:

Section 1. Definitions and Principles of Construction.

Term Sheet - "Exposure Fee" shall mean with respect to each Reimbursement, L/C Payment or IDC Advance, the product of (a) the Exposure Fee Percentage multiplied by (b) the amount of such Reimbursement or L/C Payment or IDC Advance,

Section 5. Terms of the Credit. 5.02 Interest Payment. - On each interest payment date and on any date of prepayment of the related Note, the Borrower shall pay to Ex-Im Bank interest in arrears on all amounts disbursed and outstanding from time to time under the credit, or, in the case of a prepayment of the credit, on all amounts so prepaid, calculated at an interest rate per annum equal to 3.66%.

If any payment default shall occur, the Borrower shall pay to the Ex-Im Facility Agent for the account of Ex-Im Bank and the Ex-Im Facility Agent, as the case may be, on demand, interest

on such unpaid amount (to the extent permitted by the applicable law) for the period from (and including) the Payment Default Date (but excluding) the date such amount shall have been paid in full, at an interest rate per annum equal to the higher of: (i) the rate specified in Section 5.02(a) above plus one percent (1%) per annum; or (ii) the applicable rate of interest specified in the Federal Reserve Statistical Release 11.15 (519) as the average monthly rate for the month immediately preceding the date of the relevant Payment Default Date, available at <http://www.federalreserve.gov/releases/H15/data.htm> under the heading of "U.S. government securities" and the subheading of "Treasury constant maturities," for a maturity closest to the duration of the payment Default plus one percent (1%)

Section 6 - Condition precedent

6.02(g)- Exposure Fee, Other Fees and Expenses - Ex-Im Bank shall have been paid the Exposure Fee or arrangements satisfactory to Ex-Im Bank for the payment thereof shall have been made. All other fees and expenses then due and payable under Section 7 shall have been paid.

7. He submits that thus it can be seen from the above, that the Exposure Fee percentage is applied to the total of U.S. Contract Financed Portion amount and local Cost financed portion and IDC financed portion amount only. In the subject agreement the rate of interest is 3.66% and the Exposure fees Amount is 6.747 % i.e. U.S. \$ 41,083,590. US EX-IM bank charges two types of amount for the loan provided to borrowers. One is interest and another is

Exposure Fee. Exposure fee is determined based on various factors such as Category of Country of Borrower Credit Classification of the Borrower, Percentage of Loan Cover, Repayment Period, Drawn-down Period etc. According to the definition of Exposure Fee as given in Credit Agreement and Policy Handbook of The Export-Import Bank of United States 'Exposure fee also known as risk Premia, are charged on financial packages as compensation for repayment risk assumed by the lender, insurer or guarantor'. Hence it cannot be considered as an Interest. He relies upon the letter dated 14.03.2014 issued by Senior Portfolio Manager of Export Import Bank of the United States to state that an Exposure Fee is a fee charged by an export credit rating agency for the risk that a transaction will not be repaid. Such Exposure Fees are determined based on Percentage of cover, Product Offered, Length of Drawdown period, Length of repayment Period". He submits that the above communication dt. 14.03.2014 reveals that exposure fees are akin to interest but it is not interest. Section 65B(30) of Finance Act, 1994 defines the 'interest' as "Interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim, similar rights or obligation) but does not include any service fee or other charges in respect of moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized" and thus the 'Exposure Fee*' can never be considered as an

interest under the provisions of Finance Act, 1994. The Exposure fees have been deducted by US Exim upfrontly i.e. while disbursing the ECB amount to SPL when outstanding amount of loan, amount of disbursement of loan and period of loan are not known to both the parties. The interest can never be computed at the time of sanction of the loan. The Interest cannot be charged twice for the same period whereas in the present case the Exposure and interest were charged separately for the same period on same loan which means that both are different. He also draws parallel of charges of other bank who are charging risk premia in various nomenclatures in addition to fee and interest to state that the risk premia is similar to Exposure fee. The difference between both the cases i.e. US EXIM Bank & the others is that in the first case, the insurance facility is provided by the same bank, which lend the loan amount to the borrower i.e. US Exim Bank, whereas in the other cases, the insurance facility is provided by the other insurance agencies, and the amount of fee (risk premia) collected by the lender Bank, is subsequently paid to the insurance company i.e. Sinasure, NEXI or Euler Hermes etc. It reveals that Exposure Fee is charged by the US Exim Bank as a risk premia for providing Insurance Service, and not as an interest for providing Banking & Financial Service, but being bundled service, it is being classified under Banking & Financial Service. In all cases (i.e. Sinasure Premium NEXI Premium or Euler Hermes Premium etc.), the

Respondent have voluntarily paid Service Tax on such charges (Risk Premia) charged by various ECAs. As per RBI master circular No. RBI/2012-13/70 dated 2.07.2012, the banks are free to determine Rate of interest and for which they should factor risk premium, however once an interest rate is fixed, there cannot be a separate interest rate for covering the risk premium. Other fees are also charged like Exposure fee such as commitment fee but they are in the nature of charges and not interest. As per CBEC Circular No. 137/62/2011- ST dt. 21.10.2011 it has been clarified that Commitment Charges are in nature of charges for services rendered and not interest. According to the definition, as provided under Finance Act, 1994 after negative list regime, interest means interest payable in any manner in respect of moneys borrowed or debt incurred (including a deposit, claim, similar rights or obligation) but does not include any service fee or other charges in respect of moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized. The intention of government is very much clear to exempt only interest, but to tax various fees/charges known by any name. He relied upon the judgments in case of CCE, New Delhi Vs. Connaught Plaza Restaurant Pvt. Ltd., New Delhi 2012 – TIOL – 114 – SC- CX. He further relied upon the Tribunal's order in case of Punjab National Bank Vs. Commissioner of C. Ex. & Service Tax 2015 (038) STR 0498 Tri. Del wherein it was held that Commitment charges are

liable for service tax and HUDCO Vs. CST, Ahmedabad 2012 (26) STR 531 (TRI). He submitted that direct loans are only a small component of US Exim Bank Function and exposure fee was being charged wherever the loan were also not given by EXIM bank. Thus the Exposure fee could not have been in the nature of interest as the same was charged independently for ensuring guarantee of payments to US Exporters even where the loan was not provided by the EXIM bank. That the aim of said bank is to protect the foreign sales of US Businesses with financial product from risk of non payment and exposure fee is directly concerned with this activity of Bank. That in the article by Patrick Bower, it is categorically mentioned that an exposure fee is the percentage of the loan guarantee or the insurance policy that Exim bank Charges to cover the risk of non payment. The Exposure fee is required to be paid at stage of each disbursal and is not integrally linked to the period of the loan amount. In case the borrower decides to prepay the loan amount, or transfer the loan amount to other bank the exposure fee is still payable. Thus even in case of pre payment the exposure fee remain constant as it has been paid at the time of Disbursal of loan. Similarly the loan period is extended at a subsequent stage, payment of exposure fee is not mandatory, whereas the interest would continue to be charged for the extended period of loan. He submitted that what the exposure fee constitute is the loan guarantee element of the loan given, which ensures that the payment/

interest of seller of goods or services based in the US is safeguarded. This service is normally the function of EXIM bank is insuring the receivables of seller of goods or services and is equivalent to the functioning of Export Credit and Guarantee Corporation of India. That in medium and Loan Guarantee as EXIM bank as shown exposure fees as cost to EXIM bank besides processing fees, application fee and commitment fee and show interest as something which was negotiable between lender and borrower. That in RBI form the Exposure fees has been separately shown as separate of interest. He also submitted that the RBI Circular are not applicable to the facts of the present case as it is covered by the ECB guidelines for which Reserve Bank of India has issued separate set of instructions as same are covered under FEMA. The direct loans are given by the EXIM Bank on the Fixed Interest rates based on Commercial Interest Reference Rate which is based on the Bond rates and the CIRR is interpolated on the basis of the period of loan and the respective bond rates. He submitted that the loans by the sovereign authorities is to be linked to the bond rates of the respective country even if OECD agreement is perused. He relies upon the chart of Bond rates for the year 2011 to show that even considering the 1 to 1.3% over the bond rate of 2.3% during the year 2011 the chargeable interest rate would still be lower than 3.66% interest rate charged by the EXIM Bank from the Respondent. The interest even as per OECD

Arrangement on officially supported Export Credits, it excludes any payment by way of premium or other charge for insuring or guaranteeing supplier credits of financial credits. He also submitted that as the demand of service is sustainable hence the Respondent is also liable for interest. That in respect of other services on which service tax was paid by the Respondent, the adjudicating authority has wrongly set aside the penalty. The penalty is also imposable as no service tax was paid even after being made aware of the same and that they had hidden the expenses in their records.

8. Shri Vipin Jain, Id. Counsel for the Respondent supports the impugned order. He submits that they have paid service tax on all charges associated with the loan availed from US Exim Bank and other banks. They have not paid service tax on "Exposure fee" for the reason that it does not pertain to any service. The "Exposure fee" charged by the US Exim bank was an element of interest as apparent from the communication by the Bank wherein it was confirmed that no services had been rendered by the Bank in lieu of such exposure fee. The contention of the revenue that as per Agreement and policy handbook the exposure fee is not described as interest, but either as "fee" or "risk premium" or "compensation for repayment risk" is not correct. It is settled law that the true nature and character of a particular payment is required to be determined not merely by the

terminology or language used in a document, but by examining the totality of the circumstances and the intention of the contracting parties. He relies upon the judgment of Hon'ble Supreme Court in case of CCE Vs. Connaught Plaza Restaurant Pvt Ltd 2012-TIOL-114-SC-CX and submits that the said judgment is equally applicable in the context of service tax law. He also relies upon the judgment in case of Faqir Chand Gulati Vs Uppal Agencies Pvt Ltd 2008-TIOL-147-SC-MISC, the Hon'ble Supreme Court to state that the title or caption or the nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name may usually give some indication of the nature of the document and that the nature and true purpose of a document has to be determined with reference to the terms of the document. From the CBEC Clarification dated 21.10.2011 it is clear that the nomenclature given by the parties to a particular payment is not determinative of its true character. The mere fact that "exposure fees" is described as a fee or risk premium or compensation is not enough to hold that the same is not interest. The Revenue has relied upon the Policy Hand Book of the US Ex-Im Bank which describes Exposure Fees as "compensation" for contending that the said Exposure Fees, having been described as compensation, cannot be regarded as interest. This ground is totally untenable as a Constitutional Bench of the Supreme Court in the case of

Central Bank of India vs. Ravindra reported in 2002 (1) SCC 367 has described interest as "compensation paid by the Borrower to the lender for deprivation or use of his money". The website of US Ex-Im Bank on which reliance was placed by the revenue also describes interest as a "fees". It is, therefore, clear that the expressions "interest", "fees" and "compensation" are not mutually exclusive. The contention of the revenue that as per letter dated 14.03.2014 of the US Ex-Im Bank, the exposure fee has been described as being "akin to the interest rate" and not as interest is not correct. The letter dated 14.3.2014 of the US Ex-Im Bank has been misconstrued and partially relied. The said letter clearly describes Exposure Fees as "a part of the pricing of the loan" and further clarifies that the same is "not fees for any service rendered by the US Ex-Im Bank". The reference in the said letter to such exposure fees being "akin to the interest rate" has to be seen in the context of the remaining contents of the said letter. The Revenue has chosen to pick up only one word in the said letter and read the same totally out of context by ignoring the rest of the letter and the substance of the clarification issued by the said US Ex-Im Bank. A holistic reading of the said letter shows that according to the US Ex-Im Bank, Exposure Fees is an integral part of the interest that it charges for the use of its money, and "is not a fee for any service rendered to the borrower". The contention of the revenue that since interest cannot be charged twice for the

same period, the separate charge recovered from the Respondent by the Ex-Im Bank towards exposure fees and interest itself shows that the two charges are distinct and different from each other is also not correct. Mere bifurcation of interest into two components, i.e. a fixed one (described as interest) and a variable one (described as exposure fees) does not imply that interest was being charged or paid twice. The Revenue has failed to appreciate that it was a practice of US Ex-Im Bank to recover interest by bifurcating the same into two components. This was being done with a view to comply with an OECD agreement which required US Ex-Im Bank to give a break-up of the interest that it was charging by bifurcating the same into two components i.e. Commercial Interest Reference Rates ("CIRR" for short) and Minimum Premium Rate ("MPR" for short). Only as a matter of convenience, "CIRR" was termed as interest, while MPR was termed as "Exposure Fees". Both these components put together constitute interest. This practice followed by the US Ex-Im Bank has now been recognised by the RBI in its Circular RBI/2015-16/273 dated 17.12.2015 by which an MCLR system has been introduced in India which requires interest to be similarly bifurcated into two components i.e. MCLR, which is the base rate, and spread, which represents the credit risk premium. Both MCLR as well as spread are components of "interest" as per the RBI Circular and Directions dated 03.03.2016. The fact that interest is

composed of various components, of which credit risk premium (termed by the US Ex-Im Bank as Exposure Fees and by RBI as "Spread") is one of essential components established by several international authorities, institutes and leading academics. He relies upon following :

- (i) CFA Institute's LOS 5.a wherein the five components of interest rates are named as Real Risk-Free Rate , Expected Inflation, Default-Risk Premium, Liquidity Premium, Maturity Premium.
- (ii) Federal Reserve Bank of Minneapolis' showing four component form part of interest which includes a risk premium to compensate the bank for the degree of default risk inherent in the loan request.
- (iii) The Quarterly Journal of Economics, Vol.34, No.3, (May 1920) published by the Oxford University Press describing "variable premium for risk involved in the lending" as one of the factors that go into the determination of interest rate.

The US Ex-Im Bank has confirmed in two separate letters that the Exposure Fees recovered from the Respondent was not in lieu of any 'service' provided by it, thus clearly establishing that the same was not a 'service fee' so as to get covered by the exclusion in the statutory definition of 'interest.' W.e.f 1.07.2012, "interest" has been defined in an open-textured manner, which does not specify the components that constitute "interest". In other words, "interest" for the purposes of the Finance Act, 1994 refers to what "interest" usually is and excludes some elements

specified in the definition. It is common ground that for determining the meaning of "interest", the test of popular parlance needs to be applied, and in this regard, the meaning assigned to the term "interest" by the competent authority in India, which is the RBI, is of utmost relevance. The Reserve Bank of India (Interest Rate on Advances) Directions, 2016 dated 03.03.2016 issued by the RBI (submitted by the Respondent on 15.03.2018), states that interest is demarcated in two components, i.e. MCLR and spread, and that banks shall determine the actual lending rate by adding the two components i.e. MCLR and Spread. 'MCLR' is the base rate of lending, which is an internal benchmark set by the Banks and published on their website. This corresponds 'CIRR' charged by the US Ex-Im Bank. 'Spread' is the second component of interest, representing the 'credit risk premium' of the customer which corresponds to 'Exposure Fees' charged by the US Ex-Im Bank. In the light of the above RBI Directions, it is now usual for Banks and institutions in India to recover interest from the borrowers separately towards MCLR and spread. This is exactly what US Ex-Im Bank was doing during the period relevant to the present dispute. It is evident that the RBI Directions dated 03.03.2016 has brought the Indian banking practices in line with the US practice of bifurcating interest into its two elements. It is thus clear Credit risk premium (described by US Ex-Im Bank as "exposure fees"), is known in India as "spread", and is

recovered as "interest" in terms of the RBI Directions. The definition of interest in Section 65B (3) of the Finance Act, 1994 covers "interest payable in any manner in respect of any moneys borrowed or debt incurred." Thus, going by the statutory definition of "Interest", interest in respect of money borrowed can be paid in different manners. Such payments do not lose the character of interest merely because they are described as "fees or charges". Likewise, a fees or charge will not cease to be a fee or a charge merely because it is described as "interest". The common parlance meaning of the term 'interest' has been correctly ascertained by the Commissioner in his order. He relies upon following books, websites and other sources of information establish the common parlance meaning of the term "interest":

- (i) <http://www.businessdictionary.com>
- (ii) http://en.wikipedia.org/wiki/Real_interest_rate
- (iii) <http://www.investorwords.com/2531/interest.html#ixzz37moNWtG9>
- (iv) The Major Law Lexicon by P. Ramanatha Iyer (Vol.III, 4th Edition)
- (v) Encyclopaedic Law Lexicon, Justice C.K. Thakker (2nd Ed., 2014)
- (vi) Mitra's Legal and Commercial Dictionary (6th edition)
- (vii) Words and Phrases Lexis Nexis (4th edition) (Vol.I),
- (viii) The Law Lexicon, P. Ramanatha Aiyar (3rd edition 2012) (Vol.III),
- (ix) Wharton's Law Lexicon (16th Edition – Reprint 2015)

9. There is no basis for the assumption that interest cannot be computed or deducted upfront at the time of sanction or disbursal of loan. The mere fact that Exposure Fees was deducted upfront, instead of being paid on a yearly basis is totally irrelevant as in several financing arrangements, interest for the credit period is deducted and recovered upfront while disbursing the loan. That the Respondent had the option of either paying the exposure fee upfront or paying it on a periodical basis. The revenue's contention that Exposure Fees is in the nature of an insurance service is a new ground which was never taken up by Revenue either in the Show Cause Notice or before the Commissioner in adjudication. Such a ground cannot be urged for the first time before the Tribunal as the scope of review is limited to grounds which are arising from the adjudication order. He relies upon orders in case of Carrier Aircon 2005 (184) ELT 113 (SC) and CST vs Reliance Communication Ltd 2018-TIOL-1331-CESTAT-MUM. He also submits that the scope of proceedings before an Appellate Tribunal cannot travel beyond the grounds taken in the Show Cause Notice (Ballarpur Industries 2007 (215) ELT 489 (SC) and Toyo Engineering 2006 (201) ELT 513 (SC)].

10. He submits that the compensation which a lender recovers from the borrower for the risk of default referred to as credit risk premium is interest as per RBI's own circulars.

Such credit risk premiums cannot be regarded as an insurance as one cannot enter into an Insurance Contract with oneself. The Revenue has failed to appreciate that it is only if a third party chooses to insure the lender for the risk of default that the service rendered by such a third party acquire the character of insurance services. The contention that the respondent had voluntarily paid Service Tax on the risk premia charged by various other export agencies such as China Development Bank (CDB) and Japan Bank of International Corporation (JBIC) is not only irrelevant as there is no estoppel in law but also factually incorrect as no such payment has been made by the Respondent. The Revenue's appeal also does not bring on record any evidence or basis for claiming that such voluntary payments were made by the Respondent. The reliance placed on the order of Hon'ble Tribunal in case of Tata Steel Supra, is totally inappropriate as the said case pertained to an arrangement fee charged by the arranger of loan which was in the nature of commission which is not the case in the present matter. Similarly, in the case of HUDCO Supra and Punjab National Bank Supra, the issue involved pertained to pre-payment charges and commitment charges, respectively, which were administrative charges and not in the nature of risk premia. The revenue's contention that "once an interest rate has been fixed, there cannot be a separate charge for covering risk premium" is not supported by any authority or RBI

Guidelines. In fact, the RBI Circular dated 17.12.2015 and Directions dated 03.03.2016 accepts that a 'spread' to cover 'credit risk premium' can now be recovered by the Indian banks 'separately ', over and above the 'MCLR.' The Circular and Direction of the RBI therefore disprove the Revenue's ground. Further the submission of revenue that there are many other fees and charges that are also collected as a percentage of the debt (upfront fees, processing fees, commitment fees), on which service tax is admittedly payable is also incorrect. The Commissioner correctly noted that the quantum of exposure fees is determined on the basis of several factors such as time period of the repayment of loan; rating of the country; credit worthiness of the borrower; whether the exposure fee is financed by the Ex-Im Bank or not; whether exposure fee would be paid upfront or drawn down and drawn period. The factors which determine the quantum of exposure fees are in substance the same as factors which determine interest rate. It is for this reason that the Commissioner held that exposure fees is interest.

11. As regard revenue's appeal seeking imposition of penalty under Section 78, he submits that the Commissioner had dropped the proposal for imposition of penalty on the ground that non-payment of Service Tax on other charges and expenses relating to the borrowing of moneys from other lenders was due to *bonafide* circumstances. The fact that the

Respondent had deposited the tax liability on such other charges along with interest due thereon as well as the fact that these amounts were paid in cash and no separate credits were taken or the incidence passed on to someone else, were cited by the Commissioner as a ground for non-imposition of penalty. The above finding has been challenged in the Revenue's appeal primarily on the ground that Service Tax was paid only after non-payment was pointed out by the department; and that the company had the good team of employees well conversant with tax matters and therefore ignorance of law could not be pleaded. It is thus been pleaded that there was no reasonable cause shown by the Respondent for failure to pay the tax in time and therefore provision under section 80 were inapplicable in the present case.

11.1 The Respondent respectfully submits that it had throughout believed that services availed from third parties in relation to borrowing were not liable to tax as taxable category "Banking and other financial services" covered only services in relation to lending and not services relating to borrowing. This view point was taken not only by the appellant but also by many other parties as is evident from the decision of the Hon'ble Tribunal in the case of Tata Steel vs. Commissioner reported in 2015 TIOL 1202 CESTAT-MUM the Tribunal ruled that the scope of the taxable category Banking and Financial

Services was wide enough to commercial services in relation to borrowings.

11.2 Prior to this decision of the Tribunal, there was no authoritative decision or clarification interpreting the taxable entry in the manner which the Tribunal had done. It is also persistent to note that the Respondent had disclosed in its balance sheet the entire amount of Exposure Fee paid to the US Ex-Im bank under head "Expenditure incurred in foreign currency." This balance sheet was a public document available for anyone to examine and therefore the ground in the Revenue's appeal that the Respondent had suppressed relevant facts of the department is totally incorrect.

11.3 Despite the fact that the view taken by the Tribunal in the Tata Steel *Supra* has still not attained finality as the appeal filed has been filed and is pending against this order before the Supreme Court/High Court. The Respondent decided not to contest the matter further and deposited the entire amount of tax and interest thereon well before the issue of Show Cause Notice. In issues of interpretation such as this, imposition of penalty particularly when an assessee comes forward to deposit the tax and interest with a view to close the matter as totally unwarranted. The fact that one of the members of Tribunal which heard and contested the case of Tata Steel *Supra* concurred with the view that services in relation to borrowing were not covered under the category

"Banking and other financial services" is sufficient evidence of the bonafide nature of the Respondent's belief.

11.4 In any event, while there can be no cavil with the proposition that penalty under Section 78 constitutes a statutory offence and that, the Revenue is not required to establish the presence of mens rea; however, before the penalty is imposed, the Revenue would have to establish that non-payment of service tax was a result of conscious and/or deliberate act of wrong doing and deception. Reliance is placed on order of the Hon'ble High Court in case of the Commissioner of Central Excise v. JSW Steel Limited in C.M.A. No.2377 of 2016 vide order dated 10.7.2017.

12. Heard both the sides and perused the oral and written submissions made by both the sides. The issue whether the "Exposure Fee" paid by the Respondent to the US Ex-Im Bank is liable for service tax considering the same as "Service" or it is an element of interest on loan so availed by the Respondent. We find that the Respondent has set up a 3960 MW Coal based ultra mega power project and for this purpose they had availed ECBs. The Respondent has discharged the service tax liability on all fees, charges and expenses paid to the agencies located outside India. However they did not pay service tax on "Exposure Fee" charged by the US Ex-Im Bank considering the same to be part of interest. We find that the term interest was not defined under the Service Tax laws

prior to 01.07.2012. However after 01.07.2012, Section 65 B (30) of the Finance Act, 1994 defined "Interest" as – *"Interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim, similar rights or obligation) but does not include any service fee or other charges in respect of moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized*". In view of above definition it is clear that any amount which is payable in respect of moneys borrowed or debt incurred in any manner is an interest. This brings us to the question as to whether the Exposure fees paid by the Respondent has to be considered as part of Interest or it is service fee or any other charge. The US Ex-Im Bank apart from the "Exposure fee" has also collected other charges viz. Commitment fees, Legal & Consultancy Service charges from the Respondent. The other Banks i.e India Infrastructure Finance Co. (UK) Limited, London has collected commitment charges, LOC Commission charges, Legal & Consultancy charges, LC Commission Charges, LC Charges, Upfront fees, Comfort fees etc. The Export Import Bank of China, China Development Bank and Bank of China Ltd. All of Shanghai have collected Upfront fees etc and the Standard Chartered Bank, Mizuho Corporate Bank Ltd. and DBS Bank Ltd have collected Commitment charges, Agency fees, Facility Agent Fees, Upfront fees etc. The Respondent has discharged the service tax liability on all such fee and charges. Coming to the

agreement between the Respondent and Deutsche Bank Trust Company Americas, as Ex- Im Facility Agent and Export-Import Bank of the USA, we find that the rate of Exposure fee to be charged from the Borrower would depend upon various factors like Category of Country of Borrower, Credit Classification of the Borrower, Percentage of Loan Cover, Repayment Period, Drawn-down Period etc. The bank is charging two types of amount from the Respondents on account of borrowings made by the Respondent. The fixed interest has been charged from the Respondent @ 3.66% p.a whereas the exposure fee has been charged taking into account the above factors. In case of India the rate of Exposure fee would depend on period of loan i.e 5, 10 or 15 years. It would also depend upon the credit classification. The revenue has contended that as the "exposure fee" is described by the USA Ex-Im Bank in the relevant agreement and policy hand book not as interest, but as a "fee" or "risk premium" or "compensation for repayment risk". Thus the same cannot be considered as "Interest". We find that the said Bank has issued letter dt. 14.03.2014 which states as under :

"Re: Sasan, Samalkot, and Solar Projects financed by Ex-Im Bank

We are pleased to assist with your inquiry. We would like to clarify the definition of 'Exposure Fee' for any party with whom you may be required to respond with the same.

Exposure Fees are part of pricing for the loan (akin to the interest rate) and is not fees' for any 'service' rendered to the Borrower by Exim Bank (e.g "appraisal" or "processing" fees).

An Exposure Fee is a fee charged by an export credit agency for the risk that a transaction will not be repaid. Such Exposure Fees are determined based on:

Percentage of Cover

Products Offered

Length of Drawdown Period

Length of Repayment Period

Exposure fee levels have been established for all markets where it is possible for Ex-lm Bank to provide cover. We hope this definition clarifies. Please do / not hesitate to contact us for anything at all".

Further vide letter dt. 22.03.2014 the EXIM Bank USA stated that:

"As mentioned in our previous correspondence, an Exposure Fee is a fee charged by Export Credit Agencies, under the OECD regulations, for the risk that a transaction will not be repaid. Ex-lm Bank determines Exposure Fees based on the following : ;

- *Percentage of Cover*
- *Product (Guarantee/ Direct Loan)*
- *Repayment Period (Years)*
- *Drawdown Period (Months)*
- *Financed*
- *Payment of Exposure Fee (Upfront vs Drawdown)*

We invite you to visit our website www.exim.gov to access our exposure fee calculator. You can find it by following the steps listed below:

Home> Tools> Exposure Fees> Long Term Exposure Fee Advice. > Long Term Fee Advice Calculator or <http://wmv.exim.gov/tools/exposurefeesltongterm> financing!

By entering different variations for the aforementioned arguments you will derive different exposure fees.

Kindly note that the actual Exposure Fee for a transaction is set at the time of Ex-lm Bank's board approval.

We hope the above clarifies that an Exposure Fee is a fee charged based on the transaction risk assessment of Ex-lm Bank and is not charged for any "service" rendered to the Borrower by Ex-lm Bank".

Further, EXIM Bank USA vide their letter dated June 12, 2014 stated as under :

" This letter aims to further clarify the definition of "Exposure Fee" based on our letter dated March 14. 201J 4 and May 22, 2014.

As mentioned in our previous correspondence, an Exposure Fee is a fee charged by Export Credit Agencies, under the OECD regulations, for the risk that a transaction will not be repaid. The exposure fee levied and collected by Exim Bank at the time of disbursement of each tranche of the total loans sanctioned and on the amount of each tranche. An Exposure Fee is a percentage fee charged based on the risk assessment by Ex-Im Bank and is assessed against the total amount disbursed to the Borrower. Ex- Im Bank determines Exposure Fees- based on several factors, including:

- Credit rating of the Borrower*
- Credit enhancements, if any Percentage of Cover*
- Product (Guarantee/ Direct Loan)*
- Repayment Period (Years)*
- Disbursement Period (Months)*
- Exposure Fee to be Financed or Not Financed*
- Payment of Exposure Fee (Upfront vs. As Disbursed)*

Kindly note that actual fees for transactions are subject to change upon completion of an application and Ex-Im Bank's board approval

We hope the above clarifies that an Exposure Fee is a percentage fee charged based on the risk assessment of Ex-Im Bank and is assessed against the total amount drawn It is part of pricing for the loan (apart and separate from the interest rate) and is not "fees" for any "service" rendered to the Borrower by -Ex-Im Bank such as appraisal or processing fee".

13. We find that all the above stated letters shows the intention of the bank as to what is the nature of the "Exposure Fee" and how 'Exposure Fee' is being charged. It also states that the said fee is in the nature of "interest" and is not for providing any service. These were not "fees" for any "service" rendered to the Borrower by Bank such as appraisal or processing fee. When compared as to whether the amount being charged by the Ex Im bank in the form of interest and Exposure fee is equal to the interest being charged by other bank, we find that the adjudicating authority in Para 28.1 of the impugned order has made following observations :

“ 28.1 – Assessee submitted that regarding the lender, the amount of ECB and the dates when the same were raised were set out in Para 4.1 to the SCN. It can be seen from the table set out in Para 4.1 that they had raised the ECBs from various lenders including the Export Import Bank of the United States (hereinafter referred to as EXIM Bank). The interest that the EXIM recovered in respect of the ECB that it lends was recovered under the nomenclature of 'interest' as also 'exposure fees'. If one compared the rate of interest which the other ECB lenders had charged them with the rate of interest vis-a-vis the interest that was charged by the EXIM Bank after factoring in the exposure fee, it would clearly come out that there was not much of difference between the interest charged by lenders other than EXIM bank and that charged by EXIM Bank. A comparative table of the interest charged by lenders other than EXIM Bank and the interest charged by EXIM Bank from them under the nomenclature of interest and that charged under the

nomenclature of exposure fee are set out here in below for ease of reference:

<i>No</i>	<i>Lender</i>	<i>Availed Amount</i>	<i>Applicable Interest Rate</i>
<i>1</i>	<i>Commercial Banks</i>	<i>USD 90 Million</i>	<i>Upto March 31, 2015 - 6m LIBOR + 3.75%p.a. From April 1. 2015 to March 31, 2019 - 6m LIBOR + 4.00% p.a. After April 1, 2019 - 6 m LIBOR + 4.25% p.a.</i>
<i>2</i>	<i>IIFC UK</i>	<i>USD 452 Million</i>	<i>Applicable Interest Rate for relevant period during which Disbursement is made:- Upto Sep 30, 2012 - 6 m LIBOR + 4.85% p.a From Oct 1, 2012 to May 1,2014- 6 m LIBOR + 2.10% p.a. From May 2, 2014 to Sep 14, 2014 - 6 m LIBOR + 3.80% p.a. Sept 15, 2014 to March 25, 2015 6m LIBOR + 3.80% p.a. From March 26, 2015 onwards - 6m LIBOR + 2.85% p.a.</i>
<i>3</i>	<i>US Exim</i>	<i>USD 508.2 Million</i>	<i>Fixed - 3.66% p.a. + Exposure Fee - 6.747% of disbursed amount or 0.696% on a yearly basis.</i>

28.2 It is observed from the above that apart from EXIM Bank, USA they had also borrowed from different Commercial Banks and IIFC, UK for the same project. The rate of 'interest' that is charged for the loan given by them depended on two factors:

- (a) 6 Months LIBOR plus*
- (b) Specific rate of interest i.e. 2.10% or 2.85% or 3.75% or 3.80% or 4.00% or 4.85% P.A. This rate of interest varied for different period or over a period of time.*

28.3 Similarly, in the case of EXIM Bank, USA, the rate of 'interest' that is charged for the loan given by them depended on two factors:

- (a) *Exposure Fee, which depended on various factors mentioned above plus*
- (b) *Specific rate of interest @3.66%. P.A. for the entire period.*

28.4 The rate of interest of that is charged by different Commercial Banks and IIFC, UK, for the same project of the assessee and that charged by EXIM Bank, USA, including the Exposure Fee, it is more or less same. The term or the name given for the charging of "interest" by different Bank or Agencies will not change the character of the 'interest'. Merely because the term used is "Fee", it will not become a service; as use of the term interest in 'upfront interest', it will not become an 'interest', but will remain as a service only.”

14. The above findings of the adjudicating authority when read with the communication of the Ex-Im Bank USA clearly transpires that though the impugned Bank may be charging the amount as "Exposure fee", but the said amount is towards interest only. The revenue has submitted that the "Exposure fee" is mainly to protect the safeguard the US foreign Sales businesses. That the EXIM Bank primary function is to provide Trade Finance Guarantees to empower exporters of US goods and Services. The exposure fee could not have been in the nature of interest as the same was charged independently for ensuring guarantee of payments to

US Exporters even where the loan was not provided by the EXIM Bank. It has also been contended that even in case of increase in loan period the said "Exposure fee" would remain same and only interest would be liable to be paid on the extended period of loan. We are not in agreement with the above assertion made by the revenue for the reason as none of the clause of the agreement or any instance shows that the "Exposure fee" has been charged to safeguard the payments of sales made by US Exporters. There is no such clause under the agreement produced before us. Also the contention of the revenue that Exposure fee would remain constant irrespective of loan tenure is not correct for the reason that the Exposure fee would depend upon the tenure of loan as explained by the Adjudicating authority in Para 26.2 of the impugned order where the rate of exposure fee is directly dependent upon the tenure of loan and credit classification. The revenue has contended that the interest rate charged by the US Exim bank is still higher from the Bond rates of 2.3% during the year 2011 even after adding 1 to 1.3% hike over such bond rates as the CIRR is based on bond rates and CIRR is interpolated on the basis of period of loan and respective period of bond rates. Such comparison has been made to show that the contention of Respondent and adjudicating authority to substantiate the exposure fees is equivalent to the risk element of interest charged is incorrect. We find that the contention of the revenue is not acceptable

for the reason that the interest rate and the exposure fees charged by the US Exim Bank would depend on global scenario as well as various factors and not only dependent upon Bond rates. Had the case been so the Respondent would not have availed the loan facility on such interest rates from the US Exim bank. Any borrowing would consider the interest rate factor considering all factors and if the rates of US Exim bank is not competitive as being sought to be portrayed the Respondent would not have availed loan. Further we find that once the US Exim Bank has clarified the position vide its letter supra, we do not find any merits in revenue's contention. Also the OECD arrangement on officially supported credits' on interest cited by the Appellant to show that the interest excludes the payment by way of premium or other charge for insuring or guaranteeing suppliers credits or financial credits cannot be read with reference to borrowings made by the Respondent but the suppliers of goods and the Foreign exporters. The contention of revenue that in case of other lenders the Respondent has voluntarily paid service tax on such risk premia, we find that in the present case it is only if third party insure the lender for the risk of default that such service acquire the character of insurance service. The part of interest charged by the US Exim Bank cannot be considered as insurance premium and treated separately from interest charge as there is no

instance that there is any insurance premium charged by the Bank to the self.

15. We also find that not only the communication of the Bank vide various letters supra and comparison of the interest rates shows between the US Exim Bank and other lenders clearly shows that the Exposure fee is interest, but even the Reserve Bank of India in its Master Circular – Interest rate of Advance with RBI/2012-13/70; DBOD No. Dir. BC.5/13.03.000/2012-13 dt. 2.07.2012 supports the contention of the Respondents. The said Circular states as under :

'based on the recommendations of the Working Group on Benchmark Prime Lending Rate which submitted its report in October 2009, banks were advised to switch over to the system of Base Rate with effect from July 1, 2010. The Base Rate system is aimed at enhancing transparency in lending rates of banks and enabling better assessment of transmission of monetary policy "

16. It also provided broad guidelines for charging of Interest Rate. It stated that:

a. "An appropriate prior-approval process should be prescribed for sanctioning such loans, which should take into account, among others, the cash flows of the prospective borrower.

- b. Interest rates charged by banks, inter-alia, should incorporate risk premium as considered reasonable and justified having regard to the internal rating of the borrower. Further, in considering the question of risk, the presence or absence of security and the value thereof should be taken into account.*
- c. The total cost to the borrower, including interest and all other charges levied on a loan, should be justifiable having regard to the total cost incurred by the bank in extending the loan, which is sought to be defrayed and the extent of return that could be reasonably expected from the transaction.*
- d. An appropriate ceiling should be fixed on the interest, including processing and other charges that are levied on such loans, which should be suitably publicised".*

17. From the above it is apparent that the interest rates would depend upon the various factors and the interest can be increased or reduced by charging under various heads. It is apparent that even the Indian Banks give loan to business entities on different interest rates under which the base rate remains same but the interest rate is varied by charging or not charging interest under some other head. In the instant case we find that the rate of interest from Commercial Banks and IIFC UK is based on two factors i.e 6 Months Libor rate plus fixed rate of interest in case of EXIM Bank, the two factors considered were fixed rate of interest @ 3.665 plus exposure fee @ 6.74%. Both the interest rates are much or

less similar. The said position has not been considered by the revenue in its appeal.

18. The revenue has relied upon the terminology of the agreement as well as policy handbook to canvass that "Exposure fee" is not interest. However we do not agree with the submission of the revenue for the reason stated above and also for the reason that for deciding the nature and meaning of term "Exposure fee" various facts and factors has to be taken into consideration. The nomenclature given by the party cannot determine the true character of an agreement. Further when the lender bank itself vide its three letters has clarified the position as to what is the intention and ratio behind charging "Exposure fee", we hold that the interpretation made by the revenue is not sustainable. We also find that in order to comply with the OECD agreement which required the US Exim Bank to give a break up of interest, they were charging the same into two components i.e Commercial Interest Reference Rates (CIRR) and Minimum Premium Rate (MPR). It is only for the convenience that CIRR was considered as interest and MPR was considered as "Exposure fee". The relevant portion of OECD agreement with reference to MPR and CIRR are as under :

***19. MINIMUM FIXED INTEREST RATES UNDER
OFFICIAL FINANCING SUPPORT***

a) The participants providing official financing support for fixed rate loans shall apply the relevant CIRR as minimum interest rates. CIRRs are interest rates established according to the following principles :

- 1) CIRRs should represent financial commercial lending interest rates in domestic market of the currency concerned ;*
- 2) CIRRs should closely correspond to the rate for first class domestic borrowers ;*
- 3) CIRRs should be based on the funding cost of fixed interest rate finance;*
- 4) CIRRs should not distort domestic competitive conditions; and*
- 5) CIRRs should closely correspond to a rate available to first class foreign borrowers.*

b) The provision of official financing support shall not offset or compensate, in part or in full, for the appropriate risk premium to be charged for the risk of non –payment pursuant to the provisions of Article 23.

24. MINIMUM PREMIUM RATES FOR CREDIT RISK

The Participants shall charge no less than the applicable Minimum Premium Rate (MPR) for Credit Risk.

a) The applicable MPR is determined according to the following factors :

- the applicable country risk classification ;*
- the time at risk (i.e the Horizon of Risk or HOR);*
- the selected buyer risk category of the obligor ;*

- *the percentage of political and commercial risk cover and quality of official export credit product provided;*
- *any country risk mitigation technique applied; and*
- *any buyer risk credit enhancements that have been applied.*

b)

19. The above both together constitute "Interest" and the RBI has recognized the said practice in its Circular No. RBI/2015 – 16/273 DT. 17.12.2015 by which MCLR system (Marginal Cost of Funds based lending rate). It requires the interest to be bifurcated into two components i.e 'MCLR' which is the base rate and 'Spread' which represents the credit risk premium. Both i.e MCLR and Spread are components of interest as per the RBI Circular and directions. Even the circular dt. 17.12.2015 and directions dt. 03.03.2016 issued by the RBI permits the banks to recover the "spread" to cover "credit risk premium" separately over and above MCLR. The revenue has relied upon the judgment of Hon'ble Supreme Court in case of CCE, New Delhi Vs. Connaught Place Restaurant Pvt. Ltd., New Delhi 2012 to state that the common parlance test would be applicable in such case as "exposure fee" is never understood as "Interest". We are of the view that the term has to be understood not only with its terminology but on the basis of intention of the contracting parties. The US Exim bank vide its letter dt. 14.03.2014 has clarified that the Exposure fee is

part of pricing for the loan (akin to the interest rate) and not fees for any service rendered to the borrower by the Exim Bank. Further it clarified that *it is part of pricing for the loan (apart and separate from the interest rate) and is not "fees" for any "service" rendered to the borrower by EX-Im Bank such as appraisal fee*". Even the Hon'ble Supreme Court in para 34 of its order has held that "..... *The true character of a product cannot be veiled behind a charade of terminology which is used to market a product. In other words, mere semantics cannot change the nature of a product in terms of how it is perceived by persons in the market, when the issue at hand is one of excise classification*". The ratio of said judgment is equally applicable in the context of service tax. When the intention of the charging party is apparent in that case it has to be considered that the said amount is a loan pricing element and not towards any service. We also find that the various books, websites and other source of information relied upon by the Respondent support their claim. Coming back to definition of term Interest in terms of Section 65B (30), we find that the Interest is payable in any manner in respect of money's borrowed or debt incurred (including a deposit, claim, similar rights or obligation). In the present case based upon our above findings we have reached to the conclusion that the exposure fee is the *manner of payment of interest* of which the rate is arrived at on the basis of various factors associated with the borrowings. The

amount of such Exposure fee is never fixed but is variable depending upon the factors as communicated by the US Exim Bank and clarified by the Bank. We thus after considering all the above factors and in view of our findings as above hold that the "Exposure fee" charged by the US Exim bank cannot be considered as any service by the Bank to the Respondent but is only an interest and is not liable to any service tax. The Tribunal's order in case of Punjab National Bank 2015 (38) STR 498 (TRI) and Hudco Ltd. 2012 (26) STR 531 (TRI) relied upon by the revenue are not applicable to the present case, none of them dealt with the issue of "Exposure fee" but of pre - payment charges and commitment charges respectively which were administrative charges and not in the nature of risk premia as correctly pointed out by the Respondents.

20. The Appellant has also sought to levy penalty on the amount of service tax paid by the Respondent on other service fee and charges which was recovered by the lenders from the Respondents. It has been contended that the service tax was paid only after constant persuasion by the revenue and they did not come forward to make payment immediately. That the Respondent has very good team of employees well conversant with tax matters and it is not tenable that they were not aware of such provisions relating to service tax. Further ignorance of law is not excuse. That they never disclosed the fact related to payment of said fees/ charges to

the department. We find that the issue involved the interpretation of law. There were many cases on the issue that whether the service of borrowing is liable to service tax on reverse charge basis which this Tribunal decided in the case of Tata Steel *supra* that the said service is taxable but by difference between two members and finally with the views of third member, hence the issue being of interpretation, the bonafide belief of the respondent that the services were not taxable is genuine. It is also observed that no instance has been pointed out to show that the Respondent had deliberately not paid service tax. Unless the ingredients of knowingly non payment of service tax is established, the penalties under Section 76 or 78 cannot be imposed. We thus do not find any reason to impose penalty upon Respondent in respect of charges on which the service tax was paid belatedly by them but before the issuance of show cause notice. In the present case the respondent has given up the issue on merit in respect of demand of service tax confirmed by lower authority and paid by the respondent, whereas in all other identical cases the assessee's are contesting the liabilities. In the case of Tata Steel (*supra*) the assessee's appeal is admitted by the Hon'ble Supreme Court and the same is pending. This also shows the bonafide of the respondent. Accordingly the lower authority rightly waived the penalty proposed under Section 78. Hence the order impugned does

not require any interference on the dropping of the penalty also.

21. In view of our above findings and observations, we do not find any merit in the appeal filed by the revenue. We thus dismiss the appeal filed by the revenue and uphold the impugned order.

(Pronounced in court on 22.5.2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

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