

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70472 of 2016

(Arising out of Order-In-Original No.09/COMMR./ST/GZB/2015-16, dated-15/12/2015 passed by Commissioner, Customs & Central Excise, Ghaziabad)

Shri Uday Veer Singh, Proprietor

.....Appellant

(M/s Jyoti Syndicate And M/s Jyoti Estate,
Chiranjeev Vihar, Ghaziabad, U.P.)

VERSUS

Commissioner, Central Excise, Ghaziabad

....Respondent

(Kamla Nehru Nagar, Ghaziabad, U.P.)

APPEARANCE:

Absent on call for the Appellant

Shri Santosh Kumar, Authorized Representative for the Respondent

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

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70532/2024

DATE OF HEARING : 23.04.2024

DATE OF DECISION : 21.08.2024

SANJIV SRIVASTAVA:

This appeal is directed against order in original No 09/आयुक्त/केंद्रीय उत्पाद शुल्क/गा. बा. ०/ 2015-16 dated 15.12.2015 of the Commissioner Central Excise and Service Tax Ghaziabad. By the impugned order following has been held:

ORDER

- (i) *I hold that VCES declaration dated 24.12.2013 filed by Shri Uday Veer Singh before the Deputy Commissioner, Central Excise, Division-V, Ghaziabad was substantially false, therefore I reject the said declaration and order to withdraw the immunity granted to him under Section*

108 of the Finance Act-2013 against the VCES declaration dated 24.12.2013.

- (ii) I reduce the demand of Rs. 37,00,432/- proposed in the Show cause notice by Rs.16,34,960/- for adjustment of advances standing at the beginning of the financial year, and, order to demand and recover Service Tax along with Education Cess and S.& Higher Ed. Cess amounting to Rs. 20,65,472/- (Rupees Twenty Lacs Sixty Five Thousand Four Hundred and Seventy Two only) from Shri Uday Veer Singh against Real Estate Agent Services provided by him during the period April 2009 to March 2013 under the provisions of sub- section (1) of the Section 73 read with Section 111(1) of the Finance Act, 2013 amended.*
- (iii) I order to demand and recover a sum of Rs. 1,01,347/- Rupees One Lac One Thousand Three Hundred Forty Seven only) collected by Shri Uday Veer Singh from his clients but not paid to the exchequer and written off by him during the F. Year 2010-11 from Shri Uday Veer Singh under Section 73A(3) of the Finance Act- 1994.*
- (iv) Further, I also order to appropriate a sum of Rs.11,52,802/- being the amount of Service Tax dues already deposited by him under VCES-2013 wards the aforesaid demand commencing from April,2009 to March'2013 in chronological order.*
- (v) I order to recover Interest payable against all the aforesaid demands under Section 75 of the Finance Act, 1994 from Shri Uday Veer Singh*
- (vi) I impose a Penalty of Rs. 21,66,819/-[Rs.20,65472/- +Rs.1,01,347/-) upon Shri Uday Veer Singh in terms of Section 78 of the Finance Act, 1944, read with the provisions of Section 68 of Finance Act-1994 & Section 111 of the Finance Act, 2013, as amended. I refrain to impose penalty under Section 76 of the Finance Act- 1994 since I have already imposed penalty under Section 78 ibid.*

- (vii) In terms of clause (i) of 2nd proviso to Section 78(1) supra, if the service tax and interest is paid within a period of thirty days of the date of receipt of this order the penalty payable shall be twenty-five per cent of the service tax so determined subject to the condition that the amount of such reduced penalty is also paid within thirty days of the date of receipt of this order.*
- (viii) I impose penalty of Rs.10,000/- upon Shri Uday Veer Singh under clause (b) of Section 77(1) of the Finance Act, 1944*
- (ix) I impose penalty of Rs. 10,000/- upon Shri Uday Veer Singh under clause (c) of Section 77(1) of the Finance Act, 1944.*
- (x) I impose penalty of Rs.10,000/- upon Shri Uday Veer Singh under clause (e) of Section 77(1) of the Finance Act, 1944*
- (xi) I impose penalty of Rs. 94000/- upon Shri Uday Veer Singh under Rule 7(C) of the Service Tax Rules-1994"*

2.1 Appellant (PAN No. **AFHPS2425M**), is engaged in providing taxable Services liable to be categorized under the Real Estate Services as defined under clause of Section 65(105) (v) of Finance Act, 1994 through his two proprietorship concerns namely M/s Jyoti Syndicate and M/s Jyoti Estate both registered with Service Tax department since 2000. Pan based registration were also obtained by him for M/s Jyoti Syndicate on 07.07.2010 vide Registration No. **AFHPS2425MSD001** and for M/s Jyoti Estate on 16.03.2011 vide Registration No. **AFHPS2425MSD002**. The address of both the firms is same.

2.2 Further as per investigation undertaken revenue was of view that during April' 2009 to March' 2013, appellant had to pay Service Tax on taxable value of services amounting to Rs 8,90,37,974/- rendered by his two proprietorship concerns whereas he had paid Service Tax only against the taxable value of services amounting to Rs.5,43,02,657/-; thus during the aforesaid period he appears to have short paid Service Tax along

with education Cess and S.& Higher Ed. Cess amounting to Rs. 37,00,430/-, on the suppressed value of Taxable services amounting to Rs. 3,47,35,317/-.

2.3 Appellant had written off Rs. 1,01,347/- collected as Service Tax, in his books of accounts for the F.Y. 2010-11, which was also required to be paid by them under Section 73A(1) of Finance Act,1994.

2.4 They opted for VCES Scheme to pay their aforesaid service tax liability and M/s Jyoti Syndicate filed VCES application in Form VCES-1 dated 24.12.2013 for the period April' 2011 to September' 2012 declaring value of services Rs. 1,10,63,198/- and applicable Service Tax dues Rs. 11,52,802/-. Out of Total Service Tax dues Rs. 11,52,802/- declared by Shri Uday Veer Singh, Proprietor M/s Jyoti Syndicate , Rs. 536714/- was deposited vide challan dated 19.12.2013, Rs. 39688/- deposited vide challan dated 23.12.2013. The remaining 50% of amount alongwith interest amounting to Rs. 589370/- was also deposited by M/s Jyoti Syndicate vide challan dated 14.08.2014, as informed by M/s Jyoti Syndicate vide letter dated 25.08.2014. As Service Tax Returns in Form ST-3 for the period April 2011 to September 2012 had been filed by the appellant hence in terms of section 106 of the Finance Act 2013, appellant was not eligible to file VCES declaration for the above referred period. Also as the declaration as per investigations undertaken by revenue was substantially false the same was liable to be rejected in terms of Section 111 of the Finance Act, 2013.

2.5 A show cause notice dated 18.02.2014 was issued to the appellant asking him to show cause as to why

- (i) *VCES declaration dated 24.12.2013 filed before the Deputy Commissioner, Central Excise, Division-V, Ghaziabad should not be liable to be held as substantially false and Service Tax along with Education Cess and S.& Higher Ed. Cess amounting to*

Rs. 37,00,430/- (Rupees Thirty Seven Lacs Four Hundred Thirty only) leviable on the receipts made by him against Real Estate Agent Services during the period April 2009 to March 2013 should not be demanded and recovered from him under the provisions of sub-section (1) of the Section 73 read with Section 111(1) of the Finance Act, 2013 amended. Further, Service Tax dues amounting to Rs.11,52,802/- already deposited by him under VCES should not be appropriated and adjusted as deposits towards the instant demand commencing from April,2009 to March'2013 in chronological order

- (ii) A sum of Rs. 1,01,347/- (Rupees One Lac One Thousand Three Hundred Forty Seven only) collected by Shri Uday Veer Singh from his clients but written off during the F.Years 2010-11 should not be recovered from him under Section 73A(3) of the Finance Act-1994.*
- (iii) The immunity granted to him under Section 108 of the Finance Act-2013 should not be withdrawn*
- (iv) Interest payable against the above demand under Section 75 of the Finance Act, 1994 should not be charged and recovered from him.*
- (v) Penalty should not be imposed upon him under the provisions of*
 - 1. Section-76 and 78 of the Finance Act, 1994 for his alleged evasion of Service Tax in contravention of the provisions of Rule 6 of the Service Tax' Rules, 1994, read with the provisions of Section 68 of Finance Act-1994 & Section 111 of the Finance Act 2013, as amended*
 - 2. Clauses(b) (c) and (e) of section 77(1) of Finance Act 1994 and,*
 - 3. Rule 7C of Service Tax Rules-1994.*

27. In terms of Section 111(3) of the Finance Act-2013 this show cause notice shall be deemed to have been issued under Section 73 and the provisions of Chapter V of the Finance Act-1994 shall apply accordingly.

2.6 The show cause notice has been adjudicated as per the impugned order referred in para 1 above.

2.7 Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Rajesh Kumar Yadav, Advocate for the appellant on 19.10.2023, when he was directed to file "reconciliation statement taking figures of the OIO and VCES duly certified by the Chartered accountant and file his vakalatnama". Matter was listed on 30.11.2023.

3.2 Arguing for appellant learned counsel submitted that:

- ☐ The notice and impugned order are bad in law as the demand of service tax was determined in consolidated manner in respect of two proprietorship firms registered separately and filing separate ST-3 return. Hence, demand against appellant by clubbing the assessment of service tax, is arbitrary and without any basis.
- ☐ The service tax being an indirect tax, attaches to a transaction rather than to a person. Therefore, each transaction has to be identified as provision of taxable service for levying/ assessing/ demanding service tax.
- ☐ Service tax cannot be demanded merely on the basis of financial entries in the balance sheet and profit loss account without co-relation with specific transactions of provision of service.
- ☐ Computation of the value of taxable service and assessment of tax on it are absolutely illegal.
- ☐ Demand raised in respect of loans and advances reflected as liabilities is erroneous and illegal.
- ☐ Service tax liability in respect of written off credit balances is bad in law.

- The difference in the opening and closing balance due from debtors represent actual receipts from debtors. Service Tax has already been paid on the said amount.
- Demand of Rs 1,01,347 in respect of service tax amount collected but not paid to exchequer is bad in law and without any basis. In fact appellant had written off this amount shown to have been collected as service tax for F Y 2010-11.

3.3 Counsel as directed submitted the information as directed vide letter dated 28.11.2023 received on 30.11.2023 but sought adjournment. Matter was listed on 29.01.2024.

3.4 On 29.01.2024, Shri M B Mathur, Advocate appeared on behalf of appellant and sought adjournment. Matter was adjourned to 13.03.2024.

3.5 On 13.03.2024, Shri M B Mathur, Advocate appeared on behalf of appellant and sought adjournment. Matter was adjourned to 23.04.2024.

3.6 On 23.04.2024 none appeared on behalf of appellant. As the matter had been adjourned number of times on the request of the appellant or his counsels, order in the matter was reserved after hearing Shri Santosh Kumar, Authorized Representative for the revenue.

3.7 Authorized representative reiterated 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 Impugned order records following findings:

"I have carefully gone through the case records, facts of the case, the defence reply/additional submission of the noticee and arguments raised at the time of personal hearing held on 16.10.2015. From the facts of the case, I observe that following are the moot issues of the instant proceedings.

- 1) *Whether a proprietorship concern has an identity independent of its proprietor?*

- 2) *Whether the Best Judgment method enumerated in Section 72 of the Finance Act, 1994 may be applied to present proceedings?*
- 3) *Whether Shri Uday Veer Singh had not determined his Service Tax dues correctly with an intent to evade payment of Service Tax.*
- 4) *Whether the demand should remain limited to the period covered in the VCES declaration filed by the noticee?*

3.1. The defence has vehemently pointed out that the demand has been raised wrongly upon Shri Uday Veer Singh instead of his two registered proprietary concerns namely M/s Jyoti Estate and M/s Jyoti Syndicate; Demand cannot cover the activities undertaken by its proprietor as shown in Income Tax Returns but not recorded in the accounts of either of the two registered proprietary concerns;. Thus they have tried hard to carve out case as if the proprietors of a proprietary concern and its proprietorship concerns are distinct entities independent of each other. Now I proceed to examine the defence plea. I find that the issue is no more a res-integra. There exist no doubt or confusion that the proprietor and its proprietary concerns cannot be distinguished from each other being one and the same. The Business name adopted for proprietary concerns acts only a brand of the proprietor for convenience of the business activity undertaken by him. The proprietary concern does not have any separate legal or juristic identity independent of its proprietor. In *Ashok Transport Agency Vs. Awadesh Kumar* 1998 AIR SCW 4042= 1998(5) SCC 567 Hon'ble Supreme Court observed :-

"A proprietary concern is only business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or by or against the proprietor of business"

- *In S.K. Real Estates V Ashok Meeran* 2002 (111) Comp Cases 400 Mad. Hon'ble Madras High Court observed

5. Mr. V. Krishnamoorthy, learned Counsel for the petitioner, mainly relied on the decision of this Court in *Sri Sivasakthi Industries, rep. by its proprietor, Raman v. Arikant Metal Corporation*, 1992 L.W. (CrL.) 347. In that case, the first accused was a concern represented by proprietor Raman and the second accused was Raman and they were proceeded against for an offence under Section 138 of N.I. Act. *Pratap Singh, J*, held that accused Nos. 1 and 2 are one and the same person and, as such, the proceedings as against the first accused namely, M/s. Sri Sivasakthi Industries, represented by its proprietor, Raman, are to be quashed and the complaint is maintainable as against the second accused. The facts of the above case and the present case are identical.

6. Mr. V. Krishnamoorthy, learned Counsel for the petitioner, drew my attention to some decisions on this point. In *Raman v. Krishna Pharmaceutical Distributors, III* (1994) CCR 1601, Pratap Singh, J held that the proceedings against Sri Janaki Pharmacy, represented by proprietor, are liable to be quashed, since the proprietary concern is not a legal entity and A. Raman was the drawer of the cheque, who can be prosecuted.

In the decision of the Gujarat High Court in *Satish Jayantilal Shah v. Pankaj Mashruwala and Anr.*, 1996 Cri. LJ. 3099, R.R. Jain, J. held that definition of person under Section 11 of Indian Penal Code and under Section 11 of General Clauses Act does not include 'proprietor' and hence a proprietary concern is not a legal entity or juridic person and it can neither initiate any proceedings nor proceedings can be initiated against it.

In *Anas Industries, rep. by its proprietors. Ram Mohan v. Sri Suresh Bafna*, 1999-1 L.W. (Cri.) 405, B. Akbar Basha Khadiri, J. held that Anas Industries is the accused and it is not a juridical person and the prosecution against the proprietorship suffers inherent defect and liable to be quashed.

In yet another decision in *Vaidyanathan, etc. V. Dodla Dairy Limited, etc.* 1999-1 L.W. (Cri.) 395, M. Karpagavinayagam, J. held that it is a settled position of law that the proprietorship concern by itself is not legal entity apart from its proprietor; the proprietary concern and the proprietrix are one and the same person. The learned Judge further held, that both proprietorship and proprietrix are one and the same and it can be put in the cause title of the complaint, while prosecuting the drawer either as proprietorship concern represented by proprietrix or the proprietrix, representing the proprietorship concern, as both the things convey the same meaning. Anyhow this question does not arise in the facts of the present case.

6. In this case, accused No. 1 is the proprietary concern and accused No. 2 is the proprietor and both the accused are one and the same person. Accused No. 1 is not a legal entity or juridical person and the prosecution cannot be maintained against it. At the same time, the prosecution against accused No. 2 is maintainable and can be continued. For the reasons stated above, the proceedings against accused No. 1 are liable to be quashed,

- In *Lawn Hoisery Mills Vs. Durga Fashions* 2002 (111) Comp Cases 568 Mad. Honble Madras High Court reiterated the above position and observed:-

9. There is no dispute in the provisions of law that the proprietary concern is a non-entity. In the cause title in the complaints filed by the complainant, it is mentioned as M/s.

Sri Durga Fashions, Tiruppur, represented by its proprietor P. Subramaniam. But, this would not mean that the complaints have been filed by a person, who has no juridical entity.

10. As admitted by learned counsel for the petitioners, the proprietary concern, as such, is not an independent juridical entity, apart from its proprietor. In this case, the complaints have been filed by the proprietor as the proprietor of the proprietorship concern.

11. Learned counsel for the petitioners would cite the decision reported in Anas Industries v. Suresh Bafna [1999] 1 MWN (Crl.) 296 where it is held that the complaint cannot be filed against the proprietorship concern, as the same would suffer inherent defect. But, here, the complaints have been filed by the proprietor Subramaniam, who has signed as complainant in both these complaints.

12. Furthermore, it is seen that the said complainant has been examined as P.W.-] and he has stated that he is the complainant. Therefore, it cannot be taken to mean that a person of non-entity filed the complaints.

13. Moreover, in the decision of this court in N. Vaidyanathan/Deepika Milk Marketing v. Dodla Dairy Ltd. [2000] 1 MWN (Crl.) (Mad) (DCC) 33, it is held that it is a settled position of law that the proprietorship concern by itself is not a legal entity apart from its proprietor, the proprietary concern and the proprietor are one and the same person. It is further held in the said decision that the prosecution against the proprietor representing the proprietorship concern or proprietorship concern represented by its proprietor are one and the same, as both these things sink, sail and merge with only one entity

14. So, the above proposition of law laid down by this court in regard to cause title relating to the accused would apply equally to the cause title of the complainant also. Therefore, by following the above proposition, it can be safely held that the prosecution by the proprietor representing the proprietorship concern or the proprietorship concern represented by its proprietor are one and the same, as both things convey the same meaning

15. Therefore, even without amendment the complaints are maintainable, because the complainant in these cases is only the proprietor Subramaniam representing the proprietorship concern.

- *Honble Punjab and Haryana Highcourt in the case of Vinod Kumar Gupta Vs. CCE 2013 (287) E.L.T. 54 (P & H) again affirmed the above view ,Relevant part of the Judgment has been reproduced below:-*

9. Having heard learned counsel for the parties, we are of the considered opinion that proprietorship firm or proprietor thereof cannot be treated as two different legal entities. Partnership firm is a firm in mercantile usage, however, penalty imposed on the proprietorship or partnership firms would mean penalty on the proprietor or- partners hereof, therefore, imposition of penalties one on the proprietorship firm and second on the proprietor would amount to imposition of penalty twice, which cannot be sustained in the eyes of law.

10. Learned Single Judge of Calcutta High Court in the case of *Tarak Nath Sen and Others v. Union of India and Others*, AIR 1975 Calcutta 337, has observed as under :

'17. Thus, these decisions make it clear that although a firm in mercantile usage has a personality of its own, strictly in the eye of law, it is not a legal entity like a natural person. Therefore, the rights and obligations of a firm are really rights and obligations of the individual partners of the firm. In the instant case, according to the findings made by the Additional Collector of Customs in his adjudication order the petitioners P to DE carrying on business as a partnership firm had contravened provisions of the Customs Act and the Gold Control Rules and were liable for penalties under Section 112 of the Customs Act and under Rule 126-L(16) of the Defence of India (Gold Control) Rules. Therefore, no exception can be taken to imposition of penalties individually upon them. But since the firm is not a legal entity and Section 140 of the Customs Act was inapplicable to the adjudication proceeding the Additional Collector of Customs by imposing penalties also upon the firm has really twice punished the petitioners Nos. to De for the same sets of acts. Therefore, although propose to P - sustain the imposition of penalties under the Customs Act and the Defence of India (Gold Control) Rules upon the petitioners P to DeT the penalties of fine imposed upon the petitioner No. 5 firm should be quashed."

11. Having perused the observations of learned Single Judge of Calcutta High Court in the *Tarak Nath Sen (supra)*, we find that a firm in mercantile usage is the firm in its own, strictly in the case of legal entity like a natural person. Therefore, the rights and obligations of a firm eye of law, it is not : are really rights and obligations of the individual partners of the firm, therefore, penalty imposed on the firm would amount to imposition of penalty to the proprietor or the partner, as the case may be, therefore, imposition of penalty on the proprietor independently would not be legal.

3.2. I observe that in terms of Rule 2(d)(ii) of Service Tax Rules 1994 person liable to pay Service Tax shall be the provider of the service except as defined in clause 3 of

Section 65 apply for registration. of Finance Act-1994 Further Rule ibid also prescribe that person liable to pay tax shall further observe that registration No. of the two proprietorship concerns i.e. M/s Jyoti Syndicate (Registration No. AFHPS2425MSD001) and M/s Jyoti Estate (Registration No. AFHPS2425MSD002) contains the very same PAN No. AFHPS2425M. It leaves no doubt that both the registration have been granted to very same person having that PAN No. i.e. AFHPS2425M. This is not the case for defence that any other person except Shri Uday Veer Singh had obtained the registration for M/S Jyoti Estate and also for M/s Jyoti Syndicate. Further Rule 2(C) of Central Excise Rules 2002 also relevant for Service Tax matters for the terms not defined in Finance Act-1994 or Service Tax Rules 1994, defines the term 'assessee' as person liable to pay Tax. Since in the case of both the proprietorship concerns of Shri Uday Veer Singh, namely M/s Jyoti Estate or M/s Jyoti Syndicate, only Shri Uday Veer Singh happens to be the person liable to pay tax hence he is liable to be treated as assessee to pay any differential taxes short paid if any. Since these two proprietorship concerns do not have any separate legal identity therefore Shri Uday Veer Singh alone is the service provider who has been actually rendering services through above referred business brands namely M/s Jyoti Estate, M/s Jyoti Syndicate. Usage of the term individual or proprietary firm in the proviso to Rule 6 of service Tax Rules cannot be interpreted to infer that Service Tax Law recognises individual and his proprietorship firm separately. It simply means that individual service providers providing taxable services without the cover of any business brand, or individual service providers providing services under the cover of business brand commonly known as proprietorship firms may have the facility to pay tax and also to file prescribed returns at quarterly interval instead of monthly intervals. In view of above discussion I hold that there is nothing wrong or unlawful to ask Shri Uday Veer Singh to pay Service Tax short paid by his two proprietorship concerns or to demand taxes on the amount of services rendered by him but not recorded by him in the accounts and returns of any of his aforesaid proprietorship concerns

3.3. I have carefully perused the provisions of section 72 of the Finance Act, 1994 which reads as follows:-

SECTION [72. Best judgment assessment. If any person, liable to pay service tax,

- (a) fails to furnish the return under section 70;
- (b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made there under,

the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

3.4 I observe that Shri Uday Veer singh had not filed the St-3 return for the period April 2009 to September 2009 for his proprietary concern M/s Jyoti Estate. Further despite filing the return, best judgment method may also be resorted to when tax has not been assessed in accordance with provisions of chapter V of Finance Act-1994 and the Central Excise Officer may require the person liable to pay tax produce such documents, accounts or other evidence as may be considered necessary by him to determine the correct amount of tax payable by him. I further observe that in the show cause notice it has been discussed at length as to how correct amount of tax has not been paid by Shri Uday Veer Singh i.e. the person liable to pay tax. As regards requiring separate accounts /Balance sheet in respect of each of the two proprietorship concerns of Shri Uday Veer Singh, I observe that up to 31.03.11 service Tax was required to be paid on the basis of actual amount received by the service providers thus it is imperative to know the quantum of opening and closing debtors; the value of services rendered during the F.Y. separately in respect of two proprietorship concerns of Shri Uday Veer Singh to ascertain the correct amount of Service Tax payable by each of these two proprietorship concerns In the SCN it has been alleged and discussed in detail that difference exists between the figures reported by the proprietor in his Income tax Return and the combined figures of his two proprietorship concerns. In view of such existing difference non-availability of separate figures in respect of two proprietorship concerns can not be used by the proprietor as an alibi to evade payment of Service tax payable by him When the returns and the accounts of the two proprietorship concerns fails to reveal the truth, department is left with no option but to resort to best judgment method to determine the correct amount of tax payable by the person liable to pay tax in accordance with the spirit of the statutory provisions on the subject. In the absence of separate Balance Sheet and accounts in respect of each of the two proprietorship concerns of Shri Uday Veer Singh i.e. M/s Jyoti Syndicate and M/s Jyoti Estate separately, actual amount realised by M/s Jyoti Syndicate and M/s Jyoti Estate separately cannot be determined and thus the amount of Service Tax short paid by Shri Uday Veer Singh proprietor

M/s Jyoti Syndicate and M/s Jyoti Estate may also not be determined separately therefore the same are required to be determined in a consolidated manner on the basis of best judgment basis as prescribed under Section 72 of the Finance Act-1994. It is also essential to plug the possibility of any taxable receipts of Shri Uday veer Singh escaping the tax net due to non recording of the same in the receipts of the two registered proprietorship concerns. Moreover the proposed best judgment method does not mean to ascertain the taxable receipts in an arbitrary and illogical manner rather it is based upon the evidence of documents prepared by Shri Uday Veer Singh himself eg. Balance sheet Income Tax return etc.. Thus I hold that the concerns raised by the defence with reference to adoption of best Judgment method have been exaggerated and totally unfounded.

3.5. I have duly considered the defence plea that the Service Tax, being an indirect tax, attaches to a transaction rather than to person. Therefore, each transaction has to be identified as provision of taxable service for levying/assessing demanding service tax. I perused the case laws cited by them on the subject. I find that the gross receipts referred to have also in the income tax return have been duly reconciled with the service Tax return in the subject Show cause Notice and all items though taxable under the Income Tax Act-1961 but not taxable under the provisions of Finance Act-1994 have been duly excluded for computation of amount of Service Tax payable by Shri Uday Veer Singh. As regards identification of each transaction of service provided I find that it is not the case for defence that such gross receipts includes any item of income which is not liable to be taxed under the provisions of Finance Act-1994 More over they have also accepted in Para D.3 of their defence reply that that there is no set norm under which transactions takes place between him (real estate agent) and the builders. The whole transactions are undertaken based on mutual trust in general and wisdom of the builder in particular. For the sake of ease Para D.3 has been reproduced as follows:-

D.3 That in order to discuss the position of point of taxation w. e. f, 01.04.2011, it is pertinent to understand the peculiar nature of transactions and levy of service tax on the Real Estate Agents Services'. Before further going in to the manner of transactions it would be necessary to understand that there is no set norm under which transactions takes place between real estate agent and the builders. The whole transactions are undertaken based on mutual trust in general and wisdom of the builder in particular. Therefore real estate agent undertakes with reliable builders of trust only. While undertaking this business the role of real estate agent is limited to get the booking form for the property

filled by the prospective buyers and handing over the same to the builders either with filled up form or with filled up form. Thereafter prolonged negotiation takes place where by deal is finalized and payment of booking amount is handed over to the builder. On receipt of] payment from prospective buyer the builder makes provision for commission to be paid the real estate agent and also deducts TDS to the accounts of the real estate agent. However TDS is required to be paid as per income tax act to avoid penalty, however usually commission due to real estate agent is not forthcoming. In the meantime if the payment of commission is released in between before close of the financial year real estate agent discharges service tax on the same. At the end of financial year when the real estate agent checks his 26AS for the purpose of deduction of TDS then only he finds and comes to know that in how many cases only TDS has been paid and in others both TDS and amount of commission has been paid to him. And in cases where only TDS has been made he makes provision for commission as well as service tax in his books of account and tax is discharged as and when payment of commission is released. However if the deal is cancelled or builders himself disappears in between the provision of commission and service tax both are written off as allowable under Income tax Act, 1961.

3.6. It is pertinent to recall that vide letter dt. 21.09.2014 it had been informed by the noticee that they did not issue any bills to Builders because broker is only a selling Agent. Broker sell flat/plot on behalf of Builder. They keep only booking form and booking list in project, builder release commission on the basis of payment received from customers. It was also informed by them that they do not maintain any clients ledger account because they sell flat on behalf of builders. They maintain only booking form. Clients pay directly to builder, and the clients' ledger account is maintained in proper manner

3.7.The defence has pleaded that they check Form 26 AS at the end of Financial year and then only come to know that in how many cases they had been paid TDS alone and in how many cases have been paid along with commission. Thus though their commission becomes payable immediately after the prospective buyers pay to the builder against the bookings made by them yet they did not have any formal mechanism to know about the same till the end of the financial year. As such despite showing such utter disregard to Service Tax law and procedure now they have been daring the department to prove individual transactions On the one hand they have been showing regards for the provisions of Income Tax Act to avoid penalty on the other hand they choose to ignore the provisions of Service Tax

laws and procedure blatantly, which requires them to keep records that include invoices for providing services in respect of each transactions, without having any regard for the same or fear of penal action for such contraventions. In the absence of specific details about each transactions it would be sufficient to rely on the annual summary of such transactions being shown by the assessee in his Income Tax Returns and Balance sheet and Profit and Loss Account. In view of legal position discussed in earlier paragraph that a proprietor and his proprietorship concerns are one and same it would be wrong to conclude that noticee Shri Uday Veer Singh is not the service provider liable to pay service Tax. also find that the - Amount of Service Tax proposed to be demanded from Shri Uday Veer Singh vide instant show cause notice relates to services provided by him Incidence of Such service Tax is borne by the recipient of his services and not by him. This cannot be inferred to be a direct tax levied upon him in any manner

3.8. I find that on submission of booking form by prospective buyer to the builder concludes the services rendered by a real Estate Agent attains completion and his commission becomes payable as and when builder receives any payment from such buyer. The Real Estate Agents continue to pursue the buyers time to time to honor their payment commitments, and also provide collection facility to buyer for such payments. This also ensures that he always keeps track of the amount of commission payable by the builder to him. In rare cases bookings are cancelled. In case of cancellation of bookings the buyer is refunded partial amount of bookings and not the entire amount of booking. Such deductions are made by the builder in order to recover some of his costs involved that includes commission payable to real Estate Agents. The defence has made effort to paint a picture that bookings are cancelled in routine manner therefore they do not pay Service Tax, due to the very nature of the business, the date of completion of service could not be ascertained and known to them They have further pleaded that it was not possible for them to issue invoice within 30 days of the completion of the service. In the circumstances, it is the date of receipt of payment by the real estate agent from the builder which Can only be treated as completion of service within provisions of Point of Taxation Rules, 2011. find that the defence plea as an after-thought. The bookings are not cancelled in a routine manner. In very few and exceptional cases bookings are cancelled since cancellation always result into loss of capital for prospective buyer as not the entire amount paid is refunded to him. However for the sake of argument if it is presumed that bookings are cancelled and the real estate agent is not paid any commission for such cancelled booking still it cannot be taken a plea to not to pay Service Tax

since Rule 6(3) of Service Tax Rules 2004 enables him to take credit of excess Service Tax paid where the amount of Service is renegotiated due to deficient provision of service or any terms of contract, alternately he may resort to provisional assessment in As already accepted by the defence in Para D2 that under the terms of Rule 6(4) *ibid* in the cases where the invoice are not provisions of the Point of Taxation Rules, 2011, issued within the time period specified in rule 4A of the Service Tax Rules, 1994, the point of taxation would be the date of completion of provision of the service or receipt of payment whichever is earlier. It is surprising that despite being aware with the legal provisions on the - subject they had not bothered to ensure compliance. Thus find that the defence plea lacks merit and cannot be used as an alibi to not to pay Service Tax Dues.

3.9. I find that not on each and every financial transaction shown in the Income Tax return and balance sheet has been considered for determination of amount of service Tax payable and the items not liable for levy of service Tax have been duly excluded from the computation. Thus it is wrong to conclude that Service Tax has been levied on all incomes mentioned in the Income Tax Return. Revenue has a right to use the information disclosed by any assessee in his income Tax Return and/ or Balance sheet to determine the quantum of taxable services rendered by the assessee and also to determine the quantum of receipts whether in advance or otherwise made by the assessee for provision of services. It is not a matter of dispute that Service tax is required to be paid on the receipts made by the assessee against the services intended to be provided by him on a future date.

3.10. I have carefully considered the defence plea that Service tax cannot be demanded I from the assessee merely on the basis of financial entries shown in the Balance sheets and profit and loss account without relating it to specific service. observe that it is admitted fact that the noticee has been engaged in providing services of Real Estate Agent It has never been disputed that they had been engaged in providing services other than that of a Real Estate Agent Services. It is not the case of defence that services mentioned in Balance Sheet / P& L Account produced by the noticee include receipts from services other than a Real Estate Agent Service. Section 36A of Central Excise Act-1944 also made applicable to Service Tax matters vide Section 83 of the Finance Act-1994 reads as follows:-

"SECTION 36A. Presumption as to documents in certain cases. - Where any document is produced by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law and

such document is tendered by the prosecution in evidence against him or against him and any other person who is tried jointly with him, the Court shall,

- a) unless the contrary is proved by such person, presume-*
 - (i) the truth of the contents of such document;*
 - (ii) that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the Court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting, and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested;*
- b) admit the document in evidence, notwithstanding that it is not duly stamped, if such document is otherwise admissible in evidence."*

3.11. Since the noticee himself has produced the Balance Sheet along with the Income Tax Return filed under the statutory provisions of Income Tax Act-1961 therefore there reason as to why the contents of these documents should not be considered as truth. is no Moreover the defence has not indicated any infirmity in the Balance sheet and Income Tax Return. In this regard I am also placing reliance on the case of Kothari Shah Texturisers P Ltd. 200(196)ELT 116 (Tri Mumbai).

3.12. I observe that after amendment of Section 65(105) wef 16.06.2005 to include services to be rendered even advance and deposits are liable to be taxed on receipt basis even prior to provision of service, In-case services are not provided assessee has been granted relief under Rule 6(3) of Service Tax Rules-1994. Rule 3 of Point of Taxation Rules 2011 states that point of taxation would be the time when the invoice for service provided or to be provided is issued, however in case where service provider receives the payment before issuance of invoice, it would be the time when such payment is received by him. As such Service Tax is required to be paid on all advances collected by a service provider. It is generally accepted principle of taxation that whoever claims exemption has to prove eligibility therefore onus was shifted upon the noticee to prove that a particular advance appearing in his balance sheet is not liable to be taxed being loan in nature or an advance raised in earlier year on which due service Tax liability has been discharged. In this regard am placing reliance on following case laws:-

- In the case of CCE Vs. Harichand Shri Gopal 2010 (260) ELT 3, 5 Member Bench of the Hon'ble Supreme Court held that object and purpose of the procedure should not be overlooked Procedures are put in place to see that the goods be not diverted or utilized for some other purpose, on*

the guise of the exemption notification. Hon'ble Supreme court also rejected the plea of "substantial compliance" and "intended use"

- *In the case of Mysore Metal industries Vs. CC Bombay 1988(36)ELT369(SC) Hon'ble Supreme Court concluded that the burden remains on the party who claims exemption, to prove the facts that entitled him to exemption. When the party fails to discharge the onus it can not avail the exemption.*
- *In the case of Moti Ram Tolaram Vs. UOI 1999(112) ELT 749 SC) 3 member bench of Supreme Court reiterated that the onus remains on the party to prove and show that the conditions, which are imposed by the exemption notification, have been satisfied*
- *In the case of Presto industries Vs. 2001(128) ELT 321 it was held that the onus of proof of fulfilment of condition subject to which an exemption may be admissible lies on the assessee or upon a party claiming benefit under the Notification. Where condition precedent is not fulfilled before claiming any exemption such benefit would not be admissible*
- *In the case of Hotel Leela Ventures 2009(234) ELT 389 SC Hon'ble Supreme court Observed that " What is important to note is that in this case appellant is claiming the benefit of an Exemption Notification. The burden was on the appellant to prove that the appellant satisfies the terms and conditions of the Exemption Notification. It is well settled that Exemption Notification have to be read in the strict sense." Denying the exemption benefit the court further emphasized the requirement to comply with the conditions of the exemption notification and observed that "However, we make it clear that on principle this judgment does not settle the law and our reasoning is based only on the facts and circumstances of this case, namely, that the appellant had failed to discharge burden placed on it while claiming the benefit of Exemption Notification*
- *In CCE Vs. Paranteral drugs (2009(236) ELT 625 SC) The Supreme Court reaffirmed the above principle. The Para 8 of the judgement is reproduced below:- "We may add that exemption notifications have to be read strictly. We may also add that the burden is on the assessee to prove that the item falls within the four corners of the exemption notification"*

3.13. However I have noticed that it would have helped the noticee to produce relevant documents such as contracts of loan showing terms and purpose of loan certificate from the person advancing the loan/ details of payment of interest to such person on the amount borrowed by the noticee / details of repayment of such loans/ details of payment of Service Tax on advances raised in earlier year/ Auditors report in Form 3 CD etc. The Noticee neither produced any

of such evidence in support of their claim nor even a certificate to said effect by a Chartered Accountant. Instead they prefer to complain and curse about the knowledge of accounting of investigating officials or the Authority who had issued the Show Cause Notice. I think that since the noticee does not have any such evidence hence in order to divert attention from the facts , they have adopted a maligning approach towards investigating officials and the authority issuing the notice. Had such evidence or Chartered Accountants Certificate been produced by the defence either at the investigation stage or even at adjudication stage it would have unfolded the truth, if any, in their favour as claimed by them. In the absence of relevant evidence documents such as contracts of loan,/ certificate from the person advancing the loan/ details of payment of interest to such person on the amount borrowed by the noticee /details of repayment of such loans/ details of payment of Service Tax on advances raised in earlier year, I am unable to subscribe to the defence claim that either the advances are loans in nature or Service Tax liability on such advances had already been discharged in earlier years. have also noted that defence has claimed Rs.23,60,335/- as loan which remained static during the 5 Financial years in addition to (i) Rs. 1850000 raised during 2009-10 and repaid to the extent of Rs.17,75,000 during 2011-12 and (ii) Rs. 1,92,932/- raised earlier than 2009-10 but repaid during 2010-11. However they preferred silence and did not offer any explanation about the exact nature of advances equivalent to Rs.1,49,192/- raised during the year 2009-10; Rs.4,95,000/ raised during the year 2010-11; Rs.10,15,000/-raised during the year 2011-12; Rs.4,50,000/- raised during the year 2012-13 as shown in the table given below;-

Amount in Rs					
Name of the party	2009-10	2009-10	2010-11	2011-12	2012-13
	OB	CB	CB	CB	CB
Octagon Builders	12,81,870	12,81,870	12,81,870	12,81,870	12,81,870
Meena Sharma	10,00,000	10,00,000	10,00,000	10,00,000	10,00,000
Sunlight Estate	78,585	78,585	78,585	78,585	78,585
SMV Agencies	1,92,932	1,92,932	0	0	0
Jyoti Super Const	0	18,50,000	18,50,000	75,000	75,000
Total amount of advances claimed to be loan	2474802	4403387	4210455	2435455	2435455
Amount shown as advances in Balance sheet (Schedule-3)		4552579	4705455	3450455	2885455

Amount of Advances for which no explanation could be offered by the noticee		149192	495000	1015000	450000
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3.14. I find that neither the balance sheet explicitly discloses above facts nor the noticee cared to inform these facts to investigating Officer despite being given enough opportunity. However in order to avoid possibility of taxing repeatedly the very same amount, I hold that the Advances standing at the beginning of the Financial year need to be adjusted; this will ensure that only incremental Advances of a year are subjected to tax in that year.

3.15. I find the noticee had submitted only part information/ documents requisitioned by the investigating officer and did not provide information/documents such as details of sub- brokerage paid along with Account ledger of all sub-brokers, Form 26AS, Trial Balance/Balance Sheet for the year 2013-14. Further observe that the noticee vide letter dated 21.09.2014 (RUD-15), had also stated they did not issue any bills to Builders because broker is only a selling Agent and keep only booking form and booking list in a project. The builders release commission on the basis of payment received from customers. They had further accepted that they had not maintained any clients ledger account because they sell flat on behalf of builders. They maintain only booking form. Clients pay directly to builder, who maintains clients' ledger account in proper manner.

3.16. I further observe that differences could be noticed between the values shown in ST-3 Returns and Income Tax Returns along with the combined Balance sheets for the period 2009-10 to 2012-13 prepared for Shri Uday Veer Singh which included revenue, expenses assets and liabilities of both the proprietorship firms of Shri Uday Veer Singh i.e. M/s Jyoti Syndicate and M/s Jyoti Estate. However every effort has been made to reconcile such difference particularly for items of expenditures not to be allowed as deductions under Income Tax Act-1961 viz. payment of Penalty and interest, donation etc. and certain incomes not considered in Profit and Loss Account but liable to be taxed under Income Tax Act-1961 viz. Income from house property, capital gains, interest on bank deposits etc.

3.17. I have noted that with reference to writing off certain accounts having Credit Balance of Rs.15,75,287/- Shri Jitendra Kumar Accountant of Shri Uday Veer Singh had narrated that

- a. following accounts having credit Balance relate to their sub-brokers who have forwarded some bookings on behalf of their firms and earned brokerage. However subsequently some of the bookings forwarded by them were got cancelled and refunded back. Builders did not pay any brokerage

against such cancelled bookings hence sub-brokerage payable by them had also been written back.

Year	Party	Amount in Rs.
2010-11	Ashok Kumar	67467
2010-11	Surjeet Choudhary	300000
2010-11	Khyati Buld Estates (P)Ltd	46213
2010-11	Rajiv Suri	449
2010-11	Krishna Consultants	162748
2010-11	RajKumar Vohra	31034
2010-11	S.N. Zee Developers Ltd	53145
2010-11	Lucky Properties Real	24374
2010-11	R.B.Associates	58786
2010-11	Ashok Kumar	169472
	Total	913688

- b. They had received amount from the builders for which no service could be provided by them to such builders hence such receipts as detailed below had also been written off He claimed to have paid the appropriate Service Tax against treating such receipts as advance from customers at the time of their receipts.*

Amount in Rs.		
2010-11	Qmax limited.	41115
2010-11	ANSAL Proverties_and	117807
2010-11	Ansal build wel ltd	87461
2010-11	Ansal housing & construction	120937
2010-11	Smy_agencies ()]td.	192932
	Total	560252

- c. He further stated that in the past, some amounts due from builders could not be realized hence such Debtors accounts were written off in past 2-3 years, however Service Tax amounting to Rs. 1,01,347/- payable against such income remained out standing in their books hence the same has also been written off in 2010-11.*
- d. In support of his aforesaid claims he had assured to provide the relevant evidences along with Certificate to the effect by a Chartered Accountant at the earliest. Similarly Service Tax payable against the aforesaid written off advance of Rs.5,60,252 /- had been paid by him to the exchequer.*

3.18. I have noted that he did not provide any documentary evidence or other relevant support or even a certificate of chartered accountant to confirm the claims made by him that Rs. 9,13,688/ standing credit to 10 parties was the amount payable to such persons on account of services rendered by them to the noticee and did not represent the advance received by the noticee for any services provided or intended to be provided. Similarly Service Tax of Rs.1,01,347/- written off by them may also be the amount of Service Tax paid by the clients to the noticee but not paid by the noticee to the exchequer despite collecting the same from clients instead of service tax payable on amounts due from builders but not realized by the noticee hence writing off such accounts in 2010-11

3.19. I observe that in both the situations discussed above in respect of three types of accounts written off, accounts would continue to show credit balance and would be mentioned in the liability side of the balance sheet of the noticee. It is also pertinent to mention that mere credit balance of an account does not disclose the correct nature of transactions involved against such transaction. The noticee vide letter dated 21.09.2014 (RUD-15), had also stated that they did not issue any bills to Builders because broker is only selling Agent and keep only booking form and booking list in a project. The builders release commission on the basis of payment received from customers. They had further accepted that they had not maintained any clients ledger account because they sale flat on behalf of builders. They maintain only booking form. Clients pay directly to builder, who maintains clients' ledger account in proper manner. Thus the possibility of mis- classification of advance received from customers as creditors for services cannot be ruled out. Similarly amount of Service Tax realised from clients but not paid to exchequer and amount of service Tax payable against services rendered to clients and made due both would be having credit balance . This is also important to note that it has been duly accepted by the noticee that no invoices or bills are issued by the noticee and builders released commission as and when buyers pay them.

3.20. I have noted that sufficient opportunity had been provided to them but the noticee failed to establish the said fact either at investigation stage or at adjudication stage by submitting relevant evidence or even a certificate from the chartered Accountant to establish the nature of transactions for the credit balances written off by them. It is not out of context to point out that nature of transaction cannot be distinguished from the entries in bank passbooks /accounts and or ledger accounts containing entries without sufficient description and evidence

3.21. As I have already discussed that under Service Tax law all receipts accepted in advance for services to be provided in future are required to be taxed and onus remains on the assessee to establish that an advance is not required to be taxable for not being accepted by him in lieu of providing service, therefore I hold that in the absence of any evidence or a certificate from a Chartered Accountant to the contrary, the amount having Credit Balance of Rs.15,75,287/- and 7,14,759/- written off by the noticee during 2010-11 and 2011-12 are nothing but

- IV. Advances paid by the clients of the noticee against which either services had not been provided or if provided had not been recorded in accounts
- V. Advances received by the noticee from builders for which no service had been claimed to be provided hence written off by the noticee against which Service Tax had not been paid by the noticee
- VI. Amount of Service Tax written off by the noticee had been collected by the noticee from his clients but not paid by him to the Government

3.22. I have also noted that the noticee had been time and again repeating that they had been paying service tax whenever they had been realising the same from builder on cash basis. This leaves no possibility that the noticee would have paid the service Tax on the unrealised amount of due commission etc. being shown in the balance sheet as debtors Debtors standing at the beginning of the Financial years may be realised during that financial year and services rendered during that financial year may not be realised in that financial year and thus shown as debtors at the close of that financial year. Therefore receipts of a financial year would be equal to the amount of debtors at the beginning of the financial year and the value of services rendered during that year however amount which remained unpaid out of the aforesaid two items and shown as debtors at the close of financial year had to be deducted therefrom. I note that in table 6 of the show cause notice the receipts have been worked out in that manner and I find nothing wrong in the manner Since the noticee had paid the Service Tax only on the amount of the value of services mentioned by him in his Service Tax Return i.e. ST-3 Returns. Therefore up to 31.03.2017 matching the receipts worked out after adjusting opening and closing debtors, and also with the advances, with the figures mentioned in ST-3 return would reveal the suppression if any. However after the introduction of Point of Taxation Rules 2011 closing debtors out of the value of services rendered in that year are required to be ignored. Therefore for the Financial year 2011-12 onwards, value of services rendered in the financial year along with the amount of advances received in that Financial Year increased by the amount of

debtors as on 31.03.2011 realised in that year would be the value of services on which tax is required to be paid. It is pertinent to mention that any realization out of the debtors outstanding as on 31.03.2011 would be included in this amount due to the fact that up to 31.03.2011 Service Tax was required to be paid on cash / receipt basis hence no service Tax would have been paid on the value of services not realised till 31.03.2011. Therefore I find the defence plea that Service tax having been already paid on the difference in the opening and closing due from debtors lacks merit

3.23. I have also noted that Service Tax payable by the noticee as mentioned in the SCN is determined by the Service Tax liability on cash basis till 31,03.2011 and in accordance with the provisions of Point of Taxation Rules 2011 as evident from the workings mentioned there in. These workings are fully transparent and bring out the manner of determination of Service Tax in a crystal clear manner. Any amount on which the Service Tax has been claimed to be paid by the noticee has been mentioned therein clearly. At this stage, except adjustment of advances standing at the beginning of a Financial year, no further modification is required in the Computation of Service Tax shown in Table-6. I have also perused the workings of tax payable by the defence and notice that:-

- Defence has insisted to assume actual receipts as that mentioned by them in ST-3 Return without considering opening and closing debtors having bearing on the amount actual realised by them.
- The defence has fully ignored the amount of advances raised by them for provision of services and thus liable to be taxed in terms of Section 65(105) of the Finance Act-1994 read with Rule 6 of Service Tax Rules-1994.

3.24. In view of above glaring deficiencies in computing Taxable value and receipts of the service in gross violation of Rule 6 of service Tax Rules 1994, and Rule 3 of Point of Taxation rules-2011, the calculation shown by the defence cannot be accepted for determination of amount of Service Tax payable by the noticee in financial year

3.25. I have noted that a sizeable volume of the defence reply has been dedicated to paint a picture that the revenue officials have or little knowledge of accounting system and no principles of accounting; cursing the investigating officers, Show cause notice issuing authority; terming the lawfully drawn conclusions as whimsical attitude of statutory authorities concerned. Instead of producing relevant evidence or certificate and reports from Accounting experts like Audit Report in Form 3CD or other certificates from Chartered Accountants they have preferred to dispute the calculations made in the SCN. It is beyond understanding of common

prudence as to why despite being requested by investigating officers or even at the time of filing reply to this show cause notice they avoided to produce Chartered Accountants Certificates for the claims made by them or the evidence such as Loans contracts, terms and conditions of loans etc. They would have known that, amount of Service Tax realised but not deposited with the Exchequer would always be mentioned in the liabilities side of the Balance sheet, which had been reflected in their balance sheet. Instead of offering any cogent explanation for the same they have preferred to distract the moot issues by blaming and challenging to investigate all the bank receipts or to prove that such amount has been received in cash. They are fully aware that amount of service tax is also paid by a client along with commission and would be shown together in as a consolidate entry in bank passbook or statement. It is surprising as to why scarce public resources would be consumed for vivisection of amounts already shown in segregated form by the noticee himself. I have also noted that the noticee has pleaded that invoices are not issued by them and their revenue is booked on the basis of amount paid by the builders to them as mentioned in their 'Form26AS-Details of Tax credit for tax deducted at source' by the builders, thus there is no possibility that the builder had not paid the said amount to the noticee. As such in the absence of any related evidence or Certificate from a Chartered Accountant to the contrary, I hold that Service Tax liability of Rs.1,01,347/-being shown by the noticee in his balance sheet and written off during the Financial year 2010-11, is the amount of Service Tax which has been collected by the noticee from his clients but not deposited to exchequer. Such amount is liable to be recovered under Section 73A of the Finance Act-1994.

3.26 The defence has made efforts to dispute the leviability of Service Tax on the consideration received by the noticee for undertaking the marketing on underwriting basis. Underwriting is nothing but an assurance by the Real Estate Agent to the principal that the order for sales of real estate shall be booked for the minimum prices and in case orders are booked below that price the difference between the minimum guaranteed price and actual price shall be made good by the agent. For additional amount of sales realised in excess of minimum guaranteed sales price the agent shall be eligible to higher commission which may extend up to 100% of additional as may be agreed upon between them. In sum this is nothing but a method for marketing of real Estate. Thus the activity is duly covered under Section 65(89) read with Section 65(105)(v) of the Finance Act-1994 which read as follows:-

'65(105)(v) "taxable service" means any service provided or to be provided to any person, by a real estate agent in relation to real estate.'

"Section 65(89) " 'real estate consultant" means a person who renders in any manner, either directly or indirectly, advice, consultancy or technical assistance, in relation to evaluation, conception, design, development, construction, implementation, supervision maintenance, marketing, acquisition or management, of real estate;

3.27. The liability of service Tax payable by the noticee on marketing of flats on underwriting basis, has been duly accepted by the noticee and the Service Tax payable on such income had already been deposited by the noticee. Moreover leviability of Service Tax on such activity is not the subject matter of this show cause notice hence the defence opportunity for this show cause cannot be used to dispute such levy and seek refund for the Service Tax paid by them under VCES Scheme. Attention is invited towards Section 109 of the finance Act-2013 which makes it amply clear that any amount paid in pursuance of a declaration made under sub-section (1) of section 107 shall not be refundable under any circumstances.

6. No refund of amount paid under the Scheme,

109. Any amount paid in pursuance of a declaration made under sub-section (1) of section 107 shall not be refundable under any circumstances.

3.28. It means that after choosing to file declaration under the Voluntary Compliance Encouragement Scheme -2013, the declarant cannot raise any issue relating to the taxability of the subject services of VCES declaration.

3.29. I have noted that in the show cause notice the difference between the Income shown in Income Tax Returns and profit mentioned in P&L Account of the noticee has been duly reconciled. Items of income on account of certain expenditure viz. Penalty and interest, donation, not being allowed as deduction under the Income Tax Act, and thus added back into profit have been duly identified. Further items of incomes not shown in P&L viz. Income from house property, capital gains, interest on savings Bank and bank deposits hence added to Profit mentioned in P&L to arrive at the figure of income liable to be taxed under Income Tax Act have also been identified. I observe that such reconciliation was necessary since in the income Tax Return Shri Uday Veer Singh had to mention his entire income which may include heads of income other than profit derived from business or profession shown by the noticee in his P&L Account but liable to be taxed in terms of provisions of Finance Act-1994 e.g. 'Rental of immovable property'. In this process gross receipt of the business relating to profit derived from business or

profession and mentioned in the Income Tax Return also get verified along with the fact that such receipts pertain to Business of the noticee and include no non-profession receipts. In the show cause notice only such gross receipts had been used to verify the correctness of the Service Tax payable by the noticee as mentioned in the Service Tax Returns filed by the noticee.

3.30. I observe that with the introduction of Point of Taxation Rules 2011, w.e.f. 01.04.2011 amount of Service Tax payable is required to be paid on accrual basis or payment basis whichever is earlier. I have noted that figures of Balance Sheets for the Financial Year 2009- 10 to 2012-13 along with acknowledgement of ITR & calculation of income (RUD-19) and value of Taxable services reported in Service Tax Returns for the period 2009-10 to 2012-13 (except ST-3 for the period April'09 to Sept'09 of M/s Jyoti Estate) (RUD-20) filed by Shri Uday Veer Singh through his two proprietor ship firms i.e. M/s Jyoti Syndicate and Jyoti Enterprises, combined Balance sheets of Shri Uday Veer Singh which included state of the affairs of both of his proprietorship concerns namely M/s Jyoti Syndicate and M/s Jyoti Estate, have been compiled and compared in the Table 6 mentioned in the SCN and reproduced as follows.

Table-6- Chart showing computation of suppressed value of taxable service and S.Tax payable thereon							
No .	Particulars		2009-10	2010-11	2011-12	2012-13	Total
1	Receipts as per B/S submitted with ITR having credit balance written off		6486533	2785479	40485201	6253089	56010302
2	Add :-Misc. Accounts			1569464		714759	2284223
3	Add :-Profit on Sales of Booking				11534000	725000	12259000
4	Total Receipts as per B/S submitted with ITR	1+2 +3	6486533	4354943	52019201	7692848	70553525
5	Add:-Debtors (Opening)		1287914	1722193	234180	0	3244287
6	Less:- Debtors_(Closing)		1722193	234180	0	0	1956373
7	Value realized as per B/S	4+5 -6	6052254	584295	52253381	7692848	66582778
8	Add:- Advances received from the clients		4552579	4705455	3450455	2885455	15593944

9	Gross taxable value of services as per Balance Sheet	7+8	10604833	10548411	55703836	10578303	87435383
10	Add:-Rental of immovable property (Shop) shown in ITR as income from House Property and not included in the profit of the business reported in Profit and Loss Account.		375600	375600	395391	456000	1602591
11	Gross taxable value of services on which Service Tax was required to be paid by Shri Uday Veer Singh	9+10	10980433	10924011	56099227	11034303	89037974
12	Less value of services on which service Tax paid as per ST-3 returns filed by M/s Jyoti Syndicate and Jyoti Estate		5485971	4907438	38830897	5078351	54302657
13	Value of taxable services suppressed in ST-3 Returns filed by Shri Uday Veer Singh for M/s Jyoti Syndicate and Jyoti	12-11	5494462	6016573	17268330	5955952	34735317
14	S. Tax Rate		10%	10%	10%	12%	
15	Service Tax Payable on the value of service suppressed	13*14	549446	601657	1726833	714714	3592.651

16	Ed.Cess and S. & H.Ed. Cess @ 3% of Service Tax Amount	15* 3%	16483	18050	51805	21441	107780
17	Total Service Tax and Ed. Cess Short Paid by Shri Uday Veer Singh	15+ 16	565930	619707	1778638	736156	3700430

3.31. I find that in order to eliminate the possibility of inclusion of Service Tax on the Rs. 37,00,430 amount of advance which had been collected by the noticee in earlier year and not in current year the amount of advances standing at the commencement of Financial Year need to be subtracted. Therefore amount of service Tax liable to be paid by the noticee is required to be determined as follows:-

			2009-10	2010-11	2011-12	2012-13	Total
11	Gross taxable value of services on which Service Tax was required to be paid by Shri Uday Veer Singh	9+10	10980433	10924011	56099227	11034303	89037974
11A	Less :-Amount of advance receipts from clients at the beginning of the		2474802	4552579	4705455	3450455	15183291
11B	Gross taxable value of services after adjusting advance receipts at the beginning of the year on which Service Tax was required to be paid by	11- 11A	8505631	6371432	51393772	7583848	73854683
12	Less value of services on which service Tax paid as per ST-3 returns filed by M/s Jyoti Syndicate		5485971	4907438	38830897	5078351	54302657
13	Value of taxable services suppressed in ST-3 Returns filed by Shri Uday Veer Singh for M/s Jyoti Syndicate and Jyoti Estate	11-12	3019660	1463994	12562875	2505497	1,95,52,026
14	S. Tax Rate		10%	10%	10%	12%	

15	Service Tax Payable on the value of service	13*14	301966	146399	1256288	300660	2005313
16	Ed.Cess and S. & H.Ed. Cess @ 3% of Service Tax	15*3%	9059	4392	37689	9020	60159
17	Total S. Tax and Ed. Cess Short Paid by Shri Uday Veer Singh	16+17	311025	150791	1293976	309679	2065472

3.32. I find that in terms of Section 107(1) read with Section 105(e) of Finance Act-2013, a person opting to declare his Service Tax dues was required to determine such tax dues payable under Chapter V of the Finance act-1994 during the period 1.10.2007 to 31.12.2012 but could not be paid by him as on 31.03.2013. Text of Section 105(e) and 107(1) are reproduced below:-

105. (1) In this Scheme, unless the context otherwise requires,

(a) "Chapter" means Chapter V of the Finance Act, 1994;
 (b) "declarant" means any person who makes a declaration under sub-section (1) of section 107;; (c) "designated authority" means an officer not below the rank of Assistant Commissioner of Central Excise as notified by the Commissioner of Central Excise for the purposes of this Scheme; (d) "prescribed" means prescribed by rules made under this Scheme;

(e) "tax dues" means the service tax due or payable under the Chapter or any other amount due or payable under section 73A thereof, for the period beginning from the 1st day of October, 2007 and ending on the 31st day of December, 2012 including a cess leviable thereon under any other Act for the time being in force, but not paid as on the 1st day of March, 2013

(2) Words and expressions used herein and not defined but defined in the Chapter or the rules made thereunder shall have the meanings respectively assigned to them in the Chapter or the rules made thereunder. 3. Person who may make declaration of tax dues

106. (1) Any person may declare his tax dues in respect of which no notice or an order of determination under section 72 or section 73 or section 73A of the Chapter has been issued or made before the 1st day of March, 2013: Provided that any person who has furnished return under section 70 of the Chapter and disclosed his true liability, but has not paid the disclosed amount of service tax or any part thereof, shall not be eligible to make declaration for the period covered by the said return. Provided further that where a notice or an order of determination has been issued

to a person in respect of any period on any issue, no declaration shall be made of his tax dues on the same issue for any subsequent period (2) Where a declaration has been made by a person against whom, (a) an inquiry or investigation in respect of a service tax not levied or not paid or short: levied or short-paid has been initiated by way of-

(i) search of premises under section 82 of the Chapter; or

(i) issuance of summons under section 14 of the Central Excise Act, 1944, as made applicable to the Chapter under section 83 thereof; or

(ii) requiring production of accounts, documents or other evidence under the Chapter or the rules made thereunder; or

(b) an audit has been initiated, and such inquiry, investigation or audit is pending as on the 1st day of March, 2013, then, the designated authority shall, by an order, and for reasons to be recorded in writing, reject such declaration

SECTION 107. Procedure for making declaration and payment of tax dues. - (1) Subject a to the provisions of this Scheme, a person may make a declaration to the designated authority on or before the 31st day of December, 2013 in such form and in such manner as may be prescribed.

(2) The designated authority shall acknowledge the declaration in such form and in such manner as may be prescribed

(3) The declarant shall, on or before the 31st day of December, 2013, pay not less than fifty per cent. of the tax dues so declared under sub-section (1) and submit proof of such payment to the designated authority

(4) The tax dues or part thereof remaining to be paid after the payment made under sub- section (3) shall be paid by the declarant on or before the 30th day of June, 2014 :

Provided that where the declarant fails to pay said tax dues or part thereof on or before the said date, he shall pay the same on or before the 31st day of December, 2014 along with interest thereon, at such rate as is fixed under section 75 or, as the case may be, section 73B of the Chapter for the period of c delay starting from the 1st day of July, 2014.

(5) Notwithstanding anything contained in sub-section (3) and sub-section (4), any service tax which becomes due or payable by the declarant for the month of January, 2013 and subsequent months shall be paid by him in accordance with the provisions of the Chapter and accordingly, interest for delay in payment thereof, shall also be payable under the Chapter (6) The declarant shall furnish to the designated authority details of payment made from time to time under

this Scheme along with a copy of acknowledgement issued to him under sub- section (2).

(On furnishing the details of full payment of declared tax dues and the interest if any, payable under the proviso to sub-section (4), the designated authority shall issue an acknowledgement of discharge of such dues to the declarant in such form and in such manner as may be prescribed

5, Immunity from penalty, interest and other proceeding

108 (1) Notwithstanding anything contained in any provision of the Chapter, the declarant, upon payment of the tax dues declared by him under sub-section (1) of section 107 and the interest payable under the proviso to sub-section (4) thereof, shall get immunity from penalty, interest or any other proceeding under the Chapter.

(2) Subject to the provisions of section 111, a declaration made under sub-section (1) of section 107 shall become conclusive upon issuance of acknowledgement of discharge under sub-section 7) of section 107 and no matter shall be reopened thereafter in any proceedings under the Chapter before any authority or court relating to the period covered by such declaration.

8. Failure to make true declaration

111. (1) Where the Commissioner of Central Excise has reasons to believe that 1 the declaration made by a declarant under this Scheme was substantially false, he may, for reasons to be recorded in writing, declarant in respect of such declaration requiring him to show cause why he should not pay the tax dues not paid or serve notice on the short-paid. the

(2) No action shall be taken under sub-section (1) after the expiry of one year from the date of declaration (3) The show cause notice issued under sub-section (1) shall be deemed to have been issued under section 73, or as the case may be, under section 73A of the Chapter and the provisions of the Chapter shall accordingly apply.

3.33. I have already discussed that as per his own books of account a sum of Rs. 1,01,347/- had been recovered by Shri Uday Veer Singh from his clients, and thus liable to be paid by him under Section 73A(1); however instead of paying the said amount he had written off the said liability in the F. Year 2010-11 to avoid the payment of the same. Therefore Rs.101347 /- are liable to be demandable and recoverable from him under Section 73A(2) of Finance Act-1994

3.34. For availing immunity under the Voluntary Compliance Encouragement Scheme a declarant was required to determine his tax dues for the entire period

commencing from 1st October 2007 to 31st March 2013. However Shri Uday Veer Singh preferred to choose only a part of this period and choose to declare as much amount which has already been known to the department during the course of Audit. Obtaining two service Tax Registration for providing the very same service from the : single premises and not filing ST-3 return leads to conclusion that it was a conscious decision with an intent to prevent departmental authorities to ascertain the amount of Tax evaded by them. By artificially splitting his revenue between two registrations he had ensured a ready space for his alibi that Receipts liable to be taxed under the provisions of Finance Act-1994 and not mentioned under one to Service Tax Registration pertains to another Service Tax registration. However this alibi could not rescue him as revenue of both the registered proprietorship concerns was verified with his Income Tax Return and evasion could be detected.

3.35. I hold that during the period 2009-10 to 2012-13, Shri Uday Veer Singh, Thus I Proprietor of M/s Jyoti Syndicate & M/s Jyoti Estate had not mentioned the true and correct value of Taxable Services in the ST-3 Returns file by him, and had suppressed the same by an amount of RS. 1,95,52,026/- mentioned in the table given above. Thus for filing the declaration under VCES 2013 under Finance Act-2013 his true tax dues in terms of Section 105(e) should be disclosed for amount not less than Rs.21,66,819/- (Rs.20,65,472/ +Rs.1,01,347/-) though some amount for the period 1 October 2007 to 31st March 2009 may also be liable to be added to this amount. However, Shri Uday Veer Singh, proprietor of M/s Jyoti Syndicate had not declared true and correct tax dues as defined under Section 105(e) of chapter VI Finance Act- 1994 and declared mere Rs. 11,52,802. The definition of the term 'Tax dues' as defined in Section 105(e) does not grant any discretion to the declarant that he may choose a part of the period specified in Section 105(e) i.e 1.10.2007 to 31.12.2012 leaving the remaining period as open. In fact in terms of Section 105(e) he has to declare tax dues for the entire period specified therein. Therefore even if he prefers to declare tax dues for only part of the specified period it would amount to conclude that he had declared tax dues for remaining period as Nil. Therefore even if the noticee had filed declaration for the period 01.04.2011 to 30.09.2012, any amount of Service Tax payable by him during the period 01.10.2007 to 31.12.2012 but not paid by him and also remained unreported in his VCES-1 declaration would amount to filing of a substantially false declaration. Thus I hold that inclusion of demand for the period, beyond the period specified by the noticee in his VCES-1 Declaration dt.24.12.2012, but duly covered not only under the period specified under Section 105(e) of Finance Act-1994 i.e. 01.10.2007 to 31.12.2012,

but also under the 5 years period of limitation specified under Section 73 of Finance Act-1994 cannot be used to vitiate the proceedings initiated for withdrawal of immunity sought under VCES-2013 . I further find that in the present case unreported tax dues have been duly spread over F.Years 2009-10,2010-11,2011-12 and 2012-13. It is not the case for defence that tax dues referred to in the Show cause notice, pertains to only last quarter of fiscal 2012-13 i.e. the period not specified under Section 105(e) and thus saving the VCES declaration dt. 24.12.2013 filed by Shri Uday Veer Singh from being termed as substantially false. In this regard I am placing reliance on the case of Sadguru Construction Company 2014 (36) S.T.R. 3 (Guj.) wherein Honble Gujrat High court held that if any Service Tax is due and payable by a person for period between 1-10-2007 to 31-12-2012, it would be included in definition of expression tax dues "if it had not been paid as on 1-3-2013. Para 16 of the judgment reads as follows

16. Combined reading of Section 106 with Section 105(1)(e) would make it clear that the position of a declarant vis-a-vis his service tax dues would have to be ascertained as on 1-3-2013. If any proceedings for determination of the tax dues of a person have been initiated before 1-3-2013, declaration of such a person would not be accepted. Likewise, arrear of tax which could be declared in such declaration would be the service tax due or payable for the period between 1-10-2007 to 31-12-2012 and which sum is not paid before 1-3-2013. In plain terms, therefore, if any service tax is due and payable by a person for the aforesaid period, the same would be included in the definition of the expression "tax dues" if the same has not been paid as on 1-3-2013."

3.36. I also observe that in terms of first proviso to Section 106 of Finance Act-1994 any person who has furnished return under Section 70 of Finance Act-1994, shall not be eligible to make declaration under the Voluntary Compliance Encouragement Scheme- 2013 for the period covered by the said return. Whereas since Shri day Veer Singh 'have filed Service Tax Return for the period April 2011 to September 2012 through his two registered proprietorship concerns i.e. M/S Jyoti Syndicate (Service Tax Registration No. AFHPS2425MSD001) and for M/s Jyoti Estate (Service Tax Registration No. AFHPS2425MSD002) therefore he was not eligible for filling declaration under VCES 2013 interest and penalty liable to be imposed upon and recoverable from them. Moreover, and to seek immunity from payment of the declaration filed by them under VCES 2013 has also been found to be substantially false as discussed in detail in preceding evade payment of Service Tax as he was required to determine his liability for Service Tax paragraphs with an intent to Dues on the basis of

payment of taxable services received by him in a quarter which he ignored wholly, as during the Financial Year 2009-10 to 2010-11 and onwards he did not consider the payment received in respective quarters to determine his Service Tax liability. He had determined the same in the manner contrary to statutory provisions on the subject i.e Rule 6 of Service Tax Rules-2006 read with Section 68 of the Finance Act- 1994, and also the statutory provisions contained in Point of Taxation Rules-2011

3.37. Shri Uday Veer Singh, Proprietor of M/s Jyoti Syndicate and M/s Jyoti Estate failed to pay Service Tax amounting to Rs. 20,65,472/- along with Rs. 1,01,347/- collected from his clients but not paid to exchequer and written off during the F. Year 2010-11 during the period from April 2009 to March 2013 on or before the due date in contravention of the provisions of Section 68 of the Finance Act, read with Rule 6 of Service Tax Rules 1994, as discussed above. Thus I also hold that Service Tax dues amounting to Rs.11,52,802/- already deposited by him under VCES -2013 is liable to be appropriated and adjusted as deposit towards the instant demand in a chronological sequence commencing from April'2009.

3.38. I hold that Shri Uday Veer Singh, proprietor of M/s Jyoti Syndicate (Service Tax Registration No. AFHPS2425MSD001) and M/s Jyoti Estate Service Tax Registration AFHPS2425MSD002), had contravened the provisions of Sections 66, 67, 68,,70, 73A() of Finance Act-1994 in as much as

- g. he failed to determine correct rate of Service Tax applicable on the services rendered by them as prescribed under Section 66 of Finance Act-1994,*
- h. he failed to determine the correct value of taxable services rendered by them as stipulated under Section 67 of Finance Act-1994 read with;*
- i. he failed to pay Service Tax payable during the period April 2009 to March 2013 as stipulated vide Section 68 of Finance Act-1994 read with Rule 6 of Service Tax Rules- 1994,*
- j. He failed to keep, maintain or retain books of account in respect of his two registered proprietorship concerns namely M/s Jyoti Syndicate and M/s Jyoti Estate separately as required under Rule 5 of Service Tax Rules-1994*
- k. he did not file the returns prescribed under Section 70 of Finance Act-1994 read with Rule 7 of Service Tax Rules 1994 required to be filed for the period April 2009 to September 2009 and also failed to submit other ST-3 returns within the prescribed time*
- l. He failed to pay a sum of Rs. 1,01,347/ - to the exchequer as required under Section 73A(1) ibid being the amount of Service Tax collected from his clients*

3.39. From the above narrated facts, hold that Shri Uday Veer Singh, Proprietor of M/s Jyoti Syndicate and-M/s Jyoti Estate had not paid Service Tax amounting to Rs. 20,65,472/- payable by him during he period April'2009 to March 2013. emerges that he had also recovered It further failed to pay the same to the exchequer Shri Uday Veer Singh have wilfully suppressed the a sum of Rs. 1,01,347/- from his clients however he facts regarding the correct value of taxable service merit its classification under 'Real Estate Agent Service provided by him, made willful mis-statement, contravened provisions of chapter-V of the Finance Act-1994 and rules made there-under, with intent to evade payment of Service Tax. Thus Service Tax alongwith Ed. Cess and S& H.Ed. Cess amounting to RS. 20,65,472/- is liable to be demanded and recoverable from them under Section 73 of the Finance Act 1994 together with interest due thereon under Section 75 of the said Finance Act.

3.40,. have also noted that Shri Uday Veer Singh, Proprietor of M/s Jyoti Estates had not filed the Service Tax Returns for the period April 2009 to September 2009 and also failed to file ther ST-3 returns with in the stipulated time prescribed for filing the ST-3 Returns as detailed below in the Table. Defence has not offered any explanation for the same. Thus I hold that defence agrees with the allegation and has nothing to say in the matter

Table-4 Chart showing dates of submission of ST-3 by Jyoti Syndicate and Jyoti Estate									
SI. No.	Return Period	Half	Prescribed Due Date	Details of Filing of ST-3 Return					
				Jyoti Syndicate			Jyoti Estate		
				Actual date of filing	Delay in no of days	Penalty amount (in Rs)	Actual date of filing	Delay in no of days	Penalty amount (in Rs)
1	2009-10	1 st	25.10.09	30.01.10	97	7700		Not yet filed	20000
2	2009-10	2 nd	25.04.10	26.04.10	1	500	26.04.10	1	500
3	2010-11	1 st	25.10.10	25.10.10	0	0	25.10.10	0	0
4	2010-11	2 nd	25.04.11	21.04.11	-4	0	04.05.11 (By post)	9	500
5	2011-12	1 st	25.10.11	24.12.11	60	4000	23.12.11	59	3900
6	2011-12	2 nd	25.04.12	18.10.13	541	20000	23.05.12	28	1000
7	2012-13	1 st Qtr	25.11.12	30.04.13	156	13600	30.04.13	156	13600

	2012-13	2 nd Qtr	15.04.13	30.04.13	15	500	30.04.13	15	500
8	2012-13	2 nd	10.09.13	18.10.13	38	1800	28.11.3	79	5900
						48100			45900

3.41. I observe that Section 70 of the Finance Act 1994 requires every person liable to pay the Service Tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, and at such frequency and with such late fee not exceeding twenty thousand rupees, for a return in such form and in such manner delayed furnishing of return as may be prescribed. Rule 7 of the Service Tax Rules 1994 requires that every assessee shall submit a half yearly return in Form ST-3 for the months covered in the half yearly return, by the 25th of the month following the particular half year except for the financial year 2012-13 when the reverse charge mechanism and negative list based service tax regime was introduced due dates were 1st, 2nd quarters and 2nd half were 25 Nov 2012, 15 April 2013, 10 September 2013 respectively. I also note that Shri Uday Veer Singh had not complied with the statutory requirement as discussed above, and thus he had rendered himself liable for penal action under Rule 7(c) of Service Tax Rules-1994. Rule 7 (c) ibid prescribes for a penalty of Rs.500/- if the delay limits to 15 days similarly if the delay extends up to 30 days the penalty also increases to Rs.1000/- however if the default continues beyond 30 days the amount of penalty increases to Rs 1000 plus Rs.100 per day of default continued beyond 30 days but remains restricted to Rs.20,000/- As such I hold that a sum of Rs.48,100/- along with a sum of Rs.45,900/- are liable to be imposed upon him for delay or non filing of ST-3 Returns by Shri Uday Veer Singh for the two registrations obtained by him under the name and style of M/s Jyoti Syndicate and M/s Jyoti Estate respectively.

3.42. The defence have pleaded that if demand is not sustainable no interest is applicable. In the light of facts discussed in preceding paragraphs, I find that their willful act to evade payment of Service Tax on the services rendered by them under the category of 'Real Estate Agent' had resulted into short payment of Service Tax along with Ed.Cess and S.& H.Ed. Cess amounting to more than Rs. 21.66 Lacs, consequently the liability to pay interest automatically accrued upon them at the rate(s) applicable during the material period. Therefore I hold that interest at applicable rate(s) is chargeable and recoverable from them in terms of section 75 of Finance Act-1994. In this regard I also place reliance on the verdict given by the Hon'ble Supreme Court of India in the case of Pratibha Processors

Vs. Union Of India 1996(88) ELT12 (SC) wherein it was held that interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. Para 13 of the judgment reads as follows:-

13. In fiscal Statutes, the import of the words "tax", "interest", penalty" etc. are well known. They are I different concepts. Tax is the amount payable as a result of the charging provision. It is a compulsory exaction of money by public authority for public purposes the payment of which is enforce by law. Penalty is a ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount on an assessee who has of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty which is penal in character.

3.43. Now take up the issue, whether Shri Uday Veer Singh is liable for penalty under Section 76 & 78 of the Finance Act, 1994. I find that he was under a statutory obligation to & assess and pay its service tax liability correctly and timely and also to communicate the same to the department in the prescribed manner. find that he had not discharged its I obligation in letter and spirit and rather, he had attempted through all possible efforts to escape from the payment of due Service Tax to the department knowingly and willingly with intent to evade payment of Service Tax. In view of the above, he had willfully suppressed the facts from the department about providing taxable service, non/short payment of Service Tax with the intention to evade payment of Service Tax by giving false with declaration in their ST-3 returns and VCES declaration dt.24.12.2013 that no other amount has been received in money, against the taxable services provided by them. As regards invocation of extended period of limitation, since he has not declared and paid Service Tax dues correctly which were payable by him and has not filed ST-3 returns truthfully and correctly with intent to evade payment of Service Tax in contravention of the various provisions of the said Act and rules made there under larger period of demand is legally tenable. Reliance is placed on following case laws:-

- *In Madras Petro Chem Ltd. 1999 (108) E.L.T. 611 (S.C.) Honble Apex court held that if the Assessee working under self removal procedure failed to follow Rules extended period of limitation invokable*
- *In the case of Tech Mahindra Ltd. 2015 (38) S.T.R. 1200 (Tri. - Mumbai) it was held that non-disclosure of*

transaction in ST-3 returns inspite of specific statutory mandate in Section 66A of Finance Act, 1994, clearly amounts to suppression of facts. Copy of agreement provided only after commencing of investigation, Demand cannot be termed as time barred.

- *In the case of Star India Pvt. Ltd. 2015 (38) S.T.R. 884 (Tri. - Mumbai) Honble Tribunal held that when the assessee had been operating under self-assessment procedure during the relevant period invocation of extended period of time to confirm the tax demand cannot be faulted at all for their failure to declare the complete particulars with regard to services rendered to foreign advertisers in ST-3 return*
- *Hon'ble Apex Court in the case of Grauer & Weil (India) Ltd. 1994 (74) E.L.T. 481 (S.C.) uphold the invocation when Declaration regarding the second unit, situated on the same plot of land, claimed to have been filed before Excise Department found to be in a different context, It was held that it was not a case of simple inaction or failure but one of wilful and deliberate mis-statement and suppression.*
- *Hon'ble CESTAT in the case of Rajasthan State Beverage Corporation Limited 2013(TIOL) 1110-CESTAT (Delhi) held that:- "Despite the clear obligation enjoined by the unambiguous provisions of the Act the appellant neither obtained registration as a taxable service provider nor filed periodical returns nor remitted Service Tax provisions of the Act. The tax evasion by the appellant came to notice of revenue only when as mandated by the intelligence officers of the Anti Evasion Wing came upon information of the activities of the appellant.*

.... ..

The requisite information was provided by the appellant to Revenue in bits and pieces In these totality of circumstances, the conclusion by revenue that there was willful suppression of relevant material with a view to evade liability to tax cannot be faulted nor considered inconsistent with the statutory prescription that justify invocation of the extended period of limitation."

I further observe that in the instant case ingredients of suppression of facts, wilful mis-statement, contravention of various provisions of the Service Tax Rules-1994, Point of Taxation Rules-2011 with intent to evade payment of Service Tax exist. I find that intention to evade is to be determined on the basis of entirety of the entirety of the circumstances as emphasised by Hon'ble Allahabad High Court in the case of Usha Martin Construction Steel Ltd. 2014 (306) E.L.T. 270 (AII.). I find that the ratio of the above referred judgments are squarely applicable to this case. I also hold that when ingredients to impose penalty are found to exist in a case, invocation of extended period of limitation 21,66,819/- is liable to be demanded and

recovered from them by invoking extended period is justified and. hold that a sum of Rs. of 'limitation, under Section 73 and 73A of the Finance Act-1994 together with interest due thereon under Section 75 of the said Finance Act-1994.

3.44. I hold that penalty under section 78 of Finance Act-1994 is imposable upon Shri Uday Veer Singh proprietor M/s Jyoti Estate and M/s Jyoti Syndicate I am also placing reliance on the case of Union Of India Versus Dharamendra Textile Processors & Ors. 2008 (231) ELT 3 (SC)) where in Hon'ble Supreme Court of India [larger bench] affirmed the findings of the case of Chairman, SEBI v. Shriram Mutual Fund - (2006 (5) SCC 361). Ir Para- 33 of the Chairman, SEBI's case (supra), (Quoted with approval in Dharmendra Textiles case (supra)) 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 : A 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.
(Quoted with approval in the case of Chairman Sebi (supra))
- 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. [Quoted with approval in the case of Chairman: SEBI (supra))
- In the case of Satellite Engineering Ltd 1983 (14) E.L.T. 2177 (Bom.) Honble bombay high court held that imposition of penalty is clearly sustainable when an assessee had acted deliberately in defiance of law Relevant Extract of the judgment reads as follows:- 11. Shri Talyarkhan then submitted that even assuming that the petitioners have made a mis-declaration in respect of the weight of their consignment as such mis-declaration was not done mala fide but out of a bona fide mistake, the authorities were not justified in imposing a penalty,

- *In respect of this submission, reliance was placed on the decision in the case of M/s. Hindustan Steel Ltd. V. The State of Orissa reported in A.I.R. 1970 Supreme Court 253 = 1978 E.L.T. (159). In paragraph 7 of the judgment, the Supreme Court considering the validity of the penalty imposed under the provisions of the Orissa Tax Act while observed that the liability to pay the penalty does not arise merely upon proof of default and an order imposing penalty can be passed provided the party has acted deliberately in defiance of law or is guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. In my judgment, the penalty imposed in the present case is clearly sustainable as the petitioners have acted deliberately in defiance of law and their conduct was dishonest in making a false declaration about the weight of the third consignment. On the test laid down by the Supreme Court, the penalty imposed in the present case can be perfectly justified. In my judgment, there is no merit whatsoever in the petition and the same deserves to be dismissed*

3.45. I further find that once it is established that ingredients to attract operation of Section 78 of F.Act-1994 are present in a case, the discretion to quantify the amount of penalty ends. For this I am placing reliance upon the case of Dharmendra Textiles Processers and others f2008 (23) ELT-3 (SC)) also affirmed in the case of Rajasthan Spinning Weaving Mills Ltd.(2009(239)ELT3(SC) wherein it was held that under Section 11AC of the Central Excise Act-1944 there is no discretion to the quantum of penalty 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."

3.46 Therefore proceeding further it would be pertinent to mention that w.e.f. 14.05.2015, the penal provisions envisaged under Section 76 and 78 of Chapter V of Finance Act-1994 have been changed significantly vide Finance Act-2015. Section 78B inserted vide Finance Act- 2015 to the Chapter V of Finance Act-1994, also provides that n respect of cases, where notice under sub-section (1) of section 73 or under the proviso thereto has been served prior to 14.05.2015 but no order has been passed under sub-section (2) of section 73 prior to 14.05.2015,the provisions of section 76 or section 78, as the case may be, as amended by the Finance Act, 2015 shall be applicable. The text of section 78B reads as follows:-

SECTION 78B. Transitory provisions. - (1) Where, in any case,-

- (a) *service tax has not been levied or paid or has been short-levied or short- -paid or erroneously refunded and no notice has been served under sub-section (1) of section 73 or under the proviso thereto, before the date on which the Finance Bill, 2015 receives the assent of the President; or*
- (b) *service tax has not been levied or paid or has been short-levied or short- paid or erroneously refunded and a b notice has been served under sub-section (1) of section 73 or under the proviso thereto, but no order has been passed under sub-section (2) of section 73, before the date on which the Finance Bill, 2015 receives the assent of the President, then, in respect of such cases, the provisions of section 76 or section 78, as the case may be, as amended by the Finance Act, 2015 shall be applicable.*

(2) In cases where show cause notice has been issued under sub-section 3 of section 73 or under the proviso thereto, but no order has been passed under sub-section (2) section 73 before the date on which the Finance Bill, S 2015 receives the assent of the President, the period of thirty days for the purpose of closure of proceedings on the payment of service tax and interest under clause (i) of the proviso to sub-section (1) of section 76 or on the payment of service tax, interest and penalty under clause e of the second proviso to sub-section (1) of section 78, shall be counted from the date on which the Finance Bill, 2015 receives the assent of the President

3.47 As regards penalty under erstwhile Section 76, earlier it was imposable for the period only up to 10.05.2008 since erstwhile Section 76 was amended vide the Finance Act, 2008 w.e.f. 10.05.2008 wherein a proviso appended below the erstwhile Section 78 provided that if the penalty is payable under this section, the provisions of section 76 shall not apply. The end of justice will be met if penalty is imposed under Section 78 only. Even after the amendments effected vide Finance Act-2015 that include substitution of provisions of Section 76 and Section 78 of chapter V of Finance Act-1994 penalty under Section 76 is not imposable in cases where Service Tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, for reason of fraud or collusion or wilful mis- statement or suppression of facts or contravention of any of the provisions of Chapter V of Finance Act-1994 or of the rules made there under with the intent to evade payment of Service Tax. As I have already discussed in earlier paragraphs that Shri Uday Veer Singh had evaded payment of Service Tax by resorting to wvilful mis-statement, suppression of facts alongwith contravention of statutory provisions with intent to evade payment of Service Tax (including Education Cesses) amounting to Rs. 21,66,819/- therefore penalty is liable to be imposed upon

him under Section 78 and not under Section 76 , both amended vide Finance Act-2015.

4.3 The issues have been framed in impugned order.

4.4 Whether a proprietorship concern has an identity independent of its proprietor?

We do not find any merits in any submissions which run contrary to the preposition that proprietorship concern has no independent identity. It has the identity of the proprietor. Commissioner has in the impugned order referred to series of decisions holding so. Hon'ble Allahabad High Court has in case of **Manoj Singh [Neutral Citation No. - 2019:AHC:79899]** observed as follows:

"15. Besides, in the case of a sole proprietary concern, there are no two persons in existence. Therefore, no vicarious liability may ever arise on any other person. The identity of the sole proprietor and that of his 'concern' remain one, even though the sole proprietor may adopt a trade name different from his own, for such 'concern'. Thus, even otherwise, conceptually, the principle contained in section 141 of the Act is not applicable to a sole-proprietary concern.

16. In the case of Ashok Transport Agency v. Awadhesh Kumar, (1998) 5 SCC 567, it has been held :

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business. The provisions of Rule 10 of Order XXX which make applicable the provisions of Order XXX to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX Rule

10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business "insofar as the nature of such case permits". This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case." (emphasis supplied)

17. In Bhagwati Vanaspati Traders v. Supt. of Post Offices, (2015) 1 SCC 617, it has been held:

"11. We find merit in the second contention advanced at the hands of the learned counsel for the appellant. It is indeed true, that the NSC was purchased in the name of M/s Bhagwati Vanaspati Traders. It is also equally true, that M/s Bhagwati Vanaspati Traders is a sole proprietorship concern of B.K. Garg, and as such, the irregularity committed while issuing the NSC in the name of M/s Bhagwati Vanaspati Traders, could have easily been corrected by substituting the name of M/s Bhagwati Vanaspati Traders with that of B.K. Garg. For, in a sole proprietorship concern an individual uses a fictional trade name, in place of his own name". (emphasis supplied)

18. Directly relevant to the question raised in the present proceedings, in Raghu Lakshminarayanan v. Fine Tubes, (2007) 5 SCC 103, it was observed:

"8. The concept of vicarious liability was introduced in penal statutes like the Negotiable Instruments Act to make the Directors, partners or other persons, in charge of and control of the business of the company or otherwise responsible for its affairs; the company itself being a juristic person.

9. The description of the accused in the complaint petition is absolutely vague. A juristic person can be a company within the meaning of the provisions of the Companies Act, 1956 or a partnership within the meaning of the provisions of the Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statute. A proprietary concern, however, stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a company. Company in terms of the Explanation appended to Section 141 of the Negotiable Instruments Act, means any body corporate and includes a firm or other association of individuals. Director has been defined to mean in relation to a firm, a partner in the firm. Thus, whereas in relation to a company, incorporated and registered under the Companies Act, 1956 or any other statute, a person as a Director must come within the purview of the said description, so far as a firm is concerned, the same would carry the same meaning as contained in the Partnership Act.

10. It is interesting to note that the term "Director" has been defined. It is of some significance to note that in view of the said description of "Director", other than a person who comes within the purview thereof, nobody else can be prosecuted by way of his vicarious liability in such a capacity. If the offence has not been committed by a company, the question of there being a Director or his being vicariously liable, therefore, would not arise.

11.....

12.....

13.....

14. We, keeping in view the allegations made in the complaint petition, need not dilate in regard to the definition of a "company" or a "partnership firm" as envisaged under Section 34 of the Companies Act, 1956 and Section 4 of the Partnership Act, 1932 respectively, but, we may only note that it is trite that a proprietary concern would not answer the description of either a company incorporated under the Companies Act or a firm within the meaning of the provisions of Section 4 of the Partnership Act". (emphasis supplied)

19. The Madras High Court, in Sri Sivasakthi Industries Vs. Arihant Metal Corporation 1992 (74) Company Cases 749, P. Muthuraman Vs. Padmavathi Finance (Regd) 1994 (80) Company Cases 656 and again in S.K. Real Estates and Another Vs. Ahmed Meeran 2002 (111) Company Cases 400 has consistently held that a sole proprietorship is neither a firm nor a company nor an association of individuals, under section 141 of the Act."

In view of the above decision of Hon'ble Allahabad High Court the arguments advanced by the appellant contrary to the above preposition are to be rejected. The preposition to the effect whereby appellant has sought to argue on the basis of two his firms being registered separately with the service tax authority would not support the case of the appellant as both the firm in their registration certificate have common PAN identifier, identifying them with the sole proprietor. **It is evident from the ST-2 filed by the appellant that he had been providing same services from the same premises under the guise of two separately registered entities.**

4.5 Whether the Best Judgment method enumerated in Section 72 of the Finance Act, 1994 may be applied to present proceedings?

Undoubtedly appellant has not filed the ST-3 returns regularly by the prescribed date and have not assessed the tax liability on the receipts made. The fact of the appellant having not filed or irregularly filing the return beyond the due date is noted in para 3.40 of the impugned order and also penalties have been imposed for the same in manner as prescribed by the Finance Act, 1994. In such a situation resort made to the provisions of Section 72 prescribing for best judgement assessment cannot be faulted with. Hon'ble Delhi High Court has in the case of **National Building Construction Company [2019 (20) G.S.T.L. 515 (Del.)]** observed as follows:

"24. Reference was made to Section 72 of the Fin Act, which reads as under :-

"72. Best judgement assessment. -

If any person, liable to pay service tax, -

....."

Section 72 of the Fin Act, as the heading empowers best judgment assessment in cases where a person liable to pay Service Tax (a) fails to submit return or (b) files a return but fails to access the tax in accordance with provisions of chapter or Rules. As per the respondents failure to pay Service Tax according to the provisions of the Chapter V and Rules is the pre-requisite and pre-condition for invoking clause (b) to Section 72 of the Fin Act. Provisions of Section 72(b) would apply only when the assessee had failed to access the tax in accordance with provisions of Chapter V of the Fin Act.

25. Section 72 of the Fin Act, as the heading states, empowers and authorises the Central Excise Officer to make and pass an order known as 'best judgment assessment'. In terms, the Central Excise Officer can make an assessment of the value of the taxable service to the 'best of the judgment' and determine the sum payable by an assessee or refundable to the assessee on the basis of such assessment. The expression 'best judgment assessment' is to be found in Section 144 of the Income Tax Act and is a well-known and understood. Section 144 of the Income-tax Act is applied when an assessee fails to make a return or fails to comply with the notice issued to substantiate the return or directions issued for production of documents, etc. The expression 'best judgment assessment' in tax enactments refers to fair estimate and reasonable determination of the taxable

amount made by the Assessing Officer, when it is not possible to compute the taxable amount on the basis of records and material made available. It is a type of assessment authorized by law in the absence of full and complete details and material. 'Best judgment assessment' need not be exact and precise, albeit an objective and fair assessment of the taxable amount based upon the material and evidence available and gathered. This provision cannot be equated with and read as a provision prescribing and authorizing a separate and alternative procedure for adjudication under Section 73 of the Fin Act. Section 72 does not authorise Central Excise Officer to take up returns for Service Tax for scrutiny assessment and pass an adjudicatory order, except possibly in cases where refund is claimed. This is not only clear from the expression 'best of his judgment' used in the heading and main part of Section 72, but also when we harmoniously read this Section with Section 73 which prescribes a detailed procedure with limitation periods with regard to the period for which show cause notice can be issued quantifying the demand raised as also the time period within which the show cause notice is to be adjudicated. Said prescriptions and stipulations made in Section 73 are missing in Section 72 of the Fin Act, for the Section 72 only allows the Central Excise Officer to make 'best judgment assessment'. Section 72 of the Fin Act does not prescribe a procedure for taking up the Service Tax returns for assessments, except when refund of tax is due as per the return and has to be adjudicated."

4.6 In similar circumstances upholding the best judgement assessment made under Section 722, Bangalore Bench has in case of **Fort Health Club [2010 (17) S.T.R. 154 (Tri. - Bang.)]** held as follows:

"5. First and foremost, we find that the objection raised by the appellant regarding the invocation of Section 72 of the Finance Act, 1994 seems to be mis-placed. On perusal of the show cause notice, we find that the show cause notice specifically says that the service tax liability has been worked out based upon the best judgment method as there were no evidence coming forth from the appellant regarding the amount collected by the appellant towards services rendered. We also find that on the date of issuance of show cause notice, the provisions of Section 72 were in force.

6. We find that in the absence of any information coming forth from the appellants as regards exact amount collected by them for the services rendered, the lower authorities have resorted to the next possible way for arriving at the amount of service tax payable by the appellant. We find that it was for the appellant to come forward and justify that the accounts

and the bill book kept by them are correct and they have to be considered as an evidence, for collection of the amount. We find that the adjudicating authority in his OIO has clearly brought out the lacunae and the mis-match of the amounts collected by the appellant and the bill books shown by them as regards the service charges collected. We find that these particular findings of the adjudicating authority has not been contested by the appellant before the first appellate authority.

7. Hence, we hold that the calculation of the service tax payable under the provisions of Section 72 seems to be correct as it is understood that there is a escapement of the service tax."

Thus we do not find any merits in the submissions made by the appellant challenging findings arrived in the impugned order on the basis of best judgement assessment made as per section 72 of the Finance Act, 1994.

4.7 Whether Shri Uday Veer Singh had not determined his Service Tax dues correctly with an intent to evade payment of Service Tax.

In the present case the correct tax liability on the basis of books of account after allowing for all the possible allowances and deductions has been computed in para 3.29 to 3.31 of the impugned order. We had asked the appellant to provide for reconciliation statement duly certified by the chartered accountant. The reconciliation statement produced by the appellant along with its letter dated 28.11.2023 filed in the court on 30th November 2023 is reproduced below:

Reconciliation Statement in the light of demand of service tax raised and confirmed vide Service tax Confirmed vide Impugned Order in-
Original No. 09/Commr./ST/GZB/2015-16 dated 15.12.2015 (contested before Tribunal Allahabad - Appeal No. ST/70472 of 2016)

Sl. No.	Particulars	2009-10	2010-11	2011-12	2012-13	Total	Remarks
1	Income on account of Commission (booked on due basis) as per combined Balance Sheet of M/s Jyoti Syndicate and M/s Jyoti Estate	6486533	2785479	40485201	6253089	56010302	Summary sheet showing separately the Commission amount relating to M/s Jyoti Syndicate and M/s Jyoti Estate along with trial balances of the two firms for financial year 2010-11 to 2012-13 attached as Annexure-R-1 Coll.
2	Amount of Commission received (on which service tax was paid)	5110371	4531838	38435506	4622351	52700066	
3	Rental Income as Per Income Tax returns of Shri Uday Veer Singh	375600	375600	395391	456000	1602591	
4	Total receipts chargeable to service tax (amount of commission received plus rent received (Sl. No.2+3))	5485971	4907438	38830897	5078351	54302657	
5	Value of Taxable service as per ST-3 returns	5485971	4907438	38830897	5078351	54302657	
6	Taxable value of receipts not included in ST-3 returns, if any (Sl.No.4-5)	0	0	0	0	0	
7	Amount of Service tax short paid, if any	0	0	0	0	0	
Details of disputed Amounts in respect of which service tax demand raised and confirmed by the impugned Order dated 15.12.2015 to demand service tax alleged to have been short paid by the Appellant:							
8	Difference between amount shown as due basis and actual receipts (Sl. No 1-3)	1000562	-2121959	1654304	1174738	1707645	
9	Misc. Accounts having credit balance written off (Sl. no. 2 of Table-6)		1569464		714759	2284223	The credit balances (written off) related to the amount due from Sub-brokers from whom service was received. The related ledgers attached as R-2 Coll. Besides, some advance amount taken was also written off and shown as Income. As no service was provided/to be provided against said amount, service tax is not liable to be paid on said amount written off as per grounds of appeal. Party-wise break up of written off credit balance attaches as R-2 Coll. All the related ledgers are attached as Annexure-R3 Coll.

For JYOTI SYNDICATE
Proprietor

For JYOTI ESTATES
Proprietor

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10	Profit on Sales of Booking of Flats (Sl. No. 3 of table-6). Income shown as profit in balance sheet for sale of flats in terms of underwriting agreement with M/s Ansal Buildwell Ltd. (VCES filed but initially but not issued being contested on levability of service tax)		11534000	725000	12259000	The Appellant is contesting the issue of levy of service tax on the amount of profit earned in terms of underwriting agreement on the grounds as taken in Appeal.
11	Difference in Debtors Opening balance & Closing balance (sl. No. 5 & 6 of the Table)	-434279	1488013	234180	0	1287914
12	Advances taken (this amount has been corrected by the Adj. Authority by eliminating carried forward amounts wrongly taken by notice (value reduced from Rs.15593944 to Rs.410653/- para-3.31/Page-73 of Order refers)					410653
13	Rental of immovable property (Shop) shown in ITR as income from House Property and not included in the profit of the business reported in Profit and Loss Account.	375600	375600	375600	375600	1602591
14	Total Taxable alleged to have been suppressed	-58679	1863613	12143780	1100600	19552026
15	Gross amount of Service Tax (inclusive of Ed. Cess and H.Ed. Cess) demand confirmed					2065472

VERIFIED / CHECKED FROM RECORDS
FOR ANIL CHADHA AND ASSOCIATES

For JYOTI SYNDICATE
Proprietor

For JYOTI ESTATES
Proprietor

ANIL CHADHA & ASSOCIATES
Chartered Accountants
New Delhi
M. 200, 094543

DATE: 24-11-12

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From the perusal of the above reconciliation filed by the appellant duly certified by the Chartered Accountant in the court and the table in para 3.31 we find that amount of the service tax short paid by the appellant during the entire period of dispute has been shown as same. The reconciliation made by the Chartered Accountant on the basis of the books of account in

fact certifies the calculations made by the adjudicating authority in para 3.31 of the impugned order. As the figures in the impugned order have been reconciled with the books of account we do not have any reason to doubt the correctness of figures arrived in the para 3.31 of impugned order and hold that appellant had in fact evaded the payment of this amount as service tax.

4.8 Whether the demand should remain limited to the period covered in the VCES declaration filed by the noticee?

To answer this question we look at the provisions of Section 111 of the Finance Act, 2013 which provides as follows:

111. Failure to make true declaration.

(i) Where the Commissioner of Central Excise has reasons to believe that the declaration made by a declarant under this Scheme was substantially false, he may, for reasons to be recorded in writing, serve notice on the declarant in respect of such declaration requiring him to show cause why he should not pay the tax dues not paid or short-paid.

2. No action shall be taken under sub-section (i) after the expiry of one year from the date of declaration.

3. The show cause notice issued under sub-section (7) shall be deemed to have been issued under section 73, or as the case may be, under section 73A of the Chapter and the provisions of the Chapter shall accordingly apply.

From the perusal of the above section it is evident that mere filing of declaration under VCES scheme is not sufficient the same could have been rejected if found substantially false and proceedings initiated against the declarant in respect of the tx not paid or short paid. In present case when in the view of revenue appellant had short paid the service tax, then proceedings as per the above referred section have been contemplated. We do not find anything wrong in the proceedings initiated against the appellant. Hon'ble Madhya Pradesh High

Court has in the case of Yashwant Agrawal & Co. [2017 (47) S.T.R. 10 (M.P.)] observed as follows:

"11.That sub-section (2) of Section 106 of the Finance Act, 2013 envisages a situation under which a declaration submitted by an assessee can be rejected if under sub-section (1) he is entitled to declare his tax dues. In this regard the present case falls under the second proviso of sub-section (1) of Section 106 which states that if there is a notice or an order of determination which has been issued to the assessee in respect of any period no declaration shall be made with regard to the tax dues on the same issue for any subsequent period. So far as the contention of Shri Dalal, learned counsel for the petitioner that under sub-section (2) of Section 101 no action shall be taken after expiry of one year from the date of declaration is concerned there is no force in it because Section 101 deals with the situation where the Commissioner of Central Excise has reasons to believe that the declaration made by the assessee under the Scheme was substantially false then after issuing a notice he may direct the assessee to pay the dues not paid or short-paid and the show cause notice issued deemed to have been issued under Section 73 or Section 73A as the case may be. So far as Section 106 is concerned which is an enabling provision which deals in a situation where a particular class of assessee is liable to take advantage of the Scheme and submit a declaration. Under Section 106 any person may declare his tax dues in respect of which no notice or an order of determination under Section 72 or Section 73 or Section 73A of the Chapter has been issued or made before the 1st day of March, 2013. Further provided that where a notice or an order of determination has been issued to any person, therefore, Section 106 debars that person to avail the benefit of the Scheme against whom an order of determination has been issued. In the present case, petitioner submitted a declaration form in which he had wrongly declared that no inquiry or investigation or audit is pending against him which is a basic disqualification to avail the benefit of the Scheme, therefore, by virtue of Section 106 the declaration submitted by the petitioner was liable to be rejected. Section 101 is applicable to a situation where the assessee is entitled for availing the benefit of the Scheme, however, the issue in respect of tax dues not paid or short-paid is involved and in such a situation the limitation period of one year is provided. If the issue of entitlement to avail the Scheme is to be decided then provisions of Section 106 would apply and in the present case respondents/authority has rightly exercised the powers under Section 106 by passing the impugned order dated 16-10-2014."

4.9 Appellant have contended that the demand made on the basis of the book of accounts cannot be justified without co-

relating the same with specific transaction. The book of accounts are the statutory documents made by the appellant. Balance Sheet and Profit & Loss accounts are made on the basis of entries in the book of accounts which are also required to be statutorily audited. The entries in the book of accounts could not have been brushed aside on the basis of the above submission specifically when the reconciliation made by the qualified Chartered Accountant certifies the same. The demand made on the basis of the entries in such book of accounts after allowing for all the possible adjustment cannot be set aside in absence of anything contrary on record. In case of **Somasundaram Memorial Social Education Rural Development Society [2017 (3) G.S.T.L. 193 (Tri. - Hyd.)]** Hyderabad Bench has held as follows:

"4. The brief facts of the case are that the appellant is a society formed with unemployed youth. The appellant was providing the manpower on outsourcing basis to various Government offices. When Voluntary Compliance Encouragement Scheme (VCES) was introduced, the appellant filed application thereunder on 30-12-2013 declaring the liability of Rs. 13,20,395 and after deducting the amount of Rs. 2,19,623/-, net liability of Rs. 11,00,762/- was arrived and they paid the 50% of liability as required under the scheme. During the scrutiny of the VCES declaration, it was observed that appellant has shown income of Rs. 3,64,06,675/- as per income and expenditure statement for the period 2008-2009 to 2012-2013. Accordingly Department took the view that appellants were liable to pay the short paid Service Tax liability of Rs. 34,11,119/-in adjudication proceedings vide impugned order dated 29-3-2016, the Commissioner confirmed the said liability along with interest liability thereof, imposed penalty of Rs. 2000/- under Section 77 of the Finance Act, 1944 and a penalty of Rs. 17,20,560/- under Section 78 of the Act. Being aggrieved the appellant has filed this appeal.

5.

6. *From the record, it appears that the appellant declared a turnover in their Income Statement which has been accepted by the department under the VCES scheme. When that is accepted by the department now the plea of inflated turnover cannot be taken up. Two wrongs cannot make a right. Hence, we uphold the demand along with interest."*

4.10 There is a demand of Rs 1,01,347/- in respect of the amounts collected by the appellant but not deposited with the

exchequer under Section 73A of the Finance Act, 1994. Appellant have contended that they have written of this amount in their book of accounts. There is no provision to write of the amounts collected as service tax from their customer's in the book of account. In the present case the sums collected representing service tax were to be deposited with the exchequer in terms of section 73A. Further we are at loss to make out anything from the submissions made by the appellant to counter the demand. How can anybody write of the amounts collected? He could have written off the amounts due and not the amounts collected. If no service was provided against the amounts which were collected including this amount of service tax, then the said amount along with this amount should have been refunded back to the person from whom these were collected or deposited with the exchequer as per the provisions of Section 73A. We do not find any merits in the said submission of the appellant.

4.11 Further we note that the demand has been made in the present case on two counts namely-

- On the basis of suppressed income as per the book of accounts and service tax returns filed by the appellant.
- On the basis of admitted liability in respect of underwriting, as per the VCES declaration filed by the appellant.

Though the declaration has been rejected by the adjudicating authority for the reason that appellant was filing returns etc., during the period of dispute as recorded in the impugned order, however the benefit of immunity as available in respect of the demand covered by the declaration has been extended to the appellant and no penalty imposed on the appellant under section 78 in respect of this amount. For the remaining amount which is not covered by the declaration issue has been examined and demand confirmed separately and penalty has been imposed on that amount of tax evaded by the appellant under Section 78. The amount paid under the VCES have been appropriated against the demand made in respect of underwriting services

which have been admitted by the appellant. Thus if not directly, indirectly adjudicating authority has given the benefit of the VCES scheme to the appellant, by way of impugned order.

4.12 Thus we do not find any merits in the submissions made by the appellant in respect of the demand made on the account of suppression of value of taxable service. As we have held that appellant have suppressed the information with intent to evade payment of Service Tax, penalty imposed on the appellant under Section 78 is upheld in view of the decisions of Hon'ble Apex Court in case of Rajasthan State Spinning and Weaving Mills Ltd. [2009 (238) ELT 3 (SC)].

4.13 We also uphold the penalties for various contraventions imposed under section 77 (1), 77 (1) (b) & 77 (1) (c) of Finance Act, 1994 along with penalty imposed under Rule 7 (C) of the Service Tax Rules, 1994

4.14 In view of discussions as above we do not find any merits in this appeal.

5.1 Appeal is dismissed

(Pronounced in open court on 21.08.2024)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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