CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.II

Service Tax Appeal No.70536 of 2018

(Arising out of Order-In-Original No.26/Commissioner/GBN/2017-18 dated 27.02.2018 passed by Commissioner Central Tax, GST & Central Excise, Gautam Buddh Nagar)

M/s Fibcom India limited **...Appellant**
(B-215, DSE Road, Phase II
Gautam Buddh Nagar, Uttar Pradesh)

VERSUS

Commissioner, Central Tax, CGST & Central Excise, Noida **... Respondent**
(3rd Floor,Wegmans Business Park, KP-III
Greater Noida, Uttar Pradesh 201306)

APPEARANCE:

Shri Atul Gupta, Advocate for the Appellant
Shri N. K. Mohan, Authorized Representative for the Respondent

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

FINAL ORDER NO.-70319/2026

DATE OF HEARING : 30.07.2026
DATE OF DECISION : 01.09.2026

SANJIV SRIVASTAVA:

This appeal is directed against the Order-In-Original No.26/Commissioner/GBN/2017-18 dated 27.02.2018. By the impugned order following has been held:-

"ORDER

a) I drop the demands raised vide SCNs. Dtd. 22.10.2014 and 18.03.2016 against provision of Intellectual Property Right Services.

b) *I confirm the demand of Rs. 55,24,252/- on the party i.e. M/s. FIL, raised vide SCN dtd. 22.10.2014 against various services received by M/s FIL from out-side India for their R&D Facility at Denmark during the period 01.04.2009 to 31.03.2013, alongwith applicable Interest payable under Section 75 of the Finance Act, 1994.*

c) *I impose a penalty of Rs. 10,000/- Section 77 of the Finance Act, 1994 on the party Le. M/s. FIL for not filing the true and correct ST-3 Returns required to be filed by them under Section 70 of the Finance Act, 1994,*

d) *I impose a penalty of Rs. 38,58,611/-on the party ie. M/s. FIL under Section 78 of the Finance Act, 1994 with reference to Service Tax along with Ed. Cess and Secondary and Higher Ed. Cess not paid by M/s FIL for the period 01.04.2009 to 31.03.2011.*

e) *I impose a penalty of Rs. 8,32,821/- (i.e.50% of Rs. 16,65,641/-) on the party i.e. M/s. FIL under first proviso to Section 78 of the Finance Act, 1994 with reference to Service Tax along with Ed. Cess and Secondary and Higher Ed. Cess not paid by M/s FIL for the period 01.04.2011 to 31.03.2015, payable on transactions duly recorded by M/s FIL in specified records.*

f) *In terms of clause (ii) of second proviso to sub-section (1) of Section 78 ibid of Finance Act, 1994, if the amount of Service Tax and interest is paid within a period of thirty days of the date of receipt of this order, the above penalties payable shall be reduced to twenty-five per cent. of the service tax subject to the condition that such reduced penalty is also paid within such period. This benefit of reduced penalties would also be available subject to provisions contained in sub-section (2) and (3) of Section 78.*

g) *I direct the jurisdictional Assistant Commissioner / Deputy Commissioner to segregate the amount of Service Tax along with Education Cess, Secondary & Higher Education Cess and Interest paid by M/s FIL and to appropriate the relevant* *amount towards the aforesaid demand after due verification thereof.*

With this order, the Show Cause Notices issued vide C. No. V(15) Adj/St/Noida/Fibcom/7/14/20758-60 dated 22.10.2014 and C. No. V(30)ST/DIV-IV/Demand/Fibcom/76/2016/307 dated 18.03.2016 stands disposed off.

2.1 Appellant having Centralized Service Tax Registration No. AAACF2237PSdoo2 is engaged in manufacture of Optic Fibre based Transmission System and parts thereof falling under Chapter Heading No 85176260 and also providing/ receiving services classifiable under categories Rent a Cab Scheme Operator Service, Manpower recruitment/ supply agency services, Maintenance or Repair Services, Erection, Commissioning and Installation Services, Transport of Goods by air, Intellectual Property Rights Service other than copy right, transport of goods by road, information technology software services and legal consultancy services.

2.2 They entered into an agreement dated 08.03.2006 with Tellabs A/S Denmark to provide Technical Knowhow for manufacture and sale of the license products by using Technical Knowhow of Tellabs under the agreement. As per agreement dated 6th March 2006, Tellabs, Denmark, granted a non-exclusive, non-transferable technical knowhow license right to the assessee under the Intellectual Property Right owned and controlled by Tellabs and received Royalty for use of technical Knowhow provided to the assessee under the agreement for Networking Planning, System Design and engineering manufacturing, market sell, installation and commissioning, operate, maintain and make improvement to the agreement product in the territory ofIndia by acquiring a strong and competent team from Tellabs, Denmark to carry forward R & D activities: independently along with long term Technology Licenses for use in its territories, through an amendment to Technology and License Agreement (TALA) between the assessee& Tellabs, Denmark. The assessee has acquired the right to apply, jointly with Tellabs. Denmark, with the Indian Intellectual Property authorities (such as Patent, copyrights offices etc.) for registration of Improvement developed by the assessee based on an agreement products and through joint development projects between the assessee and Tellabs Denmark. In case of termination or non-renewal of Technology and licence agreement (TALA), the assessee will have right to the Agreement Products & to improvements developed by the assessee for a further period of 15 years.

2.3 The Appellant opened an office in Denmark in relation to R & D activities and training of India R&D staff and other design support for product development. The services of these were being used for new implementation like ASON, GMPLS for 6300 products together with India R&D.

2.4 During the course of audit of the records of the Appellant it was observed that the Appellant had paid amounts on account of Technical Know how charges, Royalty etc as detailed in annexure A, B, C & D. During the period 2009-10 to 2013-14 appellant had paid an amount of Rs 4,59,57,168/- on account of technical Know How on accrual basis and Rs. 17,47,71,259/- on cash basis. Appellant failed to discharge the service tax due in respect of these amounts paid on reverse charge basis, treating these services as import of services.

2.5 They were also transferring huge amount to their branch office in Denmark for the services received by them at branch office. In respect of these services appellant was also required to pay service tax.

2.6 The demand of service tax due from the appellant was computed on the basis of 04 Annexures A, B, C & D annexed to the Show Cause Notice dated 22.10.2014. These annexures are reproduced below:-

Annexure A					
Expenditure in Foreign Currency (Accrual Basis) (Schedule 22/27 of BS)					
Particulars	2012-13	2011-12	2010-11	2009-10	Total
Technical Know how (IPR)	0	0	20299668	25657500	45957168

Service Tax Leviable	0	0	2090866	2642723	4733589
R & D Cess	0	0	1014983	1282875	2297858
Service tax Payable	0	0	1075883	1359848	2435731
Annexure B					
Expenditure in Foreign Currency (Cash basis): Including CWIP- R & D					
Royalty	4832193	27305166	3767295	10906814	46811468
Technical Know how (IPR)	17331200	26952089	10891200	20059600	75234089
Total	22163393	54257255	14658495	30966414	122045557
Service Tax Leviable	2739395	5588497	1509825	3189541	13027258
R & D Cess	1108170	2712863	732925	1548321	6102279
Service tax Payable	1631225	2875634	776900	1641220	6924979
Annexure C					
Expenditure in Foreign Currency (Cash basis): Other than CWIP- R & D					
Service Charges (BAS)	2426058	6969680	32627951	0	42023689
Repair, Maintenance, Tooling (MMR)	86082	75706	535556	349045	1046389
Professional Fees (MCS)	421152	1710367	1044960	0	3176479
Insurance (IAS)	193367	358144	462288	0	1013799
Bank Charges & Commission (BFS)	0	275462	508272	165339	949073
Misc Charges	1412421	1335021	1768831	0	4516273
Total	4539080	10724380	36947858	514384	52725702
Service tax Payable	561030	1104611	3805629	52982	5524252
Annexure D					
Summary/ Abstract					
Service tax Payable (A)	0	0	1075883	1359848	2435731
Service tax Payable (B)	1631225	2875634	776900	1641220	6924979
Service tax Payable (C)	561030	1104611	3805629	52982	5524252
Total Service tax Payable	2192255	3980245	5658412	3054050	14884962
ST Paid on Royalty	0	0	588207	254965	843172
ST payable (Excluding R&D Cess)	2192255	3980245	5070205	2799085	14041790
R & D Cess on Technical Know-how (Accrual basis)	0	0	1014983	1282875	2297858
R & D Cess on Technical Know-how (Cash basis)	1108170	2712863	732925	1548321	6102279
Total R & D Cess	1108170	2712863	1747908	2831196	8400137
Service Tax payable (including R & D Cess)	3300425	6693108	6818113	5630281	22441927

2.6 A show cause notice dated 22.10.2014 was issued to the appellant asking by them to show cause as to why,-

(i) Service Tax amounting to Rs 2,24,41,927/- (Two Crore Twenty Four Lakh Forty One Thousand Nine Hundred and

Twenty Seven only) (inclusive of Ed.Cess & SHEC) should not be demanded and recovered under proviso to Section 73 (1) of the Finance Act, 1994.

(ii) Interest under Section 75 of the Finance Act, 1994 should not be demanded and recovered from them on the amount of service tax not paid by them as discussed above.

(iii) The penalty should not be imposed on them under Section 77 of the Finance Act, 1994 for contravention of Section 70 by not following the prescribed procedure mentioned therein regarding filing of ST-3 returns.

(iv) *The penalty should not be imposed on them under Section 78 of the Finance Act, 1994 as they have willfully not disclosed the facts narrated above to the department to evade the payment of Service Tax*.

2.7 Another show cause notice dated 18.03.2016 was issued to the appellant for subsequent period asking them to show cause as to why:

(i) Service Tax amounting Rs 99,461/- should not be demanded and recovered from them under Section 73 (1) of the Finance Act, 1994.

(ii) Interest at appropriate rate should not be demanded and recovered from them under Section 75 of the said Act.

(iii) Penalty should not be imposed upon them under Section 76 of the Finance Act, 1994 for contravention of the provisions of Finance Act, 1994/ Rules ibid.

(iv) The penalty should not be imposed on them under Section 77 of the Finance Act, 1994 for violation of provisions of Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994.

2.8 Both the Show Cause Notice have been adjudicated as per the Order-In-Original referred in Para 1 above. The demands made by the show cause notice dated 22.10.2024 has been partly confirmed to the extent as per Annexure C and the demand made by Show Cause Notice dated 13.10.2026 has been dropped. Demand of interest to that extent has been confirmed and penalties imposed under Section 77 and 78 of the Finance Act, 1994.

2.9 Aggrieved, the Appellant have filed this appeal.

3.1 Heard Shri Atul Gupta, Advocate for the Appellant and Shri N. K. Mohan, Authorized Representative for the Revenue.

3.2 Arguing for the Appellant learned Counsel submits that:-

- The Show Cause Notice is absolutely vague and is liable to be set aside. Reliance is placed on the following judgments:-
  - Shilpi Enterprises [2017 (349) ELT 308 (T– All)]
  - Brindavan Beverages P. Ltd. [2007 (213) ELT 487 (SC)]
  - Naresh Kumar [2015 (37) STR 451 (Cal)]
  - RR Financial Consultants [2014 (33) STR 12 (Delhi)]
  - Teneron Limited [2020 (1) TMI 1165 Delhi HC]
  - Sharma Fabricators & Erectors Pvt. Ltd. [2017 (5) GSTL 96 (T– All)] *affirmed in 2019 (22) GSTL J166 (All.)*
- The impugned order travels beyond the show cause notice as well as the same is vague & perverse. Reliance is placed on following decisions:-
  - Toyo Engineering India Limited [2006 (201) ELT 513 (SC)]
  - Inox Leisure Ltd. [2022 (60) G.S.T.L. 326 (T - Hyd.)} *affirmed by the Supreme Court at [2022 (61) G.S.T.L. 342 (SC)]*
  - Mitsui Chemicals India Pvt. Ltd. [2019 (369) E.L.T. 1291 (T-All)]
  - Reckitt & Colman of India Ltd. [1996 (88) E.L.T. 641 (SC)
  - Dalmia Cements (Bharat) Limited [2017 (3) GSTL 81 (T-Del)]
  - Jitendra Kumar [2023 SCC OnLine All 2837]
  - Naresh Kumar & Co. Private Limited [2014 (36) STR 271 (Cal)]

- United Telecoms Ltd. [2011 TIOL 56 CESTAT BANG]

➢ The demand raised in the Show Cause Notice for post-amendment period is unsustainable as the same has been raised upon obsolete provisions. Reliance is placed on following decisions:-
- FICCI [2014 TIOL 701 (T-Del)]
- The People's Choice [2014 -TIOL-431-HC-KAR-ST]

➢ The expenses incurred by the appellant were in the nature of reimbursements hence could not be subjected to service tax. Reliance is placed on following decisions:-
- Intercontinental Consultants and Technocrats Pvt. Ltd. [(2018) 4 SCC 669]
- KPIT Technologies Limited [2017 (7) GSTL 468 (T-Mum)
- Kusum Healthcare Private Limited [2018 (2) TMI 1408-CESTAT New Delhi]
- Aricent Technologies (Holding) Limited [2017 (5) TMI 521 (CESTAT-Chandigarh)]

➢ Without prejudice to the above submissions, service tax is not leviable as services, if any, have been incorrectly classified. Reliance is placed on following decisions:-
- Syndicate Bank [2010 (19) STR 578 (T-Mum)]
- Nirulas Corner House [2009 (14) STR 131 (T-Del)]
- Basti Sugar Mills [2007 (7) STR 431 (T-Del)]
- Arvind Mills Limited [2014 (35) STR 496 (Guj)]
- Johnson and Johnson Private Limited [2017 (52) STR 159 (T-Mum)

➢ The entire demand is revenue neutral. Reliance is placed on following decisions:-
- Shree Rainie Gums and Chemicals Pvt. Limited [2017(4) GSTL 340 (Tri.-Del)]

➢ The extended period is not invokable, thus demand up to September 2012 is time barred. Reliance is placed on following decisions:-
- SBI [2018-TIOL-1143-CESTAT-Madras]
- Vodafone Essar South Limited [2018-TIOL-1169-CESTAT Bangalore]

- Aditya College of Competitive Examinations [2009 (16) STR 154 (T)]
- Nadiad Silicate & Chem [1995 (80) ELT 891 (T)]
- Continental Foundation Jt. Venture [2007 (216) ELT 177 (SC)]
- Ajay Mishra [2023 (386) E.L.T. 310 (T- Del)]
- Damnet Chemicals Pvt. Ltd.[2007 (216) ELT 3 (SC)]
- Padmini Products Limited [1989 (43) ELT 195 (SC)]

➢ No penalty and interest is imposable.

3.3 As directed by the Bench, the Appellant provided details of the payments made by admitting to the Service Tax liability in terms of various services under Annexure C as per their reply to Show Cause Notice. The details of payment made against te admitted liability is detailed in the table below as provided by the appellant.

Heads	**Particulars**	**Description**
Repairs, Maintenance, Tooling (MMR)	The Noticee has already discharged service tax liability along with interest, vide Challan No. 00002 dated 18.02.2013. (Para C 14) The Noticee has already discharged service tax liability along with interest, vide Challan No. 00002 dated 18.02.2013 (Para C 15) The Noticee has already discharged service tax liability along with interest, vide Challan No. 00002 dated 18.02.2013 (Para C 16) The Noticee has already discharged service tax liability along with interest, vide Challan No. 00002 dated 18.02.2013 (Para C 17)	Rs. 2,54,220/- paid under Head 440245 + Rs. 2,67,161/- paid under Head 440246
Professional Fees (MCS)	The Noticee has paid service tax of Rs. 11,532/- along with interest of Rs: 12,119/- vide Challan No. 00002 dated 18.02.2013 (Para C 31)	Rs. 11,532/- paid under Head 440480; Rs. 12,119/- paid under Head 440483
Insurance + Bank Charges & Commission	The Noticee again paid service tax for the period upto 2011, along with interest through Challan No. 00002 dated 18.02.2013 (Para C 45)	Rs. 75,435/- paid under Head 440169 Rs. 37,717/- paid under Head 440170

3.4 Learned Authorized Representative for the Revenue reiterates the findings recorded in the impugned order.

3.5 We have considered the impugned order and submissions made in the appeal and during the course of argument.

4.1 The Appellant have heavily relied upon Para 34 of the Order of the Commissioner to argue that Commissioner has himself held that the demand made is vague and could not have been confirmed. Para 34 of the Order-In-Original is reproduced below:-

> *"34 The defence has contended that the SCN has picked up foreign currency expenditures from the balance sheet of M/s FIL and demanded service tax on 'service charges' under Business Auxiliary Service', on Repair, Maintenance, Tooling under Management, Maintenance or Repair Service', on Professional Fees' under "Management Consultant Service', on Insurance' under Insurance Auxiliary Service', on Bank Charges & Commission' under Banking & Other Financial Service'. However, the SCN is silent as to under which category service tax is payable on Misc. charges. It has been further pleaded that the SCN has not gone into the nature of these foreign currency expenditure and proposed service tax demand under respective categories. I agree with the defence contention that generally the SCN should have gone into the nature of foreign currency expenditures and should have established the proposed service tax demand under the respective categories, however in the present SCN not much has been mentioned to establish taxability under the category of service mentioned against the concerned expenditure. At the same time I note at the material time i.e. during the course of Internal Audit, or when they were asked by the jurisdictional authorities to comply with the audit objection they too failed to come forward with relevant clarification and information to enable the jurisdictional authorities to appraise such clarifications and to disseminate information to analyse the applicability of appropriate statutory provisions thus leaving them no option but to issue SCN on the basis of available*

information. I am already of the view that up to 30.06.2012 revenue has to discharge onus to establish taxability whereas after 30.06.2012 it was assessees turn to establish exemption or non-taxability of any transaction of service. have carefully gone through the show cause notice dtd.22.10.2014, and I find that there is not even single assertion whatsoever as to which particular or specific taxable service had been received by M/s FIL from Foreign Service Provider except mention of taxable services in a cryptically manner against the head of expenditure shown in the Annexure D to the SCN. In the absence of an allegation of having provided a specific taxable service in the show cause notice, the show cause notice nor the consequent adjudication order may stand before judicial scrutiny. Nothing hasbeen placed on record that the department was handicapped and crippled, by the total non-cooperative attitude of M/s FIL, if any, who failed to furnish the relevant transactional documents to enable identification of the specific taxable service received by them, in order to justify the failure of department to properly investigate the matter and issuance of a vague and incoherent show cause notice. There is no classification in the body of SCN only quantification has been mentioned in the Annexure of the SCN that too happens to be flawed. No corroboratory evidence has been referred to in the body of the SCN. Certain heading such as 'Business Auxiliary Service', 'Management Consultant Service', 'Management, Maintenance or Repair Service', Insurance Auxiliary Service', 'Banking & Financial Service', which have been mentioned in the annexure, seems to pertain to classification under that service. In the case of miscellaneous expenses not even that has been mentioned. I observe that it is a settled principle of law that adjudicating authority should not traverse beyond Show cause notice. Also settle legal principle is that the show cause notice shall not be generic demand and mention of *specific clarification is a must for SCN to survive the scrutiny of law as held in the case of Shubham Electricals Vs. CCE Rohtak 2015 (40) S.T.R. 1034 (Tri. Del.). Taking cues from the above decision of the tribunal and with the objective of ensuring that justice is not derailed, I proceed to examine the entire issues on merit on the basis of facts and records available before me either divulged by M/s FIL through their defence submission or by the department in the SCN and relied upon documents."*

4.2 We find that demand in respect of all other Annexure except Annexure 'C' have been dropped which can be evidenced from the Para 35 of the Order. In Annexure 'C' the demand has been made clearly indicating the nature of service received and expenditure incurred for which money was transferred to their branch office opened in Denmark. Pare 35 of the Order is reproduced below for ready reference:-

"35 I have noted that in the SCN foreign currency expenditures incurred by M/s FIL have been tabulated as follows:-

Annexure-C					
Expenditure in Foreign Currency (Cash Basis): Other than CWIP-R&D					
Particulars	**2012-13**	**2011-12**	**2010-11**	**2009-10**	**Total**
Service Charges (BAS)	2426058	6969680	32627951	0	42023689
Repairs, Maintenance, Tooling (MMR)	86082	75706	535556	349045	1046389
Professional Fees (MCS)	421152	1710367	1044960	0	3176479
Insurance (IAS)	193367	358144	462288	0	1013799
Bank Charges & Commission (BFS)	0	275462	508272	165339	949073
Misc. Charges	1412421	1335021	1768831	0	4516273
Total	**4539080**	**1724380**	**36947858**	**514384**	**52725702**
ST payable (C)	**561030**	**1104611**	**3805629**	**52982**	**5524252**

I have noted that M/s FIL has opened an office in Denmark to carry out R&D activities and training of Indian R&D staff for the development of other designs support for the products manufactured by them in India. The office in Denmark has also been used for new implementation like ASON, GMPLS for 6300 products together with Indian R&D. The R&D Facility has been interalia engaged to advance the 6300 technology; to complete the SAP6 development; to develop new products as per up-coming technology changes. Thus the R&D office in Denmark is liable to be *treated as a fixed establishment of M/s FIL. I find that Section 66A of the Finance Act-1994, the enabling provision up to 30.06.2012, (Section 66 A not applicable w.e.f. 1-7-2012 vide Notification No 23/2012-ST dated 5-6-2012) to charge Service Tax on services received from outside India, reads as follows:*

SECTION [66A. Charge of service tax on services received from outside India. (1)

Where any service specified in clause (105) of section 65 is, -

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India,

such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1. A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2. Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.]

4.3 We also note that the claim of the Appellant before us that the demand made is vague is not supported by their own reply to the Show Cause Notice before the Adjudicating Authority. The reply given by the appellant is reproduced below:-

"C. THAT SERVICE TAX IS NOT PAYABLE ON FOREIGN CURRENCY EXPENDITURE INCURRED BY THE NOTICEE.

C.1. *The SCN in Annexure-C, has picked up foreign currency expenditures from the balance sheet of the Noticee and demanded service tax on 'service charges' under 'Business Auxiliary Service', on 'Repair, Maintenance, Tooling' under 'Management, Maintenance or Repair Service', on 'Professional Fees' under 'Management Consultant Service', on 'Insurance' under 'Insurance Auxiliary Service', on 'Bank Charges & Commission' under 'Banking & Other Financial Service'. However, the SCN is silent as to under which category service tax is payable on Misc. charges.*

C.2. *The Noticee submits that the SCN has not gone into the nature of these foreign currency expenditure and proposed service tax demand under respective categories. These foreign currency expenditures are discussed herein-below in detail:*

Annexure-C					
Expenditure in Foreign Currency (Cash Basis): Other than CWIP-R&D					
Particulars	*2012-13*	*2011-12*	*2010-11*	*2009-10*	*Total*

Service Charges (BAS)	*2426058*	*6969680*	*32627951*	*0*	*42023689*
Repairs, Maintenance, Tooling (MMR)	*86082*	*75706*	*535556*	*349045*	*1046389*
Professional Fees (MCS)	*421152*	*1710367*	*1044960*	*0*	*3176479*
Insurance (IAS)	*193367*	*358144*	*462288*	*0*	*1013799*
Bank Charges & Commission (BFS)	*0*	*275462*	*508272*	*165339*	*949073*
Misc. Charges	*1412421*	*1335021*	*1768831*	*0*	*4516273*
Total	*4539080*	*10724380*	*36947858*	*514384*	*52725702*
ST payable (C)	*561030*	*1104611*	*3805629*	*52982*	*5524252*

C.3. *Copies of excel sheet providing for the bifurcation of these charges for each year, are enclosed herein as* ***Annexure-17****.*

(I) Service Charges – 'Business Auxiliary Service' (Rs. 4,20,23,689/-):

C.4. *The SCN has proposed service tax on 'Service Charges' under 'Business Auxiliary Service'. The Noticee submits that these service charges are not taxable at all. In this regard it is submitted that the SCN has failed to justify as to how these charges are taxable under 'Business Auxiliary Service'. It is submitted that the definition of 'Business Auxiliary Service' as given under Section 65(19) of the Finance Act, 1994, provides various sub-clauses. For a service to get covered under this category, it should fall under any of these sub-clauses. However, the SCN has failed to provide, under which sub-clause these service charges are covered. Therefore, service tax liability to this extent is liable to be dropped on this ground alone.*

C.5. *Year-wise detail of service charges is given herein-below:*

Year	***Amount***
2009-10	*0/-*
2010-11	*3,26,27,951/-*
2011-12	*69,69,680/-*
2012-13	*24,26,058/-*
Total	***4,20,23,689/-***

C.6. *For the year 2009-10, there was no foreign currency expenditure as 'Service Charges'. For the year 2010-11* *and 2011-12, the Noticee has booked Rs. 3,26,27,951/- and Rs. 69,69,680/- respectively as 'Service Charges' under 'Expenditure in Foreign Currency (Cash Basis)'. The Noticee submits that the SCN has not gone into the nature of these expenses and proposed service tax demand under 'Business Auxiliary Service'. It is submitted that these service charges pertain to expenses in foreign currency incurred by the Noticee in respect of its R&D Facility at Denmark. As submitted earlier, as per Article-2 of Addendum to Amendment Agreement No. 2 & 3 to TALA, the Noticee has established R&D Facility in Denmark to undertake certain research and development activities in terms of TALA. Further, Amendment Agreement No. 2 & 3 of TALA provided that Tellabs has committed to provide resources to help the Noticee in facilitating a development environment. For this, the Noticee has identified specified resources of Tellabs and the Noticee was required to compensate Tellabs for providing the specified resources to the Noticee for its R&D facility. Relevant portion of the Amendment Agreement No. 3 of TALA is reproduced herein-below:*

> *Article 1.*
>
> *1.1 For continuing the development Fibcom have identified specific resources ("Named Resources"). Fibcom will compensate Tellabs for the fully loaded costs of the Named Resources. For these Named Resources and for any other additional manpower resources made available from Tellabs Denmark Fibcom can issue the appointment letters/ contract as and when they are released by Tellabs and these resources shall work as per Fibcom requirements and the negotiated terms & conditions between Fibcom and those resources.*
>
> *...*
>
> *3. Monthly settlement of R&D cost*

> *3.1 Fibcom will pay all direct and fully allocated costs for the cost center associated with the Named Resources. Tellabs will raise an invoice to Fibcom every month. The invoice has to be paid within thirty (30) calendar days from the date of invoice.*
>
> *Details on calculation of direct allocations are given in Chapter V- Details of cost calculations.*

C.7. *From the bare perusal of the above and 'Chapter V – Details of cost calculations' of Amendment No. 3 to TALA, it is evident that Tellabs was raising invoices on the Noticee for payroll, bonus, incentive, compensation expense, travel & Entertainment, Education & Training, Computing Equipment, etc. and the Noticee was making payment of the same in foreign exchange to Tellabs.*

C.8. *In this regard, reliance is also placed on the Facility Services Agreement dated 01.09.2010 wherein Article 3, 4, 7 etc. provided that Tellabs will provide space and additional service to the Noticee. Relevant portion of the Facility Services Agreement is reproduced herein-below:*

> *3. <u>Service Fee.</u> The Service Fee for the Services specified in Exhibit A shall be DKK 85,000 per month for up to 10 Fibcom related headcount, and DKK 105,000 per month for 11 to 15 Fibcom related headcount. Additionally, if Tellabs becomes subject to any future price increase for rent or services, either based upon an index increase or a service provider increase, the Service Fee will be increased proportionately for the same increase. If Fibcom related headcount increase above 15, both parties will review and agree upon a new revised Service Fee.*
>
> *4. <u>Additional Services.</u> In case of provision by Tellabs of any other services outside of Exhibit A (e.g. meals to Fibcom personnel and/ or guest), or in case of modification of Services, such changes are subject to mutual written agreement thereof. Tellabs*

shall be entitled to be reimbursed fully for the cost attributable to the performance of such additional and/ or modified services.

C.9. *The Noticee places reliance on the invoices raised by Tellabs. Representative copies of the invoices raised by Tellabs on the Noticee for the year 2010-2011 and 2011-12 are enclosed herein as* ***Annexure-18****. The Noticee submits that from the narrations in the invoices it is evident that these charges are paid by the Noticee to Tellabs, in lieu of the specified resources provided by Tellabs. The Noticee submits that these service charges also include expenses incurred on the specified resources as their meals cost, etc.*

C.10. *For the year 2012-13, the Noticee has shown Rs. 24,26,058/- as 'Service Charges' under 'Expenditure in Foreign Currency (Cash Basis)'. It is submitted that this amount pertains to rent of R&D Facility charged by Tellabs under Article 3 of the Facility Services Agreement dated 01.09.2010. In this regard reliance is placed on the invoices raised by Tellabs for charging rent with respect to R&D Facility of the Noticee. Representative copies of invoices raised by Tellabs on the Noticee for recovery of rent under Article 3 of the Facility Services Agreement are enclosed herein as* ***Annexure-19****.*

C.11. *In the light of the above, it is submitted that these charges in no way are covered under any of the clauses of 'Business Auxiliary Service'. Therefore, the SCN deserves to be dropped to this extent.*

(II) Repairs, Maintenance, Tooling Expenses – 'Management, Maintenance or Repair Service' (Rs. 10,46,389/-)

C.12. *The SCN has proposed service tax on repair, maintenance tooling expenses under 'Management, Maintenance or Repair Service'. In this regard it is submitted that the SCN has failed to justify as to how* *these charges are taxable. Therefore, service tax liability to this extent is liable to be dropped on this ground alone.*

C.13. *Year-wise detail of Repair, Maintenance, Tooling Expenses, is given herein-below:*

Year	***Amount***
2009-10	*3,49,045*
2010-11	*5,35,556*
2011-12	*75,706*
2012-13	*86,082*
Total	***10,46,389***

C.14. *In the year 2009-10, the Noticee has shown Rs. 3,49,045/- as 'Repairs, Maintenance, Tooling expenses etc.' under 'Expenditure in Foreign Currency (Cash Basis)' in its balance sheet. It is submitted that the Noticee has received maintenance service from service providers situated outside India. In lieu of the maintenance service received from outside India, the Noticee has paid an amount of Rs. 2,08,640/- (3,200 Euro) and Rs. 1,40,405/- (2,600/- Euro) to the foreign service providers. It is submitted that the maintenance service has been received by the Noticee for its Indian operations. Copies of the invoices raised by the foreign service providers for the year 2009-2010 are enclosed herein as* ***Annexure-20****. The Noticee submits that these maintenance and repair services are received by the Noticee in India. On these amounts, the Noticee has already discharged service tax liability along with interest, vide Challan No. 00002 dated 18.02.2013. Copy of Challan No. 00002 dated 18.02.2013 along with calculation of service tax and interest, is enclosed herein as* ***Annexure-21****.*

C.15. *In the year 2010-11, the Noticee has shown Rs. 5,35,556/- as 'Repairs, Maintenance, Tooling expenses etc.' under 'Expenditure in Foreign Currency (Cash Basis)' in its balance sheet. It is submitted that the Noticee has received maintenance service from service providers situated outside India. In lieu of the maintenance service received from outside India, the Noticee has paid an amount of Rs. 1,57,150/- (3,500 Euros) and Rs.*

3,78,406/- (i.e. 6,133/- Euros, the same is included in Invoice No. 1060581-1021148 dated 16.07.2010) to the foreign service providers. It is submitted that the maintenance service has been received by the Noticee for its Indian operations. Copies of the invoices raised by the foreign service providers for the year 2010-2011 are enclosed herein as ***Annexure-20****. The Noticee submits that these maintenance and repair services are received by the Noticee in India. On these amounts, the Noticee has already discharged service tax liability along with interest, vide Challan No. 00002 dated 18.02.2013. Copy of Challan No. 00002 dated 18.02.2013 along with calculation of service tax and interest, is enclosed herein as* ***Annexure-21****.*

C.16. *In the year 2011-12, the Noticee has shown Rs. 75,706/- as 'Repairs, Maintenance, Tooling expenses etc.' under 'Expenditure in Foreign Currency (Cash Basis)' in its balance sheet. It is submitted that the Noticee has received maintenance service from service providers situated outside India. In lieu of the maintenance service received from outside India, the Noticee has paid an amount of Rs. 75,706/- (i.e. 1,227/- Euros, the same is included in Invoice No. 1060581-1021148 dated 16.07.2010) to the foreign service providers. It is submitted that the maintenance service has been received by the Noticee for its Indian operations. Copy of the invoices raised by the foreign service providers for the year 2011-2012 is enclosed herein as* ***Annexure-22****. The Noticee submits that these maintenance and repair services are received by the Noticee in India. On this amount, the Noticee has discharged service tax liability along with interest, vide Challan No. 00002 dated 18.02.2013 Copy of Challan No. 00002 dated 18.02.2013 along with calculation of service tax and interest, is enclosed herein as* ***Annexure-21****.*

C.17. *In the year <u>2012-13</u>, the Noticee has shown Rs. 86,082/- as 'Repairs, Maintenance, Tooling expenses etc.' under 'Expenditure in Foreign Currency (Cash Basis)' in its balance sheet. It is submitted that the Noticee has received maintenance service from service providers situated outside India. In lieu of the maintenance service received from outside India, the Noticee has paid an amount of Rs. 43,776/- (i.e. 600/- Euros) and Rs. 42,306/- (I.e. 600/- Euros) to the foreign service providers. It is submitted that the maintenance service has been received by the Noticee for its Indian operations. Copy of the invoices raised by the foreign service providers for the year 2012-2013 is enclosed herein as* ***<u>Annexure-23</u>****. The Noticee submits that these maintenance and repair services are received by the Noticee in India. On this amount, the Noticee has discharged service tax liability along with interest, vide Challan No. 00002 dated 18.02.2013 Copy of Challan No. 00002 dated 18.02.2013 along with calculation of service tax and interest, is enclosed herein as* ***<u>Annexure-21</u>****.*

C.18. *In the light of the above, it is submitted that the SCN did not even go into the nature of repair and maintenance services received by the Noticee. The SCN not even considered if the services are received in by the Noticee for its Indian operations for the R&D Facility at Denmark. The Noticee submits that since these charges are incurred by the Noticee for its Indian operations, it has correctly discharged service tax liability along with interest. This demonstrates that the SCN has been issued without understanding or appreciating facts. Therefore, the SCN to this extent is liable to be dropped.*

(III) <u>Professional Fees – 'Management Consultant Service' (Rs. 31,76,479/-)</u>

C.19. *The SCN has proposed service tax on professional fees under 'Management, Consultant Service'. In this regard it is submitted that the SCN has failed to justify as* *to how these charges are taxable. Therefore, service tax liability to this extent is liable to be dropped on this ground alone.*

C.20. *Year-wise detail of professional fees, is given herein-below:*

Year	Amount
2009-10	0
2010-11	10,44,960
2011-12	17,10,367
2012-13	4,21,152
Total	**31,76,479**

C.21. *For the year 2009-10, there was no foreign currency expenditure as 'Professional Fees'. For the year 2010-11, the Noticee has shown Rs. 10,44,960/- as 'Professional Fees' under 'Expenditure in Foreign Currency (Cash Basis)'. The Noticee submits that the amount of Rs. 10,44,960/- is paid by the Noticee to Tellabs for providing training to its employees in India and at Denmark. Detail of amount paid by the Noticee to Tellabs for providing training is given herein-below:*

Training Fee in India						
Particulars	Bill No.	Date	Value in DKK	Less TDS	Net Payment	Value in INR
Remote site Training, Location, start fee	91462724	15.10.2009	3,000	600	2,400	1,11,960
Training Fee in Denmark						
Prof. SVCS, General, Daily Rate, Denmark	91462724	15.10.2009	22,000	4,400	17,600	8,21,040
Prof. SVCS, General, Customized Training, Denmark	91462724	15.10.2009	3,000	600	2,400	1,11,960
Total			28,000	5,600	22,400	10,44,960

C.22. *Copy of the Invoice No. 91462724 dated 15.10.2009 is enclosed herein as* ***Annexure-24****. From the bare perusal of the above table and the invoice, it is evident that the Noticee has received training from Tellabs and* *paid Rs. 10,44,960/- out of which Rs. 1,11,960/- pertain to training received by the Noticee in India and Rs. 9,33,000/- pertain to training received in Denmark.*

C.23. *It is submitted that the SCN has wrongly classified training provided by Tellabs under 'Management or Business Consultant Service' as Tellabs is not providing any consultancy to the Noticee. The training service provided by Tellabs is executory in nature and therefore, the same is not classifiable under 'Management or Business Consultancy Service'. For ease of reference relevant provisions of 'Management or Business Consultancy Service' are reproduced herein-below:*

> ***Section 65(65) "management or business consultant"*** *means any person who is engaged in providing any service, either directly or indirectly, in connection with the management of any organisation or business in any manner and <u>includes any person who renders any advice, consultancy or technical assistance, in relation to financial management, human resources management, marketing management, production management, logistics management, procurement and management of information technology resources or other similar areas of management</u>;*
>
> *Section 65(105)(r) to any person, by a management or business consultant in connection with the management of any organisation or business, in any manner;*

C.24. *From a bare perusal of the above definition it is evident that the definition of 'Management or Business Consultant Service' covers activities which are advisory in nature. However, in the present case, Tellabs is actually providing training to the employees of the Noticee, in India and in Denmark, as the case may be. It is submitted that* *the nature of work undertaken by the Noticee is nothing but executory in nature and in no way there is any reference to 'advise', 'consultancy', or 'technical assistance' which are the imperatives of 'Management or Business Consultant Service'.*

C.25. *Therefore, it is submitted that the same is not classifiable under 'Management or Business Consultant Service'. In this regard reliance is placed on the following case laws wherein it has been held that 'Management or Business Consultancy Service' covers only advisory services and not executory services:*

- ***Syndicate Bank v. CCE, Mangalore, 2010 (19) STR 578 (Tri - Bang).***
- ***Nirulas Corner House Pvt. Ltd. v. Commr. of S.T., New Delhi – 2009 (14) STR 131 (Tri - Del).***
- ***CCE, Vadodara v. Arvind Narayan Prasad Nopany, 2008 (11) STR 353 (Tri-Ahmd)***
- ***Basti Sugar Mills Co. Ltd. v. CCE, Allahabad, 2007 (7) STR 431 (Tri - Del).***

C.26. *In the light of the above, it is submitted that the Professional Fees paid by the Noticee to Tellabs is not classifiable under 'Management or Business Consultant Service' and hence not taxable.*

C.27. *Presuming without admitting, it is submitted that if at all classifiable, training provided by Tellabs, will be classifiable under 'Commercial Training or Coaching Service'. Relevant provisions relating to 'Commercial Training or Coaching Service' are reproduced herein-below:*

> ***Section 65(26) "commercial training or coaching"*** *means any training or coaching provided by a commercial training or coaching centre;*
>
> ***Section 65(27) "commercial training or coaching centre"*** *means any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons*

on any subject or field other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes;

Section 65(105)(zzc) *to any person, by a commercial training or coaching centre in relation to commercial training or coaching;*

***Explanation**. — For the removal of doubts, it is hereby declared that the expression "commercial training or coaching centre" occurring in this sub-clause and in clauses (26), (27) and (90a) shall include any centre or institute, by whatever name called, where training or coaching is imparted for consideration, whether or not such centre or institute is registered as a trust or a society or similar other organisation under any law for the time being in force and carrying on its activity with or without profit motive and the expression "commercial training or coaching" shall be construed accordingly;*

[Explanation inserted by the Finance Act, 2010, w.e.f. 01.07.2003]

C.28. *Thus, on a plain reading of the provisions it can be seen that the basic conditions for a service to be taxable under 'Commercial Training or Coaching Service' are:*

(i) The service must be for imparting training or coaching.

(ii) Training or coaching must be provided by an institute or establishment.

(iii) Such training or coaching must be for imparting skill or knowledge or lessons on any subject or field.

(iv) Such training or coaching may be with or without issuance of a certificate.

(v) It includes coaching or tutorial classes.

C.29. *The following are expressly excluded from the purview of 'Commercial Training or Coaching Service':*

(i) Training or coaching in the field of sports.

(ii) Pre-school coaching and training centre.

(iii) Any institute or establishment, which issues any certificate or diploma or degree or any educational qualification recognized by law.

C.30. *From the perusal of the above provisions, it is evident that to be classifiable under 'Commercial Training or Coaching Service', there must be any 'training' or 'coaching'. In the present case, Tellabs provided 'training' to the employees of the Noticee in India and in Denmark. Therefore, the same is more appropriately classifiable under 'Commercial Training or Coaching Service' in terms of Section 65A of the Finance Act, 1994. However, the Noticee submits that 'Commercial Training or Coaching Service' is category-II service as provided under Rule 3(ii) of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, taxability of the which is based on the location of its performance. Therefore, training to employees of the Noticee provided in India is only liable to service tax and training provided outside India i.e. in Denmark is not taxable.*

C.31. *Without prejudice to the above, the Noticee has paid service tax of Rs. 11,532/- along with interest of Rs. 12,119/- vide Challan No. 00002 dated 18.02.2013 on Rs. 1,11,960/- pertaining to training received by the Noticee in India. Copy of Challan No. 00002 dated 18.02.2013 is enclosed as* ***Annexure-21****.*

C.32. *For the year 2011-12, the Noticee has incurred Rs. 17,10,367/- as 'Professional Fees' in foreign exchange. Detail of Professional Fees of Rs. 17,10,367/- is given herein-below:*

Invoice No. & date	*Value in FC*	*Value in INR*	*Remarks*
2200001171 dated 05.09.2011	*NA*	*2,50,000/-*	*The Noticee has received services from Deloitte Haskins & Sells for preparing and filing Income Tax Returns for five inbound assignees. On this invoice, service provider has charged service tax and the Noticee has paid the same. The same is evident from the invoice enclosed as annexure. Therefore, service tax on the same is not payable again.*

2200000423 dated 05.07.2011	*NA*	*3,75,000/-*	*The Noticee has received services from Deloitte Haskins & Sells for preparing Withholding Tax Computations of five inbound assignees. On this invoice, service provider has charged service tax and the Noticee has paid the same. The same is evident from the invoice enclosed as annexure. Therefore, service tax on the same is not payable again.*
1350686 dated 29.10.2010	*93,750*	*7,71,588/-*	*The Noticee has received following services for its R&D Facility at Denmark:* • *Assistance untill week 43 (exclusive payroll)* • *Legal advice concerning employment law* • *Meetings and discussions with Danske Bank concerning bank* • *Memo to employees concerning tax and work in India* • *Discussions concerning Withholding Tax in India* *The above mentioned services were provided by Deloitte, Silkeborg to R&D Facility of the Noticee at Denmark. Further, Deloitte has charged VAT on the said invoice and the Noticee has paid the same. The same is evident from the perusal of the invoice. The Noticee submits that since these services were provided and received outside India, the same are not taxable under the Finance Act, 1994.*
80047129 dated 09.08.2011	*38,125*	*3,13,779/-*	*The Noticee has received following services for its R&D Facility at Denmark:* • *Statement to Audit in India* • *Assistance concerning termination of Danish Employees* • *Different tax issues pension treatment etc.* *The above mentioned services were provided by Deloitte, Silkeborg to R&D Facility of the Noticee at Denmark. Further, Deloitte has charged VAT on the said invoice and the Noticee has paid the same. The same is evident from the perusal of the invoice. The Noticee submits that since these services were provided and received outside India, the same are not taxable under the Finance Act, 1994.*
Total		*17,10,367/-*	

C.33. *Copies of invoices pertaining to Professional Fees for the year 2011-12 are enclosed herein as* ***<u>Annexure-25</u>***.

C.34. *From the bare perusal of the above, it is submitted that the Noticee is not liable to pay service tax on these professional fees.*

C.35. *For the year 2012-13, the Noticee has incurred Rs. 4,21,152/- as Professional Fees. These charges pertain to services provided by Deloitte at the Noticee's R&D Facility at Denmark. The Noticee submits that since the service provider is situated outside India and the services are provided outside India, the same is not taxable under the Finance Act, 1994. Copies of payment made to Deloitte through bank for providing professional services at Denmark for the year 2012-13 are enclosed herein as* ***Annexure-26***.

C.36. *In the light of the above, it is submitted that the SCN to this extent is liable to be dropped.*

(IV) Insurance – 'Insurance Auxiliary Service' (Rs. 10,13,799/-)

C.37. *The SCN has proposed service tax on insurance expenses under 'Insurance Auxiliary Service'. In this regard it is submitted that the SCN has failed to justify as to how these charges are taxable. Therefore, service tax liability to this extent is liable to be dropped on this ground alone.*

C.38. *Year-wise detail of insurance expense is given herein-below:*

Year	*Amount*
2009-10	*0*
2010-11	*4,62,288*
2011-12	*3,58,144*
2012-13	*1,93,367*
Total	*10,13,799*

C.39. *It is submitted that the Noticee has taken insurance policies from Willis Insurance Pool, for its R&D Facility at Denmark and the employees working at its R&D Facility at Denmark. The Noticee was paying the premium to Willis*

*Insurance in foreign currency. Copy of the insurance policy taken by the Noticee from Willis Insurance is enclosed herein as **Annexure-27**. Copies of Payment made to Willis Insurance through bank are enclosed herein as **Annexure-28**. The SCN has picked these charges and alleges that the premium paid by the Noticee is taxable under 'Insurance Auxiliary Service'. For ease of reference, relevant provisions of 'Insurance Auxiliary Service' are reproduced herein-below:*

> ***Section 65(55) "insurance auxiliary service"*** *means any service provided by an actuary, an intermediary or insurance intermediary or an insurance agent in relation to general insurance business or life insurance business and includes risk assessment, claim settlement, survey and loss assessment;*
>
> ***Section 65(105)(zl)*** *to a policy holder or any person or [insurer, including re-insurer], by an actuary, or intermediary or insurance intermediary or insurance agent, in relation to insurance auxiliary services concerning general insurance business;*
>
> ***Section 65(105)(zy)*** *to a [policyholder or any person] or [insurer, including re-insurer] by an actuary, or intermediary or insurance intermediary or insurance agent, in relation to insurance auxiliary services concerning life insurance business;*

C.40. *From the perusal of the above, it is clear that the essential ingredients of the definition are as below:*

a. That the service must be provided by an actuary, or an intermediary or insurance intermediary or an insurance agent;

b. That the service must relate to general insurance business of life insurance business;

c. That the business includes risk assessment, claim settlement, survey, loss assessment.

C.41. *The scope of taxable service was clarified vide* ***Ministry's Letter No. B-II/1/2000-TRU dated 09.07.2001****, relevant portion of the same is reproduced herein-below:*

> *2.* ***Services covered in this category are the services provided by the insurance agents to the insurance company in relation to marketing of insurance policies.*** *They also provide service to the policy holder by providing information/advice on the types of insurance policies, processing of documentation, remitting of insurance premium, etc. Actuarial services are provided by the actuaries to the insurance companies. They cover diverse fields such as calculating insurance risks and premia, insurance claims adjustment services such as services of investigating claims, determining the amount of loss or damages covered by the insurance policies and negotiating settlements, services of examining claims which have been investigated and authorisation of payments and damage assessment services, administration of insurance including salvage administration and insurance consultancy services. It may be emphasized that only such services are taxable which are in relation to general insurance business such as motor vehicle insurance, insurance of buildings and other properties, marine insurance, fire insurance and other miscellaneous insurance. Services provided in relation to life insurance are not taxable.*

C.42. *Form the perusal of the above, it is submitted that the services provided by agents or middlemen in relation to general insurance only are covered under 'Insurance Auxiliary Service'. Therefore, service tax demand to this extent is liable to be dropped.*

(V) Bank Charges & Commission – 'Banking or Other Financial Service' (Rs. 9,49,073/-)

C.43. *The SCN has proposed service tax on bank charges & commission under 'Banking or Other Financial Service'. In this regard it is submitted that the SCN has failed to justify as to how these charges are taxable under 'Banking or Other Financial Service'. Therefore, service tax liability to this extent is liable to be dropped on this ground alone.*

C.44. *Year-wise detail of bank charges and commission, is given herein-below:*

Year	***Amount***
2009-10	*1,65,339*
2010-11	*5,08,272*
2011-12	*2,75,462*
2012-13	*0*
Total	***9,49,073***

C.45. *It is submitted that the Noticee has shown above amounts as 'Foreign Bank Charges' under 'Expenditure in Foreign Currency (Cash Basis)', in its balance sheet. It is submitted that the Noticee has purchased goods from foreign suppliers, for which it has paid for the cost of goods and bank charges. It is submitted that these bank charges relates to buyer's credit taken from Banks and LC negotiation charges. On the invoice value i.e. cost of the goods plus bank charges, the Noticee has paid custom duty. In this regard reliance is placed on invoices raised by the foreign suppliers and corresponding Bills of Entry. Representative copies of invoices raised by foreign suppliers and corresponding Bills of Entry are enclosed herein as **Annexure-29**. Further it is submitted that the Noticee again paid service tax for the period upto 2011, on Bank charges along with interest through Challan No. 00002 dated 18.02.2013. Copy of Challan No. 00002 dated 18.02.2013 along with calculation of service tax and interest, is enclosed herein as **Annexure-21**.*

C.46. *Therefore, it is submitted that the Noticee is not liable to pay service tax on bank charges.*

(VI) Misc. Charges (Rs. 45,16,273/-)

C.47. *The SCN has proposed service tax on Misc. charges without specifying the category under which the same is taxable. In this regard it is submitted that the SCN has failed to justify as to how these charges are taxable. Further, the SCN failed to provide under which category service tax is payable. Therefore, service tax liability to this extent is liable to be dropped on this ground alone.*

C.48. *Year-wise detail of Misc. charges is given herein-below:*

Year	***Amount***
2009-10	*0*
2010-11	*17,68,831*
2011-12	*13,35,021*
2012-13	*14,12,421*
Total	***45,16,273***

C.49. *The Noticee submits that these expenses in foreign currency are incurred by the Noticee for running its R&D Facility at Denmark. During the operation of R&D Facility at Denmark, the employees working at the facility were receiving certain services like internet, electricity, canteen, etc. for day-to-day working of the facility and making contributions to the government funds like ATP, maternity, etc. The Noticee released payment of such charges from its account at Danske Bank, Denmark. Reliance in this regard is placed on the bank statement of Danske Bank, Denmark, which is enclosed herein as* ***Annexure-30****. The Noticee submits that these expenses are not taxable as the same were incurred in relation to the Noticee's R&D Facility situated at Denmark. Presuming without admitting that the expenses incurred at R&D Facility, Denmark are for receipt of service, it is submitted that the same are not taxable as the service provider and service recipient are situated outside India and the services are provided and consumed outside India. in this regard reliance is placed on Section 64 of the Finance Act, 1994, relevant portion is reproduced herein-below:*

> ***Section 64. Extent, commencement and application****. — (1) This Chapter extends to the whole of India except the State of Jammu and Kashmir.*

C.50. *The provisions contained in Section 64 of the Finance Act, 1994 extend to the whole of India and not beyond India. From the perusal of Section 64 of the Finance Act, 1994, it is clear that service tax is leviable only on specified services as defined in the Finance Act, 1994 and that the Act extends to whole of India, excluding the State of Jammu and Kashmir. The above section does not make any specific mention about the Finance Act having extra territorial applications. In this regard reliance is also placed on the decision in the case of* ***M/s. Cox & Kings India Ltd. and Others v. Commissioner of Service Tax, Delhi, 2013-TIOL-1907-CESTAT-DEL****. Therefore, service tax on these expenses is not payable.*

C.51. *Further it is submitted that major part of these charges paid by the Noticee pertains to reimbursements to its employees working at its R&D Facility at Denmark. Therefore, the same are not taxable. In this regard, the Noticee places reliance on the decision of the Hon'ble Delhi High Court in the case of* ***Intercontinental Consultants and Technocrats Pvt Ltd v. Union of India and Anr, 2012-TIOL-966-HC-DEL-ST****wherein the petitioner has filed the writ petition inter-alia with these prayers: (i) quashing Rule 5 in its entirety of the Service Tax (Determination of Value) Rules, 2006 to the extent it includes the reimbursement of expenses in the value of taxable service for the purpose of charging service tax and (ii) declaring the Rule to be unconstitutional and ultra vires Sections 66 and 67 of the Finance Act, 1994. The relevant portion of the decision is reproduced herein-below:*

> *18. Section 66 levies service tax at a particular rate on the value of taxable services. Section 67 (1) makes*

the provisions of the section subject to the provisions of Chapter V, which includes Section 66. This is a clear mandate that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies a tax only on the taxable service and nothing else. There is thus in built mechanism to ensure that only the taxable service shall be evaluated under the provisions of 67. Clause (i) of sub-section (1) of Section 67 provides that the value of the taxable service shall be the gross amount charged by the service provider "for such service". Reading Section 66 and Section 67 (1) (i) together and harmoniously, it seems clear to us that in the valuation of the taxable service, nothing more and nothing less than the consideration paid as quid pro quo for the service can be brought to charge. Sub-section (4) of Section 67 which enables the determination of the value of the taxable service "in such manner as may be prescribed" is expressly made subject to the provisions of sub-section (1). The thread which runs through Sections 66, 67 and Section 94, which empowers the Central Government to make rules for carrying out the provisions of Chapter V of the Act is manifest, in the sense that only the service actually provided by the service provider can be valued and assessed to service tax. <u>We are, therefore, undoubtedly of the opinion that Rule 5 (1) of the Rules runs counter and is repugnant to Sections 66 and 67 of the Act and to that extent it is ultra vires. It purports to tax not what is due from the service provider under the charging Section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure and costs which are incurred by the service provider "in the course of providing taxable service". What is brought to charge under the relevant</u>

<u>Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes far beyond the charging provisions and cannot be upheld</u>. It is no answer to say that under sub-section (4) of Section 94 of the Act, every rule framed by the Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule. As pointed out by the Supreme Court in Hukam Chand v. Union of India, AIR 1972 SC 2427: -

> *"The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act."*

Thus Section 94 (4) does not add any greater force to the Rules than what they ordinarily have as species of subordinate legislation.

19. For the above reasons we quash the impugned show-cause notice and allow the writ petition with no order as to costs.

(Emphasis Supplied)

C.52. *From the bare perusal of the above decision it is clear that the Hon'ble Delhi High Court was please to hold that Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 which provides for inclusion of the expenditure or costs incurred by the service provider in the course of providing the taxable service in the value for the purpose of charging service tax is ultra vires Section 66 and 67 of the Finance Act, 1994 and travels much beyond the scope of those sections.*

C.53. *The Noticee submits that the above decision is squarely applicable in the present case. It is therefore submitted that the demand of service tax on the amounts reimbursed by the Noticee to its employees working at its R&D Facility at Denmark, are not taxable.*

C.54. *Reliance is also placed on the decision in the case of* ***Reliance Industries Ltd. v. CCE, Rajkot, 2008 (12) STR 345 (Tri.-Ahmd.)*** *affirmed by Hon'ble Supreme Court in* ***2011 (23) STR J226 (S.C.)*** *wherein it is held that the expenses incurred on account of reimbursable expenses shall not form part of the value of the taxable services. Thus, the service tax demand to this extent is not sustainable and deserves to be dropped.*

C.55. *In the light of the above, it is submitted that the SCN is liable to be dropped."*

4.4 The detail in which the Appellant has made the reply makes it evident that they have fully understood the Show Cause Notice. Hence the same cannot be said to be vague in respect of Annexure 'C'. They have provided all the necessary invoices while making reply admitting to the payments made also. They have also contended in the reply that in certain case they have paid the Service Tax due in respect of the Services received from outside India through their Branch Office in Denmark. In case of Keshavlal Lallubhai Patel v. Lalbhai Trikumlal Mills Ltd. [AIR 1958 SC 512] and held as follows:

"10. There is one more point which must be considered. It was strongly urged before us by the appellants that, in the trial court, no plea had been taken by the respondent that the agreement for the extension of time was vague and uncertain. No such plea appears to have been taken even in the grounds of appeal preferred by the respondent in the High Court at Bombay; but apparently the plea was allowed to be raised in the High Court and the appellants took no objection to it at that stage. It cannot be said that it was not open to the High Court to allow such a plea to be raised even for the first time in appeal. After all, the plea raised is a plea of law <u>based solely upon the construction of the letter which is the basis of the case for the extension of time for the performance of the contract and so it was competent to the appeal court to allow such</u>

a plea to be raised under Order 41 Rule 2 of the Code of Civil Procedure. If, on a fair construction, the, condition mentioned in the document is held to be vague or uncertain, no evidence can be admitted to remove the said vagueness or uncertainty. The provisions of Section 93 of the Indian Evidence Act are clear on this point. It is the language of the document alone that will decide the question. It would not be open to the parties or to the court to attempt to remove the defect of vagueness or uncertainty by relying upon any extrinsic evidence. Such an attempt would really mean the making of a new contract between the parties. That is why we do not think that the appellants can now effectively raise the point that the plea of vagueness should not have been entertained in the High Court."

Appellant had raised the plea of vagueness before the adjudicating authority, who had after consideration of the plea set aside the demands which he conclude were vague in nature. Based on the submissions made he concluded that demand in respect of Annexure C was no vague and proceeded to adjudicate the same after taking note of the detailed submissions made by the appellant giving the details of entire transactions covered under the said Annexure, Financial Year wise and invoice wise. In our view appellant having made detailed submissions on each and every transaction highlighted in the said annexure cannot take the plea of vagueness at this stage. Hence we do not find much merits in the plea of vagueness raised by the appellant, and proceed to decide upon the merits of the case.

4.5 We are also of the view that expenditure incurred are not in nature of reimbursable expenses which could have been extended the benefit of the judgement of the Hon'ble Supreme Court in the case of **Union of India V/s Intercontinental Consultants and Technocrats Pvt. Ltd. reported at 2018 (10) G.S.T.L. 401 (S.C.).** The reimbursable expenses and the expenses which are incurred by the service provider over and above the value of the service provided, as per the transaction agreement between the service provider and service recipient. In the present case Appellant has received these services against the payment of these charges. The same were paid to the foreign service provider either directly or through their branch office. Such charges do not fall under the category of reimbursable expenses to get the benefit of the said decision of the Hon'ble Supreme Court. (Reference be made to the decision of larger bench in the case of Bhagwathy Traders [2011 (24) STR 290 (T-LB)]. Impugned order in para 36 records as follows:

> *"36 Thus I note that in terms of Section 66A(2)up to 30.06.2012 permanent establishment of a company in India and permanent establishment of that company out side India are to be treated as separate persons for the purpose of Section 66A. I have noted from the offer of employment of Danish nationals by M/s FIL that all of them are technocrat i.e. Engineers whose designations read as Engineer, Manager Engineer, Staff Engineer, Principal Engineer, Senior Engineer etc. Since the Denmark establishment of M/s FIL is centered around these assigned personnel of M/s Tellabs who are undoubtedly are technical persons capable of providing Scientific and Technical Consultancy relevant for providing Research and Development Facility for Indian operations of M/s FIL, hence they had been acting as service provider to their Indian Head office. Due to this deeming fiction created by Section 66A (2), all the reimbursement of expenses for functioning of that branch would liable to be construed as consideration of the services being rendered by that branch to its head quarter as laid down in Rule 7 of Service Tax (Determination Of Value) Rules, 2006 which at material times reads as follows-*
>
> *7. Actual consideration to be the value of taxable service provided from outside India. (1) The value of taxable service received under the provisions of section 66A, shall*

be such amount as is equal to the actual consideration charged for the services provided or to be provided.

(2) Notwithstanding anything contained in sub-rule (1), the value of taxable services specified in clause (ii) of rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, as are partly performed in India, shall be the total consideration paid by the recipient for such services including the value of service partly performed outside India.

37 As such I find that there is no need to vivisect the expenditures incurred by M/s FIL India, in relation to expenses of its R& D centre stationed at Denmark, in to further respective category of service covering each head of expenditure independently. Moreover the defence has not forwarded any tenable plea as to how these expenses were not taxable after 01.07.2012 i.e. after the introduction of negative services based tax regime. Now proceed to examine the defence plea with reference to each of the head of expenditure incurred in foreign currency."

4.6 From the above we find that though the impugned order itself identifies that demand is made for two distinct period pre and post 01.07.20212, it fails to make any observations in respect of the demand made for period prior to 01.07.2012. During the period prior to 01.07.2012, the Finance Act, 1994 did not provided the definition of service but provided for taxation in respect of the services which were defined to be taxable services. It is settled law that during the period prior to 01.07.2012, the show cause notice issued had to contain the details of the services which were to be taxed and under the category in which they were taxed. Notice, do not provide any such details nor do the impugned order discuss so. Without establishing the category in which the services were required to be taxed during this period the demand confirmed by treating the amount paid as consideration, to any foreign recipient, against the invoices issued by him cannot directly mean that the same was to be subjected to service tax. The demand for the period prior to 01.07.2012 fails on this account as being made without establishing the taxability of the transactions. For period post 01.07.2012 the scheme of taxation of services have changed, and any consideration received/ paid for any activity undertaken by a person for another becomes taxable (Section 65 B (44) read with Section 66 of the Finance Act, 1994 as amended with effect from 01.07.2012). We do not find any fault in the approach adopted by the impugned order for the period post 01.07.2012.

4.7 Appellant have claimed that the demand should be worked out by treating the payment made by them to the foreign entities as cum tax as per Section 67 (2) of the Finance Act, 1994. They have relied upon the decisions in the case of

- Sri Chakra Tyres [1999 (108) ELT 361 (T)] affirmed by Hon'ble Supreme Court has reported at [2002 (142) ELT A 279];
- Maruti Udyog Ltd. [2002 (49) RLT 1 (SC)]

In the present case undisputedly the demand has been worked out treating the entire amount paid to the foreign entity as towards consideration for the provision of service. In this case appellant was required to pay the service tax on reverse charge basis in respect of services received from outside India. The provisions of section 67 (2) of the Finance Act, 1994 are reproduced below:

67. Valuation of taxable services for charging service tax:

(1) ……

(2) Where the gross amount charged by the service provider, for the service provided is inclusive of service tax payable, the value of such taxable service shall be the amount as, as with the addition of tax payable, is equal to the gross charged.

(3) ……..”

In the present case the demand of service tax is made from the appellant on the payments made by the appellant to the service provider on reverse charge basis. From the reading of the Section 67 (2) it is evident that the said section applies to the cases where the service tax is demanded from the service provider on the forward charge basis. Even the cases referred by the appellant were also in respect of the demand of central excise duty on the forward charge basis. We do not find applicability of the said section in the cases where the service tax is demanded from the service recipient on the reverse charge basis.

4.8 We are in agreement with the statements made by the Appellant that there has been no mala fide intention in not paying the Service Tax as the demand in respect of the services received from outside India paid on reverse charge basis would have been available to them as credits and the entire demand is Revenue neutral. In absence of any mala fide intention the demand made by invoking extended period of limitation could not survive.

4.9 We note that the Appellant admitted in their reply to the Show Cause Notice and before us that they have made payment on Service Tax as detailed earlier in Para 3.3 above prior to adjudication of the Show Cause Notice/Issuance of Show Cause Notice. We make it clear that what so ever amount has already been deposited admitting the demand would not get the benefit of observation made in earlier paras.

4.10 As we hold that the demand for the period prior to 01.07.2012 is barred by limitation in absence of any mala fide intention, we do not find any merits in the penalty imposed under Section 78. In view of the decision of Hon'ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills Ltd. [2009 (238) ELT 3 (SC)] wherein following has been held:

> *"17. The main body of sub-section 1 lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject*

to which and the extent to which the penalty may be reduced.

18. One cannot fail to notice that both the proviso to sub section 1 of section 11A and section 11AC use the same expressions: "....by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under section 11A (1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under section 11A (2) there is a legally tenable finding to that effect then the provision of section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under section 11A (2) there would be no application of the penalty provision in section 11AC of the Act. On behalf of the assessees it was also submitted that sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of section 11AC would come into play only after an order is passed under section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in section 11AC.

19. From the aforesaid discussion it is clear that penalty under section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section."

4.11 Further as we find that appellant during the entire period was filing the Service Tax returns (ST-3), the penalty imposed under Section 77 for the contravention of provisions of Section 70 cannot be upheld.

4.12 Summarizing our findings we note that :-

(i) The impugned order needs to be modified to

- the extent of the amount already deposited Rs. 6,58,184/- being confirmed along with interest, if any due.
- demand for the period within the normal period of limitation is upheld and for the period prior to 01.07.2012 is set aside.

(ii) Penalties imposed under Section 78 & 77 are set aside.

5.1 Appeal is partly allowed as indicated in Para 4.9 above.

(Pronounced in open court on 01.09.2026)

Sd/-

(P. A. AUGUSTIAN)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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