

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

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 1192 of 2011

(Arising out of Order-in-Original No. 13/2011 dt. 31/01/2011
passed by Commissioner of Service Tax, Bangalore)

Infosys Technologies Limited,

No.100, Hosur Road,
Electronic City,
Bangalore 560100.

Appellant(s)

VERSUS

Commissioner of Service Tax

Bangalore.

Respondent(s)

APPEARANCE:

Shri K. S. Naveen Kumar, Shri N. Anand, Advocate for the appellant.

Shri M. A. Jithendra, Asst. Com. (AR) for the respondent.

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20359 / 2025

Date of Hearing: 20.09.2024

Date of Decision: 19.03.2025

PER : R. BHAGYA DEVI

This appeal is filed by the appellant M/s. Infosys Technologies Ltd. against Order-in-Original No. 13/2011 dated 31/01/2011 passed by Commissioner of Service Tax, Bangalore.

2. Briefly stated the facts of the case are that the appellant is engaged in providing Information Technology Service (ITSS), Business Auxiliary Service (BAS), Management or Maintenance or Repair Service (MMR Service), online information database retrieval etc. During the course of audit of their records by the Department and scrutiny of the invoices/bills raised in connection with "Annual Technical Support Service" (ATS for short) rendered by them during the period from February 2007 to March

2009, it was observed that the appellant had discharged the service tax only 25% of the bill value instead of 100%. On scrutiny of the invoices for the period prior to 2007, it was noticed that the appellant was discharging service tax on 100% of the taxable value. On further analysis of the agreement with various clients, it was observed that the software belonging to the appellant is being sold to a customer, technical support is provided for one year without any charge. From second year onwards, the customer has to pay a pre-determined amount for utilising the technical support purchased from the assessee. On analysis of the agreement relating to provision for ATS, the Department alleged that the service falls under the category of MMR service as defined under Section 65(64) of the Finance Act, 1994. Further, it is noticed that the appellant, w.e.f. 16/05/2008, is paying service tax on the right to use software under ITSS; hence, they claimed that for the earlier period, there was a transfer of right to use of the property to the customers. It is alleged that the said explanation of the appellant is incorrect, as per the agreement, the title / copyright and other software upgrades and maintenance releases i.e. improved versions and release of the licensed software, software trouble reports, enhancements etc., vest with the appellant at all points of time and it is not transferred to the clients. It is also alleged that the abatement of 75% availed by the appellant from the gross amount charged in rendering ATS is irregular and the service tax short paid amounting to Rs.11,57,60,089/- for the period from February 2007 to March 2009 invoking extended period was demanded by issuing a show-cause notice on 02/03/2010. On adjudication, the demand was confirmed with interest and penalty under Section 76, 77 and 78 of the Finance Act, 1994. Hence, the present appeal.

3.1. Learned Counsels Shri K. S. Naveen Kumar and Shri N. Anand for the appellant submitted that there has been a protracted correspondence between the appellant and the Department on the issue of leviability of service tax on the service of computer software between 2005 and 2006. The appellant had entered into a software licence and service agreement with banks to provide ATS towards maintenance of its banking software (Finacle) sold to

banks. As a part of the ATS, the appellant provided software upgrades and maintenance releases i.e. improved versions and releases of the licence software which included software troubleshooting and software enhancement and the installation of the software was carried out in the following manner: -

- Finacle application would be received on a media (DVD).
- The license for the customer would be sent separately and not with the media.
- Further the customer checks for the required pre-requisite software (like, Java, Oracle, WAS etc.) to be in place.
- The scenario in which the installation will happen is identified. For example, this may include identifying the servers where different tiers will lie.
- Installation of database instance with Finacle schemas and table spaces.
- Installation of Finacle solutions with related database objects and seed data.
- Setting up configuration parameters for Finacle services as well as AppServer configuration for front end solutions.
- Deployment of front end solutions into AppServer.
- Login to SSO and access various Finacle Solutions.

The updates happen in the following manner:-

- As a onetime activity – Configure Patch Deployment Tool on all the tiers where Finacle applications have been installed.
- Create a schema in the existing Database Instance to store patch information.
- During configuration, give the paths of various installed solutions.
- Identify one of the servers (in case various tiers spread across multiple servers) as central server from where patches will be applied to all the servers.
- Stop the services before applying the patches.
- Deploy patches by providing patch id typically the name of the patch delivered.
- Start the services once patch is successfully deployed.
- Generate the customised reports over a time span etc.

3.2. It is his contention that these activities are considered as 'Deemed Sale' in terms of Article 366(29A) of the Constitution of India and subjected to local Sales Tax (VAT) under the category of 'Works Contract'. The appellant with effect from 01/02/2007 paid VAT on 75% of the gross value of the invoice and service tax on 25% thereby complied with the local and central levies as applicable. The appellant's records were audited by the Audit Wing of the Service Tax team. By Audit Note dated 31/08/2009, it was objected to non-payment of tax on 75% of the invoice value to which they replied stating that the appellant had been discharging Sales Tax on 75% of the bill value and sale of goods cannot be equated to rendering of service liable to service tax.

3.3. Assailing the impugned order, the learned advocate submitted that the ITSS was brought to the service tax net w.e.f. 16/05/2008 consequent to the Union Budget changes in 2008. A specific definition for 'Information Technology Software Service' was introduced in Section 65(53a) of the Finance Act, 1994 apart from amendments made to definition of MMR Service in relation to IT software, definition of "Consulting Engineer" in relation to IT software etc. All new categories of services are prospective. It is his contention that therefore, the demand for the period February 2007 to 15/05/2008 is manifestly untenable. He cited reference to the following decisions:-

- a. **Infosys Ltd. Vs. CCE & ST 2018(12) GSTL 333 (T).**
- b. **Party's appeal admitted in 2018(19) GSTL J 116 (SC).**
- c. **SAP India Pvt. Ltd. Vs. CCE [2011(21) STR 303 (T).**
- d. **IBM India Pvt. Ltd. Vs. CST [2010(17) STR 317 (T), maintained by Supreme Court in Commissioner Vs. IBM India Pvt. Ltd. [2010(18) STR J 127 (SC)].**
- e. **Larsen & Toubro Infotech Ltd. Vs. CST [2017(4) GSTL 271 (T)]**
- f. **Persistent System Limited Vs. CCE&ST [2016(42) STR 890 (T)]**
- g. **Johnson & Johnson Pvt. Ltd. Vs. CCE&ST LTU [2017(52) STR 159 (T)]**
- h. **EBZ Online Pvt. Ltd. Vs. CCE [2011(22) STR 185 (T)]**
- i. **Tata Consultancy Services Ltd. Vs. CST [2018-TIOL-2295-CESTAT-DEL]**

3.4. Further, he has submitted that for the period after 16/05/2008, service tax levy would be applicable only to the segment of business transaction which was not covered by Sales Tax / Value Added Tax (VAT). The appellant had paid sales tax / VAT on 75% of the value of the transactions for ATS; hence, the balance 25% only exigible to service tax w.e.f. 16/05/2008, which they have been paying regularly. In support, he referred to the decision of this Tribunal in the case of **Infosys Ltd. Vs. CCE&ST [2018(12) GSTL 333 (Tri)]**. Further, he has submitted that the portion of 75% of ATS value is chargeable to VAT (Sales Tax) in accordance with the judgment of the Hon'ble Madras High Court and Karnataka High Court in their own case reported in **2009(233) ELT 56 (Mad.)** and **2015-TIOL 2106 KAR-HC-VAT**.

3.5. Further, relying upon the following decisions, learned advocate submitted that no service tax can be demanded on the amount/value, if sales tax / VAT has been paid on a given transaction with regard to the such amount/value:

- a. **CST Vs. Quick Heal Technologies Ltd. [2022(63) GSTL 385 (SC)]**
- b. **Safety Retreading Co. P. Ltd. Vs. CCE [2017(48) STR 97 (SC)]**
- c. **Imagic Creative Pvt. Ltd. Vs. CCT [2008(9) STR 337 (SC)]**
- d. **Wipro GE Medical Systems Pvt. Ltd. Vs. CST [2009(14) STR 43 (T)], maintained by the Supreme Court in Commissioner Vs. Wipro GE Medical Systems Pvt. Ltd. [2012(28) STR J.44 (SC)]**

3.6. Learned Counsel further submitted that denial of the benefit of Notification No.12/2003-ST dt. 20/06/2003 by the learned Commissioner is devoid of merit as the learned Commissioner has misconstrued the nature of ATS transactions and has failed to appreciate that no cenvat credit was availed on any goods used to provide ATS. Learned Commissioner ought not to have questioned the payments made through cenvat account to discharge the service tax liability on ATS; by bringing the issue of cenvat into the scope of order, the learned Commissioner travelled beyond the scope of show-cause notice and made out a new case, thereby, violating the principles of natural justice; the interim order of the Tribunal in Sayaji Hotels Ltd. Vs. CCE [2010 (20) STR 485

(Tri. Del.) referred to by the learned Commissioner is devoid of merit as the said order was reversed by the Hon'ble High Court of Madhya Pradesh as reported in 2011(268) ELT 315 (MP).

3.7. The Learned Counsel further submitted that extended period of limitation cannot be invoked, in the present case, inasmuch as the issue was constantly agitated in a protracted manner by entering into a series of correspondences with the Revenue department. It is his contention that a genuine dispute on leviability of service tax and valuation of service cannot become a ground for alleging suppression of facts and consequently invoking extended period of limitation under Section 73 of the Finance Act, 1994, demand service tax. He submitted that all facts relating to the present issue were within the knowledge of the Department as early as in December 2005 but the Revenue chose to issue notices only in 02/03/2010. He submitted that the appellant had communicated their stand on the issue of chargeability to tax on ATS transactions to the Department on 26/04/2007; all primary and inferential facts were always with the Department as periodical audits have been conducted and responses from the appellant in the form of reply to the audit objections were submitted from time-to-time. In support, he has referred to the decision of Hon'ble Supreme Court in the case of **Calcutta Discount Vs. ITO [1961(41) ITR 191 (SC)]** wherein it was held that as long as primary and inferential facts disclosed to the Department, it is not the duty of the assessee to educate the assessing officer about the inference of the fact or law, which officer may draw from the primary facts brought on record.

4. The learned Authorised representative (AR) on behalf of the Revenue submitted that during the course of audit in August 2009, the invoices/bills raised by the appellant in relation to "Annual Technical Support" services for the period February 2007 to March 2009 were scrutinized and then it was noticed that the appellant had discharged the service tax only on 25% of the invoice value instead of on 100% of the invoice value. "Annual Technical Support" was provided to various banks by the appellant with

whom they had an agreement in relation to maintenance of their customized software 'Finacle' used by the banks. These services were provided over and above the implementation, installation and training services provided by the appellant to the clients with respect to their customized software Finacle for a separate consideration termed as 'Annual Technical Support' charges. A perusal of the agreements revealed that the Annual Technical Support consisted of following services.

- Problem solving and Trouble shooting
- Rectification of any bugs reported
- Upgrades and maintenance releases of Infosys products procured by the client.
- Upgrades mean subsequent improved versions and releases of the Licenced software. Upgrade may include software Trouble Report, Software Enhancement request.
- Maintenance release means subsequent improved releases of the application which include fixes to software trouble reported.

4.1. It is also stated that the appellant had discharged service tax on 100% of value of "Annual Technical Support" services prior to February 2007. The appellant had also paid service tax on the 100% of value from 16.05.2008. Hence, show-cause notice dated 02/03/2010 was issued to the appellant demanding Rs.11,57,60,089/- being service tax short-paid by them on 75% of the value on "Annual Technical Support" services provided by them under Management, Maintenance and Repair service for the period February 2007 to March 2009 which was confirmed by the Commissioner in the impugned order.

4.2. The Learned Authorized Representative submitted that the core issue of the appellant's submission is that the services on which the tax is demanded, consist of transfer of property in goods or the Right to Use of such goods, the goods being the Software upgrades or enhancements and there is a 'deemed sale' in terms of provisions of Article 366 (29A) of Constitution of India and Karnataka Value Added Tax Act. Since 75% of the value of "Annual

Technical Support Services" is deemed to be value of goods and hence service tax cannot be levied on such value is the contention of the appellant. But on perusal of the agreement entered into with ICICI Banking Corporation Limited, it is seen that Article 1 deals with Support Services provided by the appellant. Article 18.2 specifically refers to 'Annual Technical Support' Services and on payment of the annual technical support charges indicated in addendum 5, the bank will be entitled to the post-implementation support as under Telephonic/ fax Consultation, assistance and advice with respect to technical queries on all weekdays. The charges are for:

- Correction of errors reported in the program.
- On-site maintenance for resolution of errors reported by the bank. the
- expenses relating to on-site visit of the support engineer of Infosys shall be charged to the Bank only if the cause of the error is other than program malfunction.
- free updates to the program. Infosys, however, reserves the right to introduce new functionality as an optional separately priced product.

4.3. The AR referring to the definition of updates, he submits that "Updates" are defined under Article 1 of the Agreement as "Updates" shall mean improved releases of the program which are generally made available at no additional cost to 'INFOSYS' licensees, who have purchased annual technical support as specified in Annexure 4-BANCS 2000 Support services. Updates shall not include any options or future products which INFOSYS licenses separately. From the above clauses, it is seen that the part of the contract that is claimed as 'goods' or 'deemed sale' by the appellant by virtue of which the activity is claimed to be a composite contract, is indeed provided free of cost as a part of the Annual Technical Support Services. According to Karnataka VAT Act, 'Sale' is defined under Section 2(29) as follows:

"(29) 'Sale' with all its grammatical variation and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of

trade or business for cash or for deferred payment or other valuable consideration and includes, -

- a) a transfer otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;
- b) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- c) a delivery of goods on hire purchase or any system of payment by instalments;
- d) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

4.4. It is further submitted that a perusal of the above definition clearly establishes that a transaction will be called as a sale only when there is a consideration (cash or deferred payment, or other valuable consideration). In this case, the said deemed sale of software upgrades has not taken place since it is provided free of cost since the very definition of "updates" exposes that these are made available at no additional cost to the licensees. Hence, even the mention of such updates under Annual Technical Support Services is redundant. These Annual Technical Support services are provided for additional charges to be paid by the Banks, whereas, the updates are made available free of cost. In fact, even Article 366 (29A) of the Indian Constitution mandates that there shall be a consideration for the 'Right to Use of goods' which is a deemed sale as submitted by the appellant.

"(29A) tax 01 the sale or purchase of goods includes

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- (c) a tax on the delivery of goods on hire purchase or any system of payment by installments;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

- (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

4.5. Revenue submits that in the absence of any consideration envisaged in the said Agreement between the appellant and their clients for right to use of "updates", the contract between them is not a composite contract, but in fact a contract for service simpliciter. Such being the case, it is contradictory to claim that 75% of the value is towards Right to Use of goods or Sale of Goods. In fact, in view of the "free updates" envisaged in the agreement, there is no element of sale as per KVAT Act and the Rules made thereunder. Therefore, the said contract is not a composite contract in its essence. Consequently, it can be inferred that the charges received by the appellant are towards Annual Technical Support services. Hence, the question raised by the appellant regarding jurisdiction to levy service tax on the portion attributable to service in a composite contract becomes infructuous.

4.6. Countering, the reliance placed on the decision by the Hon'ble High, Court of Karnataka which refers to the said Annual Technical Support Services as works contract is misplaced since the question before the Hon'ble High Court was not whether the said activities can be considered as Works Contract but was dealing with whether the charges received towards implementation of software are chargeable to VAT and it was held that it is a pure service and no VAT is chargeable. While discussing these issues and considering the various activities of the appellant, reference was made to ATS services. Hence, it is submitted that the said decision cannot not be relied upon to determine the nature of contract of

ATS, since the said opinion is obiter dictum and cannot be treated as ratio descended.

4.7. It is further stated that the appellant's contention that the service tax cannot be levied on the value attributable to sale of goods cannot be sustained in view of the observation by the Hon'ble Supreme Court in the case of **BSNL** wherein the Apex Court observed **"It is possible for the State to tax the sale element provided there is a discernible sale and only to the extent relatable to such sale. It therefore follows that the Centre cannot include the value of such sale in the gross value of services and each has to exercise its power to tax only to the extent of sale and service elements present in the contract"**. This judgement clearly shows that the elements of sale and service in a contract are determined by the nature of the contract and in the instant case, there is no sale because there is no consideration for right to use of software 'updates' and "updates" by their definition in the contract itself are meant to be free. It may also be noted that the Article 18.2 in the Agreement makes it clear that "Infosys, however, reserves the right to introduce new functionality as an optional separately priced product". This shows that ATS charges do not entitle a client with certainty to access new functionalities in the software.

4.8. With regard to the appellant's claim that ITSS was introduced only from 16.05.2008, hence the liability to pay service tax arises only prospectively cannot be sustained in view of the fact that any service provided to a customer by any person in relation to maintenance or repair is leviable to service tax under section 65(105) (zzg) of the Finance act, 1994. "Maintenance or repair" is defined under Section 65(64) of the said Act. Accordingly, "maintenance or repair" means any service provided in relation to maintenance or repair or servicing of any goods or equipment. Software, being goods, any service in relation to maintenance or repair or servicing of software is leviable to service tax under section 65(105)(zzg) read with Section 65 (64) of the Finance Act, 1994. The clarification dated 29.02.2008 vide

D.O.F.No.334/1/2008-TRU stated that Management, Maintenance or repair of properties includes Management, Maintenance or repair of IT Software. However, as submitted in the above paragraphs, the department had clarified vide Circular No.81/2/2005-ST dated 7th October 2005 that Maintenance or repair of software is a taxable service and hence, this clarification only made explicit what was already envisaged in the law. Further it is contested that reliance on **UOI Vs. Martin Lottery Agencies1 Ltd.: 2009 (14) STR 593 (SC)** to state that any explanation which expanded the scope of the entry can only be prospective in nature, is not tenable because only substantive law can be only prospective in nature, however, in this case, the explanation has only clarified the scope of goods of properties which further stands clarified by the Circular No. 81/2/2005-ST dated 7th October 2005 which was a consequence of the Hon'ble Apex Court's decision in the case of **Tata Consultancy Services Vs State of Andhra Pradesh** (Civil Appeal No.2582 of 1998) which held computer software or IT software to be 'goods'. The claim of the appellant for the benefit of the Notification No.12/2003 to deduct the value of materials is not tenable as discussed already as there was no sale of goods and no documentary proof specifically indicating the value of materials sold as mandated by the said Notification.

4.9. With regard to limitation, it is stated that the Tribunal in the case of **Mopeds India Ltd. Vs. CCE: 1991 (56) ELT 241 (T)**, opined that there was suppression of facts. The appellant misstated the facts that there was sale of goods and wrongly claimed that the said activities for which they received Annual Technical Support charges have the nature of a composite contract. Relying on the decision of the apex court in the case of **Idea Mobile Communication Ltd. Versus Commr. of C.Ex. & Cus., Cochin: 2011 (23) S.T.R. 433 (S.C.)** wherein the Hon'ble Supreme Court observed:

"18. The sales tax authorities have themselves conceded the position before the High Court that no assessment of sales tax would be made on the sale value of the SIM card supplied by the appellant to their customers irrespective of the fact whether they have filed returns and remitted tax or

not. It also cannot be disputed that even, if sales tax is wrongly remitted and paid that would not absolve them from the responsibility of payment of service tax, if otherwise there is a liability to pay the same. If the article is not susceptible to tax under the Sales Tax Act, the amount of tax paid by the assessee could be refunded as the case may be or, the assessee has to follow the law as may be applicable. But we cannot accept a position in law that if tax is wrongly remitted that would absolve the parties from paying the service tax if the same is otherwise found payable and a liability accrues on the assessee. The charges paid by the subscribers for procuring a SIM Card are generally processing charges for activating the cellular phone and consequently the same would necessarily be included in the value of the SIM Card."

5. Heard both sides. The only issue to be decided is whether the appellant is liable to pay service tax on Annual Technical Support (ATS) fee on 100% of the invoice value as claimed by the Revenue as against the claim of the appellant that they are liable to pay only on 25% of the value. The period of dispute is February 2007 to March 2009. From the records, it is seen that the appellant has entered into software and support service agreement with the ICICI Bank Corporation Limited wherein at Clause 1.5 of the Agreement "updates" is defined as shall mean improved releases of the program which are generally made available at no additional cost to Infosys' Licensees, who have purchases Annual Technical Support as specified in annexure-4-BANCS 2000 support services. Update shall not include any options or future products which Infosys' licenses separately.

At Clause-1.6 of the agreement "upgrades" shall mean new releases of the program which would be made available at an additional cost to Infosys' licensees. Article 18 provides for support services read with Clause-4 of Annexure-3 of the same agreement; Annual Technical Support clearly mentions the following:

"Annual Technical Support, per annum, will be provided by Infosys for every branch after the implementation of BANCS 2000 1.0 and associate modules, and will entitle the Bank for the following:

- i. Telephonic/fax consultation, assistance and advice with respect to technical queries on all weekdays.

- ii. Corrections to errors reported in the current version of BANCS 2000 and associate modules, as and when corrections become available.
- iii. Free, upgrades and updates to BANCS 2000 1.0 and associate modules as and when available during support period.
- iv. When Infosys introduces new functionality as a optional separately priced product, the same will not be includes as free upgrade or update.
- v. Consultation and support on technical queries does not include any on-site maintenance.
- vi Any on-site maintenance provided by Infosys, will be charged extra to the Bank, on per day person basis of actual effort."

From the above, it is clear that Annual Technical Support (ATS) does not include cost of materials as it clearly states that free upgrades and updates are part of ATS and only new functionalities are priced separately. Therefore, as rightly observed by the Commissioner in the impugned order, the question of abatement under Notification No. 12/2003-ST dated 20.06.2003 does not arise. Moreover, Addendum - 5 of the above Agreement at Clause-d states that 15% of the license fee and the license fee is for use of the computer hardware and operating system provided by the appellant. Hence, nowhere we find that the value of materials gets included and therefore, the question of abatement is rightly rejected. The appellant has also contended that transfer of right to use any goods for any purpose is considered as deemed sale and hence, VAT has been discharged on 75% of the value, therefore, they are liable to pay service tax only on the 25% of the value.

5.1. In the instance case also, it is seen that VAT is being paid only on deemed sale and clearly goods are not found to be part of the Annual Technical Support Service, hence, the question of abatement does not arise even though the sale is considered to be deemed sale and VAT is discharged by the appellant. The fact that VAT has been paid will not vitiate the fact that the services rendered by the appellant are not leviable to service tax as is held by the Hon'ble Supreme Court in the case of **BSNL: 2006 (2) STR 161 (SC)**, wherein their Lordships observed as follows:

"111. It is not possible to interpret the contract between the service provider and the subscriber that the consensus was to mutilate the

integrity of contract as a transfer of right to use goods and rendering service. Such a mutilation is not possible except in the case of deemed sale falling under sub-clause (b). Nor can the service element be disregarded and the entirety of the transaction be treated as a sale of goods (even when it is assumed that there is any goods at all involved) except when it falls under sub-clause (f). This will also result in an anomaly of the entire payment by the subscriber to the service provider being for alleged transfer of a right to use goods and no payment at all for service. The licence granted by the Central Government fixes the tariff rates and all are for services.

112. Sale of Goods Act, comprehends two elements, one is a sale and the other is delivery of goods. *20th Century Finance Corporation Limited v. State of Maharashtra* - 2000 (6) SCC 12 at 44, ruled that -

"(c) where the goods are available for the transfer of right to use the taxable event on the transfer of right to use any goods is on the transfer which results in right to use and the situs of sale would be the place where the contract is executed and not where the goods are located for use.

(d) in cases where goods are not in existence or where there is an oral or implied transfer of the right to use goods, such transactions may be effected by the delivery of the goods. In such cases the taxable event would be on the delivery of goods."

113. It is, therefore, unnecessary to deal with the question of delivery of possession which is related only to situs and not to subject-matter of taxation which is a transfer of right to use goods. In the present case, as no goods element are involved, the transaction is purely one of service. There is no transfer of right to use the goods at all."

5.2. In the case of **Idea Mobile Communications Ltd. vs. Commissioner of Central Excise, Cochin: 2011 (23) STR 433 (SC)** wherein it has observed as:

"-----It also cannot be disputed that even if sales tax is wrongly remitted and paid that would not absolve them from the responsibility of payment of service tax, if otherwise there is a liability to pay the same. If the article is not susceptible to tax under the Sales Tax Act, the amount of tax paid by the assessee could be refunded as the case may be or, the assessee has to follow the law as may be applicable. But we cannot accept a position in law that even if tax is wrongly remitted that would

absolve the parties from paying the service tax if the same is otherwise found payable and a liability accrues on the assessee. The charges paid by the subscribers for procuring a SIM Card are generally processing charges for activating the cellular phone and consequently the same would necessarily be included in the value of the SIM Card.

19. There cannot be any dispute to the aforesaid position as the appellant itself subsequently has been paying service tax for the entire collection as processing charges for activating cellular phone and paying the service tax on the activation. The appellant also accepts the position that activation is a taxable service. The position in law is therefore clear that the amount received by the cellular telephone company from its subscribers towards SIM Card will form part of the taxable value for levy of service tax, for the SIM Cards are never sold as goods independent from services provided. They are considered part and parcel of the services provided and the dominant position of the transaction is to provide services and not to sell the material i.e. SIM Cards which on its own but without the service would hardly have any value at all. Thus, it is established from the records and facts of this case that the value of SIM cards forms part of the activation charges as no activation is possible without a valid functioning of SIM card and the value of the taxable service is calculated on the gross total amount received by the operator from the subscribers. The Sales Tax authority understood the aforesaid position that no element of sale is involved in the present transaction”.

5.3. In the instant case, it is also a fact that prior to and after the period in dispute, the appellant is paying service tax on the entire invoice value without disputing the fact that they are discharging VAT on part of the same value. Therefore, the question of not paying service tax on the entire value during the disputed period does not arise as the entire value is exclusively towards service element.

6. It is to be noted that the Karnataka Value Added Tax (KVAT), 2003, 'works contract' did not include computer software till 01.04.2006 and from 01.04.2006 onwards programming and providing computer software was levied to 4% tax as mentioned at Sl. No. 11 of the 6th schedule and at Sl. No. 14, Service and Maintenance of IT products including telecommunications was also levied to 4% tax. This amendment has brought in view of the

decision in the case of **Tata Consultancy Services 2004 -TIOL-87-CT-LB** by the Hon'ble Supreme Court based on which Circular No. 17/06-07 dated 24.07.2006 was issued by the VAT authorities to incorporate computer software as part of the 'works contract' in terms of deemed sale.

6.1. Reliance placed on by the appellant in their own case *Infosys Technologies Ltd. Vs. Commissioner of Commercial Taxes, Chennai (supra)*, the issue was whether the software customized or non-customized satisfies the rules as goods and whether it will be goods for the purposes of sales tax. The reliance placed on the decision in their own case decided by the Hon'ble High Court of Karnataka in the case of *Infosys Ltd. Vs. Commissioner of Commercial Tax* is also misplaced. The judgment refers to 3 types of transaction in terms of the Circular No. 17/06-07 dated 24.07.2006 issued by the VAT Authorities of Karnataka and these transaction are direct sale of software through an appropriate media; the second one is deemed sale or transfer of property in the execution of works contract where the seller would liable to claim deduction from his taxable turnover amount to his labour charges; the third category does not involve any transfer of property in software either as sale or as a part of deemed sale. At para 26 of the above order, it is observed as follows:

"In the case of Annual Technical Support (ATS), if the agreement of the contract includes annual maintenance involving both service and issuing upgrade and enhance software then such a contract is an combination of both goods and service. The contract is in the nature of works contract."

7. As discussed earlier, we find that the updates and upgrades were supplied free of cost in the contracts before us, therefore, the question of goods being part of the contract did not arise. The above order also takes note of the fact that 'upgrades' which are generally made available to the customers covered under ATS at no additional charge. At para 45 of the Hon'ble High Court order it is observed that the copyrights in the enhancements, upgrades, maintenance and releases vests with the assessee and the same is not transferred to the customer and what is transferred is only the

right to use. Therefore, the said right to use these enhancements, upgrades, maintenance and releases also constitutes goods and is liable to VAT. The record shows that the assessee has paid VAT on these enhancements and upgrades. Therefore, it is clear ATS is a works contract. It is a contract to permit right to use enhancements, upgrades, maintenance and releases as well as ATS services as it was indivisible by virtue of 46th amendment which falls under Clause (b) of Article 366 (29A). This transaction of deemed sale has been dealt with by the Tribunal Principal Bench, New Delhi in the case of **Sayaji Hotels Ltd. Versus Commissioner of C. EX., Indore 2011 (24) S.T.R. 177 (Tri. - Del.)** dated 25-1-2011 in similar set of facts has observed as follows:

"6. The question now arises as to whether a Mandap keeper, in whose case, the value of food & beverages served is much more than 40% of the gross amount charged for the Mandap keeper service, has option to avail of the general exemption under Notification No. 12/03-S.T. by treating the supply of food and beverages as sale. Since this is the core issue in this case, we will examine it on greater detail.

6.1 Notification No. 12/03-S.T. issued under Section 93(1) of the Finance Act, 1994, is a general exemption, which exempts a taxable service provided, from the tax to the extent of the service tax on the value of the goods and materials sold by the service provider to the recipient of service, subject to conditions that -

- (i) there is documentary proof specifically indicating the value of the said goods and materials.
- (ii) No credit of duty paid on such goods and materials sold has been taken under the provision of Cenvat Credit Rules, 2004, and
- (iii) When such credit has been taken by the service provider on such goods and materials, such service provider has paid the amount equal to such credit availed before the sale of such goods and materials.

The Appellant claims this exemption on three grounds -

- (a) The Appellant's transactions as Mandap keeper with their customers are the transactions of sale as well as service the sale being of the food and beverages supplied and this sale is sale within the meaning

of this term as defined in Section 2(h) of the Central Excise Act, 1944, as made applicable to Service tax by virtue of Section 65(121) of the Finance Act, 1994.

(b) In any case, the 'sale' referred to in Notification No. 12/03-S.T. would also cover the "deemed sale" under Article 366(29A) of the Constitution as under clause (f) of Article 366(29A) of the Constitution, "Tax on sale or purchase of goods" includes _"a tax on the supply by way of or as part of service or in any other manner whatsoever of goods being food or any other article for human consumption or any drink (whether or not intoxicating) for cash, deferred payment or other valuable consideration".

(c) Since Sales Tax/VAT is paid on the supply of food and beverages, in terms of Hon'ble Supreme Court's judgment in case of *Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes* (supra) Service tax cannot be charged on the value of food and beverages and since in this case, the value of food and beverages is much more than 40% of the gross amount charged, the abatement of value of food and beverages on actual basis must necessarily be allowed under Notification No. 12/03-S.T. our findings on these points are as under.

6.1.1 Coming to point (b) first, from the wordings of clause (f) of Article 366(29A) of the Constitution it is clear that by this provision, for the purpose of charging tax on sale or purchase of goods, the supply of food or drinks by the way of or as part of service is to be treated as sale of food and drinks. It is thus a legal fiction created for the purpose of enabling the State Governments to charge sales tax on supply of food and drinks involved in catering contracts, while otherwise had been held by the courts as services contracts, by treating the same as sale. As has been held by Hon'ble Supreme Court in its judgments in the cases of - (a) *State of Maharashtra v. Laljit Rishi Shah* reported in (2000) 2 SCC 699; (b) *Union of India v. Sampat Raj Dugar* reported in AIR 1992 SC 1417 = 1992 (58) E.L.T. 163 (S.C.); (c) *K. Prabhakaran v. P. Jayarajan* reported in (2005) 1 SCC 754 = AIR (2005) 688; (d) *Raymond Ltd. v. State of Chhattisgarh* reported in (2007) 3 SCC 79 and (e) *Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Tax* (supra), in construing a legal fiction, it is not to be extended beyond the purpose for which it has been created. Since Article 366(29A) had been inserted in the Constitution of India by 46th Constitutional Amendment to enable the State Governments to charge Sales tax on supply of goods or transfer of

property therein in respect of certain transactions which were involved in service contracts or were not sale as commonly understood, by deeming the same to be sale, such extended definition of sale can be construed in the context of charging Sales tax, not for understanding the scope of the word 'sale' in Service tax exemption Notification No. 12/03-S.T. For applicability of exemption Notification No. 12/03-S.T. there should be distinct "sale" of goods within the meaning of the term "sale", as defined in Section 2(h) of the Central Excise Act, 1944, which by virtue of Section 65(121) is applicable to Service tax matters and the benefit of exemption under this notification cannot be extended to the predominant service contracts not involving 'sale' of goods primarily, as defined in Section 2(h) of the Central Excise Act, 1944 misconstruing legal fiction of Article 366(29A).

6.1.2 Coming to the question as to whether there is sale of food and beverages in this case definition of the term "sale" as defined by Section 2(h) of the Central Excise Act, 1944, may be examined. The word 'sale' has been defined in this section as "any transfer of possession of goods by one person to another in ordinary course of trade or business for cash or deferred payment or other valuable consideration". This definition of sale obviously involves intention for transfer of possession for some consideration. Unless such an intention for transfer of possession of goods for some consideration is discernible in a contract, the same cannot be said to be sale. When in a contract rendering of service is the predominant intention - the use of goods being unintentional and unavoidable for performance of service and the performance of such service is for some consideration, it will be a pure service contract not involving any sale even if invoice issued show break-up of the gross amount towards value of the goods used and the value of service provided. However, if a contract is for supply of a specified quantity of goods at a specified price for use in performance of a service for separate considerations, such a contract will be a contract for sale as well as for service. Thus, whether a given contract is a contract for service or a contract for sale or for both sale as well as service or for two or more different services, depends upon the intention of the parties, which has to be ascertained from the terms of the contract. In this regard, Hon'ble Supreme Court in para 4 of its judgment in case of *Sentinal Rolling Shutters & Engg v. Commissioner of Sales Tax* reported in (1978) 4 SCC 260 has observed as under -

"4. It may be pointed out that a contract where not only work has to be done but the execution of such work requires goods to be used may take one of three forms. The contract may be for work to be done for remuneration and for supply of materials used in the execution of work for a price; it may be a contract for work in which the use of materials is accessory or incidental to the execution of work; or it may be a contract for supply of goods where some work is required to be done as incidental to sale. When the contract is of the first type, it is a composite contract consisting essentially of two contracts, one for the sale of goods and other for work and labour. The second type of contract is clearly a contract for work and labour not involving sale of goods, while the third type of contract is a contract for sale where the goods sold as chattel and some work was undoubtedly done, but it is done only as incidental to the sale"

6.1.2.1 In this case the contract of the Mandap keeper with its customers is to allow use of Mandap with all its facilities like decoration, lighting, stage, music, catering service etc. for some consideration for organizing some official, social or business function. The catering service provided is a service incidental and ancillary to the service in relation to use of Mandap and though it involves supply of food and beverages, it is essentially a service contract, not for sale of food and beverages. Thus the contract of a Mandap keeper with its customer, even if it involves catering service, is a contract of service not a contract for sale. In this regard Hon'ble Supreme Court in para 55 of its judgment in case of *Tamil Nadu Kalyana Mandapan Association v. Union of India* (supra) has observed as under :-

"The services provided by a Mandap keeper are professional services which he alone by virtue of his experience has the wherewithal to provide. A customer goes to a Mandap keeper, say a star hotel, not merely for the food that they will provide but for the entire variety of services provided therein which result in providing the function to be solemnised with the required effect and ambience. Similarly the services rendered by outdoor caterers is clearly distinguishable from the service rendered in a restaurant or hotel in as much as, in the case of outdoor catering service, the food/eatables/drinks are the choice of the person who partakes the services. He is free to choose the kind, quantum and the manner in which the food is to be served. But in case of restaurant, the customer's choice of food is limited to

the menu card. Again, in the case of outdoor catering, customer is at liberty to choose the time and place where the food is to be served. In the case of an outdoor caterer, the customer negotiates each element of catering service, including the price to be paid to the caterer. Outdoor catering has an element of personalised service provided to the customer. Clearly the service element is more weighty, visible and predominant in the case of outdoor catering. It cannot be considered as a case of sale of food and drink as in restaurant."

Hon'ble Supreme Court in case of *Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi* reported in (1979) 1 SCR 557 has held that serving of food or drinks by a restaurant to his customers does not partake of the character of sale of goods. Thus, the catering component of the Appellant's contract with their customer while rendering Mandap keeper service is service in which there is no object of sale of food and beverages and as such no sale of food and beverages is involved. In fact the food and beverages served to the guests of the customer while using the Mandap is consumed by them without transfer of possession of food and beverages from the Mandap keeper to his customer for some consideration. Just because a Mandap keeper charges a specified amount for serving food and beverages to the guests of its customers, that does not become sale of food and beverages, as the intention of the contract is providing service incidentally involving serving of food and drinks to the guests of the customer and the price charged for serving of food and drinks forms part of consideration of Mandap keeper service but not the price for sale of food and drinks.

6.1.2.2 Other than merely making a bald claim that the charges for food and drinks shown in the invoices represent the value of food and drinks only and do not include the service charges i.e. the charges for serving the food and drinks, no evidence in this regard could be produced by the appellant. If in order to claim the exemption under Notification No. 12/03-S.T., the appellant claims that their transaction with their customers involves sale of food and beverages in the sense that there is transfer of possession of a specified quantity of food and beverages to the customer for a specified price, the burden of proving this was on the Appellant. No evidence was produced to show that in every case of providing service in relation to use of Mandap, the Appellant's agreement with their customer was to supply a specified quantity of food and drinks at a specified price. The records show that

the Appellant were serving food and beverages to the guests of their customers in course of providing Mandap keeper service for which they have billed the customer. These charges are the charges for catering service, not the charges for sale of food and beverages.

6.1.2.3 In view of the above discussion, we hold that there was no sale involved in the Appellant's transaction as Mandap keeper while serving their customers, for there is no sale of food and beverage as defined in Section 2(h) of the Central Excise Act, 1944. When there is no sale of any materials or goods, the exemption under Notification No. 12/03-S.T. would not apply. This exemption notification is inapplicable to indivisible service contracts like the present one in hand.

6.1.3.1 As regard the third contention of the Appellant that value of food and beverages served in their case is more than 40% of the gross amount charged for service in relation to use of Mandap, and abatement under Notification No. 21/97-S.T. and its successor Notification No. 1/06-S.T. is 40%, abatement of actual value of food and drinks has to be allowed under Notification No. 17/03-S.T., and disallowance of exemption under this notification would amount to levy of both Service tax by Central Government and Sales tax/VAT by the State Government on the same value, which is not permissible in view of Hon'ble Supreme Court's judgment in case of *Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes* (supra), such plea is untenable for the reason that field of taxation and power of taxation of union and state is different. Different aspects of a transaction is taxed under different legislative entries. After carefully considering plea of the appellant, we are of the view that the same is devoid of merit for the following reasons :

(1) Hon'ble Supreme Court in case of *Tamil Nadu Kalyana Mandapam Association v. Union of India* (supra) while considering the validity of levy of Service tax by the Central Government on the service in relation to use of Mandap, while dismissing the argument of the Appellants that Service tax by Central Government on catering services, a part of service in relation of use of Mandap, amounts to tax on sale and purchase of goods, and upholding the levy, held that the fact that sales tax on the supply of goods involved in the said service can be levied does not mean that a Service tax cannot be levied on the service aspect of catering. In this regard paras 42, 43, 44 and 45 are reproduced below :-

"42. As far as the above point is concerned, it is well settled that for the tax to amount to a tax on sale of goods, it must amount to a sale

according to the established concept of a sale in the law of contract or more precisely the Sale of Goods Act, 1930. Legislature cannot enlarge the definition of sale so as to bring within the ambit of taxation transactions, which could not be a sale in law. The following judgments and the principles laid down therein can be very well applied to the case in hand.

1. *M/s. J.K. Jute Mills Co. Ltd. v. The State of U.P. & Anr, (1962) 2 SCR 1;*
2. *M/s. Gannon Dunkerley & Co. and Ors. v. State of Rajasthan & Ors., (1993) 1 SCC 364;*
3. *The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1959) SCR 379;*
4. *The Sales Tax Officer, Pilibhit v. M/s. Budh Prakash Jai Prakash [1955] 1 SCR 243;*
5. *M/s. George Oakes (P) Ltd. v. State of Madras [1962] 2 SCR 570.*

43. *In regard to the submission made on Article 366(29A)(f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of food and drink by whatever mode it may be made. It does not conceptually or otherwise include the supply to services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article "such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods". In other words, the operative words of the said sub-article is supply of goods and it is only supply of food and drinks and other articles for human consumption that is deemed to be a sale or purchase of goods.*

44. *The concept of catering admittedly includes the concept of rendering service. The fact that tax on the sale of the goods involved in the said service can be levied does not mean that a service tax cannot be levied on the service aspect of catering. Mr. Mohan Parasaran, learned senior counsel for the appellant submitted that the High Court before applying the aspect theory laid down by this Court in the case of Federation of Hotel and Restaurant v. Union of India & Ors. (supra) ought to have appreciated that in that matter Article 366(29A)(f) of the Constitution was not considered which is of vital importance to the present matter and that the High Court ought to have differentiated the two matters. In reply, our attention was*

invited to paras 31 and 32 of the judgment of the High Court in which service aspect was distinguished from the supply aspect. In our view, reliance placed by the High Court on Federation of Hotel and Restaurant (supra) and, in particular, on the aspect theory is, therefore, apposite and should be upheld by this Court. In view of this, the contention of the appellant on this aspect is not well founded.

45. It is well settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that Service tax is levied as a percentage of the gross charges for catering cannot alter or affect the legislative competence of Parliament in the matter."

Thus, the plea that Service tax cannot be levied on the portion of value of Mandap Keeper Service which represents the value of food and beverages served is baseless. In fact in paras 42 & 43 of the Apex Court judgment reproduced above it has been held in very clear terms that Article 366(29A)(f) only permits the states to impose a tax on the supply of food and drinks by whatever mode it may be made and it does not conceptually or otherwise includes the supply to services within the definition of sale and purchase of goods.

(2) In the case of *Imagic Creative Pvt. Ltd. v. Commissioner of Commercial Taxes* (supra), the assessee was providing "advertising Agency's service" and was paying Sales tax on goods used in providing the service by treating the same as deemed sale. The commercial tax department wanted to include the value of service portion also in the value of goods for the purpose of charging Sales tax which was not accepted by Hon'ble Supreme Court on the ground that accepting the commercial tax authority's plea would amount to extending the legal fiction beyond the purpose for which it was created. It is in this context that the Hon'ble Court observed that payment of Service tax and the VAT are mutually exclusive, as when Sales tax/VAT is charged on the value of goods used in an indivisible service contract involving use of goods in rendering of service by treating the goods supply as deemed sale under Article 366(29A) of the Constitution, Sales tax on such deemed sale can be charged only on the value of the goods, not on the entire value of the contract including the value of service portion, as doing so would amount to charging of tax on a service contract i.e. service tax by the State Governments which they cannot do. But the position is different when charging Service tax on an indivisible service contract by Central

Government where some goods have been used for performing the service. For charging tax on such indivisible service contract, no legal fiction is required - service tax is to be charged if the service is taxable on the measure as chosen by the legislature, as it is settled law that measure of a tax is independent of the nature of the tax. The Service tax can be charged on the gross amount charged for the service including the value of the goods used for providing the service. Therefore the observations of Hon'ble Supreme Court in case of *Imagic Creative Pvt. Ltd.* (supra) that payments of Service tax and VAT are mutually exclusive is in consonance with observation of the Apex Court in para 44 of its judgment in case of *Tamil Nadu Kalyana Mandapam Association v. Union of India* (supra).

6.4 In view of the above, we hold that there was no sale contract in the Appellant's contract as Mandap keeper for the purpose of levy of Service tax under Finance Act, 1994 and therefore exemption Notification No. 12/03-S.T. is not available to the Appellant."

8. In view of the above discussions, we do not find any reason to disagree with the Commissioner with regard to payment of service tax on the entire invoice value. Accordingly, same is upheld. However, we find that the appellant has been approaching the department and agitating this issue through series of correspondences/communications from December 2005 onwards. Various correspondence has been placed on record from December 2005 to September 2009 and at no point of time, objections were raised by the department. The Commissioner in the impugned order though admits the fact that the appellant vide their letter dated 26.04.2007 had informed the Department that service tax was being discharged on 25% of the value, discarded the same on the ground that the letter nowhere mentioned that VAT was being paid and the appellant failed to file the agreements and these omissions indicate the intention to evade payment of tax. We find that as rightly claimed by the appellant, there are no willful suppression of facts or misstatement of facts as seen from the correspondences and various letters filed by the appellant. Therefore, the show-cause notice dated 2.3.2010 invoking suppression cannot be sustained. The Supreme Court in the case of **Uniworth Textiles**

**Ltd.Versus Commissioner of Central Excise, Raipur 2013
(288) E.L.T. 161 (S.C.)** dated 22-1-2013 observed as follows:

"25. Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the *fides* of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. In *Aban Loyd Chiles Offshore Limited and Ors.* (supra), this Court made the following observations :

"21. This Court while interpreting Section 11-A of the Central Excise Act in *Collector of Central Excise v. H.M.M. Ltd.* (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement or suppression of fact with intent to evade the payment of duty. It has been observed :

'...Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the assessee was guilty of wilful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.'

It was held that the show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the assessee is put to notice the assessee would have no opportunity to meet the case of the Department. It was held :

...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause

notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso...."

(Emphasis supplied)

26. Hence, on account of the fact that the burden of proof of proving *mala fide* conduct under the proviso to Section 28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a willful default on the part of the appellant, we hold that the extended period of limitation under the said provision could not be invoked against the appellant".

9. In view of the above, the demands along with interest are limited only to the normal period. All other penalties are set aside.

Appeal is partially allowed on above terms.

(Pronounced in open court on 19.03.2025.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

GB/RV