

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**
REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 40096 of 2023

(Arising out of Order-in-Appeal No. 73/2022 dated 12.12.2022 passed by the
Commissioner of GST & Central Excise (Appeals-II), Chennai)

**M/s. South Nests Software Solutions
Pvt. Ltd.,**

No. 28, Batra Centre, Sardar Patel Road,
Guindy,
Chennai-600032.

...Appellant

Versus

Commissioner of GST and Central Excise

Chennai South Commissionerate
MHU Complex, No.692,
Anna Salai, Nandanam,
Chennai-600 035.

..Respondent

APPEARANCE:

Shri Gopal Mundhra, Advocate for the Appellant
Shri Anoop Singh, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

HON'BLE MR. AJAYAN T.V, MEMBER (JUDICIAL)

FINAL ORDER No.40568/2025

DATE OF HEARING: 11.02.2025

DATE OF DECISION:30.05.2025

Per Mr. Ajayan T.V.

M/s. South Nest Software Solutions Pvt. Ltd.(SNSS), the appellant herein, has preferred this appeal being aggrieved by the impugned Order-in- Appeal No. 73/2022 dated 12.12.2022 (OIA) passed by the Appellate Authority. By the said OIA, the appellate authority has, save for setting aside the penalty imposed under Section 77 of the Finance Act, 1994, otherwise rejected the appeal preferred by the appellant against the

disputed Order in Original No.30/2021-JC dated 25-08-2021 of the Adjudicating Authority confirming the demand of Service Tax of Rs.69,12,601/- towards Service Tax liability for the period from October 2014 to June 2017 under Section 73(2) of the Finance Act, 1994 (Act) read with proviso to Section 73(1) ibid along with appropriate interest and equivalent penalty imposed under Section 78 of the Act as well as a penalty of Rs.10,000/- imposed under Section 77 of the Finance Act.

2. Briefly stated, the facts are that the appellant is engaged in providing ERP Development services to their associated enterprise M/s Executive Ship Management Pte Singapore (ESM Pte). The appellant is registered with Service Tax department under Service Tax Registration No.AAMCS8626DSD001. Based on Intelligence that the appellant has not paid service tax on the ERP Development services provided by them to their associated enterprise ESM Pte by claiming the same as export of services, Officers of Directorate General of GST Intelligence (DGGI), Chennai commenced their investigation and conducted search proceedings. It was observed that M/s. ESM Pte has entered into contracts with various ships / shipping lines and are engaged in providing ship crew recruitment and management services to these ships/ shipping lines. ESM Pte has entered into Custom Enterprise Resource Planning (ERP) Development Agreement with the appellant and retained the appellant to develop the ERP for technical management of the ships being managed by ESM Pte as per the specifications of ESM Pte.

The development of the integrated customised shipping ERP solutions by the appellant and the functionalities and modules to be delivered by the appellant inter-alia includes crew management, crew planning, crew training and appraisal, portage bill, inventory/purchase accounts-purchase to payment etc. Scrutiny of the documents suggested that the appellant is an intermediary between ESM Pte and the ships/ship owners who are the clients of ESM Pte. The said services are provided by the appellant in the taxable territory, however, the appellant has not paid service tax on the said services provided, by claiming it as "export of services".

3. On conclusion of its investigation the department was of the view that ESM Pte and the appellant are managed by the same Board of Directors Mr. Balaji Singh Teeka and Ms. Sikha Singh who hold 5000 shares (50%) each in the appellant and they have constituted ESM Pte and are the Directors of ESM Pte also. The department further held the view that though ESM Pte does not hold any shares in the appellant, Mr. Balaji Singh Teeka and Ms. Sikha Singh are the common Directors of ESM Pte and the appellant and are the ultimate beneficiaries of both these entities. Hence it appears that the appellant is an establishment of Mr. Balaji Singh Teeka and Ms. Sikha Singh in taxable territory and ESM Pte is an establishment of Mr. Balaji Singh Teeka and Ms. Sikha Singh in non taxable territory and as such both these entities are "distinct persons" as explained under item (b) of explanation 3 of clause (44) of section 65B of the Finance Act.

4. The department was therefore of the view that merely because ESM Pte is situated outside the taxable territory and merely because the appellant has received the consideration in foreign convertible currency from ESM Pte, the appellant cannot consider the services provided as "export of services". Since the appellant has not fulfilled the conditions of Rule 6A(1)(d) and 6A(1)(f) of the Service Tax Rules, 1944, the services rendered by the appellant to ESM Pte cannot be treated as "export of services" and hence the appellant is liable to pay service tax on the services provided by them. The appellant is located in taxable territory and the services are provided from taxable territory. The department further held the view that the above facts regarding the non payment of Service Tax on the taxable services provide by the appellant came to the notice of the department only when conducting the investigation and the appellant appears to have suppressed relevant and vital facts from the department with malafide intention to evade service tax. In view of the above, the department issued Show Cause Notice No. 32/2020 dated 29.06.2020 invoking extended period of limitation. The appellant replied contesting the demands and after due process of law, the adjudicating authority passed the aforementioned OIO No.30/2021-JC dated 25-08-2021 confirming the demand of Service Tax along with appropriate interest and equivalent penalty imposed under Section 78 of the Act as well as a penalty of Rs.10,000/- imposed under Section 77 of the Finance Act. Aggrieve by the said OIO, the

appellant preferred an appeal before the Appellate Authority who has however, passed the impugned OIA aforementioned. Hence this appeal.

5. Shri Gopal Mundhra, Advocate, appeared and argued for the appellant. The Ld. Counsel submitted that ESM Holdings is the ultimate parent entity for the Appellant and other two group companies namely, Executive Shipping Service Pte Ltd, Singapore ("ESS Pte") and Executive Ship Management Pte Ltd, Singapore ("ESM Pte"). ESS Pte based in Singapore provides ship management services to ship owners and shipping lines in terms of the standard BIMCO ship management agreements. The Ship management services, consists of two aspects/limbs, Technical Management and Crew Management. ESS Pte further enters into a back to back agreement with ESM Pte, by which ESM Pte is required to perform the same ship management services, comprising of technical management services and crew management services for ESS Pte. ESM Pte in turn, sub-contracts such technical management services and crew management services to the Appellant and other group companies situated in India as follows:

- Executive Ship Management Private Limited ("ESM India"): ESM Pte sub-contracts crew management services to this entity.

- Nobel King Purchase Solutions Pvt Ltd (NKPS): ESM Pte sub-contracts procurement related and data management services to NKPS.
- Billion Honour Accounting Services (BHAS): ESM Pte sub-contracts accounting and payroll related services to this entity.
- Appellant ("SNSS"): ESM Pte sub-contracts ERP Development services to the appellant.

6. For the Dispute Period, the relevant flow of services is explained as under:

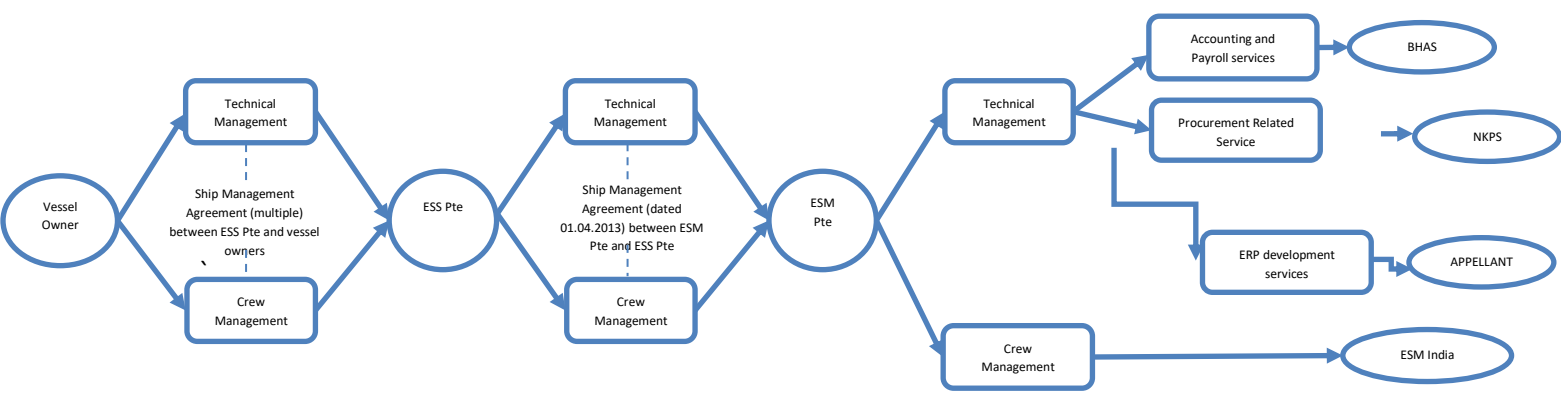
(a) the Appellant was engaged in rendering services in terms of the Customs Enterprise Resource Planning Development Agreement dated 2nd February 2009, which has been subsequently amended with addendums dated 12th September, 2012; 15th March, 2013 and 1st March, 2014 which has the following scope of services (hereinafter collectively referred to as "ERP Agreement")

(b) As per the ERP Agreement, the Customer shall retain the Developer as an independent contractor to develop the ERP described in the Specifications contained in Exhibit A attached to and made part of this Agreement. The Developer would undertake the development of the ERP as specified under the terms and conditions set forth in the ERP Agreement.

(c) ESS Pte in turn uses the services rendered by ESM Pte to render technical management and crew management services

to the ships/shipping lines in terms of the ship management agreement entered into with them.

- 7. Thus, the Ld. Counsel submits, while both ESS Pte and ESM Pte are engaged in providing technical management and crew management services, the Appellant merely renders one part of only one aspect of such services i.e,ERP Development.
- 8. In his written submissions, the Ld. Counsel depicted the flow of services and the services performed by each entity as under :



- 9. The Ld. Counsel submits that from the above it is evident that ESM Pte is in the business of rendition of technical management and crew management services, it had appointed the Appellant to independently provide ERP Development services in terms of the ERP Agreement which are rendered entirely by the Appellant to ESM Pte. The services of the appellant are in the nature of ERP development, installation and maintenance services and not that of rendering or facilitating the services of technical management and crew management rendered by ESM Pte to its clients. It is submitted that considering the nature of

services rendered by the appellant reliance is placed on the decision in ***SNQS International Socks Private Ltd (Trading Division) v Commissioner of GST & Central Excise, Coimbatore Commissionerate, 2023 (11) TMI 898- CESTAT Chennai, affirmed in Commissioner of GST and Central Excise v. M/s. SNQS International Socks Private Limited, 2024 (388) ELT 530 SC***. That in the present facts, the appellant provides a similar bouquet of services to ESM Pte on a principal to principal basis and has no oral or written agreement with the customers and accordingly the services rendered by the appellant cannot be said to be intermediary services.

10. It is the submission of the Ld. Counsel that in terms of the ERP Agreement, the Appellant follows the cost-plus pricing method and invoices its client ESM Pte at an amount equal to cost plus 8.70%/5.30% raised on a monthly basis. In view thereof the consideration so earned by the Appellant has no correlation with the occurrence or otherwise of supply of goods/ services from vendors to the ESM Pte or from ESM Pte to ESS Pte/ship owners, and in such circumstances, it cannot be said that the Appellant is arranging or facilitating the underlying supply of goods/services from vendors to ESM Pte or from ESM Pte to ESS Pte/ ship owners. It is a settled position inter alia by the below decisions that in cases where consideration is charged as cost plus mark up, the assessee does not act as an intermediary as the services had no direct nexus with the underlying supply. Reliance is placed on the

decisions in ***Verizon India Pvt Ltd v CST, 2021 (45) GSTL 275 (Tri-Del) and Lubrizol Advanced Materials India Pvt Ltd v CCE, Belapur, 2019 (22) GSTL 355 (Tri-Mumbai)***.

11. It is a well-established position that ESM Pte. and the Appellant are two separate legal persons and not establishment of a single legal person. In view of the above extract, it is evident that a subsidiary and a holding company or group companies are not covered by the abovementioned provision and therefore, do not fall under the ambit of 'distinct persons'.

12. In this regard, reliance also placed on *Linde Engineering India Pvt. Ltd. vs. Union of India - 2022 (57) G. S. T. L. 358 (Guj.)* where the following has been held, *"Therefore, the services rendered by the petitioner No.1-Company outside the territory of India to its parent Company would have to be considered "export of service" as per Rule 6A of the Rules, 1994 and Clause (f) of Rule 6A of the Rules, 1994 would not be applicable in the facts of the case as the petitioner No.1, who is the provider of service and its parent Company, who is the recipient of services cannot be said to be merely establishment so as to be distinct persons in accordance with Item (b) explanation 3 of Clause (44) of Section 65B of the Act, 1994."*

13. It is submitted that it has been well established inter alia by the below judgements that software development service (such as that in the nature rendered by the Appellant) do not

qualify as intermediary services, namely, ***Firststrand Services Pvt. Ltd. Versus Commissioner of CGST & CX, Mumbai East – 2019 (2) TMI 579 – CESTAT MUMBAI, Infodesk India Pvt. Limited Versus The Union Of India & Ors. - 2025 (1) TMI 583 - Gujarat High Court***

14. The Ld. Counsel also pointed out that the services rendered by the Appellant in terms of the ERP Agreement for the Dispute Period under Service Tax regime are identical in nature to those which are now rendered post 1 July, 2017 under the GST regime. The GST laws allow refund of accumulated input tax credit pertaining to export of goods/services. In this regard the Appellant had regularly filed refund claims with respect to the services rendered to ESM Pte in terms of the ERP Development Agreement. The GST authorities after examining whether the services rendered by the Appellant are intermediary services rendered in India or if they qualify as export of services, accepted Appellants various refund claims and granted refund at various instances through GST refund orders as stated in the grounds at UU of the grounds of appeal, after concluding that the services rendered by the appellant are not intermediary services rendered in India but are in fact export of services. It is settled position in law that the Department cannot approbate and reprobate at the same time. Reliance is placed on the judgements in ***Bhagwat Sharan (Dead) thr. L.R.s v. Purushottam and Ors [AIR 2020 SC 2361] AND Nitish Kumar Pandey v.***

The State of Madhya Pradesh and Ors [AIR 2020 SC 3407].

15. The Ld. Counsel also relied on Circular No. 159/15/2021-GST dated 20.09.2021 wherein the meaning of term intermediary was again clarified. He submitted that while the said Circular is issued in the GST regime, it has specifically stated in no unclear terms that the concept of intermediary was borrowed from the service tax regime and that there is broadly no change in the scope of intermediary services in the GST regime. Thus, the said Circular is binding on the Respondent even for determining the scope of "intermediary" under the Service Tax regime. It has been clarified in para 3.5 thereof that sub-contracting for a service is not an "intermediary" service. Reliance is also placed on the decisions in ***Genpact India Pvt Ltd v UOI & Ors, 2023 (77) GSTL 512 (P & H), Integreon Managed Solutions Pvt Ltd v. Commissioner of Central Goods and Service Tax, Mumbai East, 2023 (4) TMI 1074-CESTAT MUMBAI and Black Rock Service India Private Limited v Commissioner of CGST.***

16. That in the present case the appellant and ESM Pte are not even holding and subsidiary companies but are rather group companies, operating independently, with independent management, operations, and decision making and there cannot be any instance of application of explanation (b) to Section 65B(44) to such facts. Reliance is placed on the decisions in ***Linde Engineering India Pvt Ltd v UOI, 2022***

(57) GSTL 358 (Guj), L & T Sargent & Lundy Ltd v CCE & ST, Vadodara-I, 2021 (11) TMI 69-CESTAT Ahmedabad, Zalon Technologies India Pvt Ltd v CCE, 2022 (10) TMI 878- CESTAT KOLKATA, Celtic Systems Pvt Ltd v CCE & ST Vadodara-I, 2023 (70) GSTL 74 (Tri-Ahmd), selling simplified India Pvt Ltd v Commr of CGST, East Delhi, 2022 (9) TMI 522-CESTAT, New Delhi and Vodofone International Holdings BV v UOI, 2012 (6) SCC 613. It is also submitted that the use of the word 'merely' further dilutes condition (f) of Rule 6A and on a conjoint reading of the word 'merely' while interpreting clause (f) of Rule 6A, i.e. "the provider of service and recipient of service are not merely establishments of a distinct person", it is made apparent that the provider of service and the recipient of service are not merely establishment of distinct persons, or no more than what is specified in the statute. Therefore, the term "merely" in the context of the export of service condition implies that the service provider and service recipient must not only be different establishment of the same person, but there must be a cogent relationship between service provider and service recipient and there must be undisputed fact of performance of service. Nevertheless, in the facts of the present case, the Appellant and ESM pte are distinct legal entities therefore the said condition stands fulfilled.

17. The Ld. Counsel also placed reliance on CBIC Circular No. 161/17/2021-GST dated 20.09.2021 in relation to export of services under the GST regime. The circular has in no unclear

terms clarified that a company incorporated in India and a body corporate incorporated by or under the laws of the country outside India, which is also referred to as foreign company under companies Act, are separate persons, and thus are separate legal entities. Accordingly, these two separate persons would not be considered as “merely establishments of a distinct person”. Therefore, he submits that the appellant satisfies all the condition prescribed for classifying its services as “export of services”.

18. The Ld. Counsel submits that favourable judgements have been rendered under GST, which dealt with the same service agreement for the period from 1st July 2017 and governed by service agreement, 2016, in the case of group companies rendering other services sub-contracted by ESM Pte, namely, in respect of ESM India by Final order No.A/85492/2024 dated 14.05.2024 in Service Tax Appeal No.86879 of 2021 in the case of Executive Ship Management Pvt Ltd v Comr. of CGST & CE, Navi Mumbai; the Joint Commissioner of CGST & Central Excise, Thane Commissionerate vide Order No.61/AKS-10/TH-CGST/2024-25 dated 11th July, 2024 has held that services rendered by a group company NKPS were not intermediary services and would be treated as export of service under GST and that GST authorities have also granted refund at various instances through GST refund orders and the Additional Commissioner of GST & Central Excise, Chennai vide Order in Original No.21/2025-DGGI (ADC) dated 17.01.2025 has in the case of one of the other group entities

i.e. BHAS, held that accounting and payroll services provided by it would not qualify as 'intermediary' service and would be treated as export of service under GST and all the ruling had inter-alia also relied upon the ruling in SNQS International Socks Private limited (Trading Division) cited supra.

19. The Ld. Counsel submits that the appellants were filing their ST-3 returns regularly and duly indicating therein the amounts charged against export of service provided and that thus the recovery of the entire tax demanded is barred by limitation and is unsustainable. He submits that when they have shown the amount charged against export of service provided, extended period of limitation cannot be invoked, and if at all, only the normal periods of limitation of 30 months from the date of filling of Service Tax returns should be applicable. The present matter covers the dispute period from October 2014 to June 2017 whereas the SCN was issued only on 29.06.2020. The appellant had filed Service Tax returns for this period on 21.07.2015, 20.10.2015, 22.04.2016, 24.10.2016, 25.04.2017 and 11.08.2017 respectively as is evidenced by the ST-3 returns forming part of the Appeal records. In the present case since the service tax returns were all filed well before January 2018 the entire demand is wholly barred by limitation.

20. It was also submitted that the appellant had made sufficient disclosure in books of account and return to the extent of export claimed. Reliance was placed on the decisions in **Good**

Year India Ltd vs. CCE 024 (10) TMI 287 - CESTAT CHANDIGARH , Orbit Research Associates Private Limited vs. Commissioner Of Service Tax (Appeals I), New Delhi - 2023 (8) TMI 246 - CESTAT New Delhi, Progressive Endeavours Pvt. Ltd. vs. CCE 2024 (10) TMI 1261 - CESTAT KOLKATA and Kamal Auto Finance Ltd. v. Commissioner of Service Tax, Jaipur [2012 (26) S.T.R. 46 (Tri. – Del.) .

21.Ld. Counsel further submitted that even otherwise the scope of intermediary is a matter of interpretation and is a contentious issue and the question of alleging *mala fide* does not arise. Reliance is place on the decision ***M/s. Sunrise Immigration Consultants Pvt. Ltd. vs Commissioner of Central Excise and Service Tax, Chandigarh [2018-TIO-1849-CESTAT-CHD], LANXESS ABS Ltd. vs Commissioner [2010(259) ELT 551 (Tribunal)]***. The Ld. Counsel says that the appellant was under *bona fide* belief as regards the non-taxability and place reliance on the decisions in ***Commissioner of Customs vs. Reliance Industries Limited (2015 (325) E.L.T. 223 (S.C.)***.

22.Per contra, Shri Anoop Singh, Ld. AR for the department while reiterating the rationale reflected in the impugned OIA, submits that the service rendered by the appellant fall under definition of intermediary as discussed in the OIA with specific reference to clauses of agreement, definition of Intermediary

in statutory rules. He submitted that without facilitation done by the Appellant the main services cannot be rendered. It is evident that the Ship owners or vendors are paying for the requisition of goods or services. Consideration for the Appellant for activities rendered in respect of Ship owners/vendors is in the form of consideration from their foreign service recipient who is indeed the main service provider.

23. Ld. AR submits that for intermediary or agent or broker, it is not necessary that the consideration must be directly received from Customer of main service. Usually, they receive consideration from Principal Service Provider or provider of main service, even for the service rendered by agent or intermediary to various customers, for e.g.:- Insurance Agent or Custom Broker.

24. The Ld. AR submits that the Purchase Order, Invoices, revised invoices, delivery receipts, negotiations etc are dealt by the Appellant on directions and on behalf of foreign Service Provider who is providing main service. That, it is the matter of record that the appellant liaise/coordinate with vendors as well as Port agents as per instruction of Foreign service provider of the main service.

25. The Ld. AR draws attention to para 12.2 of the decision in ***M/s. SNQS International Socks Private Limited (Trading Division) Versus Commissioner of G.S.T. and Central***

Excise, Coimbatore Commissionerate - 2023 (11) TMI

898 - CESTAT CHENNAI, wherein it was observed that the word "on behalf" in the statute connote an agency when one person acts on behalf of the other. The former acts as an agent of the latter. An agency is the relationship of principal and agent in terms of a contract – express or implied. The Ld. AR submits that it is the matter of record that clauses after clauses in the duties of Appellant as per Contract refers to "On behalf of". Ld. A.R. contended that the Appellant is under obligation to act on behalf of, to act on approval of, to act upon request of, to liase on behalf of Main service provider.

26. The Ld. AR submits that the issue of non-fulfilment of condition laid down in Rule 6A(1)(d) has been discussed by the Adjudicating Authority. Place of provision of Intermediary Service is the location of Service Provider and in instant case, service provider is located in India and therefore, place of provision is within India. In view of above, as per Rule 6A of Service Tax Rules, 1994, since place of service for such activities being in the nature of intermediary services is not outside India, such services cannot be treated as export of service. The Ld. AR submits that the issue of condition laid down in Rule 6A(1)(f) has been discussed by the Adjudicating Authority and in the instant case provider and recipient are not merely establishment of a distinct person. The Ld. AR submits that the argument of the counsel that the expression 'establishments of distinct persons' should be establishment of the same person, i.e. the same legal entity, placing reliance

on in the case of **M/s Linde Engg** and **GST Circular** is not correct.

27. The Ld. AR draws attention to the definition of person in Section 65B(37), rule 6A and submits that the definition of 'person' does not mean company alone the definition of person for the purpose of Service Tax includes natural persons/'individuals. It is the Ld. AR submission that as per Rule 6A (1) of STR 1994 provision of any service provided or agreed to be provided shall be treated as export of service when the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act. It is his submission that interpretation given by the assessee as mentioned in certain words in statutory rules and definition of person in statute completely redundant.

28. Ld. A.R. submits that in the case at hand the appellant is an establishment of Shri Balaji Singh Teeka and Smt Sikha Singh in taxable territory and M/s ESM Pte Singapore is an establishment of same persons in non-taxable territory. As such both these 2 separate legal entities are merely establishments of same set of individuals. It is submitted that GST Circulars and case laws may not be relevant since the definition of person or use of words 'MERELY' may be unique to Service Tax laws and rules. Further, in respect of other case laws cited by learned Counsel, it is submitted that the facts such as two separate legal entities being merely

establishments of same set of individuals; contract for essentially carrying out instructions given to an entity in taxable territory by related entity in non-taxable territory and both entities being guided by same head and brain etc are peculiar to this case.

29. We have heard the rival submissions at length, carefully perused the appeal records as well as the case laws submitted as relied upon.

30. The issues that arise for determination are :

A. Whether the Demand is wholly barred by limitation as contended by the Appellant?

B. If the demand is not barred by limitation, then on merits the issues that arise for consideration are whether the appellant is an intermediary as defined in Rule 2(f) of the Place of Provision of Services Rules, 2012 (POPS Rules) and also whether the services rendered by the Appellant to M/s. ESM Pte can be treated as Export of Services as per Rule 6A of the Service Tax Rules, 1994 (STR Rules)?

31. When a plea that the demand is wholly barred by limitation is raised, we find it apposite to deal with the said issue first. The question of limitation goes to the root of the matter and involves a question of jurisdiction to raise the demand itself in the first instance. This in turn is premised on the provisions of law that prescribe the situations as well as the attendant ingredients thereto that attract its application. The findings of fact on the

question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question therefore needs to be examined and is to be determined having regard to both the facts and law involved therein. To appreciate whether the demand is wholly barred by limitation, it would therefore be appropriate to reproduce section 73(1) of the Finance Act, 1994 as it stood at the relevant time. This section deals with recovery of service tax not levied or paid or short levied or short paid or erroneously refunded. It is as follows:

“73.Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. —

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —

- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "thirty months", the words "five years" had been substituted."

32. Thus, from a perusal of sub-section (1) of section 73 of the Finance Act, it can be seen that where any service tax has not been levied or paid, the Central Excise Officer may, within thirty months from the relevant date, serve a notice on the person chargeable with the service tax which has not been levied or paid, requiring him to show cause why he should not pay amount specified in the notice.

33. The proviso to section 73(1) of the Finance Act stipulates that where any service tax has not been levied or paid by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Chapter or the Rules made there under with intent to evade payment of service tax, by the person chargeable with the service tax, the provisions of the said section shall have effect as if, for the word "thirty months", the word "five years" has been substituted.

34. The "relevant date" has been defined in section 73 (6) of the Finance Act as follows:

“ 73 (6) For the purposes of this section, “relevant date” means, —

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

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

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

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

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

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

(emphasis supplied)

35. The provisions of Section 73, save for a variation in the normal period, when it was one year as opposed to thirty months in the provision as reproduced above, came up for consideration before the Honourable Delhi High Court in ***Bharat Hotels Ltd v. Commissioner of C.Ex (Adjudication), 2018 (12) GSTL 368 (Del.)***, and was

analysed in detail. The relevant portions of the judgement are under:

"20. The only question of law that arises in the present appeal is whether the [Customs,] Excise and [Service] Tax Appellate Tribunal (CESTAT) fell into error in holding that the eviction of the extended period under proviso to Section 73(1) of the Finance Act in respect of two services, i.e. management, maintenance and repair services and Mandap Keeper services is justified in the facts and circumstances of the case. At the outset, the relevant section in question, i.e., Section 73 of the Finance Act (as applicable in 2008) needs to be stated. The section is reproduced below for reference -

"SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. - (1)

Where any Service Tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the Service Tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

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

- (a) fraud; or
- (b) collusion; or
- (c) wilful misstatement; or
- (d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of Service Tax,

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

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

21. The meaning of the words 'wilful misstatement' and 'suppression of facts' has been a subject matter of judicial scrutiny in various Supreme Court judgments which are necessary to be discussed before proceeding to the merits of this case. However, these words have been interpreted as given in Sections 28 of the Customs Act, 1962 (hereinafter referred to as "the Customs Act") and 11A of the [Central] Excise Act, 1944 (hereinafter referred to as "the Excise Act"). In order to determine if the same interpretation extends to Section 73 of the Act the following decisions of the Supreme Court have to be looked at. In the case of ***Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur* [(2013) 9 SCC 753 = 2013 (288) E.L.T. 161 (S.C.)]** the Supreme Court discussed its previous judgments to determine the applicability of the proviso to Section 28 of the Customs Act for extension of limitation period for issuing notice for payment of duties that have not been levied, short-levied or erroneously refunded. The relevant paragraphs of the judgment are excerpted below :

"9. *The show cause notice was issued on 2-8-2001, more than six months after the appellant had imported furnace oil on behalf of*

Uniworth Ltd. in January, 2001. This time period of more than six months is significant due to the proviso to Section 28 of the Act. The Section, at the relevant time, read as follows :

28. Notice for payment of duties, interest, etc. -

(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may, -

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six Months", the words "five years" were substituted.

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

10. The section imposes a limitation period of six months within which the concerned authorities must commence action against an importer/assessee in case of duties not levied, short-levied or erroneously refunded. It allows the said limitation period to be read as five years only in some specific circumstances, viz. collusion, wilful

misstatement or suppression of facts. Since the said show cause notice was issued after the elapse of six months, the revenue, for its action to be legal in the eyes of law, can only take refuge under the proviso to the section."

22. Section 28 of the Customs Act like Section 73 of the Act (in this case) relates to notice for payment of duty that has not been levied, short-levied or erroneously refunded. The proviso to Section 28 of the Customs Act and the proviso to Section 73(1) of the Act, both set out conditions for extension of limitation period for issuing of a Show Cause Notice. The difference between the two sections lies in the insertion of conditions of 'fraud' and 'contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of Service Tax' in Section 73 of the Finance Act, 1994. **In *Uniworth (supra)*, the Supreme Court discussed the interpretation of the proviso of a similar provision in Section 11A of the Excise Act and held that it is *pari materia* to the proviso to Section 28 of the Customs Act. The relevant paragraphs are excerpted below :**

"13. This Court, in Pushpam Pharmaceuticals Co. v. Collector of Central Excise, Bombay [1995 Supp (3) SCC 462], while interpreting the proviso of an analogous provision in Section 11A of The Central Excise Act, 1944, which is pari materia to the proviso to Section 28 discussed above, made the following observations :

xxxxxx

xxxxxx

xxxxxx

18. We are in complete agreement with the principle enunciated in the above decisions, in light of the proviso to Section 11A of the Central Excise Act, 1944. However, before extending it to the Act, we would like to point out the niceties that separate the analogous provisions of the two, an issue which received the indulgence of this Court in Associated Cement Co. Ltd. v. Commissioner of Customs [(2001) 4 SCC 59] 3, at page 619 in the following words :

53. ... Our attention was drawn to the cases of *CCE v. Chemphar Drugs and Liniments* [(1989) 2 SCC 12], *Cosmic Dye Chemical v. CCE* [(1995) 6 SCC 117], *Padmini Products v. CCE* [(1989) 4 SCC 275], *T.N. Housing Board v. CCE* [1995 Supp (1) SCC 50] and *CCE v. H.M.M. Ltd. (supra)*. In all these cases the Court was concerned with the applicability of the proviso to Section 11A of the Central Excise Act which, like in the case of the Customs Act, contemplated the increase in the period of limitation for issuing a show cause notice in the case of non-levy or short-levy to five years from a normal period of six months....

54. While interpreting the said provision in each of the aforesaid cases, it was observed by this Court that for proviso to Section 11A to be invoked, the intention to evade payment of duty must be shown. This has been clearly brought out in *Cosmic Dye Chemical* case where the Tribunal had held that so far as fraud, suppression or misstatement of facts was concerned the question of intent was immaterial. While disagreeing with the aforesaid interpretation this Court at p. 119 observed as follows: (SCC para 6)

6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful' preceding the words 'misstatement or suppression of facts' which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty'. It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Misstatement or suppression of fact must be wilful.

The aforesaid observations show that the words "with intent to evade payment of duty" were of utmost relevance while construing the earlier expression regarding the misstatement or suppression of

facts contained in the proviso. Reading the proviso as a whole the Court held that intent to evade duty was essentially before the proviso could be invoked.

55. Though it was sought to be contended that Section 28 of the Customs Act is in pari materia with Section 11A of the Excise Act, we find there is one material difference in the language of the two provisions and that is the words "with intent to evade payment of duty" occurring in proviso to Section 11A of the Excise Act which are missing in Section 28(1) of the Customs Act and the proviso in particular....

56. The proviso to Section 28 can inter alia be invoked when any duty has not been levied or has been short-levied by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter, his agent or employee. Even if both the expressions "misstatement" and "suppression of facts" are to be qualified by the word "wilful", as was done in the Cosmic Dye Chemical case while construing the proviso to Section 11A, the making of such a wilful misstatement or suppression of facts would attract the provisions of Section 28 of the Customs Act. In each of these appeals it will have to be seen as a fact whether there has been a non-levy or short-levy and whether that has been by reason of collusion or any wilful misstatement or suppression of facts by the importer or his agent or employee. (Emphasis supplied)"

23. It is important to note the proviso to Section 11A of the Excise Act at this stage. It states that :

"Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of

-

- (a) fraud; or
- (b) collusion; or
- (c) any wilful misstatement; or
- (d) suppression of facts; or

(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under Section 11AA and a penalty equivalent to the duty specified in the notice.”

24. As noticed in the excerpted portions of the Supreme Court’s judgment, the material distinction between the provisos of Section 11A of the Excise Act and Section 28 of the Customs Act was contemplated in *Associated Cement Co. Ltd. v. Commissioner of Customs* (supra) [2001 (128) E.L.T. 21 (S.C.)]. The only material difference in the language of the two provisions is that the phrase ‘with intent to evade payment of duty’ is not used in Section 28 of the Customs Act. The Court held that the words ‘fraud’ and ‘collusion’ inherently imply the requirement of an intent, which in this case is the intent to evade payment of duty. With respect to misrepresentation and suppression of facts the Court held that the fact that these words are preceded by the word ‘wilful’ means that there should be an intention to evade payment of duty behind these acts. And, therefore, in *Uniworth* (supra), the judgments of the Supreme Court interpreting the proviso to Section 11A of the Excise Act were applied in the interpretation of the proviso to Section 28 of the Customs Act.

25. The meaning of the phrase *pari materia* has been explained in an American case in the following words: “Statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons or things. The word *par* must not be confounded with the word *similis*. It is used in opposition to it - intimating not

likeness merely but identity. It is a phrase applicable to public statutes or general laws made at different times and in reference to the same subject." [*United Society v. Eagle Bank*, (1829) 7 Connecticut 457, p. 470, as cited in CRAIES, Statute Law, p. 134 (7th Edition)]. The provisos to Sections 11A of the Excise Act, 28 of the Customs Act and Section 73 of the Finance Act, refer to the same class of persons, i.e., persons from whom tax has been not been levied, or has been short-levied or erroneously refunded. The subject matter of these provisos is issuance of a Show Cause Notice in order to collect such tax. **Further, there seems to be no difference in language of the proviso to Section 11A of the Excise Act and Section 73(1) of the Finance Act. Since, the pith and substance of both these provisions is the same, the various judgments of the Supreme Court discussing the interpretation of proviso to Section 11A of the Excise Act can be extended to interpret Section 73(1) of the Finance Act. Further, since proviso to Section 28 of the Customs Act is *pari materia* to proviso to Section 11A of the Excise Act (as held in *Uniworth*), the interpretation of proviso to Section 28 may also be extended to interpret the proviso to Section 73 of the Finance Act. *Uniworth* (supra) is also authority on the meaning of '*wilful misstatement*' and '*suppression of facts*'; the Court held that :**

"...

12. ... The conclusion that mere non-payment of duties is equivalent to collusion or wilful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months

may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso.

.....

14. In *Sarabhai M. Chemicals v. Commissioner of Central Excise, Vadodara* [(2005) 2 SCC 168], a three-judge bench of this Court, while referring to the observations extracted above, echoed the following views :

"23. Now coming to the question of limitation, at the outset, we wish to clarify that there are two concepts which are required to be kept in mind for the purposes of deciding this case. Reopening of approvals/assessments is different from raising of demand in relation to the extended period of limitation. Under Section 11A(1) of the Central Excise Act, 1944, a proper officer can reopen the approvals/assessments in cases of escapement of duty on account of non-levy, non-payment, short-levy, short-payment or erroneous refund, subject to it being done within one year from the relevant date. On the other hand, the demand for duty in relation to extended period is mentioned in the proviso to Section 11A(1). Under that proviso, in cases where excise duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded on account of fraud, collusion or wilful misstatement or suppression of facts, or in contravention of any provision of the Act or Rules with the intent to evade payment of duty, demand can be made within five years from the relevant date. In the present case, we are concerned with the proviso to Section 11A(1).

24. In the case of *Cosmic Dye Chemical v. Collector of Central Excise, Bombay* [(1995) 6 SCC 117], this Court held that intention to evade duty must be proved for invoking the proviso to Section 11A(1) for

extended period of limitation. It has been further held that intent to evade duty is built into the expression "fraud and collusion" but misstatement and suppression is qualified by the preceding word "wilful". Therefore, it is not correct to say that there can be suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for invoking the proviso to Section 11A.

25. In case of Pushpam Pharmaceuticals Co. v. C.C.E. [1995 (78) E.L.T. 401 (S.C.)], this Court has held that the extended period of five years under the proviso to Section 11A(1) is not applicable just for any omission on the part of the assessee, unless it is a deliberate attempt to escape from payment of duty. Where facts are known to both the parties, the omission by one to do what he might have done and not that he must have done does not constitute suppression of fact."

26. Again, the Supreme Court in *Continental Foundation Joint Venture Holding v. Commissioner of Central Excise, Chandigarh-I* [(2007) 10 SCC 337 = 2007 (216) E.L.T. 177 (S.C.)], held that :

"10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or 'collusion' and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct. "

27. Therefore, it is evident that failure to pay tax is not a justification for imposition of penalty. Also, the word

'suppression' in the proviso to Section 11A(1) of the Excise Act has to be read in the context of other words in the proviso, i.e. "fraud, collusion, wilful misstatement". As explained in *Uniworth* (supra), "misstatement or suppression of facts" does not mean any omission. It must be deliberate. In other words, there must be deliberate suppression of information for the purpose of evading of payment of duty. It connotes a positive act of the assessee to avoid paying excise duty. The terms 'misstatement' and 'suppression of facts' are preceded by the expression 'wilful'. The meaning which has to be ascribed is, deliberate action (or omission) and the presence of an intention. Thus, invocation of the extended limitation period under the proviso to Section 73(1) does not refer to a *scenario* where there is a mere omission or mere failure to pay duty or take out a license without the presence of such intention.

28. In the present case, the Revenue argues that appellant wilfully suppressed the value of taxable services and thus did not discharge its liability of paying the Service Tax on same. The contention of the appellant is that the appellant was under a *bona fide* belief that the appellant was not liable for payment of Service Tax for the Mandap Keeping and Management, Maintenance and Repair Services. The appellant has supported the non-payment of Service Tax for Mandap Keeper Services by Notification No. 12/2003-S.T. It also states that, during the enquiry itself, it paid Service Tax on the sale of the above-mentioned items for the periods 2004-05 and 2005-06 with interest and had also started paying Service Tax on these items regularly from April, 2006. The same has been also acknowledged by the DGCEI in the SCN.

29. As regards management, maintenance and repair services the appellant claimed that it was unaware of the development under Section 65(105)(zzg) of the Finance Act and that when the same came to the knowledge of the appellant, the appellant promptly got itself registered for the said service and started discharging its Service Tax liability with respect to the said service from financial year 2006-07, and also paid Service Tax for the financial year 2005-06. The same has again been also acknowledged by the DGCEI in the SCN. The absence of any material disclosing intent to evade payment of Service Tax by the appellant is evident by the fact that it promptly made all the payments pertaining to Service Tax liability with respect to Mandap Keeper Service and Management, Maintenance and Repair Service as soon as the appellant became aware of the same (during the enquiry) and continued to pay Service Tax thereafter. **The authorities are unanimous that to invoke the extended period under cognate provisions (such as Section 11A of the Excise Act or Section 28A of the Customs Act) the burden is cast upon it to prove suppression of fact. The Revenue has not been able to prove an intention on the part of the appellant to evade tax by suppression of material facts. In fact, it is clear that the appellant did not have any such intention and was acting under *bona fide* beliefs. For these reasons, it is held that the Revenue cannot invoke the proviso to Section 73(1) of the Finance Act to extend the limitation period for issuing of SCN.** The SCN was issued on 24-10-2008. The undischarged liability for payment of Service Tax with respect to Mandap Keeper Service and Management, Maintenance and repair services alleged in the SCN is for the period 2004-06 and 2005-08 respectively. Since the proviso to Section 73(1) cannot be invoked the SCN had

to be served within one year from the relevant date. Therefore, the SCN with respect to short payment of Service Tax for Mandap Keeper Service for the years 2004-2006 is barred by limitation. The SCN with respect to short payment of Service Tax for Management, Maintenance and Repair Services for the years 2005-2007 is also barred by limitation.” **(emphases supplied)**

Without multiplying authorities suffice to say, similar views have been taken in the decisions in ***Principal Commissioner of CGST & C.Ex, Mumbai v. Securities and Exchange Board of India, 2023 (385) ELT 865 (Bom.)*** and ***Naresh Kumar & Co Pvt Ltd v. UOI, 2014 (36) STR 271 (Cal.)***.

36. We find that the contention of the appellant that the demand was wholly barred by limitation has been addressed by the appellate authority in para 9 of the impugned Order in Appeal, as under:

“9. The appellant has contended against invocation of extended period of limitation stating that the matter involves legal interpretation, bonafide belief, etc. The transactions of the appellant being of such nature giving scope to more than one view has not been taken up at all for resolution with advance ruling authority or with the Department by the Appellant. Service tax law clearly casts a responsibility of self-assessment on the assessee/appellant. Further by declaring the services rendered as “export of service.”, the appellant escaped scrutiny as well. Whether the appellant has acted in error or ignorance, it could not be an excuse as held in the case of D. Cowasji [1978 (2) ELT J154 (SC)] that

"We are not quite sure that if the maxim that everyone is presumed to know the law is applied, there will be any case of payment under a mistake of law unless that presumption is rebutted in the first instance, for, the moment it is assumed that everyone is presumed to know the law, it is clear that no one can make a mistake as to the law. It is sometimes said that every man is presumed to know the law, but this only a slovenly way of stating the truth that ignorance of the law is not in general an excuse (See Frederick Pollock, "Jurisprudence and Legal Essays", p.89"

Therefore in the absence of any positive volition on the part of the appellant to get clarification on the nature of services rendered by them, their pleadings of error, interpretation etc are just an afterthought. Also the pleading of appellant as to their 'bonafide belief' also fails as they are aware of chargeability of otherwise to service tax. They had taken service tax registration and declared the income under export of service. It should be noted that even though the appellant is a software developer for their group company abroad, all the utility of IT service is only with respect to ships berthing in India. This never cast a doubt in appellant's mind. They have never provided any instance that the software developed was used by their clients abroad for rendering service anywhere outside the territory of India. That being the case, the claim of 'bonafide belief' is unfounded. In this regard I place reliance on the decision of principal bench of the tribunal in the case of Liberty Sales [2014 (3) ECS 190]. Therefore, I hold that invocation of extended period is tenable."

37. We find that the appellate authority has conceded that the appellant has declared the income under export of service. Thus, the appellant's contention that it is regularly filing the returns with such declaration of income under export of service remains uncontroverted and on the contrary, stands conceded. Further, the paragraph of the citation in the case of D. Cowasji relied on, has not been cited in full and has omitted the last sentence which states "There is no presumption in this country that every person knows the law, it would be contrary to common sense and reason if it were so" [see *Maule, J. in Martindale v. Fulkner*, (1846) 2 CB 706, 719]."; and thus conveys an intent contrary to the finding of the adjudicating authority.

38. That apart, the aforesaid findings of the appellate authority in para 9 of the impugned order in appeal not only militates against the decision of the Honourable Delhi High Court in ***Bharat Hotels Ltd v. Commissioner of C.Ex (Adjudication), 2018 (12) GSTL 368 (Del.)***, reproduced above, but are also against the decisions rendered by this Tribunal as elucidated infra.

39. At this juncture, it would be apposite to notice the decision of a coordinate bench of the tribunal in ***Accurate Chemical Industries v CCE, Noida, reported in 2014(300) ELT 451 (Tri-Del)***, wherein, the question of the effect of non-scrutiny

of the returns filed by the assessee upon self-assessment was examined in detail. The relevant portions are as under:

" 7.1 Though with effect from 1-10-1996, self-assessment has been introduced and the monthly ER-1 return filed by an assessee are not required to be assessed by the Range Superintendent (RO), in terms of the following instructions issued by the Central Board of Excise & Customs (CBEC) not only every ER-1 return filed by an assessee is required to be scrutinized by the RO for correctness of rate of duty applied to the goods cleared, arithmetical accuracy of duties/amounts dues and payable; Cenvat credit availment, valuation etc., this scrutiny must be completed within 3 months and the returns of the units whose annual duty payment is Rs. 1 crore to Rs. 5 crores and more than Rs. 5 crores, are also to be cross checked by the Assistant Commissioner and Additional Commissioner, respectively.

- (1) Circular No. 249/83/96-CX., dated 11-10-1996 (para 3);
- (2) Circular No. 311/27/97-CX., dated 15-4-1997 (regarding maintenance of register of scrutiny and reporting progress of scrutiny of ER-1 returns in monthly Technical Report being sent to the Board.)
- (3) Circular No. 818/15/2005-CX., dated 15-5-2005 issued by C.B.E. & C. under Rule 12(3) of Central Excise Rules, 2002 prescribing two stage scrutiny of ER-1 and ER-3 returns - preliminary scrutiny and detailed scrutiny as per detailed check list prescribed for this purpose.

7.2 From the above Circulars of the C.B.E. & C. regarding scrutiny of ER-1 returns, it is clear that the returns filed by an assessee are required to be subjected to detailed scrutiny in course of which the concerned officer can call for the documents from the assessee wherever necessary for scrutiny. Therefore in this case, if the concerned Range officer/Assistant/Deputy Commissioner or concerned Additional Commissioner had checked the returns, the short payment would have been immediately detected as, as observed by the Commissioner

in para 4.5 of the impugned order, even the registration certificate of the appellant mentioned them as a unit of Accurate Transformers Ltd., and in all the documents of the appellant, the transfer of goods from the appellant to Accurate Transformer Ltd. had been reflected as inter unit transfer. **Neither there is any allegation nor evidence to prove that there was some collusion between the appellant and the Jurisdictional Central Excise officers. The short payment was detected when during visit by the audit team, the records maintained by the appellant and made available by them to the audit officers were examined by them, - something which should have been done by the Jurisdictional Range Officers and Divisional Assistant Commissioner/Deputy Commissioner much earlier. The assessee cannot be penalized by invoking extended period under proviso to Section 11A(1) for demand of duty and penal provisions of Section 11AC for indolence on the part of the jurisdictional Central Excise officers. Moreover Apex Court in a series of judgments -**

CCE v. Chemphar Drugs & Liniments reported in 1989 (40) E.L.T. 276 (S.C.);

Padmini Products v. Collector reported in 1989 (43) E.L.T. 195 (S.C.);

Pushpam Pharmaceuticals v. CCE reported in 1995 (78) E.L.T. 401 (S.C.);

Anand Nishikawa Co. Ltd. v. CCE, Meerut reported in 2005 (188) E.L.T. 149 (S.C.);

Continental Foundation Jt. Venture v. CCE, Chandigarh reported in 2007 (216) E.L.T. 177 (S.C.)

has held that something positive other than mere inaction or non-payment of duty is required for invoking extended period under proviso to Section 11A(1) and that suppression means failure to disclose full information with intent to evade the payment of duty and mere omission to give certain information is not suppression of fact unless it is deliberate with intention to evade the payment of duty. The above condition for

invoking extended period prescribed in these judgments is not satisfied in this case.” (*emphasis supplied*)

40. We are of the view that allowing the assessee to self-assess the tax is a mere facility extended to the assessee. That in no way detracts or dilutes the statutory responsibility of the jurisdictional central excise officers to ensure correctness of the assessment, exemptions claimed and duty payments made. In the instant case, on a perusal of the ST-3 returns available as part of the Appeal records, we find that in the ST-3 returns filed regularly, the Appellants have, under PART B, titled “VALUE OF TAXABLE SERVICE AND SERVICE TAX PAYABLE”, against B1.8 titled the “amounts charged against export of service provided or to be provided”, duly indicated the amounts in respect of each month in the appropriate place provided for such declaration. The appellant has also indicated in the respective rows thereafter, pursuant to the said particulars indicated in the ST 3 returns, the total amount claimed as deduction, the consequent net taxable value as well as the service tax payable in the appropriate rows and columns as was necessary. Therefore, we are of the considered view that the aforesaid responsibility of the jurisdictional departmental officers to scrutinize the returns filed, reflecting the information of amounts charged against export service provided, and declarations of deductions claimed and service tax payable that has been so declared by the appellant, and the abject failure to take up the information for scrutiny, is not to be held to the detriment of

the appellant, by invoking of the extended period of limitation. In view of the mandatory responsibilities cast on the jurisdictional officers by various circulars, they cannot abdicate responsibility, more so when there is complete absence of any evidence that they have indeed embarked on such a scrutiny and called for the necessary information and that the assessee has not responded to their letters seeking such information. In the show cause notice too, there is no whisper of any finding that the returns that the appellant has so regularly filed have been scrutinized and a subsequent allegation that the appellant had not furnished any information that has been sought for consequent to such scrutiny. The mandate of the statute, as laid down in Section 14 of the Central Excise Act, 1944, made applicable under Section 83 of the Finance Act, 1994 in relation to service tax as they apply in relation to a duty of excise, empowers the jurisdictional range officers to issue summons requiring any person to give evidence or produce records etc., and can be resorted to by the said officers in the course of performance of their official duties as per extant Departmental instructions, if it so becomes necessary.

41. Likewise, we find that in a case where revenue had preferred the appeals on the ground that the respondents in their monthly ER returns filed for the relevant period, have simply shown the quantum of credit availed on inputs without specifying the service on which the said credit was availed, and that therefore this would amount to suppression from the

department with intent to avail wrongful credit, a co-ordinate bench of this Tribunal in its decision in **CCE, Indore v Medicaps Ltd, reported in 2011(24) STR 572 (Tri-Del)** has held as under:

4. We find no merits in the above contention of the revenue. Admittedly the credit availed by the assessee was reflected in the monthly returns. If there is no column in the monthly return to show the nature of service on which the credit was availed, the assessee cannot be blamed for not disclosing the said fact. For invoking the longer period of limitation, there has to be a suppression or mis-statement with an intent to evade payment of duty. When the respondents have reflected the amount of credit availed by them in their monthly returns, it cannot be said that there was any positive act of suppression or misstatement on their part. As such, we are of the view that Commissioner (Appeals) has rightly held a part of the demands as barred by limitation.

42. There is a catena of decisions in similar vein wherein, various High Courts as well as this Tribunal, have consistently held that when the assessee is registered and filing returns regularly, the range officer had a duty to scrutinize returns and detect any irregularity and to raise pertinent queries in this regard and that in the light of any negligence or failure to do so, the allegation of suppression by the assessee cannot be countenanced. To cite a few, apart from those cited above, the decisions in **Jagadamba Power & Alloys Ltd v CCE, Jaipur, 2025(391) ELT 478 (Chhattisgarh) affirmed in CCE v Jagadamba Power & Alloys Ltd, 2025 (391) ELT 465 (SC), Swastik Engineering v CCE, Bangalore, 2010 (255) ELT 261 (Tri-Bang) upheld in CCE Bangalore II v Swastik Engineering, 2014 (302) ELT 333 (Kar)** and the latest decisions of the Principal Bench of the Tribunal at Delhi

in ***Final Order No.50511/2025 dated 23-04-2025 in the case of M/s. Indian Railway Catering and Tourism Corporation Ltd v. The Commissioner of Service Tax, Delhi-I and in Final Order No.50515/2025 dated 23-04-2025 in the case of M/s. Industrial Sales & Services v Commissioner of CGST &Service Tax, Jaipur***, would suffice.

43. We are of the view that when the appellant has duly provided all the information sought in the mandatory returns prescribed, it would be all the more reason for a jurisdictional range officer entrusted with the duty to safe guard Government Revenue by verifying and scrutinizing the information being furnished in the returns by the assessee, to be diligent and inquire into the details of such amounts charged against export of service. The very fact that the appellant has claimed and stated that it has made export of service, is reason enough for any officer to then promptly embark on the requisite inquiry within the mandated period prescribed for such scrutiny as laid down in the Department circulars and instructions in order to ensure correctness of the assessment and ensure complete remittance of the requisite duty. In the instant case, the extended period sought to be invoked is from October 2014 to June 2017 and hence, even before the present SCN issued on 29-06-2020 pursuant to investigations commenced on 09-05-2019, there was ample opportunity for the jurisdictional range officers to carry out their mandated responsibility and detect any irregularities, if

at all any. In the light of the ratio of the decisions stated supra, when the knowledge of the fact that the appellant has been claiming the said amounts received as towards export of service duly reflecting them in the returns, was already known to the Department, we are of the view that the learned adjudicating authority has egregiously erred in finding that the invoking of the extended period of limitation was tenable.

44. We find that the Bonafide belief of the appellant that has manifested as the appellant's declaration of the amounts received as towards export of service provided in the ST-3 returns filed with the Department, was also averred by the Company in their letter dated 25-06-2020 addressed to the Senior Intelligence Officer, DGGI (CZU), Chennai, wherein in response to the Department's queries during investigation, it was stated that " The taxable services exported outside India are not leviable to service tax and therefore exempt. Service Tax is a destination based tax therefore if the services are consumed abroad, they are covered under export and are not leviable to service tax. Since M/s. SNSSPL is exporter of software outside India, service tax is exempted." For reasons best known to the authorities, these returns have not been scrutinised as and when filed, or if scrutinized, have not excited them enough to embark on any inquiry within the normal period so as to raise a tenable demand, if any, on the appellant. When it is the responsibility of the jurisdictional departmental officers to scrutinize the returns filed reflecting the information of amounts towards export service provided

and service tax payable indicated by the appellant, any failure on their part to take up the information for scrutiny can neither be condoned to the detriment of the appellant, nor would it then justify invoking of the extended period of limitation by the Department. It is also pertinent to note that the Honourable Apex Court in ***Uniworth Textiles Ltd v CCE, Raipur, 2013 (288) ELT 161 (SC)***, held as under:

“24. Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of *bona fide* conduct, by observing that “the appellants had not brought anything on record” to prove their claim of *bona fide* conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of *mala fide* lies on the shoulders of the one alleging it. This Court observed in *Union of India v. Ashok Kumar & Ors. - (2005) 8 SCC 760* that “it cannot be overlooked that burden of establishing *mala fides* is very heavy on the person who alleges it. The allegations of *mala fides* are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility.” (emphasis supplied)

45. We also find that when the appellant held a bonafide belief that its services were not liable to tax being export of services and had in fact declared the amounts received as towards export of service provided, there cannot be a finding of wilful misstatement or suppression of facts with intent to evade payment of duty attributable to the Appellant. Honourable Supreme Court has often rendered decisions on these lines

and apart from those cited in line in the decisions referred supra, the following citations also lay down the aforesaid proposition, namely, ***Commissioner of C.Ex & Customs v. Reliance Industries Ltd, 2023 (385) ELT 481 (SC)*** and ***Jayant Juneja v CCE, Jaipur, 2015 (326) ELT 634 (SC)***.

46. We notice that while the appellate authority has conceded that the transactions of the appellant is of a nature that gives scope to more than one view, yet he has chosen to uphold the invocation of extended period on the ground that the appellant ought to have approached the Department seeking resolution. What the appellate authority has failed to appreciate is that evidently the appellant never harboured any doubt that its service was not an export of service, and it is apparently for that reason, that the appellant has declared the amounts received as towards export of service provided in its returns. Be that as it may, this Tribunal has in its decision in ***Smart Finance Vs. Commissioner of Central Excise, Jaipur [2014-TIOL-1555-CESTAT-DEL], 2015(37)STR 313 (Tri-Del)*** held as under:

"5. The appellate authority in para 13 of the order observes that a doubt on the part of the appellant regarding its taxability to Service Tax is not relevant; in case the appellant has a doubt about taxability of the service "the appellant should have approached the department for clarification" but failed to do so and therefore the appellant had deliberately avoided payment of Service Tax, suppressed the fact of non-

*payment of Service Tax and therefore imposition of penalty under Section 78 is valid. **The order of the appellate authority is equally misconceived as there is no provision for an assessee to seek advisory opinion from departmental officers nor is any statutory provision brought to our notice which authorises departmental officers to provide advice on interpretation of provisions of the Act; assessment of transactional facts qua the provisions of the Finance Act, 1994 and provide guidance on taxability or otherwise. The perception of the learned appellate Commissioner that every departmental officer is a sui generis advance ruling authority is a misconception that has no legislative basis.***” (emphasis supplied)

The said view has recently been reiterated in the decision of the Principal Bench of this Tribunal in **Commissioner of Central Excise Commissionerate v. K.K.Gupta Construction Pvt. Ltd, (2024) 17 Centax 353 (Tri-Del)**.

47. That apart, we also find substance in the appellant’s contention that the issues herein, i.e., whether the appellant is an intermediary or not, or, whether the appellant’s view that inasmuch as they are earning foreign exchange by rendering service to their service recipient abroad, it tantamount to export of service, is a tenable view or not; are all interpretational issues. If the appellant has interpreted the provisions to his benefit, it cannot be said that it was malafide or an act of wilful suppression and in such circumstances too

neither can extended period be invoked nor any penalty be imposed. Decisions in ***International Merchandising Company, LLC v CST, New Delhi, 2022 (67) GSTL 129 (SC) Lanxess ABS Ltd v Commissioner, 2010 (259) ELT 551 (Tri) and Ispat Industries v CCE, Raigad, 2006 (199) ELT 509 (Tri-Mumbai)*** refers.

48. On a perusal of the ST-3 returns available as part of the Appeal records, we have found that in the ST-3 returns filed regularly, the Appellants have duly indicated therein, the amounts charged against export of service provided in the appropriate place provided for such declaration. The appellant has also indicated the consequent net taxable value as well as the service tax payable, pursuant to the said particulars indicated in the ST 3 returns. The present matter covers the dispute period from October 2014 to June 2017 whereas the SCN was issued only on 29.06.2020. The appellant had filed Service Tax returns for this period on 21.07.2015, 20.10.2015, 22.04.2016, 24.10.2016, 25.04.2017 and 11.08.2017 respectively as is evidenced by the ST-3 returns. As per Section 73(6)(i) (a), where a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed, is the relevant date. Therefore, given that the returns for the relevant period under dispute is from October 2014 to June 2017, when the date of filing of the last return for the said period is 11.08.2017, the

normal period of thirty months would come to an end by February 2020. In the aforesaid circumstances when the invoking of extended period of limitation was not available to the Department considering the fact that the appellant had declared the amounts received as towards export of service in the ST 3 returns and the said fact was in the knowledge of the department, therefore, the SCN issued on 29-06-2020 is beyond the normal period of limitation and the entire demand is barred by limitation. The normal period of thirty months when calculated in the reverse from the date of issuance of the SCN which is on 29-06-2020, which could at best have been covered, is only if there was a demand for the period from January 2018 onwards alone. In the present case the service tax returns were all filed well before January 2018 and the period under dispute is also only upto June 2017. Thus, for the reasons we have elucidated supra, the confirmation of the demand of service tax in the instant case, which was for the period from 01.10.2014 to 30.06.2017, was entirely barred by limitation and is therefore wholly unsustainable and is liable to be set aside.

49. Given our findings above that the extended period of limitation was not invokable and that the demand was wholly barred by limitation, we are disinclined to now go into the merits of the dispute for more reasons than one. Firstly, a finding on merits is rendered inconsequential, as the demands are even otherwise unsustainable being wholly barred by limitation. Secondly, there is no question of such a demand

under Chapter V of the Finance Act, 1994, recurring in respect of the appellant. Thirdly, with the advent of the GST regime, the Finance Act 1994 has been amended and by virtue of Section 173 of the CGST Act, 2017, Chapter V of the Finance Act, 1994 has been omitted, of course subject to the repeal and savings as provided under Section 174 of the GST Act *ibid*, Last, but not the least, having found in favour of the appellant on limitation, we are now forbidden from rendering a finding on merits as per the binding judicial precedents cited as under.

50. We find that the Honourable High Court of Allahabad, in ***Commr of Cus, C.Ex & S.Tax v. Monsanto Manufacturer Pvt Ltd, 2014 (35) STR 177 (All)***, has held as under:

"20. Though in the appeal by the assessee several questions of law have been framed, the following question has been pressed at the hearing :

"Whether the Tribunal having held that proceedings were barred by limitation and proceedings were liable to be quashed on the ground of limitation, the Tribunal committed an illegality in deciding the question on merits. Hence is the finding of Tribunal on merits liable to be set aside?"

21. The appeal is admitted on the following question of law and is by consent taken up for final hearing.

22. The Tribunal came to the conclusion that the demand by the Revenue was beyond the period of limitation of one year prescribed under Section 73(1) of the Finance Act, 1994 and

that the period of five years could not have been invoked.

That part of the judgment of the Tribunal has been confirmed in the companion appeal. **Once that be the position and the Tribunal having come to the conclusion that the extended period of limitation could not have been validly applied, the Tribunal, in our view, acted outside its jurisdiction in entering upon the merits of the dispute on whether the demand for duty should be confirmed. Once it is held that the demand is time barred, there would be no occasion for the Tribunal to enquire into the merits of the issues raised by the Revenue.**

23. In **State Bank of India v. B.S. Agricultural Industries (I)-(2009) 5 SCC 121**, the Supreme Court dealt with a situation where the consumer forum had held that the complaint was barred by limitation but had nonetheless proceeded to decide the issue on merits. Holding that this would amount to an illegality, the Supreme Court observed :

"12. As a matter of law, the consumer forum must deal with the complaint on merits only if the complaint has been filed within two years from the date of accrual of cause of action and if beyond the said period, the sufficient cause has been shown and delay condoned for the reasons recorded in writing. In other words, it is the duty of the consumer forum to take notice of Section 24A and give effect to it. **If the complaint is barred by time and yet, the consumer forum decides the complaint on merits, the forum would be committing an illegality and, therefore, the aggrieved party would be entitled to have such order set aside.**"

24. **Consequently, since the Tribunal was justified, as we have held, in coming to the conclusion that the demand was time barred, there was no occasion for the Tribunal to enter upon the merits of the dispute.** We, accordingly, answer the

question of law as framed by the assessee in the affirmative and in favour of the assessee.

25. The appeal by the assessee shall stand disposed of in the aforesaid terms.” (**Emphasis supplied**)

51. We find that the Honourable Supreme Court **in Commissioner of Customs, Mumbai v B.V. Jewels, 2004 (172) ELT 3 (SC)**, has observed that “ **If, in reality, the CEGAT found that the action taken by the departmental authorities was beyond the period of limitation, it could have disposed of the appeals before it only on that ground without examining the merits**”. This decision of the Apex Court in B.V. Jewels *ibid* has been followed in **Commr of Service Tax, Mumbai IV v. Rochem Separations (I) P Ltd, 2019 (366) ELT 103 (Bom)**. It is also seen that the jurisdictional High Court in **E.T.A General Pvt Ltd v Additional Commissioner of C.Ex, Chennai, 2016 (44) STR 409 (Mad)** has held as under:

“11. In *Commissioner of Customs, Central Excise & Service Tax v. M/s. Monsanto Manufacturer Pvt. Ltd.*, reported in 2014-TIOL-550-HC-ALL-ST, while declaring the demand as beyond the period of one year, the Tribunal, entered into the merits of the appeal filed by the assessee and passed an adverse order. Before the Allahabad High Court, one of the substantial questions of law raised by the assessee, was when the Tribunal having held that proceedings were barred by limitation, has committed any illegality in deciding the question on merits. Whether the finding of the Tribunal on merits, is liable to be set aside?”

12. While addressing the above said substantial question of law, decision of the Hon'ble Supreme Court in *State Bank of India v. B.S. Agricultural Industries* reported in (2009) 5 SCC 121, has been pressed into service, wherein, the Hon'ble Supreme Court had an occasion to deal with a situation, where the consumer forum held that the complaint was barred by limitation, but nonetheless had proceeded to decide the issue on merits. Dealing with the issue, which is similar to the case on hand, at Paragraph 12, the Hon'ble Supreme Court in *State Bank of India's* case (cited *supra*), held as follows :-

"12. As a matter of law, the consumer forum must deal with the complaint on merits only if the complaint has been filed within two years from the date of accrual of cause of action and if beyond the said period, the sufficient cause has been shown and delay condoned for the reasons recorded in writing. In other words, it is the duty of the consumer forum to take notice of Section 24A and give effect to it. If the complaint is barred by time and yet, the consumer forum decides the complaint on merits, the forum would be committing an illegality and, therefore, the aggrieved party would be entitled to have such order set aside."

Applying the ratio of the Supreme Court in *State Bank of India v. B.S. Agricultural Industries* reported in (2009) 5 SCC 121, the Allahabad High Court in *Commissioner of Customs, Central Excise & Service Tax v. M/s. Monsanto Manufacturer Pvt. Ltd.*, reported in 2014-TIOL-550-HC-ALL-ST, answered the question of law in favour of the assessee.

13. Judgment of the Supreme in *State Bank of India's* case (cited *supra*), followed in *Commissioner of Customs's* case (cited *supra*), squarely applies to the facts on hand, wherein, CESTAT, Madras, while dismissing the appeal as

time-barred, has entered into the merits of the case and dismissed the same, on merits. In the words of the Hon'ble Supreme Court, that would be an illegality.

14. Though Mr. A.P. Srinivas, learned counsel appearing for the Revenue submitted that the correctness of the order impugned before us, can be decided in an appeal before the CESTAT and prayed to sustain the order, dated 15-2-2016 in W.P. No. 5501 of 2016, in the light of the above discussion and the decision in State Bank of India's case (cited supra), ***we are not inclined to accept the said contention. When the Hon'ble Supreme Court has described the manner of disposal of an appeal, as illegality, the same can be corrected by this Court, in exercise of the powers under Article 226 of the Constitution of India and no useful purpose would be served in relegating the appellants to approach the alternative remedy. Courts have held that a writ petition is maintainable, when the act committed is per se illegal, and contrary to the statute.***

15. ***In the light of the above discussion and decisions, we are inclined to interfere with the order of the Writ Court as well as the Order-in-Appeal No. 349/2015 (STA-II), dated 30-11-2015, passed by the Commissioner of Service Tax (Appeals-II) and the same are set aside."***

52. Given our findings that the demand is wholly barred by limitation for the reasons stated above, adhering to judicial discipline and respectfully following the binding judicial precedents of the Honourable Apex Court and High Courts

cited supra, we refrain from delving into the merits of the matter and rendering a finding on merits. Inasmuch as we have found the demand unsustainable and liable to be set aside, the consequential demand of interest and penalty imposed is also found to be untenable and liable to be set aside.

53. In the light of our discussions and findings above, we hold that the impugned Order-in- Appeal No. 73/2022 dated 12.12.2022, to the extent it had upheld the demand along with applicable interest and equivalent penalty as confirmed in the disputed Order in Original of the adjudicating authority, is unsustainable and is hereby set aside.

The appeal is allowed with consequential relief in law, if any.

(Order pronounced in open court on 30.05.2025)

(AJAYAN T.V.)
Member (Judicial)

vi

(VASA SESHAGIRI RAO)
Member (Technical)