

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

SERVICE TAX APPEAL NO.52016 of 2018

[Arising out of Order-in-Appeal No. 76/ST/DLH/2018 dated 16.04.2018 passed by the Commissioner (Appeals-I) CGST & Central Excise, New Delhi].

M/s. E-City Property Management & Services Pvt. Ltd.

B-10, 2nd Floor, Essel House,
Britannia Chowk,
Lawrance Road, Onkar Nagar,
New Delhi-110035.

...Appellant

VERSUS

**Principal Commissioner of
Central Excise & CGST, Delhi-North**

CR Building, I.P. Estate, New Delhi-110002

...Respondent

APPEARANCE:

Mr. Kunal Agarwal, Advocate for the appellant

Ms. Jayakumari, Authorised Representative for the Respondent

Coram: HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 29/04/2024

DATE OF DECISION: 29/08/2024

FINAL ORDER NO.58108/2024

DR. RACHNA GUPTA

Appeal is filed to assail Order in Appeal No.76/2018 dated 16.04.2018 vide which the demand of service tax on the amount received as reimbursements towards the expenses incurred for purchase of consumables has been confirmed as was proposed vide two Show Cause Notices (SCN).

2. Facts in brief relevant for the purpose are that the appellants were registered with Service Tax for providing Management, Maintenance or

Repair Service (MMRS). Advertising Space or Time Service and Business Auxiliary Service falling under Section 65(105)(zzg), (e) and (b) respectively under the Finance Act, 1994 (hereinafter referred as the Act). The audit of appellant's records was conducted. During the course of audit, it was observed from the other income statement that appellant had received reimbursement from their clients under various heads. However, they had treated the said reimbursed amount as being received under the head for "consumable/equipment and other, as non-taxable, and had not paid service tax on the same. It was observed that the appellants had incurred various expenditures on items such as cleaning material, pest control, equipment etc during the course of providing the MMRS. The appellants had charged their clients for such expenditure and had also been reimbursed for the same by their clients. Scrutiny of the invoices pertaining to such consumable also revealed that the appellants had not charged the Service Tax on consumable from their clients. The Appellants explained vide their letter dated 11.01.2012 that they bought these consumables on behalf of their clients on pure agent basis for which only the cost of consumables was recovered from the clients, and provided the relevant documents including agreement with their clients.

3. From the perusal of the agreements entered into by the appellants with clients, it appeared to the department that the appellants had entered into contractual agreement with the recipient of Service (MMRS etc.) on principal-to-principal basis and not as client's pure agent. Further, the appellants used the goods so procured in the course of providing said taxable services and also held the title to goods so procured as was evident

from the invoices pertaining to such goods. Therefore the assertion of the appellants that they acted as a pure agent of their clients did not appear to be tenable to the department and it appeared that all components of the amount charged/collected by the appellants from their clients in relation to the MMRS including the amount reimbursed were integral part of amount charged for the services provided by appellant to their client. Hence it was alleged that the reimbursed amount should form part of the gross value of taxable services provided by them to their clients. Accordingly, two following SCNs were issued to the appellants invoking Rule 5A of Service Tax Rules and Rule 5 of Service Tax (Determination of Value) Rules, 2006:-

Sl.No.	SCN date & No.	Period	Amount demanded
1	23/04/2012 bearing No.18/2012- 13/Audit	2006-07 to 2009- 2010	Rs.38,88,187/-
2	03/09/2012 bearing No.94/2012-13	2011-2012	Rs.2,52,169/-

Demand has initially been confirmed vide Order-in-Original No.19-20/2016-17 dated 21.01.2017. Appeal against the said order has been rejected vide order under challenge.

4. We have heard Mr. Kunal Agarwal, Id. Counsel for the appellant and Ms. Jayakumari, Authorized Representative for the respondent.

5. Ld. Counsel for appellant mentioned that the Appellant is engaged in providing the services of operation and management of various properties like malls, multiplexes, schools etc. During the relevant period the Appellant entered into an agreement dated 1.4.2008 with E-City Projects Construction

(P) Ltd., Mumbai, (for short "ECPCPL"), a mall developer, under which, the Appellant arranges various services like maintenance, cleaning, housekeeping etc. at Fun Republic mall, Chandigarh being provided by different vendors at the sites and in turn gets the fixed management fee as its service charges against the same. In terms of the agreement, the cost of the facilities provided by the vendors are recovered from the mall owners on cost-to-cost basis. There is no separate service except management of the services provided by the vendors at the mall sites being provided by the Appellant. Appellant charges a management fee for the above stated services, on which due Service Tax is being paid on regular basis and there is no dispute in this respect.

6. Under the said agreement, the Appellant is also working as an arranger of the consumables utilized by the maintenance staff while maintaining the property of ECPCPL. All the consumables supplied by the vendors are directly being purchased by the Appellant on behalf of ECPCPL and the cost of the same is being reimbursed by ECPCPL and there is no element of profit involved in it. The recovery cost of the same is not the part of the gross value of management service provided by the Appellant as both are distinct activities. The consumables are directly received by the ECPCPL/service recipient at its place and kept under his custody and in turn issued to the maintenance staff by them only. Further, the Appellant is not entitled to take out said consumables from the premises of ECPCPL.

7. Ld. Counsel further submitted that the Appellant has been providing the Management, Maintenance or Repair Services to clients on principal-to-principal basis and not as his pure agent. Therefore, in terms of Section 67

of the Act, the reimbursed value of the consumables collected by the Appellant from client, in relation to taxable service of MMR, would not form integral part of the amount charged for MMR Services

8. With respect to the reliance placed by the Department on Rule 5 (1) of the Determination of Value Rules, 2006 to include the value of reimbursed expenses in the taxable value, it is submitted that Rule 5 (1) of the Valuation Rules has been held ultra-virus to Section 67 of the Act and has been struck down by Hon'ble Supreme Court of India in the case of **UOI Vs. Intercontinental Consultants and Technocrats Pvt. Ltd. 2018 (10) GSTL 401 (SC)**, wherein it has been held that the value of taxable service cannot go beyond the amount charged for the 'service' itself, thereby holding that no service tax could have been levied on reimbursable expenses.

9. It is also submitted that the transaction involving sale of goods (consumables) along with maintenance service would be in nature of works contract. Reliance in this regard is placed on the decision in the case of **Unique Buildcon Pvt. Ltd. Vs. CCE & ST, 2022 (7) TMI 1182-CESTAT New Delhi and MP Laghu Udyog Nigam Ltd. Vs. Principal Commissioner of Customs, Central Excise & Service Tax, Bhopal 2023 (5) TMI 607**. Further, works contract relating to maintenance were not covered under the definition of works contract service as envisaged under Section 65 (105) (zzzza) of the Act, hence, value of consumables even if included in value of MMR service, it will not be taxable as part of consideration for rendering due to MMR service itself being not taxable in

such circumstance beyond 01.07.2012. The entire period except for the period from March, 2006 to June 2007 is the period beyond 01.07.2012.

10. Further, Cum-tax benefit is prayed to be extended for computation of demand. Finally, it is submitted that extended period of limitation has wrongly been involved while issuing the SCN.

11. It is submitted that the present case does not warrant invocation of extended period of limitation in absence of any mala fide on the part of the Appellant. This is especially since the entire demand itself is based on assumptions and presumptions as the amount reimbursed are sought to be taxed without even determining the taxable category of services. Further, what has been taxed is the value of goods. Also, the Appellant has provided all the data as and when required by the Department. For this reason, no suppression can be alleged and the demand is time barred till September 2010.. With these submissions the order under challenge is prayed to be set aside and appeal is prayed to be allowed.

12. While rebutting these submissions, Id. DR has mentioned that as per Section 67 of the Act gross amount means all amount charged and received during the provision of the taxable service, and the Appellant has charged all components of consideration in lump sum namely management fee for all purchases made for clients during the provision of MMR Service. Thus, exclusion of amount towards reimbursable expenditure is not sustainable and same is susceptible to Service Tax.

Since various charges billed by the Appellant have nexus with MMR Services, as per Rule 5 (1) of the Determination of Value Rules, 2006 same will form part of taxable value.

13. Ld. DR further submitted that the Appellant has also not fulfilled the conditions prescribed under Rule 5 (2) of the Determination of Value Rules, hence, the Appellant do not qualify to be called as pure agent and all expenditure incurred and recovered simultaneously during the provision of MMR service are susceptible to Service Tax. Otherwise also, the appellants only were buying various items of cleaning materials etc on behalf of clients, the service recipients but were occasionally mentioning the same on the invoices. Thus, it is clear that they were not acting an agent of service recipient. Also it does not appear from the contract that the Appellant has been engaged by the clients as an agent to contract with third party for supply of any goods or services on its behalf. Thus, the expenditure incurred is not warranted to be excluded. The invocation of extended period of limitation is impressed upon to have been rightly invoked.

14. The agreements between the appellants and client clearly recite that the appellants would be reimbursed for all expenditures on actual cost basis incurred on the outsourced agencies or on the material purchased for maintenance of equipment and Mall. These facts were suppressed by the appellant. The said agreements otherwise were not the one between an agent and a principal; rather these were between two principals. The appellants do not fulfill the conditions of pure agent. The value of goods thus was part of service charge reimbursed to the appellant. With these

submissions order of the Commissioner (Appeals) is prayed to be upheld and appeal to be dismissed.

15. Having heard the rival contentions and perusing the records, we observe that :

The demand has been confirmed on the ground that the consumables used by the appellants for providing the MMR services were agreed to be reimbursed to the appellant but the appellant had failed to fulfill the conditions prescribed under Rule 5 (2) of the Valuation Rules and thus the appellant cannot be held as pure agent and the amount reimbursed shall therefore form the part of transaction value towards rendering taxable service.

16. To adjudicate the correctness of these findings we foremost look into the agreements in question. Appellant has entered into two different agreements with EPCL as follows:

1. As per agreement dated 01.08.2008 between M/s STC Developers Pvt. Ltd. and appellants for maintenance and management of "Cross River Mall" at Shahdara, Delhi, the appellants would be reimbursed all expenditure on actual cost basis incurred on the outsource agencies or incurred over the material purchased for the maintenance of the equipment & Mall. The Appellants were allowed to outsource.

Maintenance service to specialized agencies but they were responsible for its performance.

2. Similarly, for managing & maintaining Malls of E-City Projects Constructions (P) Ltd. agreement dated 1st April, 2008 required

appellants to arrange all necessary consumables at their own cost & expenses & same was to be re-billed to other party & the items should be of necessary certification. The items were thus needed for maintenance & management by appellants & the items were not specified by other party, the same were to be decided by appellants as per requirement of appellants. Further, such goods were used by appellants only.

17. It is further observed that the modest operation of the facilities against the maintenance of malls is that appellant (EPMS) arranges the various services at different malls being provided by different vendors at the sites and in turn gets the fixed management fee as its service charges against the same. The cost of the facilities provided by the vendors are recovered from the malls on cost to cost basis as per the agreements with the malls. There is no separate service except management of the services provided by the vendors at the mall sites being provided by the EPMS. Admittedly the due taxes on management fee are being paid under business auxiliary services on regular basis. The supply of manpower like mall managers etc. for controlling all the Mall operational activities to manage the smooth maintenance of the mall which is charged under mall management fee are also being covered under business auxiliary services and due taxes are being paid accordingly.

18. The dispute is with respect to all the consumables supplied by the vendors to the appellants for being used for clients while rendering MMR Service. In the agreements it is expressly agreed that the consumables shall be directly purchased by the appellant on behalf of the clients. The cost

of the same is agreed to be recovered from the clients and there is no element of profit involved in it. The recovery of cost of the same should not be the part of the gross value of services provided by the appellant. We take support from statute.

19. Valuation of taxable services is governed by Section 67 of Finance Act, 1944, explanation whereof defines 'Consideration' as follows:-

Prior to 2015, the term 'Consideration' under Section 67 included: -

"Consideration" includes any amount that is payable for the taxable services provided or to be provided"

Post year 2015 (w.e.f. 14.05.2015), term 'Consideration' includes:-

- (i) Any amount that is payable for the taxable services provided or to be provided;
- (ii) Any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;
- (iii) Any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.

These provisions has been interpreted & elaborated by Supreme Court in the case of **Commissioner of Service Tax etc. v. M/s. Bhayana Builders (P) Ltd. Etc., 2018 (2) TMI 1325 - Supreme Court wherein it is held as follows:-**

"12) On a reading of the above definition, it is clear that both prior and after amendment, the value on which service tax is payable has to satisfy the following ingredients:

a. Service tax is payable on the gross amount charged:- the words "gross amount only refers to the entire contract value between the service provider and the service recipient. The word "gross" is only meant to indicate that it is the total amount charged without deduction of any expenses. Merely by use of the word "gross" the Department does not get any jurisdiction to go beyond the contract value to arrive at the value of taxable services. Further, by the use of the word "charged", it is clear that the same refers to the amount billed by the service provider to the service receiver.

20. Therefore, in terms of Section 67, unless an amount is charged by the service provider to the service recipient, it does not enter into the equation for determining the value on which service tax is payable.

b. The amount charged should be "for such service provided": Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words "for such service provided" the Act has provided for a nexus between the amount charged and the service provided. Therefore, any amount charged which has no nexus with the taxable service and is not a consideration for the service

provided does not become part of the value which is taxable under Section 67."

21. Thus, it becomes clear that the expenses incurred by the Appellant towards consumables, which are reimbursed on actuals by service recipient, are not towards any service provided by the Appellant. The consideration or gross amount charged for the MMR Service of property (mall) is the management fee charged by the Appellant, on which service tax has already been paid by the Appellant. Hence, the said amount cannot be subject to service tax.

22. This observation gets support from Clause 5 & 6 of agreement to procure consumables, which read as follows:-

(5) EPMS shall arrange for the necessary consumables at its own cost and expenses and the same will be rebilled to ECPCL. However, EPMS shall ensure that the items used shall be with necessary certification from Agmark, FPO and ISI wherever applicable. In other case the material shall meet highest quality standards.

(6) EPMS shall not take out any material from the premises unless accompanied with complete delivery challan, duly authorized by the property head.

23. It is clear that appellant never owned the consumables purchased. Prior purchase itself appellant is aware that goods belong to its client, EPCL. There is nothing on record to show that any of the purchase remained unutilized and reverted to the appellant. There is no denial to the fact that

the appellant recovers only the amount which has been paid on behalf of the recipient of service that the appellant only charges the cost of consumables and does not recover anything over and above the cost incurred by the appellant for the procurement of the said goods. The expenses incurred in procurement of consumables is recorded as cost/expense, while the amount reimbursed by the service recipient is recorded as income. These observations when read in light of above discussed section 67 and decision in case of Bhayana Builders (Supra) establishes that the amount reimbursed for the goods used in providing MMR service does not qualify to be called as consideration of section 67. Hence no tax liability arises on this count.

24. We further observe that SCNs have been issued invoking Rule 5 of value Determination Rules, 2006.

25. The only reason for which the Department sought service tax on the amounts reimbursed to the appellant by the client is that the Appellant did not fulfill the conditions laid down in Rule 5 (2) and clause (c) to the Explanation-1 to Rule 5 (2) of the Determination of Value Rules to qualify as a pure agent.

26. It is further clarified in sub-rule (2) of Rule 5 of the Valuation Rules, it has been prescribed that expenditure or cost incurred by the service provider as a pure agent of the service recipient shall be excluded from the value of taxable service, if conditions of the said Rule are satisfied.

27. It is observed that under Explanation-1 (c) to Rule 5 of the Valuation Rules, which deals with the inclusion or exclusion of certain expenditure or costs from the value of services, it has been clarified that a pure agent

means a person who 'does not use such goods or services so procured'. In present case the Appellant is providing the MMR service to mall owners, in addition the Appellant is supplying the consumables which is directly received by the service recipient. Although procurement of the consumables and provision of MMR service are provided under the same agreement, however, two are distinct activities which can be established from the fact that for MMR service management fee is received and for consumables separate invoice is raised on cost-to-cost basis. Thus, it cannot be said that all components are received as part of lump sum management fee. Further, in terms of clause 6 of the agreement dated 1.8.2008 the Appellant is also not allowed to take any material from the mall premises and are possessed by the service recipient only. Thus, it cannot be said that the consumables are used by the Appellant for provision of MMR service. Thus, clause (c) to the Explanation-1 to Rule 5 (2) of the Determination of Value Rules stands satisfied. Hence, the Appellant qualify as a pure agent (as other conditions are also satisfied and have not been disputed by the Department). Thus we hold that the findings under order under challenge are liable to be set aside.

28. We also observe that Rule 5 of Valuation Rules, 2006 has been struck down by Hon'ble High Court of Delhi holding it ultra-vires Section 67 of the Act. In the case **of Intercontinental Consultants and Technocrafts Pvt. Ltd. reported in 2018 (10) GSTL 401 (SC)**. The Hon'ble Court has essentially considered a challenge of the validity of Rule 5(1) of the Service Tax Valuation Rules. This provision was challenged to the extent it includes reimbursement of expenses in the value of taxable services for levy of Service Tax. Apart from the challenge to its constitutionality, the provision

was challenged claiming it is ultra vires the provisions of Sections 66 and 67 of the Act. The High Court held that Section 66 of the Act levies tax only on the taxable services; that this is an inbuilt mechanism to ensure that only the taxable service shall be evaluated under the provisions of Section 67; that on construing the provisions of Sections 66 and 67 (1)(i) together and harmoniously, it is clear that the value of taxable service shall be the gross amount charged by the service provider, and nothing more and nothing less than the consideration paid as a quid pro quo for the service can be brought to charge. The High Court further held that the common thread that runs through Sections 66 and 67 and 94 (the Rule making power), manifests that only the service provided by the service provider can be valued and assessed to tax. The High Court concluded that the provisions of Rule 5(1) of the valuation Rules are repugnant to Sections 66 and 67 of the Act since the provision purport to tax not, what is due from the service provider under the charging section, but seeks to extract something more from him by including in the valuation of the taxable service other expenditure and costs which are incurred by the service provider in the course of providing taxable service.

29. Thus, in view of the above law laid down by the Hon'ble Delhi High Court, recovery of expenses cannot be considered as income for any service rendered. It is further submitted that The Special Leave Petition (SLP) before the Hon'ble Apex Court was filed by revenue against the abovementioned ruling of the Delhi High Court. The Hon'ble Apex Court has upheld the ruling of the Delhi High Court, in the case of **Union of India and Anr. v. M/s. Intercontinental Consultants and Technocrats Pvt. Ltd., 2018 (3) TMI 357 - Supreme Court of India**, wherein it has observed that:

"22) Section 66 of the Act is the charging Section which reads as under:

"there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clauses of Section 65 and collected in such manner as may be prescribed."

23) Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the 'value of taxable services. Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.

24) In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services.

As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such taxable service.

That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 01, 2006) or after its amendment, with effect from, May 01, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that

Rule 5 of the Rules went much beyond the mandate of Section 67. We. therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.

25) This position did not change even in the amended Section 67 which was inserted on May 01, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of subsection (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider.

29) In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable

expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the learned counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature."

30. Thus, it stands established even by the Hon'ble Apex Court that value of reimbursable expenses incurred by the service provider, which are reimbursed by the service recipient, are not to be included in the gross amount charged for the provision of taxable service in terms of Section 67 of the Act, and Rule 5(1) of ST Valuation Rules, stipulating inclusion of such value into the value of taxable service is ultra-vires Section 67 of the Act.

31. Finally, coming to the plea of invocation of extended period it is observed that appellant has submitted that the demand, as pertaining to the period from April 2006 to September 2010 and covered under SCN dated 23.04.2012, is time-barred considering the normal limitation period of one year, as the Appellant has not suppressed any facts with malafide intention. We observe that in the instant case, the sole ground for invoking extended period of limitation is that the appellant has not intimated the department of the fact of non-payment of service tax on reimbursable expenses received from service recipient under rule 5(2) of the ST Valuation Rules.

32. As already held above that service tax is not payable on the reimbursable expenses received by Appellant on actual from service recipients. Since the service tax was not payable on the said amounts, and there was no requirement to disclose the non-taxable amounts, there is

neither a suppression of fact nor any intention to evade payment of service tax is imputable to the Appellant. Once the information is completely and clearly disclosed in the return in respect of taxable service, and there is no requirement to disclose non-taxable amounts, there can be no suppression by the Appellant, since the information is already available with the department.

33. We draw our support from the judgement of the Hon'ble Supreme Court in the case of **Anand Nishikawa Co Ltd. vs. CCE 2005 (188) ELT 149 (SC)**, wherein it is held as under:-

"28. However, in the case of LMP Precision Engg. Co. Ltd. (supra), this Court came to the conclusion that the manufacturer was guilty of "suppression of facts." In that decision, manufacturer did not make any attempt to describe the products while seeking an approval of classification list and in that background of facts, it was held that it amounted to "suppression of facts" and therefore, Excise authorities were entitled to invoke proviso to Section 11A of the Act. It also appears from that decision that this Court also held that if any classification was due to mis-interpretation of the classification list, suppression of facts could not be alleged. From this judgment, it is therefore clear that since the Excise authorities had collected samples of the products manufactured by the appellant and inspected the products and the relevant facts were very much in the knowledge of the Excise authorities and nothing could be shown by the Excise authorities that there was any deliberate attempt of non-disclosure to escape duty, no claim as to "suppression of facts" could be entertained for the purpose of invoking the extended period of limitation within the meaning of proviso to Section 11A of the Act."

34. We also rely upon the decision of the Hon'ble Supreme Court in the case of **Uniworth Textiles Limited vs. Commissioner of Central Excise reported in 2013 (288) ELT 161 (SC)**.

35. Hon'ble Supreme Court in the case of **Union of India v. Ashok Kumar and Others, 2005 (8) SCC 760** has held as under:-

"It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of malafides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility"

36. In view of above discussion, we hold that the extended period has wrongly been invoked. Hence the demand under SCN dated 23.04.2012 is held to be barred by time as at the relevant time the period of limitation was one year. The demand under second SCN is held not sustainable in light of above findings. In the light of the discussion arrived at on the issue of invocation of extended period of limitation the penalty is also not imposable as there is no intention of appellant to evade payment of service tax found. We draw our support from the decision of the Hon'ble Supreme Court in the case of **Hindustan Steel Ltd. v The State of Orissa reported in AIR 1970 (SC) 253**, In respect of the imposition of penalty it was held as under:

"But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An Order imposing penalty for failure to carry out a statutory obligation is the result of quasi-criminal proceedings, and the penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Where penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a

consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the Statute."

37. In the light of entire above discussion, it is held that service tax demand on the reimbursed amount has wrongly been confirmed. Present is not the case where the extended period of limitation should have been invoked. For the same reason penalty is also held to have been wrongly imposed. Resultantly, we hereby set aside the order under challenge. The appeal accordingly is allowed with consequential benefit, if any.

[Pronounced in the open Court on 29/08/2024]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)