

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH – COURT NO. 2

Service Tax Appeal No. 75566 of 2020

(Arising out of Order-in-Original No. PRINCIPAL COMMR/BBSR/ST/27-28/2020 dated 27.08.2020 (issued on 02.09.2020) passed by the Principal Commissioner, G.S.T. and Central Excise, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha)

M/s. K.V. Mohana Rao & Company Private Limited : Appellant

Flat No. 203, Vaishnavi Residency, Vidyutnagar,
Saligramampuram, Visakhapatnam – 530 024 (Andhra Pradesh)

VERSUS

Principal Commissioner, G.S.T. and Central Excise : Respondent

C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007 (Odisha)

WITH

Service Tax Appeal No. 75567 of 2020

(Arising out of Order-in-Original No. PRINCIPAL COMMR/BBSR/ST/27-28/2020 dated 27.08.2020 (issued on 02.09.2020) passed by the Principal Commissioner, G.S.T. and Central Excise, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha)

M/s. K.V. Mohana Rao & Company Private Limited : Appellant

Flat No. 203, Vaishnavi Residency, Vidyutnagar,
Saligramampuram, Visakhapatnam – 530 024 (Andhra Pradesh)

VERSUS

Principal Commissioner, G.S.T. and Central Excise : Respondent

C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007 (Odisha)

WITH

Service Tax Appeal No. 75568 of 2020

(Arising out of Order-in-Original No. PRINCIPAL COMMR/BBSR/ST/27-28/2020 dated 27.08.2020 (issued on 02.09.2020) passed by the Principal Commissioner, G.S.T. and Central Excise, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha)

M/s. Mythri Infrastructure and Mining India Pvt. Ltd. : Appellant

[Formerly 'M/s. Mythri Infra']

Main Road, Tikiri, Rayagada, Odisha – 765 001

Office Address: Door No. 50-117-17, Beside State Bank of India,
North Extension Layout, Seethammadhara, Visakhapatnam – 530 013

VERSUS

Principal Commissioner, G.S.T. and Central Excise : Respondent

C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007 (Odisha)

Appeal No(s): ST/75566-75570/2020-DB

WITH

Service Tax Appeal No. 75569 of 2020

(Arising out of Order-in-Original No. PRINCIPAL COMMR/BBSR/ST/27-28/2020 dated 27.08.2020 (issued on 02.09.2020) passed by the Principal Commissioner, G.S.T. and Central Excise, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha)

T. Srinivasa Rao, : **Appellant**
General Power of Attorney Holder and Auth. Signatory
M/s. K.V. Mohana Rao & Company Private Limited
Door No. 50-117-17, ASR Nagar, Beside State Bank of India,
North Extension Layout, Seethammadhara, Visakhapatnam – 530 013

VERSUS

Principal Commissioner, G.S.T. and Central Excise : **Respondent**
C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007 (Odisha)
AND

Service Tax Appeal No. 75570 of 2020

(Arising out of Order-in-Original No. PRINCIPAL COMMR/BBSR/ST/27-28/2020 dated 27.08.2020 (issued on 02.09.2020) passed by the Principal Commissioner, G.S.T. and Central Excise, C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007, Odisha)

M.V. Ravichandra, Managing Director, : **Appellant**
M/s. K.V. Mohana Rao & Company Private Limited
Flat No. 203, Vaishnavi Residency, Vidyutnagar,
Saligramampuram, Visakhapatnam – 530 024 (Andhra Pradesh)

VERSUS

Principal Commissioner, G.S.T. and Central Excise : **Respondent**
C.R. Building, Rajaswa Vihar, Bhubaneswar – 751 007 (Odisha)

APPEARANCE:

Shri R. Nageswara Rao, Consultant
Shri T. Satyamurthy, Advocate
For the Appellant(s)

Shri S.S. Chattopadhyay, Authorized Representative
Shri S. Mukhopadhyay, Authorized Representative
For the Respondent

CORAM:

HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOS. 77224-77228 / 2024

DATE OF HEARING: 12.09.2024

DATE OF DECISION: 05.11.2024

ORDER: [PER SHRI K. ANPAZHAKAN]

The present appeals have been filed against the impugned common Order-in-Original No. PRINCIPAL COMMR/DBSR/ST/27-28/2020 dated 02.09.2020 passed by the Principal Commissioner, GST, Bhubaneswar. As all the appeals emanate from the same Order-in-Original, all the appeals are taken up together for disposal by a common order.

2. The facts of the case are that M/s. K.V. Mohana Rao & Company Pvt. Ltd., (the appellant) were engaged in providing various services viz. Mining Service, Site Formation and Clearance Service, Maintenance or Repair Service, Works Contract Service, Transportation Service etc to M/s. Utkal Alumina International Ltd (hereinafter referred as UAIL or the service recipient) Rayagada, Odisha. The appellant carried out taxable as well as exempt works such as Mining works, works in relation to Ash Pond, Red Mud Storage Pond, construction of boundary wall for Red Mud Storage Pond, construction of check dam, construction of road bridge, Repair and maintenance of road, construction of embankment on the railway siding, transport of Bauxite ore from Mines top to the Plant/Refinery etc. In connection with carrying out the mining activity of Bauxite Ore, the appellant entered into a contract dated 14.05.2012 with the service recipient. After about 3 years of service activity, the appellant closed their business operations from November, 2015 onwards, consequent to transfer of Baphilimali Mines Development Work Agreement dated 14.05.2012, entered with the service recipient, to M/s. Mythri Infra, Visakhapatnam, in terms of an Assignment and Novation Agreement dated 29.10.2015. By virtue of this Novation Agreement, the appellant transferred all its assets/plant and

machinery to one Mr. T. Srinivasa Rao of M/s Mythri Infra.

2.1 The Directorate General of Central Excise Intelligence, Visakhapatnam Regional Unit, Visakhapatnam (DGCEI or Investigating Agency) initiated investigation against the appellant regarding the payment of service tax, correctness of CENVAT credit availment, liability of reversal of CENVAT credit due to transfer of assets to Mythri Infra etc. During the course of investigation, the officers of DGCEI visited the mining site of the service recipient and seized 48 numbers of old and used machinery, located at the site for the purpose of mining of Bauxite Ore, under a Panchanama dated 14.12.2016. Thereafter, a Show Cause Notice No. 37/2017-18 / F. No. INT/DGCEI/HZU/SC/51/2016-17/VRU.PF-1 dated 12.06.2017 was issued proposing confiscation of the said machinery valued at Rs.17.30 crores. Consequent to subsequent investigation, another show cause notice No.06/2017-18(ORNo.22/2017-18-ST) F. No. DGCEI/VRU/INV/ST/17/2016PF-1 dated 18.11.2017, was issued to the appellant demanding service tax and CENVAT credit for the period 2012-13 to 2015-16 wherein the Revenue felt that the appellant has not paid appropriate service tax and availed ineligible credit. The appellant submitted replies to the above Show Cause Notices, vide their reply letters dated 22.11.2017 and 22.05.2019, respectively.

2.2. The said two Notices were adjudicated by the Ld. adjudicating authority vide the impugned Order-in-Original Principal Commissioner/BBSR/ST/27-28/2020 dated 27.08.2020 (issued on 02.09.2020),

wherein he has confiscated the 48 number of machineries as proposed in the Notice dated 12.06.2017. He has ordered for release of the machineries confiscated on payment of redemption fine of Rs.50,00,000/-. The Ld. adjudicating authority has confirmed various demands of service tax as demanded in the Notice dated 18.11.2017. The demands of service tax confirmed in the impugned order are summarized in the table below:

S. No.	Description	Demand confirmed (in Rs.)
1	Demand on Free Supply Materials supplied by the service recipient under Section 73 of the Finance Act, 1994.	5.91 crores
2	Service tax demand under Section 73 of the Finance Act, 1994.	33.84 crores
3	CENVAT Credit demand on capital goods (confiscated machinery) under Rule 14 of CENVAT Credit Rules, 2004 read with Section 73 of the Finance Act, 1994.	3.51 crores
4	CENVAT Credit demand on capital goods under Rule 14 of CENVAT Credit Rules, 2004 read with Section 73 of the Finance Act, 1994.	3.22 crores
5	CENVAT credit demand on inputs and input services under Rule 14 of CENVAT Credit Rules, 2004 read with Section 73 of the Finance Act, 1994.	69.07 lakhs
	Total	47.19 crores

2.3. The amounts paid during the course of investigation i.e., Rs.1,86,41,324/- along with interest of Rs.29,59,357/- and Rs.3,25,57,169/- along with interest of Rs.56,06,076/- were appropriated towards the duty demands.

2.4. The Id. adjudicating authority has imposed the following penalties against the appellants: -

(i) M/s. K V Mohana Rao and Company Pvt. Ltd

S. No.	Section	Penalty imposed
i	Penalty in terms of Section 78 of the Finance Act, 1994.	Rs.47.19 crores
ii	Penalty under Section 77 ibid	Rs.10,000/-
iii	Late Fees under Section 70 ibid	Rs.16,800/-

(ii) An amount of Rs.3.51 crores have been imposed as penalty under Section 78 ibid on M/s. Mythri Infra, the assignee of Assignment and Novation Agreement dated 29.10.2015.

(iii) Personal penalty of Rs.1 lakh each has been imposed on Shri M. V. Ravichandra, Managing Director and Shri T. Srinivasa Rao, GPA Holder of the appellant company, under Section 78A of the Finance Act, 1994.

2.5. Appellant at Sl. No.(i) have filed the appeals against the confiscation of the machinery, confirmation of demands of service tax and CENVAT credit and imposition of penalties against them.

Appellants at Sl. Nos. (ii) & (iii) have filed appeals against the penalties imposed on them.

3. During the hearing held on 12.09.2024, Shri R Nageswara Rao, Consultant and Shri T. Satya Murthy, Advocate, appearing for all the appellants, filed synopsis in respect of the appellant-company and additional written submissions in respect of M/s. Mythri Infra, Shri M. V. Ravichandra, Managing Director and Shri T. Srinivasa Rao, GPA Holder of the appellant-company and made detailed submissions.

3.1. Regarding the quantification of the service tax demand of Rs.33.84 crores in the impugned order, the appellant submits that the Revenue has quantified the said demand in Annexures – A2 to A5 for the years 2012-13 to 2015-16 respectively. For the year 2012-13, demand amounting to Rs.1.25 crores was quantified in respect of 3 transactions including the demand of service tax on Commission received; For the remaining years, each transaction is taken into account either on the basis of RA Bill / Invoice issued by the appellant or on the basis of the Payment Advice issued by the service recipient by which the service consideration and service tax was paid to the appellant; Sum total of the tax liability of such transactions during a particular year are quantified in addition to Commission, taken on lump sum basis, for the whole year. They submit that the duty paid during the respective year as per the ST3 returns was considered and the remaining amount was proposed as demand; This is the mode adopted during the years 2013-14 to 2015-16; Accordingly, Service Tax demand of Rs.33.84 crores was proposed in the notice and the same was confirmed in the O-I-O dated 27.08.2020 (issued on 02.09.2020).

3.2. The appellant submits that while accepting the demands as per the said Annexures in some instances, they chose to contest only those demands, which according to them, are either not taxable or exempt services or double demands. Accordingly, the appellant has dealt these contested issues under different heads, such as, Bauxite Ore Transportation, reimbursable expenditure on diesel, double demands on advances, clearly exempt services like., road works, railway works, service tax demand on material supply per se etc.

3.3. During the course of the Hearing and in their written submissions, the appellant made a detailed presentation of their stand by way of facts and figures drawn from their financial records to sustain their view point. They contended that the Revenue had inflated the demand to abnormal proportions. In this regard, they contended that the Revenue reopened clearly established issues like tax liability on free supplies, reimbursable expenditure, railway works, roads which are all squarely covered by settled case laws. In respect of double demands, it is their contention that ignoring the trade practice and the clear documentation of the appellant, the Revenue demanded tax twice on the advances amounting to Rs.10.68 crores. The first demand is towards – once when the advances were received and for a second time on the total gross receipts of the final bills / invoices, without giving consideration to the factual position that such advances were adjusted from the said bills / invoices and that the service recipient paid only the balance amount after adjusting the advance paid to them earlier. Perusal of the impugned

Annexures to the notice also revealed that both the final bill amounts as well as advance amounts were taken into consideration for affixing the tax liability on the appellant. In the appeal memorandum, the appellant provided elaborate details on this front unfolding as to how advances were taxed initially and how the gross receipts of the final bills were taxed subsequently, supporting each case, with either the RA Bill / Invoice of the appellant or the Payment Advice of the service recipient in each case. According to the appellant, demands on free supplies, reimbursable expenditure, road works, railway works are clearly settled by virtue of judgments of various Tribunals and the Apex Court. The appellant also submitted that 3 individual demands, amounting to Rs.1,20,84,466/-, of the present case (S. No. 68 of Annexure – A3, S. Nos.3 & 75 of Annexure – A4) relating to the Red Mud Pond are double demands, in which case, para 108 of the present notice specifically states that such of those demands covered by the notice dated 17.10.2016 and relating to Red Mud Pond are excluded from the present proceedings and yet demanded the same amounts in the present notice.

3.4. The appellant then furnished their arguments in respect of the separate demands confirmed in the impugned order by segregating them under various categories, which are detailed as under:

4. Demand of Rs.5.91 crores on Free Supply Materials(details relating to the demand are available in Annexure – 7 to the notice): In respect of the demand of service tax of Rs.5.91 Crores on the materials supplied free of cost by the service recipient, the appellant submits that the issue is settled against the Revenue by the Hon'ble Apex Court

vide judgement in the case of ***M/s. Bhayana Builders (P) Ltd. etc. – [2018 (10) G.S.T.L/ 118 (SC)]***. It is pointed out that the decision in *M/s. Bhayana Builders (P) Ltd.* has been reiterated by the Hon'ble Supreme Court in the case of ***M/s. Jayhind Project Ltd Vs. Commr. Service Tax, Ahmadabad [2024 (388) E.L.T. 38 (SC)]***. The appellant further submits that this Tribunal in Appeal No.ST/75673/2021 has decided the same issue vide *Final Order No. 75972 of 2024 dated 02.05.2024 [CESTAT, Kolkata]* wherein the Tribunal has set aside the demand on free supply of materials with regard to M/s. Mythri Infra in respect of the same Mining Contract assigned to them in terms of an Assignment and Novation Agreement dated 29.10.2015; the said appeal covers all the issues as of the present appeal, in relation to free supply material. Accordingly, they submitted that the demand of service tax confirmed in the impugned order on this count is not sustainable.

5. **Service tax demand:** Regarding the demand of service tax of Rs.33.84 crores, the appellant submits that this is a combined demand covering service tax on various categories. The break-up of this demand and the submission of the appellant on these demands confirmed in the impugned order are as below:

5.1. Bauxite Ore Transportation: Demand Rs.9.03 crores:

This demand has been confirmed in respect of the Goods Transport Agency (GTA) service rendered by the appellant on reverse charge basis. The appellant submits that the demand of service tax on this category from them is not sustainable as they are not the 'persons' liable to pay tax on this activity. They

contend that in respect of GTA service, service tax under reverse charge mechanism is liable to be charged at the hands of the service recipient, in terms of Section 68(2) of the Finance Act, 1994 read with Notification No.30/2012-ST. Accordingly, the appellant submits that in this case, the service recipient viz M/s. Utkal Aluminium Pvt. Ltd., is liable to pay the service tax on reverse charge basis. According to the appellant, the service recipient, in fact, paid the service tax on this activity themselves and reported such details to the investigating agency and that the personnel of the service recipient in their deposition before the investigating agency confirmed payment of service tax themselves to the exchequer. Thus, demanding the service from the appellant, who is only a provider of the GTA service and not the recipient of service, would not be legally sustainable.

5.2. The single ground on which this demand is confirmed against the appellant in the impugned order is that they had billed service tax on the GTA service in respect of 12 RA bills / invoices raised by them on the service recipient. The appellant submits that out of the 12 transactions, 4 transactions are covered by singular evidence i.e., payment advice issued by the service recipient (but not the RA bill / invoice issued by the appellant), 2 transactions are covered by one bill, of the remaining bills service tax is billed only in 2 RA Bills / Invoices. However, in respect of those 12 transactions, the service recipient has not paid the service tax to appellant. The appellant submits that in all these 12 instances, the payment advices issued by the service recipient clearly indicate that service tax was not paid to appellant; contrary to the allegation, the service tax element was not indicated in respect of the RA Bills / invoices (except in 2 cases) /payment

advices. The appellant confirms that in none of the 12 transactions cited by the Revenue, the service recipient did pay service tax to the appellant. The appellant submits that they had also produced conclusive evidence in the form of depositions of the appellant and the service recipient, ledger accounts of the appellant and payment advices of the service recipient before the Ld. adjudicating authority clearly disproving the allegation of the Revenue; however, he has ignored the submissions and confirmed the demand of service tax under this category.

5.3. The invoice no. 2 dated 06.09.2014 inducted by the Ld. Adjudicating Authority (para 5.35(i) of the O-I-O in Page No. 247 of Vol. I) to conclude that the appellant have collected service tax on this activity is not factually correct since the service recipient did not honour the said invoice in toto. The corresponding Payment Advice No.51407542 dated 24.10.2014 confirms that only service consideration i.e. Rs.1,60,67,790/- is paid but not the service component (page no. 156 of Vol. III).

5.4. It is submitted that the demand confirmed on the basis of a single invoice without verification of all the invoices is not legally sustainable (even in respect of this single invoice, the Department could not prove that the appellant has actually collected the service tax, except making a mere allegation). In this regard, the appellant intends to rely on the following decision of the Hon'ble CESTAT Kolkata:

(i) M/s. R.S. Ispat Pvt. Ltd. Versus Commissioner of Central Excise, Kolkata-IV and Shri Radhe Shyam Agarwal, Director M/s. R.S. Ispat Pvt. Ltd. Versus Commissioner of Central Excise, Kolkata-IV, 2024 (9) TMI 176 - CESTAT Kolkata.

5.5. It is also the case of the appellant that the impugned activity, being chargeable to service tax under reverse charge mechanism, demand under Section 73 of the Finance Act, 1994 cannot be invoked against them and as such the notice is issued in excess of jurisdiction; for argument sake, even if it is a case of collection of service tax, the notice should have been issued under Section 73A *ibid*; but no such notice was issued; there is no mandatory penalty under Section 73A *ibid*; fact remains, they have not collected any service tax from the service recipient in respect of this service activity. Accordingly, they pleaded for setting aside of this demand.

6. Reimbursable expenditure: Demand of Rs.4.78 crores:

6.1. This demand pertains to procurement of HSD by the appellant in the case of exigency in terms of Clause 5.10 of the contract dated 14.05.2012 wherein such *expenses of procurement are liable to be reimbursed by the service recipient*. In this regard, the appellant submits that no service tax was paid by the service recipient on such reimbursable expenses as the said expenses are not liable to service tax; this demand is not legally tenable upto 14.05.2015 in terms of Section 67 of the Finance Act, 1994 and in view of the Hon'ble Apex Court's judgement in the case of ***Union of India & Anr. Vs. M/s. Intercontinental consultants and Technocrats Pvt. Ltd [2018 (10) G.S.T.L. 401 (S.C.)***. It is further submitted that the appellant did not collect service tax from the service recipient in respect of this activity upto 14.05.2015 except billing service tax in one instance viz. Service Tax Invoice No.

HSD/REIMB/01 dated 17.12.2014. In respect of this Invoice, the claim is as under.

Deisel reimbursement bill	Rs.20,76,92,552/-
Deisel for transportation under GTA	Rs.16,13,94,958/-
Deisel for Mining work assessable amount for ST	Rs.4,62,97,594/-
Service tax 12% on bill amount	Rs.55,55,711/-
Education cess 2% on ST	Rs.1,11,114/-
SHE Cess 1% on ST	Rs.55,557/-
Total	Rs.21,34,14,935/-
Service Tax amount	Rs.57,22,383/-

According to the appellant, the said claim was honoured by the service recipient vide payment advice no. 51411435 dated 04.02.2015 and the said service tax amount of Rs.57,22,383/- was paid to them on a value of Rs.4,62,97,594/- only though the invoice value was of the order of Rs.20,76,92,552/- which includes advances amounting to Rs.18,88,65,202/- and that the same were adjusted from the final bill and the remaining amount only was paid as seen from the said payment advice. The appellant adds that they paid this service tax to the Revenue in the normal course and submitted proof thereof – tax payment challan.

6.2. Thus, the appellant submits that there is no service tax liable to be paid on these expenditures for diesel reimbursed by the service recipient upto 14.05.2015. Accordingly, the demand of service tax of

Rs.4.78 crores confirmed in the impugned order on this count is not sustainable.

7. Demand on advances: Rs.10.68 crores:

7.1. The appellant submits that this is a double demand, wherein initially, when the advances were received, demands were raised on such advances, subsequently, service tax is demanded for the second time when they raised the final bill on the gross value— which value is inclusive of the said advance component. The appellant submits that when they raise the final bill, the advance component is adjusted and the remaining amount only was paid to them; this being the factual position, charging service tax on the advances first when the advances were received and demanding service tax on the entire gross value of the final bills (which gross values are inclusive of such advances) for the second time, amounts to double demand on the advances. The appellant, in addition to providing documentation like RA bills / invoices and the corresponding payment advices, furnished detailed submissions and graphic presentation in the form of tables as to how advances were charged to service tax initially and how the gross values of the final bills (which values include the advances received) were charged for a second time and how the Revenue ignored the aspect of adjustment of advances in the final bills and receipt of the remaining amount by the appellant from the service recipient. In view of the above factual position, the appellant submits that the demand confirmed in the impugned order on this count is not sustainable.

8. Confirmation of demand of Rs.1.96 crores on supply of material:

8.1. The appellant submits that this is a case of demand of service tax on supply of materials. It is submitted that no service tax is payable on material supplied wherein CST has already been paid. There is no service element involved in the pure supply of materials. In proof thereof, the appellant submitted copy of work order, related invoice and the Chartered Accountant's Certificate indicating payment of CST on the said transaction. Accordingly, the appellant submits that the demand confirmed on this count is not sustainable.

9. Confirmation of demand of Rs.1.49 crores – Road Works:

9.1. The appellant submits that construction of roads is exempted under Notification No. 25/2012-ST; the said Notification clearly exempts the services provided by way of construction of roads for the use of general public; the stand of the Revenue is that the road is a private property belonging to the service recipient and hence the benefits of Notification No. 25/2012 are not applicable to the appellant. In this regard, the appellant submits that the notification speaks of only "usage of the roads by general public" and it does not refer to ownership of the roads. It is the submission of the appellant that the Revenue clearly admitted to the usage of the said road by the inhabitants of 16 villages on either side of the road. Thus, the appellant submits that the exemption provided under Notification 25/2012 is available to them.

9.2. The other ground based on which the Revenue has confirmed the demand is that the appellant has

billed service tax in respect of this activity and hence it is alleged that the appellant collected service tax on this activity. In this regard, the appellant submits that even though they billed service tax in a few cases, the service recipient did not pay service tax even on a single instance; the Revenue has not brought in any evidence to substantiate the allegation that the appellant has actually collected the service tax. As the activity of construction of road is exempted from payment of service tax as per Notification 25/2012-ST, the appellant submits that the demand confirmed on this count is not sustainable.

9.3. In support of their contention that construction of road used by general public is not subject to service tax, the appellant relied on the following decisions.

Commr. of Cus. & C. Ex., Raipur vs. National Project Construction Corpn. Ltd. [2020 (42) G.S.T.L. 75 (Tri. - Del.)]

Rajendra Singh Bhamboo vs. Commr. of C. Ex. & S.T., JAIPUR-I [2019 (22) G.S.T.L. 278 (Tri. - Del.)]

9.4. Accordingly, the appellant submits that the demand of Rs.1.49 crore on this count is not sustainable.

10. Confirmation of demand of Rs.1.15 crores on Commission:

10.1. The appellant submits that they have sub-contracted some of the work orders to the sub-contractors on back-to-back basis, in which case the appellant paid service tax on the entire contract value; while disbursing this amount to the sub-contractors, they retained their profit margin and TDS and paid the remaining amount to the sub-contractors. They submit that it is on this profit margin that the above

demand is confirmed with a nomenclature 'Commission'. However, the appellant contends that this component, forming part of contract value, was already subjected to tax in the hands of the appellant, the main contractor; since service tax is paid by them on the total contract value, this demand under the category of 'Business Auxiliary Service' is not sustainable. It is the submission of the appellant that confirmation of this demand amounts to double taxation in as much as the entire contract value is subjected to service tax already in the hands of the main contractor. The appellant contends that the Adjudicating Authority has not given any findings to the above said submissions made by the appellant.

10.2. Accordingly, the appellant submits that the demand of Rs.1.15 crores confirmed in the impugned order is not sustainable.

11. Railway work – Demand of Rs.49.37 lakhs:

11.1. The appellant submits that works related to Railways are exempted under Notification No. 25/2012-ST. This demand has been confirmed in the impugned order on the ground that it is a private railway line for use by UAIL. Sl. No. 14(a) of Notification No. 25/2012-ST dated 20.06.2012 envisages that all original works by way of construction, erection, commissioning or installation in relation to 'Railways' are exempt from service tax. The Notification does not distinguish between public Railway and private Railways. Thus, the appellant submits that the services rendered in relation to railway line / siding meant for the use of UAIL would qualify for exemption in terms of Notification No. 25/2012-ST. tax.

11.2. In support of their contention, the appellant relied on the following decisions where no distinction has been made between Government Railway and Private Railway:

- i. ***Commissioner of Central Excise, Raipur vs. Anand Construction [2017 (51) S.T.R. 435 (Tri. - Del.)]***
- ii. ***In Re: Rites Limited [2019 (20) G.S.T.L. 657 (A.A.R. - GST)]***
- iii. ***Commr. of Cus. & C.Ex., Raipur vs. National Project Construction Corpn. Ltd. [2020 (42) G.S.T.L. 75 (Tri. - Del.)]***
- iv. ***Rajendra Singh Bhamboo Vs. Commr. of CEx& ST, Jaipur-I [2019 (22) G.S.T.L. 278 (Tri. - Del.)]***

11.3. Accordingly, the appellant submits that the demand of Rs.49,37,297/- confirmed in the impugned order is not sustainable.

12. Erection, Commissioning and Testing – Double Demand – Rs.92.46 lakhs:

12.1. In this regard, the appellant makes the submission that the demand raised in the instant notice on this issue against S. No. 68 of Annexure – A3 and S. No. 75 of Annexure – A4, has already been covered in the Show Cause Notice dated 17.10.2016 (indicated at last two entries of Annexure – 9 to the said Show Cause Notice) and hence it is a double demand. According to the appellant, this fact has been accepted in para 108 of the present notice that income relating to construction of Red Mud Pond, covered by the work order no. 11/10639/01/1757 is excluded in these proceedings on the ground that the same is covered by Show Cause Notice dated 17.10.2016. It

is submitted that the Ld. adjudicating authority did not give any findings on the submissions made by them on this demand in the entire Order-in-Original. Accordingly, the appellant submits that the double demand of Rs.92.46 lakhs, covered by notice dated 17.10.2016, is not legal and proper and hence, the same is not sustainable.

13. Eastern piling – Demand of Rs.12.36 lakhs:

13.1. The appellant submits that the amount involved in this demand pertains to lumpsum compensation paid by them on behalf of UAIL and got reimbursed later. Thus, the submission of the appellant is that this reimbursement does not relate to any activity which is liable for service tax. The appellant submits that M/s. Eastern Piling & Construction Pvt. Ltd., while executing a 33KV tower line and stringing work upto the mines top, encountered certain problems with the local villagers and negotiated with them for a lump sum compensation; For this purpose, the appellant paid the said amount to the said company on behalf of UAIL and got the same reimbursed from UAIL; As such, it is not relatable to any service by the appellant and hence the service tax confirmed in the impugned order on this count is not sustainable. In support of their stand, the appellant provided two letters dated 27.08.2013 & 25.10.2013 and another note dated 17.07.2013. Accordingly, the appellant submits that the demand of Rs.12.36 lakhs confirmed in the impugned order is liable to be set aside.

14. Demand of Rs.28.38 lakhs:

14.1. The contention put forth by the appellant is that this demand figuring at S. No. 3 of Annexure – A4 is a case of double demand covered under S. No. 68 of

Annexure – A3 of the Notice; A perusal of S. No. 3 of Annexure – A4 indicates that the demand is relied upon Work Order No.11/10639/02/1758 dated 08.07.2011 and Payment Advice No. 51400850 dated 29.04.2014. The appellant submits in this regard that the Work Order indicates that the same is for Erection and Commissioning of entire mechanical and electrical instrumentation equipment including installation of piping for a value of Rs.7,48,07,083/-; Payment Advice No. 51400850 dated 29.04.2014 indicates the value as Rs.7,00,43,807/-; There is a noting in hand to effect 2,29,63,675 on the said Payment Advice. The appellant submits that this is a case of double demand as the same Payment Advice has been relied upon for both the demands (S. No. 68 of Annexure – A3 and S. No. 3 of Annexure – A4). The appellant also submits that values of the demands at S. No. 68 of Annexure – A3 and S. No. 75 of Annexure – A4 (which demands are already covered by notice dated 17.10.2016 and dealt at para 12 supra) put together match to the value of the work order cited above.

14.2. Accordingly, the appellant submits that the double demand of Rs.28,38,310/- confirmed in the impugned order is liable to be set aside.

15. Confirmation of Demand of Rs.78.96 lakhs:

15.1. It is their submission that this is a double demand on the advances received and the tax thereon was paid earlier; this demand relates to S. Nos. 12, 16 & 17 of Annexure – A3. The total demand of the 3 invoices shown as liability is Rs.1,50,74,782/- (36,78,374 + 68,19,229 + 45,77,179); In respect of the above 3 transactions, the appellant obtained advances amounting to Rs.7.47 crores (2cr + 4.47cr + 1cr) during the year 2011-12; the appellant paid

service tax amounting to Rs.46,85,866/- under challan no. 127 dated 30.07.2012 and Rs.22,89,746/- under CENVAT Credit on the said amounts. The appellant submits the related ledger accounts and challan evidencing payment of service tax; these advances are adjusted in the present bills. It is their submission that while this is the factual position, the investigating agency indicated tax liability on the total gross amount (which is inclusive of the above cited advances adjusted in the respective RA Bills) which resulted in the double demand of Rs.78,96,432/-. The appellant provided detailed calculations in this regard in paras 17.13 to 17.13.2 of the Appeal Memorandum.

15.2. Thus, the appellant submits that the demand of Rs.78.96 lakhs is liable to be set aside.

16. Confirmation of demand of Rs.7.79 lakhs – Hiring of Additional dumper:

16.1. The appellant has stated that the demand relates to hiring of additional dumper for transportation of Bauxite Ore. Shri S K Rout, UAIL, in his statement dated 09.09.2016 stated that no service tax relating to this transaction was paid to the service provider as the same is used in connection with transportation of Bauxite Ore which is chargeable to service tax on reverse charge mechanism and that UAIL paid service tax on the same. The appellant submits that Revised Service Tax invoice no. 40 dated 01.06.2015 and related payment advice dated 15.06.2015 confirms the above position. The appellant contends that while this is the factual position, the Revenue, relying on the original invoice dated 22.05.2015 raised initially and without taking the revised invoice into consideration, demanded service tax; It is their contention that no service tax

was collected in this case as seen from the payment advice; Since the tax is to be payable by the service recipient and the same was already paid by him and since the appellant was not paid the said service tax, the demand on this count is liable to be set aside.

17. Works Contract Service: Confirmation of demand of Rs.22.87 lakhs:

17.1. The appellant submits that this demand figures at S. No. 7 of Annexure – A3 and S. Nos. 21 & 22 of Annexure – A4 and that they have collected and correctly paid service tax as per the provisions relating to Works Contract Service on these three transactions related to construction of boundary wall of Red Mud Pond and installation of chain link fences around Red Mud Pond. While the nature of service is indicated as Works Contract Service against S. No. 7 of Annexure – A3 and S. No.21 of Annexure – A4, it is indicated as Erection & Commissioning Service against S. No. 22 of Annexure – A4. In all the cases, the Revenue calculated the demand on 100% of the value. In the Notice dated 24.09.2012 issued by DGCEI, the work orders relating to Red Mud Pond were classified under Works Contract Service; the Notice dated 17.10.2016 also held the activity to be Works Contract Service. Accordingly, the appellant paid tax on 40% of the value after availing abatement available under Works Contract Service, as against the claim of the Revenue i.e., quantification of the demand on 100% of the value in the present proceedings, which is not correct; While the Revenue calculated the tax on the total value, the appellant computed tax on 40% of the value, applicable to Works Contract Service. It is submitted that the appellant had collected and correctly paid service tax as per the provisions relating

to Works Contract Service on these transactions. In proof thereof, the related payment advices issued by the service recipient were provided by the appellant negating the claim of the Revenue. Accordingly, the appellant submits that the demand confirmed on this count is not sustainable.

17.2. Accordingly, the appellant prayed for setting aside the demand of service tax of Rs.22.87 lakhs confirmed on this count.

18. Demand of Rs.1.25crores for the year 2012-13.

18.1. This demand relates to 3 transactions. Out of the 3 transactions, S. No.1 relates to work in connection with railway siding which is not liable to service tax. However, appellant collected service tax and paid the same to the exchequer in the normal course; related invoice no. 1 of the Annexure – A2 dated 03.09.2012, payment advice no. 31403356 dated 12.09.2012 and connected tax payment challan no. 106 dated 27.09.2012 are all evidences for the payment of service tax on this value. Hence, the appellant submits that there is no demand. It is contended that the demand relating to S. No. 2 of the Annexure – A2 is in respect of road works, which is exempted as per Notification 25/2012; Demand relating to S. No. 3 is in respect of commission is already dealt at paragraph 10*supra* and it is not liable to service tax.

18.2. The appellant therefore submits that as such the entire demand of Rs.1,25,04,961/- confirmed in the impugned order pertaining to the year 2012-13, is not legally tenable.

19. Thus, the appellant submits that they could satisfactorily explain the demand amounting to Rs.33,28,86,315/- out of the total demand of Rs.33,84,44,273/- confirmed in the impugned order, as mentioned at S. No. 2 of the table in para 2.2. of this Order *supra*.

19.1. The head wise break-up of the demand of Rs.33.29 crores explained above are summarized below:

Sl. No	Details of the activity	Amount of demand confirmed
1	Bauxite ore Transportation	90381558
2	Reimbursement of HSD	47857000
3	Advances (Double Demand)	106838902
4	Supply of material	19604644
5	Road Work for the period 2013-14 to 2015-16	14923377
6	Commission for the period 2013-14 to 2015-16	11554825
7	Railway Work	4937297
8	Erection, Commissioning & testing (double demand)	9246156
9	Eastern piling	1236000
10	Sl. No. 3 of Annexure-4 (double demand)	2838310
11	Sl. No. 12, 17 and 16 of Annexure A-3 (double demand)	7896432
12	Hiring of Additional Dumper	779479
13	Works Contract Service	2287374
14	Annexure-A2 Demand for the year 2012-13)	12504961
		332886315

19.2. The appellant submits that the difference of Rs.55.57 lakhs pertains to the income from non-taxable activity. However, the appellant submits that they are not in a position to substantiate the service tax liability on this balance amount with proper documentation as the unit had closed its operations and offices way back in the year 2015. The appellant submits that their grievance before the Ld. Adjudicating Authority was that the Investigating Agency computed the demand arbitrarily, the Ld. Adjudicating Authority, without addressing the submissions and evidence, also confirmed the demand of Rs.33.84 crores arbitrarily; however, they have contended that the demand in respect of this differential amount fails on limitation front; the appellant submits that the present notice was issued on the heels of the earlier notice dated 17.10.2016 covering the same period; the said notice has clearly gone on record that the assessee was providing exempt/non-taxable services like bauxite ore transportation, reimbursable expenditure, road works etc., and yet did not question the said clearances; the three successive audits conducted during the relevant period also did not question the said transactions; in fact, the audit memo dated 06.05.2016 for year 2014-15 has asked for reversal of proportionate CENVAT Credit on the ground that the appellant have provided taxable as well as exempt/non-taxable clearances. Thus, it is submitted that the demand raised by invoking extended period of limitation is not legal and proper.

20. Confiscation of the old and used machinery valued Rs.17.3 crores, imposition of RF of Rs.50 lakhs, demand of Rs.3.51 crores and imposition of mandatory penalty of Rs.3.51 crores on the appellant, M/s K V Mohana Rao and Company Pvt. Ltd and imposition of mandatory penalty of Rs.3.51 crores on M/s Mythri Infra:

20.1. In this regard, the appellant submits that the Show Cause Notice dated 12.06.2017 was issued proposing confiscation of 48 numbers of old and used capital goods valued at Rs.17.30 crores on the ground that the appellant has transferred those capital goods to M/s. Mythri Infra, but have not reversed the proposed credit availed on the capital goods as provided under Rule 3(5A)(a) of the CENVAT Credit Rules, 2004. In this regard, the appellant submits that they have closed their operations consequent to execution of 'Assignment and Novation Agreement' dated 29.10.2015, executed between the service recipient, the appellant and Shri T. Srinivasa Rao of M/s. Mythri Infra; As per the agreement, the impugned capital goods – 48 in number – got transferred to Shri T Srinivasa Rao in 'as is where is' condition in the same premises where they were located earlier for execution of the same work which was still remaining to be executed; As the remaining service is to be executed to the same service recipient under the same contract, by M/s. Mythri Infra, there is neither physical removal nor deemed removal of the said capital goods from the place where they were initially located. They contend that this position is evident from the Panchanama dated 14.12.2016 under which the seizure of the said machinery was effected; the Panchanama clearly reveals that the investigating agency has effected the seizure from the

same place where the impugned capital goods were located by the appellant. The appellant further points out that no invoice was also issued as there was no physical removal of the capital goods.

20.2. The appellant submits that since there is no physical removal of the 48 numbers of the capital goods, Rule 3(5A)(a) of the CENVAT Credit Rules is not attracted as held in the following judgments:

- i. ***L.G. Balakrishnan & Bros. Ltd Vs. Commissioner of Central Excise, Trichy [2016 (340) ELT 708 (Tri. Chennai)]***
- ii. ***Hero Motors Ltd. Vs. Commissioner of C.Ex., Ghaziabad [2014 (310) E.L.T. 729 (All.)]***
- iii. ***Dalmia Cements (Bharat) Ltd. Vs. Commissioner of C.Ex., Tiruchirappalli [2008 (224) E.L.T. 484 (Tri. – Chennai)]***
- iv. ***Commissioner of C.Ex., Tiruchirappalli Vs. CESTAT, CHENNAI [2015 (323) E.L.T. 290 (Mad.)]***
- v. ***Commissioner of C.Ex., Cus. & S.T., Raipur Vs. Bhilai Steel Plant [2018 (12) G.S.T.L. 28 (Chhattisgarh)]***

20.3. They also submit that in the case of ***J. K Spinning and Weaving Mills Ltd and Another Vs. Union of India and Others [1987 (32) E.L.T. 234 (S.C.)]***, relied on in the above decision of Hon'ble Chhattisgarh High Court, the Hon'ble Supreme Court held that "removal" means physical movement of the goods and it contemplates shifting of a thing from one place to another; In other words, it contemplates physical movement of goods from one place to another; in the present case, there was no physical movement of the capital goods from the place of their location to another place.

20.4. The appellant also submitted that invocation of Rules 8(4), 24 & 25(1)(a) to (d) of the Central Excise Rules, 2002 is not warranted in this case as the same is applicable to goods removed from a factory or warehouse; the appellant in the present case is a service tax registrant and is neither a factory nor a warehouse. Thus, it is contended that explanation to Rule 8 is not attracted; Rule 24 invoked on the basis of Rule 8 is also not attracted; Rule 25 is applicable to 5 categories of persons – producer, manufacturer, registered person of a warehouse, and an importer. The appellant does not fall under the above categories. Therefore, it is the contention of the appellant that invocation of the said rules is legally not tenable; The Revenue invoked the said provisions for the purpose of effecting the seizure of the impugned machinery and eventually came up with the proposal for confiscation of the same; Seizure effected under the above legal provisions, therefore, is not legally tenable. Hence, the consequent confiscation is also not legal.

20.5. In the Notice dated 12.06.2017, to which M/s. Mythri Infra is a party, no penalty is proposed on them; in the second Notice dated 18.11.2017, M/s Mythri Infra is not a party. The appellant submits that however, vide impugned order, the Id. adjudicating authority imposed a mandatory penalty of Rs.3.51 crore on M/s Mythri Infra; Thus the Id. adjudicating authority has traversed beyond the ambit of the Show Cause Notice; Hence the impugned penalty on M/s Mythri Infra is not legally sustainable.

20.6. In addition to confiscation of the machinery and imposition of redemption fine of Rs.50 Lakhs, the Id. Adjudicating Authority also demanded duty of Rs.3.51

crores on the said capital goods. In view of the above submissions to the effect that there was no physical removal of the said capital goods, the appellant submits that the demand of duty of Rs.3.51 crores is not sustainable. The appellant submits that Rule 3(5A) which requires payment of an amount equal to the CENVAT Credit taken on the capital goods on removal of the same and thus, the duty demand of Rs. 3.51 crores in this case is legally not sustainable.

20.7. The appellant also submits that while the legal position stands so, the officers, during the course of investigation, persuaded the appellant for payment of the amount in terms of Rule 3(5A) of the CENVAT Credit Rules; hence the appellant paid an amount of Rs.3,25,57,169/- towards the demand along with interest thereon amounting to Rs.56,06,076/- in cash vide challan dated 22.12.2016; The said amount was paid during the investigation proceedings along with interest much prior to the issuance of the notice.

20.8. In view of the above said legal position, the appellant submits that confiscation of the machinery, imposition of redemption fine of Rs.50 lakhs, demand of Rs.3.51 crores from the appellant in addition to imposition of mandatory penalty of Rs. 3.51 crores on them and imposition of mandatory penalty of Rs.3.51 crores on M/s. Mythri Infra are all liable to be set aside. Thus, the appellant prayed for return of the amount of Rs.3,25,57,169/- towards the demand along with interest thereon amounting to Rs.56,06,076/- paid in cash vide challan dated 22.12.2016, treating the same as a deposit made during the investigation.

21. Confirmation of CENVAT Credit demand of Rs.3.22 crores on capital goods:

21.1. The appellant submits that part of this demand of Rs.3.22 crores, i.e. Rs.1.36 crores, is not legal and proper, as it is a double demand already covered and confirmed within the demand of Rs.3.51 crores as stated above; the demand is in relation to the same machinery covered by the same documents which is already confirmed in the said demand of Rs.3.51 crores.

21.2. The appellant submits that the details of the credit relating to the demand of Rs.3.51 crores are provided in Annexure – B3 to the notice and the details of credit relating to the demand of Rs.3.22 crores are provided in Annexure – B2 to the notice. In both the Annexures, in respect of each invoice, details such as the name of the manufacturer, description of the capital goods are provided. On a comparison of both the Annexures, the appellant submitted that demands relating to certain invoices have been noticed in both the Annexures. The appellant tabulated such invoices giving cross reference to the entries of both the above cited Annexures on pages 137 and 138 of Vol. I of the Appeal, clearly delineating the mode of double demand. Accordingly, the appellant claims that it is a double demand.

21.3. The appellant also contested this demand on additional ground i.e., this demand was raised on two grounds (i) credit was availed without having proper duty paying documents, (ii) 100% credit was taken in the year of receipt instead of 50% of the credit and in violation of the provisions of the CENVAT Credit Rules, 2004. The appellant submits that both grounds were

met by them as per the explanations provided on pages 138 – 140 of Vol. I of the Appeal Memorandum.

21.4. The appellant submits that they are not contesting the remaining demand of Rs.1.86 crores and they have already paid this amount along with interest during the course of investigation, much before issuance of the notice; In view of Section 73(3) of the Finance Act, 1994 and settled case law on the subject in the case of ***Shri Selvakumar Textiles Vs. Commissioner of C.Ex., Coimbatore [2005 (188) E.L.T. 334 (Tri.-Chennai)]***, the appellant contends that the proceedings conclude and there is no need for the Revenue to issue any notice; Hence this part of the demand is not legally sustainable. The appellant also submits that the total demand fails on limitation front also. In view of the above submissions, the appellant prayed for setting aside the demand of Rs.1.36 crores confirmed in the impugned order, as they are not contesting the remaining demand of Rs.1.86 crores confirmed in the impugned order.

22. Confirmation of CENVAT Credit demand of Rs.69.07 lakhs on inputs and input services:

22.1. The Ld. adjudicating authority confirmed this demand on the ground that the appellant had taken excess credit in certain cases and in some other cases availed credit either without supporting documents or in the absence of proper duty payment documents. The demand was raised for 3 years – 2013-14, 2014-15 & 2015-16 and the demand details are provided in the Annexures – C-1, C-2 & C-3 respectively as Rs.43,66,149/-, Rs.12,15,906/- & Rs.13,25,621/- for the respective years. The appellant contested this demand on merit as well as on the ground of limitation, in view of one more Notice dated

17.10.2016 issued to the appellant by invoking extended period and the successive audits conducted by the Revenue during the relevant period. The appellant submits that CENVAT Credit availment of the appellant-company was examined by the audit wing of the Revenue and it chose not to raise any other demand on this front, except the demand of Rs.11,19,214/- wherein the appellant was required to reverse the said credit on proportionate basis on the ground that they utilized CENVAT Credit of Rs.19,58,625/- on inputs and input services, used both in taxable and non-taxable services; Since it satisfied itself as to the correct availment of CENVAT Credit on Capital goods, inputs and input services during the entire period from 2008-09 to 2014-15, raising any demand again by invoking extended period of limitation is not sustainable. It is therefore submitted that the entire demand of Rs.69.07 lakhs is not legally tenable on limitation front.

22.2. On merit front it is submitted that the appellant could locate documents involving credit of Rs.17,64,603/- and submitted along with the appeal in substantiation of their CENVAT Credit claim. The Ld. Adjudicating Authority did not advert to the said documentary evidence. The appellant submits that they have provided detailed explanation besides segregating the documents towards inputs and input services by tabulating the same and also made detailed submissions as to how the demand relating to the year 2015-16 is not legally tenable and the same was not addressed by the Original Authority. In this regard, the appellant submitted that detailed submissions on extended period are provided at para 15 of the reply to notice dated 18.11.2017 on pages 113 – 118 of Vol. II, para 27 of the appeal – page 174

- 179 of Vol. I and also at S. No. VI of the Synopsis submitted during the course of personal hearing on 12.09.2024.

23. In view of the above submissions, the appellant- M/s K. V. Mohana Rao and Company Pvt. Ltd. - has prayed for setting aside the demands confirmed in the impugned order as well as the penalty imposed on merit as well as on limitation.

24. Regarding the mandatory penalty imposed on them, the Appellant M/s. Mythri Infra submitted that the Notice dated 12.06.2017 proposed confiscation of the machinery, to which M/s Mythri Infra is a party. However, there was no proposal of imposition of penalty under Rule 25 of the Central Excise Rules, 2002, read with Section 78 of the Finance Act, 1994, in the said Notice. In the second notice dated 18.11.2017, proposing demand of duty / CENVAT credit, M/s. Mythri Infra is not a party to this notice. However, vide impugned order, the adjudicating authority imposed mandatory penalty of Rs.3.51 crores on M/s Mythri Infra. Thus, the adjudicating authority has traversed beyond the ambit of show cause notice. Hence, it is submitted that the impugned penalty on M/s. Mythri Infra is not legally sustainable; No notice under the proviso to sub-Section (1) of Section 73, has been served on M/s Mythri Infra. Hence, it is contended that they are not liable to penalty in terms of Section 78 of the Finance Act.

24.1. Shri. Srinivasa Rao, GPA Holder & Authorized Signatory submitted that he is neither a Director, Manager, Secretary in the company. He was merely a General power of Attorney Holder. A General power of

Attorney holder is merely an agent who acts on behalf of and as per the instructions of the principal. Hence, he is not liable to penalty in terms of Section 78A of the Finance Act, 1994. This view has also been accepted by the Hon'ble Supreme court in the case of *Suraj Lamp and Industries Pvt Ltd vs State of Haryana & Anr (2012) 1 SSC 656*. From the alleged non-payment of service tax by KVMR, the intention of the appellant to evade service tax cannot be presumed without any evidence on his involvement and intention to evade tax. Evasion of service tax needs to be distinguished from failure to pay service tax. There was no mala fide on the part of the appellant to evade service tax. The fact of mere being in charge of the affairs of the company itself is not a ground for imposition of penalty, in terms of Section 78A of the Finance Act, 1994. Penalty has been imposed on the appellant in a mechanical manner, without bringing on record any evidence as to the role played by him nor has any mala fide on part of the appellant has been established. Accordingly, he submitted that the penalty imposed on him is liable to be set aside.

24.2. Shri M. V. Ravichandra, Managing Director, M/s. K. V. Mohana Rao & Co. Pvt. Ltd, submitted that in view of the submissions made by M/s. K. V. Mohana Rao & Co. Pvt. Ltd, the entire demand in the case is not legally sustainable on both merits as well as on limitation. In terms of Section 78A *ibid.*, the penal liability thereunder arises only when the person concerned was knowingly concerned with the specified contraventions. From alleged non-payment of service tax by KVMR, the intention of this appellant to evade service tax cannot be presumed without any evidence on his involvement and intention to evade

tax. Evasion of service tax needs to be distinguished from failure to pay service tax. It is submitted that there was no mala fide on the part of the appellant to evade service tax. The fact of mere being Managing Director of the company itself is not a ground for imposition of penalty, in terms of Section 78A of the Finance Act, 1994. Penalty was imposed on the appellant in a mechanical manner, without bringing on record any evidence as to the role played by him nor has any mala fide on the part of the appellant been established. Accordingly, he prayed for setting aside the penalty imposed on him.

25. The Ld. Authorized Representative of the Revenue submitted that the appellant has raised service tax in the bills; Even though the appellant claimed that they have not collected the service tax from the clients, the said facts have not been verified by the adjudicating authority. Regarding the appellant's claim of reimbursable expenses are not includable for the purpose of computation of service tax, the Ld. Authorized Representative of the Revenue submits that the nature of reimbursable expenses needs to be verified by the adjudicating authority. Accordingly, he submits that these issues need to be remanded back to the adjudicating authority for the purpose of verification before determining their eligibility for the exemption.

25.1. Regarding confiscation of the capital goods, it is his submission that as per the Novation Agreement dated 29.10.2015, all assets have been transferred to M/s. Mythri Infra; Since the appellant has sold these 48 numbers of capital goods to Mythri Infra, they are liable to reverse CENVAT Credit proportional to the depreciated value; Since, the appellant has not

reversed the proportional CENVAT credit, the Id. adjudicating authority has rightly confiscated the capital goods and imposed redemption fine and penalty on Mythri Infra in the impugned order.

25.2. Regarding invocation of extended period of limitation to demand service tax, he contends that the issues involved in the Show Cause Notice dated 17.10.2016 issued to the appellant are totally different from the issues involved in the impugned order; since, the appellant has not disclosed these details in the ST-3 returns filed by them, extended period has been rightly invoked to confirm these demands.

25.3. Subsequent to personal hearing, the Id. Authorized Representative of the Revenue made a written submission substantiating the confirmation of the demands in the impugned order, which are summarized below:

(i) Regarding inclusion of the value of free supply materials in the assessable value for the purpose of demanding service tax, the Id. A.R submitted that in Para 5.38 to Para 5.44, the Adjudicating authority discussed the issue in detail and on the basis of a specific piece of evidence that they charged and collected service tax amounting to Rs.57,22,383/- on diesel, the demand has been confirmed. He submits that this is a peculiar set of facts which distinguishes the case laws relied upon by the Appellant. The Id. Departmental Representative further submits that the Appellant neither submitted any cogent reason nor any piece of evidence to refute the findings of the adjudicating Authority. The invoice no.

HSD/REIMB/01 dated 17.12.2014 has been reproduced in the order itself which clearly shows that the appellant charged service tax on the said bill/invoice.

- (ii) It is also submitted that the demand of service tax was made on various taxable services like Mining of Minerals, repair & maintenance, site formation & clearance, works contract service, transportation of bauxite ore, reimbursement of HSD, earth work for railway embankment, Hiring of dumper etc. The main allegation in all these cases is that in almost all cases, they charged and collected service tax from the recipient but failed to pay such tax so realised to the Govt exchequer. The allegations made in the notice is supported by evidences of issuing bills/invoices. The Adjudicating Authority gave detailed finding on each and every allegation in para 5.33 to 5.37 in the order in original. He held that the appellant is liable to pay service tax on the values on incomes so incurred by them towards providing various taxable services including the services on which the appellant has charged service tax in the bills raised by them. In this regard, the appellant relied on Section 12B of the Central Excise Act, which is made applicable to service tax and contended that once service tax is charged in the invoice, the same is payable in the next month in which bill/invoice was issued. Subsequent less realization may be adjusted by an assessee. But after issuing invoice, there is no justifiable reason for not showing that liability in the return and non-payment of tax.

(iii) Regarding the demand under Rule 3(5A) of the CCR 2004 payable on capital goods sold without payment of appropriate amount along with confiscation and penalty, the Ld. Departmental Representative submitted that this issue has been dealt by the Adjudicating authority in para 5.45 to 5.48 giving clear findings with legal propositions which were not refuted by the Appellant before the Tribunal. In this regard, the he relied upon the decision in the case of *CCE, Belgaum Vs Associated Cement Co Ltd [2009(236) ELT 240(Kar)]* wherein the Hon'ble High court of Karnataka has decided a similar issue in favour of department. The Kolkata Bench of CESTAT also decided a similar issue in favour of Revenue in the case of *M/s J K Paper Vs CCE, Bhubaneshwar [2014 (309) E.L.T. 359 (Tri. - Kolkata)]* by following above decision of Hon'ble High Court of Karnataka. Applying the principle laid down in Allied Air-Conditioning and Arasmeta Captive Power Company's case, the Hon'ble court observed that the word, 'removal' is to be understood according to the context in which the word is used. It does not always mean physical removal only. The ratio laid down by the Hon'ble Karnataka High Court in Associated Cement's case is applicable to the present case and accordingly, the Ld. Authorized Representative of the Revenue submits that once the ownership and control of the equipments, machineries are transferred to another legal entity, even if it is situated in the same factory premises, it would be construed as 'removal' within the meaning of Rule 3(4) of the CENVAT Credit Rules, 2004 and CENVAT Credit

on the capital goods availed by the transferor is liable to be recovered.

(iv) Regarding the irregular availment of CENVAT Credit on capital goods, inputs and input services, the Ld. Departmental Representative submits that in the impugned order, the Ld. Adjudicating Authority observed that the appellant did not produce all the relevant invoices on which credit of capital goods, inputs and input services were availed, either during the course of investigation or during the course of adjudication process. He also observed that the Accountant and GPA Holder & Authorized Signatory admitted the excess credit availment without documents in their statement recorded before proper officer. They also stated that such excess availment was made due to their fund crunch at the time of discharging service tax liability. The Ex-Manager (Taxation) also admitted that they have taken excess credit without any supportive documents. Accordingly, the Ld. A.R. submits that the Original Authority has correctly held that the credit on such capital goods, inputs and input services are not available to them.

(v) The Ld. Authorized Representative of the Revenue also submits that the submission of appellant made before Tribunal is not acceptable since they failed to discharge their burden to justify their claim by submitting supporting documents before Adjudicating Authority. The documents submitted by the Appellant before the Hon'ble Tribunal are new and not been perused by the lower authority.

Even they failed to justify validity of entire credit taken on capital goods, inputs and input services. They admitted a major portion of credit was availed irregularly. In view of the above submissions, the Ld. Authorized Representative of the Revenue supported the confiscation of the impugned capital goods, confirmation of the demands of service tax, CENVAT Credit, interest and imposition of penalties in the impugned order.

(vi) Regarding invocation of extended period of limitation, the Ld. A.R. of the Revenue submits that detailed findings in this regard has been given by the Ld. Adjudicating Authority in para 5.54 of the Impugned Order. He also submits that the appellant has deliberately availed benefits of notifications without fulfilling the terms and conditions laid therein. They charged and collected service tax but not deposited to the government exchequer deliberately. They resorted to maintain false books of accounts by non-accounting huge turnover in their audited P & L account. They availed and utilized excess CENVAT Credit on capital goods, inputs and input services and a major portion of the same is admitted by them. There are sufficient evidences on record to show their mala fide intention. Accordingly, he justified the invocation of extended period of limitation. In this regard, he relied upon Apex Court's decision in the case of *UOI Vs Dharmendra Textile Processors [2008 (231) ELT 3 (SC)]* and in the case of *Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)]*. He also relied upon the decisions of Hon'ble High Court in the case

of *CCE Vs Haryana Industrial Security Services [2011 (21) STR 210 (P & H)]* and in the case of *CCE, Mangalore Vs K Vijaya C Rai [2011 (21) STR 224 (Kar)]*. He further relied upon the decisions of Hon'ble Tribunal in the case of *Shiv Network Vs CCE [2009 (14) STR 680 (Tri-Ahmd)]* and in the case of *CCE Vs Ajay Sales Agencies [2009(13) STR 40(Tri-Ahmd)]*.

25.4. In view of the above submissions, the Ld. Authorized Representative of the Revenue justified the demands of duty, interest and penalty confirmed in the impugned order. Accordingly, he prayed for rejecting the appeals filed by the appellants.

25.5. In response to the submissions made by the Ld. Departmental Representative, the appellant provided detailed comments, contesting the said submissions, wherein they reiterated their earlier submissions made in the Appeal Memorandum as well as synopsis dated 12.09.2024 submitted during the course of personal hearing. In view of brevity, the same are not reproduced.

26. Heard both sides and perused the appeal documents.

27. We observe that in the present proceedings, the appellant has been issued with two Show Cause Notices - One proposing confiscation of 48 numbers of capital goods and the other demanding service tax under various categories of services, CENVAT Credit, interest thereon besides proposing for imposition of penalties. The appellant contested the confiscation as well as confirmation of the demand of service tax, CENVAT Credit along with interest and penalty on merit as well as on the ground of limitation.

Confiscation of 48 numbers of old and used machinery – demand thereon – imposition of penalties:

27.1. Regarding confiscation of the 48 numbers of old and used machineries and imposition of redemption fine and penalties, we observe that the issue originated from the execution of Novation Agreement dated 29.10.2015. A perusal of the Terms and conditions of the Agreement reveals that it is a tripartite agreement among the three parties, namely, the appellant, M/s. Mythri Infra and the service recipient, M/s. Utkal Aluminium. As per the agreement, the impugned capital goods – 48 in number– got transferred to Shri T. Srinivasa Rao in 'as is where is' condition in the same premises where they were located earlier for execution of the same work which was still remaining to be executed. As the remaining service is to be executed to the same service recipient under the same contract, by Mythri Infra, there is neither physical removal nor deemed removal of the said capital goods from the place where they were initially located. We observe that this position is evident from the Panchanama dated 14.12.2016 under which the seizure of the said machinery was effected. The Panchanama clearly reveals that the investigating agency has effected the seizure from the same place where the impugned capital goods were located and used by the appellant. We also observe that no invoice was issued as there was no physical removal of the capital goods. Even if there is a sale involved in the transaction, the question of reversal of CENVAT Credit on the depreciated value in terms of Rule 3(5A) of the CCR 2004, would arise only at the time of removal of the capital goods.

It is a fact on record that the capital goods were physically not removed from the premises where they were located prior to the Novation Agreement.

27.2. We observe that the impugned order has sought reversal of proportional credit on the depreciated value as per Rule 3(5A)(a) of the CENVAT Credit Rules. For the sake of ready reference, the said Rule is reproduced below:

3(5A) (a) If the capital goods, on which CENVAT credit has been taken, ***are removed after being used***, the manufacturer or provider of output services shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT Credit, namely :-

for computers and computer peripherals :

for each quarter in the first year @ 10%

for each quarter in the second year @ 8%

for each quarter in the third year @ 5%

for each quarter in the fourth and

fifth year @ 1%

27.3. From the Rule extracted above, we observe that the Rule envisages payment of an amount equal to CENVAT Credit taken on the capital goods reduced by percentage points for each year of its usage only on 'removal' of the capital goods. In the present case, we observe that there was no physical 'removal' of the capital goods. A perusal of the Panchanama clearly indicates that the capital goods have not been 'removed' from the place where they were located. Thus, we observe that the reversal of proportional CENVAT Credit as envisaged in Rule 3(5A)(a) was not warranted at that time when the seizure of the capital goods took place.

27.4. We observe that the position that Rule 3(5A)(a) of the CENVAT Credit Rules is applicable only if the capital goods are physically removed is supported by the following judgments:

- i. ***L.G. Balakrishnan & Bros. Ltd Vs. Commissioner of Central Excise, Trichy [2016 (340) ELT 708 (Tri. Chennai)]***
- ii. ***Hero Motors Ltd. Vs. Commissioner of C.Ex., Ghaziabad [2014 (310) E.L.T. 729 (All.)]***
- iii. ***Dalmia Cements (Bharat) Ltd. Vs. Commissioner of C.Ex., Tiruchirappalli [2008 (224) E.L.T. 484 (Tri. – Chennai)]***
- iv. ***Commissioner of C.Ex., Tiruchirappalli Vs. CESTAT, CHENNAI [2015 (323) E.L.T. 290 (Mad.)]***
- v. ***Commissioner of C.Ex., Cus. & S.T., Raipur Vs. Bhilai Steel Plant [2018 (12) G.S.T.L. 28 (Chhattisgarh)]***

27.5. In the case of ***J. K Spinning and Weaving Mills Ltd and Another Vs. Union of India and Others [1987 (32) E.L.T. 234 (S.C.)]*** the Hon'ble Supreme Court held that "removal" means physical movement of the goods and it contemplates shifting of a thing from one place to another; in other words, it contemplates physical movement of goods from one place to another; in the present case, there was no physical movement of the capital goods from the place of their location to another place. The relevant part of the said decision is reproduced below:

"38. It is submitted on behalf of the appellants that the Explanations to Rule 9 and Rule 49 are ultra vires the provision of Clause (b) of sub-section (4) of Section 4 of the Act inasmuch as "place of removal" as defined therein, does not contemplate any deemed removal, but a physical and actual removal of the goods from a factory or any other place or

premises of production or manufacture or a warehouse etc. This contention is unsound and also does not follow from the definition of "place of removal". Under the definition "place of removal" may be a factory or any other place or premises of production or manufacture of the excisable goods etc. The Explanations to Rules 9 and 49 do not contain any definition of "place of removal", but provide that excisable goods produced or manufactured in any place or premises at an intermediate stage and consumed or utilised for the manufacture of another commodity in a continuous process, shall be deemed to have been removed from such place or premises immediately before such consumption or utilisation. Clause (b) of sub-section (4) of Section 4 has defined "place of removal", but it has not defined 'removal'. There can be no doubt that the word 'removal' contemplates shifting of a thing from one place to another. In other words, it contemplates physical movement of goods from one place to another."

27.6. In his submission, the Revenue relied upon the decision in the case of *CCE, Belgaum Vs Associated Cement Co Ltd [2009 (236) ELT 240(Kar)]* and contended that the word, 'removal' is to be understood according to the context in which the word is used. The ratio laid down by the Hon'ble Karnataka High Court in Associated Cement's case is applicable to the present case and accordingly, the Ld. Authorized Representative of the Revenue submits that once the ownership and control of the equipments, machineries are transferred to another legal entity, even if it is situated in the same factory premises, it would be construed as 'removal' within the meaning of Rule 3(4) of the CENVAT Credit Rules, 2004 and CENVAT credit on the capital goods availed by the transferor is liable to be recovered. We observe

that the above said observation is contrary to the provisions of Rule 3(5A) of the CENVAT Credit Rules, 2004 which has been invoked to demand reversal of CENVAT credit. The said Rule 3(5A) reproduced supra specifically says that the reversal of CENVAT credit is warranted when the said capital goods are 'removed' after being used. The word 'removed' used in Rule 3(5A) means physical removal only. When there is no physical removal, the question of reversal of CENVAT credit availed on the capital goods does not arise. Thus, the issue to be decided in this case is whether the transfer of assets as per the Novation Agreement dated 29.10.2015 warrants physical removal of the capital goods or not. In this case, we observe that the assets of the appellant M/s. K. V. Mohan Rao & Company has been transferred to M/s/ Mythri Infra by means of a Novation Agreement dated 29.10.2015. By this agreement, M/s. Mythri Infra steps into the shoes of M/s. K.V. Mohana Rao & Company to undertake the same work which were not finished. The same equipment which was used to render the service will be continued to be used by M/s. Mythri Infra to undertake the same work which was earlier assigned to M/s. K. V. Mohana Rao & Company. From the Novation Agreement it is evident that there was no intention to remove the machinery, even though the same were transferred to M/s. Mythri Infra. We agree with the inference of the Ld. Authorized Representative of the Revenue that the word 'removal' is to be understood in the context in which it is used. In the present context, there was no need for removal of the machinery as the same were continued to be used by M/s. Mythri Infra, to execute the same Work Order. Thus, we observe that the 'removal' of the machinery was not even intended in

the Novation Agreement. Accordingly, we hold that the decisions referred by the Ld. Departmental Representative are not relevant to the present case on hand.

27.7. In view of the above discussions and by relying on the decisions cited above, we hold that the confiscation order in respect of the capital goods [48 in number] is not legally sustainable. Since, the confiscation of the capital goods is legally not sustainable, the question of imposing redemption fine does not arise. Accordingly, we set aside the confiscation of the 48 numbers of capital goods and the redemption fine imposed in the impugned order. We also set aside the demand of Rs.3.51 crores on the impugned capital goods and the mandatory penalty imposed on M/s K V Mohana Rao and Company Pvt. Ltd., and allow the Appeal filed by the appellant number 1 to this extent.

27.8. Regarding the penalty of Rs.3.51 crores imposed on M/s. Mythri Infra, we observe that as per the Novation agreement M/s. Mythri Infra are the recipient of the capital goods. Further we find that in the show cause notice proposing confiscation of the capital goods, there was no proposal to impose penalty on M/s. Mythri Infra for the alleged offence of clearance of the capital goods without reversal of proportional CENVAT Credit. Thus, we observe that the Adjudicating authority has travelled beyond the scope of the Show Cause Notice and imposed penalty on M/s. Mythri Infra. Further, the person, liable to pay service tax, as determined under sub-section (2) of section 73, shall be liable to pay mandatory penalty in terms of Section 78 *ibid*. In the present case, there is no such determination under Section 73(2) in respect

of M/s Mythri Infra. Accordingly, we hold that the penalty imposed on M/s. Mythri Infra is not sustainable and hence we set aside the same.

Demand of Rs.3.22 crores of CENVAT Credit on capital goods:

28. In the impugned order, there is a demand of Rs.3.22 crores which has been confirmed. This demand pertains to CENVAT Credit availed on capital goods. In respect of this demand, the appellant submitted that the demand for Rs.1.36 crores is already covered as part of the Rs.3.51 crores CENVAT amount discussed in paragraphs 27.1 to 27.6 supra and therefore it is a double demand. It is submitted by the appellant that part of the demand of Rs.3.22 crores i.e., Rs.1.36 crores is related to the same machinery, covered by the same documents, based on which the demand of Rs.3.51 crores is confirmed in the impugned order. The appellant submitted that the details of the invoice-wise credit relating to the demand of Rs.3.51 crores, are provided in Annexure – B3 to the notice and the details of invoice-wise credit relating to the demand of Rs.3.22 crores are provided in Annexure – B2 to the notice. On perusal of both the Annexures, we observe that in respect of each invoice, details such as the name of the manufacturer, description of the capital goods are provided. On a comparison of both the said Annexures, we observe that the demands in respect of 19 invoices have been noticed in both the Annexures – B2 & B3 revealing that such demands figuring in Annexure – B2 are double demands since they already exist in Annexure – B3. The appellant submitted that this position is clearly explained in the form of a detailed statement on Pages 137 – 138 of Vol. I. For a fair appreciation

of this issue, the said statement is reproduced hereunder.

Invoice No& date	Description of goods	Details of Demand			
		Sl. No of Annexure -B-2	Demand	Sl. No of Annexure - B-3	Demand
48/25.08.2012	BEML BH 60M Rear Dumper	1	1013520/-	32	1368252/-
50/27.08.2012	BEML BH 60M Rear Dumper	2	1013520/-	33	1368252/-
52/27.08.2012	BEML BH 60M Rear Dumper	3	1013520/-	34	1368252/-
54/28.08.2012	BEML BH 60M Rear Dumper	4	1013520/-	35	1368252/-
65/30.08.2012	BEML BH 60M Rear	5	1013520/-	36	1368252/-
66/31.08.2012	BEML BH 60M Rear	1	1013520/-	37	1368252/-
7888967/7.9.2012	EC700C L (Volvo Excavator)	7	2419334/-	38	2244281/-
200550/15.9.2012	IDM 30 Blast hole Driller	8	12,54,540/-	39	846815/-
DS/121079/31.10.2012	Escorts Hydra Crane	9	69,216/-	40	93442/-
101035/30.06.2011	Crawler CM 341	32	101830/-	24	224025/-
Nil/17.8.2011	Crushing Plant	34	406850/-	2	935755/-
12735-I/31.10.2011	Motor Grader - BG-	36	535600/-	28	361527/-

E74036/12.10.2011	D-50 Bull Dozer	37	478950/-	29	323289/-
E74037/31.10.2011	D-80 Bull Dozer	38	695250/-	27	469290/-
052/2013/22.7.2013	Generator Set 500KVA	39	113835/-	30	158168/-
E74176-1/22.2.2012	BD-65 Bull Dozer	1	643750/-	31	466716
052/2013/22.7.2013	Generator Set 500KVA	4	74138/-	30	158168/-
101035/30.06.2011	Crawler CM 341	24	101830/-	24	224025/-
Nil/17.8.2011	Crushing Plant	26	406850/-	2	935755/-
Total			1,36,61,842 /-		156,50,768 /-

28.1. A comparative study of the details furnished in the above cited statement with the related Sl. Nos. in the Annexures – B2 & B3, it is clear that the invoices enumerated in the statement are available in both the Annexures – B2 & B3 against the respective serial numbers – inferring that the same set of invoices have been subjected to double demand – once in Annexure – B3 and for a second time in Annexure – B2. Thus, we observe that this demand of Rs.1.36 crores, which is part of the demand of Rs.3.22 crores of Annexure – B2, is a double demand since it already exists in Annexure – B3. The very fact that the demand of Rs.3.51 crores has been made in respect of the capital goods for payment of Excise Duty under Rule 3(5A) of the CCR 2004, even in respect of the present capital goods with Excise Duty value of Rs.1.36 crores, would go against the claim of the Revenue that they are not eligible for the CENVAT Credit. Under the Rs.3.51 crores demand, since Rs.1.36 crores pertains to the same capital goods, this would show that the Revenue cannot demand Rs.1.36 crores under the demand of

Rs.3.22 crores. Hence we hold that the demand is legally not sustainable. Accordingly, we set aside the demand of Rs.1.36 crores confirmed along with the penalty imposed on this count.

28.2. In respect of the balance irregular availment of credit amounting to Rs.1.86 crores (Rs.3.22 crores minus Rs.1.36 crores), they are not contesting this demand of Rs.1.86 crores. They have submitted that they have already paid this amount along with interest during the course of investigation, much before issuance of the notice. It is their plea that in view of the provisions of Section 73(3) of the Finance Act, 1994, the proceedings conclude and there is no need for the Revenue to issue any notice. This view has been held in the case of ***Shri Selvakumar Textiles Vs. Commissioner of C.Ex., Coimbatore [2005 (188) E.L.T. 334 (Tri.-Chennai)]***. We observe that the appellant has paid this Rs.1.86 crores before issue of the notice. As this amount is not being contested by the appellant, we uphold the demand of service tax of Rs.1.86 crores along with interest. We uphold the appropriation of this amount along with interest in the impugned order. As the appellant has paid this Rs.1.86 crores along with interest before issue of the Notice, in terms of Section 73 (3) of the Finance Act 1994, we hold that no penalty is imposable on the appellant on this amount of Rs.1.86 crores.

Demand of Rs.5.91 crores on free supply material:

29. Regarding the remaining demands confirmed in the impugned order, we observe that demand of service tax of Rs.5.91 Crore has been confirmed in the impugned order on account of materials supplied free of cost by the service recipient. We observe that the

issue is settled against the Revenue by the Hon'ble Apex Court vide judgement in the case of ***M/s. Bhayana Builders (P) Ltd. etc. [2018 (10) G.S.T.L. 118 (S.C.)***. The decision in *Bhayana Builders (P) Ltd. (supra)* has been reiterated by the Hon'ble Supreme Court in the case ***Jayhind Project Ltd. Vs. Commissioner of Service Tax, Ahmedabad [2024 (388) E.L.T. 38 (S.C.)***. We also find that this Tribunal in Appeal No.ST/75673/2021 has decided the same issue vide ***Final Order No. 75972 of 2024 dated 02.05.2024 [CESTAT, Kolkata]*** wherein this Tribunal has set aside the demand on free supply material with regard to M/s. Mythri Infra in respect of the same Mining Contract assigned to them in terms of an Assignment and Novation Agreement dated 29.10.2015 .We observe that the said appeal covers all the issues as of the present appeal, in relation to free supply material. The relevant part of the said decision is reproduced below:

"9. We find that the short issue involved in the matter is whether the free supplies of materials is required to be added in the taxable value of the services provided by the appellant or not.

9.1. The said issue came up before this tribunal in the case of Vantage International Management Company (supra) wherein this Tribunal observed as under: -

"7. The period of dispute involved in this case is from December 2010 to December 2015. The provisions of valuation of taxable services for charging service tax are contained in Section 67 ibid. The said statutory provision has defined the term 'consideration', to include any amount that is payable for the taxable services provided or to be provided for provision of taxable service. Section 67 ibid was amended by the Finance Act, 2015 (20 of 2015), w.e.f. 14.05.2015. The effect of

amendment was that subclauses (ii) and (iii) were inserted in clause (a) in the definition of consideration contained in the explanation part appended to Section 67 *ibid*. The amended provisions include *inter alia*, any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, subject to the fulfilment of the prescribed conditions. In the present case, it is an admitted fact on record that the appellant had never charged any cost of fuel to M/s. ONGC over and above the amount claimed by it for providing the taxable service. Since, M/s. ONGC was not required to make payment of fuel to the appellant, its value cannot be added to the taxable value both under the un- amended and amended provisions of Section 67 *ibid*. Further, the appellant herein had received the entire consideration for provision of service in monetary terms. Hence, it cannot be said that it was not properly able to determine the value of taxable service, in order to attract the provisions of Rule 3 (b) of the Service Tax (Determination of Value) Rules, 2006. Similarly, the provisions of Rule 5 *ibid* also would not attract in this case inasmuch as no cost of fuel was charged or billed by the appellant to the recipient of service.

8. We find that the issue arising out of the present dispute is no more *res integra*, in view of the judgement of Hon'ble Supreme Court in the case of M/s. Bhayana Builders (P) Ltd.(*supra*), relied upon by the learned Advocate for the appellant. The relevant paragraphs in the said judgement are extracted herein below:

11. As already pointed out in the beginning, all these assesseees are covered by Section 65(25b) of the Act as they are rendering 'construction or industrial construction service', which is a taxable service as per the provisions of Section 65(105)(zzq) of the Act. The entire dispute relates to the valuation that has to be arrived at in respect of taxable services rendered by the assesseees. More precisely, the issue is as to whether the value of goods/materials supplied or provided free

of cost by a service recipient and used for providing the taxable service of construction or industrial complex, is to be included in computation of gross amount charged by the service provider, for valuation of taxable service. For valuation of taxable service, provision is made in Section 67 of the Act which enumerates that it would be 'the gross amount charged by the service provider for such service provided or to be provided by him'. Whether the value of materials/goods supplied free of cost by the service recipient to the service provider/assessee is to be included to arrive at the 'gross amount', or not is the poser. On this aspect, there is no difference in amended Section 67 from unamended Section 67 of the Act and the parties were at ad idem to this extent.

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. 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 "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. The cost of free supply goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined"

13. A plain meaning of the expression 'the gross amount charged by the service provider for such service provided or to be provided by him' would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the 'gross amount' simply, because of the reason that no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words 'for such service provided or to be provided' by the service provider/assessee. Again, obviously, in respect of the goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to sub-section (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient, naturally, no amount is received by the service provider/assessee. Though, sub-section (4) of Section 67 states that the value shall be determined in such manner as may be prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed

which includes the value of free goods/material supplied by the service recipient for determination of the gross value."

9. In view of the foregoing discussions, we do not find any merits in the impugned order passed by the learned Commissioner of Service Tax. Therefore, by setting aside the same, the appeal is allowed in favour of the appellant."

9.2. As the issue has already been settled on the similar facts in the case of Vantage International Management Company (supra) wherein it has been held that free supplies of materials is not to be included in the assessable value of services provided by an assessee, therefore, following the said decision, we hold that appellant are not required to include the free supplies of materials provided by the service recipient. In taxable value of service."

29.1. The appellant submitted that the Ld. Adjudicating Authority confirmed this demand on the strength of invoice no. HSD/REIMB/01 dated 17.12.2014 (para 5.43 of the O-I-O – pages 255 - 256 of Vol. I). In this regard, the appellant submitted that this invoice relates to reimbursable expenditure but not free supplies. On verification, we find that the said invoice is related to reimbursable expenditure and not related to free supply of materials. We observe that reimbursable expenditure and free supplies are different issues; demanded under two different heads; governed by two different clauses in the contract agreement dated 14.05.2012; usage of such invoice relating to reimbursable expenditure towards free supplies is not legally permissible. We also observe that the Original Authority has travelled beyond the ambit of show cause notice in as much as there is no such allegation (collection of tax) in respect of free supplies in the notice. Accordingly, we hold that confirmation of demand of Rs.5.91 crores on the

strength of this single invoice, which is not relatable to free supplies, is legally not sustainable.

29.2. The appellant has factually proved that the amount received is only on account of reimbursements and not as part of any consideration. Considering the factual matrix with the ratio laid down the cited decisions, we hold we hold that the demand of service tax amounting to Rs.5.91 crores confirmed in the impugned order on this count is not sustainable and hence we set aside the same

Service tax demand of Rs.33.84 crores:

30. Regarding the demand of service tax of Rs.33.84 crores, we observe that this is a combined demand covering service tax on various categories. The break-up of this demand and examination of the evidence available with respect to each demand is as below:

30.1. Bauxite Ore Transportation: Demand Rs.9.03 crores.

30.1.1. This demand has been confirmed on the Goods Transport Agency (GTA) service rendered by the appellant on reverse charge basis. We observe that in respect of GTA service, service tax under reverse charge mechanism is liable to be paid by the service recipient, in terms of Section 68(2) of the Finance Act, 1994 read with Notification No.30/2012-ST. In this case, the service recipient, M/s. Utkal Aluminium, falls within the ambit of one of the 'persons' liable to pay tax, as they are the 'consingnees'. We also observe that the service recipient M/s. Utkal Aluminium has confirmed that they have paid the service tax on the GTA service as recipient of service. Thus, we hold that the demand of

service tax from the appellant again is a double taxation which is legally not sustainable.

30.1.2. We observe that the only ground on which this demand is confirmed against the appellant is that the appellant has billed service tax on the GTA service in the RA bills / invoices in respect of 12 RA bills / invoices raised by them on the service recipient. However, the appellant submitted that in respect of those 12 transactions, the service recipient has not paid the service tax to them. It is the plea of the appellant that out of the 12 transactions, the Revenue relied upon the payment advices issued by the service recipient only but not on RA bills / invoices issued by the appellant in respect of 4 transactions (S. Nos. 15, 20, 27 & 37 of Annexure – A4); the said 4 payment advices do not indicate payment of service tax; of the remaining transactions, 1 RA bill covered 2 transactions (S. Nos. 32 & 34 of Annexure – A4); of the RA bills / invoices relied upon, the allegation 'ST billed' is true only in respect of 2 RA bills / invoices (S. Nos. 42 & 46 of Annexure – A4) but not in respect of the remaining RA bills / invoices. The appellant submits that in all these 12 transactions, the corresponding payment advices (pages 132 – 173 of Vol. III) clearly indicate that service tax was not paid to them. We observe that in the impugned order, the Ld. adjudicating authority has extracted only one invoice to substantiate the allegation of collection of service tax by the appellant on this category of service. We perused the corresponding Payment Advice No.51407542 dated 24.10.2014 pertaining to this invoice (S. No. 156 of Vol. III), which confirms that only service consideration i.e. Rs.1,60,67,790/- was paid to the appellant and not the service component. Thus, we observe that the appellant has

negated the allegation against them that they have collected service tax under the category of GTA service. Further, we observe that the charge in the show cause notice is that the appellant has billed the service tax amount in the 12 RA bills / invoices raised by them. However, there is no evidence adduced by the Revenue to substantiate the allegation that the appellant has actually 'collected' service tax. On the contrary, the appellant has submitted evidence to the effect that the service tax amount mentioned in the said bills / invoices are not collected, by producing the ledger accounts and also the Payment Advices, w.r.t. these 12 RA bills / invoices.

30.1.3. We observe that the demand of service tax of Rs.9.03 crores cannot be confirmed on the basis of a single invoice without verification of all the invoices that too when this single invoice relied upon, belies the allegation of the Revenue. In this regard, we derive support from the judgment in the case of *M/s. R.S. Ispat Pvt. Ltd. Vs. CCE, Kolkata-IV and Shri Radhe Shyam Agarwal, Director M/s. R.S. Ispat Pvt. Ltd. Vs. CCE, Kolkata-IV, 2024 (9) TMI 176 - CESTAT Kolkata*. Since, the appellant is not the 'person' liable to pay service tax under the category of GTA service and the evidence submitted by the appellant indicates that they have not collected service tax on this service and the appellant claims that the service recipient has already paid service tax on this category, we hold that the demand of service tax of Rs.9.03 crores confirmed under the category of GTA service from the appellant, is not legally sustainable.

30.2. **Reimbursable expenditure: Demand of Rs.4.78 crores.**

30.2.1. This demand pertains to procurement of HSD by the appellant in case of exigency. We observe that as per Clause 5.10 of the contract dated 14.05.2012, *such expenses of procurement are liable to be reimbursed by the service recipient.* We observe that this demand is legally not tenable upto 14.05.2015 in terms of Section 67 of the Finance Act, 1994, in view of the Apex Court judgement in the case of ***Union of India & Anr. Vs. M/s. Intercontinental consultants and Technocrats Pvt. Ltd [2018 (10) G.S.T.L. 401 (S.C.)]***. The relevant part of the said decision is reproduced below:

"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. On this aspect of the matter, we may usefully refer to the Constitution Bench judgment in the case of Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited [(2015) 1 SCC 1] wherein it was observed as under :

"27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-a-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit* : law looks forward not backward. As was observed in *Phillips v. Eyre* [(1870) LR 6 QB 1], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of

"fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

30. As a result, we do not find any merit in any of those appeals which are accordingly dismissed."

30.2.2. We observe that the demand of service tax has been confirmed on the ground that the appellant has collected service tax from the service recipient. The impugned order has cited the evidence of Invoice No. HSD/REIMB/01 dated 17.12.2014, wherein service tax has been included in the invoice raised. Scrutiny of the corresponding payment advice no. 51411435 dated 04.02.2015 indicates that the appellant collected advances amounting to Rs.18,88,65,202/- (and the same were adjusted) and the final bill on such reimbursable expenditure was raised by the appellant vide Service Tax Invoice No. HSD/REIMB/01 dated 17.12.2014. This invoice indicates the following position.

Deisel reimbursement bill	Rs.20,76,92,552/-
Deisel for transportation under GTA	Rs.16,13,94,958/-

Deisel for Mining work assessable amount for ST	Rs.4,62,97,594/-
Service tax 12% on bill amount	Rs.55,55,711/-
Education cess 2% on ST	Rs.1,11,114/-
SHE Cess 1% on ST	Rs.55,557/-
Total	Rs.21,34,14,935/-
Service Tax amount	Rs.57,22,383/-

30.2.3. It can be seen from the above documents that the total reimbursement bill on HSD upto 17.12.2014 was Rs.20,76,92,552/- out of which advance received upto that date amounting to Rs.18,88,65,202/- was adjusted and the remaining amount was paid to the appellant. We observe that as per the Payment Advice No.51411435 connected to this invoice, service tax amounting to Rs.57,22,383/- only (on a value of Rs.4,62,97,594/-) was reimbursed but not on the entire value of Rs.20,76,92,552/- which amount is inclusive of the advances received by the appellant under this head upto this date. The appellant submitted that except this one bill, they have not raised service tax in any other bills of diesel reimbursements. We thus observe that the investigation has not brought in any other evidence to establish that the appellant has collected the service tax on all the amounts reimbursed towards diesel reimbursements upto this date except to the above extent. The appellant produced documentary evidence – challan no. 066 dated 30.01.2015 and corresponding ST3 return for the period Oct, 2014 to Mar, 2015 – to the effect that they have discharged

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the above service tax liability (along with interest amounting to Rs.9,31,259/-) since it was collected from the service recipient. For ready reference, the said challan is extracted and reproduced below:

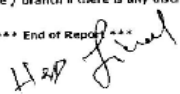

Corporation Bank




TAXPAYER'S COUNTERFOIL		
Bank Name / Reference No	CORPORATION BANK / CE30012015892517	
Commissionerate Code	25	
e- Focal Branch	024 - MUMBAI - FORT	
Major Head Code	0044	
Division / Range Code	07 / 07	
Location Code	260707	
Assessee Code	AAACK7024PST002	
Name Of The Assessee	K V MOHAN RAO CO.PVT LTD.	
Address1	K V MOHAN RAO CO.PVT LTD.,OLD IACR GIRLS HOSTEL, HOTEL KAPILASH ROAD, NEW COLONY,RAYAGADA, RAYAGADA,ORISSA	
Address2	RAYAGADA, ORISSA	
City / State	RAYAGADA/ORISSA	
PIN	755001	
CIN	03500023001201500066	
CIN - Details	BSR Code:0350002 Pay Date:30/01/2015 Challan Seq no:00066	
Scheduled Date	30/01/2015	
Realisation Date & Time	30/01/2015 13:01:50	
Status & Reason	E - Executed	
Accounting Head	Accounting Head Description	Amount Tendered
00440402	MINING SERVICES	5555711.00
00440403	MINING SERVICES - OTHERS	931259.00
00440298	Primary education cess - Tax collection	111114.00
00440426	Secondary and Higher education cess - Tax collection	55557.00
Total Amount(Rs.)		6653641.00
Total Amount in Words	Rupees Sixty-Six Lakh Fifty-Three Thousand Six Hundred Forty-One Only	
Remarks		

* This report is generated from the data available at Web Centre.
Please contact the Web Centre / branch if there is any discrepancy in the report.

*** End of Report ***



30.2.4. In view of the legal position on this issue and the decision of the Hon'ble Apex Court cited above, we observe that there is no service tax liable to be paid on these expenditure for diesel reimbursed by the service recipient upto 14.05.2015 except to the above extent, which was already paid to the exchequer. In respect of the remaining transactions upto 14.05.2015, we observe that the appellant did not collect service tax from the service recipient since the same is not legally payable. The Revenue did not come up with any other evidence, except the above cited evidence, to substantiate that the appellant collected service tax on this count upto 14.05.2015. Accordingly, we hold that the demand of service tax of Rs.4.78 crores confirmed in the impugned order on

this count for the period upto 14.05.2015 is not legally sustainable.

30.3. Demand on advances: Rs.10.68 crores:

30.3.1. In this regard, the appellant has submitted that this is a double demand. In accordance with the trade practice, the appellant received advances such as mobilization advance, ADHOC work advance, mining advance, ADHOC compensation for fixed cost of mining work etc. In fact, clause 7.2 of the contract agreement dated 14.05.2012 provides for mobilization advance of Rs.58,78,97,000/- to the appellant @10% of the contract value. The details of receipt of such advances in 3 installments during the year 2012 and the payment of tax thereon along with details of challans under which tax was paid are furnished by the appellant on page 61 of Vol. I of the Appeal. Thus, we observe that initially when the advances were received, they have paid service tax on the advances. Subsequently, service tax is demanded for the second time when they raised the final RA bill / invoice on the gross value, – which is inclusive of the said advance component. The appellant furnished details of 28 final RA bills / invoices (pages 61 to 63 of Vol. I) by which the said advances were adjusted and the remaining amount was paid to the appellant as is clear from the corresponding payment advices issued by the service recipient. While this is the factual position, the Revenue demanded service tax on the entire gross value in respect of the above 28 instances as seen from the said table as well as the respective entries in the Annexures – A3 to A5 of the Show Cause Notice. From the documents (payment advices) submitted by the appellant, we find that when they raise the final

bill, the advance component is adjusted and the remaining amount only was paid to them. We observe that the Id. adjudicating authority has confirmed this demand by taking into account the gross value again in the impugned order without considering the factual position that the said advances were adjusted from the gross values of the said final bills / invoices that would make it as a double demand on the advances. The appellant submitted each of the above cited 28 RA bills / invoices and the corresponding payment advices issued by the service recipient in support of their stand of double demand.

30.3.2. As an illustration, we reproduce the following two instances of double demand in this regard.

Service Tax Invoice no. 5 dated 02.06.2014.

Gross Bill amount	Rs.4,17,51,692/-
less mobilization advance @10%	Rs.41,75,169/-
Taxable value	Rs.3,75,76,523/-
Service Tax@12%	Rs.45,09,183/-
Education Cess @2% on ST	Rs.90,184/-
SHE Cess @1% on ST	Rs.45,092/-
Total ST paid after adjusting mobilization advance	Rs.46,44,458/-

As against the above, Service Tax liability indicated in Annexure – A4 to the Show Cause Notice in respect of this invoice on gross value without considering mobilization advance, is Rs.51,60,509/-.

Accordingly, the double demand confirmed in the Order-in-Original on account of non-consideration of mobilization advance - Rs.51,60,509/- minus Rs.46,44,458/- = Rs.5,16,051/-.

Service Tax Invoice no. 6 dated 03.07.2014

Gross Bill amount	Rs.4,06,96,206/-
less mobilization advance @10%	Rs.40,69,621/-
Taxable value	Rs.3,66,26,595/-
Service Tax@12%	Rs.43,95,190/-
Education Cess @2% on ST	Rs.87,904/-
SHE Cess @1% on ST	Rs.43,952/-
Total ST paid after adjusting mobilization advance	Rs.45,27,046/-

As against the above, the Service Tax liability indicated in Annexure – A4 to the Show Cause Notice in respect of this invoice on gross value without considering mobilization advance, is Rs.50,30,051/-.

30.3.3. We observe that the Ld. Adjudicating Authority, for the purpose of confirmation of this demand, cited invoice dated 12.04.2014 in para 5.35 (iii) of the O-I-O - page 249 of Vol. I. This invoice indicates billing of service tax on the mobilization advance amounting to Rs.14,70,00,000/-. The appellant on page 61 of Vol. I submitted the challan details of service tax payment for the above cited mobilization advance. Therefore, this citation will not be of any help to the Revenue.

30.3.4. We find that the co-ordinate Bench of Hyderabad Tribunal, in the case of **Vishwanath Projects Ltd Vs CST Hyderabad, vide Final Order No. A/31050/2019 dated 11.11.2019**, on the issue of service tax liability on mobilization advance, has held as under :

21. xxxxxxxxxx The amount so received is a mobilization advance which has been adjusted against total bill, on

which they have discharged full amount of service tax. We find that the question of taxability on mobilization advances has been well settled and this Bench in the case of GJF Construction Company Limited vs. CCE, Hyderabad (supra) and CESTAT Mumbai in the case of Thermax Instrumental Limited vs. CCE (supra) held that mobilization advance received by the assessee is not chargeable to service tax, if it is in the nature of an advance. On this ground, the demand under this head also needs to fail

30.3.5. In view of the above factual position and the cited case law, we hold that the demand confirmed in the impugned order on this count (mobilization advance) is not sustainable.

30.3.6. In respect of mining advances, the appellant submitted the details of demands made on such advances on page 64 of Vol. I. The amount received under the mining advances head was of the order of Rs.55,79,44,031/- and the demand from the Revenue on this count is Rs.3,55,89,882/- as per the said details. The said advances were adjusted under 13 RA bills / invoices details of which are provided on pages 64 – 65 of Vol. I. The related entries of Annexures – A3 to A5 indicate that tax liability is created on the total gross value of the said final bills / invoices without considering the fact that the above cited mining advances were adjusted in the said bills / invoices and the remaining amounts alone were paid to the appellant leading to a double demand of Rs.3,55,89,882/- on the said advances.

30.3.7. The appellant also received ADHOC mining local payments amounting to Rs.7,38,50,000/- under 9 payment advices (page nos. 399 to 414 of Vol. IV) during the year 2013-14 as per the details provided on page 66 of Vol. I. The said advances were adjusted

from the final bill no.1 dated 06.05.2014 for Rs.8,74,01,930/- which position is confirmed by the corresponding payment advice no. 51404145 dated 22.07.2014 (page nos. 416 to 420 of Vol. IV). The related S. Nos. 20, 23, 36, 39, 47, 54 & 63 of the Annexure – A3 and S. No. 17 of Annexure – A4 to the Show Cause Notice reveal that tax liabilities were created on the advances as well as on the total gross value of the final bill leading to a double demand of Rs.82,19,400/-. In the above fashion, ADHOC mining local payments amounting to Rs.6,00,00,000/- were received during the year 2015-16 @ Rs.1 crore per month as seen from the payment advices (page nos. 422 to 432 of Vol. IV). Tax liability of Rs.80,72,000/- was created on the said amounts against S. Nos. 3, 8, 17, 20, 25 & 35 of Annexure – A5. The Appellant raised final invoice no. 70 dated 09.11.2015 with description 'mining local payment for Apr, 2015 to Sep, 2015' for Rs.6 crores. The said invoice and the related payment advice (pages 436 & 441 of Vol. IV) indicates adjustment of the above advance and only service tax component was paid to the appellant since the same was not paid at the time of receipt of the above cited advances. The related S. No. 45 of the said Annexure however created tax liability of Rs.84 lakhs without taking the fact of adjustment of the above said advances in the said final invoice into consideration resulting in a double demand of Rs.84 lakhs.

30.3.8. In the similar manner, in respect of advances on ideal charges, the Revenue made out a double demand of Rs.2,34,84,000/-. The same are available on page nos. 68 – 69 of Vol. I.

30.3.9. In the similar manner, there are double demands in respect of tyre repair charges, administrative charges etc., details of which are provided on pages 70 – 74 of Vol. I.

30.3.10. As seen from the detailed submissions made by the appellant, duly supported by documentary evidences, it is evident that the Revenue made out double demands on advances – once on advances per se and for a second time on the total gross values of the final bills / invoices, which values include the advance amounts and the appellant has been paid the remaining amount after adjusting the said advances from the final bills / invoices. This fact of double demand is corroborative from the said 3 Annexures – A3 to A5 themselves since there are separate columns therein for bill amounts as well as mobilization / work advances and tax liability is created against both the entries which liabilities are confirmed by the Ld. Adjudicating Authority. We, therefore, hold that the double demand of Rs.10.68 crores confirmed in the impugned order is not legally sustainable.

30.4. Confirmation of demand of Rs.1.96 crores on supply of material:

30.4.1. We observe that in this regard, the appellant submitted that this is a case of demand of service tax on supply of materials. They have submitted the evidence of a specific payment advice (page no. 500 of Vol. IV) which is mentioned in S. No.5 of Annexure - A4 to the Notice, which contains the following details:

- Payment Advice No.51401372 dated 15.05.2014.
- Name of Client: M/s UAIL.
- Work / Service description: Supply of Material for construction of Red Mud Storage Dam.
- Work Order No. 21000078.
- Nature of Service: Site Formation.
- Bill Amount: Rs.15,86,13,625/-.
- Total taxable value: Rs.15,86,13,625/-.
- Service Tax: Rs.1,90,33,635/-.
- Ed. Cess: Rs.3,80,673/-.
- SHE Cess: Rs.1,90,335/-.
- Total Rs.1,96,04,644/-.

30.4.2. From the above details, provided by the Revenue against the said S. No.5 of the Annexure, we observe that this transaction is a pure supply of materials. However, in the impugned order, the nature of service has been indicated as Site Formation Service. In this backdrop, the appellant produced the related work order, invoice (page no. 502 – 519 of Vol. IV) and a Chartered Accountant Certificate dated 10.03.2024, produced at the time of personal hearing. This documentary evidences submitted by the appellant reveals that material has been supplied in this transaction on which CST has been paid. Thus, we hold that no service tax is payable on this transaction involving only pure sale of materials. Accordingly, we hold that the demand of Rs.1.96 crores, confirmed in the impugned order, on this count is not sustainable.

**30.5. Confirmation of demand of Rs.1.49 crores
– Road Works:**

30.5.1. This demand pertains to construction of roads. We observe that construction of roads is exempted under Notification No. 25/2012-ST. The said Notification clearly exempts the services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of a road, bridge, tunnel, terminal for road transportation for use by general public.

30.5.2. The stand of the Revenue is that the road is a private property belonging to the service recipient and hence the benefits of Notification No. 25/2012 are not applicable to the appellant. In this regard, we observe that the notification speaks of only "usage of the roads by general public" and it does not refer to ownership of the roads. We have perused the depositions obtained by the investigating agency during the course of investigation from the personnel of the appellant as well as the service recipient and the payment advices of the service recipient. We find that Para 54 of the notice dated 18.11.2017 clearly admits to usage of the road by local villagers at different stretches. Shri Sameer Kumar Rout, Assistant General Manager (Taxation), UAIL in his statement dated 15.03.2017, in response to question no. 4, clearly admitted that the said road is used by the local villagers for years together even before setting up of the plant and before acquiring the ownership of the mines road by M/s UAIL. Thus, we find that the evidence available on record clearly indicates the usage of the said road by the inhabitants of 16 villages on either side of the road.

30.5.3. The issue that construction of road used by general public is not subject to service tax, has been dealt in the following case laws :

- i. ***Commr. of Cus. & C. Ex., Raipur vs. National Project Construction Corpn. Ltd. [2020 (42) G.S.T.L. 75 (Tri. - Del.)]***
- ii. ***Rajendra Singh Bhamboo vs. Commr. of C. Ex. & S.T., JAIPUR-I [2019 (22) G.S.T.L. 278 (Tri. - Del.)]***

30.5.4. The Tribunal Delhi in the case of *Commr. of Cus. & C. Ex., Raipur vs. National Project Construction Corpn. Ltd.*(supra) has held as under :

"9. Having considered the rival contentions, we hold that under the admitted facts and circumstances in this appeal, the service rendered by the appellant is taxable only and the category of works contract service in view of the law laid down by Hon'ble Supreme Court in Larsen & Toubro (supra). Secondly, we hold that the work relating to road construction, even in the premises of NTPC, which may be termed as private road is exempt service as per the definition of works contract service which specifically exempts 'road service'. There is no distinction made out by the Legislature with respect to public road and private road. We further find that admittedly, the appellant have paid the Service Tax under the works contract composition scheme along with the interest. We hold that the appellant is entitled to pay tax under the 'works contract composition scheme' and once they have discharged the tax liability there is no further liability on them. Accordingly, this appeal filed by Revenue is dismissed and the cross objection filed by the respondent-assessee are allowed. Misc. Application by Revenue stands disposed of. The

respondent-assessee is entitled to consequential benefits in accordance with law. The respondent-assessee is directed to submit a calculation of the discharge of the tax liability under the works contract composition scheme before the adjudicating authority. If in case any discrepancy is found, the same shall be pointed out to the assessee and assessee shall deposit any tax which is found to be short paid, on verification of the calculation."

30.5.5. The other objection of the Revenue is that the appellant billed service tax in respect of this activity and hence it is alleged that the appellant collected service tax on this activity. In this regard, we observe that even though the appellant billed service tax in two instances (invoice dated 28.10.2013 & invoice no.1 dated 16.02.2015 – page nos. 534 & 545 of Vol. IV), fact remains, service tax is not paid to the appellant by the service recipient in these two cases as is evident from the corresponding payment advice no. 41407074 dated 27.11.2013 and payment advice no. 51413660 dated 29.03.2015 (page nos. 535 & 548 of Vol. IV), the service recipient did not pay service tax even in these two instances. In all, there are 12 transactions in respect of road work, details of which are provided on page nos. 84 – 85 of Vol. I. The related bills / invoices and payment advices are provided on page nos. 520 – 562 of Vol. IV. From a perusal of these documents, we observe that, apart from the two instances cited above, none of the bills / invoices indicate billing of service tax. The payment advices in all the 12 cases indicate that service tax was not paid by the service recipient to the appellant. We thus observe that the Revenue has not brought in any evidence to substantiate the allegation

that the appellant has actually collected the service tax. While this is the factual position, the Ld. Adjudicating Authority cited the above two bills / invoices (paragraphs 5.33.2 & 5.33.4 of O-I-O - page nos. 243 & 245 of Vol. I) for the purpose of confirmation of the demand without appreciating the difference between billing and collection and without establishing that the appellant collected service tax in those two cases.

30.5.6. As the activity of construction of road is exempted from payment of service tax as per Notification No. 25/2012-ST, fortified by the cited case law and documentary evidence placed to the effect that no Service Tax was collected by the appellant, we hold that the demand of Rs.1.49 crores confirmed in the impugned order on this count is legally not sustainable.

30.6. Confirmation of demand of Rs.1.15 crores on Commission:

30.6.1. We observe that the appellant has sub-contracted some of the work orders to the sub-contractors on back-to-back basis in which case the appellant paid service tax on the entire contract value. While disbursing this amount to the sub-contractors, they retained their profit margin and TDS and paid the remaining amount to the sub-contractors. It is on this profit margin that the above demand is confirmed with a nomenclature 'Commission'.

30.6.2. Shri M. V. Ravichandra, Managing Director of the Appellant Company, in his statement dated 07.09.2016, in response to question no.41 stated that some of the contracts were sub-contracted to Shri T. Srinivasa Rao for execution; in terms of the

agreements entered for the purpose, the sub-contractor has to raise the bills for the work certified on their company based on which the bills would be raised by them on M/s UAIL; on receipt of the payments from UAIL they will pay the entire amount to the sub-contractor after deducting the sub-contract commission and applicable TDS; they were billing and paying service tax on the total amount of service charges billed on UAIL. From the above, we observe that the so-called commission has been subjected to tax in the hands of the appellant at the time when they raised the bill on UAIL and that such billed amount is inclusive of the said commission. In other words, commission is part and parcel of the billed amount by the appellant on UAIL, which amount suffered service tax in the hands of the appellant. The above position is further confirmed by condition no.12 of sub-contract agreement dated 10.09.2011, provided by the appellant during the course of personal hearing on 12.09.2024.

30.6.3. We observe that the Ld. adjudicating authority has not given any findings to the above said submissions made by the appellant. The deposition of the personnel of the appellant that the so-called Commission has been subjected to tax in the hands of the appellant already and any further demand would amount to double taxation has not been adverted to.

30.6.4. Since the demand has been made and confirmed as 'Commission' received by the appellant, it would be relevant to go through the relevant statutory provisions under Business Auxiliary Services under Section 65(19), which are extracted below :

Section 65 (19) "business auxiliary service' means any service in relation to,-

- (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
- (ii) promotion or marketing of service provided by the client; or
- (iii) any customer care service provided on behalf of the client; or
- (iv) procurement of goods or services, which are inputs for the client; or
- (v) production or processing of goods for, or on behalf of, the client; or
- (vi) provision of service on behalf of the client; or
- (vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision ,and includes services as a commission agent, but does not include any activity that amounts to manufacture of excisable goods but does not include any information technology service and any activity that amounts to " manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944.

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause,—

- (a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person—
 - (i) deals with goods or services or documents of title to such goods or services; or
 - (ii) collects payment of sale price of such goods or services; or
 - (iii) guarantees for collection or payment for such goods or services; or
 - (iv) undertakes any activities relating to such sale or purchase of such goods or services;”

In the present case, from the factual details discussed on the issue, the activity would not fall under (i) to (vi) above. Coming to the entry (vii), there is nothing to indicate that the appellant is acting as 'Commission agent' for the sub-contractor to whom the back-to-back contract has been given. The appellant is the one who is directly raising the bills for the work and receives the payment from the client. They are not performing any of the activities under (i) to (iv) specified to be the activities to be undertaken by the 'Commission agent'. Since the work has been given on back-to-back basis, they retain a part of the margin as their profit and after deducting the TDS, they are giving the balance amount to the sub-contractor. Thus, we do not see that the profit margin retained by the appellant would fall under any of the above (i) to (vii) categories, so as to attract Service Tax payment under Business Auxiliary Service.

30.6.5. Further, it is to be noted that the appellant has not rendered any service to the sub-contractor, but it is the other way round. The profit margin on such back-to-back transfer of the contract is in the nature of trading the contract to make a profit. This activity is not mentioned as a taxable service under Section 65(19) of the Finance Act, 1994, under the definition of the Business Auxiliary Service. Hence, the confirmed demand is not sustainable.

30.6.6. Therefore, we hold that this demand of Rs.1.15 crores confirmed in the impugned order under the category of 'Business Auxiliary Service' is not sustainable.

30.7. Railway work – Demand of Rs.49.37 lakhs:

30.7.1. This demand (S. No. 15 of Annexure – A3 to the SCN – Page No. 123 of Vol. V) was raised/confirmed on the ground that it is a private railway line. The corresponding purchase order dated 06.07.2012 and the payment advice no. 41405001 dated 23.09.2013 are on Pages. 563 – 567 of Vol. IV. These documents do not indicate payment of service tax to the appellant by the service recipient. The Revenue, with the endorsement in the remarks column of the above cited S. No. of the Annexure to the notice, reading as “work in connection with railway siding for use by UAIL / ST not billed” (wherein this demand was proposed) admitted that ST was not billed in this case. We observe that the services rendered to Railways are exempted under Notification No. 25/2012-ST. We observe that this demand has been confirmed in the impugned order on the ground that the services rendered by the appellant are related to private railway lines. We observe that Sl. No. 14(a) of Notification No. 25/2012-ST dated 20.06.2012 envisages that all original works by way of construction, erection, commissioning or installation in relation to ‘Railways’ are exempt from service tax. As per Section 2(31)(b) of Indian Railways Act, 1989, “all lines of rails, sidings, or yards, or branches used for the purpose of, or in connection with a railway;” are considered as part of railways only. We observe that this definition clearly indicates that even private sidings / lines are deemed to be railway sidings / lines. Accordingly, we observe that this definition clearly confirms that the services rendered in relation to railway line / siding meant for the use of UAIL would qualify for the exemption in terms of Notification No. 25/2012-ST. Thus, upon a harmonious reading of the

Finance Act, 1994 with the Indian Railways Act, 1989, we hold that the impugned works rendered by the appellant related to Railways are exempt from service tax.

30.7.2. This issue stands decided in the following case laws :

- i. ***Commissioner of Central Excise, Raipur vs. Anand Construction [2017 (51) S.T.R. 435 (Tri. - Del.)]***
- ii. ***Commr. of Cus. & C.Ex., Raipur vs. National Project Construction Corpn. Ltd. [2020 (42) G.S.T.L. 75 (Tri. - Del.)]***
- iii. ***Rajendra Singh Bhamboo Vs. Commr. of CEx& ST, Jaipur-I [2019 (22) G.S.T.L. 278 (Tri. - Del.)]***

30.7.3. The same view has been taken by this Tribunal in the case of ***Triveni Engicons Pvt. Ltd. v. Commissioner of C.G.S.T. & C.Ex., Jamshedpur [Final Order No. 75496 of 2024 dated 04.03.2024 in Service Tax Appeal No. 76649 of 2018 (CESTAT, Kolkata)]***. The relevant paragraph of the said decision is reproduced below:

"7. We find that the issue has already been settled by this Tribunal and it has been categorically held that there is no distinction between public railways and private railways. In these circumstances, following the decision of this Tribunal in the case of *M/s. Hari Construction & Associates Pvt. Ltd. (supra)*, we hold that the appellant is entitled to the benefit of exemption vide Notification No. 17/2005-S.T. dated 07.06.2005 and Notification No. 25/2012-S.T. dated 20.06.2012, as claimed. Accordingly, no demand of Service Tax is sustainable against the appellant."

30.7.4. We observe that the Original Authority, without appreciating the fact that the Revenue itself admitted to the non-billing of service tax, confirmed this demand by citing invoice no.1 dated 03.09.2012 which is the subject matter of S. No. 1 of Annexure - A2 to the notice (page 122 of Vol. V) for the year 2012-13 in which case, the appellant submitted that service tax has been collected and paid during the normal course vide challan no. 106 dated 27.09.2012. All the connecting documents relating to this transaction i.e., invoice, payment advice & challan are on pages 129 – 131 of Vol. III.

30.7.5. In view of the discussions and by relying on the decisions cited above, we hold that the demand of Rs.49,37,297/- confirmed in the impugned order is not sustainable.

30.8. Erection, Commissioning and Testing – Double Demand – Rs.92.46 lakhs (S. No. 68 of Annexure – A3 and S. No. 75 of Annexure – A4):

30.8.1 The appellant submitted that this is a double demand as the same demand related to construction of Red Mud Pond has been raised in the Show Cause Notice dated 17.10.2016. We have perused the Show Cause Notice dated 17.10.2016 issued to the appellant and the Annexure 9 appended thereto (page no. 569 of Vol. IV). We observe that paragraph 108 of the present Show Cause Notice dated 18.11.2017 clearly states that the income relating to red mud pond has been covered in the Notice dated 17.10.2016 and that the same are excluded from the present proceedings. We observe that the present demand is covered by S. No. 68 of Annexure – A3 and S. No. 75 of Annexure – A4 wherein details of the related two invoices are provided. Exactly the same

two demands figure in the last two entries in Annexure – 9 to the Show Cause Notice dated 17.10.2016 clearly revealing that it is a double demand. We observe that the Ld. adjudicating authority has not given any findings on the submissions made by the appellant on this demand in the entire Order-in-Original. Thus, we hold that the demand raised in the instant notice is a double demand as the demand on this issue has already been covered in the Notice dated 17.10.2016. We accordingly hold that this demand of Rs.92.46 lakhs is not legally sustainable.

30.9. Eastern piling – Demand of Rs.12.36 lakhs (S. Nos. 28 & 41 of Annexure – A3 on Page Nos. 123 – 126 of Vol. V):

30.9.1. We observe that the amount involved in this demand pertains to lump sum compensation paid by the appellant on behalf of UAIL and got reimbursed later. We observe that this reimbursement does not relate to any activity which is liable for service tax. The demand figures against S. Nos. 28 & 41 of Annexure – A3 (Page Nos. 123 – 126 of Vol. V) to the SCN. The related documentary evidence suggesting that it is a lumpsum compensation but not service activity is available on Pages 597 – 601 of Vol. IV. We have scrutinized S. Nos. 28 & 41 of Annexure – A3 of the Notice, which does not indicate any details relating to nature of service, classification, etc. We also observe that there is no discussion with reference to this demand either in the notice or in the impugned order. The documentary evidence submitted by the appellant clearly reveal that M/s Eastern Piling & Construction Pvt. Ltd., while executing a 33KV tower line and stringing work upto the mines top, encountered certain problems with the local villagers

and negotiated with them for a lump sum compensation. For this purpose, the appellant paid the said amount to the said company and got the same reimbursed from UAIL. The documentary evidence submitted by the appellant in the form of two letters dated 27.08.2013 and 25.10.2013 and a Note dated 17.07.2013, indicate that the reimbursement received by the appellant was not related to any taxable service. Accordingly, we hold that service tax confirmed in the impugned order on this count is not sustainable. Hence, the demand of Rs.12.36 lakhs confirmed in the impugned order on this count is set aside.

30.10. Demand of Rs.28.38 lakhs (S. No. 3 of Annexure – A4 – page no. 127 of Vol. V)

30.10.1. The appellant submitted that this is a case of double demand which is already covered against S. No. 68 of Annexure – A3 (page no. 126 of Vol. V) as well as in the Notice dated 17.10.2016. We have perused the S. No. 3 of Annexure – A4 and S. No. 68 of Annexure – A3 of the Notice. S. No. 3 of Annexure – A4 indicates that the Revenue has relied upon the Work Order No.11/10639/02/1758 dated 08.07.2011 and Payment Advice No. 51400850 dated 29.04.2014 for the purpose of raising this demand. We observe that the same Payment Advice has been relied upon against both the serial numbers i.e., S. No.68 of Annexure – A3 and S. No. 3 of Annexure – A4. Accordingly, we hold that this is a double demand which is already a part of the demand raised in the Notice dated 17.10.2016 also as seen from the discussion in para 30.8 supra. Thus, we hold that the demand of Rs.28,38,310/- confirmed in the impugned

order is not sustainable and hence the same is set aside.

30.11. Confirmation of Demand of Rs.78.96 lakhs:

30.11.1. The appellant submitted that this is a double demand on the advances received and the tax thereon was paid earlier at the time of receipt of advance. This demand relates to S. Nos 12, 16 & 17 of Annexure – A3. The total demand of the 3 invoices shown as liability is Rs.1,50,74,782/- (36,78,374 + 68,19,229 + 45,77,179). In respect of the above 3 transactions, the appellant obtained advances amounting to Rs.7.47 crores (2cr + 4.47cr + 1cr) during the year 2011-12. The Appellant claimed that they have already paid service tax amounting to Rs.46,85,866/- under challan no. 127 dated 30.07.2012 and Rs.22,89,746/- under CENVAT Credit on the said amounts. The appellant submitted the related ledger accounts and challan evidencing payment of service tax (page no. 611 to 613 of Vol. IV). We observe that these advances on which service tax has already been paid, are adjusted in the present bills. However, the investigating agency has taken into consideration the gross amount for the purpose of computation of the tax liability of the appellant which resulted in the excess demand of Rs.78,96,432/-. Detailed calculations and submissions in this regard are provided on pages 102 to 104 of Vol. I (This demand is similar to the demand discussed in paragraph 30.3 *supra*). Thus, we hold that the demand of Rs.78.96 lakhs confirmed in the impugned order on this count is not sustainable.

30.12. Confirmation of demand of Rs.7.79 lakhs – Hiring of Additional dumper:

30.12.1. This demand is related to hiring of additional dumper for transportation of Bauxite Ore. (S. No.15, 50 of Annexure – A5 to the notice – Page No. 131 - 133 of Vol. V). Shri S K Rout, UAIL, in his statement dated 09.09.2016, in response to question no. 33 (page no. 295 of Vol. VI) stated that no service tax relating to this transaction was paid to the service provider as the same is used in connection with transportation of Bauxite Ore which is chargeable to service tax on reverse charge mechanism and that UAIL paid service tax on the same. The Revenue cited the reference of original invoice dated 22.05.2015, wherein the appellant has raised service tax also in the bill. However, the appellant submitted that later they issued a Revised Service Tax invoice no. 40 dated 01.06.2015, wherein the service tax earlier billed was excluded. The appellant submitted the related payment advice dated 15.06.2015, in support of their contention that they have not collected the service tax raised in the original invoice dated 22.05.2015. (Related RA Bill / Invoice is on Pages 592, 595 & 493 of Vol. IV). Submissions on the subject in Memorandum of Appeal on Pages 94 – 96 of Vol. I.). We have perused the revised invoice dated 01.06.2015, wherein the service tax billed earlier was excluded. The corresponding payment advice 15.06.2015 confirms the claim of the appellant that they have not collected the service tax on this bill. Thus, we observe that the related payment advice indicates that only service consideration was paid and no service tax component was paid. Since, the appellant was not paid the said service tax and the activity undertaken is not liable to service tax at the

hands of the appellant, the demand is not legally sustainable on merit.

30.12.2. We observe that the Original Authority cited invoice no. 40 dated 22.05.2016 in para 5.35 (vi) of the O-I-O - page 250 of Vol. I for the purpose of confirming this demand. It is on record that this invoice was cancelled and a revised invoice was issued for which no service tax was paid by the service recipient to the appellant. This citation therefore will not be of any help to the Revenue. Accordingly, we hold that the demand confirmed in the impugned order on this count is not sustainable and hence we set aside the same.

30.13. Works Contract Service: Confirmation of demand of Rs.22.87 lakhs (S. No. 7 of Annexure – A3 and S. Nos. 21 & 22 of Annexure – A4 – pages 123, 127 & 128 of Vol. V):

30.13.1. The appellant submitted that the activities undertaken by them are related to construction of boundary wall of Red Mud Pond and installation of chain link fences around Red Mud Pond. (S. No. 7 of Annexure – A3 and S. Nos. 21 & 22 of Annexure – A4 – pages 123, 127 & 128 of Vol. V). These services are appropriately classifiable as 'Work Contract Service' and accordingly, they have collected and correctly paid service tax under 'Works Contract Service' on these three transactions. In the notice dated 24.09.2012 issued by DGCEI, the work orders relating to Red Mud Pond were classified under Works Contract Service. Notice dated 17.10.2016 also held the activity to be Works Contract Service. Accordingly, the appellant submitted that they have paid tax on 40% of the value after availing abatement available under Works Contract Service. From the S. Nos in the

Annexure to the notice, we observe that the said service has been classified as 'Erection, Installation & Commissioning Service' against S. No. 22 of Annexure – A4 and as 'Works Contract Service' against the remaining two serial numbers i.e., S. No. 7 of Annexure - A3 and S. No. 21 of Annexure A4 and the Revenue calculated the service tax on the total value received by them, without giving the abatement in all the 3 cases.

30.13.2. We observe that the adjudicating authority has not given any reason to reject the claim of the appellant for the said services under the category of 'Work Contract Service' in respect of S. No. 22 of Annexure – A4. Also, there is no finding as to why the said services are classifiable under the category of 'Erection, Installation & Commissioning Service'. Even though the service is indicated as 'Works Contract Service' in respect of the other 2 S. Nos. (Sl. No.7 of Annexure - A3 and Sl. No. 21 of Annexure A4), demand is computed on the entire value. We observe that the service rendered by the appellant include materials also and hence the said services are appropriately classifiable under the category of 'Work Contract Service'. Accordingly, we hold that the appellant is eligible for the abatement 60% available to 'Works Contract Service'. Thus, we hold that the appellant has rightly computed service tax on 40% of the value and correctly paid service tax as per the provisions relating to Works Contract Service on these three transactions. We observe that the appellant was paid service tax on 40% of the value in all these 3 cases as seen from the related payment advice nos. 41402914 dated 18.07.2013, 51404898 dated 14.08.2041 and 51404907 dated 14.08.2014 (pages 602 – 606 of Vol. IV). Accordingly, we hold that the

demand confirmed on this count i.e., Rs.22,87,374/- is not sustainable and hence we set aside the same.

30.14. Demand of Rs.1.25 crores for the year 2012-13:

30.14.1. We observe that this demand, pertaining to 3 transactions, details of which are available on Annexure – A2 appended to the notice (page 122 of Vol. V).

30.14.2. Transaction against S. No.1 relates to Earth work for Railway embankment between Tikri Station to UAIL Plant. This work in connection with railway siding is not taxable as discussed in para 30.7 *supra*. The appellant submitted that they have paid service tax in respect of this transaction to the exchequer in the normal course. In support of their claim, they submitted invoice no. 1 dated 03/04.09.2012 of the Annexure – A2, Payment Advice No. 31403356 dated 12.09.2012 and connected tax payment challan no. 106 dated 27.09.2012 (pages 129 – 131 of Vol. III). We observe that these documents evidence that the appellant has paid the service tax on this transaction.

30.14.3. The next demand relating to S. No. 2 of the Annexure – A2 is related to road works. In view of the discussions at paragraph 30.5 *supra*, the appellant is eligible for the benefit of exemption Notification No. 25/2012. Accordingly, we hold that the demand confirmed in the impugned order relating to road construction activities is not sustainable.

30.14.4. Another part of the demand at S. No. 3 is related to 'Commission' received by the appellant. In view of the discussions at paragraph 30.6 *supra*, we hold that this amount is not liable to service tax and

accordingly this demand amounting to Rs.39,89,544/- is set aside.

30.14.5. Thus, we hold that the entire demand of Rs.1,25,04,961/-, confirmed in the impugned order, pertaining to the year 2012-13, is legally not tenable and hence the same is set aside.

30.15. We observe that the details furnished by the appellant, which are discussed in paragraphs 30.1 to 30.14 of this order, explained the demands amounting to Rs.33,28,86,315/- out of the total demand of Rs.33,84,44,273/- confirmed in the impugned order as mentioned at S. No. 2 of the table in paragraph 2.2 *supra*. Thus, there is a difference of Rs.55,57,958/- which has not been clearly explained by the appellant.

30.16. The appellant submits that the difference of Rs.55,57,958/- pertains to the income from non-taxable activity. However, the appellant submits that they are not in a position to substantiate the service tax liability on this balance amount with proper documentation as the unit had closed its operations and offices way back in the year 2015. The appellant submits that the Ld. Adjudicating Authority has not given any finding in the impugned order with reference to the voluminous evidence and extensive submissions and the service tax liability on this amount. However, the appellant submits that the remaining demand Rs.55,57,958/- lakhs fails on limitation front.

30.17. We observe that the present notice was issued on the heels of the earlier notice dated 17.10.2016, covering the same period; the said notice has clearly gone on record that the appellant was providing exempt / non-taxable services like bauxite ore

transportation, reimbursable expenditure, road works etc., and yet did not question the said clearances. We also observe that three successive audits have been conducted during the relevant period, the audit teams did not question the said transactions; in fact, the audit memo dated 06.05.2016 for year 2014-15 has asked for reversal of proportionate CENVAT Credit on the ground that the appellant have provided taxable as well as exempt / non-taxable clearances. Thus, we observe that notice cannot be issued again by invoking extended period of limitation, as held by the Hon'ble Apex Court in the case of ***Nizam Sugar Factory v. Collector of Central Excise, A.P. [2006 (197) E.L.T. 465 (S.C.)]***. Accordingly, we hold that the confirmed demand in respect of extended period, out of Rs.55.57 lakhs is not sustainable and hence, we set aside the same on the ground of limitation.

31. Confirmation of CENVAT credit demand of Rs.69.07 lakhs on inputs and input services:

31.1. We observe that the above demand has been raised for 3 years – 2013-14, 2014-15 & 2015-16 - and the demand details are provided in the Annexures – C-1, C-2 & C-3 as Rs.43,66,149/-, Rs.12,15,906/- & Rs.13,25,621/- respectively.

31.2. This demand has been confirmed in the impugned order on the ground that the appellant had taken excess credit in certain cases and in some other cases availed credit without any supporting documents / proper duty paid documents. This demand has been challenged by the appellant on merit front as well as limitation front.

31.3. In respect of this demand, the appellant vehemently contended that the demand fails on limitation front in view of the successive audits and another Show Cause Notice dated 17.10.2016, issued under extended period. It is their plea, when the service tax audit raised an objection, during the audit of its accounts for the year 2014-15, requiring them to reverse proportionate CENVAT Credit amounting to Rs.11,19,214/- on the ground that they made taxable as well as non-taxable clearances and there was no other objection on their CENVAT credit availment, the present demand is not legally tenable on limitation front.

31.4. We perused the documentary evidence submitted by the appellant on limitation front. The Audit Officers called for various documents from the appellant including CENVAT Credit Documents, statement of credit availment, item-wise and document-wise. The CENTRAL EXCISE AND SERVICE TAX AUDIT MANUAL 2015 – CESTAM-2015 provides the documents to be verified by the auditors in the areas like CENVAT Credit and the auditors are bound to examine each and every aspect / record / document in relation to CENVAT Credit, Provision of services, payment of service tax, valuation, exemptions, taxable /non-taxable services etc. of the assesseees.

31.5. Having regard to the above position and the evidence cited by the appellant, accounts of the appellant company were audited upto the period 2014-15. We, therefore, hold that the demand under this head for the years 2013-14 and 2014-15 amounting to Rs.43,66,149/- and Rs.12,15,906/- respectively are liable to be set aside on time bar front and accordingly we set aside the same.

31.6. With regard to the demand of Rs.13,25,621/- relating to the normal period – 2015-16 – the appellant contested the same on various grounds.

- The demand pertains to 141 documents.
- Excess credit availment was pointed out only in respect of 4 invoices. The same was duly explained by the appellant.
- There is no objection from the department in respect of the remaining 137 documents by the very fact, '0' is indicated against these documents in column 8 of the Annexure – C3 with caption 'excess credit claimed than invoice'.
- The Department admitted that the appellant provided duty payment documents to the extent of credit availment of Rs.25,71,907/- as against the availment of credit of Rs.27,63,848/-. The relevant portion of the table is extracted below:

Particulars	Inputs	Input services	Total
Input / Input Service credit claimed / declared as taken during 1st half year of 2015-16 vide ST3 return:	11,44,183	1,68,910	13,13,093
Input / Input Service credit claimed / declared as taken during 2nd half year of 2015-16 vide ST3 return:	0	14,50,755	14,50,755
Total Input / Input Service credit declared as taken during 2015-16 vide ST3 returns by M/s KVMR & Co Pvt. Ltd.:	11,44,183	16,19,665	27,63,848
Input / Input Service credit pertaining to 2015-16 towards which M/s KVMR & Co. Pvt. has submitted duty payment documents during the course of investigation as detailed above	22,77,863	2,94,044	25,71,907
Total Input / Input Service credit taken without support of duty payment documents / in excess of the eligible credit as evidenced by duty payment documents for the year 2015-16	0	13,25,621	13,25,621

31.7. In this regard we find that the demand has been computed as per Annexure – C3. A perusal of Annexure – C3 shows that there is a mismatch between the CENVAT credit availed as 'inputs and input services'. Both inputs and input services put together the appellant produced documents evidencing availment of credit of Rs.25,71,907/- as against the availment of credit of Rs.27,63,848/-. This has been accepted by the department in the Annexure – C3. However, we observe that the department has taken the difference between Rs.16,19,665/- and Rs.2,94,044/-, amounting to Rs.13,25,621/-, as the ineligible credit for the year 2015-16. The department has not considered the difference between Rs.22,77,863/- and Rs.11,44,183/-, for which documents have been produced by the appellant, but the same has not been taken into account while computing the net excess credit availed for which document is to be produced by the appellant. For ready reference the extract of the said Annexure reproduced at the end of paragraph 31.6 supra is relevant.

31.8. From the above Annexure, we observe that the demand has been raised on the ground that there is misreporting of credit availment under input services instead of under inputs and vice versa. Cross reporting of inputs under input services and vice versa, as claimed by the appellant, if found correct, should not be a ground for disallowing the credit as long as the entries in the annexure are supported by proper duty payment documents. It should also be borne in mind that technical grounds should not come in the way of allowance of substantial benefit, due to the appellant. Since the appellant has already produced documents evidencing availment of credit of

Rs.25,71,907/- as against the availment of credit of Rs.27,63,848/-, as accepted by the Department in the said Annexure and since the same are available with the department, the appellant is required to produce documentary evidence in respect of the balance credit of Rs.1,91,941/- only. The appellant submitted that they have the documentary evidence for availment of this balance CENVAT Credit of Rs.1,91,941/- also. Accordingly, we remand the matter back to the adjudicating authority for the purpose of verification of documents w.r.t availment of CENVAT credit of Rs.13,25,621.

LIMITATION:

32. We observe that the appellant contested all the demands confirmed in the impugned order on merit as well as on the ground of limitation.

32.1. The appellant provided exhaustive documentary evidence to support their claim that the demand for the extended period in the present case is not legally sustainable. In this regard they had provided the correspondence between the audit officers and the appellant, in connection with the auditing of their records, covering the period right from 2011-12 to 2014-15. This correspondence reveals that the officers called for various documents from the appellant on areas like CENVAT Credit, provision of services, payment of service tax, valuation, exemptions, taxable and non-taxable services etc., of the appellant in relation to their transactions covering the period 2011-12 to 2014-15, which the appellant complied with. Various objections were raised including payment of service tax, interest, reversal of CENVAT Credit. From the correspondence, we observe that the department is very well aware of the free

supply materials, reimbursable claims, exemptions availed by the appellant on roads, railways and non-payment of service tax on Bauxite ore transportation, commission etc.

32.2. The Investigating Officer who investigated the case pertaining to the show cause notice dated 17.10.2016 also called for various documents like invoices, bills, supplementary invoices, debit notes, reimbursement claims, form 26AS and audited annual balance sheets and P&L accounts for the same period as of above. This notice clearly acknowledges:

“..... the noticee have executed various works like construction of Road, Mining and Transportation of Bauxite”. (para 3.2)

“.... in as much as on many of such output services like construction of Roads, Transportation of ores, etc., which consumed the above labour expenses, they have not paid any service tax claiming exemption or due to shifting of the liability to the service receiver.” (para 4.4)

32.3. It is thus clear that:

- The Department was very much aware of all the taxable and non-taxable services of the appellant as early as when they were carrying out the audit of the accounts of the company up to 2012-13;
- The Department has carried out service tax audit of the company upto the year 2014-15;
- The Departmental Officers examined the complete documents / records of the company

up to the year 2014-15 including its availment of CENVAT credit and even asked for reversal of CENVAT credit on proportionate basis on taxable and non-taxable services, short payment of service tax, interest amounts etc.;

- ST-3 returns were reconciled with tax paid challans.
- ST-3 returns were reconciled with P&L Accounts and its bills.
- All the objections of the audit were complied with by the appellant;

32.4. In view of the above factual position, we hold that the Revenue was well aware of the issues on which demand was raised in the present proceedings much before issuance of the present notice. When the facts are in the knowledge of Revenue through audit of the accounts of the appellant as well as through the proceedings of other notice dated 17.10.2016, issued under the extended period, suppression of facts with intention to evade the tax cannot be alleged and extended period of limitation cannot be invoked.

32.5. In view of the above, we hold that the extended period of limitation cannot be invoked to demand service tax and CENVAT credit in this case. Accordingly, we hold that in the case of all the confirmed demands discussed above, the extended period provisions could not have been invoked. Hence, we hold that the following demands in respect of the extended period i.e., upto to the year 2014-15 are not legally sustainable on account of the time bar and set aside the same:

S. No.	Nature of demand	Demand hit by limitation
1	Free supply material	Rs.5,91,69,382
2	Service tax demand	Rs.31,15,68,179
3	Cenvat Credit demand on capital goods	Rs.1,36,61,842
4	Cenvat Credit demand on inputs and input services	Rs.55,82,055
Total		Rs.38,99,81,458

33. Demand for the normal period i.e., for the year 2015-16 against the demand of Rs.33.84 crores is Rs.2.68 crores.

33.1. We observe that the Departmental Representative in their submissions on behalf of the respondent, while dealing with the extended period, came up with a contention that the demand for the year 2015-16 falls under the normal period. The appellant, in their comments, in response to the above, admitted the contention of the former. In dealing with this demand, the appellant, making the Annexure – A5 to the notice, covering this demand, as the basis, came up with their arguments and furnished the details of demand in two annexures – Annexure – I & II. In the Annexure – I, the appellant provided the details of invoice-wise demands of Annexure – A5 to the notice wherein they agreed with the tax liabilities shown by the department in the Annexure – A5. In other words, they have no dispute with regard to the demand in respect of 39 invoices detailed in Annexure – I made by the appellant. The appellant contested the demand in respect of the remaining 12 invoices, details of which are provided by them in the Annexure – II. Broadly, the reasons for disagreement are provided as under:

- Mobilization advance on which the appellant paid tax when it was received, was subjected to tax for a second time in respect of 6 invoices, wherein tax liability was indicated on the total gross value of the final bill without considering the adjustment of mobilization advance – demand involved – Rs.40,72,803/-.
- Demand on clearly exempt service – Roads – demand of Rs.3,96,226/-.
- Hiring additional dumper – demand of Rs.7,79,479/-.
- Double demand on mining where the advance was already subjected to tax and again taxed in the final bill on the total gross value without considering the fact of adjustment of advance – demand of Rs.84,00,000/-.
- Double demand on local payments where the advances were already subjected to tax and again taxed in the final bills on the total gross value without considering the fact of adjustment of advance – demand of Rs.98,00,000/-.

The total demand on this count according to the appellant is Rs.2,34,48,508/-. The appellant adds that these demands are already placed under the respective heads in the Appeal Memorandum and have been contested along with the demands relating to the earlier years. The details of the paras under which these demands were dealt in the Appeal Memorandum are also provided in the said Annexure – II.

33.2. The appellant summarized their stand with reference to Annexure – A5 to the notice in the form of a table as provided hereunder.

Normal period - Financial year 2015-16		
S. No	Description	Amount
1	Total demand as per Annexure - A5 on the 51 invoices / payment advices	11,27,88,747
2	Demand on commission	54,08,541
3	Total Demand (S. No. 1+2)	11,81,97,288
4	Tax payable as per the appellant as per Annexure - I	4,82,05,012
5	Tax payable as per the appellant as per Annexure - II	4,11,35,227
6	Total (S. No. 4+5)	8,93,40,239
7	Tax payable on commission as per the appellant	0
8	Total (S. No. 6+7)	8,93,40,239
9	Difference (S. No. 3-8)	2,88,57,049
10	Total amount demanded by the department	11,81,97,288
11	Total demand accepted by the appellant	8,93,40,239
12	Total demand disputed by the appellant	2,88,57,048
13	Total (S. No. 10+11)	11,81,97,287

33.3. We observe that all the afore said demands were examined by us under the respective heads and set aside the demand on merit in respect of the period from 2012-13 to 2014-15. Since the issues are same and since they are already covered under the respective heads, we hold that this demand of Rs.2,34,48,508/- pertaining to the normal period (2015-16) is also not legally sustainable. Accordingly we set aside this demand.

33.4. The demand of Rs.54,08,541/- pertaining to commission and relating to this period is also set aside on the grounds discussed in paragraph 30.6 supra.

33.5. Thus, we observe that out of the total service tax liability of Rs.11,81,97,28/- for the Financial year 2015-16, the appellant has paid service tax amounting to 8,93,40,239/-, which is not in dispute. The balance amount of Rs.2,88,57,048/- is part of the impugned demand under various heads. These issues are discussed in various headings in Paragraph 30 supra. According to the appellant, all these demands fall under the categories of double demands / exempted services / services leviable to tax under RCM, which are discussed in paragraph 30 supra. The break-up figures for the normal period under each of the categories discussed in paras 30 needs to be verified. If they fall within the categories, held as double demands / exempted services / services leviable to tax under RCM in this order, set aside by us on merits, then there won't be any liability on the appellant. Accordingly, the demand for the normal period of limitation as quantified by the appellant is remanded back to the adjudicating authority to verify the correctness of their claim under each of the categories claimed by the appellant in terms of the above directions.

34. We observe that the main allegation of the Revenue in all these cases is that in almost all cases, the appellant has charged and collected service tax from the recipient but failed to pay such tax so realised to the Govt exchequer. In the impugned order, the Ld. Adjudicating authority has held that the appellant is liable to pay service tax on the values on incomes so incurred by them towards providing various taxable services including the services on which the appellant has charged service tax in the bills raised by them. In this regard, the Ld. Authorized Representative of the Revenue has relied on Section

12B of the Central Excise Act, which is made applicable to service tax and contended that once service tax is charged in the invoice, the same is payable in the next month in which bill/invoice was issued. Subsequent less realization may be adjusted by an assessee. But after issuing invoice, there is no justifiable reason for not showing that liability in the return and non-payment of tax.

34.1. In this regard, we observe that the main criterion that determines the liability of payment of service tax is its taxability. If an activity undertaken by the appellant is liable to pay service tax as per the extant provisions of service tax, then the appellant is liable to pay the service tax whether they collect it or not from the service recipient. On the other hand, if an activity undertaken by the appellant is not liable to service tax as per the extant provisions of law, then the liability of payment of service tax cannot be fastened on the appellant. However, we also observe that even if the appellant is not liable to pay service tax, but the appellant has collected any amount representing it as service tax, then as per the provisions of Section 73A of the Finance Act, 1994 and the appellant is liable to pay the amount of service tax collected by them to the exchequer. In this regard, we do not agree with the submission of the Ld. A.R that once service tax is charged in the invoice, the same is payable in the next month in which bill/invoice was issued, even if the activity is not liable for service tax and the service recipient has not paid the service tax as per the bills raised. Documentary evidence placed by the appellant proves that the service recipient has made the payment after removing the Service Tax component. In some cases, where the Service Tax component has been paid by the recipient, then

Service Tax has been discharged by the appellant. Further, we observe that the provisions of Section 12B of the Central Excise Act, 1944 is not relevant as the same are applicable for refund of duty collected.

34.2. We examined the issues involved in the impugned order on the basis of the above observations mentioned in para 34.1 supra. We observe that in respect of some of the issues such as inclusion of the value of free supply materials and reimbursable expenditures in the assessable value, liability of service tax on road works and railway works and service tax liability on goods transportation where the liability of payment of service tax is under RCM by the service recipient, the appellant has raised service tax in some of the bills / invoices. The liability of service tax on all these activities have been discussed in paras 30.1 to 30.14. The appellant submitted that in respect of the cases where they have billed the service tax in the bills / invoices and collected the same from the service recipient, they have paid the same to the exchequer. However, in many cases, even though they have billed service tax in the bills / invoices initially, the service recipient has not paid the service tax amount to them and submitted the RA bills / invoices raised for final payment and the corresponding payment advices issued by the service recipient as evidence for non-collection of the service tax amount from the service recipient.

34.3. We have perused the evidences submitted by the appellant. The evidences indicate that the appellant has paid service tax to the exchequer when raised in the bills and collected by them, even though there is no liability of payment on the appellant on such activities. The evidences in the form of RA bills

/ invoices / payment advices submitted by the appellant indicate that in many cases, even though they billed service tax in the bills, the service tax amount was not paid to them by the service recipient. On the basis of those evidences submitted by the appellant, we observed that even though the appellant billed service tax in some of the bills initially, the appellant is not liable to pay service tax, as the service recipient has finally not paid the service tax amount to them, as evidenced by the RA bills / invoices raised for final payment / payment advices issued by the service recipient. However, we make it clear that in any of the cases where the appellant has billed service tax in the bills and collected it from the service recipient and not paid the same to the exchequer during the normal period i.e., 2015-16, the appellant is liable to pay the amount of service tax collected by them to the exchequer, even if the activity is held as not liable to service tax in this order, as per the provisions of Section 73A of the Finance Act, 1994. We have already held that the demands for the period prior to 2015-16 are not sustainable on merit as well as on limitation. Thus, the above said verification needs to be done only for the demands confirmed in the impugned order for the Financial year 2015-16, which is the demand pertains to the normal period of limitation. Revenue is directed to conduct the verification on this aspect and complete the verification within three months from the date of receipt of this order. The appellant should cooperate and produce the relevant documents for verification.

Personal Penalties:

35. The Original Authority, vide impugned order imposed a penalty of Rs.1 lakh on Shri M. V. Ravichandra, Managing Director of M/s K. V. Mohana Rao & Co. Pvt. Ltd., under Section 78A of the Finance Act, 1994.

35.1. The appellant, Shri M. V. Ravichandra, in his reply to the notice as well as the appeal filed before this Tribunal elaborately relied upon the reply / appeal filed by the main appellant, M/s K. V. Mohana Rao & Co. Pvt. Ltd and came up with a plea that if the contents of the appeal are taken into consideration, no demand subsists on merit as well as on limitation, in which case there is no contravention of the provisions of the Act & the Rules made thereunder. It is his further plea that in terms of Section 78A *ibid*, the personal liability thereunder arises only when the person concerned was knowingly concerned with the specified contraventions and that from the alleged non-payment of service tax by the main appellant – the intention of the appellant to evade service tax cannot be presumed without any evidence on his involvement and intention to evade tax. According to him, there was no *mala fide* on his part and that the mere being Managing Director of the company itself is not a ground for imposition of penalty in terms of Section 78A *ibid*.

35.2. From the discussions in the foregoing paragraphs, we have set aside almost all the demands on merit. Most of the demands pertain to settled issues like free supplies, reimbursable expenditure, road works, railway works and services liable to tax under RCM by the service recipient like Bauxite Ore Transportation. In addition, there are double demands

on the advances, demand of service tax on supply of material, demand on lump sum compensation paid to villagers, commission, etc. These demands are set aside on limitation front too. In this backdrop, it may not be fair to impute mala fide intention on the part of Shri Ravichandra. Having regard to this position, we set aside the penalty of Rs.1,00,000/- imposed on Shri M. V. Ravichandra, Managing Director of M/s K. V. Mohanarao & Co. Pvt. Ltd.

35.3. The Original Authority also imposed a penalty of Rs.1 Lakh on Shri T. Srinivasa Rao, GPA Holder and Authorized signatory of M/s K. V. Mohanarao & Co. Pvt. Ltd., Shri Srinivasa Rao submitted that he is a mere General Power of Attorney holder and acted on behalf of and as per the instruction of the principal and that he is not liable to penalty under Section 78A ibid in terms of the judgment of Hon'ble Supreme Court in the case of *Suraj Lamp and Industries. Pvt. Ltd. Vs. State of Haryana & Anr. - (2012 1 SSC 656)*. He further submitted that intention of the appellant to evade tax cannot be presumed without any evidence on his involvement and intention to evade tax and that there was no *mala fide* on his part to evade tax. He pleaded that the fact of mere being in charge of the affairs of the company itself is not a ground for imposition of penalty on him under this section.

35.4. From the discussions in the foregoing paragraphs, we have set aside almost all the demands on merit. Most of the demands pertain to settled issues like free supplies, reimbursable expenditure, road works, railway works and services liable to tax under RCM by the service recipient like Bauxite Ore Transportation. In addition, there are double demands on the advances, demand of service tax on supply of

free material, demand on lump sum compensation paid to villagers, commission, etc. These demands are set aside on limitation front too. In this backdrop, it may not be fair to impute mala fide intention on the part of Shri T. Srinivasa Rao. Having regard to this position, we set aside the penalty of Rs.1,00,000/- imposed on Shri T. Srinivasa Rao, GPA Holder and Authorized signatory of M/s K. V. Mohana Rao & Co. Pvt. Ltd.

36. In view of the above findings, we pass the following order:

- (i) We set aside the confiscation of the 48 numbers of capital goods and the redemption fine of Rs.50 lakhs imposed in the impugned order. The demand of Rs.3.51 crores confirmed on this machinery against M/s K. V. Mohana Rao & Company Pvt. Ltd., is set aside. The Penalty of Rs.3.51 crores imposed on both M/s K. V. Mohana Rao & Company Pvt. Ltd., and M/s. Mythri Infra is not sustainable and hence the same are set aside.
- (ii) Out of the demand of Rs.3.22 crores confirmed, we uphold the demand of Rs.1.86 crores along with interest paid by the appellant. We set aside the demand of Rs.1.36 crores, part of the demand of Rs.3.22 crores, on merit as well as on time bar. No penalty is imposable on the demand of Rs.1.86 Crores paid, as it was paid before issue of the Notice.
- (iii) The demand of service tax of Rs.5.91 crores, confirmed in the impugned order on account of materials supplied free of cost by the

service recipient, is set aside on merit as well as on limitation.

- (iv) The demand of service tax of Rs.33,28,86,315/- crores confirmed in the impugned order on various services, is set aside on merit as well as on limitation. The confirmed demand out of Rs.55,57,958/- pertaining to the extended period, is set aside on the ground of limitation. The demand for the normal period, if any, is to be confirmed subject to verification as mentioned in Sl. No. (ix) below.
- (v) The demand of Rs.55,82,055/- on inputs and input services out of the demand of Rs.69.07 lakhs, pertaining to the period 2013-14 and 2014-15 confirmed in the impugned order on account of irregular availment of Cenvat credit is set aside on the ground of limitation. The demand of Rs.13,25,621/- pertaining to input and input services out of the demand of Rs.69,07,000/-, for the normal period i.e., 2015-16 is remanded to the Original Authority for decision as per the directions contained in paragraph 31.8 supra.
- (vi) The demand confirmed in the impugned order by invoking extended period of limitation (except the CENVAT Credit demand of Rs.1.86 crores) is set aside. For the same reason, penalties imposed on the appellant and demand of interest on the confirmed demands are set aside. Penalty on the demand of Rs.1.86 crores is set aside in terms of Section 73(3) of the Finance Act, 1994, in

view of payment of the said amount along with interest prior to issuance of notice.

- (vii) For the same reason, the personal penalties imposed on Shri M. V. Ravichandra, Managing Director and T. Srinivasa Rao, Power of Attorney Holder of M/s K. V. Mohana Rao & Company Pvt. Ltd., are also set aside as no mala fide intention can be imputed against them.
- (viii) The recovery of late fee of Rs.16,800/- (Rupees Sixteen thousand and Eight hundred only) ordered by the Original Authority under Section 70 of the Act, read with Rule 7(c) of Service Tax Rules, 1994 for delayed filing of ST-3 returns for the period 2012-13 to 2015-16 is upheld.
- (ix) The demand of Rs.2,68,76,094/- pertaining to the normal period of limitation for the Financial year 2015-16, is remanded to the Original Authority for decision as per the directions in paragraphs 33.3 to 34.3 supra.
- (x) The appellant is liable to pay the amount of service tax raised by them in the bills and collected by them, to the exchequer, pertaining to the year 2015-16, even if the activity is held as not liable to service tax in this order, as per the provisions of Section 73A of the Finance Act, 1994. Revenue is directed to conduct the verification on this aspect for the year 2015-16 and complete the verification within three months from the date of receipt of this order.

- (xi) The appellants would be eligible for consequential relief, if any, as per this order, as per law.

(Order pronounced in the open court on **05.11.2024**)

Sd/-

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/-

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd