

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 75928 of 2016

(Arising out of Order-In-Original No.49/COMMR/ST-I/KOL/2015-16 dated 29/02/2016 passed by Commissioner of Service Tax-I, Kolkata)

M/s. Redtech Network India Private Limited

(4th Floor, PS Srijan Tech Park,
DN-52, Sector V, Salt Lake City, Kolkata-700091)

Appellant

VERSUS

Commr. of Service Tax, Kolkata

(Kendriya Utpad Shulk Bhawan, 3rd Floor,
180, Santipally, Rajdanga Main Road, Kolkata-700107)

Respondent

APPEARANCE :

Ms. Priyanka Rathi, Advocate for the Appellant

Mr. P. Das, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.75747/2025

Date of Hearing : 20/02/2025

Date of Decision: : 24.03.2025

ORDER [PER R. MURALIDHAR]:

The Appellant is engaged in development of telecommunication billing and customer care software. During the relevant period, i.e., 2009-10 to 2012-13, the Appellant entered into a "Product Export and Distribution Agreement" dated November 01, 1999 ("agreement") with its 100% subsidiary company, 'M/s Usha Comm. Tech Inc.' ("UCT"). As per clause 2 of the agreement, the Appellant had granted to UCT an exclusive licence to purchase the software product from Appellant solely for the purpose of export and to further sublicense these softwares to the end customers of UCT outside India. Further, in connection with such supply of software, the Appellant had also granted UCT right to promote, market, advertise and distribute such products. Once UCT received definitive order from its customers, purchase order was placed on the Appellant by UCT as per clause 3.3

of the agreement. In consideration for such supply of software and related services by Appellant to UCT, the Appellant received 60% of the total net revenue received by UCT from end user for the sale of such software product by UCT to the end user as provided under clause 3.4 of the agreement. Based on the premise that UCT is acting as an agent for the Appellant for sale of software in overseas market which is a taxable service under the reverse charge under the category of business auxiliary services, a Show Cause Notice was issued demanding Rs. 4,03,47,312, on Reverse Charge basis, by invoking the extended period provisions. Revenue alleged that UCT is undertaking marketing of products, procuring customers, effecting sale of such products and getting commission for same. Another demand of Rs.39,81,736 was made under Reverse Charge Mechanism on alleged import of Management or Business Consultancy Services on the ground that the appellant is using third party software for which they have remitted the royalty outside India.

2. The appellants submitted that this does not amount to providing of the Business Auxiliary Services by UCT and produced the details of the procedure adopted by them towards the billing to the customers. It was argued that it is a case of sale to UCT and further sale by them to the ultimate customers. They submitted the software was being imported by them on payment of consideration and the same is not in the nature of Royalty. The appellant also submitted that the extended period cannot be invoked since there has been no suppression on their part. All the transactions have been properly recorded and carried forward in their Profit and Loss account and Balance Sheet and they are paying Service Tax in the normal course and filing ST 3 Returns. Thus, the appellant contested both the demands on merits and on account of time bar. After due process, the Adjudicating authority went on to confirm the entire demand along with interest and penalty. Being aggrieved, the appellants have filed the present Appeal before the Tribunal.

3. The Ld Advocate appearing on behalf of the appellant makes the following submissions :

- The agreement is for supply and sale of softwares and related services by Appellant to UCT and not for UCT to act as commission agent for procuring orders. This is evident from invoices raised by Appellant on UCT directly for such supply of software and related services. Further, as per clause 13.1 of the agreement, it has been categorically mentioned the UCT is not agent of Appellant and both parties are independent contractors.
- UCT is not the commission agent of Appellant and the same is also clear from the fact that as per clause 3.4 read with exhibit 4A, the consideration is received by the Appellant from UCT for supply of software and related service. That the agreement nowhere stipulates that the consideration is in nature of commission for getting the customers for the Appellant.
- Further, merely because such consideration for supply of software is based on revenue earned by UCT from final customer cannot change the nature of transaction especially when there is no obligation on UCT to act as commission agent. It is well settled that mode of determination of consideration has no impact on actual nature of transaction.
- The order has failed to appreciate that there is difference between granting rights and casting an obligation on someone. That it has been incorrectly held that UCT is carrying out marketing activities and acting as commission agent. It is submitted that no such inference can be drawn as the agreement nowhere mandates marketing activity to be undertaken by UCT and the Appellant has only granted marketing rights to UCT in connection with sale of software (as per clause 2) which cannot be confused with obligation to do

marketing activity. In fact, most of the marketing activity is carried out by Appellant himself as per clause 1.3 of 2003 Agreement.

- Thus, the terms of the contract are explicit and cannot be interpreted otherwise to fasten liability. Further, intention of the parties to the agreement should be given effect to which is to undertake supply of software and services of installation etc to the other party.
- Further, from various clauses, it is evident that UCT is subcontracting the orders received by it to the Appellant. That there exists buyer seller relationship between Appellant and UCT and not Appellant and the end customers. That the end customers are customers of UCT, which is also clear from the fact that as per clause 3.3, the purchase orders are first placed by end customers on UCT and thereafter UCT places purchase order on Appellant. Thus, the finding that end customers are Appellants customer is incorrect and no demand can arise based on the said finding. Sample copies of the purchase order placed by end customer on UCT and then by UCT to Appellant is enclosed as **Annexure-C.** Further copies of invoices raised by UCT on its customer and by Appellant on UCT is enclosed as **Annexure-D.**
- It is further submitted that it is evident from the agreement entered between UCT and end-user that for all the technical and practical purposes such as, defect claims, technical glitches etc., the liability is with UCT, i.e., owner of the product. Therefore, the finding in the Impugned Order that UCT is not owner of the product is incorrect and hence, the Impugned Order is liable to be set aside.
- The Appellant further submits that it is a settled law that method of payment is not determinative of nature of the

transaction and that the nature of any transaction is to be determined from the intent of the parties and substance of the commercial arrangement between the parties. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of ***Aditya Minerals (P) Ltd. v. CIT, [1999] 239 ITR 817 (SC).***

- It is submitted that in the Impugned Order, the Ld. Adjudicating Authority has relied on the fact that as per the agreement, UCT was granted the right to market the software product of the Appellant. However, the fact that UCT was granted the right to market the software product cannot be interpreted to mean that UCT was obligated to market and distribute the products owned by the Appellant to the customers located outside of India. It is submitted that on conjoint reading, analysis and understanding of the distribution agreement, purchase orders and agreement entered between UCT and its customers, it is clear that the software product were sold by the Appellant to UCT which were further resold to the end-users. Therefore, the Impugned Order confirming the demand on the basis of assumptions and presumptions is liable to be set aside. Reliance in this regard is placed on the decision of ***Kirlosker Oil Engines v. CCE 2017 (349) E.L.T. 299 (T).*** Further, reliance is placed on the decision of this Hon'ble Tribunal in ***CCE v. Agrasen Sponge Pvt. Ltd. (2025) 26 Centax 141 (Tri.-Cal)*** wherein it was held that demand cannot be based on estimation without any tangible evidence.
- The Appellant humbly submits that the fact that right to use the software product has been granted to UCT is evident from the agreement. It is submitted that the right to use software product is deemed sale as held in ***Quick Heal Technologies Limited v. Commissioner of Service Tax, Delhi, 2020-VIL-27-CESTAT-DEL-ST*** affirmed by the Hon'ble Supreme Court in

Commissioner of Service Tax, Delhi v. Quick Heal Technologies Limited 2022-VIL-45-SC-ST.

- That further, the Appellant uses third party software along with its own software to provide telecommunication billing solutions and for using such third party software, the Appellant was remitting royalty outside India. The issue for consideration is that whether the Appellant has received business management and consultancy services as procurement of third party software and hence, service tax is payable under reverse charge mechanism on the royalty paid by the Appellant.

4. In view of the above submissions, the appellant contends that the appeal may be allowed on merits.

5. The appellant also takes the stand that the confirmed demand is not legally sustainable even on account of time bar, for the following reasons :

- The demand is made for the alleged non-payment of Service Tax on Reverse Charge basis. The service in question is an input service for the appellant. Therefore the Service Tax paid, if any , on Reverse Charge basis, would be eligible as cenvat credit to the appellant themselves. Therefore, the issue is revenue neutral. She relies on the case law of ***H.V. Transmission Ltd. vs. Commissioner of Central Excise, Jamshedpur, (2025) 26 Centax 369 (Tri.-Cal)*** wherein it has been held that there cannot be any demand in case of revenue neutrality and in such cases extended period is also not invocable.
- Secondly, it is a settled law that extended period of limitation is not invokable when demand is based on balance sheet figures. Further, this Hon'ble Tribunal in the case of ***Eldyne Electro Systems Pvt. Ltd. vs. Commissioner of Service Tax (2024)***

25 Centax 234 (Tri.-Cal) has held that extended period is not invocable when the demand is based on the information available in balance sheet and profit and loss statement of the taxpayer. Relevant extract of the decision is as follows:

*“9. Regarding the demand of interest, we observe that there is no suppression of facts with intention to evade the tax established in this case. **The entire demand has been raised on the basis of the information available in their Balance Sheet and Profit and Loss Account. In such circumstances, we hold that extended period of limitation not invocable.** However, the appellant has paid the service tax demanded for the extended period also. The Appellant submitted that they will not claim any refund of the service tax already paid for the extended period and prayed for waiver of interest. We observe that, just because the appellant has paid service tax including the extended period of limitation, the interest also cannot be demanded for the service tax voluntarily paid by them for the extended period, which is otherwise not payable. We find that this view has been held by this Tribunal decision in the case of *Bharat Roll Industries Pvt. Ltd. v. Commissioner of Central Excise [2024-TIOL-411-CESTAT-KOL]* wherein waiver of interest has been granted under similar facts and circumstances.”*

- Further, in the present case, the Appellant has periodically filed the returns and hence, all the information was available with the Department at all times. Therefore, invocation of extended period is unsustainable and hence, the Impugned Order is liable to be set aside.

6. In view of the above arguments, the Ld Advocate prays the appeal may be allowed on account of time bar also.

7. The Ld AR appearing on behalf of the Revenue, submits that this is not a case where the appellant is selling their software to UCT. That entity is merely acting as an agent of the appellant procuring the orders on their behalf. The appellant is directly despatching the software to the third parties. On the total bill raised by UCT on the third party, the revenue is shared at a proportion of 40 : 60 or 30 : 70. This shows that the consideration received by UCT is nothing but commission for the orders canvassed by them. While the appellant is

trying to make out this is only the profit margin on account of trading by UCT, the case is otherwise and is clearly covered by BAS. The appellant has failed to discharge the Service Tax liability by paying the same on Reverse Charge basis. Therefore, he prays that the appeal may be dismissed.

8. He submits that though the appellant was paying Service Tax and was registered in the normal course, they never disclosed the details of their transactions with UCT, which was discovered by the Revenue after detailed verification of their books of accounts. Hence, he submits that the Revenue has brought in enough evidence so as to invoke the extended period provisions. Hence, he submits that the appellant has no case even on time bar.

9. After hearing both the side extensively, on their oral requests both the sides were given liberty to make their further submissions, if any, by way of written submissions and the order was reserved.

10. The appellants vide their e mail have made the following additional submissions:

10.1 The Impugned Order is bad in law as it has been passed beyond the time prescribed in Section 73 (4B) of the Finance Act, 1994

10.2 The present case, the Department had issued the Show Cause Notice No. V(15)257/ST-Adjn/Commr/14/19407 to the Appellant on 15.10.2014 and the Impugned Order has been passed on 29.02.2016, i.e., after one year from the date of issuance of the SCN. It is submitted that as per the statutory provisions, the time limit to pass the order is one year from the date of SCN and that the said time-limit is mandatory and hence, the manner in which the present proceedings have been adjudicated by the Ld. Respondent is in

violation of the statutory provisions. Therefore, the Impugned Order is unsustainable and is liable to be set aside on this ground itself.

10.3 The time limit for adjudication of SCN and passing of the order has been dealt under S. 73 (4B) of the Finance Act, 1994 ("Act"). That as per the provisions of the said Section, as applicable during the relevant period, the adjudicating officer was mandatorily required to pass an order within the time period of six months or one year, as the case maybe. Relevant extract of the provision is as follows:

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

(4B) The Central Excise Officer shall determine the amount of service tax due under subsection (2)-

(a) within six months from the date of notice where it is possible to do so, in respect of cases whose limitation is specified as eighteen months in sub-section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A)."

10.4 In the present case, the SCN was issued under the proviso to Section 73(1) of the Act and therefore, Ld. Respondent was mandatorily required to decide the case and pass an order within one year from the date of issuance of the SCN, as per S. 73(4B)(b) of the Act. However, in the present case, the Impugned Order has been passed on 29.02.2016, which is beyond the time limit prescribed in S. 73(4B)(b) of the Act. Therefore, the Impugned Order has been passed in clear violation of the provisions and hence, is liable to set aside.

10.5 It is submitted that in addition to the present provision under the Finance Act, similar provisions are contained under other indirect

tax legislations such as S. 11A(11) of the Central Excise Act, 1944 ("Excise Act") and S. 28(9) of the Customs Act, 1962 ("Customs Act") wherein timeline has been prescribed to pass the order adjudicating the SCN.

10.6 The issue whether such time limit to pass the order is mandatory or directory came up for consideration before various Courts and a consistent view has been taken by the Courts that the timeline is mandatory and is required to be followed by the adjudicating officers. In this regard, the Appellant places reliance on a recent decision of the Principal Bench of the Hon'ble Tribunal in the case of ***M/s Kopertek Metals Pvt. Ltd. vs. Commissioner of CGST (West), 2024 (12) TMI 269 - CESTAT NEW DELHI*** wherein, the similar issue arose for consideration before the Hon'ble Bench i.e. whether the time limit prescribed under Section 11 A(11) of the Excise Act, which is *pari materia* to S. 73

(4B) of the Act, is mandatory and is required to be followed by the Department authorities. That for ease of reference of this Hon'ble Bench, the relevant provision of the Excise Act is as follows:

"11A(11) The Central Excise Officer shall determine the amount of duty of excise under sub-section (10) –

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);

*(b) **within one year from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4) or sub-section (5).***"

10.7 The Appellant submits that in the case of *Kopertek Metals (supra)*, the SCN was issued on 28.04.2015 and the order was passed on 14.06.2022, i.e., after the expiry of time limit of one year as prescribed in S. 11 A(11) of the Excise Act. That the validity of the

order dated 14.06.2022 was challenged by the Appellant therein *inter alia* on the ground that the passing of the order is time barred in view of S. 11 A(11) of the Excise Act whereas, the Department contended that the time limit as prescribed in S. 11 A(11) of the Excise Act is directory in nature as the provision mentions the phrase "*where it is possible to do so*".

10.8 The Hon'ble Tribunal, while interpreting S. 11 A(11) of the Excise Act rejected the contention of the Department and held that the time limit prescribed in S. 11 A(11) of the Excise Act is mandatory and that the phrase "as far as possible" is to be interpreted to include only insurmountable exigencies and cannot be relied on by the Department in each and every case where there is delay in adjudication without any sufficient cause. Relevant extract of the decision is as follows:

"15. It transpires from the aforesaid decisions that:

- (i) The phrases "as far as possible" and "as far as practicable" are more or less inter-changeable along with the word "feasible";*
- (ii) Only when circumstances or insurmountable exigencies make it impracticable or not possible for the adjudication to take place within the stipulated period that the authorities may deviate from the time limit prescribed under the Statute;*
- (iii) The mandate of the legislature that the show cause notice should be adjudicated within six months or one year, as the case may be, only provides flexibility for extension of the period when it is not practicable or possible to adjudicate it within the said time limit. The time limit period cannot be extended endlessly without any plausible justification;*
- (iv) The indifference of the Adjudicating Authority to complete the adjudicating process within the statutory time limit cannot be*

condoned to the detriment of the assessee or detrimental to the interest of the exchequer;

- (v) *There is a definite purpose and intention of the legislature to prescribe such time limit. The legislature has clearly intended to avoid uncertainty, which otherwise can emerge...*

10.9 In the present case, the order has admittedly been passed after a delay of one year and hence, is in contravention to S. 73 (4B) of the Act. That further, no reason has been provided by the Ld. Respondent for not adhering to the time limit prescribed in S. 73 (4B) of the Act and for the delay in passing the Impugned Order.

10.10 The Appellant further places reliance on the decision of the Hon'ble Bombay High Court in the case of ***IDFC First Bank Ltd. vs. Union of India, (2023) 10 Centax 256 (Bom.)*** wherein while deciding whether the time limit as prescribed in S. 73 (4B) of the Act are mandatory or directory in nature, the Hon'ble High Court rejected the contention of the Department, i.e., the time limit is merely directory, and laid emphasis on the word "shall" used in the provision to hold that the time limit prescribed in S. 73 (4B) of the Act is mandatory. Relevant extract of the decision is as follows:

"15. From a plain reading of the provisions of Section 73(4B) and more particularly, in the context of the legislative intent in introducing sub-section (4B), we cannot accept such contention as urged by the respondent that there is no mandate on the concerned officer of the department to decide the show cause notices expeditiously, and/or the timelines which are set out in sub-section (4B) would be required to be held to be merely directory, as the provision would make an allowance for a belated adjudication of the show cause notice. In our opinion, such contention as urged on behalf of the respondent would militate against the plain reading of sub-section (4B) when it pointedly provides that the Central Excise Officer "shall" determine the amount of service tax due under section 73(2), which in clause (a) thereof provides for the

timelines, namely, within six months from the date of notice where it is possible to do so, in respect of cases falling under section 73(1); and secondly, when it provides that such determination be made within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to Section 73(1) or the proviso to Section 73(4A)."

10.11 As submitted above, the Appellant further refers to the similar provision under the Customs Act, 1962 wherein, as per Section 28, the order is to be passed within six months/one year from the date of issuance of show cause notice. Relevant extract of the provision is as follows:

"28(9) The proper officer shall determine the amount of duty or interest under sub-section (8), -

(a) within six months from the date of notice, where it is possible to do so, in respect of case falling under clause (a) of sub- section (1);

(b) within one year from the date of notice, where it is possible to do so in respect of cases falling under sub-section (4)"

10.12 That the aforementioned provision of the Customs Act was interpreted by the Hon'ble Delhi High Court in the case of **Swatch Group India Pvt. Ltd. vs. Union of India (2023) 10 Centax 5 (Del.)** wherein, it was held that the time limit prescribed in the statute to pass an order is mandatory and is required to be adhered to by the Department. Relevant extract of the decision is as follows:

"34. The flexibility, at the same time, in our opinion, cannot be equated with the lethargy of the Department or its officers. The Legislature has mandated the show cause notices to be adjudicated within six months or one year as the case may be; it has provided flexibility only to the extent that if the same is not practicable/possible the period can be extended. The phrase

'where it is possible to do so' would only mean that wherever it is not practicable/possible to do certain act, the period can be extended. The same, however, cannot be an endless period without any plausible justification.

...

46. In our view, there is no material to show that it was not possible for the proper Officer to determine the amount of duty within the prescribed period. The mention of the words, "where it is not possible to do so", in our opinion, does not enable the Department to defer the determination of the notices for an indeterminate period of time. The legislature in its wisdom has provided a specific period for the authority to discharge its functions. The indifference of the concerned officer to complete the adjudication within the time period as mandated, cannot be condoned to the detriment of the assessee. Such indifference is not only detrimental to the interest of the taxpayer but also to the exchequer.

47. In the absence of any ground that it was not possible for the officer to determine the amount of duty within the prescribed period, the impugned SCN has lapsed and cannot be adjudicated."

10.13 In the light of the consistent view adopted by the Courts, it is evident that the time limit to pass an order, as prescribed in the statute, is mandatory. Thus, the Ld. Respondent was bound to pass an Order within one year from the date of the SCN. However, in the instant case, the Order has been passed after one year and hence, the Impugned Order is in violation of S. 73 (4B) of the Act. Hence, the impugned Order is unsustainable and is liable to be set aside.

11. The Appellant humbly prays before this Hon'ble Tribunal that in light of the submissions made hereinabove, the impugned Order is untenable in the eyes of law and is liable to be set aside.

12. The Ld AR , in his rejoinder makes the following submissions :

12.1 Hon'ble Tribunal being a creature of a statute cannot interpret a provision which clearly is recommendatory in nature to be a mandatory one. The main argument of the appellant that the impugned order passed beyond the timeline prescribed in Section 11A (11) of the CEA is legally not sustainable, is not acceptable. The decision of Hon'ble Tribunal in the case of **M/s. Kopertek Metals Pvt. Ltd. Vs Commissioner OF CGST (WEST) NEW DELHI (2024 (12) TMI 269-CESTAT NEW DELHI** cannot be applied in this case due to following reasons:

12.2 In the case of Mis. Kopertek Metals Pvt. Ltd. supra, all the adjudication orders were passed after a considerable period of more than five years. Annexure A of the above order of Hon'ble Tribunal may be referred. Whereas in the present appeal, the Order is passed within a short period after issuing show cause notice. The SCN was issued on 15.10.2014 and the OIO was passed on 29.02.2016, which is within less than 2 years. This shows that inordinate delay has not occurred in respect of most of the above appeals.

12.3 The Hon'ble Bench should have referred the matter in M/s Kopertek Metals Pvt. Ltd to a larger bench only after acknowledging disagreement with their own orders. Accordingly, the decision in Kopertek Metals Pvt. Ltd, passed violating judicial disciplines, is bad in law and cannot be relied upon.

12.4 The present notice was issued on the basis of facts and laws prevailing during the point of time. Moreover, the appellant did not challenge the notices before any judicial forum to make such notices non-est. They participated in the adjudication process and thereby admits the power to issue such notices by a proper officer. Such question cannot be raised before a statutory court like CESTAT. Legality of show cause notices cannot be challenged before any appellate forum except before High Court through a Writ Petition and Hon'ble High Court may give relief on such petitions in exercising

power under Article 226 of the Indian Constitution. Hon'ble Tribunal has no such power to hold the notice non-est at the appellate stage.

13. Heard both sides. Considered the Appeal papers and written submissions made by both the sides.

14. Since the appellant has questioned the legality of the Order in Original, this is required to be taken up first, before going into the aspect of merits or time-bar aspects.

15. As per the appellant, the ratio laid down in the case of **Kopertek Metals Pvt Ltd Vs CCGST – Final Order No.59511-59720/2024 dated 25.11.2024**, as well the ratio laid down in the other case laws cited by them, is required to be applied in the present case.

16. It would be important to go through the relevant portions of the Kopertek Metals Final Order, which are extracted below :

**Kopertek Metals Pvt. Ltd. Vs Commissioner of CGST (West) -
FINAL ORDER NO. 59511-59720/2024 dated 25.11.2024**

7. Sub-section (11) of section 11A, was thrice amended, and is reproduced, as it stood during the relevant period:

From 28.04.15 to 13.05.2015

11A(11) The Central Excise Officer shall determine the amount of duty of excise under sub-section (10) –

- (a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);
- (b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4) or sub-section (5).

From 14.05.2015 to 13.05.2016

11A(11) The Central Excise Officer shall determine the amount of duty of excise under sub-section (10) –

- (a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);
- (b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4).

From 14.05.2016 upto 29.03.2018

11A(11) The Central Excise Officer shall determine the amount of duty of excise under sub-section (10) –

- (a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);
- (b) within two years from the date of notice, where it is possible to do so, in respect of cases falling under sub-section (4).

9. The show cause notice in this appeal was issued on 28.04.2015 by the Principal Additional Director General. It was adjudicated on 14.06.2022 by the Adjudicating Authority. As the notice was issued on 28.04.2015, it would be governed by the provisions of sub-section (11) of section 11A, as it stood during the period from 28.04.2015 to 13.05.2015. Sub-section (11) of section 11A, as it stood during this period, provided that the Central Excise Officer shall determine the amount of duty within

six months from the date of notice, where it was possible to do so, in respect of cases falling under sub-section (1). However, in respect of cases falling under sub-section (4) or sub-section (5), the Central Excise Officer shall determine the amount of duty within one year from the date of notice, where it is possible to do so. The show cause notice in this appeal was issued under sub-section (4) of section 11A. Thus, the Central Excise Officer had to determine the amount of duty within one year from the date of notice, where it was possible to do so.

11. What is important to note is that the show cause notice that was issued on 28.04.2015 was required to be adjudicated latest by 27.04.2016;

12. It was incumbent upon the Adjudicating Authority to determine the amount of duty within one year from 28.04.2015, where it was possible to do so. The discussion and findings in the impugned order start from paragraph 117 but no reason has been given in the impugned order by the Adjudicating Authority for not being able to determine the duty within the stipulated period of one year from the date of issuance of the show cause notice.

20. It would be seen from the aforesaid judgment of the Delhi High Court in **Swatch Group** that the High Court made it amply clear that the incorporation of words like “where it is possible to do so” merely give a certain degree of flexibility to the department where there are circumstances or insurmountable exigencies which make it impracticable or not possible for the

authorities to adjudicate, and in such cases the authorities can deviate from the time limit provided in the Statute. The High Court further held that when the legislature has specifically provided flexibility only to the extent that it was not practicable/possible to adjudicate within the stipulated time, the period can be extended only on satisfaction of such circumstances. The Delhi High Court specifically observed that the phrase “where it is possible to do so” would only mean wherever it is not practicable/possible to do a certain act, the period can be extended but the same cannot provide endless time limit to the department without any plausible justification.

25. It transpires from the aforesaid decisions that:

- (i)** The phrases “*as far as possible*” and “*as far as practicable*” are more or less interchangeable along with the word “*feasible*”;
- (ii)** Only when circumstances or insurmountable exigencies make it impracticable or not possible for the adjudication to take place within the stipulated period that the authorities may deviate from the time limit prescribed under the Statute;
- (iii)** The mandate of the legislature that the show cause notice should be adjudicated within six months or one year, as the case may be, only

provides flexibility for extension of the period when it is not practicable or possible to adjudicate it within the said time limit. The time limit period cannot be extended endlessly without any plausible justification;

- (iv)** The indifference of the Adjudicating Authority to complete the adjudicating process within the statutory time limit cannot be condoned to the detriment of the assessee or detrimental to the interest of the exchequer;
- (v)** There is a definite purpose and intention of the legislature to prescribe such time limit. The legislature has clearly intended to avoid uncertainty, which otherwise can emerge; and
- (vi)** *Even if no time limit is prescribed for adjudication of a show cause notice, then too the adjudication has to be done within a reasonable period.* However, what would be a reasonable period would depend upon the nature of the Statute, rights and liabilities thereunder and other relevant factors.

27. The show cause notice, in the present case, was issued on 28.04.2015. It called upon the noticees to show cause within thirty days from the date of receipt of notice, failing which it was specifically provided that the matter would be adjudicated ex

parte without any further communication. It is seen that the period one year from 28.04.2015 expired on 27.04.2016. Even if cause was not shown by the noticees to the said notice, the Adjudicating Authority should have proceeded to decide the matter ex parte, but what is seen is that the Adjudicating Authority even let this statutory time limit of one year pass without even adhering to the stipulation contained in the show cause notice that the matter would be decided ex parte even if no cause is shown within thirty days. It appears that it is only on 07.09.2016 i.e. almost after a period of five months after the expiry of one year that the first hearing was fixed by the Adjudicating Authority on 07.09.2016.

42. The aforesaid discussion would lead to the inevitable conclusion that the impugned order would have to be set aside only for the reason that the adjudication was not completed within the time limit prescribed under sub-section (11) of section 11A of the Central Excise Act.

17. We find that similar matter in respect of Adjudication order in respect of Customs was before the Delhi High Court in the case of **VOS Technologies India Pvt Ltd Vs The Principal Addl Director General** decided vide **Judgement dated 10.12.2024.**

74. The meaning to be ascribed to the phrase "where it is possible to do so" was lucidly explained in Swatch Group. As the Court observed on that occasion, while the aforesaid expression did allow a degree of flexibility, it would have to be understood as being concerned with situations where the proper officer may have found it impracticable or impossible to conclude proceedings. Swatch Group had explained that expression to be applicable only where the proper officer were faced with

"insurmountable exigencies" and further recourse being rendered "impracticable or not possible". It thus held that the leeway provided by the statute when it employed the phrase "where it is possible to do so", could not be equated with lethargy or an abject failure to act despite there being no insurmountable factor operating as a fetter upon the power of the proper officer to proceed further with adjudication.

85. The position which thus emerges from the aforesaid discussion and a review of the legal precedents is that the respondents are bound and obliged in law to endeavour to conclude adjudication with due expedition. Matters which have the potential of casting financial liabilities or penal consequences cannot be kept pending for years and decades together. A statute enabling an authority to conclude proceedings within a stipulated period of time "*where it is possible to do so*" cannot be countenanced as a license to keep matters unresolved for years. The flexibility which the statute confers is not liable to be construed as sanctioning lethargy or indolence. Ultimately it is incumbent upon the authority to establish that it was genuinely hindered and impeded in resolving the dispute with reasonable speed and dispatch. A statutory authority when faced with such a challenge would be obligated to prove that it was either impracticable to proceed or it was constricted by factors beyond its control which prevented it from moving with reasonable expedition. This principle would apply equally to cases falling either under the Customs Act, the 1994 Act or the CGST Act.

86. When we revert to the facts that obtain in this batch, we find that the respondents have clearly failed to establish the existence of an insurmountable constraint which operated and which could be acknowledged in law as impeding their power to conclude pending adjudications.

18. The Hon'ble Bombay High Court in the case of ***IDFC First Bank Ltd. vs. Union of India, (2023) 10 Centax 256 (Bom.)*** wherein while deciding whether the time limit as prescribed in S. 73 (4B) of the Act are mandatory or directory in nature, the Hon'ble High Court laid emphasis on the word "shall" used in the provision to

hold that the time limit prescribed in S. 73 (4B) of the Act is mandatory and held as under :

14. In short, the contention of the respondent is to the effect that Section 73(4B) does not make it mandatory to decide the cases in one year and a notice can very well be decided beyond one year of its issuance. In facts of the case, even referring to the provisions of Section 73(4B) which are brought on the Statute book by an amendment made to the Finance Act, 1994 by the Amendment Act No. 2 of 2014, such contention as canvassed by the deponent of the reply affidavit and as canvassed by Mr. Mishra cannot be accepted. It would be appropriate to extract sub-section (4B) of Section 73, which reads thus:

"Section 73 - Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded

... ..

(4B) The Central Excise Officer shall determine the amount of service tax due under sub-section (2)—

- a. within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);
- b. within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A)]."

15. From a plain reading of the provisions of Section 73(4B) and more particularly, in the context of the legislative intent in introducing sub-section (4B), we cannot accept such contention as urged by the respondent that there is no mandate on the concerned officer of the department to decide the show cause notices expeditiously, and/or the timelines which are set out in sub-section (4B) would be required to be held to be merely directory, as the provision would make an allowance for a belated adjudication of the show cause notice. In our opinion, such contention as urged on behalf of the respondent would militate against the plain reading of sub-section (4B) when it pointedly provides that the Central Excise Officer "shall" determine the amount of service tax due under section 73(2), which in clause (a) thereof provides for the timelines, namely, within six months from the date of notice where it is

possible to do so, in respect of cases falling under section 73(1); and secondly, when it provides that such determination be made within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to Section 73(1) or the proviso to Section 73(4A).

16. We may observe that the legislature providing that the determination be made within six months from the date of the notice as provided for in clause (a) of sub-section (4B) is concerned, cannot be read to nullify or attaching no weightage to the timelines so prescribed. It can however, be acceptable that a reasonable/plausible delay beyond six months may in a given case be justified depending on the facts and circumstances of the case, for reasons which do not make it possible for the adjudicating officer to conclude the proceedings of the show cause notice. This can be for reasons which are acceptable in law which a reasonable body of persons would accept to be absolutely justifiable, considering the duration of such period. This would certainly not mean that it can be an unexplained, unjustified, unreasonable and an inordinate delay. The same principle would apply to clause (b) of sub-section (4B) of Section 73.
17. We may also observe that when the legislature uses the words 'where it is possible to do so' in clauses (a) and (b), the legislature is conscious of some free play which is required to be made available to the adjudicating officer. However, such limited relaxation cannot be intended to mean that it would defeat the sanctity and purpose for which the period of six months and one year has been set out to clause (a) and (b) of sub-section (4B). The word 'where it is possible to do so' thus cannot be read to defeat the timelines of six months and one year as set out in clauses (a) and (b) of sub-section (4B). Also these words cannot be construed to mean that by use of such words a complete freedom is available to the adjudicating officer to adjudicate the show cause notice at his own sweet will, much less, with such inordinate delay as in the present case which is of almost more than 12 years.

18. If the interpretation of the provisions as canvassed on behalf of the revenue is accepted, it would tantamount to defeating the well settled principles of law that a show cause notice is required to be taken to its logical conclusion within a reasonable period of time and expeditiously, as a show cause notices issued under any fiscal legislation and concerning recovery of revenue would have a very serious concern and bearing on the public revenue. Hence, there cannot be any laxity much less any lethargic approach on behalf of the officers is delaying adjudication of such notices. The legislative provisions which intend to bring about an expeditious and effective adjudication of a show cause notice cannot be defeated by the officers sitting tight on the show cause notice and/or not expeditiously taking them to the logical conclusion. Such is the view repeatedly taken in series of judgments of this Court, to which a detailed reference has been made by us in our decision in *Coventary Pvt. Ltd. (supra)*. These are decisions in *ATA Freight Line (I) Pvt. Ltd. v. Union of India & Ors.* Writ Petition No. 3671 of 2022 against which Special Leave Petition (Civil) Diary No. 828 of 2023 filed by the Union of India came to be dismissed by the Supreme Court; in *CMA-CGM Agencies (India) Pvt. Ltd. v. Union of India & Ors.* Writ Petition No. 1313 of 2021; in *Shreenathji Logistics v. Union of India & Ors.* Writ Petition No. 540 of 2020; in *Sushitex Exports (India) Ltd. & Ors. v. Union of India & Anr.* 2022 SCC Online Bom. 191; in *Sanghvi Reconditioners Pvt. Ltd. v. Union of India, through the Secretary, Department of Revenue & Ors.* 2017 SCC Online Bom 9781; in *Reliance Industries Ltd. v. Union of India* 2019 (368) E.L.T. 854 (Bom.); in *Parle International Ltd. v. Union of India* 2021 (375) E.L.T. 633 (Bom.) and in *Bombay Dyeing and Manufacturing Company Limited v. Deputy Commissioner of CGST and CX, DIV-IX, Mumbai Central GST Commissionerate* 2022 (382) E.L.T. 206(Bom.).

19. The importance and significance of these words have been extensively dealt by the Delhi High Court in the case of **Swatch**

India - 2023 (386) E.L.T. 356 (Del.). It may be useful to go through the relevant portion, which is extracted below :

32. The unamended Section 28(9) of the Customs Act, specifically provides that the proper officer 'shall' determine the amount of duty within six months or within one year, as the case may be, from the date of notice. It only provides certain degree of inbuilt flexibility by incorporating the words 'where it is possible to do so'.

33. The phrases "as far as possible" and "as far as practicable" appear in other statutes as well came up for consideration before the Apex Court in C.N. Paramasivam and Another v. Sunrise Plaza: (2013) 9 SCC 460/[2013] 30 taxmann.com 320 (SC). It is observed that the words "possible" and "practicable" are more or less interchangeable along with the other words such as feasible, performable etc. The incorporation of such words gives certain degree of flexibility to the Department such as if some circumstances or insurmountable exigencies arise, which makes the recourse unpracticable or not possible, the authorities can deviate from what was required to be done in terms of the statute. When the challenge is laid to the act of the authorities deviating from the rule, the onus shifts on the authority to prove that it was not practicable or possible to follow the rule. The same is to be adjudicated on the facts and circumstances of each case."

20. It would also be important to compare the language used under the unamended Section 11A (11) of the Central Excise Act 1944, Section 28(9) of the Customs Act 1962 and Central Excise Manual.

Central Excise Act 1944 :

Section 11A(11) The Central Excise Officer *shall* determine the amount of duty of excise under sub-section (10) –

(a) within six months from the date of notice *where it is possible to do so*, in respect of cases falling under sub-section (1);

(b) within one year from the date of notice, *where it is possible to do so*, in respect of cases falling under sub-section (4) or sub-section (5).

Customs Act 1962 :

Section 28 (9) :The proper officer *shall* determine the amount of duty or interest under sub-section (8),—

(a) within six months from the date of notice, *where it is possible to do so* in respect of cases falling under clause (a) of sub- section (1);

(b) within one year from the date of notice, *where it is possible to do so* in respect of cases falling under sub-section (4).

THE FINANCE ACT 1994

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

(4B) The Central Excise Officer shall determine the amount of service tax due under subsection (2)

(c) within six months from the date of notice where it is possible to do so, in respect of cases whose limitation is specified as eighteen months in sub-section (1);

(d) within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A)."

21. We find that the Section 73 (4B) provision of the Finance Act 1994, is *para materia* with the provisions of Section 11A (11) of Central Excise Act 1944 and Section 128 (9) under Customs Act 1962. Under all these Acts, the words used are "*Shall*" and "*Where it is possible to do so*" and in the Manual "*as far as possible*". The

importance and significance of these words as well as to whether these are directory or mandatory in nature, have already been interpreted in the case laws cited above

22. In the **Kopertek Metals Pvt Ltd.[Kopertek for short]**, decided by the Principal Bench – Delhi Tribunal, it has been held that non adjudication of the order, with no reason being given to the effect that the order could not be passed on time due to circumstance beyond the control of the Adjudicating authority, the same would be fatal to the legality of the order. In **VOS judgement**, cited supra the Delhi High Court has also held so and has noted that the delay is required to be viewed from the facts of the case. As per these decisions, when the reason for delay is not explained by way of plausible reasons in the Order in question, it fails to prove that "*it was not possible to pass the authority*" within the time-frame.

23. The Revenue countering the claim of the appellant that **Kopertek Metals** case should be applied, has taken the stand that in that case, the delay in passing the Order in Original was very high whereas the delay in case of the OIOs passed in the present case are not that high and hence, this case law cannot be applied.

24. We find that if the time-frame given in a statute is not fulfilled, the decision as to whether it is correct or erroneous would not depend on the deviation period. The delay, whether it is for one day or one year or ten years are all taken as delay only. Similar is the situation even in case of time-frame given for filing of appeals. To take an example, the time frame for filing an appeal before the Commissioner (Appeals) is 60 days. He has the power to condone the delay if the appeal is filed within the next 30 days. However, if the appeal is filed even after One day after 90 days, there is no power to condone the delay. He cannot differentiate between the appeal filed with a delay of one or two days delay after 90 days and the appeal filed with higher delay. In all these cases, he has to hold that the condonation period thereon has expired and is required to dismiss the appeal on this

ground itself. The Hon'ble Supreme Court in the case of **Singh Enterprises [Appeal Civil 5949 of 2007]**, has held that in case of such appeals, even the Tribunal and Courts have no power to condone the delay. On a factual matrix, we find that even in the present case in many cases the delay is to the extent to 2 years. Therefore, we do not find any merits in the arguments of the Revenue that delay by number of days should be the factor to be considered to apply or otherwise the Tribunal's order in the case of Kopertek Metals.

25. Another objection from Revenue was on account of two more orders passed by the Delhi Tribunal on similar issue, in the case of **M/s Picasso Digital Media Pvt Ltd Vs Commissioner. CGST, East Delhi [2024(2) TMI 1160-CESTAT-New Delhi]** and **M/s Citicorp Finance India Limited Vs Commissioner of Service Tax, Delhi-11 [2023 (11) TMI 891-CESTAT NEW Delhi]**, wherein the Tribunal has refused to entertain the request of the appellant to consider the delay in passing the Order in Original for setting aside the Order. As per Revenue, the Tribunal should have referred the matter to the Larger Bench rather than passing a different order on the same issue.

26. On going through the Picasso case, we find that the issue therein was Service Tax demand for the period April 2006 to March 2011 for which show cause notice dated 21.10.2011 was issued and the Order in Original dated 02.05.2022 was passed. We find that only by of amendment brought by Finance Act 2014 (with effect from 6.8.2014), the Section 73 (4B), was inserted to specify the time-frame for adjudication of the Service Tax matters. Hence, there was no time-frame applicable for Adjudication of the SCN issued in 2011. The appellant had only made a normal reference towards the delay without citing any statutory provisions or the case laws. In that context the decision was rendered by the Tribunal.

27. In the case of Citicorp, again the issue is that of Service Tax demand. The Show Cause Notice was issued on 23.04.2012. Therefore, even in this case, on the date of issue of SCN, the

statutory provision with regard to the time-frame to complete the Adjudication had not come into force. The Adjudicating authority had confirmed demand holding that appellant has not appeared for Personal Hearing nor have they filed any reply. This was properly countered by the appellant before the Tribunal showing evidence of having filed the replies and also appearing for the Hearing. They raised the additional point about the delay in completion of the adjudication proceedings. The Tribunal did not negate this claim. But considering the overall factual details of the case, the Tribunal took the view that the matter requires to be remanded to the adjudicating authority to consider all the submissions including that of delay in passing the Order in Original.

28. On the other hand Kopertek Metals decision which was rendered later, had gone into all the factual details and the statutory provisions and has considered many of the decisions of High Courts including that of the jurisdictional High Court of Delhi and has come to a proper conclusion on the issue. Therefore, we do not find that the Kopertek Metals had taken a contrary view on the issue requiring any LB referral. Accordingly, we proceed ahead with the factual details in the present case to explore as to whether Kopertek can be applied or not.

29. The Section 73 (4B) provisions came to be inserted with effect from 6th August 2014. The Show Cause was issued on 15.10.2014 and the same came to be adjudicated vide OIO dated 29.02.2016. The OIO should have been issued 14.10.2015, whereas the same has been issued on 29.02.2016, after One Year 4 months. As we have seen while interpreting the statutory provisions, the days by which the delay has taken place, cannot be the factor to decide as to whether the statute in question has been contravened or not.

30. In the OIOs there is nothing to indicate that the appellant has in any way delayed the proceedings necessitating the Adjudicating authority to delay the passing of the order at his end. The appellants have attended the only PH granted on 30th December 2015, as can be

observed from Para 3.2 of the OIO [page 22]. The PH itself has been granted after one year two months from the date of SCN. The last but one para of the SCN dated 15.10.2014, reads " *If no cause is shown within 30 days of receipt of this notice and the assessee or through authorized representative to do not appear before the adjudicating authority, when the case is posted for hearing, the case will be decided ex-parte on the basis of available records without making further reference to them.*" In the Kopertek case also the issue was identical, as can be seen from Para 27 of the Final Order of the Tribunal :

27. The show cause notice, in the present case, was issued on 28.04.2015. *It called upon the noticees to show cause within thirty days from the date of receipt of notice, failing which it was specifically provided that the matter would be adjudicated ex parte without any further communication.* It is seen that the period one year from 28.04.2015 expired on 27.04.2016. Even if cause was not shown by the noticees to the said notice, the Adjudicating Authority should have proceeded to decide the matter ex parte, but what is seen is that the Adjudicating Authority even let this statutory time limit of one year pass without even adhering to the stipulation contained in the show cause notice that the matter would be decided ex parte even if no cause is shown within thirty days. It appears that it is only on 07.09.2016 i.e. almost after a period of five months after the expiry of one year that the first hearing was fixed by the Adjudicating Authority on 07.09.2016.

31. In the Order in Original, there is no mention of the circumstances which proved to be impediment in completing the adjudicating process within one year. Another issue weighing in our mind is that in this case, the appellant is a duly registered assessee. They have been paying Service Tax and filing their Returns. The demand as per the Revenue, emanates from the transactions pertaining to import of service. As submitted by the appellant and also held consistently by the Tribunals and Courts that this is a clear case of revenue neutrality, wherein the suppression clause cannot be invoked. This being the case, in the first place, the Revenue did not have the case in respect of extended period itself. In such a situation, the period for adjudication itself gets shortened to six months.

However, since the SCN was issued invoking the extended period, though not invocable, the Adjudicating authority cannot be faulted even if the OIO is passed within one year.

32. Considering the factual matrix in the present case, we take the view the ratio laid down by the Tribunal in the case of *Kopertek Metals*, would be squarely applicable.

33. Accordingly, we set aside the impugned Order in Original on this ground itself and allow the appeal.

34. In the normal course, after applying the case of *Kopertek* and other decisions with reference to the delayed adjudication, we need go into the time bar aspect. But since in this case the Service Tax demand emanates from the Reverse Charge mechanism basis, we are required to comment as to whether the Service Tax during the extended becomes payable at all. For this purpose, we also had a look into this aspect. The appellants mainly have made two submissions. First of all, the Service Tax, if any payable, would be eligible as cenvat credit. Hence, it is a case of revenue neutral situation. In such a case, the appellant cannot be fastened with allegation of suppression with an intent to evade Service Tax payment. Secondly, they are registered Service Tax payers, filing ST 3 Returns, and maintaining all statutory records including P & L Accounts and Balance Sheet. The quantification of the demand has been derived from these records only. Hence, the appellants have not suppressed any data but all the issues are properly reflected in the books of records.

35. We find force in the argument of the appellant. It is not in dispute that both the services in question, which the Revenue is alleging as being imported, are input services for the appellant for providing their output service. The Mumbai Tribunal in the case of **Jet Airways (I) Ltd Vs CST Mumbai – 2016 (44) STR 465 (Tri-Mum)** has held as under :

10.4 In our considered view the appellant could have availed Cenvat credit of the service tax paid on reverse charge mechanism as they are liable to pay tax on output service hence, Revenue neutral situation arises wherein appellant pays the tax and takes the credit. We note that the issue as to confirmation of service tax liability arose on the payment made to CRS Company, as decided by majority decisions, in three cases namely *British Airways*, *Thai International Public Co. Ltd.* and *Austrian Airways* wherein the question of revenue neutrality arose, which was answered in favour of assesses therein. It is a settled law that question of Revenue Neutrality is a good ground, more so when the tax liability is being discharged under reverse charge mechanism. This very plea of revenue neutrality in an identical issue was raised in *British Airways* case and decided also. It is settled law when an issue is raised and decided in a judgement, the ratio applies.

36. This Bench in the case of **Eldyne Electro System Pvt Ltd Vs CST – 204 (25) Centax 2234 (Tri-Kol)**, has held as under :

9. Regarding the demand of interest, we observe that there is no suppression of facts with intention to evade the tax established in this case. The entire demand has been raised on the basis of the information available in their Balance Sheet and Profit and Loss Account. In such circumstances, we hold that extended period of limitation not invocable.

37. We find that to the factual matrix of the present case, the ratio of the cited cases would be applicable. Hence, we hold that the Revenue was in error in invoking the extended period and confirm the demand. We set aside the confirmed demand for the extended period and allow the appeal to this extent on account of time bar.

38. To summarize :

- (a) The entire demand is being set aside on account of delayed passing of Order in Original
- (b) In this case, no case towards suppression has been made out by Revenue. It is also a case of revenue neutrality since

the Service Tax, if any payable, would be eligible as Cenvat Credit. Hence, the confirmed demand for the extended period is being set aside on account of time bar.

(c) Thus, the Appeal stands allowed with consequential relief, if any, as per law.

(Pronounced in the open court on 24.03.2025)

Sd/-

(R. Muralidhar)
Member (Judicial)

Sd/-

(K. Anpazhakan)
Member (Technical)

Pooja