

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

**APPEAL Nos. ST/87578-87581/2015
ST/Cross/91030,91032,91031,91033/2016**

Board of Control for Cricket in India

Appellant

Vs.

Commissioner of Service Tax-II, Mumbai

Respondent

**APPEAL No. ST/85038/2016
ST/Cross/91050/2016**

Commissioner of Service Tax-II, Mumbai

Appellant

Vs.

Board of Control for Cricket in India

Respondent

(Arising out of Order-in-Original No. 30 to 33/PR.COMMR/ST-II/PK/2015-16 dated 19.8.2015 passed by Commissioner of Service Tax-II, Mumbai)

Appearance:

Shri Shri V. Sridharan, Sr. Advocate, with Shri Vinay Jain, Advocate, for appellant-assessee
Shri Roopam Kapoor, Commissioner (AR), for Revenue

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 10.8.2018

Date of Decision: 10.12.2018

ORDER No. **A/88075-88079/2018**

Per: Sanjiv Srivastava

These appeals (Four Appeals have been filed by BCCI (appellant) and one appeal has been filed by the revenue) are directed against the order in original No 30 to 33/ PR. COMMR/ ST-II/PK/2015-16 dated 19/08/2015 of the Commissioner of Service Tax: II: Mumbai. By the said order Commissioner has adjudicated four show cause notices as detailed in para 2, holding as follows:

"Order

- i. *I confirm total demand of Rs 131,19,45,874/- (Rs One Hundred and Thirty One Crores, Nineteen Lakhs Forty Five Thousand Eight Hundred and Seventy Four only) in respect of the service tax liability which is to be paid by the noticees in terms of proviso to sub-section 1) if Sec 73 of Finance Act, 1994.*
- ii. *I order recovery of interest at the appropriate rate against the above confirmed demand, under Sec 75 of the Finance Act, 1994.*
- iii. *I impose a penalty of Rs 25,96,08,402/- (Rs. Twenty Five Crores Ninety Six Lakhs Eight Thousand Four Hundred and Two Only) under Section 78 of the Act.*
- iv. *I impose a penalty of Rs 87,82,39,421/- (Rupees Eighty Seven Crores Eighty Two Lakhs Thirty Nine Thousand Four Hundred Twenty Nine Only) under Section 76 of the Act.*
- v. *I impose penalty of Rs 5,000/- (Rupees Five Thousand Only) each for SCNs art Sr Nos 1,2,3 above and Rs 10,000/- (Rupees Ten Thousand Only) for SCN at Sr No 4 above (Total Rs*

25,000/- 9Rupees Twenty Five Thousand Only) under Section 77 of the Act.

- vi. *This order is issue without prejudice to any other action that may be initiated against The Board of Control for Cricket in India under the provision of Finance Act, 1994 or the Rules made thereunder or under the provision of any law for time being in force."*

2.1 Appellant is a society registered under the Tamil Nadu Societies Registration Act, 1975, having a separate sub-committee known as Indian Premier League (IPL) set up to oversee the operations of domestic T-20 Cricket competitions in India and abroad.

2.2 Appellants entered in media rights license agreement as licensor with M/s MSM Satellite, Singapore (MSM or Licensee) & M/s World Sports Group (India) Pvt Limited (WSG or Licensee) vide agreement dated 21.01.2008 (Revised by agreements dated 25.03.2009 and 25.06.2010) licensing them the media rights for telecast of IPL matches. They also entered in Memorandum of Understanding dated 16.04.2008 with M/s Live Current Media Inc (LCM), Canada to design, build, operate, maintain & promote the IPL website as the sole IPL website sanctioned by appellant. They also received certain amounts from M/s Pioneer Digadsys under the head of "Media Right

Incomes" but had not produced the copy of agreement with them.

2.3 On scrutiny of the said agreement revenue was of the view that the services provided by the appellants to the licensee were covered by the definition of Franchise Services as defined by Section 65 (47) read with Section 65(48) and Section 65 (105) (zze) of the Finance Act, 1994. Since Appellants had not paid the service tax by classifying the services provided by them and had not filed ST-3 returns, four show cause notices were issued to the Appellants as detailed in table I below:

Table 1	Details of Show Cause Notices			
SCN No	Date	Period	Amount	Remarks
V/ ST/ HQ/ AE/ E/ 47/ 09	14.10.2009	2007-08 & 2008-09	36,52,38,000	Extended period as per proviso to 73(1), Interest under Section 75 and penalties under Section 76, 77 & 78
	19.04.2011	2009-10	37,53,77,320	
174/ Commr/ 2011-12	24.10.2011	2010-11	41,10,17,933	
V/ ST/ Dn-II/ Gr VIII/ TBCCI/59/ 10	13.03.2013	2011-12	38,40,60,229	

2.4 After considering the submissions made by the appellants in reply to show cause notice and also during the personal hearings granted Commissioner adjudicated the four show cause notices as per the order indicated in para 1 supra. Commissioner has allowed the benefit of cum tax benefit to the appellants. He also has imposed penalty under section 78 on in respect of First Show Cause Notice and Penalty under Section 76 in respect of other three show cause notices.

He has imposed penalty under section 77 in respect of all four show cause notices and has demanded the interest in respect of the demands confirmed.

2.5 Aggrieved by the order appellants have filed these appeals.

2.6 Revenue has filed the appeal challenging the part of order whereby benefit of cum tax value has been granted by the Commissioner.

3.0 Appellants have in their appeal assailed the order of Commissioner on various grounds which were again pressed during the argument of the appeal.

4.1 We have heard Shri V. Sridharan Ld Counsel for the appellants and Shri Roopam Kapoor, Commissioner Authorized Representative, for the revenue. On conclusion of the arguments both the parties were asked to make written submissions stating various points argued by them. Both the party's have filed the written submissions.

4.2 Arguing for the appellant learned counsel submitted-

- a. The appellants had entered into agreement dated 21st January 2008 with M/s MSM Satellite, Singapore and M/s World Sport Group (I) Private Limited for sale of Media Rights for telecast of Indian Premier League

(IPL) matches. Both the agreements are identical except for the territory of operation. While M/s MSM was given telecast rights for India, Pakistan, Sri Lanka, Bangladesh, Bhutan, Nepal and Maldives, telecast right for rest of the world were given to WSG.

b. Some of the salient features of the agreement relevant for the controversy under dispute are as hereunder:-

i. Subject to the terms and conditions of this agreement, and in particular clause 2.1 (ii) and (iii) below and the provisions pertaining to exclusivity referred to in clause 2.3 below, licensor hereby grants to licensee during the rights period and within the territory:

- a) The television rights and internet rights on exclusive basis;
- b) The audio rights on exclusive basis;
- c) The mobile rights on an exclusive basis;
- d) The in flight programming rights;
- e) The right to make available interactive services to viewers of footage;

- f) The right to produce unilateral coverage and unilateral commentary for transmission and delivery by means of permitted delivery system.
- ii. 2.9 The licensor hereby grants to the licensee a non-exclusive royalty free license to exploit during the rights period and within the territory the league logos, league marks and team logos (collectively the "licensor marks"), together with these materials provided to licensee pursuant to clause 2.11 below solely in connection with licensee's exploitation to the media rights hereunder and the promotion thereof and the promotion of the channel, in accordance with the brand guidelines and the terms of this agreement (including without limitation clause 12 below)
- c. The Finance Act, 2010, introduced a new category of service namely "Commercial Use or Exploitation of any Event" under Section 65 (105) (zzzzr) of The Finance Act, 1994 effective from 01.07.2010. as an abundant caution appellants started discharging service tax under this category on media right income from service recipients located in India. In respect of

the recipients located outside India they claimed the benefit of export of service.

- d. Department had been issuing various show cause notices to them classifying the broadcasting rights given by them to various broadcasters under various categories-
 - i. 1999 to 2003- Advertising Services, However CESTAT held that the income so received cannot be taxable under the category of advertizing services;
 - ii. 2005-06 to 2010-11, in respect of media rights income for matches under than IPL under the category of Intellectual Property Right Services (IPR Services)
- e. Grant of Media Right is not a provision of "Franchise Service" as no right to represent the appellant has been granted. The service recipient is not performing any service, which is being provided by the service provider.
- f. The definition of franchisee requires satisfaction of following two conditions cumulatively-
 - i. The agreement must grant representational right to the service recipient;
 - ii. The rights granted should be in relation to either-

- a) Sale of goods identified with Franchisor;
- b) Manufacture of goods identified with Franchisor;
- c) Provide service identified with Franchisor;
- d) Undertake any process identified with franchisor.

Since these conditions are not satisfied in the present case the services cannot be classified under franchisee service.

- g. Appellants have not given any representational rights to MSM & WSG
 - i. Representational right shall be given to undertake any process identified with franchisor whether or not a trade mark, service mark, trade name or logo or any such symbol involved;
 - ii. Live matches are displayed on TV screen of the viewers, for which the viewer has to switch on/ log on to the channel of licensee. The identity of broadcaster remains the same and is not lost. They rely on the decision of CESTAT in case of M/s Global Transgene Ltd [2013 (32) STR 86 (CESTAT)], wherein it has been held that the identity of

franchisee is lost and the customer avails the service as if the outlet is owned by the franchisor.

- iii. Provisioning of league marks, league logos, and team logos cannot be considered as grant of representational rights to the service recipients. The permission to use these logos is granted for identification of the match with league. This does not imply that they have given representational rights to licensee. There is also no consideration in the agreement for the use of these logos;
- h. The activities performed by MSM & WSG are not covered in either of the limb of Franchise Service
 - i. The second main condition for franchise service is that the franchisor should grant the rights to do certain specific activity. In other word all sort of representational rights are not covered.
 - ii. Show cause do not specify the nature of service which appellant is providing and in turn it has authorized the license to do so;
 - iii. Licensee have not been granted any right to provide the services identified with the

franchisor i.e. to organize, control and promote the game of cricket in India.

- i. The process is not identified with them-
 - i. Appellants have given media rights to M/s MSM/ WCG. In turn MSM and WCGH broadcast the signals to the consumers.
 - ii. Appellants do not carry out any process in relation to the broadcasting of signals. They are engaged in conducting the matches and providing the signals to broadcasters.
 - iii. MSM broadcasts matches through its TV channel "Sony" whereas WSG has sub licensed media rights to various other broadcasters.
- j. The service recipient has to perform the activity, what is undertaken by the service provider, as has been held by CESTAT in case of M/s Directi Internet Solution Pvt Ltd. [2014 (36) STR 849 (T-Mum)] and M/s Delhi International Airport P Ltd. vs CST [2017 (50) STR 275 (Del)]
- k. The best category in which the services provided by them can be classified is "Commercial use or Exploitation of any event" under section 65 (105) (zzzzr) of the Finance Act, 1994 with effect from 01.07.2010.

Appellant has taken registration under the aforesaid category and started discharging service tax on media rights income on services within India. CESTAT has in case of M/s Royal Western India Turf Club Ltd. [2015 (38) STR 811 (T-Mum)].

- l. Commissioner himself in para 22 of O-I-O has accepted that the correct classification of the service rendered will be "Commercial Use or Exploitation of an Event." In para 34, Commissioner has while confirming the demand under IPR/ Franchise services held that after 01.07.2010, these services will be classified under the category of "Commercial Use or Exploitation of an Event." In case of M/s Indian National Shipowners Association [2009 (14) STR 299 (Bom)] it has been held that *"Introduction of new entry and inclusion of certain services in that entry would presuppose that there was no earlier entry covering the said services."*
- m. They have rightly claimed the benefit of Export of Service Rules, 2005 and the amounts received from M/s MSM and sub licensees of WSG qualifies for Export. The services provided by them either under category "franchise

service" or "commercial use or exploitation of event service" are category (iii) services and following conditions need to be satisfied in order to consider the services as export of service-

- i. Service is provided from India and used outside;
 - ii. Payment for such services is received in convertible foreign exchange.
- n. After 27.02.2010, the only condition that needs to be satisfied is that payment should be received in convertible foreign exchange.
- o. It is undisputed fact that against all these services the payments have been received in convertible foreign exchange. Since the conditions as prescribed for the availing the benefit of Export of Services are satisfied they have correctly availed the benefit of the same.
- p. Department has admitted that the services provided by the appellant do amount to export of services, because in Show Cause Notice dated 13.03.2013, the demand has been made only in respect of that turnover not shown as export in ST-3 return. To the extent they have disclosed as exports no demand has been made.

- q. They also rely on the decision of the tribunal in case of Paul Merchants Ltd. [2013 (29) STR 257 (T-Del)] wherein it has been held that destination of service has to be decided on the basis of the place of consumption. (Para 76 (v))
- r. Tribunal has in case of Tech Mahindra {[2014 (36) STR 332 (T-Mum)] upheld by Bombay High Court in {2014 (36) STR 241 9Bom)}} held that post 27.02.2010, the only condition that needs to be satisfied for treating a service to be export of service, is that consideration for the service is received in convertible foreign exchange.
- s. They also rely on the decision in the case of Microsoft Corp (I) Ltd. Vs CST [2014 (36) STR 766 (T-Del)], Vodafone Essar Cellular Ltd. vs CCE [2013 (31) STR 738 (T-Mum)] & CST Vs Ate Enterprises Pvt Ltd [2017 TIOL 1906-HC-MUM-ST and CST vs Balaji Telefilms Ltd. [2016 (43) STR 98 (T-Mum)], EPW Da Costa Vs UOI [1980 (121) ITR 751 (Del)]
- t. Appellants are entitled to the CENVAT Credit on input services used by them for providing the output services.
- u. Cum tax benefit has been rightly allowed to them by the Commissioner {CCE Patna vs Advantage Media Consultant [2008 (10) STR

449 (T-Kol)] maintained in [2009 (14) STR J49 (SC)]}.

- v. Extended period of limitation is not available to the department for making the demand as the department was throughout aware of the services provided by the appellant, by way of granting media rights to various broadcasters for live telecast of the matches. Further the issue involved is one of interpretation of statute and cannot be alleged as a matter of suppression of facts.
- w. Since there has been no non-compliance on the part of appellants' penalties under Section 76, 77 & 78 of the Finance Act, 1994 are also not sustainable. Penalty under Section 78 can only be imposed in case of any fraud or suppression with an intention to evade payment of service tax which is not applicable in the present case.
- x. Interest under Section 75 is not demandable.

4.3 Arguing for the Revenue Learned Authorized Representative submitted-

- a. Commissioner has, in his findings, gone through the terms of the contract and held that –
 - i. Commercial right to each of the league matches and player auctions were owned and controlled by BCCI.

- ii. As per Para 2.1 of the agreement exclusive right to broadcast had been granted by BCCI.
- iii. Para 2.9 also grants to the licensee non exclusive royalty free license for exploitation of the league logos.
- iv. As per para 2.14 of the agreement licensee shall have right to refer to it as 'official broadcaster' of the Indian Premier League. Commissioner observed that it was mandatory for the licensees to display the sponsored logos of BCCI during the time when important details of tournament were flashed on the screen display (para 8.10 of the agreement).
- v. Commissioner has also observed that IPL title or its logo marks were under exclusive control of BCCI. He further, observes that license to exploit league logos, league marks and team logos are nothing but representational rights and such services will be correctly classified under Franchisee Services.
- vi. Since World Sports Group is an organization having its office in India, the question of benefit of export of service does not arise.
- vii. So far as MSM was concerned, Commissioner held that through several services were concurrently performed during the live telecast of IPL match,

the actual service of providing the representational rights along with the media rights were performed in India since the matches were played in India. He also observed that the benefit of services has accrued in India and even the service was consumed in India.

- b. During the course of hearing had stated that the service is correctly classifiable under 'Exploitation of Commercial Events' to be covered under the scope of Commercial Use or Exploitation of any event organized by any person or the organization which became taxable from 2010. Appellants had submitted that they were filing returns from 2010 onwards under the above category as the services provided by them is more appropriately covered under the above said category. While the appellants have sought to classify their activities under the above said services, this was not the stand of the Department. All the SCNs (including the last SCN which covers the period after 2010 also and is in appeal before the Tribunal) have asked the appellants to show cause as to why the service should not be classified under Franchisee Service. Commissioner has also, in para 34 of his Order (in respect of SCN No. V/ST/Dn-II/Gr VIII/TBCCI/59/10/1689 dated 13.3.13) held that

the service provided by BCCI is covered under Franchisee Service.

- c. TRU has issued Circular dated 26.2.2010 when the service of "Commercial use or Exploitation of any event" was introduced. Circular clearly states that the rights covered under this service is only limited to the commercial exploitation of the event and does not give any representational rights. The grant of representational rights is totally different than those of commercial exploitation of an event, **in so far as the latter does not have any grant equated to it or does not represent any grant.** The commercial exploitation of the event services is thus totally different from the franchise services in so far as the former only provides for one time commercial exploitation without providing any rights to the person.
- d. A perusal of the conditions of the agreement dated 25.6.2010 made in supersession of Agreement dated 25.3.2009 between BCCI and various parties bring forth following :
- i. That BCCI controls the commercial right to each of the league.
 - ii. That there is official league marks and there are licensor logos and licensor marks. (as detailed in

the definitions and interpretation) which clearly gives a brand identity to the licensor.

- iii. That the right has been granted on exclusive basis and licensor will not enter into agreement with any other person except as qualified in the agreement (para 2.2)
- iv. The licensor (BCCI) granted to the licensee (MSM) *“a non-exclusive royalty free license to exploit, during the Rights Period and within the Territory the Licensor Logos, League Marks and Team Logos (collectively the “Licensor Marks”) together with those materials provided to Licensee pursuant to Clause 2.11 below.....”*. (Para 2.9)
- v. The said rights clearly show that (a)there are Logos and Marks; (b) that licensee has given the rights of exploitation to these Logos and Marks and (c) the same has to be done in accordance with the brand guidelines.
- vi. The above said rights are to be used in connection with licensee exploitation of the media rights and thus the use of Logos and Marks owned by BCCI have been granted to MSM, **especially when they had to be used in accordance with the brand guidelines**, squarely covers the services under the scope of franchise service.

- vii. The licensee can refer to itself as 'Official Broadcaster of the IPL'. (Para 2.14)
- viii. Para 5 of the Agreement specifically provides that the licensor shall make the feed available to the licensee, licensor has the right to insert graphics package at its own discretion which may integrate copyright notices, trademark legends, etc. which the licensor may specify and / or require. Specifically para 5.3 obligates the licensee to carry the sponsored logo on the top left hand side of the screen. The quality of the programme, is monitored by the licensor and they also ensure that their logo is displayed at top of screen in the Feed given by them. Thus, at no stage, the programme and the logo associated with it becomes the exclusive right or property of MSM (licensee) but the ownership of the same vests with the licensor which is also displayed on the TV screen.
- ix. Para 5.5 of the Agreement also prescribes that the licensee cannot tamper with the integrity of the Feed. It was submitted that all the above clauses clearly show that BCCI has rights over the programme, these rights are enforceable, and they are exercising their right through various

methods which include the display of their brand logos and marks on the screen.

- x. As per para 8 of the Agreement the licensee has to obtain permission of licensor for various services. Most importantly the licensee is prohibited from any modification of the Feed.

Para 8.3 of the Agreement provides *“Licensee agrees that it will not alter or add to the content of the Feed whether electronically or otherwise so as to remove, change or obscure any in-Venue advertising any Graphics Package or Live Feed Insertions incorporated into the Feed by or on behalf of Licensor in accordance with this Agreement, same and to the extent as may be required to comply with applicable Law.”*

- e. In the case of Subway, Hon’ble Bombay High Court had referred to the Franchise agreement and had looked into the definition of Franchise. Hon’ble High Court had referred to the Black’s Law Dictionary to define the Franchisee in the context of a commercial transaction “as the sole right granted by the owner of a trademark or a trade name to engage in business or to sell goods or service in a certain area”. In terms of the test laid down by the Hon’ble High Court, the transaction between BCCI and MSM fulfilled all the conditions

of the definition, as the Team Logo and Marks are owned by the BCCI, the Feed of the cricket matches is also owned and produced by BCCI and MSM is given exclusive right to engage in the business of telecasting the same in the area specified in the contract.

- f. The activities undertaken by the BCCI fits into the above judgment of Hon'ble High Court as well as the Tribunal in the case of Shoppers Stop.
- g. Hon'ble Tribunal in the case of Amway India Enterprises Pvt. Ltd. as upheld by Hon'ble Supreme Court [2016-TIOL-221-SC-T] to establish that it is not necessary for all the activities to be undertaken by franchisee for the services to be held as franchise service. In the instant case is as M/s. MSM Satellite and Ors have been given the right to represent themselves as final broad caster of the IPL.
- h. In the case of Podar Jumbo Kids Vs. Commr. Service Tax, Mumbai-I {2017-TIOL-3317-CESTAT-Mum.}, wherein the Hon'ble Tribunal held that a franchise is given representational right to provide service(refer to 2.1, 5.5, 5.1 & 2).
- i. In essence the gist of the agreement can be summarized as the fact that BCCI owns a Brand under which they conduct the matches, they could have marketed the matches themselves but instead

given the rights including the representational rights of these matches as BCCI matches.

j. To claim the benefit of export of the service is concerned, Appellant's have submitted that as the service receiver is located outside India and as they have received the money in foreign exchange, the service provided by them should be treated as export. Apparent Fallacies in the said submission of the Appellants are as listed below.

i. The export of service Rules till 2010, categorically stated that the service should be used outside India. In the instant case, the franchise service has not used at all outside India. The services provided by BCCI regarding the representational rights of IPL and BCCI so far as it relates to the telecast of IPL matches was for recipients in India. franchisee has used these services to broad cast the matches in India and thus service has not used outside India, which is one of the cardinal tests for export of services. The Rule in the provision cannot be read in isolation. This position has also clarified by the Board in Circular dtd. 24.02.2009, Board had clarified "*Keeping principal in view, the meaning of the term used outside India has to be understood in the context with the characteristics of a particular category of services*

as mentioned in sub-rule 1 of Rule 3". Similarly, while talking sub-rule 3 (category 3) the Board had stated that "in this context the phrase outside India is to be interpreted to mean that the benefit of the service should be accrue outside India". Similarly, while further clarifying the above mentioned Circular, vide Circular No. 141/10/2011-TRU dtd 13th May 2011, the Board had clarified that in respect of Rule 3(i)(iii) had specifically stated that "it may be noted that the words 'accrual of benefit' are not restricted to mere impact on the bottom-line of the person who pays for the service". It was further, stated that "for example effective use of advertising services shall be place where the advertising material is disseminated to the audience though actually the benefit may finally accrue to the buyer who is located at another place". This situation is exactly the case decider.

- ii. The subscriptions in the form of advertisements also was collected by the subsidiary of MSM viz. Sony Television India in India itself, from which, they may have remitted the funds MSM to BCCI. Attention in this regard was invited to Paragraph 5 of the Show Cause Notice No. 747/Commr/2012-13, wherein it was stated "97% of the payment received of Rs. 498,38,0,769/- payment received

at Sr. No. 2 & 3 table below has been received from M/s. Sony Pictures Entertainment on behalf of MSM Satellite Ltd.

iii. Condition 5.1 of the agreement dtd. 25.06.200 which reads *"Licensor shall make the Feed available to the licensee (from not later than 10 minutes before the start and until not earlier than 10 minutes after the end of the relevant Match/ Player Auction). At the Host Broadcaster's truck or facility at or in the vicinity of the Venue, without any charge levied by or on behalf of licensor or any third party for the production of the Feed or for such access"*.

iv. The feed is delivered to M/s. MSM in India only as the Host broadcaster truck or facility is to be located at or in vicinity of the venue.

k. It was thus submitted that considering the fact that the service has been provided in India only and used in India the simple act of signing contract with an overseas party does not make it an export of service. The payment of a certain sum of money by M/s. Sony Entertainment also corroborates the issue. The simple act of signing a contract with an entity located abroad will not render the service as exports but will need to be examined in light of the provisions of the relevant rules in the regard.

- l. So far as the imposition of the penalty is concerned appellants had deliberately suppressed the facts of the case and had failed to declare the media right income in their Service Tax Returns. No extended period has been invoked in three of the four Show Cause Notices.
- m. Even after the issuance of first Show Cause Notice appellants had not declared their turnover in their S.T. Returns in any of the categories. The appellants are thus liable for penal action which has been correctly imposed by the Commissioner in his adjudication order.

5.0 We have considered the submissions made by the appellants in the appeal memo and by the Counsel during the course of hearing of the Appeals, along with the submissions made by the learned Authorized representative. The issues that need to be deliberated in this appeal are as listed below:

- i. Whether the services as provided by the appellants to M/s MSM Singapore & M/s WSG qualify to be Franchisee Services as defined by the Section 65 (47) read with Section 65(48) and Section 65 (105) (zze) of the Finance Act, 1994.
- ii. Whether the services as provided by the Appellant qualify to be Export of Service as defined in terms

of Export of Services Rules, 2005 as amended from time to time.

- iii. Whether the extended period of limitation can be invoked in the facts and circumstances of this case.
- iv. Whether penalties imposed under Section 76, 77 & 78 of Finance Act, 1994 justified in the facts and circumstances of this case.

6.1 The issue is in reference to the Franchise services which have been defined under Finance Act, 1994 as amended as following:

“Section 65 (47): “franchise” means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake process identified with franchisor, whether or not a trademark, service mark, trade name or logo or any such symbol, as the case may be is involved.

Section 65 (48) “franchisor” means any person who enters into franchise with a franchisee & includes any associate of franchisor or a person designated by franchisor to enter into franchise on his behalf & the term franchisee shall be construed accordingly.

Section 65 (105) (zze) the “taxable service” means any service provided or to be provided to a franchisee, by the franchisor in relation to franchise.”

6.2 Hon'ble Bombay High Court in the case of Mahyco Monsanto Biotech [2016 (44) STR 161 (BOM)] has observed as follows:

“Para 42. In our opinion, the most fundamental aspect of permissive use of goods is that at the end of the period for which the use is granted, the goods must be returned to the transferor. Let us consider this in the context of a car hire service, a book library service, Amazon Kindle Unlimited and iTunes Radio. When a car is taken on hire, a fee is paid and the car can be used for a certain period of time. During this time, the person renting the car can only use it. He cannot part with it and certainly cannot destroy it. Once the period of hire comes to an end, the car must be returned to the transferor. Therefore, the effective control over the car remains with the transferor. Likewise, in the case of a book library, the books must be returned to the library. With the Kindle Unlimited, one must pay a subscription fee to gain access to an unlimited number of books in the proprietary AZW format. When the subscription expires, all the books are repossessed. iTunes Radio too is a similar concept. A subscription fee is paid, which allows access to music. Once this expires, access to the music is denied. These, in our opinion, are cases of permissive use. The Monsanto India sub-licensing transaction could only be a service in one circumstance, i.e., if the seed companies gave Monsanto India a bag of seeds to mutate and improve with the Bollgard Technology which would, thereafter, be returned to the seed companies. That might perhaps be a service”.

Para 70. “We do not mean to suggest that every franchise agreement will necessarily fall outside the purview of the amended MVAT Act. There is conceivably a class of franchise agreements that

would have all the incidents of a 'sale' or a 'deemed sale' (i.e., a transfer of the right to use). *Black's Law Dictionary* defines a franchise, in the context of a commercial transaction as (*Black's Law Dictionary, 8th Ed.*) :

The sole right granted by the owner of a trade mark or a trade name to engage in business or to sell a good or service in a certain area".

Para 71. "*Chambers' Dictionary (Chambers' Dictionary, 1983 Ed.)* too describes it as a -

a commercial concession by which a retailer is granted by a company the exclusive right of retailing its goods in a specified area ..."

The test laid down by Hon'ble Bombay High Court regarding Franchise is one where there is transfer of the right by the owner of a trade mark is temporary.

6.3 Delhi Bench of Tribunal has in case of Delhi Public School Society, has interpreted the said franchise service as following:-

"4. Salient clauses of the agreement between the assessee and the Franchisee :

The assessee entered into agreements with distinct entities which intended to establish schools in different areas (within India and overseas as well) in collaboration with the assessee. The assessee apparently has experience in establishing and managing schools that provide quality education and has a brand image in the said area. We are informed by learned counsel for the assessee; and this assertion is not disputed by Revenue, that the several agreements, insofar as are relevant for the purposes of these appeals, are substantially similar

and have identical provisions, relevant to consideration of this lis. We therefore advert to relevant provisions of the agreement dated 20-1-2004 entered into between the assessee and Maharaja Hari Singh Social and Educational Foundation, Jammu (hereinafter referred to as Society). This agreement and another was considered in the adjudication order dated 30-3-2006, the subject of Appeal No. 248 of 2006. Now, to the relevant provisions of the agreement dated 20-1-2004 :

(i) the agreement bears the heading Education Joint Venture;

(ii) the preamble to the agreement states that as the Society is desirous of setting up an English Medium School at Leh (Ladakh) it approached the assessee for an educational joint venture and the parties agreed to set up an English Medium School at Leh. Clause 1 provides that the parties would collaborate to set up the school at Leh. Clause 2, sets out that the assessee permits, allows and grants a revocable license to the Society to use the name DPS, its Logo and motto for the purpose of the school to be established at Leh, during currency of the agreement. Under Clause 3, the Society is required to pay the assessee rupees one lakh, in advance commencing from the year the school starts functioning.

(iii) Clause 4, provides that the assessee shall be at liberty to grant license for or open more schools in the area of Leh (Ladakh), in collaboration with any other society/organization or on its own.

(iv) Clause 5, states that the school shall be established, managed and run by a Board of Management (BOM). Other sub-clauses in this Clause set out the composition of the BOM. Suffice it to notice, that the Chairman of the BOM shall be the Chairman of the

assessee or any other nominee of it; and the Vice-Chairman is also a nominee of the assessee; and three of the other six members of the BOM would also be nominees of the assessee. The pro Vice-Chairman and three of the ordinary members of the Board would be nominees of the head of the Society and the pro Vice-Chairman could exercise powers of the Chairman or the Vice-Chairman only in their absence. Thus, of the nine members of the BOM, five are representatives of the assessee and four of the Society.

(v) Clause 6, enumerates powers, functions and authority of the BOM. The BOM is responsible for the management, control and running of the school; all rights in relation to the school (save as excepted); the liabilities in relation to the BOM or the school shall however be to the account of the Society (not the assessee or the BOM); and the BOM is obligated to fulfill the assessee's (DPSS) policies. Apart from (specified) academic responsibility, the BOM is entrusted the duty to appoint the Principal, teachers and staff of the school, to be selected by a Selection Committee constituted by the assessee which shall comprise one member of the Society. The clause sets out other powers and functions of the BOM which are of a house-keeping nature and incidental to management.

(vi) Clause 7, enumerates the obligations of the Society under the agreement. The Society (not the assessee) has extensive and exclusive obligations, in respect of providing land, buildings, all infrastructural amenities for the school including residential accommodation for the Principal, teachers and staff; and the entire financial responsibility towards these provisions. The Society is also responsible for meeting the deficit in the revenue budgeted expenditure, to raise loans for all establishment

and running expenditure and to meet the consequent financial liability. The assessee is specifically immunized any liability or responsibility in this area and the Society undertakes to indemnify the assessee from any claims in this regard. Sub-clause (p) enjoins the Society to ensure that the school will be in a single campus and that no other educational or other institution (unconnected with the assessee) purports to claim any association with the school. The Society is also required to contest all litigation against the assessee by third parties, arising out of the agreement (under instructions from the assessee) and to bear all the expenses in this behalf.

(vii) Obligations of the assessee are spelt out in Clause 8. Included are academic, managerial, supervisory and mentoring obligations, integral to transfer of the assessee's academic, operational and managerial expertise in the area of establishing and running of schools. Sub-clause (g) enjoins that the assessee will allow and permit use of the name (DPS), its motto/logo, during currency of the agreement; however without any right/title/interest acquiring thereto to the Society or the school. It is specifically stipulated that the rights in the name/motto/logo are the absolute property of the assessee and use of the name (DPS), the motto or the logo is limited for the purposes of the Leh school; and use of these is prohibited for establishing branches or granting sub-licenses [sub-clause (h)].

(viii) Clause 9, sets out the further agreed terms and conditions between the parties. Accordingly, the school building, furniture, fittings, laboratory, library and sports materials etc., shall be provided by the Society; the Society shall bear the expenditure of the staff and the assessee shall not be liable for the same; and on determination of the agreement all assets will stand

transferred to the Society. The entire liability arising out of termination of the faculty, staff shall be to the sole account of the Society, to the total exclusion of the assessee.

(ix) Clauses 10 and 11 of the agreement set out provisions relating to the tenure of the agreement, extension of the same and for termination thereof.

(x) Clause 12, stipulates that on termination of the agreement and closure of the school, all moveable and immovable properties of the school will be returned to the Society, after settlement of the liabilities owing to the assessee; and on dissolution, the Society shall be exclusively liable for all claims against the school, its BOM or the assessee in respect of the management thereof; and the assessee will not in any manner be liable. Clause 13, stipulates that on termination of the agreement, the Society will not use the name/logo/motto of DPS or identical/similar or deceptively similar name/logo/motto, even if it desires to run a school in the same premises or elsewhere.

20. Issues 'C' and 'D'

With effect from 16-6-2005, 'franchise' is defined (to the extent relevant and material for the lis), to mean an agreement where the other party is granted a representational right to provide service or undertake any process identified with the franchisor. Ingredients (2) and (4) of the earlier definition are omitted. In the light of our analysis on issues 'A' and 'B' and for reasons recorded therein the assessee must be considered as having provided the taxable "franchise" service subsequent to 16-6-2005 as well.

The appellant has contended that w.e.f. 10-9-2004 a new taxable service was introduced vide Section 65(105)(zzr)

which is enacted to be a service provided to any person by the holder of Intellectual Property Right (IPR) in relation to Intellectual Property Service (IPS). IPR is defined in Section 65(55a) and IPS in Section 65(55b). IPR is defined to mean any right to intangible property, namely, trademarks, designs, patents or any other similar intangible property, under any other law for the time being in force, but excluding copyright IPS is defined to mean transferring, temporarily or permitting the use or enjoyment of, any intellectual property right. The assessee argues that w.e.f. 10-9-2004 the agreements, on a true and fair construction of their terms, constitute the taxable service falling under Section 65(105)(zr) and therefore subsequent to 10-9-2004 the assessee could not have been assessed to service tax for having provided 'franchise' service. The assessee cannot also be assessed to service tax for having provided the taxable IPS, since even from the show cause notice stage and thereafter as well, the assessee was never put on notice that it would be assessed to tax as the provider of IPS.

In this connection, Shri Sahu referred to a Board Circular dated 27-10-2008 which is a clarification of service tax liability in relation to production of alcoholic beverages under a brand licensing arrangement. Para 2.1 of the circular clarifies that wherever licensee/manufacturers alcoholic beverages under the authority to use a brand name granted by the owner of such brand name - the brand owner; and even where the brand owner provides technical staff/assistance to maintain the required quality, alcoholic beverages so manufactured on the user of such brand name and technical know-how would come within the taxable IPS, even where the property, risk and reward of products so manufactured in here with the manufacturer and not the brand owner. We are not

inclined to lay much credit on this Board Circular, particularly since there is no apparent analyses in the circular on whether such activity would not comprise the other taxable category namely "franchise" service. In any event, in the agreements under consideration in the present lis, apart from receiving remuneration for services provided by the assessee and inherence of risk and reward of the enterprise solely and exclusively on the other parties and not on the assessee, there is also a more regular engagement between the assessee and the other party under the agreements for the purpose of ensuring integration of the assessee academic and managerial experience; operational inputs and its concepts of the business of establishing and running quality English Medium Schools. Further, there is no transfer of the right in the name/logo/motto from the assessee to the other party.

*Another contention of the appellant requires to be considered. According to Shri Sahu, the adjudicating authority had assessed the demand on the analysis of sample agreements between the assessee and other parties and concluded that the assessee is administering schools in collaboration with the others; is actively participating in management of the schools with a dominant role thereat vis-à-vis the other parties. The role of the CESTAT is therefore confined to the issue as to whether the conclusion by the adjudicating authority that the assessee had given representational rights to the other parties, in terms of the agreements, is valid and sustainable; this Tribunal cannot in the circumstances arrive at a conclusion as to the taxability of the assessee contrary to the conclusions recorded by the adjudicating authority. Shri Sahu referred to several decisions on this aspect including *Hukum Chand Mills Ltd. v. CIT - (1967)**

63 ITR 232 SC, Karnataka State Forest Industries Corporation Ltd. v. CIT - (1993) 201 ITR 674 (Karn.); Ciba of India Ltd. v. CIT - (1993) 202 ITR 18 (Bom.); CIT v. Indira Balkrishna - (1960) 39 ITR 546 (SC); Hindustan Ferodo Ltd. v. C.C.E. - (1997) 106 STC 214 (SC) = 1997 (89) E.L.T. 16 (S.C.); Saci Allied Products Ltd. v. C.C.E., Meerut - 2005 (183) E.L.T. 225 (S.C.); Warner Hindustan Ltd. v. C.C.E., Hyderabad - 1999 (113) E.L.T. 24 (S.C.); and Reckitt & Colman of India Ltd. v. C.C.E. - (1997) 10 SCC 379 SC = 1996 (88) E.L.T. 641 (S.C.).

The above citations, in our respectful view, do not assist the appellant. In paragraphs 5.3 to 5.5 (of the adjudication order dated 30-3-2006 - the subject matter of ST Appeal No. 248/20006), the adjudicating authority analysed the claim of the assessee that it was not expected to have a mere passive role, of receiving money for allowing the franchisee to exploit its goodwill and had in fact a dominant role in running the school's and anybody having a dominant role is the master of the situation and has a definitive role in managing the organisation by applying its know-how and expertise in running the schools and therefore the assessee cannot be said to have fulfilled the second ingredient of the definition of "franchise" (prior to 16-6-2005). In our analysis, the adjudicating authority in the abovementioned paragraphs while setting out the contentions of the assessee concluded nevertheless that the second ingredient of "franchise" is also fulfilled. The adjudicating authority concluded that in order to internalise the know-how expertise etc. of the assessee into the enterprise (the schools), a regular engagement of the assessee with the enterprise is essential and such engagement is not inconsistent with the provision of franchise service, insofar as the second ingredient thereof

is concerned. In our considered view, the extent of engagement of the assessee with the enterprise (school) as provided by the terms of the agreement is in furtherance of effective execution of the franchise service provided by it and would not tantamount to the assessee being a joint venturer with the other parties to the agreements. The several decisions referred to by Shri Sahu, in the circumstances do not apply to the facts and circumstances of the present appeals.

On a careful analysis of the transactions engendered pursuant to the agreements between the assessee and other parties, we are of the considered view that these fall more appropriately and clearly within the framework of the taxable 'franchise' service rather than the other, namely IPS. Pursuant to the agreements in issue there is not a mere temporal transfer or permitting of the use or enjoyment of IPR, as defined in Section 65(55a). There is a raft and bouquet of other services provided by the assessee [apart from a mere temporal transfer of intangible property, even assuming that permitting the other party to use the assessee's name (IPS), motto and logo, constitute transfer of intangible property]. Under the agreements, the assessee provides its established concepts of business; operational expertise in establishing and administering English Medium Schools; standards of academic quality and the assessee undertakes to supervise, evaluate and mandate academic and other activities of the School through periodic deputation of visiting teams, ensuring that reports of findings of such teams are considered and adopted by the school and the staff. The terms of the relevant agreements considered holistically bring the transactions more wholesomely within the fold of 'franchise' service rather than 'IPS'. The essential character of the services

provided by the assessee fall overwhelmingly within 'franchise' service. We are compelled to the conclusion that the services provided by the assessee do not fall within IPS since except the temporal permitting of the use or enjoyment of the assessee's intangible property (in its name/motto/logo), other services performed under the agreements are outside the purview of IPS. The temporary permission to use or enjoy the assessee's intangible property right in its name/motto/logo also falls within franchise service as an ingredient thereof; and the agreements fulfil the other requirements of franchise service as well, in a more comprehensive sense, than in the case of IPS.

It may also be noticed that in accordance with the interpretive principles for classification of services set out in Section 65A of the Act, where composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a) are in issue, these are required to be classified as if they consisted of a service which gives them their essential character, insofar as this criterion is applicable. Considered on the touchstone of this principle, the raft of services provided by the assessee under the several agreements, in their essential character fall within "franchise" service.

On the aforesaid analysis we hold against the assessee on issue 'C'. Since the aspects for determination set out as Issue 'D' are dovetailed into our analysis on issue 'C', answered as above, issue 'D' is also answered against the assessee and in favour of Revenue."

6.4 In light of the above decisions the activities undertaken by the Appellant in respect of the

agreements with M/s MSM Singapore and M/s WSG need to be analyzed. There is no dispute in respect of the activities undertaken by the Appellant. The role and activities undertaken by the Appellant, in respect of the grant of media rights have been summarized by the Hon'ble Apex Court, in Union of India Vs Board of Control for Cricket in India [Order dated 22.08.2017 in Civil Appeal No 10732 to 10739/2017]

"2. The precise origin of the game of cricket, though largely unknown, has been traced, at least, to late 15th Century England. With the expansion of British Empire the game of cricket travelled to different parts of the globe including India. Today, if there has to be a national game in India, cricket would certainly be a front-runner. The packed stands in all cricketing venues is certainly not the full picture. Live telecast of all major cricketing events, domestic and international, is beamed to millions of homes in the country. Telecasting/Broadcasting rights are leased out by the organizing body 2 i.e. Board of Control for Cricket in India (hereinafter referred as the "BCCI") through competitive bidding.

3. BCCI is the "approved" national level body holding virtually monopoly rights to organize cricketing events in the country. Grant of telecasting rights of these events is, therefore, a major source of revenue for the BCCI."

6.5 Hon'ble Supreme Court of India in Secretary, Ministry of Information and Broadcasting (Mol&B), Govt. of India (GoI) and Others Vs. Cricket Association of Bengal and Others [1995 2 SCC 161], held, "...It

must further be remembered that sporting organizations such as BCCI/CAB in the present case, have not been established only to organize the sports events or to broadcast or telecast them. The organization of sports events is only a part of their various objects, as pointed out earlier and even when they organize the events, they are primarily to educate the sportsmen, to promote and popularize the sports and also to inform and entertain the viewers." Thus Appellants essentially organize matches so that the same can be viewed by people, either by visiting the stadium or through the telecast of the same.

6.6 from the above decisions and the observations of the Apex Court, it is quite evident that appellants are not only responsible for organizing the cricket matches but also to educate, promote, popularize, inform and entertain the viewers. For the said purpose appellants allow entry into the stadium for viewing the match and also ensure the telecast of the match for the purpose of those who cannot visit the stadium for viewing the said matches. For taking the live telecast of the matches to the home of viewers, Appellant grant media rights to selected party on exclusive basis. The party granted such media rights represents the BCCI, and is designated in terms of the agreement as *"Official Broadcaster"*. In light of the above decisions we take note of the observations made by the Commissioner on

the terms of agreements entered into by Appellants with the M/s MSM, Singapore and M/s WSG.

6.7 On the basis of the terms of agreements as discussed above when compared with the terms of agreement as considered by the tribunal in case of Delhi Public School Society, supra, we find striking similarities. Commissioner has in his order examined the terms of agreement and has observed as follows:

"a) On perusal of the various definitions & clauses / sub-clauses given in the agreements dt 21.01.2008 between BCCI & MSM / WSG, inter alia, the following is observed:

(i) The licensor (BCCI) as per para 2.1 of the agreement, granted to M/s MSM Satellite, Singapore & M/s World Sports Group (both licensees), media rights such as television rights, licensee mobile rights on an exclusive basis, the right to make available Interactive services to viewers of the footage & the right to produce unilateral coverage & unilateral commentary for transmission & delivery by means of the permitted delivery system & the exclusive right to Broadcast etc. BCCI has granted royalty-free license to the licensee.

(ii) As per para 2.2 of the agreement it is inter alia observed that the Licensor grants exclusive media rights to the Licensee. One of the clauses of these rights is that the right or license granted to the Licensee is on an "Exclusive" basis which means that the Licensor will not enter into agreements with any other person to license to such other person the rights as qualified in this agreement.

Here I observe that BCCI granted the media rights to their licensees on exclusive basis & undertook that they will not enter

into agreements with any other persons for licensing of such media rights.

(iii) As per para 2.9 of the Agreement the Licensor grants to the Licensee a non-exclusive royalty-free license to exploit during the rights period, the League Logos, League Marks & Team Logos (collectively called the Licensor's Marks) together with those materials provided to Licensee solely in connection with the Licensee's exploitation of the media rights.

(iv) As per para 2.14 of the Agreement, the Licensee shall have the right to refer to itself & to authorize third parties to refer to it as the "**Official Broadcaster of the Indian Premier League**" & Licensor hereby confirms that it shall not authorize any third party to use any such designation in or in relation to the territory.

(v) In the agreement under the major paras 2, 3, 4, 5, 6, 8 & 9 the franchisor inter alia laid down terms & conditions regarding grant of media rights, access & additional licensee production, over spilling of satellite transmissions, availability of live feeds, licensee's general obligations etc.

(vi) In consideration for the grant of the media rights, the Licensees had to pay BCCI the rights fee. Under para 7 of the Agreement the details of the rights fees, payment schedule, bank guarantees etc was given. As per the para 7.3(i) of the Agreement, all amounts (including the rights fee) due under the agreement must be paid by the Licensee into the designated account in Indian Rupees (INR).

(vii) Under para 8 of the Agreement the Licensee's general obligations were mentioned. The licensee was obliged to follow the terms & conditions mentioned in para 8 which were as follows:-

Para 8.1 - Interactive Services - "Licensee shall be entitled to launch Interactive Services in connection with the exercise of the media rights provided that such Interactive Services shall not (i) offer to make available any gambling service without prior written agreement of Licensor or (ii) be exercised in such manner as to suggest an endorsement by Licensor, IPL, or by any individual or

team participating in the IPL of any goods, games or services without the consent, authorization & approval of (as applicable) the Licensor, IPL or such individual or team

Para 8.2 - Virtual Advertising - Licensee agrees that it will not alter or add to the content of the Feeds whether electronically or otherwise so as to remove, change or obscure any in-venue advertising, any graphics package or live feed Insertions incorporated into the feed by or on behalf of Licensor in accordance with this agreement. ...

Para 8.3- Quality & Integrity of Broadcast - Licensee shall ensure that all of its transmission of Footage & the transmissions of any sub-licensee shall be of a quality & standard generally to be expected of a leading broadcaster...

Para 8.4- Licensee shall comply & shall procure that all Sub-licensee comply, at all times with the prevailing Broadcaster's guidelines & Brand guidelines as may be issued by licensor from time to time during the rights period...

Para 8.6 - Licensee shall ensure that the league & the teams are each referred to by their full titles (as notified by Licensor from time to time & including any Title Sponsor) in all transmissions of the Feed or footage, it being agreed that no inadvertent failure to comply with the provisions of this clause shall amount to a breach of this agreement....

Para 8.7 - It is agreed that the licensee shall be entitled to retain all revenues that it derives from the graphics, advertising and/or sponsorship that it incorporates within its transmissions of Feed, footage and/or unilateral footage .

Para 8.8 - Broadcast sponsors - Licensee shall be permitted to appoint & to permit its sub-licensee to appoint broadcast sponsors subject to the terms & conditions of this agreement & in particular the provisions of clause 8.9....

Para 8.10 - Sponsored Title & Logos - In all transmissions, broadcasts & exhibitions of matches, Licensee shall:

Ensure that the sponsored title & the relevant sponsored logo shall appear in the opening & closing titles, together with a verbal mention of the sponsored title immediately afterwards,

Ensure that the sponsored title & the sponsored logo shall prominently appear on the screen display of any fixture/league table(s) or team lineup, all trailers & other on air and/or off air publicity and/or promotional material in relation to the league or any match, Licensee's broadcasts of any service (including news bulletins)....

Ensure that whenever the sponsored title & the relevant logo so appear, they shall not be diluted by juxtaposition with a name, brand name or logo of any third party

16. *In this regard I clearly observe that it was mandatory for the licensees to majorly display the sponsored titles & logos of BCCI during the time when important details of the tournament were flashed on the screen display.*

Para 8.13 - Licensee acknowledges that all Intellectual Property rights in each of the sponsored logo & sponsored title together with any goodwill attached to each of them shall remain as between the parties, the sole property of the Licensor & shall inure solely for the benefit of the Licensor....

(viii) Para 12.4 - Any & all Intellectual Property Rights that subsisted in the feed & footage (including transmissions & recordings thereof by Licensees & any sub-licensees) shall be owned by the Licensor for the full term of copyright including all renewals, reversions & extensions thereof & thereafter in perpetuity.

17. *On perusal of the contents of the Agreement I observe that the Indian Premier League (IPL) represented the Twenty 20 cricket tournament in India. It is a cricket tournament with a unique identity of its own, in the sense that the IPL title or its logos, marks etc cannot be used for any other Twenty 20 cricket tournaments anywhere else in the world. The cricket matches in*

the tournament are played only among the fixed set of teams which have their own distinct identity & are a part of IPL league. Only the BCCI has the authority to admit the teams & to hold the players auction for the IPL league. BCCI holds the commercial rights to each of the league teams, the league matches & the player auctions. The IPL league & the sponsored teams have their own exclusive league logos, league marks, team logos. As per para 2.9 of the Agreement, BCCI granted to their licensees, a non-exclusive royalty-free license to exploit the league logos, league marks & team logos (all collectively called as the licensor's marks) solely in connection to exploitation of media rights by the licensees. I find that such licensor's marks are actually a sort of brand identities which are owned by BCCI & BCCI has given to the licensees the rights to exploit them in the media. Here I also find that while telecasting the tournament on the television or through mobile / internet medium, the licensees only portray such brand identities of the IPL tournament & do not show their own involvement while telecasting of the matches. It is thus clear that the IPL tournament is a product of BCCI & the broad cast or telecast of such product through the media would infer as marketing of the product. When the media rights are given to the licensees, it allows them to telecast the matches under the brand identities or licensor's marks' of the BCCI."

6.8 In our view accordingly the services as provided by the Appellants to the M/s MSM, Singapore and M/s WSG are squarely covered by the definition of franchise services as defined by the Section 65(47), 65(48) & 65(105) (zze) of the Finance Act, 1994.

6.9 Appellants have in their submissions referred to the decision of Global Transgene, supra to argue that
"5.4 Admittedly, in a franchisee transaction the

franchisee loses his individual identity and represent the identity of franchisor to the outside world, as in the case of 'McDonald' the customers are not concerned with who owns the 'McDonald's restaurant (franchisee). The customers identify it with 'McDonald (the franchisor)."

The said argument needs to be considered in the light of observations made by the tribunal in case of Amway as follows:

*"11. As regards franchise service, the contentions that no word in a statute is to be treated as redundant, that legislature is deemed not to waste its words and that each word in a statute has to be given proper meaning is unexceptionable and accepted. Consequently, we are not making any reference to various judicial pronouncements cited by the appellant in support of the said contentions. The appellant also tried to explain to us as to how the word "franchise" is understood in some other countries. These sources may be useful for interpretational purposes in case of ambiguity in the statute, However, the word franchise is defined in Section 65(47) of Finance Act, 1994 and therefore any reference to the meaning of the said word in other countries is of no direct relevance, because for the purpose of this case, we have to go only and only by the definition of franchise given in Section 65 (47) *ibid*. Therefore, it will be pointless to indulge in any analysis with regard to the meaning of the word franchise in other countries (and in relation to any other Indian law for that matter). In this regard it is useful to extract below the portion of para 9 from the judgment in the case of UOI and Another v. Hansoli Devi and Others (*supra*):*

“A provision is not ambiguous merely because it contains a word which in different contexts is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is, in my judgment, ambiguous only if it contains a word or phrase which in that particular context is capable of having more than one meaning”.

12. *It is evident that the only issue involved in the present case to the extent it relates to the impugned demand under franchise service is whether the appellant gave to the distributors representational right to sell its products i.e. products identified with it; the appellant does not dispute that it gave right to sell products identified with it to the distributors. To decide this issue, one necessarily has to refer to Amway’s Business Starter Guide” and “Distributor Application and Terms and Conditions”. As per the terms and conditions of distributors, an Amway distributor is also governed by Rules of Conduct. According to the Business Starter Guide, a distributor is also known as an Amway Business Owner (ABO). Top 10 Rules prescribed for ABOs inter alia stipulate that the ABO is to be “truthful and accurate in offering Amway business opportunity or selling Amway products”. In other words, an ABO does not merely sell Amway product but also offers Amway business opportunity. In terms of Code of Ethics of Amway distributors, the ABO inter alia agrees to.*

(i) present Amway products and Amway Sales and Marketing Plan to all prospective distributors. Amway Sales and Marketing Plan as defined in para 2.1.5 of Business Starter Guide means “the plan provided in the Amway Business Starter Guide detailing Amway’s performance incentive systems, sponsoring procedures and guidelines, requirements, systems, procedures, and

policies regarding the presentation of Amway products, the Amway business and the management of an Amway organization, as amended from time to time by Amway and of which these Rules are a part.

(ii) be courteous and prompt in handling of any and all claims for exchange and return.

(iii) conduct himself in such a manner as to reflect only the highest standards of integrity, frankness and responsibility because he recognizes that his conduct as an Amway Distributor has far reaching effects.

As per para 4.1 of the said Guide, a Distributor must adhere strictly to the guidelines, systems, procedures and policies mentioned in the Amway literature, the Amway Business Starter Guide of which these Code of Ethics and Rules of Conduct and Amway Sales & Marketing Plan are a part. Para 4.8 of the Guide, inter alia, stipulates that Distributor shall comply with all law, regulations and codes that apply to the operation of their Amway business wherever said Amway business may be conducted within the market and they must not conduct any activity that could jeopardize the reputation of the Distributor and/or Amway. Thus the ABO is not merely having right to sell Amway product; he also does presentation of Amway's Sales & Marketing Plan which inter alia also includes Amway's system, procedures and policies regarding presentation of Amway's products, the Amway's business and Amway's organization. The ABO is also required to conduct and behave in the manner prescribed so as not to jeopardize the reputation of Amway.

As per para 4.13 of the Guide, no distributor shall represent to anyone that there are exclusive franchises or territories available under the Amway Sales and

Marketing Plan. No distributor shall represent that he or she or anyone else has the authority to grant, sell, assign or transfer such franchises or to assign or designate territories. Thus the Business Starter Guide clearly delineates as to in what respects/aspects the ABO cannot represent. In other words, it follows that it is incorrect to claim that a distributor has not been granted representational rights to sell products identified with Amway. It becomes further evident from para 8.2 of the said Guide which states that, "At the first contact with prospective customers and Distributors, a Distributor should (8.2.1) Introduce himself by name; (8.2.3) As soon as practicable, he should make himself known in a suitable fashion as an Amway Distributor and should provide information concerning his name and address as well as concerning Amway; (8.2.3) Indicate purpose of contact, namely the sale of Amway Products and/or the introduction of the prospect to the Amway business" (emphasis added).

Thus, at the first contact, the distributor is expected to make himself known in a suitable fashion as an Amway distributor and provide information concerning his name and address as well as concerning Amway and the purpose of contact, including introduction of the prospect to the Amway business. Thus it again becomes evident that the ABO has been given right to represent Amway business. Para 12.12 of the Guide also clearly states that "if the distributor makes a serious misrepresentation of Amway or the Amway business which in Amway's opinion, is not likely to be satisfactorily remedied by corrective actions", then Amway can terminate the authorization to operate as a distributor. Thus only serious misrepresentation of Amway or Amway business can lead to termination of distributorship. In other words,

he can, indeed should/is expected to, represent Amway in accordance with and to the extent allowed as per the Amway's Business Starter Guide and Distributor Application and Terms and Conditions. In the Sections of the Starter Guide dealing with Social Media Policy, it is stated (referring to the ABOs) that "Remember, what you say reflects upon your and Amway's reputation". Now Amway's reputation can be affected by what the ABOs says only when he is taken to represent Amway in some (however limited) capacity.

From the aforesaid analysis of the Amway "Business Starter Guide" and "Distributor Application and Terms and Conditions", it becomes evident that ABO/distributor is not merely granted right to sell Amway products but he has the representational rights to sell such products."

In light of the above observations, the phrase representational right would not mean, extinguishing the identity of the franchisee, but is only to grant representational right in respect of the transaction in relation to the services that is being provided by the franchisor. In terms of para 2.14 of the agreement, appellants have authorized the licensee to refer themselves as "**Official Broadcasters of the IPL**". Thus the activity of the telecast or broadcast of the IPL matches which as noted by the Apex Court, in decisions referred earlier, has been assigned for a consideration to the licensee, and they have been permitted in terms of the agreement as "**official broadcasters of the IPL**". **Thus it is quite evident that the appellants have**

granted representational rights to the licensee, in relation to the telecast/ broadcast of the IPL matches.

6.10 The decision of tribunal in case of Direct Internet Solution Pvt Ltd, supra referred to by the Appellant, in their submissions, is also distinguishable, because in that case the ICANN which was proposed to be the franchisor, was not required to provide any services which it got provided through the franchisee. The para 35, 36 & 39 of the said decision where the issue has been considered are reproduced below:

"35. It would be seen from the above-mentioned sub-clauses, ICANN Accredits the appellant after identifying and setting minimum standards for the purpose of registration functions. Further, Clause 2.2 permits the appellant to use a symbol which indicates that ICANN has accredited the appellant. We have also gone through and seen the said symbol which is reproduced below :

36. From the mission and core values as also the agreement between ICANN and the appellant we are not able to find out any service or a process for which ICANN is associated and is being provided by the appellant. Appellants provided registrar service and as per the powers under Article II of powers for ICANN, ICANN is prohibited from acting as registrar. From the agreements or from the by-laws, we are not able to find any process that has been developed by the ICANN and being used by the appellants. We find what is being done by the ICANN is to set minimum standards for the performance of registration function and recognize that the appellants

are meeting those standards. Revenue has not been able to pinpoint to us either any service or any process for which ICANN is known and that process is being used or being provided by the appellants. In the absence of any such service or process we are unable to agree with the Revenue that the appellants are providing franchise service of ICANN. Even the agreement which permits the use of ICANN symbols clearly indicates that appellants are ICANN Accredited Registrar and nothing beyond that. We are in agreement with the appellant's submission that accreditation and representing the ICANN are two different things and the appellants are only accredited by ICANN and they are not representing ICANN.

39. *We find that agreement between ICANN and Registry has not been produced either by Revenue or the appellant. We find that Revenue have not been able to bring on record any service or process identified with ICANN which is required to be provided by various registries accredited by ICANN. It appears that registries are also accredited like registrars. ICANN might have provided minimum standards for registries but that does not imply that registries are providing any service or process identified with ICANN. A reading of the above mentioned agreement clearly indicates that this is an agreement between registry and the appellant and has nothing to do with ICANN and under the circumstances we are not able to persuade ourselves that the appellants are providing franchise service of the associate franchisor of ICANN (i.e. registries)."*

The facts in that case are clearly distinguishable from the facts of the present case. In terms of the decisions of the Apex Court referred by us earlier, the functions

performed by the appellants are not restricted to organizing the match but are much beyond that. Telecasting/ broadcasting of the match for the purpose of viewers who are not in position to visit the venue of match for watching the match is also the function being performed by them.

6.11 The decision of the Delhi High Court in case of Delhi International Airport P Ltd, referred by the Appellant was considered by the tribunal in case of Godfrey Phillips India Ltd [2018 (10) GSTL 467 (T-Mum)]

“5.2 In the instant case the appellants are giving machine containing their company logo, which may be illuminated, affixed on the said machine. The said machine in terms of agreement is required to be placed in such manner that the logo/illuminated logo is clearly visible. Ld. CA have relied on the decision of Hon’ble Delhi High Court in case of Delhi International Airport P. Ltd. v. Union of India [2017 (50) S.T.R. 275 (Del.)]. In the said case the appellants were appointed by Airport Authority of India (AAI) for long term operation, management and development of Delhi Airport. This was done under policy decision of Government of India to privatize Airport for their better management. In the said case facts were as follows:

8. The consortium led by the GMR Group was selected by the AAI as the successful bidder to design, construct, operate, maintain, upgrade, modernize, finance, manage and develop the Delhi airport and the consortium led by the GVK Group was selected by the

AAI as the successful bidder to design, construct, operate, maintain, upgrade, modernize, finance, manage and develop the Mumbai airport.

9. *As per the policy decision of the Government of India and in terms of the respective OMDAs, both dated 4-4-2006, executed between the AAI and the petitioners, the petitioners have been granted the exclusive right and authority to undertake some of the functions of the AAI being the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the respective Airports.*

10. *Article 2.1.1 of the OMDA reads as under:*

"AAI hereby grants to the JVC, the exclusive right and authority during the term to undertake some of the functions of the AAI being the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and to perform services and activities constituting Aeronautical Services, and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport and the JVC hereby agrees to undertake the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and at all times keep in good repair and operating condition the Airport and to perform service and activities constituting Aeronautical Services and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport in accordance with the terms and conditions of this Agreement (the "Grant")."

11. *The petitioners provide various Aeronautical Services and Non-Aeronautical Services as mentioned in Schedule 5 and Schedule 6 of the OMDA respectively to*

various consumers. For the services provided, the petitioners charge from the users of the services.

12. Under Article 11.1 of the OMDA, in consideration of the Grant of Rights granted under Article 2.1.1 of the OMDA, the petitioners have to, inter alia, pay an Annual Fee to AAI. The Annual Fees payable to AAI is @ 45.99% in the case of DIAL & @ 38.7% in the case of MIAL, of the projected Revenue to be received by the petitioners.

13. The Revenue's share payable to AAI is paid through an escrow bank account. Under the escrow mechanism, all receipts from various sources received by the petitioners are deposited into a Receivable Account from which they are transferred to a Proceeds Account. From the Proceeds Account, payments are first made towards statutory dues and out of the balance, AAI is paid the Annual Fees and any other amounts due to it under the OMDA. The balance is transferred to a Surplus Account, which comes to the petitioners as their respective share of the Revenue.

In the said case the defence of the appellant was what they are recovering is only share of the Revenue and DIAL is not paying to Airport Authority of India. In paras 28 and 29 of the said order following has been observed.

28. It is further submitted that the AAI's share is not relatable to any Franchise but is a 'revenue share' and the Annual Fees is paid out to the AAI through an escrow mechanism even before any portion of the gross revenue is received by the petitioners. It is contended that the Annual Fees is not a 'consideration' paid by the petitioner to AAI for any service, but is an appropriation of Revenue by AAI even before any part of the Revenue is received by the petitioners.

29. It is contended that the AAI has a right to receive its specified revenue share. The gross revenue is appropriated by AAI at its very source and the petitioner receives only the balance of the gross revenue. There is no payment by the petitioner to AAI from its funds but AAI appropriates its share from the escrow account as per the priority mentioned in the escrow mechanism. It is submitted that AAI renders no service to the petitioners for earning this share of the revenue on which the petitioners have already paid Service Tax under the taxing entry 'Airport Services'.

In the said case after examining terms of the agreement Hon'ble High Court reached to the conclusion that no representational rights granted by Airport Authority of India to Delhi International Airport P. Ltd. The facts are clearly distinguishable. There is no revenue sharing in the instant case.

5.3 Examination of terms of the contract reproduced in the para 60 of the said order clearly shows that DIAL was not required to prominently show the logo/mark to AAI anywhere while providing the said service. The perusal of the Article 2.1.1. of the Agreement in the said case (reproduced above) clearly shows that specified activities were sub-contracted to DIAL without any representational rights. However in the present case the appellants are receiving money from clients. The clients are required to place the machine provided by the appellant at prominent place in their premises. The clients are required to display the logo/mark/illuminated signs of the appellant prominently displayed. In view of the above it is seen that agreement in the impugned case is different than the agreement in case of DIAL. In paras 55 to 58 Hon'ble High Court has observed as under :

55. For OMDA to constitute a franchise, it would have to satisfy the requirements of Section 65(47) of the Finance Act, which *inter alia* requires that the franchisees (Petitioners) should have been granted representational right by franchisor (AAI).

56. Merely because, by an agreement, a right is conferred on a party to sell or manufacture goods or provide services or undertake a process, would not *ipso facto* bring the agreement within the ambit of a franchise. What is also required is to establish that the right conferred is a "representational right".

57. The term "representational right" would necessarily qualify all the three possibilities i.e., (i) to sell or manufacture goods, (ii) to provide service, and (iii) undertake any process identified with the franchisor.

58. A representational right would mean that a right is available with the franchisee to represent the franchisor. When the Franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor. The individual identity of the franchisee is subsumed in the identity of the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor.

The above observations essentially summarized the test for existence of franchisee.

5.4 The appellant also relied on the Tribunal in case of *Global Transgene Ltd. v. CCE* [2013-TIOL-1259-CESTAT-MUM = 2013 (32) S.T.R. 86 (Tri. - Mumbai)]. In the said case facts are as under:

3.1 The contention of the appellant is that they have entered into a Commercial Agreement dated 14-10-2001

with M/s. Biocentury Transgene (China) Co. Ltd. (BTC) to multiply cotton seeds containing 'Fusion Bt. Technology' for transferring the technology to the sub-licensees. Under this contract, they are liable to pay royalty to BTC. This transaction is not under dispute in this appeal.

3.2 Pursuant to this agreement, the appellant entered into sub-licensing agreement with various seed procuring companies to transfer the technology obtained from BTC for a consideration in the form of sub-license fee and the Revenue seeks to levy service tax on this fee under 'Franchisee services'.

3.3 The contention of the appellant is that before the amendment on 16-6-2005 or thereafter, one of the key requisitions for the transaction to qualify as taxable franchise service was that the franchisee should have been granted 'representational right' to sell or manufacture goods or to provide service or undertake any process identified with franchisee, whether or not a trademark, service mark, trade name or logo or any such symbol.

3.4 The appellant produced sample of product-package labels from and contended that no logo or hallmark belonging to the appellant is put on the package. The package only contains a remark 'Fusion BT' which denotes that the seeds being sold contain Fusion BT genes, which is neither a logo, nor a trademark or hallmark of the appellant. It only indicates the technology contained in the seeds under sale.

3.5 The contention is that the said product-package label clearly indicates that the seeds are manufactured and marketed in by the sub-licensees in their own name. There is no representation on the package either of the Appellant or the Licensor (owner of the technology). The

label on the package shows beyond reasonable doubt the sub-licensees do not claim to represent anybody but effect the production, sale, and marketing on their own name.

3.6 The contention is that the said style of the presentation of the product-package label is synonymous with the practice being followed by other manufacturers. For example, a laptop containing a label of "Intel" or "Windows" only denotes that the processor or the operating system/software, as the case may be, in the said laptop is that of Intel or Microsoft. By putting such label, the laptop manufacturing company does not represent either "Intel" or "Microsoft" or become the franchisee of "Intel" or "Microsoft" or become the franchisee of "Intel" or "Microsoft".

We find that in the said case there is no logo or mark of the Global Transgene Ltd. on the product being marked. In the instant case product being marked and the machine used for making the product, both contained logo/mark/eliminated signs of the appellant. In view of this fact in case are different. In the instant case the agreement contains following clause.

WHEREAS GPI is in the business of selling beverage ingredients (for hot and cold beverages) of different flavours, premixes and syrups (hereinafter called "Raw Materials") as well as placement and maintenance of its branded beverage vending machines.

WHEREAS the Franchisee has approached GPI and represented that it has the required location and requisite infrastructure and has offered to run and operate GPI's vending Machine at this location using GPI Raw Materials and as per technical assistance and guidance of GPI at its premises.

AND WHEREAS relying upon the aforesaid representations of the Franchisee, GPI has agreed to enter into this agreement on such terms and conditions as mentioned hereinafter.

NOW THIS AGREEMENT WITNESSETH and it is hereby mutually agreed between the parties hereto as follows:

--

ARTICLE 2 INSTALLATION : GPI shall install __No. of Beverages Vending machines (hereinafter referred as the said machine/s) along with accessories more particularly described in Annexure-A attached herewith, at the premises of the Franchisee located at____(complete address). To meet the expenses incurred in installation, the Franchisee shall make a onetime payment of Rs. 5,000/- as installation charges at the time of entering into this agreement.

ARTICLE 3 SCOPE OF SERVICES AND OBLIGATIONS OF THE FRANCHISEE:

The Franchisee hereby agrees and undertakes that it shall at all times;

(a) Run and operate the said vending machine/s and sell beverages prepared from GPI "Raw Materials" mentioned in Annexure-A (attached herewith) or as modified by GP from time to time,

(b) Franchisee shall not sell any other beverages from vending machine other than as specified by GPI from time to time and shall follow the operating instructions for the machine at all times for proper and consistent functioning.

(c) Provide at its own expenses the entire infrastructure, facilities (including electricity, BMC water,

etc.) and manpower necessary for the aforesaid activities/services.

(d) Purchase the requisite quantities of the aforesaid "Raw Materials" from GPI/its authorized nominee and shall maintain adequate stock of the same at all times during the term of this agreement.

(e) GPI/its nominee only shall have the right to re-fill/reload the said Raw Materials in the said machine.

(f) Under no circumstances and in no manner use the said Raw Materials for any other purpose than as agreed under this agreement

(g) -----

(h) Store the said raw materials in perfectly sealed condition and shall not change the original composition of the same without the written approval from GPI and shall at all times be liable for any misuse, tampering, adulteration of the said same either by itself or by any other person and in any manner whatsoever.

(i) Use the fresh and can unexpired stock of the said raw materials for the preparation of the said beverages and undertaken/bear all the liabilities/fines/penalties, etc., as may be brought against/imposed on GPI in case of any violation in this regard.

(j) Maintain and keep intact the original logo advertisement and/or any other indication/mark affixed on the said machine and shall neither obstruct, deface or remove the same nor shall add any other logo, advertisement, mark, etc. (other than the ones agreed/approved by GPI) to the said machine. It shall not obstruct, move or remove the said machine from its original place of installation without prior written approval of GPI. In the event the machine contains an

illuminated signs, shall keep such sign illuminated at all times.

ARTICLE 6 : INTELLECTUAL AND PROPRIETARY RIGHTS : The Franchisee shall not have any rights, titles or interests including intellectual/ proprietary rights or otherwise in or to the GPI trademarks, trade names, logos, said raw materials, machines, etc., supplies by GPI.

ARTICLE 7: OWNERSHIP AND TITLES: The ownership rights, titles, interests, etc., in the said Vending Machine shall always vest with GPI. The Franchisee hereby agrees to hold the same as a Bailee in trust for GPI without any right, title or interest in or to the same and shall neither sell, alienate, mortgage, withhold the same in any manner whatsoever nor it shall create any charge or encumbrance on the same. It shall not have any right of unpaid vender lien in respect of the said Vending Machine. The said Vending Machine is and shall at all times remain sole property of GPI and GPI shall have the absolute rights to take away, remove, renovate, replace and or to deal with it in any manner and at any time as it may deem fit and proper.

Perusal of the above terms and condition of the agreement shows that significant importance has been given to the display of logo/advertisement and other indication/mark affixed on the machine. There are clauses that prohibit appellant from the obstructing/defacing or removing the same from the said machine. The agreement also prohibits adding any other logo, mark (other than agreed and approved by the appellant). Agreement also prohibits the appellant's clients from moving or removing machine from its original place of installation without prior approval of the appellant. Clause in agreement shows that clients are

required to keep illuminated signs on the machine, if any, illuminated all the times. The article 6 of the said agreement prescribed that franchisee shall not have any right, title or interest in the appellant's trade mark/trade name/logo. Aforesaid agreement also prohibits franchisee from selling any other beverages from the vending machines in terms of clause (b) of Article 3 of agreement. In fact as per clause (e) of Article 3, the appellant or its nominee only have right to refill, reload the raw material in the vending machine. In terms of above condition of the agreement itself apparent that the appellant have granted representational right to the franchisee. To any person wishing to have beverages, it would appear that he is buying beverages from the appellant and not from the franchisee as it is the appellant's name that appears on the machine and same is prominently displayed on the machine. The raw material used also appearing the brand name of the appellant. To a person purchasing the beverage from the said vending machine it would appear that he has buying the same from the appellant through franchisee. In this circumstance, it cannot be denied representational rights have been granted to the franchisee by the appellant."

In the media rights agreement under consideration we find that similar conditions as to those in the case of Godfrey Phillips, we are inclined to follow the said decision distinguishing the decision Global Transgene & Delhi International Airport Authority.

6.12 Since we are holding that the services provided by the appellant in terms of media rights agreement to the

licensee to fall within the category of Franchise Services, we do not examine the claim for classification under the category of "Commercial Use or Exploitation of Event." In our view, the category of "Commercial Use or Exploitation of Event" refers to the services being in relation to the Commercial Use or Exploitation of the Event for one time and is not in relation to grant of representational rights to perform a particular function over period of time.

7.1 Now coming to the second issue framed by us i.e. "Whether the Services Provided by the Appellant will qualify as Export of Services for the purpose of Export of Service Rules, 2005 as amended from time to time." The relevant provisions of the said rules are reproduced below:

3. Export of taxable service.-

(1) The export of taxable service shall mean,-

(i) specified in sub-clauses (d), (p), (q), (v), (zzq), (zzza), (zzzb), (zzzc), (zzzh), (zzzr), (zzzy), (zzzz) and (zzzza) of clause (105) of section 65 of the Act, be provision of such services as are provided in relation to an immovable property situated outside India;

(ii) specified in sub-clauses (a), (f), (h), (i), (j), (l), (m), (n), (o), (s), (t), (u), (w), (x), (y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zza), (zzc), (zzd), (zzf), (zzg), (zzh), (zzi), (ztl), (zzm), (zzn), (zzo), (zzp), (zss), (zst), (zzv), (zzw), (zxx), (zzy), (zzzd), (zzze), (zzzf) and (zzzp) of clause

(105) of section 65 of the Act, be provision of such services as are performed outside India:

Provided that where such taxable service is partly performed outside India, it shall be treated as performed outside India;

(iii) specified in clause (105) of section 65 of the Act, but excluding, –

(a) sub-clauses (zzzo) and (zzzv);

(b) those specified in clause (i) of this rule except when the provision of taxable services specified in sub-clauses (d), (zzzc) and (zzzr) does not relate to immovable property; and

(c) those specified in clause (ii) of this rule,

when provided in relation to business or commerce, be provision of such services to a recipient located outside India and when provided otherwise, be provision of such services to a recipient located outside India at the time of provision of such service:

Provided that where such recipient has commercial establishment or any office relating thereto, in India, such taxable services provided shall be treated as export of service only when order for provision of such service is made from any of his commercial establishment or office located outside India.

(2) *The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-*

(a) *such service is provided from India and used outside India; and*

(b) payment for such service provided outside India is received by the service provider in convertible foreign exchange.

Explanation.- For the purposes of this rule "India" includes the designated areas in the continental shelf and Exclusive Economic Zone of India as declared by the notifications of the Government of India in the Ministry of External Affairs numbers S.O. 429(E), dated the 18th July, 1986 and S.O.643(E), dated the 19th September, 1996."

Amendments were made to the said Export of Service Rules, 2005 from time to time, however the amendment made by Notification No 6/2010-ST, dated 27.02.2010 omitted the clause (a) in sub rule 2 to Rule 3 of the said rules. Thus in their submission of Appellant have stated that by the said amendment that service has been provided from India and used outside India is no longer relevant for treating the services provided as export of service.

7.2 Before the issue is further discussed, manner of provision of the service needs to be examined. In their submissions in para C.8, Appellants have stated-

"C.8 The first condition says that the service should be provided from India and should be used outside India. In the instant case, media rights are provided to M/s MSM who in turn provide rights to TV channels and other digital media. The appellant engages the services of Programme Producers such as M/s IMG and M/s

Hawkeye to produce the TV programme for them. The footage or live feed is then provided to M/s MSM which has its location outside India (copy of agreement shows that M/s MSM is located outside India). Thus from the above facts, it is clear that the services are used outside India by M/s MSM. Just because of the fact that the match is being played in India, it cannot be said that the services are used in India. Thus the first condition is satisfied."

In the entire para appellants do not state the place where the service is provided and the manner of provision of the service. However in para A.19 they have explained the process as follows:

"A.19 The appellants have given media rights to M/s MSM/ WSG. In turn, MSM & WSG broadcast the signals to the consumers. The process of broadcasting can be broadly described as follows:-

- a) Satellite uplink setup is placed at the stadium where the match is held near the television production control room.*
- b) Satellite uplink setup receives video and audio signal.*
- c) Satellite uplink setup processes and encrypts this audio video signal and uplinks it to designated transponder in a designated satellite.*
- d) The signals are then received by the earth stations or through antenna direct to home.*
- e) Signals are then transmitted through cable or through network of TV channels to individual viewers.*

A.20 The appellants does not carry out any of the process mentioned above. The appellants are engaged in conducting matches and providing signals to the broadcasters."

7.3 From the above submissions made by the appellant, it is undisputedly admitted that appellants have provided the program feed to the M/s MSM Singapore at the venue of match which is in India and not outside. The programme feed as provided by the appellant, is encrypted and then uplinked by the said M/s MSM/ WSG to the designated transponder in designated satellite. The satellite beams back the uplinked signal, for transmission through cable or network of TV Channels to the individual viewers. In the entire process at no stage the feed, provided by the appellant is routed through any place outside India. Thus service provided by the appellants are provided in India and used in India. The service provided by the appellant is in form of the feed for the live broadcast of match, and not for transfer of media right. The recipient of service carries the said feed to the individual viewers. Transfer of media right is only to exclusively authorize the M/s MSM Singapore or M/s WSG to broadcast the said feed as Official Broadcaster for the IPL. Thus we are not convinced by the argument advanced by the appellant that in para C.8 that location of the person to

whom the media rights have been transferred will determine the place where the service has been provided, and since in the present case the person to whom the media rights have been transferred is located in Singapore, the service should be treated as export of service..

7.4 Appellants have heavily relied upon the decision of Tribunal in case of Balaji Telefilms Ltd. [2016 (43) STR 98 (T Mum)]. However in the said case the programmes were exported to Hongkong and uplinked from there for beaming back to viewers in India. Reference is made to para 6 and 7 of the said decision which are reproduced below:

“6. In the impugned order, it was held that the appellant provides ‘programme production service’ to M/s. SGL Entertainment Ltd. while the uplinking from Hong Kong by M/s. SGL Entertainment Ltd. for beaming to the distributors in India was in the course of rendering ‘broadcasting service’ taxable under Section 65(105)(zk) of Finance Act, 1994; that the service rendered by the assessee being different from the service rendered by the overseas entity, it was held that the inference in the show cause notice that the destination of the service exported from India was ultimately to be India is not acceptable. Relying on the ‘master circulars’ of the Reserve Bank of India and Paragraph 2.40 of the Foreign Trade Policy, the adjudicating authority also held that the consideration had been received in freely convertible currency. Revenue, aggrieved by the dropping of proceedings, is in appeal before us having reviewed the

impugned order in exercise of powers under Section 86(2) of Finance Act, 1994.

7. According to the appeal of Revenue, the adjudicating authority is in error and failed to appreciate that the programmes that were exported to Hong Kong were beamed back to India. This, in our considered opinion, is a fallacy that Revenue authorities, steeped as they are in the legacy of tax on 'visibles', are susceptible to. The reviewing authority appears to have ignored the fundamental aspect that the proceedings were initiated under Finance Act, 1994 and that the tax was sought to be levied on taxable services and any adjudication thereon shall necessarily be circumscribed by such. The findings cannot go beyond the services that are taxable under Section 65(105) to focus on the manifest form of the service for determination of the usage. Prima facie, we do not find any merit in this line of appeal. We, however, do not fail to consider this in detail."

Thus the said case is distinguishable on facts. For the same reason the decision of the *E P W Da Costa vs UOI* [1980 (121) ITR 751 (Delhi)] is distinguishable. In para 5 & 6 the Hon'ble High Court has held-

"(1) Where the gross total income of an assessed, being an Indian company, includes any income by way of royalty, commission, fees or any similar payment received by the assessed from the Government of a foreign State or a foreign enterprise in consideration for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available

or provided or agreed to be made available or provided to such Government or enterprise by the assessed, or in consideration of technical services rendered or agreed to be rendered outside India to such Government or enterprise by the assessed, under an agreement approved by the Board in this behalf, and such income is received in convertible foreign exchange in India, or having been received in convertible foreign exchange outside India, or having been converted into convertible foreign exchange outside India, is brought into India, by or on behalf of the assessed in accordance with any law for the time being in force for regulating payments and dealings in foreign exchange, there shall be allowed, in accordance with and subject to the provisions of this section, a deduction of the whole of the income so received in, of brought into, India in computing the total income of the assessed,"

*6. The question for consideration is whether the petitioner has received payment from the BBC in consideration for the use outside India of information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available to the BBC. **The BBC is a commercial corporation interested in knowing how the BBC broadcasts are received by the listeners in India. For that purpose they engaged the petitioner to conduct a public opinion survey. The petitioner has stated in his rejoinder that the information supplied by the petitioner is used by the BBC in its audience research organisation and, inter alia, helps the said organisation in planning its programme. Apparently the BBC would make modifications in its programmes after knowing***

from the information supplied by the petitioner as to how its broadcasts are received in India.”

7.5 Since prior to amendments made in Rule 3, with effect from 27.02.2010, the requirement of “providing the services from India for use outside India was mandatory and is not satisfied in the present case, we hold that benefit of Export of Services Rules, 2005 will not be available to the appellants.

7.6 Appellants have also relied upon the decisions of tribunal in case Paul Merchants Microsoft Corp (I) Ltd Vodafone Essar Cellular Ltd & Ate Enterprises in their support. However we do not find any merit in such reliance for the period prior to 27.02.2010 and the said decisions are clearly distinguishable.

i. In case of Paul Merchants, the tribunal was considering the case of money transfer from foreign land to the recipient in India. Paul Merchants were acting as agent for the Western Union, who was approached by the person intending to transfer money to recipient in India. Paul Merchants were responsible for delivery of the said money to the Indian recipient. For rendering this service Paul Merchants received certain commission from the Western Union. Demand was made in respect of the service provided by the Paul Merchants for delivery of to Indian recipient. In the said Paul Merchant

provided the service to the Western Union, which has been held to be Export of Service. In this case the service has been provided by the Paul Merchants to entity located outside India for delivery of money to Indian recipient. Since the service has been provided by Paul Merchant for use outside India the same has been held to be Export of Service. In the present case the appellants have provided the feed to the recipient in India and the service has been provided in India and also used in India hence the case of Paul Merchants distinguishable.

ii. Similarly in case of Microsoft, they were providing services as per Market Development Agreement dated 1-7-2005 entered into by the them with the Microsoft Operations Pvt. Ltd. of Singapore required the appellant to identify the consumers in Indian Territory to provide marketing and technical support services on behalf of the foreign principal while making sale of Microsoft Products in India and maintaining the same. In the said case Microsoft (India) was providing services of market development to their principal located in Singapore for development of their market in India. The case of the department for not allowing the benefit of export of services was that the said market development was to happen in India and hence the services were being used in India. Tribunal has after examination of the facts

found that market development was for the sale of the products of the foreign entity and hence cannot be said to be used in India. Accordingly the benefit of export of services was extended.

iii) Similarly in case of Vodafone, the services were provided in case of international roaming to service provider providing telecom services to its consumers while they were in India. The services which were being provided were provided to the service providers located outside India and were used by them for providing the services to their customers when they were in India, same is not the case in present case, hence the said decision is clearly distinguishable.

iv) Similarly the case of Ate Enterprises too can be distinguished.

7.7 In the present case the grant of media rights is not the service but the delivery of the feed to the person to whom the media rights have been granted for telecast is the service provided. Since this service feed has been provided by the appellant to the person holding media rights in India the service has been provided in India and all the activities in relation to the consumption of the said feed for broad cast of the match have been performed in India, the claim for the appellants in respect of the said feed as export of Service cannot be

agreed to. The same view has been expressed by Bombay High Court in case of Tech Mahindra [2014 (36) STR 241 (Bom)]. The relevant excerpts of the said decision are reproduced below:

“58. In that context, a closer look at these Rules would be necessary. The Export of Services Rules, 2005 were notified by Notification No. 9/2005S.T., dated 3-3-2005. Rule 3 defines what is export of taxable service. The definition was substituted with effect from 19-4-2006. The export of taxable service in relation to taxable services which have been referred to in clause (i) of sub-rule (1) of Rule 3 is in relation to an immovable property situated outside India.

59. Then comes Rule 3(1)(ii) and which relates to taxable service specified in sub-clauses of clause (105) of Section 65 of the Finance Act, 1994. However, the services referred therein are those which are performed outside India. The first proviso below this was stating that if such taxable service is partly performed outside India it shall be considered to be performed outside India. Then, there is a further proviso of this sub-rule wherein it was stated that any taxable service provided shall be treated as export of service only if such service is delivered outside India and used in the business or any other purposes outside India and payment for such service provided is received by the service provider in convertible foreign exchange. [see Rule 3(2)].

60. Rule 3(1)(iii) refers to all such taxable services specified in clause (105) of Section 65 of the Finance Act, 1994, but excluding those in sub-clauses (zzzo) and (zzzv) and those specified in clause (i) of this Rule except when the provision of taxable services specified in sub-clauses

(d), (zzzc), (zzzr) and (zzzzm) does not relate to immovable property. Thus, the classification appears to be of taxable service in relation to immovable property which is situated outside India and if it satisfies the conditions in the proviso below sub-rule (1) of Rule 3, then, there is stipulation in relation to taxable services referred to in several sub-clauses of clause (105) of Section 65 of the Finance Act, 1994 and specified in Rule 3(1)(ii). That is in relation to taxable services, specified in these sub-clauses of clause (105) of Section 65 of the Finance Act, 1994 which sub-clauses have been specified in Rule 3(1)(ii), as are performed outside India. However, in relation to that also if such taxable service is performed partly outside India it shall be considered to have been performed outside India. The further proviso below sub-rule (2) as it then stood stated that for the purpose of sub-rule (2) of Rule 3 of the Export of Services Rules, 2005 any taxable service provided shall be treated as export of service only if such service is delivered outside India and used in the business or any other purpose outside India and payment for such service provided is received by the service provider in convertible foreign exchange. Rule 3(1)(iii) takes within its fold the services other than those part of Rule 3(1)(i) and (ii) and stipulates that such taxable services which are provided and used in and in relation to commerce or industry and the recipient of such services is located outside India provided that such recipient has commercial or industrial establishment or any office relating thereto in India, then, such taxable services shall be treated as export of service only if the order for provision of such service is made from any of its commercial or industrial establishment or any office located outside India. **The service so ordered is delivered outside India and used in the business**

outside India and payment of such service provided is received by the service provider in convertible foreign exchange. Then, there is broad category referring to such taxable services which are provided and used other than in or in relation to commerce or industry, if the recipient of taxable services is located outside India at the time when such services are received.

61. There is substitution as we have said above and what we find is that below Rule 3(1) and its clauses, Rule 3(2) has been substituted with effect from 1-3-2007 by Notification No. 2/2007ST, dated 1-3-2007. Rule 3(2)(a) has been omitted with effect from 27-2-2010. The words "such service is provided from India and used outside India; and" were omitted with effect from 27-2-2010 by Notification No. 6/2010ST, dated 27-2-2010. Thereafter, the only condition remained to be satisfied and for the purpose of being qualified or termed as export of taxable service is that any taxable service specified in sub-rule (1) of Rule 3 shall be treated as such when the payment for such service is received by the service provider in convertible foreign exchange. We are concerned with the situation prior to this omission. We are of the view that if Mr. Sridharan's submissions have to be accepted, then, we must ignore this omission."

7.8 With effect from 27.02.2010, when the condition relating to receipt place of provision and use have been omitted, the situation changes. Since the service provided falls within category (iii) service the location of the service recipient, determines whether the service can be treated as export of service, subject to the requirement that the consideration for the said services

are received in convertible foreign exchange. In the show cause notice for the period post 27.02.2010, the benefit of export of service has been allowed to the extent of payment received in convertible foreign exchange from M/s MSM Singapore. It is uncontroverted fact that entire consideration in respect of media rights agreement was not received in convertible foreign exchange. Quiet substantial amount in terms of the said agreement was paid by M/s Sony Picture Entertainment Limited a subsidiary of M/s MSM Singapore from its advertisement revenues to appellant as a consideration for the service provided by the appellant. In para 5, of the adjudication order, the mode of payment has been explained, and is reproduced in table below:

Invoice No	Amount in INR	Date of Receipt	Document No	Amount in INR	
				Before TDS deduction	After TDS deduction
MSM-IPL-2011-12 dtd 28.02.11	4983810769	07.03.11	SCSQ063001	2351690000	2116521000
		30.06.11	IT36701106270984	280430770	252387693
		29.09.11	IT3671109270985	2351690000	2116521000
				4983810770	448542969
					3

Out of the total payments received payments mentioned on 30.06.11 and 07.03.11 has been received M/s Sony Pictures Entertainment on behalf of MSM Singapore. The net amount after TDS deduction has been credited in the Appellant Bank Account with HDFC Bank.

Further income of Rs 34,64,40,768/- has been received from sub licensees M/s WSG. It is admitted fact that appellant has themselves claimed benefit of export of service in respect of certain part of the income from media rights agreement. However they have not claimed the said benefit in respect of entire amount. This would be for the reason that entire income from media rights is not received in convertible foreign exchange. (Para C.12 of the submissions).

7.9 From the para 7 of show cause notice dated 13.03.2013 it is quite evident in respect of the payments received from M/s MSM Singapore demand has been made in respect of those amounts which are not in convertible foreign exchange and cannot be treated as export of service. The said para of Show Cause Notice dated 13.03.2013 is reproduced below:

"7. On scrutiny of ST-3 Returns for 2011-12 filed under 'Commercial use and Exploitation of events', it is observed that BCCI has claimed amount received against export of service of Rs.416,98,88,398/- (i.e. Rs.175,46,33,398/- plus Rs.241,52,55,000/-). Under Franchisee Services BCCI has not claimed any amount received against export of service. Department has already issued various SCNs under 'franchisee services' on the issue as mentioned in Para-03 above which are pending for adjudication.

BCCI has claimed export of service on media right income in ST-3 for 2011-12 for Rs.416,98,88,398/-. The representative of BCCI has clarified that out of the said

amount, the amount of Rs.256,83,00,000/- pertains to ESPN Singapore and remaining amount of Rs.160,15,88,396/- pertains to MSM Singapore. However, on going through the balance-sheet for 2011-12, it was noticed that out of the total export income from media right of Rs.533,92,51,537/-, the income of Rs.498,38,10,769/- pertain to M/s. MSM Singapore, as mentioned in para 05 and 06 above. However, as against the export income of Rs.498,38,10,769/-, they have claimed only Rs.160,15,88,396/- from M/s. MSM Singapore, in their ST-3 Returns. For the balance amount of Rs.338,23,00,002/- they could not offer any explanations or documentations. In the absence of any explanation, the said income of Rs.338,23,00,002/- appears to be liable for payment of service tax. As such on the balance amount of Rs.338,23,00,002/- BCCI is required to pay service tax at the rate of 10.30% which works out to Rs.34,83,76,900/-.

In view of this, the BCCI is not entitled to claim export of services on the following amount:-

Name of the party	Export of Service Amount Disallowed	Service tax Payable 10.30%
M/s. MSM, Singapore	Rs.338,23,00,002/-	Rs.34,83,76,900/-
M/s. World Sport Group India Pvt. Ltd.	Rs.34,64,40,768/-	Rs.3,56,83,399/-
Total	Rs.372,87,40,770/-	Rs.38,40,60,299/-

7.10 Thus in view of the discussions as above and the decisions referred we are of the view that benefit under Export of Service Rules, 2005 could not have been extended to the appellant, for the period prior to

27.02.2010. For the period after 27.02.2010, the said benefit has been extended to the appellant, to the extent they have shown that the payment against the said services was received in convertible foreign exchange.

8.1 Now coming to the issue of limitation. In table below, the date of issue of show cause notice along with the period of demand is indicated.

Table 1		Details of Show Cause Notices		
S N	SCN No	Date	Period	Amount
1	V/ ST/ HQ/ AE/ E/ 47/ 09	14.10.2009	2007-08 & 2008- 09	36,52,38,000
2	V/ ST/ HQ/ AE/ E/ 47/ 09	19.04.2011	2009-10	37,53,77,320
3	174/ Commr/ 2011-12	24.10.2011	2010-11	41,10,17,933
4	V/ ST/ Dn-II/ Gr VIII/ TBCCI/59/ 10	13.03.2013	2011-12	38,40,60,229

From the perusal of the above table it is quite evident, show cause notices at S No. 2, 3 & 4 have been issued in normal period of limitation. Also the show cause notice at SI No 1, has quite substantial period within normal period of limitation. However some period pertaining to 2007-08, may be beyond the normal period of limitation.

8.2 Appellants have claimed that they have not suppressed anything and department was fully aware that appellant is providing media rights to various

broadcaster. Department had tried to tax the said income from media rights, by classifying the income received under said agreements under various categories, i.e. Advertising services, Intellectual Property Right Service etc. The appellants entertained a bonafide belief that the services under the said media right agreement were not classifiable under the category of "franchise service." When the service tax was introduced under the category of "Commercial Use or exploitation of any event" they started discharging service tax liability under the said category. Thus the invocation of extended period of limitation cannot be justified, for the reason that there was no suppression of facts with intention to evade payment of tax. The issue involved in the matter was that of interpretation.

8.3 It is fact that appellants had not been declaring the income from media right agreements in the ST-3 return filed by them. Further appellants have not in any case brought out any reason for entertaining the bonafide belief to effect that the services rendered by them will not be classifiable under the category of "franchise service."

8.4 The tribunal has in case of L'OREAL India Pvt Ltd Vs Commissioner of Central Excise Pune [2015 (330) ELT 253 (T-MUM)] has held-

“5.11 Reliance is placed on the decision of the Hon’ble Gujarat High Court in the case of Neminath Fabrics Pvt. Ltd. [2011-TIOL-10-HC-AHM-CX = 2010 (256) E.L.T. 369 (Guj.)] and the Larger Bench decision in Union Quality Plastic Ltd. [2013-TIOL-1072-CESTAT-AHM-LB = 2013 (294) E.L.T. 222 (Tri.-LB)] wherein it has been held that knowledge and awareness of the department is not a relevant factor for invocation of extended period of time. In these decisions, it was ruled that whenever there is non-levy or short-levy of duty with an intention to evade payment of duty or any of the circumstances enumerated in the proviso to Section 11A(1) of the Central Excise Act, such suppression or wilful omission is either admitted or demonstrated, invocation of the extended period of limitation would be justified.”

8.5 In case of Continental Drugs Company Pvt Ltd. Vs Commissioner Service Tax Mumbai [2015 (39) STR 154 (T-MUM)], tribunal held-

“5.2 As regards the claim of the appellant that they had not suppressed any facts and therefore, extended period time cannot be invoked, the appellant has not brought on record any evidence to prove their bona fides. Bona fide belief is not blind belief but has to be based on reasonable measures taken to entertain such belief. There is nothing in the records to show that the appellant consulted either the department or obtained any legal opinion as their liability towards service tax. In the absence of any such evidence, it is difficult to accept this contention. Inasmuch as the appellant did not obtain any registration nor did they follow any of the statutory procedures, the appellant had clearly suppressed the facts from the department with an intent to evade service

tax. In these circumstances, the confirmation of duty demand invoking the extended period of time along with interest thereon cannot be faulted. Consequently, the appellant is also liable to penalty under the provisions of the Finance Act, 1994."

8.6 In case of SUNIL HI-TECH ENGINEERS LTD vs Commissioner Central Excise Nagpur [2014 (36) ELT 408 (T-Mum)] it was held that

"7.7 The next question for consideration is whether extended period of time could be invoked for confirmation of service tax demand. The argument adduced is that the appellant was under the bona fide belief that they were not liable to pay service tax since the main contractor was discharging service tax. This claim of the appellant is quite hollow and misleading. The appellant had been discharging service tax on the services rendered by them prior to 1-3-2006 as a subcontractor. In their reply to the show cause notice dated 29-12-2010 vide reply dated 19th September, 2011, in para 4.1, the appellant has stated as follows :-

"4.1 But, with effect from 1-3-2006, the said Notification 15/2004 has been replaced by Notification 1/2006, which also prohibited availment of Cenvat credit on input services. Hence with effect from 1-3-2006, we have stopped paying service tax and sought the benefit of various circulars and judicial pronouncements to the effect that no service tax is payable by the sub-contractors, if the main contractor pays service tax."

This averment of the appellant clearly shows that the reason for non-payment service tax was not because of any bona fide belief but because Notification 1/2006-S.T.

which provided for abatement in value of taxable service stipulated a condition that no Cenvat credit of excise duty paid on inputs and capital goods and service tax paid on input services shall be availed. Since the main contractor was prohibited from availing input service tax credit, the appellant stopped paying service tax on input services. Under the previous Notification 15/2004-S.T., the restriction on non-availment of credit applied only on inputs and capital goods and not on input services. With the change in the tax regime, the appellant resorted to non-payment of service tax on input services. Thus the non-payment was a deliberate ploy on the part of the appellant to minimize tax liability. Consequently, the appellant also stopped filing service tax returns and did not furnish any information to the department in respect of the taxable services rendered by them as a sub-contractor. This action on the part of the appellant was deliberate and is a clear admitted position. After the case was made out against the appellant on the basis of investigation conducted, in order to wriggle out of the tax liability, the appellant feigned bona fide belief by placing reliance on non-applicable circulars and decisions. In the light of these glaring evidences available on record and the clear admission on the part of the appellant, we reject the contention of the appellant that extended period of time cannot be invoked. The appellant has taken a weak plea that their records were audited in March, 2008 by the department and therefore, the department had knowledge of the appellant's transactions since 27-3-2008, this plea cannot be accepted for the following reason. In Neminath Fabrics case [2010 (256) E.L.T. 369 (Guj.)], the Hon'ble High Court of Gujarat held that if any of the ingredients for invoking extended period of limitation is present, then extended period of limitation

can be invoked for confirmation of demand and knowledge of the department is not relevant. A larger bench of this Tribunal in *Union Quality Plastics Ltd.* case [2013-TIOL-1072-CESTAT-AHM-LB = 2013 (294) E.L.T. 222 (Tri.-LB)] also held the same view. The relevant extracts from the *Neminath Fabrics* case is reproduced below :-

“17. The proviso cannot be read to mean that because there is knowledge the suppression which stands established disappears. Similarly the concept of reasonable period of limitation which is sought to be read into the provision by some of the orders of the Tribunal also cannot be permitted in law when the statute itself has provided for a fixed period of limitation. It is equally well settled that it is not open to the Court while reading a provision to either rewrite the period of limitation or curtail the prescribed period of limitation.

18. The Proviso comes into play only when suppression etc. is established or stands admitted. It would differ from a case where fraud, etc. are merely alleged and are disputed by an assessee. Hence, by no stretch of imagination the concept of knowledge can be read into the provisions because that would tantamount to rendering the defined term relevant date nugatory and such an interpretation is not permissible.

19. The language employed in the proviso to sub-section (1) of Section 11A, is clear and unambiguous and makes it abundantly clear that moment there is non-levy or short levy etc. of central excise duty with intention to evade payment of duty for any of the reasons specified thereunder, the proviso would come into operation and the period of limitation would stand extended from one year to five years. This is the only requirement of the provision. Once it is found that the ingredients of the

proviso are satisfied, all that has to be seen as to what is the relevant date and as to whether the show cause notice has been served within a period of five years therefrom."

Section 73 of the Finance Act, 1994 is pari materia to Section 11A of the Central Excise Act and therefore, the ratio of the above decision applies squarely to the facts of the present case. Thus we are of the considered view that extended period of time has been correctly invoked to demand and confirm service tax in the present case."

8.7 Thus in view of the above decisions and the fact that appellants had not been declaring the income from media right agreement in their ST-3 returns, the appellants have suppressed the same with intention to evade payment of service tax. Thus extended period of limitation as provided for by the proviso to Section 73(1) has been rightly invoked for demanding Service Tax in the notice dated 14.10.2009.

9.1 Now coming to the issue of penalty. Though in each of the show cause notices, penalties have been proposed under Section 76, 77 and 78 of the Finance Act, 1994. While adjudicating Commissioner has imposed penalties as indicated in table below:

S N	SCN Date	Section 76	Section 77	Section 78	Total
1	14.10.2009	0	5000	259608402	259613402
2	19.04.2011	331504986	5000	0	331509986
3	24.10.2011	372636385	5000	0	372641385

4	13.03.2013	174098050	10000	0	174108050
	Total	878239421	25000	259608402	113787282
					3

9.2 Since we have held that extended period of limitation has been rightly invoked in the present case, the provisions of section 78 will get attracted automatically and hence the penalty as imposed in respect of the Show Cause Notice dated 14.10.2009 has to follow. In case of Rajasthan spinning and Weaving Mills Hon'ble APEX Court has held as follows:

"16. The other provision with which we are concerned in this case is Section 11AC relating to penalty. It is as follows :

11AC. Penalty for short-levy or non-levy of duty in certain cases.- *where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (2) of section 11A, shall also be liable to pay a penalty equal to the duty so determined :*

[Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purpose of this section, the duty as reduced or increased, as the case may be, shall be taken into account :

Provided also that in case where the duty determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available, if the amount of duty so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days of the communication of the order by which such increase in the duty takes effect -

Explanation. - For the removal of doubts, it is hereby declared that -

(1) the provisions of this section shall also apply to cases in which the order determining the duty under sub-section (2) of section 11A relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(1) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person.]

17. *The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.*

18. *One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "...by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assesseees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.*

19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.

20. At this stage, we need to examine the recent decision of this Court in Dharamendra Textile (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textile and we see no reason to understand or read that decision in that manner. In Dharamendra Textile the court framed the issues before it, in paragraph 2 of the decision, as follows :

"2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr. [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the 'Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose

penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the "Rules') and a decision of this Court in Chairman, SEBI v. Shriram Mutual Fund & Anr. [2006 (5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench."

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows :

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered.....".

21. From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows :

"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statutes mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The

said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here."

23. *The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides."*

9.3 Penalties under Section 76 and Section 77, are for the reason of contraventions of various provisions and acts of omission to perform the task as required to be performed under the provisions of the act. Such penalties are in nature of Civil Liabilities and do not require any contumacious conduct on the behalf of the defaulter. Hon'ble Supreme Court has in case of Gujarat Travancore Agency held as follows:

"4.Learned Counsel for the assessee has addressed an exhaustive argument before us on the question whether a penalty imposed under Section 271(1)(a) of the Act involves the element of mens rea and in support of his submission that it does he has placed before us several cases decided by this Court and the High Courts in order

to demonstrate that the proceedings by way of penalty under Section 271(1)(a) of the Act are quasi criminal in nature and that, therefore, the element of mens rea is a mandatory requirement before a penalty can be imposed under Section 271(1)(a). We are relieved of the necessity of referring to all those decisions. Indeed, many of them were considered by the High Court and are referred to in the judgment under appeal. It is sufficient for us to refer to Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what it intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by Statute proceeds on the assumption that society suffers injury by and the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of coercion is present

in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum Volume 85, page 580, Paragraph 1023 :

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

Hence we uphold the penalties imposed under the provisions of Section 76 and 77 of the Finance Act, 1994.

10.1 Since the demand of tax has been upheld the demand for interest will follow> It is now settled law that interest under Section 75, is for delay in the payment of tax from the date when it was due. Since appellants have failed to pay the said Service Tax by the due date interest demanded cannot be faulted.

11.1 Appellants have in their submissions claimed that benefit of CENVAT Credit of the service tax paid on input services used for providing the output services should be allowed to them. The said preposition is well

founded and they should be entitled to the admissible CENVAT Credit on the input services.

12.1 Commissioner has while adjudicating the matter allowed the benefit of cum tax value, while determining the Service Tax payable. The said benefit allowed is well supported by the decision of Tribunal in case of CCE Patna Vs Advantage Media Consultant {[2008 (10) STR 449 (T-Kol)] maintained by the Apex Court in {2009 914) STR J49 (SC)}. Accordingly we are in agreement with the benefit allowed. Accordingly the appeal filed by the revenue also needs to be dismissed.

13.1 Commissioner has while adjudicating the demand in respect of the development of website developed and maintained by M/s. Live Current Media (SCN F.No.V/ST/HQ/AE/E/47/09/1190 dtd 19.4.2011) has held that services provided to M/s Live Current Media were taxable services but for the reason that appellants had not received the consideration against the provisioning of the said service till the time of adjudication dropped the demand and has ordered that the same should be paid as soon as the amount is recovered. Appellants have in their submissions have not challenged this part of the order or the order confirming the demand in respect of the services provided by them to Pioneer Digisys Pvt. Ltd.

14.1 In result we modify the order of the Commissioner to the extent that appellants should be allowed to avail the CENVAT Credit in respect of input services used for providing the output services if otherwise admissible. But for the above modification the appeals filed by the Appellants are dismissed and the cross objections disposed accordingly.

14.2 The appeal filed by the revenue is also dismissed and the cross objections filed by the appellants in respect of the said appeal stand disposed accordingly.

(Pronounced in court on 10.12.2018)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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