

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
WEST ZONAL BENCH**

Appeal No. ST/87268/2015

(Arising out of Order-in-Original No. MUM-LTUNT-000-COM-13-15-16 dated 29.06.2015 passed by Principal Commissioner of Central Excise & Service Tax, LTU, Mumbai)

**Commissioner of Central Excise &
Service Tax (LTU), Mumbai**

Appellant

8th floor, Centre-I,
World Trade Centre,
Cuffe Parade,
Mumbai 400 005.

Vs.

Shell India Markets Pvt. Ltd.

Respondent

Powai Plaza 401-403, 4th floor,
Hiranandani Business Park,
Mumbai 400 076.

Appearance:

Shri Bidhan Chandra, Authorised Representative for the
Appellant

Shri Shankey Agarwal, Advocate for the Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)

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

FINAL ORDER NO. **A/86253/2019**

Date of Hearing: 24.04.2019

Date of Decision: 18.07.2019

PER: SANJIV SRIVASTAVA

This appeal has been filed by the revenue against order in original No 13/PR. COMMR (WLH)/LTU-M/S.TAX/2015 dated 29.06.2015 of Principal Commissioner Central Excise & Service Tax LTU- Mumbai holding as follows:

"5.01 The amount of Rs 4,13,42,028/- (Rupees Four Crores Thirteen Lakhs Forty Two Thousand and Twenty Eight only) 9service Tax inclusive of ED. & S H Ed Cess)

paid by the noticee during investigation, is hereby appropriated against the demand of Service Tax made under reverse charge mechanism on the services received from the foreign service providers.

5.02 The amount of Rs 1,40,37,728/- (Rupees One Crore Forty Lakhs Thirty Seven Thousand Seven Hundred Twenty Eight Only) paid by the noticee as interest on the service Tax paid by them during investigation is hereby appropriated.

5.03 Other than the above actions proceedings initiated vide impugned show cause notice No 12/Commr/OFG(6)/SIMPL/STD/Non-CERA/2014-15 dated 17th October 2014 are hereby dropped."

2.1 Respondents herein are registered with LTU. They had been incurring expenditure in foreign currency as remittance to various service providers who do not have any permanent establishment in India and were providing taxable service to them. They were not paying service tax on the gross amount remitted. Suspecting tax evasion investigations were undertaken.

2.2 Findings that came forth as result of the investigations undertaken are recorded in table below:

Description	Amount 'Rs
Period	2009-10 to 2012-13
Foreign Currency Remitted to Service Providers	2106,34,63,677
Amount Remitted towards Taxable Services	1263,39,04,599
Amount Remitted towards Non Taxable Services	842,99,59,078
Service Tax paid by the Respondent in regular course	137,19,62,543
Service Tax Paid during the course of investigation	4,13,42,028

Total Service Tax paid	141,33,04,571
Interest paid by the respondent	1,40,37,728

2.3 They have not paid Service Tax in respect of the amounts remitted towards services indicated in table below claiming these remittances to be towards non taxable services or exempted services.

Description	Amount 'Rs	Service Tax 'Rs	Remarks
Sponsorship without Benefits and Membership Service	88,99,005	9,16,597	Non Taxable
IPR Services received from their Parent Company.		1,60,87,397	Exempted (Nofn No 17 /2004-ST) Abatement towards R & D Cess

2.5 Thereafter a Show Cause Notice dated 17.10.2014 was issued to the respondents requiring them to show cause as to why:-

- i. The benefit of Notification No 17/2004-ST dated 10.09.2004 as amended by Notification No 14/2012-ST dated 17.03.2012 should not be denied.
- ii. The Service Tax amounting to Rs 5,83,46,022/- for the period from 2009-10 to 2012-13 on the services received from foreign service providers under reverse charge mechanism should not be charged and recovered from them under proviso to Section 73(1) of Finance Act, 1994.
- iii. The amount of Service Tax inclusive of Ed & SHE Cess, of Rs 4,13,42,028/- already paid by them during investigation should not be appropriated against the amount demanded.
- iv. Interest amount of Rs 1,40,37,728/- already paid by them during investigation should not be appropriated

against the amount of interest payable as at sr no (iv) above.

- v. Penalty should not be imposed on them under Section 76 of the Act for failure to pay Service Tax within the prescribed time as required under Section 68 of the Act and Rule 6 of the Rules.
- vi. Penalty should not be imposed on them under Section 77 of the Act for failure to file proper return within the prescribed period as required under Section 70 of the Act and Rule 7 of the Rules.
- vii. Penalty should not be imposed on them under Section 78 of the Act for failing to pay Service Tax.

2.6 Show Cause notice was adjudicated by the Commissioner LTU as per the impugned order referred in para 1, supra. Aggrieved by the order of Commissioner, revenue has filed this appeal.

3.1 In their appeal, revenue has raised following questions arising out of the order of adjudicating authority for consideration-

- i. Whether the noticee is liable to penalty in respect of the tax short paid in the normal course, but paid before the issuance of Show Cause Notice.*
- ii. Whether the noticee is liable to pay Service Tax on the services of (i) "Sponsorship services without benefit" received from outside India & (ii) Membership fees paid outside India.*
- iii. Whether the noticee is eligible to exemption under notification 17/2004-ST dated 01.09.2004.*
- iv. If the noticee is held to be liable pay tax on services of sponsorship and membership and if the benefit of notification 17/2004-ST is denied to them, then whether they are liable to be penalized in terms of section 76, 77 and 78 of the Finance Act, 1994.*

3.3 Challenging the order of the Commissioner not imposing penalty on the respondents, relying on the decisions in case of *Jay Yushin Ltd [2000 (119) ELT 718*

(T-LB)], *Coca Cola Industries Pvt Ltd* {2007-TIOL-245-SC-CX}, *Crystal Quinone Pvt Ltd* [2009 (233) ELT 499 (T-Ahd)], *SLP against Indeos ABS Ltd* [2010 (254) ELT 628 (Guj)] revenue has relied on the following decisions:

- i. Neminath Fabrics [2010 (256) ELT 369 (Guj)]
- ii. Machino Montell (I) Ltd [2006 (202) ELT 398 (P & H)]
- iii. Tata Steel Ltd [2013-TIOL-707-CESTAT-MUM]
- iv. Automotive Stampings & Assemblies Ltd. [2015-TIOL-836-CESTAT-Mum]
- v. Dharamendra Textile Processors [2008 (231) ELT 3 (SC)]
- vi. Dharampal Premchand Ltd [2011 (265) ELT 81 (T)]
- vii. Global facility Management Service P Ltd [2013 (31) STR 585 (T-Chennai)]
- viii. Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)]
- ix. CBEC Circular No 889/09/2009-CX dated 21.05.2009.

3.3 In respect of sponsorship fees paid by the appellants after referring to invoice No IND/SHEL/06-0 dated 01/08/09 for Contract No UKIERI, which specifically record the Invoice Type as “Services” for Description : “payment of the 4th Year Sponsorship fee” have stated that there can be no doubt that it is a commercial invoice for commercial service viz sponsorship fee for sponsorship which had been continuing into 4th Year”. By holding that such payments are donation or grant commissioner has dropped the demand made. No contract or document has been produced showing that these amount were remitted towards donation.

3.4 Commissioner has held that membership fees paid by the appellant to be taxable under category of “Club or Association Services” but has dropped the demand holding it to be time barred. Commissioner has failed to appreciate that the normal period for raising the demand is within 18

months from the date of knowledge. Further if it was not the investigation undertaken revenue would have never been in know of the things. It has been held by Apex Court in Case of Mehta & Co and Kalvert Foods India Pvt Ltd that the period of limitation is to be computed from the date of knowledge.

3.5 Commissioner has dropped the demand in respect of abatement claimed towards the R & D Cess in terms of Notification No 17/2004-ST relying on the decision of Tribunal in case of Rochem Separation Systems (I) Pvt Ltd dated 10.12.2014. The said order of Tribunal has been challenged in appeal before the Bombay High Court hence should not have been considered as binding precedent.

4.1 We have heard Shri Bidhan Chandra, Additional Commissioner, Authorized Representative for the revenue and Shri Shankey Agarwal, Advocate for the respondents.

4.2 Arguing for the revenue learned Authorized Representative,

4.3 Arguing for the respondents, learned advocate submits that

- i. The benefit of R & D Cess abatement is available against the liability to pay service tax under Section 66A of the Act. [Cummins Technologies India Ltd [2017 (9) TMI 224 (Del)], Rochem Separation Systems Pvt Ltd [2015 (39) STR 112 (T-Mum)]. United News of India [2017 (3) TMI 17 (Del)]. The ground for challenging the order of Commissioner in this respect is that Appeal of department against the order of Tribunal in case of Rochem is pending in High Court. The appeal filed by the revenue against the decision of Tribunal has been dismissed by the High Court vide its order dated 17th September 2018 in CEA No 57/2017
- ii. They had paid certain donations to British Council Trading registered in UK for UK-India Education and

Research India (UKIERI) which is nothing but a grant for educational purposes and did not represent any consideration for service. This amount is not paid towards any sponsorship service. It is settled that burden is on the revenue to show that the service provided by them is sponsorship service. {Hindustan Coca Cola Beverages Pvt Ltd [2016 (42) STR 696 (T)]. GSP Infratech Development Ltd [2015 (39) STR 327 (T)]}.

- iii. The membership fees paid to Society of Petroleum Engineers (SPE) is not liable to service tax under the category of "Club or Association Service", as SPE is a charitable not for profit organization. The person seeking any employment in the company like theirs is required to be member of SPE. No benefit is received by any person and no events are organized by SPE in India.
- iv. In absence of any ingredients such as fraud, suppression or wilful misstatement required for invoking extended period as prescribed by Section 73, the demand itself is time barred. The demand in the present case is totally revenue neutral as the entire amount paid by them on reverse charge basis is available as credit to them. Reliance is placed on following decisions.
 - o Reliance Industries Ltd. [2016 (44) STR 82 (T-Mum)]
 - o Sarovar Hotels Pvt Ltd [2017 (9) TMI 893 (T-Mum)]
 - o Punjab Chemicals & Crop Protection [2017 (47) STR 345 (T-Chan)]
 - o British Airways [2014 (36) STR 598 9T-Del]]
 - o Jet Airways (I) Ltd [2016 (44) STR 465 9T-Mum)]
 - o INA Bearings India Pvt Ltd [2017 (12) TMI 1143 (T-Mum)]

v. Penalty is not impossible as the ingredients specified by section 78 for invoking that section are missing in the present case. Reliance placed on following decisions.

- o Naramada Chematur Pharma Ltd [2005 (1790 ELT 276 (SC)]
- o Jamshedpur Beverages [2007 (214) ELT 321 (SC)]
- o Jain Irrigation Systems Ltd [2015 (40) STR 752 (T-Mum)]
- o Surya Pharmaceuticals Ltd [2016 (43) STR 479 (T-Chan)]
- o Dineshchandra R Agarwal [2013 (31) STR 5 9Guj)]
- o Popular Vehicles & Services Ltd [2010 (18) STR 493 9T-Bang)]
- o Matrimony.com Pvt Ltd [2019 (3) TMI 1180 (T-Chennai)]

5.1 We have considered the impugned order with the submissions made in appeal and during the course of arguments.

5.2 Issue for consideration can be listed as follows:

- i. Whether the amount paid to UAEIRI can be considered as fees for “sponsorship services” leviable to service tax.
- ii. Whether the amounts paid as membership fees to SPE can be considered liable to service tax under the category “Club or Association Services”.
- iii. Whether the benefit under Notification 17/2004-ST is admissible to the recipient of service. (respondent)
- iv. Whether penalty under Section 78 can be imposed on the Appellants.

5.3 Whether the amounts paid to UAEIRI can be considered as fees for “sponsorship service” leviable to service tax:

Appellants have claimed that the amounts paid by them to UKEIRI were towards donations made by them to UKEIRI. Revenue has contended relying on the invoice stating Invoice Type as "Services" for Description : "Payment of the 4th Year Sponsorship fee".

In their appeal revenue has stated that the invoice itself is the sufficient to prove that appellants have not paid this amount as donation but have made payments towards certain services which they would have got in return of such payment and hence would not be covered by the exclusion clause to Section 65 (99a) of the Finance Act, 1994, which reads as follows:

"“sponsorship” includes naming an event after the sponsor, displaying the sponsor’s company logo or trading name, giving the sponsor exclusive or priority booking rights, sponsoring prizes or trophies for competition, but does not include any financial or other support in the form of donations or gifts, given by the donors subject to the condition that the service provider is under no obligation to provide anything in return to such donors.”

From the perusal of the invoice itself following is evident that the invoice has been indicating "British Council Trading" and is issued against the contract number: UKIERI for an amount of GBP 100,000/- towards "payment of the fourth year re sponsorship fee for UKIERI." In our view the invoice itself justifies the correctness of the stand taken by revenue. If the invoice has been issued against a contract, appellant could have easily contradicted the stand taken by the revenue by producing the contract "UKEIRI" referred to in invoice. Since the contract against which the payments have been made has been not produced just by looking at antecedents of project UKEIRI, this amount can never be called as donation made. Details of Project UKEIRi and its funding partners as submitted by the respondents along with their submissions makes following evident:

“UK-India Education and Research Initiative (UKIERI) started in April 2006 with the aim of enhancing educational linkages between India and the UK. Since then UKIERI has been recognized as a key multi stakeholder programme that has strengthened the research, leadership, education and now skill sector relations between the two countries.”

“UKIERI is a multi-stakeholder partnership programme supported by Governments Funding partners:

UK Partners	Indian Partners
<i>Department for Business, Energy and Industrial strategy</i>	<i>Ministry of Skill Development and Entrepreneurship.</i>
<i>Department of Education</i>	<i>Ministry of Human Resource Development</i>
<i>Foreign and Commonwealth Office</i>	<i>Department of Science & Technology</i>
<i>The Scottish Government</i>	<i>University Grants Commission</i>
<i>Northern Ireland Initiative</i>	<i>All India Council for Technical Education</i>

However these details do not clearly establish the nature of the payments made. In absence of any conclusive evidence coming on record in respect of the payments made we are left with no option but to remit the matter back to Commissioner, after looking into contract under which this payment has been made.

5.4 Whether the amounts paid as membership fees to SPE can be considered liable to service tax under the category “Club or Association Services”.

Respondents have contended that the payments made to SPE were in towards membership of that organization. This membership comes without any benefits to them and hence cannot be considered as “Club or Association Services” as defined under Finance Act, 1994. Commissioner has in his order discussed the issue in this respect in his order and has held that the membership of SPE is covered by the definition of “Club or Association

Services". For coming to such finding he has relied upon the information available of web site of SPE. These findings of the Commissioner have not been challenged by the Appellant by way of an appeal or by filing the cross objections in the matter. Hence this finding of Commissioner against the appellants has become final. However during the course of argument counsel for appellant sought to raise the issue by stating that SPE do not organize any activities. Such argument even if allowed at this stage is without any merits because as per the Annual Report of SPE following information can be culled out which is enough to hold that submissions made are contrary to published information on SPE.

Consolidated Statement of Financial Position as of 31 st March				
	2009	2010	2012	2013
Assets	USD Thousands			
Cash and Cash equivalents	8883	9100	20725	18485
Other Assets	7376	11100	14690	13514
Reserve Fund Investments	32124	42700	38561	39999
Property and Equipment	4946	3700	12582	19959
Interest in SPE Foundation	7463	7800	10471	10811
Total Assets	60792	74400	97029	102768
Liabilities				
Account Payable	5420	6600	11038	11870
Deferred Revenue	9875	11500	17057	18459
Total Liabilities	15295	18100	28095	30329
Net Assets	45497	56300	68934	72439
Consolidated Statement of Activity for year ended 31 st March				
	2009	2010	2012	2013
Meetings	7414	7700	15119	9821
Memberships	-2029	-3300	-4589	-5071
Education and Professional Activities	-395	-300	113	-232
Print and Electronic Media	-3621	-4200	-2745	-2520
Member Advantage	-498	-400	-922	-1427
Operating Income	871	-500	6976	571
Extraordinary Gain		600		
Investments	-14807	10500	283	3532
Net Income	-13936	10600	7259	4103

Commissioner has held that the demand is barred by limitation. Revenue has challenged this finding of the Commissioner in their appeal. For holding so Commissioner has held that issue is completely revenue neutral and any

amounts appellant pay on the reverse charge basis will available as credit to them. We are not in agreement with such finding of Commissioner, as it is against the basic scheme of payment of Service Tax on reverse charge basis. Admissibility of CENVAT Credit cannot be reason for nonpayment of tax. Payment of tax and admissibility of credit are two different ideas in the scheme of indirect tax. Service Tax is paid on the output services of the service provider whereas the credit is admissible in respect of the input services received by the service recipient. The credit though taken on the receipt of the services/ documents relating to the service it can be utilized only at the time of payment of tax on the output services or the finished goods. Tribunal has in case of Sudarshan Castings [2007 (217) ELT 428 (T-Del)] held as follows:

“12. The theory of ‘revenue neutrality’, advanced by the appellants appears to us to be a highly hypothetical concept, cut off from the ground-level realities. The appellants have not been able to demonstrate with facts and figures before the lower authorities (nor before us) as to how the theory can be made applicable to them. By sculpting the air, no Eiffel Tower could be created. Yet, the wondrous human mind revels in such fantasies! Otherwise, Rumsfeld would not have made the following remarks: “There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don’t know. But there are also unknown unknowns. These are things we don’t know we don’t know.”

In case of Deccan Veneer [2008 (223) ELT 263 (T-Bang)] in similar circumstances as present case Tribunal has held as follows:

“8.1 Even the observation as to revenue neutrality made in paragraph 168 of the impugned order, ignores the provisions of Rule 57-E(3) of the Rules, under

which it was provided that, the provisions of subsection (2) of Section 57-E shall not apply in cases where the additional amount of duty became recoverable from the manufacturer on account of any short levy or non-levy by reason of fraud, collusion or any wilful misstatement or suppression of facts. The issue of revenue neutrality was, therefore, required to be considered by the Commissioner in view of the findings reached in the order, that there was massive under-valuation of goods by suppression of material facts with intent to evade payment of duty, and in light of the provisions of Section 57-E(3) of the Rules of 1944 or any other corresponding new Rules.”

Hon'ble Supreme Court has in case of Mahindra & Mahindra [2005 (179) ELT 21 (SC)] held as follows:

“4. There can be number of eventualities where extended period of limitation in terms of proviso to section 11A may be available to the Department despite availability of Modvat credit to an assessee. The availability of Modvat credit to an assessee by itself is not conclusive or decisive consideration. It may be one of the relevant consideration. How much weight is to be attached thereto would depend upon the facts of each case.”

Appellants have relied upon series of the decisions in which it has been held that revenue neutrality can be the ground for holding that extended period of limitation is not applicable. However we are not in position to agree with the said argument in view of the decision of the Apex Court referred above. Also it needs to be noted that revenue neutrality and invocation of extended period of limitation are question of facts and need to be examined in facts of the case in hand. In case of payment of the tax on reverse charge basis the services recipient steps into the shoes of the service provider and pays the tax as if he has himself provided the service. That transaction of is complete when the person paying the tax makes the payment for the service received and tax needs to be paid

on receipt of service. Since the tax is paid by the service recipient by stepping into the shoes of service provider, even the persons paying the tax and taking the credit though have same identity differ and hence the principle of revenue neutrality should not apply to such cases.

Since Commissioner has dropped the demand holding the same to be barred by limitation on ground of revenue neutrality we remit the matter back to Commissioner for examining the issue of limitation on the basis of other evidences adduced in the show cause notice for invoking extended period of limitation.

5.5 Whether the benefit under Notification 17/2004-ST is admissible to the recipient of service. (respondent)

Commissioner has allowed the benefit of notification and dropped the demand in this respect. Revenue has challenged the order of Commissioner on the ground that the order of CESTAT relied upon by the Commissioner while extending the benefit is under challenge before the High Court of Bombay.

Revenue has contended that the benefit of this notification is admissible only to the service provider and not the deemed service provider under Section 66A(1)(b). This argument of revenue was rejected by the tribunal in case of Rochem Separation Systems Pvt Ltd [2015 (39) STR 112 (T-Mum)] holding as follows:

“10. The Commissioner has rejected the benefit of Notification No. 17/2004 for the reason that the notification applies only to Section 66 and not to Section 66A in which the appellant is required to pay service tax on the import of services or reverse charge basis. The Commissioner’s further reasoning is that the appellant is only a deemed provider of service under Section 66A(1)(b) and cannot be treated as one who provided the service. This reasoning is flawed Section 66A was introduced by Finance Act, 2006 w.e.f. 18-4-2006 whereas the

Notification No 17/2004 was issued on 10-9-2004. It appears that the law makers slipped on bringing an amendment to the notification because the intention of the notification is very clear, that is, not to levy service tax on cess paid towards the import of technology. Careful reading of the notification indicates that what is exempted is “taxable service provided by the holder of the Intellectual Property Right to any person.....” Service Tax Rule 2(r) defines “Provider of Taxable Service” to include a person liable for paying service tax. Therefore, this rule read with Notification No. 17/2004 can be interpreted only to mean that the appellant being the person liable to pay service tax under Section 66A will also be eligible for exemption. It must not be forgotten that the charge of service tax on Intellectual Property Right under Section 65(105)(zzr) is actually made under Section 66. What Section 66A does is only to fasten the liability to the receiver of services in India while receiving services from abroad. In the present case the charge of service tax is under Section 66 but the appellant being the receiver is liable to pay under Section 66A. The Commissioner’s reasoning is not correct and is rejected. The appellants are eligible to benefit from Notification No. 17/2004.”

In case of Cummins Technologies [2017 (7) GSTL 69 (T-Del)], tribunal held as follows:

“6. *Section 66 of the Finance Act, 1994 is the charging Section, which provides that in respect of taxable services mentioned therein, service tax shall be levied and collected in such manner as may be prescribed. Even for the import of service, the service tax has to be levied under Section 66 ibid. Since a deeming fiction was created in Rule 66A ibid, providing for payment of service tax by the recipient of service, such levy is in consonance with the charging provisions contained in Section 66 ibid. Thus, the provisions of Chapter V of the Finance Act should also be applicable in respect of the service tax paid under Section*

66A ibid. In the present case, since the appellant is liable to pay service tax as a recipient of the taxable service, the provision of Section 66 ibid should also be applicable to it. In other words, upon fixing the responsibility for payment of service tax under reverse charge mechanism, no distinction can be placed between the service receiver and service provider for the purpose of Section 66 ibid. Therefore, we are of the view that the benefit of exemption Notification No. 17/2004-S.T., dated 10-9-2004 should also be available to the respondent. We find that the Tribunal in the case of United News of India (supra) while interpreting the provisions of Section 66A ibid, has held that the benefit of the exemption should also be available to the recipient of service. The relevant paragraph in the said order is extracted herein below :

“5. Heard both sides and perused the appeal records. The only dispute in the case is that the eligibility of the appellant for the exemption under Notification cited above as a recipient of service. A plain reading of Section 66A brings out the legal obligation of the recipient of service in certain situations. The said Section stipulates that taxable service shall be treated as if provided by the recipient of service in India and accordingly, all the provisions of Chapter V shall apply. We find that the tax liability is put on the appellant on such legal fiction. It is not legally tenable to hold that such legal fiction will have limited application only for payment of service tax and not with reference to any concession available to such service tax. No such implication can be read from the provisions of Section 66A. Further, we also note that the conditions mentioned in the Notification 13/2010 have been fulfilled and there is no dispute on that score. When the provider of service is put to liability to discharge service tax as per provisions of Section 66A all the provisions of Chapter V shall have full force for charge and collection of service tax. The exemption now claimed is part and parcel of the

provisions of service tax as the Notification 4 ST/58841/2013-ST [DB] has been issued under the powers vested under Section 93 of the said Act. Section 68(2) specifies the person to pay service tax as per the rate prescribed under Section 66. We note that Section 66A is applicable to all services which are specified under clause (105) of Section 65. However, no rates are specified. Considering the legal position as stipulated clearly in Section 66A, we find that the legal fiction cannot be restricted only to collection of tax without applying any concession of the notification applicable thereto when the conditions of the said Notifications are fulfilled by the recipient of such service. Accordingly, the finding in the impugned order on this issue is not sustainable. The appeal is allowed on this issue.””

Also we take note of the fact that the appeal filed by revenue against the order of Tribunal in case of Rochem Separation Systems Pvt Ltd, has been dismissed by the Bombay High Court vide order dated 17.09.2018 in CEA No 57/2017. Bombay High Court has upheld the order of tribunal holding that the demand is barred by limitation.

Following the above decisions we do not find any merits in the appeal of the revenue in this respect.

5.6 Whether penalty under Section 78 can be imposed on the Appellants?

Revenue has challenged the order of Commissioner whereby he has dropped the penal proceedings initiated against the appellants under Section 78. The facts of the case and submissions of the appellant in this respect have been recorded by the Commissioner in the impugned order follows:

“4.02 Penalty in the case of short payment of tax:

i) A careful consideration of facts & submissions shows that while the noticee was paying service tax on its foreign expenses under reverse charges, there were some

instances of short levy and non-levy of tax. While the total tax paid on all services in regular course was Rs.137.2 crores, a short levy of Rs.4.13 Crores was alleged by the department. This was accepted by the noticee and they paid the full amount of tax along with interest. The payments were made before issue of the SCN. The present show cause notice has been issued for confirmation of the demand and for imposition of penalty under Section 78. The principal submission of the noticee is that:

- *the situation was revenue neutral. The noticee itself was eligible to avail credit of the tax payable by it. There could be no intention to evade such tax, credit of which was available to them. In absence of 'intention to evade', it is contended that the provisions of section 78 would not apply.*
- *Certain amount of tax was not paid due to inadvertence arising out of 'inaccuracy in the internal system'.*
- *There were areas on which there was lack of clarity and the interpretation adopted by the noticee did not match with the interpretation adopted by the department. The noticee had adopted the interpretation to the best of his understanding but the Department did not appreciate the same.*
- *They believed bona fide that tax was not payable."*

After recording so Commissioner proceeds to drop the penal proceedings initiated against the appellant, relying on the decision in case of Jay Yushin Ltd [2000 (119) ELT 0718 (T-LB)], Coca Cola Industries Pvt Ltd [2007-TIOL-245-SC-CX], Crystal Quinone Pvt Ltd [2009 (233) ELT 499 (T-Ahd)] and Daman Ganga Board Mills P Ltd [2012 (276) ELT 4532 (T-Ahd)]

The issue that is under Consideration is vis a vis the imposition of penalty under Section 78 of Finance Act,

1994. Hon'ble Bombay High Court has in case of Padma Shri V V Patil SSK [2007 (215) ELT 23 (Bom)] held as follows:

“Emphasis by Advocate Shri Kolte was on the tail piece of sub-section (2B). According to him, once the short duty is paid before issuance of show cause notice, the department is prohibited from issuing show cause notice and, therefore, there cannot be any adjudication u/s. 11A(1) and (2) and, therefore, there cannot be any imposition of either interest u/s. 11AB or penalty u/s. 11AC. We quote the tail piece, relied upon by Advocate Shri Kolte :

“.....On receipt of such information (regarding payment under sub-section (2B) shall not serve any notice under sub-section (1) in respect of duty so paid.”

We are afraid, the proceedings starting with the show cause notice u/s. 11A(1) are prohibited so far as duty paid. It does not make any reference, much less prohibits issuance of show cause notice for the purpose of according an opportunity to the assessee to show cause as to why interest may not be charged or penalty may not be imposed. The department would be justified in issuing show cause notice pertaining to duty as well if the duty as ascertained by the assessee himself and paid is less than duty as prima facie ascertained by the officer of Central Excise. In any case, we are unable to agree with the submission by learned Counsel Shri Kolte that on payment of short duty as under sub-section (2B), before issuance of show cause notice, no interest u/s. 11AB can be charged, by virtue of portion of Section 11AB (2B) reproduced hereinabove.”

On the issue of revenue neutrality we have discussed the issue in substantial detail in para 5.4 and have held that revenue neutrality cannot be valid ground for nonpayment/ short payment of taxes required to be paid under the reverse charge mechanism. Hence we do not find any merits in the order of Commissioner holding that for the

reason of admissibility of CENVAT Credit in respect of the tax sought to be recovered the issue is revenue neutral. However in para 4.02 (ii) Commissioner himself observes:

“ii) So far as the claim of inaccuracy in the internal system is concerned, the noticee has not provided any detail of the actual inaccuracy. It is not known as to what was the inaccuracy and how did it result into short payment of tax. Similarly, except for non payment of tax on TDS, the noticee has not pointed out the actual cases of difference of opinion and the basis for their belief that the tax was not payable. ...”

Thus in our view Commissioner has himself rejected the arguments advanced by the respondents in respect of system inaccuracies and bonafide belief. Once the Commissioner has rejected such arguments then in respect of the amount of tax paid by the appellants during the investigation he could not have dropped the penal proceedings. In para 9 (d) of the Show Cause Notice following is stated:

“d) thus they have failed to disclose the facts to the Department as regards the foreign currency expenditures incurred by them which are liable to Service Tax under reverse charge mechanism under section 66A of Finance Act, 1994. In light of the fact that they were receiving services from foreign entities and were liable to pay Service Tax under the Reverse Charge Mechanism, it appears that the assessee has deliberately suppressed material facts from the department which has facilitated the evasion of Service Tax payable on the said services received by them from Foreign Service providers. These facts could not have been noticed if a case had not been booked by the department and it was revealed only through investigations that the expenditure in foreign currency was not on account of expenditure incurred by their foreign offices but towards services received by them which were chargeable to Service Tax under Section 66A

of Finance Act, 1994. CERA also consequent to audit on the records of the assessee has raised doubts about the service tax liability on expenditure incurred in foreign currency and payments thereof. Therefore extended period of five years under proviso to Section 73(1) of Finance Act, 1994 is invokable”.

It is now settled by decision of Hon'ble Supreme Court in case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)], that the ingredients for invoking provisions of mandatory penalty under section 78 are identical to those invoking extended period under Section 73, and if the ingredient for invoking extended period are found then the penalty under Section 78 is a must. Hon'ble Apex Court has stated-

“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. *.....*

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."*

So Commissioner is necessarily mandated in the present case to record the findings in respect of the above referred para of show cause notice. If commissioner finds that that was has been stated in this para of show cause notice is

correct, he has no option but to impose penalty equivalent to the duty demanded.

Since order of Commissioner has not considered this aspect the matter needs to be remanded back to him for re-determination of the issue on limitation.

5.8 In view of discussions as above we summarize our finding in respect of each issue as follows:

S No	Issue	Decision
i	Whether the amount paid to UAEIRI can be considered as fees for “sponsorship services” leviable to service tax.	Remanded for consideration of contract named UAEIRI
ii	Whether the amounts paid as membership fees to SPE can be considered liable to service tax under the category “Club or Association Services”.	Remanded for Consideration of Issue on limitation
iii	Whether the benefit under Notification 17/2004-ST is admissible to the recipient of service. (respondent)	Order of Commissioner upheld.
iv.	Whether penalty under Section 78 can be imposed on the Appellants.	Matter remanded

6.1 In view of our discussions as above we partly allow the appeal of revenue and remand the matter to adjudicating authority for consideration of issues as indicated in para 5.8.

(Order pronounced in the open court on 18.07.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)