

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No.**

Service Tax Appeal No. 233 of 2010

(Arising out of Order-in-Appeal No. SB(18)18/STC/2010 dated 12.02.2010 passed by Commissioner of Central Excise (Appeals), Mumbai-I)

Bank of Baroda

Corporate Taxation Dept.,
Baroda House,
Behind Dewan Shopping Centre,
Jogeshwari (W),
Mumbai 400 102.

Appellant

Vs.

Commissioner of Service Tax, Mumbai

Respondent

5th floor, New Central Excise Bldg.,
115, M.K. Road, Churchgate,
Mumbai 400 020.

Appearance:

Shri S.S. Gupta, C.A. for the Appellant

Shri M.K. Sarangi, Authorised Representative for the
Respondent

CORAM:

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

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

FINAL ORDER NO. **A / 86424 / 2019**

Date of Hearing: 01.05.2019

Date of Decision: 21.08.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against Order in Appeal No SB(18)18/STC/2010 dated 12th February 2010 of Commissioner Central Excise (Appeals) Mumbai –I. By the impugned order Commissioner (Appeal) has held as follows:

“14. In view of the above findings, I uphold the impugned Order in Original No 245/2008 dt 26.12.2008, regarding

payment of service tax on commitment charges, with interest and the penalty imposed under Sec 77 of the Act, subject to the service tax amount payable being modified to Rs 3,28,602/- (3,22,158 ST + 6,444 Ed Cess), as detailed in para 12(ii) above, and paid by the appellant on 22.12.2006. The penalty imposed, each under Sec 76 and 78 of the Act, also stands proportionately reduced to the extent of total service tax payable of Rs 3,28,602/- and accordingly reject the appeal filed by the Appellant."

2.1 Appellant is a public sector bank and is providing Banking and Financial Services as defined by Section 65(12) of the Finance Act, 1994.

2.2 As per the intelligence gathered the Appellant had entered into a credit facility agreement with M/s Clearing Corporation of India Ltd (CCIL) under which M/s CCIL were required to pay a commitment fee to the Appellant, as fixed percentage, per annum, of fund based limit. The said commitment fee was directly being debited to the account, by the Appellant, without raising any invoice. The said service of lending was a taxable service, w.e.f 11.09.2004 under the category of "*Banking and Other Financial Services*". However appellants had not taken any registration or paid service tax in respect of the services so rendered.

2.2 After completion of investigations a Show Cause Notice dated 26.12.2006, was issued to them asking them to show cause as to why

"i. the service tax including education cess amounting to Rs 3,30,031/- (Rupees Three Lakhs thirty thousand and thirty one only), as detailed in Annexure I, should not be assessed and recovered from it under proviso to section 73 read with Section 66 and 68 of the said Act under "Banking and Other Financial Services";

- ii. appropriate interest on the amount of ST, being assessed should not be recovered from it at the applicable rate(s) under Section 75 of the said Act;*
- iii. the penalty as provided for under Section 76 of the said Act should not be imposed on it;*
- iv. the penalty for contravention of any provision of the said Act or any rule made thereunder should not be imposed on it as provided for under section 77 of the said Act;*
- v. the penalty for suppressing the entire value of taxable services with an intent to evade payment of ST should not be imposed on it as provide for under Section 78 of the said Act;*
- vi. the ST of Rs 3,28,602/- including Education Cess paid by it vide TR-6 challan dated 22.12.2006, for the period from 10.09.04 to September'06 under "Banking and Other Financial Services" should not be appropriated against the total ST payable during the said period;*
- vii. the interest of Rs 46,560/- paid by it vide TR-6 challan dated 22.12.06, due to delayed payment of ST on Commitment Fee Charges, for the period from 10.09.04 to September'06, should not be appropriated against the total interest payable on the above account;"*

2.3 The show cause notice was adjudicated by the Assistant Commissioner, Service Tax Division-III Mumbai, confirming the demand of Service Tax along with interest and penalties as proposed in the Show Cause Notice.

2.4 Appellants proceeded to file the appeal against the order of Assistant Commissioner to Commissioner (Appeal). Commissioner (Appeal) has vide the impugned order dismissed the appeal filed by the Appellants.

2.5 Appellants have thus filed this appeal before tribunal.

3.1 In the appeal filed appellants have challenged the impugned order stating that-

- Commitment charges/ fees received by them are not distinct and separate from interest and hence should not have formed the part of taxable service under the category of “*Banking and Other Financial Services.*”
- The amounts charged by the appellant to CCIL for establishing the line of credit at Rs 3,75,000/- per quarter is in lieu of interest which the appellant would have earned had CCIL utilized the facility and as CCIL had not utilized the facility, in the hands of appellant these so named commitment fees charges are in fact, in terms of banking practices, minimum interest and not bank charges.
- The facility so extended by the appellant is disaster management facility only and cannot be termed as lending. This is further strengthened by the fact that CCIL had never utilized this facility by drawing any amount out of Rs 100 Crore extended by them during the entire period.
- They are one of the six promoters of CCIL and hence CCIL cannot be considered as one of the Banking Customer for them. Thus relevant provisions of Section 65 (105)(zm) do not apply in their case.
- Cum Tax Benefit as per Section 67(2) should have been allowed to them.
- Penalties under Section 76, 77 & 78 should not have been imposed, also benefit of Section 80 should have been extended to them.
- Simultaneous penalties under Section 76 and 78 should not have been imposed [The Financers [2007 (80 STR 7 (T-Del)], Kamal Photo Studio and Color Lab [2007 (7) STR 307 (T-Mum)]
- They being public sector bank, o malafide intentions can be attributed to them for invoking extended period of limitation.
- They rely on following decisions

- o Industrial Security Agency [2008 TIOL 960 CESTAT-Del]
 - o Shree Soap & Chemical Ind [2008 TIOL 950 CESTAT-Ahm]
 - o Elecon Cargo Pvt Ltd [2008 TIOL 905 CESTAT Del]
 - o R R Construction Co [2008 TIOL 881 CESTAT Del]
 - o N D Mazumdar & Co [2008 TIOL 218 CESTAT Kol]
 - o LIC [2008 TIOL 2091 CESTAT Del]
 - o Vijay Laxmi [2008 TIOL 2027 CESTAT Del]]
 - o Remac Marketing P Ltd [2008 TIOL 2050 CESTAT Kol]
 - o Prodorite Anticorrosive Ltd [2008 TIOL 2020 CESTAT Mad]
 - o Bank of Baroda [2008 TIOL 1915 CESTAT Ahm]
 - o Dixon Electronics [2008 TIOL 1971 CESTAT Del]
 - o Punjab Ex Servicemen Corp [2008 TIOL 1972 CESTAT Del]
- On payment of Service Tax with interest, prior to issue of Show Cause Notice the proceedings should have abated. {CBEC Circular F No 137/203/2007-CX-4 dated 03.10.2007, Vist Infotech Bangalore [2009 TIOL CESTAT Bang], Manipal Country [2009 TIOL 2121 CESTAT Bang]}

4.1 We have heard Shri S S Gupta, Chartered Accountant for the Appellants and Shri M K Sarangi, Additional Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the appellants, learned Chartered Accountant submitted-

- The amount received by them as Commitment fees from CCIL has nexus with the inaction of the borrower and not for any service provided by them. Hon'ble Supreme Court has in case of Bhayana Builders Pvt Ltd [2018-TIOL-66-SC-ST] held that there should be nexus between the nature of services rendered and also the amount received in order to consider any amount as value of taxable service under Section 67.
- Decision of Housing & Development Corporation Ltd {2012 (26) STR 531 (T-Ahd)} will not be applicable to the present facts as in this case the appellants did not carry out any activity and the amount is levied as per the agreement entered into the parties. Therefore the said amount do not form the part of value of taxable service.
- The commitment fees charged by them from CCIL are in nature of liquidated damages to recover the loss suffered by them, for the reason that this amount could not have been lent against the interest to other borrowers. [M/s Cheshire and Fifoot, 7th Edition, The Law of Contract page 561 to 565, Ansons Law of Contract 28th Edition J Beatson page 624 & 625, McGregor on Damages, 20th edition by James Edelman para 16.033 & 16.034 page 517 & 518]
- Issue on the payment of damages has been considered and decided by the Australian GST {Shaw V Director of Housing & Anor (No 2) [2001 ATC 4054]}. Further in case of Ram Decorative & Industries Limited [2000 (124) ELT 659 (T)] it has been held that commitment charges collected from the buyers of excisable goods who failed to lift the entire quantity are in nature of liquidated damages and not includible in assessable value.

- Commitment charges for un-availed portion of facilities fall within broad meaning of interest and same is excluded from the purview of the service tax. Board has vide letter F No B2/8/2004-TRU dated 10.09.2004 sated *“The interest on loans has been specifically excluded by way of amendment to the provisions relating to the valuation. All such interests that are in nature of interest on loan would thus remain excluded from taxable value.”*
- Commitment charges are inclusive of service tax and hence the benefit of Section 67(2) should have been extended to them.
- They had reasonable belief that no tax is payable. The proceedings have been started against them on the basis of CAG audit objection. CBEC has vide Circular No 345/6/2008-ST dated 11.06.2008 has clarified with regard to levy of service tax on foreclosure charges and vide letter No 137/62/2011-ST dated 21.10.2011 with regard to levy of service tax on commitment charges. In view of complexity of issues and the confusion with regards to payment of service tax on commitment charges, extended period of limitation should not be invoked.
- Since tax with interest was paid prior to issuance of Show Cause Notice, show cause notice should not have been issued, in view of decisions as follows:
 - o Master Kleen [2012 (25) STR 439 (Kar)]
 - o Adecco Flexione Workforce [2012 (26) STR 3 (Kar)]
 - o Tide Water Shipping Pvt Ltd [2015 (37) STR 558 (T-Bang)]
 - o Marquis Advertising & Marketing [2019 (2) TMI 412 (CESTAT Mum)]

4.3 Arguing for the revenue learned Authorized Representative submitted that issue in respect of levy of Service Tax, on the Commitment Charges, has been

decided by the tribunal in case of Punjab National Bank [2015 (38) STR 498 (T-Del)]. While holding in favour of revenue, tribunal had relied upon the decision in the case of HUDCO [2012 (26) STR 531 (T-Ahd)]. Further the commitment charges are distinguishable from the interest as Commitment charges are in respect of the undisbursed portion of the loan whereas the interest is charged on the disbursed (utilized portion of loan). It is not also in nature of damages as claimed by the appellant, but is an amount charged by the appellant from its client, for making available the contracted amount to client on demand. Hence the demand in respect of service tax made needs to be sustained. Appellants have not taken the registration and had not filed any ST-3 return during the period in dispute and hence they had suppressed this information with intention to evade payment of service tax due and hence demand made by invoking proviso to Section 73(1) of the Finance Act, 1994 cannot be faulted with. Further demand of interest and penalties imposed too are justified.

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

5.2 Undisputedly Appellants had extended the Line of Credit facility under a written agreement to Clearing Corporation of India Ltd (CCIL). (CCIL) was set up in April, 2001 to provide guaranteed clearing and settlement functions for transactions in Money, G-Secs, Foreign Exchange and Derivative markets. The Core Committee, appointed at the behest of Reserve Bank of India for setting up CCIL, identified six 'core promoters' for CCIL - State Bank of India, IDBI Bank Ltd.(formerly Industrial Development Bank of India), ICICI Bank Ltd, Life Insurance Corporation of India (LIC), Bank of Baroda and HDFC Bank Ltd.

5.3 CCIL had vide its letter No CCIL/L7S/o6/265 dated 17.11.2006 in response to summons dated 09.11.2006 issued to them submitted the details stating that-

- Appellants recovered interest on the line of credit (LOC) amount utilized by it in form of LOC utilization charges;
- The LOC utilization charges were recovered by CCIL from its defaulting members;
- No bills were raised by the appellants for the commitment charges which were paid based on the terms of agreements either at the commencement or at the end of a calendar quarter;
- Commitment charges were paid by account payee cheques.

5.4 Vide letter No TRY:Admn.FC:06/77 dated 21.12.006, appellants submitted the copy of Credit facility agreement dated 11.04.2002 entered with CCIL. In the said letter they further stated-

- Only CCIL had been extended such credit facility agreement;
- Commitment charges of Rs 3,75,000/- per quarter had been received from CCIL
- No bills had been raised by them on CCIL for commitment charges;
- Service Tax of Rs 3,28,602/-- together with interest of Rs 46,560/- was paid by them on 22.12.2006.

5.5 Appellants have vehemently submitted that the commitment charges are in nature of interest charges or the damage charges made by them from their customer/client for making available the said credit facility available to them. Since these are in nature of interest/ damages they are not to be included in the value of taxable services provided by them. To understand the nature of commitment charges, reference is made to the letter

reproduced below available at page 49 of the appeal paper book:

CCIL
Bank of Baroda
ATTN: Mr. M.S.

EXHIBIT - "E"

TRY/2008/11/

29.11.08

The Senior vice president-Operations,
(Fixed Income & Money Market)
The Clearing Corporation of India Ltd,
5th, 6th, 7th Floor, Trade World, 'C' Wing,
Kamala City, S.B.Marg, Lower Parel(w),
Mumbai-400 013

FA X ED

Dear sir,

RE: LINE OF CREDIT FACILITY OF RS100 CRORES EXTENDED TO YOU -RENEWAL

We refer to your letter CCIL/F&M/08-09/327 dt 6th November 2008 requesting for renewal of the existing line of credit facility being enjoyed by you with us at revised terms and conditions advised to you vide our letter TRY/08/BO/3098/01 dt 10.10.08.

We are pleased to advise you that the facility is renewed for a further period of 12 months w.e.f 14.11.08 on the following terms and conditions.

Facilities sanctioned:

1. Clean Line of Credit of Rs100 crores at BPLR(Bank's present BPLR i.e.13.25% with the option of converting the avallment into a repo transaction next day at NSE MIBOR+100 basis points
2. REPO limit of Rs100 crores against back-to-back REPO with RBI at 50 bps spread over RBI's REPO rate.

Other Conditions:

- The LOC facility to cover the various segments viz. securities, Foreign Exchange, CBLO, Multimodel Settlement and any other segment.
- CCIL shall pay commitment charges on clean LOC of Rs100 crores at the rate of 0.20p.a. payable quarterly for the unaviled portion of the limit.

Kindly convey your acceptance on the duplicate copy of this sanction letter and send the same along with the appropriate board resolution.

Yours faithfully,

K.D.LAMBA,
DEPUTY GENERAL MANAGER,

देवरी शाखा, ६ वां मंज कलपतरु हेरिटेज बिल्डिंग, नागिक नोटवाली मार्ग, पोस्ट बुराई ४०० ०२३
Treasury Branch, 6th floor, Kalpataru Heritage Building Nanik Motwane Marg, Fort, Mumbai 400 023
दूरभाष/ telephone: ०२२-६६३६ ३६३६ फेक्स/ fax: ०२२-६६३३ ९४२३

From the above letter, it is quite evident that the Commitment Charges are neither the interest charges as claimed by the appellant nor the liquidated damages. The clear distinction has been drawn in respect of interest

charges and the commitment charges. Interest charges are in respect of the amount availed or drawn /utilized from the clean line of credit facility made available by the appellant to CCIL, whereas commitment charges are in respect of un-availed portion of the credit limit. These charges are also in not nature of liquidated damages but are towards making available the clean line of credit facility available to their client/ customer. As per the information available on "investopedia.com" the distinction between the terms commitment charges and interest as used in the Banking and Financial Industries has been explained as follows:

"A commitment fee is a banking term used to describe a fee charged by a lender to a borrower to compensate the lender for its commitment to lend. Commitment fees typically are associated with unused credit lines or undisbursed loans.

The terms committed and uncommitted facilities are used to refer to the terms and conditions of capital funding for short- or long-term agreements. A committed facility is a credit source that has committed to providing a loan to a company. In committed facilities, the borrowing company must meet specific requirements set forth by the lending institution in order to receive the stated funds. Once the terms and conditions of the loan contract have been agreed upon, the lender must advance money to the borrower when requested. In return, the borrower pays the lender a commitment fee – a fee payable to a lender on available but undrawn amounts and calculated as a percentage of those undrawn funds from time to time. With a committed facility, the bank agrees to provide funds up to a maximum limit for a specified period of time and at an agreed interest rate. Although the terms and conditions are stringent and specific on how the funds are to be used,

borrowing firms receive a guaranteed source of funding for the duration of the agreement.

A commitment fee generally is specified as either a flat fee or a fixed percentage of the undisbursed loan amount. The lender charges a commitment fee as compensation for keeping a line of credit open or to guarantee a loan at a specific date in the future. The borrower pays the fee in return for the assurance the lender will supply the loan funds at the specified future date and at the contracted interest rate, regardless of conditions in the financial and credit markets.

Legally, a commitment fee is different from interest, although the two often are confused. The key distinction between the two is that a commitment fee is calculated on the undisbursed loan amount while interest charges are calculated by applying an interest rate on the amount of the loan that has been disbursed and not yet repaid.”

5.6 Commissioner (Appeal) has in para 10 & 11 of his order recorded as follows:

“10. (i) As per banking practices, some banks levy a ‘commitment fee’ in case the loan is not availed of within a stipulated period of time after it is processed and sanctioned. The term, ‘Commitment fee’, in Economics, Accounting & Finance / Banking & Finance is defined as a charge made by a bank, in addition to interest, to make a loan available to a potential borrower. It is a compensation paid to a lender by a borrower for the lender’s promise to give a mortgage at some future time. A commitment fee, is an expense, separate from interest, charged on the loan to be secured by the mortgage. The commitment fees arises when a borrower decides not to proceed with the loan and then demands return of the fee on the premise that the lender has performed no services to earn it. The lender is entitled to the ‘commitment fee’ either as ‘liquidated damages’ for breach of contract or as

compensation for earmarking the funds for loan to the borrower.

(ii) 'Liquidated damages' are monetary compensation for a loss, detriment, or injury to a person or a person's rights or property, awarded by a contract stipulation regarding breach of contract. Generally, contracts that involve the exchange of money or the promise of performance have a liquidated damages stipulation. The purpose of this stipulation is to establish a predetermined sum that must be paid if a party fails to perform as promised. Damages can be liquidated in a contract only if, (a) the injury is either "uncertain" or "difficult to quantify", (b) the amount is reasonable and considers the actual or anticipated harm caused by the contract breach, the difficulty of providing the loss, and the difficulty of finding another, adequate remedy; and (c) the damages are structured to function as damages, not as a penalty, which applies to the Appellant's case.

11. The opening of a line of credit by the Appellant, for loan to the potential borrower, M/s. CCIL, is in itself part of the taxable service of lending, provided by the Appellant to M/s. CCIL, and as per banking practices they, as lender, have charged the 'commitment fee' either as 'liquidated damages' for breach of contract or as compensation for earmarking the funds for loan to the said borrower. Commitment fees, are therefore distinct and separate from interest and are thus part of the taxable service charges which are liable to service tax. Further, M/s. CCIL is an independent company, and even if they had been promoted by the Appellant, as claimed, it does not mean that M/s. CCIL cannot be a customer of the Appellant, for the purpose of providing taxable services, as argued in their submission. The contention of the Appellant in this regard, vide para 5(ii), (iii) and (iv) above, is therefore not acceptable."

5.7 In view of the discussions as above and established practices in banking and financial industry we do not find any merits in the submissions of the appellant that the commitment fees charged by them for extend clear line of credit facility to CCIL is interest charge or in nature of liquidated damages. The reliance placed by the counsel for appellant on the decision of this tribunal in case of Ram Decorative & Industries Limited [2000 (124) ELT 659 (T)] is not of any help. In that decision the tribunal was dealing with goods which are tangible in nature and were produced for sale to the customer on an agreed price. The charges which were collected towards the goods not actually lifted by the buyer were held not to be added to the value of the goods that were actually lifted by the buyer. In the case of services, which are intangible in nature the same principle cannot apply. The services are agreed to be provided against the consideration for providing them. The creation Clear Line of Credit was the service provided by the appellant to their client viz CCIL against the consideration which they call "commitment fees". Against the amounts drawn from this clear line of credit, appellants recovered the interest at agreed rate. Since these charges were towards the creation of Clear Line of Credit facility for the client, they cannot be called the damages too. It is not even the case of appellant that CCIL had ever committed to draw Rs 100 crore from the Clear Line of Credit extended to them by the appellant. They had got this Clear Line of Credit facility extended to them against the payment of agreed consideration. The reliance placed by the appellant on the various Commentaries in relation to Contract, referred in para 4.2 above do not help the case of the appellant. For levy of liquidated damages the existence of specific contract, whose performance has been vitiated by the actions of the parties to the contract need to be established. In the present case appellants have not been able to establish existence of such a

contract whereby CCIL had agreed to borrow the said amount of Rs 100 Crores from them. On the contrary as banking industry product Clear Line of Credit has been sanctioned by the appellant in favour of CCIL against agreed consideration. Thus in our view the findings recorded by the Commissioner in this respect cannot be faulted with.

5.8 In view of discussions as above we do not find any merits in submissions of the Appellant, relying on the Hon'ble Apex Court decision in case of Bhayana Builders. In this case there is clear nexus between the service provided and the consideration received. In case of HUDCO, Tribunal has held as follows:

“8. This definition of ‘Banking and other financial services’ was amended by Finance Act, 2004 and the present definition as amended reads as under :

“banking and financial services” means -

(a) the following services provided by a banking company or a financial institution including a non banking financial company or any other body corporate or commercial concern, namely :-

- (i) financial leasing services including equipment leasing and hire purchase;*
- (ii) credit card services;*
- (iii) merchant banking services;*
- (iv) securities and foreign exchange (forex) broking;*
- (v) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services, but does not include cash management;*
- (vi) advisory and other auxiliary financial services including investment and portfolio research and*

advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy; and

(vii) provision and transfer of information and data processing; and

(viii) other financial services, namely, lending, issue of pay order, demand draft, cheque, letter of credit and bill of exchange, providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults, operation of bank accounts;

(b) foreign exchange broking provided by a foreign exchange broker other than those covered under sub-clause (a);

From the above, it can be seen that sub-clause (viii) and clause (b) marked bold were added in the 2004 Budget thus expanding the scope of services.”

9. *A taxable service is defined under Section 55(105)(zm) of Finance Act, 1994 and is as under :*

“Taxable service means any service provided or to be provided to any person by a banking or a financial institution including non-banking financial company or any other body corporate or commercial concern, in relation to banking and other financial service.”

10. *The definitions produced as above, would show that all the services related to lending form part of the taxable service. Therefore, the question is whether the prepayment charges and charges levied for resetting the interest rate form a part of the lending process or not. If the amounts collected are in the nature of interest, no Service Tax is leviable since there is no Service Tax on the interest, but only on the activity of lending. The appellants have contended that such charges are nothing but interest and are treated as interest. The question to our mind is*

not whether how the appellants are treating it or income tax department is treating it, but the question is whether the activity of collecting prepayment charges and reset charges in respect of a borrower can be called as service in relation to lending. When a borrower opts for prepayment of loan, as submitted by the appellants themselves, the tenure of the loan, reason for the prepayment, track record of the borrower in servicing loan, the Interest rate existing at the time of lending and at the time of closure, and the loss to the lender because of prepayment are taken into account. Admittedly, the prepayment charges vary from borrower to borrower, according to the appellant themselves. Further, it is collected for premature closure of the loan and it is not the interest factor that is taken into account. It has to be noted that when a borrower makes a prepayment and therefore pays interest separately up to the date of payment, that amount is shown separately as interest and prepayment charges are not collected as interest, but collected as prepayment charges. Further, even though the borrower has already borrowed the money and the process is over, when prepayment is proposed, borrower is expected to make a request which has to be considered by lender, charges worked out and informed and paid along with principal and interest up to the date of payment. Therefore, there is definitely an element of service involved in considering the request of the borrower for prepayment of loan, fixing of prepayment charges, collection of the same and closure of loan. These activities can be definitely in relation to Banking & other Financial services, which includes lending after 10-9-04. Further, when loans are foreclosed, the situation gives rise to the issue of asset liability mis-match for the lender since lender has to find alternative source for deployment of such funds. Prepayment charges are the charges leviable by a bank/lender to offset the cost of such finding such alternative source for deployment of fund and also

intended to make exit difficult for the borrower. This shows that prepayment charges can never be considered to be in the nature of interest.

11. *The appellants relied upon the judgment of Tribunal in the case of SIDBI, wherein the Tribunal had held that the activity of foreclosure of the loan cannot be treated as Banking & other Financial Service.*

12. *We have considered the decision of the Tribunal in the case of SIDBI. In that case, the demand for Service Tax was made on the amount collected for prepayment of direct loan from the customer. In that case also, as in the present case, it was submitted by the appellant that foreclosure of loan is a case of ending service and foreclosure charges are basically in lieu of interest loss and to prevent the customer from indiscriminately seeking foreclosure. While considering the issue, Tribunal took note of the definition of Banking & other Financial Services as existed prior to amendment only. After reproducing the definition, the Tribunal has observed that “the authorities below have not indicated as to which category of the definition, the activity of foreclosure falls under. Foreclosure is an ending of loan already given and cannot be treated as a service to the customer of loan and hence the same cannot be treated as rendering any services by the financial institution. We agree with the Id. Advocate that it is a case of withdrawing services rendered at the request of customer and the foreclosure premium is a kind of compensation for possible loss of expected revenue, on the loan amount returned by the customer. The most important aspect to be taken note of is the fact that during the relevant time, the services provided in relation to lending were not taxable. Therefore, the Tribunal had no occasion to consider whether the service was in relation to lending. The appellants contended that the Tribunal had considered the issue and come to the conclusion that the*

activity of foreclosure is amounting to withdrawal of the service and not providing any service at all and therefore, the decision of the Tribunal in the case of SIDBI would be still applicable even though the definition was different. At this stage, we have to take note of the fact that in the case of SIDBI, the Department had not even indicated as to which part of the definition, the activity of foreclosure falls under. The observations of the Tribunal in the order start with this sentence. There was no discussion as to the nature of payment, method adopted, how it is covered under the definition and why it is taxable. When the definition itself did not cover the lending activity itself, the question as to whether the prepayment of loan is a part of service or not, was not considered and could not have been considered. The observations of the Tribunal have to be considered in the context in which they were made and in line with which provisions they were made and it is also to be taken note that the decision is in the light of the submissions made by both sides. In this connection, we find it appropriate to take note of the decisions cited by the Id. Authorised representative appearing for the Department and listed below, to support his submission that the facts of the decision relied upon have to be shown, and the ratio of the case is what is decided therein in the facts of the case and not what logically can be deducted from the same.

(i) Collr. of CCE, Calcutta v. Alnoori Tobacco Products - 2004 (170) E.L.T. 135 (S.C.)

(ii) CCE, Bangalore v. Srikumar Agencies - 2009 (13) S.T.R. 3 (S.C.)

(iii) Sneh Enterprises v. CC, New Delhi - 2006 (202) E.L.T. 7 (S.C.)

13. *We find that these decisions support the submissions. We have already seen that in the case of SIDBI, the facts*

were not discussed in detail, statutory provisions were different and the submission were different.

14. *The two decisions of the European Court cited by the Id. Counsel are not appropriate since they do not really relate to Banking & other Financial Services. Further without comparing statutory provisions, it will not be appropriate to rely upon the decision of the European Court, for Indian cases. The appellants also relied upon the decision of Hon'ble High Court of Madras in the case of Edupuganti Pitchayya & Ors v. Gonuguntla Venkata Ranga Row, dt. 20-10-43. In that case, Hon'ble High Court took a view that out of the amount collected over and above the principal is in the nature of interest and it denotes consideration of or otherwise in respect of loan or retention by one party of some of money or other property belonging to another. This was submitted to support the view that prepayment charges and reset charges are nothing but interest. In this case, prepayment/reset charges are not in the nature of interest at all but is in the nature of charge for early closure of loan/resetting of loan and is relatable to lending since it either closes the loan or charges the terms and hence it cannot be equated with interest at all. It has to be noted that in the case of prepayment, interest is collected separately till the date of prepayment. It is also not necessary that when a loan is prepaid or reset, the lender suffers. In fact, foreclosure by prepayment and reset are relatable to lending and if an application for processing a loan application is chargeable to Service Tax and processing fee charged for foreclosure/prepayment of loan or reset of interest would also be chargeable. In fact, we are unable to see what is the difference between the liability of Service Tax in respect of application of a loan where the processing fee is charged which is independent of loan and over and above the interest, when we see here also it is over and above the interest. The processing fee is charged for considering*

the various aspects such as credit worthiness of the borrower repaying capacity of the borrower, period of loan vis-à-vis repaying capacity of the borrower, quality of assets of the borrower etc. When the proposal is made for prepayment of loan or resetting, processing the application is involved. Therefore, there is definitely an element of service in prepayment of loan or resetting of interest. As already discussed earlier, the definition covers any activity in relation to lending.

15. *Even though, we have not discussed the charges levied for resetting the loan in detail, the principle underlining reset of interest and prepayment of loan are same. The Revenue has a better case in respect of reset charges since the issue is not at all covered by the decision of the Tribunal in the case of SIDBI as far as resetting charges are concerned. Further, in the case of resetting, the relationship between the lender and the borrower does not cease to exist and loan also continues. Therefore, resetting of interest rate can be definitely considered as a service rendered by the appellant in relation to lending and is covered by Service Tax definition. It was submitted by the appellant that resetting charges were not being collected by them after 2004-2005. However, it was submitted by the Id. A.R. appearing for the Department that in the financial year 2005-06, 2006-07, 2007-08, the appellant had changed the head of income from resetting charges to additional interest. We find that this submission was not made before the original adjudicating authority and further we also find that in Para 5 wherein the Service Tax liability has been worked out in the table, in the first year, it has been shown as reset charges whereas in the year 2005-06, it has been shown as additional interest charges. In the year 2006-07 and 2007-08, it has been specifically indicated as additional interest (prepayment). This gives an impression that contrary to the submission made by the Id. A.R. appearing for the Department, the*

Department's contention was that in the year after 2005-06, the appellant did not collect any reset charges. In any case, in view of the conclusion that we have reached that the service tax is payable on reset charges as well as prepayment charges, we consider that it is not necessary for us to go into this aspect.

16.

17.1 *The appellant has contended that Service Tax is a value added tax. Service Tax may be charged when there is a value addition in the services provided by the service provider. Since the customers do not get any value addition in the services provided by charging reset charges/prepayment charges, Service Tax is not payable.*

17.2 *Charges collected for restructuring of loans and prepayment of loans is a way of value addition. The very fact that the cost that the customer has to pay for the facilities of prepayment/reset, is named as prepayment "charge" and reset "charge", immediately conveys that the same is in the nature of fee in lieu of some service/facility. The cost of the service for the customers increases or decreases with the increase or decrease of these charges. Thus, the reset charges and prepayment charges can be considered as the cost incurred by the borrower towards value added services like restructuring of the loan and prepayment of loan. Hence, the same charges are liable for Service Tax.*

18.1 *Reset charges/prepayment charges charged to the customers by the appellant is in the nature of additional interest only and therefore not liable to Service Tax.*

18.2 *The appellant has contended that the said charges are calculated taking into consideration the rate of interest and loan amount. Thus, they are in the nature of additional interest and not liable to Service tax.*

18.3 *It has already been discussed that the prepayment charges are the charges for allowing the facility of prepayment of loan. Similarly, reset charges are the charges levied by the appellant for restructuring the interest rate. The method of calculating the charges has no bearing on the nature of service provided. Just because the charges have been calculated based on the outstanding loan amount and the interest rate prevalent at that time will not change the head of income from service charges to interest.*

18.4 *Interest is nothing but the time-compensation for somebody's money being retained by somebody else. The longer the period of retention, the higher will be the interest amount. In this background, the prepayment charges can never be considered to be in the nature of interest as prepayment only means payment before time. This should ideally result in refund of interest and not the demand for more interest because the borrowed money is being paid back before time."*

5.9 Following the decision of HUDCO, tribunal has in case of Punjab National Bank, in respect of Commitment Charges held as follows:

"5. *I have carefully gone through the facts of the case and submissions made by the appellants in the appeal memorandum and during personal hearing. I observe that the commitment charges are the charges imposed on the client who decide not to draw the amount of loan that has been at their disposal. These charges are basically to compensate for the loss of interest that the bank would have earned if the customer had drawn money from loan account. It is seen that the charges are related to lending of money to the client and; in order to give limit/overdraft facility, the bank keeps the fund available for the same. Under such circumstances, it is evident that such charges are integrally connected with the lending which is a taxable*

service. Therefore, commitment charges cannot be separated from lending service. I, therefore, hold that the commitment charges are chargeable to Service Tax and the amount of Rs. 46,902/- is recoverable from them."

5.10 On the issue of limitation the only ground urged by the appellant is that was confusion prevailing in respect of levy of Service Tax in respect of the Commitment Charges, which lead to delay in payment of taxes. We do not find any merits in the submissions of the Appellant. Appellants have not shown any bonafide reason to show that they entertained such a belief. Further if they claim the issue was clarified by CBEC only in 2011, then what made them pay the service tax in the year 2006. The arguments advanced by the appellants do not establish the existence of such a bonafide belief. In case of HUDCO, the bench rejected the similar grounds raised by the appellant on limitation stating as follows:

"20. *It was submitted on behalf of the appellant that the appellant is wholly owned Government Company and therefore there cannot be mala fide intention on their part to evade payment of Service Tax. Revenue relied upon the decision of the Tribunal in the case of Bharat Petro Corporation Ltd. v. CCE, Nasik 2009 (242) E.L.T. 358 (Tri.-Mum.), wherein the Tribunal upheld the submission that BPCL is a Government owned company had suppressed the fact and therefore, just because it is wholly owned Govt. company, it cannot be said that bona fide can be presumed. He also submitted that blind belief cannot be a ground for non-payment of taxes. In this case, we find that the appellants have treated the amount of prepayment charges as additional interest and reset charges as additional interest from 2005-2006. It was also submitted that Income Tax Department has accepted such treatment given by them. The fact remains that after definition of lending was amended, and the service tax*

definition included in the activity in relation to lending for liability to Service Tax, appellant should have intimated the fact to the Department and checked up whether such collection of amount in relation to lending would be liable to tax or not. It is settled law that Government company is not Government and it has to be taken note that even Government departments make the payments for the services received from another department. Telecommunication department used to provide telecommunication services to other departments and other departments paid for the telecom services rendered and even for the services rendered by Railways, Postal and other departments, payments are made. Therefore, the fact that the appellant is a wholly owned government company, does not mean that they need not have to follow the law of land or take it lightly and plead ignorance of law or being a wholly government company, seek differential treatment. The fact remains that the appellant was required to declare the income received once the law was amended and they were required to seek clarification, if there was doubt. Even if they felt that the activity did not attract Service Tax, ST-3 returns should have been filed/or Department addressed intimating that these services are not liable to tax. In this case, the submission made by the Id. A.R. that plea of bona fide has to be considered in the light of decision of the Tribunal in the case of SPIE CAPAG S.A. v. CCE Mumbai - 2009 (243) E.L.T. 50 (Tri.-Mum.), is appropriate. In that case, while dealing with the plea of bona fide belief, the Tribunal observed that "the least that was expected of the appellant to discharge the plea of bona fide belief was to make enquiries from Central Excise authorities or some reputed legal firm regarding dutiability of items manufactured by it." Therefore, we find ourselves in agreement with the submissions that the appellant could not have interpreted the law according to their understanding without taking sufficient care for their

interpretation, is correct. In the absence of any evidence to show that the appellant had intimated the Department or had obtained legal opinion, invocation of extended period on the ground of suppression of facts has to be upheld.

21. *Therefore, the demand for extended period for Service Tax and interest thereon has to be upheld.”*

5.11 Thus following the decision as above we uphold the demand of Service Tax made by invoking the extended period of limitation. Also the demand made in respect of the interest at appropriate rate under Section 75 is upheld.

5.12 On the issue of penalty Tribunal has in case of HUDCO held as follows:

“22. *An alternative submission was made that the provisions of Section 80 are invocable in this case. According to Section 80 of Finance Act, 1994, “provision of Section 76, 77 or 78, no penalty shall be imposable on the assessee for any failure referred to any such provision, if the assessee prove that there was a reasonable cause for the said failure.” We consider that the appellant being a wholly owned government company and the fact that they did not pay Service Tax only on prepayment charges and reset charges and also in view of the fact that accounting treatment given to these items as additional interest has been accepted by the Income Tax department, in our opinion, would be sufficient for invoking provisions of Section 80 of Finance Act, 1994. Accordingly, while upholding the demand of Service Tax and interest, penalties imposed under various Sections of Finance Act, 1994 are set aside.”*

5.13 In our view when he have held the invocation of extended period of limitation in terms of proviso to section 73(1), penalty under Section 78 should follow in view of the decision of Hon'ble Apex Court in case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)]. Also

for various contraventions of the provisions of Chapter V of Finance Act, 1994, the penalties imposed under Section 76 and 77 too are justified. We also take note of the Section 80 of The Finance Act, 1994 whereby the following has been provided:

“80. Notwithstanding anything contained in the provisions of Section 76, Section 77, Section 78 or Section 79 , no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.”

Taking note of the fact that Appellants are a Public Sector Bank and had deposited the entire amount of Service Tax along with interest much before the issuance of Show Cause Notice to them and also the decisions in case Adecco Flexione Workforce {2012 (26) STR 3 (Kar)} wherein Hon'ble Karnataka High Court held as follows:

“3. Unfortunately the assessing authority as well as the appellate authority seem to think. If an assessee does not pay the tax within the stipulated time and regularly pays tax after the due date with interest. It is something which is not pardonable in law. Though the law does not say so, authorities working under the law seem to think otherwise and thus they are wasting that valuable time in proceeding against persons who are paying service tax with interest promptly. They are paid salary to act in accordance with law and to initiate proceedings against defaulters who have not paid service tax and interest in spite of service of notice calling upon them to make payment and certainly not to harass and initiate proceedings against persons who are paying tax with interest for delayed payment. It is high time, the authorities will change their attitude towards these tax payers, understanding the object with which this enactment is passed and also keep in mind the express provision as contained in sub-sec. (3) of Sec. 73. The Parliament has expressly stated that against persons who

have paid tax with interest, no notice shall be served. If notices are issued contrary to the said Section, the person to be punished is the person who has issued notice and not the person to whom it is issued. We take that, in ignorance of law, the authorities are indulging in the extravaganza and wasting their precious time and also the time of the Tribunal and this Court. It is high time that the authorities shall issue appropriate directions to see that such tax payers are not harassed. If such instances are noticed by this Court hereafter, certainly it will be a case for taking proper action against those law breakers.”

Similar view has been taken in case of Master Kleen [2012 (25) STR 439 (Kar)] and Tide Water Shipping Pvt Ltd [2015 (37) STR 558 (T-Bang)]. Thus we find the case to be fit where provisions of Section 80 should be invoked to set aside the penalties that are imposed under Section 76, 77 & 78 of Finance Act, 1994.

6.1 In view of above we allow the Appeal to the extent of setting aside the penalties imposed under Section 76, 77 and 78 of Finance Act, 1994. The impugned order to the extent of confirming the demand of Service Tax and interest is upheld.

(Order pronounced in the open court on 21.08.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)