CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
MUMBAI REGIONAL BENCH
Service Tax Appeal No. ST/86600/2015

and

Service Tax Miscellaneous Application No ST/MISC/85933/2021

(Arising out of Order-in-original No 01/STC-I/SKS/15-16 dated 7th May 2015 and Addendum to Order dated 24th June 2015, of Commissioner Service Tax, Mumbai –I)

Emirates **…. Appellant**
3, Mittal Chambers
228, Nariman Point, Mumbai 400021
Vs

Commissioner of Service Tax ….Respondent
115, New Central Excise Building
M K Raod, Churchgate Mumbai 400020

Appearance: Shri D B Shroff, Advocate
Shri Nitin Ranjan, Deputy Commissioner, Authorised Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. **A/87412/2021**

Date of Hearing: 22.12.2021

Date of Decision: 22.12.2021

Per Sanjiv Srivastava

This appeal is directed against order in original No 01/STC-I/SKS/15-16 dated 7th May 2015 and Addendum to Order dated 24th June 2015, of Commissioner Service Tax, Mumbai –I. By the impugned order Commissioner held as follow:

"ORDER

in view of the above, I pass the following order:

5. The Show Cause Notice F.NO. ST-1/HQ/Audit/EA2000/Gr.10/ Emirates/ 2012-13/Pt } dated 22.10.2013 for Rs. 37,76,07,022/- issued to M/s. Emirates having office at 3 Mittal Chambers, 228, nariman Point, Mumbai- 400021 for Wrong *availment of Cenvat of Service Tax paid on PSF and UDF which is answerable to the Commissioner Service Tax 1, Mumbai is decided as under :*

5.1 The demand for inadmissible Cenvat Credit availed by the noticee as above is confirmed to the extent of Rs. 31,95,39,496/- under Rule 14 of the CCR 2004 read with proviso to Sec 7311) of the Finance Act. The same is liable to be recovered from M/s. Emirates forthwith,

5.2 l hereby order the payment of interest under Rule 14 of CCR 2004 read with Section 75 of the Finance Act, 1994 on the above service tax amount of Rs.31,95,39,496/- confirmed against M/s Emirates as above from the date of wrong availment to the date of payment.

5.3 Thereby appropriate the amount of Rs. 22,87,851/- deposited by the noticee against their confirmed liability as mentioned in para 5.1 above. I also appropriate amount of RS. 7,19,071/- deposited by them against their interest liability arising in view of Para 5.2 above.

5.4 Thereby impose penalty under Rule 15(3) of CCR 2004 read with Sec 78 of the Finance Act amounting to Rs. 31,95,39,496/-only, on M/s. Emirates.

5.5 This order is issued without prejudice to any other action that may be initiated against the noticee M/s. Emirates under the provisions of the Finance Act, 1994 or rules framed there under or any other law for the time being in force in India."

2.1 During course of audit of the records of Appellant, who is service provider providing taxable service under the category of *"transport of passengers by air"* and *"transport of goods by air",* it was observed that they had taken inadmissible CENVAT credit on various services such as "Passenger Service Fee (PSF) and User Development Fee (UDF), classified under the head "Airport Services" on the basis of the invoices of various airport authorities.

2.2 After completion of investigations and collecting the details of the credit taken by the appellant on these services, a show cause notice dated 22.10.2013 was issued to appellant asking them to show cause as to why:-

i. The Cenvat credit amounting to Rs 37,76,07,022/- (Rupees Thirty seven crores seventy six lakhs seven thousand and twenty two only) wrongly taken on PSF & UDF mentioned at para-7 of the SCN and utilized for payment of service tax on output services should not be demanded and recovered from them under Rule 14 of Cenvat Credit Rules, 20104 read with proviso to the Sub Section (1) of Section 73 of the Finance Act, 1994.

ii. the service tax paid on account of PSF under the head Airport service totally amounting to Rs 22,87,851/- vide challan no 50371 dtd 18.10.2013 should not be appropriated against the demand raised.

iii. Interest at appropriate rate should not be demanded and recovered from them under Rule 14 of the Cenvat Credit Rules, 2004 read with the provisions of Section 75 of the Finance Act, 1994.

iv. *The interest paid amounting to Rs 7,19,071/- vide challan no 50371 dtd 18.10.2013 should not be appropriated against the interest recoverable.*

v. *Penalty should not be imposed upon them under Rule 15(3) and 15(4) of the Cenvat Credit Rules, 2004 as applicable during relevant period read with section 78 of the Finance Act, 2014.*

2.3 Show cause notice was adjudicated by the Commissioner as per the impugned order referred in para 1, above. Aggrieved appellants have preferred this appeal.

3.1 Appellants have filed Miscellaneous Application in the matter on 1st November 2021 stating as follows:

3. By the present application the Applicant seeks to refer to and rely upon certain crucial documents which evidences that there has been no utilization of CENVAT credit pertaining to Passenger Service Fees, User Development Fees and Development Fees levied by the Airport Authorities for the period 1 st April, 2008 to 31st March, 2021.

4. The Applicant submits that no demand is sustainable as the Applicant has not utilized the CENVAT credit and have reversed CENVAT credit availed in respect to the abovestated services and that the same is reflected in the ST-3 Return filed on 24th April, 2015 for the period October, 2014 – March, 2015. Hereto annexed and marked as "Annexure A" is a copy of the ST-3 Return filed on 24th April, 2015 for the period October, 2014 – March, 2015.

5. The Applicant further states that, the Impugned Order records that the Applicant had agreed to reverse the CENVAT credit but were unable to produce evidence to support the said contentions. In respect to the same, the Applicant submits that the Applicant were unable to furnish the document before the Respondent as the same was under internal processing on account of fimalization of service tax returns, In view of the categorically places on record that the Applicant had reversed the CENVAT Credit amounting to Rs. 31,71,51,646/- in relation to the abovementioned services. Hereto annexed and marked as "Annexure B" is a copy of the Chartered Accountant Certificate dated 30th November, 2021.

6. The Applicant therefore prays that: the Applicant be allowed to place on record and refer to and rely upon ST-3 Return filed on 24th April, 2015 for the period October, 2014 - March, 2015 and Chartered Accountant Certificate dated 30th November, 2021 during the hearing and final disposal of the Appeal.

3.2 The miscellaneous application was considered by the bench on 02.12.2021 along with the appeal and following directions were given:

"Part heard. Adjourned to 22/12/2021 for allowing AR to seek verification of facts stated by the appellant in miscellaneous application and for completion of arguments"

4.1 We have heard Shri D B Shroff, Advocate for the appellant and Shri Nitin Ranjan Deputy Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the appellant learned counsel submitted that-

- In response to the direction given by the bench on last date of hearing department had asked them to provide invoices against which the credit was taken and sought to be denied as per the impugned order. They had provided the invoices for some period. However they are not aware of any further development in the matter.
- Revenue authorities have misdirected themselves by calling for the invoices, whereas the demand in the present case has been crystallized and confirmed by the impugned order, and the fact that was to be verified was only with respect of the debit made by them.
- In similar circumstances Commissioner has vide his subsequent order dated 30.03.2017, taken note of the amount debited by them and appropriated the amount against the demand made.
- In present case the certain portion of the demand would be time barred as they have not suppressed anything from the authorities (refer exhibit 15) and extended period may not be invokable and penalties under section 78 may not be justified
- Since the entire amount of disputed credit has been reversed by them, the appeal should be allowed.

4.3 Arguing for the revenue learned authorized representative while re-iterating the findings recorded in the impugned order submits the letter dated 21st December 2021, in response to the direction issued by the bench on 02.12.2021. The text of letter is reproduced below:

"Sub:- (Legal/Court Matter) Compliance of Directions of Hon'ble CESTAT in Appeal No.ST/86600/2015 - M/s Emirates

Please refer to your mail dated 16.12.2021 on the above subject.

The verification report submitted by the jurisdictional officers in respect of M/s Emirates in Appeal No.ST/86600/2015 is as follows:

1. On perusal of the ST-3 retum filed by the taxpayers on 24.04.2015 for the period Oct to March for the financial period 2014-15 it is noticed that the assessee reversed the Cenvat Credit during the month of February 2015 as detailed below :

(Amount in Rs.)

Sr. No.	*Cenvat Credit Reversal*	*Remarks*
13.1.3.8 (Tax)	*83,23,05,289/-*	*under the category of under protest and without any protest*

2. From the above table it cannot be said that an amount of Rs. 31,71,51,646/- is reversed towards PSF, UD & UDF. Therefore, a mail dated 03.12.2021 was sent to assessee to submit the relevant invoices amounting to Rs. 31,71,51,646/-. The assessee has submitted 247 invoices on 13.12.2021 regarding the said amount.

3. The said invoices were examined and it was found that the assessee has submitted invoices to the extent of Rs. 10,59,06,737/-. The annexure I, II, III, IV & V detailing the category (PSF, UDF & DF-invoice no. date, porno toy Ed Ces & SHE Cess) are enclosed herewith for ready reference. On certain invoices it is found that the invoice number is hand written which renders them invalid.

4. Since the assessee has submitted insufficient invoices, the assessee's contention that Cenvat Credit reversed under protest to an extent of Rs. 83.23,05,289/- (As per ST-3 returns) is including the amount of Rs. 31,72,51,646/- towards PSF/UDF/DF is baseless and absolutely incorrect.

In view of the above facts, it appears that the assessee has not reversed the said amount of Rs.31,71,51,646/

This is issued with the approval of the Principal Commissioner."

5.1 We have considered the impugned order along with the submissions made in appeal and during the course of argument. We have also considered the Miscellaneous application and the verification report submitted by revenue.

5.2 Commissioner has in the impugned order while making the record of personal hearing as stated as follows:

"PERSONAL HEARING

Personal hearing was granted to the Noticee on 12.2.2015 which was attended Mr A.C. Pradeep, Finance Controller of M/s. Emirates; Mr. Niren Shethia and Ms. Legro Salot of PWC. They reiterated the written submissions made by them vide letter dated 9.1.2015. It was submitted that PSF and UDF has relationship with provisions of their services and therefore they are eligible for the Cenvat credit. They submitted that the SCN covers the period of April 2008 to January 2013, whereas during the period April 2012 to January 2013 they have not availed any Cenvat credit of ST paid on PSF and UDF. They were pointed out that the SCN was based on the details submitted by the noticee. Upon this it was conceded by them that the quantification of Service tax is erroneous; that subsequent to SCN they had submitted the detailed quantification of Service tax availed by them in respect of PSF and UDF duly certified by a CA vide certificate dated 25.6.2014 vide which the total quantum of cenvat on PSF and UDF was worked out to Rs. 31,95,39,496/-. They agreed to submit the correct quantification by 24.2.2015. They further submitted that they have reversed entire Cenvat credit availed by them during in December 2014/January 2015.

Subsequently, they submitted a letter dated 2.3.2015, received on 5.3.2015 for the additional submissions pursuant to personal Hearing. They interalia stated that:

i. *Pursuant to the directions from Audit officers of Service tax , department they have agreed to reverse the Cenvat credit on PSF and UDF availed during the period 2008-09 to 2011-12; that the they shall be reversing the amount of Rs. 31,79,45,704/-(i.e. total cenvat availed Rs. 31,95,39,496/- less Rs. 22,87,851/- paid in cash); that all the reversal and payments are made under protest.*

ii. *They have obtained a certificate from an independent CA quantifying the cenvat availment on PSF and UDF during April 2008 to March 2012, at Rs. 31,95,39,496/ as against the demand worked out in SCN at Rs. 25,86,73,098/-; that during the period April 2012 to January 2013, they have not availed any Cenvat credit whereas the SCN alleges that the cenvat on UDF during the period was Rs. 11,89,33,924/-; thai in view of the CA certificate the SCN demand should be reduced to Rs. 31,95,39,496/-,*

iii. *They have not utilized the entire Cenvat availed by them in as much as they have utilized the eligible Cenvat as per Rule 6(3) of CCR 2004; that they have not carried forward the balance of cenvat in ST3 which implies that they have reversed the balance Cenvat. They relied upon the SC judgment in the case of Bombay Dyeing Ltd [2007(215)ELT 3 SC] and Boards circular No. 858/16/2007-CX dt 8.11.2007 as per which reversal of CENVAT credit before utilization amounts to non availment of credit that since they have not availed the entire credit questions of further reversal do not arise.*

....

5.2 Further in para 4.6.13 Commissioner again records as follows:

"4.6.13 It appears that, as mentioned in their letter dated 2.3.2015 (received on 5.3.2015) the noticees and availed the credit of UDF for the period April 2012 to Jan. 2013, totally amounting to Rs. 7,44,20,009/- in, in March 2014. This seems to be the part of the 'recomputed cenvat credit amounting to Rs. 45,63,93,1897- as mentioned above. Thus the noticee is availing the credit at a much delayed stage. At the same time they are also claiming that they have not availed any Cenvat during the period 2012-13. They are also making contradictory submissions such as they had availed only admissible credit after computing the ration under Rule 6(3), ***and at the same time vide their letter dated 2.3.2015, they are also submitting that they are reversing the amount of Rs. 31,79,45,7041- 'under protest'. They have not submitted any evidence such as General entry or reversal entry of the Cenvat Register. If their claim that they had availed only proportionate admissible credit as per Rule 6(3) is true, then what amount is reversed now 'under protest'?.*** *I also fail to appreciate why the 'protest' is*

registered for the entire amount. Is it not correct that, irrespective of the stand on the issue of admissibility of Cenvat on PSF and UDF, they are bound to reverse the proportionate credit under provisions of Rule 613)? I would have appreciated their point of view if they had mentioned that they are reversing the amount of credit which is admissible to them after the 6(3) reversals, 'under protest'. But by covering the entire amount as reversal 'under protest', it appears that the noticee is claiming that they are eligible. for the entire credit and reserving their right to claim it at a later stage. Is the assessee trying to submit that even the provisions of Rule 6(3) is not applicable to them? Thus, the hollowness of the submissions made by the noticee defending their wrong availment of.......”

5.3 The appellant has through the miscellaneous application, placed on record the ST-3 return for the period October 2014 to March 2015, filed on 24th April 2015, and have claimed that they have already reversed the entire amount of Rs. 31,79,45,704/-(i.e. total cenvat availed Rs. 31,95,39,496/- less Rs. 22,87,851/- paid in cash), confirmed by the Commissioner in the impugned order. However due to some reason the evidence of reversal could not be made available to Commissioner before passing of impugned order. They have supported their claim of reversal by the Chartered Accouintant Certificate dated 30th November 2021, which is reproduced below:

Date:- 30th November, 2021

TO WHOMSOEVER IT MAY CONCERN

We M/S. SSP K & Associates have verified records of Indian Branch of M/s Emirates (hereinafter referred to as 'Emirates India' and having its office at 3, Mittal Chambers, 228, Ground Floor, Nariman Point, Mumbai 400 021) relating to CENVAT Credit availed by it in respect of Passenger Service Fees (hereinafter referred to as 'PSF'), User Development Fees (hereinafter referred to as 'UDF') and Development Fees (hereinafter referred to as 'DF') levied by the Airport Authorities for the period 1 April 2008 to 31 March 2012 (hereinafter referred to as 'Disputed period').

Based on our verification of the CENVAT Credit Register for the period October 2014 to March 2015 and the corresponding Service Tax Returns and workings, we hereby confirm the following:

1. *The total amount reversed in 'Section 13 - CENVAT Credit Taken and Utilised' of the Service Tax Return (Form ST-3) in row numbers 13.1.3.8, 13.2.3.4 and 13.3.3.4 is INR 85,78,05,523 as reported in the Month of February 2015. The amount of INR 85,78,05,523 includes the following reversals:*
    a. *CENVAT Credit reversed under 'Protest' to the extent of INR 75,76,65,738. The said amount includes PSF/UDF/DF for the disputed period aggregating to INR 31,72,51,646;*

b. CENVAT Credit reversed without any 'Protest aggregating to INR 9,96,08,710 on account of other objections (other than the issue of PSF/UDF/DF) raised by authorities during audits; and

c. Regular CENVAT Credit on Education Cess and Secondary and Higher Education Cess under Rule 6(3) of the CENVAT Credit Rules, 2004 pertaining to the month of February 2015 aggregating to INR 5,31,075.

2. It is therefore clear that Emirates India has reversed the CENVAT Credit in relation to PSF/UDF/DF amounting to INR 31,72,51,646 pertaining to the disputed period; The said reversal is reported in the month of February 2015 in the half yearly Service Tax Returns for the period October 2014 to March 2015;

3. Emirates India has represented that subsequent to the Show Cause Notice issued on 22 October 2013, they revised the ratios for reversal of CENVAT Credit under Rule 6(3) of the CENVAT Credit Rules, 2004 for the each year of the disputed period in March 2014 and filed the Service Tax return for the half year period October 2013 to March 2014 in April 2014, We have been informed that the revised ratios have not been disputed by the audit authorities. We have checked this Service Tax Return and the corresponding workings. From the workings it is apparent that a clear CENVAT Credit balance of INR 29,15,74,401 dehors all credits relating to PSF/UDF/DF and all output liabilities has been arrived at by undertaking the following steps:

i. Deduction of all credits relating to PSF/UDF/DF amounting to INR 31,72,51,646;

ii. Application of the revised ratios year-wise under Rule 6(3);

iii. Appropriation of all the output liabilities for the disputed period from the resultant amount;

From the above, it is verified that there is no utilization of credits pertaining to PSF/UDF/DF to discharge the output liabilities as reported in the Service Tax returns except in the Month of June 2008 amounting to INR 66,94,368, which has been duly paid along with interest.

For SSP K & Associates Chartered Accountants"

5.4 To verify the claim of reversal made by the appellant in their miscellaneous application, we had directed revenue authorities. The verification report submitted by the revenue through authorized representative is without any merits. The fact that was required to be verified from the ST-3 r5eturns was vis a vis the reversal entries reflecting in the ST-3 return. To verify the reversal made the authorities have sought to verify the invoices against which the credit was taken. The futile exercise of verification of invoice undertaken by the revenue, cannot certify the reversal entries made. The reversal entry cannot be corroborated back to the invoices. It is not to be verified whether the credit has been taken against the proper invoices/ documents evidencing the payment of tax. Total demand of CENVAT Credit has been determined by the impugned order and if the same has been reversed by the Appellant as submitted by them before the adjudicating authority and in their Miscellaneous application needs to be verified from their ST-3 returns which are already filed and available with the department.

5.5 In a subsequent order in the similar matter Commissioner has vide his order in original No 95/STC-I/SM/16-17 dated 30.03.2017, after verification of debit entries held as follows:

"CENVAT CREDIT REVERSED UNDER PROTEST TO BE APPROPRIATED

19. It was informed by the assessce that no cenvat credit was availed by them from April 2012 to July 2014. Cenvat credit for the said period was availed during the months of Aug, Sept and Oct. 2014. On being pointed out by the department during audit conducted in the month of Dec. 2014, the credit so availed, amounting to Rs.55.45,55,865/- was reversed by them "Under Protest" in the month of Feb. 2015. As the said amount was paid under protest, show cause notice was issued to the assessee on 11.03.2016. I find that there is no provision in Cenvat Credit Rules, 2004 of reversing cenvat credit 'under protest'. Even otherwise since the assessee has reversed the amount with the claim that the amount has been paid under protest, it is apparent that the assessee is disputing the contention of the department that they are not eligible for cenvat credit on PSF, UDF/ DF. In view of the deliberations in the preceding paras, there is no doubt that airlines are not eligible to avail cenvat credit on PSF, UDF/ DF and there was no reason for the assessee to reverse the same under protest. It is therefore be concluded that the amount of cenvat credit of Rs.55,45,55,865/ - availed by the assessee for PSF and UDF/DP during Aug., Sept, and Oct 2014 has been wrongly availed and the amount of Rs.55,45,55,865/-reversed in Feb 2015 is to be appropriated against the amount of cenvat credit that has been wrongly availed.

INTEREST

20. As per the provision of Rule 14 of Cenvat Credit Rules, 2004 as it existed all the relevant time, where the cenvat credit has been taken and utilised wrongly, the same along with interest is liable to be recovered and the provisions of Sections 11A and 11AA of the Excise Act or sections 73 and Section 75 of the Finance Act, shall apply mutatis mutandis. This provision was the result of the amendment to Rule 14 brought about by notification 18/2012-CE(NT) dated 17.03.2012. Prior to the said amendment in the happening of any of three situations, namely- 1) credit has been wrongly taken, 2) credit has been wrongly utilised and 3) credit has been erroneously refunded, interest was liable to be paid. However; with the said amendment it is clear that not only has the cenvat credit to be wrongly availed, the same has to be utilised in order to saddle the assessee with interest while recovering the wrongly availed cenvat credit. It has been made more explicit vide notification no. 6/2015-CE (NT) dated 01.03.2015. Thus, the intention of the *legislature as regards interest is very clear. If the assessee reverses the cenvat credit wrongly availed which has not been utilised, then interest cannot be recovered from such assessee in respect of such reversed amount.*

20.1 I find that the show cause notice has not made any specific allegation on the matter as to whether the alleged wrongly availed cenvat credit has been utilized or not before the amount having been reversed in Feb 2015. The assessee on the other hand has contended that the credit availed on the impugned services has not been utilised. The local cenvat credit availed during Aug, Sept and Oct 2014 on account of the impugned services amount to Rs 55,45,55,865/ - which was reversed in Feb 2015. I have perused the ST-3 returns filed for the said period and find that the cenvat credit balance for the months August 2014 to Feb 2015 was minimum of Rs 103 cr for any given said month. The contention of the assessee that they have not utilized the said credit amount during the said months is therefore found to be correct.

20.2 In view of the Rule position as detailed above, no interest is liable to be paid by the assessee, for the wrong availment of cenvat credit of Rs 55,45,55,865/ -. In terms of Rule 14 of CCR, 2004."

5.6 In view of the above we are of the view that matter needs to be relooked by the adjudicating authority vis a vis the claim of reversal made by the appellant.

5.7 Appellants have also claimed bonafides by referring to Exhibit 15. The said letter has been considered by the Commissioner in the impugned order, in para 4.5.2 stating as follows:

"4.5.2 It was also claimed by them that their records were audited by Service Tax officers in 2008 covering the period 2003-08; that during the audit, vide their letter dated 15.12.20108, they had informed the department that they are availing the Cenvat credit on PSF to which no objection was raised; that as such there was no suppression by them and there was no malafide intention to avail inadmissible cenvat credit. It was contested that for this reason, the extended period under Sec.7311) cannot be invoked and therefore the majority period of the SCN is time barred. They also relied upon several judgments which mainly held that even non mentioning of certain facts cannot be held as suppression of facts with an intention to evade tax. The major thrust of the above defence is their purported letter dated 15.12.2008 allegedly submitted during audit. I have gone through the copy of the said letter dated 15.12.2008 which was submitted by the notice along with their written reply. The said letter purportedly declare that they had been availing Cenvat credit on PSF. It is seen that the said letter was addressed to the Assistant Commissioner of Service Tax, for submitting following documents for EA 2000 Audit:

i. *Information as per Annexure A along with supporting.*
ii. *Brief Note of activities-Synopsis*
iii. *Registration Copy (ST-1 and ST-2)*

iv. Details of Service wise revenue. Service Tax paid.

v. Copies of Service tax returns from Jan 2003 711 Sept 2008.

The said letter per-se do not mention about any details relating to cenvat availment and input services on which cenvat is availed by them. The reference of PSF comes in Annexure A which was purportedly submitted by them where in they had mentioned that List of input Services in the same category in respect of which tax credit is availed- Passenger Service Fee'. Ironically, they have mentioned PSF as a input service whereas as they were collecting the charges from passengers, as if they were providing it as out-put service to the passengers. This fact was not disclosed in the said letter. As such it creates a wrong or misleading impression that PSF was for services received by the noticee , where as this was contrary to the fact.

The above cannot be termed as a proper disclosure. What was important and should have been declared by them was the fact that the PSF was collected by them on behalf of the AA! Or Airport operator. Only such declaration would have given any clear understanding and insight of the nature of transaction between AAI and the noticee and the purpose of issue of invoice by AAI, on which the cenvat is availed by them. In absence of any clear and understandable disclosure it can not be assumed that they declared about such availment of credit. Just a mention of a PSF would neither give any idea to the Audit officers about the real nature of such Cenvat availment nor can this be expected that they would conduct a separate enquiry to gauge the fallacious nature of such purported declaration.

It appears from the noticee's submission that what they are trying to say is that when they had purportedly given the letter mentioning 'PSF' in the list as one of the services on which the Cenvat is availed, the department should have caused full enquiry by asking for all the details about the same and raised all the objections during the said audit conducted in 2008 itself. By not causing the investigations it tantamount to approving or allowing their Cenvat on PSF.

In this context, l observe that in the case of M/s. Step Cosmetics V/S. CCE (1996 (87) ELT 734 (Tri}], the hon'ble CESTAT held that 'Revenue act on the basis of declarations filed by the assessee. The declaration had to be correct and all facts had to be correctly stated therein. By filing incomplete /incorrect declaration and by withholding vital facts which are within the knowledge of the assessee, it could never be a valid defence that the department should have un-earthed the full and correct facts which the assessee sought to suppress. No legal frame work could be established for such understanding. The fact remains that the noticee never made any declaration mentioning the that they are provider of service to AAI for collecting PSF on their behalf. Even while defending the present SCN, the noticee is still saying they are the recipient of the services. However, they could not elaborate what services they have received from AAI, for which the PSF and UDF is collected from passengers .....

.......Beside, there seems to be an element of misdeclaration with an intention to avail the inadmissible cenvat credit. This fact get support from their submissions in response to the present SCN as well where they are trying to claim that they are infact provider to services for which PSF and UDF is collected. This claim is contrary to the facts as examined in the forgoing paras.

It is peculiar to note that the entire dispute arises because of the mechanism adopted for remitting the PSF and UDF collected by the airlines to AAL. It was the DGCA direction that the AAI /Airport operator would raise an Invoice for collecting the same and the airline would remit the amounts collected by them as PSF and UDF from the passengers to AAI, Kad there been no Invoice raised by AAL, there would not have been any occasion to avail such cenvat. The raising of invoice always gives an impression that the airline is a recipient of services. But fact is the invoice were just part of the mechanism to recover the PSF and UDF which were collected by airlines on behalf of AAI. These were not for any services provided or to be provided to the noticee to qualify as a 'input service'. The noticee is only trying to take undue advantage of the situation to get the inadmissible and illegal benefit. This arrangement itself hides the true nature of the transaction and the notice has attempted to drive mileage out of it knowing fully well that the invoices were only a mechanism to facilitate the remittance of PSF and UDF to AAI and such remittance were not for receipt of any service. Though these facts were known to the noticee, they did not declare it to the department. Therefore it appears to be a clear case of suppression and wilful misdeclaration with an intention to defraud the revenue. Therefore, the extended period as well as penal provisions are invokable in this case."

5.8 However in our view when the appellant is claiming to have admitted and reversed the entire credit confirmed by the impugned order, we do not find any merits in the submissions made by the appellant vis a vis the invocation of extended period of limitation. However in remand proceeding adjudicating authority should consider the said letter for taking into account this letter for establishing bonafides, for purpose of penalty imposed.

5.9 In view of the discussions as above we are of the view that matter needs to be relooked into by the adjudicating authority for verification of the following:

- Amount of credit reversed by the appellant as claimed on the basis of ST-3 return filed by them;
- In case on verification, if appellant is able to substantiate their claim no further action is required;
- In case the some amount is not found to be reversed, consequences as per law follows;
- Issue needs to examine afresh for bonafides in view of exhibit 15;

6.1 Miscellaneous application filed by the appellants is allowed.

6.2 The appeal filed by the appellant is allowed and matter remanded back to the original authority as per the directions stated in para 5.9 above.

6.2 Adjudicating authority in view of the amount involved in the proceedings should decide the matter in remand proceedings within three months of receipt of this order.

(Operative portion of the order pronounced in the open court)

Sanjiv Srivastava
Member (Technical)

Dr Suvendu Kumar Pati
Member (Judicial)