CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 85317 of 2023

(Arising out of Order-in-Original No. 65/RB/Commissioner/Belapur/2022-23 dated 10.12.2022 passed by the Commissioner of CGST & Central Excise, Belapur Commissionerate.)

Reliance Jio Infocomm Ltd. **.... Appellants**
Building No. 5 B, Reliance Corporate Park,
5 TTC Industrial Area, Thane Belapur Road,
Ghansoli, Navi Mumbai- 400 701.

Versus

Commissioner of CGST & Central Excise Belapur **.... Respondent**
1st Floor, CGO Complex, CBD Belapur,
Navi Mumbai- 400 614.

Appearance:

Shri Rafique Dada & Shri Vikram Nankani, Sr. Advocates, assisted by
Shri Vipin Jain, Shri Vishal Agarwal, Shri Abhishek K. Deodhar &
Ms Shilpa Balani, Advocates for the Appellants

Shri Devang Girish Vyas, Additional Solicitor General (ASG), assisted by
Shri Priyesh Bheda, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85812/2024

Date of Hearing: 28.02.2024
Date of Decision: 27.08.2024

Per: BENCH

Brief facts of the case, leading to this appeal, are summarised herein below:

1.2 The appellants herein M/s Reliance Jio Infocomm Ltd, are *inter alia,* engaged in the business of providing taxable services, under the category 'telecommunication service', defined under Section 65(109a) of the Finance Act, 1994 (for short, referred to as 'the Act of 1994'). On introduction of the Negative List of services, the appellants were recognised as the service provider for provision of the taxable 'service', defined under 65B(44) of the Act of 1994. For provision of such taxable service, the appellants got themselves registered with the jurisdictional Service Tax department. Upon introduction of Goods and Services Tax (GST) with effect from 01.07.2017, the appellants have taken GST registration by migrating from the Service Tax regime to the GST regime.

1.3 For providing the telecommunication service, the appellants were granted a Unified License (UL) No. 20-401/2013 (AS-I) dated 21.10.2013 by the Department of Telecommunications ('DoT'), Ministry of Communications & IT, Government of India under Section 4 of the Indian Telegraph Act, 1885. For the aforesaid purpose, the appellants had set up telecommunication infrastructure viz., poles, masts, towers, optical fibre cable network, antennas, data centre etc., throughout the country. The appellants were availing Central Value Added Tax (CENVAT) credit of Central Excise duty paid on the capital goods/inputs and service tax paid on the input service and the credit so availed, was utilised for payment of service tax on the output service provided by the appellants.

1.4 In this case, the appellants have contended that after the requisite telecommunication infrastructure was set up, they had initiated testing of the infrastructure from December 2015, by on-boarding their employees/ business associates as 'test users'; that thereafter, they had decided to undertake a trial run, with a wider spectrum of users/subscribers w.e.f. 05.09.2016 and eventually, they had launched the commercial telecommunication operations w.e.f. 01.07.2017.

1.5 The CENVAT credit availed by the appellants prior to the date of introduction of the GST law, were permitted to be carried forward into the GST law and for such purpose, the declaration in Form GST TRAN-1 was required to be filed before the jurisdictional authorities, which were duly complied with by the appellants. During the course of verification of Transitional Credit in the prescribed form TRAN-1, the audit wing of the department had observed that the appellants commenced their activities of provision of telecommunication services from September, 2016 and such services were provided to the general public/consumers initially without consideration i.e., free of charge, during the period from 05.09.2016 to 31.03.2017. The departmental authorities had interpreted that the provision of service as free of charge should be considered as 'exempted services', in terms of Explanation 3 *appended* to Rule 6(1) of the CENVAT Credit Rules, 2004 (for short, referred to as 'the CCR'). With such an understanding, the department had concluded that the appellants are required to pay an amount, equal to 7% of the value of the 'exempted services' in terms of Rule 6(3)(i) of the CCR. Since, the appellants had failed to comply with such statutory requirements, show cause proceedings were initiated for recovery of the said amount. The Show Cause Notice (SCN) No. V/AE/Bel/Gr.B/ Reliance Jio/12-150/4/2019-20 dated 05.10.2021 issued in this regard by the department was adjudicated upon by the learned Commissioner, CGST & Central Excise, Belapur vide Order-in-Original No. 65/ RB/ Commissioner/ Belapur/ 2022-23 dated 10.12.2022 (for short, referred to as "the impugned order"). By resorting to the Best Judgement Assessment provisions contained in Section 72 of the Act of 1994 read with Section 174(2) of the CGST Act, 2017, the impugned order was passed, by confirming an amount of Rs.9590,95,08,127/- along with interest; and imposing penalties under Section 77 and 78 of the Act of 1994 on the appellants. In support of confirmation of the adjudged demands, the original authority has based his findings, *inter alia*, on the following aspects:

(i) the activities in the form of Telecommunication service provided by the noticee free of charge/without consideration to the subscribers, during the period 05.09.2016 to 31.03.2017, falls under the category of 'exempted services', in terms of Explanation-3 of Rule 6(1) of the CCR inasmuch as no consideration is involved in such activities;

(ii) commercial launch of telecommunication service to the general public during the period 05.09.2016 to 31.03.2017, cannot be treated as a trial/testing phase, as claimed by the noticee and therefore, their plea that the company had commercially launched their services w.e.f. 01.07.2017 is not correct;

(iii) that services provided to subscribers, who have not exceeded the specified free limits (domestic voice calls, 100 SMS per day and upto 4GB data usage per day) were services provided without consideration and were distinct and separate from paid telecommunication service which were provided to Reliance Retail Ltd (RRL), with whom the appellants had entered into a Master distribution agreement for sale of pre-paid vouchers.

(iv) since the free telecommunication service provided to the subscribers and paid telecommunication service provided to RRL are entirely distinct transactions, valuation method prescribed for the telecommunication service cannot be applied for the valuation of the free telecommunication service provided by the noticee, in terms of Explanation to Rule 5 of the Service Tax (Determination of Value) Rules, 2006;

(v) the noticee had indulged into the activity of providing telecommunication service to subscribers during the period from 05.09.2016 to 31.03.2017, who were within the specified limits (Domestic Voice calls, 100 SMS per day & upto 4GB data usage till 03.12.2016 & upto 1 GB w.e.f. 04.12.2016), without receiving any consideration. In view of the fact that the impugned activity of providing the telecommunication service to their subscribers was without any consideration, such activity did not fit into the definition of "service", as defined under Section 65B(44) of the Act of 1994;

(vi) the noticee having not maintained separate records for utilization of inputs and input services distinctly for different types of services, were required to reverse CENVAT Credit in terms of Rule 6(3) of the CCR;

(vii) the noticee's claim, on the basis of the certificate dated 15.09.2022 issued by the Chartered Accountants, that CENVAT credit of Rs.4724,77,29,885/- was availed as capital goods during the period April, 2012 to March, 2017 cannot be accepted, in view of the provisions contained in Rule 2(k)(C) of the CCR, wherein it has been mandated that when the value of capital goods is up to Rs.10,000/- per piece, then such item shall not be termed as capital goods, but shall fall under the definition of 'input'. It has also been held that the noticee has failed to substantiate during the course of investigation with documentary evidences in respect of availment of CENVAT credit on the capital goods;

(viii) the suggestions made by the noticees for arriving at the value of exempted services on the basis of Average Revenue Per User (ARPU) for the telecommunication industry for the financial year 2016-2017; per GB cost as per cost audit report for subsequent year 2017-2018; published basic tariff applied on number of zero value recharges done; and similar tariff plans offered in subsequent period, were discarded, holding that the said methods suggested are based on the comparative values of a period, other than the relevant period. It has further been held that there was vast difference in the cost for provision of service in the initial years in a telecommunication service industry, like that of the noticees; and as such, the valuation methods suggested by them are not in accordance with the provisions contained in Section 67 of the Act of 1994, Service Tax (Determination of Value) Rules, 2000 and Rule 6(3) of the CCR.

(ix) with regard to invocation of the extended period of limitation contained in the proviso to Section 73(1) of the Act of 1994, read with Rule 14 of the CCR, the impugned order has held that the noticee has suppressed the relevant facts of provision of exempted and non-exempted service in the periodic ST-3 returns and that since the department has gathered such information from verification of TRAN-1, suppression of fact on the part of the noticee is manifest and accordingly, the said statutory provisions are correctly applicable for confirmation of the proposed demands.

1.6 Feeling aggrieved with the impugned order dated 10.12.2022, the appellants have preferred this appeal with the Tribunal.

2.1 Shri Rafique Dada and Shri Vikram Nankani, Senior Advocates, duly assisted by Shri Vipin Jain, Shri Vishal Agarwal, Shri Abhishek K. Deodhar & Ms Shilpa Balani, Advocates all appearing for the appellants, submitted at the outset, that the findings of the learned Commissioner that two distinct services were provided by the appellants, the first to the subscribers (which was allegedly free of charge) and the second to RRL (for sale of pre-paid vouchers for consideration) was not only beyond the scope of the SCN but also otherwise factually incorrect and otherwise untenable. They referred to 10 tariff plans submitted by the appellants Company to the TRAI, the media release and the Customer Acquisition Form (CAF) to submit that all the subscribers who were on-boarded during the relevant period, had specifically agreed in the service contract i.e., CAF to pay for appellant's telecom services as per the tariff plans filed with the TRAI from time to time. The on-boarding of the customers was not limited to initial period, during which the 'Jio-welcome offer' and the 'Jio Happy New Year' plans were applicable, but were for an unspecified open–ended period. The introductory offers stating that certain number of SMS messages and data usage upto a certain limit was free, implied that the customers who were signing CAF, were in fact agreeing to pay the applicable tariff for usage beyond the initial threshold limits. It was thus totally incorrect for the learned Commissioner to hold that the appellants have provided free telecom services to their subscribers and that too ignoring the fact that the appellants company had earned thousands of crores of revenue not only from Inter Connection Usage charges (IUC) but also from sale of vouchers during the period 2016-17. They also submitted that the learned Commissioner's finding that the revenue earned from sale of vouchers was not consideration flowing from subscribers but, from another entity i.e., RRL, who has been appointed as Master distributors for sale of such vouchers, was totally absurd and illogical as the vouchers were purchased by RRL only for further sale to subscribers, who alone were entitled to avail telecommunication services from the appellants. Also, it was submitted by the learned Counsels, that the mere activity of re-selling or distributing telecom vouchers by RRL did not amount to provision of telecommunication service, as under Section 4 of the Indian Telegraph Act, 1885 only a licence holder was entitled to provide telecommunication services in India.

2.2 It was further submitted by the learned Counsel for the appellants that the appellants were providing a single service viz., 'telecommunication service', which was undisputedly, rendered for a consideration as evident from the tariff plans filed with the TRAI, the media release and the 2016-17 revenue figures extracted in the impugned order. They submitted that the department had vivisected a single and indivisible telecommunication service rendered by the appellants as that within the specified threshold, being called as 'free' and that beyond the specified threshold, as being termed as 'top-up/paid'; overlooking the provisions of continuous supply of service provided under the Point of Taxation Rules, 2011, which specifically dealt with telecommunication service as a continuous service. They further submitted that the learned adjudicating authority has erred in presuming that the 'free' telecommunication service was rendered to subscribers; whereas, the paid and top-up telecommunication services was rendered to RRL, the master-distributor of recharge vouchers. They submitted that in any event, even for the telecommunication service rendered within the specified threshold limit, the consideration in the form of Interconnection Usage Charges (IUC) was undisputedly being recovered by the appellants. Thus, they submitted that the persons from whom IUC charges were recovered was irrelevant for determination of whether the telecommunication service was rendered without consideration or otherwise, inasmuch as IUC is a consideration, charged in respect of telecommunication service *qua* the subscribers. Learned Counsel also submitted that even if IUC is considered to be a consideration received from third party telecom operators, but the subscribers are the beneficiaries and as such, the service remains as single, indivisible telecommunication service, which cannot be said to have been provided without consideration.

2.3 Learned Counsel submitted that Explanation 3 to Rule 6(1) of the CCR covers activities specifically excluded from the ambit of 'service' under Section 65(B)(44) of the Act of 1994 and not activities without consideration. Further, they have referred to the Explanation 4 appended to Rule 6(1) of the CCR to state that even if explanation 3 is interpreted as covering activities without consideration, the value of such activities would in terms of the said explanation 4 would be 'nil', being the invoice value thus, resulting in no liability against the appellant under Rule 6(3) of the CCR. They also submitted that no input and input service can be regarded as used for providing the alleged exempted services, in view of the fact that the taxable services provided by the appellants could not have been rendered by using a lesser quantum of input/input services. It was therefore, their submission that the entire CENVAT credit on inputs and input services has been used for providing taxable output services.

2.4 Learned Counsel further submitted that the capital goods on which CENVAT credit was availed by the appellants are classifiable under Chapter 84 or 85 of the Central Excise Tariff Act, 1985. Thus, it has been contended that since Chapter 84 and 85 and the components, spares and accessories of the goods under such chapters are considered as 'capital goods' in the definition provided under Rule 2(a)(A) (i) and (iii) of the CCR, denial of CENVAT credit on the capital goods in the impugned order is not proper and justified. They further submitted that in certain cases, the value of goods procured by the appellants was below Rs.10,000/- per piece, the total quantum of such credit would be very meagre, i.e., around Rs. 6.90 crores, for which denial of the CENVAT benefit to the tune of Rs.4724 crores in the impugned order was totally uncalled for and unjustified and therefore, the same deserves to be quashed and set aside. It was further submitted that even if Rule 6(3) of the CCR was attracted in the present case and the appellant's liability was to be determined under Rule 6(3)(i) of the CCR as 7% of the value of exempted services, there was no justification for the learned Commissioner to have disallowed the entire CENVAT credit availed by the appellants in the garb of best judgement determination of value. It was pointed out that under Rule 6(3) of the CCR, the liability of the appellants was 7% of the value of exempted service which could not exceed the total amount of CENVAT credit availed. Despite invoking the best judgement method of determination of value, the learned Commissioner has, on the pretext of not having adequate data, refused to determine the value of exempted services and thereafter straight away disallowed the entire CENVAT credit, which is merely the upper limit prescribed in the said Rule.

2.5 On the issue of invocation of extended period of limitation for issuance of the SCN, learned Counsel submitted that the facts regarding launching of the telecommunication service by the appellants were known to the department right from the inception inasmuch as the media release and tariff plans designed were filed with the regulatory authorities i.e., TRAI. Further, they also submitted that the CENVAT credit availed on the disputed goods/services and reversal made in respect of certain credits, were duly reflected in the periodical returns filed by the appellants. They also submitted that investigation conducted by the department was ongoing since April, 2018 and after the expiry of the normal period of limitation, the show cause proceedings were initiated in October, 2021, which is clearly barred by limitation of time. In this context, they submitted that since there is no element of fraud, collusion, suppression of facts etc., with an intent to defraud the government revenue, the SCN should have been issued within the prescribed normal period of eighteen months and the extended period cannot be invoked, in absence of proper substantiation, with regard to the involvement of the appellants in the fraudulent activities itemised above.

2.6 In support of their above stand, the learned Counsel have referred to and relied upon the following judgements delivered by the judicial forums:

(i) *Aphali Pharmaceuticals Ltd. Vs. State of Maharashtra* - 1989 (44) E.L.T. 613 (SC)

(ii) *Union of India* Vs. *Hindustan Zinc Ltd.* - 2014 (303) E.L.T. 321 (SC)

(iii) *Commissioner of Central Excise & Customs, Vadodara-I Vs. Sterling Gelatin*- 2011 (270) E.L.T. 200 (Guj.)

(iv) *Reliance Industries Ltd. [Gujarat High Court in R/TAX Appeal No. 219 of 2022 as also R/TAX Appeal No. 196 of 2023]*

(v) *Vodafone Mobile Services Ltd. Vs. Commissioner of Service Tax, Delhi - 2019 (27) GSTL 481 (Del.)*

(vi) *Tamil Nadu Housing Board Vs. Collector of Central Excise, Madras-* 1994 (74) E.L.T. 9 (SC)

(vii)*Commissioner of Central Excise and Customs Vs. Reliance Industries Limited* - 2023 (385) E.L.T. 481 (SC)&(2023) 8 Centax 96 (S.C.)

(viii) *Goodyear India Ltd. Vs. Commissioner of Central Excise, Delhi-IV*2014 (301) E.L.T. 410 (Tri-Del.)

(xi) *Gannon Dunkerely& Co. Ltd. Vs. Commissioner (Adj.) of Service Tax* - 2021 (47) G.S.T.L. 35 (Tri.-Del.)

(x) *Shiv Shakti Co-Op. Housing Society, Nagpur Vs. Swaraj Developers &Ors. – Judgement dated 17304.2003 in SLP (C) 19030 of 2002*

(xi) *Commissioner of Customs Vs. Toyo Engineering India Limited*- 2006 (201) E.L.T. 513 (S.C.)

(xii) *Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Ltd.*- 2007 (215) E.L.T. 489 (S.C.)

3.1 Shri Devang Girish Vyas, learned Additional Solicitor General (ASG) appearing for Revenue, reiterated the findings recorded in the impugned order and further submitted that the telecommunication service provided by the appellants during the disputed period was "exempted", as per the provisions contained in Rule 6 of the CCR. In this regard, he has stated that the appellants have offered telecommunication service *(Domestic voice calls, SMS up to 100 per day, Data Usage up to 4GB/1GB per day, Jio Apps, Jio Security, etc.)* to subscribers on 'free' basis inasmuch as no consideration was charged for provision of such services. Apart from relying upon the reasoning given by the learned Commissioner in the impugned order for holding that Rule 6(3) of the CCR was attracted in the present case, learned ASG also submitted by referring to the provisions of Section 65 B (44) of the Act of 1994, that activities for which no consideration was charged was deemed to be an exempted service for the purposes of Rule 6 of the CCR, by virtue of the deeming fiction created by explanation 3 to Rule 6 of the CCR. Learned ASG submitted that since there was no consideration charged for the activities undertaken by the appellants, such activities would not fall within the ambit of the definition of 'service' and would be in the nature of 'No Service'. Therefore, he stated that in such a scenario, the activities of the appellants would attract the provisions of Rule 6 (1) of the CCR, according to which, no CENVAT credit shall be allowed and the credit not allowed, shall be calculated by the output service provider i.e., the appellants, in terms of the provisions of sub-rule (2) or sub-rule (3) of Rule 6 of the CCR.

3.2 He has also referred to the Explanation 3 appended to sub-rule (1) of Rule 6 of the CCR, to state that the appellants had not provided any service inasmuch as there is no element of consideration involved therein, and as such, the transaction in question should be considered as 'exempted service', defined in clause (e) of Rule 2 of the CCR, for the purpose of reading of Rule 6 of the CCR. He further submitted that since the appellants had used inputs and input services for the activities, which are not to be considered as 'service', they are required to pay the amount at the requisite percentage provided under the statute.

3.3 Learned ASG further submitted that since the appellants had not provided any material evidence with regard to actual user data and actual time length of the services used, in respect of the free telecommunication services provided by them, the stand of the department is correct in resorting to the Best Judgement Assessment for applying the provisions of Rule 6 of the CCR. Therefore, he asserted that the appellants were liable to pay 7% of the value of exempted service.

3.4 In support of the above submissions, learned ASG has relied upon the judgement of Hon'ble Supreme Court in the case *Commissioner of Central Excise Vs. Modi Rubber,* reported in 2001 AIR SCW 4363 (SC 3 Judges Bench), to state that no credit of duty paid on inputs is available, if the final product is exempt from payment of duty. By relying upon the judgement of Hon'ble Delhi High Court in the case of *Lally Automobiles Private Limited Vs. Commissioner (Adjudication)* – 2018 (17) G.S.T.L. 422 (Del.), he submitted that the CENVAT statute has been designed to give the benefit of credit to only excisable goods or taxable services, and if such goods or services are exempted, then the assessee would pay the availed credit at a percentage of value of such exempted goods or services; and for that purpose, recovery mechanism has been provided in the statute, which is Rule 6 of the CCR. Further, learned ASG has also referred to the judgement of the Hon'ble Supreme Court in the case of *ALD Automotive Ltd. Vs. Commercial Tax Officer* – (2019) 13 SCC 225 to state and submit that availment of CENVAT credit, being a concession/benefit provided in the statute, observance of the procedures laid down therein have to be strictly adhered to, which in the present case, is absent inasmuch as no documentary evidences were produced by the appellants before the adjudicating authority to demonstrate that they had dealt only with the provision of taxable service and not the exempted service.

3.5 Learned ASG submitted that the appellants had suppressed the material facts from the department regarding provision of the actual service, and thus, they had the *mala fide* intention in defrauding the government revenue by way of not making payment of service tax. He further submitted that since the department was aware about the *modus operandi* of the appellants, through conducting of audit and in-depth investigation of the matter, suppression of facts on the part of the appellants are manifest and accordingly, invocation of extended period of limitation for issuance of show cause notice is proper and justified.

4. Heard both sides and examined the records of the case, including the written submissions filed during the course of hearing of appeal, by both sides.

5.1 The various issues, that are in dispute in the present appeal before the Tribunal are itemised herein below:

(i) Whether the order passed by the learned Commissioner has traversed beyond the scope of the Show Cause Notice?

(ii) Whether the activity of provision of telecommunication services by the appellants, during the disputed period, involved receipt of any consideration; or was any service provided without any consideration/ free of charge?

(iii) Whether the activities undertaken by the appellants for provision of telecommunication service, can be regarded as 'exempted service', in terms of Explanation 3 to Rule 6(1) of the CCR, when read with the definition of 'service' under Section 65B(44) of the Act of 1994 or otherwise?

(iv) When the telecommunication service provided by the appellants through M/s RRL, as Master Distributor, can it be said that the services are not provided to the subscribers and only provided to such distributor?

(v) Whether, for the purposes of Explanation 3 to Rule 6(1) of the CCR, an activity which is not specifically listed in the exclusion portion of the definition of 'service' in Section 65B(44) of the Act of 1994, can be regarded as an 'exempted service' for the purposes of

Rule 6 of the CCR, merely by reason of the fact that no consideration was specifically and separately charged for such an activity?

(vi) Assuming that the activity specified in (v) above is an exempted service by virtue of Explanation 3, what would be the value of such an exempted service for the purpose of Rule 6(3)(i) of the CCR, particularly in view of Explanation 4 appended to such rule?

(vii) Whether the learned Commissioner was correct in completely ignoring the provisions of the Point of Taxation Rules, 2011 while determining the issue whether services had been provided without consideration?

(viii) Can the extended period of limitation be invoked under Section 73 of the Act of 1994 read with Rule 14 of the CCR for confirmation of the adjudged demands on the appellants?

5.2 Before dealing with the substantive issues on merits, it is necessary to first deal with the grievance of the appellants that the order passed by the learned Commissioner had traversed beyond the scope of the SCN by confirming the demands raised therein on an entirely new and different basis, than the one proposed in the said SCN.

5.3 The allegation in the SCN was that telecommunication service provided to the subscribers was partly non-exempt (Interconnection usage charges and prepaid vouchers) and partly exempted (activities provided free of charge without consideration to the subscribers). Significantly, the SCN did not treat revenues earned from sale of prepaid vouchers to be a service provided to RRL, as is the finding recorded by the learned Commissioner in paragraph 41.2 of the impugned order. In the defence submissions, the appellants had pointed out that it had during the relevant period, earned substantial revenues from sale of prepaid vouchers, thus disproving the allegation of free provision of telecommunication service. In the defense submissions, the appellants had also referred to the notification issued under the Point of Taxation Rules, 2011 (POT Rules) to be a category of continuous supply of service. This submission was made for driving home the point that for deciding the question, whether any service had been provided without consideration, what has to be determined first is the point of time when the service is deemed to be provided i.e., the point of time when contractually a payment becomes due to be made to the telecom service provider. On this basis, the submission made by the appellants before the learned Commissioner was that all their subscribers were contractually bound to pay applicable tariff charges, the moment the specified threshold of 100 SMS, 4GB data was crossed. Instead of dealing with this submission, we find that the learned Commissioner while passing the impugned order, had completely ignored the POT Rules and the notification issued by the Central Government. He has instead, given an entirely different and new reasoning in paragraph 41.2 for confirming the demands raised in the SCN. The learned Commissioner has held in paragraph 41.2 that the revenues earned by the appellants from sale of pre-paid vouchers was not a consideration received by them for providing telecommunication service to the subscribers, but was a consideration received for providing services to RRL, with whom they had executed a master distribution agreement for sale of prepaid vouchers. In paragraph 41.2, the learned Commissioner has proceeded on the basis that to the extent of specified limits of 100 SMS per day and 4 GB data per day, telecommunication service was provided to subscribers and the moment the above free limits were exceeded, the services were to be regarded as not provided to the subscribers but to another company i.e., RRL. He has further held that the free telecommunication service (provided to the subscribers) and paid telecommunication service (provided to RRL) are entirely distinct transactions, which cannot be clubbed. It is on this reasoning that the learned Commissioner holds that the revenues earned from the sale of prepaid vouchers are not 'consideration' received for provision of telecommunication service. Quite apart from the fact that this reasoning is bordering on absurdity, we find that the learned Commissioner has by adopting this reasoning, almost jettisoned the reasons originally assigned in the SCN and replaced the same with an entirely different logic. It is trite that an adjudicating authority cannot change the underlying basis of a demand raised in a SCN and confirm the demand on an entirely different logic. We have therefore no hesitation in holding that the impugned order passed by the learned Commissioner is unsustainable, having traversed beyond the scope of the SCN issued to the appellants. Though, this ground alone is sufficient basis for allowing the appeal, we have in the following paragraphs, dealt with the other issues on merits and on limitation, as both sides have made detailed submissions, dealing with those issues.

6.1 In order to address the issues framed herein above on the merits of the matter, the statutory provisions, relevant for consideration, are extracted below:

"Finance Act, 1994

Chapter V

Service Tax

Pre-Negative list period prior to 01.07.2012:

Section 65 (109a)*"**telecommunication service**" means service of any description provided by means of **any transmission, emission or reception of** signs, **signals**, writing, **images and sounds** or intelligence or information of any nature, by wire, **radio**, **optical**, visual or other electro-magnetic means or systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception by a person who has been granted a licence under the first proviso to sub-section (1) of section 4 of the Indian Telegraph Act, 1885 (13 of 1885) **and includes**—*

(i) voice mail, data services, audio tex services, video tex services, radio paging;

(ii) fixed telephone services including provision of access to and use of the public switched telephone network for the transmission and switching of voice, data and video, inbound and outbound telephone service to and from national and international destinations;

*(iii) **cellular mobile telephone services** including **provision of access to and use of** switched or non-switched **networks for the transmission of voice, data and video**, **inbound and outbound** roaming service to and from national and international destinations;*

(iv) carrier services including provision of wired or wireless facilities to originate, terminate or transit calls, charging for interconnection, settlement or termination of domestic or international calls, charging for jointly used facilities including pole attachments, charging for the exclusive use of circuits, a leased circuit or a dedicated link including a speech circuit, data circuit or a telegraph circuit; ….

Post Negative List period w.e.f. 01.07.2022:

Section 65B. Interpretations. – In this Chapter, unless the context otherwise requires,—

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

(a) an activity which constitutes merely,--

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.…

Valuation of taxable services for charging service tax.
Section 67. *(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,—*

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount
received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation.—For the purposes of this section,—

(a) "consideration" includes--

(i) any amount that is payable for the taxable services provided or to be provided;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.

(b) [omitted w.e.f. 01.07.2012]

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise."

"CENVAT Credit Rules, 2004

Definitions.
2. *In these rules, unless the context otherwise requires,—*

*(e) "**exempted service**" means a—*
(1) taxable service which is exempt from the whole of the service tax leviable thereon; or
(2) service, on which no service tax is leviable under section 66B of the Finance Act; or
(3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken
but shall not include a service—
(a) which is exported in terms of rule 6A of the Service Tax Rules, 1994; or
(b) by way of transportation of goods by a vessel from customs station of clearance in India to a place outside India;

Obligation of a manufacturer or producer of final products and a provider of output service.
6 . *(1) The CENVAT credit shall not be allowed on such quantity of input as is used in or in relation to the manufacture of exempted goods or for provision of exempted services or input service as is used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services and the credit not allowed shall be calculated and paid by the manufacturer or the provider of output service, in terms of the provisions of sub-rule (2) or sub-rule (3), as the case may be:*
.....
Explanation 1.—For the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of rule 2 shall include non-excisable goods cleared for a consideration from the factory.

Explanation 2.—Value of non-excisable goods for the purposes of this rule, shall be the invoice value and where such invoice value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Excise Act and the rules made thereunder.

Explanation 3.—For the purposes of this rule, exempted services as defined in clause (e) of rule 2 shall include an activity, which is not a 'service' as defined in section 65B(44) of the Finance Act, 1994, provided that such activity has used inputs or input services.

Explanation 4.—Value of such an activity as specified above in Explanation 3, shall be the invoice/agreement/contract value and where such value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Finance Act, 1994 and the rules made thereunder…..

(3)
(a) A manufacturer who manufactures two classes of goods, namely :—
(i)non-exempted goods removed;
(ii)exempted goods removed; or

(b)a provider of output service who provides two classes of services, namely:—
(i)non-exempted services;
(ii)exempted services,

shall follow any one of the following options applicable to him, namely :—

(i)pay an amount equal to six per cent of value of the exempted goods and seven per cent of value of the exempted services subject to a maximum of the sum total of opening balance of the credit of input and input services available at the beginning of the period to which the payment relates and the credit of input and input services taken during that period; or

(ii)pay an amount as determined under sub-rule (3A):….

6.2 It is an admitted fact on record that the appellants are providing 'telecommunication service'. The said phrase was defined in pre-negative list regime (i.e., prior to 01.07.2012) under Section 65(109a) of the Act of 1994, which has been quoted in paragraph 7.1 above. The said definition, remains relevant in the post-negative list regime w.e.f. 01.07.2012. This fact is evident from the Notification No.28/2011 dated 01.04.2011 as amended by Notification No.38/2012 dated 20.06.2012, by which 'telecommunication service' was specifically notified by the Central Government to be an instance of a service which is supplied in a continuous manner. Further, Notification No. 1/2013-Service Tax dated 22.02.2013, prescribing the ST-3 Return, has also captured the list of 119 services, which were specifically defined in the service tax statute effective up to 01.07.2012, as 'taxable service'. Since, telecommunication service has not been specifically defined in the post-negative list regime and that such service has been specifically notified in 2012 to involve continuous supply of service and has also been considered for filing of the ST-3 Return by the assessee in the post-negative list regime, it cannot be said that such phrase defined earlier, cannot be applied for the period post July, 2012. On reading of the above definition of 'telecommunication service', it transpires that telecommunication service encompasses a bouquet of various services such as, making outgoing calls, receiving incoming calls, sending and receiving SMS, internet usage, ISD, international roaming, etc. This bouquet of services is provided to subscribers as one single indivisible service. In the present case, though the appellants had not charged for usage of the facilities provided within the prescribed threshold limit, but on completion of the period and/or exceeding the usage limit, the appellants had intended to charge and in fact charged, barring a minuscule percentage of subscribers for the services as per the approved plan. It is not the case of the Revenue that each of the subscribers covered under the threshold limit were provided with a mobile number, which were subsequently changed to another mobile number on completion of the threshold limit period. The learned Commissioner in the impugned order has vivisected one single telecommunication service provided to the subscriber into two distinct services i.e., the first one provided to the subscribers to the extent of usage within the specified threshold of 100 SMS and 4GB data; and the second, provided to RRL for the paid usage by the same subscriber beyond the specified threshold. We cannot find any justification, logic or basis for such an approach, either under the Act of 1994 or under the Indian Telegraph Act, 1885. As we have already observed above, this was also not the basis assigned in the SCN for invoking and applying Rule 6(3) of the CCR therein.

6.3 In the present case, the facts are not in dispute that the appellants have appointed M/s. RRL, as the Master distributor, who in turn, manages the entire supply chain of distribution of services, provided by the appellants. Telecommunication service can only be provided by Unified License holder(s), who have been issued with the license by the Department of Telecommunication (DoT), Government of India, under the Indian Telegraph Act, 1885. The persons/agencies (more particularly, M/s RRL) involved in the supply chain, were only for the purpose of facilitating ultimate usage of such service by the consumers, with whom the appellants have the contractual agreement. Thus, mere involvement of the agencies in the supply chain cannot change the nature of telecommunication service, which are being provided by the appellants to their subscribers and for that purpose, were also duly recognised by the Regulatory Authorities. In other words, the agencies involved in between the appellants and their subscribers are only facilitators, engaged for smoothening the business activity of the appellants. Since, the telecommunication service in question has been provided by the appellants alone to the subscribers, there is no substance in the finding that such supply of service was effected to the subscribers by the agencies, as the service provider.

6.4 Further, "Telecommunication service" under clause (zzzx) of Section 65(105) of the Act of 1994 was notified to be continuous supply of service in terms of Notification No. 28/2011-Service Tax dated 01.04.2011, under the pre-negative list regime; which was continued to be considered as 'continuous supply of service', even after the introduction of the negative list regime w.e.f. 01.07.2012. In this context, the Notification No.38/2012-Service Tax dated 20.06.2012, has retained the 'telecommunication service' among others, to consider those as continuous supply of service. It has been made clear in the said notification that the date of effect would be from 01.07.2012. We find that the order of the learned Commissioner has totally overlooked this Notification and the POT Rules, even though this was one of the main planks of the appellants' defence before him. The factum of telecommunication service, being notified under the POT Rules is an undisputed position. The upshot of this is that the contract (CAF) has to be examined for determining the point of time, when the service is deemed to be provided. We have gone through the CAF and taken note of the clauses therein to the effect that the subscribers have agreed to pay all charges raised on account of services provided and that they have also agreed to the variation in the tariff charges. Insofar as the subscribers who are within the specified threshold of 100 SMS and 4 GB data are concerned, the point of taxation is the point of time when such subscribers become contractually obliged to pay for the services. It is relevant to note qua the subscribers whom the point of taxation did not arise till 31.03.2017, the same arose under the new tariff plans as applicable from 01.04.2017, which mandated every subscriber to pay for a minimum recharge amount.

6.5 The consequence of telecommunication service being a continuous supply of service, in our view is that till such time the point of taxation is triggered, there cannot be any determination to the effect that an exempt service in terms of Explanation 3 to Rule 6(1) of the CCR has been rendered. It is only when the point of taxation is triggered, then a determination can be made as to whether the service, which is deemed to be provided is taxable or exempt. The SCN and the impugned order have jumped the gun and have, without examining the point of taxation provisions, alleged and concluded that telecommunication service were provided without consideration and on this basis, has held that the provisions of Rule 6 of the CCR are applicable. One of the submissions made by learned ASG was that since services were being provided by the appellants on a daily basis, the said service concluded the same day and a new service started the next day. On this basis, it was argued that telecommunication service provided by the appellants could not be considered to be a continuous supply of service. We do not agree with this submission, since telecommunication service has been specifically notified by the Central Government to be a continuous service and therefore the first part of the definition of continuous supply, as extracted above, is not the one that is relevant. That apart, we also do not find any basis for the submission that services as per the contract were to be provided on a daily basis, merely because the prescribed thresholds of 100 SMS and 4GB data were computed on a daily basis. In our view, the service contracts, as evidenced by the CAF on record, were for an indefinite and indeterminate period, thus satisfying even the first limb of the definition of "continuous supply of service".

6.6 If we apply the POT Rules to the present case, we find that only 0.15% of subscribers were such, who surrendered their SIM connections and de-activated the connection before the POT was triggered. Even in respect of this small percentage of subscribers, the question of applying Rule 6 of the CCR can arise, only if it is shown that no consideration whatsoever was received for the services provided to them. In this connection, we note that the term consideration is not really defined in the Act of 1994, as the explanation Section 67 of the Act of 1994 merely provides that the term 'consideration' includes certain specified amounts and expenditure. Therefore, the meaning of the term 'consideration' in

Section 2(d) of the Indian Contract Act, 1872 would be of relevance and reads thus "*when, at the desire of the promisor, the promissee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called consideration for the promise*". We note that the learned Commissioner also in the impugned order at paragraph 41 has referred to the said definition in Section 2(d) of the Act of 1872.

6.7 It is not in dispute that the appellants have earned IUC charges for the telecommunication service rendered by them from the very inception i.e., the moment a subscriber activates his SIM card and receives a call from outside the network. It is the appellants submission that the IUC charges are consideration for the telecommunication service provided to the subscribers, even though the same is received not from the subscriber, but from other telecommunication companies from where the calls are originating. In this regard, we find that Section 67 of the Act of 1994 is of relevance, in that, it provides that the value of taxable services for a taxable service is the "gross amount charged by the service provider for such service provided or to be provided by him". This section does not state that the gross amount must flow from the service recipient. The emphasis in the section is on the amount that a service provider charges and receives for his services. It is irrelevant for the purposes of Section 67 of the Act of 1994 that some part of such consideration has flown from a third party. The gross amount charged for a taxable service would, considering the language of Section 67 of the Act of 1994 be the sum total of the amount received by the service provider from the service recipient and the amount received from a third party. So long as the amount received from the third party has nexus with the service provided to a service recipient, it would constitute consideration. This being the position, we hold that the IUC charges received is also consideration for the telecommunication service provided by the appellants. Consequently, the finding of the learned Commissioner that services provided within the specified threshold was free of charge is incorrect.

6.8 We note in this connection that IUC charges are consideration that a telecommunication company earns for the usage of its network for calls that are received from outside networks to its subscribers. When mobile services were introduced in India, the telecom subscribers in India were required to pay to their service providers not only for the outgoing calls but also for all incoming calls. Subsequently, as part of the regulatory changes brought in by the Government of India through the Telecommunication Interconnection Usage Charges (IUC) Regulations, 2003, the principle of "caller party pays" was introduced with the result that the subscribers did not have to pay for incoming calls and the responsibility of paying such charges fell upon the caller party. This amount was recovered by the receiving network service provider as IUC charges from the network service provider from where the call was originating. Since as we have held above, that the meaning of consideration in Section 67 of the Act of 1994 is agnostic to the entity paying it, receipt of IUC charges is also a part of the consideration for telecommunication service provided to a subscriber, as the facility of receiving incoming calls from third party networks is an integral part of the telecommunication service, being provided to a subscriber. We therefore, hold that even in respect of the 0.15 per cent of subscribers who never recharged their mobile phones and therefore did not directly pay anything to the appellants company, the services provided to such subscribers cannot be considered as provided without consideration; since, in respect of such subscribers too, IUC charges were earned and received by the appellants, albeit from other telecommunication service providers. The fact that a separate contract also existed with the other telecom service providers with a view to give effect to the regulatory regime of 'caller party pays' does not alter the fact that the service of enabling the subscribers to receive incoming calls from outside third party networks was a telecom service provided by the appellants to their subscribers. This service of receiving incoming calls from outside networks was required to be provided by the appellants not only in terms of their service contracts with the subscribers, but also to comply with one of the mandatory conditions of the Unified Licence granted to them.

6.9 We also find that since the bouquet of facilities provided by the appellants are exclusively in context with provision of 'service' under the category of telecommunication service, it would not be proper to split the single service into different constituents such as data, SMS, ISD, international roaming, inter-connect charges to conclude that some of the facilities provided were 'free' and some others were 'chargeable'. We can take the example that an individual visiting a 5-Star hotel for having a meal, and is offered with other facilities like, free parking, valet parking, enjoyment of the ambience in the lobby, free Wi-Fi, etc., for which, ostensibly, no consideration is charged, except for the consideration charged for the meal itself. In this situation, it would be illogical to contend that such other facilities provided are separate from the restaurant services offered by the hotel. In other words, the beneficiary of the host of services would only pay for the restaurant bill and in such circumstances, it cannot be construed that the other services availed were 'free' services. Similarly, an airline offering a certain class of ticket e.g. First Class, Business Class, Frequent Flyer, etc., also offers so-called "free" facilities such as free pick-up and drop from and to the airport, free access to the lounge, which may entail free refreshments, free extra baggage allowance, priority check-in, priority boarding, etc. Even in such case, it would be irrational to assume that any service other than 'transport by air service' is being rendered by the airlines. Therefore, applying the above examples to the facts of the present case, it cannot be concluded that the threshold facility provided as introductory offers at the initial stages of the launch, which was subsequently curtailed and charged for provision of service at the commercial run phase, was an exempted service, in order to fall under the purview of Explanation 3 appended to sub-rule (1) of Rule 6 of the CCR.

6.10 In the course of the hearing, we had specifically inquired from the learned Counsel appearing for the appellants, whether there was any subscriber in respect of which no revenue, either directly through recharge vouchers or indirectly through IUC charges was earned by them. We were informed that there were 771 of such subscribers, who did not seem to have activated their SIM and therefore, neither received nor made any calls, SMS nor data. This number constitute less than 0.0007 per cent of the total subscribers of the appellants' company. Even in respect of these subscribers, it was submitted on behalf of the appellants that the cause of action for invoking Rule 6 of the CCR never arose, in view of POT Rules, since these subscribers were, in terms of the service contract, never liable to pay anything to the appellants' company during the relevant period.

6.11 In view of the above analysis and the detailed discussions made in the preceding paragraphs, we are of the considered opinion that an element of consideration was always present in the provision of telecommunication service, as a continuous supply of service, during the disputed period. Therefore, the observations of the learned adjudicating authority that the telecommunication service provided by the appellants free of charge/without consideration to the subscribers, during the period 05.09.2016 to 31.03.2017, falls under the category of 'exempted service', is not proper and justified.

7.1 The object behind enactment of the CENVAT statute is to avoid the cascading effect of tax burden on account of double taxation (both at input as well as final product stages), so that the manufactured final product or output services would not be exorbitantly high and the ultimate consumer should not be burdened with the extra cost for the goods and services. Keeping the said objective in mind, the Central Government, in exercise of the powers conferred by Section 37 of the Central Excise Act, 1944 and Section 94 of the Finance Act, 1994 has enacted the CENVAT Credit Rules, 2004.

7.2 In the context of the provision of service, sub-rule (1) of Rule 3 of the CCR, which is the enabling provision, has entitled a provider of output service to take CENVAT credit of service tax paid on the input service(s) and duty paid on input/capital goods. The CENVAT credit so taken / availed by the service provider, are permitted to be utilised under sub-rule (4) of Rule 3 of the CCR, for payment of service tax on any output service. The obligation of a provider of output service is contained in Rule 6 of the CCR. Sub-rule (1) of Rule 6 of the CCR provides that the CENVAT credit shall not be allowed on the input services, which are used for provision of exempted services; and, the credit not allowed, shall be calculated and paid by the provider of output service, in terms of the provisions of sub-rule (2) or sub-rule (3), as the case may be. Explanations 1 to 4 were appended to sub-rule (1) of Rule 6 of the CCR. Explanation 3, relevant for consideration of the present dispute, has clarified that for the purpose of this rule, 'exempted service' as defined in clause (e) of Rule 2 of the CCR, shall include an activity, which is not a 'service' as defined in Section 65B(44) of the Act of 1994, provided that such activity has used inputs or input services. The phrase 'exempted service' has been defined in the CENVAT statute to mean taxable service which is exempted from the whole of service tax leviable thereon; or service, on which no service tax is leviable under Section 66B of the Finance Act; or taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing for such taxable service, shall be taken.

8.1 Even if we assume that qua the 0.0007 percent subscribers or 0.15 percent subscribers, the services provided by the appellants were free of charge/without consideration, as held by the learned Commissioner, the next question that would arise is whether, such services (supposedly provided without any consideration), are exempted services for the purpose of Rule 6(3) of the CCR. The Revenue has relied upon Explanation 3 to Rule 6(1) of the CCR, for contending that the said explanation contains a deeming fiction, deeming activities undertaken without consideration to be exempt service for the limited purpose of applying Rule 6. The said Explanation 3 provides that the expression exempted service will include an activity which is not a service as defined in section 65B(44) of the Act of 1994. It has been argued by the appellants that according to Explanation 3 and the definition of service, as extracted above, activities which are deemed to be an exempted service are the eight activities specified in the definition of 'service' i.e., transfer of title in goods, transfer of title in immovable property, deemed sale in terms of Article 366(29A) of the Constitution of India, transaction in money, actionable claim, services by an employer to an employee, fees taken in courts or tribunal, functions and duties performed by members of the parliament, members of state assemblies, person holding constitutional posts and Chairperson/ Member/Director in a Government body. We agree with this contention of the appellants and are of the view that the reference in Explanation 3 to Rule 6(1) to an activity, which is not a service as defined in Section 65B(44) of the Act of 1994, can only be a reference to the said eight activities which are specifically enlisted in the definition of service, as not being a service. These eight activities, as referred to above, are activities which otherwise qualify as service, as defined in section 65B(44) of the Act of 1994, viz., activity carried out by a person (service provider); for another (service recipient); for consideration. Despite meeting with the statutory stipulation for qualifying as a service, the statute has mandated that the said eight activities, would not be a service as defined in Section 65B(44) of the Act of 1994. Therefore, we are of the view that, the deeming fiction envisaged in explanation 3 to Rule 6(1) of the CCR would apply to these eight activities as enumerated above. This view of ours is further supported by Explanation 3, when read in conjunction with explanation 4 to Rule 6(1) of the CCR, both having been introduced simultaneously. Explanation 4 provides that the value of activity specified in Explanation 3 shall be the invoice/agreement/contract value, thereby clearly contemplating the existence of a consideration. Even the later part of Explanation 4 which stipulates that if the value is not available, the same shall be determined using reasonable means consistent with the principles of valuation contained in the Act of 1994 and the rules made thereunder. We have perused through all the three sub-clauses of section 67(1) of the Act of 1994 and note that each of them contemplates the existence of a consideration, so is the position under the Service Tax (Determination of Value) Rules, 2006. If an activity without consideration was also to be considered as an activity, which is not a service and thus deemed to be an exempt service by application of Explanation 3, the value of such exempt service in any case would be NIL. This is so as Explanation 4 requires adoption of invoice/agreement/contract value. In our view, the only reasonable and logical way of reading Explanation 3 and 4 is that, activities without consideration are not activities, contemplated to be covered by Explanation 3 to Rule 6(1) of the CCR.

8.2 We also note that even if a view is taken that an activity without consideration is an exempt service by virtue of Explanation 3, such a view will not help the case of Revenue in any manner inasmuch as, the value of such an exempted service would have to be necessarily 'nil', in view of Explanation 4. The said Explanation 4 stipulates that the value of the exempt service shall be the invoice/agreement/contract value, which undisputedly as per the Revenue's own say is 'NIL', in the facts of the present case. Therefore, whatever mileage the Revenue would have gained from Explanation 3, is lost by application of Explanation 4 of Rule 6(1) of the CCR.

9. We now turn to the issue whether, the learned Commissioner was justified in disallowing the entire amount of CENVAT credit availed on input, input services and capital goods, by applying the provisions of Rule 6(3)(i) of the CCR. This rule which has been extracted above, provides that a provider of output service, who provides two classes of services, namely non-exempted services and exempted services, shall pay an amount equal to 7% of the value of the exempted services, subject to a maximum of the

sum total of the opening balance of the credit of input and input services available at the beginning of the period, to which the payment relates and the credit of input and input services taken during that period. As per this rule, the liability of a service provider is 7% of the value of exempted service. The SCN as well as the impugned order holds that in the absence of subscriber wise data of actual usage within the specified threshold, it is not possible to determine the value of exempted services and therefore, the maximum limit prescribed in the Rule i.e., the sum total of the opening balance of the credit and further credits of input and input services have been taken as disallowable. We find that this approach is totally inconsistent with the legal provision. In terms of Rule 6(3)(b) of the CCR, it was incumbent upon the learned Commissioner to determine the value of exempted service and then apply 7% to such a value. In case, some data was not forth coming for determination of value, it was always open to the learned Commissioner to apply best-judgement method and determine the value of exempted service on some reasonable and logical basis. It was not open for the learned Commissioner to determine the liability under Rule 6(3)(b) of the CCR to be equal to the maximum limit prescribed therein i.e. the total amount of CENVAT credit availed on inputs and input services, including the opening balance. The absence of data and usage could be a valid ground for invoking the best judgement method for determination of value, but certainly cannot be a ground for refusing to determine the value of such exempted services and instead adopting the maximum upper limit prescribed therein. We also note that the learned Commissioner has made *much ado* about the appellants not having furnished subscriber wise data with respect to those subscribers, who were within the specified limits along with their consumption of voice/SMS/data usage; and subscribers who had exceeded the specified limit along with their voice/SMS/data usage. It is not in dispute that particulars regarding the total GB data (internet usage which includes data used for calls, as the same are Voice over IP or VoIP calls) consumed during the relevant period for all the subscribers put together had been furnished by the appellants. The learned Commissioner, in the impugned order does not set out as to how the data with respect to each of the 10.86 crore individual subscribers, as being within the specified limits (100 SMS and 4GB/1GB data per day) vis-à-vis those who had exceeded the said specified consumption would have enabled him to arrive at the so called value of exempt service and as to why the said value could not have been arrived at by taking the maximum of the total data consumption during the relevant period, which had been duly furnished by the appellants. We are therefore, of the view that the learned Commissioner was not justified in abdicating his responsibility of determining the value of so-called exempt service under Rule 6(3)(i) of the CCR and the supposed failure by the appellants to furnish the information sought for, does not absolve him of his failure to act, in accordance to the provision of the CCR.

10. We also note that while adopting the maximum prescribed limit in Rule 6(3)(i) of the CCR, the learned Commissioner has included the credit taken by the appellants on capital goods. This credit amounts to Rs.4724 crores. Though the learned Commissioner does not dispute that disallowance under Rule 6 of the CCR cannot cover capital goods, he has held that the appellants had incorrectly considered certain inputs as capital goods. According to the learned Commissioner, the capital goods whose value were below Rs.10,000/- per piece were required to be treated as inputs and not as capital goods. Instead of quantifying the quantum of such instances, the learned Commissioner has treated all CENVAT credits taken on capital goods, as pertaining to inputs. We find that such an approach is perverse, in absence of any specific provisions contained in the statute to such extent. According to the appellants, the quantum of CENVAT credit on the capital goods, whose value was less than Rs.10,000/- per piece, was Rs.6,90,70,509/-. The quantification of demand of the disallowance amount under Rule 6(3)(b) of the CCR is therefore, inflated to the extent of Rs.4724,77,29,885/- and accordingly, the impugned order, to the extent it has denied the CENVAT credit on the entire capital goods is without any legal basis.

11. Learned ASG for Revenue has relied upon the judgement of the Hon'ble Delhi High Court in the case of Lally Automobiles (supra), to state that the appellants are required to pay the requisite percentage of amount in respect of exempted service provided by them. However, on reading of the said judgement, we find that the issue decided by the Hon'ble Delhi High Court was in context with the trading activity and availment of CENVAT credit. The Hon'ble Court have answered that, an assessee would be ineligible for claiming input service tax credit on an output, which is neither a service nor excisable goods, i.e., relating to trading activity. Since, the present dispute has not dealt with the issue of trading activity,

the ratio of the said judgement does not apply to the case in hand. Further, the issue dealt with by the Hon'ble Supreme Court in the case of ALD Automotive (supra), was in context with the concession provided to a dealer for sale of goods, concerning payment of sales tax. On the contrary, the issue in hand relates to provision of service and not sale of goods. Hence, the judgement relied upon by the learned ASG is distinguishable from the facts of the case. The learned ASG has urged that disallowance of the entire amount of CENVAT credit availed was justified since non-exempted services provided were negligible and that the majority of the services were exempt. This submission has to be only stated to be rejected as the appellants liability in terms of Rule 6 of the CCR has to be determined with reference to the language and requirements of the said Rule and not on an any other basis. So also the submission of the learned ASG to the effect that CENVAT credit is a concession does not advance the case of the Revenue as, even if CENVAT is a concession, such concession once validly availed can be curtailed or denied only in terms of the Rules under which the same has been granted. As has already been concluded by us, no reversal was warranted under Rule 6 of the CCR, consequently CENVAT being a concession, does not further the case of the Revenue.

12.1 We now deal with the last aspect of the demand being time barred. To justify the stand that extended period of limitation can be invoked for issuance of the SCN beyond the normal period, the learned Commissioner has observed in the impugned order that the appellants were governed under the self-assessment procedure; that they had failed to declare the information with regard to provision of the exempted service; and that they had failed to make true disclosure of such factual aspect in the ST-3 returns.

12.2 It is a fact on record that the appellants have filed GST TRAN-1 form before the jurisdictional departmental authorities, providing the requisite data of CENVAT credit available in their books of accounts, for switching into the GST era. It is also an admitted fact on record that during the course of verification of GST TRAN-1 vis-à-vis the records maintained by the appellants, the jurisdictional service tax-audit authorities have observed that during the period from 05.09.2016 to 31.03.2017, the appellants had provided telecommunication services to the general public/consumers free of charge, without involvement of any consideration. Such observations made by the audit wing of the department were also duly acknowledged by the learned Commissioner at paragraph 2, in the impugned order. Thus, the entire dispute had arisen from verification of the details submitted by the appellants and it is an issue of interpretation by the departmental authorities that such services provided during the disputed period has to be considered as an 'exempted service', in terms of Explanation 3 appended to Rule 6(1) of the CCR.

12.3 Insofar as non-levy, short levy or non-paid service tax, the recovery mechanism has been provided in Section 73 of the Act of 1994. Sub-section (1) of said Section 73 has mandated that for effecting recovery of service tax, the Central Excise officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax, requiring him to show cause, as to why he should not pay the amount specified in the notice. The proviso clause appended to sub-section (1) of Section 73 of the Act of 1994 has substituted the period of 'thirty months' to 'five years', in the eventuality, where non-levy or short paid service tax was owing to the reason of fraud; or, collusion; or, wilful mis-statement; or, suppression of facts; or, contravention of any of the provisions of Chapter V of the Finance Act, 1994 or of the rules made thereunder with intent to evade payment of service tax.

12.4 On reading of the provisions contained in Section 73 of the Act of 1994, it transpires that the conditions to be fulfilled for invocation of the proviso clause contained therein are that, there should be an act of commission or omission such as fraud, collusion, wilful mis-statement and/or suppression of facts; and that such act of commission should be 'with an intent to evade the payment of service tax'. The department, in the present case, had not relied upon any evidence, other than those furnished by the appellants under the cover of the periodic returns and that submitted during the course of investigation proceedings. Thus, it cannot be said that there is element of suppression of fact, mis-statement etc., which justify invocation of the extended period of limitation. Short-levy, non-levy or short-paid/non-paid service tax, if any, can be recovered under the main part of Section 73 of the Act of 1994 and the proviso clause cannot be referred to or invoked, without substantiating involvement of the appellants on the activities itemised therein. In other words, issuance of show cause notice under the normal period is the 'rule' and issuance of the same, by invoking the extended period of limitation is the 'exception', for which, the onus of proof entirely lies with the department. In the case in hand, we find that the department had failed to substantiate the case of suppression of facts etc., by placing reliance on any credible evidence gathered behind the back of the appellants. In other words, whatever documents or records that were relied upon in the SCN, were furnished by the appellants, the fact of which are evident from paragraph 41 in the SCN, wherein forty-one numbers of Relied Upon Documents (RUDs) were referred to, which were the records provided by the appellants during the course of investigation. Further, it is also worthwhile to mention that the appellants had duly filed their periodical returns and the telecommunication activities provided by them were duly monitored under the regulatory framework of TRAI, Department of Telecommunication, Government of India. Thus, the department cannot plead ignorance that the fact of provision of service by the appellants were not known to them at the relevant point of time.

12.5 The law is well settled that for invoking the extended period of limitation, the department has to prove that there is deliberate withholding of information, which the assessee knew otherwise, is required to be proved that such action would result into evasion of payment of the legitimate tax due of the State; that mere inaction or failure in non-compliance of the provisions would not attract the extended period of limitation and the demand in such cases, shall be confined only to normal period. In this context, the Hon'ble Supreme Court in the case of *Commissioner of Central Excise and Customs Vs. Reliance Industries Limited*(supra) have held as under:

> *"**13.** The first proviso to the abovementioned sub-section (1), which is the relevant provision relating to the extended period of limitation, reads as under:*
>
> > *"**Provided** that where any duty of excise has not been levied or paid or has been short levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilfull misstatement 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, by such person or his agent, the provisions of this sub-section shall have effect, for the words one year the words five years were substituted."*

14. *In the case of Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay, 1995 Sup (3) SCC 462/1995 (78) E.L.T. 401 (SC) this Court, while dealing with a similar fact circumstance wherein the extended period of limitation under the abovementioned proviso had been invoked, held that since the expression "suppression of facts" is used in the company of terms such as fraud, collusion and willful misstatement, it cannot therefore refer to an act of mere omission, and must be interpreted as referring to a deliberate act of non-disclosure aimed at evading duty, that is to say, an element of intentional action must be present.*

15. *Similarly, in the case of Collector of Central Excise, Hyderabad v. M/s. Chemphar Drugs and Liniments, Hyderabad, 1989 (2) SCC 127/1989 (40) E.L.T. 276 (S.C.)/1989 taxmann.com 612 (S.C.) this Court, while dealing with a similar situation of invocation of extended period of limitation under section 11(A) of the Act, this Court held as under:*

> *"In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assesse declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the products other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence"*

xxxx xxxx xxxx xxxx

23. *We are in full agreement with the finding of the Tribunal that during the period in dispute it was holding a bonafide belief that it was correctly discharging its duty liability. The mere fact that the belief was ultimately found to be wrong by the judgment of this Court does not render such belief of the assessee a malafide belief particularly when such a belief was emanating from the view taken by a division bench of Tribunal. We note that the issue of valuation involved in this particular matter is indeed one were two plausible views could co-exist. In such cases of*

> *cases of disputes of interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation by considering the assessee's view to be lacking bonafides. In any scheme of self-assessment it becomes the responsibility of the assessee to determine his liability of duty correctly. This determination is required to be made on the basis of his own judgment and in a bonafide manner.*
>
> ***24.*** *The extent of disclosure that an assessee makes is also linked to his belief as to the requirements of law. In the present case the assessee who was required to self-assess his liability determined the assessable value on the basis of an interpretation given by CESTAT in its order dated 28-7-2000. It could not have foreseen that the view taken by CESTAT would be upset and overturned by the Supreme Court as it happened on 9-8-2005. The assessee's conduct during the material period i.e. between 2000 to 2005 cannot be considered to be malafide when it merely followed the view taken by the Tribunal in IFGL's case. On the question of disclosure of facts, as we have already noticed above the assessee had disclosed to the department its pricing policy by giving separate letters. It is also not disputed that the returns which were required to be filed were indeed filed. In these returns, as we noticed earlier there was no separate column for disclosing details of the deemed export clearances. Separate disclosures were required to be made only for exports under bond and not for deemed exports, which are a class of domestic clearances, entitled to certain benefits available otherwise on exports. There was therefore nothing wrong with the assessee's action of including the value of deemed exports within the value of domestic clearances.*
>
> ***25.*** *We also take note of the fact that in the show cause notice itself it has been accepted by the revenue that the self-assessment procedure did not require an assessee to submit copies of all contracts, agreements and invoices. This being the admitted position in the notice we do not find any basis for agreeing with the findings of the Commissioner that certain relevant documents had not been filed and thereby suppressed from the scrutiny of the revenue officers. An assessee can be accused for suppressing only such facts which it was otherwise required to be disclosed under the law. The counsel for the Revenue has, while pleading that facts was suppressed been unable to show us the provision or rule which required the assessee in this case to make additional disclosures of documents or facts. The assertion that there was suppression of facts is therefore clearly not tenable."*

12.6 Though, the above judgement was delivered in context with Section 11A of the Central Excise Act, 1944, but the ratio are squarely applicable to the facts of the present case inasmuch as Section 11A *ibid* is *pari materia* with the provisions contained in Section 73 of the Act of 1994. We note that the requirements of disclosure in the service tax regime did not include a requirement of disclosing whether or not an assessee was maintaining separate accounts for exempted and non-exempted services. Applying the ratio laid down by the Hon'ble Supreme Court in the above judgement, we hold that non-disclosure of a fact, which an assessee was not otherwise required by the rules and the Act to disclose in its returns or invoices, cannot be termed as an act of suppression. It has also been contended by the learned ASG that the appellants have requested TRAI not to share information, we find that this submission besides being irrelevant is incorrect, as it is TRAI, which has under cover of its letter 19.08.2021, while being requested to furnish copy of Accounting Separation Report (ASR) filed with them informed the department that the covering letter under cover of which the same was filed by the appellants had a request to the authority to maintain confidentiality. This in our view cannot be a basis to contend that TRAI did not share information at the behest of the appellants. The same appears to us as an independent decision of TRAI. In any case, the appellants have during the course of the adjudication proceedings, have furnished a copy of the ASR, as recorded in para 41 of the impugned order. Therefore, the ruse of the so-called information not having been furnished at the behest of the appellants is not a submission available to the Revenue. Therefore, we are of the considered view that there is no legal basis for invoking the extended period of limitation provided in the proviso to Section 73(1) of the Act of 1994, for confirmation of the adjudged demands on the appellants.

13. Since the service tax demand is not sustainable in view of the discussions made in the foregoing paragraphs, the demand for interest and penalty are also not sustainable. Even otherwise, there was no justification of ordering for recovery of interest on the amount determined as payable under Rule 6(3)(b) of the CCR, since the appellant had CENVAT credit balances far exceeding amounts determined as payable. Rule 14 of the CCR, under which interest has been ordered to be paid itself provides that interest is only payable on CENVAT credit, if such credit is utilised by an assessee. We therefore, hold that in any view of the matter there could have been no justification for ordering recovery of interest. We also note that the learned Commissioner was not justified in imposing penalty on the appellants by invoking the provisions of Rule 15 of the CCR. This provision is only applicable, if CENVAT credit has been wrongly taken or utilised. This provision, on its plain reading, is inapplicable to a case of incorrect determination of the 'amount' determined as payable in terms of Rule 6(3)(b) of the CCR.

14. In view of the foregoing discussions and analysis, we do not find any substance in the impugned order dated 10.12.2022, insofar as it has confirmed the adjudged demands on the appellants. Therefore, the impugned order is set aside and the appeal is allowed in favour of the appellants, both on merits as well as on limitation.

(Order pronounced in open court on 27.08.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

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