

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

APPEAL Nos. ST/87648/2013,86215/2015,86329/2016

(Arising out of Orders-in-Original No. 272-273/COMMR(WLH)/LTU-M/S.Tax/2014 dated 18.3.2015, 19-21/ST-II/RS/2013 dated 26.3.2013 and 18/COMMR(RS)/LTU-M/S.Tax/2015 dated 28.2.2016 passed by Commissioner of Central Excise & Service Tax (LTU), Mumbai-II)

Tata Motors Ltd.

Appellant

Vs.

Commissioner of Cen.Excise & ST(LTU), Mumbai

Respondent

Appearance:

Shri V. Sridharan, Sr. Advocate, with Shri Vinay Jain, Advocate, and Shri Aditya Jain, C.A., for appellant
Shri K.M. Mondal, Spl. Counsel, for respondent

CORAM:

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

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

Date of Hearing: 24.8.2018
Date of Decision: 08.01.2019

ORDER No. A/**85016-85018 / 2019**

Per: Sanjiv Srivastava

These appeals are directed against the Order in Original of Commissioner Service Tax Mumbai II dated 26.03.2013, 18.03.2015 & 07.03.2016. By the said orders commissioner has adjudicated show cause notices issued to the appellant which are listed in Table 1 below:

Table 1		Details of Show Cause Notice Adjudicated.	
SCN No & Date		Period	Amount 'Rs
V/ST/Div VI/CERA/Gr-H/TM/08-09, 16.10.09		04-05 to 08-09	325,73,98,727/-
V/ST/Div VI/CERA/Gr-H/TM/08-09, 22.10.10		09-10	25,60,88,900/-
V/ST/Div VI/CERA/Gr-H/TM/08-09, 19.10.11		10-11	41,01,97,500/-
17.10.2012		11-12	46,63,42,800/-
21.02.2014		12-13	46,00,63,920/-
23.01.2015		13-14	43,91,01,360/-

1.2 In the show cause notices demand has been made on various counts as detailed below in table 2:

SCN Date	Authoriz ed Service Station Service	Banking and Other Financia l Services	Busine ss Auxilia ry Service s	Consult ing Engine er Service s	Total
16.1 0.09	105,02, 81,948	205,65, 07,920	4,05,7 1,259	11,00,3 7,600	325,73,9 8,727/-
22.1 0.10	25,60,8 8,900				25,60,88, 900/-
19.1 0.11	41,01,9 7,500				41,01,97, 500/-
17.1 0.12	46,63,4 2,800				46,63,42, 800/-
21.0 2.14	46,00,6 3,920				46,00,63, 920/-
23.0 1.15	43,91,0 1,360				43,91,01, 360/-

1.3 Commissioner has adjudicated the matter by his order supra and held as follows in respect of respective Show Cause Notice:

- i. Show Cause Notice dated 16.10.2009: Confirmed the demand of Rs 312,45,23,327/- along with interest in respect of Authorized Service Station Services, Banking and Other Financial Services and Business Auxiliary Services. Imposed penalty

under section 76 for the period from 1/4/2004 to 17/04/2008 and imposed penalty of Rs 5000/- under Section 77 of the Finance Act, 1994. He also imposed a penalty of Rs 312,45,23,327/- under Section 78 of the Finance Act, 1994.

- ii. Show Cause Notice dated 22.10.2010: Confirmed the demand of Rs 25,60,88,900/- along with interest. Imposed penalty under section 76 for the period from 1/4/2009 to 31/3/2010 and also imposed penalty of Rs 5000/- under Section 77 of the Finance Act, 1994.
- iii. Show Cause Notice dated 19.10.2011: Confirmed the demand of Rs 41,01,97,500/- along with interest. Imposed penalty under section 76 for the period from 1/4/2010 to 31/3/2011 and also imposed penalty of Rs 5000/- under Section 77 of the Finance Act, 1994.
- iv. Show Cause Notice dated 17.10.2012: Confirmed the demand of Rs 46,63,42,800/- along with interest. Imposed penalty of Rs 23,31,71,400/- under Section 78 of the Finance Act, 1994.
- v. Show Cause Notice dated 21.02.2014: Confirmed the demand of Rs 46,00,63,920/- along with interest. Imposed penalty of Rs 23,00,31,960/- under Section 78 of the Finance Act, 1994.

vi. Show Cause Notice dated 19.10.2011: Confirmed the demand of Rs 43,91,01,360/- along with interest. Imposed penalty of Rs 21,95,50,680/- under Section 78 of the Finance Act, 1994.

2.0 Appellants have challenged the order of the Commissioner in respect of each show cause notice. We have heard Shri V Sridharan Learned Counsel for the Appellant and Shri K M Mondal, Learned Special Counsel and Authorized Representative for the revenue.

3.0 Authorized Service Station Services. (Issue in all the three show cause notices)

3.1 The appellants have been registered for providing taxable services under the category "Authorized Service Station Services" [Section 65 (105) (zo) r/w Section 65 (9)] with effect from 01.04.2007 though the said services were made taxable from 16.07.2001. The authorized dealers of the Appellants, provided "Authorized Service Station" service to the customers of appellants and the cost of such service is paid by the appellants to the dealers. Appellants for meeting this expense make a provision for the warranty on the basis of their sales. When so ever such service is provided by the authorized dealer, a debit entry is passed on in the provision for the warranty made. The reimbursement received by the dealer/ authorized service station from the assessee for

carrying out service of any motor car, light motor vehicle or two wheeled motor vehicle manufactured by the appellant is includible in the value of taxable service provided by the appellant.

3.2 The normal practice is that appellants provide certain free services at the service station. The reimbursement towards the consideration for the services rendered by the dealer on account of appellants is made by the Appellants to the dealer. These service charges reimbursed by the Appellant to the dealer for providing free services during the warranty period are includible in the value of taxable services provided by the Appellants. Dealers provide the maintenance service to the customers and such cost is paid by the appellant to the dealers and an debit entry is passed on in the provisions for warranty made.

3.3 Appellants are themselves having Tata Car Service Centre, Worli Mumbai for providing similar services. They have taken registration in respect of the said shop from 1.04.2007 and have been paying service tax in respect of the service provided from there. In view of Appellants, the said car repair shop at Worli is not an Authorized Service Station, and is their own repair shop, hence they were not liable to pay service tax in respect of services provided from the said shop. However in view of the department since they have registered

themselves with effect from 01.04.2007 and have been paying service tax in the category of "Authorized Service Station Service" with effect from 01.04.2007 there contention for not paying the service tax for the period prior to that date is not tenable. Thus service tax is demanded in respect of the value of the service provided from the Tata Car Repair Shop.

3.4 Several Letters were issued to the appellant by the department calling for information in respect the payment of service tax on taxable services in this category. Appellants have vide their letter dated 5.09.2008 submitted that in the case of reimbursement made by them to the dealer in respect of the taxable services provided under the category of "Authorized Service Station Services" the liability to pay service tax was on the dealers and not them. Accordingly appellants were asked to furnish the list of dealer vide letter dated 18.03.2009, 4.05.2009 and 16.06.2009. However no reply was received from them. Accordingly show cause notice demanding the service tax in respect of these services have been issued.

3.5 Commissioner has considered the submissions made by the appellants at the time of adjudication and confirmed the demand made in respect of the amounts reimbursed by them to their authorized dealers consideration for taxable services provided by them

under the category of “Authorized Service Station Services”. Commissioner has also confirmed the demand in respect of the services provided by the appellants from Tata Car Service Centre Worli Mumbai.

3.6 Appellants have challenged the order of the Commissioner stating that in respect of the taxable services under the category of “Authorized Service Station Services”, it is the dealers who are actually providing the taxable service. Appellants are only reimbursing to dealer the amount of expense borne by the dealers in terms of labour charges incurred by them. The dealers would raise service invoice for the labour charges and material charges would be settled through credit notes issued. The authorized service station also charge service tax on invoices from appellant wherever applicable, and they take the credit of the service tax paid. The entire case has been made against them in this respect only for the reason that the they had failed to provide the list of the dealers across the country for verification. Since said list have not been provided this demand has been saddled on them. Further during course of adjudication they had provided the list of all their dealers to the Commissioner. Taxable Services under the category of “Authorized Service Station Services” are not covered under the reverse

charge mechanism as provided for under Section 68 of Finance Act, 1994 for the period prior to 01.07.2012.

3.7 Further as per explanation to section 67, the value of taxable service will include the *“the reimbursement received by the authorized service station from manufacturer for carrying out any service of any motor car {light motor vehicle} or two wheeled motor vehicle manufactured by such manufacturer”*. Thus the amounts reimbursed by them to the Authorized dealers/ service stations, have been included in the value of the taxable service provided by the said service stations.

3.8 The department has issued the show cause notice only for the reason that they have failed to provide the list of dealers and hence were liable to pay service tax. While adjudicating Commissioner has gone beyond the scope of show cause notice and has confirmed the demand holding that it was the contractual obligation on the appellant to provide the said services.

3.9 The estimated expenditure towards warranty is taken into consideration while calculating the price of vehicle and excise duty discharged on the value of vehicle determined after adding the estimated expenses towards warranty. They also have paid VAT on the said price inclusive of estimated warranty charges. Once having paid excise duty and VAT on the said estimated

warranty charges, Service Tax cannot be demanded again in view of the decisions as follows:

- i. ASL Motors Co [2008 TIOL 114 CESTAT-KOL]
- ii. Indus Motor Co [2008 (9) STR 18 (Tri Bang)]
- iii. Pillai & Sons Motor Co [2009 (14) STR 844 (Tri Chennai)]

3.10 They also referred to various text books on the Contract Law, to submit *“There is a Collateral Contract between the appellants and customers by way of providing warranty to the customers. The consideration for such contract is the agreement of the buyer to purchase the vehicle from Tata dealers.”* Thu the reimbursement of expenditure is not a consideration for any service provided by the appellants.

3.11 The contract in present case is a Work Contract, for repair and maintenance of movable property, and was not taxable prior to 1.7.2012. They relied upon the decision of Apex Court in case of Larsen & Toubro [2015 (39) STR 913 (SC)] to buttress the argument.

3.12 They also disputed the quantification of demand, for the reasons enumerated below:

- i. Authorized Service Station Services are applicable only to any motor car, light motor vehicle or two wheeled motor vehicle. The services under this category do not cover the services provided to

commercial vehicle. While making the demand revenue has also included the reimbursement made by them to their dealers for commercial vehicles for good transport. {reliance placed on Circular No 87/05/2006-ST dated 06.11.2006 and Circular No 96/7/2007-ST dated 23/08/2007]

- ii. Demand is also made in respect of reimbursement made by the appellants towards the goods/ materials which need to be corrected.
- iii. The corrected demand if re-determined after correcting for the said inclusions will be substantially be reduced as in table below:

Particulars	Show Cause Notice Dated					
	16.10.09	22.10.10	19.10.11	17.10.12	21.02.14	23.01.16
Value on which service tax demanded as per SCN	885.54	248.63	398.25	452.76	372.22	355.26
Errors in picking up the figures from balance sheet.		-46.83	-171.40	-138.85		
Value attributable to servicing of commercial vehicles for goods transport	-658.48	-146.02	-161.12	-147.20	-51.23	-212.61

Value attributable to vehicles exported				- 38.34	- 41.11	- 38.18
Value attributable to servicing of commercial; vehicles for good transport applications from July 12 to Mar 13.					- 130.28	
Value attributable to servicing of passenger cars etc.	227.06	55.78	65.73	128.37	149.60	104.47
Value attributable to material included in the reimbursement	- 193.64	- 49.44	- 56.79	- 94.33	- 67.81	
Net Value for payment of Service Tax	33.42	6,34	8.94	34.04	81.79	104.47
Recomputed Service Tax demand	3.89	0.65	0.92	3.51	10.11	12.91

3.13 In respect of demand, made for services provided from Tata Car Repair Shop, Worli they stated that in terms of the definition of Authorized Service Station as

per Section 65 of the Finance Act, 1994, the service station should be one authorized by the motor vehicle manufacturer to carry out service, repair, reconditioning or restoration of motor car/ light motor vehicles.. In this case for the car/ light motor vehicles if TATA brand, appellants as manufacturer are themselves providing the services to their customers. This service being provided by them cannot be said to be provided under authorization of manufacturer and hence shall be outside the scope of definition of authorized service station. Similarly in case of cars/ Light Motor Vehicles of other brands the services are being provided not under the authorization from the manufacturer and hence the same cannot also be said to be covered under the definition of authorized service station. In addition if any service tax is to be demanded the same should be demanded on the value determined after excluding the value of material sold. Hence the demand needs to be re-quantified.

3.14 On the contrary revenue has submitted that appellants authorized dealers provide "Authorized Service Station Service" by way of different maintenance services to the appellants customers and cost of such services is borne by the appellants (reimbursed by them). The reimbursement received by the dealer/ authorized service station from the appellant for

carrying out any service or repair of any motor car, light motor vehicle or two wheeled motor vehicle manufactured by the appellants is includible in the value of taxable service as per Ministry's Classification [F No B.11/1/2001-TRU dated 9/1/2001 and Board Circular 87/05/2006-ST dtd 6/11/2006.

3.15 Since the appellants have failed to provide the list of authorized dealers which has been asked from them vide letter dated 5/9/2008, the onus of payment of service tax towards warranty sales lies on them.

3.16 The appellants are under contractual obligation to provide the said service to the customers. Admittedly appellants have collected the consideration for providing the aid services from their customer at the time of sale of vehicle. The consideration so received is in respect of discharging the contractual obligation to provide after sale services to the customers during the warranty period. The relationship between the appellant and the customers is distinct from the relationship between the appellants and their authorized dealers. Payment of service tax by the dealers would be in respect of the services provided by the dealers, as part of their obligation for which consideration has been received by them. The demand is not in respect of the dealers service tax liability, but is in respect of taxable services agreed to be provided by the appellant for which the

consideration has been received by them from the recipient of service.

3.17 If appellants can show that dealers have paid service tax on the amount of re-imburement made by them to the dealers by producing necessary evidence they can be absolved of the demand. For such verification matter should be remanded for consideration of the adjudicating authority.

3.18 The contentions of the appellant in respect of Tata Car Service Centre Worli Mumbai are without any justifiable basis or reason. Appellants have themselves started paying the service tax, in respect of the services provided from the said service centre, with effect from 1.04.2007, without any change in the facts or law expanding the scope of definition of taxable services. Thus there is no justifiable reason why they should not have discharged the service tax for the prior period.

3.19 We have considered the submissions made by both the sides. The issue for the purpose of levy any tax is correct identification of the taxable person. In the present case the crux of dispute is in respect of the identification of the taxable person, whether it is Appellant or the Authorized Dealer who are providing the Taxable Service under the category of "Authorized

Service Station Services” to the recipient of the services, i.e. the customers who have purchased the car.

3.20 It is the submission of the Appellants that while determining the price of the car they have taken into account the “estimated warranty expenses” and have also made the provision for the same in their book of accounts. This implies the customers purchasing the car/ light motor vehicle/ two wheeled motor vehicle from the appellants, directly or through their authorized dealers have paid the consideration for provision of the free after sales services during the warranty period. Appellants are thus under contractual obligation to provide the said after sale services free of cost during the warranty period to its customers. Delhi High Court has in case of *The New Bank Of India Ltd. vs Union Of India And Ors.* [ILR 1977 Delhi 672], laid down the law stating as follows:

“(12) Various instances of collateral contract may be taken as analogies for drawing such an inference of a collateral contract between the Government and the bank. When the shop-keeper sells goods to the consumer and hands over to him the guarantee given by the manufacturer in respect of the goods, the buyer of the goods can claim that a collateral contract between him and the manufacturer may be implied if and only if the guarantee of the manufacturer ensures, for the benefit of the buyer of the goods. Since a guarantee will have no other meaning except for the benefit of the buyer such

collateral contracts have been implied between the buyers and the manufacturers. Suppose, however, that the manufacturer says that he has tried to be as careful as possible in manufacturing the goods but he expressly stipulates that he will not be liable in any way to a buyer of the goods from the dealer. In that event, it would be difficult to argue that he has expressed an intention to have any contractual relation with the buyer of the goods.”

3.21 Commissioner has in his order in para 6.24 to 6.26 of the order concluded as follows:

“6.24 The noticee is under contractual obligation with their customers, to provide warranty service during the period of warranty as integral part of the sale of vehicles. The noticee has got an option to provide the Service required to be provided to their customers either wholly or partly on their own and also either directly or through an agent appointed by him. The noticee has also got an option to out-source part of services required to be provided under the warranty obligation. The Noticee can also outsource the labour component. What is relevant is that the Noticee is under obligation to provide the greed services to their customers during the warranty period.

6.25 The question is who is the service provider who is liable to pay Service Tax. Payment otherwise of Service Tax by dealers is of no relevance or consequence for the issue under consideration. As such the Noticees claim that the demand has been made from them merely because of the reason that they did not provide the list of dealers during the investigation, is skirting the issue. The payment of Service Tax, if any made by the dealers, would be in respect of services provided, as part of the

obligation, for which the consideration has been received by them. The show cause notice have not sought to shift the dealer's service tax liability on the noticee. The show cause notices only seek to demand Service Tax on the taxable services agreed to be provided by the noticee for which the consideration has been collected from the recipient of the service. Hence, the Noticee's contention that no notification is issued under Section 68(2) shifting the Service Tax liability in respect of "Authorized Service Station" on the service recipient is a misplaced argument and is of no consequence for the issue under consideration.

6.26 As already mentioned earlier, the Service Tax demanded from the Noticee is in respect of consideration included in the price of the vehicles at the time of sale of vehicles and charged by the Noticee from the customers, The consideration so received from the customers is in respect of discharging the statutory obligation of the Noticee to provide after sale services to the vehicle owners during the warranty period. It is pertinent to mention that only for the purpose quantification of the consideration, specifically ear marked by the Noticee himself for providing service to the vehicle purchasers, the Show Cause Notice has taken the figures from the Balance Sheet of the Noticee for expenses towards discharging the obligation of providing the said service to vehicle owners. This does not in any way means the Service Tax is proposed to be demanded on considerations received by dealers in respect of their independent activities. In fact dealers are neither entitled to receive any consideration from the recipient of services nor actually received. The relationship and transactions between the Noticee and the customers are different and independent of the relationships an transaction between

the Noticee and the dealers. Recipients of services have never entered into any legal agreement with dealers for provision of the taxable service under consideration.

6.27 Noticee has vide letter dated 27.06.2009 addressed to the Assistant Commissioner of Central Excise Pune III Division stated the following in relation to warranty services provided to customers:

“Cost of warranty and free after sales services provided by the dealers are included in the assessable value of the vehicles manufactured by us” (para 4)

“As regards providing the services by authorized service station to the owner of vehicle, the manufacturer is the service provider and owner of vehicle is the beneficiary. The fact that the dealer recovering the amount from us substantiates the same” (para 7)

6.28 Assuming but without accepting that the services are provided through dealers, the law protects third parties dealing with agents. In the present case, the customer is protected by law as if they receive the services directly from the principal and they are legally entitled to deal only with the principal and not the agent. The Noticee himself categorically and un-ambiguously affirmed this view in their letter dated 22.06.2009. The law does not even compel the customer to recognize the agent appointed by the Noticee to provide the service. The customer is in fact dealing only with the principal and not with his agent though the agent may be a complete substitute for the principal. Dealer is not under obligation to take care of manufacturing defects, if any. Dealer's role in providing the service is only limited. Appointment of any agent does not prevent the principal from acting himself doing the business of the agency unless there is an express prohibition to the above effect. It is also not

the contention of the Noticee that Service Tax has been paid on the entire amount attributable to warranty.

6.30 The contract specifically mentions that the service of maintenance or repair during the warranty period has to be provided by the noticee. This is the essence of the contract. In the present case, the noticee is under obligation to provide the service of maintenance and repair during the warranty period. The consideration is admittedly collected by the Noticee from the customers of the vehicles. Merely because of the fact that the Noticee has provided the part of the said service through his agent, it cannot be said that Service Tax is not leviable on such services and that too when the agent is not under obligation to provide the service and consequently not entitled to collect the consideration from the customers of the vehicles.

6.31 Even the Noticee has admitted that the Service Tax is liable to be paid only on the labour component and not on the material component. There is no contract – one for sale of goods and the other for supply of service. The contract is a single composite contract for providing maintenance and repair services during the warranty period. This is a single composite service which includes use of materials in the course of provision of services. Agent is admittedly supplying only the labour component and the supply is complete when both materials and labour are integrated and provided as single composite service in accordance with the contract between the Notice and the customers.

6.32 As per the contract the Service Provider is the Noticee and admittedly the consideration for service provided has been paid by the recipient of service namely customers, and received only by the Noticee. Noticee himself vide his letter dated 27.06.2009 stated that they

are the service provider and the customers are the recipient of service.”

3.22 In our view the Commissioner has in above para's misdirected himself debating the contractual obligations of the appellant rather than determining the service provider and service recipient. In any case before any tax liability can be determined the law mandates that service provider and service recipient should be determined, and also the taxable person and the registered person. Without making such a determination no tax liability could be determined. The observations of Commissioner if examined with reference to the observations made by Delhi High Court, referred above, we find, Appellants have a contractual binding to ensure that during the warranty period, warranty services are provided to the buyers of the TATA vehicles free of any cost. The contractual obligation cannot mean that appellant is responsible for providing the warranty services himself. The Contractual obligation is to ensure that service is provided free. Once that service is provided free of cost, the contractual obligation is discharged. The appellants are free to organize the manner of provision of the service in the manner they desire, i.e. it can be by themselves, or by arranging the same through some other person. In case where the appellants themselves

provide the free warranty services they should be held liable for providing the said services to the consumer of the said service and in case the same is provided through some third person that person becomes liable for providing the service. A contractual obligation, or collection of consideration for the same cannot be equated to the providing the service, as has been held by the Commissioner. For levy of service tax it is essential to identify the person who has provided the taxable service and the person who has received the service. In the case under consideration appellants have provided the warranty services to their customers through the dealers network and for providing free warranty services as per their contractual obligation they have made the payments to the dealer's which is evident from the debit entries made by them in their book of accounts. These debit entries by themselves will not mean that taxable services have been provided by them. However, the fact that these debit entries made were inclusive of service tax is a fact that needs to be verified. The Customers of Appellants have received the taxable service from the dealers of the customer, and appellants have to ensure that these services are provided free, hence appellants are under contractual obligation to discharge the legal liabilities arising out of such provisioning of service through their dealers or

agents. The customer/ vehicle owner would definitely be not discharging the said legal liabilities including payment of service tax on the said services. Further these services cannot be said to be provided because of the arrangement made without payment of tax liabilities as has been held by the Hon'ble Supreme Court in case of Mohd. Ekram Khan & Sons vs Commissioner Of Trade Tax, U.P. [(2004) 4 STJ 233]

“In support of the appeals, learned counsel submitted that the position in law is no longer res integra. In Premier Automobiles Ltd. & Anr. etc. v. Union of India (1972 (2) SCR 526) it was clearly held that the replacement of defective parts during the warranty period would not involve any sale. Reliance was also placed on decisions of the Delhi, Madhya Pradesh and Kerala High Courts reported in Commissioner of Sales Tax, Delhi Administration, Vikas Bhawan, New Delhi v. Prem Nath Motors (P.) Ltd. (1979(43) STC 52), Prem Motors v. Commissioner of Sales Tax, Madhya Pradesh (1986(61) STC 244) and Geo Motors v. State of Kerala (2001 (122) STC 285). It was submitted that the assessee, as part of the warranty agreement, replaced the defective parts. There was a contractual obligation for the same and, therefore, there was no sale involved.

In response, learned counsel for the revenue submitted that the transaction between the assessee and the manufacturer was a separate transaction. It is not the case of the assessee that the manufacturer had supplied the goods to the customers. If it had supplied parts to the customers through assessee; the position may have been different. The manufacturer was obligated to make the

replacement. If it did not possess the parts to meet the contractual obligation, it would have purchased the parts from any seller of the parts and would have paid the sales tax. In the instant case, the assessee had supplied the goods for which it received the consideration by way of credit notes and/or other mode of payment. That being the position, the High Court was justified in its view about the taxability of the transactions.

The decision in Premier Automobiles case (supra) is really of no assistance to the assessee. The fact situation there was different. The issues in the said case were different. One of the issues was whether the expenses on account of warranty and statutory bonus were to be excludable while working out the ex-work cost. It was held by this Court that manufacturers furnish warranty covering the cars sold. Under the warranty all defects on account of faulty manufacture have to be set right and the defective parts have to be replaced free of costs by the manufacturer or his dealer within the specified period or given distance travelled by the car. The car manufacturers enter into an agreement with the manufacturers of components providing for a warranty so far as the components supplied are concerned. The whole object behind the warranty is that the consumer who has to make a heavy investment for the vehicle should be assured of a proper performance of the vehicle in a trouble free manner for reasonable length of time. Therefore, entire cost of warranty was to be borne by the manufacturer. The issue was entirely different from the one at hand and the ratio in the said case provides no answer to the present dispute. Prem Nath's case (supra), as the factual position goes to show, dealt with transfer of property in the part or parts replaced in pursuance of the stipulation of warranty as part of the original sale of

car for the fixed price paid by the buyer/consumer. The price so fixed and received was a consolidated price for the car and the parts that may have to be supplied by way of replacement in pursuance of the warranty. That decision also throws no light on the present controversy. Though the decision in Geo Motor's case (supra) and Prem Motor's case (supra) support the stand of the assessee, we find that basic issue as to the nature of the transaction between the assessee and the manufacturer was lost sight of. As noted above, in a case manufacturer may have purchased from the open market parts for the purpose of replacement of the defective parts. For such transactions, it would have paid taxes. The position is not different because the assessee had supplied the parts and had received the price. The categorical factual finding recorded by the taxing authorities and the High Court is that the assessee had received the payment of the price for the parts supplied to customers. That being so, the transaction was subject to levy of tax as has been rightly held by the High Court. The decisions in Geo Motor's case(Supra) and Prem Motor's case (supra) stand overruled."

3.23 In para 6.35 and 6.36, Commissioner has observed as follows:

"6.35 In case any spare parts and consumables are sold by the service provider to the service recipient during the course of providing taxable services, Notification No 12/2003-ST dated 20.06.2003 provides for exemption of Service Tax to the extent of value of goods and materials so sold by the service provider to the service recipient, if documentary proof of such sale exists and no credit of excise duty paid on such spares or consumables have

been taken. The circular further goes on to note that for availing such exemption, the goods must be sold and consequently they must be available (whether independently or as a part used for repair of a vehicle) for sale. In other words, the exemption would not be available to such consumables which have been consumed during the process of providing service and are not available for sale.

6.36 In the instant case, the Noticee has not come up with any evidence regarding "sale" of any goods or materials used while providing taxable service during the warranty period, nor has the Noticee made a categorical submission that they were not taking CENVAT credit of Central Excise duty paid on such materials. The other circular dated 23.08.2007 relied upon by the Notice also stresses the same aspects. It is clarified that whether a given transaction is sale or not, is to be determined taking into account the surrounding circumstances, real nature and the material facts of the transaction. Payment of VAT/ Sales Tax may be treated as an indication of sale of goods. However, where goods are used in the course of providing service, they are to be treated as inputs used for providing the service and accordingly, cost of such inputs shall form integral part of taxable service. The service provider is entitled to take input credit of excise duty paid on such parts or any goods used in providing the service. The cost of such inputs ought to form integral part of such taxable service. In view of the above and also in view of the fact that no evidence have been produced by the noticee either regarding sale of materials, parts etc. and regarding non-availment of CENVAT credit on such goods, the assessee's request for exclusion of, or exemption of

Service Tax on, the value of such goods used for providing service cannot be acceded to.”

3.24. In our view the matter needs to be relooked for determination of tax liability and all the documents that appellants would like to produce in their support. The order of Commissioner proceeds on no availability of certain documents for his consideration. Further appellants have also claimed that certain expenses such as those relating to commercial vehicles and in relation to the material/ parts supplied during the provisioning of the services needs to be deducted while calculating the value of services in respect of which demands can be made. Further the basic document in respect of the registration and payment of the service tax by the authorized dealers in respect of free warranty services provided needs to be examined and then only a final view and quantification of service tax to be paid can be done. In view of this we are of the view that matter in respect of services provided under category of “Authorized Service Station Services” through authorized dealer needs to be remanded back to the original authority for redetermination.

3.25 Since it is an admitted fact that certain information as required by the department was not made available to the department by the Appellants, the

extended period of Limitation as per proviso to sub section (1) to Section 73 of Finance Act, 1994 shall be available to the department for demanding the tax short paid if any in respect of Show Cause Notice dated 16.10.2009. In all other show cause notices, the demand has been made within the normal period of limitation as provided for by sub section (1) to Section 73 of Finance Act, 1994, hence they shall in any case not be hit by limitation.

3.26 In respect of the services provided through the Tata Car Service Centre Worli, the appellants have themselves by taking registration with effect from 1.04.2007 have admitted that service tax was payable in respect of the services provided from the said Service Centre. It is also a fact that with effect from 1.04.2007 onwards they have been service tax on the services provided from the said service centre, and have been filing the service tax returns in form ST-3, we are of the view that appellants should have paid the Service Tax for the period prior to 01.04.2007. Since the demand cannot be made for the period beyond five years by invoking the extended period of limitation as per proviso to sub section (1) to Section 73 of Finance Act, 1994, the demand has to be limited accordingly. Thus we uphold the demand of service tax for the period

1/4/2004 to 31/3/2007 in respect of the services provided from the said service centre.

4.0 Business Auxiliary Services

4.1 As per the Section 66A the services provided by a person having established business/ fixed establishment legally constituted/ incorporated outside India and such service is received by a person having established business/ fixed establishment legally constituted/ incorporated in India, then such service shall be taxable as if this service was provided by the recipient himself in India. The appellant paid commission in foreign currency to foreign agents in respect of goods exported outside India. Whenever appellants export vehicles directly to customers outside, they paid commission to the overseas parties who assisted them in procuring orders and in other activities associated with the deliver, realization of payment, after sale services etc.

4.2 Business Auxiliary Services as defined by Section 65 (19), means service provided in relation to promotion or marketing or sale of goods produced by a client, any customer care service provided on behalf of the client and services incidental or auxiliary to any of the activities, such as billing, collection or recovery of cheques, payment, evaluation or development of

prospective customers etc. The same also includes service as commission agent. Appellants do not dispute the classification of services provided by overseas parties as classifiable under the taxable category of “Business Auxiliary Service.”

4.3 Appellants have challenged the demand stating that these services have been provided by the foreign buyers outside India, they cannot be taxable in India. Section 66A of the Finance Act, 1994 as introduced with effect from 18.04.2006 reads as follows:

“66A. Charge of service tax on services received from outside India.—

(1) Where any service specified in clause (105) of section 65 is,—

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that where the recipient of the service is an individual and such service received by him is otherwise

than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1.--A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2.--Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.';"

4.4 Section 66A clearly and unambiguously provides that, the services provided by the person (person A) having any fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India to any person (person B) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, shall be treated to be provided by the person B to himself and shall be taxable in India.

4.5 In case of Tata Steel Ltd [2016 (41) STR 689 (T)] it has been held as follows:

“14. In the present case, certain facts are required to be appreciated. The appellant is a public limited company located in India. They decided to acquire certain companies abroad. For the said purpose, they were in need of certain amount of money. For borrowing the said money, appellant took the help of 10 MLAs who themselves are banking and financial institutions. These MLAs, in fact, provided 90% of the loan required. However, the remaining 10% of the loan amount was arranged by them from six other banks. After arranging the said money the amount was given to the appellant. Since the assets which they were procuring was located abroad, the money was used by the appellant abroad. It is to be noted that the dispute in the present case is relating to the service tax on the services used by the appellant in respect of MLAs and Agent Bank's services. MLAs and Agent Banks performed certain services abroad, which resulted in the lending of money by 16 banks to the appellant and the money was received by the appellant. Thus the services were in connection with lending of money and the services were received and used/consumed by the appellant.

15. On a careful reading of clause (a) & (b) of Section 66A, it is quite clear that when the service provider is from outside India and the recipient of the service who has his place of business, fixed establishment, permanent address or usual place of residence in India, then the recipient of such service will be liable to pay service tax. This is also clear from the reading of Rule 3(iii) of Taxation of Services (Provided from Outside India & Received in India) Rules, 2006. As per provisions of

this rule, the taxable services provided from outside India & received in India shall be such services as are received by a recipient located in India for use in relation to business or commerce. In the present case, indisputably the recipient of services is the appellant located in India. The expression "received by a recipient located in India" in Rule 3(iii) of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 matches the expression "received by a person who has his place of business, fixed establishment, permanent address or usual place of residence, in India" in clause (b) of Section 66A of the Finance Act, 1994. Harmonious reading of the provisions of clause (b) of Section 66A of the Finance Act, 1994 and the provisions of Rule 3(iii) of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 makes it clear that the recipient located in India is liable to pay tax on the taxable services received for use in relation to business or commerce. In this case, money was received by the appellant. The fact that this money was used abroad to acquire certain assets will not make any difference. Location of assets, procured as a result of receiving the money which in turn was consequent to the receipt of the said service, is immaterial.

16. In the present case, there is no dispute that the appellant is located in India. There is also no dispute that the services of the MLAs and the agent bank were received and consumed by the appellant. There is also no dispute that the appellant has remitted fees to the MLAs and the Agent Bank for their services. It is, however, contended that the services provided by them were in relation to 'borrowing' and not in relation to 'lending', therefore, their services are not covered by the definition of 'Banking & other financial services' which includes

'lending' only. It is a common knowledge that lending and borrowing go together. There cannot be a lender without a borrower. The appellant has borrowed loans from the non-resident banks and these loans were arranged by the MLAs. Clearly therefore, the services provided by the MLAs were in relation to loans (i.e. lending of money) given by the non-resident banks to the appellant."

4.6 In view of such a clear stipulation, by the section 66A, and the decision in case of Tata Steel, supra we do not find any merits in the submissions of the appellant and uphold the demand confirmed by the Commissioner on this account.

5.0 Banking and Financial Services

5.1 While auditing the records of the Appellants it was noticed that Appellant were having incomes from Hire Purchase & loan contracts on securitization/ sale of receivables. As per the revenue total income on account of Hire Purchase/ Loan Contracts is to the tune of Rs 1746.49 during the period 2005-06 to 2008-09 Crores on which service tax of Rs 205,65,07,920/- is demandable under the category of banking and financial services. Demand of Service tax so short paid is made by the Show Cause Notice dated 16.10.2009.

5.2 The demand has been made on the basis of income as recorded in Profit and Loss Account of the appellant from Hire and Purchase activity undertaken

by the appellants and also the loans provided by them. Appellants have contended that the income as reflected in P & L Account, is inclusive of the income earned by them on sales made by them their own behalf and also incomes of sales effected by subsidiaries namely “*Sheba Properties Limited, Mumbai*” and “*Tata Motors Finance Limited, Mumbai*”. These subsidiaries have merged with the appellant.

Table: Income to be Taxed under Banking & Financial Service					Amount ‘Rs Crore
Particulars	Financial Year				
	2005-06	2006-07	2007-08	2008-09	Total
Tata Motors Limited	432.67	546.52	363.20	275.17	1617.56
Sheba Properties Limited	2.90	3.78	0.00	0.00	6.68
Tata Motors Finance Limited	0.00	122.25	0.00	0.00	122.25
Total	435.57	672.55	363.2	275.17	1746.49

5.2 Appellants contended the income in respect of Banking and Financial Service, comprise of various components and in respect of certain components they have paid the service tax. The details (as stated in table below) of the income and service tax already discharged where made available by them to the adjudicating authority during the personal hearing and also by the letter dated 28.09.2012. However adjudicating authority has not given any findings in this regard and have gone ahead to confirm the demand made in respect of the entire income.

Particular	Financial Year				
	2005-06	2006-07	2007-08	2008-09	Total
Interest on Loan Contract	272.55	429.48	307.70	267.28	1277.01
Securitization (P & L)	84.17	60.16	-1.61	-55.51	87.21
Provision for expenses no longer required	6.74	0	0	0	6.74
Interest Investments	3.80	0	0	0	3.80
Dealer Subvention (Interests)	3.53	7.55	4.20	1.18	16.46
Credit Card Recoveries	0.11	-0.01	0	0.01	0.11
Lease Income	14.47	7.16	5.10	4.74	31.47
Late Payment Charges	0	0	18.20	39.59	57.79
Total Not Leviable to Service Tax (A)	385.37	504.34	333.59	257.29	1480.59
Late Payment Charges	23.19	18.19	10.31	0	51.69
Hire Purchase Income	23.07	8.84	3.20	1.16	36.27
Pre Closure Charges	1.04	9.02	13.88	11.36	35.3
Service Charges	0	0.32	0.45	0.36	1.13
Termination Charges	0	1.08	1.44	1.11	3.63
Processing Fee	0	4.73	4.36	6.30	15.39
Total Leviable to Service Tax (B)	47.3	42.18	33.64	20.29	143.41
Total (A) + (B)	432.67	546.52	367.23	277.58	1624.00
Service tax paid debited in Income	0	0	-4.03	-2.41	-6.44
Total Income	432.67	546.52	363.20	275.17	1617.56
Income on which Service Tax is paid under heading Banking and Financial Services	52.23	53.14	63.49	47.54	216.4

5.3 There is no dispute to the fact that certain incomes, of the appellants as per the balance sheet/ P & L accounts are classifiable under the category of “Banking and Financial Services” and are leviable to service tax. From the table in par 5.2 there is acceptance/ admittance of the levy of service tax on incomes from loan payment charges, Hire Purchase Income, Pre Closure Charges, Service Charges, Termination Charges and Processing fees. Appellants have disputed the levy of service tax in respect of the incomes from Interest on Loan contract, Securitization, Provision for expenses no longer required, Interest

Investments, Dealer Subvention (interest), Credit Card Recoveries, Lease Income & Late Payment Charges.

5.4 Primary contention of the Appellants is that Income from the interest on loan contracts is not leviable to service tax, and for this they relied upon the Explanation (1) to Section 67 of the Finance Act, 1994 and also Rule 6(2) of the Service Tax (Determination of Value) Rules, 2006. The said provisions are reproduced below:’

“Finance Act, 1994

67. Valuation of taxable services for charging service tax- For the purpose of this chapter, the value of any taxable service shall be the gross amount charged by the service provider for such service provided or to be provided by him.

Explanation 1 – For removal of doubts, it is hereby declared that the value of taxable service, as the case may, includes-

(a).....

.....

but does not include-

.....

(viii) interest on loans.

Service Tax (Determination of Value) Rules, 2006
w.e.f 19.04.2006

6(2) Subject to the provisions, contained in sub-rule (1), the value of any taxable service, as the case may, does not include-

.....

(iv) interest on loans.

5.5 From the facts as discussed in the adjudication order the issue is not whether the income from interest on loans is subject to service tax or not but the issue is whether the agreements/ contracts entered into by the appellants are loan contracts/ agreement or they are something else which fall under the category **“Banking and Financial Services”**. Further the contention of appellants that interest on loans are not subjected to service tax may not be tenable in every case. The reference made by the appellants is to the provisions relating to the Valuation of Taxable Services, and it is provided for the purpose of determining the value of taxable service interest on loans may not be included in the value of taxable services. However said provision do not perse exempt the income earned against loan contract from the levy of service tax, if the same is classifiable under category of taxable services specified under the Finance Act, 1994. In this case revenue has

contended that if the income from loan contract, is in classifiable under the category of Banking and Financial Services, then the same do not get exempted in view of the provisions relating to determination of value of taxable services.

5.6 Commissioner has examined the issue in detail in the order, and found that the loan agreement between the appellant and the prospective purchaser (s) of a vehicle is titled **“Loan Cum Hypothecation Cum Guarantee Agreement.”** Commissioner has thus recorded that very title suggests that agreement is not merely for providing loan, but consists of series of transactions relating to loan, hypothecation and guarantee, thus services provided under the agreement are not relating to loan transactions only. The findings of commissioner recorded, are reproduced below:

“7.10 The agreement is entered into between the Noticee and prospective purchaser(s) of a “Vehicle” or “Construction Equipment” or “Body Building on Chassis of Vehicle (hereinafter, for convenience, referred to either as “purchaser(s) of movable asset(s)” or as “purchaser(s) of vehicle(s)”. Though the Noticee is referred to in this agreement as a “Lender” and the purchaser of vehicle is referred to as the “Borrower”, the terms of the agreement indicate that the contract is not of a contract of loan simpliciter.

7.11 The salient features of the said agreement are as given below:-

- *The sum lent by the Noticee to the purchaser of any of the aforesaid movable assets is on the terms and conditions set forth in the agreement, including interalia that the purchaser of the vehicle shall hypothecate and charge the movable asset owned and belonging to the purchaser, in favour of the Noticee. The Noticee has agreed to lend to the borrower not for any general purpose but only towards the total cost of purchase of any one or more of the aforesaid movable assets.*
- *The purchaser of the asset shall utilize the purchased asset only in the manner mentioned in this agreement. The so called loan is given subject to this condition.*
- *The details of the seller from whom the purchaser shall acquire the vehicle forms part of the agreement.*
- *The Noticee may at his discretion disburse the amounts directly to seller. In case the seller has availed of any facility from its bankers/financiers the disbursement may be made directly to such bankers/financiers of the seller. Such disbursement shall be deemed to be a disbursement to the purchaser of the asset.*
- *The purchaser of the asset shall repay to the Noticee this amount, together with interest by way of periodical instalments as computed by the Noticee. Other amounts due and payable by the purchaser of the vehicle to the Noticee shall also be paid from time to time. The same is determined not by market or prevailing rate of interest. Consequently the periodical instalments is fixed by the Noticee unilaterally. An ordinary loan agreement would be based on prevailing rate(s) of interest.*

- *The part of the loan taken by the purchaser of vehicle for such purchase shall be repaid in instalments as set out in the agreement. Thus, the period for which the amount is lent and the manner of repayment is pre-determined by the Noticee and not as per the requirement of the borrower as would be the case in respect of a plain loan agreement.*

The expected date of delivery of the vehicle by the seller to the prospective purchaser of the vehicle forms a relevant part of the agreement. In case the prospective purchaser requests the Noticee to cancel the loan because of non-delivery of the vehicle by the seller, then the prospective purchaser is bound to pay to the Noticee, in addition to any other charge, payable by him under the agreement, cancellation charges as set out in the agreement. This condition is not generally seen in an ordinary loan agreement.

- *In case repayment is sought to be made by the purchase of the vehicle of the entire outstanding amount, then the Noticee would be entitled to charge penalty.*
- *As regard the method of appropriation, when any payment due is received by the Noticee, it shall be appropriated not just towards the principal and interest but towards the dues in the following order, viz.-*
 - (a) *Cost, charges, expenses and other monies;*
 - (b) *Interest on cost, charges, expenses and other monies;*
 - (c) *Delayed Payment Charges, if any;*
 - (d) *Interest payable in terms of this Loan agreement; and*

(e) *Repayment of installment of principal amount as due and payable under this Loan agreement.*

- *The purchaser of the vehicle shall continue to be liable for any amount due to the Noticee after adjustment of the net proceeds of sale, realization, recovery and/or insurance claim as above. Further, the Noticee has the absolute discretion to appropriate any payments received towards any dues.*
- *The purchaser of the vehicle shall make to the Noticee an upfront payment of an amount mentioned in the agreement which payment would be non-refundable and utilized by the Noticee to meet his costs and expenses.*
- *The purchaser's liability and obligation to repay the amounts of loan, interest thereon, delayed payment charge, costs, fees, charges, expenses and all other monies shall be absolute and unconditional.*
- *The purchaser of the vehicle agrees and undertakes to maintain the movable asset in marketable condition at his own expenses and replace broken/damaged parts for normal maintenance of the asset. The purchaser agrees to engage mechanics, dealers, service facilities expressly authorized by the manufacturer of the Asset to effect repairs and to service the Asset. Thus, the purchase, maintenance, etc., of the movable asset is tagged with the so called loan arrangement which is normally the case in respect of a straightforward loan transaction.*
- *The purchaser agrees that the Noticee shall not be responsible for any delay of delivery, non-delivery, theft, accident, etc. of the vehicle. If the purchaser*

fails to comply with any of the terms of the agreement, the Noticee may – without having the obligation to do so and without prejudice to his rights – takes such steps as he may deem fit to keep and maintain the vehicle at the purchaser's cost, charges and expenses which shall be reimbursed by the purchaser on demand by the Noticee.

- *The purchaser of the vehicle shall utilize the loan only for the purpose permitted under this agreement.*
- *The movable asset hypothecated to the Noticee shall be comprehensively insured. Further, the Noticee's lien shall be marked on the insurance.*
- *In the event of any damage rendering the vehicle totally road unworthy or beyond any further use, the compensation payable by the purchaser of the vehicle shall be the value of entire outstanding as on date of the realization of the entire dues. As and when insurance claim is received, the Noticee will arrange to refund to the purchaser of the vehicle the said claim only if the purchaser has repaid in full the outstanding principal and interest when the Noticee receives the above referred claim cheque.*
- *The movable asset shall be hypothecated and charged in favour of the Noticee by the purchaser. The charge/hypothecation so created shall continue in full force so long as all the amounts due under the agreement have been paid by the purchaser of the movable asset to the Noticee.*
- *The Noticee may at his absolute discretion, require the vehicle purchaser to deposit a certain sum of money as security deposit (margin money), which shall not earn any interest to the depositor.*

7.12 The Noticee, in addition to the above mentioned agreement with the customers, also enters into a Deed of

Assignment of loan with underlying securities, like financial institutions and banks, whereby the receivables from the so called Hire Purchase contracts are immediately assigned. The Noticee states that this is similar to discounting of bill of exchange. They get cash immediately, which is equal to the EMIs (Equated Monthly Instalments) receivable under the contract over a period of time less discounting charges. It is seen that this Deed, named as “Deed of Assignment of Loans with underlying Securities”, is entered into between the Noticee [(i) as Assignor and (ii) as Servicer] and IL&FS (as Investor Agent) and HDFC Bank Limited (as Assignee). The salient features of this Deed are:-

- The Noticee has agreed to act as the assignor of certain loan receivables. The Noticee is also acting in his capacity as the servicing and paying agent. IL&FS Trust Company Limited has agreed to act as the representative of the assignee, viz., HDFC Bank. The said HDFC Bank has agreed to act as the buyer of certain loan receivables.*
- The Noticee has agreed to sell, transfer and assign the Assigned Receivables (explained below) and HDFC Bank in turn has agreed to acquire the same as per the terms of the agreement and for this it is agreed that the Noticee shall execute and deliver to HDFC their (the Noticee's) rights, title, interest, claims and benefits in the said Assigned Receivables.*
- The Assigned Receivables means the receivables in respect of the Loan Agreements, discussed above. Further, for the purpose of this Deed, the “Amounts Due” means the amount due and payable by the purchaser(s) of the vehicle(s) to the Noticee in respect of the said Assigned Receivables. The*

purchaser of vehicle who has acquire the vehicle upon the terms and conditions set forth in the relevant Loan Agreement, is referred to in this Deed as "Borrower".

- This Assigned Receivables is agreed to be transferred and assigned by the Noticee to HDFC Bank.*
- Vide this Deed of Assignment of Receivables, the Noticee has agreed to sell, transfer and assign to HDFC Bank Limited, such Assigned Receivables (along with Securities) at a price or consideration agreed upon under the Deed.*
- In consideration of HDFC Bank Limited having paid this Purchase Consideration, the Noticee has unconditionally and irrevocably transferred all his rights, title, benefits and interests and the entire ownership in such Receivables (Assigned Receivables) to the said HDFC Bank Limited.*

7.13 As can be seen from the above, the series of financial transaction(s) between the Noticee and the purchasers of the vehicles and also between the Noticee and HDFC Bank/IL&FS, as reflected in the afore-discussed Agreement and Deed of Assignment of Loans with underlying Securities, cannot be treated merely as a plain and straightforward loan transaction. Material facts on record and the surrounding circumstances indicate that there are number of transactions, all constitute an integral part of the single composite transaction, intended to be carried through as a whole to achieve the specific objective.

7.14 The money stated to be money loaned in the so called Loan Agreement was not for any general purpose. It was specifically given for purchase of a vehicle or other movable assets mentioned therein. It is subject to the

condition that the vehicle shall be hypothecated in favour of the Noticee. It is the Noticee who decides from whom the movable asset should be purchased. The money said to be loaned is not given to the borrower but to the seller of the vehicle. The borrower is in no position to question the method of computation of interest by the Noticee. On one extreme, even cancellation charges are levied where the vehicle purchaser decides to cancel his booking on account of the reason there is likelihood of delay in the expected date of delivery of the vehicle. On the other extreme, the so called loan arrangement carries a penalty where the vehicle owner decides to pre-pay the cost of the vehicle instead of paying the same through instalments agreed upon. Specific provision is made in the agreement as to how the amount recovered from the vehicle purchaser should be appropriated. This appropriation includes even payment of a non-refundable amount. The Noticee, in his capacity as lender under the agreement, takes an undertaking from the vehicle owner even regarding up-keep and maintenance of the vehicle in marketable condition. Though the movable asset is transferred to the purchaser, the lien of the asset is still kept with the Noticee. As the title of the agreement itself suggests, it is not a simple loan agreement but also an agreement for hypothecation and a guarantee agreement.”

5.7 Hon'ble supreme Court has in case of Association of Leasing and Financial Service Companies Vs Union of India [2010 (20) STR 417 (SC) held as follows:

“37. Applying the above decisions to the present case, on examination of the impugned legislation in its entirety, we are of the view that the impugned levy relates to or is with respect to the particular topic of "banking and other

financial services" which includes within it one of the several enumerated services, viz., financial leasing services. These include long time financing by banks and other financial institutions (including NBFCs). These are services rendered to their customers which comes within the meaning of the expression "taxable services" as defined in Section 65(105)(zm). The taxable event under the impugned law is the rendition of service. The impugned tax is not on material or sale. It is on activity/ service rendered by the service provider to its customer. Equipment Leasing/ Hire- Purchase finance are long term financing activities undertaken as their business by NBFCs. As far as the taxable value in case of financial leasing including equipment leasing and hire-purchase is concerned, the amount received as principal is not the consideration for services rendered. Such amount is credited to the capital account of the lessor/ hire-purchase service provider. It is the interest/ finance charge which is treated as income or revenue and which is credited to the revenue account. Such interest or finance charges together with the lease management fee/ processing fee/ documentation charges are treated as considerations for the services rendered and accordingly they constitute the value of taxable services on which service tax is made payable. In fact, the Government has given exemption from payment of service tax to financial leasing services including equipment leasing and hire-purchase on that portion of taxable value comprising of 90% of the amount representing as interest, i.e., the difference between the installment paid towards repayment of the lease amount and the principal amount in such installments paid (See Notification No. 4/2006 - Service Tax dated 1.3.2006). In other words, service tax is leviable only on 10% of the interest portion. (See also

Circular F.No. B.11/1/2001-TRU dated 9.7.2001 in which it has been clarified that service tax, in the case of financial leasing including equipment leasing and hire-purchase, will be leviable only on the lease management fees/ processing fees/ documentation charges recovered at the time of entering into the agreement and on the finance/ interest charges recovered in equated monthly installments and not on the principal amount). Merely because for valuation purposes inter alia "finance/ interest charges" are taken into account and merely because service tax is imposed on financial services with reference to "hiring/ interest" charges, the impugned tax does not cease to be service tax and nor does it become tax on hire- purchase/ leasing transactions under Article 366(29A) read with Entry 54, List II. Thus, while State Legislature is competent to impose tax on "sale" by legislation relatable to Entry 54 of List II of Seventh Schedule, tax on the aspect of the "services", vendor not being relatable to any entry in the State List, would be within the legislative competence of the Parliament under Article 248 read with Entry 97 of List I of Seventh Schedule to the Constitution.

38. According to Mr. Arvind Datar and Mr. K. Parasaran, learned counsel appearing on behalf of some of the appellants, once the subject matter of hire-purchase and leasing is constitutionally characterized as a sale (deemed sale) by the Constitution (Forty-sixth Amendment) Act, the said subject matter can be taxed only under Entry 54, List II and it cannot be taxed under Entry 97, List I. According to the learned counsel, the object behind enactment of the Constitution (Forty-sixth Amendment) Act was to reserve the exclusive competence to tax hire-purchase transactions with the State Legislature and exclude the Parliament from the

legislative sphere. In support of the above contentions, learned counsel placed reliance on para 44 of the judgment of this Court in the case of Bharat Sanchar Nigam Limited (supra), the relevant portion of which is quoted hereinbelow:

"44. Of all the different kinds of composite transactions, the drafters of the Forty-Sixth Amendment chose three specifications, a works contract, a hire- purchase contract and a catering contract to bring them within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time."

39. Emphasizing the underlined words, the learned counsel contended that a hire-purchase does not involve a sale and service at the same time and, therefore, service tax cannot be levied on the interest/ finance charges which is sought to be done in the present case. In our view, the judgment in Bharat Sanchar Nigam Limited's case has no application to the present case. As stated above, what is challenged in this case is the service tax imposed by Section 66 of the Finance Act, 1994 (as amended) on the value of taxable services referred to in Section 65(105)(zm) read with Section 65(12) of the said Act, insofar as it relates to financial leasing services including equipment leasing and hire-purchase as beyond the legislative competence of Parliament by virtue of Article 366(29A) of the Constitution. In short, legislative competence of the Parliament to impose service tax on financial leasing services including equipment leasing and hire-purchase is the subject matter of challenge. Legislative competence was not the issue before this Court in the Bharat Sanchar Nigam Limited's case. In that case, the principal question which arose for determination was in respect of the nature of the transaction by which mobile phone

connections are enjoyed. The question was whether such connections constituted a sale or a service or both. If it was a sale then the States were legislatively competent to levy sales tax on the transaction under Entry 54, List II of the Seventh Schedule to the Constitution. If it was service then the Central Government alone had the legislative competence to levy service tax under Entry 97, List I and if the nature of the transaction partook of the character of both sale and service, then the moot question would be whether both the legislative authorities could levy their separate taxes together or only one of them. It was held that the subject transaction was a service and, thus, the Parliament had legislative competence to levy service tax under Entry 97, List I. In para 88 of the said judgment, this Court observed that "No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods". The principle of law in para 88 squarely applies to the present case. As stated above, we are concerned with "financial leasing services" which are sought to be taxed under Section 65(12)(a)(i). The taxable event is indicated in Section 65(105)(zm). As stated above, the impugned provision operates qua an activity of funding/ financing of equipment/ asset under equipment leasing under which a lessee is free to select, order, take delivery and maintain the asset. The lessor (NBFC) arranges the finances. It accepts the invoice from the vendor (supplier) and pays him. Thus, the lessor (NBFC) renders financial services to its customer(s) and what is taxed under the impugned provision is the income, by

way of finance/ interest charges in addition to management fees/ documentation charges, which is earned by the financier (lessor). The taxable event is the service which is rendered by the finance company to its customer(s). The value of taxable service under Section 67 is income by way of interest/finance charges (measure of tax) which is not determinative of the character of the levy. Thus, Section 67 of the Finance Act, 1994 seeks to tax financial services rendered by the appellant(s) with reference to the income which the appellant(s) earns by way of interest/ finance charges. In the circumstances and for the reasons given hereinabove, the question of splitting up of transactions, as contended on behalf of the appellant(s), does not arise. As held hereinabove, equipment leasing and hire-purchase finance constitute long term financing activity. Such an activity was not the subject matter of the discussion in the Bharat Sanchar Nigam Limited's case. The service tax in the present case is neither on the material nor on sale. It is on the activity of financing/funding of equipment/ asset within the meaning of the words "financial leasing services" in Section 65(12)(a)(i). Lastly, we may state that this Court has on three different occasions upheld the levy of service with reference to Entry 97 of List I in the face of challenges to the competence of the Parliament based on the entries in List II and on all the three occasions, this Court has held that the levy of service tax falls within Entry 97 of List I. The decisions are in the case of T.N. Kalayana Mandapam Association (supra), Gujarat Ambuja Cements Ltd. (supra) and All-India Federation of Tax Practitioners (supra). Conclusion"

5.8 Thus in this case the agreement is not of a loan as understood in general terms but incorporates various other factors which are taxable under the category of

Banking and Financial Services. Appellants have by way of these agreements extended credit facility to the buyers, for a consideration. The part of considerations which cannot be classified as “interest on loan” would be subjected to service tax, by way of determination of value of value of taxable service by application of Section 67 or Service Tax (Determination of Value of Taxable Services) Rules, 2006.

5.9 The claim of the appellant to the exemption under Notification 4/2006-ST dated 01.03.2006 needs to be examined in terms of the wording of the said notification. For ease of reference the text of said notification is reproduced below:

*“G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (herein referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, **hereby exempts the taxable service, specified in sub-clause (zm) of clause (105) of section 65 of the Finance Act, that is to say the financial leasing services including equipment leasing and hire-purchase as defined in item (i) of sub-clause (a) of clause (12) of section 65 of the Finance Act, provided or to be provided to any person, from so much of the service tax leviable thereon under section 66 of the said Finance Act, as is equivalent to the service tax calculated on ninety per cent. of an amount, forming or representing as interest, i.e. the difference between the installment paid towards repayment of the***

lease amount and the principal amount contained in such installment paid.

Explanation.- This exemption shall not apply to any amount, other than an amount forming or representing as interest, charged by the service provider such as lease management fee, processing fee, documentation charges and administration fee.”

5.10 The said notification exempts only the amount representing the interest part in the installment paid towards the repayment of lease amount and the principal amount contained in such installment to the extent of ninety percent. This exemption notification itself shows that the interest per se is not exempted by the application of Section 66A/ Rule 6(2) but where the legislature intended exemption the same has been granted by way of exemption notification. Secondly this exemption notification is applicable only in respect of the financial leasing services including equipment leasing and hire-purchase as defined in item (i) of sub-clause (a) of clause (12) of section 65 of the Finance Act, 1994. For claiming the benefit of the said Notification appellants need to show that the contracts entered by them with the borrowers are in respect the services covered by the notification. In view of the decision of the Apex Court in case of Commissioner of Customs (Import) Vs M/s Dilip Kumar and Company & Others [2018 (361) ELT 577 (SC)] the exemption notification

needs to be construed strictly and person claiming the exemption has to show that he falls within the purview of the Notification. Relevant excerpts from the said decision are reproduced below:

“27. Now coming to the other aspect, as we presently discuss, even with regard to exemption clauses or exemption notifications issued under a taxing statute, this Court in some cases has taken the view that the ambiguity in an exemption notification should be construed in favour of the subject. In subsequent cases, this Court diluted the principle saying that mandatory requirements of exemption clause should be interpreted strictly and the directory conditions of such exemption notification can be condoned if there is sufficient compliance with the main requirements. This, however, did not in any manner tinker with the view that an ambiguous exemption clause should be interpreted favouring the revenue. Here again this Court applied different tests when considering the ambiguity of the exemption notification which requires strict construction and after doing so at the stage of applying the notification, it came to the conclusion that one has to consider liberally.

35. *In the judgment of two learned Judges in **Union of India v. Wood Papers Limited**, (1990) 4 SCC 256 [hereinafter referred as ‘**Wood Papers Ltd. Case**’ for brevity], a distinction between stage of finding out the eligibility to seek exemption and stage of applying the nature of exemption was made. Relying on the decision in **Collector of Central Excise vs. Parle Exports (P) Ltd.**, (1989) 1 SCC 345, it was held “Do not extend or widen the ambit at the stage of applicability. But once that hurdle is crossed, construe it liberally”. The*

reasoning for arriving at such conclusion is found in para 4 of **Wood Papers Ltd. Case** (supra), which reads“...

Literally exemption is freedom from liability, tax or duty. Fiscally, it may assume varying shapes, specially, in a growing economy. For instance tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objective etc. That is why its construction, unlike charging provision, has to be tested on different touchstone. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principles requires it to be construed strictly. Truly speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it.

When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject, but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction...” (emphasis supplied)

41.*After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statute including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging*

provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State.

43.*There is abundant jurisprudential justification for this. In the governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the Courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes.*

Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualizing different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law.

There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide

the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee.

But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view.

52.To sum up, we answer the reference holding as under -

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export Case (supra) stands overruled.”

5.11 Thus appellants are required to make a justifiable claim, claiming the benefit of exemption if applicable in their case, and then adjudicating authority needs to examine or reject the said claim after considering all the relevant aspects in a judicial manner.

5.12 Further in their submissions appellants have claimed the income that has been sought to be taxed under the category of banking and financial service to classified under various heads (refer para 5.2). They have in their submissions admitted that service tax is payable in respect of certain incomes and have also stated that certain incomes would not form the part of taxable service under the category of Banking and Financial Services. The banking and financial services have been defined in very wide manner and appellants need to show specifically how the incomes they have claimed under various heads do not get classified under the said definition for the purpose of levy of service tax.

5.13 In respect of dealer subvention income, the appellant states that the same is an interest income. The interest does not arise on account of any loan simplicitor. They recover from the vehicle purchaser, finance charges on the principal amount. Where a prospective purchaser is unwilling to pay at the said rate, the dealers in order to increase their sales, agree to bear part of these finance charges. It is clear that the real cost/ value of the services provided by the assessee is worth 9% of the principal amount. Therefore, the entire amount shall in toto form' the gross amount charged' for, the purpose of determining taxable value under Section 67, even if the dealer undertakes to pay

part of the financial charges on behalf of the vehicle purchaser.

5.14 As regards late payment charges, in the instant case, they extend certain credit facilities by way of permitting deferred payment for the vehicles sold and in the process levies several financial charges spread over a period of time. As such, late payment charges which are integrally related to the financial services provided are also part of the consideration received from the service recipient for the taxable services provided classifiable under "Banking and Other Financial Services".

5.16 As regards considerations received and accounted for as 'credit card receipts' the assessee claims that these pertain to some past period not covered by the show cause notice. Appellants have not substantiated the said claim. Further in terms of the law service tax is payable on the realization basis and not on the accrual basis.

5.17. It is contended that the term "or any other Body Corporate" as appearing in section 65(12) has to be read ejusdem generis with the preceding words, namely, Banking Company or a Financial Institution including a Non-Banking Financial company. In effect, only a Body Corporate which is in the nature of the aforesaid Banking Company, etc. will be covered under the

taxable head. of Banking and other Financial Services. In the result, they would not get covered as a provider of taxable service in respect of the aforesaid services. Even assuming that they are not engaged in any banking/non-banking financial services, they would still come within the ambit of "body corporate". Since the words "or any other" precede the words, "Other Body Corporate", it is made explicitly clear that such body corporate can be somebody "Other" than the specially mentioned bankers, financial/non-financial bodies. Therefore, the above contention of the appellant is devoid of any merit.

5.18 The agreement titled as "Loan-cum-hypothecation-cum guarantee agreement" does not have the character of the 'loan' agreement. In fact, number of charges are collected from the persons and delayed payment charges are @ 36% per annum. In a typical financial and hire purchase agreement the value of asset is shown as receivables but in the present case, the assessee sold, transferred and assigned their receivables entirely to the assignee as per the Deed of assignment of loan with underlying securities. Therefore the material facts and the documents on record clearly show that the assessee is not in the business of giving 'loan' on interest and consequently, the consideration received for the various services provided does not qualify as 'interest on loan'.

The aforesaid services provided by the assessee would appropriately fall under the category of 'Banking and Other Financial Services'.

5.18 Commissioner has in para 7.50 and 7.51 of his order stated as follows:

“7.50 “Loan” means a sum of money advanced on interest. In effect “Loan” is money lent on interest. The conditions for “loan” given is that the amount should be repaid generally within the agreed time frame and often at an agreed rate of interest in order to be “loan”, the amount paid must be recoverable from the borrower. The loan given may be secured or un-secured. The Bombay Money Lenders Act, 1946 regulates and control transaction of money lending in the state of Bombay. The act is intended to regulate the transactions with the borrowers. The noticee has nowhere claimed that they are in the business of lending money as “loan”.

7.51 RBI regulates excessive interest charged by NBFC by directing NBFC to adopt an interest rate to be charged for “loan and advances” and disclose the rationale of interest rate adopted to the borrowers and customers. The details should also be made available in the website of the Company or published in the Newspapers. Borrower should be explicitly informed and aware of the exact rate of interest to be charged. The Noticee has not adduced any evidence in support of fulfillment of the said RBI regulations. It is also not the claim of the Noticee that the Noticee is a “loan company”. The agreement titled as “loan cum hypothecation cum guarantee agreement” does not have any character of “loan” agreement. In fact, number of charges are collected from the persons and delayed payment charges are @ 36% per annum. In a

typical financial and hire purchase agreement, value of the assets is shown as receivables but in the present case, the Noticee sold, transferred and assigned their receivables entirely to the assignee as per the deed of the assignment of loan with underlying securities. It is pertinent to note that the assignee, as per the deed may also transfer the receivables to a subsequent assignee or assessee in part or full. Therefore, the material facts and the documents on record clearly show that the noticee is not in the business of giving "loan" on interest and consequently consideration received for the various services provided does not qualify as interest on loan."

5.19 The real context of the above observations is not understood or clear. The observations of Commissioner do not deal with the issue of classification of certain incomes claimed as appellant "interest on loan". Commissioner has made reference to all irrelevant and extraneous issues to skirt the issue on hand. It is question of common understanding that the Banking and Financial services are not service simplicitor as loan, deposit or advances but are Financial Products, designed with combination of various isolated services so that adequate finance is made available to consumer/ buyer at competitive prices. How these products are organized is not relevant, but whether these products get classified under the category of taxable services specified under Banking and Financial Services needs to be examined Commissioner have concluded on the basis of extraneous or irrelevant

considerations and concluded that the transactions are not of extending the loan. In such a situation we are not in position to uphold the order of Commissioner to this extent and remand the matter for consideration of the issues afresh in light of observations made in previous paras.

6.1 In respect of all the show cause notices other than notice dated 16.09.2009, demands have been made within the normal period of limitation, and penalties imposed under Section 76 and 77 of the Finance Act, 1994. We uphold the penalties imposed under the said sections for the reason that these penalties are vis a vis the contravention of the provisions and do not involve a guilty intent as has been held by the Hon'ble Supreme Court in case of Gujarat Travancore Agency [1989 SCC (3) 52] case. Hon'ble Apex Court held as follows:

“Learned counsel for the assessee has addressed an exhaustive argument before us on the question whether a penalty imposed under s. 271(1)(a) of the Act: involves the element of mensrea and in support of his submission that it does he has placed before us several cases decided by this Court and the High Courts in Order to demonstrate that the proceedings by way of penalty under s. 271(1)(a) of the Act are quasi criminal in nature and that therefore the element of mensrea is a mandatory requirement before a penalty can be imposed under s. 271(1)(a). We are relieved of the necessity of referring to all those decisions. Indeed, many of them

were considered by the High Court and are referred to in the judgment under appeal. It is sufficient for us to refer to s. 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to s. 276C which provides that if a person wilfully fails to furnish in due time the return of income required under s. 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of s. 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mensrea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by Statute proceeds on the assumption that society suffers injury by and the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under s. 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need of establish the element of mensrea it is generally sufficient to prove that a default in complying with the statute has

occurred. In our opinion, there is nothing in s. 271(1)(a) which requires that mensrea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum, volume 85, page 580, paragraph 1023:

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

Accordingly, we hold that the element of mensrea was not required to be proved in the proceedings taken by the Income tax Officer under s. 271(1)(a) of the Income-tax Act against the assessee for the assessment years 1965-66 and 1966-67."

6.2 However since we are remanding the matter for determination of service tax short paid, the quantum of penalty needs to be redetermined accordingly.

6.3 In respect of the Show Cause Notice that appellants have not provided the relevant information in respect of these services sought to be taxed in the their returns filed and have also not paid the service tax as required to be paid on these services. By not declaring all the said details in their return appellants are liable for suppression with the intent to evade payment of duty. Thus extended period of limitation as provided by proviso to Section 73(1) of the Finance Act, 1994 is applicable in their case. Hon'ble Supreme Court has in

case of Madras Petrochem {1999 (108) ELT 611 (SC)] held as follows:

“9.*The contention for the revenue is that under the self removal procedure, the primary obligation of an assessee is to make proper declarations and entries in the production Register RG 1, the gate passes and RT 12 returns unlike in the Physical Control System where the Excise Inspector present in the factory has to duty of completing the assessment on the spot. We find that the Tribunal has considered the contention of both the parties and came to the conclusion as under:*

“It was incumbent on the appellants to file necessary classification lists in respect of the T.O. and white oil, the enter the production figures in the RG 1 Register, to effect clearances under gate passes and to disclose the particulars of clearances in the RT 12 returns. These submissions were not controverted by the appellants before us. The suppression of material particulars in respect of the production and clearance of T.O. for consumption outside the factory and white oil for consumption within the factory could not, in the facts and circumstances of the case, be said to be through inadvertence.”

10.*So, we have no hesitation to hold on facts of this case in view of finding recorded by the statutory authorities concurrently, that proviso to Section 11A would be attracted, as it stood at the material time and the demand was, therefore, within time as recorded above. This finding has been recorded consistently by all the authorities below and we do not find any error to interfere with the same.*

11.*Then, learned Counsel for the appellant referred to the following decisions of this Court regarding*

interpretation of Section 11 of the Act. In the case of Lubri-Chem Industries Ltd. v. Collector of Central Excise, Bombay [1994 (73) E.L.T. 257 (S.C.) = 1994 (2) Supp. III 258], this Court while interpreting proviso to Section 11A held that extension of limitation period beyond six months up to five years for making a demand for excise duty, there has to be conscious or deliberate withholding of information by assessee and mere inaction is not enough. The relevant portion relied is read as under:

“.....under the proviso to Section 11A of the Central Excises and Salt Act (earlier Rule 10 of the Rules made under the said Act), it has to be established that the excise duty had not been levied or paid or short levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or the Rules with intent to evade payment. Something more positive than mere inaction or failure on the part of the assessee or conscious or deliberate withholding of information when the assessee knew otherwise was required before the assessee could be saddled with any liability beyond the period of six months.””

12.*Learned Counsel further referred to the decision of this Court in the case of Collector of Central Excise, Hyderabad v. M/s. Chemphar Drugs & Liniments, Hyderabad [1989 (40) E.L.T. 276 (S.C.) = 1989 (2) SCC 127], which has also been referred in the aforesaid decision.*

13.*Another submission is with reference to the decision in the case of J.K. Cotton Spinning & Weaving Mills Ltd. v. Collector of Central Excise [1998 (99) E.L.T. 8 (S.C.) = 1998 (3) SCC 540] that this proviso should be strictly construed. It was held that the proviso to Section 11A of Central Excises and Salt Act permitting the extension*

time should not be stretched more than the elasticity supplied in the section itself. So, the eventuality envisaged in Section 11A for further lengthening of the limitation period must be strictly construed.

14. *The proposition of law as laid down is not in dispute. We find in the present case as aforesaid, a clear finding was recorded that the petitioner was aware and was obliged to file RG 1 Register, gate passes and also of clearances in the RT 12 returns by disclosing the particulars which was not done in the present case. The finding recorded in this case, especially in the background that this was a case of self removal procedure in which there is obligation cast on the assessee to make proper and correct declaration and entries in the production register RG 1. Further finding was that it was not by inadvertence. There could be no other inference if it was not by inadvertence, then deliberate, then it is not in the realm of inaction of the assessee but with the objective of a gain, which in other words would be conscious withholding of the information. Thus unhesitatingly we conclude, on the facts of this case, proviso to Section 11 would be applicable, hence, show cause notice is held to be within time."*

6.4 Also accordingly penalty to justified under section 78, in view of decision of Apex Court in case of Dharmender Textile Processor [2008 (231) E.L.T. 3 (S.C)] and Rajasthan Spinning and Weaving Mills [2009 (238) E.L.T. 3(SC)] case.

19. *From the aforesaid discussion it is clear that penalty under section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with*

the intent to evade duty by adopting any of the means mentioned in the section.

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

"2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai & Anr. [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the 'Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the

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

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

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

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

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

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

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

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

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

24. It must, however, be made clear that what is stated above in regard to the decision in Dharamendra Textile is only in so far as section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it) with regard to the several other statutory provisions that came up for consideration in that decision."

6.4 Penalty under Section 76 imposed in respect of the said show cause notice for the period prior to amendment barring imposition of penalty both under section 76 and 78 too cannot be faulted with.

6.5 However since the matter are being remanded the quantum of penalties too need to be determined after determination of duty demand.

6.6 Interest is payable as statutory liability in case of short payment of service tax by the due date. Thus Demand for interest under Section 75 of Finance Act, 1994 is also upheld in view of the Apex Court decision in case of Kerala State Electricity Board [2008 (9) STR 3 (SC)]

“16. Submissions of Mr. Iyer that the payment of interest was the statutory liability of the service provider must be considered in the aforementioned context. If Appellant itself was liable for payment of tax, it was also liable for payment of statutory interest thereupon, if the same had not been deposited within the time stipulated by the statute. The liability to pay tax was not on the foreign company. Only on default on the part of the appellant the interest was leviable. Appellant was clearly liable therefor. In other words, the liability being that of the appellant, it must accept the liability of payment of interest leviable thereupon in terms of statute occasioned by the breach on its part to deposit the amount of tax within the prescribed time.”

7.1 In the result we uphold the demand of Service Tax made under in respect of services provided from Tata Car Care Centre, Worli, Mumbai and also in respect of the services provided under the category of Business Auxiliary Services. In respect of the Service Tax demands made for the reimbursements made to Authorized Dealers and that in respect of Banking & Financial Services we are remand the matter to the original adjudicating authority for redetermination of

the issues and quantum of demand after taking into account our observations in para 3 & 5 above.

7.2 Thus Appeal No ST/87648/13 in respect of adjudication order dated 26.03.2013 adjudicating the Show Cause Notices dated 16.09.2009, 22.10.2010 and 19.10.2011, is allowed partially by way of remand in respect of the issues mentioned in para 6.1 above. The Appeal No ST 86214/15 in respect of adjudication order dated 18.03.2016 adjudicating the Show Cause Notices dated 17.10.2012 & 21.02.2014 & Appeal No ST/86329/16 in respect of adjudication order dated 07.03.2016 adjudicating the Show Cause Notices dated 23.01.2016 are allowed by way of remand.

7.3 Since the issues are quite old in remand proceedings Commissioner should adjudicate the matter within four months from the date of receipt of this order.

7.4 Appeals are disposed of in above terms.

(Pronounced in court on 08.01.2019)

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

(Sanjiv Srivastava)
Member (Technical)