CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70362 of 2019

(Arising out of Order-in-Original No.03/ADJ./COMMR./2018-19 dated 27.12.2018 passed by Commissioner (Audit) CGST & Central Excise, Lucknow)

M/s Premier Car Sales Ltd., **.....Appellant**
(Shahjanaf Road, Hazratganj, Lucknow U.P.)

VERSUS

Commissioner (Audit), CGST & Central Excise, Lucknow **....Respondent**
(7A Ashok Marg, Lucknow)

WITH

Service Tax Appeal No.70378 of 2019

(Arising out of Order-in-Original No.LKO/EXCUS/000/COM/ST/13/2018-19 dated 12.02.2019 passed by Commissioner of CGST & Central Excise, Lucknow)

M/s Premier Car Sales Ltd., **.....Appellant**
(Shahjanaf Road, Hazratganj, Lucknow U.P.)

VERSUS

Commissioner (Audit), CGST & Central Excise, Lucknow **....Respondent**
(7A Ashok Marg, Lucknow)

APPEARANCE:

Shri Kapil Vaish, Chartered Accountant for the Appellant
Shri Sandeep Pandey, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NOs.- 70191-70192/2024

DATE OF HEARING : 09 January, 2024
DATE OF DECISION : 24 April, 2024

P. K. CHOUDHARY:

The above appeals have been filed by the Appellants against Orders-in-Original dt. 27-12-2018 and 12-02-2019 passed by the Ld.Commissioner, CGST & Central Excise, Lucknow. As the issues involved in both the appeals are common for different periods, both these appeals are being disposed of by this common order.

2. The breakup of demands in the two orders are as under:–

Description	Appeal No. ST/70362/2019	Appeal No. ST/70378/2019	Issue No.
Disallowance of cenvat credit under Rule 6(3) of Cenvat Credit Rules, 2004	Rs.3,35,65,791/-	Rs.13,80,65,985/-	1
Service tax on logistic charges	Rs.53,07,859/-	Rs.8,04,148/-	2
Service tax on collection of toll plaza	Rs.58,45,817/-	NIL	3
Service tax on other income	NIL	Rs.4,26,27,473/-	4
Total	Rs.4,47,19,467/-	Rs.18,14,97,606/-	

3. Briefly stated, the facts of the case are that M/s Premier Car Sales Ltd are engaged in trading of Motor Vehicles of Hyundai, Honda two wheelers and Piaggio three wheelers. They have been registered under Service Tax for providing services of Servicing of Motor Vehicle', `Business Auxiliary Services' and `Renting of Immovable Property Services'. During the course of scrutiny of records of the Appellants, it was observed that they had availed Cenvat credit in respect of service tax paid on various input services like telephone service, courier service, business promotion, cleaning and house keeping, insurance, maintenance or repairs, advertisement etc. It was alleged that some of the services had been used commonly for providing taxable services as well as non taxable activities like trading of motor vehicles. It was observed that while availing such Cenvat credit, Appellants had neither maintained separate account as prescribed under Rule 6(2) of Cenvat Credit Rules 2004[1], nor they had paid an amount as determined under Rule 6(3A) of CCR, 2004. Accordingly, demands were raised by issuing Show Cause Notice[2]. It was further observed that the Appellants had

[1] CCR
[2] SCN

received logistic charges on account of providing customer care services and handling charges. These logistic charges were charged from the customer over and above the ex-show room price of the cars. It was alleged that the logistics charges were being received against providing services. The liability of service tax as defined under Business Auxiliary Services was applicable on the same. During scrutiny of records of the Appellants, it was also observed that the Appellants had provided service of "Collection of Toll Charges" to the National Highways Authority of India[3] and had not discharged service tax liability on such collection charges. Appellants entered into a contract with NHAI secured though competitive bidding for engagement as the user fee collecting agency for collection of user fee and remittance of fixed weekly amount for collection of said user fee. Reliance was placed on CBIC Circular No.152/3/2012 dt. 22-02-2012 wherein it was clarified that if the SPV (Special Purpose Vehicle) engaged an independent entity to collect toll from users on its behalf and a part of toll collected is retained by that independent entity as commission or is compensated in any other manner, service tax liability arises on such commission or charges under the Business Auxiliary Services. In the Statement of Demand cum Show Cause Notice dt. 23-04-2018 for the period 2015-16 to 2016-17, demands were also proposed (in addition to disallowance of Cenvat credit under Rule 6(3) of CCR, 2004 and demand of service tax on logistic charges) on certain other income. It was observed that the Appellants had received amounts under the head Business Auxiliary Services, Renting of Immovable Property Services, Repair Re-conditioning, Restoration, Decoration Services and Work Contract Services. It was observed that during the year 2015-16 and 2016-17, Appellants had short paid service tax Rs.2,26,52,109/- and Rs.2,06,59,728/- respectively. After adjudication all the demands were confirmed and penalties have been imposed. Hence, the present appeals before this Tribunal.

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[3] NHAI

4. In Appeal No.ST/70362/2019, SCN was issued on 17-10-2017 by invoking extended period of limitation and in Appeal No.ST/70378/2019, statement of demand was issued on 23-04-2018 within the limitation period of 30 months.

Issue No.1: Disallowance of credit under Rule 6(3) of Cenvat Credit Rules 2004.

5. The Learned Commissioner, in both the cases, held that the Appellants have availed Cenvat credit relating to taxable and exempted services. Therefore, amount has been demanded for the period 2012-13 to 2014-15 @ 6% of the value of exempted services. It has been held that the Appellants had chosen not to follow the statutory provision by not excersing any option in the form of Rule 6(2), Rule 6(3) and Rule 6(3A) of CCR, 2004 and that it was obligatory on a service provider to take all required steps including informing the jurisdictional Range Officer about the activity. Since the Appellants had not maintained separate records of input services, used in taxable services and exempted services, they have lost the first option. Further to avail the benefit of second option, the Appellants were required to intimate in writing to the jurisdictional Superintendent by submitting certain particulars regarding availment of benefit provided by Rule 6(3A) of CCR, 2004. Appellants having deliberately ignored all the options available to them and now they have no option but to pay an amount equal to 6% of exempted services. It has also been held that in fact the Appellants had availed much lesser credit during the relevant period, is not relevant and there is no bar/limitation in Rule 6(3)(1) of CCR, 2004 for demanding higher amount. For the period 2015-16, demand has been raised @7% for the period 2016-17, demand has been raised @ 7% but has been restricted to the amount of opening balance of credit as on 01-04-2016 and the credit taken during April 2016 to March 2017.

6. Appellants in their grounds of appeal and written submission submitted that they have been maintaining separate records of input services availed at workshop and services

availed at show rooms. They submitted that services availed at workshop were exclusively related to provision of taxable services. However, services availed at show room can be said to be common to taxable and exempted services. It was submitted that during 2012-13 to 2014-15, they availed credit of Rs.80.37 lakhs which included services of Rs.23.94 lakhs availed at workshop and Rs.56.43 lakhs at showroom. They have also submitted Chartered Accountant's Certificate, certifying the said figures. It was further submitted that on proportionate basis, the ratio of taxable/exempted service is 35:56 and therefore at best they were liable for payment of Rs.34,72,329/- which they have duly paid. They further submitted that the benefit/option under Rule 6(3A) is available even if the option is not exercised in the beginning of the year. Reliance in this connection has been placed on following decisions:-

(a) Tiara Advertising Vs. CCE reported in 2019 (30) G.S.T.L. 474 I (Telangana).
(b) CCE Vs. Secure Meters Ltd. reported in 2017 (354) 146 (T) upheld by High Court.
(c) Reliance Life Insurance Co. Ltd Vs. CCE reported in 2018 (363) E.L.T. 1050.
(d) Aster (P) Ltd. Vs. CCE reported in 2016 (43) S.T.R. 411.
(e) Mercedes Benz India Pvt. Ltd. Vs. CCE reported in 2015 (40) S.T.R. 381 (T).
(f) Etrans Solutions Pvt. Ltd. Vs. CCE reported in 2020 (372) E.L.T. 867 (T).

7. For the period 2015-16 to 2016-17, Appellant's additional submissions had been that the value of exempted services has not been computed correctly. The main reason for the difference is that the sale price includes the value of spare parts, whereas, the cost of goods sold does not include the cost of spare parts sold for the year 2015-16. The cost of spare parts sold was Rs.177.65 crores and the same was liable to be reduced while computing the value of exempted services. Therefore, the gross margin for the year 2015-16 will stand reduced from Rs.191.5 crores to Rs.13.8 crores and the computation of amount @ 7% for the year 2015-16 shall stand reduced from Rs.13.4 crores to

Rs.1.76 crores. For the year 2016-17, Appellants availed credit of Rs.75.75 lakhs. It included services of Rs.29.14 lakhs availed at workshop and Rs.46.61 lakhs availed at show room. It was submitted that as per ST-3 returns, Appellants had provided taxable services of Rs.26.6 crores and the value of exempted services on the basis of 10% of the value of goods sold (819 crores) works out to Rs.81 crores. It was submitted that on attributable basis, Appellants were liable for reversal of credit of Rs.34.91 lakhs in the ratio of 27:81. They have already paid an amount of Rs.1.36 crore by way of pre deposit, which will take care of the entire demand of Cenvat credit and interest.

8. It was also submitted that in similar cases of Appellant's sister concern, proportionate payment had been accepted as deposit under Rule 6(3A). No appeal has been filed against the said order of Commissioner (Appeals).

9. The learned Departmental Representative reiterated the findings of the Order-in-Original.

10. Heard both sides and perused the appeal records.

11. The main issue in the present case is as to whether the option of 6% or 7% as given in Rule 6(3) of CCR, 2004 can be thrust upon the Appellant if they had failed to exercise the option under Rule 6(3A) of CCR, 2004. This issue has come up for consideration before various Benches of the Tribunal, wherein it has consistently been held that the benefit of Rule 6 (3A) cannot be denied even if the assessee has not exercised the said option in the beginning of the year. Reliance in this connection is placed on the judgement of Hon'ble High Court of Telengana in the case of Tiara Advertising Vs. UOI reported in 2019 (30) G.S.T.L. 474. Relevant paras are reproduced for ready reference: –

> *"14. Further, we may reiterate that Rule 6(3) of the Cenvat Credit Rules, 2004, merely offers options to an output service provider who does not maintain separate accounts in relation to receipt, consumption and inventory of inputs/input services used for provision of output services which are*

chargeable to duty/tax as well as exempted services. If such options are not exercised by the service provider, the provision does not contemplate that the Service Tax authorities can choose one of the options on behalf of the service provider. As rightly pointed out by Sri S. Ravi, Learned Senior Counsel, if the petitioner did not abide by the provisions of Rule 6(3) of the Cenvat Credit Rules, 2004, it was open to the authorities to reject its claim as regards the disputed Cenvat Credit of Rs.17,15,489/- ".

"15. We may also note that in the event the petitioner was found to have availed Cenvat Credit wrongly, Rule 14 of the Cenvat Credit Rules, 2004 empowered the authorities to recover such credit which had been taken or utilised wrongly along with interest. However, the second respondent did not choose to exercise power under this Rule but relied upon Rule 6(3)(i) and made the choice of the option thereunder for the petitioner, viz., to pay 5%/6% of the value of the exempted services. The statutory scheme did not vest the second respondent with the power of making such a choice on behalf of the petitioner. The Order-in-Original, to the extent that it proceeded on these lines, therefore cannot be countenanced."

12. In the case of Mercedes Benz India Pvt. Ltd. Vs. CCE reported in 2015 (40) S.T.R. 381 (Tri–Mum), the appellants were engaged in manufacturing of motor vehicle as well as trading activity of similar goods . Demands had been raised under Rule 6(3A) of CCR, 2004 on the ground that appellants had not exercised the option under the said Rule. This Tribunal held that in case the assessee fails to exercise an option under Rule 6(3A) of CCR, 2004, there is no provision that option of payment of 5% would be automatically applied. Relevant paras are reproduced as under:–

"5.3. As regard the contention of the adjudicating authority that this option should be given in beginning and before exercising such option, we are of the view that though there is no such time limit provided for

exercising such option in the rules but it is a common sense that intention of any option should be expressed before exercising the option, however the delay can be taken as procedural lapse. We also note that trading of goods was considered as exempted service from 2011 only, thus it was initial period. We are also of the view that there is no condition provided in the rule that if a particular option, out of three options are not opted, then only option of payment of 5% provided under Rule 6(3)(i) shall be compulsorily made applicable, therefore we are of the view that Revenue could not insist the appellant to avail a particular option. In the present case admittedly it is appellant who have on their own opted for option provided under Rule 6(3)(ii). The meaning of the option as argued by the Ld. Sr. Counsel is that "option of right of choosing, something that may be or is chosen, choice, the act of choosing". From the said meaning of the term 'option', it is clear that it is the appellant who have liberty to decide which option to be exercised and not the Revenue to decide the same."

"5.4. We find that the appellant admittedly paid an amount of Rs.4,06,785/- plus interest, this is not under dispute. Therefore in our view, the appellant have complied with the condition prescribed under Rule 6(3)(ii) read with sub-rule (3A) of Rule 6 of Cenvat Credit Rules, therefore demand of huge amount of Rs.24,71,93,529/- of the total value of the vehicle amounting Rs.494,38,70,577/- sold in the market cannot be demanded. We are also of the view that Rule 6 of the Cenvat Credit Rules is not enacted to extract illegal amount from the assessee. The main objective of the Rule 6 is to ensure that the assessee should not avail the Cenvat Credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted

services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than Cenvat Credit attributed to the input or input services used in the exempted goods. It is also observed that in either of the three options given in sub-rule (3) of Rule 6, there is no provisions that if the assessee does not opt any of the option at a particular time, then option of payment of 5% will automatically be applied. Therefore we do not understand that when the appellant have categorically by way of their intimation opted for option provided under sub-rule (3)(ii), how Revenue can insist that option (3)(i) under Rule 6 should be followed by the assessee."

"5.5. As discussed above and in the facts of the case that actual Cenvat credit attributed to the exempted services used towards sale of the bought out cars in terms of Rule 6(3A) comes to Rs.4,06,785/- where as adjudicating authority demanded an amount of Rs.24,71,93,529/-. In our view, any amount, over and above Rs.4,06,785/- is not the part of the Cenvat Credit which required to be reversed. The legislator has not enacted any provision by which Cenvat credit, which is other than the credit attributed to input services used in exempted goods or services; can be recovered from the assessee."

13. The above view has consistently been taken by this Tribunal in various other cases. The issue is therefore no more *res integra*. We therefore, hold that the Appellants are eligible for benefit of Rule 6(3A) of CCR, 2004, even if they have not exercised their option before the beginning of the year.

14. The Appellants have submitted that they have maintained separate records for availing Cenvat credit at workshops and showroom. They have also submitted that services availed at

workshop are attributable to taxable services only in as much as Appellants have provided services of repair/maintenance service of vehicle at workshop (authorized service station). These services have always remained taxable. Appellants have also submitted a certificate from the Chartered Accountant certifying that Appellants have been maintaining separate records of Cenvat credit in workshop and their showroom at head office. We find that a similar issue had come up in the case of Appellant's sister concern wherein it was submitted that the Cenvat credit pertaining to the workshop was exclusively related to taxable services and was not liable for reversal under Rule 6(3) of CCR, 2004. Vide order dt. 15-09-2021, the Commissioner (Appeals) in the said case held that appellants were not required to reverse input services availed in workshop. The learned DR has also not disputed the Appellants contention that no exempted services are provided from workshop. Even otherwise, it is well known that workshops are used for providing services of repair and maintenance of vehicles and trading of vehicles is carried out from showrooms. We hold that services availed at workshop were exclusively related to provision of taxable services and therefore Appellants were not liable for reversal of any amount out of the Cenvat credit availed at workshop under Rule 6(3) of CCR, 2004. For the period 2012-13 to 2014-15, Appellants have submitted that the ratio of taxable services to exempted services was 35:56 and on attributable basis they were liable for reversal of Rs.34,72,629/- under Rule 6 (3A) of CCR, 2004 and Rs.26,30,230/- towards interest. They have also produced copies of challans evidencing the said payment. The Departmental Representative has not disputed the said payment as well as its computation. We therefore hold that Appellant's liability for reversal under 6 (3A) of CCR, 2004 for the year 2012-13 to 2014-15 was Rs.34,72,629/- only . We also order for appropriation of the amount paid towards reversal & interest thereon. For the period 2015-16 and 2016-17, Appellants had submitted that they have availed credit of Rs.46.61 lakhs only at showroom (duly certified by their Chartered Accountants). The ratio of taxable and exempted service is 27:81. On attributable basis, they would be liable for reversal of credit of Rs.34.95 lakhs. They also submitted that the said amount alongwith interest may be appropriated from the amount of Rs.1.36 crores deposited by way of pre-deposit. As already mentioned, Department has not disputed the said computation and payment of Rs.1.36 crores. We therefore order for appropriation of amount of Rs.34.95 lakhs along with interest due thereon from the deposit of Rs.1.36 crores.

Issue No.2 : Demand of service tax on logistic charges recovered from the buyers of car.

15. Appellants had been recovering logistic charges from the buyers of the car. It is the case of the Department that the Appellants had not deposited service tax on such logistic charges. The learned Commissioner has held that the Appellants have charged the logistics charges over and above the ex-showroom price of car. If logistic charges were part of the transaction value, then it could have been included in the sale value and mentioned in the sale invoice but Appellants had separately charged logistic charges and issued separate invoice in this regard. It has therefore been held that it is a pure service taxable under the provisions of Finance Act, 1994 and these logistics charges are not the part of transaction/sale value, rather logistics charges are the amount charged from the customers in view of services related to logistics charges. Appellants have submitted that they have collected logistics charges as part of transaction value at the time of sale of vehicle. These charges are part of sale invoice and VAT is collected on the same. They also submitted that there can be no service till the goods are sold to another person.

16. We have perused the copy of invoice for sale of car as well as invoice for logistic charges. Both these invoices have been raised simultaneously at the time of sale of vehicle. We also note that the VAT Tribunal vide order dt. 25-01-2014, in their own

case for A/Y 2009-10, had held that the logistic charges recovered at the time of sale of car is liable to be included in the sale price of vehicle. It therefore held that VAT was payable on logistic charges. It is the settled principal of law that service tax and VAT are mutually exclusive and a transaction can either be taxed under service tax or under VAT. Once VAT has been paid, service tax cannot be demanded.

17. The Hon'ble Delhi High Court in the case of Tim Delhi Airport Advertising Pvt. Ltd. Vs. Special Commr –II 2016 (44) S.T.R 399 (Del.) held that levy of service tax and VAT are mutually exclusive. The intention of the party to the transaction would be material. If a transaction has been held to be one of providing services, then the same was not chargeable to VAT.

18. We also note that a similar issue had come up for consideration before the Commissioner (Appeals) in the case of Appellant's sister concern wherein the Lower Authorities had confirmed the demand of Rs.1.08 crore under Rule 6(3) of CCR, 2004 on receipt of logistic charges. Vide Order-in-Appeal No.282/ST/Appl/LKO/2019 dt. 31-05-2019, the Commissioner (Appeals) Lucknow held that the Appellants had been paying VAT on logistic charges. It is the settled law that VAT and service tax are mutually exclusive. Therefore demand of service tax has been set aside. Para 8 of the order reads as under:–

> *"Regarding demand of service tax on logistic charges, the appellant has produced copy of invoices raised by them which clearly show that the appellant has been paying VAT on the logistic charges. It is a settled law that VAT and service tax are mutually exclusive. Therefore, demand of service tax on logistic charges is not maintainable and the same is set aside".*

19. On a specific query by the Bench, the learned Chartered Accountant informed that Department has not filed any appeal against the said order. It therefore appears that Department has accepted the said order.

20. In view of above, we hold that service tax could not have been demanded on logistic charges; particularly when Appellants have paid VAT on the same, Department has not been able to specify the nature of service provided and the order of Commissioner (Appeals) in another case has been accepted by the Department.

Issue No.3 Demand of service tax on collection of toll tax at toll plaza.

(i) Appellants had entered into a contract with NHAI and obtained right to collect toll tax at toll plaza. It had to pay fixed amount per week to the NHAI and remaining amount of collection had to remain with the Appellants.

(ii) The impugned order has held that the Appellants are carrying out the activity for another person (NHAI) for consideration and therefore falls in the definition of service. It holds that the negative list entry under section 66D (h) covers access to a road or bridge on payment of toll charges. Services of toll charges on behalf of an agency authorized to levy toll are in the nature of services used for providing the negative list services. As per the principle laid down in sub-section (1) of section 66F of the Act, the reference to a service by nature or description in the Act will not include reference to a service used for providing such service. Therefore, the service by way of access to a road or a bridge on payment of toll charges is outside of service tax ambit, but the charges received / retained for providing service of collection of toll tax is well within the sphere of taxable service. In view of the above observation, demand of service tax had been confirmed on the amount retained after payment to NHAI.

21. Appellants have vehemently contended that the collection of toll charges in terms of contract with NHAI falls in negative list under section 66D(h) of Finance Act, 1994. They also

contended that they have collected toll charges in its independent capacity as a contractor. It obtained right to collect toll under a contract. It has neither rendered any service to NHAI nor has acted as commission agent for NHAI. Payment had been received from vehicle owners and not from NHAI. Negative list entry under section 66D(h) reads as under:–

> *"66D Negative list of services – The negative list shall comprise of the following services namely –*
>
> *a to g ….*
>
> *h service by way of access to a road or a bridge on payment of toll charges."*

22. We find that the aforesaid issue relating to liability for payment of service tax on collection of toll charges under a contract with NHAI is no more *res integra*. This issue has been dealt with by this Tribunal in series of cases.

23. In the case of Sangam India Ltd. Vs. CCE reported in 2023 (73) G.S.T.L. 87, the Tribunal referred to the contract with NHAI and held that Appellants were not liable for payment of service tax on collection of toll charges. It allowed the appeal after making following observations:-

> *"We find that the allegation that the appellant worked as a 'Commission Agent' on whose behalf he collects the toll , appears to have overlooked the underlying scheme of the tender which brought the appellant into this transaction . The contractual arrangement between the appellant and NHAI was for undertaking the collection of toll or user fee. The terms of the contract was very clear : possession of the 'Kanwaliyas Toll Plaza ' asset is transferred to the appellant for the stream of lump sum payment guaranteed by the appellant . Any deficit returns owing to decreased vehicular traffic or any other reason affects the revenue steam of the appellant. A 'Commission Agent ' is akin to a channel partner in delivery of goods / service , wherein the Principal bears all the risks . In*

the instant case, the tax liability does not arise by way of being commission Agent as per Section 65 (19) of the Finance Act, 1994 for the period prior to introduction of negative list regime".

24. Similarly in the case of Commissioner of Service Tax Vs. Ideal Road Builders Pvt. reported in 2018 (12) G.S.T.L. 192, the Tribunal rejected the Departmental appeal after holding that the activity of toll collection by the respondent was not on behalf of NHAI/MSRDC but on their own account, they have secured the right to collect the toll. Relevant portion of the order reads as under:-

"We have carefully considered the submissions of both the sides as well as relevant records and case laws cited by the rivals. We find that in the present case the respondents has secured the right to toll collection in auction. The respondents being the suitable bidder were given right to collect the toll and under the terms and conditions of such auction the respondents were liable to pay the bid amount to NHAI/MSRDC. Such bid price which the respondents were liable to pay to the NHAI/MSRDC was in no way connected with the collection of toll or quantum of toll amount. The respondents had to pay NHAI/MSRDC the bid amount irrespective of the fact whether such activity would earn him profit or loss. The NHAI/MSRDC were in no way concerned with the collection made by the respondents. As a result of same we find that though in case of respondent M/s. MEP income from toll collection was in negative during the year 2007-08, 2008-09 and 2011-12 but they had to pay the bid amount to NHAI/MSRDC. This leaves no doubt in our mind that the activity of toll collection by the respondents was not on behalf of NHAI/MSRDC but on their own account once they had secured the right to collect the toll. We also find that the activity of NHAI/MSRDC is of developing, maintaining and management of national state highways which is a statutory function. They have not been engaged in the said activity as business. In such case it cannot be said that the respondents has been providing auxiliary service to any business".

"4.2. We also find that the respondent's case is not even concerned with charging commission from NHAI or MSRDC unlike the judgments cited above. They stand on

better footing than the cases cited by the Counsel for the respondents as in the present case they had secured the right to collect the toll from NHAI/MSRDC in a bid for lump-sum amount. This amount is to be paid to NHAI/MSRDC irrespective of any quantum of toll collection. The toll collection is not being done on commission basis or in lieu of any remuneration. All the proceeds of the toll collection belong to the respondents with no interference or right of NHAI/MSRDC. The income so generated is their own business income and NHAI/MSRDC has no right over such toll collection. The toll is not collected by the respondents as representative or agent of NHAI/MSRDC nor any commission in terms of quantum of amount or percentage is charged by the respondents from NHAI/MSRDC. They are liable only to pay the bid amount installment to NHAI/MSRDC irrespective of any collection which can in no way be said to be commission income. They have purchased the right to collect the toll in auction which in no way can be termed as rendering of service to NHAI or MSRDC. Rather the respondents in terms of the agreement are liable to pay the amount fixed at auction to the NHAI/MSRDC irrespective of the fact that such collection of Toll is profitable to them or not. This leaves no doubt that for the above reason also the Toll collection by the respondents is not arising from any "Business Auxiliary Service". We further find that even M/s. NHAI and MSRDC do not consider the toll collection by the respondents on their behalf as commission agent. They consider the respondents as in business of toll collection and even tax is collected at source u/s. 206C of the Income-tax Act from the installments paid by the respondents. The said section is in respect of collection of tax of income tax at the time of receipt of amount. The respondents income is towards its own toll collection and they do not get any commission on account of collection of toll from NHAI/MSRDC. There is no deduction of tax at source under Section 194H which is towards collection of tax on commission income. Thus, the difference between the toll collection and the bid amount paid by the respondents to M/s. NHAI/MSRDC in no way can be termed as consideration for any service. The reliance placed by the Revenue upon Board Circular No. 152/3/2012-S.T., dated 22-2- 2012 is not correct for the reason that the respondents has not collected such toll charges on commission or charges on behalf of NHAI/MSRDC. The toll collection is their own income and is not parted with NHAI/MSRDC as they are concerned only *with the bid amount finalized in auction and therefore cannot be termed as activity of Business Auxiliary Service. In view of above findings and judgments cited by the respondents we hold that the activity of the respondent cannot be considered as "Business Auxiliary Service" and cannot be taxed to service tax. Thus, the appeals filed by the Revenue is not sustainable on merits and accordingly dismissed."*

25. We find that Appellants' case is squarely covered by the aforesaid decisions of the Tribunal. We therefore set aside the demand on toll collection and allow the appeal on this issue.

Issue No.4 Demand of Service tax Rs.4.26 crores on other taxable services for the period 2015-16 and 2016-17.

26. In Appeal No.ST/70378 /2019, Statement of Demand have been issued on 23-04-2018 for the year 2015-16 and 2016-17. The said Statement of Demand had been issued on the basis of SCN dt. 17-10-2017 which was issued on the basis of observations of the audit for the period 2012-13 to 2014-2015. Appellants have vehemently submitted that on the basis of Statement of Demand issued under section 73(1)(A) , demand of service tax could not have been raised on miscellaneous income. Section 73 (1)(A) of Finance Act reads as under:-

"Notwithstanding anything contained in sub – section (1) (except the period of [thirty months] of serving the notice for recovery of service tax) , the Central Excise Officer may serve , subsequent to any notice or notices served under that sub-section , a statement , containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period , on the person chargeable to service tax , then , service of such statement shall be deemed to be service of notice on such person , subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices ".

27. Plain reading of aforesaid section 73(1)(A) makes it clear that Statement of Demand can be issued for a subsequent period, on the basis of SCN for earlier period only if the grounds relied upon for the subsequent period are same as are mentioned in the earlier notice. We find that the earlier SCN dt. 17-10-17 had been issued for the period 2012-13 to 2014-15 and is proposed to demand service tax Rs.4.47 crores on following grounds:-

(a) Disallowance of credit under Rule 6(3) of CCR, 2004.

(b) Demand of service tax on logistic charges recovered from the buyers of car.

(c) Demand of service tax on collection of toll tax at toll plaza.

28. In the aforesaid SCN, there was no proposal to demand service tax on other income. Therefore, the demand is liable to be set aside on this preliminary observation that demands on new issues cannot be raised by way of Statement of Demand. However, we find that the demand is also not sustainable on merits, in view of our observation in subsequent paragraphs. The Statement of Demand proposed to demand Rs2.26 crores for the year 2015-16 and Rs2.07 crores for the year 2016-17 on the ground that the value of services declared in ST3 returns was much less than the amount received under the heads sale of services, other operating revenue, rent received, miscellaneous income and business auxiliary services. Details of demand as per statement of demand are as under:-

For Financial year 2015 -16:

(Amounts in Rs.)

SI. No	**Various Services provided by the Noticee**	**Amount received as per ST-3 Returns**	**Amount received under heads Sale of Services , other operating Revenues ,**	**Differential Amount of Various services provided on which service tax has not**	**Service tax (Including Cess) payable @ 14.5 % on the differential amount of**

			Rent received ,Misc. Income &Auxiliary Business Income as per Balance Sheet (In Rs)	been paid (D-C)	services provided (E)
A	**B**	**C**	**D**	**E**	**F**
1	**Business Auxiliary Services**	**3,34,36,105**	**28,29,13,433**	**15,62,21,439**	**22,26,52,109**
2	**Renting of immoveable property services**	**19,84,903**			
3	**Repair, reconditioning restoration or decoration**	**6,45,85,025**			
4	**Work Contract Services**	**26685961**			
	Total	**12,66,91,994**	**28,29,13,433**	**15,62,21,439**	**2,26,52,109**

For Financial Year 2016-17 :

(Amount in Rs.)

SI. No	Various Services provided by the Noticee	Amount received as per ST-3 Returns	Amount received under heads Sale of Services , other operating Revenues , Rent received ,Misc. Income & Auxiliary Business Income as per Balance Sheet	Differential Amount of Various services provided on which service tax has not been paid (D-C)	Service tax (Including Cess) payable @ 14.5 % on the differential amount of services provided (E)

			(In Rs)		
A	B	C	D	E	F
1	Business Auxiliary Services	3,64,25,530	27,70,50,334	13,77,31,518	2,06,59,728
2	Renting of immoveable property services	26,43,688			
3	Repair, reconditioning restoration or decoration	7,07,57,470			
4	Work Contract Services	2,94,92,128			
	Total	13,93,18,816	27,70,50,334	13,77,31,518	2,06,59,728

Appellants had submitted that no difference was found under the head Business Auxiliary Services, Renting of Immovable Property Services and Repairing Services. However differences were noticed in the amounts declared under the head Works Contract Services, other operating revenue and miscellaneous income. Headwise, yearwise details of said differences are as under:-

Nature of receipt	2015-16 (Rs)	2016-17 (Rs)	Total (Rs)
Works contract service	1,07,66,256	1,26,39,482	2,34,05,738
Other operating revenues	14,15,85,236	11,54,22,313	25,70,07,549
Miscellaneous income	58,33,578	96,67,159	1,55,00,737
Total	15,81,85,070	13,77,28,954	29,59,14,024

With regard to difference in value of works contract services, Appellants submit that these services relate to painting services provided on the motor vehicle received in workshop. In terms of Rule 2 A of Service Tax (Determination of Value) Rules, 2006, Appellants have availed abatement of 30%. We have seen a sample copy of invoice and note that Appellants have paid VAT on 60% of taxable value & service tax on 70% of taxable value. In other words, they have availed abatement of 30%. On perusal of detailed chart, we note that difference in value between the value declared in ST-3 return the value as per Balance Sheet is also about 30%. We therefore hold that there is no short payment of service tax under the head Works Contract service.

29. With regard to difference in value of other operating revenue, Appellants had submitted that the entire difference of Rs25.7 crores represents the discount received from suppliers on purchase of motor vehicle, spare parts etc. They have also produced sample copies of schemes, to prove that the manufactures of vehicles used to provide discount on sale of vehicles, spare parts etc. Appellants have also submitted a certificate from a Chartered Accountant certifying that the amounts received and accounted for under the head other operating revenue in the P/L account pertains to the amount received towards various discounts , schemes given by supplier of car, spare parts etc. It has further been certified that the aforesaid amount does not pertain to any service provided by the Appellants.

30. We find that the aforesaid issue of liability for payment of service tax on various discounts received by dealers of motor vehicles stands settled in series of decisions. Some of them are as under:-

(a) CCE Vs. Sai Service Station Ltd. reported in 2014 (35) S.T.R. 625 .

(b) My Car (P) Ltd. Vs. CCE reported in 2015 (40) S.T.R. 1018.

(c) Sharyu Motors Vs. CCE reported in 2016 (43) S.T.R. 158.

31. In case of My Car (P) Ltd. vs. CCE reported in 2015 (40) S.T.R. 1018 (Tri –Delhi), the Tribunal has held that incentives received by authorized dealers of Maruti Udyog Limited were not taxable under the category of business auxiliary services. Para 4 (iv) of the order reads as under:-

> *"For incentive on spare parts it is the case of the appellant that these incentives are given to the appellant for achieving certain targets of purchase of spare parts which is purely an activity of buying*

and selling on which local VAT is paid at the time of sale. Appellant strongly argued that such an incentive is only a trade discount based on performance. Appellant has relied upon the case law Deputy Commissioner of sales tax vs. Motor Industries Co. Ernakulam (supra). Similarly appellant is getting incentives on MGA, incentive on Free MGA, balance Score Card, Incentive on Wagon R and Alto Cars, Incentive on Esteem and Maruti 800 etc . Incentive of free credit, Incentive on sale of employees of LIC, SBI and Fetchers Scheme, Misc. Spot Credit and IFC, Finance pay out and National Subvention of MUL, part reimbursement of advertisement and incentive for arranging camps / sales mela and Free Mega Checkup Camps. It is the case of the appellant that all these amounts received from MUL, are either compensatory payments or in the nature of performance based trade discounts on achieving certain performance targets or is an activity which is mutually beneficial to both the Appellant and MUL. It is not the case of the Revenue that MUL continues to remain the owner of the goods dealt by the Appellant. All the vehicles / spares are purchased by the appellant and then sold. The incentives given by the MUL has to be considered performance based trade discounts and will not be in the nature of BAS commissions. On perusal of the case records and the factual matrix we agree with the arguments of the appellant that payments received on these accounts cannot be held to be classifiable as provision of taxable services of BAS under section 65 (19) of the Finance Act , 1994."

32. In view of the above, we hold that the Appellants were not liable for payment of service tax on discount /incentive

received from suppliers of motor vehicle, spare parts etc and accounted for under the head other operating revenue.

33. Appellants submitted that the miscellaneous income of Rs1.55 crores represents amounts written off (excess received from customers), insurance claim received etc. From the head wise details available on page 178 of appeal paper book, we note that the amount of Rs1.55 crores also includes amount received towards reimbursement of claims by the suppliers under warranty, sale of scrap etc. The learned Commissioner has not specified the nature of service in respect of aforesaid amount of Rs1.55 crores. We hold that none of these amounts pertained to receipt against any services and therefore, the demand of service tax on the same is liable to be set aside.

34. In view of the above, we set aside the entire demand of Rs.4.26 crores on account of other income. SCN dt 17-10-17 for the period 2012-13 to 2014-15 has been issued under proviso of Section 73 (1) by invoking extended period of limitation. The order invokes the extended period of limitation on the ground that the Appellants had contravened the facts to evade payment of service tax willfully. Appellants never approached the department till departmental officers demanded the records in respect of business conducted by them. Therefore, intension of suppressing the transaction and thereby service provided itself is proved beyond any doubt.

35. We find that all the issues in Appeal No.ST/70362/ 2019 involved interpretation of CCR and provisions of Service tax law. It cannot be said that Appellants have deliberately suppressed any information to evade payment of service tax. All receipts on which service tax is proposed to be demanded had duly been accounted for in Appellant books of accounts.

36. In the case of Continental Foundation JT Venture reported in 2007 (216) E.L.T. 177 (SC), the Hon'ble Supreme Court held that suppression means failure to disclose full information with the intent to evade payment of duty. Relevant paras of the order are as under:-

"10. The expression "suppression" has been used in the proviso to Section 11 A of the Act accompanied by very strong words as 'fraud' or 'collusion' and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression .When the revenue invokes the extended period of limitation under Section 11 A the burden is cast upon it to prove suppression of fact . An incorrect statement cannot be equated with a willfull misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

> *"12. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned , they are clearly qualified by the words 'wilful' , preceding the words "mis-statement or suppression of facts " which means with intend to evade duty . The next set of words 'contravention of any of the provisions of this Act or Rules ' are again qualified by the immediately following words 'with intend to evade payment of duty' . Therefore , there cannot be suppression or mis- statement of fact , which is not willful and yet constitute a permissible ground for the purpose of the*

proviso to section 11 A . Mis –statement of fact must be willful.

37. In case of Collector of Central Excise vs. Chemphar Drugs liniments reported in 1989 (40) E.L.T. 276, the Hon'ble Supreme Court has held that extended period of 5 years is applicable only when something positive other than mere inaction or failure on the part of manufacturer is proved. It further holds that conscious or deliberate with holding of information by manufacturer is necessary to invoke larger limitation of 5 years. Para 8 and 9 of the decision reads as under :-

> *"8. Aggrieved thereby, the revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub –section 11 A of the Act , it has to be established that the duty of excise has not been levied or paid or short –levied or short –paid , or erroneously refunded by reasons of either fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, <u>before the period of six months . Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement</u> or suppression or contravention if any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The tribunal came to the conclusion that the facts referred to*

hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the product other than those falling under Tariff item 14 E manufactured by the respondent and this was in the knowledge, according to the tribunal, of the authorities. These findings of the tribunal have not been challenged before us or before the tribunal itself as being based on no evidence.

> *"9. In that view of the matter and in view of the requirements of Section 11 A of the Act, the claim had to be limited for a period of six months as the tribunal did. We are, therefore, of the opinion that the Tribunal was right in its conclusion. The appeal therefore fails and is accordingly dismissed".*

38. In case of M/s Shervani Industries, Syndicate Ltd. reported in 2009 (14) S.T.R. 486. (Tri–Delhi), this tribunal has held that extended period of limitation is not invocable when there is scope of difference in interpretation. Para 14 of the order reads as under:-

> *"However, we find force in the submissions of the learned Advocate that there was scope for difference in interpretation and hence for entertaining a view that there was no levy of tax*

and therefore, the demand of tax for the extended period of limitation would not be applicable. We also noted that the issue involved in this case is the interpretation of the provision of the Finance Act and the penalties are not warranted. Accordingly, the demand of tax for the normal period of limitation is upheld. Penalties are set aside. The appeal is disposed of in the above terms."

39. In view of above, we hold that demand for the period 2012-13 to 2014-15 is not sustainable on the ground of limitation also. However since Appellants have voluntary paid an amount of Rs.34,72,629/- under Rule 6(3)(A) and Rs.26,30,230/- towards interest for the period 2012-13 to 2014-15, the same will not be refundable.

40. As regards interest and penalty, we find that the issue is no more *res integra*. Once demand is not sustainable, interest and penalty under Section 78 would not be imposable. In support of above, reference is made to the following decisions :-

(a) CCE, Pune Vs. Coca –Cola India Pvt. Ltd ., 2007 (213) E.L.T. 490 (S.C);

(b) CCE & C. Vadodara –II Vs Indeos Abs Ltd. 2010 (254) E.L.T. 628 (Guj.) , affirmed by the Hon'ble Supreme court in [2011 (267) E.L.T A155 (S.C)

(c) Hindalco Industries Ltd vs. Commissioner of Central Excise, Bhubaneswar –II-2023 –TIOL – 403 - CESTAT –KOL .

(d) M/s Jai Balaji Industries Ltd. vs. Commissioner of Central Excise, Bolpur -2023 (6) TMI 1102 – CESTAT KOLKATA.

41. In the present case, partial demand has been confirmed under Rule 6 (3)(A) of CCR, 2004. In this connection, Appellant have produced copy of final order No.70200 and 70201/2021 dt 05-08-2013, in the case of their sister concern (M/s Beeaar

Autowheels India Pvt. Ltd.), wherein partial demand had been confirmed under Rule 6 (3) (A) of CCR, 2004 and Commissioner (Appeals) upheld the imposition of penalty. This Tribunal set aside the penalties after observing as under :-

> *"Having considered the rival contentions, I hold that it is a case of venial breach and there is no contumacious conduct on the part of the appellant. Penalties imposed are set aside and appeals are allowed. Appellants are entitled for consequential relief, in accordance with law."*

42. In view of the above discussions, we set aside both the impugned orders and allow the appeals with consequential relief, as per law.

(Order pronounced in open court on – **24th April, 2024**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS