CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. ST/86398/2015

(Arising out of Order-in-Original No. 48/ST-VII/RS/2014 dated 23.03.2015 passed by Commissioner of Service Tax, Mumbai-VII)

Croda India Company Pvt. Ltd. **Appellant**
Plot No.1/1 Part,
TTC Industrial Area, MIDC,
Thane-Belapur Road,
Koparkhairne,
Thane 400 709

Vs.

Commissioner of Service Tax-VII Mumbai **Respondent**
115, New Central Excise Bldg.,
M.K. Road, Churchgate,
Mumbai 400 020.

Appearance:

Shri Gagan Kumar with Shri Lokesh Jain, Advocates for the Appellant
Shri M.K. Sarangi, Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. **A/85916/2019**

Date of Hearing: 11.02.2019
Date of Decision: 17.05.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against order in original No 46/ST-VII/RS/2014 dated 23.03.2015 of Commissioner Service Tax –VII Mumbai. By the said order Commissioner has held as follows:

"4.1 I confirm the demand of Service Tax of Rs 1,32,57,559/- (Rupees One Crore Thirty Two Lakhs Fifty

Seven Thousand Five Hundred and Fifty Nine only) and order its recovery from M/s Croda Chemicals (India) Private Limited under the provisions of Section 73(2) of the Finance Act, 1994 for the reasons discussed above.

4.2 I order recovery of interest at appropriate rate from the due date till the date of payment, on the amount of demand confirmed at Para 4.1 above, from M/s Croda Chemicals (India) Private Limited under the provisions of Section 75 of the Finance Act, 1994.

4.3 I impose a penalty of Rs 1,32,57,559/- (Rupees One Crore Thirty Two Lakhs Fifty Seven Thousand Five Hundred and Fifty Nine only) on M/s Croda Chemicals (India) Private Limited under the provisions of Section 78 of the Finance Act, 1994.

4.4 I impose a penalty of Rs 10,000/- (Rupees Ten Thousand only) under Section 77 of the Finance Act, 1994 on M/s Croda Chemicals (India) Private Limited."

2.1 Appellant are registered with the department for providing various taxable services viz Technical Inspection and Certification Agency Services, Maintenance and Repair Services, Business Auxiliary Services, Transport of Goods by Road Transport Agency Service, Business Support Service and Information Technology Software Services.

2.2 During the course of CERA audit it was noticed that Appellants had during the period 2008-09 to 2012-13 received from their associated enterprises (M/s Croda International) located abroad a sum of Rs 12,02,62,275/- for sale of their goods (falling under chapter 29, 34 & 38) in India as detailed in the table below:

S No	Particulars	Amount (Rs)
1	Commission from Overseas Group Companies	9,40,89,745
2	Expenses Reimbursed by Overseas	80,51,169

	Group Companies	
3	Foreign Exchange remittance made	1,81,21,361
	Total	12,02,62,275

2.3 On this amount received they did not paid the Service Tax amounting to Rs 1,32,57,59/-.

2.4 A show cause notice was thus issued to the appellants asking them to show cause as to why this amount of Rs 1,32,57,559/- should not be demanded from them in terms proviso to Section 73(1) of Finance Act, 1994 along with interest under Section 75. Penalties under Section 76, 77 & 78 ibid were also proposed.

2.5 After considering the submissions made by the appellants Commissioner adjudicated the matter as per his order referred in para 1, supra. Aggrieved by the order of Commissioner, Appellants filed this appeal.

3.1 We have heard Shri Gagan Kumar, Advocate for the Appellants and Shri M K Sarangi, Additional Commissioner, Authorized representative for the revenue.

3.2 Arguing for the Appellants learned counsel submitted-

i. They are not liable to pay service tax amounting to Rs 1,04,96,144/- on the indent commission received by them for the sale of goods in domestic market. These services have been provided by them to their group companies abroad and are to be treated as export of services for the reason as follows:

   a. Period 01.04.2008 to 27.02.2010

      Rule 3(1)(iii)/ Definition 3(2)(a)(b) Export of Service Rules, 2005 during this period for the Business Auxiliary Service to qualify as export of service, the service should have been provided to a person outside India and should have been used outside India. Also the payments should have been received in

convertible foreign exchange. Since the services provided by them are admittedly Business Auxiliary Services against which the payments have been received in convertible foreign exchange, these services will qualify as export of services as has been held in following cases;

GAP International [2015 (37) STR 757 (T-Del)]

Microsoft Corporation (I) (P) Ltd [2014 (36) STR 766 (T-Del)]

Paul Merchants Ltd [2013 (29) STR 257 (T-Del)]

Samsung India Electronics P Ltd [2016 (42) STR 831 (T-Del)]

IBM India (P) Ltd [2016 (55) GST 161 (T-Bang)]

ABS India Ltd [2009 (13) STR 65 (T-Bang)]

Blue Star Ltd [2008 (11) STR 23 (T-Bang)]

SGS India (P) Ltd [2014 (34) STR 354 (Bom)]

Simpra Agencies [2014 (36) STR 430 (T-Del)]

b. Period 28.02.2010 to 30.06.2012:

The clause (a) of Rule 3(2) of Export of Services Rule, 2005 which prescribed condition for use of outside India was deleted. Thus the only condition that was required to be satisfied was that the services specified should have been provided to person located outside India and the payment for the same should have been received in convertible foreign exchange. Since in the present case the service recipient was located outside India and the payments were received in convertible foreign exchange, the services provided were squarely covered by the said provisions as export of service.

c. Period 01.07.2012 to 31.03.2013:

During this period the service tax has been demanded from them treating them as providing intermediary services and thus according to rule 9 of Place of Provision of Services Rules, the place of provision of services is the location of service provider. This approach cannot be sustained because prior to amendments made in the definition of intermediary by Notification No 14/20014-ST dated 11.07.2014 (w.e.f 1.10.2014), the definition did not included intermediary in relation to sale of goods. This exclusion of intermediary in relation to sale of goods is further evident from Education Guide, Para 5.9.6. Thus Rule 9 will not be applicable and the as per Rule 3 the place of provision will be the location of service recipient. The service provided thus will continue to be export of services in terms of Rule 6A of Service Tax Rule, 1994.

ii. They have recovered expenses under various heads from their overseas associate group companies on actual basis. Since these reimbursement is in relation to the services that are considered as export of services, these charges will form the part of full value of service rendered and exported. Hence not leviable to service tax. Further in case of Intercontinental Consultants & Technocrats (P) Ltd [2018 (66) GST 450 (SC)], Hon'ble Apex Court has held Rule 5(1) of The Service Tax 9determination of Value) Rules, 2006 is ultra vires and hence these reimbursements made cannot be subjected to service tax. Supreme Court has further held that amendments made to Section 67 by Finance Act, 2015, by adding explanation top the effect that

"consideration includes reimbursement" is effective prospectively from 14.05.2015. Since entire period of demand is prior to that date, the demand made in respect of these reimbursements cannot be sustained.

iii. Appellants are not liable to discharge service tax on the reimbursement of expenses made to overseas associate group companies as these services were rendered to them completely outside India and hence are non taxable in terms of Section 66A of the Finance Act, 1994. Since these amounts are nothing but reimbursements then even in case of reverse charge the taxable value is to be determined under Section 67 of Finance Act, 1994 and as per decision of Apex Court in case of Intercontinental Consultants, these charges which are in nature of reimbursements cannot be part of the taxable value. Further whatsoever charges Service Tax is paid by the appellants under the reverse charge mechanism is also available to them as CENVAT Credit and hence the situation is totally revenue neutral.

iv. Extended period of limitation is not invokable in the present case in view of the decisions in following cases:

   a. Continental Foundation Joint Venture [2007 (216) ELT 177 (SC)]
   b. Kingfisher Airlines Ltd. [2015 (40) STR 1159 (T-Mum)]
   c. Reliance Industries Ltd. [2016 (57) GST 84 (T-Mum)]

v. Since they are not liable to pay service tax no penalty could have been imposed on them in view of following decisions:

   a. Sarup Tanneries Limited [2005 (184) ELT 217 (T)]
   b. Explicit Trading [2004 (169) ELT 205 (T)]

c. Gamma Consultancy (P) Ltd [2006 (4) STR 591 (T)]

vi. Interest is also not payable as there is no service tax payable beyond the due date.

3.3 Arguing for the revenue learned Authorized Representative while reiterating the findings in impugned order submitted that-

i. In respect of the demand which appellants claim to have been made in respect of the services exported by them i.e. commission towards sale of good in India from associated overseas companies the fact which is most relevant is whether these services have been utilized outside India. In case it is held that these services were utilized provided and utilized outside India then they can be treated as export of services. However adjudicating authority has relying on the Circular dated 13.10.2011 concluded that these services have been not been used outside India and hence cannot be treated as export of services. The decisions of the Tribunal in case of GAP International referred to by the Appellants is clearly distinguishable.

ii. The pleadings of the Appellant are self contradictory is as much as they are relying on CBEC guidelines (w.e.f 01.07.2012) to say that they are not providing intermediary service of Commission Agent, while on the other hand they are disputing the applicability of Circular dated 13.05.2011.

iii. The decision in case of Star India Pvt Ltd [2015 (8) STR 884 (T-Mum)] squarely covers the issue in favour of revenue.

iv. The other decisions relied upon by the appellants in case of Crompton Greaves Ltd 2015-TIOL-2724-CECT-Mum, Roha Dyechem Ltd 2017-TIOL-3448-CEST-Mum, SGS India [2014 (34) STR 354 (Bom)] &

Tech Mahindra [2014 (36) STR 241 (Bom)] are also distinguishable.

v. On the issue of revenue neutrality, it should be noted that in terms of CENVAT Credit scheme all the tax payments made under the Act are made Cenvatable to avoid the cascading effect. The general preposition that only because they are eligible to CENVAT Credit they are not required to pay tax is against the basic framework of law.

vi. Extended period of Limitation is rightly invokable in the present case in view of the decisions in case of Reliant Advertising [2013 (31) STR 166 (T)], Vodafone Digilink [2011 (24) STR 562 (T-Del)] and Bharat Sanchar Nigam Ltd [2011-TIOL-552-CEST-Mum]

4.1 We have considered the impugned order, submissions made in the appeal and during the course of arguments.

4.2 Demand of Service tax in the present case has been made on three counts, i.e.

i. The charges received by the appellants from their associated group of companies abroad for sale of their goods in India as Commission are leviable to service tax. (Service Tax demand Rs 1,04,96,144/-)

ii. The charges received by the appellant for recovery of expenses from associate group companies (Service Tax Demand Rs 8,67,926/-)

iii. The foreign exchange remittances made by the appellant for recovery of expenses to the associate group companies (Service Tax Demand Rs 18,93,490/-)

4.3 The issues for our consideration in the present case are framed as under:-

I. Whether the charges recovered by the Appellants as Commission for sale of goods of associated group of

companies abroad are leviable to service Tax under category of Business Auxiliary Service provided in India or the same are in respect of Export of Services as defined from time to time and thus exempt from payment of Service Tax.

II. Whether Service Tax is leviable in respect of reimbursements made by the associated group companies to the appellants towards expenses actually incurred by them.

III. Whether in respect of Foreign Exchange remittances made by the appellants to their associated group companies abroad for reimbursement of various expenses incurred by them could be levied to service tax on reverse charge basis treating the services provided as import of services.

IV. Whether the demand is hit by limitation as extended period of limitation as per Section 73 of The Finance Act, 1994 is not invokable in the present case.

V. Whether demand for interest under Section 75 and penalties imposed under Section 77 and Section of Finance Act, 1994 can be sustained.

4.4 Whether the charges recovered by the Appellants as Commission for sale of goods of associated group of companies abroad are leviable to service Tax under category of Business Auxiliary Service provided in India or the same are in respect of Export of Services as defined from time to time and thus exempt from payment of Service Tax.

4.4.1 Admittedly the services provided by the appellant in respect of the sale of goods for the associated group of companies abroad in India are classifiable under the taxable category of Business Auxiliary Services as defined by the Section 65(105)(zzb) of the Finance Act, 1994. While the contention of revenue is that commission received by the appellants towards provision of these

services is taxable in India, appellant claim exemption treating these services as export of services during the relevant periods. Thus we are concerned with the question whether these services are services provided in India or are export of services.

4.4.2 In the present case we are concerned with the period from 2008-09 to 2012-13. During the period under consideration, whether services provided are export of services or not needs to determined in terms of Export of Services Rules, 2005 as amended from time to time for period upto 30.06.2012 and for period thereafter in terms of Place of Provision of Services Rules, 2012. The relevant provisions of the Rule as they existed from time to time during the period of dispute are reproduced below:

Export of Service Rules, 2005

(1) Export of taxable services shall, in relation to taxable services.–

(i) …….;

(ii) …….:

Provided …….;.

(iii) specified in clause (105) of section 65 of the Act, but excluding.–

a. sub-clauses (zzzo) and (zzzv);

b. those specified in clause (i) of this rule except when the provision of taxable services specified in sub-clauses (d),(zzzc),(zzzr) and (zzzzm) does not relate to immovable property; and

c. those specified in clause (ii) of this rule, when provided in relation to business or commerce, be provision of such services to a recipient located outside India and when provided otherwise, be provision of such services to a recipient located outside India at the time of provision of such service:

Provided that where such recipient has commercial establishment or any office relating thereto, in India, such taxable services provided shall be treated as export of service only when order for provision of such service is made from any of his commercial establishment or office located outside India.

Provided further that where the taxable service referred to in sub-clause (zzzzj) of clause (105) of section 65 of the Act …..

(2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-

a. *such service is provided from India and used outside India; and*
b. *payment for such service provided outside India is received by the service provider in convertible foreign exchange.*

Explanation.- ……..

(In sub-rule (2), clause (a) - omitted & Explanation at clause (b) - substituted vide NTF. NO. 06/2010-ST, DT. 27/02/2010)

Place of Provision of Services Rules, 2012.

2. Definitions

(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account.;

3. Place of provision generally -

The place of provision of a service shall be the location of the recipient of service:

Provided that in case the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.

9. Place of provision of specified services.-

The place of provision of following services shall be the location of the service provider:-

(a) ……;

(b) …….;

(c) Intermediary services;

(d) ……..

4.4.3 Admittedly in the present case, the commission received by the appellant is in respect of the sale of goods of associated group companies in India. It is not the case wherein the commission was paid in respect of the goods sold by the associated group companies elsewhere. It is the submission of the appellants that the services provided by them to their associated group companies for which they have received this commission is a performance based service. In para 3.2 of his order Commissioner has recorded as follows:

"3.2 The Noticee have admitted that they are providing services of commission agent to their associated group companies which are located outside India. They have also admitted that the associated group companies do not have any business operations in India. They only have customers located in India. Therefore the marketing and promotion services provided by the Noticee are used by the sales of the product to the customers in India. Admittedly, Noticee have earned commission of Rs 9,40,66,745/- from its associate group companies, located abroad for selling of goods manufactured by them, in Indian market during the period 2008-09 to 2012-13. The services of commission agent were used in India."

4.4.4 CBEC has vide

i. Circular No 111/05/2009 dated 24.02.2009 clarified as follows:

"2. The matter has been examined. Sub-rule (1) of rule 3 of the Export of Services Rule, 2005 categorizes the services into three categories:

(i) Category (I) [Rule 3(1)(i)] : For services (such as Architect service, General Insurance service, Construction service, Site Preparation service) that have some nexus with immovable property, it is provided that the provision of such service would be 'export' if they are provided in relation to an immovable property situated outside India.

(ii) Category (II) [Rule 3(1)(ii)] : For services (such as Rent-a-Cab operator, Market Research Agency service, Survey and Exploration of Minerals service, Convention service, Security Agency service, Storage and Warehousing service) where the place of performance of service can be established, it is provided that provision of such services would be 'export' if they are performed (or even partly performed) outside India.

(iii) Category (III) [Rule 3(1)(iii)] : For the remaining services (that would not fall under category I or II), which would generally include knowledge or technique based services, which are not linked to an identifiable immovable property or whose location of performance cannot be readily identifiable (such as, Banking and Other Financial services, Business Auxiliary services and Telecom services), it has been specified that they would be 'export',-

(a) If they are provided in relation to business or commerce to a recipient located outside India; and

(b) If they are provided in relation to activities other than business or commerce to a recipient located outside India at the time when such services are provided.

3. It is an accepted legal principle that the law has to be read harmoniously so as to avoid contradictions within a legislation. Keeping this principle in view, the meaning of the term 'used outside India' has to be understood in the context of the characteristics of a particular category of service as mentioned in sub-rule (1) of rule 3. For example, under Architect service (a Category I service [Rule 3(1)(i)]), even if an Indian architect prepares a design sitting in India for a property located in U.K. and hands it over to the owner of such property having his business and residence in India, it would have to be presumed that service has been used outside India. Similarly, if an Indian event manager (a Category II service [Rule 3(1)(ii)]) arranges a seminar for an Indian company in U.K. the service has to be treated to have been used outside India because the place of performance is U.K. even though the benefit of such a seminar may flow back to the employees serving the company in India. For the services that fall under Category III [Rule 3(1)(iii)], the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus, for Category III services [Rule 3(1)(iii)], it is possible that export of service may take place even when all the relevant activities take place in India so long as the ***benefits of these services accrue outside India****. In all the illustrations mentioned in the opening paragraph, what is accruing outside India is the benefit in terms of promotion of business of a foreign company. Similar would be the treatment for other Category III [Rule 3(1)(iii)] services as well."*

ii. **Circular No 141/10/2011 dated 13.05.2011 clarified as follows:**

Circular No.111/05/2009-ST was issued on 24th February 2009 on the applicability of the provisions of the Export of Services Rules, 2005 in certain situations. It had clarified on the expression "used outside India" in Rule 3(2)(a) of the Export of Service Rules 2005 as prevalent at that time. The condition specified in Rule 3(2)(a) has since been omitted vide Notification 06/2010-ST dated 27 Feb 2010. In the context of the stated Circular an issue has been raised, whether for the period prior to 28.2.2010 the requirement that the service should be "used outside India" invariably means the location of the recipient?

2. In the stated Circular it was inter-alia, clarified that the words, "used outside India" should be interpreted to mean that "the benefit of the service should accrue outside India". It is well known that services, being largely intangibles, are capable of being paid from one place and actually used at another place. Such arrangements commonly exist where the services are procured centrally eg audit, advertisement, consultancy, Business Auxiliary Services. For example, it is possible to obtain a consultancy report from a service provider in India, which may be used either at the location of the customer or in any other place outside India or even in India. In a situation where the consultancy, though paid by a client located outside India, is actually used in respect of a project or an activity in India the service cannot be said to be used outside India.

3. It may be noted that the words "accrual of benefit" are not restricted to mere impact on the bottom-line of the person who pays for the service. If that were the intention it would render the requirement of services being used outside India during the period prior to 28.2.2010 infructuous. These words should be given a harmonious interpretation keeping in view that during the period upto 27.2.2010 the explicit condition was provided in the rule

that the service should be used outside India. In other words these words may be interpreted in the context where the effective use and enjoyment of the service has been obtained. The effective use and enjoyment of the service will of course depend on the nature of the service. For example effective use of advertising services shall be the place where the advertising material is disseminated to the audience though actually the benefit may finally accrue to the buyer who is located at another place.

4. This, however should not apply to services which are merely performed from India and where the accrual of benefit and their use outside India are not in conflict with each other. The relation between the parties may also be relevant in certain circumstances, for example in case of passive holding/ subsidiary companies or associated enterprises. In order to establish that the services have not been used outside India the facts available should inter-alia, clearly indicate that only the payment has been received from abroad and the service has been used in India. It has already been clarified that in case of call centers and similar businesses which serve the customers located outside India for their clients who are also located outside India, the service is used outside India.

5. Besides above, to attain the status of export, a number of conditions need to be satisfied which are specified in Rule 3(1) and Rule 3(2) of Export of Services Rules 2005. The Circular No.111/05/2009-ST explained the expression "used outside India" only and the other conjunct conditions, as applicable from time to time, also need to be independently satisfied for availing the benefit of an export."

4.4.5 Thus there is no dispute about the facts that the services provided by the appellant to their associated group companies abroad are in relation to marketing and promotion of the sale of the goods of those associated

companies in India. Though the receiver of the service is located outside India he uses these services for promoting the sale of goods in India. In our view the services rendered in relation to marketing and sales promotion of goods in India have been used by the associated group companies in India. It is only as result of such usage of services in India that the sales of the these associated group company goes up in India.

4.4.6 In terms of Export of Service Rules, 2005 as they existed prior to their amendment by Notification NO. 06/2010-ST, dated 27/02/2010, Rule 3(2)(a), specifically prescribed the condition of “use outside India” as determining factor to treat the services as export of services. The phrase used in the said rule is “used outside India” and not “beneficiary of service outside India”. In the present case though the beneficiary of service is located outside India, but the use of service is in India for sales promotion of the goods of the beneficiary. The sales promotion of the goods needs to be looked qua the market in which the goods are sold or intended to be sold and not qua the location of manufacturer/ beneficiary of service. The same is the crux of the two circulars issued by CBEC.

4.4.7 Appellants have relied on series of decisions in support of their contention that these services have been issued by the recipient of services located abroad/ outside, hence should be treated as export of service. These decisions are considered in table below:

GAP International [2015 (37) STR 757 (T-Del)]	The facts of the case are completely distinguishable. The services in case of GAP International were in relation to the procurement of goods and not for the sale of goods in Indian market. The goods by the foreign entity by availing the services of service provider were to be consumed by the foreign entity in foreign land. Since these services were in relation to the

	procurement of goods and not in relation to marketing and sales promotion of the goods in India the case is clearly distinguishable.
Microsoft Corporation (I) (P) Ltd [2014 (36) STR 766 (T-Del)]	As per the para 3.2 of the order the consideration for the services provided is linked to the expenses incurred and is not linked to the invoice value as in the present case. Para 3.2 of the decision is reproduced below: ***"3.2*** *Consideration payable to appellant for providing aforesaid services was prescribed by clauses 6.1, 6.2, 6.3 and 6.4 of the agreement which reads as under :* *"6.1 Product Support Services and Consulting Services. For product support services and consulting services rendered pursuant to Article 2, MO shall pay Subsidiary an amount equal to one hundred and ten percent (110%) of Subsidiary's actual expenses, less revenues, incurred in connection with its duties, provided such expenses comply with Subsidiary's budget, as adjusted from time to time, and provided, further, such expenses are not already covered by another Section of this Agreement or covered in another agreement between Subsidiary and MO or any MO affiliate. The reimbursement and additional compensation shall be exclusive of any applicable consumption tax such as a Value Added Tax or a Goods and Services Tax, which consumption tax shall be the responsibility of MO.* *6.2 Marketing of Microsoft Products. For assistance in the marketing of Microsoft Products under Article 3, MO shall pay Subsidiary one hundred and fifteen percent (115%) of Subsidiary's actual expenses, less*

	revenues, incurred in connection with its duties as defined in Article 3, provided such expenses comply with Subsidiary's budget, as adjusted from time to time, and provided, further, such expenses are not already covered by another Section of this Agreement or covered in another agreement between Subsidiary and MSFT or any MSFT affiliate. Taxes, insurance, duties, freight and other charges not attributable to the Microsoft Product itself paid by the customer shall not be considered in calculating the amount of commission. The commission payments shall be exclusive of any applicable consumption tax such as a Goods and Services Tax or a Value Added Tax which consumption tax shall be the responsibility of MO. *6.3 RGE Services. For RGE Services rendered pursuant to Article 4, MO shall pay subsidiary an amount equal to one hundred and ten percent (110%) of Subsidiary's actual expenses, less revenues, incurred in connection with its duties, provided such expenses comply with Subsidiary's budget, as adjusted from time to time, and provided, further, such expenses are not already covered by another Section of this Agreement or covered in another agreement between Subsidiary and MO or any other MSFT affiliate. The reimbursement and additional compensation shall be exclusive of any applicable consumption tax such as a Value Added Tax or a Goods and Services Tax, which consumption tax shall be the responsibility of MO.* *6.4 Other Inter-company Services. For other services and/or sales provided pursuant to Article 5, MO or Subsidiary shall*

	invoice the recipient of the sales and/or services for such sales and/or services at a price as may be agreed between the parties from time to time, provided, however, that any amount so invoiced shall be consistent with the arm's length standard (as defined in the OECD transfer pricing guidelines and relevant national legislation). The invoice shall contain a general description of the sales or services and the cost of the sales and/or services to be paid."" From the reading of the said paras in the contract, the bench had observed in para 51 stating "*Even otherwise also, I find that the disputed service is the service being provided by the appellant to his principal located in Singapore. The marketing operations done by the appellant in India cannot be said to be at the behest of any Indian customer. The service being provided may or may not result in any sales of the product in Indian soil."* From the facts as stated above it is quite evident that services provided by Microsoft India, were generalized service for sales promotion of the products of Microsoft Singapore in the territory assigned to them, whereas in the present case the commission is linked not to expenditure but the actual invoice value of sale. Thus this decision to is distinguishable.
Paul Merchants Ltd [2013 (29) STR 257 (T-Del)]	As per para 4, the demand was made on the reimbursement made by foreign entity towards the expense incurred by the Paul Merchants towards advertisement and other promotional activities undertaken for promoting the business of foreign entity. Hence this case too is distinguishable as

	the tax demand is in respect of the expenses reimbursed by the foreign entity and not in relation to actual sale of goods.
Samsung India Electronics P Ltd [2016 (42) STR 831 (T-Del)]	This decision has been passed heavily relying on the decision in case of Blue Star Ltd, which is clearly distinguishable. Hence we find this decision also distinguishable.
IBM India (P) Ltd [2018 (17) GSTL 268 (T-Bang)]	The period of dispute in the present case was 16-8-2002 to 30-11-2005, hence the matter should have been considered as per the law existing at that time but relying upon various decisions, rendered in terms of Export of Services Rules, 2005 the Bench passed the decision. Since the matter needed to be considered and decided as per the law existing at the material time we do not find that this decision would be applicable in the present case.
ABS India Ltd [2009 (13) STR 65 (T-Bang)]	Since the judgment is in respect of the un-amended Export of Service Rules, 2005 it has not considered the scope of phrase "used in India" and hence is distinguishable.
Blue Star Ltd [2008 (11) STR 23 (T-Bang)]	Since the judgment is in respect of the un-amended Export of Service Rules, 2005 it has not considered the scope of phrase "used in India" and hence is distinguishable.
SGS India (P) Ltd [2014 (34) STR 554 (Bom)]	In para 24, Hon'ble Bombay High Court summarizes the fact stating "***24.*** *In the present case, the Tribunal has found that the assessee like the respondent rendered services, but they were consumed abroad. The clients of the respondents used the services of the respondent in inspection/test analysis of the goods which the clients located abroad intended to import from*

	India. In other words, the clients abroad were desirous of confirming the fact as to whether the goods imported complied with requisite specifications and standards. Thus, client of the respondent located abroad engaged the services of the respondent for inspection and testing the goods. The goods were tested by the respondents in India. The goods were available or their samples were drawn for such testing and analysis in India. However, the report of such tests and analysis was sent abroad. The clients of the respondent were foreign clients, paid the respondent for such services rendered, in foreign convertible currency. It is in that sense that the Tribunal holds that the benefit of the services accrued to the foreign clients outside India." Since in this decision the service under consideration was in relation to goods under consideration for import by a foreign entity, the same is distinguishable.
Simpra Agencies [2014 (36) STR 430 (T-Del)]	The issue under consideration in the case was with respect to classification of services. After holding that services are classifiable as "Business Auxiliary Services". Tribunal followed its decision in case of GAP International and Paul Merchant since there is no discussion in respect of export of service vis a vis the facts of that case we do not find thus case applicable to the present set of facts.

4.4.8 In case of Tech Mahindra [2014 (36) STR 241 (Bom)], Hon'ble Bombay High Court has analyzed the provisions of Export of Service Rules, 2005 and has held as follows:

"57. *The other submission of Mr. Sridharan pertains to the Export of Services Rules, 2005. The argument*

proceeds on the footing that it is difficult to determine the situs or locale of the service. Rule 3(1)(i), (ii) and (iii) of the Export of Services Rules, 2005 have been enacted so as to overcome the difficulty of determining the situs or locale of service.

58. *In that context, a closer look at these Rules would be necessary. The Export of Services Rules, 2005 were notified by Notification No. 9/2005 S.T., dated 3-3-2005. Rule 3 defines what is export of taxable service. The definition was substituted with effect from 19-4-2006. The export of taxable service in relation to taxable services which have been referred to in clause (i) of sub-rule (1) of Rule 3 is in relation to an immovable property situated outside India.*

59. *Then comes Rule 3(1)(ii) and which relates to taxable service specified in sub-clauses of clause (105) of Section 65 of the Finance Act, 1994. However, the services referred therein are those which are performed outside India. The first proviso below this was stating that if such taxable service is partly performed outside India it shall be considered to be performed outside India. Then, there is a further proviso of this sub-rule wherein it was stated that any taxable service provided shall be treated as export of service only if such service is delivered outside India and used in the business or any other purposes outside India and payment for such service provided is received by the service provider in convertible foreign exchange. [see Rule 3(2)].*

60. *Rule 3(1)(iii) refers to all such taxable services specified in clause (105) of Section 65 of the Finance Act, 1994, but excluding those in sub-clauses (zzzo) and (zzzv) and those specified in clause (i) of this Rule except when the provision of taxable services specified in sub-clauses (d), (zzzc), (zzzr) and (zzzzm) does not relate to immovable property. Thus, the classification appears to be*

of taxable service in relation to immovable property which is situated outside India and if it satisfies the conditions in the proviso below sub-rule (1) of Rule 3, then, there is stipulation in relation to taxable services referred to in several sub-clauses of clause (105) of Section 65 of the Finance Act, 1994 and specified in Rule 3(1)(ii). That is in relation to taxable services, specified in these sub-clauses of clause (105) of Section 65 of the Finance Act, 1994 which sub-clauses have been specified in Rule 3(1)(ii), as are performed outside India. However, in relation to that also if such taxable service is performed partly outside India it shall be considered to have been performed outside India. The further proviso below sub-rule (2) as it then stood stated that for the purpose of sub-rule (2) of Rule 3 of the Export of Services Rules, 2005 any taxable service provided shall be treated as export of service only if such service is delivered outside India and used in the business or any other purpose outside India and payment for such service provided is received by the service provider in convertible foreign exchange. Rule 3(1)(iii) takes within its fold the services other than those part of Rule 3(1)(i) and (ii) and stipulates that such taxable services which are provided and used in and in relation to commerce or industry and the recipient of such services is located outside India provided that such recipient has commercial or industrial establishment or any office relating thereto in India, then, such taxable services shall be treated as export of service only if the order for provision of such service is made from any of its commercial or industrial establishment or any office located outside India. The service so ordered is delivered outside India and used in the business outside India and payment of such service provided is received by the service provider in convertible foreign exchange. Then, there is broad category referring to such taxable services which are provided and used other than in or in relation to

commerce or industry, if the recipient of taxable services is located outside India at the time when such services are received.

61. *There is substitution as we have said above and what we find is that below Rule 3(1) and it's clauses, Rule 3(2) has been substituted with effect from 1-3-2007 by Notification No. 2/2007ST, dated 1-3-2007. Rule 3(2)(a) has been omitted with effect from 27-2-2010. The words "such service is provided from India and used outside India; and" were omitted with effect from 27-2-2010 by Notification No. 6/2010ST, dated 27-2-2010. Thereafter, the only condition remained to be satisfied and for the purpose of being qualified or termed as export of taxable service is that any taxable service specified in sub-rule (1) of Rule 3 shall be treated as such when the payment for such service is received by the service provider in convertible foreign exchange. We are concerned with the situation prior to this omission. We are of the view that if Mr. Sridharan's submissions have to be accepted, then, we must ignore this omission."*

4.4.9 In light of discussions and the Bombay High Court decision in case of Tech Mahindra as above we are of the view that services provided by the appellants were provided for the sale of goods of the associated group companies in India and were thus used in India. According for the period prior to 27.02.2010 the benefit of export of services as claimed by the appellant in respect of commission received by them for sale of goods in India from associated group companies cannot be extended to them.

4.4.10 From 27.02.2010, the condition of *"use outside India"* has been removed by way of omission of clause "a" of sub-rule (2) of Rule 3 of Export Of Service Rules, 2005. When the said condition has been omitted the only conditions to be satisfied for considering the service to

qualify as export of service are in respect of the location of *"service recipient"* and *"the receipt of consideration in convertible foreign exchange".* Admittedly in the present case the service recipient is located outside India and the payments toward considerations for providing the service are received in convertible foreign exchange. In our view the benefit of export of services cannot be denied to the Appellant from 27.02.2010 onwards till 30.06.2012.

4.4.11 From 01.07.2012 onwards the Place of Provision of Service Rules, 2012 were introduced. Rule 2 (f) of the said Rules define "intermediary". Commissioner has in his order held that appellant was providing the "intermediary services" in relation to sale of goods by the associated group companies and hence by application of the rule 9 ibid, the place of provision of service is the location of service provider. In para 3.3 to 3.5, Commissioner has held as follows:

"3.3 This is a case where the intermediary services are provided by a person located in India relating to sale of goods in India, for which the consideration has been received as commission by the service provider in India. Intermediary services provided by the noticee is appropriately classifiable as "Business Auxiliary Services" under Section 65(105)(zzb) of Finance Act, 1994. Noticee also applied for and has taken service tax registration for provision of Business Auxiliary Service.

3.4 To determine whether transaction amounts to export of service or not depends upon the place of provision under consideration or place of consumption of service under consideration.

3.5 Section 94 of Finance Act, 1994 gives power to the Central Government to make Rules for carrying out the provisions of the Acts, including the power to make Rules to determine the place of provision of taxable service. Notification No 28/2012-ST dated 20.06.2012 has been

issued in exercise of the powers conferred under clause (hhh) of Sub Section (2) of Section 94 of the Finance Act, 1994. Rule 9 of the said Rules states that place of provision of the intermediary service shall be location of service provider. The services provided by the Noticee admittedly an intermediary service, the place of provision of the service provided by the Noticee and consequently the place of consumption is the location of the Noticee i.e. India. Hence the question of treating said service as export of service w.e.f 20.06.2012 does not arise."

4.4.12 We cannot agree with the conclusion of the Commissioner, holding the services provided by the Noticee as "intermediary service". From the Rule 2(f) of Place of Provision of Service Rules, 2012, it is quite evident that service provided in relation to sale of goods by a commission agent cannot be classified as intermediary service. We are further supported in our view because para 5.9.6 of The Education Guide issued by the CBEC clearly states:-

"5.9.6 What are "Intermediary Services"?

Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time:

i) The supply between the principal and the third party; and

ii) The supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition."

Thus while it is true that intermediary includes intermediary in respect of sale of goods, but legislature has while framing these rules deemed it fit to exclude the intermediaries in respect of sale of goods from the definition of intermediary. Hence we cannot sustain the view expressed by the Commissioner, contrary to the express definition of intermediary provided by the Place of Provision of Service Rules, 2012. Hence in our view the services provided by the appellant in respect of the sale of goods of associated group companies cannot be said to be services provided by intermediary as defined by said Rules ibid. Since Rule 9 is applicable to specified services and the services provided in this case being not the intermediary services, this Rule will not be applicable for determination of place of provision of service.

4.4.13 We are in agreement with the appellants that by application of Rule 3, the place of provision in this case will be the location of Service Recipient. Rule 6A of the Service Tax Rules, 1994 introduced with effect from 01.07.2012, by Notification No 36/2012-ST dated 20.06.212 reads as follows:

*"**6A. Export of services.-***

(1) The provision of any service provided or agreed to be provided shall be treated as export of service when,-

- *(a) the provider of service is located in the taxable territory,*
- *(b) the recipient of service is located outside India,*
- *(c) the service is not a service specified in the section 66D of the Act,*
- *(d) the place of provision of the service is outside India,*
- *(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and*
- ***(f)** the provider of service and recipient of service are not merely establishments of a distinct person in*

accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act"

Since tin respect of the services provided by the appellant for sale of goods of the associated group companies satisfy the all the conditions as laid down by the said Rule 6A to treat it as export of service are satisfied we are bound to hold that the commission received towards sale of goods of associated group companies abroad are in relation to export of services.

4.4.14 **Summarizing our findings as per discussions above we hold that benefit of export of services in respect of commission received towards sale of goods of the associated group companies in India post 27.02.2010 shall be admissible to the appellants.**

4.5 Whether Service Tax is leviable in respect of reimbursements made by the associated group companies to the appellants towards expenses actually incurred by them.

4.6.1 Admittedly appellants have received certain amounts as reimbursements from their associated group abroad on actual basis for various activities undertaken by them and as detailed in table below:

Nature of reimbursement	**Amount 'Rs**
Travel Expenses of the employees of overseas associate companies	9,61,505
Trade exhibition, ICMBA Conference,	9,95,690
Training expenses of the employee of overseas company	3,00,067
AMC Charges paid to M/s Ramco Systems Ltd on behalf of M/s PT Croda Indonesia	7,89,374
Salary cost of their seconded employees from respective overseas group companies to which they were seconded on quarterly basis	38,17,754

Detention and Demurrage Cost	1,48,173
Management Consultancy and Testing Services	6,01,833
Repacking Charges on purchase of goods, procurement of designed cartons, price variation on goods purchased.	4,36,770
Total	80,51,166

4.5.2 Appellants have claimed that these reimbursements were made by their associated group companies on actual basis in respect of various expenses incurred by them under various heads. These expenses have been sought to be added in the value of taxable services in view of Rule 5 of the Service Tax (Determination of Value) Rules, 2006.

4.5.3 In case of Intercontinental Consultants & Technocrats (P) Ltd [2018 (66) GST 450 (SC)], Hon'ble Apex Court while holding the said Rule 5 ultra vires the statue held as follows:

"21.*Undoubtedly, Rule 5 of the Rules, 2006 brings within its sweep the expenses which are incurred while rendering the service and are reimbursed, that is, for which the service receiver has made the payments to the assessees. As per these Rules, these reimbursable expenses also form part of 'gross amount charged'. Therefore, the core issue is as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5. As noted above, prior to April 19, 2006, i.e., in the absence of any such Rule, the valuation was to be done as per the provisions of Section 67 of the Act.*

22.*Section 66 of the Act is the charging Section which reads as under:*

"there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clauses of Section 65 and collected in such manner as may be prescribed."

23.*Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the 'value of taxable services'. Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.*

24.*In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasized that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.*

25.*This position did not change even in the amended Section 67 which was inserted on May 1, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is*

expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider.

26.*It is trite that rules cannot go beyond the statute. In Babaji Kondaji Garad, this rule was enunciated in the following manner :*

"Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the byelaw, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."

27.*The aforesaid principle is reiterated in Chenniappa Mudaliar holding that a rule which comes in conflict with the main enactment has to give way to the provisions of the Act.*

28.*It is also well established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held in Taj Mahal Hotel :*

"the Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect."

29.*In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and*

charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature. …….”

4.5.4 In view of the decision of Apex Court holding that Rule 5 is ultra vires the Section 67 of The Finance Act, 1994 during the material period and noting that Commissioner has not given any other reason for including these charges in value of taxable service, we hold that these charges cannot be added to the value of taxable services provided by the appellants. However we make it clear that since these charges cannot be added to value of taxable services provided, appellants could not have claimed any CENVAT Credit in respect of the input services received for providing these reimbursable services to their associate group companies. Subject to verification of the fact of non availment of CENVAT Credit in respect of these input services we agree with the contentions of the appellants in this respect.

4.6 Whether in respect of Foreign Exchange remittances made by the appellants to their associated group companies abroad for reimbursement of various expenses incurred by them could be levied to service tax on reverse charge basis treating the services provided as import of services.

4.6.1 Appellants had made certain payments towards various services received by them from their overseas associate group companies or others. Appellants have

claimed that these payments are also in nature of reimbursements for specific activity and not in nature of payment towards the service received from abroad. Since these are reimbursements, they too cannot be added in the value of taxable service, even if the demand of Service Tax in this case is on reverse charge basis. In their view decision of Apex Court in case of Intercontinental Consultant will apply to these charges.

4.6.2 We find that the payments made in the Foreign Currency are for provision of various services to the appellant or its employees by the overseas group associate companies. These charges are not reimbursement but payments towards the specific service provided by the overseas group associate company and are not reimbursements. If the arguments made by the appellant were to be accepted then every payment made by the service recipient to the service provider will be nothing but reimbursement made. That is not even the scope of decision of the Apex Court in case of Intercontinental Consultants. For claiming some payments made to be reimbursable expenses, the claimant has to from the contract identify the main service provided and then the expense reimbursed. In this case if the payments are made for provision of specific service, which is taxable service, then the service tax is payable.

4.6.2 Admittedly in present case the service provider the associated group companies are not having any office or presence in India. Thus the recipient of service has to pay the service tax on reverse charge basis. We do not find any merits in the submissions made by the appellant in this respect.

4.7 Whether the demand is hit by limitation as extended period of limitation as per Section 73 of The Finance Act, 1994 is not invokable in the present case.

4.7.1 Commissioner has in para 3.14 to 3.16 on issue of limitation held as follows:

"3.14 Assessee has also contended that the demand for the period 01-04-2008 to 30-09-2011 is barred by limitation period. The undisputed fact is that the issue was raised during the course of CERA audit conducted by the CAG on their records. Thus it is evident that the department was not aware till the date of audit the fact that the Noticee was earning commission but not assessing/paying the service tax on it. Statutory returns filed by the Noticee do not contain the details of commission earned by them. Therefore, the fact of misdeclaration and contravention of the provisions of law with intent to evade service tax is clearly established. The recovery mechanism provided in proviso clause to Section 73(1) of the Finance Act, 1994, as it existed at the material time, provides for demanding Service Tax short paid or not paid during the period up to five years, by reason of –

(a) fraud, or

(b) collusion, or

(c) wilful mis-statement, or

(d) suppression of facts, or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of Service Tax.

Thus, each of the sub-clauses getting covered by (a) to (e) of Section 73(1) are independent of each other and existence of any / each one of the individual situation is good enough to attract demand of Service Tax for extended period under the proviso clause to Section 73(1). In the present case, the Noticee has suppressed the material facts as discussed above. In the ST-3 returns filed by the Noticee, they did not declare about the impugned commission earned by them which resulted in non payment of service tax. But for audit, non furnishing

of commission earned by the Noticee could have gone unnoticed. Under self assessment, onus to declare the information correctly in the statutory ST-3 returns is on the taxable person.

3.15 From the foregoing, it is evident that non declaration of commission earned in the statutory ST-3 returns was deliberate act on the part of the Noticee with intent to evade payment of appropriate Service Tax. Thus, in the instant case, as already discussed above, the Noticee had deliberately suppressed the material facts from the department with intent to evade payment of Service Tax. Hence, the department is justified in demanding the Service Tax with interest by invoking proviso to Section 73(1) of Finance Act, 1994.

3.16 Thus, it is a clear case of suppression of facts and contravention of provisions of law leading to evasion of Service Tax leviable on the services provided by the assessee. I, therefore, hold that the assessee is liable for penalty in terms of Section 78 ibid. As the penalty under Section 78 is sufficient to meet the justice, I do not impose any penalty under Section 76 ibid."

4.7.2 The facts about the commission being received by the appellants from their overseas associate group companies for sale of their goods in India was never brought to the knowledge of department. Neither the commission received were reflected in the ST-3 return filed by the appellants. Though appellant had taken registration for providing business auxiliary services, and they do not dispute the fact that the services provided by them to the overseas associated group companies are appropriately classifiable under the said category they should have reflected the commission received from the overseas associated group companies in the ST-3 return. Having not done so they have clearly suppressed the relevant information with the intention to evade payment of service

tax. We find that in similar circumstances in following decisions invocation of extended period has been upheld:

i. **Tamilnadu Coop Textiles Processing Mills Ltd [2007 (207) ELT 593 (T)]**

"9.*We have considered the decisions cited before us. In the case of Padmini Products (supra), it was held that, where there was scope for doubt as to whether the goods were dutiable or not, the extended period of limitation under the proviso to Section 11A(1) would not get attracted. In the present case, there was no scope for the Mills to doubt whether grey fabrics processed by them were handloom fabrics or powerloom fabrics. In TNHB's case, it was held that the assessee must be aware that duty was leviable and must be found to have deliberately avoided paying duty so that the extended period of limitation could be invoked for demanding the duty from them. This condition, in our view, stands satisfied in the present case. In the case of Chemphar Drugs & Liniments (supra), it was held that conscious or deliberate withholding of information by manufacturer was necessary to invoke the larger period of limitation. The facts and circumstances of the present case, which have already spelt out, indicate that the Mills deliberately suppressed material facts before the Department. In the relevant invoices, they declared the goods as handloom fabrics, even though they were aware of the fact that the goods were dutiable powerloom fabrics. In the case of G.T.C. Industries (supra), the Tribunal did not find any evidence of the job worker having suppressed any fact with intent to evade payment of duty on the goods manufactured by them and removed under the brand name of G.T.C. Industries Ltd. and, accordingly, it was held that the longer period of limitation was not invocable against the job worker. This decision of the Tribunal is not applicable to the present case of the Mills for reasons already noted by*

us. In the case of Karmayogi Dyeing Pvt. Ltd. (supra), it was found by the Tribunal that the wrong declaration of fabric by the processor (job worker) was based on the declaration given to them by the supplier of grey fabric, and, in the absence of anything to indicate that the processor had colluded with the other party for wrong declaration, it was held that the extended period of limitation would not be available. This decision is also not applicable to the facts of the present case inasmuch as the grey fabric supplier (Co-optex) has not been shown to have misdeclared the fabrics in their delivery documents to the Mills. They were using different product code numbers for grey handloom fabrics and grey powerloom fabrics in the delivery documents and the scope of this practice was known to the processor (the Mills). Hence there was no question of collusion between the Mills and Co-optex. In their appeal, the Mills have raised a feeble plea that the relevant facts were known to the Department and hence the allegation of suppression against them is not sustainable. However, they have not established that the relevant facts were known to the Department prior to the investigating officers' visit to their premises. Even if it be assumed that the Department had knowledge of the relevant facts, the Mills can still be found to have suppressed such facts as held by the Tribunal in the case of Bajaj Tempo Ltd. (supra).

10.*For the reasons already recorded by us, it is held that the extended period of limitation was rightly invoked in this case for demanding duty from the Mills in respect of the processed powerloom fabrics supplied to Co-optex during the period of dispute."*

ii. **Rail Tel Corporation of India [2015 (40) S.T.R. 1131 (Tri. - Del.)]**

6. *We find that the appellant had registered itself under leased circuit service and as has been analysed above the impugned service rendered clearly and unambiguously fell under the scope of leased circuit service. Thus for the appellant who operates in this field and was even registered for leased circuit service, and therefore was not unaware thereof. Bona fide belief is not some sort of hallucinatory belief. It is a genuine belief of a reasonable person operating in an appropriate environment. Thus for such as assessee as the appellant, it could not have been a bona fide belief on its part that the service rendered did not fall under leased circuit service because there was no scope of any confusion or ambiguity in that regard. Further, the appellant did not timely provide the information sought and had to be issued repeated reminders. Therefore we are of the view that the appellant is guilty of suppression of fact and therefore the extended period has rightly been invoked and mandatory penalty is clearly imposable."*

iii. In case of **Pasupati Spinning and Weaving Mills [2015 (318) ELT 623 (SC)]**Hon'ble Apex Court held "4. …….Equally, we do not think that there is any ground for interference on the extended period of limitation being applicable inasmuch as CESTAT is again correct in saying that as the declaration and RT-12 returns being vital documents submitted by the respondent (appellant herein) did not mention the vital word "hanks", they suppressed a material fact which, to their knowledge, would not bring their sewing thread within the exemption Notification. ……"

iv. Reliant Advertising [2013 (31) STR 166 (T)-

"17. *Ld. Counsel for the respondent/assessee has contended that since no penalty as proposed in the Show Cause Notice was imposed in the adjudication order, invoking the provisions of Section 80, invocation of the extended period of limitation is also unsustainable. This*

contention does not commend acceptance by this Tribunal. The adjudicating authority clearly recorded a finding that failure of the assessee to disclose the position in conformity with the position in its balance sheet, in the ST-3 returns filed amounts to suppression of the correct taxable value from the department; that this position is fortified by the figures in the balance sheet of the assessee admitted by Ms. Shaifali Singh, in her statement recorded on 23-8-2006. Since there is a suppression by the assessee, rationally concluded by the adjudicating authority, invocation of the extended period of limitation is legitimate. The adjudication order is thus impeccable and warrants no interference. The appellate authority erred in reversing the adjudication order."

4.7.3 Appellants have relied upon the certain decisions to claim that extended period of limitation cannot be invoked in the present case. However we find that these decisions are not applicable in the present case for the reasons as stated below:

a. Continental Foundation Joint Venture [2007 (216) ELT 177 (SC)]-

While discussing the issue on suppression the Apex Court stated *"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 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."* Since the facts in that case were known to both the parties Hon'ble Apex Court held charge of suppression cannot be invoked. That is not

the case here. In this case certain information which was available with the appellants was never disclosed to revenue, with the intention to evade payment of tax. This decision of Apex Court is clearly distinguishable.

b. In case of Kingfisher Airlines Ltd. [2015 (40) STR 1159 (T-Mum)] Tribunal stated "***26.1*** *So far the question of invocation of extended period is concerned, I find that there is no case of any suppression on the part of the appellant Airlines. The appellant Airlines have duly disclosed the receipts from passengers towards excess baggage in their books of account, maintained in the ordinary course of business. I find that the issue is one of interpretation of the taxing statute and as such being debatable, there is no element of any fraud or suppression. Accordingly, the extended period of limitation is held not invocable."* This decision is also distinguishable. It is not the case that the book of accounts maintained by the appellant were completely declared to the revenue and were made available to the authorities from time to time. As per Rule 6(3) of The Service Tax Rules, 1994, it is not that every book of account maintained by the Appellant is known to the revenue, but the appellant is required to make a declaration to the jurisdictional officers in respect of the book of accounts maintained by it. Same provision exists in Rule 22 of Central Excise Rules, 2002. Thus without making a enquiry into this aspect that the said book of account were declared to the revenue or not the decision of Tribunal holding that information was made in book of accounts in normal course of business is nothing but per-incuariam to this extent and cannot be binding precedent. In this decision also one member has who has differed with the majority held on limitation aspect stating *"**20.** Being well aware of the requirement of law, the appellants collected excess baggage charges over a long period of time without declaring the same to the department. This shows suppression of facts and intention*

of the appellant to evade duty. Hence, the extended period under Section 73(1) of the Finance Act has been rightly invoked. Reliance is placed on Bharat Roll Industry (Pvt.) Ltd. v. CCE, Haldia - 2008 (229) E.L.T. 107 (Tri.-Cal.). The appellants have not been able to show any judgment of the Courts to support a view that the issue of classification of excess baggage and the liability of Service Tax on such excess baggage was a debatable issue. In the case of Jetlite India v. CCE - 2011 (21) S.T.R. 80 (Tri.-Delhi), it was held that excess baggage charges are leviable to Service Tax. The issue is very clear and the failure to pay Service Tax cannot be condoned."

C. Similarly we find decision in case of Reliance Industries Ltd. [2016 (57) GST 84 (T-Mum)] to not applicable in the present set of facts.

4.7.4 In light of discussions as above we uphold the charges of suppression with intent to evade payment of duty for invoking extended period of limitation as provided by Section 73 of Finance Act, 1994.

4.8 Whether demand for interest under Section 75 and penalties imposed under Section 77 and Section of Finance Act, 1994 can be sustained.

4.8.1 While adjudicating Commissioner has imposed penalties as under Section 77 and 78 of Finance Act, 1994.

4.8.2 Since we have held that extended period of limitation has been rightly invoked in the present case, the provisions of section 78 will get attracted automatically. In case of Rajasthan spinning and Weaving Mills Hon'ble APEX Court has held as follows:

*"**16.** The other provision with which we are concerned in this case is Section 11AC relating to penalty. It is as follows :*

***11AC. Penalty for short-levy or non-levy of duty in certain cases**.-*

.....

17. *The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.*

18. *One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "....by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assessees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.*

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 v. 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 v. 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 statues 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."*

4.8.3 Hence we uphold imposition of penalty under Section 78, however the same needs to be re-quantified as indicated earlier in the order.

4.8.4 Penalties under Section 77, is for the reason of contraventions of various provisions and acts of omission to perform the task as required to be performed under the provisions of the act. Such penalties are in nature of Civil Liabilities and do not require any contumacious conduct on the behalf of the defaulter. Hon'ble Supreme Court has in case of Gujarat Travancore Agency held as follows:

*"**4.**Learned Counsel for the assessee has addressed an exhaustive argument before us on the question whether a penalty imposed under Section 271(1)(a) of the Act involves the element of mens rea 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 Section 271(1)(a) of the Act are quasi criminal in nature and that, therefore, the element of mens rea is a mandatory requirement before a penalty can be imposed under Section 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*

Section 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 Section 276C which provides that if a person willfully fails to furnish in due time the return of income required under Section 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 it 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 Section 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 mens rea 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 Section 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 to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mens rea 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.""

Hence we uphold the penalties imposed under the provisions of Section 77 of the Finance Act, 1994.

4.8.4 Since the demand of tax has been upheld the demand for interest will follow. It is now settled law that interest under Section 75, is for delay in the payment of tax from the date when it was due. Since appellants have failed to pay the said Service Tax by the due date interest demanded cannot be faulted.

4.9 Thus in view of discussions as above we respond to questions framed by us in para 4.3 as follows:

I. The demand in relation to the commission received by appellants in respect of sale of goods of associated group companies can be sustained upto 26.02.2010. For period post 26.02.2010, the benefit of export of service will be admissible to them. Matter remanded for re-quantification of demand upto 27.02.2010.

II. Demand in respect of reimbursements made by the overseas group associate companies in relation to expenses incurred by the appellant cannot be sustained. The demand is set aside subject to verification of the fact that appellants have not availed any CENVAT credit in respect of such reimbursable expenses.

III. Demand in respect of the reimbursements made to the overseas group associate companies in relation to expenses incurred by them is sustained. However since the appellants have disputed the computation of demand the matter is remanded back to original authority for re-computation of demand.

IV. Extended period of limitation is invokable in the present case.

V. DEMAND for interest under Section 75 and penalties under section 77 and 78 of Finance Act, 1994, to upheld. However the quantum of interest and penalties need to be redetermined in terms of recomputed demand.

5.0 Thus we dispose of the appeal by setting aside the impugned order and remand the matter back to adjudicating authority for re-computation of demand, interest and penalties as indicated in para 4.9 above.

(Order pronounced in the open court on 17.05.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

tvu