आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हॉउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009		Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009

फ़ोन नंबर./ PHONE No.: 079-2754 4599 फैक्स/ FAX : 079-2754 4463 E-mail:- *oaahmedabad2@gmail.com*

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. F.NO. STC/15-30/OA/Denovo/2023 DIN :20240164WT000082398C

आदेश की तारीख़ / Date of Order : 28.12.2023

जारी करने की तारीख़ / Date of Issue : 10.01.2024

द्वारा पारित/Passed by -

उपेन्द्र सिंह यादव / UPENDRA SINGH YADAV

आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR-04/2023-24

1 | यह प्रति उस व्यक्ति को ,जिसके लिए यह आदेश जारी किया गया है ,उसके व्यक्तिगत उपयोग के लिए नि:शुल्क प्रदान की जाती है|
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2 | इस मूल आदेश से असंतुष्ट कोई भी व्यक्ति उचित प्राधिकारी को अपील निम्नलिखित ढंग से कर सकता है-:

सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपिलाय न्यायाधिकरण को अपील-: वित्त अधिनियम 1994,की धारा 86 के अंतर्गत अपील निम्न को की जा सकती है पश्चिम क्षेत्रीय पीठ ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण) सिस्टेट (ओ ,20-न्यू मेन्टल अस्पताल कम्पाउंड ,मेघाणीनगर ,अहमदाबाद|380016-

Any person aggrieved by the original order may appeal to the appropriate authority in the following manner: -

Appeal to Customs, Excise and Service Tax Appellate Tribunal: - Under section 86The Finance Act, 1994 appeal is to be filed with: West Regional Chair, Customs, Excise and Service Tax Appellate Tribunal (CESTAT) O-20, New Mental Hospital Compound, Meganinagar, Ahmedabad -380016.

1 | अपीलीय न्यायाधिकरण का वित्त अधिनियम ,1994 की धारा 86 की उप-धारा (1)के अंतर्गत अपील ,सेवाकर नियानावली 1994,के नियम (1)9 के अंतर्गत निर्धारित एस.टी 5. में ,चार प्रतियों में आदेश प्राप्ति के दिनांक से तीन माह के भीतर की जा सकेगी एवं उसके साथ जिस आदेश के विरूद्ध अपील की गई हो उसकी प्रतियाँ भेजी जानी चाहिए)उनमें से एक प्रमाणित प्रति होगी (और वित्त अधिनियम 1994,की धारा 86 के अंतर्गत निर्धारित किए अनुसार शुल्क लगा होना चाहिए | जिस स्थान पर न्यायाधिकरण की न्यायपीठ स्थित है ,वहा के नामित सार्वजानिक क्षेत्रा बैंक के न्यायापीठ के सहायक रजिस्ट्रार के नाम से निर्धारित फ़ीस रेखांकित बैंक ड्राफ्ट के रूप में भेजनी होगी|

The Appeal should be filed in Form No ST 5, under sub-section (1) of section 86 of the Finance Act, 1994 of Appellate tribunal prescribed in Rules mentioned in Service tax Rules, 1994 Rule 9 (1). It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate. Fee should be charged under section 86 of the Finance Act, 1994. the fees should be submitted through draft the name of Assistant Registrar of Tribunal of the designated public sector bank as set out Located at the bench of the Tribunal , determined by the outlined bank.

2| वित्त अधिनियम 1994,की धारा 86 की उप-धाराओं (2) एवं2) ए (के अंतर्गत सेवाकर नियमावली 1994 ,के नियम (2)9 के अंतर्गत निर्धारित किए गए फॉर्म एस.टी 7.में की जा सकेगी एवं उसके साथ आयुक्त ,केन्द्रीय उत्पाद शुल्क या आयुक्त ,केन्द्रीय उत्पाद शुल्क)अपील (के आदेश के प्रति) उनमे से एक प्रमाणित प्रति होगी (और आयुक्त/सहायक आयुक्त अथवा उप-आयुक्त ,केन्द्रीय उत्पाद शुल्क को अपीलीय न्यायाधिकरण में आवेदन करने के आदेश देते हुए सीमा एवं केन्द्रीय उत्पाद शुल्क बोर्ड / आयुक्त ,केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रति भेजनी होगी|

The Appeal can be filed to the Appellate Tribunal in Form S.T. 7 both under sub-section (2) & (2A) of the section 86 of the Finance Act, 1994, Provided that the Appeal can be made to the Appellate Tribunal against the Order of the Commissioner of the Central Excise or Order of the Commissioner of Central Excise (Appeals) accompanying the certified copy of the Order passed by the Commission.

3| यथासंशोधित न्यायालय शुल्क अधिनियम 1975 ,की शर्तो पर अनुसूची 1-के अंतर्गत निर्धारित किए गए अनुसार यथास्थिति मूल आदेश या न्यायनिर्णयनकर्ता प्राधिकारी के आदेश की प्रति पर रूपये -/6.50 का न्यायालय टिकट लगा होना चाहिए ।

Amended Court Fees Act, 1975 on the terms of the status quo as defined under Schedule 1 original copy of the order or the order of Adjudicating authority Rs 6.50 / - I, the Court must be stamped.

1. ब्यौरापूर्ण करने हेतु सीमाशुल्क उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण , 1982 ,नियमावली (कार्यविधि)की ओर ध्यान आकर्षित किया जाता है ।

Full details for, attention is invited to customs, excise and Service Tax Appellate Tribunal (Procedure) Rules 1982,

2. इस आदेश के विरूद्ध सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण में शुल्क के 7.5% जहां शुल्क अथवा शुल्क एवं जुरमाना का विवाद है अथवा जुरमाना जहां शीर्फ जुरमाना के बारेमे विवाद है उसका भुकतान करके अपील की जा शकती है।

The order against the Customs, Excise and Service Tax Appellate Tribunal, where 7.5% of the fee or surcharge fee or the only penalty fees and fines for the fall of the dispute is a dispute that can be appealed by Settles.

विषयः कारण बताओ सूचनाः -

Sub : Denovo Proceedings initiated vide the Hon'ble CESTAT vide it's Order No. A/10043/2023 dated 12.01.2023, arising OIO No. STC/51/COMMR/AHD/2011 dated 28.11.2011 issued by the then Commissioner, Service Tax, Ahmedabad (Show cause notices bearing F.No. STC/4-54/O&A/10-11 dated 20.08.2010) issued against M/s. Stelemec Ltd., Ularia, Taluka Sanand. Ahmedabad.

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR-04/2023-24

M/s. Stelemec Ltd., Ularia, Taluka Sanand. Ahmedabad (hereinafter referred to as "M/s. Stelemec /the 'Assessee' ") were issued Show Cause Notice vide F.No. STC/4-54/O&A/10-11 dated 20.08.2010 by the then Commissioner, Service Tax, Ahmedabad. The said SCN was adjudicated by the then Commissioner, Service Tax, Ahmedabad vide Order In Original No. STC/51/COMMR/AHD/2011 dated 28.11.2011. The demand of Service Tax/Cenvat Credit of Input Service total amounting to Rs. 63,47,691/- was confirmed towards short payment of Service Tax on GTA Service (Rs. 6,44,202/-), Business Auxiliary Service (Rs. 11,05,988/-) and Cenvat Credit of Service Tax of Rs. 45,97,691/-. The rest of the demand of Rs. 5,31,962/- was dropped by the then adjudicating authority i.e. the then Commissioner, Service Tax, Ahmedabad vide the aforementioned OIO. On being aggrieved by the said OIO confirming the demand of Service Tax/Cenvat Credit of Input Service total amounting to Rs. 63,47,691/-, the said assessee had preferred an appeal before the Hon'ble CESTAT, Ahmedabad, The Hon'ble CESTAT vide it's Order No. A/10043/2023 dated 12.01.2023 has set aside the said OIO and remanded the matter for passing a denovo order after considering the new facts available after adjudication of the case, nature of services and other submissions of the said assessee.

BRIEF FACT OF THE CASE PERTAINING TO THE SCN ISSUED TO M/S STELMEC LTD ARE AS FOLLOWS

1. Ms Stelemec Ltd., Ularia, Taluka Sanand. Ahmedabad (hereinafter referred to as "M/s. Stelemec /said assessee") were engaged in providing taxable services falling under the category of "Business Auxiliary Service" and "Transport of Goods by Roads Services". They were registered with the Service Tax Commissionerate for the same and were having Registration Number AAECS5686BST001.

2. During the course of audit of records of M/s Stelemec on 20.02.2009, by the officers of Service Tax Commissionerate and subsequent scrutiny & reconciliation of the records maintained by them with the returns filed by them for the period 2004-05 to 2007-08, it was revealed that:

2.1. There was difference in the figures of the freight expenses shown by the said assessee in their ST-3 returns and those appearing in the Balance Sheet of the corresponding period. This had resulted in short

payment of Service Tax to the tune of Rs. 6,44,202/- during the period 2004-05 to 2007-08.

2.1.1. Out of the said short payment, the said assessee had paid the Service Tax of Rs 2,52,936- for the period 2004-05 to 2006-07 on 14.10.2008 vide GAR-7 challan No. 01/2008-09. However, they had failed to pay the interest amounting to Rs.72,138- on the said amount.

2.1.2. Thus, the balance amount of Service Tax Le Rs.3,91,266/- along with the interest of Rs.72,138/- remained to be paid by the said assessee was recoverable from them under section 73(1) of the Finance Act, 1994.

2.2. The said assessee had rendered installation services during the period 2007-08 and collected an amount of Rs.9,16,184/- which was shown as installation income in their records. Since, Erection, Commissioning or Installation Service was a taxable service w.e.f 1.7.2003 it had resulted in non payment of Service Tax amounting to Rs.1,00,784/- applicable thereon which was recoverable along with interest from them under Section 73(1) and 75 of the Finance Act, 1994.

2.3. During the period 2004-05 to 2007-08, the said assessee had received commission charges. Verification and scrutiny of the ledgers & ST-3 returns filed by the said assessee for the corresponding period revealed that there was a difference in the amount of commission charges as appearing in their ledgers and as declared by them in their ST-3 returns. This had resulted in short-payment of Service Tax of Rs.11,05,988/- which was required to be recovered from them under section 73(1) of the Finance Act. 1994 along with interest. Out of the said short payment, the said assessee had paid an amount of Rs.43,005/- vide GAR-7 challan dated 18.04.2009.

2.4. During the period from 2004-05 to 2007-08, the said assessee had in total received an amount of Rs.45,20,354/- as re-imbursement expenses like cost of traveling, clearing charges, tender fees, stamp duty & out of pocket expenses from their clients VSL., Landis & Gyr Ltd. & M/s Siemens service receivers. As per the agreement with the above clients, the said assessee was responsible for making best efforts to promote sale of the products of their clients at their own expenses and any servicing, repairs or attending to customer complaints was the responsibility of the said assessee. Thus, there were no additional expenses in attending to activities like servicing,

repairs or attending customer complaints. Hence, the income i.e. reimbursement of expenses from such activities was nothing but service charge which was in the nature of Commission and fell within the ambit of "Business Auxiliary Service" and the said assessee was liable to pay Service Tax on such income. It, therefore, appeared that the said assessee had short-paid Service Tax amounting to Rs.4,31,178/- on re-imbursement expenses of Rs.45,20,354/- received during the period from 2004-05 to 2007-08.

2.5. The said assessee had availed CENVAT Credit amounting to Rs.45,97,501/- during the period 2006-2007 & 2007-2008 on the strength of Debit Notes issued by M/s Gupta Metallics & Power Limited & M/s Dhariwal Doshi Industries Limited. Verification of the records revealed that, at the time of taking credit on the basis of debit notes, both the above- mentioned parties were not registered with the Service Tax department. M/s Gupta Metallics & Power Limited & M/s Dhariwal Doshi Industries Limited took Service Tax registration on 01.06.2007 and 05.07.2006 respectively i.e. subsequent to issue of debit notes. It therefore, appeared that the said assessee had wrongly availed CENVAT Credit of Rs.45,97,501/- on basis of debit notes.

2.6. The said assessee had paid Service Tax amounting to Rs.1,42,528/- on GTA services through their CENVAT account. Whereas, as per the CBEC Circular No.97/8/2007 dated 23.08.07 issued from F.No.137/85/2007CX4, Service Tax payable on GTA services was to be paid by cash. The said assessee later on had paid an amount of Rs.1,43,000/- vide GAR 7 challan dated 05.20.2009. However, interest amounting to Rs.34,316/- on the above delayed payment was not paid by the said assessee.

2.7. Verification of the records maintained/returns filed by the said assessee had further revealed that the ST-3 returns for the Half-year ending on 30.09.2004, 31.03.2005, 30.09.2005, 31.03.2006, 30.09.2006, 31.03.2007 & 31.03.2008 were filed late.

3. In view of the above, the said assessee by mis-declaring value of Service in periodical ST-3 returns did not discharge their Service Tax liability correctly under the service categories of "Business Auxiliary Services", "Transport of Goods by Road Services" and "Erection, Commissioning or Installation Service" during the period from 2004-05 to 2007-08 and thereby had contravened the following provisions:

i) Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules. 1994 as amended in as much as the said assessee had failed to discharge the Service Tax liability correctly thereby resulting in non payment/short payment of Service Tax as mentioned in foregoing paras and had failed to credit the Service Tax in Government account within the stipulated time limit.

ii) Section 70 of the Finance Act, 1994, in as much as the said assessee had not disclosed full, true and correct information about the value of the services provided by them.

iii) Section 75 of the Finance Act, 1994 in as much as they had failed to make payment of Service Tax along with interest.

iv) Section 76 of the Finance Act, 1994, as amended, for failure of timely payment of Service Tax as required under Section 68(2) of the said Act;

v) Rule 9 of the CENVAT Credit Rules, 2004, in as much as they had wrongly availed and utilized CENVAT Credit on documents that had not been specified.

4. Accordingly, the said assessee were issued **Show Cause Notice F.No. STC/4-40/O&A/10-11 dated 24.8.2010** asking them to Show Cause to the Commissioner, Central Excise Bhavan, 7th Floor, Near Government Polytechnic, Ambawadi, Ahmedabad-380015 as to why:-

i. (a) Service Tax amounting to Rs.22,82,152 (Rupees Twenty-two lakh eighty-two thousand one hundred and fifty-two only) (Rs.6,44,202/- as per Annexure A + Rs.1,00,784/- Service Tax short paid on installation income + Rs.11,05,988/- as per Annexure 'B' + Rs. 4,31, 178/ Service Tax on reimbursement expenses) short paid, not paid by them should not be demanded and recovered from them under the proviso of Section 73 (1) read with Section 68 of the Finance Act, 1994 invoking the extended period of five years as discussed hereinabove and Service Tax of Rs 2,52,936/- and Rs 43,005/- paid by them should not be appropriated against the said demand.

(b) interest at applicable rate on the amount of Service Tax liability as detailed above should not be demanded and recovered from them for the delay in making the payment under Section 75 of the Finance Act, 1994.

(c) penalty should not be imposed upon them under Section 76 of the Finance Act 1994, for their failure to make the payment of Service Tax in prescribed time limit.

(d) penalty should not be imposed upon them under Section 77 of the Finance Act, 1994 for their failure to assess the correct taxable value and not showing the same in ST-3 returns within stipulated time.

(e) penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 for suppressing the value of taxable services provided by them before the department with intent to evade payment of service tax.

ii. (a) CENVAT credit amounting to Rs.45,97,501/- (As per Annexure 'e') wrongly availed should not be demanded and recovered alongwith interest from them under the provisions of Rule 14 of CENVAT Credit Rules, 2004, read with Section 73(1) and 75 of the Finance act, 1994.

(b) penalty should not be imposed upon them under Rule 15 of the CENVAT Credit Rules, 2004 read with Section 78 of the Finance Act. 1994 for wrong availment of CENVAT Credit with an intent to evade payment of service tax.

iii) interest of Rs.34,316 on delayed payment of Service Tax on GTA services should not be demanded & recovered from them under Section 75 of the Finance Act, 1994

iv) Penalty under Section 77 of the Finance Act, 1994 should not be imposed upon them for late filing of returns during the half years ending on 30.09.2004. 31.03.2005, 30.09.2005, 31.03.2006, 30.09.2006, 31.03.2007 & 31.03.2008.

Defence Reply filed at the time of initial adjudication proceeding

5. In reply to the Show Cause Notice, the said assessee have vide their defence replies dated 22.3.2011, 25.5.2011 and 15.9.2011 submitted as follows:

5.1. The demand of Service Tax of Rs. 6,44,202/- on account of difference in figures of expenditure shown in Profit & Loss account and Balance Sheet for the period from January 2005 to March 2008 vis-à-vis freight charges shown in ST-3 returns for the corresponding period.

5.1.1. The expenses which are accounted in Profit & Loss Account are not on the basis of actual expenditure in form of cash but are based on accrual basis, which means accepted liability for payment. Hence, the demand based on wrong comparison needs to be set aside since it was based on the assumption that figures in Profit & Loss Account reflects the cash expenditure and as per the settled law the demand based on assumptions and presumptions were untenable in law.

5.1.2. In case of GTA service, obligation to pay service tax was fastened on the Assessee in his capacity as a consignor or consignee only on the basis of payment. As per notification No. 35/2004 dated 3.12 2004, service tax was payable either by consignor or consignee only on payment of freight and not otherwise. Hence, the Department's contention that expenditure which had been booked in Profit & Loss Account on accrual basis should be considered for payment of service tax was contrary to legal position and hence unstainable.

5.1.3. The figure reflected in Profit & Loss Account and Balance Sheet includes following five types of expenditures and eventualities viz.

i. Expenses of GTA service where Goods Transport Agencies such as Gati Transport etc. who have discharged service tax liability by themselves:

ii. Expenses of Goods Transport services on which they have paid and discharge service tax liability.

iii. Miscellaneous freight charges paid at factory for the short distance consignment and which are paid to transport operator and not to GTA but are less than Rs.1500/- per consignment and therefore exempted from payment of service tax as per the notification No. 34/2004

iv. Expenditure towards octroi

v. In the year 2007-2008, the figures of all the units had been considered which inter-alia included unit-I which was located at Ulariya, Ahmedabad, unit-II was located at Usgaon near Vasai in State of Maharashtra, unit-III M/s. Hames Industries Pvt. Ltd. was located at Usgaon near Vasai in State of Maharashtra, unit-IV i.e. Espirit Switchgears Pvt. Ltd. was located at Sathivali near Vasai in State of Maharashtra, unit-V i.e. Scady Industries Pvt. Ltd. was located at Veeramgam in Gujarat State. Therefore the amounts of Freight & Octroi charges about other units needs to be deducted.

Thus, the total figures shown in Profit & Loss Account and Balance Sheet included the above figures; whereas in Service Tax return the figures at Sr.No.i were reflected and therefore there was difference between the figures reported in ST-3 returns and the figures

reflected in Profit & Loss Account and Balance Sheet for the same period. In support of this contention, the Chartered Accountant's certificate certifying the above groupings in Profit & Loss Account and Balance Sheet vis-à-vis the figures shown in ST-3 return was submitted by them.

5.1.4. The demand of service tax on unexplained figures was unsustainable since the figures were reconciled and as per the provisions of Law the service tax cannot be demanded on the following amounts:

a) Amount paid to GTA service provider who had paid the service tax liability on their amount of Rs 1,00,08,866/- viz Gati Transport, etc.

b) Amount of GTA which had been accounted on accrual basis and in ST-3 returns accounted on actual payment basis, the difference amounting to Rs 13,59,823/- cannot be held as taxable since as per the provisions of Service Tax Rules 2 (d) (1) (v) read with Rule 6, service tax is payable only after payment to GTA is effected.

c) The amount which are paid to Goods Transport operator and not to GTA for short distance and which are less than Rs. 1500/- are exempted from service tax payment as per Notification No. 34/2004 dated 03.12.2004 amounting to Rs. 4,39,326/-.

d) Amount of octroi payment which has been accounted in Profit & Loss Account and Balance sheet under the common accounting heading "transport and octroi" amounting to Rs. 2,97,959/-.

e) Amount pertaining to other units in the year 2007-08 in view of the explanation in para 1.3 hereinabove which is beyond the jurisdiction of this Commissionerate is Rs. 87,46,677/-.

5.1.5. In support of these contentions, reliance was placed by them on the following judgments:

a) CST. A' bad v/s. Purni Ads Pvt. Ltd. as reported in 2010 (19) STR 242 (Tri. Abad).

b) Synergy Audio Visual Workshop P. Ltd. v/s C.S.T., B' lore as reported in 2008 (10) STR 578 (Tri. Bang.).

c) Anchors Agencies (P) Ltd. v/s C.C.E. Bhopal as reported in 2008(10)ST 567 (Tri. Del.).

d) Navyug Alloys P. Ltd vs C.C.E. Vadodara as reported in 2009 (13) STR 421 (Tri.).

e) Commissioner of Service Tax. Ahmedabad vis Purni Ads Pvt. Ltd. as reported in 2010 (19) STR 242 (Tri.-Abmd.).

f) Anchor Agencies (P) Ltd, v/s CCE. Bhopal as reported in 2008 (10) STR 567 (Tri-Del.).

g) Synergy Audio Visual Workshop v/s CST, Bangalore. 2008 (10) NTR 578 (Tri - Bang.)

h) Kirloskar Oil Engines Lad, v/s CCE, Nasik as reported in 2004 (178) ELT. 998 (Tri. Mumbai)

i) Hindalco Industries Ltd. v/s CCE. Allahabad as reported in 2003 (161) E.L.T. 346 (Tri-Del.)

j) Group Advertising Consultant v/s CCE, Delhi as reported in 2006 (4) STR 61 (Tri-Del).

k) Splendour Security Services Pvt. Ltd. v/s CCE. New Delhi as reported in 2007 (5) STR 144 (Tri-Del).

l) Turret Industrial Security Pvt. Ltd. CCE&C. JSR as reported in 2008 (9) STR 564 (Tri-Kolkata).

m) Anchor Agencies (P) Ltd v/s CCE, Bhopal as reported in 2008 (10) STR 567 (Tri-Del).

n) La Freightlift (P) Ltd. v/s CST. Chennai as reported in 2009 (14) STR 513 (Tri-Chennai).

o) Sudesh Sharma v/s CCE, Ludhiana as reported in 2010 (19) STR 512 (Tri-Del).

p) Space Travels v/s CCE, Mumbai-I as reported in 2006 (3) STR 659 (Tri-Mum).

5.2. The demand of Service Tax amounting to Rs. 1,00,784/- not paid on installation income of Rs. 9,16,184/-.

5.2.1. Invocation of extended period was untenable in view of the following judgments;

a) Rolex Logistics Pvt. Ltd. v/s CST. Bangalore as reported in 2009 (13) STR 17 (Tri - Bang).

b) Aditya College of Competitive Exam vs CCE. Visakhapatnam as reported in 2009 (16) S.T.R. 154 (Tri. - Bang.

c) Agro Pack v/s CCE, Surat as reported in 2009 (240) E.LT. 135 (Tri-Ahmd.).

d) Cambay Organics Pvt. Ltd vs CCE, Vadodara as reported in 2007 (217) E.L.T. 586 (Tri. Ahmd.).

5.2.2. The demand was raised on the basis of audit report which inter-alia contemplates Service Tax payable on erection, commissioning and installation service on the basis of bill/debit memorandum raised by them on its client and accounted in books of accounts and reflected in Profit & Loss Account to the credit side under the head of "other income". This entire accounting was on basis of accrual basis; whereas during relevant period the service tax was payable only on receipt of payment of the value of service rendered. It was an assumption of the Department that the bills once accounted into Books of Accounts and

shown to the credit side of Profit & Loss Account means payment received. Hence, the Show Cause Notice which was based on assumption without having induced my evidence about the receipt of payment was unstainable.

5.2.3. The Service Tax on the above amount had been worked out by considering the above income was inclusive of tax and service tax has been paid by the noticee during the period December 2007.

5.2.4. A Chartered Accountant's certificate certifying the reconciliation to that effect was submitted by them.

5.2.5. In view of this factual position, the service tax which had already been paid cannot be demanded again from the noticee, otherwise it will tantamount to double taxation which was unsustainable.

5.2.6. In support of this contention, reliance was placed on the following judgments;

a) Navyug Alloy's Pvt. Ltd v/s C.CE. Vadodara as reported in 2009 (13) STR 421 (Tri).

b) Invincible Security v/s Commissioner Of Customs, Noida as reported in 2009 (15) S.TR. 228 (Tri. - Del.).

5.3. The demand of Rs. 11,05,988/ was of service tax on the basis of difference between the figures of ST-3 returns vis-à-vis figures shown in Profit & Loss Account and Balance Sheet under the heading of Commission charges receivable.

5.3.1. Sr. No.1 of Annexure "B" to the Show Cause Notice shows opening balance debtors amounting to Rs 1,11,32,454/- for the year 2004-2005. This figure shown as opening balance of debtors on account of commission receivable as of April, 2004 clearly establishes that the services of commission agent was provided prior to July, 2004 and therefore during the said period the service tax under Business Auxiliary service on commission agent was not at all payable. The service tax was introduced first time on commission agent effective from July 2003 but was exempted from payment of service tax vide notification no. 13/2003 dated 20.6.2003 and the said notification was amended vide Notification No.8/2004-S.T. dated 09.07.2004. Therefore, the services which were rendered prior to July 2004 were not taxable. Hence, the demand which had been worked out by adding an amount of Rs. 1,11,32,454/- which is the opening balance debtors is not correct. Moreover, the closing balance of Rs. 6,24,351/- as on 31.03.2008 for the above amount of Rs. 1,11,32,454/- has not been taken in to account.

5.3.2. Reliance was placed on the following judgments:

a) Reliance Industries Ltd. vs. C.C.Ex. & Cus as reported in 2008 (10) STR 243 (Tri.) Approved by Hon'ble High Court of Gujarat as reported in 2010 (19) STR (807) (Guj.)

b) C.C.E, Noida v/s Matsushita T. T. & Audio (India) Lid as reported in 2006 11) STR 162 (Tri. Del.).

c) Lumax Samlip Industries vs. C.S.T. Chennai as reported in 2007 (6) STR 417 (Tri. Chennai).

d) C.C.Ex & Cus, Vadodara-II vs. Schott Glass India Pvt. Ltd. as reported in 2009 (14) STR 146 (Guj).

5.4. The demand of Rs. 4,31,178 demanded on the reimbursement of expenditure claimed from the client while acting as pure agent:

5.4.1. Their client had paid service tax for the services rendered on the consideration received by them as commission which was 6% of ex-factory value of the goods sold or on the basis of FOR value as per agreement between their client and VXL Landis & GYR Ltd. In clause 1.2 (g) of the said agreement it was agreed that reasonable expenses incurred by the employee of their client towards travelling, out of pocket, etc will be reimbursed by M/s. VXL Landis & GYR Ltd. Therefore, the amount received towards reimbursement of those expenses cannot form part of gross value received as commission for rendering the services as marketing agent. In view of this factual matrix, the impugned demand on wrongly understood and assumed figures received towards reimbursement were unsustainable since those amounts were not part of the gross amount of services rendered. In support of this contention, reliance was placed on the following judgments:

a) Thejus Badri & Jatin Badri Co. v/s CCE. Salem as reported in 2007 (7) STR 268 (Tri-Che.)

b) Louis Berger International Inc vis CCE, Hyderabad as reported in 2010 (17) STR 287 (Tri-Bang),

5.4.2. The contention of the Department in the impugned Show Cause Notice as well as in the audit objection was that the reimbursable expenses incurred by their client on behalf of their client should form part of value of services was contrary to the terms of agreement as well as CBE&C Circular No. B1/4/2006-TRU dated 19.4.2006 and contrary to Service Tax (Determination of Value) Rules, 2006. The said rule under Rule 5 under sub-rule (ii) provides that the expenditure or cost incurred by service provider as a pure agent as a recipient of service shall be

excluded from the value of taxable service under the following conditions

a) if the service provider acts as a pure agent and makes payment to the third party for the goods or services or makes the payment on behalf of recipient of service to the third party.

In case of their client, they had effected the payment of tender fees for procuring tender document for their client or paid stamp duty to be affixed on the agreements, which has been entered between their client and the buyer of the client as per the terms of tender notice. Both these expenses were squarely covered by the exclusion clause of Rule 5 sub-rule (2) (i) (iii). Hence, the demand raised in the impugned Show Cause Notice on this ground was untenable. In support of this contention, they placed reliance on the following judgments:

a) Cargolinks v/s CCE, Mangalore as reported in 2010 (19) STR 548 (Tri-Bang).

b) Nazeer & Co v/s CCE, Kochi as reported in 2009 (13) STR 672 (Tri-Bang).

c) Apco Agencies vis CC&CE, Calicut as reported in 2008 (10) STR 169 (Tri-Bang).

d) GAC Shipping (India) Pvt Ltd. v/s CCE&C, Cochin as reported in 2008 (9) STR 524 (Tri-Bang).

e) Alathur Agencies vis CC&C, Calicut as reported in 2007 (7) STR 402 (Tri-Bang).

f) Sri Sastha Agencies Pvt.Ltd vs Asst.CCE&C, Palakkad as reported in 2007 (6) STR 185 (Tri-Bang).

g) E.V.Mathai (Tri-Bang) & Co vis CCE. Cochin as reported in 2006 (3) STR 116.

h) F.No.B1/4/2006-TRU dated 19.4.2006, Circular No. 287/107/2010-CX4 dated 17.9.2010.

5.4.3. The accounting head shown in Profit & Loss Account and Balance Sheet on the credit side of Profit & Loss Account as commission charges receivable shows the total amount which includes the commission amount as well as debit notes raised for reimbursement of expenditure effected by the said assessee while working as pure agent such as tender fees, stamp duty reimbursement expenses, clearing charges, testing charges, etc. the said assessee was working as pure agent of client viz. VXL Landis and GYR Ltd (now known as Siemens Metering Ltd).

5.4.4. Chartered Accountant's certificate evidencing their contention was submitted

5.5. Demand raised amounting to Rs. 45,97,501/- on the ground that Cenvat credit availed on the basis of debit note raised by the provider of service without mentioning registration number.

5.5.1. It was settled preposition of Law that the mistakes in the documents were curable defect and therefore the Cenvat credit was not to be denied for such technical breach which were curable in nature when substantive conditions were complied with.

5.5.2. It was not disputed that they had not received those input services nor it was in dispute that those input services were not used by them in the business of manufacture of their final product, therefore, the substantive compliance for eligibility and availment of Cenvat credit of service tax paid on input service was the payment of value of services including the amount of service tax as per Rule of Cenvat Credit Rules, 2004 and the services are input services in terms of Rule 2 (1) of Cenvat Credit Rules, 2004. Thus, when substantive compliances were fulfilled, the impugned Show Cause Notice contemplating recovery of Cenvat credit availed on the ground that debit notes raised by service provider does not show registration number was not sufficient in view of the fact that the said service providers had obtained registration number and the said registration number were available on the debit notes. Thus, the defect in document on the basis of which credit was availed stands cured. In such situation, the Cenvat credit cannot be denied and recovered in the light of following judgments:

a) Sanghi Industries Ltd. vs CCE. Rajkot as reported in 1009 (239) ELT 349 (Tri-Ahmd)

b) Secure Meters Ltd. v/s CCE, Jaipur as reported in 2010 (18) STR 490 (Tri-Del)

5.5.3. Rule 9(1)(g) contemplates an invoice, a bill or a Challan issued by the provider of input service that means the document which is issued as per Rule 4A(1) of Service Tax Rule, 1994 was sufficient for availment of Cenvat Credit. The words used in Rule 4A (1) are "Invoice, Challan or Bill or a document whatever name called"; whereas Rule 11 of Central Excise Rules, 2002 specifically call the document as "invoice" only. This indicates that in case of Service Tax specific nomenclature is not essential. Thus, the Service Tax Rules do envisage flexibility in nomenclature depending on trade and business practices.

5.5.4. Rule 5 (1) of Service Tax Rules also contemplate that the records maintained by Assessee are acceptable. Thus, the private documents,

records maintained in normal course of business are acceptable documents as per legislative intent in case of Service tax. The dictionary meaning of "invoice" means list of goods or services sold or provided with prices. The dictionary meaning of "bill" means printed or written statement of charges for services rendered. The Collins English dictionary states "bill" means note of charges, whereas the word "challan" is nowhere defined in any English dictionary but it is a typical word used in India. Thus, when Rule 4A contemplates the documents as invoice, bill or challan, it indicates not any specific document but documents which are providing the details as per Rule 4A is the document envisaged by the Service Tax Rules.

5.5.5. As per the settled law, the construction of document depends upon its pith and substance and not upon the labels that parties may put upon it. In support of this contention, they placed reliance on the judgment of Hon'ble Apex Court in case of Indrajeet Singh reported at AIR 1996 S.C 247. Thus, on the basis of this settled law while deciding the cases of documents eligible for taking credit of service tax the Hon'ble Tribunal has held that debit note or memo of debit was also a document for availing the Cenvat credit.

5.5.6. They relied on the following judgments

a) Chemplast Sanmar Ltd, v/s CCE. Salem as reported in 2010 (17) STR 253

b) Pharmlab Process Equipments Pvt. Ltd. v/s CCE. Ahmedabad as reported in 2009 (16) STR 94 (Tri-Ahd)

5.5.7. For imposing the service tax in case of inter-group companies or associate firm, the entry debited in Books of Accounts were considered for levying service tax and such entry was sufficient to avail the Cenvat credit. In para 5 of the CBE&C Circular No. 122/3/2010-ST dated 30.4.2010 the Board has opined "when there is compliance of substantive law, the credit can be availed on the documents or debit entries or debit notes which indicates the compliance" In view of this circular, the contentions raised by them get supported. As per the settled law, the circulars were binding on authorities, therefore, the impugned Show Cause Notice contrary to CBE&C Circular needs to be set aside in the light of following judgments:

a) NRC Limited v/s Union of India as reported in 2011 (263) ELT 218 (Bom)

b) Union of India v/s Arviva Industries (1) Ltd. as reported in 2007 (209) ELT 5(S.C.)

c) Paper Products Ltd. v/s CCE as reported in 1999 (112) ELT 765 (S.C.)

5.5.8. The service provider had issued the impugned debit notes and simultaneously had applied for registration number or issued a letter for inserting the Business Auxiliary Service as additional activity in existing certificate. The Department had granted the registration number and incorporated the activity of BAS into an existing registration certificate within a period of 2-3 months from the issuance of first debit note. However, the service provider had paid the service tax collected to the Government treasury under the service tax registration number allotted in due course of time. In such circumstances, the Cenvat credit cannot be denied on such technical breach once service tax had been paid. The Service Tax registration number on the document was a curable defect and which had been cured by the service provider and in turn their client had also informed the Department of such action. In such case, the impugned Show Cause Notice proposing to deny Cenvat credit when the defect had already been cured was unsustainable. As such, it was settled law that mere non-availability of service tax registration number on the document cannot be the ground for denial of Cenvat credit as held by Hon'ble Tribunal in the following cases:-

a) Secure Meters Ltd. v/s CCE. Jaipur as reported in 2010 (18) STR 490 (Tri- Del)

b) CCE. Vapi v/s Jindal Photo Ltd. as reported in 2009 (14) STR 812 (Tri-Ahmd)

c) Philips Electronics (India) Ltd. v/s CCE. Vadodara as reported in 2009 (14) STR 209 (Tri-Ahmd)

5.5.9. The copies of debit notes were enclosed and those debit notes were showing the service tax registration number of the service providers. It was worthwhile to note that the service tax charged under those debit notes had been paid by the service provider to Government of India and TR-6 challan/GAR-7 challan evidencing such payment were enclosed. Thus, when the debit notes were with registration number of service provider and the amount of service tax had been paid by the service provider to the Government and the noticee had paid service tax to the service provider and there was dispute about input services, in such case cenvat credit of service tax paid on such services cannot be denied on technical ground.

5.6. The interest amounting to Rs. 34,316/- demanded as per para 8 of Show Cause Notice was not payable since it is not the case that tax payable on GTA was not paid on time. Section 75 of Finance Act contemplates payment of interest only if tax liability was not paid on time, whereas in their case. service tax liability was paid by debiting the Cenvat account correctly as per the provisions applicable during relevant time. However, considering department's objection, their client has opted for payment in cash. Such payment by cash cannot be construed that it was delayed payment since the required payment was paid by way of debit in Cenvat account on time. In support of this contention, reliance was placed on the following judgments:

a) CCE. Vadodara-l v/s Vulcan Gears as reported in 2010 (17) STR. 251 (Tri-Ahmd.)

b) CCE,Vadodara-II v/s H.B. Engineering Pvt. Ltd, us reported in 2009 (15) STR. 721 (Tri.- Ahmd.)

c) Super Spinning Mills Limited as reported in 2009 (246) ELT 789 (Commr. Appl.)

5.7. Penalty was not imposable.

5.7.1. Penalty under Section 76 of Finance Act, 1994 was not imposable. When the duty demand itself was not payable, the penalty under Section 76 was not imposable in view of the facts stated in preceding paragraphs.

5.7.2. Penalty under Rule 15 of Cenvat Credit Rules, 2004 read with Section 78 of Finance Act was not imposable since they had not availed credit of Rs. 45,97,501/- wrongly as alleged in view of the explanation and the settled law stated in preceding paragraphs. Therefore, proposition to impose Penalty under Rule 15 of Cenvat Credit Rules, 2004 read with Section 78 was unsustainable in the light of judgments in case of M/s Hindustan Petroleum Coprn. Ltd. v's CCE. Ghaziabad as reported in 2006 (200) E.L.T 433 (Tri - Del.)

5.7.3. It was settled preposition of Law that composite Penalty cannot be imposed under two different statutes. Thus, proposition of imposing Penalty under Rule 15 of Cenvat Credit Rules, 2004 and under Section 78 of Finance Act in view of the decision in the case of M/s Golden Horn Container Services P. Ltd. v/s CCE ,Raigad as reported in 2009 (16) S.T.R. 422 (Tri-Mumbai)

5.7.4. Penalty under Section 77 of Finance Act, 1994 was not imposable since their client had not failed to assess the correct taxable value as well as had not failed to file returns on time.

5.8. Interest was not chargeable.

No tax was payable therefore in the absence of tax liability interest under Section 75 was unsustainable. Reliance was placed on the judgment in the case of M/s Sparr Engineering vis CCE, Bangalore-ll as reported in 2007 (207) ELT 522 (Trị - Bang).

5.9. Demand barred by limitation-based on records provided. The demand was based on the Audit conducted by the Department. Their client had regularly filed the ST-3 Returns with the Department which shows that the Department was well aware of the credit availed by their client. Therefore, the allegation of the department was barred by limitation and therefore needs to be set aside in the light of following judgments:

a) Roles Logistics Pvt. Ltd v/s Commr., of Service Tax, Bangalore as reported in 2009 (13) STR 147 (Tri-Bang.)

b) Martin & Harris Laboratories Lut vs CCE. Gurgeon as reported in 2005 (185) ELT 421 (Tri-Del.)

5.10. They requested for personal hearing before the matter is finally adjudicated in the rest of natural justice.

6. Various Personal hearings were granted to the said noticee on 28.02.2011, 23.03.2011, 03.05.2011, 25.05.2011, 20.06.2011, 03.08.2011, 08.09.2011, 12.09.2011 but all dates were adjourned on request of the said assessee and lastly on 15.09.2011 the personal hearing was held and shri D.A. Bhalerao, Advocate and authorised representative, appeared for hearing. He explained the submission and requested to decide the case on merits.

7. The then adjudicating authority i..e the Commissioner of Service Tax, Ahmedabad vide the OIO NO. STC/51/COMMR/AHD/2011 dated 28.11.2011 had adjudicated the case and had passed order as under:

(i) Confirmed the demand of service tax of Rs.6,44,202/- (Rupees Six lakh forty-four thousand two hundred and two only) for thc years 2004-05 to 2007-08 under the category of 'Goods Transport Agency Service' and ordered to recover the same from M/s Stelemec under proviso to Section 73(1) of the Finance Act, 1994;

(ii) Ordered to appropriate the amount of Rs. 2,52,936/- (Rupees Two lakh Fifty two thousand nine hundred and thirty six only) already paid by M/s Stelemec against the above confirmed demand subject to verification by the jurisdictional Assistant Commissioner;

(iii) Confirmed the demand of service tax of Rs. 11,05,988/- (Rupees Eleven lakh five thousand nine hundred and eighty eight only) for the years 2004-05 to 2007-08 on commission charges under the category

of "Business Auxiliary Services' and ordered to recover the same from M/s Stelemec under proviso to Section 73(1) of the Finance Act, 1994;

(iv) Ordered to appropriate the amount of Rs. 43,005/- (Rupees Forty three thousand and five only) already paid by M/s Stelemec against the above confirmed demand subject to verification by the jurisdictional Assistant Commissioner;

(v) Ordered to recover interest on the above confirmed demand of Rs. 17,50,190/- (Rs. 6,44,202+ Rs. 11,05,988/-) (Rupees Seventeen lakh fifty thousand one hundred and ninety only) from M/s Stelemec, at the prescribed rate under Section 75 of the Finance Act, 1994;

(vi) Imposed penalty of Rs.200/- (Rupees Two hundred only) per day for the period during which failure to pay the tax continued, upon M/s Stelemec under Section 76 of the Finance Act, 1994, for the period upto 17.4.2006;

(vii) Imposed penalty of Rs.200/- (Rupees Two hundred only) per day for the period during which failure to pay the tax continued, or at the rate of 2% of such tax, per month, whichever is higher, from 18.4.2006 till the date of actual payment of the outstanding of service tax upon M/s Stelemec under Section 76 of the Finance Act, 1994. for the period upto 31.3.2008; provided further that the amount of penalty payable in terms of this section shall not exceed the service tax payable by M's Stelemec for the period from 2004-05 to 2007-08;

(viii) Imposed penalty of Rs. 17,50,190/- (Rupees Seventeen lakh fifty thousand one hundred and ninety only) on M/s Stelemec under section 78 of the Finance Act. 1994. In the event of M/s Stelemec opting to pay the amount of service tax along with all other dues as confirmed and ordered to be recovered, within thirty days from the date of communication of this order, the amount of penalty liable to be paid by them under Section 78 of the Finance Act, 1994 shall be 25% of the said amount. However, the benefit of reduced penalty shall be available only if the amount of penalty is also paid within the period of thirty days from .the communication of this order, otherwise full penalty shall be paid as imposed in the above order;

(ix) Dropped the demand of service tax of Rs. 1,00,784/- (Rupees One lakh seven hundred and eighty-four only) for the year 2007-08 under the category of "Erection, Commissioning or Installation Services';

(x) Dropped the demand of service tax of Rs 4,31,178/- (Rupees Four lakh thirty-one thousand one hundred and seventy-eight only) for the years 2004-05 to 2007-08 on 'reimbursement expenses 'under the category of "Business Auxiliary Services";

(xi) Confirmed the demand of Cenvat Credit of Rs. 45,97,501/- (Rupees Forty five lakh ninety seven thousand five hundred and one only) wrongly availed/utilized by M/s Stelemec during the years 2006-07 and 2007-08 and ordered to recover the same from them, under Rule 14 of Cenvat Credit Rules. 2004 read with proviso to Section 731) of the Finance Act, 1994;

(xii) Ordered to recover interest on the confirmed demand of Rs. 45,97,501/- (Rupees Forty-five lakh ninety-seven thousand five hundred and one only) at the prescribed rate from M/s Stelemec in terms of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994;

(xiii) Imposed penalty of Rs. 45,97,501/- (Rupees Forty-five lakh ninety-seven thousand five hundred and one only) on Mis Stelemec under Rule 15(4) of the Cenvat Credit Rules. 2004 read with Section 78 of the Finance Act, 1994;

(xiv) Ordered to drop the demand for recovery of interest of Rs. 34,316 (Rupees Thirty-four thousand three hundred and sixteen only) for delayed payment of service tax of Rs.1,42,528/ during the year 2007-08 under the category of "Goods Transport Agency Service" from M/s Stelemec, at the prescribed rate under Section 75 of the Finance Act, 1994;

(xv) Imposed a penalty of Rs. 1,000/- (Rupees One thousand only) per return [Totalling Rs. 7,000/- (Rupees Seven thousand only) for late submission of ST-3 returns on Ms Stelemec under Section 77 of the Finance Act, 1994.

8. The assessee being aggrieved with the above OIO, had filed an appeal before CESTAT and CESTAT vide Final Order No. A/10043/2023 dated 12.01.2023 has remanded back the matter to the original Adjudicating Authority for passing a fresh order on the following points, as understood from the CESTAT order as under:

(i) Short payment of Service Tax of Rs. 6,44,202/- on GTA Service towards the difference in freight expenses mentioned in profit and loss account and ST-3 returns needs to be re-considered based on CA Certificate or to be verified from other required documents if needed.

(ii) Short payment of Service Tax of Rs. 11,05,988/- on commission income needs to be justified after examining the actual contract under which the payment has been received and to specifically examine nature of services and its taxability.

(iii) Cenvat Credit of Rs. 45,97,501/- availed on strength of improper documents (Debit Notes) needs to be reconsidered in response to departmental verification report received after the adjudication of the present case.

9. It is relevant to mention here that the after implementation of the GST w.e.f. 01.07.2017, the said assessee had been migrated into GST and it now falls under the Jurisdiction of CGST, Ahmedabad North Commissionerate, therefore, I, being the Commissioner of the CGST & Central Excise, Ahmedabad North Commissionerate, am the adjudicating authority to adjudicate the case remanded back by the Hon'ble CESTAT, Ahmedabad in terms of provisions of Section 174 of the CGST Act, 2017.

THE PRESENT DEFENCE SUBMISSIONS

10. The said noticee through his authorized representative of Shri H. G. Dharmadhikari, Advocate has submitted their written submission dated 20.11.2023 stating that:

10.1. The Hon'ble CESTAT has remanded the matter back to the Original Adjudicating Authority vide its order dated 12.01.2023 to decide the matter afresh with respect to the demand of Service tax and Cenvat Credit which has been confirmed by the Original Adjudicating Authority vide its order dated 28.11.2011.

10.2. The following are the demands to be adjudicated in the remand ...

Sr. No.	Annex to SCN	Particular of Demand	Period	Value
1.	A	Service Tax on GTA Service	2005 to 2008	Rs. 6,44,202/-
2.	B	Service Tax on BAS Services (Commission)	2004 to 2008	Rs. 11,05,988/-
3.	C	Denial of Cenvat Credit	2006 to 2008	Rs. 45,97,501/-
		Total		Rs. 63,47,6911-

10.3 Demand of Service Tax on GTA Service: (Annexure A to Show Cause Notice: Rs. 6,44,202/-:

10.3.1. They have submitted that the above demand was proposed in the Show Cause Notice on the basis of scrutiny of Service Tax Returns filed by their client vis-a-vis figures reflected in the Balance Sheet and Profit and Loss Account; without considering the explanations submitted by their client during the period of Audit conducted by the department.

10.3.2. It was submitted that while issuing the impugned Show Cause Notice the department had failed to appreciate the nature of expenses and accounting practice adopted by their client.

10.3.3. In terms of Section 68 of Finance Act, 1994 read with Rule 6(1) of Service Tax Rules, 1994 the service tax is payable on 5th of next calendar month in which the value of service is received and not otherwise and in case of RCM after payment of value of service.

10.3.4. It is worthwhile to note that in case of accrual basis accounting system the amounts reflected in the Books of accounts are not the actual amount received or paid during the period. The department has not considered the submissions advanced by their client that all the expenses reflected in the balance sheet are not paid in the same year and closing balances are carried forward in the next year. Thus, for this reason alone the computation of demand of service tax under the category of GTA service under reverse charge mechanism without determining the exact payment made by their client to the Goods Transport Agencies is unsustainable.

10.3.5. In the impugned Show Cause Notice the department has not determined the actual amount paid to GTA during the period qua each consignment note which is pre-requisition to levy of service tax under reverse charge mechanism on receipt of GTA Service.

10.3.6. The demand of service tax under RCM cannot be determined on the basis of assumption that the amount reflected in the P&L Account are entirely towards Freight Charges and paid during the period are liable for payment of Service tax under reverse charge mechanism without scrutiny of each consignment note.

10.3.7. Further nature of each transaction based on consignment note will determine the liability to pay Service tax under RCM by recipient of services. That is constitution of service provider, responsibility to pay freight by consignor or consignee, freight charges of each consignment, nature of goods transported etc. whereas, in the present case the department has not carried out the said task and has simply proposed demand on the freight charges reflected in the debit side of Profit and Loss Account.

10.3.8. The amounts reflected in the ledger of Transporters/ GTA maintained in the books of their client Company are the amount of invoices raised by transporters which includes monthly bills for consolidated consignments, octroi charges etc. Whereas the statute provides for levy of service tax qua consignment note, and no other document such as ledger folio, which is the basis of impugned Show Cause Notice. Hence, the demand raised without adducing the evidence of consignment note is untenable in the light of following judgment:

a) CST vs JWC Logistics Pvt. Ltd. 2019 (22) G.S.T.L. 237 (Tri. Mumbai)

b) Mahanadi Coalfields Ltd. Vs CCE 2022 (57) G.S.T.L. 242 (Tri. - Kolkata)

c) South Eastern Coalfields Ltd. Vs CCE 2017 (47) S.T.R. 93 (Tri. - Del.

10.3.9. Even department has also failed to show the working of amount of freight charges from the period 01.01.2005 to 31.03.2005 for the purpose of levy of service tax.

10.3.10. Thus, the entire demand of service tax is contrary to Section 67 read with Rule 6 of STR, 1994 which inter-alia contemplates in case of event for payment of service tax is actual receipt of value for provision of services. Thus, in case of reverse charge mechanism as per Rule 2(d)(1)(iv) of Service Tax Rules, 1994 person liable for payment of tax is a recipient of service but the liability to pay service tax is only on payment of value of services and in case of GTA Services it is 25% of value under the abatement is chargeable to service tax. In view of this the impugned demand is not providing any details which are essential in law to sustain the demand.

10.3.11. The impugned Show Cause Notice at Annexure A to the Show Cause Notice has simply copied the figures from the Profit and loss account without realizing that the figures reported in profit and loss account are on accrual basis and not on payment basis. Hence, the demand is contrary to the provisions of Rule 6 of STR, 1994 and therefore, not sustainable.

10.3.12. After receipt of remand order passed by Hon'ble CESTAT wherein the Hon'ble Tribunal at para 3 of its remand order has discussed that demand should be on the basis of receipt of payment which has not been corrected till date. Hence, despite of submission by their client supported by Chartered Accountant who has arrived at Column No. 10 of reconciliation statement the amount on which service tax is payable which is shown as Nil shown for the year 2006 to 2008 the figures of summation of column no. 7 less column no. 8 results the freight expenses on which service tax is payable only after the payment of freight is worked out. Therefore, the service tax which is liable to be paid by their client is 35,158 which is paid by their client.

10.3.13. As regards valuation of service of Transportation of Goods by Road the department in the impugned Show Cause Notice has considered the octroi and has not given the deduction of net taxable amounts of Rs. 1500/- freight of each consignment establishes the impugned demand is suffering from vice of vagueness and is contrary to Section 67 of FA, 1994 read with Service tax (Determination of Value) Rules Contemplates that service tax is chargeable only on the value of such service i.e. taxable service. Therefore, in the Show Cause Notice while computing the value of transportation of goods by road the inclusion of octroi is contrary to the Section 67 read with Rule 5 of Service tax (Determination of Value) Rules.

10.3.14. The impugned demand has also not considered the exemption granted to individual consignment where transportation charges are less than 1500/- in terms of Not. No. 34/2004-ST dated 03.12.2004.

10.3.15. Therefore, the Chartered Accountant Certificate has considered the issue of wrong valuation in column no. 3 and 4 in his certificate which merits the consideration.

10.3.16. In support of the contention that the service tax is to be demanded on payment of value of services as per Rule 6 of STR, 1994 the reliance is placed on the following judgments:

a) Tempest Advertising (I) Limited vs CCE 2007 (5) S.T.R. 312 (Tri. - Bang.)

b) Free Look Outdoor Advertising vs CC 2007 (6) S.T.R. 153 (Tri. - Bang.)

10.3.17. In support of their contentions, that Chartered Accountant Certificate should not be brushed aside but merits to be considered. Reliance has been placed on the following judgments:

a. CCE vs HCL Office Automation 2003 (156) E.L.T. 937 (Tri. - Del.)

b. Balajee Machinery vs CCE 2022 (66) G.S.T.L. 440 (Tri. - Kolkata)

c. CCE vs Viclarbha. Winding Wires Ltd. Vs 2008 (229) E.L.T. 218 (Tri. - Mumbai)

d. CST vs JWC Logistics Pvt. Ltd. 2019 (22) G.S.T.L. 237 (Tri. Mumbai)

e. Tempest Advertising (P) Limited vs CCE 2007 (5) S.T.R. 312 (Tri. - Bang.)

f. Rajasthani Sangh vs CCE 2019 (25) G.S.T.L. 34 (Tri. Chennai)

g. Turret Industrial Security Pvt. Ltd. Vs CCE 2008 (9) S.T.R. 564 (Tri. Kolkata)

10.4. **Service Tax on Business Auxiliary Services (Commission received) (Annexure B to Show Cause Notice: Rs. 11,05,988/-):**

10.4.1. The impugned Show Cause Notice proposed to determine the Service Tax liability of Rs. 11,05,988/- at Annexure B for the period 2004-05 to 2007-08 on the basis of figures of gross commission & Service Charge reflected in the Balance Sheet vis-a-vis Figures reflected in the Service tax Returns without identifying the nature of activity carried out by their client on the basis of scrutiny of invoices or debit notes raised by their client for said commission.

10.4.2. In response to audit paras on the said issue raised by the department vide letter dated 14.03.2009, their client has submitted the detailed reply along with supporting documents vide letter dated 26.03.2009 received by department on 01.04.2009 along with the reconciliation and copies of invoices.

10.4.3. The foremost submission is that the activity of commission agent under the category of Business Auxiliary Services was exempted vide Not. No. 13 of 2003 dated 20.06.2003 which was operative till the amendment introduced vide Not. No. 8/2004-ST dated 09.07,2004.

10.4.4. Thus, the value of sales commission accrued prior to 09.07.2004 should not have been considered and the part of the said commission received after 09.07.2004 should not have been considered whereas the impugned demand considered both hence the demand on amount of Rs. 1,11,32,454/- and there is no working with respect to Commission received after 09.07.2004 which is only chargeable to service tax in terms of Rule 6 of STR, 1994 therefore, the entire demand worked out based on ledger balancing is untenable in the light of following judgments.

a) Excel Consultancy vs CCE 2010 (19) S,T.R.665 (Tri. - Del.)

b) Sudesh Sharma vs CCE 2010 (19) S.T.R. 512 (Tri. - Del.)

c) LA Freightlift (F) Ltd. Vs CCE 2009 (14) S.T.R. 513 (Tri. - Chennai)

10.4.5. In the calculation as per the Sr. No. 10 the value of services worked out for taxing event is Rs. 32,75,947/- and tax payable on it is worked out to Rs. 3,34,147/- without considering whether amount of 32,75,947/- is received towards the services rendered after 09.07.2004 or prior to that date. Hence, the opening balance of Rs. 1,11,32,454/-is obviously for the services rendered prior to 01.04.2004 i.e. prior to 09.07.2004 when those services became taxable. In support of this contention the demand of service tax on services rendered prior to the taxability with effect from 09.07.2004 is unsustainable, reliance in support has been placed on the following judgments:

a. Sudesh Sharma vs CCE 2010 (19) S.T.R. 512 (Tri. – Del.)
b. Air Liquide Engg. India P. Ltd. Vs CCE 2008 (9) S.T.R. 486 (Tri. - Bang.)

10.4.6. Even for the subsequent years i.e. 2005-06, 2006-07 and 2007-08 figures are worked out with the erroneous understanding of accounting and without understanding the requirement of Rule 6 of STR, 1994. During the relevant time the service tax liability is to be paid on the basis of payment actually received by the service provider. Therefore, their client has worked out the correct liability of difference of Service Tax Payable amounting to Rs. 16,840 for the year 2006-07 and Rs. 20,205/- for the year 2007-08 which is correct. (letter dated 26.03.2009 addressed by their client to department in reply to audit paras) in the annexure attached to the letter in column no. 3 the amount received towards the commission is disclosed. Thereafter, the deduction of stamp duty tender fees testing charges are deducted to arrive at taxable income in the year 2004-05, 2005-06, 2006-07 and 2007-08 which merits consideration.

10.4.7. In support of the contention that the service tax is payable on the value of services rendered after service became taxable and not on the basis of payment towards the debtors received after the date when the service became taxable, reliance has been placed on the following judgments:

a. CCE vs Schott Glass India Pvt. Ltd. 2009 (14) S.T.R. 146 (Guj.)
b. CST vs Consulting Engineering Services (I) P. Ltd. 2013 (30) S.T.R. 586 (Del.)

10.4.8. Further, without prejudice to the aforesaid submissions it is submitted that the working done by department at Annexure B is contrary to accounting standards as well as facts. The department has not considered the reconciliation submitted by their client vide letter dated 26.03.2009. The gross errors in computation of service tax as under:

a. That service tax liability should have been worked out on monthly basis since the taxable event is 5th day of next month in which

the value for taxable services received in terms of Rule 6 of Service Tax Rules, 1994 and not in lumps at the end of year,

b. The amount received towards the taxable service during the month needs to be considered on actual receipts during the month and not by mathematical calculation of opening balance plus Sales during the period Less closing balance. Balances of debtors maintained in the books of account cannot reflect actual receipt of value as it may be different on account of discounts, reimbursements etc.

c. The deductions claimed by their client on account of reimbursement of Octroi Charges, Repairs and Maintenance for Meter, Travelling Expenses, stamp duty, courier charges as explained and submitted along with relevant documents vide letter dated 26.03.2009 were not at all considered neither any counter query has been raised by department before issuance of impugned Show Cause Notice.

d. Further, differential value derived for determination of service tax value is inclusive of service tax as stated in the column no. 5 and 6 of Annexure B whereas the service tax has been worked out without doing backward calculation.

10.4.9. The above gross errors exhibit total non-application of mind on the part of department while issuing the impugned SCN and for this reason also as per settled law in catena of judgments the Show Cause Notice arising out non-application of mind needs to be set aside. In support of this contentions the reliance is placed on the following judgments:

(a) Evergreen Suppliers Vs CCE 2008(9) S.T.R. 467 (Tri-Bang)

10.4.10. It is settled preposition of law that the reply to audit para submitted by the Assessee should be considered.

10.4.11. In this case their client has submitted the explanation qua the demand on business auxiliary services (Commission Agent Services) in form of reconciliation which merits the consideration and as per that the amount of service tax payable works out to Rs. 16,840/- and Rs. 26,205/- for the year 2006-07 and 2007-08 respectively.

10.4.12. In support of this contention reliance has placed on the following judgments:

(a) TVS Motor Company Ltd. Vs CCE 2018(16) G.S.T.L. 17 (Mad)
(b) Suresh Synthetics Vs CCE 2009 (245) E.L.T. 792 (Tri.- Ahmd)

10.5. Cenvat Credit availed on the basis of Debit Notes issued by the Commission Agents Annexure D: Rs. 45,97,501/-

10.5.1. The impugned Show Cause Notice proposed to demand the cenvat credit of service tax availed on the basis of debit notes issued by M/s. Dhariwal and Doshi Industries Pvt Ltd and M/s. Gupta Metallics Power Ltd during the period 2006-07 and 2007-08.

10.5.2. The allegations made in the impugned Show Cause Notice for such denial is that at the time of issuance of said debit notes said service providers were not registered with the service tax department and has obtained the service tax registration on subsequent dates.

10.5.3. In this regard, it is submitted that there is gross error in computation of Cenvat Credit availed on the basis of Debit Notes issued by M/s. Dhariwal and Doshi Industries Pvt Ltd and M/s. Gupta Metallics & Power Ltd during the period 2006-07 and 2007-08 in the Annexure C to the Show Cause Notice.

10.5.4. In the said Annexure C the debit notes reflected in the table for the year 2006-07 are shown as issued by M/s. Dhariwal and Doshi Industries Pvt Ltd whereas the said Debit Notes were actually issued by M/s. Gupta Metallics & Power Ltd. the corrected table is submitted by way of chartered accountant certificate dated 10.09.2011.

10.5.5. In view of the aforesaid factual corrections their client has availed the Cenvat credit to the tune of Rs. 22,99,372/- on the basis of Debit Notes issued by M/s. Gupta Metallics & Power Ltd during the period 2006-07 and to the tune of Rs. 10,08,336/- on the basis of Debit Notes issued by M/s. Dhariwal & Doshi Indus. Pvt. Limited. Thus, total Cenvat credit allegedly availed wrongly during the period is Rs. 33,07,708/- (Rs. 22,99,372/- + Rs. 10,08,336M and not Rs. 45,97,501/- as alleged in the impugned Show Cause Notice at Annexure C.

10.5.6. In support of this contention the detailed Chartered accountant certificate, affidavits of said commission agents along with the copies of debit notes, service tax registration certificates, computation of tax and challan evidencing payment of service tax by the respective commission agents are annexed herewith. Also enclosed are copies of Chartered accountant certificate and Affidavits of Commission Agents.

10.5.7. In view of the aforesaid, facts and circumstances, it is submitted that the said commission agents were registered at the time of issuance of impugned Show Cause Notice under the service tax but under the different category whereas at the time of payment of service tax they had amended their registration certificate to that effect and deposited the service tax with the Revenue.

10.5.8. Therefore, the allegation in the Show Cause Notice that the Commission Agents were not registered at the time of issuance of Debit Notes get negated and for the procedural lapses if any, the substantial benefit of Cenvat Credit in the hands of recipient of service cannot be denied who had availed the Cenvat credit after making payment of value along with tax to the service provider.

10.5.9. It is worthwhile to note that apart from such procedural aspect there is no other allegation in thc Show Cause Notice for denial of Cenvat credit. The service of Commission Agent is received and consumed by their client for manufacturing of their finished goods cleared on payment of duty. Thus, the eligibility of availment of Cenvat credit is not in dispute.

10.5.10. In the given facts and circumstances their client has correctly availed the Cenvat credit and therefore, the impugned Show Cause Notice proposing denial of credit is not sustainable. In support of this contention reliance is placed on the following judgments:

a) Mafatlal Industries Ltd. Vs CCE 2020 (43) G.S.T.L. 562 (Tri. - Ahmd.)
b) General Manager, BSNL Vs CCE 2014 (36) S.T.R. 445 (Tri, - Del.)
c) Secure Meters Limited vs CCE 2010 (18) S.T.R. 490 (Tri. - Del.)

10.5.11. In case of their client, the impugned Show Cause Notice is issued on the basis of figures mentioned in the Balance Sheet and Profit and Loss Account vis-à-vis Service Tax Returns filed with the department without conducting investigation and inquiry in the matter as well as without considering the explanations offered by their client along with supporting documents.

In support, reliance has been placed on the following case laws:-

a) Shubham Electricals vs CCE 2015 (40) S.T.R. 1034 (Tri. - Del.)

b) Ess Gee Real Estate Developers Pvt. Ltd. Vs CCE 2020 (34) G.S.T.L. 486 (Tri. - Del.)

In view of the aforesaid submissions, in addition to reply to Show Cause Notice, and submissions submitted at the time of personal hearing in first round of litigation, it was thereby prayed that the impugned Show Cause Notice be set aside and thereby confer justice in the hands of their client.

PERSONAL HEARING:-

11. The personal hearing in this matter had been fixed on 27.10.2023 which was adjourned on request of shri H G Dharmadhikari & D.A. Bhalerao, Advocate, authorized representative of the said assessee. Further, as per their request, next date of hearing in this matter was fixed on 20.11.2023. Shri D. A. Bhalerao, Advocate, authorized representative of the said assessee appeared for hearing on the scheduled date. He submitted a written defence submission alongwith supporting documents and requested to decide the case based on their submission.

DISCUSSION AND FINDINGS:

12. I have gone through the Show Cause Notice dated 28.11.2011, OIO No. STC/51/COMMR/AHD/2011 dated 28.11.2011 issued by the then adjudicating authority i.e. the Commissioner of Service Tax, Ahmedabad, the order of Hon'ble CESTAT, Ahmedabad bearing No. A/10043/2023 dated 12.01.2023 and the written submission dated 20.10.2023 of the said assessee and all other records available in the file.

12.1. I find that the matter has been remanded back to me by the Hon'ble Tribunal, vide its order No. A/10043/2023 dated 12.01.2023 for passing a fresh order on three issues/points which are as under:

a) Short payment of Service Tax of Rs. 6,44,202/- on GTA Service towards the difference in freight expenses mentioned in profit and loss account and ST-3 returns needs to be re-considered based on CA Certificate or to be verified from other required documents if needed.

b) Demand of Short payment of Service Tax of Rs. 11,05,988/- on commission income needs to be justified alongwith clarity about the nature of service category under which it falls.

c) Demand of Cenvat Credit of Rs. 45,97,501/- availed on strength of improper documents (Debit Notes) needs to be reconsidered in response to departmental verification report received after the adjudication of the present case.

12.2. The three principal issues as enumerated above are being taken up individually for discussion; I first take up the issue of short payment of service tax on 'Freight Expenses'.

12.2.1. I find that in so far as the issue of the demand of Service Tax on the GTA Service, the Hon'ble Tribunal has observed that the adjudicating authority has rejected the CA Certificate without calling any other supporting documents and thereby the CESTAT has remanded the case to decide it afresh with necessary supporting documents if required in case of doubt about the CA Certificate.

12.2.2. In terms of directions of the Hon'ble Tribunal, I have re-checked the details submitted by the said assessee as well as those available on records and find that there was short payment of service tax of Rs. 6,44,202/- towards GTA in F.Y. 2004-05 to 2007-08, however, the said assessee had accepted the service tax liability of Rs. 2,52,936/- for F.Y. 2004-05, 2005-06 & 2006-07 which was appropriated but they had contested the demand of service tax pertaining to F.Y. 2007-08. The working of demand of service tax for F.Y. 2007-08 is as under:-

Sr. No.	Description	2007-08
1	Freight Charge/Expenses (G.T.A.) as per Balance Sheet	1,72,74,869/-
2	Freight amount as per ST-3 returns	46,12,545/-

3	Difference in freight amount (1-2)	1,26,62,324/-
4	Taxable value after giving 75% abatement	31,65,581/-
5	Service Tax payable/ short payment of service tax	**3,91,266/-**

12.2.3. It is incumbent upon me to record here that before commencement of the adjudication proceeding, letters F.No. STC/15-30/OA/Denovo/2023 dated 25.10.2023 & 27.10.2023 for personal hearing in this matter had been issued which expressly requested the said assessee to submit the relevant supporting documents as per direction of the Hon'ble Tribunal so as to enable the adjudicating authority to verify the correctness of their claim but even after passage more of more than 14 years from the date of issuance of show cause notice and even after 1 year from the date of order of Hon'ble Tribunal, they have neither bothered nor made any efforts to submit any supporting documents in support of the eligibility to avail the exemption benefit. Even during the course of personal hearing, expect for submitting an unabridged written reply by mentioning that they had submitted reply to show cause notice, written submissions and additional submission alongwith the supporting documents at the time of personal hearing before the original adjudicating authority, copy of all such submissions only have been submitted before me. But I am constrained to observe that not even a single new document has been produced by the assessee in support of their claim to exemption before me.

12.2.4. Further, it would not be out of place to mention here that my predecessor adjudicating authority had also made observation that

(i) On verification of General Ledger- Bank -Cash-Journal with corresponding Lorry receipt/consignment notes, in all the cases, the assessee had made payment of freight amount only.

(ii) Lorry receipts/Consignment notes did not have details regarding the person (consigner/ consignee/ GTA) liable to pay service tax.

(iii) The Chartered Accountant's Certificate had also been produced without any supporting documents to buttress the claim for exemption from payment of service.

(iv) The deductions should be supported by the relevant ledgers of freight expense.

(v) The assessee was liable to pay service tax under reverse charge mechanism as recipient of service in terms of Rule 2(1)(d)(v) of the Service Tax Rules, 1994.

12.2.5. In these circumstances, I am left no option except to have a re-look into the documents and records available with me.

12.2.6. I find that the said assessee had re-produced a Reconciliation Statement in respect of freight expenses shown in Balane Sheet and ST-3 returns for the period 2004-05 to 2007-08 alongwith a Certificate showing detailed Break-up of Freight and Octroi Expense for F.Y. 2007-08 unit wise issued by Shri Anil P. Karia, Chartered Accountants of M/s. Bafan Karia Associates, Mumbai.

12.2.7. The above certificates had shown deductions such as (i) Freight expense on which service tax paid by GTA (ii) Misc freight expense having value less than Rs. 1,500/- per consignment covered under exemption in terms of Notification No. 34/2004-ST dated 03.12.2004. (iii) Octroi Charges (iv) Freight & octroi charges of other units which were consolidated in Balance sheet for F.Y. 2007-08. But the said assessee had not produced any supporting documentary evidences so as to make it possible to verify the correctness of such deductions and corroborate the same with the documents such as (i) proof of payment of amount of Service Tax paid to the GTA (ii) ledgers and bills of freight/octroi expenses and with respect to value of GTA expenses having value less than Rs. 1,500/- per consignments. Without producing any supporting documentary evidences, the CA certificates dated 20.08.2010 issued before more than 14 years ago does not have not much water to buttress the exemption claim of the assessee at this stage.

12.2.8. I, further, find that the assessee had relied upon various decisions of the Hon'ble Tribunal which dealt with the issue of payment of service tax on the actual realization arising out of the liability only after receipt of the payment whereas in the case before me, the assessee was liable to pay service tax under reverse charge mechanism being recipient of service in terms of Rule 2(1)(d)(v) of the Service Tax Rules, 1994 and the value on which service tax was liable to be paid was not the amount earned by the assessee but it was the amount that they had paid to the service providers. Further, they have failed to produce any documentary evidence in support of their claim at the time of personal hearing conducted before the undersigned as an adjudicating authority.

12.2.9. In view of the above, I am constrained to hold the view that Service Tax of Rs. 6,44,202/- for the years 2004-05 to 2007-08 is recoverable from the assessee under the proviso to Section 73(1) of the Finance Act, 1994 alongwith interest under Section 75 ibid. I find from the facts of the case that Service Tax of Rs.

2,52,936/- for the year 2004-05 to 2006-07 had already been paid by the assessee. The same will be required to be appropriated against the demand of Rs. 6,44,202/- and the remaining amount of Service tax of Rs. 3,91,266/- for the year 2007-08 is required to be recovered under the proviso to Section 73(1) of the Finance Act, 1994 alongwith interest under Section 75 ibid.

13. The next issue which needs to be discussed pertains to short payment of Service Tax amounting to Rs. 11,05,988/- on Commission Charges received by the assessee during the period F.Y. 2004-05 to 2007-08.

13.1. I find that the Hon'ble Tribunal has observed that the Show Cause Notice merely picks up the head of commission from balance sheet and compares the same with the ST-3 return. The OIO also made the vague reference to commission received in respect of repairs and attending to customers complaints. In absence of clarity of nature of service it is difficult to ascertain how the service would become taxable under the category of Business Auxiliary Service. Accordingly, appeal has been allowed by way of remand to decide the issue afresh after examining the actual contract under which such payment has been received and it has been directed to specially examine the nature of services provided and its taxability.

13.2. I find that with regard to the nature of service in respect of above, it would be pertinent to mention here that the undisputed fact which was never challenged by the said assessee is that the assessee had received income from the activities carried out as a commission agent and even though they had also paid service tax on such commission income under the category of Business Auxiliary Services. I also find from their reply and documents available on records that they had received income as sale commission, hence the same is also not disputed.

13.3. It is pertinent to mention here that the said assessee had submitted reply by stating that they had been working as pure agent of their clients viz. VXL Landis and GYR Ltd. (now known as Siemens Metering Ltd.) for making best efforts to promote sale of their products. I further find some debit notes (GEB/DR/02 dated 24.08.2005, GEB/DR/03 dated 31.12.2005, GEB/DR/01 dated 05.05.2006) issued by M/s Dhariwal & Doshi Industries Pvt. Ltd. to the said assessee available in file which show the activity as sale commission towards representing & rendering service for procurement of order for supply of goods. The said debit notes were issued in relation to service for procurement of orders for supply or sales of goods of the Principals provided on behalf of the said assessee. Looking at the above, the point that the said assessee was acting

as sales agent for promotion of sales of goods of their clients and was receiving commission charge for such activities is quite clearly established.

13.4. The activities undertaken as a commission agent accurately falls under the category of Business Auxiliary Service. For sake of brevity and better understanding the definition of Business Auxiliary Service is reproduced as under:-

Business Auxiliary Service

(Section 65(19) of the Finance Act, 1994)

*"**Taxable Service**" means any service provided or to be provided to a client by any person in relation to business auxiliary service.*

(Section 65 (105) (zzb) of the Finance Act, 1994)

(A) Date of Introduction:

01.07.2003 vide Notification No.7/2003-ST dated 20.06.2003

(B) Definition and scope of service:

*"**Business Auxiliary Service**" means any service in relation to, -*

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

*[**Explanation** - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of change, organised, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;]*

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

*[**Explanation** - For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]*

(v) production or processing of goods for, or on behalf of the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (viii), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services,

management or supervision, and ***includes services as a commission agent,*** *but does not include any activity that amounts to "manufacture" of excisable goods.*

Explanation *- For the removal of doubts, it is hereby declared that for the purposes of this clause, -*

(a) *"**Commission Agent**" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person -*

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(b) *"**Excisable Goods**" has the meaning assigned to it in clause (d) of Section 2 of the Central Excise Act, 1994;*

(c) *"**Manufacture**" has the meaning assigned to it in clause (f) of Section 2 of the Central Excise Act, 1944;*

Hence, it is evident from the above that the income of commission head reflected in Balance Sheet has correctly been compared with the figures reported in the ST-3 returns and accordingly short payment of service tax was pointed and demanded in the Show Cause Notice. Hence, the question of nature of service in respect of such transactions is amply clarified and the sale commission income is accurately falling under the category of Business Auxiliary Service.

13.5. From the above, it is apparent that the nature of service towards income received as commission by the assessee is nothing but rendering of service as sales commission agent which clearly falls under "Business Auxiliary Service". Now the point that needs to be determined is about its taxability.

13.6. From the definition of "Business Auxiliary Service" as elaborated herein above, I find that w.e.f. 01.07.2003 Service as a Commission agent is included under the table of "Business Auxiliary Service" wherein it was explained that "**Commission Agent**" means any person who acts on behalf of another person and causes sale or purchase of goods, **or provision or receipt of services**, for a consideration, and includes any person who, while

acting on behalf of another person - (i) deals with goods or services or documents of title to such goods or services; or (ii) collects payment of sale price of such goods or services; or (iii) guarantees for collection or payment for such goods or services; or (iv) undertakes any activities relating to such sale or purchase of such goods or services;

13.7. I find that vide Notification No. 13/2003-ST dated 20.06.2003, the Business Auxiliary Service provided by a commission agent has been granted exemption from payment of Service Tax w.e.f. 01.07.2003. I, further, find an explanation to the said Notification that "commission agent" means a person who causes sale or purchase of goods, on behalf of another person for a consideration which is based on the quantum of such sale or purchase. In view of the said explanation, it is evident that the commission agent who causes sale and purchase of goods on behalf of another person is only eligible for exemption from the payment of service tax but the exemption provided under the said notification is not applicable if the cause of sale and purchases is towards provisions of services provided by such commission agent. From the documents available with me, I find that the assessee had received commission for provisions of representing & rendering services to their clients for procurement of orders for supply/sale of goods. In view of this, the commission income received by the said assessee is towards provisions of services in respect of procurement of orders for sale/supply of goods of their principals which cannot be extended to provide the exemption benefit in guise of sale or purchases of goods and therefore, the activity, as commission agent towards provisions of service carried out by the said assessee, is liable for payment of service tax under the category of "Business Auxiliary Service" w.e.f. 01.07.2003.

13.8. Now coming to the submission of the said assessee, I find that they have mainly contested that prior to introduction of Notification No. 08/2004-ST dated 09.07.2004, the Service tax was not applicable towards activity of commission agent under the category of Business Auxiliary Services and the opening balance as on 01.04.2004 as well as amount of commission income between 01.04.2004 to 09.07.2004 was also allowed for exemption as per Notification No. 13/2003-ST dated 20.06.2003. The said argument does not hold much water to shield them as it has already been discussed in above paras that the commission income received by the said assessee, towards provisions of services provided in relation to procurement of orders for sale/supply of goods of their principals, cannot be extended to exemption from payment of service tax under Notification No. 13/2003-ST dated 20.06.2003. Therefore, the activity as commission agent in relation to

provisions of service carried out by the said assessee was taxable w.e.f. 01.07.2003 under the category of "Business Auxiliary Service". I find that the exemption benefit in respect of commission income pertains to provisions of cause of sale and purchase of goods had been given while calculating the demand of service tax of Rs. 11,05,988/- in the Show Sause Notice.

13.9. It would be appropriate to reproduce the calculation sheet of SCN for sake of clarity in the issue:-

ANNEXURE 'B'

WORKS-SHEET OF COMMISSION CHARGES RECEIVED DURING THE PERIOD 2004-05 TO 2007-08

Sr. No.	Description	2004-05	2005-06	2006-07	2007-08
1	Gross Commission & Service Charge as per Balance Sheet	51698934	43762424	54716033	53394730
	Add. O.B. Debtors	11132454	8144076	3105378	10068566
2	Total (1 + O.B. Debtors)	62829388	51906509	57821411	63763296
	Less C.B. Debtors	8144076	3105378	10068566	11082815
3	Gross receipt of commission & service charge as per ledger (2 – C.B. Debtors)	54685311	4880122	47752845	52680481
4	Less (i) Stamp duty reimbursement	1032644	2055026	714878	—
	(ii) Tender Fees	48600	—	—	2000
	(iii) Clearing charge	311609	—	—	—
	(iv) Credit note for rate diff.	96000	171912	7020	—
	(v) Testing Charge	—	30351	42723	7691
	Total (i to v)	1488763	2257289	764621	9691
5	Income of commission (3-4) with Service Tax	53196558	46543833	46988224	52670790
6	Income as per S.T. 3 (With Service Tax)	27768144	40933746	46259815	51777331
7	Diff. commission & service charge (5-6)	25428414	5610087	728609	893459
8	Less sales Commission from 01.04.04 to 09.07.04	13953672	—	—	—
9	Less O.B. Debtors Sales Commission	8198795	—	—	—
10	Net Diff. Commission & service charge (7-8-9)	3275947	5610087	728609	893459
11	Diff. of S.T. to be payable	334147	572229	89181	110431
	Grand Total				1105988
	Paid				43005
	Difference Payable				1062983

Assistant Commissioner, Service Tax, Div-III, Ahmedabad.

Superintendent, Service Tax, AR-13, Div-III, Ahmedabad.

13.10. From the above, it can be seen that at Sr. No. 9 for the F.Y. 2004-05, an amount of Rs. 81,98,795/- has been reduced towards opening balance of debtors sales Commission to arrive at the taxable value which shows that the opening balance of debtors was inclusive of income of sales commission towards provisions of sales of goods as well as services. It is incumbent upon me to mention here that the commission income in respect of provisions of service is covered under cover of ambit of taxable service tax w.e.f. from

01.07.2003 and not from 09.07.2004 as claimed by the said assessee. Further, it can also be seen at Sr. No. 8 for the F.Y. 2004-05 that an amount of Rs. 1,39,53,672/- for the period from 01.04.2004 to 09.07.2004 has also been reduced to arrive at the taxable value for F.Y. 2004-05. It is pertinent to mention here that the Hon'ble Tribunal has also observed that the defence of the appellant that the benefit of exemption notification on the sales commission has not been extended is incorrect.

In view of the above, it is evident that the permissible deductions as per Notification No. 13/2003-ST dated 20.06.2003 and Notification No. 08/2004-ST dated 09.07.2004 have undeniably been given to the assessee while issuing the Show Cause Notice.

13.11. I. Further, I find that the said assessee had relied upon various judgments to argue that the services rendered by them prior to the date of introduction of levy of Service was "Business Auxiliary Service". I do not find any merit in this contention with facts of the issue pending before me. As it has already been discussed in my findings in above paras that the service of commission agent has been covered under the ambit of taxable chain w.e.f. 01.07.2003 however in case of provisions of sale and purchase of goods, the same was excluded from levy of service tax and the benefit of such exemption has been provided to the assessee in the demand notice itself, hence, I do not find any reason not to hold the view that the demand of service tax of Rs. 11,05,988/- has correctly been calculated in the show cause notice and my findings are in conformity with SCN. Therefore, Service tax of Rs. 11,05,988/- is required to be recovered from the assessee under the proviso to Section 73(1) of the Finance Act, 1994 along with interest under the provisions of Section 75 ibdi.

14. The next issue pertains to wrong availment of Cenvat Credit amounting to Rs. 45,97,501/- taken during the period 2006-07 to 2007-08 on strength of debit notes issued by M/s Gupta Metallics and Power Ltd. and M/s Dhariwal & Doshi Industries Pvt. Ltd.

14.1. I find that while remanding back the matter, the Hon'ble Tribunal has observed that a copy of letter dated 21.01.2013 of the Commissioner of Service Tax, Ahmedabad regarding verification in respect of debit notices had been obtained after adjudication of the case by the adjudicating authority. Since this report was not available with the adjudicating authority the decision could not be taken after examining the complete facts. For ease of reference, copy of relevant page of the order of the Hon'ble Tribunal is reproduced hereunder:-

revenue in respect of such debit notes. The said report indicates that no debit notes were issued by M/s Gupta Metallics and Power Ltd and M/s Dhariwal & Doshi Industries Pvt Ltd during 2006 -2007and the same were fake. However, 4 debit note issued by M/s Dhariwal & Doshi Industries Pvt Ltd in the year 2007 -2008 were found to be genuine. Similarly debit notes issued by M/s Gupta were found to be genuine. The revenue has placed on record letter dated 21.01.2013 of Commissioner of Service Tax Ahmedabad. The letter is reproduced below:-

> "Please refer to your office letter F.No. ST/131/2012 dated 03.12.2012 on the above subject.
>
> The total Cenvat credit involved is Rs. 45,97,501/- out of which Rs. 33,07,708/- pertains to the Division –I of Central Excise Vadodara – I. The Dy. Commissioner, Vadodara –I has verified the relevant Cenvat Credit Debit /notes and has found that the debit notes issued during the year 2006 -07 involving service tax of Rs. 22,99,372/- were not issued by M/s. Dhariwal & Doshi Industries Pvt Ltd and hence, appear to be fake. Since the debit notes are fake with no entres in the registers at their end, there is no question of issuing SCN.
>
> Four debit notes issued by M/s. Dhariwal & Doshi Industries Pvt Ltd in the year 2007 -2008 are involved in this case. The deputy Commissioner, Service Tax, Division – III, Ahmedabad has verified these four debit notes with the documents supplied by the Deputy Commissioner, Vadodara –I and it is reported that service tax has been paid in respect of these 4 debit notes viz., Debit Note No. GEB/DR/02 dt. 24.08.2005, GEB/DR/03 dt. 31.12.2005, GEB/DR/01 dt. 5.5.2006 and GEB/DR/02 dt. 16.5.2006 involving total service tax of Rs. 10,08,336/-.
>
> Another Rs. 12,89,793/- pertains to Central Excise, Division Chandrapur. The Dy Commissioner has verified an amount of Rs. 14,18,141/- (including above Rs. 12,89,793/-) as admissible and can be allowed. AC/DC report No. CNo. IV (11) 168/ST/Misc/Infor/2012, dtd 20.12.12 of DC Chandrapur along with its enclosures is enclosed with this letter for perusal please."

5.3 It is noticed that this report has been obtained after adjudication of the case by the adjudicating authority and the same was not available at the time of adjudication. Since this report was not available with the adjudicating authority the decision could not have been taken after examining complete facts. Consequently the demand on this issue is also

Before going ahead with further discussion in this matter, it would be appropriate for me to take a look towards the fact of case wherein I find that the assessee had availed CENVAT Credit amounting to Rs. 45,97,501/- during 2006-07 & 2007-2008 on strength on Debit Notes issued by (i) Dhariwal Doshi Industries Limited (ii) M/s Gupta Metallics & Power Limited. Further, it is also on record that at the time of taking CENVAT Credit on strength on such debit notes, both of these companies were not registered with the Service Tax department and the service tax registration had been taken later on 05.07.2006 & 01.06.2007 respectively.

.2. As regard availment of Cenvat Credit of Service Tax amounting to Rs. 22,99,373/- in the year 2006-07

.1. It is also pertinent to mention here that during the initial adjudication proceeding of the case, the payment of service tax in respect of such debit notes had not been validated by the said assessee with submission of relevant tax paying documents entitled for availing of the said credit. However, now on perusing the content of the letter dated 21.01.2013 of the Commissioner of Service Tax, Ahmedabad as referred to in the Hon'ble Tribunal's order, the entire issue needs to be looked afresh. As per the said letter, it is undisputed that no debit notes were issued by M/s Gupta Metallics and Power Ltd. and M/s Dhariwal & Doshi Industries Pvt. Ltd. during 2006-07 and the same were found to be fake. Accordingly, the CENVAT Credit of Rs. 22,99,372/- taken by the said assessee during 2006-07 based on debit notes issued of M/s Dhariwal & Doshi Industries Ltd is not available at all to them.

.2.2. The said assessee had submitted that the debit notes for the year 2006-07 were shown as issued by M/s Dhariwal and Doshi Industries Pvt. Ltd. whereas the said Debit Notes were actually issued by M/s Gupta Metallics & Power Ltd and the said assessee has claimed the same as admissible credit with support of CA Certificates dated 10.09.2011. The said argument is not acceptable since they have not produced any documentary evidences to sustain the payment of service tax either from their end or from the supplier's end. Rather than this, I find various factor like not having service tax registration number at the material time by the supplier, non-submission of tax paying documents, observation made by the Hon'ble Tribunal based on verification report issued by the Commissioner of Service Tax, Ahmedabad to effect that no debit notes were issued by M/s Gupta Metallics and Power Ltd and M/s Dhariwal & Doshi Industries Pvt. During 2006-07 and the same were fake and I categorically hold the view that the Cenvat credit involving Service Tax of Rs. 22,99,372/- is liable to be disallowed and the same needs to be recovered from the said assessee.

14.3. Availment of Cenvat Credit of Service Tax amounting to Rs. 10,08,336/- in the year 2007-08 towards 4 Debit Notes issued by M/s. Dhariwal & Doshi Industries Pvt. Ltd.

14.3.1. I find that the Hon'ble Tribunal in its impugned order has referred to verification report regarding the service tax payment in respect of debit notes involving total service tax of Rs. 10,08,336/- wherein it was reported that the payment of service tax in respect of 4 Debit Notes involving total service tax of Rs. 10,08,336/- had been paid by M/s Dhariwal & Doshi Industries Pvt.

Ltd. Hence, the question of payment of service tax against the said debit notes appears to be acceptable. But at the same time, I observe that the service provider i.e. M/s Dhariwal & Doshi Industries Pvt. Ltd. had mentioned Service Tax Registration No. 1003/GTA/CND/2004-05 which in fact had been issued for payment of service tax under the category of "Goods Transport Agency" and not for the payment of "Business Auxiliary Service' on strength of which the Credit of Rs. 10,08,336/- had been availed. It means the service provider had provided the service and issued debit notes without mentioning a valid service tax registration and at the material point of time they were unable to pay applicable service tax.

14.3.2. I observe that the provisions of Section 68 of the Finance Act, 1994 and Rule 6 of the Service tax Rules, 1994 governs payment of service tax and there is no liberty to pay service tax to the service providers at a later date at his own so as to create a situation where the Cenvat Credit can be availed by the recipient of service in advance.

14.3.3. I, further, observe that the Show Cause Notice alleges that Rule 9 of the CENVAT Credit Rules, 2004 prescribes documents for availing Cenvat Credit wherein debit notes is not a prescribed documents for availing Cenvat Credit. As per clause (f) of the Rule 9(1) of the Cenvat Credit Rules, 2004, an invoice, a bill or challans issued by a provider of input service credit is admissible and it is explicitly clear that no other document other than the prescribed documents can be permissible for the purpose of availing cenvat credit. Therefore, the debit notes without having proper service tax registration no. also are not accepted as valid documents for the purpose of Cenvat Credit. I place reliance on the Judgment of Hon'ble Tribunal Delhi, reported at Godrej Consumer Products Ltd. v/s Commissioner of C.Ex., Indore reported at 2010(20) STR 609 (Tri-Delhi) the relevant text is reproduced as under:-

"Considering the submissions made by the ld. DR and on perusal of the records, I find that the lower appellate authority has rightly denied the input service credit to the appellants, which they have taken on the strength of debit notes. As per Rule 9(1)(i) of the Cenvat Credit Rules, 2004, the credit can be availed on the strength of invoice, supplementary invoice, challan or bills of entry. Hence, I do not find any infirmity in the impugned order for denial of input service credit. Accordingly, the demand for input service credit is confirmed."

In view of the above, I find that since there is no substantive compliance of the law to consider the debit notes as valid document for availing to cenvat credit, hence, the same is liable to be disallowed and is required to be recovered from the said assessee.

14.4. Availment of Cenvat Credit of Service Tax amounting to Rs. 12,89,793/- in the year 2007-08,

14.4.1. I find that the Hon'ble Tribunal in its impugned order has referred to verification report regarding the service tax payment of Rs. 14,18,141/- (including Rs. 12,89,793/- also) which pertains to Central Excise, Division, Chandrapur and the same was found as admissible by the Jurisdictional Deputy Commissioner. At the same time, I find that the said assessee have submitted in their reply that they have not availed the said Cenvat Credit as the same does not pertain to them and A Chartered Accountant's Certificate dated 20.08.2010 produced at the material time before the then adjudicating authority to effect that debit note No. 6 dated 21/05/2006, No. 07 dated 20.05.2006, No. 08 dated 24.05.2006 involving amounting to Rs. 12,87,793/- issued by M/s Gupta Metallics & Power Ltd. were erroneously added in demand for year 2007-08- as the said Debit Notes were already considered in Cenvat Credit amount of Rs. 22,99,372/- in year 2006-07 which can be verified from the credit entries available in Table for year 2006-07 pertaining to Division-I, Central Excise, Vadodara-I which appears to be fake. This can be put in a simpler way by saying that the question of availment of said Cevat Credit by the said assessee is no longer available at this stage. Therefore, without going into depth of the relevant documents, I am disallowing the Cenvat Credit of Rs. 12,89,793/- to the said assessee.

Looking to the above fact and circumstances and non-submission of documentary evidences in support of their claim, I am constrained to come to conclusion that the Cenvat Credit amounting to Rs. 45,97,501/- is not admissible to the said assessee and the same is required to be recovered from the said assessee alongwith applicable interest under the provisions of Section 14 of the Cenvat Credit Rules, 2004.

15. Imposition of penalty under the provisions of Section 76 and 78 of the Finance Act, 1994 & Rule 15 of the Cenvat Credit Rules, 2004 readwith Section 78 of the Finance Act, 1994.

15.1. As regards imposition of penalty under the Section 76(1) of the Finance Act, 1994, which prescribes penalty for failure to pay service tax in accordance with the provisions of Section 68 or rules made under this chapter within stipulated time. As per discussion in paras supra, it has been established beyond doubt that the said assessee had failed to pay applicable service tax towards GTA Service as well as Business Auxiliary Service and have also failed to reverse the inadmissible Cenvat Credit within time period as

prescribed. Therefore, I hold them liable to penalty under the provision of Section 76 of the Finance Act, 1994 as applicable at the material time.

15.2. As regards imposition of penalty under Rule 15 of the Cenvat Credit Rules, 2004 which prescribes penalty for wrongly taken or utilised Cenvat Credit of input/capital goods/input services. I find that the case in my hand is crystal clear as it pertains to wrong availment and utilisation of Cenvat Credit of input services on strength of debit notes which was not valid documents as prescribed under Rule 9(1) of the Cenvat Credit Rules, 2004. I, further, find that it is also on record that some of the debit notes were fake, hence, it would not be out of place to mention here that the said assessee had failed to discharge the burden of proof regarding the admissibility of the Cenvat Credit cast upon them in terms of provisions of Rule 9(6) of the Cenvat Credit Rules, 2004. The availment of Cenvat Credit on strength of invalid document such as debit notes or fake documents had it not been detected by the departmental authorities during the course of audit, it would have gone undetected. Hence, I hold a view that this is a case of wrong availment of Cenvat Credit amounting to deliberate non-declaration and suppression of vital information from the department with a sole intention to evade payment of service tax.

15.3. As regards imposition of penalty under Section 78 of the Finance Act, 1994, In the present case the suppression of facts and willful misstatement has been established, as discussed in the paragraphs *supra.* I consider this a fit case for imposing penalty under Section 78 of the Finance Act, 1994, which provides penalty for suppressing, etc. of value of taxable services reads as under :-

Section 78 (1) – *"Where any service tax has not been levied or paid, or has been short-levied or short-paid, or erroneously refunded, by reason of*

(a) *fraud or*

(b) *collision 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 the intent to evade payment of service tax,*

The person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall be liable to pay a penalty, in addition to the service tax and interest thereon, if any, payable by him, which shall not be less than, but which shall not exceed twice, the amount of service tax so not levied or paid or short-levied or short -paid or erroneously refunded;

Provided that where such service tax as determined under sub-section (2) of section 73, and the interest payable thereon under section 75, is paid within thirty days from the date of communication of order of the Central Excise Officer determining such service tax, the amount of penalty liable to be paid by such person under the section shall be twenty -five percent of service tax so determined;

Provided further that the benefit of reduced penalty under the first proviso shall be available only if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso:

Based on above facts and circumstances, discussion and documents available on records, the question of suppression of facts with intent to evade payment of service tax and non-reversal of inadmissible credit in this case has been established beyond doubt and the detection of non-payment of service tax as well as non-reversal of credit was unearthed only on scrutiny of books of account or other statutory financial records of the assessee during the course of audit by the departmental officers. Had the audit not been conducted, the said fact would have never come to light and such a huge revenue leakage would have remained undetected. Various Courts including the Apex Court have clearly laid down the principle that tax liability is a civil obligation and therefore, the intent to evade payment of tax cannot be established by peering into the minds of the tax payer, but has to be established through evaluation of tax payers' behaviour. The responsibility on the tax payer to voluntarily make information disclosures is much greater in the system of self-assessment. The omission or commission on the part of the assessee has clearly demonstrated their intention to evade payment of service tax, as they were very much aware of the unambiguous provisions of Finance Act, 1994 and Rules made there under. They have failed to disclose to the department at any point of time, the fact regarding short payment of service tax and wrong availment of cenvat credit as discussed in forgoing paras. All these operates on the basic and fundamental premise of honesty of the assessee; therefore, the governing statutory provisions create an absolute liability on the assessee when any provisions is contravened or there is breach of trust placed on them. Such contravention on the part of the assessee tantamounts to willful misstatement and suppression of facts with an intent to evade the payment of the duty/ tax. It is also evident that such fact of contravention and short paying the service tax by not declaring actual taxable value of the service provided and wrong availment of cenvat credit, as discussed earlier, on the part of the assessee came to the notice of the department only when the audit was conducted by the department. In the case *of Mahavir Plastics versus CCE Mumbai, 2010*

(255) ELT 241, it has been held that if facts are gathered by department in subsequent investigation extended period can be invoked. Therefore, I find that all essential ingredients exist in this case to invoke the extended period under proviso to Section 73(1) of the Finance Act, 1994.

15.4. In this regard, I rely upon, the observations of the Hon'ble Apex Court in the case of Rajasthan Spinning and Weaving Mills/ High Court of Gujarat at Ahmedabad in Tax Appeal No. 338 of 2009 in the case of Commissioner of Central Excise, Surat-I Vs. Neminath Fabrics Pvt. Ltd. dated 22.04.2010 regarding applicability of the extended period in different situations.

*"**11.** A plain reading of sub-section (1) of Section 11A of the Act indicates that the provision is applicable in a case where any duty of excise has either not been levied/paid or has been short levied/short paid, or wrongly refunded, regardless of the fact that such non levy etc. is on the basis of any approval, acceptance or assessment relating to the rate of duty or valuation under any of the provisions of the Act or Rules thereunder and at that stage it would be open to the Central Excise Officer, in exercise of his discretion to serve the show cause notice on the person chargeable to such duty within one year from the relevant date.*

***12.** The Proviso under the said sub-section stipulates that in case of such non levy, etc. of duty which is by reason of fraud, collusion, or any mis-statement or suppression of facts, or contravention of any provisions of the Act or the rules made thereunder, the provisions of sub-section (1) of Section 11A of the Act shall have effect as if the words "one year" have been substituted by the words "five years".*

***13.** The Explanation which follows stipulates that where service of notice has been stayed by an order of a Court, the period of such stay shall be excluded from computing the aforesaid period of one year or five years, as the case may be.*

***14.** Thus the scheme that unfolds is that in case of non levy where there is no fraud, collusion, etc., it is open to the Central Excise Officer to issue a show cause notice for recovery of duty of excise which has not been levied, etc. The show cause notice for recovery has to be served within one year from the relevant date. However, where fraud, collusion, etc., stands established the period within which the show cause notice has to be served stands enlarged by substitution of the words "one year" by the words "five years". In other words the show cause notice for recovery of such duty of excise*

not levied etc., can be served within five years from the relevant date.

15. *To put it differently, the proviso merely provides for a situation where under the provisions of sub-section (1) are recast by the legislature itself extending the period within which the show cause notice for recovery of duty of excise not levied etc. gets enlarged. This position becomes clear when one reads the Explanation in the said sub-section which only says that the period stated as to service of notice shall be excluded in computing the aforesaid period of "one year" or "five years" as the case may be.*

16. *The termini from which the period of "one year" or "five years" has to be computed is the relevant date which has been defined in sub-section (3)(ii) of Section 11A of the Act. A plain reading of the said definition shows that the concept of knowledge by the departmental authority is entirely absent. Hence, if one imports such concept in sub-section (1) of Section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court. If it is not open to the superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal.*

17. *The proviso cannot be read to mean that because there is knowledge the suppression which stands established disappears. Similarly the concept of reasonable period of limitation which is sought to be read into the provision by some of the orders of the Tribunal also cannot be permitted in law when the statute itself has provided for a fixed period of limitation. It is equally well settled that it is not open to the Court while reading a provision to either rewrite the period of limitation or curtail the prescribed period of limitation.*

18. *The Proviso comes into play only when suppression etc. is established or stands admitted. It would differ from a case where fraud, etc. are merely alleged and are disputed by an assessee. Hence, by no stretch of imagination the concept of knowledge can be read into the provisions because that would tantamount to rendering the defined term "relevant date" nugatory and such an interpretation is not permissible.*

19. *The language employed in the proviso to sub-section (1) of Section 11A, is, clear and unambiguous and makes it abundantly clear that moment there is non-levy or short levy etc. of central excise*

duty with intention to evade payment of duty for any of the reasons specified thereunder, the proviso would come into operation and the period of limitation would stand extended from one year to five years. This is the only requirement of the provision. Once it is found that the ingredients of the proviso are satisfied, all that has to be seen as to what is the relevant date and as to whether the show cause notice has been served within a period of five years therefrom.

20. *Thus, what has been prescribed under the statute is that upon the reasons stipulated under the proviso being satisfied, the period of limitation for service of show cause notice under sub-section (1) of Section 11A, stands extended to five years from the relevant date. The period cannot by reason of any decision of a Court or even by subordinate legislation be either curtailed or enhanced. In the present case as well as in the decisions on which reliance has been placed by the learned advocate for the respondent, the Tribunal has introduced a novel concept of date of knowledge and has imported into the proviso a new period of limitation of six months from the date of knowledge. The reasoning appears to be that once knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of Section 11A would be applicable. However such reasoning appears to be fallacious inasmuch as once the suppression is admitted, merely because the department acquires knowledge of the irregularities the suppression would not be obliterated.*

21. *It may be noticed that where the statute does not prescribe a period of limitation, the Apex Court as well as this Court have imported the concept of reasonable period and have held that where the statute does not provide for a period of limitation, action has to be taken within a reasonable time. However, in a case like the present one, where the statute itself prescribes a period of limitation the question of importing the concept of reasonable period does not arise at all as that would mean that the Court is substituting the period of limitation prescribed by the legislature, which is not permissible in law.*

22. *The Apex Court in the case of Rajasthan Spinning and Weaving Mills (supra) has held thus :*

"From sub-section (1) read with its proviso it is clear that in case the short payment, non payment, erroneous refund of duty is unintended and not attributable to fraud, collusion or any wilful mis-statement or

suppression of facts, or contravention of any of the provisions of the Act or of the rules made under it with intent to evade payment of duty then the Revenue can give notice for recovery of the duty to the person in default within one year from the relevant date [defined in sub-section (3)]. In other words, in the absence of any element of deception or malpractice the recovery of duty can only be for a period not exceeding one year. But in case the non-payment etc. of duty is intentional and by adopting any means as indicated in the proviso then the period of notice and a priory the period for which duty can be demanded gels extended to five years."

23. *This decision would be applicable on all fours to the facts of the present case, viz. when non-payment etc. of duty is intentional and by adopting any of the means indicated in the proviso, then the period of notice gets extended to five years."*

15.5. In the case of KUTTUKARAN TRADING VENTURES Versus C.C.E., CUS. & SERVICE TAX, COCHIN { 2014 (35) S.T.R. 481 (Ker.)} it was held that-- ***Demand - Limitation - Finding of adjudicating authority that assessee had not furnished all material details in their ST-3 returns and those details were disclosed only in audit conducted by Department - HELD : This is a finding of fact, which cannot be ignored by higher appellate authorities, especially when there is no material to come for different finding - Invocation of extended period upheld - Section 71(3) of Finance Act, 1994. [para 25]. Maintained in 2015 (40) STR J187 (Supreme Court).***

In view of the aforementioned detailed discussion and in view of the facts and circumstances pertaining to the subject case, the suppression of facts with deliberate intention to evade payment of service tax as well as non-reversal of Cenvat Credit availed based on inadmissible documents as well as fake documents on part of the said assessee has been established. Accordingly, I am constrained to hold that the extended period in terms of proviso to Section 73(1) of the Finance Act, 1994 are correctly invokable in this case and for the same reasons, all ingredient for imposing penalty on the assessee under Section 78 exists, therefore, the assessee is also liable for penal action under the provisions of Section 78 of the Finance Act, 1994.

15.6. Coming the submission of the said assessee, I find that the said assessee have relied upon judgments of various appellate forum in support of their claim. It is incumbent upon me to record it here that the case in my hand has been remanded by the Hon'ble Tribunal for afresh adjudication for very

limit issues based on documentary evidence provided by the said assessee before me. On the basis of observation of the Hon'ble Tribunal, the issues pending before me needs to be decided exclusively based on documentary evidences but the said assessee has failed to produce any additional documentary evidence in support of the claim except relying on the submission and documents submitted by them at the time of initial adjudication proceeding before the then adjudicating authority. It is worthwhile to mention here that the said assessee had failed to produce the required supporting documentary evidences even before the then adjudicating authority. I, therefore, do not find any justifiable reason to take a different view in the matter which had already been decided vide OIO No. STC/51/COMMR/AHD/2011, dated 28.11.2011 by my predecessor adjudicating authority. I totally agree with the view taken up in the said OIO, hence, I recap and reiterate the discussion and findings of my predecessor adjudicating authority as discussed in the said OIO on the issue of demand of Service Tax/wrong availment of Cenvat Credit, interest and imposition of penalty, which is under de novo proceedings.

16. In view of the discussions and findings as recorded in the foregoing paragraphs, I pass the following order:

ORDER

(i) I confirm the demand of service tax of Rs.6,44,202/- (Rupees Six Lakhs Forty-Four Thousand Two Hundred and Two only) for the years 2004-05 to 2007-08 under the category of 'Goods Transport Agency Service' and order to recover the same from M/s Stelemec under proviso to Section 73(1) of the Finance Act, 1994; Since the amount of Rs. 2,52,936/- for the year 2004-05 to 2006-07 had already been paid by M/s Stelemec, the same is appropriated against the confirmed demand;

(ii) I confirm the demand of service tax of Rs. 11,05,988/- (Rupees Eleven Lakhs Five Thousand Nine Hundred and Eighty-Eight only) for the years 2004-05 to 2007-08 on commission charges under the category of "Business Auxiliary Services' and order to recover the same from M/s Stelemec under proviso to Section 73(1) of the Finance Act, 1994; Since the amount of Rs. 43,005/- had already been paid by M/s Stelemec, the same is appropriated against the confirmed demand;

(iii) I hold liability of interest on the confirmed demand of Rs. 17,50,190/- (Rs. 6,44,202+ Rs. 11,05,988/-) at the prescribed rate under Section 75 of the Finance Act, 1994 and order to recover the same from M/s Stelemec;

(iv) I impose penalty of Rs.200/- (Rupees Two Hundred only) per day for the period during which failure to pay the tax continued, upon M/s Stelemec under Section 76 of the Finance Act, 1994, for the period upto 17.4.2006;

(v) I impose penalty of Rs.200/- (Rupees Two Hundred only) per day for the period during which failure to pay the tax continued, or at the rate of 2% of such tax, per month, whichever is higher, from 18.4.2006 till the date of actual payment of the outstanding of service tax upon M/s Stelemec under Section 76 of the Finance Act, 1994. for the period upto 31.3.2008; provided further that the amount of penalty payable in terms of this section shall not exceed the service tax payable by M/s Stelemec for the period from 2004-05 to 2007-08;

(vi) I impose penalty of Rs. 17,50,190/- (Rupees Seventeen Lakh Fifty Thousand One Hundred and Ninety only) on M/s Stelemec under section 78 of the Finance Act. 1994. In the event of M/s Stelemec opting to pay the amount of service tax along with all other dues as confirmed and ordered to be recovered, within thirty days from the date of communication of this order, the amount of penalty liable to be paid by them under Section 78 of the Finance Act, 1994 shall be 25% of the said amount. However, the benefit of reduced penalty shall be available only if the amount of penalty is also paid within the period of thirty days from the communication of this order, otherwise full penalty shall be paid as imposed in the above order;

(vii) I confirm the demand of Cenvat Credit of Rs. 45,97,501/- (Rupees Forty-Five Lakhs Ninety-Seven Thousand Five Hundred and One only) wrongly availed/utilized by M/s Stelemec during the years 2006-07 and 2007-08 and order to recover the same from them, under Rule 14 of Cenvat Credit Rules. 2004 read with proviso to Section 731) of the Finance Act, 1994;

(viii) I hold liability of interest on the above confirmed demand Rs. 45,97,501/- (Sr. No. vii above) at the prescribed rate in terms of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994 and order to recover the same from M/s Stelemec;

(ix) I Impose penalty of Rs. 45,97,501/- (Rupees Forty-Five Lakhs Ninety-Seven Thousand Five Hundred and One only) on M/s. Stelemec under Rule 15(3) of the Cenvat Credit Rules. 2004 read with Section 78 of the Finance Act, 1994;

17. Show Cause Notice No. No. STC/4-54/O&A/10-11 dated 20.08.2010 issued by the Commissioner of Service Tax, Ahmedabad to M/s. Stelemec Ltd., Ahmedabad stands disposed of in consequence of the Hon'ble CESTAT, Ahmedabad Order No. A/10043/2023 dated 12.01.2023 in the above manner.

(UPENDRA SINGH YADAV)
COMMISSIONER

F. No.: STC/15-30/OA/Denovo/2023 Date:- 28.12.2023

By Regd. Post A.D. / By Hand

To,

(1) M/ s. Stelemec Limited, Ularia, Taluka-Sanand, Ahmedabad.

Copy to:-

(i) The Principal Chief Commissioner, Central Excise & Central Goods and Service Tax, Ahmedabad Zone, Ahmedabad

(ii) The Assistant Commissioner, Central Excise & CGST, Division-III, Ahmedabad North

(iii) The Superintendent, Central Excise & CGST, Range-I, Division-III, Ahmedabad North for information and necessary action.

(iv) The Superintendent (HQ, System) Central Excise & CGST, Ahmedabad North with a request to upload the OIO on official website.

(v) Guard File.