IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
SOUTH ZONAL BENCH, CHENNAI

COURT HALL No.III

SERVICE TAX APPEAL No.42289 OF 2018

(Arising out of Order-in-Original No. 81/2018, CH.N. GST (Commr.) dated 26.06.2018 by Principal Commissioner of GST and Central Excise, Chennai North Commissionerate, 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai 600 034).

M/s.Jubilant Motor Works (South) Pvt. Ltd. ...Appellant
No.531, 533 and 535, Nandanam
Anna Salai, Chennai 600 035

Versus

The Commissioner of GST & Central Excise ...Respondent
Chennai North Commissionerate
No.26/1, Mahatma Gandhi Road
Nungambakkam, Chennai 600 034

APPEARANCE:

Shri. Raghavan Ramabhadran, Advocate
For the Appellant

Shri. Rudra Pratap Singh, Additional Commissioner (A.R)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

Date of Hearing: 13/12/2023

Date of Decision:05.02.2024

FINAL ORDER No.40132/2024

ORDER : Per Ms. SULEKHA BEEVI C.S.

Brief facts are that the appellant is engaged in sales and service of 'AUDI' brand of cars and are providing the taxable services such as 'Authorized Service Station Service' and 'Business

Auxiliary Service'. The appellant has obtained registration under Service Tax Commissionerate. The appellant company was established in December 2015 and prior to its formation M/s.Jubilant Motor Works Pvt. Ltd. was carrying out the Chennai operations with the separate Service Tax registration. The appellant took over all the business activities in respect of Chennai Operations from M/s.Jubilant Motor Works Pvt. Ltd. from December 2015 onwards with all assets and liabilities in respect of Chennai Operations.

1.2. Intelligence gathered by the Officers of Directorate General of Central Excise Intelligence, Bangalore Zonal Unit indicated that, appellant, M/s. Jubilant Motor Works (South) Pvt. Ltd. is evading payment of service tax, as it appeared from the ST 3 returns filed with the department, that appellant has not declared their entire service income as accounted in their books of accounts.

1.3. Further, it appeared that appellant was availing input service tax credit in respect of services which are used by them in their show room and their service centre. These show rooms and service centres are engaged in the activity of trading in cars / spares / accessories as well as providing taxable service. Thus, it appeared that appellant was availing ineligible CENVAT credit on certain common input services used for taxable services and

trading and utilizing the same towards payment of their service tax liability.

1.4. Based on the said intelligence, investigations were initiated and relevant documents / records were resumed under summons proceedings. The statement of Shri Manish P. Vice-President, Finance and Accounts was recorded. It was deposed by Shri Manish P that the Jubilant Motor Works Pvt. Ltd. was established in the year 2008 and was engaged in sales and service of AUDI brand cars. The company is having 5 showrooms (2 in Bangalore, one each in Mangalore, Chennai and Pune) and five service centres (2 in Bangalore, one each in Mangalore, Chennai and Pune). M/s.Jubilant Motor Works Pvt. Ltd. had obtained separate service tax registrations in respect of Pune and Chennai Operations. With regard to the Sales and Service Operations at Bangalore and Mangalore, they have obtained a common registration covering two service centres and two show rooms at Bangalore, one service centre and one show room at Mangalore. Shri Shamit Bhatia and Shri Umesh Sharma are the Directors of the Company and Shri K. Subramanian is the CEO of the Company. M/s. Jubilant Motor Works Pvt. Ltd. started operations in Chennai in the year 2009. During December 2015 a separate Company namely M/s. Jubilant Motor Works (South) Pvt. Ltd. (appellant) was established with Shri K. Subramanian as CEO and Director of the

Company. After formation of M/s. Jubilant Motor Works (South) Pvt. Ltd., they have obtained a fresh Service Tax registration in respect of the premises at Chennai. Further, Shri Manish P. stated that after initiation of investigations by DGCEI, he is in the process of quantifying their correct service tax liability and also working out the differential service tax liability in respect of Chennai operations of both the Companies, and to discharge the tax at the earliest. The lapse has occurred due to shortage of manpower and further a team looking after the taxation matter is stationed at Noida and due to non-availability of Senior Manager at Chennai, there was a communication gap resulting in certain lapses in service tax compliances.

1.5. The statement of Shri Amrit Raj V., Senior Manager, Finance and Accounts of appellant company was recorded. It is stated by him *inter alia* that the appellant company is receiving various incentives from M/s. Volkswagen group sales, India Pvt. Ltd. in the form of

- Incentive (Audi Promotional) – for promoting AUDI brand cars,
- Incentive Income (Annual) – for promoting AUDI brand cars,
- Incentive Income (Marketing Bonus) – for promoting AUDI brand cars through marketing and advertising,
- Incentive Income (quarterly) – for promoting AUDI brand cars,
- Incentive Income (retail standards) – for promoting AUDI brands by meeting the service standards of the brand at showroom and service centre,

- Incentive Income (Service target) – for promoting AUDI brands by meeting the service standards of the brand at service centre,
- Incentive Ambition plan - for promoting AUDI brands by meeting the service standards of the brand at show room,
- Incentive Income monthly - for promoting AUDI brand cars
- Incentive from VW – others – for various other activities,
- Incentive AUDI genuine accessories (included in incentive income (service target) – for promoting the genuine accessories of AUDI brand to the customers,
- Incentive Income AUDI genuine parts (included in incentive income (service target) for promoting the genuine parts of AUDI brand to the customers for,
- Incentive SFAI – for generating market for AUDI brand of cars through customer enquiry and follow up for convincing the prospective customers to buy the cars.

1.6. It was noted that the appellant has not declared the above incentive income in the Service Tax returns and have not discharged service tax on the same. Further, incentive income from Castrol Company was not declared in the Service Tax 3 returns and have not discharged service tax on the same.

1.7. Similarly, the appellant had not paid service tax on car advance money forfeited. When a customer books a car, certain amount is collected from him as advance towards booking. Subsequently, if the customer cancels the booking, the advance amount given by the customer will be forfeited against the cancellation.The appellant had not declared the said income in the ST 3 returns and had not discharged the service tax.

1.8. The appellant had availed input service tax credit on certain common input services which were used for providing both taxable and trading (exempted services). The appellant did not follow the procedure prescribed under Rule 6 (3) of CENVAT credit Rules 2004 by maintaining separate accounts. However, after initiation of investigation, theyquantified the ineligible CENVAT credit availed and utilised by them in respect of trading (exempted services) and the service tax liability and paid up Rs.41,09,425/- (including interest of Rs.15,11,944).

1.9. It therefore appeared that the services provided by the appellant are rightly classifiable as:

i. Authorised Service Station Services for the services of providing repair and service of "AUDI" brandcars for the period up to 30.06.2012.

ii. Business auxiliary services in respectthe income received under the heads – Finance Income, insurance income, insurance income renewal, service charges towing, commission - AUDI car sale, courtesy car income, service charges received (registration), commission on trading, services charges received - AUDI sure, service charges received - service plan, service charges –pick up and drop income, incentive(AUDI promotional), incentive income (annual), incentive income (marketing Bonus),incentive income (quarterly), incentive income (retail standards), incentive income (service target), incentive ambition plan, incentive income monthly, incentive from VW - others, incentive AUDI genuine accessories, incentive income AUDI genuine parts, incentive SFAI and incentive income from Castrol appears to be the consideration for the services provided by appellant

which falls under the taxable category of business auxiliary services for the period up to 30.6.2012.

iii. With effect from 1/7/2012, as per definition of service "under Section 65 B 44 and taxable service as per Section 65 B 51 of the Finance Act 1994.

1.10 Further, the transport of goods by road services, sponsorship services, legal services, supply of manpower for any purpose or security services, works contract services received by appellant are covered under the reverse charge mechanism as per section 68 (2) of the Finance Act 1994 read with Rule 2 (1) (d) (i) of service tax rules 1994 read with notification No.30/2012- ST dated 20.6.2012 as amended. Show Cause Notice no.66/2016-17 dated 18.10.2016 was issued to the appellant proposing to demand the service tax for the period from 4/2011 to 3/2016 and also proposing to recover the amount being 7/6/5 percentage of the value of the exempted services provided by them during the period from 4/2011 to 3/2016 for ineligible credit availed in respect of exempted service. The Show Cause notice proposed to demand interest and also for imposing penalties. After due process of law, the original authority passed the following order.

(i) I confirm the demand of Service tax including of cess amounting to Rs. 10,71,78,845/- for the period from April 2011 to March 2016 Under *proviso* to sub-section (1) of Section 73 of the Finance Act, 1994.

(ii) I appropriate an amount of Rs. 10,27,647/- paid by noticee against demand at (i) above.

(iii) I demand Interest on the amount mentioned at (i) above under Section 75 of the Finance Act, 1994.

(iv) I appropriate an amount of Rs.4,40,040/- paid by the noticee against interest demanded in (iii) above.

(v) I order recovery of Rs.6,58,91,965/- in terms of Rule 14(1) (ii) of the CENVAT Credit Rules, 2004 read with *proviso* to Section 73(1) of the Finance Act, 1994.

(vi) I appropriate an amount of Rs.15,69,838/- paid by the noticee against demand at (v) above.

(vii) I demand interest on the amount mentioned at (v) above under Rule 14 (1) (ii) read with Section 75 of the Finance Act, 1994.

(viii) I appropriate an amount of Rs. 10,71,903/- paid by the noticee in cash against interest demanded in (vii) above.

(ix) I impose a Penalty of Rs. 10,71,78,845/ under Section 78 of Finance act 1994. However, in terms of *proviso* to Section 78, this penalty shall be reduced to 25% of the total penalty if the entire demand, interest and such reduced penalty is paid within 30 days from the receipt of this Order.

(x) Since penalty under Section 78 is already imposed, I refrain from imposing penalty under Section 76 of the Finance Act, 1994.

(xi) I impose a penalty of Rs. 10,000/- (Rupees Ten thousand only) under Section 77 of Finance Act, 1994.

(xii) I impose a Penalty of Rs. 6,58,91,965/- under Rule 15(3) of the CENVAT Credit Rules, 2004 read with Sections 78 of Finance act 1994. However, in terms of *proviso* to Section 78, this penalty shall be reduced to 25% of the total penalty if the entire demand, interest and such reduced penalty is paid within 30 days from the receipt of this Order.

(xiii) I refrain from imposing any penalty under Rule 15(A) of the CENVAT Credit Rules, 2004 as a penalty is imposed under Rule 15(3) of the CENVAT Credit Rules, 2004 read with Section 78 of Finance act 1994.

(xiv) I impose a Penalty of Rs.1,00,000/- under Section 78A of the Finance Act, 1994, on Shri. Manish P., Vice-President (Finance & Accounts), M/s. Jubilant Motor

Works (South) Pvt Ltd, D-6, South Phase, Ambattur Industrial Estate, Ambattur, Chennai- 600058.

2. The Ld. counsel Shri Raghavan Ramabhadran appeared and argued the matter. The submissions are as under:

i. The Appellant is a private limited Company engaged in the sale of AUDI brand cars, purchased from Volkswagen on principal-to-principal basis for sale to various customers.

ii. The Appellant's Company was incorporated on 03.11.2015 and the Appellant took over all business activities with respect to Chennai operations of M/s Jubilant Motor Works Pvt. Ltd. (hereinafter referred to as "JMWPL") with effect from 21.12.2015, vide Business Transfer Agreement dated 18.12.2015.

iii. Prior to the transfer of business to the Appellant, the Chennai operations of JMWPL (i.e., sale and service of AUDI brand cars purchased from Volkswagen) were carried on by JMWPL Company. JMWPL continues to exist till date.

iv. Show Cause Notice No. 66/2016-17 dated 18.10.2016 was issued to the Appellant alleging demand of service tax on various incentive income and reversal of input tax credit for the period April 2011 to March 2016. Therefore, the demand pertaining to period prior to transfer of business is also imposed on the Appellant.

v. The Impugned Order in Para 32 of the order relies on the Memorandum of Understanding (MoU) dated 16.08.2016 signed among the Appellant, JMWPL and Volkswagen to hold the Appellant is liable for the period prior to the period of transfer also (i.e., prior

to 21st December 2015). The Impugned Order further states that the Appellant cannot claim that only existing dues at the time of transfer is recoverable as per Section 87(c) of the Act. However, the SCN has not invoked Section 87(c) of the Act nor invoked any provision to hold that Appellant is liable for the period prior to transfer of the business to the Appellant.

vi. In the instant case, the Appellant had purchased Audi brand of cars which were further re-sold to their customers. Volkswagen had launched certain incentive schemes wherein various pre-agreed incentives were provided to the Appellant in respect of Audi brand of cars/parts sold by Volkswagen to the Appellant. The discounts passed on relate only to the activity of sale of cars by Volkswagen to the Appellant.

vii. Similarly, the Appellant also received target-based incentives from Castrol for purchase of engine lubricants by the Appellant.

viii. For the period up to 01.07.2012, the Impugned Order has given a finding that the Appellant carries out the activities only on behalf of Volkswagen and that these definitely promote the products of Volkswagen. Hence, these activities undertaken for incentives are covered by the definition of 'Business Auxiliary Services' under Section 65(19) read with Section 65 (105) (zzb) of the Act. However, SCN did not specify the category/sub-clause under which the service in question will be covered under Section 65(19) of the Act.

ix. For the period post 01.07.2012, no finding is given in the Impugned Order.

x. In respect of incentives received from castrol, the demand is confirmed in the Impugned Order on the portion of 'product discounts' received from Castrol by stating that this activity is similar to that of the Appellant's for Volkswagen. The period involved for this demand is only for the period April 2011- March 2012.

xi. During the relevant period, various customers booked cars with the Appellant by making an advance deposit. Out of such bookings, in certain cases, the customers cancelled their bookings. In those cases, the Appellant retained a portion of the advance deposited by the customers as liquidated damages and booked the same in its financials as 'forfeiture income'. The service tax amount of INR 10,27,645/- and interest of INR 4,40,041/- under this demand has been paid under protest at the stage of audit.

xii. For the period both prior to 01.07.2012 and period form 01.07.2012, there is no specific allegation in the SCN demanding service tax on the forfeiture income.

xiii. For the period prior to 01.07.2012, no finding is given by the Impugned Order.

xiv. For the period from 01.07.2012, the Impugned Order states that the forfeiture income would have to be considered as a declared service falling under 66E(e) of the Act, as it amounts to agreeing to tolerate an act or a situation.

xv. The Appellant owns a showroom of AUDI brand cars. The Appellant also owns an authorised service centre for providing repair and maintenance service and authorised service station services to its customers.

xvi. Further, the Appellant availed Cenvat credit of various input services, including certain common input services like Security, accounting etc.

xvii. On being pointed out during audit, the Appellant calculated the proportionate Cenvat credit relating to common input services as per Rule 6(3A) of CCR, 2004 and deposited an amount of ₹ 15,69,836/- towards Cenvat credit and interest of ₹ 10,71,903/- on 18.6.2016. This fact has been acknowledged in Page 38 of the Impugned Order.

xviii. The Impugned Order finds that the Appellant has not filed any written option for adopting to reverse credit as per Rule 6 (3) (ii) of CCR and hence appellant is not eligible for the said benefit and that the Department is justified in demanding payment under Rule 6 (3) (i) by 6%/7%/5% of the value of the exempted services.

xix. The summary of the tax demands are as tabulated below.

S.No.	Issue	Tax Amount Involved (Rs.)
1.	Non-payment of service tax on various incentives received from Volkswagen	10,59,25,916/-
	Non-payment of service tax on incentives received from Castrol	18,676/-
2.	Non-payment of service tax on car advance forfeiture from customers	12,34,253/-
3.	Non-reversal of CENVAT credit under Rule 6(3)(i) of the CENVAT Credit Rules	6,58,91,965/-

xx. The Ld. Counsel for appellant explained as under:

A. The Appellant Company was incorporated in December 2015. There cannot be any liability on the Appellant for the entire demand prior to December 2015. (i.e., April 2011 to 20th December 2015)

A.1 It is submitted that Section 68 of Finance Act, 1994 (hereinafter referred to as 'the Act') casts the duty of payment of service tax on the person who provides a taxable service. However, up to the period 20th December 2015, the Appellant Company had not entered into any business transaction with JMWPL, and it was incorporated only on 03.11.2015. In such a situation, the question of the Appellant Company providing any taxable service does not arise. Therefore, as the Appellant Company did not provide any taxable service till 21st December 2015, appellant is not liable to pay service tax.

A.2 Consequently, the Department cannot demand service tax from the Appellant under Section 73 of the Act as it empowers the Department to demand service tax only from the person chargeable with service tax, which is not the Appellant for the period up to 20th December 2015. In this regard, reliance is placed on the decision of the Hon'ble jurisdictional Madras High Court in **Deputy Commissioner of Service Tax, Chennai v. Service Care Pvt. Ltd, 2019 (365) E.L.T. 225 (Mad.),** wherein in the context of Section 73(1) of the Act, it was held that the words 'person chargeable' and the words 'the person to whom such tax refund has erroneously been made', means the

actual assessee, on whom, after issuance of show cause notice, assessment is made, would be the person liable to pay the amount of service tax. So, notice seeking to show cause should be issued under Section 73 only to the person chargeable. This decision was relied on by the Hon'ble Tribunal in **JayaswalNeco Industries Ltd. v. Commissioner of Custom Central Excise & Service Tax, Raipur 2021 (47) GSTL 370 (Tri.- Del.).**

A.3 The Appellant submits that for the period prior to the Business Transfer Agreement, tax can be demanded only from JMWPL and not the Appellant. Hence, the demand of service tax for the period up to 20th December 2015 is liable to be set aside on this count.

A.4 Further, it is submitted that the SCN did not invoke any provision for demand on the Appellant for a period that is prior to taking over of business from its predecessor Company JMWPL. However, the Impugned Order has invoked Proviso to Section 87(c) of the Act at paragraph 32 therein. The said provision, which has been introduced with effect from 06.08.2014, by Finance (No.2) Act, 2014 provides for any recovery from the successor, in case of a transfer of business. At the outset, the impugned order is incorrect in invoking a provision beyond SCN.

A.5 It is not the case of the Department that as on the date of transfer of business from JMWPL to the Appellant, any service tax was recoverable or due from JMWPL. In fact, there is no amount due or recoverable from JMWPL even as on date. In this regard reliance is

placed on the decision of the Uttarakhand High Court in the case of **R.V. Man Power Solution v. Commissioner of Customs and Central Excise 2014 (33) S.T.R. 23 (Uttarakhand)**, wherein it has been held that Section 87 is one of the methods of recovery of the amount due and payable after adjudication is done. Such claim can be made only when the final adjudication has been done after quantifying the amount due and payable by the assessee (transferor).

A.6 It is submitted that, in such scenario when no tax is recoverable or due on JMWPL (transferor), even Proviso to Section 87(c) of the Act is not applicable to the facts of this case.

A.7 It is submitted that there is no provision in the Act under which proceedings could have been initiated and continued and the Appellant could have been assessed and taxed for the period prior to 20th December 2015. In this regard reliance is placed on the decision of the Delhi High Court in **Freezair India (P) Limited v. Commissioner of Central Excise, Commissionerate 2014 (304) ELT 360 (Del),** wherein in Para 21 of the said decision, it has been held that Proviso to Section 11 of the Central Excise Act, 1944 [*pari materia* to Proviso to Section 87(c) of the Act] and Rule of the Central Excise Rules, 1944, relate to recovery and is a method of recovery of the dues assessed and payable by the predecessor. Further observed that taxation statutes, normally treated and regarded as self-contained codes, expressly or by clear implication should stipulate when a successor will be

liable for vicarious liabilities or dues of the predecessors or sellers.

A.8 Without prejudice, it is submitted that, in any case, Proviso to Section 87(c) of the Act has been inserted prospectively with effect from 06.08.2014. Therefore, the entire demand prior to 06.08.2014 as per SCN is liable to be set aside for lack of authority under law. In this regard, reliance is placed on the decision of the Supreme Court in **Rana Girders Ltd. v. Union of India 2013 (295) ELT 12 (SC)** wherein in Para 21 of the said decision it has been held that Proviso to Section 11[*parimateria* to proviso to Section 87(c) of the Act] which was added by way of Amendment only w.e.f. 10.09.2004 is not applicable to the period prior to 10.09.2004.

A.9 Without prejudice, it is submitted that even if there was an agreement between the Appellant and JMWPL to the effect of taking over the liabilities of Chennai operations, such agreement cannot be relied upon by the Department to shift the service tax liability, if any, from JMWPL to the Appellant. In other words, a private agreement between the parties cannot have the effect of altering the statutory liability cast upon one of them. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in **Deputy Commercial Tax Officer v. Sha SukrajPeerajee [1968 (21) STC 5]**, wherein the Department relied on the registered instrument of transfer of business to hold the transferee liable for arrears of sales tax due before the period of transfer. Holding against the Department, the Apex Court in Para 6 of the decision held that it is not open to the State Government to rely

on the instrument inter vivos between the transferor and the transferee and cannot contend that there is any contractual obligation between the transferor and the State Government who is not a party to the instrument. This principle has been followed in the following decisions,

(i) JCB India Ltd. v. CST 2008 (12) S.T.R. 714 (Tri. - Del.) [Para 4 of the decision]

(ii) CC v. Nicholas Piramal India Ltd. 2009 (13) S.T.R. 383 (Tri. - Del.).[Para 5 of the decision]

A.10 Therefore, the entire demand pertaining to period before 20th December 2015 is liable to be set aside.

ISSUE 1: Non-payment of service tax on various incentives received from Volkswagen and Castrol.
(Amount Involved Rs. 10,59,25,916/-and Rs. 18,676/-)

B. SCN does not mention the specific clause under which the alleged services are taxable and hence demand cannot be legally sustained.

B.1 The Appellant submits that Show Cause Notice should clearly indicate the sub-clause of Section 65(19) under which the alleged business auxiliary services are rendered. If the demand is made merely stating that the services rendered falls under Business Auxiliary Services without mentioning the specific clause, the demands cannot be legally sustained.

B.2 In this regard reliance is placed on the decision of the CESTAT in **Syniverse Mobile Solutions Pvt Ltd., (Earlier Transcibernet India Pvt Ltd.) Versus Commissioner Of Customs, Central Excise & Service Tax, Hyderabad – IV 2023 (6) TMI 463 - CESTAT HYDERABAD**, where without going into

further merits the Tribunal set aside the demand on the sole ground that the Department has failed to issue the Show Cause Notice with specific allegation specifying the sub-clause of Section 65(19). Similar view has been held in the following decisions,

- *Commissioner Of Customs And Central Excise, Goa Versus Shri. Swapnil Asnodkar 2018 (1) TMI 266 - CESTAT MUMBAI*
- *United Telecoms Ltd. Versus Commissioner Of Service Tax, Hyderabad 2010 (10) TMI 730 - CESTAT, BANGALORE*

C. The discounts/incentives offered are in relation to the sale and purchase of goods. The same does not fall within the scope of the definition of service.

C.1 The Appellant submits that trade discounts are a pre-sale occurrence, the quantification whereof depends on many factors. In this regard reliance is placed on Para 27 of the decision of the Hon'ble Supreme Court in ***Southern Motors v. State of Karnataka, 2017 (358) E.L.T. 3 (S.C.)***.

C.2 The Appellant submits that the core issue stands settled in favour of the Appellant where the courts have consistently held that demand of Service Tax on the discounts and incentives received by the dealers from the manufacturer is not liable to Service Tax. In this regard, reliance is placed on the decision of Hon'ble Tribunal in ***CST, Mumbai-I v. Sai Service Station Ltd. — 2014 (35) S.T.R. 625 (Tri-Mumbai)*** wherein the Hon'ble CESTAT has held that demand of service tax raised on sale/target incentive on sale of vehicles and incentive on sale of spare parts does not amount

to promotion and marketing of products and demand under BAS is not sustainable. The Hon'ble Tribunal held that these incentives are in the form of a trade discount. This principle has been followed in the following decisions,

i. *S. K. Cars India Pvt Ltd v Commissioner of GST & Central Excise, Salem,2023-Vil-488-CESTAT -CHE-ST*
ii. *Kafila hospitality and travels Pvt Ltd v Commissioner of sales tax ,Delhi 2021(47) G.S.T.L.140(Tri-LB)*
iii. *Asveen Air travels Pvt Ltd v Commissioner of GST and central excise Chennai ,2022-TIOL-404-CESTAT-MAD*
iv. *Commissioner Of Central Excise, Jaipur-II v. LMJ Services Ltd, 2017 (3) TMI 1674*
v. *Sharyumotors v Commissioner of service tax, Mumbai2016 (43) S.T.R. 158 (Tri. - Mumbai)*
vi. *My Car Private Ltd. 2015 V CCE (40) S.T.R. 1018 (Tri. - Del.)*
vii. *Commissioner of service tax, Mumbai V Sai service station2014 (35) S.T.R. 625 (Tri-Mumbai)*
viii. *M/s Commercial Motors Versus Commissioner, Central Excise, Meerut-II, 2019 (1) TMI 716 - CESTAT ALLAHABAD*

C.3 For the period post 2012 as well, the same principle that the incentives received are in the form of trade discount has been followed in the following decisions,

i. *M/S. T.V.Sunadram Iyengar &Sons Pvt Ltd V Commissioner of CGS T& Central excise, 2021-VIL-391-MAD-ST*
ii. *Roshan motors Pvt Ltd v Commissioner of Central Excise and Customs & CGST, Jaipur,2022(8) TMI 1254- CESTAT New Delhi*
iii. *M/s. Rohan Motors Limited Vs Commissioner of central exercise 2020 (12) TMI 1094- CESTAT New Delhi*

iv. M/s PREM MOTORS PRIVATE LIMITED Vs COMMISSIONER, CENTRAL EXCISE & CGST-JAIPUR 2023-VIL-208-CESTAT-DEL-ST

C.4 Similarly, the Appellant had purchased goods from Castrol to be used in their workshop. Castrol offers product discounts and target incentives based on the purchases made by the Appellant as per the agreement between the Appellant and Castrol. The submission of the incentives received from Volkswagen is applicable for the incentives received from Castrol as well. Hence, for the sake of brevity, it may be treated as part and parcel of this submission as well.

Issue 2: Non-payment of service tax on car advance forfeiture from customers. (Amount Involved Rs. 12,34,253/-)

D. The Department has failed to mention and classify the services it seeks to propose and demand Service Tax in the SCN. On this ground itself, the entire demand proposed in the SCN merits to be set aside.

D.1. The Appellant submits that the SCN issued by the Department has not classified any of the services on which it seeks levy Service Tax on the Appellant. The SCN is vague and does not specify any classification of the services rendered by the Appellant.

D.2. The Appellant submits that it is a settled position SCN must specify the exact sub-heading/classification under which the Service falls for proposing a demand of Service Tax. When the SCN is bereft of clarity and does not convey the

exact nature of service rendered, such SCN is vague and the proceedings must fail on this ground itself.

D.3. In this regard, reliance is placed upon the Judgements of this Hon'ble Tribunal in *CCE &ST, Pondicherry vs A.M Manickam and Others 2017(6) TMI 57-CESTAT Chennai* and *CCE, Pondicherry vs R Sundaramurthy& Co 2019 (5) TMI 228-CESTAT Chennai.* Further, reliance is placed upon the following decisions as well wherein SCNs which were vague in their allegation regarding classification of service was set aside.

a) *United Telecoms Limited vs CST, Hyderabad 2011 (22) S.T.R. 571 (Tri.-Bang)*
b) *Vatsal Resources Private Limited vs CST, Surat-I 2023 (68) G.S.T.L. 279 (Tri.-Ahmd.)*

D.4. Consequently, the entire demand merits to be set aside on this ground itself.

E. The OIO is beyond the scope of the SCN. Hence, on this ground itself, the entire demand merits to be set aside.

E.1 As submitted above, the SCN has failed classify any of the services it seeks to impose Service Tax liability on the Appellant. The OIO has travelled beyond the scope of the SCN by classifying the services it seeks to impose Service Tax liability on the Appellant.

E.2 The Appellant submits that the SCN is the foundation ofadjudication proceedings and if the charges are not brought out properly to the knowledge of assessee, then he should not face charges by any order passed beyond the SCN. In this regard, reliance

is placed upon *Apex Fluidomatics Limited vs CCE, Ahmedabad 2014 (313) E.L.T. 106 (Tri.-Ahmd.)*

E.3 Further, if the Adjudicating Authority travels beyond the scope of the SCN to confirm the demand, the same is bad in law. In this regard reliance is placed upon *Inox Leisure Limited vs CST, Hyderabad 2022(60) G.S.T.L 326 (Tri.-Hyd)*.

E.4 Consequently, the demand confirmed in the OIO merits to be set aside on this ground alone.

F. The Appellant is not liable to pay Service Tax on Forfeiture Income.

F.1 The Appellant submits that the 'forfeiture income' is nothing but in the nature of penalty/liquidated damages levied by the Appellant on the customers for cancellation of bookings of vehicles. This income is not in the nature of consideration towards any service. It is submitted that penal charges of any nature are not consideration for provision of any service because penalty itself is charged when no service is provided or no sale is undertaken.

F.2 It is submitted that when the purpose to levy 'forfeiture charges' is to penalize the customers or make good the loss suffered by the Appellant on cancellation of booking, the same cannot be said to be towards any activity.

F.3 The Appellant submits that collection of forfeiture charges is a condition to the contract and not consideration to contract.

F.4 Hence, the demand of service tax on 'forfeiture income' alleging the same to be consideration against provision of 'BAS' for the period up to 30.06.2012 is liable to be set aside on this ground alone. In this regard, the Appellant places reliance on Circular No. 121/2/2010-ST, dated 26.04.2010, Circular No. 96/7/2007-ST, dated 23.08.2007, Circular issued under F. No. 137/25/2011-ST, dated 03.08.2011, wherein it has been uniformly held that no Service Tax can be charged on an amount received in the nature of penal charges.

F.5 With respect to the period from 01.07.2012, the Appellant submits that the forfeiture of income does not qualify as consideration for any service provided by the Appellant to the customers. In this regard, reliance is placed on the decision of the Larger Bench Hon'ble Tribunal in Commissioner of Service Tax, Chennai v. **M/s Repco Home Finance Ltd 2020-VIL-309-CESTAT-CHE-ST,** wherein it was observed that that there is marked distinction between "conditions to a contract" and "considerations for the contract" and held that the foreclosure charges, therefore, are not a consideration for performance of lending services but are imposed as a condition of the contract to compensate for the loss of "expectations interest" when the loan agreement is terminated pre-maturely.

F.6 It is a well settled principle that liquidated damages and charges in the nature of penalty is not chargeable to service tax. This settled principle has been adopted in the following decisions,

i. *M/S Lemon tree hotel vs. Commissioner, GST,2020-TIOL-1114-CESTAT-DEL*

ii. *M/S K.N. food industries Pvt. Ltd Vs Commissioner of CGST and Central Excise Kanpur ,2019-TIOL-3651-CESTAT-ALL*

iii. *Rajcomp info services Ltd Vs Principal commissioner, CGSTandCentral excise-Jaipur I,2023-TIOL-154-CESTAT-DEL*

F.7 The Appellant submits that **Circular No. 178/10/2022-GST dated 03.08.2022** issued in the GST Regime has clarified regarding the supply of service of agreeing to the obligation to refrain from an act or tolerate an act or a situation, or to do an act. The said Circular has adopted the principles laid down in the above decisions and has clarified that the amount paid as 'liquidated damages' is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract and there is no agreement, express or implied, by the aggrieved party receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages.

F.8 The Appellant submits that **Circular No. 214/1/2023-Service Tax dated 28.02.2023** has also adopted the contents of the said Circular No. 178/10/2022-GST dated 03.08.2022 (supra) and has clarified that the jurisprudence that has evolved over time, may be followed in determining whether service tax on an activity or transaction needs to be levied treating it as service by way of agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act.

F. 9. Hence, placing reliance on the above decisions and the Circulars, the Appellant submits that,

Appellant is not liable to discharge service tax on the forfeiture income as it does not qualify as consideration for any service provided by the Appellant.

Issue 3: Non-reversal of CENVAT credit under Rule 6(3)(i) of the CENVAT Credit Rules. (Amount Involved Rs. 6,58,91,965/-)

G. The Intimation Under Rule 6(3) of the Credit Rules is merely procedural and the Appellant is free to choose any one of the three options provided under Rule 6 of the CCR.

G.1 The Appellant has reversed the proportionate credit of Rs. 15,69,836/- with interest of Rs. 10,71,903/- in terms of Rule 6(3) of the CCR. The SCN in Para 4.6 has duly acknowledged the same.

G.2 The Impugned order has alleged that the Appellant has not maintained separate accounts for the receipt and use of input services used commonly for providing taxable and exempted service as mandated under Rule 6 of the Credit Rules and that therefore, the Appellant is liable to pay the amount as per Rule 6(3)(i) of the CENVAT Credit Rules.

G.3 It is submitted that an assessee receiving common inputs/ inputs services used in taxable as well as exempted activities, is free to opt for method given under Rule 6(2) and 6(3) of the CCR. There is no bar in the CCR which restricts an assessee or mandates him to opt for one option over the other. [Rule 6 (3) (i) over Rule 6 (3) (ii)].

G.4 The Appellant submits that with respect to the procedural condition regarding prior intimation in writing, the issue stands settled in favour of the

Appellant. In this regard, reliance is placed on the following decisions,

a. *Mercedes Benz India (P) Ltd. V. Commissioner Of C. Ex., Pune-I 2015 (40) S.T.R. 381 (Tri. - Mumbai)*
b. *Reliance Life Insurance Co. Ltd v. Commissioner of ST, Mumbai 2018 (363) ELT 1050 (Tri-Mum)*
c. *Saravana Stocks Pvt. Ltd. V Commr. Of Gst& C. Ex., Chennai 2021 (52) G.S.T.L. 408 (Tri. - Chennai)*

G.5 In view of the above, the Appellant submits that the impugned order proposing to demand 6%/7% of the value of exempted goods under Rule 6(3) is incorrect. The impugned order is not sustainable on merits and may be dropped.

H.1 The SCN has invoked extended period of limitation for the period April 2011 to September 2014.

H.2 The Appellant submits that they did not suppress any information from the Department with the intention to evade payment of Service tax. The Audit team was provided with a copy of the financial statements for the relevant period. Thus, all the facts with regard to the above transaction were within the knowledge of the Department and there has been no suppression on part of the Appellant.

H.3 The Appellant further submits that there is no finding in the Impugned Order for invoking the extended period. On this ground alone, the extended period of limitation cannot be invoked.

H.4 Therefore, the extended period of limitation under Proviso to Section 73(1) of the Act cannot be

invoked in the absence of any positive act of the Appellant which proves the intention to evade Service tax. Reliance in this regard is placed on the following cases:

a) *Anand Nishikawa Co. Ltd v. CCE, Meerut, 2005 (188) ELT 149-Supreme Court.*
b) *Continental Foundation Jt. Venture v. CCE, Chandigarh-I, 2007 (216) ELT 177-Supreme Court.*
c) *CCE, Mumbai IV v. Damnet Chemicals Pvt. Ltd. 2007 (216) ELT 3- Supreme Court.*
d) *Padmini Products Ltd. v. CCE, 1989 (43) ELT 195-Supreme Court.*

I.1 It is submitted that in the view of the foregoing submissions, since the demand of Service Tax is unsustainable, the question of imposing interest under Section 75 of the Act and penalty under Section 77 and 78 of the Act does not arise.

I.2 It is further submitted that, in any case, the Appellant has not taken or utilized the credit wrongly by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of CCR and the Act and therefore no interest is payable under Rule 15 of the CENVAT Rules.

In light of the above submissions, it is humbly prayed that the appeal be allowed in full, and the Impugned Order confirming the demand of Service tax interest and penalties be set aside with consequential relief.

3.1. The Ld. AR Shri Rudra Pratap Singh appeared and argued for the department. In regard to the first contention of appellant that, appellant company has been established only with effect from 21/12/2015 and therefore not liable to pay service tax prior to this

period, the Ld. AR adverted to the statements recorded from Shri Manish Pahuja and Shri Amritharaj V. It is submitted by Ld. AR that Shri Manish Pahuja had clearly admitted that he is the person responsible and looking after the operations of M/s. Jubilant Motor Works Pvt. Ltd. (JMWPL) as well as the appellant Company. It is also admittedby him that he is responsible for the lapse of non-payment of service tax. It is submitted that the appellant had taken over the business of M/s. Jubilant Motor Works Pvt. Ltd. as a going concern and therefore, the appellant is liable to pay the service tax for the period prior to 2015 also.

3.2. In his statement, Shri Amritraj has given the details of incentives received from M/s. Volkswagen Group Sales India Pvt. Ltd. So also the incentives received from Castrol India was admitted to be received for promoting and selling the Castrol brand of oils. These incentives were neither declared in ST – 3 returns nor did the appellant discharge service tax on these amounts.

3.3. To support the contention that the incentives are received by appellant from M/s. Volkswagen for providing the services of promoting the sales and business of M/s. Volkswagen, the agreement signed between M/s. Volkswagen and the appellant was adverted to by the Ld. AR. The agreement consists of money

marketing and sales promotion clauses. Article 4 deals with 'Planning and supply of vehicles' and reads as under:

> "(1) In order to meet their mutual marketing and sales targets, the Dealer shall agree on an annual sales target for each calendar year and the dealer shall dedicate all required resources in terms of infrastructure, manpower, marketing budgets etc. requires and as may be recommended by supplier to achieve the targets set by the supplier for the year. Such annual target shall be re-negotiated when necessaryin case any significant change occurs to the national automobile market and / or the sales environment".

3.4. Further, Article 10 which deals with 'sales / After Sales Promotion' reads as under:

> (i) The Dealer shall consult with the supplier to determine the sales distribution measures within its Main Territory of Responsibility, in order to achieve the best distribution and sales and After Sales. In particular, the Dealer shall maintain organization to carry out and promote the sales and After Sales service of the Contractual Products particularly throughout the Main Territory of Responsibility. The Dealer shall promote the Contractual Products, after sales service thereof and such other services which are designated by the supplier and provided by the supplier and the sale organization.
> ……..
> (4) To safeguard and promote the sales of the Contractual Products, the Dealers shall conduct its Audi approved plus business effectively and in line with the suppliers' guidelines and shall offer financial services in line with the suppliers' recommendations".

3.5. It is argued by the Ld. AR that the incentives are given to the appellant for promoting the business / sales of M/s. Volkswagen and therefore these incentives are nothing but consideration received for providing Business Auxiliary Services. So also in the case of incentives received by appellant from M/s. Castrol India are for providing sales promotion of castrol products. The confirmation of demand of service tax under Business Auxiliary Services is correct and proper.

3.6. The appellant also earned income as 'car advance money forfeited'. When a customer books a car, certain amount is collected from him as advance, towards booking. Subsequently, if the customer cancels the booking, the advance amount given by the customer is forfeited against the cancellation. It is submitted that the details of forfeited advance would show huge amounts. The appellant is liable to discharge service tax on these amounts.

3.7. In regard to the demand raised on the ground that the appellant has availed CENVAT credit on common input services used for exempted service (trading) and taxable services, the Ld. AR submitted that the appellant had not maintained separate accounts as required under Rule 6 (3) of CENVAT Credit Rules 2004. Further, they did not intimate the department that they intend to reverse the proportionate credit attributable to trading as per Rule 6 (3 A) (ii). Therefore, the appellants have to pay an amount of 5%, / 6% / 7% of the value of exempted goods (trading turnover) and the confirmation of this demand requires no interference.

3.8. The Ld. AR prayed that the appeal may be dismissed.

4. Heard both sides.

5. The issues arising for consideration are as under:

(i) Whether the appellant is liable to discharge the service tax prior to 12/2015 as they have taken over the business of M/s. JMWPL only with effect from 12/2015?
(ii) whether the demand of service tax on the incentives received from M/s. Volkswagen and M/s. Castrol India Ltd. are subject to levy of service tax under BAS?
(iii) Whether appellant is liable to pay service tax on the amount of advance forfeited due to cancellations?
(iv) Whether the appellant is liable under Rules 6 (3A) (i) to pay an amount of 5%, / 6% / 7% of value of exempted services (trading) when the appellant has already reversed proportionate credit as under Rule 6 (3 A) (ii) which is attributable to trading?

6.1. We take up to discuss the issues (iii) to (iv) as above before taking up the discussion on issue no. (i). The appellant has received incentives / discounts from M/s.Volkswagen and M/s. Castrol India as narrated in the preceding paragraphs. The case of the department is that the appellant is providing services of sales promotion and marketing to M/s. Volkswagen and M/s. Castrol and incentives and discounts received are nothing but consideration for such services and would fall under BAS. The appellant has countered this allegation by submitting that these amounts are nothing but target incentives and is related to sale of cars and sale of castrol oil. The Show Cause Notice covers the period from April 2011 to March 2016. It falls before the period 1/7/2012 and after. Though the Show Cause Notice alleges that these are services of promotion and marketing falling under BAS, the Show Cause Notice does not specify under which subclause of section 65 (19), the alleged service would fall. For better

appreciation, the definition of BAS under Section 65 (19) is reproduced as under:

[(19) "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 [20] [***]
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 [21] [Explanation-For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, 'inputs" means all goods or services method for use by the client;]
v. [22] [production or processing of goods for, or on behalf of, the client;]
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 (vi), 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, [23] [but does not include any activity that amounts to manufacture of excisable goods.]
[24] [Explanation --- For the removal of doubts, it is hereby declared that for the purposes of this clause,---

6.2 For the period after 1/7/2012, the issues has to be considered as per definition of service as under Section 65 (B) 44. The definition of 'service' reads as under:

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—
(a) an activity which constitutes merely,--
i. a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
ii. such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or
iii. a transaction in money or actionable claim;
(b) a provision of service by an employee to the employer in the course of or in relation to his employment;
(c) fees taken in any Court or tribunal established under any law for the time being in force.

6.3. It needs to be stated that in the Show Cause Notice, it is merely avered that the activity falls under BAS, and the specific sub clause of Section 65 (19) has not been mentioned. So from the Show Cause Notice it is not possible to understand as to why the department alleges that the activity would fall under BAS. However, in the impugned order, the adjudicating authority goes a step further to observe that the activity is in the nature of promotion of business of M/s. Volkswagen and M/s Castrol India. It requires to be stated that the agreements very clearly state that the relationship between the appellant and these companies are on a principal to principal basis. Thus, M/s. Volkswagen or M/s. Castrol cannot be considered as a client of the appellant. In para 25.4 of the impugned order, the adjudicating authority holds that 'I do agree that the sale takes place on principal-to-principal basis.' However, it is observed by the adjudicating authority that such principal to principal relation between the appellant and M/s. Volkswagen is only for limited purpose of sale. We are unable to decipher or agree with this view of the adjudicating authority. In a principal-to-principal transaction, the appellant purchases the cars / products / from the Company by paying the sale consideration. The appellant then becomes the owner of such cars / products and then resells it to its customers. In such process, there cannot be any activity of promoting the sales of M/s. Volkswagen or M/s. Castrol India Ltd. The appellant would be interested to sell

more cars to make profit for themselves. The incentives offered for achieving targets of sale cannot be said to be incentives for promoting the sale of M/s. Volkswagen as the appellant is interested to do more sales for their own benefit of making more profit. It cannot be said that they promote the sales of M/s. Volkswagen or M/s. Castrol India Ltd. The incentives depend on the targets achieved which the appellant is interested to achieve as they would earn more profit. Even if there was no such incentive the appellant would be attentive and focused to sell cars to their maximum possible. The incentive is not in the nature of any consideration for providing services to M/s. Volkswagen and M/s. Castrol India Ltd.

6.4. The Tribunal in the case of ***M/s. S.K. Cars India (P) Ltd. Vs. Commission of GST and CE, Sale, 2023-VIL-488 CESTAT, Chennai-ST*** had occasion to consider a similar issue. It was held that the incentive / discount are in regard to sales transaction and cannot be subject to service tax.

> *"7. The first issue is in regard to the demand of service tax on the incentives received by the appellant from the manufacturer for sale of cars. The definition of Business Auxiliary Services under Section 65 (19) of the Act ibid is reproduced as under:*
>
> *"Business Auxiliary Services" means:- any service in relation to—*
> *(i) Promotion or marketing or sales of goods produced or provided by or belonging to the client; or*
> *(ii) Promotion or marketing of service provided by the client; or*
> *(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," input means all goods or services intended for use by the client.

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

(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 (vi), 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 supervisionand includes services as commission agent, but does not include any activity that amounts to manufacture of excisable goods.

Explanation. For the removal of doubts, it is hereby declare that for the purposes of this clause, ...

(a) "commission agent" means any person who acts on behalf of another person and clause 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 -

(1) Deals with goods or services or documents of title to such goods or service; 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 a such sale or purchase of such goods or services;

(b) "excisable goods" has the meaning assigned to it in clause (d) of section e of the Central Excise Act, 1944;

(c) "manufacture" has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944."

8. The very same issue was analysed by the Tribunal in the case of ***M/s. Rohan Motors Ltd.*** (Supra). The relevant paragraphs read as under:

"2. The appellant is a dealer of Maruti Udhyog Ltd. [MUL]. The appellant buys vehicles from MUL for further sale to the buyers by virtue of a dealership agreement dated January 1, 2013 entered into between Maruti Suzuki India Ltd. and the appellant. Under the said agreement, the appellant receives discount form MUL, which are referred to as "incentives" under the scheme. The Department has sought to levy service tax on the incentives received by the appellant under the category of "business auxiliary service" [BAS].

….

…..

10. As noticed above, the appellant purchases vehicles form MUL. and sells the same to the buyers. It is clear from the agreement that the appellant works on a principal to principal basis and not as an agent of MUL. This is for the reason that the agreement itself provides that the appellant has to undertake certain sales promotion activities as well. The carrying out of such activities by the appellant is for the mutual benefit of the business of the appellant as well as the business of MUL. The amount of incentives received on such account cannot, therefore, be treated as consideration for any service. The incentives received by the appellant cannot, therefore, leviable to service tax.

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12.*The Tribunal placed reliance on an earlier decision of the Tribunal in Tyota Lakozy Auto Pvt.Ltd.[**2017(52)STR299 (Tri.- Mumbai)**] and observed.*

> *"4. From a perusal of various case laws relied by the appellant, we note that the discounts/incentives received by the appellant form MUL cannot be made liable for payment of Service Tax under BAS, since the appellant is purchasing the cars from MUL on principal to principal basis and subsequently, reselling the same.*
>
> *5. Revenue has ordered for payment of Service Tax under various receipts recorded under miscellaneous income. These include loading/unloading charges, Pollution Checkup charges, penalty-cum processing charges etc. It is obvious that these amounts have been received not towards provision of any service on behalf of MUL or anybody else. Consequently, there is no justification for levying Service Tax under BAS.*
>
> *6. In miscellaneousincome, commission amounts received from ICICI have also been included. This commission has been received for provision of furniture to ICICI for facilitation of accommodating representatives in the premises of the appellant for selling insurance policies for cars. Such an activity cannot be considered under BAS as has been held by the Larger Bench in the case of Pagadiya Auto Centre (supra). Consequently, we set aside the demand of Service Tax on such commission received.*
>
> *7. A portion of the demand also has been raised under the category of GTA. The appellant has paid the freight expenses in connection with transportation of Cars to their customers. However, they have not issued any consignment notes which are necessary to identify the appellant as a goods transport agency. As per the views expressed by the Tribunal in the case of South Eastern Coal Fields Ltd,. (supra), in the absence of consignment notes, the activity of the appellant cannot be classified under GTA service. Consequently, we set aside the demand under GTA service".*

13. The same view was taken by the Tribunal in Commissioner of Service Tax, Mumbai-I Vs. Sai Service Station Ltd. [2013 (10) TMI 1155-CESTAT Mumbai].

14.In regard to the period post July, 2012, reliance has been placed by the

learned counsel for the appellant on an order dated March 23, 2017 passed by the Joint Commissioner, Central Excise in the matter of M/s.Rohan Motors Ltd. The period involved was from October, 2013 to March 2014 and 2014-15. The Joint Commissioner, after placing reliance upon the decision of the Tribunal in Sai Service Station Ltd., observed as follows:

> *"I also find that the ratio of the aforesaid case of CCE, Mumbai-I Vs. Sai Service Station is squarely applicable to the facts of the present case and hold that no service tax can be demanded on the incentive which was in form of trade discounts, extended to the party in terms of a declared policy for achieving sales target. Accordingly, I find that the demand of service tax raised on this count is unsustainable. Thus demand of interest under section 75 of the Act is also no sustainable."*

15.The Department, in the present cannot be permitted to take a different view. The service tax on the amount received from incentives could not, therefore, have been levied to service tax."

9.The Tribunal in the case of BM Autolink Vs Commissioner of Central Excise, Kutch (Supra) has taken similar view and set aside the demand of service tax on the incentives received for sale of cars.

> *"4. We have carefully considered the submissions made by both the sides and perused the records. We find that the fact is not under dispute that the appellant being a dealer purchase the vehicles from M/s. Maruti Suzuki India Ltd. and subsequently sell the same to various customers. The transaction between M/s. Maruti Suzuki India Ltd. and the dealer and subsequently sale transaction between the dealer and the customers are purely on principal to principal basis. The vehicle manufacturer M/s.Maruti Suzuki India Ltd. on the basis of yearly performance of sale grants the discount to the dealer, this discount is nothing but a discount in the sale of value of the vehicle and throughout the year therefore, these sales discount in the course of transaction of sale and purchase of the vehicles hence, the same cannot be considered as service for levy of service tax. The issue is no longer res-integra as the same has been decided in various judgement cited by the appellant.*
>
> *ROSHAN MOTORS PVT. LTD. 2022 (8) TMI 1254 – CESTAT NEW DELHI*

10.The same view was taken by the Tribunal in **CST v. Sai Service Station Ltd**. – 2013 (10) TMI 1155 – CESTAT Mumbai = 2014 (35) S.T.R. 625 (Tribunal).

11.In regard to the period post

> "I also find that the ratio of the aforesaid case of CCE, Mumbai – I v. Sai Service Station is squarely applicable to the facts of the present case and

> hold that no service tax can be demanded on the 'incentive' which was in form of trade discounts, extended to the party in terms of a declared policy for achieving sales target. Accordingly, I find that the demand of service tax raised on this count is unsustainable. Thus demand of interest under section 75 of the Act, is also no sustainable."

> 10.Following the above decisions which is squarely applicable to the facts of the case, we hold that the incentives by the appellant cannot be subject to levy of service tax under the category of Business Auxiliary Services."

6.5. For the period after 01/07/2012, the demand has been made under the definition of service under Section 65 (44) B. We have already concluded that there is no element of service. The incentives are purely on the basis of sales and not for providing service of promoting the business of M/s. Volkswagen / Castrol India. The demand made after 01/07/2012 also is not sustainable. From the above discussions and following the decision as above we have no hesitation to hold that the demand of service tax raised on incentives / discounts from M/s. Volkswagen and M/s. Castrol cannot sustain and requires to be set aside. Ordered accordingly.

7. The next issue is with regard to the demand confirmed on amount of advance forfeited at the time of cancellation of booking of car. In the case of ***Lemon Tree Hotel Vs. Commissioner, GST CE & Customs, Indore 2020 (34) GSTL 220 (Tri-Delhi)*** a similar question was considered wherein the demand of service tax was raised by department on the amount retained on cancellation of advance booking made for accommodation in hotel. It was held

that such amount is not liable to levy of service tax under Section 66 E (C) of Finance Act 1994 or under Section 65 (105) (zzz-w) of Finance Act 1994. The relevant paras read as under:

> *"3. So far as the first issue is concerned, the appellant , in the course of their business of running a hotel, offers advance booking to its customers, on payment of rent or deposit. Sometimes in the event of cancellation or of no show i.e. if the guest does not come for stay, the appellants retains the full or part of the amount towards cancellation charges. It is admitted that the appellant have paid service tax under Accommodation Services as and when they receive advance, availing the permissible abated value. It is the case of the Revenue that upon cancellation by the customers, the gross amount received by the appellant qualifies the receipt under Section 66E(e), which is defined as under:-*
>
> *"Following shall constitute the declared services viz.:-*
>
> *"agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and chargeable on full value and not on abated vale".*
>
> *4. Ld. Commissioner (Appeals) in confirming the demand under this head has observed that retention of such cancellation charges is not against the provisions of intended services but for not availing the said services by the customers, which the appellant has tolerated.*
>
> *5. Having considered the rival contentions, I find that the aforementioned observation of the Commissioner (Appeals) are erroneous and have no legs to stand. Admittedly, the customers pay an amount to the appellant in order to avail the hotel accommodation services and not for agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and chargeable on full value and not on abated value. The amount retained by the appellant is for, as they have kept their services available for the accommodation, and if in any case, the customers could not avail the same, thus, under the terms of the contract, they are entitled to retain the whole amount or part of it. Accordingly, I hold that the retention amount (on cancellation made) by the appellant does not undergo a change after receipt. Accordingly, I hold that no service tax is attracted under the provisions of Section 66E (e) of the Finance Act. Accordingly, this ground is allowed in favour of the appellant.*

7.2. Similarly, in the case of ***M/s. Bharat Heavy Electricals Ltd. Vs. Commission of GST and CE Thiruchirappalli*****2023-VIL – 359- CESTAT-Chennai – ST** the question arose as to whether

appellant is liable to pay service tax on the liquidated damages recovered for delay in supply and service. The Tribunal answered in the negative and in favour of the assessee. The relevant paras read as under:

"5. After hearing both sides, we find that the only issue that is to be decided by us is: whether the Liquidated Damages received by the appellant for tolerating the delay would amount to "declared service" within the meaning of Section 65E (e) of the Act ibid, and consequently, whether the appellant would be liable to Service Tax on the same in terms of Section 668 ibid.?

6.1 The Learned Advocate for the appellant would submit, at the outset, that the issue involved in the case on hand is no more res integra as the same has been settled by the orders of various Benches of the CESTAT, namely -

(i) South Eastern Coalfields Ltd. v Commissioner of Central Excise and Service Tax, Raipur [2020 (12) TM1 912 CESTAT, New Delhi 2020-VIL- 559-CESTAT-DEL-ST);

(ii) M.P. PoorvaKshetra Vidyut Vitran Co. Ltd. v. Principal Commr., CGST &C.Ex., Bhopal [2021 (46) G.S.T.L. 409 (Tri. Delhi) - 2021-VIL-30 CESTAT-DEL-ST);

(iii) Neyveli Lignite Corporation Ltd. v. Commissioner of Cus., C. Ex. & S.T., Chennai [2021 (53) G.S.T.L. 401 (Tri. Chennai) - 2021-VIL-338-CESTAL CHE-ST);

(iv) Steel Authority of India Ltd. v. Commissioner of G.S.T. & Central Excise, Salem [2021 (7) TMI 1092 - CESTAT, Chennai - 2021-VIL-326- CESTAT CHE-ST)

(v) MNH Shakti Ltd. v. Commissioner, C.G.S.T. &C.Ex., Rourkela (2021 (11) TMI 427-CESTAT, Kolkata - 2021-VIL-600-CESTAT-KOL-SI]:

(vi) K.N Food Industries Pvt. Ltd v. Commissioner of C.G.S.T. &C.Ex., Kanpur (2020 (38) G.S.T.L. 60 (Tri. Allahabad) 2019-VIL-731-CESTAT ALH-ST]

(vii) Khaira and Associates v Commr. of Cus., C.Ex. & S.T, Bhopal (2020 (34) GSTL. 224 (Tri. Delhi) 2019 VIL-1204-CESTAT-DEL-ST);

(viii) M/s. Amit Metaliks Ltd. v. Commissioner of C.G.S.T., Bolpur (2019 (11) TMI 183-CESTAT, Kolkata 2019 VIL-679-CESTAT KOL-ST].

7.3. He would invite our attention to the order of the Delhi Bench of the Tribunal in the case of ***M/s. South Eastern Coalfields Ltd.*** (supra) and in particular, to the following observations:-

"26. Thus, a service conceived in an agreement where one person, for a consideration, agrees to an obligation to refrain from an act, would be a 'declared service' under section 66E(e) read with section 65B (44) and would be taxable under section 68 at the rate specified in section 668. Likewise, there can be services conceived in agreements in relation to the other two activities referred to in section 66E(e).

27 It is trite that an agreement has to be read as a whole so as to gather the intention of the parties. The intention of the appellant and the partieswas for supply of coal; for supply of goods; and for availing various typesof services. The consideration contemplated under the agreements was forsuch supply of coal, materials or for availing various types of services. Theintention of the parties certainly was not for flouting the terms of theagreement so that the penal clauses get attracted. The penal clauses arein the nature of providing a safeguard to the commercial interest of theappellant and it cannot, by any stretch of imagination, be said thatrecovering any sum by invoking the penalty clauses is the reason behind the execution of the contract for an agreed consideration. It is not the intention of the appellant to impose any penalty upon the other party nor is it the intention of the other party to get penalized.

28. It also needs to be noted that section 658(44) defines "service" ta mean any activity carried out by a person for another for consideration Explanation (a) to section 67 provides that "consideration" includes any amount that is payable for the taxable services provided or to be provided The recovery of liquidated damages/penalty from other party cannot be said to be towards any service per se, since neither the appellant is carrying on any activity to receive compensation nor can there be any intention of the other party to breach or violate the contract and suffer a loss. The purpose of imposing compensation or penalty is to ensure that the defaulting act is not undertaken or repeated and the same cannot be said to be towards toleration of the defaulting party. The expectation of the appellant is that the other party complies with the terms of the contract and a penalty is imposed only if there is non-compliance.

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30. The activities, therefore, that are contemplated under section 66E (e), when one party agrees to refrain from an act, or to tolerate an act or a situation, or to do an act, are activities where the agreement specifically refers to such an activity and there is a flow of consideration for this activity.

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40. It is in this context and in the context of section 74 of the Contract Act, that the Supreme Court observed:

20. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of parties pre- determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract for predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated.

41. The Supreme Court also noticed that section 74 of the Contract Act merely dispenses with the proof of "actual loss or damages". It does not justify the award of compensation, when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good the loss or damage which actually arose or which the parties knew when they made the contract 'to be likely to result from the breach'. The Supreme Court also found that there was no evidence that any loss was suffered by the plaintiff in consequences of the default by the defendant, save as to the loss suffered by being kept out of possession of the property. The Supreme Court, therefore, held that plaintiff would be entitled to retain only an amount of Rs. 1000/- that was received as earnest, out of amount of Rs. 25,000/-.

42. The conclusion drawn by the learned authorized representatives of the Department from the aforesaid decision of the Supreme Court that compensation received is 'synonymous' with 'tolerating' or that the Supreme Court acknowledged that in a breach of contract, one party tolerates an act or situation is not correct.

43. It is, therefore, not possible to sustain the view taken by the Principal Commissioner that penalty amount, forfeiture of earnest money deposit and liquidated damages have been received by the appellant towards "consideration" for "tolerating an act" leviable to service tax under section 66E(e) of the Finance Act."

7.4. The above decisions are squarely applicable to the facts and the issue as to whether appellant is liable to pay service tax on advance amount forfeited on cancellation of booking. We find that the demand of service tax cannot be sustained. This issue is answered in favour of the appellant and against the department.

8.1 The next issue to be addressed is whether the appellant is liable to pay 5% / 6% / 7% of the value of exempted services (trading) as they failed to maintain separate accounts of common inputs availed for taxable services and exempted services. The Ld. counsel for appellant has submitted that appellant has reversed the proportionate credit attributable to trading. The details are also furnished. The department has raised the present demand on this ground for the reason such reversal of proportionate credit as under Rule 6 (3) (ii) cannot be accepted as the appellant has not given prior intimation to the department that they intend to adopt the method of reversal of proportionate credit as under Rule 6 (3) (ii). The issue as to whether the assessee is required to follow only Rule 6 (3) (i) on failure to intimate the department as to the option to reverse proportionate credit is no longer res-integra. It has been held in various decisions that the requirement for giving an intimation is only procedural in nature and the department cannot deny to an assessee the option available under Rule 6 (3) (ii) only because they did not comply with the procedure of prior intimation.

8.2. The Tribunal in the case of ***Mercedes Benz India Pvt. Ltd. Vs CCE, Pune 2015 (40) STR 381 (Tri-Mum)*** held as under:

> *" 2.3 The show cause notice was issued wherein it was alleged that the appellant while reversed the amount of Cenvat credit and paying the interest had not followed the procedure as laid down in sub-rule 3A(a) and (b) of the said rules respectively, inasmuch as they had neither exercised these option by intimating the same in writing to the superintendent of central Excise giving required particulars nor have they determined and paid any amount provisionally for every month. Further this amount cannot be*

treated as final determination of the whole financial year as envisaged under sub rule 3A(c) of the said rule. Thus by not following laid down procedure as envisaged under sub-rule 3A(c) of the said rule the appellant becomes liable to calculate and pay amount equivalent to 5% of the value on exempted services.

5.1 We have observed that in Rule 6(3) prevalent at the relevant time, two options have been provided-

(i) Payment of 5% on value of exempted services

(ii) Payment of an amount equal to the Cenvat Credit amount attributed to input services used in or in relation to manufacture of exempted goods or provision of exempted services as provided under sub rule (3A)(b).

It is observed that the appellant has availed the option provided under sub- rule (3)(ii) of Rule 6 and paid an amount as per sub-rule (3A) along with interest and intimated the same to the jurisdictional superintendent in writing vide letter dated 14-3-2012. From the perusal of the said letter, we observed that the appellant categorically stated in the said letter that payment of Cenvat Credit, which they have made along with interest is in accordance with Rule 6 (3A) of Cenvat Credit Rules. With this act of the appellant, it is clear that the appellant opted for the option as provided under Rule 6(3)(ii) of the Cenvat Credit Rules, 2004, in accordance to which, the appellant are supposed to an amount equivalent to Cenvat Credit on input service attributed to the exempted service in terms of Rule 6(3A). In the present case, the appellant has availed Cenvat credit in respect of common input services, which has been used in relation to the manufacture of the final product well as for trading of bought out cars. Therefore they are supposed to pay an amount equivalent to Cenvat credit which is attributed to the input service i.e. sale of car. In our view, three options have been provided under sub-rule 6(3), and it is up to the assessee that which option has to be availed. Revenue could not insist the appellant to avail a particular option. In the present case the appellant have admittedly availed option as provided under Rule 6(3)(ii) and paid an amount as required under sub-rule (3A) of Rule 6. As regard the compliance of the procedure and conditions as laid down for availing option as provided under sub-rule (3) (ii), we find that foremost condition is that the appellant is required to pay an amount as per the formula provided under sub-rule (3A) on monthly basis. However, we find that as per the provision, payment on monthly basis is provisional basis, therefore it is not mandatory that whole amount or part of the amount was required to be paid on every month. The appellant though belatedly calculated the amount required to be paid in terms provided under sub-rule (3A) of Rule 6, therefore to fulfill the condition, assessee should pay the said amount, which has been complied by the appellant .

5.2 As regard the delay in payment, if any, the appellant have discharged the interest liability on such delay. Regarding the compliance as provided under Clause (a) of sub rule (3A) of Rule 6 the appellant while exercising this option is required to intimate in writing to the Jurisdictional Superintendent, Central Excise, the following particulars namely

(i) Name, address and registration No. of the manufacturer of goods or provider of output service;

(ii) Date from which the option under this clause is exercised or proposed to be exercised;

(iii) Description of dutiable goods or taxable services;

(iv) Description of exempted goods or exempted services;

(v) Cenvat credit of inputs and input services lying in balance as on the date of exercising the option under this condition.

As per the submission of the appellant and perusal of their letter along with enclosed details, it is found that more or less all these particulars were intimated to the Jurisdictional Superintendent. The appellant has been filing their returns regularly on monthly basis to the department. On perusal of the copies of the such return submitted along with appeal papers, it is observed that the particulars, as required under clause (a) of sub-rule (3A) of Rule 6 has been produced to the range superintendent. Therefore all the particulars which are required to be intimated to the Jurisdictional superintendent while exercising option stand produced. Though these particulars have not been submitted specifically under a particular letter, but since these particulars otherwise by way of return and some of the information under their letters has admittedly been submitted, we are of the view, as regard this compliance of Rule 6 (3A|), it stood made.

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

5.4. We find that the appelant admittedly paid an amount of Rs 4,06 785/ plus interest, this is not under dispute. Therefore in our view, the appellant have complied with the condition prescribed under Rule 6(3)(ii) read with sub-rule (3A) of Rule 6 of Cenvat Credit Rules, therefore demand of huge amount of Rs 24,71,93,529 of the total value of the vehicle amounting to Rs.494,38,70,5777 sold in the market cannot be demanded. We are also of the view that Rule 6 of the Cenvat Credit Rules is not enacted to extract illegal amount from the assessee. The main objective of Rule 6 is to ensure

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

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

5.6. We have gone through judgments relied upon by the Ld. A.R. in the arguments, we found that as regards the judgments on the issue of availment of Cenvat Credit on the input or input services used in dutiable and exempted goods, the provision involved in the present case i.e Rule 6 (3) (i) (ii) (3A) has not been considered in the relied upon judgments, therefore the same are not applicable. As regard the other judgments, all these judgments, all these judgments having different facts and dealing with other provisions such as SSI exemption, exemption notification etc. which are not identical to the fact of the present case. Moreover, in the present case the substantive provisions under Rule 6 (3) (ii) and sub rule (3A) i.e. payment of equivalent to the Cenvat Credit, which the appellant have complied with and if at all there is delay, the required interest has also been paid, therefore in the present case, there is no case of noncompliance of procedure and condition. Therefore, the judgments cited by the Ld. A.R. are not applicable.

6.1. In view of these observations, we are of the considered view that demand confirmed by the adjudicating authority has no legs and therefore the same cannot be sustained. The impugned order is set aside and Appeal is allowed.

8.3. Similar view was taken in the case of ***M/s. Cranes and Structural Engineers Vs. CCE 2016 (8) TMI 387 – CESTAT, Bangalore*****.** Relevant para is as below:

4.1 On analysis of Rule 6(3A), I find that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing to the Department regarding the option exercised. In the present case admittedly there is no intimation given by the appellant informing the exercise of his option. The

argument of the Department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculating under the first option. According to me, this argument is devoid of merit, because the said Rule does not say anywhere that on failure to intimate, the manufacturer/service provider would lose his right to avail second option of reversing the proportionate credit. Sub-Rule (3A) is only a procedure contemplated for application of Rule 6(3). Consequently, the argument of Revenue is that the appellants exercising option is mandatory and on its failure, the appellant has no other option but to accept and apply Rule 6(3)(1) and make payment of 5%/10% of the sale price of exempted goods or exempted services is not acceptable, because the Rule does not lay down any such restriction and this has been field in the judgments cited supra. It has been held in the judgment that the condition in Rule 6(3A) to intimate the Department is only a procedural one and that procedural lapse is condonable and denial of substantive right on such procedural failure is unjustified. Therefore keeping in view the facts and evidence on record, the demand raised by the Revenue is not legal and proper. Moreover, the demand raised by the Revenue is also hit by limitation as the appellant reversed the pro-rata credit with interest on 31.7.2010 itself and communicated to the Department whereas the show-cause was issued only on 13.3.2012 which is beyond the period of one year and the allegation of the Department regarding suppression of fact is also not tenable because the appellant has disclosed these facts in their periodical ER1 returns filed by them. Therefore, the impugned order is not sustainable on merit as well as on limitation and therefore, I set aside the impugned order by ping the appeal of the appellant with consequential relief, if any.

8.4. After considering the facts and following the above decisions, we hold that the demand raised alleging that appellant has to pay 5% / 6% / 7% of the value of exempted services even though they have reversed proportionate credit cannot sustain. This issue is found in favour of appellant and against the department.

9. Now we may return to the first issue as to whether the appellant is liable to pay service tax for the period prior to 12/2015. It is argued by the Ld. counsel that the liability to pay service tax as per Section 68 is on the person who has rendered the services. The appellant company has come into existence only in 2015 and

therefore cannot be called upon to pay service tax prior to 2015. As we have already found the issue on merits for the demands for the period prior to 2015 and after 2015 to be not sustainable, we find that any further discussion on this issue would be of no consequence. We therefore think it is not necessary to delve into this issue which is of technical nature.

10. From the foregoing, we hold that the confirmation of demand of service tax, interest and penalties cannot be sustained. In the result, the impugned order is set aside. The appeal is allowed with consequential reliefs, if any.

(Pronounced in court on 05.02.2024)

(VASA SESHAGIRI RAO)
Member (Technical)

(SULEKHA BEEVI C.S.)
Member (Judicial)

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