CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

SERVICE TAX APPEAL NO. 10193 OF 2017
(Arising out of OIO-AHM-EXCUS-003-COM-018-009-2016-17 dated 19/10/2016 passed by Commissioner of Central Excise, Customs and Service Tax – AHMEDABAD-III)

GUJARAT POWER CORPORATION LTD. ....Appellant
BLOCK NO. 8, 6TH FLOOR, UDYOG BHAVAN,
SECTOR-11, GANDHINAGAR-GUJARAT

VERSUS

C.C.E. & S.T.- AHMEDABAD-III ....Respondent
CUSTOM HOUSE... 2ND FLOOR,
OPP. OLD GUJARAT HIGH COURT, NAVRANGPURA,
AHMEDABAD, GUJARAT-380009

APPEARANCE:
Shri. Amal Dave, Advocate for the Appellant
Shri. Dinesh Prithiani, Assistant Comm. (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 11392 /2022

DATE OF HEARING: 22.07.2022
DATE OF DECISION: 18.11.2022

RAJU

This appeal has been filed by M/s Gujarat Power Corporation Limited against confirmation of demand of service tax, interest and imposition of penalty. Learned Counsel pointed out that there are multiple issues raised in the instant case.

2. The first issue in dispute is the service tax is leviable on one time premium/salami under the category of renting of immovable property:

Learned counsel argued that a demand of Rs.11,80,19,611/- has been confirmed under the category of renting of immovable property service. It was submitted that the demand has been confirmed considering the one-time premium charged by the appellant as rent in addition to the annual lease rent which is being charged separately. It is submitted that on a perusal of the contract it is clear that the demand of Rs. 11,80,19,611/- has been confirmed considering the one time premium as a consideration towards rent and a

perusal of the contract, shows that rent was being charged over and above the one time premium. It is a settled legal position that one time premium/salami cannot be considered as consideration towards rent and hence cannot be leviable to service tax under the category of renting of immovable property. Reference be made to the following decisions:

(i) Kagal Nagar Parishad v/s. CCE, Order No. A/86376/2018
(ii) CST V/s. Greater Noida Development Authority, 2015 (40) STR 46 (All.)
(iii) Greater Noida Industrial Development Authority V/s. CCE & ST. 2015 (38) STR 1062.

2.1 Leaned Authorized Representative on this issue argued that while reply to SCN, the appellant has admitted that the premium amount is collected as cost of the land which they have to handover to the government. It is pertinent to mentioned that appellant has leased out the land for 30 years and it is not sold and therefore the Premium amount collected as a cost of land is not acceptable. He argued that this amount is nothing but the part of the rent and as per the Provisions of Section 67 (1) of the Finance Act, 1994, where Service Tax chargeable on any taxable service with reference to its value, then such value shall be that specified in clauses (i) to (ii). As per Sub-section (3) of Section67, the gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provisions of such service. Further, as per the Explanation (c) to the Section 67 ibid says that "(c) "gross amount charged includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise. Learned Authorized Representative further argued that the amount whether it is premium or deposit or whatever accounting name assigned, it is the part and parcel of the gross value of taxable service and appellant have their full time appointed CA as well as Mehul J Dayanak, I.C.W.A. Sr. Executive

(Finance) who are well aware of the provisions of the Service tax and further they are registered under' Renting of immovable properties". however, by not paying the appropriate service tax on said Premium amount clearly shows their intention to evade the service tax. Appellant is required to pay the service tax from the date of invoice and not from the date of payment and accordingly demand is rightly invoked.

2.2.1 We have considered rival submissions for the issue. We find that the issue regarding includability of the one time premium in the assessable value has been examined by the Tribunal in the case of Greater Noida Industrial Development Authority 2015 (38) STR 1062. In para 10.1 of the said order, following has been observed:

> **"10.1** A lease is a transaction, which has to be supported by consideration. The consideration may be either premium or rent or both. The consideration which is paid periodically is called rent. As regards premium, the Apex Court in the case of *Commissioner of Income Tax, Assam and Manipur* v. *Panbari Tea Co. Ltd.* reported in (1965) 3 SCR 811 has made a distinction between premium and rent observing that when the interest of the lessor is parted with for a price, the price paid is premium or salami, but the periodical payments for continuous enjoyment are in the nature of rent, the former is a Capital Income and the latter is the revenue receipt. Thus, the premium is the price paid for obtaining the lease of an immovable property. While rent, on the other hand, is the payment made for use and occupation of the immovable property leased. Since taxing event under Section 65(105)(zzzz) read with Section 65(90a) is renting of immovable property, Service Tax would be leviable only on the element of rent i.e. the payments made for continuous enjoyment under lease which are in the nature of the rent irrespective of whether this rent is collected periodically or in advance in lump sum. Service Tax under Section 65(105)(zzzz) read with Section 65(90a) cannot be charged on the "premium" or 'salami' paid by the lessee to the lessor for transfer of interest in the property from the lessor to the lessee as this amount is not for continued enjoyment of the property leased. Since the levy of Service Tax is on renting of immovable property, not on transfer of interest in property from lessor to lessee, Service Tax would be chargeable only on the rent whether it is charged periodically or at a time in advance. In these appeals, in the show cause notice dated 19-3-2012 issued by the Addl. Director, DGCEI, New Delhi, Service Tax has been demanded only on the lease rent and not on the premium amount while in the subsequent show cause notice dated 17-10-2012 issued by the Commissioner of Central Excise and Service Tax, Noida, the amount of premium has also been included in the lease rent for the purpose of charging of Service Tax for which no valid reasons have been given. Therefore, the Order-in-Original dated 30-4-2013 confirming the Service Tax demand on the premium amount is not correct and to this extent, the Service Tax demand would not be sustainable."

It is noticed that the appeal filed by the Revenue against the said order of Tribunal has been dismissed by Hon'ble High Court of Allahabad reported at 2015 (40) STR 46. It is seen that the department's appeal for Hon'ble High Court of Allahabad did not even challenge this observation of the Tribunal

reproduced in para 10.1 above. The appeal filed by the Greater Noida Industrial Development Authority against the said order before Hon'ble High Court of Allahabad was however dismissed. It is noticed that in the appeal of Revenue against the order of Tribunal in the case of Greater Noida Development Authority the Hon'ble High Court has observed as follows in the opening para:

> "The Commissioner of Service Tax, Noida has filed this appeal against the order of the Customs, Excise & Service Tax Appellate Tribunal Principal Bench, New Delhi, dated 28-8-2014 passed in Appeal No. ST/59067/2013 and Appeal No. ST/3256/2012 [2015 (38) S.T.R. 1062 (Tri.-Del.)]. The department is aggrieved by the part of the judgment, wherein it has been held that the letting out of vacant land by way of lease/license, for construction of buildings or temporary structure for use at a later stage in furtherance of business and commerce, is a taxable service only from 1-7-2010 and not from any date prior to it."

From the above, it is seen that the Revenue has not appealed against the specific finding in para 10.1 of Tribunal order dated 28.08.2014 wherein it has been held that the onetime premium is not taxable under the Renting of Immovable Property Service.

2.2.2 The impugned order placed reliance on the decisions of Tribunal in the case of CIDCO Ltd. 2015 (37) STR 122 and in the case of Maharashtra Industrial Development Corporation 2014 (36) STR 1295. We noticed that both these decisions are interim orders fixing the pre-deposit under Section 35F of the Central Excise Act. The decision of the Tribunal in the case of Greater Noida Development Authority (supra) is a final decision which has been approved by Hon'ble High Court of Allahabad. In view of above, the payment on one time premium/ salami cannot be charge to service tax under renting of immovable property service. The demand on this count is set aside.

3. The second issue in dispute is if service tax can be levied on signature bonus under the category of scientific or technical consultancy service. The appellant in respect of their contract with Torrent Power Ltd. received Rs. 10 Crore as signature bonus:

Learned counsel argued that the amount of Rs. 1,03,00,000/- was confirmed under the category of scientific or technical consultancy service. This amount has been calculated on the sum of Rs.10 crores received as signature bonus

which is a contractual payment made by one party to the contract to another. It was submitted that the department vide its letter dated 04.04.2013 informed the appellant that such signature bonus is to be taxed under the category of business support service. However, the show cause notice has been issued alleging such signature bonus to be in the nature of scientific or technical consultancy service, and therefore, considering the fact that the department is not clear under which category such services are appropriately classifiable. the demand is barred by limitation. It was submitted that the demand has been raised for the year 2009-10 and in 2013, the appellant was informed that such signature bonus is a business support service and then subsequently the show cause notice was issued proposing demand under scientific and technical consultancy service, this itself shows that even the department is not clear about the nature and classification of such service, and therefore, alleging suppression and mis-declaration on the part of the assessee is not tenable and hence the extended period of limitation cannot be invoked. He argued that, such signature bonus is in the nature of contractual obligation and is not a consideration towards any service, and therefore, even otherwise the demand is not sustainable. A reference to the letter by the department be made on Page No.139 of the paper book.

3.1 Learned Authorized Representative argued that the definition of scientific or technical consultancy under Section 65(92) of the Finance Act, 1994 as it stood during the relevant time was as follows:

> "Scientific or technical consultancy means any advise, consultancy, or scientific or technical assistance, rendered in any manner, either directly or indirectly, by a scientist or technocrat, or any science or technology institution or organization to a client, in one or more disciplines of science or technology."

Learned Authorized Representative relied on CBEC vide Letter F.No. B.11/1/2001-TRU dated 09.07.2001 has at Para 2 of Annexure-1 of the said letter has clarified Consultation as under:

> "The taxable service should be understood in the context of its commonly understood meaning and scope. For instance, it would cover consultation, advice or technical assistance provided by a scientist or a technocrat or science or technology an institution on any issue relating to any branch of science and technology. Such consultation may be in the nature of an expert opinion/advice in regard to scientific or technical feasibility or any other scientific or technical aspect of a project, process or design, recommending an apt technology, suggestion for improvement in existing technology or process, providing consultation on any technical problem or about new technology, etc."

Learned Authorized Representative further argued that as per the MoU signed between appellant Torrent Power Ltd (in short TPL) and Share Holder Agreement (SHA) dated 12.12.09 and at Paragraph 2.3 of said SHA, TPL shall pay a non-refundable Rs. 10 crore as signature bonus to GPSC for its "expertise and consultation service" in power project at the time of signing the SHA as per the Directives of Energy and Petrochemicals Department. Government of Gujarat (Para 3.2 of OIO). Learned Authorized Representative further argued that said MoU was for coal based power project at village Rampara -2/Uchchaniya in Taluka Rajula of District Amreli. From the browsing of the website/ portal of GSPL, the said project is mentioned under the Head of Coal Project, wherein it is clearly mentioned that "The ToR for the project has been approved by the MoEF New Delhi". This ToR is nothing but "STANDARD TERMS OF REFERENCE (TOR) FOR EIA/EMP REPORT FOR PROJECTS/ ACTIVITIES REQUIRING ENVIRONMENT CLERANCE UNDER EIA NOTIFICATION 2006". He argued that at least 53 terms have been stipulated to get the clearance from the MoEF and these terms are not feasible to fulfil without Technocrats advice and consultancy. As per the said Agreement entered between appellant and TPL and as admitted by the appellant regarding seeking the necessary permission from the Government clearly falls within the definition of 'Scientific or Technical Consultancy services. Appellant's contention that Department had agreed that Signature Bonus would fall under Business Support Service' and since the said service is covered only if the same is received after 1st May 2011 and appellant has received the said

amount prior to May 2011, appellant is not liable for service tax. Learned Authorized Representative further added that this argument is baseless as Department has not issued any SCN or demanded the Service Tax under Business Support Service as the department has issued SCN and has held to be taxable under Scientific or Technical Consultancy services.

3.1.1 Learned Authorized Representative argued that, appellant admitted they have certain obligation to perform and on another said that the obligation are not in nature of any service, but appellant failed to produce any evidence as actually what kind of obligations, they were required to perform. Mere saying that obligation were not taxable service appears to be flimsy ground without any substance and evidence.

3.2 We have considered rival submissions. It is noticed that the appellant has contended that there is no evidence on record to say that any scientific and technical consultancy service was given by the appellant to M/s Torrent Power Limited for which an amount of Rs. 10 Crores was charged. It has been argued that M/s Torrent Power Limited has paid non-refundable sum of Rs. 10 Crores as signature bonus which is directly payment made by one party in the contract to the other. The Revenue has to establish that certain Scientific and Technical Consultancy Service was given for receipt of this payment. It has been argued that no such evidence has been brought on record by Revenue to establish that payment made as signature bonus by M/s Torrent Power Limited to the Nodal Agency appointed by the State of Gujarat was not charged any value for any taxable service. From the Show Cause Notice, it is seen that the allegations are based on the Memorandum of Understanding signed between GPCL (Appellant) and M/s Torrent Power Limited for promoting a joint venture company (JVC) for setting up 1000+ MW coal based Power Project at village Rampara 2/Uchchaiya in Taluka Rajula of District Amreli-Gujarat.

Para 2.3 of the Share Holder Agreement executed between the party on 12.12.2009 mandates that the Torrent Power Limited shall pay a non-refundable amount of Rs. 10 Crores as signature bonus to GPCL for its expertise and consultation services in power project at the time of signing the share holder agreement as per the direction of Energy and Petrochemical, (Govt. of Gujarat) vide letter No. IPP-2006-4561-K dated 20.07.2009. The said clause 2.3 of the share holder agreement reads as follows:

> **"2.3 Signature Bonus**
>
> TPL shall pay non-refundable Rs. 10,00,00,000/- (Rupees Ten Crore Only) as signature bonus to GPCL for its expertise and consultation services in power project at the time of signing the SHA, as per the directives of Energy and Petrochemicals Department, Government of Gujarat, vide letter no. IPP-2006- 4561-K dated 20.07.2009."

On examination of the above paragraph of the share holder agreement, it is seen that the said signature bonus is given for what the appellant brings to table for the purpose of such agreement. It is not for any specific service given by the appellant to M/s Torrent Power Limited. It is seen from the Show Cause Notice, Revenue has not pointed out any specific example of any service in the nature of Scientific and Technical Consultancy extended by the appellant to M/s Torrent Power Limited. It is noticed that para 2.3 of the agreement between the appellant and M/s Torrent Power Limited uses the expression 'for its expertise and consultation services in Power Project'. It is not necessary that the expertise and consultation services can only be scientific and technical in nature. To be classified under scientific and technical consultancy service, the services and the consultancy should be in the field of science and technology. No evidence has been produced by Revenue to substantiate the claim that the consultancy provided, if any, in the nature of scientific and technical consultancy. The crux of the para 23.7 of Order-in-Original in following terms:

> "….M/s GPCL Identifies the power projects based on various fuels, prepares techno economic feasibility reports for such power projects, Identifies suitable private joint sector parties and Implements these Jointly with the selected parties. Thereafter, M/s GPCL obtains various statutory and non-statutory

> clearances for Implementation of power project, such as, water and air pollution clearance, forest clearance, environmental and forest clearance, civil aviation clearance etc. It also pursues the formalities related to acquisition of land under the Land Acquisition Act, 1984 and ties up the fuel linkages for the power project. Paragraph 2.9 of SHA clearly states that they have agreed to provide various services Including assistance in the finalization of loan/borrowing from lenders/financial institutions and provide equity capital contribution in time, as may be required by the Company. They also undertake to provide assistant to the Company in obtaining various approval and negotiation of the terms and condition of the Power Purchase Agreement with distribution company(s), in establishing fuel linkage, in obtaining clearance and also provide assistance for the evacuation of power generated by the company. Thus M/s. GPCL acts as a nodal agency for augmenting various needs of power sector."

The scope of responsibilities of M/s GPCL is very wide. Only a small part of their services could possibly fall under the category of scientific and technical consultancy in terms of the abovementioned obligations of GPCL. Most of the services relates to formalities and clearances from the government. In these circumstances, we do not find that the evidence produced by the Revenue to substantiate the claim that the services provided by the appellant was in the nature of scientific and technical consultancy is absolute.

3.3 In the aforesaid circumstances, we do not find any merit in the argument of the Revenue that any service in the nature of Scientific and Technical Consultancy has been provided by the appellant to M/s Torrent Power Limited. Consequently, the demand on this count is therefore set aside.

4. The third issue raised in dispute is if the demand of Rs. 1,29,71,525/- under works contract services is sustainable:

Learned counsel argued that the appellant had entered into contract with M/s. PGVCL for supply and erection of single point lighting connection on turnkey basis. The appellant discharged service tax on such project under the works contract category. The department raised a demand of Rs.1,29,71,525/- along with interest on the grounds that proper valuation method as per Service Tax Valuation Rules, 2006 was not followed. It is submitted that it is not the case of the department that the appellant did not discharge service tax, but it is a question of proper valuation being adopted for the purpose of assessment. He argued that the department has also not alleged any fraud or mis-

declaration with the intent to evade the payment of tax, and therefore, the demand of Rs.1,29,71,525/- is time barred. He further argued that the question of classification and valuation is the one which involves interpretation of law and the fact that the appellant discharged service tax liability as per the impression which it had regarding the valuation of such service, mere short payment of service tax would not mean that the extended period of limitation would be invokable. Therefore, he argued that the demand being beyond the normal period of limitation is hence not sustainable.

4.1 Learned Authorized Representative argued on this issue that as per Rule 2A(i) of the Service Tax (Determination of Value) Rules, 2006, appellant was required to pay service tax on the value equivalent to the gross amount charged for the Works Contract less the value of property in goods transferred in the execution of the said works contract and also less value added tax or sales tax, as the case may be, paid or payable, if any, transfer of property in goods involved in the execution of the said works contract. During scrutiny of the documents, it was revealed that appellant has not determined the correct assessable value and short paid Service Tax of Rs. 1,29,71,525/-.

4.2 Learned Authorized Representative further argued that it is not in dispute that appellant has paid Rs. 48.75 lakhs under Works Contract for the expense incurred during the year 2010-11 and 2011-12. However, failed to pay service tax of Rs. 1,29,71,525/- on account of non-determination of proper value as per Rule 2A of Service Tax Valuation Rules, 2006.

4.2.1 Learned Authorized Representative argued that appellant has accepted the short payment and accordingly paid 1,29,71,525/ alongwith interest of Rs. 49,02,189/- vide challan dated 27.08.2014. Appellant has claimed that it was bonafide mistake in calculation of taxable service, and therefore, penalty cannot be imposed. Learned Authorized Representative argued that from perusal of the Table enumerated at Para No. 24.1 of OIO, it is very clear that

appellant has evaded the service tax. This plea is not tenable as Rule 2A of Service Tax Valuation Rules, 2006 is very clear and there is no ambiguity and there is no such issue of interpretation of Rule involved. Learned Authorized Representative submits that any lay man can understand the said Rule. If there was any doubt, appellant had to approached the Department and would have seek guidance or would have made request for provisional assessment of their ST-3 Returns. He further submits that Department have set up Help Desk, Tax Assistant Desk at Commissionerate level as well available on CBEC site with motive to resolve any difficulties faced by tax payers. Had it been not detected by Audit, appellant would have never come forward and would have paid. This act clearly shows their ill motive to evade the duty.

4.3 We have considered rival submissions. We find that the issue relates to valuation of the service tax provided by the appellant to M/s PGVCL for supply and erection of single point lighting action on turn key basis. The demand has been raised on the ground that proper valuation method as per Service Tax Valuation Rules – 2006 was not followed.

4.4 The Show Cause Notice alleged that the appellant was paying service under the category of works contract only on the value of labour expenses incurred during the year 2010-2011 and 2011-2012 while Rule 2A of Service Tax Valuation Rules-2006 contains specific provision for determination of value of service tax involved in the execution of works contract which requires the service provider to pay service tax on the gross amount charged for the works contract. The appellant had discharged the service tax liability along with interest when the said liability was pointed out. The said demand has been challenged only on the ground of limitation. It has been argued that since the issue involve is purely of valuation and therefore, bonafide belief cannot be doubted. It has also been argued that no specific charge of suppression, mis-declaration etc. has been invoked. It is seen that the show cause notice seeks

to appropriate the amounts already paid under the head of service tax and interest. We find that Rule 2A of the Service Tax Valuation Rules – 2006 is very clear and the appellant have also admitted their liability and paid the same. In these circumstances, we do not find any error in the impugned order appropriating the legally due service tax and interest paid by the appellant. We also note that penalty has been imposed in the impugned order. It is seen that in para 13 and 14 of the Show Cause Notice charge of the suppression, misdeclaration has been made in following terms:

> ”13. The government has from the very beginning placed full trust on the service provider so far as the payment of service tax is concerned and accordingly measures like self-assessments etc., based on mutual trust and confidence are in place. Further, a taxable service provider is not required to maintain any statutory or separate records under the provisions of Service Tax Rules as considerable amount of trust is placed on the service provider and private records maintained by him for normal business purposes are accepted, practically for all the purpose of Service tax. All these operate on the basis of honesty of the service provider; therefore, the governing statutory provisions create an absolute liability when any provision is contravened or there is a breach of trust placed on the service provider. Further, Sec. 70 of the Finance Act, 1994 casts an obligation on the service provider to himself assess the tax due on the services provided by him. Likewise, Rule 9(6) of the Cenvat Credit Rule also casts the burden of proof regarding the admissibility of the CENVAT credit on the service provider. Whereas it appears that the facts. and figures mentioned in the Audit Report were not reflected in the periodical ST-3 returns filed by the assessee nor were the same ever informed by them to the department in any manner. The material facts came to the knowledge of the department only during the course of audit of the said assessee. Had it not been detected by the Audit, the same would have gone unnoticed causing loss of revenue to the exchequer. It appears that the assessee by not disclosing the material facts wholly and truly has suppressed/concealed the said facts from the department. Further it appears that they have mis-declared the value of taxable services of renting of immovable property provided by way of leasing of lands for Solar Park at Charanka in their periodical returns by not disclosing the consideration of lease premium amount charged/received towards the said leasing activity and thereby suppressed the actual value of the said taxable services provided by them. It therefore appears that all the above acts of contravention of various provisions of the Finance Act 1994 and the rules made thereunder and the provisions of Cenvat Credit Rules, 2004 have been committed by the assessee deliberately and wilfully by resorting to suppression of facts with an intent to evade payment of service tax Thus, it appears that the assessee has short paid/not paid service tax and wrongly availed cenvat credit as discussed in this notice by reason of wilful mis-statement, suppression of facts and contravention of various provisions of the Finance Act 1994 and the rules made thereunder with intent to evade payment of service tax and therefore, the extended period of limitation of the five years appears to be invokable under proviso to Section 73(1) of the Finance Act, 1994 for the recovery of the service tax not paid /cenvat credit wrongly availed by them. Further, it appears that the assessee is also liable to pay interest on the amount of service tax not paid/cenvat credit wrongly availed under the provisions of Section 75 of the Finance Act, 1994.

> 14. It further appears that all the acts of contravention of various provisions of the Act and the Rules on the part of the assessee have been committed deliberately with an intent to evade payment of service tax by mis-declaring and suppressing the material facts from the department and thus appears to have rendered the assessee liable for penal action under Section 78 of the Finance Act, 1994. They also appear to have rendered themselves liable for penal action under Section 76 and 77 of the Finance Act 1994 for contravention of various provisions of the Act/Rules discussed in paras supra. It further appears that the assessee have indulged in contravention of the various provisions of Cenvat Credit Rules, 2004 as discussed hereinabove and have rendered themselves liable to penalty in terms of the provisions of Rule 15 of the Cenvat Credit Rules, 2004."

Thus, the averment of the appellant that no charge of suppression, misdeclaration has been made is misplaced and incorrect. The Commissioner in the impugned order at para 38 has observed as follows:

> "38. Further, the assessee has contended that service tax of Rs.1,29,71,525/- alongwith interest of Rs.49,02,189/- on value of 'Work Contract Service' provided to M/s PGVCL was paid by them before issuance of show cause notice, hence no penalty in imposable. on them. However, as elaborated at para 24 and sub-paras thereof, I find that M/s GPCL had made short payment of service tax of Rs.1,29,71,525/- during the period 2010-11 and 2011-12 and this short payment of service tax has been paid by them only on 27.11.2013 with interest of Rs.49,02,189/- on 27.8.2014 that too after pointed out by the central excise auditors. Further, M/s GPCL has also contended that service tax of Rs.9,12,76,391/- alongwith Interest of Rs.2.20 crores, on development charge received from various developers, was paid by them before issuance of show cause notice, no penalty Is Imposable for the same. However, I find that during the year 2012-13, M/s GPCL issued 22 Invoices to various parties for recovery of development charge on which service tax payable was worked out to Rs.9,12,76,391/-. As discussed at length at para 27 and sub-paras thereof, the assessee had not discharged service tax within six month of date of Invoice. It is observed from annexure to show cause notice that they had raised one Invoice on 8.9.2011, two Invoices on 14.2.2012 and remaining 19 Invoices during the month of May-2012 and not paid service tax till the date of audit of their records. The assessee paid the service tax only when pointed out by central excise auditors during the audit of their records between February-2013 to July-2013. Further, they paid Interest of Rs.2.20 crores vide various challans till May-2014. Therefore, I find that had it not been detected by the Audit, the same would have been gone unnoticed causing loss of revenue to the government. Hence, for contravention of the Act/ Rules, M/s GPCL has made themselves liable for penal action under Section 78 of the Finance 65 Act, 1994."

We are in agreement with the observations made by the Commissioner on the charge of suppression and imposition of penalty. We find that the provisions of law in Rule 2A of Service Tax Valuation Rules – 2006 is very clear and unambiguous. In these circumstances, the actions of the appellant can only

be malafide. In view of above, we uphold the impugned order as far as this issue is concerned.

5. The fifth issue in dispute is if service tax amounting to Rs. 20,24,224/- is leviable on the consideration of Rs. 1,63,77,215/- received from M/s PGVCL being 2% of the value of the project:

Learned counsel argued that the department has sought to tax the amount received by the appellant being 2% of the project cost, considering it to be value received towards business auxiliary services. It was submitted that other than raising the demand under business auxiliary services category. the department has nowhere mentioned as to how such amount would be taxable under the business auxiliary service category and whether such amount was received towards any commission which could be considered under the BAS category. It was submitted that since the demand is raised under BAS category without any further details, it is vague in nature; the same is also not sustainable and is barred by limitation. It was submitted that, the Tribunal, Mumbai has in the case of M/s. Swapnil Asnodkar reported at **2018 (10) GSTL 479**, held that when there is no clarity in the show cause notice whether what goods or services the assessee has provided or promoted. then the demand becomes vague and such demand is not enforceable. Similarly, the CESTAT, Allahabad has in the case of M/s. Dharamvir Singh & Company reported at **2018 (8) GSTL 440**. held that when the break up of services is not given in the show cause notice and no specific clause is mentioned under which the demand is proposed, then such demand is not sustainable. The Tribunal, in the case of M/s. Balaji Enterprises reported at **2020 (33) GSTL 97** has held that when the show cause notice proposes a service category, but does not specify which clause is being invoked for the purpose of demand, then such show cause notice is vague and the demand is not sustainable. Similar orders have also been passed by the CESTAT. Mumbai in the case of M/s. Ceat India Ltd. reported at **2016 (331) ELT 456** and in the case of M/s. Unity Arrow Shipping Agency reported at **2014 (310) ELT 933**. Therefore, it

is a settled legal position that when the show cause notice is being issued, the service category and also the clause under which the tax is proposed to be demanded has to be considered very clearly and if the show cause notice is vague to the extent that it does not point out category of service or the clause under which the service tax is being demanded, then such show cause notice is vague and demand under such notice is not sustainable

5.1 He further submitted that in the present case when the department itself is not clear as to how and under what category of BAS service such amount is taxable, it would be wrong to allege that the appellant did not pay service tax on such amount with an intention to evade the payment of tax, and therefore, such demand is beyond the normal period of limitation and hence liable to be set aside.

5.2 Learned Authorized Representative argued that it is not in dispute that appellant had recovered 2% of project cost during the year 2010-11 and 2011-12 as the appellant had entered into agreement with PGVCL on turnkey basis for supply and erection of 11KV H.T line etc. as per the Rural Electrification Corporation (REC) quality control mechanism under RGGVY for the benefit of BPL. As per the agreement, PGVCL has to pay 2% of the Project Cost as consideration to appellant. Appellant earned an amount of Rs. 1.13 crore in 2010-11 and Rs. 49.50 lakhs in 2011-12 from PGVCL which consideration for taxable service BAS. He submits that on pointing out, appellant paid the service tax on said amount on 31.03.2013 but refrain from payment of interest. Since the due service tax was not paid in time, interest is applicable.

5.3. We have considered rival submissions. We find that the demand in respect of development charge @2% cannot be project cost being sought to be taxed under Business Auxiliary Service. The appellant has argued that Revenue has failed to clarify as to how the amount received @2% of the project cost would qualify as Business Auxiliary Service. It has been pointed out that the demand is vague in nature without specifying under which

category of Business Auxiliary Service the demand has been raised. We have seen para 5 and 5.1 of show cause notice where the charges of demand under this head has been mentioned. It is seen that there is absolutely no indication as to how the amount received by the appellant would qualify as Business Auxiliary Service. It is a bland allegation without any substantiation and therefore it cannot be upheld, in view of the decisions relied upon by the appellant namely M/s Swapnil Asnodkar reported at 2018 (10) GSTL 479 and M/s Balaji Enterprises reported at 2020 (33) GSTL 97. In the aforesaid decisions, it had been clearly laid down that unless the specific nature of service is examined and specific category under Business Auxiliary Service specified in the show cause notice, the demand cannot be sustained. In view of above, demand under this head and the penalty imposed under this head is set aside.

6. Whether service tax of Rs. 97,335/- is payable on the income of Rs. 9,45,000/- during the year 2009-10:

Learned Counsel argued that the case of the department is that the appellant received rent income of Rs.9,45,000/- in the year 2009-10, and therefore, there was a short payment of Rs.97,335/- being service tax thereon. Learned counsel submitted that during the relevant period of time, there was a basic exemption limit of Rs. 10,00,000/- and since the amount received towards rent income was less than the threshold limit of exemption, the appellant had not paid service tax thereon. The case of the department that because the appellant received signature bonus and hence the threshold limit of Rs. 10,00,000/- was crossed during the relevant period of time is also not a valid case for the purpose of invoking the extended period of limitation. The appellant was under the impression that signature bonus was not leviable to service tax and hence since the rent received was less than Rs.10 lakhs, the appellant did not pay service tax thereon. He argued, even otherwise the

demand of service tax amounting to Rs.97,335/-being beyond the normal period of limitation is time barred and liable to be set aside.

6.1 Learned Authorized Representative argued on this issue that during the year 2009-10, appellant failed to service tax of Rs. 97,335/- for renting of immovable property. Appellant is not disputing the income earned during the year 2009-10 as renting of immovable property but contended that since threshold limit of Rs. 10 lacs was not exceeded during the year 2009-10, they are not liable for service tax but this plea is not tenable that during the year 2009-10 appellant had provided taxable service of "Scientific or Technical Consultancy" and had recovered the taxable value under the head of "Signature Bonus" and did not pay the service tax thereon wherein the demand of Service tax of Rs. 1,03,00,000/ on "Scientific or technical consultancy" has been confirmed in this present OIO. Thus, appellant has exceeded the threshold limit of Rs 10 lacs, appellant was not eligible for exemption limit and accordingly appellant is liable for payment of service tax of Rs. 97,335/ alongwith interest. Learned Authorized Representative further argued that the appellant is registered with Service Tax department for Renting of immovable property, however, failed to pay service tax, clearly indicate their intention of evasion and therefore, penal provision is rightly invoked.

6.2 This issue relates to demand of service tax of Rs. 97,335/- on an amount of Rs. 9,45,000/- received by the appellant in the year 2009-2010. The only ground on which the appellant has defended it is that it falls within the basic threshold limit of Rs. 10 Lakhs during the relevant time. We find that demand under head of signature bonus or one time payment have not been sustained in para 2 and 3 above. Consequently, the appellant succeeds in its argument that the value being threshold limit no tax can be charged. The appeal on this count is allowed.

7. The sixth issue in dispute is if service tax totalling to Rs. 13,90,401/- is payable under reverse charge mechanism on the payments made to the foreign entities.:

Learned counsel argued that the case of the department is that the appellant is liable to pay service tax of Rs.9,50,404/- on the amount paid to M/s. Atlantis Resources Corporation Pvt. Ltd. on the grounds that the services were provided by an overseas entities and the appellant being the recipient of such services was liable to pay service fax under the reverse charge mechanism. The same is the case as regards the demand of Rs.4,39,997/- on the amounts remitted by the appellant to M/s. Solar Media Ltd. It is submitted that even if the case of the department is correct the present one is a situation where the amount of service tax if payable was available as cenvat credit to the appellant, and therefore, such being a revenue neutral situation, the extended period of limitation could not have been invoked. He argued that it is a settled legal position that when cenvat credit of the tax paid is available to an assessee himself, then the intention to evade the payment of tax cannot be attributed and hence the extended period of limitation cannot be invoked. Reference be made to the following decisions:

1. M/s. Jay Yuhshin Ltd. reported in **2000 (119) ELT 718**.
2. M/s. John Energy Ltd. Order No. **A/12620/2018 dated 26.11.2018**
3. M/s.Murugappa Morgan Thermal No. **A/11638/2019 dated 21.08.2019**

He further argued that the appellant has remitted these amounts to the overseas service providers for providing services in the territories which are not within India, therefore, the performance of the service being undertaken in a foreign country and being done by a foreign entity, the appellant is not liable to pay any service tax on these amounts inasmuch as no services are rendered within the territory of India. Since all the activities are undertaken outside India, merely because the appellant remitted some amount towards such activities, would not mean that such activities are carried out of India

and services are received within India. Therefore, even otherwise the case of the department is not sustainable.

7.1 Learned Authorized Representative argued on this issue that it is not in dispute that M/s. Atlanis Resources Corporation Pvt. Ltd has assisted the appellant in understanding the feasibility for tidal energy project within the State and prepared feasibility for establishing Tidal Powered Electricity Generation in the marine areas of Gulf of Kutchh. The work done included Satellite map delineating, HTL line from BISAG, indicating location of 66KVA High Tension line passing through Mandvi Beach, Oceanographic survey, tide velocity and flow modelling, CRZ mapping through ISRO. This service fall under the Consulting Engineering Service and appellant is required to pay service tax under RCM. Here it is pertinent to mentioned the Section 65 B of the Finance Act, 1994 which is for "Interpretations. - wherein at (27) (d) defines the "India" means "the air space above its territory and territorial waters,". Thus, the activities of Oceanographic survey. tide velocity and flow modelling, CRZ mapping through ISRO is done within the India and accordingly the overseas service provider has provided the service in India and under RCM, appellant being a service receiver, liable for payment of service tax.

7.2 It is also not in dispute that appellant had hosted International Conference on Indian Solar Power Investment & Technology Summit 2012' at Ahmedabad and availed the service of M/s. Solar Media Ltd., London availed the service by way of selling of sponsorship and exhibition space to companies headquarters outside India and they were required to introduce relevant industry experts and brand representative to appellant with the objective of maximising the success of said Summit and arrangement of International Speakers for Summit 2012 at Ahmedabad. Thus, payment made by appellant to said overseas M/s. Solar Media Ltd., London, was for taxable service of 'promotion or marketing of brand of goods/service/events' and appellant failed

to pay service tax under RCM. The said service is covered under sub rule (iii) of Rule 3 of Taxation of Services (provided from Outside India and Received in India) Rules, 2006. He argued that the Hon'ble Bombay High Court in case of Indian National Shipowners Association v. Union of India and reported in 2009 (13) S.T.R. 235 (Bom.) has held that The Finance Act was amended and Section 66A was inserted by Finance Act. 2006 w.e.f. 18.04.2006, the Government got legal authority to levy service tax on the recipients of the taxable service Because of the enactment of Section 66A, a person who is resident in India or business in India becomes liable to be levied service tax when he receives service outside India from a person who is non-resident or is from outside India The Hon'ble Supreme Court has upheld the same. Union of India v. Indian National Shipowners Association 2010 (17) S.T.R.J57 (S.C.). Learned Authorized Representative further submits that Period involved is February, 2010, in view of the aforesaid Decisions, plea of the appellant that they have not received the service in India is not tenable as Section 66A w.e.f. 18.04.2006 clearly holds that a person who is resident in India or business in India becomes liable to be levied service tax when he receives service outside India from a person who is non-resident or is from outside India.

7.3 We have considered the rival submissions. We find that this demand is made in respect of amounts remitted by the appellant to certain foreign entities. The appellant has defended on the ground of limitation stating that it is a Revenue neutral situation as the appellant would have been entitled to the cenvat credit on the taxes paid. The appellant has relied on certain decisions. It is seen that the service tax liability in this category arises in respect of payments made to M/s Atlantis Resources Corporation Private Limited and M/s Solar Media Limited both located outside India. The payment made to M/s Atlantis Resources Corporation Private Limited was in respect of feasibility report for Tidal Energy Projects within state in the Gulf of Kutch. The appellant has claimed that proportion of feasibility report for establishing Tidal

Powered Electricity Generation in the marine areas of Kutch. Similarly, payment has been made to Solar Media Limited for co-hosting partnership plus arrangements of international speakers for Summit-2012. This was for the purpose of hosting international conference on "Indian Solar Power Investment and Technology Summit-2012" with Solar Media Limited. The period involved in both services received from M/s Atlantis Resources Corporation Private Limited is 2010-2011 and that in respect of M/s Solar Media Limited is 2012-2013. In case of services provided by M/s Atlantis Resources Corporation Private Limited, the service has been sought to be classified under the head of 'Consulting Engineer's Service' and demand under reverse charge has been made under Rule 3(iii) of Taxation of Service (Provided from Outside India and Received in India) Rules, 2006 read with Section 66A of the Finance Act-1994. The appellants have not challenged any facts. The defence is mainly on the ground that the demand is barred by limitation as credit of the said service tax was admissible to the appellant. The appellant have made a bland statement that credit of these taxes paid would be admissible to them, they have not mentioned under what are the taxable output services in respect of which these input service could be availed as cenvat credit. In absence of the said evidences, the reliance on the aforesaid case law cannot be made. In the appeal memorandum, the appellants have argued that the Commissioner has failed to give any findings on the defence regarding non-taxability of services received from M/s Atlantis Resources Corporation Private Limited and M/s Solar Media Limited. The appellant had contended before the adjudicating authority that the entire activity in both these cases were outside India and the appellant was not the service recipient. It has been argued that the appellant had submitted the details of agreement with M/s Atlantis Resources Corporation Private Limited and M/s Solar Media Limited to the adjudicating authority. It is noticed that Commissioner has given findings on the taxability both in case of the M/s Atlantis Resources

Corporation Private Limited and M/s Solar Media Limited in para 28 of the impugned order. Para 28 of the order reads as follows:

> 28.1 Regarding applicability of service tax on services provided by M/s Atlantis, M/s GPCL has contended that service tax is leviable only when the activity of rendering of the prescribed service takes place in taxable territories of India. M/s GPCL has appointed M/s Atlantis for preparation of feasibility report for establishing Tidal Powered Electricity Generation In the marine area of Gulf of Kutch. M/s GPCL paid an amount of Rs.92,27,225/- to Atlantis for the same. M/s Atlantis has rendered the service from outside India for preparation of said feasibility report. Since service tax is leviable only when the activity of rendering of the prescribed service takes place in taxable territory of India, they are not liable to pay service tax as the said service has been rendered from outside India. M/s GPCL has also contended that they have made payment under consideration on behalf of study co and not as service provider and they had received shares in consideration of the above payment and not any service.
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> 28.2 From Memorandum of Understanding dated 10.12.2009 between M/s Atlantis Resources Corporation Pte. Ltd., Singapore and M/s GPCL, it is observed that M/s GPCL has appointed M/s Atlantis to assist assessee in understanding and preparation of the feasibility report for establishing Tidal Powered Electricity Generation within the State of Gujarat. M/s Atlantis to undertake the study, write the Report and use its reasonable efforts to deliver the Report to StudyCo. The StudyCo delivers the Reports to GPCL. Accordingly, M/s GPCL had made payment of US$ 200,000 equivalent to Indian Rs.92,27,225/- to Atlantis on 20.02.2010 for the said purposes. From the feasibility report submitted by M/s Atlantis, it is seen that M/s Atlantis carried out study which includes Satellite map delineating HTL line from BISAG, indicating location of 66KVA High Tension Line passing through Mandvi Beach, Oceanographic survey, tidal velocity and flow modeling, CRZ mapping through ISRO. Therefore, the service rendered by Atlantis by way of preparation of feasibility report for M/s GPCL is a taxable service failing within the meaning of "Consulting Engineering's Service" as defined under Section 65(105) (g) of the Finance Act, 1994 read with Section 65(31) of the Finance Act, 1994.
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> 28.3 Further, the facts made available, it is found that though the service provider i.e. M/s Atlantis was located outside India, the services were rendered in India and received by M/s GPCL In India. Hence, in terms of Rule 3(iii) of "Taxation of service (provided from outside India and received In India) Rules, 2006 read with Section 66A of the Finance Act, 1994, I hold that M/s GPCL, being recipient of the service, is liable to pay service tax of Rs.9,50,404/- on the payment of Rs.92,27,225/- made to M/s Atlantis. I find that all the argument put forth by the assessee are not tenable. In the Instant case, the only condition to be satisfied for the services, provided by M/s Atlantis and received by M/s GCPL, to be taxable is that the service recipient should be located in India. Undoubtedly, M/s GPCL, the recipient of service, is located in India. Therefore, I hold that the service provided by M/s Atlantis and received by M/s GPCL is taxable and consideration paid against the said service is liable to service tax at the end of the service receiver i.e. M/s GPCL.
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> 28.4 Regarding applicability of service tax on services provided by M/s Solar Media Ltd. (SML), M/s GPCL has contended that the entire activities of SML were undertaken outside India and therefore the service rendered by SML outside India to GPCL would not fall within the ambit of service tax and accordingly will not be liable to tax In India. They have also stated that GPCL has paid the amount to SML inclusive of Indian Taxes, and hence GPCL, being service recipient, has already paid service tax to the service provider.

> 28.5 It is observed that M/s GPCL agreed to be the host of International Conference on 'Indian Solar Power Investment & Technology Summit 2012. The said summit was held in Ahmedabad in April-2012, M/s Solar Media Ltd. (SML) arranged international speakers for the said Summit. As per the agreement between M/s GPCL and M/s SML, M/s SML had right to sell sponsorship and exhibition space to companies headquartered outside India and they were required to introduce relevant industry experts and brand representatives to M/s GPCL with the objective of maximizing the success of Indian Solar Power Investment and Technology Summit 2012 Accordingly, M/s GCPL. being host, made payment of 47727.45 GBP equivalent to Indian Rs.38,74,572/- to M/S SML on 07.03.2012, 13.04.2012 and 23.04.2012. Therefore, M/s SML has provided services related to making arrangements for the event to be held by M/s GPCL for plans for Solar Project and for this purpose M/s GPCL has made payment to them. Therefore, the service rendered by M/s SML is a taxable service under category 'Services of promotion or marketing of brand of goods/ services/events' as defined under Section 65(105)(zzzza) of the Finance Act, 1994.
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> 28.6 Further, from the available records, it is found that though the service provider i.e. M/s SML was located outside India, the services were rendered in India and received by M/s GPCL in India. Hence, in terms of Rule 3(iii) of 'Taxation of service (provided from outside India and received in India) Rules, 2006 read with Section 66A of the Finance Act, 1994, I hold that M/s GPCL, being recipient of the service, is liable to pay service tax of Rs.4,39,997/- 12.36% on the amount of Rs.38,74,572/- made to M/s SML. I find that all the argument put forth by the assessee are not tenable. As per the sub-rule (iii) of Rule 3 of the said rules, the taxable services provided from outside India and received in India, shall, in relation to taxable services mentioned in the said sub-rule shall be such services as are received by a recipient located in India for use in relation to business or commerce. In the instant case, the only condition to be satisfied for the services, provided by M/s SML and received by M/s GPCL, to be taxable is that the service recipient should be located in India. Undoubtedly, M/s GPCL, the recipient of service, is located in India. Therefore, I hold that the service provided by M/s SML and received by M/s GPCL is taxable and consideration paid against the said service is liable to service tax at the end of the service receiver i.e. M/s GPCL."

The appellant have not raised any fresh grounds in their appeal memorandum. We find significant force in the argument in order-in-original. In view of above, we do not find any merit in the defence of the appellant. The demand under this head along with penalties is upheld. Appeal on this count is dismissed.

8. The seventh issue raised in dispute is if service tax of Rs. 9,12,76,391/- is payable on the gross amount of Rs. 74,61,38,167/- when such amounts were not received:

Learned counsel argued that the demand of Rs. 9,12,76,391/- has been confirmed against the appellant on the grounds that the appellant was paying service fax on receipt basis, however, as per the service tax rules, with effect

from 01.07.2011 the liability to pay service tax was as and when the invoices were being raised. In this regard, it was submitted that the appellant was discharging service tax on receipt basis and the appellant was not aware that from 01.07.2011, service tax was payable on raising of the invoice and not on receipt basis. During the relevant period of time, the appellant raised 22 invoices amounting to Rs. 74,61,38,167/-, while as the appellant did not receive such amounts and therefore, the appellant being under a bona-fide impression that he service tax was to be discharged on receipt basis, did not pay service tax. The appellant did not pay service tax under such a bona fide belief, and therefore, the confirmation of such demand under the extended period of limitation is not sustainable. He argued that since the beginning the appellant was paying service tax on receipt basis and being under a bona fide impression the appellant kept the same practice, therefore, since it is not the case that the appellant did not discharge service tax with an intention to evade the payment of fax, the extended period of limitation cannot be Invoked.

8.1 Learned Authorized Representative on this issue argued that non-payment of Service Tax of Rs. 9,12,76,391/ on gross amount of 'Development Charges' from their customers under Real Estate Agent Service. Learned Authorized Representative further submits that it is not in dispute that appellant is nodal agency for the development of 'Solar Park' at Charanka, Patan, for which development work of the land was undertaken and land was given on lease to various parties, and have issued 22 invoices to various parties for recovery of development charges and did not pay the service tax of Rs. 9,12,76,391/- under the category of Real Estate Agent' within the six months from the date of issue of invoices. He submits that as per Rule 3 (a) of the Point of Taxation Rules, 2011, the liability of payment of Service Tax in this case becomes the date when the invoice are issued by the appellant and not the date of payment. Appellant have accepted their liability and have paid the Rs. 4,15,93,832/- from PLA and Rs. 4,96,82,559/ from Cenvat Account.

Appellant have paid the interest of Rs. 2.20 crores against late payment of service tax. He submits that appellant's plea that due to ignorance and they failed to pay service tax in time is lame excuse. He argued that the appellant is well aware of the Act/ Rules, but he has refrained from payment of service tax in time and violated the provisions of finance act and therefore penal action is rightly invoked.

8.2. This issue relates to failure in payment of service tax by the appellant as per the changes made in the Service Tax Rules w.e.f. 01.07.2011. The liability to pay service tax prior to 01.07.2011 was arising at the time of receipt of consideration. The appellant claimed that he was not aware of the change which came on 01.07.2011 and consequently in respect of 22 invoices, the appellant failed to pay service tax on time. The appellant has contended that they had bonafide belief that there was no change in the manner of payment on 01.07.2011 and therefore, it was a bonafide error on their part. It is seen that the appellant is not a small assessee and the claim of ignorance of law is not good enough to bypass their responsibilities. The appellant has however discharged the said liability along with interest. The law was not ambiguous but was very clear at the material time. In these circumstances, we do not find any merit in the arguments of the appellant.

8.3 It is seen that the appellant was paying service tax on the receipt basis and could not have possibly avoided payment of these amounts of service tax. The appellant would have in normal course paid the service tax at the time of receipt of consideration. Invoking Section 80 of the Finance Act, 1994, we are of the opinion that penalty imposed under Section 78 on this count needs to be set aside. Appeal on this count is partially allowed. The order is upheld except for penalty under Section 78, which is set aside.

9. The eight issue in dispute is if service tax of Rs. 13,43,547/- under Rule 6(3) of the Cenvat Credit Rules, 2004 is leviable and whether interest on such amount is imposable:

Learned counsel argued that the case of the department has been that an amount of Rs.13,43,547/- was payable by the appellant under Rule 6(3) of the Cenvat Credit Rules, 2004. In this regard, the appellant had made a submission that the transaction was that a plot in the solar power project at Patan had been leased by the appellant to itself and for which a payment of Rs.99.52 lakhs was made by the appellant to the appellant itself and hence since there was no recipient of service, such activity was exempt from the payment of service tax. Therefore, the case of the department was that since the service was provided by the appellant to itself and such being the case, it was an exempt service, and therefore, cenvat credit of various input services was not available to the appellant. The appellant while considering this fact reversed the credit of Rs.13,43,547/- and the only issue in this regard was about the levy of interest on such amount of credit which was not utilized. It was submitted that the appellant had availed cenvat credit under a bona-fide impression that the appellant was eligible for taking such credit and on being pointed out by the department such cenvat credit was reversed. In the facts there was no question of any mala-fide intention to avail fraudulent credit and even the department has not suggested as such in the show cause notice or in the impugned order. Therefore, the interest on such amount being demanded under the extended period of limitation is not sustainable.

9.1 He further argued that the Hon'ble Delhi High Court has in the case of M/s. Hindustan Insecticides Ltd, reported at 2013 (297) ELT 332 held that the limitation for demanding interest would also be as per Section 11A, and therefore, if the short payment of tax was not due to any mala-fide intention, then the demand of interest invoking the extended period of limitation would not be sustainable. Therefore, in the present case, since the department has not alleged any fraud, collusion or mala-fide intention with regards to such amount of cenvat credit, interest cannot be demanded invoking the extended period of limitation. Therefore, the demand of interest is time barred.

9.2 Learned Authorized Representative on this issue argued that it is not in dispute that appellant have availed the cenvat credit on various services for Solar Park Project and plot developed by appellant himself. Since, services cannot be provided to oneself, no service tax was leviable on such development expenses as covered under exempted service as defined under Rule 2 (e) of the CCR,04. Therefore, as per the provisions of Rule 6 (3) of CCR,04, appellant was required to pay an amount of Rs. 13,43,547/- @5%/6% on the value of such exempted service alongwith interest. He submits that the appellant agreed with the contention and paid the same on 01.08.2013 without interest. Appellant claimed that since they have sufficient balance in their Cenvat Account, interest is not required to be paid. He submits that the relevant period is 2011-12 to August 2013 i.e. from the date of wrong availment of cenvat credit to the date of reversal, whereas appellant submitted the Service Tax Return from April 2013 to September 2013 showing cenvat credit details which is not sufficient. Thus, appellant failed to produce the sufficient evidence to support its claim.

9.3. This issue relates to availment of cenvat credit on Solar Power Project on the Plot developed by the appellant themselves. The appellant has availed credit on services. Revenue has alleged that the appellant has not provided any taxable service from the Solar Power Project at Charanka Patan. The said Solar Power Project at Charanka Patan has been leased to the appellant themselves and an amount of Rs. 99.52 lakhs has been paid to itself towars development expanses @ 100 Per Sq. Meter during the year 2011-12 and Rs. 1.24 Crores as development expanses @ 125 Per Sq. Meter during the year 2012-13. Revenue has alleged that credit has been availed on various services for the said Solar Power Project although the services provided by the appellant to themselves are not taxable, therefore, on these amounts @5% of Rs. 99.52 Lakhs and @6% of Rs. 1.24 Crores becomes payable under Rule 6 of the Cenvat Credit Rules, 2004. The appellant have agreed with the

objection and paid the amount on 01.08.2013 by debiting their cenvat credit account. However, they have failed to pay the interest under Rule 14 on the ground that they had not utilized the said credit and they always had sufficient balance in their cenvat credit account during the period of default. On the demand of Rs. 13,45,547/-, the appellant has contended that the cenvat credit pertains to services availed for their Wind Mills. They have claimed that the credit in respect of Wind Mills located away from the premises of the factory is admissible in terms of various Tribunals decisions. They have also claimed that Revenue could not have demanded an amount of 5%/6% of the exempted transactions but only could have asked for reversal of cenvat credit availed on these services.

9.4. We find that some of these contentions of the appellant were not raised before the Original Adjudicating Authority. No evidence has been produced by the appellant that the credit of Rs. 13,473,547/-, relates to Wind Mills operated by the appellant. However, in many circumstances, credit of services availed in respect of Wind Mills located away from the factory is admissible. The exact nature of transaction in the instant case is not clear from the appeal memorandum or from arguments made by the appellant. Moreover, this argument was not raised before the lower authority. In these circumstances, we set aside the demand on this count and remit the matter back to the original adjudicating authority for fresh adjudication. The appellant have also stated that in these circumstances demand of an amount of 5% / 6% under Rule 6 of the Cenvat Credit Rules could not have been made but only the demand of the actual amount of credit taken could have been made. The said issue can also be examined by the adjudicating authority in the remand proceedings. The appeal on this issue is allowed by way of remand to original adjudicating authority.

10. The ninth issue in dispute is if demand of cenvat credit of Rs. 17,90,125/- is sustainable in the present case:

Learned counsel argued that the appellant had during the course of adjudication given a bifurcation of various services on which cenvat credit was availed. For the services aggregating to Rs.11,67,454/- the appellant has submitted that such services being in the nature of security service. housekeeping service, gardening services, advertisement services and maintenance of guest house services, were input services inasmuch as they had a direct nexus with the solar power project which was going on at Charanka. The Commissioner has not considered such submission made by the appellant and on a very flimsy ground has just held that the appellant is not in a position to prove how these are input services. He submitted that all the services mentioned in Annexure-"X" are services which are in the nature of input services and hence such services are admissible for the purpose of cenvat credit. Therefore, the order of the Commissioner rejecting cenvat credit to the tune of Rs.11,67,454/- is not sustainable. As regards the remaining amount, the appellant had submitted that since the appellant is a big concern and receiving so many different services, the appellant being under a bona-fide impression took cenvat credit of such services and it was not because of any mala-fide intention, that the cenvat credit was availed. Therefore, for the remaining amount, the demand under the extended period of limitation would not be sustainable inasmuch as availment of cenvat credit is a subject matter of interpretation and even the department has not alleged that the appellant had any ill-intention to avail wrongful credit. Therefore, such demand over and above Rs.11,67,454/-is time barred and liable to be set aside in the interest of justice.

10.1. It has been alleged that the appellant have availed proportionate cenvat credit on input service pertaining to general expenses of the company and full credit on specific services pertaining to Solar Park- Charanka. It has been alleged that the appellant have availed credit for inadmissible services. Before the original adjudicating authority, the appellant have admitted that

credit of Rs. 6,22,671/- is not admissible and has agreed to reverse the same. The adjudicating authority has however upheld the entire charge in respect of all other service in respect of which credit has been availed. While the impugned order does not give detailed findings on each head under which credit has been availed. The impugned order observes that no credit on travelling expanses is available to the assessee under Rule 2(l) of the Cenvat Credit Rules -2004. In view of above, he has specifically denied the cenvat credit in respect of service tax paid for Hotel Expanses, Personal Accident Policy Premium, Air Ticket Charges, Personal Telephone Expanses, Servicing and Repairing of Car, Security Service provided at place other than registered premises and Outdoor Catering etc. No reasoning has been given by the Commissioner as to how and why these services are excluded from the term 'Input Service'. In view of above, the demand on this count is set aside and matter is remanded to the Commissioner for fresh adjudication and for giving detailed reasoning after following the principles of natural justice. The appeal on this issue is allowed by way of remand.

11. The appeal is disposed of in above terms.

(Pronounced in the open court on 18.11.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha