

In the High Court At Calcutta
Constitutional Writ Jurisdiction
Appellate Side

WP 3137(W) of 2013
Sourav Ganguly
-Vs.-
Union of India & Ors.

Coram : The Hon'ble Justice Arijit Banerjee

For the Petitioner : Mr. J. K. Mittal, Adv.
Mr. Paritosh Sinha, Adv.
Mr. Amitava Mitra, Adv.
Ms. Dolon Dasgupta, Adv.

For the Respondents : Mr. R. Bharadwaj, Adv.
Mr. K. K. Maiti, Adv.

Heard On : 25.08.2015, 18.09.2015, 18.11.2015,
27.11.2015
14.01.2016

CAV On : 14.01.2016

Judgment On : 30.06.2016

Arijit Banerjee, J.:-

(1) In this writ application the petitioner challenges the instruction/circulation bearing No. 42/Comm(ST)/2008 dated 26 July, 2010 issued by the Central Board of Excise and Customs as also the show cause notice dated 26 September, 2011 issued by the Additional Director General, Directorate General of Central Excise Intelligence (Respondent No. 4) and the order (original) No.

24/Commr/ST/Kol/2012-13 dated 12 November, 2012 passed by the Commissioner, Service Tax, Calcutta.

Facts of the case:-

(2) The petitioner is a cricketer and is a former captain of the Indian Cricket Team. He participated in the IPL Cricket tournament held in India as a member of the Kolkata Knight Rider Team. At all material times he acted and still acts as brand ambassador for various products. He also acted as anchor in television shows and particularly on Zee Bangla Channel. The petitioner is also engaged in writing articles for Sports Magazines.

(3) Service tax was introduced in India for the first time in the year 1994 under Chapter V of the Finance Act, 1994 which has been amended from time to time. More and more categories of service have been brought within the purview of the service tax net by successive amendments to the Finance Act. Section 65 (105) of the Finance Act defines and/or enumerates the types of services which attract service tax.

(4) Finance Act, 1994 was amended by the Finance Act, 2003 and with effect from 1 July, 2003 a new service, namely 'Business Auxiliary Service' was made taxable under sub Clause (zzb) of Clause 105 read with Clause 19 of Section 65 of Chapter V of the Finance Act, 1994,

vide notification No. 7/2003 dated 20 June, 2003. After this amendment, 'taxable service' came to include any service provided or to be provided to a client by any person in relation to business auxiliary service. Section 65 (19) of the said Act defines 'Business Auxiliary Service' as follows:-

'S. 65(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*
- (iii) Any customer care service provided on behalf of the client; or*
- (iv) Procurement of goods or services, which are inputs for the client; or*

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

- (v) Production or processing of goods for, or on behalf of, the client;*
- (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, but does not include any activity that amounts to manufacture of excisable goods.

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

- (a) 'commission agent' means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration,*

and includes any person who, while acting on behalf of another person_

- (i) Deals with goods or services or documents of title to such good or services; or*
- (ii) Collects payment of sale price of such goods or services; or*
- (iii) Guarantees for collection or payment for such goods or services; or*
- (iv) Undertakes any activity relating to such sale or purchase of such goods or services;*
- (b) 'excisable goods' has the meaning assigned to it in clause (d) of Section 2 of the Central Excise Act, 1944 (1 of 1944).*
- (c) 'manufacture' has the meaning assigned to it in clause (f) of Section 2 of the Central Excise Act, 1944 (1 of 1944)."*

(5) Section 73 of the Act relating to recovery of service tax was introduced with effect from 10 September, 2004 providing a limitation period of one year for recovery of service tax which would stand extended to five years in case of any fraudulent or similar act on the part of the assessee. Section 73 of the Act is set out hereunder:-

"S. 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded

1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any service tax has not been levied or paid or has been short-paid or short-levied or erroneously refunded by reason of_

(a) Fraud; or

- (b) Collusion; or
- (c) Willful mis-statement; or
- (d) Suppression of facts; or
- (e) Contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

By the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words 'one year', the words 'five years' had been substituted.

*Explanation.*_ Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be.

- 2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

.....

- (6) For the purpose of this section, 'relevant date' means,
 - (i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid_
 - (a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;
 - (b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;
 - (c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;
 - (ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made thereunder, the

date of adjustment of the service tax after the final assessment thereof;
(iii) *in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund."*

(6) The Finance Act, 1994 was further amended with effect from 1 May, 2006 by the Finance Act, 2006 vide notification No. 15/2006-ST dated 24 April, 2006 by introducing a new taxable service described as 'Business Support Service' under sub-Clause (zzzq) of Clause 105 read with Clause 104c of Section 65 of the Finance Act, 1994. After such amendment 'taxable service' came to include any service provided or to be provided to any person by any other person in relation to support services of business or commerce, in any manner. Section 65 (104c) of the Act defines 'Support Services of Business or Commerce' as follows:-

"S. 65 (104c). "Support service of business or commerce' means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customers relationship management services, accounting and processing of transactions, operational or administrative assistance in any manner, formulation or customer service and pricing policies, infrastructural support services and other transaction processing."

(7) By notification No. 24/2010-ST dated 22 June, 2010, the Finance Act, 1994 was once again amended with effect from 1 July, 2010 by bringing within the service tax net, 'Services of promotion of brand of goods/services etc.' under sub-Clause (zzzzq) of Clause 105 of Section

65 of the Act. After such amendment 'taxable service' came to include any services provided or to be provided to any person, by any other person, through a business entity or otherwise, under a contract for promotion or marketing of a brand of goods, service, event or endorsement of name, including a trade name, logo or house mark of a business entity by appearing in advertisement and promotional event or carrying out any promotional activity for such goods, service or event. The explanation to sub-Clause (zzzzq) provided that for the purposes of the said sub-Clause, 'brand' includes symbol, monogram, label, signature or invented words which indicate connection with the concerned goods, service, event or business entity.

(8) The Dept. of Central Board of Excise and Customs issued an instruction/circular dated 26 July, 2010 relating to service tax issues in respect of Indian Premier League. The material portion of the said Circular is extracted hereinunder:-

"(1) It is felt that sponsorship of IPL is not sponsorship of any sports event, since IPL in itself is not a sports event but an entity of franchisee teams and therefore it is taxable. On the same analogy the sponsorship received by a player or a Team would be independent of sport event and hence taxable.

(2) The activity of the franchisee subserves the business of BCCI IPL and would fall within the scope of 'Business support services' which is a taxable service under the service tax law.

(3) The players provide taxable service when they wear apparel provided by the franchisee that are embossed with

commercial endorsements or when they participated in endorsement event. The service provided by the players for promoting or marketing of the logos/brands/marks of the franchisee/sponsors would fall under the 'business support service' and chargeable to service tax. However, the fee charged for playing the matches will fall outside the purview of taxable service. In case the players are paid composite fee for playing the matches and for participating in promotional activities the component of promotional activities should be segregated for charging service tax and if it cannot be done then service tax should be leviable on the total composite amount. The Commissionerate having jurisdiction on the address of the players should issue show cause notice to the players for rendering service to the franchisee. In case, the address of the players is out of India, the liability to pay service tax would fall on the franchisee under the reverse charge mechanism."

(9) The office of the Additional Director General, Directorate General of Central Excise Intelligence, Calcutta Zonal (respondent no. 4) initiated investigation against the petitioner on 5 November, 2009 by calling upon the petitioner to produce various records and documents relating to the activities of the petitioner. By a letter dated 24 November, 2009, the petitioner contended that he was not rendering any business auxiliary services and had earned income by playing the game of cricket for the country. Under cover of letters dated 14 December, 2009 and 15 March, 2010, the petitioner submitted all documents sought for by the office of the respondent no. 4 including the copies of agreements entered into with various companies and corporate entities. The petitioner received a summon

dated 12 January, 2011 from the office of the respondent no. 4 to appear on 19 April, 2011 for making statements and producing documents about the details of income received by the petitioner during the period 1 January, 2010 till 30 September, 2010 as also to produce the balance sheet for the year 2009-10. The petitioner appeared through his authorised representative being his chartered accountant and submitted all documents called for. The petitioner again received a letter dated 4 August, 2011 seeking details of TDS amount deducted in respect of the payments received by the petitioner. By letter dated 20 August, 2011 the petitioner supplied the information sought for.

(10) The respondent no. 4 issued a show cause-cum-demand notice dated 26 September, 2011 to the petitioner demanding service tax (including cess) of Rs. 1,51,66,500/- on the amount received by the petitioner during the period 1 May, 2006 till 30 June, 2010 by invoking the extended period of limitation of five years under the proviso to Section 73 of the Finance Act, 1994 on the ground of 'suppression of facts with the intent to evade payment of service tax' by the petitioner.

(11) The petitioner filed his reply dated 27 November, 2011 to the said show cause notice and appeared before the respondent no. 3 in

compliance with the hearing notice. The petitioner filed additional submission before the authority vide his letter dated 8 October, 2012.

(12) The Commissioner of Service Tax (respondent no. 3) by his order dated 12 November, 2012 confirmed the demand of service tax along with the interest and penalty on the petitioner. Being aggrieved, the petitioner has approached this Court for quashing of the show cause notice and the order dated 12 November, 2012 as also the instruction/circular dated 26 July, 2010 referred to above.

Contention of the petitioner:-

(13) Appearing on behalf of the petitioner Mr. Mittal, Ld. Counsel submitted that the demand of service tax to the tune of Rs. 1,51,66,500/- is on the total receipt of Rs. 13,56,54,639/-. This total receipt and service tax demanded on the same can be broken up into two parts. Firstly, service tax of Rs. 53,02,661/- on total receipt of Rs. 4,85,66,782/-. This amount includes Rs. 23,05,000/- received by the petitioner for writing articles in magazines, on which the tax effect is Rs. 2,43,595/-; Rs. 2,00,00,000/- received by the petitioner for anchoring TV shows on which the tax effect is Rs. 20,60,000/-; and sum of Rs. 2,62,61,782/- received by the petitioner for Brand Endorsement on which the tax effect is Rs. 29,99,066/-. Secondly, service tax of Rs. 98,63,839/- has been demanded on receipt of fee from KKR for playing

cricket in IPL amounting to Rs. 8,70,87,857/-. This demand is made on account of business support service under Section 65 (105)(zzzq) of the Finance Act, 1994. The amount of Rs. 8,70,87,857/- includes Rs. 4,37,00,000/- received for playing IPL in South Africa the tax effect on which is Rs. 51,50,442/-.

(14) Ld. Counsel submitted that brand endorsement/brand promotion was made taxable with effect from 1 July, 2010. Undisputedly, the petitioner was granted registration on 3 August, 2010 for such activities and from 1 July, 2010 the petitioner has undisputedly paid service tax for the services of brand endorsement/brand promotion. The CBEC by its circular/instruction dated 26 February, 2010 has clarified that promotion of brand or celebrity acting as a brand ambassador will be covered under the newly added service under Section 65 (105)(zzzzq) of the Finance Act, 1994. It was submitted that the petitioner by letter dated 24 November, 2009 clearly disclosed his activities and sources of receipts and denied that his activities are covered under business auxiliary services. Further, under cover of letter dated 14 December, 2009 the petitioner submitted copies of agreements and audited accounts for five years. On 28 January, 2011 a statement of the petitioner's representative was recorded by the Department. Further, by letter dated 20 August, 2011 the petitioner

submitted the complete date wise details for all receipts for the period from 1 May, 2006 to 30 June, 2010 by specifying the entry of each receipts and this is not disputed by the Department.

(15) Mr. Mittal submitted that the respondent no. 2, i.e. the Central Board of Excise and Customs issued the impugned instruction/letter dated 26 July, 2010 admitting that there were differences in views in respect of the service tax issue related to IPL. In paragraph 3 of the said letter it was stated that fee charged for playing matches will fall outside the purview of taxable service. However, it was stated that if the players are engaged in promotional activities as well as playing cricket and if there is no segregation, the service tax will be charged on the total composite amount. Relying on such instruction/letter which is illegal, the impugned demand has been raised on the petitioner. No levy exists on the activities of the petitioner during the relevant period of time and the entire proceeding against the petitioner including the demand is without jurisdiction.

(16) Ld. Counsel submitted that the receipt of Rs. 4,85,66,782/- includes amounts received for writing articles in sports magazines as well as fee received for anchoring TV shows on Zee Bangla. These amounts obviously do not attract service tax and if these amounts are excluded, the receipt in respect of brand endorsement would be Rs.

2,62,61,782/- on which service tax effect is Rs. 29,99,066/- . Since 'Brand endorsement' was brought within the service tax net with effect from 1 July, 2010, the demand raised on the petitioner for brand endorsement for the period 1 May, 2006 till 30 June, 2010 under business auxiliary service under Section 65 (105)(zzb) of the Finance Act, 1994 is illegal and without jurisdiction. The respondent no. 3 in his order dated 12 November, 2012 has admitted that the aforesaid receipt is towards 'Brand Endorsement' fees. Since during the relevant period of time there was no levy of service tax on brand endorsement fees, the demand of the Department is illegal. Brand endorsement is obviously a different category from Business Auxiliary Service and had brand endorsement been covered under business auxiliary service, it would not have been necessary for Parliament to introduce a new category called 'brand endorsement' by way of amendment. Ld. Counsel submitted that it is a settled principle of law that when by making a substantive amendment to the statute, a new levy is imposed, it implies that there was no such levy in existence prior thereto. In this connection Ld. Counsel referred to a decision of the CESTAT, Principal Bench, New Delhi in the case of *Commissioner of Service Tax, Delhi-vs.-Shriya Saran, 2014 (36) STR 641*, where on similar facts the Tribunal held that the services provided by the

assessee for brand promotion were covered by Section 65 (105)(zzzzq) of the Finance Act, 1994 which had come into force with effect from 1 July, 2010 and hence, during the period prior to 1 July, 2010 the assessee's activities in terms of her contracts could not be taxable under Section 65(105)(zzb) of the said Act.

(17) Ld. Counsel also relied on a Division Bench judgment of the Bombay High Court in the case of *Indian National Shipowners' Association-vs.-Union of India, 2009 (14) STR 289*, wherein at paragraph 38 of the judgment, the Bombay High Court held in the context of the Finance Act, 1994 that introduction of a new entry and inclusion of certain services in that entry would pre-suppose that there was no earlier entry covering the said services. Therefore, prior to introduction of entry (zzzzj), the services rendered by the assesseees' were not taxable. Creation of new entry was not by way of amending the earlier entry. It is not a carve out of the earlier entry. Therefore, the services rendered by the assesseees cannot be brought to tax under that entry.

(18) As regards the receipt of amount of Rs. 23,05,000/- by the petitioner on account of writing articles in sports magazines, Ld. Counsel submitted that on a bare perusal of the provisions of the Finance Act, service tax is not leviable on such receipt under business

auxiliary service or any other entry. However, the demand of Rs. 53,02,661/- on the amount of Rs. 4,85,66,782/- includes service tax of Rs. 2,43,595/- on the amount received for writing articles, although there is no allegation in the impugned show cause notice that remuneration received for writing articles attracts service tax. The demand on the amount received for writing articles is bad under the law.

(19) As regards the amount of Rs. 2,00,00,000/- received as fee for anchoring TV show, the same also does not attract service tax under any entry. However, the service tax demanded on the said amount is Rs. 20,60,000/-. This demand is also illegal and bad in law.

(20) As regards the impugned instruction/letter dated 26 July, 2010, Ld. Counsel submitted that an instruction/letter issued by the Ministry cannot expand the scope of law or cannot create tax liability and a circular contrary to the statutory provisions has no existence in the eye of law. In this connection, Ld. Counsel relied on a decision of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Bolpur-vs.-Ratan Melting & Wire Industries, 2008 (12) STR 416*. At paragraph 6 of the judgment, the Hon'ble Apex Court observed as follows:-

"6. Circulars and Instructions issued by the Board are no doubt binding in law on the authorities under the respective

statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the Circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Govt. and/or the State Govt. are not concerned they represent merely their understanding of the statutory provisions. They are not binding upon the Court. It is for the Court to declare what the particular provision of statutes says, and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

Ld. Counsel also relied on another decision of the Hon'ble Apex Court in the case of *Jhunjhunwala-vs.-State of Uttar Pradesh, 2006 (206) ELT 3*. In that case what fell for determination was whether the appellant was a 'manufacturer' within the meaning of S. 2 (cc) of the Uttar Pradesh Trade Tax Act, 1948. The High Court relied on a circular issued by the Commissioner of Trade Tax and held that the appellant was a 'manufacturer' and was thus liable to pay trade tax. While setting aside the order of the High Court, the Hon'ble Apex Court held that the Commissioner's circular could not have created a liability by drawing inference that the purchasers from farmers who have grown, cut or sawn timbers, ballis, bamboos will bring them within the umbrella of the expression 'manufacturer'. There is no logic for such a conclusion when the statutory definition does not say so. It needs no emphasis that a circular cannot create tax liability. The expression

'manufacturer' cannot cover the types of transactions referred to in the Commissioner's circular. Whether an activity amounts to manufacture has to be factually determined. There cannot be a direction to treat a particular type of transaction to be a manufacturing activity without examining the factual scenario.

(21) Ld. Counsel submitted that when the statutory provisions do not so prescribe, there was no basis or logic for the instruction dated 26 July, 2010 that if there is no bifurcation, the entire composite fee will be taxable. The allegation that the petitioner's agreement with KKR is both for 'playing cricket as well as for promoting' and the fee received is a 'composite fee' is influenced by the instruction dated 26 July, 2010 and is not the truth nor based on any material but has been made on the basis of surmise and conjecture. The agreement would reveal that the same was only for playing cricket and even assuming but not admitting that the agreement was for playing cricket and promotion, the circular could not direct that service tax be charged on the entire amount. Such an instruction is illegal. In any event, the claim made is for the period prior to the issuance of instruction/letter dated 26 July, 2010 and such circular cannot be applied retrospectively. In this connection Ld. Counsel relied on a decision of the Hon'ble Supreme Court in the case of *Suchitra Components Ltd.-vs.-Commissioner of*

Central Excise, Guntur, 2007 (208) ELT 321, wherein it was held that a beneficial circular has to be applied retrospectively while an oppressive circular has to be applied prospectively. Thus, when a circular is against the assessee, he has the right to claim enforcement of the same only prospectively.

(22) Ld. Counsel submitted that the proceeding under challenge was instituted on the basis of instruction contained in the said impugned circular to issue show cause notice. This is impermissible in law. Ld. Counsel relied on a decision of the Delhi High Court in the case of *Poona Bottling Co. Ltd.-vs.-UOI, 1981 (8) ELT 389*, wherein the High Court held that the advice given by the Central Govt. for all purposes amounted to directions from higher authorities and show cause notice issued in pursuance thereof without independent application of mind was illegal and without jurisdiction. Ld. Counsel also referred to a judgment of the Hon'ble Apex Court in the same case reported in *2003 (154) ELT A240* wherein the aforesaid judgment of the Delhi High Court was affirmed. Mr. Mittal also referred to a decision of the Delhi High Court in the case of *Indian Aluminium Co. Ltd.-vs.-UOI, 1983 (12) ELT 349*, wherein it was held that it is not open to the Board of Central Excise and Customs in its administrative capacity to issue directives to various subordinate authorities exercising *quasi-judicial* functions to

interpret excise notifications in a particular manner and to restrict relief thereunder. Since the impugned levy or imposition of excise duty or demands in show cause notices gives effect to the direction of the Board, the same is illegal and void.

(23) Ld. Counsel then submitted that the entire proceeding with regard to demand of service tax on IPL fee received by the petitioner from KKR as 'business support service' under Section 65(105)(zzzq) of the Finance Act, 1994, is without jurisdiction, illegal and non-est as the levy itself was not in existence during the relevant period i.e. 1 May, 2006 to 30 June, 2010. He further submitted that in any event, even going by the impugned circular dated 26 July, 2010, the fee charged for playing matches will fall outside the purview of taxable service.

Mr. Mittal then referred to the agreement between the petitioner and KKR and in particular Clause 2.1 thereof which provides that the petitioner was being engaged as a professional cricketer and the KKR shall provide fee to the player. He further referred to Clause 5.1 of the agreement which provides that the player has to wear and use only the team clothing and the player cannot disclose badge, mark, logo, trade name etc. He submitted that the amount received by the petitioner was only in respect of the cricketing skill as per the said

agreement and the petitioner was not engaged in any promotional activity. Indeed, the agreement with KKR debarred the petitioner from engaging in any promotional activities. The allegation of the Department that the petitioner apart from playing cricket, also engaged in promotional activity is completely without basis and perverse. Thus, the amount of Rs. 8,70,87,857/- received as fee for playing cricket professionally in the IPL for KKR does not fall within the service tax net.

As per the terms of the agreement with KKR the petitioner was under full control of KKR and he had no choice but to follow the directions given by KKR and he was under an obligation to wear dress/uniform as per the directions of the KKR. Under the agreement, the petitioner was not free to use his skills as per his own decision. Even the manner of interview, the time and place of performance was dictated by KKR. Thus, the petitioner was not providing any service as an individual independent worker. The status of the petitioner was that of an employee rather than an independent worker. If a person is in employment and receives any amount for the same, it is not taxable under any provisions of the Finance Act, 1994. In this connection, Ld. Counsel relied on an order dated 6 June, 2014 passed by the Commissioner of Central Excise (Appeals), Delhi-III in Appeal No. 330-

332/SVS/RTK/2014 wherein under similar circumstances it was held that the appellant (another cricket player) was in the employment of IPL and was not an independent worker and that an employee working for and under the instruction of the employer cannot be said to be providing service which may attract service tax. It was observed that the terms and conditions of the agreement made the appellant totally servile to Chennai Super Kings (CSK). The appellant played for CSK as a team player having no independent entity. Whatever output/goals were achieved were by the team as a whole and there could not be any quantification of any work done or services provided by the appellant. He was simply a purchased member of a team working under CSK and thus could not provide any service to CSK as an individual.

(24) Ld. Counsel then submitted that the total fee of Rs. 8,70,87,857/- received from KKR includes an amount of Rs. 4,37,00,000/- for playing IPL outside India (South Africa) on which tax effect is Rs. 51,50,443/-. He submitted that the provisions of Finance Act, 1994 are not applicable for services rendered outside India as Section 64 of the Act specifies that the Act applies to the services rendered within the territory of India except the State of Jammu and Kashmir. Hence, on that ground also, service tax demand is illegal to the extent of Rs. 51,50,442/-.

(25) Ld. Counsel next submitted that in paragraph 6 of the impugned notice dated 26 September, 2011 it has been alleged that there was suppression of material facts by the petitioner and, hence, the extended period of limitation is invocable under the proviso to sub-Section (1) of S. 73 of the Finance Act, 1994. This allegation is completely without basis. All relevant information was furnished by the petitioner in the year 2009 regarding the activities of the petitioner along with copies of agreement and audited records. Even thereafter, as and when any other information was called for, the same was provided. In his letter dated 24 November, 2009, the petitioner clearly stated that his activities are not covered under the Finance Act, 1994. It is also significant that the respondent no. 2 in its impugned instruction/letter dated 26 July, 2010 admitted that there were difference in views in respect of the service tax issue relating to IPL. The Department has also not stated what has been suppressed not has adduced any evidence in support of such allegation. Hence, the Department acted without jurisdiction by demanding the service tax of Rs. 1,51,66,500/- beyond the normal period of one year. In this connection Ld. Counsel relied on two decisions of the Hon'ble Supreme Court in the cases of *Uniworth Textiles Ltd.-vs.-Commission of Central Excise, Raipur, 2013 (288) ELT 161* (paras 12, 14 and 16) &

Commissioner of Central Excise, Aurangabad-vs.-Bajaj Auto Ltd., 2010 (260) ELT 17 (paras 12 and 16) in support of his submission that the extended period of limitation is not applicable just for any omission on the part of the assessee unless it is a deliberate attempt to escape from payment of duty/tax. Where the facts are known to both the parties, the omission by one to do what he might have done and not that he must have done does not constitute suppression of fact. Ld. Counsel also relied on a decision of the Hon'ble Apex Court in the case of *Anand Nishikawa Co. Ltd.-vs.-Commission of Central Excise, Meerut, 2005 (188) ELT 149*, wherein it was held that in taxation, 'suppression of facts' must be construed strictly. It does not mean any and every omission and the act must be deliberate and wilful to evade payment of duty/tax.

(26) As regards the penalty imposed by the Commissioner, Ld. Counsel submitted that the same was done illegally and arbitrarily. Ld. Counsel referred to S. 78 of the Finance Act, 1994, and submitted that the facts of this case do not by any stretch of imagination attract the provisions of S. 78. Once it is held that the extended period of limitation cannot be invoked in the present case, the levy of penalty becomes unsustainable. In this connection, Ld. Counsel relied on a decision of the Hon'ble Supreme Court in the case of *Commissioner of*

Sales Tax, UP-vs.-Sanjiv Fabrics, 2010 (258) ELT 465, in support of his submission that in taxing statutes *mens rea* is an essential element required to be examined by the authority while imposing penalty. Ld. Counsel also relied on another decision of the Hon'ble Apex Court in the case of *UOI-vs.-Rajasthan Spinning & Weaving Mills, 2009 (238) ELT 3*, in support of his submission that penalty is a punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting a fraudulent means. If it be held that the extended period of limitation is not invocable as there was no suppression of facts or other fraudulent act on the part of the assessee, the normal period of limitation of one year would not stand extended and the question of penalty would not arise.

(27) Mr. Mittal finally submitted that during the pendency of the writ petition, the petitioner has paid the entire demand of Rs. 1,51,66,500/- in terms of the court's order dated 12 February, 2013 and has deposited a further sum of Rs. 50 lacs in terms of the Division Bench order dated 10 March, 2014 passed in MAT 320 of 2014. The order dated 12 February, 2013 passed on the present petition provided that 'it goes without saying that if this writ petition succeeds, the petitioner shall be entitled to claim refund of the entire amount together with interest.' Ld. Counsel submitted that in view of the

submissions made by him, the writ petition should be allowed with costs and direction should be given to the respondent authorities to refund the sum of Rs. 1,51,66,500/- and Rs. 50 lakhs to the petitioner along with interest at the rate of 12 per cent per annum from the date of payment of the said sums till the date of refund.

Contention of the respondents:-

(28) Appearing on behalf of the respondent authorities, Mr. Bharadwaj, Ld. Counsel primarily urged the point of availability of an alternative remedy. He submitted that the order challenged in the present writ petition is an appealable order and the petitioner has adequate alternative remedy by way of a statutory appeal. Hence, the writ petition should not be entertained. In this connection, Ld. Counsel relied on a decision of the Punjab and Haryana High Court in the case of *Paramount Impex Pvt. Ltd.-vs.-UOI, 2010 (17) STR 234*. In that case, the writ petitioner had challenged a show cause notice demanding service tax. The High Court held that the writ petition should not be entertained since the petitioner had an opportunity of filing reply to the show cause notice before the authorities concerned.

Ld. Counsel also relied on a decision of the Gujarat High Court in the case of *Inox Air Products Ltd.-vs.-UOI, 2014 (35) STR 307*. In that case also the writ petitioner had challenged a show cause notice

demanding service tax in the region of Rs. 2.32 crores. The High Court held that when an alternative remedy is available to the aggrieved party, it must exhaust the same before approaching the writ court. The High Court further referred to a decision of the Hon'ble Apex Court in the case of *Bellary Steels & Alloys Ltd.-vs.-CCT, (2009) 17 SCC 547*, wherein it was observed that where a show cause notice is challenged by way of a writ petition without filing reply to the notice, the High Court should not entertain the writ petition.

(29) Ld. Counsel then submitted that during the period 1 May, 2006 till 30 June, 2010 the petitioner had failed and neglected to pay service tax on account of charges/remuneration received for rendering business auxiliary services under Section 65(19) of the Finance Act, 1994.

(30) In addition, the petitioner received substantial remuneration from IPL franchisee for rendering promotional activities and the services rendered by the petitioner are classifiable under the taxable head of 'business support services' under Section 65(19)(zzzq) of the Finance Act, 1994. He submitted that prior to obtaining service tax registration on 3 August, 2010 in relation to the service of 'Promotion of Brand of Goods, Services, Events, Business Entity Services', the petitioner did not discharge his service tax liabilities for rendering

business auxiliary service. Further, the petitioner did not obtain service tax registration under 'Business Support Service' in relation to charges received from KKR.

(31) Ld. Counsel then submitted that the petitioner had exploited his celebrity image as 'Brand Ambassador' for the purpose of promotion/marketing/sale of various products or appearing in the ad-media against which he had received service charges/remunerations as per the agreement with various corporate clients and as per the provisions of S. 65 (19)(i) of the Finance Act, 1994, such activity of the petitioner is taxable under the category of 'Business Auxiliary Services'. Some of the clauses of the agreement between the petitioner and the Corporate Houses categorically mentioned the term 'Brand Endorsement Fees'. Anchoring in the TV show and writing articles by the petitioner was meant to promote the activity of the organizations with whom he had entered into contracts. The Dept. has rightly classified the petitioner's services under 'Business Auxiliary Services'.

(32) Ld. Counsel submitted that the petitioner has acknowledged that he had represented KKR for undertaking promotional activities for various sponsors of the KKR Cricket Team. He received promotional money of Rs. 8.7 crores approximately from Knight Riders Sports Pvt.

Ltd. for endorsing logos/brand marks of the franchisee/sponsors. The terms and conditions of the agreement dated 21 August, 2008 between Knight Riders Sports Pvt. Ltd and the petitioner makes a categorical reference to this aspect. Against point no. 4 of the agreement under the column sponsorship, media and promotional activities, it is mentioned that the player grants to the franchisee (for the benefit of both the franchisee and IPL with the right to the franchisee and IPL to sub-license such rights) the right during the term to photograph the player both individually and as a member of the squad when he is involved in activities relating to the team; to film, televise, photograph, identify and otherwise record the player and his performance during the matches and periods ancillary thereto including training and press conference, under the condition set down from time to time by the franchisee or IPL; and to use the player identification and to assist the franchisee to comply with their promotional benefits for their association with the franchisee.

(33) Ld. Counsel submitted that in terms of S. 65(105)(zzzzq) of the Finance Act, 1994, taxable service means any service provided or to be provided to any person, by any other person, through a business entity or otherwise, under a contract for promotion or marketing of a brand of goods, service event, or endorsement of name, including a trade

name, logo or house-mark of a business entity by appearing in advertisement and promotional event or carrying out any promotional activity for such goods, service or event. The petitioner while representing KKR, besides playing cricket, also undertook promotional activity against which he received a sum of Rs. 8.7 crores approximately. Hence, the petitioner has provided taxable services which are classifiable under business auxiliary services.

(34) Ld. Counsel finally submitted that there is nothing wrong with the clarificatory circular dated 26 July, 2010 or the show cause cum demand notice or the order dated 12 November, 2012 passed by the Commissioner of Service Tax, Calcutta. All the three were issued strictly in accordance with law and on a proper interpretation of relevant provisions of the Finance Act, 1994. Ld. Counsel prayed for dismissal of the writ petition.

Court's View:-

(35) Ld. Counsel for the respondents has taken a preliminary objection as to the maintainability of the writ petition in view of there being an alternative statutory remedy of appeal available to the petitioner. He has submitted that generally a show cause notice is not interfered with in the exercise of jurisdiction under Art. 226 of the Constitution. It is only in a case where the authority issuing the show

cause notice did not have jurisdiction to do so or on the face of it the show cause notice does not disclose commission of any offence, the Writ Court may interfere.

(36) It is true that ordinarily this Court in the exercise of its high prerogative writ jurisdiction does not intervene when an efficacious alternative remedy is available to the aggrieved person. Where an order has been passed by a statutory authority and the statute provides for a procedure to challenge such order before a higher authority, the Writ Court normally requires the aggrieved party to exhaust such alternative remedy before the court entertains his grievance in the exercise of writ jurisdiction. This is, however, a rule developed by the courts themselves and has no bearing on the jurisdiction of the court to entertain a writ petition. It is settled law that existence of an alternative remedy in no way abrogates the power of the High Court to entertain a writ petition. It is a rule of self-imposed restraint that the courts have developed in the interest of judicial discipline. In appropriate cases courts are justified in interfering and have, in fact, interfered in spite of existence of an alternative remedy. Broadly speaking, where the vires of a statute or a statutory rule is challenged or breach of a fundamental right is complained of or an order or action of an authority is challenged on

the ground of lack of jurisdiction or on the ground of violation of the principles of natural justice, the Writ Courts have interfered in spite of an alternative remedy being available to the writ petitioner. However, no rigid formula can be laid down regarding cases where the Writ Court may interfere in spite of there being an alternative remedy and nor is it desirable to do so. The discretion should be left to the court to be exercised in accordance with sound principles of law and judicial conscience in a given factual matrix. The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion.

(37) In the present case, the show cause notice was issued admittedly beyond the period of 12 months. The petitioner has challenged the invocation of the extended time period of five-years on the ground that there was no justification to do so. It is submitted that the invocation of extended period of limitation is erroneous and such error goes to the jurisdiction of the authority issuing the show cause notice.

(38) Having considered the submissions of the Ld. Counsel, I am of the opinion that if it is finally decided that the extended period of limitation was wrongly invoked by the authority in issuing the impugned show cause notice, the logical conclusion that would follow is that the show cause notice was issued without jurisdiction. In that

event, this court would be justified in interfering with the show cause notice and the order in which it culminated in the exercise of jurisdiction under Art. 226 of the Constitution of India. An authority cannot clothe itself with jurisdiction by erroneously deciding a point of fact or law. An authority cannot confer on itself jurisdiction to do a particular thing by wrongly assuming the existence of a factual matrix, existence whereof is a pre-condition for exercise of jurisdiction by such authority.

(39) In the instant case, since the petitioner has challenged the jurisdiction of the authority to issue the impugned show cause notice, in my view, the writ petition cannot be rejected at the threshold. Whether or not the petitioner will ultimately succeed on merits is a different question altogether. However, in my opinion, it cannot be said that the writ petition is not maintainable at all and should not be entertained for adjudication.

(40) In this connection one may refer to the decision of this Court in the case of *Simplex Infrastructures Ltd.-vs.-Commissioner of Service Tax, Kolkata* (WP 912 of 2013) wherein at paragraphs 44 to 48 it was observed as follows:-

“(44) There can be no dispute that the question of limitation is a question of jurisdiction and that the Commissioner has no authority and / or jurisdiction to issue

notice after the period of limitation prescribed in the Finance Act, 1994.

(45) In M/s Raza Textiles Ltd., Rampur -Vs- The Income Tax Officer, Rampur reported in AIR 1973 SC 1362, the Supreme Court held that no authority, much less a quasi-judicial authority, could confer jurisdiction on itself by deciding the jurisdictional fact wrongly. The question of whether the jurisdictional fact had rightly been decided or not was a question open to examination by the High Court in an application under Article 226 of the Constitution of India.

(46) In the aforesaid case, the Supreme Court held that where the Income Tax Officer had assumed jurisdiction by deciding a jurisdictional fact erroneously, the assessee would be entitled to a writ of certiorari as prayed for, since it was incomprehensible to think a quasi-judicial authority could erroneously decide a jurisdictional fact and impose a levy.

(47) In Shrisht Dhawan -Vs- Shaw Brother reported in (1992) 1 SCC 534 the Supreme Court followed its earlier judgment in M/s Raza Textiles Ltd. and reiterated the proposition that a Court or Tribunal cannot confer jurisdiction on itself by deciding a jurisdictional fact wrongly.

(48) In Calcutta Discount Company Ltd. -Vs- Income Tax Officer, Companies District I, Calcutta & Anr. reported in AIR 1961 SC 372, a Constitution Bench of the Supreme Court held that where the action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, would issue appropriate orders or direction to prevent the same."

(41) Additionally, I am of the view that once a writ petition is admitted, affidavits are invited from respondents, affidavits are filed and the matter comes up for final hearing before the Court, at that stage of final hearing it would be unjust and unfair to dismiss the writ petition only on the ground of availability of an alternative remedy.

One cannot be oblivious of the fact that more often than not a considerable time period elapses between the point of time when a writ petition is admitted and the point of time when it comes up for final hearing. In the case of *Hriday Narain-vs.-Income Tax Officer, Bareilly, AIR 1971 SC 33*, the Hon'ble Supreme Court observed that the High Court was not justified in dismissing as not maintainable a petition which was entertained and heard on merits only because of an alternative remedy is available to the petitioner.

(42) For the reasons aforesaid, the preliminary issue of maintainability of the writ petition is decided in favour of the petitioner. In my view, the petition cannot be dismissed in *limine*.

(43) Coming to the merits of the case, the first point that has been urged on behalf of the petitioner is that the impugned show cause notice is barred by limitation and as such is without jurisdiction. The show cause-cum-demand notice is dated 26 September, 2011 and pertains to the period from 1 May, 2006 till 30 June, 2010. On a plain reading of Section 73 of the Finance Act, 1994, where any service tax has not been paid or has been short paid or erroneously refunded, the Department may serve a notice on the assessee requiring him to show cause why he should not pay the amounts specified in the notice. Such notice has to be issued within 12 months (now 18 months) from date

when such service tax was payable. Any notice issued beyond such period would be barred by limitation. However, the period of limitation stands extended to five-years if non-payment or short-payment or erroneous refund of the service tax is by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of Chapter 1 of the Finance Act, 1994, or the Rules made thereunder with intent to evade payment of service tax, by the person chargeable with such tax.

(44) In the instant case, the impugned notice was issued admittedly beyond 12 months (or even 18 months) from the date when, according to the Department, the service tax was payable by the petitioner. However, the Department invoked the extended period of limitation.

In the impugned notice it is stated, *inter alia*, as follows:-

" APPLICABILITY OF EXTENDED PERIOD OF LIMITATION

Shri Sourav Ganguly by way of his act of omission and failure suppression of material facts with the intent to evade payment of Service Tax, did not discharge the due Service Tax liability amounting to Rs. 1,51,66,500/- (INR One Crore fifty-one Lakh sixty six Thousand & five Hundred only) during the period from 1.5.2006 to 30.6.2010 on the amount/remuneration of service charges received from various corporate clients under the aforesaid two taxable services of BAS & BSS as detailed above. As envisaged in the first proviso to Sub-Section (1) of Sec. 73 of the Finance Act, 1994 as amended, the said amount thus appears to be recoverable from Shri Sourav Ganguly under the first proviso to Section 73 of the said Finance Act, 1994 and under Sec. 91 and 95 of the Finance (No. 2) Act, 2004 with penalty & interest as per law"

(45) The question is whether the Department was justified in invoking the extended period of limitation for the purpose of issuing the impugned show cause notice. I am of the opinion that a mechanical reproduction of the language of the proviso to Sec. 73 (1) of the Finance Act, 1994 would not *per se* justify invocation of the extended period of limitation. A mere bald assertion that the assessee wilfully suppressed the material facts with intent to evade payment of service tax, is not sufficient. The notice must contain particulars of facts and circumstances in support of such allegation. After all, the allegation of suppression of material facts to evade payment of tax amounts to ascribing a fraudulent motive to the assessee and is a serious allegation. Just as in judicial proceeding, when fraud is alleged against a person, such allegation would carry no weight unless particulars of fraud are furnished by the person alleging fraud, in my view, in a quasi-judicial proceeding also when an allegation of fraud or any allegation of similar nature is made against a person, particulars of the same must be furnished. The person against whom fraud is alleged must know with sufficient certainty of the case that he has to answer. A mere *ipse dixit* that fraud has been committed or something has been done or permitted to be done with fraudulent motive cannot be taken note of and cannot form the basis of any action on the part of

the authorities. Even if, such particulars are not included in the notice, the Department should be in a position to justify and/or substantiate its allegation of suppression of material facts on the part of the noticee.

(46) Coming to the facts of the present case, is there any suppression on the part of the petitioner as would entitle the Department to take recourse to the extended period of limitation? In my opinion, the answer must be in the negative. The Department initiated the enquiry by issuing the letter dated 5 November, 2009. The petitioner duly responded to the said letter by his letter dated 24 November, 2009 wherein he categorically stated that he was not rendering any business auxiliary services and had earned income by playing cricket for the country. Thereafter, under cover of letters dated 14 December, 2009 and 15 March, 2010, the petitioner supplied all documents called for by the office of the respondent no. 4 including copies of agreements entered into with various companies and corporate entities. Thereafter, in compliance of summon dated 12 January, 2011, the petitioner through his authorised representative appeared before the respondent no. 4 for making statements and producing documents. Again by his letter dated 20 August, 2011, the petitioner supplied the

information sought for by the Department by its letter dated 4 August, 2011.

(47) From the aforesaid it would appear that the petitioner was prompt and diligent in responding to all the notices issued by the Department and in his replies, the petitioner clearly explained the nature and scope of his activities. Subsequently, copies of contracts entered into by the petitioner with the corporate entities were also made available to the Department. In my view, there was full and sufficient disclosure of the nature of the petitioner's activities to the Department and it cannot be said that the petitioner suppressed material facts to deceive the Department with intent to evade payment of service tax.

(48) It is also be noted that it is stated in the last paragraph of the impugned show cause notice that the same is 'based on records made available'. On a plain reading this means that the notice was issued on the basis of records and materials submitted by the petitioner. Hence, there does not seem to be any basis in the Department's contention that the petitioner suppressed material facts with intent to evade payment of service tax. Suppression of fact in the context of this case can only mean non-disclosure of correct information deliberately to evade payment of service tax. There must be an element of fraud and

dishonest motive before a non-disclosure simpliciter can be called 'suppression of facts'. In the present case, the petitioner suppressed nothing and maintained all throughout that he did not render any business auxiliary service or business support service and as such was not liable to pay service tax under those heads. Even if, such perception of the petitioner was found to be erroneous subsequently, still the same, would not, in my opinion, amount to suppression of facts. Unless a party deliberately conceals material facts with a dishonest motive of evading some liability or making unlawful gain he cannot be said to be guilty of suppression of facts.

(49) As would appear from the impugned show cause notice, there is no allegation of any conscious act on the part of the petitioner that constitutes fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of the Finance Act, 1994 or any Rule made thereunder with intent to evade service tax. There is only a sweeping statement that the petitioner by his 'act of omission and wilful suppression of material facts with the intent to evade payment of service tax did not discharge the due service tax liability amounting to Rs. 1,51,66,500/- during the period from 1.05.2006 to 30.06.2010'. There is no whisper in the impugned notice of the facts which have been allegedly suppressed. Mr. Mittal has vociferously

argued that the vague assertion that the petitioner had wilfully suppressed material facts with intent to evade payment of service tax was unfounded and I find considerable force in such argument.

(50) The petitioner furnished all information that was called for by the Department from time to time. Once the information is supplied as per the requirement of the authority and information supplied has not been questioned, a belated demand has to be held to be barred by limitation. This proposition finds support from the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Central Excise, Chandigarh-vs.-Punjab Laminates Pvt. Ltd., 2006 (202) ELT 578*.

(51) In this connection it may also be noted that in the case of *Commissioner of Central Excise, Chennai-vs.-Chennai Petroleum Corporation Ltd., 2007 (211) ELT 193*, the Hon'ble Apex Court held in effect that where the department was aware of the activities of the assessee, the extended period of limitation could not be invoked on the basis of the allegation of suppression on the part of the assessee. In the facts of the present case, all the activities of the petitioner were performed in the public sphere and were visible and known to the world at large. The Department must have been and is deemed to have been aware of the nature of activities of the petitioner and the Department cannot be permitted to feign ignorance of the same.

(52) In *Collector of Central Excise, Hyderabad-vs.-Chemphar Drugs and Liniments, Hyderabad, (1989) 2 SCC 127*, the Hon'ble Apex Court held, in the context of excise duty under the Central Excise Act, that in order to make the demand for duty sustainable beyond a period of six months and up to a period of five years in view of the proviso to Section 11A(1) of the Act, it has to be established that the duty of excise was not levied or paid or short levied or short paid or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it can be saddled with any liability beyond the period of six months.

(53) In *Anand Nishikawa Co. Ltd.-vs.-Commissioner of Central Excise, Meerut, (supra)*, the Hon'ble Supreme Court observed as follows:-

".....we find that 'suppression of facts' can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression."

(54) In *Commissioner of Central Excise, Aurangabad-vs.-Bajaj Auto Ltd., 2010 (260) ELT 17*, the Hon'ble Supreme Court referred to its earlier judgments in the cases of *Chemphar Drugs and Liniments, Hyderabad (supra)* and *Anand Nishikawa Co. Ltd. (supra)* and held that it was settled that mere failure to declare would not amount to wilful suppression. There must be some conscious, deliberate act with a view to evade service tax.

(55) The principle of law which emerges from the judgments of the Hon'ble Supreme Court referred to above, is that mere failure to disclose a transaction or activity and pay tax thereon or a mere misstatement or mere contravention of the Central Excise Act or the Finance Act, 1994 as amended, or of any Rules framed thereunder, is not sufficient for invocation of the extended period of limitation. There has to be a positive, conscious and deliberate action on the part of the assessee intended to evade tax, for example, a deliberate misstatement or suppression pursuant to a query, in order to evade tax. A clear fraudulent motive or an element of *mens rea* on the part of the assessee has to be established before the Department can take recourse to the extended period of limitation.

(56) On a reading of the impugned notice, I am of the view that the Addl. Director General (respondent No. 4) proceeded on the basis that

there had been contravention of the provisions of the Finance Act, as a result whereof, service tax that was payable had not been paid. The respondent no. 4 did not address the issue which he was required to do for issuing the show cause notice by invoking the extended period of limitation.

(57) In my considered view and in view of the law as discussed above, the impugned show cause notice is hopelessly barred by limitation. There was no ground or justification whatsoever for issuing such notice by invoking the extended period of limitation. None of the pre-conditions necessary for taking recourse to the extended period of limitation exists in the facts of this case and by wrongfully invoking the extended period of limitation the respondent no. 4 conferred on himself a jurisdiction which he otherwise did not have.

(58) In view of the aforesaid, the impugned show cause notice and the order dated 12 November, 2012 in which it culminated cannot be sustained.

(59) Even if, I were to decide the issue of limitation in favour of the Department, I would still have been compelled to quash the impugned show cause notice and the order dated 12 November, 2012 on other grounds which are indicated below.

(60) The demand raised by the Department can be broken up and summarized as under:

Nature of Activity	Remuneration received (Rs.)	Service Tax (Rs.)
Writing Articles in Magazines	23,05,000/-	2,43,595/-
Anchoring TV Shows	2,00,00,000/-	20,60,000/-
Brand Endorsement	2,62,61,782/-	29,99,066/-
Playing Cricket in IPL	8,70,87,857/-	98,63,839/-

(61) The aforesaid amounts of service tax have been claimed by the Department under the heads of 'Business Auxiliary Service' or 'Business Support Service'. Business auxiliary service is defined in Sec. 65(19) of the Finance Act which has been set out earlier in this judgment. It is an exhaustive definition and not an inclusive one. Broadly speaking, it means any service in relation to promoting, marketing, or selling goods produced or provided by or belonging to a client or promoting or marketing service provided by the client. It must be a service rendered in the field of trade and commerce or any kind of business. It is a service rendered by a person to popularize the product or service of a client and/or enhance the sale of such product or service. It also encompasses service provided on behalf of the client as also procurement of goods or service which are inputs for the client. Customer care service rendered on behalf of the client also comes within the purview of 'Business Auxiliary Service'. It also includes a

service incidental or auxiliary to any of the aforesaid activities and includes services as a commission agent. Thus, what activities amount to business auxiliary service have been defined with precision in the Finance Act, 1994. It was not the intention of the legislature that any and every kind of activity which can loosely be termed as 'Business' would attract service tax. It being a taxing provision, the same must be construed strictly and any benefit of doubt in the matter of interpretation of the provision must go in favour of the assessee.

(62) Similarly, Sec. 65 (104c) of the Finance Act which has been noted above defines 'Support Service of Business or Commerce'. The said term or expression has been defined to mean certain activities in relation to business or commerce. The activities mentioned in the definition Section which are perhaps illustrative and not exhaustive, are all meant to enhance some business or commerce. In order to qualify as business support service, in my view, an activity should be one of which primary object is to advance a business or commercial interest.

(63) Writing articles for newspapers or sports magazines or for any other form of media cannot by any stretch of imagination be said to be amounting to rendering business auxiliary service within the meaning of Sec. 65(19) or business support service under Sec. 65(104c) of the

Finance Act, 1994. Writing article for publication in a media is for the benefit of the readers who have interest in the concerned topic. The petitioner wrote articles for media, primarily for the sports lovers. It would be preposterous to suggest that in writing such articles the object of the petitioner was to advance any business or commercial venture. The articles were meant for information and even entertainment of the general public interested in sports. An article written by a celebrity in an issue of a magazine may to some extent boost the sale of that issue but I do not think it can be said that the object of the author in writing the article or permitting publication thereof was to promote circulation of the concerned magazine. That might be an incidental effect but the same cannot foist service tax liability on the author of the article. Hence, in my view, the remuneration received by the petitioner for writing articles would not attract service tax.

(64) For similar reasons, the remuneration received by the petitioner for anchoring TV shows cannot be brought within the service tax net. Television shows are meant for entertainment of the viewers. In contemporary world watching television is a primary form of recreation. It would be absurd to say that anchoring TV shows amounts to rendering business auxiliary service or business support

service. By anchoring a TV show, a celebrity or for that matter any other person does not render service with the object of enhancing any business or commercial interest. No reasonable authority with proper application of mind could classify anchoring of TV show as business auxiliary service or business support service. Hence, in my view, the remuneration received by the petitioner for anchoring TV shows does not attract service tax.

(65) As regards the claim of service tax to the tune of Rs. 20,60,000/- on the sum of Rs. 2,62,61,782/- received by the petitioner for brand endorsement, such claim has been made under the heading 'Business Auxiliary Service'. The Department's contention is that being a celebrity, the petitioner permitted the commercial use of his photographs, videos, speech and also appeared in person for promotion and marketing of products/services belonging to corporate entities engaged in business/commercial activities. For rendering such services, the petitioner received considerable amounts of service charges from corporate clients/service recipients. Such services provided by the petitioner were classifiable under the taxable service head of 'Business Auxiliary Services' with effect from 1 May, 2006. Thereafter, with effect from 1 July, 2010 the said services were placed separately under the head of 'Promotion of Brands of Goods, Services,

Events, Business Entity etc. Services', in terms of Sec. 65(105)(zzzzq) of the Finance Act, 1994 as amended.

According to the Department, commercial advertisement has taken different shapes and forms with the passage of time. Apart from the advertisement in print and visual media and sponsorship, one of the recent trends is to advertise a brand (i.e. goods, services, events, business houses bearing a particular brand name or house name) usually by a celebrity to associate him/her with the brand. The intended impression that is created in the mind of customers or users is that the products and services of that brand have the level of excellence comparable to that of the celebrity. The difference between business auxiliary service (effective from 1 July, 2003) and the newly introduced service of brand promotion (effective from 1 July, 2010) is that the latter has a wide coverage since mere promotion of brand would attract tax under this service head even if such promotion cannot be directly linked to promotion of a particular product or service. If the brand name/house mark is promoted by a celebrity without reference to any specific product or service, it is difficult to classify it under business auxiliary service. Such activities like establishing goodwill or adding value to a brand would fall under the newly introduced service head of Brand Promotion. These

contentions of the Department would appear from the show cause notice dated 26 November, 2011 which is under challenge.

(66) On this issue, Ld. Counsel for the petitioner submitted that 'Brand Endorsement' was brought within the service tax net with effect from 1 July, 2010. The demand raised for brand endorsement for the period 1 May, 2006 till 30 June, 2010 under the head of 'Business Auxiliary Service' is illegal and without jurisdiction. The respondent no. 3 in his letter dated 12 November, 2012 has admitted that the receipt of Rs. 2,62,61,782/- by the petitioner was towards 'Brand Endorsement Fees'. 'Brand Endorsement' and 'Business Auxiliary Service' are separate categories. If brand endorsement was covered under business auxiliary service, it would not have been necessary for Parliament to introduce a new category of 'Brand Endorsement' by way of amendment. If by making a substantive amendment to a taxing statute, a new levy is imposed, it implies that there was no such levy in existence prior thereto.

(67) I am inclined to agree with the submission of Ld. Counsel for the petitioner that since by amendment of the Finance, Act, 1994, a new taxable service category of 'Brand Promotion' was introduced with effect from 1 July, 2010, the logical corollary and inevitable inference is that such category of service was not taxable prior to 1 July, 2010.

In this connection I am in agreement with the decision of the CESTAT, Principal Bench, New Delhi in the case of *Commissioner of Service Tax, Delhi-vs.-Shriya Saran (supra)*, and the decision of the Division Bench of the Bombay High Court in the case of *Indian National Shipowners' Association-vs.-UOI, (supra)*. Business auxiliary service and brand promotion are distinct service heads as admitted by the Department in the show cause notice under challenge. It is also admitted in the order of the respondent no. 3 that the amount of Rs. 2,62,61,782/- was received by the petitioner on account of brand endorsement. Since brand endorsement was not a taxable service during the period of time for which the tax demand has been raised, such demand cannot be sustained. Such service rendered by the petitioner could not be taxed under the head of business auxiliary service as has been sought to be done.

(68) As regards the remuneration received by the petitioner for playing IPL cricket, in my opinion, the service tax demand raised on such amount under the head of 'Business Support Service', is also not legally tenable. According to the Department, the terms of the contract that the petitioner entered into with M/s. Knight Riders Sports Pvt. Ltd. would reveal that the petitioner's obligation was not limited to displaying his cricket skills in a cricket match. He also lent

himself to business promotional activities. Thus he provided taxable service when he wore apparel provided by the franchisee that was embossed with commercial endorsements or when he participated in endorsement event. The Department admits that the fee charged for playing the matches will fall outside the purview of taxable service. However, the Department contends that the petitioner has been paid composite fee for playing matches and for participating in promotional activities but the component of promotional activities could not be segregated for charging service tax. Accordingly, service tax is chargeable on the composite amount. For this contention, the Department relied on the letter dated 26 July, 2010 issued by the Central Board of Excise and Customs which is also under challenge in this writ petition.

In his order dated 12 November, 2012 the respondent no. 3 has held that the petitioner has received substantial remuneration from IPL franchisee (Knight Riders Sports Pvt. Ltd.) for rendering of promotional activities to market logos/brands/marks of franchisee/sponsors. Such fees/remuneration have been paid to the petitioner by the franchisee in addition to his playing skills and thus the services rendered by the petitioner are classifiable under the taxable service head of 'Business Support Services' as per the

provisions of Sec. 65(104c) read with Sec. 65(105)(zzzzq) of the Finance Act, 1994. There appears to be inherent inconsistency in such decision of the respondent no. 3. Sec. 65(105)(zzzzq) pertains to brand promotion whereas Sec. 65(104c) pertains to business auxiliary services. They are two distinct and separate categories. As already indicated above, the taxable head of brand promotion was not in existence prior to 1 July, 2010, hence, reliance on that head for levying tax on the amount received by the petitioner from the IPL franchisee is misplaced and misconceived. This is sufficient to vitiate the order.

(69) Further, I find from the contract entered into by the petitioner with the IPL franchisee that the petitioner was engaged as a professional cricketer for which the franchisee was to provide fee to the petitioner. The petitioner was under full control of the franchisee and had to act in the manner instructed by the franchisee. The apparel that he had to wear was team clothing and the same could not exhibit any badge, logo, mark, trade name etc.. The petitioner was not providing any service as an independent individual worker. His status was that of an employee rather than an independent worker or contractor or consultant. In my opinion, it cannot be said that the petitioner was rendering any service which could be classified as

business support service. He was simply a purchased member of a team serving and performing under KKR and was not providing any service to KKR as an individual. In this regard, I fully endorse and agree with the order dated 6 June, 2014 passed by the Commissioner of Central Excise (Appeals) Delhi-III in Appeal No. 330-332/SVS/RTK/2014, the facts of which case was similar to the facts of the instant case, excepting that the player concerned in that case was a member of the Chennai Super Kings.

(70) In so far the letter/instruction dated 26 July, 2010 issued by the CBEC is concerned, the material portion thereof has been extracted above in this judgment. The petitioner is aggrieved by the instruction in the said letter to the effect that in case the players (in IPL) are paid composite fee for playing matches and for participating in promotional activities, the component of promotional activities should be segregated for charging service tax and if it cannot be done then service tax should be leviable on the total composite amount. Having considered the submissions made in this regard and the decisions cited, I am of the view that the Board of Central Excise and Customs in its administrative capacity is not entitled to impose its views on its various subordinate authorities exercising quasi-judicial functions to interpret a particular provision of a statute in a particular manner. A

circular/instruction/letter cannot create tax liability. The statutory provisions relating to service tax do not provide that the fees received by an IPL player would attract service tax. This is admitted by the Department even in the said circular which states, *inter alia*, that charges for playing matches will fall outside the purview of taxable service. If the statute does not provide for levying service tax on fee received for playing matches, such a liability cannot be created by issuing a letter/instruction/circular. A circular cannot travel beyond the statute. The statute does not provide that if a player receives a composite amount for playing matches and promotional activities and the segregation of the two elements is not possible, then the composite entire amount may be taxed. Such an act on the part of the Department will be *de hors* the statute and without jurisdiction or authority of law. It will also be in contravention of Art. 265 of the Constitution of India. The Central Board of Excise and Customs cannot seek to legislate by issuing circulars/instructions. As observed by the Hon'ble Supreme Court in the case of *Ratan Melting & Wire Industries (supra)*, the clarifications/circulars issued by the Central Govt. or the State Govt. represent merely their understanding of the statutory provisions. In my opinion, if such circulars/instructions/clarifications are contrary to or inconsistent with the statutory provision in question

or seek to create a liability which the statute does not contemplate, such circular/instruction is liable to be struck down. A misconceived and legally untenable interpretation of a statutory provision and/or an erroneous understanding thereof, which if applied by the quasi-judicial authorities will unduly prejudice the citizens of the country, cannot be allowed to stand.

Accordingly the impugned circular/instruction dated 26 July, 2010 is quashed to the extent it states that if composite fee received for playing matches and for participating in promotional activities cannot be segregated, then service tax should be levied on the total composite amount.

(71) In view of the aforesaid, in my view, the remuneration received by the petitioner from the IPL franchisee could not be taxed under business support service.

(72) It was not necessary for me to go into the merits of the case and express my view on whether the service tax demand raised on the petitioner is legally sustainable on merits. I am conscious of the fact that a Writ Court is not ordinarily concerned with the decision of an Authority but with the decision making process. However, if the order impugned is *ex facie* illegal and contrary to the provisions of the statute in question or if the order is so unreasonable that no

reasonable person could have passed the order keeping in mind the facts of the case and the applicable law, it is the duty of the Writ Court to intervene. (See the case of *Associated Provincial Picture House Ltd.-vs.-Wednesbury Corporation, (1947) 2 All ER 680*). Since I have heard the Ld. Counsel for the parties on the merits of the case, I felt it proper to express my opinion in that regard.

(73) In conclusion, I hold that the show cause notice impugned in this petition is without jurisdiction as being time barred. The demand made in the show cause notice is barred by limitation. The order of the respondent no. 3 is consequently also without jurisdiction and *ex facie* illegal. Even on merits the claim of the Department is not sustainable. Both the show cause notice and the said order are set aside. The impugned letter dated 26 July, 2010 issued by the Central Board of Excise and Customs is also set aside. The petitioner is entitled to refund of the sum of Rs. 1,51,66,500/- and the sum of Rs. 50,00,000/- that he has deposited in terms of this Court's order along with interest at the rate of 10 per cent per annum from the date of deposit till the date of payment. Such refund is to be made to the petitioner within a period of four weeks from date.

(74) WP 3137(W) of 2013 is accordingly allowed. There will, however, be no order as to costs.

(75) Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.

(Arijit Banerjee, J.)