**CUSTOMS.EXCISE.&.SERVICE.TAX.APPELLATE.TRIBUNAL,.**
**West.Zonal.Bench,.O-20,.NMH.Compound.**
**Ahmedabad.**

Serial.No..

Appeal.No..

Appellant.

Respondent.

Arising.out.of.the.OIA/OIO.No..&.date.

Passed.by..

1..

E/441/2011.

C.C.E..&.S.T.,.Surat.II.

Atul..Limited.

OIA.No..SKSS/248/SRT-II/2010.dated.23.12.2010.

C.C.E.&.Cus.(Appeals),.Surat.II.
2..

E/11633/2013.

Essar.Oil.Limited.

C.C.E..&.Cus.,.Ahmedabad.I.

OIO.No.29/Commissioner/.

2013.dated.5.3.2013.

C.C.E..&.Cus,.Ahmedabad.I.

3..

E/12000/2013.

Balaji.Filaments.Limited..

C.C.E..&.S.T.,.Vapi.

OIA.No.SRP/22/VAPI/2013-14.dated.11.4.2013.

C.C.E.Cus.&.S.Tax,.Vapi.

4..

E/12265/2013.

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Hindalco.Industries.Limited.

C.C.E..&.S.Tax,.Vadodara.II.

OIA.No.PJ/39/.VDR.II/2013-14.dated.15.4.2013.

C.C.E.Cus.&.S.Tax,.(Appeals).Vadodara.

5..

E/12263/2013.

Hindalco.Industries.Ltd.

C.C.E..&.S.Tax,.Vadodara.II.

OIA.No.PJ/18/.VDR.II/2013-14.dated.10.4.2013.

C.C.E.Cus.&.S.Tax,.(Appeals).Vadodara.

6..

E/12924/2013.

Birla.Cellulosic.

C.C.E..&.S.Tax,.Surat.II.

OIA.No.CCEA-SRT-II/SSP-46/2013-14.dt.31.5.2013.

C.C.E.&.Cus...(Appeals),.Surat.II.

7..

E/13047/2013.

Amoli.Organic.Pvt..Limited.

C.C.E..&.S.Tax,..Vadodara.II.

OIA.No.PJ/113/.VDR.II/2013-14.dated.23.5.2013.

C.C.E.&.Cus...(Appeals),.Vadodara.II.

8..

E/13149/2013.

Superfine.Syntex.Limited..

C.C.E..&.S.Tax,...Surat.I.

OIA.No.CCEA-SRT-I/SSP-111/2013-14.dt.19.6.2013.

C.C.E.&.Cus...(Appeals),.Surat.I.

9..

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E/13305/2013.

D.K..Polymers.

C.C.E..&.S.Tax.Vapi.

OIA.No.SRP/156/VAPI/2013-14.dated.2.7.2013.

C.C.E.Cus.&.S.Tax,.Vapi.

10..

E/13452/2013.

Essar.Oil.Limited.

C.C.E..&.S.Tax,.Rajkot.

OIO.No.85/COMMR/2013.dated.19.8.2013.

C.C.&.C.Ex,Rajkot.

11..

E/13981/2013.

G.P.T..Steel.Industries.Limited.

C.C.E.&.S.Tax,.Rajkot.

OIO.No.81/COMMR/2013.

C.C.C.E,.Rajkot.

12..

E/11048/2014.

Garden.Silk.Mills.Limited.

C.C.E..&.S.Tax,.Surat.I.

OIA.No.SUR-.EXCUS-001-.APP-621/13-14.dated.11.2.2014.

C.C.E.Cus.&.S.Tax.(Appeals),.Surat.I.

Appearance:.

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Present..Shri.Rakesh.M..Shah,.Senior.Manager,.Ms..Dimple.Gohil,.S/Shri.Willingdon.Christian,..P.V..Sheth,.Jigar.Shah,.Advocates.and.Shri.Dhaval.K..Shah,.Advocates.for.the.appellants/assessee.
Present..Shri.N..Nagori,.A.R..for.the..Revenue.

**Coram:.Honble.Dr..D.M..Misra,.Member.(Judicial).**

Date.of.hearing:.22.3.2017.

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Date.of.pronouncement:

Final..Order.No..

**Per Dr. D.M.Misra:**

Appeal at Serial No.1 (E/441/2011) is filed by Revenue and the Appeals at Serial Nos.2 to 12 are filed by the assesses-appellants against respective impugned orders. Since the issues involved in all these appeals are common, these are taken up together for disposal. In Revenues appeal though the issues of penalty and levy of interest are involved, however, the issue of penalty is no more pending, being decided in favour of assesse by the Honble Gujrat High Court.

2. The facts more or less are similar in all the appeals; the appellants have availed inadmissible CENVAT credit on various grounds but later on being pointed out, reversed the same before utilization or not utilized the same. The Department proposed to recover interest for the period of availing the CENVAT credit, even though the same has not been utilized.

3. Advocate Shri Jigar Shah has fairly submitted that there are conflicting views of High Courts and Tribunal on the issue. He has submitted that Honble Karnataka High Court in the case of C.C.E., LTU, Bangalore vs. Bill Forge Pvt. Ltd. 2012 (279) ELT 209 (Kar.) after taking into consideration the judgment of the Honble Supreme Court in the case of UOI vs. Indo-Swift Laboratories Ltd. 2011 (265) ELT 3 (SC) held that mere availing of credit in the Books of Accounts, which is nothing but only a book entry, hence, interest cannot be charged under Rule 14 of Cenvat Credit Rules, 2004 when the said credit is not utilized. The ld. Advocate submitted that in their own case, this Tribunal vide its Order No.10196/2015 dated 4.2.2015 set aside the demand of the interest and reduced penalty. It is his contention that as held by the Honble Bombay High Court in the case of ACCE vs. Dipsi Chemicals Pvt. Ltd. 1987 (32) ELT 556 (Bom.), the said decision of the Division Bench of this Tribunal, in Hindalco Industries Ltd. case is binding. Further, he has submitted that resolving the conflicting views of the Honble Karnataka High Court in the case Bill Forge Pvt. Ltd. and the Honble Madras High Court in the case of C.C.E., Chennai IV vs. Sundaram Fasteners Ltd. 2014 (304) ELT 7 (Mad.), the Larger Bench of this Tribunal in the case of J.K. Tyres & industries Ltd. vs. C.C.E., Mysore 2016 (340) ELT 193 (Tri-Larger Bench) observed that the judgment of the jurisdictional High Court is binding on the Tribunal and accordingly, held that the Bangalore Bench of the Tribunal should follow the judgment of the Honble Karnataka High Court in Bill Forge Pvt. Ltds case. It is his contention that levy of interest on the credit availed has been considered by the Honble Gujarat High Court in the case of C.C.E., Vadodara II vs. Dynaflex Pvt. Ltd. 2012 (25) STR 277 (Guj.). The Honble Gujarat High Court following the ratio laid down by the Apex Court in the case of C.C.E., Mumbai I vs. Bombay Dyeing and Mfg. Co. Ltd. -2007 (215) ELT 3 (SC) observed that when the credit entry has been reversed before its utilization, the same amounts to not taking of the credit. Applying the said principle, therefore, demanding interest under Rule 14 of CENVAT Credit Rules,2004 in the present case also, is bad in law. He has further submitted that Rule 14 of Cenvat Credit Rules, has been

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amended with effect from 17.3.2012 whereby the expression taken or utilized has been substituted with the expression taken and utilized wrongly. It is his contention that the said amendment since made the position of law clear, hence should be understood as clarificatory in nature and retrospective in application, in view of the principle laid down by the Honble Supreme Court in the case of Zile Singh vs. State of Haryana 2004 (8) SCC 1 and in the case of Government of India vs. Indian Tobacco Association 2005 (187) ELT 162 (SC).

4. Ld. Advocate Shri Willingdon Christian for the appellant M/s Garden Silk Mills Ltd. submitted that this Tribunal taking note of the judgment of the Honble Gujarat High Court in Dynaflex Pvt. Ltd.s case while considering the issue of applicability of interest on wrongly availed credit but reversed before its utilization in the case of Garden Silk Mills Limited 2015 TIOL 2304 CESTAT AHM held in favour of the assessee. He has further submitted that as there is a judgment of the jurisdictional High Court on the same issue, hence, it is to be followed. Ld. Advocate, however, fairly submitted that the earlier decision of the same Bench in the case of Gujarat Guardian Ltd. v.C C.C.E., Surat II 2016 (46) STR 552 (Tri-Ahmd.), on the same issue, which was also decided taking into consideration the principle laid down in Dynaflex Pvt. Ltd.s case was not brought to the notice of the Bench deciding the appeal filed by M/s Garden Silk Mills Ltd.

5. Ld. Advocate Shri Dhaval K. Shah for the appellants supporting the aforesaid arguments submitted that in the case of appellant , M/s Amoli Organics Pvt. Ltd., the demand of interest was issued invoking extended period of limitation even though the credit was reversed without utilizing the same, hence the demand is barred by limitation. In support , he has referred to the judgment of the Honble Delhi High Court in the case Hindustan Insecticides Ltd. v. C.C.E., LTU 2013 (297) ELT 332 (Del.).

6. Per contra, ld. A.R. for Revenue, on the other hand submitted that the issue has been settled by the Honble Supreme Court in the case of Ind-Swift Laboratories Ltds case. and has been followed by the Honble Madras High Court in the case of Sundaram Fasteners Ltd. 2014 (304) ELT 7 (Mad.), Honble Chhattisgarh High Court in C.C.E., Raipur vs. Vandana Vidyut Ltd. 2016 (331) ELT 231 (Chhattishgarh) and by the Honble Bombay High Court in C.C.E., Pune I vs. GL & V India Limited 2015 (321) ELT 611 (Bom.). It is his contention that the Larger Bench of this Tribunal in the case of J.K. Tyres & Industries Limited observed that the judgment delivered by the Honble Karnataka High Court is binding on the Bangalore Bench being the jurisdictional High Court. It is his contention that since there is no judgment from the jurisdictional High Court on the very same issue, hence the judgments delivered by the Bombay High Court, Chhattisgarh High Court and Madras High Court following the ratio of the Honble Apex Court in the Ind-Swit Laboratories Ltd.s case ought to be followed by this Tribunal. He has submitted that the Division Bench of this Tribunal in Gujarat Guardian Ltds case distinguishing the ratio laid down by the Honble Gujrat High Court in Dynaflex Pvt. Ltd.s observed that it was delivered in a different context, but in the case on hand, there is a specific judgment of the Honble Supreme Court on the issue,hence the ratio laid down by the Apex Court in Indo Swift Laboratories Limiteds case is accordingly applicable. He submits that the

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Division Bench which decided the Garden Silk Mills Limited& Hindalco Ltd.s case has not taken note of the earlier judgment of the same Bench in Gujarat Guardian Ltds case and also the judgments of various other High Courts, hence cannot be considered as a good law and binding precedent being delivered per incurium . Further, he has submitted that in a recent case, the Delhi Bench of this Tribunal in Shree Cement Limited vs. C.C.E., Jaipur II 2017 - TIOL 636 CESTAT DEL considering the judgments of various High Courts and the Supreme Court in Ind-Swift Laboratories Ltds case observed that interest would be payable on the credit wrongly availed even if not utilized. Responding to the argument that the amendment to Rule 14 of CCR,2004 w.e.f 17.3.2012 is clarificatory in nature and retrospective in application, the ld. A.R. for Revenue submitted that Mumbai Bench of Tribunal in the case of Balmer Lawrie & Co Ltd. vs C.C.E., Belapur 2014 (301) ELT 573 (Tri-Mum.) being confronted with the same argument, rejected the said contention observing that no retrospective operation of the said Notification has been provided by the legislature, while introducing the amendment w.e.f. 17.3.2012 by virtue of Notification No.18/2012-CE (NT) dated 17.3.2012, hence, the amendment is effective prospectively.

7. On the issue of limitation, ld. A.R. for Revenue has submitted that since inadmissible CENVAT credit has been availed by suppressing the relevant facts from the knowledge of the Department, accordingly, interest on such irregular availment of CENVAT credit has been rightly confirmed invoking extended period. Also, it is his contention that after detection of the irregular credit , delay in issuance of the show cause notice, cannot be the ground for not applying the extended period, in view of the law laid down by the Honble Gujarat High Court in the case of Commissioner of C.Ex., Surat I vs. Neminath Fabrics Pvt. Ltd. 2010 (256) ELT 369 (Guj.)

8. Heard both sides and perused the records. The limited question needs to be answered is: Whether interest on the amount of CENVAT credit availed but not utilized is recoverable or otherwise. The recovery of interest on the inadmissible CENVAT credit has been directed under Rule 14 of the CENVAT Credit Rules, 2004 which at the relevant time read as under:

Rule 14. Recovery of CENVAT credit wrongly taken or erroneously refunded :- Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of Sections 11A and 11AB of the Excise Act or Sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries.

9. The aforesaid Rule has been interpreted by the Honble Supreme Court in the case Indo Swift Laboratories Ltd.(supra). While examining the issue whether interest would be leviable on credit availed wrongly but not utilized, reversing the opinion of the High Court that or should be read as and in the expression taken or utilized, their Lordship observed as follows:

16.?A bare reading of the said Rule would indicate that the manufacturer or the provider of the output service becomes liable to pay interest along with the duty where CENVAT credit has been taken or utilized wrongly or has been

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erroneously refunded and that in the case of the aforesaid nature the provision of Section 11AB would apply for effecting such recovery.

17.?We have very carefully read the impugned judgment and order of the High Court. The High Court proceeded by reading it down to mean that where CENVAT credit has been taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly for according to the High Court interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. Therefore, High Court on a conjoint reading of Section 11AB of the Act and Rules 3 & 4 of the Credit Rules proceeded to hold that interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is wrongly utilized. In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. The issue is as to whether the aforesaid word OR appearing in Rule 14, twice, could be read as AND by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word OR in between the expressions taken or utilized wronglyor has been erroneously refunded as the word AND. On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest.

10. The aforesaid ratio has been interpreted by various High Courts subsequently . The Honble Madras High Court in the case of Sundaram Fasteners Ltd. (supra) recorded as follows:

10. We do not agree with the submissions made by the? learned counsel for the assessee, as the decisions rendered in the aforesaid cases by the Allahabad High Court as well as the Karnataka High Court as well as the Honble Supreme Court, arose out of a case where the assessee claimed benefit of an exemption notification. The question which fell for consideration in those cases is as to whether reversal of credit after the removal of the final product would entitle the assessee therein to the benefits of exemption notification, which states that the reversal of the credit should be done before the removal of the products. In such circumstances, the Courts considered the issue and said that for the purpose of extending the benefits of exemption notification, the time of reversal was not the material and reversal of the credit would amount to no creditbeing taken. In these decisions, Rule 14 or Section 11AB was not the subject matter for consideration. Therefore, these decisions relied upon by the learned counsel for the assessee are clearly distinguishable by facts, while read in the context of the facts and relevant notification which are applicable to the facts of the case.

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11. The Honble Bombay High Court also in the case of GL & V India Pvt. Ltd. (supra) referring to the ratio of the Honble Supreme Courts decision in Indo Swift Laboratories Ltd.s case observed as follows:

16.?In so far as the judgment passed by the Madras High Court is concerned, the Madras High Court has taken a view that mere taking of Cenvat credit facility is not at all sufficient for compelling the assessee to pay interest as well as penalty. With great respect to the Honble Judges of the Madras High Court, we may say that this is not what has been held by their Lordships of the Apex Court. The Apex Court has in clear terms held that the interpretation as paced by the Punjab and Haryana Court for invoking the provisions of Rule 14, there has to be taking as well as utilizing is not correct in law. The Apex Court has held that such an interpretation is totally impermissible. In that view of the matter, the said judgment would be of no assistance to the case of the assessee.

12. Similarly, the Honble Chhattisgarh High Court in the case of Vandana Vidyut Ltd. (supra), following the ratio laid down in Ind-Swift Laboratories Ltd. observed as follows:

9.?The aforesaid consideration takes it beyond the ambit of any controversy that under Rule 14, even if the Cenvat credit was taken by making paper entries by one not entitled to the same, the liability for interest arises irrespective of its reversal before utilization. The conclusion of the Tribunal that the Cenvat credit having remained a paper entry only liability for interest would not arise in absence of utilization was thus clearly erroneous.

13. Taking note of all these judgments, recently, the Principal Bench of this Tribunal at Delhi in the case of Shree Cement Ltd. vs. C.C.E., Jaipur II - 2017 TIOL 636 CESTAT DEL observed as follows:

6.2 By following the Honble Supreme Courts decision in case of Ind-Swift Laboratories Ltd. and Honble Chhattisgarh High Courts decision in case of Vandana Vidyut Ltd. (supra) and Honble Bombay High Courts decision in case of GL & V India Pvt. Ltd., both the appeals are rejected and the impugned order sustains.

14. The ld. Advocates Shri Willingdon Christian and Shri Jigar Shah have vehemently argued that this Tribunal in Hindalco Industries Ltd.s case vide Order No.A/10196/2015 dated 4.2.2015 and Garden Silk Mills Ltd.s case 2015 TIOL - 2304 CESTAT AHM taking into consideration the decision of the jurisdictional High Court in Dynaflex Pvt. Ltd.s case observed that interest is not chargeable on mere availment of CENVAT credit without its utilization. I find that the judgment of Garden Silk Mills Ltd.s case was delivered on 21.9.2015 and that of Hindalco Industries Ltd.s case was on 04.2.2015. In both these cases, it has not been brought to the notice of the Tribunal that in an earlier judgment, in the case of Gujarat Guardian Ltd. (supra) delivered by the same Bench, this Tribunal after referring to the ratio laid down in Ind-Swift Laboratories Ltd.s case and the applicability of the judgment of Honble Gujarat High Court in Dynaflex Ltd.s case, recorded its finding as follows:

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5.?So far as charging of interest upon wrongly taken Cenvat credit is concerned, it has been argued by the appellant that in view of various judgments, relied upon in para 2 above, no interest is payable when the credit taken is not utilized and reversed subsequently. It is the case of the appellant that as per the ratio laid down by the Apex Court and the jurisdictional High Court of Gujarat when a Cenvat credit taken is reversed by an assessee than it amounts to not taking Cenvat credit at all and accordingly no interest is payable. In this regard, it is seen that the law laid down by the Honble Supreme Court and High Courts relied upon by the appellant were with respect to admissibility of an exemption Notification when there was a condition for availing exemption that Cenvat credit with respect to certain inputs should not be taken by an assessee. It was in that context that Honble Supreme Court and jurisdictional High Courts gave the rulings that reversal of Cenvat credit will amount to not taking Cenvat credit and accordingly benefit of relevant exemption notifications was held to be available to such assessees who reverse Cenvat credit earlier taken. However, in the present proceedings in hand there is a specific ruling by the Apex Court on the issue in the case of UOI v. Ind-Swift Laboratories Ltd. (supra) with respect to Rule 14 of Cenvat Credit Rules, 2004.

15. Also, in recent judgment of Delhi Bench of this Tribunal, after taking into consideration judgments of different High Courts and that of the Supreme Court, held that interest is leviable on the credit availed even if not utilised. Therefore, the observation made by the Tribunal in Hindalco Industries Ltds case and in Garden Silk Mills Ltd.s case, in my opinion, is per incuriam and hence cannot be considered as binding precedent being contrary to the ratio laid down by various High Courts.

16. Another issue raised by the ld. Advocate is that subsequent amendment brought to Rule 14 of Cenvat Credit Rules, 2004, the expression taken or utilised wrongly has been substituted with taken and utilised wrongly be read as clarificatory in nature and hence retrospective in application. I find that this issue has also been considered by the Mumbai Bench of this Tribunal in Balmer Lawrie & Co . Ltd. 2014 (301) ELT 573 (Tri-Mum.). After considering in detail, this Tribunal at Para 5.4 observed as follows:

5.4?As regard the argument advanced by the appellant that since the expression Cenvat credit taken or utilized wrongly had been substituted effective from 17-3-2012 with the words Cenvat credit taken and utilized wrongly,the same would have retrospective effect and, therefore, inasmuch as the appellant has not utilized the credit there will not be any liability to interest, this argument is misplaced. Rule 14 of the Cenvat Credit Rules, 2004 was amended by a Notification No. 18/2012-C.E. (N.T.), dated 17-3-2012 and amendments effected in Rule 14 of the Cenvat Credit Rules, 2004 read follows :-

11.?In Rule 14 of the said rules, with effect from the 17th day of March, 2012, -

(a) for the words taken or utilized wrongly, the words taken and utilized wrongly shall be substituted;

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This amendment rule makes it absolute clear that the amendment is with effect from 17-3-2004 and not before. In view of the express provisions in the Amendment Rules, the argument of the appellant that amendment being in the nature of substitution would have retrospective effect cannot be accepted. It is a trite law that every statutory provision is prospective only unless it is explicitly provided that it is retrospective in nature and the legislature provides for such retrospective operation. In the present case, no such retrospectivity has been provided by the legislature in respect of Notification 18/2012-C.E. (N.T.), dated 17-3-2012 and, therefore, the argument of the Counsel in this regard and the decisions relied upon in support of the same cannot be accepted.

17. In these circumstances, I do not find merit in the contentions raised in the respective appeals that mere availment of CENVAT credit without its utilisation of the same will not attract interest at appropriate rate under Rule 14 of Cenvat Credit Rules, 2004 as was in force during the relevant time. However, as far as recovery of interest is concerned for invoking extended period of limitation, the principle laid down in this regard including the judgment of Honble High Court in the case of Hindustan Insecticides Ltd. vs. C.C.E., LTU 2013 (297) ELT 332 (Del.) will be applicable. After analyzing relevant provisions, it has been observed by their Lordships at Para 14 of the said Judgment as follows:

14.?A reading of the aforesaid paragraph would show that in the said case notice of payment for interest was issued after four years and it was held that it was beyond a reasonable period and the department could recover the amount from the Assessing Officer, who had not taken steps for four

years and not from the respondent-assessee therein. The finding of the Supreme Court on interpreting the applicable Act was that no limitation period was prescribed, therefore, proceedings for recovery could be initiated within a reasonable time. The ratio in the said case is distinguishable for the reason that payment of interest is to be made under Section 11A and, therefore, the period of limitation prescribed therein would equally apply as has been held by the Delhi High Court in the case of Kwality Ice Cream Company (supra), Punjab and Haryana High Court in the case of M/s. VAE VKN Industries Private Limited (supra) and Gujarat High Court in Gujarat Narmada Fertilizers Company Limited (supra). These judgments have relied upon the decision of the Supreme Court approving the view of the Tribunal in TVS Whirlpool Limited (supra) wherein pari materia provisions of the Customs Act were considered. This being a distinguishing feature, we feel that the appellant is entitled to succeed in the present appeals. The question of law is accordingly answered in affirmative, i.e., in favour of the appellant and against the respondent-Revenue.

18. Advocate Shri Willingdon Christian has submitted that the demand notice for recovery of interest in Appeal No.E/11048/2014 was issued for the period December 2011 to February 2012 on 10.12.2012, hence, it is within the normal period of limitation. Consequently, their appeal is rejected. Remaining appeals are remanded to the adjudicating authority for the limited purpose of verification of the fact whether extended period of limitation for recovery of

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interest is applicable or otherwise in the light of the settled principle of law in this regard.

19. The appeals are disposed of as above.

**(Dr..D.M..Misra).**

**Member.(Judicial).**

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