CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH-KOLKATA

COURT NO.- I

Service Tax Appeal No. 77117 of 2019

(Arising out of Order–in-Appeal No. 24/Commr/ST/Kol/2012-13 dated 12.11.2012 passed by Commissioner of Service Tax- Kolkata-700107)

Sourav Ganguly **.....Appellant**
(Ex-Captain of Indian Cricket Team,
At, 2/6, Biren Roy Road, (East), Behala,
Kolkata, West Bengal, 700008)

Versus

Commissioner of Service Tax, Kolkata
(Now Commissioner of Central
Goods & Service Tax & Central Excise,
Kolkata South) **.....Respondent**
(180, Rajdanga Main Road, Shantipally, 3rd Floor,
Kolkata-700107

APPEARANCE:
Shri J.K Mittal, Advocate for the Appellant
Shri Manish Mohan, Authorized Representative for the Department

CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING: JANUARY 17, 2020
DATE OF DECISION: DECEMBER 14, 2020

FINAL ORDER No.: 75660/2020

JUSTICE DILIP GUPTA

The reliefs claimed in this appeal, which is directed against the order dated November 12, 2012 passed by the Commissioner of Service Tax, Kolkata[1] confirming the demand of service tax under "business auxiliary service"[2] and "support services of business or commerce"[3] with interest and penalty, are for setting aside the

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1. **the Commissioner**
2. **BAS**
3. **BSS**

aforesaid order passed by the Commissioner and for granting interest to the appellant on the amount of Rs. 1,51,66,500/- deposited with the Department on February 26, 2014 towards the demand of service tax as also Rs. 50 lacs deposited on March 26, 2014 towards penalty, from the date of deposit till the date the amount was transferred to the account of the Registrar General of the Calcutta High Court.

2. BAS has been defined under section 65 (19) of the Finance Act 1994[4] to mean inter-alia, any service in relation to promotion or marketing or sale of goods produced or provided by or belonging to the client; or any service in relation to promotion or marketing of service provided by the client. This service is taxable under section 65(105) (zzb) of the Finance Act which defines "taxable service" to mean any service provided or to be provided to a client by any person in relation to BAS.

3. Section 65(104c) of the Finance Act defines BSS to mean services provided in relation to business or commerce. It is taxable under section 65 (105)(zzzq) of the Finance Act.

4. It needs to be noted that w.e.f. July 1, 2010, 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 logo of a business entity by appearing in advertisement and promotional event or carrying out any promotional activity for such goods, service or event became taxable under section 65 (105)(zzzzq) of the Finance Act.

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4. The Finance Act

5. The appellant is a former captain of the Indian Cricket Team in the IPL Tournament and has also represented the Kolkata Knight Riders Sports Pvt. Ltd.[5]. According to the appellant, he received fees for playing cricket; for acting as a 'brand ambassador' for various brands; for anchoring TV shows; and for writing sports articles for magazines.

6. The Directorate General of Central Excise Intelligence, Kolkata initiated investigation against the appellant on November 5, 2009 and sought certain records. Ultimately, a show cause notice dated September 26, 2011 was issued to the appellant proposing to demand service tax on the amount received by the appellant during the period from May 1, 2006 to June 30, 2010 by invoking the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act.

7. The show cause notice mentions that the appellant had rendered his celebrity image as a 'brand ambassador' for promotion and marketing/sale of various products, for which he had received remuneration as per the agreements. This service would appropriately be classified as BAS, but service tax was not paid by the appellant. In addition, the appellant also received remuneration from an IPL franchisee KKR for rendering promotional activities to market logos/ brands. This remuneration that the received was in addition to his playing skills and this service that he rendered would be classified under the head BSS, but the appellant did not discharge the service tax liability.

8. The show cause notice notes that commercial advertisements had taken different shapes and forms with the passage of time and the

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5. KKR

trend was to advertise a brand by using a celebrity to associate him with the brand so as to create an impression in the minds of the customers that the product and services of that brand have the level of excellence comparable to that of the celebrity. Thus, a "brand ambassador" works under a contract for a reasonably long period and promotion or marketing of sale of goods or services are covered under BAS. The show cause notice thereafter distinguishes BAS and the newly introduced service of "promotion of brand of goods and services" w.e.f. July 1, 2010 in the following terms:

> "The difference between the services classifiable under "BUSINESS AUXILIARY SERVICE"(effective from 1-7-2003 & 10-9-2004) i.e., BAS and newly introduced service of "PROMOTION OF 'BRAND' OF GOODS, SERVICES, EVENTS, BUSINESS ENTITY ETC SERVICES" (effective from 01-7-2010) is **that the latter has a wide coverage in the sense that mere promotion of a brand would attract tax under this service even if such promotions cannot be directly linked to promotion of a particular product or service. Many companies/ corporate houses** (for example Sahara, ITC or Tatas) **are associated with a range of activities including production/ marketing/ sale of goods, provision of services, holding of events, undertaking social activities etc.**
>
> If the brand name/ house mark etc is promoted by a celebrity without reference to any specific product or services etc, it is difficult to classify it under BAS. Such activities like mere establishing goodwill or adding value to a brand would fall under this newly introduced service as above."

9. In regard to BSS relating to IPL, the show cause notice mentions that prior to the Finance Act 2010, sponsorship service did not include "services" in relation to sponsorship of sport events and, therefore, service tax was largely not paid on the sponsorship under IPL. However, sponsorship of a team does not come within the scope of the exclusion clause and so sponsorship of IPL is not sponsorship of sports events but of an entity of franchisee and, therefore, taxable. On the same analogy, the sponsorship fee received by a player or a team would be independent of sports event and hence taxable.

10. After having so observed, the show cause notice mentions:

"4. Function of the Noticee and Classification of the Service Rendered:

4.1 From the investigation conducted against the said notice vis-à-vis the statutory provisions, the following salient points emerged;

Shri Sourav Ganguly, Ex-Captain of Indian Cricket Team residing at 6, Biren Roy Road (East), Kolkata-8 (holding IT PAN No. AFTPG6407P) **had rendered his celebrity image as "brand Ambassador" for promotion, marketing /sale of various products by appearing in AD-Media against which he had received service charges/ remuneration as per agreements with various corporate clients.** Investigations undertaken by DGCEI, KZU had revealed that for rendering of the service referred to above, Shri Sourav Ganguly had received considerable sum of money from various corporate clients from 1.5.2006 (09-5-06) onwards till 30.6.2010 and **such services are appropriately classifiable under the service head of "Business Auxiliary Service" as per the provisions of Section 65(19) read with Section 65 (105)(zzb) of the Finance Act 1994. But the service tax accruable on account of receipt of service charges/ remuneration for rendering of 'Business Auxiliary Services' was not discharged by the noticee from 1.5.2006 to 30.6.2010.**

In addition to above, M/s Sourav Ganguly had received substantial remuneration from IPL Franchisee (Knight Riders Sports Private Limited) for rendering of promotional activities to market logos/ brands/ marks of franchisee/ sponsorers. Such fees/remunerations have been paid to Shri Sourav Ganguly by the franchisee in addition to his playing skills and thus the services rendered by the notice in this regard in this regard is squarely classifiable under the taxable service head of "Business Support Service" as per the provisions of Section 65(104c) read with Section 65(105)(zzzq) of the Finance Act 1994.

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5.2. It is admitted position on record that the Shri Ganguly (the Noticee) obtained service tax registration only on 03-8-2010 relating to the service of 'Promotion of 'Brand' of Goods, Services, Events, Business Entity etc Services'- but did not discharge his service tax liabilities before that under the "BAS" (Business Auxiliary Services) that appears to be lawfully due from him with appropriate interest as detailed herein above. **Similarly, Shri Ganguly did not obtain service tax registration under BSS (Business Support Services) relating to service charges received from M/s Knight Riders Sports Pvt. Ltd and thus did not discharge his service tax liabilities that appears to be lawfully due also with appropriate interest.** In view of the fact that Shri Ganguly (the notice) had rendered two taxable services namely, '**Business Auxiliary services' (ref: Table-I) and 'Business Support services' (Ref: Table-II),** it appears Shri Sourav Ganguly (the noticee) stands liable to pay the service tax due in respect of service charges received from 1.5.2006 (09-5-2006) to 30-6-2010 (20-3-2010). But the same was not discharged by the Noticee as per the prevalent position of service tax law till the date of issuance of this Notice even after pointing out the legal obligations during investigation. So, in the back drop of facts narrated herein above, it appears that during 01-5-06 to 30-6-2010 the Service Tax plus Education Cess and S&H Edu. Cess total amounting to **Rs.1,51,66,500/-**

(INR one crore fifty-one lakh sixty-six thousand & five hundred only)remains unpaid by Shri Ganguly because of willful non-payment/ evasion of the tax on his part."

(emphasis supplied)

11. The show cause notice also invokes the extended period of limitation contemplated under the proviso to section 73 (1) of the Finance Act and the relevant portion of the show cause notice concerning this issue is reproduced below:

"6. Applicability of Extended Period of Time Limit:

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 Ganfuly 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."

12. The appellant was, therefore, required to show cause why:

"(i) Service Tax amounting to Rs. 51,52,914/- plus Education Cess of Rs. 1,03,058/- plus S&H Education Cess of Rs. 46,689/- relating to "Business Auxiliary Service" [**as in Table-I**]& Service Tax amounting to Rs. 95,76,543/- plus Education Cess of Rs. 1,91,531/- plus S&H Education Cess of Rs. 95,765/- relating to "Business Support Service" (**as in Table-II**) totaling to Service Tax of Rs. 14729457/- plus Education Cess of Rs. 2,94,589/- plus S&H Education Cess of Rs. 1,42,454/- **[Grand Total of Rs. 1,51,66,500/-]** should not be demanded and recovered from Shri Sourav Ganguly invoking the extended period of time limit as envisaged under first proviso to the Sub-Section (1) of Sec. 73 of the Finance Act, 1994 as amended.

(ii) Interest at the appropriate rate as applicable during the material period should not be charged/demanded and recovered from him under section 75 of chapter V of the Finance Act, 1994, as amended for the delayed payment of Service Tax including Education Cess and S&H Edu. Cess as in [i] above;

(iii) Penalty should not be imposed upon the Noticee in terms of Section 76, 77 and 78 of Finance Act, 1994 as amended for willful non-payment of the amount of Service Tax including Education Cesses and for contravention of the provisions of Sec. 68,69 and 70 of Chapter V of the Finance Act, 1994."

13. The receipt from the various activities performed by the appellant, on which service tax has been computed in Tables I and II attached to the show cause notice, are as follows:-

Sl No.	**Nature of Receipts**	**Gross Amount received in Rs.**	**Service tax demand in Rs. (01.05.2006 to 30.06.2010)**	**Category/Section**
1.	Brand Promotion	2,62,61,782	29,99,066	Business Auxiliary Service 65(105)(zzb)
2.	Fee for Article Writing	23,05,000	2,43,595	Business Auxiliary Service 65(105)(zzb)
3.	Fee for Anchoring in TV show	2,00,00,000	20,60,000	Business Auxiliary Service 65(105)(zzb)
4.	Cricket fee from KKR	8,70,87,857	98,63,839	Business Support Service 65(105)(zzzq)
TOTAL		**13,56,54,639**	**1,51,66,500**	

14. A reply was filed by the appellant to the aforesaid show cause notice. It was asserted that the appellant had not provided any service that could be classified either under BAS or BSS during the period May 1, 2006 to June 30, 2010. In particular, it was stated that the appellant was a legend in the field of game of cricket and had a huge following of fans, mainly in view of his overall performance as an international level cricket player. The appellant had, therefore, gathered huge reputation not only as a cricket player "but also as a distinguished sports celebrity (celebrity-model) nationally and internationally commanding a huge 'Brand Value' in the World of Commerce- the Brand hereto is "SOURAV GANGULY". It was further

stated that various corporate houses had approached the appellant for associating the brand 'Sourav Ganguly' with their brands in commercial terms. Thus the appellant, "the owner of the Brand Sourav Ganguly", was found commercially useful in the following areas or fields:

> **"(i)** Endorsements of various Brands owned by various corporate and business houses.
>
> **(ii)** Appearance or appearances with a view to endorse Brands owned by business or corporate houses.
>
> **(iii)** Writing of articles on the game of cricket as an expert in all fields of the game of cricket.
>
> **(iv)** Hosting (or acting as an anchor) television shows (reality shows)-, and in this case his high positive visibility was encashed by various television channels.
>
> **(v)** Allowance of commercial use of still photographs, Video photo, image, name etc. in the promotion of brands owned by various corporate house, business house or like organization.**"**

15. It was, therefore, asserted that the basic nature of the entity 'Sourav Ganguly' was as follows:

> **"(i)** An individual being absolute owner of the brand 'Sourav Ganguly'.
>
> **(ii)** Except the absolute ownership of the brand 'Sourav Ganguly',- he did not have any active role or organization or infrastructure for doing any business or offering any business services.**"**

16. It was, accordingly, stated in the reply that the appellant as an 'entity' had only allowed the 'brand Sourav Ganguly' to be the 'content' for purpose of brand endorsement or like purpose.

17. In regard to **BAS,** the appellant stated:

> "The basic nature of the entity as discussed in paras-10 and 11 can never be said to be any "Auxiliary" to any main business activity- what actually the entity could do only to become a 'content' (as Sourav Ganguly) for the purpose endorsement of any 'brand'- and nothing else. One has to be actively engaged with a normal and reasonable degree of regularity for the provision of any auxiliary service to any main business services (function) of promotion or marketing or sale and there has to have a direct link to the business process involved in promotion or marketing or sale (of goods or service). Therefore, it is clear that Mr. Sourav Ganguly had not performed any Business Auxiliary Service during the instant period from 01.05.2006 to

> 30.06.2010 and in generic terms it was not possible for him to do that also. All agreements mentioned there in the Show Cause-cum-Demand notice were very much out of the purview of Business Auxiliary Service in so far as the basic nature of the entity Mr. Sourav Ganguly was concerned."

18. In regard to **BSS**, the appellant stated:

> "It is reiterated that the basic nature of the entity Mr. Sourav Ganguly cannot provide any 'support service' to any 'business'. In terms of the agreement with Kolkata Knight Riders Mr. Sourav Ganguly was to play IPL matches as an international level cricket player and perform certain obligations, of course as a player, as mentioned therein the agreement. Mr. Sourav Ganguly, except as a player and as owner of the brand Sourav Ganguly, had nothing to do with the business carried out by IPL. The franchisee i.e. Kolkata Knight Riders were only involved with the IPL. The business of IPL was supported by Kolkata Knight Riders not the player Mr. Sourav Ganguly who was only responsible to play IPL matches and allow his brand to be used in the process of playing IPL series/matches."

19. A personal hearing was also provided to the appellant by the Commissioner and what was stated by the appellant during the course of personal hearing granted to the appellant on January 1, 2012 has been reproduced in paragraph 8 of the appeal memo, and it is as follows:

> "8. That the Authorized representative of the Appellant also appeared on 01.01.2012 before the Adjudicating Authority in compliance with hearing notice wherein the Appellant has refuted all the allegations mentioned in the said show cause notice dated 26.09.2011 raised various contentions including those already made during the course of investigations as referred ereinabove, and also stated that all demand is barred by limitation also under section 73 as it is not a case of suppression of facts and also stated that the CBEC itself in the letter DY.No.42/Commr(ST)/2008 dated 26.07.2010 has clarified that no service tax is leviable only fee received for paying fee and in the statement dated 28.01.2011 recorded by DGCEI of authorized representative of the Appellant, it is clearly stated that the Appellant has received fee only for playing cricket, and in said statement it was also denied that fee for cricket will be taxable under business support service, and said statement has been relied upon by the Department, while issuing the show cause notice. It was also submitted that no allegations have been made in the show cause notice regarding amount received for writing article on sports and also no allegation have been made in the show cause notice regarding the amount received for anchoring the TV show on Zee Bengla, therefore, service tax on the same has been wrongly computed, and in any case not taxable under business auxiliary service. It was also submitted that so far the amount received for the brand promotion activity is concerned, same is taxable w.e.f

> 01.07.2010, same is taxable w.e.f 01.07.2010 , under separate category, under which the Appellant already registered and paying service tax, and demand in the present case, only upto 30.06.2010."

20. The Commissioner, however, did not accept the submissions made by the appellant in the reply filed to the show cause notice and, as noted above, confirmed the demand of service tax.

21. The relevant portion of the order passed by the Commissioner in regard to **BAS** is reproduced below:-

> "The perusal of the statute vis-à-vis the activity undertaken by Sri Sourav Ganguly for a consideration as indicated in the various contracts appended above clearly shows that the noticee provided business auxiliary service. I find that one of those contracts (case of BMA Stainless Ltd) clearly mentioned the aspect and presence of Service Tax element in such transactions. Also the Annexdure-1 to the reply of Show cause notice shows that the noticee received considerable amount as he performed certain activities while under a contract for various organizations. That such activities on the part of the noticee were taxable service is very much evident from the narration "Nature of Receipts' declared by the noticee himself. The **noticee himself in the Annexure-1 to the reply of the show cause notice states that he received Brand Endorsement fees** (vide sl. No. 1-4, 6-9, 11, 14, 17, 19 24 & 25) **which for all practical purposes signify providing services related to promotion or making or sale of goods produced or provided by or belonging to the client. Hi anchoring in TV show was nothing but promotional activity for the promotion of service which the TV channel provides (vide sl. no. 12, 18, 20, 22 of Annexure-1 to the reply of the show** cause notice). **Same goes for the fee received by him for article writing because the noticee's action was a promotional activity of the service provided by the Organizations with whom he was under contract. From above it can be clearly seen that Mr. Sourav Ganguly during the material period while under contract with various organizations provided certain taxable services and the same are classifiable under Business Auxiliary Services. Thus, I find that the demand of Rs. 5302661/- made in this regard is proper."**
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> **(emphasis supplied)**

22. In regard to the **BSS**, the Commissioner observed as under:-

> **"The noticee while representing Kolkata Knight Rider besides playing also undertook promotional activity and against such promotion had received Rs. 87087857/-. The noticee has never denied that he has not promoted logos/brands/marks of franchisee/sponsors who are Kolkata Knight Riders in the instant case.** I also note that the noticee performed the entire activity under contract because he himself declared so in the Annexure-1 to his reply.

> **From above it can be clearly seen that Mr. Sourav Ganguly during the material period while under contract with various organizations provided certain taxable services and they are classifiable under Business Support Services. Thus, the demand of Rs. 9863839/- made in this regard is proper."**
>
> **(emphasis supplied)**

23. The Commissioner also imposed penalty under section 78 of the Finance Act and the relevant portion of the order dealing with this aspect is reproduced below:-

> "I find that the show cause notice has proposed penal action in terms of section 76, 77 and 78. In his submission made after the personal hearing the notice himself asserted that he had obtained registration under service tax legislation for the provision of Brand Promotion Services only with effect from 01.07.2010. It is also very much evident from the facts of the case that the noticee failed to comply with the formalities like getting themselves registered in accordance with the provisions of section 69 and paying due service tax. Thus, the noticee is liable to be penalized in terms of section 77. This admitted position and the findings above shows that the noticee is liable to be penalized under section 77. The reference of the contract between BMA stainless Ltd. and the noticee has been made in the discussions related to 'Business Auxiliary Services'. It clearly shows that the noticee was well aware of the taxability of the transactions made by him while providing taxable services. His reply to the show cause notice is full of inventive logics and they can best be called as an effort to deflect the issue. **Thus, it is clear that there is presence of the elements for which penalty under section 78 is imposable.**
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> "I find that in the instant case the SCN was issued on 26.9.11 and the proviso 5 to Section 78 was introduced on 10.05.2008. I, thus, find it improper to penalize the noticee both in terms of Section 76 and 78. However, as observed earlier in relation to the issue of limitation make it clear that there is presence of the elements in the instant case for which penalty under section 78 is impossible."
>
> **(emphasis supplied)**

24. It would thus be seen that demand of service tax for the payments received towards article writing, anchoring TV shows and as a brand ambassador has been confirmed under BAS, while the demand raised towards the remuneration received from KKR has been confirmed under BSS.

25. The submissions made by Shri J.K. Mittal, learned counsel for the appellant under various heads are as follows :-

Fee for Article Writing

(i) There is no allegation in the show cause notice that service tax is leviable on fees received for article writing, but still the Commissioner has confirmed service tax demand of Rs. 2,43,595/- on fees received for article writing under BAS. The order, therefore, has travelled beyond the scope of the show cause notice and the demand is liable to be set aside for this reason. In support of this contention, reliance has been placed on **Commissioner of Customs, Mumbai** vs. **Toyo Engineering India Limited**[6] and **Precision Rubber Industries Pvt. Ltd.** vs. **Commissioner of Central Excise, Mumbai, 2017**[7]**.**

Fee for Anchoring in TV Shows

(ii) There is no allegation in the show cause notice that service tax is leviable on fees received for anchoring TV shows. The Commissioner, however, has confirmed service tax demand of Rs. 20,60,000/- on fees received for anchoring TV show. The demand is, therefore, liable to be set aside.

Brand Ambassador Fee

(iii) The show cause notice mentions that the appellant rendered his celebrity image as 'Brand Ambassador for

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6 2006 (201) ELT 513 (SC) (2006) 7 SECT 592
7 2016 (334) ELT 577 (SC)

promotion, marketing/sale of various products'. It alleges that the said service prior to July 1, 2010 was taxable under BAS and w.e.f July 1, 2010, the said service was separately placed under section 65(105)(zzzzq) of the Finance Act. The Commissioner has given a finding that the appellant accepted that he had received 'brand endorsement fees', but service tax on brand promotion was levied w.e.f July 01, 2010, when section 65(105)(zzzzq) was incorporated in the Finance Act. Thus, the alleged service was not taxable prior to July 01, 2010. In this connection reliance has been placed on the decisions of the Tribunal in **Commissioner of Service Tax, Delhi** vs. **Shriya Saran**[8], **Indian National Shipowners' Association** vs. **Union of India**[9], **Hanuman Coal Company** vs. **Commissioner of Central Excise, Kanpur**[10] **and R.K. Paliwal** vs. **Commissioner of Central Excise, Kanpar**[11].

Cricket Playing Fee

(iv) The show cause notice alleges that the appellant had received remuneration from the IPL franchisee (KKR), in addition to playing skill for promotional activities to market logos/brands/marks of franchisee / sponsors. The Commissioner assumed that the amount received was a composite fee and the entire amount was leviable to service

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8. 2014 (36) STR 641 (Tri. Del)
9. 2009 (14) STR 289 (Tri. Bom.)
10. 2011 (22) STR 350 (Tri. Del.)
11. 2012 (26) STR 567 (Tri. Del.)

tax in terms of the Instructions dated July 26, 2010. The view taken by the Commissioner is not correct for the following reasons:-

(a) No contrary evidence was collected by the Department from KKR or from any other source;

(b) Even otherwise, as per the agreement, the Appellant was engaged "as a professional cricketer" and was provided "playing fee";

(c) It is a settled principle of law that if no machinery exists to exclude non-taxable service, a composite contract is not taxable since law must provide measure or value of the rate to be applied and any vagueness in the legislative scheme makes the levy fatal; and

(d) The Agreement with KKR was for employment and not for acting as an independent worker.

Beyond Jurisdiction and time barred

(v) The demand was raised by invoking the extended period of limitation by alleging "suppression of material facts" in respect of the entire demand for the period May 1, 2006 to June 30, 2010, without stating what was suppressed. The Commissioner has also not given any reason to apply the extended period of limitation. The extended period of limitation, therefore, could not have been invoked.

Penalty

(vi) The Commissioner has imposed penalty under section 78 of the Finance Act, whereas element for imposing penalty under section 78 and for invoking the extended period of limitation under section 73 are same. Therefore, if the extended period of limitation could not be invoked, penalty under section 78 could also not be levied.

Cum-duty benefit

(vii) The appellant is entitled to cum-duty benefit under section 67, if the tax is payable.

Interest to the Appellant

(viii) The appellant is entitled to interest on Rs. 1,51,66,500/- from the date of deposit on February 26, 2014 and on Rs. 50 lacs from the date of deposit on March 21/26, 2014 till February 16, 2017, when the said amount was deposited by the Government with the Registrar General of the High Court.

26. Shri Manish Mohan, learned authorized representative of the Department, however supported the order passed by the Commissioner and made the following submissions.

(i) The Commissioner has correctly held that the appellant provided BAS and BSS services during the period May 1, 2006 to June 30, 2010;

(ii) The Commissioner was justified in imposing penalty under section 78 of the Finance Act for the reason

that all that ingredients mentioned in the section for imposing penalty were satisfied;

(iii) The Commissioner (Service Tax) CBEC, New Delhi by a letter dated July 26, 2010 clarified that remuneration paid to players for promoting or marketing of logo/brands/marks of the franchisee/ sponsorers would fall under BSS and would be chargeable to service tax and that in case it was not possible to segregate the fee paid for playing matches and for participating in promotional activities, service tax should be levied on the composite amount that was received; and

(iv) There is a difference between the 'onus of proof' and 'burden of proof' as was observed by the Calcutta High Court in **Commissioner of Cus. (Prev.) West Bengal, Kolkata** vs. **Ritu Kumar[12].**

27. The submissions advanced by learned counsel for the appellant and the learned authorized representative of the Department have been considered.

28. Broadly, the following issues arise for consideration in this appeal:

(i) Whether the 'Brand Endorsement' fees received by the appellant was for providing services relating to promotion or marketing or sale of goods produced or provided by or belonging to the client, so as to make the service taxable

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12. 2006(202) E.L.T. 754 (Cal.)

under BAS **or** was for promotion or marketing of a brand of goods for it to be taxable under section 65(105)(zzzzq) of the Finance Act;

(ii) Whether anchoring in TV show was a promotional activity for the promotion of service which the TV channel provided so as to make the service taxable under BAS;

(iii) Whether the fees received by the appellant for writing articles was a promotional activity of the services provided by the Organizations with whom the appellant was under a contract, so as to make the service taxable under BAS;

(iv) Whether the appellant, apart from playing for KKR, also promoted logos/brands/marks of franchisee/sponsors so as to make the services taxable under BSS; and

(v) Whether the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act could have been invoked in the facts of the present case and whether penalty under section 78 of the Finance Act could have been imposed.

(vi) Whether the appellant is entitled to interest on the amount deposited from the date of deposit to the date the amount was transferred to the account of the Registrar General of the Calcutta High Court.

First Issue

29. The relevant portion of the definition of **BAS** under section 65(19) of the Finance Act is as follows:

> **"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

***** ***** ******"

30. BAS is taxable under section 65 (105)(zzb) of the Finance Act and this section is reproduced below:

"65(105)(zzb)- "taxable service" means and service provided or to be provided to a client, by any person in relation to business auxiliary service.**"**

31. It has been pointed out by the learned counsel of the appellant that brand endorsement/brand promotion services were made taxable w.e.f July 1, 2010 by introducing sub-clause (zzzzq) in section 65(105) of the Finance Act and the appellant sought registration for the above mentioned activity which was granted on August 3, 2010, where after the appellant paid service tax from July 1, 2010 for the services relating to brand endorsement/brand promotion. The contention, therefore, is that no demand could have been made or confirmed for this service for the period May 1, 2006 to June 30, 2010 under BAS.

32. This submission of learned counsel for the appellant deserves to be accepted.

33. Paragraph 4.1 of the show cause notice, which has been reproduced above, mentions that the appellant had rendered his celebrity image as a "Brand Ambassador" for promotion, marketing/sale of various products against which he received remuneration from May 1, 2006 upto June 30, 2010 and such services would appropriately be classifiable under BAS. The appellant claims that he had rendered his celebrity image as a

'Brand Ambassador" for promotion of brand of goods by appearing in advertisement, which service would be taxable only under section 65(105)(zzzzq) of the Finance Act w.e.f. July 1, 2010.

34. Section 65 (105)(zzzzq)of the Finance Act, which came into force w.e.f. July 1, 2010 is, therefore, reproduced below:

> **"65(105)(zzzzq):-**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.
> **Explanation:** For the purposes of this sub-clause, "brand" includes symbol, monogram, label, signature or invented words which indicate connection with the said goods, service, event or business entity;"

35. Thus, any service provided to any person, by any other person, through a business entity 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 became taxable w.e.f July 1, 2010 under section 65(105(zzzzq) of the Finance Act.

36. At this stage, it would be useful to examine the nature of activities that were undertaken by the appellant. In reply to the communication dated December 14, 2009 sent by the Department to the appellant prior to the issue of the show cause notice, the appellant submitted copies of the contracts entered with Chirag Computers, Vibgyor Allied Industries Ltd. and BMA Stainless Ltd. The contract with Chirag Computers indicates that Chirag was

desirous of engaging the services of the appellant, and the appellant agreed to provide services in connection with the advertisement, promotion, marketing and endorsement of the products under the trade mark CHIRAG**.** The appellant was required to participate in the promotional campaigns to be launched by CHIRAG in respect of the products and act as an ambassador of CHIRAG during all his public appearances and endorse the products. The contract with Vibgyor Allied Industries Ltd. indicates that Vibgyor was in search of a celebrity suitable for advertising their retail products under the company name "M/s Vibgyor Gold Ltd." and the appellant had communicated his willingness to act as a "model/brand ambassador" for the Company in connection with the promotion of the products. The appellant, therefore, granted the right and license to use the "Player Identification" in connection with the advertisement and promotion of the business of the Company. The contract with BMA Stainless Ltd. indicates that BMA was desirous of engaging the services of the appellant and the appellant had agreed to provide services in connection with the advertisement, promotion, marketing and endorsement of the products under the trade mark "CAPTAIN" or "BMA". The contract also mentions that the appellant will act as a brand ambassador for BMS Stainless Ltd.

37. The terms of the aforesaid contracts clearly indicate that the appellant was required to provide services in connection with advertisement, promotion, marketing and endorsement of the products under the trade mark CHIRAG or "CAPTAIN"/BMA or advertise and promote the business of the Company 'Vibygor'. The contracts also indicate that the appellant was to act as an

ambassador of CHIRAG/BMA Stainless Steel Ltd. and that the appellant had granted rights and license to Vibygor Gold to use the "player Identification" in connection with the advertisement and promotion of the business of the said company. It, therefore, transpires that the services which the appellant was required to perform under the contracts was for promotion or marketing of brand of goods under a trade name. The show cause notice also takes note of the fact that the appellant had rendered his celebrity image as a "Brand Ambassador" for promotion, marketing/sale of various products by appearing in ad-media. This is a service which would fall under section 65(105)(zzzzq) of the Finance Act and this activity was subjected to service tax w.e.f July 1, 2010. The appellant has been paying service tax for this service w.e.f July 1, 2010. The activity for which the demand has been confirmed under BAS for the period commencing May 1, 2006 upto June 30, 2010 is the same activity for which the appellant is paying service tax w.e.f July 1, 2020. The show cause notice does not mention that there is any difference in the service which the appellant rendered before July 1, 2010 or w.e.f. July 1, 2010.

38. The Instructions dated February 26, 2010 issued by the CBEC in relation to "promoting a brand of goods, services, events, business entity etc." that was included as a new service in the list of taxable services brings out the differences between an activity which would fall under BAS and an activity taxable under section 65(105)(zzzzq) of the Finance Act w.e.f. July 1, 2010 in the following manner:

> "4. Promoting a 'brand' of goods, services, events, business entity etc.

> 4.1 Commercial advertisement has taken different shapes and forms. Apart from the advertisements in print and visual media and sponsorship, **one of the recent trends is to advertise a brand** (i.e. of goods, services, events, business houses bearing a particular brand name or house name) **usually by using a celebrity** (such as sportsperson, film stars, etc.) **to associate him/her with the brand. The intended impression that is created in the minds of customers or users is that the products and services of that brand have the level of excellence comparable to that of the celebrity.** Unlike in case of advertisements using models, a brand ambassador works under a contract of a reasonably long period, where under he is not only required to advertise the goods or service in different media but also to attend promotional, product launching events, make appearances in public activities related to the brand or the brand holder or use such goods or services in public. The contractual amounts are substantial and it may not only involve an individual celebrity but a group of celebrities such as a cricket team or the actors of a successful film.
>
> 4.2 **It is important to note that promotion or marketing sale of goods produced, provided or belonging to a client and promotion or marketing of services provided by the client are already covered under Business Auxiliary Services (BAS). Such activities would continue to remain classified under B.A.S.** The difference between the services classifiable under B.A.S and the newly proposed service is that the latter has a wider coverage in the sense that mere promotion of a brand would attract tax under this service even if such promotions cannot be directly linked to promotion of a particular product or service. **Many companies/corporate houses (for example Sahara, ITC or Tatas) are associated with a range of activities including production/marketing/sale of goods, provision of services, holding of events, undertaking social activities, etc. If the brand name/house marks, etc. is promoted by a celebrity without reference to any specific product or services, etc., it is difficult to classify it under BAS. Such activities, like mere establishing goodwill or adding value to a brand would fall under this newly introduced service."**
>
> **(emphasis supplied)**

39. It would, therefore, be seen from the aforesaid Instructions that when a product is advertised by using a celebrity, the intention is to create an impression in the minds of customers or users that the product and services of the brand have the level of excellence comparable to that of the celebrity. It is only promotion or marketing or sale of goods produced, provided or belonging to a

client and promotion of marketing of services provided by the client that are covered under BAS and they would continue to be covered under BAS. The Instructions further notes that many important companies were associated with a range of activities including production, marketing, sale of goods, provision of services, holding of events, undertaking social activities and if the brand name/house mark is promoted by a celebrity, without reference to any specific product or services, the service would not be classified under BAS, but would be classifiable under the newly added service under section 65(105)(zzzzq) of the Finance Act.

40. There is, therefore, no manner of doubt that the activity carried out by the appellant would be classifiable under the new taxable service contemplated under section 65(105((zzzzq) of the Finance Act.

41. The issue that would arise for consideration is whether this activity of the appellant would fall under BAS prior to July 1, 2010 though there is no change in the definition of BAS w.e.f. July 1, 2010. In other words, if a new service has not been carved out of an existing taxable service, then can it be said that the activity which is attributable to a new service can also be attributable to a pre-existing service.

42. This issue has been settled by the Bombay High Court in **Indian National Shipowners' Association**. The High Court held 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 service. The portion of the judgment on this aspect is reproduced below:

> **"37. Entry (zzzzj) is entirely a new entry.** Whereas entry (zzzy) covers services provided to any person in relation to mining of mineral, oil or gas, services covered by entry (zzzzj) can be identified by the presence of two characteristics namely (a) supply of tangible goods including machinery, equipment and appliances for use, (b) there is no transfer of right of possession and effective control of such machinery, equipment and appliances. According to the members of the 1st petitioner, they supply offshore support vessels to carry out jobs like anchor handling, towing of vessels, supply to rig or platform, diving support, fire fighting etc. Their marine construction barges support offshore construction, provide accommodation, crane support and stoppage area on main deck or equipment. Their harbour tugs are deployed for piloting big vessels in and out of the harbour and for husbanding main fleet. They give vessels on time charter basis to oil and gas producers to carry out offshore exploration and production activities. The right of possession in and effective control of such machinery, equipment and appliances is not parted with. **Therefore, those activities clearly fall in entry (zzzzj) and the services rendered by the members of the 1st petitioner have been specifically brought to the levy of Service Tax only upon the insertion of this new entry.**
>
> **38. If the Department's contention is accepted that would mean that the activities of the members of the 1st petitioner are covered by entry (zzzy) and entry (zzzzj). Such a result is difficult to comprehend because entry (zzzzj) is not a species of what is covered by entry (zzzy). Introduction of new entry and inclusion of certain services in that entry would presuppose that there was no earlier entry covering the said services.** Therefore, prior to introduction of entry (zzzzj), the services rendered by the members of the 1st petitioner were not taxable. **Creation of new entry is not by way of amending the earlier** entry. It is not a carve out of the earlier entry. Therefore, the services rendered by the members of the 1st petitioner cannot be brought to tax under that entry."
>
> **(emphasis supplied)**

43. This issue was also examined by a Division Bench of the Tribunal in **Shriya Saran**. The period of dispute in the appeal was from 2006-07 to 2010-11. The contention of the Department, as in the present case, was that the assessee had provided service of "promotion or marketing or sale of goods provided by or belonging to the client, or promotion or marketing of service provided by client" under the head BAS. The contention of the assessee, however, was that it had provided service of promotion or marketing of brand or goods under a contract, which service became taxable w.e.f July 1, 2010 only under section 65 (105)(zzzzq) of the Finance Act, and so during the period of dispute,

which was prior to the said date, the activity of the assessee was not taxable. The Tribunal examined the provisions of section 65(105)(zzb) as also section 65(105)(zzzzq) of the Finance Act and observed that, notwithstanding the language used in the contract, the services provided by the assessee would be covered under section 65(105)(zzzzq) of the Finance Act. This is for the reason that an activity would not be leviable to service tax under a pre-existing category, if that activity was brought under a tax net from a later date. The Tribunal, after noticing the difference between promotion of a brand and promotion of a particular product, concluded that the assessee was promoting a brand and not marketing a particular product. The relevant portion of the decision is reproduced below:

> "9.2 **Brand endorsement is a form of brand promotion or advertising campaign that involves a well known person using his or her fame to help promote a product or a service**. Examples of such brand endorsements are manufacturers of perfumes, cosmetics and clothing using the services of well known film actors or fashion models for promoting their brand by the appearance of such celebrities in advertisements in audio-visual media, product launch events. **Such promotional activity for the goods produced or being traded by a person under a brand or services provided by a person under a brand by celebrity appearance in advertisements or promotional events for such goods or services against a contract is covered by the definition of brand promotion service under Section 65(105)(zzzzq), as such activity adds to the brand value and is more for promotion of brand of the goods or services and is not merely for promotion or marketing or sale of goods or services, which is covered by the definition of 'Business Auxiliary Service' under Section 65 (19)**.
>
> 10. **The point of dispute is as to whether the activity of the respondent is Business Auxiliary Service covered by Section 65(105)(zzb) read with Section 65(19) or is the service of brand promotion covered by Section 65(105)(zzzzq).**
>
> **************
>
> **12. We do not agree with the above contention of the Department, for the following reasons :-**
>
> **(a)** While Business Auxiliary Service in terms of its definition in Section 65(19), covers among other activities, the services in

relation to promotion or marketing or sale of the goods produced or provided by or belonging to the client or promotion or marketing of services provided by the client, Section 65(105)(zzzzq) covers the promotion or marketing of the brand name/trade name of the client, which may be of more than one product

(b) From the wordings of clause (zzzzq) of section 65(105), it is clear that the services of brand promotion covered under this Clause are those which are provided by the service provider in terms of a contract for promotion or marketing of brand of goods, services or event or endorsement of trade name, logo or house mark of a business entity by appearing in advertisement and promotional events or by carrying out any promotional activity for such goods services or events. **In the present case it is not in dispute that the respondent was carrying out promotion of the client's goods and service by appearing in advertisement and promotional events herself or acting as brand ambassador or carrying out promotional activities for the client's goods or services;** such as appearances in trade meets, fashion shows or as guest of honour in the promotional events. As discussed in para 9.2 above such promotional activity by a celebrity is more for brand promotion than mere marketing or promotion or sale of the clients goods/services.

(c) In fact, **the respondent's activity is Celebrity endorsement which is a form of advertising campaign for brand promotion that involves a well known person using his/her fame to help promote a product or service and such endorsement confers on the brand of the product/service, a larger than life image - the more famous the Celebrity endorser,** the more impact it can have on enhancing the brand value. Though clause (i) and (ii) of Section 65 (19) also cover marketing or promotion of goods produced/provided or services provided by a client, when such marketing or promotion of branded goods/services is by Celebrity endorsement which involves promotional events being carried out by the Celebrity or advertisements by the Celebrity in audio visual or print media, this activity becomes brand promotion.

(d) The contracts of the respondent with her clients have all the features of the contracts for Celebrity endorsement, the purpose of which is promoting a brand and not merely marketing or promoting some particular goods or services.

12.1 Therefore, notwithstanding the language of the respondents contracts with her clients that she was to provide the services of endorsement/promotion of the clients services and products, on going through the details of the activities through which the service of endorsement/promotion of the clients product/services is to be provided, it is clear that the overall objective of these agreements is the brand promotion and not mere promotion or marketing of a particular product or service. **Therefore, we hold that the services provided by the respondent are covered by Section 65(105)(zzzzq)**

> **which had come into force w.e.f. 1-7-2010 and, hence, during the period prior to 1-7-2010 the respondent's activity in terms of her contracts mentioned above could not be taxable under Section 65(105)(zzb), as, as held by Tribunal** in the case of Jetlite (India) Ltd. vs. CCE, New Delhi (supra), Gujarat State Petronet Ltd. vs. CST, Ahmadabad (supra) and Triveni Earthmovers Pvt. Ltd. vs. CCE, Salem (supra), **an activity is not liable to service tax under a pre-existing category when that activity had been brought under tax net from a certain date."**
>
> **(emphasis supplied)**

44. In view of the aforesaid decisions of the Bombay High Court and the Tribunal it has to be held that the activity carried out by the appellant could not have been subjected to levy of service tax under BAS prior to July 1, 2010 and would only be taxable w.e.f July 1, 2010 under section 65(105)(zzzzq) of the Finance Act.

SECOND ISSUE

45. The Commissioner has held that anchoring by the appellant in TV shows was for promotion of service which the TV channel provided and, therefore, it would be taxable under BAS.

46. The contention of learned counsel for appellant is that the show cause notice does not contain any allegation on this aspect and the Commissioner has recorded this finding merely on the basis of details given by the appellant in the reply filed to the show cause notice.

47. This contention of learned counsel for the appellant deserves to be accepted for the simple reason that the show cause notice does not make any mention of this demand. It has been held by the Supreme Court in **Precision Rubber Industries (P) Ltd.** vs. **Commissioner of C. Ex., Mumbai**[13] that a show cause notice is the foundation in the matter of levy and recovery of duty. Thus, if the show cause notice has

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not called upon the appellant to submit any reply on this aspect of the demand, the said demand could not have been confirmed.

THIRD ISSUE

48. The Commissioner has confirmed the demand raised on the amount received by the appellant for article writing under BAS.

49. The contention of leaned counsel for the appellant is that the demand could not have been confirmed in the absence of any charge relating to this aspect in the show cause notice.

50. This contention of the learned counsel for the appellant also deserves to be accepted for the reason stated while dealing with the Second Issue.

FOURTH ISSUE

51. The show cause notice alleges that the appellant had received remuneration from IPL franchisee-KKR, in addition to playing skill, for promotional activities to market logos/brands/marks of franchisee/sponsors and the demand has been confirmed under BSS on the assumption that the amount received was a composite fee and, therefore, leviable to service tax in terms of the Instructions dated July 26, 2010 issued by CBEC. In this connection the Commissioner has also referred to the answers given by the appellant to question nos. 4 and 8.

52. The contention of learned counsel for the appellant is that the findings recorded by the Commissioner that the appellant did not deny that he had promoted logo/ brands/ marks of franchisee/ sponsors is factually incorrect and even otherwise the said activity would not be covered under BAS.

53. It would, therefore, the appropriate to reproduce question numbers 4 and 8 and the answers given by the appellant and they are as follows:

> "**Question No. 4 :** It is noted on perusal of Shri Sourav Ganguly's income details submitted on 15.3.2010 that, Shri Sourav Ganguly has received considerable amounts from M/s Knight Riders Sports Pvt. Ltd., Mumbai in control of Kolkata Knight Riders Team (subsidiary of M/s Red Chillies Entertainment Pvt. Ltd., Mumbai) relating to the IPL events.
>
> In this regard, out of total amount received by Shri Sourav Ganguly from M/s Knight Riders Sports Pvt. Ltd., Mumbai-please confirm the amount received (i) as cricket playing fees and (ii) Business promotional service fees other than (i) above. Please submit documentary evidence in support of your confirmation in this regard.
>
> **Ans:-** Sourav Ganguly has received payments from M/s Knight Riders Sports Pvt. Ltd., Mumbai only for playing cricket in terms of the agreement entered into with them. This would be evident from the agreement – which will be submitted within seven days.
>
> **Question No. 8 :** Shri Mitra, do you agree that a service provided by a person-that includes a cricket player/celebrity also-for promoting or marketing of logos/brands/marks of the franchisee/sponsors falls under the taxable category of 'Business support services'? If you agree, please confirm whether due service tax has been paid by Shri Sourav Ganguly on this court in respect of IPL events. If non-the reasons there for.
>
> **Ans:** No, I do not agree in principle. This is because there is a separate classification of service under **Brand Ambassador promoting brand of goods/services**;
>
> Mr. Sourav Ganguly has duly obtained S. Tax registration as a service provider under 'Brand Ambassador for promoting brand of goods/services'-as already stated herein above. In IPL, only Franchisee had agreements with corporate houses-not players. So, in our perception, a Franchisee is liable for payment of service tax under Business support service provided to corporate clients because of their contractual obligations – and thus, so far as players are concerned, there cannot be twice or repeat taxation on the same service."

54. Question No. 4 requires the appellant to give details of the amount received as cricket playing fees and business promotional service fees. The answer given by the appellant to this question was very specific. The appellant stated that he had received payment from KKR "**only for playing cricket in terms of the agreement entered into with them"**. Question No. 8 required a response from the appellant on the issue as to whether service provided by a cricket player/celebrity for promoting or marketing of logos/brand/ marks of franchisee/ sponsors falls under BSS. The answer given by the appellant is that it would not fall under BSS for the reason that there is a separate classification of service under "Brand Ambassador for promoting brands of goods/ services" and the appellant had obtained service tax registration as a service provider under this category.

55. The appellant had, therefore, categorically stated that the amount received from KKR was only for playing cricket, yet an inference had been drawn by the Commissioner that the appellant had not denied this fact.

56. Even otherwise, for the reasons stated in the First Issue, the confirmation of demand under this head is bad.

57. The Commissioner has also placed reliance on the Instructions dated July 26, 2010 issued by CBEC. They are reproduced below:

"Government of India
Ministry of Finance
Department of Revenue
(Central Board of Excise & Customs)
****

New Delhi the July 26, 2010

Sir,

Subject: Service Tax, issues in respect of the Indian Premier League (IPL) – regarding.

****

> 3. Remuneration paid to the players: Some Commissionerates have issued Show Cause Notices demanding service tax on the remuneration that has been paid to the players. Perusal of the contracts that players have signed with the teams reveals that the obligations of the players are not limited to displaying their cricketing skills in a cricket match. They have also to lend themselves to promotional activities. Thus the players provide taxable services when they wear apparel provided by the franchisee that is embossed with commercial endorsements or when they participate in endorsement events.
>
> The services provided by the players for promoting or marketing of the logos/brands/marks of the franchisee/ sponsorers would fall under "business support service" and chargeable to service tax. However that fee charged for playing the matches will fall outside the purview of taxable service. In case the players are paid composite free fee 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 rending service to the franchisee. In case the address of the player is out of India, the liability to pay service tax would fall on the franchise under the reverse charge mechanism."

58. The Commissioner has, in view of the aforesaid Instructions assumed that the amount received was a composite fee and the entire amount was leviable to service tax in terms of the Instructions dated July 26, 2010. The view taken by the Commissioner is not correct. In the first instance, as noted above, the appellant had received the fees for playing cricket only and even otherwise, it is a settled principle of law that if no machinery exists to exclude non-taxable service, a composite contract is not taxable since law must provide a measure or value of the rate to be applied and any vagueness in the legislative scheme makes the levy fatal.

59. The confirmation of demand under this head, therefore, cannot be sustained.

FIFTH ISSUE

60. The show cause notice dated September 26, 2011 proposed to demand service tax on the fees received by the appellant during the period May 1, 2006 to June 30, 2010 by invoking the extended period of limitation contemplated under the proviso to section 73(1) of the

Finance Act. Section 73 (1) of the Finance Act, as it stood at the relevant time, with the proviso is reproduced below.

> **"73(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-levied or short-paid or erroneously refunded by reason of-
>
> (a) fraud; or
> (b) collusion; or
> (c) wilful mis-statement; or
> (d) suppression of facts; or
> (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with 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."

61. For the purposes of section 73 of the Finance Act, 'relevant date' has been defined in section 73 (6) of the Finance Act to mean as follows:

> "73 (6) For the purposes 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."

62. The records indicate that the Director General of Central Excise Intelligence, Kolkata initiated investigation against the appellant on November 5, 2009 and sought records and documents, including the fees received and copies of the agreements. The appellant submitted a reply dated November 24, 2009 clearly stating that the appellant had not carried out any activity which would be leviable to service tax under BAS and that he had earned income by playing cricket for the country. This was followed by a communication dated December 14, 2009 enclosing copies of the contracts. However, the appellant received a letter dated January 18, 2010 seeking documents/ information to which a reply was submitted by the appellant on March 15, 2010. It is after a gap of about ten months that the appellant received summons on January 12, 2011 for appearance on April 19, 2011.

63. The show cause notice was issued to the appellant on September 26, 2011 in regard to the demand covering the period from May 1, 2006 to June 30, 2010 by invoking the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act as the limitation contemplated under section 73(1) Finance Act was one year from the relevant date. The allegation made in the show cause notice regarding the applicability of the extended period of time limit is as follows:

> "Shri Sourav Ganguly by way of his act of omission and failure, suppression of material facts with the intend to evade payment of service tax, did not discharge the due service tax liability".

64. The Commissioner has not dealt with the issue of limitation and only a statement has been made, while dealing with the imposition of penalty under section 78 of the Finance Act, that the issue of limitation was dealt earlier.

65. It will, therefore, be necessary to reproduce section 78 of the Finance Act, which deals with penalty for suppressing value of taxable services. It is reproduced below:

> **78 Penalty for suppressing value of taxable service**
>
> Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of-
>
> (*a*) fraud; or
> (*b*) collusion; or
> (*c*) wilful mis-statement; or
> (*d*) suppression of facts; or
> (*e*) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax, the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall not be less than, but which shall not exceed twice, the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded:

66. It would be seen from a perusal of section 73(1) of the Finance Act read with its proviso and section 78 of the Finance Act that the ingredients for applicability of the provision, namely fraud, collusion, wilful mis-statement, suppression of facts or contravention of any other provisions of the Act are similar.

67. It would, therefore, be necessary to again reproduce the finding recorded by the Commissioner, while dealing with the imposition of penalty under section 78 of the Finance Act. The Commissioner observed:

> "However, as observed earlier in relation to the issue of limitation make it clear that there is presence of the elements in the instant case for which penalty under section 78 is impossible."

68. It is seen from the order that the issue about limitation has not been dealt at all in the earlier part of the order of the Commissioner.

69. It was imperative for the Commissioner to have recorded a finding on the issue of limitation, for it is only where any service tax has not been paid that the Central Excise Officer can within one year from the relevant date serve notice on the person chargeable with the service tax which has not been paid. The proviso to section 73(1) of the Finance Act, however, permits the notice to be served within five years but the conditions stipulated therein have to be satisfied.

70. Thus, not only should the show cause notice give specific details of willful mis-statement or suppression of facts but should also specify that this was with an intent to evade payment of service tax and the Commissioner has to decide this issue on the basis of the facts brought before him. What is seen in the present matter is that the show cause notice merely reproduces the words of the Statue, without providing any specific factual details regarding the applicability of the proviso to section 73(1) of the Finance Act, nor has the Commissioner recorded any finding regarding the applicability of the said proviso.

71. The Delhi High Court in **Bharat Hotels Limited** vs. **Commissioner of Central Excise (Adjudication)**[14] had examined at length the issue relating to the extended period of limitation under the proviso to section 73 (1) of the Act and the following observation was made:

> "27. Therefore, it is evident that failure to pay tax is not a justification for imposition of penalty. Also, the word „suppression" in the proviso to Section 11A(1) of the Excise Act has to be read in the context of other words in the proviso, i.e. "fraud, collusion, wilful misstatement". As explained in Uniworth (supra), "misstatement or suppression of facts" does not mean any omission. It must be deliberate. In other words, there must be deliberate suppression of information for the purpose of

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> evading of payment of duty. It connotes a positive act of the assessee to avoid excise duty.
>
> **xxxxx**
>
> Thus, invocation of the extended limitation period under the proviso to Section 73(1) does not refer to a scenario where there is a mere omission or mere failure to pay duty or take out a license without the presence of such intention."
>
> **xxxxx**
>
> The Revenue has not been able to prove an intention on the part of the Appellant to avoid tax by suppression of mention facts. In fact it is clear that the Appellant did not have any such intention and was acting under a bonafide belief."

72. In **Pushpam Pharmaceutical Co.** v/s **Commissioner of Central Excise, Bombay[15],** the Supreme Court examined whether the Department was justified in initiating proceedings for short levy after the expiry of the normal period of six months by invoking the proviso to section 11A of the Excise Act. The proviso to section 11A of the Act carved out an exception to the provisions that permitted the Department to reopen proceedings if the levy was short within six months of the relevant date and permitted the Authority to exercise this power within five years from the relevant date under the circumstances mentioned in the proviso, one of which was suppression of facts. It is in this context that the Supreme Court observed that since "suppression of facts" had been used in the company of strong words such as fraud, collusion, or wilful default, suppression of facts must be deliberate and with an intent to escape payment of duty. The observations are as follows;

> "4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date**. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts.** The meaning of the word both in law and even

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15. 1995 (78) ELT 401 (SC)

> otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of court the context in which it has been used indicates otherwise. **A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty.** Where 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 render it suppression."
>
> **(emphasis supplied)**

73. This decision was referred to by the Supreme Court in **Anand Nishikawa Company Ltd.** vs. **Commissioner of Central Excise**[16] and the observations are as follows:

> **"26**…….. This Court in the case of Pushpam Pharmaceutical Company v. Collector of Central Excise, Bombay, while dealing with the meaning of the expression "suppression of facts" in proviso to Section 11A of the Act held that the term must be construed strictly. It does not mean any omission and the act must be deliberate and willful to evade payment of duty. The Court, further, held :-
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> > "In taxation, it ("suppression of facts") can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where 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 render it suppression."
>
> **27.** Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], 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 willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in proviso to Section 11A of the Act."

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16. 2005 (188) ELT 149 (SC)

74. These two decisions in **Pushpam Pharmaceuticals Co.** and **Anand Nishikawa Company Ltd.** were followed by the Supreme Court in a subsequent decision of the Supreme Court in **Uniworth Textile Limited** v/s **Commissioner of Central Excise, Raipur**[17] and the observations are:

> "18. We are in complete agreement with the principal enunciated in the above decisions, in light of the proviso to section 11A of the Central Excise Act, 1944."

75. The Supreme Court in **Continental Foundation Joint Venture Holding** vs. **Commissioner of Central Excise, Chandigarh-I**[18] also held:

> "10. The expression 'suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as 'fraud' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11-A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."

76. It is, therefore, clear that even when an assessee has suppressed facts, the extended period of limitation can be invoked only when "suppression" is wilful with an intent to evade payment of service tax.

77. It also needs to be noted that the show cause notice was issued after about two years from the date the enquiry was initiated against the appellant. This fact assumes importance as section 73 (1) of the Finance Act requires that a show cause notice should be issued within one year from the relevant date. No explanation has been given by the

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17. 2013 (288) ELT 161 (SC)
18. 2007 (216) ELT 177 (SC)

Department for this inordinate delay. It also needs to be noted that though information was supplied by the appellant to the Department, but letters were written by the Department to the appellant in a routine manner seeking information and even the date for personal appearance was fixed after a long gap of ten months.

78. Thus, for the reasons stated above it is not possible to hold that the extended period of limitation contemplated under the proviso to section 73 (1) of the Finance Act could have been invoked in the facts and circumstances of the case.

SIXTH ISSUE

79. The appellant has also claimed interest from the date the amount was deposited by the appellant in pursuance of the impugned order till the date amount was transferred to the Registrar General of the Calcutta High Court.

80. It transpires from the records that after the passing of the order dated November 12, 2012 by the Commissioner, the appellant deposited the confirmed demand of Rs. 1,51,66,500/- on February 26, 2014 and subsequently also deposited an amount of Rs. 50 lacs on March 21/26, 2014 in compliance of an interim order dated March 10, 2014 passed by the Calcutta High Court, in the Writ Petition filed by the appellant to assail the order passed by the Commissioner. The said Writ Petition filed by the appellant was allowed by a learned Judge of the High Court on June 30, 2016 and the amount deposited was directed to be refunded with interest at the rate of ten percent per annum from the date of deposit till the date of payment. The Department however, filed an appeal before a Division Bench of the Calcutta High Court against

the order of the learned Judge and by an interim order dated February 16, 2017, the Division Bench directed that the amount of Rs. 2,01,66,500/- (1,51,66,500+50,00,000/-) should to be deposited by the Department with the Registrar General of the High Court, which amount was to be invested in an interest bearing fixed deposit. The Division Bench, by judgment and order dated August 14, 2019, allowed the appeal filed by the Department and directed that the amount deposited by the Department with the Registrar General of the High Court shall be returned to the appellant with accrued interest as on the date of refund.

81. The contention of the appellant is that no interest has been paid to the appellant from the date of deposit of the amount of Rs. 1,51,66,500/- on February 26, 2014 with the Government till the date the said amount was deposited by the Government with the Registrar General of the High Court. Likewise, the appellant has not been paid interest on Rs. 50 lacs from the date it was deposited with the Government on March 21/26, 2014 till the said amount was deposited by the Government with the Registrar General of the High Court. It has, therefore, been urged by learned counsel of the appellant that the appellant should get interest on the amount of Rs. 2,01,66,500/- from the date of deposit with the Government till the said amount was transferred to the Registrar General of the High Court, if it is ultimately held that the appellant is not entitled to pay service tax.

82. As the appeal filed by the appellant is being allowed and the demand confirmed by the Commissioner is being set aside, there is no reason why the appellant should not be granted interest on the amount of (Rs. 1,51,66,500 and 50,00,000) deposited with the Government

from the date of deposit of the amount upto the date of transfer of the said amount to the Registrar General of the High Court.

84. Thus, for all the reasons above, the impugned order dated November 12, 2012 passed by the Commissioner is set aside and the appeal is allowed. The appellant shall also be entitled to interest on the amount of Rs. 1,51,66,500/- and Rs. 50,00,000/- from the date of deposit of the amount with the Government upto the date the amount was transferred to the Registrar General of the Calcutta High Court at the rate of ten percent per annum. This amount shall be paid to the appellant within a period of one month from the date of this order, failing which the appellant would be entitled to get interest at the same rate from the date of this order upto the date of payment of the amount.

(Pronounced in the open Court on **14.12.2020**)

Sd/

(JUSTICE DILIP GUPTA)
PRESIDENT

Sd/

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Babita/JB