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

COURT HALL No. III

SERVICE TAX APPEAL No. 40810 OF 2017

(Arising out of Order-in-Original No. LTUC/765/2016-C dated 23.12.2016 passed by Commissioner, Large Taxpayer Unit, 1775, Jawaharlal Nehru Inner Ring Road, Anna Nagar Western Extension, Chennai 600 101)

M/s. Royal Sundaram General Insurance Company Ltd. **.... Appellant**
No. Vishranthi Melaram Towers,
Bo.2/319, Rajiv Gandhi Salai,
Karapakkam
Chennai 600 097.

Versus

The Commissioner of GST & Central Excise, **...Respondent**
Chennai South Commissionerate
MHU Complex, No.692, Anna Salai,
Nandanam,
Chennai 600 035.

AND

SERVICE TAX APPEAL No. 40198 OF 2020

(Arising out of Order-in-Original No.32/2019 dated 28.11.2019 passed by Commissioner of GST & Central Excise, Chennai South, No.692, M.H.U. Complex, 5th Floor, Anna Salai, Nandanam, Chennai 600 035.)

M/s. Royal Sundaram General Insurance Company Ltd. **.... Appellant**
No. Vishranthi Melaram Towers,
Bo.2/319, Rajiv Gandhi Salai,
Karapakkam
Chennai 600 097.

Versus

The Commissioner of GST & Central Excise, **...Respondent**
Chennai South Commissionerate
MHU Complex, No.692, Anna Salai,
Nandanam,
Chennai 600 035.

APPEARANCE :

Mr. Raghavan Ramabadran, Advocate
For the Appellant

Mr. R. Subramanian, Special Counsel
For the Respondent

CORAM :

Hon'ble Ms. SULEKHA BEEVI C.S., Member (Judicial)
Hon'ble Mr. M. AJIT KUMAR, Member (Technical)

DATE OF HEARING : 14.06.2023
DATE OF DECISION : 25.07.2023

FINAL ORDER No.

Interim Order Nos.40007-40008/2023 dt.25.07.2023

ORDER : Per Ms. SULEKHA BEEVI, C.S.

The issues involved in both these appeals being analogous they were heard together and are disposed by this common order.

1. Brief facts are that, the appellant, M/s. Royal Sundaram Allianz Insurance Company Ltd., public limited company, having Head office at Karappakkam, Chennai is engaged in providing General Insurances in the nature of Motor, Health, Personal Accident and Fire and Burglary insurance services and Miscellaneous policies. They have centralized registration, and are registered for payment of service tax under reverse charge mechanism on commissions paid to insurance agents, etc.

2. Intelligence was gathered by DGCEI, Chennai zonal unit that the appellant is availing cenvat credit wrongly on the basis of invoices issued by dealers of Motor Vehicles containing description of services which were never actually provided by the automobile dealers to the appellant. Accordingly, investigation was initiated and documents recovered, statements recorded. The investigations was done as under :

(i) Investigation into the alleged irregular availment of cenvat credit by appellant on the basis of invoices issued by the automobile dealers (excluding the dealer, M/s.TVS Sundaram Motors) and manufacturers (excluding the manufacturer, M/s.Honda Cars India Ltd.)

(ii) Investigation on the irregular availment of credit on the basis of invoices issued by the manufacturer, M/s.Honda Cars India Ltd.

(iii) Investigation into the alleged irregular availment of credit on the basis of invoices issued by the dealer, M/s.TVS Sundaram Motors.

3. It is noted that the dealers of motor vehicles not being Agents / Brokers / Intermediaries of the Insurance companies are neither permitted to do insurance business nor are they permitted to receive commission. The investigations revealed that the motor vehicle dealers have been soliciting business of insurance of the appellant while selling the vehicles to customers. The appellant actually pays commission to the dealers for soliciting their insurance business. As the dealers / manufacturers are not permitted to do insurance business (as per Insurance Act and IRDA Regulations) and not permitted to

receive commission, the invoices are raised describing the services as 'Data processing, and Policy servicing related activities'. It was thus concluded from the investigations that dealers have actually not provided any services to the appellant, much less the service described in the invoices and these invoices are raised only to pass over the insurance commission to the dealers in the guise of providing services. The dealers pay service tax on the amount collected from the appellant as per the invoices. The appellant has availed cenvat credit of the service tax paid by them. According to department the availment of such credit is irregular for the reason that no services as described in the invoices has been provided by the dealer to the appellant.

3.1 It was also noted that some of the computer generated invoices did not have all particulars as required under Rule 4A of Service Tax Rules, 1994 as these did not bear the signature of the dealer to evidence as to who has issued the invoice. For this reason also, the credit is ineligible.

3.2 Further the credit availed on invoices issued by M/s.Sundaram Motors showed that there are two sets of invoices. In the invoices issued to appellant, the services were described as 'data processing and policy servicing services'. Whereas at the end of M/s.Sundaram Motors, the nature of service provided was described as 'additional incentive'.

4. From the above, it appeared to the department that the appellant has wrongly availed cenvat credit. Show cause notice for the different periods 2010-2011 to 2014 to 2015 and SOD for the period April 2015

to June 2017 was issued to the appellant proposing to disallow the credit and to recover the same along with interest. After due process of law, the adjudicating authority disallowed the credit, and confirmed the demands along with interest and imposed penalties. Aggrieved, the appellants are now before the Tribunal.

5. The Ld. Counsel Shri Raghavan Ramabadran appeared and argued for the appellant. It is submitted that the appellant is engaged in providing general insurance services pertaining to motor insurance, health insurance, property insurance, engineering insurance, liability insurance and other miscellaneous insurances.

5.1 At the time of sale of the automobiles, the automobile manufacturers through their established dealer network assist the vehicle buyers to obtain the insurance. From the view point of the insurance companies, including the Appellant, the dealers of automobile manufacturers are usually the first point of contact with the buyers of motor vehicle and hence for motor insurance too. Accordingly in order to increase its customer base, the Appellant enters into agreement with various automobile manufacturers and their authorized dealers in order to get access to their customers through various dealerships.

5.2 The case of the Department is as follows :

a. Firstly, that the invoices on which credit is taken do not reflect the true description of the services provided by the dealers to the appellant.

b. Secondly, in respect of M/s.Honda Motors India Ltd., that the appellant has availed cenvat credit based on unsigned invoices issued ;

c. Thirdly, that the appellant has availed cenvat credit on invoices issued by one of their car dealers namely, M/s.TVS Sundaram Motors, who had maintained two sets of invoice documents.

5.3 The undisputed facts are that, the automobile dealers have paid service tax to the government on such invoices. The dealers / service providers have stated the description of service to be in the nature of infrastructure support services and have paid service tax accordingly. The department has not issued any show cause notice against these dealers / service providers disputing the nature of service provided by them or disputing the description of services mentioned in the invoices raised by them. So also, there are not even any penalty proceedings initiated against the dealers / service providers for incorrect issuance of invoices. In other words, the department is not disputing the fact of providing the service or the nature of service provided or the remittance of service tax at the dealers' end.

5.4 The dealers / service providers have always stated the description of service in their tax invoice as per Rule 4A of Service Tax Rules, 1994. The description given is in the nature of infrastructure support services and the dealers / service providers have accordingly remitted service tax. This fact has never been disputed by the Department. No show cause notice was ever issued against the dealers

/ service providers for non-compliance of Rule 4A of Service Tax Rules, 1994 and imposing penalty under Section 77 (1) (e) of the Act for any discrepancy in issuing invoice. In other words, at the service provider's end, the Department has all along acceded to the fact that the description of service in the tax invoice is in accordance with Rule 4A of the Service Tax Rules. Once the nature and description of services as mentioned in the invoice is not disputed at the service providers' end, the same cannot be questioned at the service recipient's end. This is for the reason that the assessment based on the returns in the hands of the service provider has become final and the Department has accepted those returns based on the declarations made by the service provider. Having accepted and not disputed it, the Department cannot be allowed to raise the issue at the service recipient's end.

5.5 To support this argument Ld. Counsel relied on the judgment of the Hon'ble High Court of Madras in *M/s.Modular Auto Ltd. CCE Chennai* – 2008-VIL-541-MAD-ST. The ratio laid in this case was followed by the Tribunal in the case of *M/s.Ford India Pvt. Ltd. Vs Commr. of GST & CCE* - 2019-VIL-182 CESTAT CHE-ST.

5.6 The very same issue in this appeal on identical set of facts was considered by the Tribunal in the case of *Cholamandalam MS General Insurance Co. Ltd. Vs CCE* - 2021 (3) TMI 24 CESTAT CHENNAI [2021 (47) GSTL 263 (Tri.-Chennai)]. The Tribunal in the said case followed the judgment of the Hon'ble jurisdictional High Court in the case of *M/s.Modular Auto Ltd.* (supra) to hold that when it is not disputed that the dealer has paid service tax on the services described in the

invoices, the denial of credit at the recipient's end cannot be justified without reopening the assessment at the dealer's end.

5.7 In regard to the second issue of denial of cenvat credit on unsigned computer generated invoices issued by M/s.Honda Motors India Ltd. to the appellant, the Ld. Counsel submitted that there is no dispute that the service provider is registered with the service tax department and that the service tax as mentioned in the invoices is deposited with government. The credit cannot be denied only because there was no signature in the invoices. There is no allegation that the invoices are fake or bogus. When the tax paid is not in dispute, the credit cannot be denied on such technical grounds. To support this argument, the Ld. Counsel relied on the decisions in the case of *Poorna Info Vision Vs CCE Cochin* – 2019 (365) ELT 592 (Tri.-Bang.) and *CCE Cochin Vs A.B. Maruthi India Pvt. Ltd.* – 2018 (8) GSTL 209 (Tri.-Bang.). The decision in the case of *Automax Vs CCE Delhi* – 2018 (363) ELT 1121 (Tri.-Chan.) was relied to argue that when the duty paid nature of the goods and the actual receipt of the goods in the recipients' factory is not disputed, the credit cannot be denied on the mere ground that description of goods in the invoice is incorrect. It was also held therein that as no investigation was initiated at the hands of the transporter or supplier, and therefore credit cannot be denied at the recipients' end.

5.8 The third issue is the denial of credit for the reason that the invoices issued by M/s.TVS Sundaram Motors reflects the existence of two sets of invoices. The allegation is that in the invoices issued to the

appellant, the services are described as 'Data processing and Policy Servicing Services'. The invoices at the dealer's end shows 'additional incentive'. The Ld. Counsel explained that only one invoice describing the service as 'data processing and policy servicing services' was issued to the appellant. They are not aware of a second set maintained by the dealer. The appellant cannot be penalized by denying credit for the invoice maintained by the service provider, on their own volition.

5.9 The Ld. Counsel adverted to the allegations in appeal No.40198/2020 (for the period 2015-2017) and submitted that the demand along with interest has been confirmed on the very same grounds. It is alleged and concluded that no services as described in the invoices have been provided by the dealers to the appellant. Though there is no whisper in the Statement of Demand (SOD) No.14/2018 dated 13.04.2018 issued for the period April 2015 to 2017, that the service provided by the dealer is liable for payment of service tax under Reverse Charge Mechanism (RCM) in terms of notification 30/2012-ST, the adjudicating authority in para 13 of the OIO has made discussions in this regard. So also, there is no mention in the SOD that the activities cover reimbursable expenditure. However, in para 14.2 the adjudicating authority has held that the amounts paid by appellant to dealer are reimbursements and therefore no service tax is payable by dealer on such amounts, and therefore appellant is not eligible for credit. The Ld. Counsel argued that by considering the notfn no.30/2012 and the amount as reimbursements, the adjudicating authority has travelled beyond the SCN.

6. The Ld. Counsel adverted to the decision of the Tribunal in the case of *Karur Vysya Bank Ltd. VS CCE Trichy* - 2019 (22) GSTL 63 (Tri.-Chennai). It is pointed out that in the said case, the department had issued SCN demanding service tax under "Business Support Service" (BSS) on infrastructure support services provided to insurance companies by the bank. The Tribunal upheld the confirmation of demand. It was thus argued that when service tax is not paid by an assessee (Bank) for Business Support Services, demand has been raised for providing infrastructure facilities and supports to the insurance company. That therefore the dealers have rightly paid the tax for the services provided to the appellant. The credit availed by the appellant on such tax is eligible.

7. The Ld. Counsel has put forward arguments on the ground of limitation also. It is prayed that the appeals may be allowed.

8. The Ld. Special Representative appointed by the department Sri R. Subramanian appeared and argued for the department. The Ld. Special Counsel has submitted lengthy written submissions. Bereft of the unnecessary details, repetitions, the crux of the arguments are as under :

It is submitted by the Ld. Special Representative of the department that the investigations brought to light that the issuance of invoice is a tool employed by the dealer / manufacturer to claim their undue payment (commission) under the garb of providing services. It was detected that actually there is no receipt of any service by the appellant so as to avail the credit. The Ld. Special Representative adverted to

the relevant provisions of Insurance Act, 1938 and IRDA Regulations to argue that dealers / manufactures of motor vehicles not being insurance agents / brokers / intermediaries of the Insurance companies, are not permitted to do insurance business. So they are not allowed to receive insurance commission. However, the dealers / manufacturers have been soliciting insurance business of the appellant. As they cannot receive commission from the insurance company (appellant), the dealers and manufactures raise invoice on the instructions given by the appellant describing that they have provided 'Data processing & policy servicing related activities' to the appellant. These invoices are raised in the guise of providing services to the appellant so that the commission for promoting insurance business can be paid to the dealers / manufacturers.

8.1 Section 40 (1) of Insurance Act, 1938 reads as under :

> *"3.2 As per Section 40 (1) of the Insurance Act, 1938, No person shall after the expiry of six months from the commencement of this Act, pay or construct to pay any remuneration or reward whether by way of commission or otherwise for soliciting or procuring insurance business in India to any person except an insurance agent or an intermediary or insurance intermediary."*

8.1.1 As per IRDA Circular Ref: 011/IRDA/Brok-Com/August/2008 dated 25/08-2008 issued under Section 14 of IRDA Act, 1999, which limits the payment of Commission or brokerage to 10%. The circular specifically state, "*No payment of any kind including "administrative or servicing charges*" is permitted to be made to the agent or broker in respect of the business of which he is paid agency commission or brokerage."

8.2. The appellant maintains business connection with automobile dealers for procuring insurance policy from the vehicle buyers. The tie up with manufacturer brings out the mechanism for rendering such insurance services and they inform the dealer the rate of commission for rendering such services. The appellant is not authorized to outsource such insurance services. As per Section 40 of Insurance Act, 1938, only licensed Brokers are permitted to do insurance business and entitled to receive commission. For the purpose of receiving the commission, the dealers have raised the invoices describing the services as 'data processing and policy servicing activities'. In reality, the dealers do not provide any such service and only provide insurance services. The taxable value and the service tax is calculated as a percentage of own damage (OD) premium and intimated by appellant to the dealers through e-mail.

8.3 The Ld. Special Representative of the department relied upon the various statements recorded during investigation to argue that these facts have been brought out from such statements which have not been retracted. In para 39 of OIO, the adjudicating authority has considered the statement of Sri Venkatachalam Sekar who is a representative of the appellant. It is stated by him that appellant has entered into service provider agreements for 'Data Processing and Policy servicing and related activities services'. The rates for the services have not been specified in the agreement. The appellant gives a specific percentage of value of the insurance policy as payout to the dealers. The

statements of other persons are also on similar lines. It is argued that the adjudicating authority is correct in making the following findings :-

(i) the payment made by the appellant to the dealers of motor vehicles is a percentage of OD premium collected and the said payout details are calculated by the Head office of the appellant and communicated to the dealers.

(ii) Since, the appellant cannot term such payout as commission, which will be violative of IRDA guidelines, the dealers were given prescribed format to raise invoices as if they provided 'Data processing and policy servicing related activities'.

(iii) the dealers accordingly raised invoices on the insurance companies in the format provided to them.

(iv) dealers have not provided the services as mentioned in the invoices.

8.3.1 The Ld. Spl. Counsel urged that the invoices are issued to create an illusion as though the dealers have provided services, wherein, the entire web of activities was formulated by the appellant to capture the customers at the time of buying vehicles itself. The appellant therefore cannot avail credit of the service tax paid on these invoices and the adjudicating authority has rightly confirmed the demand.

8.3.2 The Ld. Special Representative submitted that the decisions in the case of *Modular Auto Ltd.* (supra) and *Cholamandalam MS General Insurance Co.* (supra) are not applicable as the facts are different.

8.4 The arguments of the appellant on the second issue as to the credit disallowed on computer generated unsigned invoices was countered by referring to the discussion made by adjudicating authority in para - 40 of OIO dt. 23.12.2016. It is argued that the Board vide F.No.224/44/2014-CX.6 dt. 06.07.2015 had issued instructions for option to issue invoices in electronic form and authentication of digital signature. This came into effect only on 6.7.2015. So the credit availed by appellant on unsigned invoices issued by e-mail from M/s.Honda Cars is not valid and the demand has been correctly confirmed by the impugned order.

8.5 The third issue is regarding two sets of invoices showing different description of services. The description of service in the invoice of the account maintained by the dealer (TVS Sundaram Motors) is shown as 'additional incentive'. The description of the service in the corresponding invoice of the appellant shows as 'Data processing and Policy related activities'. The appellant has not been able to explain the discrepancy. The credit has been righty denied by the adjudicating authority.

9. It is asserted by the Ld. Counsel that the credit has been denied not because of incorrect description of service in the invoice, but because the dealers and manufacturers did not provide any service to the appellant and the invoices have been raised to pay the commission on insurance services to the dealers. The Ld. Special Representative prayed that the appeal may be dismissed.

10. Heard both sides.

11. The issue to be decided is whether the appellant is eligible to avail credit of the service tax paid by them on the invoices issued by automobile dealers.

12. The main argument advanced on behalf of the department is that the dealers have not provided any service to the appellant and that the invoices are raised for the purpose of paying the commission to the dealers by the appellant. It is thus the case of the department that the dealers have been providing insurance services to the appellants illegally against the provisions of Insurance Act,1938 and IRDA Regulations. To coverup this, and to facilitate the payment of commission for the insurance services provided by dealers, the invoices have been issued. On his ground, the credit availed by the appellant of the service tax paid by them on these invoice is held to be not eligible. Let us proceed to examine the rival contentions.

13. It is not disputed that the dealers have paid the service tax collected from the appellant to the government. So also, the payment of service tax by the dealers on these impugned invoices is not objected to by the department. The department has issued show cause notice only to the appellant proposing to deny the credit availed of the tax paid by them.

14. The Ld. Special counsel has relied upon various statements recorded during the investigation to argue that it has been unearthed by the department that no services were provided by the dealers to the appellant. These witnesses have been subjected to cross examination. The Ld. counsel appearing for the appellant has referred to the cross examinations and argued that it has been clarified during cross examination that services were indeed provided. The allegation in the SCN that no services were provided is mainly based on the statements recorded during investigation. The cross examination of Sri. Venkatachalam Sekar, Financial controller of appellant is as under:

<u>Cross by representative of appellant/assessee</u>

> Q: Do you agree that Khiviraj Motors (KM) was promoting Royal Sundaram Alliance General Insurance Co. Ltd (RS) as one of the preferred insurers to car buyers?
>
> A: Yes
>
> Q: Do you agree that if a customer agreed to take insurance fresh or renewal from RS, that KM processed and issued the policy?
>
> A: Yes

Do you agree that for the above service KM was paid service charges at a % of the OD premium?

A: Yes

Q: Do you agree that KM rendered the services mentioned in Schedule A of the agreement of the service provider agreement dated 15.11.2013?

A: Yes, they provided Policy servicing and Data processing services.

Q: Do you therefore agree that your answer to question no. 18, 19 20, 25 (questions by department while recording statement) are incorrect?

A: Yes it is incorrect

{four separate questions and answers are made into one here}

Q : why were there such four incorrect replies?

A: I was forced to give such answer.

Q: In question no. 34, is the description in the invoices-data processing and policy servicing-absolutely false?

A: No. They are providing data processing and policy related activities services.

Q: Do you agree that you received from KM, Chennai Ford, Honda Cars India Ltd, SM etc, the service of promoting RS as one of the preferred insurers and wherever they are successful they processed and issued the insurance policies etc using data processing at their site?

A: Yes.

Q: If you were forced to give reply, why did you not retract the statement.

A: I did not retract because I was not aware of the process.

The cross examination of other witnesses is also on similar lines. The cross examination of Sri S. Shanmugam Sundaram, General Manager, Finance of Chennai Auto Agencies (dealer) is as under; -

Q: Do you agree that Chennai Auto Agencies was promoting RS as one of the preferred insurers to car buyers?

A: Yes

Q: Do you agree that if a customer decided to take insurance from RS, you were processing and issuing the policy, remitting insurance premium collected to RS?

A: Yes

Q: Do you agree for rendering the above services, you had employed staff, computers, other infrastructure etc?

A: We are using our staff and computer to generate the policies

Q: Do you agree that for the above services you were paid charges at a % of the OD premium?

A: Yes, we were getting the service charges.

Q: Do you agree that you rendered a service to RS and received payment for that?

A: Yes of course, we are rendering services towards insurance policies and getting payment for that.

15. During cross examination, the witnesses have denied the statement given before the officers. It can be seen that the evidence brought forth in cross examination is that the motor vehicle dealers have indeed provided services to the appellants and collected charges for the same along with service tax from the appellant. The Ld. Special Representative of the Department has made efforts to argue that the statements recorded during investigations have not been retracted and therefore such statements recorded during investigation alone must be

relied on, and that the deposition made during cross examination is after-thought and that has to be disregarded in toto. The argument is not tenable. It is the right of an assessee to cross examine witnesses whose statements the assessee would like to discredit. The intention of cross examination is to bring out clarity and truth of the statements given before the officers of the department. The appellant has contested the truthfulness of these statements and requested for cross examination. The courts have always emphasized the importance and need to permit cross-examination of witnesses.

16. Section 9D of the Central Excise Act,1944 provides as to how the statements recorded during investigation can be admitted in evidence. The said Section has been adopted in Finance Act, 1994 as provided in Section 83 of the Finance Act, 1994.The Hon'ble High Court of Punjab and Haryana in the case of *G-Tech Industries Vs Union of India* – 2016 (339) ELT 209 (P&H) had occasion to consider the compliance of the provisions of Section 9D of the Central excise Act, 1944. It was held that the statements recorded during an inquiry or investigation cannot be merely accepted in evidence. For admitting such statements summons has to be issued to the witness and examined. The witness can be cross examined by the assessee. The relevant para reads as under:

> **"16.** Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the

handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the Gazetted Central Excise officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

17. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

.. ..

20. Reliance may also usefully be placed on Para 16 of the judgment of the Allahabad High Court in *C.C.E.* v. *Parmarth Iron Pvt Ltd.*, 2010 (260) E.L.T. 514 (All.), which, too, unequivocally expound the law thus :

"If the Revenue choose (sic chose?) not to examine any witnesses in adjudication, their statements cannot be considered as evidence."

21. That adjudicating authorities are bound by the general principles of evidence, stands affirmed in the judgment of the Supreme Court in *C.C.* v. *Bussa Overseas Properties Ltd.*, 2007 (216) E.L.T. 659 (S.C.), which upheld the decision of the Tribunal in *Bussa Overseas Properties Ltd*. v. *C.C.*, 2001 (137) E.L.T. 637 (T).

22. It is clear, from a reading of the Order-in-Original dated 4-4-2016 supra, that Respondents No. 2 has, in the said Orders-in-Original, placed extensive reliance on the statements, recorded during investigation under Section 14 of the Act. He has not invoked clause (a) of sub-section (1) of Section 9D of the Act, by holding that attendance of the makers of the said statements could not be obtained for any of the reasons contemplated by the said clause. That being so, it was not open to Respondent No. 2 to rely on the said statements, without

following the mandatory procedure contemplated by clause (b) of the said sub-section. The Orders-in-Original, dated 4-4-2016, having been passed in blatant violation of the mandatory procedure prescribed by Section 9D of the Act, it has to be held that said Orders-in-Original stand vitiated thereby."

17. The Hon'ble Jurisdictional High Court in the case of *Sri Bala Ganeshan Spinners* - 2021 (377) ELT 510 (Mad.) has emphasised the requirement of cross examination. The Tribunal in the case of *Swift Institutes of Engineering Technology Vs Commissioner* - 2020 (34) GSTL 502 (Tri-Chand) had occasion to consider the applicability of Section 9D of Central Excise Act 1944, to the investigations conducted for short payment of service Tax.

18. During cross-examination the witnesses have categorically stated that the dealers provided services to the appellant in the nature of 'data processing and insurance related activities'. The dealers have also collected charges from the appellant for such services along with service tax. In the SCN it is alleged that the cenvat credit is not eligible to the appellant as the description of services in the invoices is incorrect. At times, in the SCN as well as OIO it is alleged that the credit is inadmissible as no services at all were provided by the dealers to the appellants. For better appreciation a sample of the invoice is noticed as under:

To
Royal Sundaram Alliance Insurance Company Ltd.
46, Whites Road, Royapettah
Chennai – 600 014

Date: - 11/02/2015

Invoice No.: - JAN/2015

Pan No.: - AADCD1751B

Service Tax No.: -AADCD1751BSD001

Particulars	Amount
Data Processing and Policy Servicing and related activities for the month of January 2015	374519
Service Tax & Cess at 12.36%	46291
Total Gross	**420810**

Kindly make the payment in favour of M/s DHANALAKSHMI AUTOMOTIVES INDIA PRIVATE LIMITED

For *Dhanalakshmi Automotives India Private Ltd*

Signature and Seal

19. From the above document, it can be seen that the dealers have raised the invoice collecting charges for the services provided by them. There is nothing in these documents to indicate that no services were provided. At the cost of repetition, it needs to be stated that though department alleges that no services have been provided vide these invoices they do not dispute the payment of service tax made as per these invoices on the services provided. Further, the appellant has accounted such payments in their income tax returns and service tax returns. The oral evidence and documentary evidences in the nature of

invoices and agreements establish that dealers have provided services to the appellant.

20. It is seen that these services are provided as per the agreements entered into by the appellant with the dealer/ manufacturer. The agreement dated 01.10.2013 entered between M/s.Honda Cars India Ltd. and the appellant reads as under

OBJECT

WHEREAS

a) HCIL is engaged in the business of manufacture of automobiles/Vehicles and providing incidental services to Customers through its network of Dealerships including servicing, repairs and the like;

b) Insurer is engaged in general insurance business in India being duly licensed and authorized by IRDA;

c) Insurer has offered to himself provide to Customers certain Insurance Services under brand Honda Assure which includes the facility of availing/renewing Policies and convenient handling of claims on a non-exclusive basis through Dealerships for convenience of customers or in such manner as contemplated hereunder;

d) HCIL has agreed to facilitate on non-exclusive basis the offer of Insurance Services by Insurer to Customers at Dealerships through utilizing the Infrastructure established and provided by Dealership together with IT Support maintained and provided by HICIL in terms hereof;

NOW THIS AGREEMENT WITNESSETH AS FOLLOWS :

ROLE OF HCIL

During the term of this agreement HCIL shall, Facilitate and provide to the extent feasible and deemed expedient :

a. Establish, maintain and make available the same to Insurer the necessary IT Support to enable the Insurer's provision of various Insurance Services at Dealerships to Customers.

b. Facilitate availability of infrastructure of Dealers and also facilitate the relationship between Insurer and Dealerships for insurer making available insurance Services to customers in terms of this MOU:

CONSIDERATION

In consideration of the services provided in pursuance of this Agreement Insurer agrees to pay

a) HCIL, a fee, mutually agreed for utilization of the IT support established; maintained and provided by HCIL that would be available to the Insurer for its providing the Insurance Services.

b) Dealerships a fee/service charge for utilization the infrastructure provided by Dealers at Dealerships.

c) The nominated Brokers such reasonable brokerage (subject to IRDA norms) for the brokerage services to be provided by them.

The rates of the fee or charges may be mutually agreed upon from time to time in writing.

21. Similar agreements have been entered with M/s.Tata Motors, M/s.Ford etc. From such agreements it can be seen that the dealers have provided services to the appellant. Further, the transactions are not hidden or suppressed in any manner. The department alleges these are illegal and in contravention of Insurance Act and IRDA Regulations. The guide lines on outsourcing of activities by Insurance companies issued by IRDA produced by the appellant shows that the non-core activities and activities supporting core activities can be out sourced. It is not disputed that the dealers have paid the service tax to the government which was collected from the appellant.

22. The Ld. Counsel for appellant has referred to the decision in the case of *Karur Vyshya Bank Vs Ltd Vs CCE, Trichy* - 2019 (22) GSTL 63 (Tri Chennai). In the said case the SCN was raised demanding service tax on the bank on the amounts received from Insurance companies for providing infrastructural support in the nature of office space,

electricity, network etc. The decision makes it clear that such services when provided to Insurance Companies are indeed taxable, under BSS.

23. In the case on hand, the department does not dispute the payment of tax. The department has not initiated any proceedings against the dealers alleging that there are no services provided and that no tax has to be paid by them. The SCN is issued to the appellant alleging that the credit availed on such services is ineligible. The Cenvat Credit Rules,2004 provide for a mechanism to the service provider to avail and utilize credit of the tax paid on input services used for providing output services. This credit scheme ensures smooth flow of duties , eliminating the cascading effect of duties /taxes.

24. The department has opted to retain the tax collected, but has sought to deny the credit to the appellant without questioning or disturbing the assessment of the dealers. By alleging that no services have been provided, the department is actually denying the legality of the tax paid. However, no proceedings are initiated against the service provider who has collected the tax from the appellant and paid it to the government. The SCN is issued only to the appellant, who is the service recipient.

25. The very same issue came up for consideration before the Tribunal in the case of *Cholamandalam MS General Insurance Company Ltd*. (Supra). The facts and allegations are identical. The Tribunal followed the decision of the Jurisdictional High court in the case of *Modular Auto Ltd.* (supra). The relevant para of the discussion of the Tribunal is as under :

"6.1 The allegation of the Department is that no services have been provided by the dealers to the appellant as per the invoices and therefore, the appellant is not eligible to avail credit of the Service Tax reflected in this invoices. In paragraph 31 of the Order-in-Original dated 30-1-2017, the crux of the allegations of the Department has been recorded by the Original Authority, as under :

"31. On careful consideration of the statements of personnel of M/s. Chola and Dealers, I find that

(i) The payment made by M/s. Chola to M/s. Hyundai/Dealers of Motor Vehicles is only a percentage of OD premium collected and the said payout details are calculated by the Head Office of M/s. Chola and communicated to the Dealers;

(ii) M/s. Chola could not term such payout as commission (which would be in violation of IRDA guidelines) and hence the Dealers were given prescribed format to raise invoices as if they provided "computing network connectivity through extranet, internet space, furniture and fixtures, consumables, salary of staff, computers, printers, electronics and electricity";

(iii) the Dealers accordingly raised invoices on the insurance companies in the format provided to them and

(iv) the Dealers have not provided the services as mentioned in the description of the invoices. In other words, the description of the services contained in the invoices used for availing Cenvat Credit do not reflect the true description of the services."

6.2 From the above, it can be seen that the case of the Department is that the *payout* paid by the appellant to the dealers on the OD premium collected by the dealers from the customers is camouflaged as service provided by the dealers to the appellant; that therefore, the services contained in the invoices have actually not been provided by the dealers to the appellant and thus, Cenvat credit is not eligible.

7.1 Though in the Show Cause Notice the main allegation is that the description of services in the documents on which credit has been availed is not correct, at the time of adjudication, the main finding is that no services have been provided by the dealers to the appellant and that therefore credit is not eligible. At this juncture, it needs to be pointed out that the Department has no dispute with the Service Tax collected from the appellant by the dealer and remitted to the Government. The assessment of Service Tax paid at the dealer's end has not been disturbed/questioned by the Department; only the credit availed at the service recipient's end has been questioned by issuing the present Show Cause Notice.

7.2 If the Department contends that no service has been provided, the crucial question arises as to why Service Tax was collected from the dealer. The discussion by the Original Authority at paragraph 37 countering this argument is as under :

"37. As regards their contention in Para N.1 to N.7 that if no service is provided by the Dealer there is no requirement to pay service tax; that at the time of accepting service tax from the dealer, the department chooses to look at the form of transaction and accept service tax. In this regard, I find that the issue involved

is not about the service tax payable by the Dealer. It is about the mentioning of true description of services in the invoice and the services mentioned in the invoices in the instant case admittedly were not provided by the Dealers. Only after the in-depth investigation conducted with the Dealers, the fact of Dealers issuing invoice with the description suggested by the Taxpayer have come to light. Hence their contention that department cannot approbate and reprobate in the same case is not valid."

7.3 It is not disputed that the dealer has paid Service Tax on the services described in the invoices. If that be so, the denial of credit at the recipient's end cannot be justified by the Department without reopening the assessment at the dealer's end.

.. .. …

8.1 A similar issue came up for consideration in the case of *M/s. Modular Auto Ltd.* (supra). The substantial questions of law considered in the above case are as under :

"2. The above appeals are admitted on the following substantial questions of law;

(a)When the service provider was not before the Tribunal, whether the Tribunal can go into the question as to whether the said service provider had provided service to the appellant or not, more so when the said service provider has been assessed to service tax under Business Support Service for the service rendered by them to the appellant.

(b) Is the Tribunal not in error in refusing credit to the appellant for service tax paid by them to service provider when payment of service tax by the appellant for the service rendered by service provider is not in dispute and that it is settled, the assessment to tax at the hands of the service provider end cannot be questioned in the hand of service receiver (appellant in this case)?"

.. .. …

10. From the foregoing, after appreciation of the facts and following the decision of the Hon'ble High Court in *M/s. Modular Auto Ltd.* (supra), we hold that the impugned order cannot sustain and requires to be set aside, which we hereby do."

(emphasis supplied)

26. It needs to be stated that the allegations raised are the same as seen in para 39 of the order impugned in this appeal. Similar view was taken by the Tribunal in the case of *ICICI Lombard General Insurance Company Vs CCE, Mumbai Central* - 2023 (2) TMI 2023. We therefore

hold that after appreciating the facts and evidence, and by applying the ratio in the above decisions the denial of edit cannot be justified.

27. The second ground for rejecting the credit is that computer generated invoices are not signed. In para 40 of the impugned OIO dt. 23.12.2016, the adjudicating authority has noted that in regard to the invoices raised by M/s.Honda Cars India Ltd., the credit to the tune of Rs.6,93,203/- is ineligible for the reason that the invoices do not bear signature. It is further stated that the Board has issued instructions only w.e.f 06.07.2015 that invoices in electronic forms and authentication with digital signature is permissible. It is concluded by the original authority that the invoices are not in the prescribed format as required under Rule 4A of the Service Tax Rules, 1994. Rule 9 of CCR 2004 deals with the documents on which credit can be availed. The second proviso to the Rule 9 states that if the document does not contain all the particulars, but contains the details of duty or service tax payable, the description of goods or taxable service, service tax registration number, person issuing the invoice etc., the Deputy Commissioner or the Assistant Commissioner of Central Excise can verify the same and if satisfied can allow the credit. This means, when the tax paid is in order, the credit has to be allowed even though the invoice may be technically deficient for want of some particulars. In the present case, it is not disputed that the tax has been paid by the appellant. Merely because the computer generated invoice does not contain the signature, it cannot be said that the credit is ineligible.

Further, for the period after 2015, the Board has clarified that signatures are not required in the case of computer generated format.

28. The third issue is rejection of credit on the ground that the invoices issued by M/s.TVS Sundaram Motors (service provider) contains a different description of the service. It is alleged in the SCN that invoice maintained by dealer mentions the description of service tax as 'additional incentives' whereas the invoice with the same serial number maintained by the assessee has the description as 'data processing and policy related services'. Again, it is not disputed that the tax has been paid as per the invoices. Appellant who is the service recipient cannot be found fault for the description mentioned in the invoice maintained by the service provider. Appellant has no control over the accounts maintained by the service provider (dealer). The credit at the recipient's end cannot be denied for this reason. We hold that the denial of credit on this reason is not justified.

29. Appeal No.ST/40198/2020 covers the period from April 2015 to June 2017. The facts and allegations are the same. Based on the very same investigation, the SOD dated 13.04.2018 has been issued proposing to deny the credit availed on the invoices issued by dealers, proposing to recover the amount along with interest and for imposing penalties. Interestingly, in para 13.2 it is held by the adjudicating authority that the commission charges paid by appellant to the dealers will be liable to service tax under Reverse Charge Mechanism in terms of notification 30/2012. Again, in para 14.1, it is concluded that there is no consideration received for the services provided by the dealers to

appellant and that the chares paid by appellant to dealers along with service tax are nothing but reimbursable expenses. Para 14.2 of the OIO observes as under ;

> "In view of the above, I find that the reimbursements made to automobile manufacturers are not 'service' and no service tax is payable on the same. Hence such credit is not admissible as input service credit."

30. The Ld. Counsel has pointed out that there is no whisper in the SOD that the appellant is liable to pay service tax on such charges under RCM. Again, there is no such allegation in the SCN that the charges are reimbursable expenses. The SOD is issued to consider the same set of facts of earlier SCN. Moreover, the reimbursable expenses have to be included in the taxable value after the amendment brought forth in Section 67 of Finance Act, 1994 w.e.f. 14.05.2015. So the said finding is legally incorrect. Being the same set of facts and issue, we find that the demand for the period involved in Appeal St/40198/2020 is also covered by the decision in the case of *Cholamandalam MS General Insurance Co.* (supra).

31. From the discussions made above, we find that denial of credit is not justified. The impugned orders are set aside. The appeals are allowed with consequential relief, if any.

(order pronounced in court on 25.07.2023)

Separate order

sd/-

(M. AJIT KUMAR)
Member (Technical)

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

gs

Per M. Ajit Kumar,

32. I have perused the order prepared by my learned Sister Ms. Sulekha Beevi C.S., Member (Judicial). I find that the issues involved are important as there are allegations of blameworthy conduct by the appellant. If the findings in the impugned order are found incorrect and the appeal succeeds, it would be a rare but exemplary exertion of the right of a taxpayer to pay taxes in the teeth of opposition by the department. If the findings of the impugned order are found to be correct and true, then;

(i) it would be a case of fake invoicing with its attendant evils.

(ii) it would involve defrauding the ultimate taxpayer on whom the incidence of tax rests, to the tune of Rs Rs.62,31,23,972/- during the impugned period alone.

(iii) it would be an ingenious and creative method of using tax laws for unjustly enriching participants to the specially devised scheme, at the cost of the ingenuous and hapless taxpayer.

(iv) it may possibly be a violation of IRDA circular which is mentioned in the impugned order.

Hence the issue deserves a deeper examination of facts and layered treatment of law, which I propose to explore before coming to a conclusion. Hence this separate order.

33. The brief facts of the case are that the appellant is engaged in the business of providing general insurance service pertaining to motor insurance, health insurance, property insurance, etc. They started the insurance business in the year 2001 and are registered with

the Insurance Regulatory Development Authority of India (IRDAI). During the course of business, the appellant has entered into agreements with automobile manufacturer such as Ford India Private Ltd. (Ford), Tata Motors and others in terms of which the appellant and automobile manufacturer agreed to act in concert along with authorized dealers of the car to convenience car customers for the insurance coverage of cars. The appellant entered into a tripartite agreement on 24.2.2008 with the car manufacturer, M/s. Tata Motors Limited (TML) and service provider, M/s. Tata Business Support Services Limited (TBSS), who reportedly provides IT support services for enabling issuance of insurance policies to customers at the dealership location. Similar agreements have been made by the appellant with dealers of other car manufacturers. This agreement with dealers is examined as a representative one for all dealers to avoid duplicity of discussions. It statedly allows the appellant to generate policies at the dealership at the time of sale of the car to the customers. As per the agreement, the appellant offered to provide customers certain insurance services through dealers utilizing the infrastructure provided by TBSS. As per the agreement the salient role of the service provider TBSS, as culled from the appellants written submission, was;

> TBSS shall
>
> a. Establish and maintain necessary infrastructure for the purpose of:-
>
> i) enabling the insurer to provide various motor insurance services from dealerships to customers
>
> ii) putting in place required Management Information System (MIS) as desired by TML / Insurer

b. Providing insurer with necessary support for intimating customers about renewals, interacting in matters of claims and such matters as may be mutually agreed upon.

It was further mentioned in the Agreement that, the insurer shall neither treat TML or TBSS as its agent / broker nor construe them as soliciting or procuring insurance business for or on behalf of insurer. In consideration for the infrastructure established and maintained by TBSS, the appellant-insurer agrees to pay TBSS service charges on the basis of policies issued by them and printed at the dealerships at such rates as may be mutually agreed upon from time to time. During the relevant period, the appellant had entered into agreements styled as "Service Provider Agreement" and availed the services of various automobile dealers (hereinafter referred to as 'dealers') for provision of certain services. In terms of these agreement, the dealers, as service providers shall provide the following services:-

I **Policy & Data Processing**:-

a. Arrange for physical collection of completed proposal forms and organize them for quality check and data entry

b. Conduct preliminary quality checks for the proposal form as per the Standards and instructions of the company

c. Identify and escalate any discrepancies found in the proposal forms and / or support documents and get them rectified.

d. Enter the data in the application form with receipt details in an agreed application and general control sheets.

e. Forwarding the data to the company.

II **Policy Servicing**:

a. Printing of policy pack as per the Standards and Instructions of the Company

b. Ship the policy pack to the insured

c. In case of the returned policy, keep record of the details of the customer and send the details to the company

d. Prepare detailed MIS as required by the company in the format provided by the Company

e. Carry out data entry for the service request received from the customer for the policies processed by service provider

f. Handle the refund request of the customer and forward the same to the company for refund

g. Handle the request received from the customer for duplicate policy issuance for the policy processed by the service provider

h. Collection of documents from the customer for complying with AML & KYC norms

i. Printing and posting of reminders for short collections, info pending etc.

j. Assisting in the claims documentation and investigation processes

III **Pre-Inspection (Motor Vehicle)**

a. Doing the inspection of the vehicle for motor proposals, wherever necessary, at the request of the company

b. Preparing the pre-inspection report for the vehicle inspected and forwarding the same to the company to facilitate the underwriting of the proposal

c. Preparing details MIS for all the vehicles inspected by the service provider in the format provided by the company

IV. **Risk Management / Risk Inspection**:-

a. Inspection of the risk of project / manufacturing facility / fixed asset / item to be insured etc.

b. Preparing of the Inspection report for the risk inspected and forwarding the same to the company

V. **Training / Workshops / Survey**:-

a. Conducting training / workshops on behalf of the company

b. Holding client awareness program on behalf of the company

c. Managing campaign on behalf of the company

d. Conducting specialized surveys to get the feedback of the customer on behalf of the company.

e. Distribution of publicity material and advertising materials of the company.

34. The appellant as a provider of output service, took CENVAT input credit on the invoices generated by the car dealers during this process. DGCEI took up investigation against the appellant company on the ground that the invoice of dealers contained description of 'services' that were not provided to the appellant. It was an instrument used to pass on renumeration to the dealers in circumvention of IRDAI guidelines, for selling the appellants insurance policies. After due process the impugned order came to be passed wherein it was held that the appellant is not eligible to take CENVAT credit on invoices issued by car dealers. The order held that dealers were raising invoices as per the instructions of the appellant for receiving the payouts / commissions from the appellant, while no taxable service was provided by the dealers as mentioned in their invoices. Hence the irregularly

availed credit needs to be reversed. Therefore, the payment of charges by the appellant to the dealer, on which the disputed 'service tax' was voluntarily discharged by the appellant and credit availed, is not duty as contemplated under the Finance Act 1994. It was at best commission paid to the dealers for the business given to the insurance company. Additionally, in respect of the services provided by M/s. Honda Cars India Ltd. (manufacturer) and TV Sundaram Motors (Dealer), it was found that the documents on which the credit was availed was not proper. The CENVAT credit wrongly availed by M/s. Honda Cars India Limited and TV Sundaram Motors (Dealer) and which was reversed by them to the tune of Rs.69,35,403/- and Rs.1,72,63,912/- respectively was demanded and confirmed. Hence in the impugned order, it has been held that the appellant has availed ineligible CENVAT credit of Rs.62,31,23,972/- (Rs.59,89,24,657/- + Rs.69,35,403/- + Rs.1,72,63,912/-), which has been demanded with interest and penalty imposed. The period covered is from 2010-11 to 2014-15. The learned Commissioner has divided the demand for irregular CENVAT credit, into three parts as under. Irregular availment of CENVAT credit;

A. on the basis of invoices issued by automobile dealers (excluding automobile dealer viz. M/s. TVS Sundaram Motors) & Automobile Manufacturers (excluding automobile manufacturer, Viz. M/s. Honda Cards India Ltd.)

B. on the basis of invoices issued by the automobile manufacturer viz. Honda Cards India Ltd. and

C. on the basis of invoices issued by the automobile dealer, viz. M/s. TVS Sundaram Motors.

35. Aggrieved by the impugned order the appellant has assailed the same before us in appeal. Since the written and oral submissions made by the rival parties and their representatives have already been mentioned in the order of the learned Member (Judicial), I am not repeating the same again. The averments shall be separately mentioned and considered in the relevant part of the discussion below. The following issues have come up for consideration in the appeal;

11.	Dealers are providing "Business Auxiliary Services" and the appellant is entitled to the CENVAT credit of the same	82
12.	Contractual supply is the essence of applicability of service tax.	82
13.	Cost of input service is included in the assessable value of the final services.	82
14.	M/s. Cholamandalam MS General Insurance Company Limited and other judgments in favour of appellant	83
15.	Irregular availment of CENVAT credit on the basis of irregular invoice without signature by appellant	92
16.	Irregular availment of CENVAT credit on the basis of duplicate invoices by appellant	100
17.	Service tax department cannot act as a super-regulator and hold the appellant responsible for violation, if any, under other laws and regulations	101
18.	The extended period of limitation is not invocable in the present case.	105
19.	Penalty under section 78 of the Finance Act, 1994 read with Rule 15 of Credit Rules is not attracted in the present case	108
20.	No interest payable	109
21.	Summary of findings	110

I now intend to examine the issues as listed above.

36. **At the outset, the appellant submits that the Show Cause Notice is vague and based on incorrect principles of law. Therefore, the impugned Show Cause Notice itself is liable to be dropped.**

36.1 The appellant is of the view that the department in the impugned order has wrongly denied the availment and utilization of CENVAT credit by the appellant on invoices given by dealers of cars. While the order at places states that no services have been received by the appellant, in other places, it emphasizes that services received by the appellant are not what have been described in the invoices. It

does not discuss how the department has the authority to collect and retain the service tax that has been discharged by the dealers on such transactions if no services were indeed provided. Further, the denial is on the basis of invoices raised by the dealers. The impugned order fails to understand the basic transaction that the appellant has entered into, hence the order is liable to be set aside on this ground alone.

36.2 I find that this issue is a summation of more than one stand taken by the appellant which is repeated by them later in the points listed above and hence will be taken up when the individual issue arises.

37. **‘Service” is intangible in nature**

37.1 The appellant submits that the Finance Act 1994 does not define the term ‘service’ per se till 1.7.2012. hence, one has to look at the ordinary meaning of service for the period prior to 2012. The service rendered is consumed by them as and when provided by the service provider. There is no end product of the service, unlike goods and the movement of service cannot be traced or tracked inasmuch as service cannot be transferred from person to another. Thus, once there is an understanding for provision of service, the service recipient states that he has received the services from the service provider, the service provider states that service has been provided to the service receiver, the service provider raises an invoice for provision of service on the service receiver, the service receiver honors the said invoice and most importantly these facts being undisputed and no contrary evidence being produced on record, it has to be concluded that services have been provided by the service provider to the service receiver.

Therefore, CENVAT credit cannot be denied to the appellant under any circumstances.

37.2 This proposition of the appellant that once the service provider and recipient agree on the provision of a service being done and received, credit cannot be denied is not legally sound. Tax liability does not arise due to consent of parties. There has to be a legally valid levy. Secondly the appellants averments are based on a turn of phrase. What needs to be discussed is the provision of 'taxable service' by the service provider and not any activity, if provided at all, that is merely a 'service'. Firstly, prior to 01/07/2012, the levy is on "taxable service", hence an activity needs to be understood in the said terms. For if there is ambiguity in understanding the scope of the subject of levy, and one has to take the aid of external sources to arrive at the meaning, then there is no tax at all. The Hon'ble Supreme Court in **Mathuram Agrawal Vs. State of Madhya Pradesh [(1999) 8 SCC 667]** held;

> "The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. . . . . "

Again in **Suresh Kumar Sharma Vs. Union of India [2007 5 STR 254 (Kar)]** the Hon'ble High Court held as under;

> *". . .There are three components of a taxing statute viz., subject of the tax, person liable to pay the tax and the rate at which the tax is levied. If there is any real ambiguity in respect of any of these components which is not removable by reasonable construction, there would be no tax in law till the defect is removed by the statute. There are three stages in the imposition of tax namely (1) declaration of liability in respect of persons or property, (2) assessment of tax that quantifies the sum which the person liable has to pay, and (3) methods of recovery if the person taxed does not voluntarily pay. The taxing statute has to be strictly construed.. . "*
>
> (emphasis added)

37.3 Service tax was introduced through Chapter V of the Finance Bill, 1994 during the presentation of the Union budget and implemented as an Act from 01/07/1994. Section 65(105) defined "taxable service". Only an activity which was a specified service and defined as a "taxable service", under the statute, was liable to tax. Initially it was limited to three services. These were 'Telephone Services', 'Non-Life Insurance Services' and 'Stock Brokers Services'. Slowly over the years new services were added to the "taxable services" list and only those specific activities which were covered by definition under the statute were brought under the levy. The rate at which such a service had to be taxed came to be imposed through Section 66 on the value of taxable services. The Hon'ble Supreme Court in **Union of India v. Intercontinental Consultants and Technocrats Private Limited** reported in 2018 (10) G.S.T. L. 401 (SC), examined section 67 regarding the valuation of taxable service. Relevant paragraphs are extracted below:

> "21) . . . . As noted above, prior to April 19, 2006, i.e., in the absence of any such Rule, the valuation was to be done as per the provisions of Section 67 of the Act.
>
> 22) Section 66 of the Act is the charging Section which reads as under: "there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clauses of Section 65 and collected in such manner as may be prescribed."
>
> 23) Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various subclauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the 'value of taxable services'. Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.

> 24) In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 01, 2006) or after its amendment, with effect from, May 01, 2006. . ."
>
> (emphasis added)

Hence there was a clear mandate in section 67 that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies a tax only on the 'taxable service' and nothing else. As a result of this inbuilt check mechanism, only 'taxable service' and not 'any service' were subjected to levy under the provisions of section 67, prior to changes made in the statute effective from 01/07/2012. While the authority for levy of service tax on specified services from 01/07/1994 was contained in Section 66 of the Finance Act, 1994, with effect from 01.07.2012, the authority for levy of service tax was contained in Section 66B of the Finance Act, 1994. The section stipulated a rate of 14 per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in any as may be prescribed. As per Section 66BA, reference to section 66 was to be construed as reference to section 66B. It still required that an activity should be performed and not be in the negative list before it fell under the subject of service tax levy. Levy has to be distinguished from collection. Duty needs to be collected or paid only if there is a valid levy on a subject of tax.

37.4 Thus a plain reading of the Act shows that each activity that has been brought under the net of a taxable service was defined under Section 65 of the Finance Act 1994. The position in law changed from 01/07/2012 in that all activities which did not form part of the negative list was per se included and brough under the service tax levy. However, a reading of both the sections, prior and post the change, show that there is absolutely no confusion in understanding the meaning of an activity and whether it is a service leviable to tax during either of the periods. The declaration of liability for each activity is unambiguous before and after the definition underwent a change. Hence there is no gain in saying that there is difficulty in identifying the subject of the levy without reference to the Britannica Encyclopedia or Black's Law Dictionary etc. In **Pyarali K. Tejani Vs. Mahadeo Ramchandra Dange & Ors** [[1973] INSC 196 / 1973 Latest Caselaw 196 SC] the Apex Court held;

> "…In the field of legal interpretation, dictionary scholarship and precedent-based connotations cannot become a universal guide or semantic tyrant, oblivious of the social context, subject of legislation and object of the law…"

The point as canvassed by the appellant is thus not the correct way forward. The constitutionality of the levy is not under challenge here. The appellants contention that service has been provided by the dealer and received by them and that these facts are undisputed and no contrary evidence is produced on record is not factually correct as seen from the SCN and the impugned order. The whole dispute is based on a challenge by the department, to the events culminating in the appellant taking credit on the invoices provided by the dealers. Hence

we need to examine the evidence on record before coming to a conclusion.

37.5 It is seen that the appellant has put forward their argument in furtherance of their view that the dealers are providing "Business Auxiliary Services" which is being received by them and is eligible as input credit. We shall cross that bridge when we come to it.

38. **Without prejudice, the appellant submits that the nomenclature accorded to the services provided is not relevant, but the provision of service is the determinative factor**

38.1 The appellant submits that according to them they have received the services as mentioned in the contract. However, even if the contention of the department was to be accepted, that the description of services mentioned in the invoices is incorrect, it would be an error on part of the department to hold that no services have been provided at all. Nomenclature mentioned in the invoices, or even at accounting stage does not take away the substance of provision of the service itself. It is a settled principle of law that the substance of the transaction has to be seen in order to tax the same. The nomenclature alone would not determine the nature of transaction.

38.2 This submission of the appellant encapsulates the whole dispute. Both parties to the dispute hold the same view on the principle of law involved, but apply it to their perception of events, arriving at different results. It is the answer to this riddle which will resolve this dispute and which I have set out to discover by the end of these discussions.

39. **Without prejudice to the above submission, if the contention of the department is to be accepted that there is no services being provided by the dealers to the appellant, then there is no requirement to pay service tax at all and whatever CENVAT credit is taken should be treated as refund of the tax not required to be paid.**

39.1 The appellant has raised two issues of law here;

(i) When there is no service being provided by the dealer to the appellant, then why was 'service tax' paid on such transactions accepted by the department?

(ii) When there is no requirement to pay service tax at all then whatever CENVAT credit is taken should be treated as refund of the tax not required to be paid.

39.2 The answer to query (i) above is that in the self-assessment regime the taxpayer assesses his tax liability and pays the same to the exchequer as provided for in law. It is not the appellants case that the amount was forcefully exacted by the department. In such a situation, it has been pointed out by Revenue in their submissions, that if the dealer had collected monies from the taxpayer as a tax, even if it was wrongly done, it has to be deposited to Government as per Section 73A(2) of the FA, 1994. This does not mean that department has accepted the taxpayer's assessment and that the actions of the taxpayer have been ratified. There is considerable force in the averments of Revenue. Section 73A of the FA 1994, which was inserted by Finance Act, 2006 w.e.f. 18-4-2006 (much earlier than the period in dispute), is reproduced below;

> **73A. Service Tax Collected from any person to be deposited with Central Government**
>
> (1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made thereunder from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.
>
> (2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.
>
> (emphasis added)

The wording of section 73A(2) are clear and unambiguous and should not have left any room for doubt in the mind of the appellant. However, the appellant having sought clarity, it is further stated that any tax collected, retained or not refunded by the department in accordance with the provisions of a statute must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Hence any excess money collected as tax and paid to government is seen to have been retained under the authority of law. The issue has been dealt with in the landmark nine Judge verdict of the Hon'ble Supreme Court in **Mafatlal industries Ltd Vs Union of India [1997 (89) E.L.T. 247 (S.C.)]** decided by a majority of 8:1. The relevant portion is reproduced below;

> "99. . . . The said enactments including Section 11B of Central Excises and Salt Act and Section 27 of the Customs Act do constitute "law" within the meaning of Article 265 of the Constitution of India and hence, any tax collected, retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded, as the case may be, under the authority of law. . ."
>
> *(emphasis added)*

Further the Apex Court in **Union of India & Ors. Vs VKC Footsteps India Pvt Ltd.** [Civil Appeal No 4810 of 2021] dated: 13/09/2021 stated;

> "D.1.3. Part III- Legal Propositions
>
> (i) Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. There being no challenge either to the levy or collection of taxes in these cases, taxes paid into the coffers of the Union Government or the States become the property of the Union/States;
>
> (ii) The refund of taxes is neither a fundamental right nor a constitutional right. The Constitution only guarantees that the levy should be legal and that the collection should be in accordance with law. There is no constitutional right to refund. Refund is always a matter of a statutory prescription and can be regulated by the statute subject to conditions and limitations;
>
> (iii) Even in the case of an illegal levy or a levy which is unconstitutional, the decision of the nine judges Bench in Mafatlal Industries Limited v. Union of India held that the right of refund is not automatic. The burden of proof lies on the claimant to establish that it would not cause unjust enrichment."
>
> (emphasis added)

39.3 Now to the second issue raised by the appellant, when there is no requirement to pay service tax at all then whatever CENVAT credit is taken should be treated as refund of the tax. Revenue in their submissions have stated that there is no provision in the law which mandates the department to reassess the self-assessment made by the appellant and refund the tax suo moto, even if the tax is not leviable at all. If the tax paid is not payable or leviable, the appellant or anyone else claiming refund must on his own should make an application for a refund in terms of Section 11B of the Central Excise Act,1944 as made applicable to the Finance Act,1994 by virtue of Section 83 of the Act. There is again considerable force in the averments of Revenue. The Finance Act, 1994, is a self-contained

enactment. It contains provisions for collecting the taxes which are due according to law but have not been collected and also for refunding the taxes which have been collected contrary to law. It, therefore, follows that any and every claim for a refund of service tax can be made only under and in accordance with the provisions of the Act and in the forums provided by the Act. Hence in this case it is for the person who remitted tax to government to claim any eligible refund, if he feels so, only in terms of Section 11B of the Central Excise Act,1944 (CEA 1944). The Apex Court in its judgment in "Mafatlal Industries" (supra) has declared the law on the subject. Relevant portion is extracted below;

> "68. . . . To repeat - and it is necessary to do so - so long as Section 11B is constitutionally valid, it has to be followed and given effect to. We can see no reason on which the constitutionality of the said provision - or a similar provision - can be doubted. It must also be remembered that Central Excises and Salt Act is a special enactment creating new and special obligations and rights, which at the same time prescribes the procedure for levy, assessment, collection, refund and all other incidental and ancillary provisions. As pointed out in the Statement of Objects and Reasons appended to the Bill which became the Act, the Act along with the Rules was intended to "form a complete central excise code". The idea was "to consolidate in a single enactment all the laws relating to central duties of excise". The Act is a self-contained enactment. It contains provisions for collecting the taxes which are due according to law but have not been collected and also for refunding the taxes which have been collected contrary to law, viz., Sections 11A and 11B and its allied provisions. . . where a statute creates a special right or a liability and also provides the procedure for the determination of the right or liability by the Tribunals constituted in that behalf and provides further that all questions about the said right and liability shall be determined by the Tribunals so constituted, the resort to civil court is not available - except to the limited extent pointed out therein. Central Excise Act specifically provides for refund. It expressly declares that no refund shall be made except in accordance therewith. The Jurisdiction of a civil court is expressly barred …." (Emphasis supplied)

Hence it is clear from the judgment that it is for the person who is aggrieved to initiate the process of refund in terms of Section 11B, if

he feels that he has paid tax not due and it's not for the department to so *suo moto* refund the amount or allow CENVAT credit of the same.

39.4 Based on the discussions I do not find any substance in the appellants averments on this settled point.

40. **Manner of payment of consideration is merely a measure for payment of consideration. It is not relevant to decide the nature of service provided by the appellant.**

40.1 It is submitted by the appellant that the agreement between the appellant and the dealers mentions that the payment would be mutually decided. (It will be seen later in the discussion that the officials of the appellants Co and car dealers agree that there was no mutuality in the decision and the payments were made by the appellant on their own reconning to the dealers) Further the fact that the consideration is calculated in sync with the quantum of business procured by the dealers is not a determinative factor that the amount paid to the dealers is merely a payout / commission. This is only a measure / manner of computation of consideration for service provided by the dealers to the appellant. It is wholly irrelevant to decide the nature of services provided by the appellant as would be clear from the judgment of the Hon'ble Supreme Court in **Senairam Doongarmall V. CIT – 1961 42 ITR 392 (SC).** It was submitted by them that the nature of the services rendered cannot be assumed from the terms of the payment or manner of determination of consideration. They further submit that under the Service Tax (Determination of Value) Rules, 2006 even consideration in kind is being considered as value of taxable

service under section 67 of the Finance Act, 1994. Hence, the impugned notice is liable to dropped on this ground.

40.2 I agree with the principle stated by the appellant on this issue. The predicament with labels is that they tend to discourage the examination of facts at the very threshold. Hence, I too agree that just because the dealers label the payment in the invoice as being for 'Data Processing and Policy Servicing and related activities' it will not become representative of its true character. A principle of interpretation of an activity, is that the nomenclature assigned to it is not decisive of its nature. The fact that the payments made by the appellant to the dealer is calculated in sync with the quantum of business procured by the dealers cannot be the lone determinative factor that the amount paid to the dealers is merely a payout / commission. One has to look at the activity performed, the belief, knowledge and intention of the parties signing the agreement. One can also examine the commensurate nature of the payments made for the service involved etc especially in the case of suspect agreements. It should satisfy the test of what a reasonable person of ordinary prudence would do. So, it is a combination of factors that have to be examined. This is however not the same as saying, 'it is wholly irrelevant to decide the nature of services provided by the appellant'. Being a part of the agreement, it is relevant to understanding the nature of the contract but is not the sole factor. Moreover, valuation of a service and payment of duty come secondary after satisfactorily determining whether an activity which is performed is a taxable activity. The measure adopted to pay a consideration alone is not determinative of the taxability of a service.

As discussed at para 37.3 above, there is a clear mandate that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies a tax only on the taxable service and nothing else. Hence the appellant needs to explore the exact activity being performed by the dealer and received by him along with other factors and come to a conclusion as to whether it is a legitimate taxable service. Then accordingly test the declared description in the invoice with the proper classification of the service received by him, to meet the requirements of Rule 9 of CCR 2004.

41. **Reliance placed on the statements recorded by the department is wholly erroneous**

41.1 The appellant states that the impugned order has relied on the statements recorded from officials of the appellant's company and car dealers. That in all the statements which are relied upon, the element of provision of various services have been brought out despite the misleading questions and the intimidating tactics employed during the investigation. However, their lament is that these facts have not been considered in the impugned order in its proper perspective. That the fact is all the dealers have received payments from the appellant and remitted the same to the government on or before the due date. They further add that statements would not be automatically binding and reliable until the procedure prescribed under section 9D of the Central Excise Act 1944 is satisfied.

41.2 Response of Revenue: (RSAICL refers to the appellant). It's stated by Revenue in their submissions that the learned Adjudicating Authority (AA) found that the statements were corroborated by

circumstantial evidences like payout workings prepared in excel sheets communicated by the personnel of the Branch / Head Office of the appellant; that personnel of Branch / Head Office of RSAICL had issued instructions through their official email id's to prepare invoices in the formats devised by them to be issued by the car dealers to claim the payouts etc. The adjudicating authority had not felt the need for summoning the officers of DGCEI who recorded the statements as no clarification was to be obtained from the DGCEI officers in view of the fact that all the witnesses replied during cross-examination that no retractions were made by them. The contention of the appellant is that during the cross-examination of various persons, it was clearly admitted by all the dealers that they were providing the services of data processing and policy servicing to the appellant that during examination Shri B. Balaji stated in answer to Question No. 5 that he was forced to give the statement; that in his cross-examination Shri Venkatachalam Sekar stated in answer to Question No. 9 that he was forced to give the reply; that that in such circumstances, the statement given by the said persons loses its relevancy and evidentiary value. With regard to Shri B. Balaji's assertion in respect of reply to Question No. 5, Revenue has referred to the question asked and the reply given by him, the text of which is reproduced below:-

> "Q5. Please see Bill No. 007-A1/14-15/Chn dt. 27.1.15 raised by M/s. TVS Sundaram Motors, Chennai to RSAICL towards the reimbursement of expenses viz. policy processing expenses, policy servicing expenses, training expenses involving total service for the month of December 2014 for a value of Rs.16,83,197/- and service tax of Rs.2,08,043/- totalling to Rs.18,91,240/-. In this connection, I

> am showing you an invoice No SM/BAS/2014-15/1070 dt. 2.1.15 raised by M/s. TVS Sundaram Motors (Legal Document filed with all authorities) submitted by them to DGCEI, CHZU for the same amount with description as "Additional Incentive (HA) for December 2014" for the same amount with service tax. Please explain whether the services mentioned in the Bill No. 007-A1/14-15/Chn dt. 27.1.15 had been rendered by SM To RSAICL and also explain for what purpose these invoices were raised by SM.
>
> *Ans: Having seen the above documents, I have appended my signature in it. The payout to the car dealers are made based on the payout statement calculated as a percentage on OD premium collected by the dealer (SM) from the customer, which is prepared by RSAICL and the same was communicated to us for furnishing the invoice to the car dealer. Accordingly, M/s. TVS Sundaram Motors had issued Bill No. 007-A1/14-15/Chn dt. 27.1.15 for having claimed and received the payout. However, the payout does not represent the service charges for the description mentioned in the Bill No. 007-A1/14-15/Chn dt. 27.1.15."*

The query put forth was to bring out two types of bills issued by M/s. TVS Sundaram Motors, Chennai one showing reimbursement of expenses viz. "policy processing expenses, policy servicing expenses, training expenses" for the month of December 2014 and another as showing "Additional Incentive (HA)" for December 2014 wherein both the bills were issued for the same amount. Shri Balaji explained that the amount mentioned in one of the bills is prepared by the appellant towards 'payout' calculated as a percentage of the OD premium and another bill was issued as 'incentive' for having claimed the payout. He also stated that the payout does not represent the service charges meaning that the amount claimed is not for rendering of services. The question and answer mentioned above were put forth and replied

based on documents available on record and contained a wealth of facts, for which the officer cannot exert any pressure or force any one to explain the contents of. During the cross-examination of witness namely Shri Balaji, the genuineness of the documents was not questioned and the appellant in the instant appeal filed also have not disputed the veracity of the documents. Shri Balaji had all the time to explain to the AA, the necessity for M/s. TVS Sundaram Motors to raise two sets of invoices / bills for the same amount and for the same month calculated as a % of OD premium. As Shri Balaji had failed to clarify his explanation for query No. 5 even during cross-examination by the AA and thus stating that the answer to the query was taken by force does not hold water and it is an afterthought. Secondly, the appellant's contention is that the statement from Shri Venkatachalam Sekar, Financial Controller of RSAICL in respect of Question No. 18, 19, 20 and 25 was taken by force in his statement recorded by DGCEI. For ease of understanding, all the 4 queries and answers are reproduced below-

> Q.18 The email dated 12.615 encloses the proforma invoice and the payout details regarding the insurance policies done by M/s. Khivraj Motors Pvt. Ltd. The dealer has got orders for the insurance policies for your company for the month of May 2015. The total payout to them is exactly same as the Data processing and Policy servicing services which the dealers have supposed to be provided to you. How is it possible? Is it mere coincidence or that you have actually given them commission only for the insurance policies sold, in the name of services which they had never provided?
>
> *Ans.: I have seen the print out shown to me and signed on it on token of seeing it. As already stated by me, the payouts given to the car dealers are arrived on the OD premium received. Hence there*

are no actual services as claimed in the invoices of the dealers. We follow the practice of sending such mails along with the payout statements and subsequently receiving hardcopies of corresponding invoices from the dealers and send them to our Corporate Office as instructed by the Finance Dept of our Corporate Office.

Q.19 Please see and sign the statement of Mr. S. Chandrasekhar, General Manager (Finance), KMPL dated 26.6.15. He has stated in the answer to questions 1 that "KMPL have not provided any data processing, policy servicing etc. to the said insurance company. The invoices have been raised by KMPL only to receive the payouts / commission (for customer referral-new and renewal policies) on the insurance amount collected by KMPL from the customers.". it means that KMPL have not provided any service to you but prepared the invoice on the basis of instructions sent by you vide email dated 12.6.2015. Why dealers are asked to raise such invoices?

Ans. I have seen the statement of Mr. S. Chandrasekhar, General Manager (Finance), KMPL dated 26.6.15 that you have shown to me and I have endorsed my signature on it for having seen it. I agree with the answer stated by Mr. S. Chandrasekhar, General Manager (Finance), KMPL to Question No. 1 except in respect of Invoice No. 1404/14/000401 dt. 9.6.15 mentioned therein whereas the actual Invoice No. is 1404/14/000401 dt. 9.6.15 for the same Bill amount of Rs.25,954/-. And in respect of the agreement with KMPL, I have already furnished a copy of the agreement. The dealers were asked to raise such invoices on us so as to facilitate payment of payout.

Q.20 Kindly see and sign the Invoice No. 39004503 dated 30.4.2015 issued by M/s. Chennai Auto Agencies Pvt. Ltd. (also called as Chennai Ford) 423, Ponnamallee High Road, Chennai (ST Regn. No. AAACC4158LST003). According to the invoice, they have provided "Data Processing and Policy Servicing and related activities for the month of April 2015" and you have paid Rs.1,99,443/- as the service charge and Rs.24,651/- as service tax. Please answer the following questions relating to each service mentioned in the invoice.

a) <u>What are the Data Processing and Policy servicing and related activities provided by Chennai Auto Agencies P Ltd. to you</u>?

b) Who uses these Data Processing and Policy servicing services? Please provide name, address and contact no. of your employee / manpower who have been using the services to provided?

c) Have you taken CENVAT credit on this invoice?

Ans. Having seen the above-mentioned invoices, I had appended my signature in it. RSAICL has received the above-mentioned invoices from Chennai Ford. The particulars mentioned in the invoices as "Data Processing, Policy servicing and related activities" are towards insurance payouts that RSAICL had paid to the dealers which are actually a percentage fixed on the OD premium collected by them. The payout details are calculated by our Central Payout Team located at the Corporate Office and the same is communicated to the car dealers for raising invoices on us.

Q25. This email encloses the proforma invoice and the payout details regarding the insurance policies done by M/s. Chennai Auto Agencies Pvt. Ltd. As per the statement enclosed to the email, the dealer has got orders for the insurance policies for your company for the month of April 2015. The total payout to them is Rs.2,24,094/- (inclusive of service tax of Rs.24,651/-) which is exactly same as the Data Processing and policy servicing and related activities services which the dealers have supposed to be provided to you. How is it possible? Is it mere coincidence or that you have actually given them commission only for the insurance policies sold, in the name of services which they had never provided?

Ans. I have seen the print out shown to me and signed on it on token of seeing it. As already stated by me, the payouts given to the car dealers are arrived on the OD premium received. Hence there are no actual services as claimed in the invoices of the dealers. We follow the practice of sending such mails along with the payout statements and subsequently receiving hardcopies of corresponding invoices from the dealers and send them out Corporate Office as instructed by the Finance Dept of our Corporate Office."

(emphasis added)

Shri Venkatachalam Sekar is the Financial Controller holding a responsible post in the appellant-company and is also aware of the

legal position of the statutes with which he is having his day-to-day work. He has not recanted his statement so far. The submission regarding the statements being taken using 'intimidating tactics' was an afterthought which was rightfully dismissed by the adjudicating authority in his order dated 23.12.2016.

41.3 After going through the averments of the appellant and the response by the department, I find that the appellant has challenged the admission of the statements recorded from the official of the appellants company and dealers as evidence.

41.4 I shall first deal with the legal issue of the admissibility of the statements in evidence and only if found valid, discuss whether they support the stand of Revenue or not.

41.5 The Finance act 1994, is a special and self-contained enactment creating new and special obligations and rights, which at the same time prescribes the procedure for levy, assessment, collection, refund, investigation and all other incidental and ancillary provisions. To avoid repetition certain sections of the **Central Excise Act 1944** (CEA 1944), has been made applicable in relation to service tax as they apply in relation to a duty of Central Excise. These are found in section 83 of the **Finance Act, 1944** (FA 1944). One such section made applicable is section 14 of the CEA 1944, which is reproduced below.

> **14. Power to summon persons to give evidence and produce documents in inquiries under this Act.—**
>
> (1) Any Central Excise Officer duly empowered by the Central Government in this behalf shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such

> officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.
>
> (2) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required: Provided that the exemptions under sections 132 and 133 of the Code of Civil Procedure (5 of 1908) shall be applicable to requisitions for attendance under this section.
>
> (3) Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860).
>
> (emphasis added)

The section makes it clear that the investigating officers in the impugned case were empowered to record a statement from the company officials and dealers, which shall be deemed to be recorded during a "judicial proceeding" within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860). That statements given before Customs Officers and by implication Central Excise Officers, investigating an offence is admissible as evidence has been stated by the Apex Court in **Surjeet Singh Chhabra Vs Union of India [1997 (89) E.L.T. 646 (S.C.)]** and many other judgments of Constitutional Courts. Even in the case of criminal proceedings, let alone departmental proceedings, it is for the person making a claim that a statement has been obtained by officials from him using 'intimidating tactics' etc to establish the same. Section 24 of the **The Indian Evidence Act, 1872,** which deals with matter relating to criminal proceedings and has more stringent safeguards, can be taken as a guide, runs as follows

> **"Section 24 : Confession caused by inducement, threat, or promise, when irrelevant in criminal proceeding** :
>
> A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to, the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

To attract the provisions of this section, the following facts have to be established:

(a) that the confession has been made by an accused, person to a person in authority;

(b) that it must appear to the Court that the confession, has been obtained by reason of any inducement, threat or promise proceeding from a person in authority;

(c) that the inducement, threat or promise must have reference to the charge against the accused person; and

(d) the inducement, threat or promise, must, in the opinion of the Court, be such that the accused in making the confession believed or supposed that by making it he would pin any advantage or avoid any evil of temporal nature in reference to the proceedings against him.

It is noted that in this case the statements by the officials are not by accused persons nor against themselves but only explain the functioning of the appellants company in a certain context. Further neither the officials nor the appellants counsel during the cross examination or otherwise till the issue of the impugned order or before us, have been able to establish that the actions of the investigative officers attract the provisions mentioned in the section above.

41.6 A question arises as to how much weightage can be given to these replies recorded in the form of a statement. Before examining

this issue, it may help to know the officials who were examined and have given their statements. They are listed below;

a) Shri L.S. Swaminathan, State Head, Chennai Branch office of the appellant's company

b) Shri Venkatachalam Sekar, Financial Controller of the appellant's company

c) Shri T.S. Rangarajan, Head – Taxation of the appellant's company

d) Shri Jethmall Chordia, Partner M/s. Khivraj Motors

e) Shri S. Chandrasekar General Manager (Finance) of M/s. Khivraj Motors

f) Shri S. Suresh, General Manager Finance, M/s. Sundaram Motors (Division of TV Sundaram Iyengar & Sons)

g) Shri S. Shanmugasundaram, General Manager Finance, M/s. Chennai Auto Agencies

h) Shri Shailendra Kumar, staff, Business Development, M/s Honda Cars India Ltd.

i) Shri B. Balaji, Area Manager, M/s. Sundaram Motors

It is seen that all the officials held middle and senior level positions in their respective organizations. They were not bereft of legal advice that such companies generally have. To say that they did not know the procedure to retract a statement appears incredulous. Being put under a recorded cross examination by legal representatives hired by the company, in a case involving a blame worthy act attributable to the company itself while being its employee, would be stressful.

41.7 Most of the answers of officials related to explaining the purpose of the documents and the nature of activity performed by them. Hence the statements could not have been dictated by the officials as they could not know the implication of details contained in the documents etc. What is also noted is that in spite of a large list of 25 activities that were to be performed by the automobile dealers as per the "Service Provider Agreement" listed at para 33 above, the officials when questioned were unable to list out the activities that were actually performed. In fact, they admitted that no service at all was performed. But to that a little later. In contrast during the cross examination no specific document or statement came up for reference. Not even the documents on the basis of which testimonials from the officials were recorded so that they could be re-explained by the officials concerned in case any misunderstanding had crept into the recording of the same. The answers of officials were in monosyllables or very short, as seen at para 14 above. It was an opportunity lost by the appellant. Factual proof of the activity / service rendered as per the agreement could have been presented by the officials being examined by the appellant's counsel. In fact, apart from making a reference to the agreement with dealers or stray words or sentences in the impugned order, the appellant in the present case has shown remarkable shyness in showing physical / documentary proof that would demonstrate that the activity in the agreements with dealers were actually performed. The stand of the learned AA hence cannot be faulted in accepting the legally valid statements after rejecting the claim of threat / duress by the officials and satisfying himself of their evidentiary value in

understanding the issue and deciding the matter. The appellant has further contended that the statements would not automatically be binding and reliable until the procedure prescribed under section 9D of the Central Excise Act 1944 is satisfied as held by the Hon'ble High Court in **G-Tech Industries Vs Union of India [2016 (339) E.L.T. 209 (P & H)].** It would hence be appropriate to reproduce the said provision:

> "9D. Relevancy of statements under certain circumstances.-
>
> (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,-
>
> (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or
>
> (b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.
>
> (2) The provision of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court."
>
> (emphasis added)

It is seen that section 9D is relevant for the purpose of proving the truth of a fact, in any prosecution launched for an offence under the Central Excise act, 1944. The impugned order does not emanate from a proceeding of prosecution. A five judge Bench of the Apex Court by a majority decision in **Thomas Dana vs The State Of Punjab, [1959**

AIR 375] held that there is no escape from the conclusion that the proceedings before the Sea Customs Authorities under s. 167(8) (which was a pre-cursor to the Customs Act, 1962, a sister Act to the FA 1994 and CEA, 1944), were not "prosecution" within the meaning of Art. 20 (2) of the Constitution. Action by quasi-judicial officers under CEA 1944 / FA 1994 is not done as per the provisions of criminal law. Prosecution of offenders under these Act, are launched separately under the CrPC in a criminal court. It is in these prosecution cases that section 9D ibid becomes relevant. It is relevant to note that standards of evidentiary requirement differ greatly between civil and criminal laws. It is not disputed that, in this case, cross examination of officials who gave the statements as sought by the appellant was allowed and done. In a similar situation it was held by the Hon'ble Supreme Court in **M/s Telestar Travels Pvt. Ltd. & Ors Vs Special Director of Enforcement** [2013 (289) ELT (3) SC], as under;

> "18. . . . It is only when a deposition goes through the fire of cross-examination that a Court or Statutory Authority may be able to determine and assess its probative value. Using a deposition that is not so tested, may therefore amount to using evidence, which the party concerned has had no opportunity to question. Such refusal may in turn amount to violation of the rule of a fair hearing and opportunity implicit in any adjudicatory process, affecting the right of the citizen. The question, however, is whether failure to permit the party to cross examine has resulted in any prejudice so as to call for reversal of the orders and a de novo enquiry into the matter. The answer to that question would depend upon the facts and circumstances of each case. For instance, a similar plea raised in **Surjeet Singh Chhabra v. Union of India and Ors.** (1997) 1 SCC 508 before this Court did not cut much ice, as this Court felt that cross examination of the witness would make no material difference in the facts and circumstances of that case. The Court observed
>
> > "3. It is true that the petitioner had confessed that he purchased the gold and had brought it. He admitted that he purchased the gold and converted it as a kara. In this situation, bringing the gold without permission of the authority is in contravention of the Customs Duty Act and also FERA. When

> the petitioner seeks for cross-examination of the witnesses who have said that the recovery was made from the petitioner, necessarily an opportunity requires to be given for the cross-examination of the witnesses as regards the place at which recovery was made. Since the dispute concerns the confiscation of the jewellery, whether at conveyor belt or at the green channel, perhaps the witnesses were required to be called. But in view of confession made by him, it binds him and, therefore, in the facts and circumstances of this case the failure to give him the opportunity to cross-examine the witnesses is not violative of principle of natural justice. It is contended that the petitioner had retracted within six days from the confession. Therefore, he is entitled to cross-examine the panch witnesses before the authority takes a decision on proof of the offence. We find no force in this contention. The customs officials are not police officers. The confession, though retracted, is an admission and binds the petitioner. So there is no need to call panch witnesses for examination and cross-examination by the petitioner."
>
> (emphasis added)

Further the Apex Court in **"Bishnu Prasad Sinha v. State of Assam" [AIR 2007 SUPREME COURT 848**] held as under;

> "31. A confessional statement, as is well known, is admissible in evidence. It is a relevant fact. The Court may rely thereupon if it is voluntarily given. It may also form the basis of the conviction, wherefor the Court may only have to satisfy itself in regard to voluntariness and truthfulness thereof and in given cases, some corroboration thereof. . . . ."

In **Commissioner of Customs, Calcutta Vs South India Television (P) Ltd [2007-TIOL-126-SC-CUS]** it was stated;

> ". . We may clarify that strict rules of evidence do not apply to adjudication proceedings. They apply strictly to the courts' proceedings. . ."

Hence the learned AA has on his satisfaction, correctly relied upon the statements and cannot be faulted. This Tribunal cannot go into the merits of the AA's satisfaction, if it is reasonable. As held by the Hon'ble Apex Court in **Gazi Saduddin v. State of Maharashtra and Another [(2003) 7 SCC 330]**;

> "Primarily, the satisfaction has to be of the authority passing the order. If the satisfaction recorded by the authority is objective and is

> based on the material on record then the courts would not interfere with the order passed by the authority only because another view possibly can be taken. Such satisfaction of the authority can be interfered with only if the satisfaction recorded is either demonstratively perverse based on no evidence, misreading of evidence or which a reasonable person could not form or that the person concerned was not given due opportunity resulting in prejudicing his rights under the Act."

The statements which clarified/ explained the information contained in documents from the personal knowledge of official dealing with it, cannot be said to be perverse or not based on evidence. Voluntary statements, if clearly proved and found acceptable are the most effective proofs of law and can't be ignored. The legal issue of the admissibility of the statements in evidence is hence found valid.

41.8 I next propose to discuss whether these statements support the stand of Revenue or not.

41.9 The main charges against the appellant regarding taking ineligible CENVAT credit is set out at para 34 above. One of the conclusions in the impugned order is that the dealers are raising invoices as per the instructions of the appellant for receiving the payouts / commissions from the appellant and no taxable service is provided by the dealers as mentioned in their invoices. Therefore, the payment of charges by the appellant to the dealer, on which the disputed 'service tax' was voluntarily discharged by the appellant and credit availed, is not duty as contemplated under the Finance Act 1994 (FA 1994). In accordance with section 106 of the Indian Evidence, the fact within the knowledge of a person must be proved as the burden of proof is cast upon him. Moreso, when he is confronted with documents

and manner of working which are within his special knowledge. Section 106 of the Indian Evidence Act., 1872 gives statutory recognition to this universally accepted rule of evidence.

> **106. Burden of proving fact especially within knowledge**.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

White collar omissions and commissions can only be proved by documents and correspondence which has to be explained and decoded by officials who are in the know about it. When the appellant was required to discharge certain obligations as per an agreement, company officials will be in the best position to disclose and demonstrate that it was done in the manner agreed. This information has necessarily to be reduced to writing to help the investigators and later the proper officer to come to a conclusion on the happening or non-happening of an event.

41.10 I find from the statement given in question-and-answer form by the representatives of M/s. Khivraj Motors Pvt. Ltd. Chennai (KMPL), M/s. Sundaram Motors, M/s. Khivraj Pearl and M/s. Chennai Auto Agencies Pvt. Ltd. that they all carry a common thread. All the dealers have stated that they have not provided any 'data processing and policy servicing and related activities' to the appellant. No proof of any of the 25 activities as listed in the agreement with the car dealers and mentioned at para 33 above, was shown to have been performed by the dealers during the questioning of the dealers or by the appellants, right from the stage of investigation till the passing of the impugned order, except to state that the activities were mentioned in the agreements with the car dealers or to point out some stray words

or sentences in the impugned order. The activity to be performed remained on paper in the form of an agreement but was not acted upon by the dealers at the behest and with the knowledge of the recipient of the activity which is the appellant. It was mentioned in the impugned order that car dealers have admitted raising invoices towards charges of 'data processing and policy servicing and related activities' as required of them by the confidential email communication received by them from the appellant. The amount of payout was decided by the insurance company i.e appellant. No representative from the insurance company assisted the dealers and no separate expenses is specifically incurred on behalf of the appellant or any other preferred insurance company. They do not provide any space to the employees of any insurance company and they have not rented any portion of the premises to the insurance companies, insurance agents, brokers / intermediaries for providing them in infrastructure, manpower etc. The amounts received from the appellant are fixed as a percentage on the basis of the premium amount booked for the insurance policies for new vehicles and for the renewal of old policies. The invoices are prepared on the basis of the standard format given by the appellant through their emails. The invoices prepared by the car dealers were as given to them by the appellant-company and the amounts reflected therein were a percentage of the insurance premium and had nothing to do with the service provided by the said dealers. One of the dealers mentioned that the 'commission' received from the appellant is recognized as income and accounted under the head 'Insurance Income'.

41.11 Secondly, in the statement recorded from the car manufacturer M/s. Ford India (FIPL) reveal that they have the following insurance companies as 'Preferred Insurance Companies' viz. The New India Assurance Company Limited, Bajaj Allianz General Insurance Company Limited, Royal Sundaram Alliance General Insurance Company Limited (appellant) and IFFCO Tokyo General Insurance Company Limited; that since they want uniformity of insurance services to their customers across the country, they have entered into an agreement with the insurance companies to mutually deliver the services mentioned in Annexure A of the agreement like Issue / Renewal of Insurance Policies, Claim processing etc. They only facilitate Insurance companies to have business through their dealer network and apart from this, there is no other service provided by them to the insurance companies. Hence even the car manufacturers were not providing the whole gamut of service to the appellant which is contrary to their agreement.

41.12 Revenue in their written submissions have invited attention to para 5.7.16 of the OIO wherein Shri Venkatachalam Sekar, Financial Controller of M/s RSAICL when asked to state whether any third party is involved while the insurance policy purchased by the customers of the car from the dealers and if so who are all the third parties and their role. He has replied that the third parties like TBSSL provide the IT support to the insurance companies and car dealers, that they maintain a website of their company wherein they give access to all the dealers of car manufacturer by giving them username and password, that these dealers can login in their website and enter the details of the

cars like model number, price of the car, registration number, chassis number etc. and the car owners name, address, phone number etc. which is required by the dealer itself while selling a car and get the insurance policy printed in their showroom itself and give it to the customers at the time of delivering the car or other motor vehicles, that the infra company gives them the details of the premium collected from each dealer which then reconciled with the payment deposited by each dealer in their account, that thereafter they make payment of payouts to the car dealers accordingly and the infra-company gets a service charge at rate as negotiated with them, however, the amount paid is accounted as 'Payouts' in their Books of Accounts and that the present rates of service charge to infra–companies are:

TBSS-TATA	4% of OD Premium
HCIL	2% of OD Premium
TBSS-Ford	1.75% of OD Premium
TBSS-Renault	1.75% of OD Premium

The deposition made shows very clearly that whatever support which are needed for issuance of insurance policies are not provided by the car dealers but by the Infra-company for which they are paid a very small percentage of the OD Premium but with an intention to suppress this fact M/s RSAICL has shown this charge as 'Payouts' in their Books of Account. Shri Venkatachalam Sekar has further admitted that they have no option but to pay the 'payouts' to the car dealers due to their agreement with the car manufacturers and that there is no separate sale of insurance policies because it is automatically sold with the sale of the new car as the price of the insurance is in-built in the 'On Road

Price' of the car. Hence it is seen that the dealers who have a pool of captive customers which would be otherwise difficult for the insurance company to net, canvasses the purchaser of an insurance policy, helps in making the sale of the car insurance policy, enters the details available with them about the customer using the appellants IT support infrastructure in furtherance of the sale of policy, receives the insurance premium from the customers and takes a print out of the insurance policy to complete the sale of the policy and hand it over to the customer. Apart from this activity towards the sale of insurance policy to the customer, no other service activity is provided to the appellant which was listed in the agreement.

41.13 Shri Venkatachalam Sekar, Financial controller stated that they have entered into a tripartite agreement with M/s Ford (car manufacturer), M/s TBSSL and the car dealers. The 'payout' given by the appellant to car dealers of different car manufacturers is as under:

Name of the car manufacturer	Payout to the dealers
Honda	22% on OD Premium
Maruti	15 to 30% on OD Premium
Tata	10 to 30% on OD Premium
Renault	20% on OD Premium
Ford	10 to 25% on OD Premium
Piaggio	10 to 20% on OD Premium
Ashok Leyland	10 to 30% on OD Premium
Mahindra	10 to 20% on OD Premium

As per the statement of Sri Jethmall Chordia, Partner in M/s Khivraj Pearl (a division of the car dealer Khivraj Motors), the commissions/ payouts received from the various preferred insurance companies is at a fixed percentage @ 55% on the premium amount for the insurance policies booked for new vehicles and 10% for renewals. It is relevant

to note that the Service Charge paid to infra–companies for their service is in the range of 1.75 to 4% of OD premium and the dealer, who cannot recall having provided any service activity as per the agreement to the Insurance Company, gets paid a percentage between 10 to 55 % on the OD premium amount for the insurance policies booked, allegedly for providing 'services'. These cannot be held to be genuine transactions of 'data processing and policy servicing'. Hence it cannot be said as averred by the appellant that the method of calculating the 'consideration' is wholly irrelevant to decide the nature of services provided by the appellant. When examined in totality the payments do not satisfy the test of what a reasonable person of ordinary prudence would do while hiring services. They signify something more.

41.14 Third, the statements of senior officials of the appellant company, which was again based on a 'Question' and 'Answer' format, reveal that some of the questions which were asked by the departmental officers were, a request to provide documents like agreement and as to what type of services were rendered by the appellant towards data processing and policy servicing and related activities? What was the documentary evidence in support of their claim? How is the amount calculated towards cost? What was the expenses incurred by the appellant with regard to data processing and policy servicing and related activities and whether it is specified under any agreement? How are the charges arrived at for data processing and policy servicing and related activities? How many data processing and policy servicing and related activities have been made by the

dealers? How the data processing charges raised on the appellant by car dealers are accounted for in the books of accounts? For which the officials have replied that no staff is deployed by the appellant in any of the car dealers' premises. They do not verify or monitor the services as claimed in the invoices of the dealer and that the amount paid out by the appellant to the dealers are actually fixed as a percentage on the Own Damage (OD) premium collected by the dealers. That the payout details are collected by the appellants 'Central Payout Team' (CPT) located at their corporate office and the same is communicated to the car dealers for raising invoices on them (appellant). The CPT sends emails to their sales team which in turn sends it to the branch who then conveys the details to the car dealer through the Territory Manager of the branch. Based on this payout statement, the dealers issue invoices to the appellant for claiming payouts. The total payout to the dealers is exactly the same as that of 'data processing and policy servicing and related activities' shown in the invoice given by the dealers to the appellant since it is based on the appellants own payout statement.

41.15 The belief, knowledge and intention of the parties are a part of evidence. Documents do not always speak in a language understood by the layman. These are effectively brought to life through the statements of officials who are in the know of things. Based on this evidence the learned AA has to form his own conclusion. When all the parties to the act were of the knowledge that no taxable service was required to be provided or were actually provided and were of the belief that they would be renumerated for selling the insurance policy to their

unsuspecting captive customers for the appellants benefit with the intention of profiting from this business, then it is a case where no activity was done or provided by the dealers and what monies were received by the dealers based on invoice prepared and sent to them by the appellant was not the fruit of a taxable activity declared in the invoice. In such a situation the service tax shown to be paid on the invoices was not a tax. It was the misuse of a tax mechanism of CENVAT credit to not only pass on monies to car dealers but to unjustly enrich all the participants of this scheme both financially and in the growth of business, at the cost of the customer-taxpayer who was clueless of the whole fraudulent scheme. While the appellant paid the dealer, he got back the amount as input credit to be used for payment of duty on output service. No financial injury was caused to either the dealer or the appellant. They benefitted at the cost of the customer, who in reality was not expected by law to bear the final burden of a non-tax.

41.16 The entire story unravels through facts and documents which are connected and explained by the officials involved and hence lend credibility to the findings in the impugned order.

41.17 I find that with respect to SCN 30/2012-ST. the impugned order states that the service provided by the dealer is liable for payment of Service Tax under the Reverse Charge Mechanism. I find that this finding is not based on the charge made in the SCN and hence does not sustain.

42 **Unless the assessment made by the jurisdictional officer of the dealer is revised, the credit at the recipient's end cannot be denied.**

42.1 The appellant states that the dispute is regarding classification and hence CENVAT credit cannot be denied at the hands of the recipient-appellant.

42.2 From going through the facts in issue, I find that this is not a case of the department seeking to change the classification of a service at the recipient's end. It's a case where as per the proviso to Rule 9(2) of CENVAT Credit Rules, 2004, (CCR 2004) the appellant being the provider of output service, is required to satisfy the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, that the input services on which CENVAT credit is sought to be taken has been received and is covered by the description given in the invoice which has been received and accounted for in the books of the appellant. It is for the recipient of the service / appellant to prove and satisfy the proper office in this regard. The SCN to the appellant is about this deficiency by the appellant to satisfy the proper officer. The principle that the burden of proof regarding the admissibility of CENVAT, while taking input credit, falls on the recipient is further made clear by Rule 9(5) of CCR, 2004. There cannot be a compromise regarding the actual receipt of service according to the description in the invoice, as discussed at para 40 below.

42.3 The mode and method of availing CENVAT credit is provided for in the CCR, 2004. Relevant portions of Rule 9 of the said Rules are extracted below;

> RULE 9. Documents and accounts. – (1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, ...
>
> (2) No CENVAT credit under sub-rule (1) shall be taken unless all the particulars as prescribed under the Central Excise Rules, 2002 or the Service Tax Rules, 1994, as the case may be, are contained in the said document:
>
> Provided that if the said document does not contain all the particulars but contains the details of duty or service tax payable, description of the goods or taxable service, assessable value, Central Excise or Service tax registration number of the person issuing the invoice, as the case may be, name and address of the factory or warehouse or premises of first or second stage dealers or provider of output service, and the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, is satisfied that the goods or services covered by the said document have been received and accounted for in the books of the account of the receiver, he may allow the CENVAT credit.
>
> . . . . . .
>
> (5) The manufacturer of final products or the provider of output service shall maintain proper records for the receipt, disposal, consumption and inventory of the input and capital goods in which the relevant information regarding the value, duty paid, CENVAT credit taken and utilized, the person from whom the input or capital goods have been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit.
>
> (emphasis added)

The jurisdictional Hon'ble High Court of Madras happened to examine the claim of credit by the recipient, under the GST laws, the principles of which are similar to the claim of CENVAT credit, in **Pinstar Automotive India Private Limited v. Addl. Commissioner CGST & CE, [W.P. No. 8493 of 2023].** The Hon'ble Court held that in the case of non-payment of GST by supplier to the Government, the

substantive liability falls on the supplier and the protective liability upon the purchaser. Relevant portion of the judgment is below;

> "10. An additional factor is that where the tax liability has been met by way of reversal of ITC and similarly recovery is effected from the supplier as well, this would amount to a double benefit to the revenue. Thus, while the Department may reverse credit in the hands of the purchaser, this has to be a protective move, to be reversed and credit restored if the liability is made good by the supplier. Thus, the substantive liability falls on the supplier and the protective liability upon the purchaser. A mechanism must be put in place to address this situation."
>
> (emphasis added)

The Hon'ble Apex Court too examined a similar matter in Civil Appeal No. 230 OF 2023 (Arising from SLP(Civil) No. 2572/2022) **The State of Karnataka Vs M/s Ecom Gill Coffee Trading Private Limited.** Though the above-mentioned case pertains to VAT/ Pre-GST regime, it's principles are squarely applicable under the Service Tax regime as well. It examines the relevance of the 'burden of proof' as per Section 70 of the KVAT Act, 2003, which is similar to Rule 9(5) of the CENVAT Credit Rules 1994, extracted above. Since the matter has been examined extensively along with contra arguments a major portion of the judgment is extracted below;

> 9. While considering the aforesaid issue/question, Section 70 of the Karnataka Value Added Tax Act, 2003 is required to be referred to, which reads as under:
>
> > "70. Burden of proof.- (1) For the purposes of payment or assessment of tax or any claim to input tax under this Act, the burden of proving that any transaction of a dealer is not liable to tax, or any claim to deduction of input tax is correct, shall lie on such dealer.
> >
> > (2) Where a dealer knowingly issues or produces a false tax invoice, credit or debit note, declaration, certificate or other document with a view to support or make any claim that a transaction of sale or purchase effected by him or any other dealer, is not liable to be taxed, or liable to tax at a lower rate, or that a deduction of input tax is available, the prescribed authority shall, on detecting such issue or production, direct

the dealer issuing or producing such document to pay as penalty:

(a) in the case of first such detection, three times the tax due in respect of such transaction or claim; and

(b) in the case of second or subsequent detection, five times the tax due in respect of such transaction or claim.

(3) Before issuing any direction for the payment of the penalty under this Section, the prescribed authority shall give to the dealer the opportunity of showing cause in writing against the imposition of such penalty."

9.1 Thus, the provisions of Section 70, quoted hereinabove, in its plain terms clearly stipulate that the burden of proving that the ITC claim is correct lies upon the purchasing dealer claiming such ITC. Burden of proof that the ITC claim is correct is squarely upon the assessee who has to discharge the said burden. Merely because the dealer claiming such ITC claims that he is a bona fide purchaser is not enough and sufficient. The burden of proving the correctness of ITC remains upon the dealer claiming such ITC. Such a burden of proof cannot get shifted on the revenue. Mere production of the invoices or the payment made by cheques is not enough and cannot be said to be discharging the burden of proof cast under section 70 of the KVAT Act, 2003. The dealer claiming ITC has to prove beyond doubt the actual transaction which can be proved by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. The aforesaid information would be in addition to tax invoices, particulars of payment etc. In fact, if a dealer claims Input Tax Credit on purchases, such dealer/purchaser shall have to prove and establish the actual physical movement of goods, genuineness of transactions by furnishing the details referred above and mere production of tax invoices would not be sufficient to claim ITC. In fact, the genuineness of the transaction has to be proved as the burden to prove the genuineness of transaction as per section 70 of the KVAT Act, 2003 would be upon the purchasing dealer. At the cost of repetition, it is observed and held that mere production of the invoices and/or payment by cheque is not sufficient and cannot be said to be proving the burden as per section 70 of the Act, 2003.

10. Even considering the intent of section 70 of the Act, 2003, it can be seen that the ITC can be claimed only on the genuine transactions of the sale and purchase and even as per section 70(2) if a dealer knowingly issues or produces a false tax invoice, credit or debit note, declaration, certificate or other document with a view to support or make any claim that a transaction of sale or purchase effected by him or any other dealer, is not liable to be taxed, or liable to take at a lower rate, or that a deduction of input tax is available, such a dealer is liable to pay the penalty. Therefore, as observed hereinabove, for claiming ITC, genuineness of the transaction and actual physical movement of the goods are the sine qua non and the aforesaid can

be proved only by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. The purchasing dealers have to prove the actual physical movement of the goods, alleged to have been purchased from the respective dealers. If the purchasing dealer/s fails/fail to establish and prove the said important aspect of physical movement of the goods alleged to have been purchased by it/them from the concerned dealers and on which the ITC have been claimed, the Assessing Officer is absolutely justified in rejecting such ITC claim.

11. In the present case, the respective purchasing dealer/s has/have produced either the invoices or payment by cheques to claim ITC. The Assessing Officer has doubted the genuineness of the transactions by giving cogent reasons on the basis of the evidence and material on record. In some of the cases, the registration of the selling dealers have been cancelled or even the sale by the concerned dealers has been disputed and/or denied by the concerned dealer. In none of the cases, the concerned purchasing dealers have produced any further supporting material, such as, furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. and therefore it can be said that the concerned purchasing dealers failed to discharge the burden cast upon them under Section 70 of the KVAT Act, 2003. At the cost of repetition, it is observed and held that unless and until the purchasing dealer discharges the burden cast under Section 70 of the KVAT Act, 2003 and proves the genuineness of the transaction/purchase and sale by producing the aforesaid materials, such purchasing dealer shall not be entitled to Input Tax Credit.

12. Despite the findings of fact recorded by the Assessing Officer on the genuineness of the transactions, while refusing to allow the ITC, which came to be confirmed by the first Appellate Authority, the second Appellate Authority as well as the High Court have upset the concurrent findings given by the Assessing Officer as well as the first Appellate Authority, on irrelevant considerations that producing invoices or payments through cheques are sufficient to claim ITC which, as observed hereinabove, is erroneous. As observed hereinabove, over and above the invoices and the particulars of payment, the purchasing dealer has to produce further material like the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods including actual physical movement of the goods, alleged to have been purchased from the concerned dealers.

13. Now so far as the reliance placed upon Rules 27 and 29 of the Karnataka Value Added Tax Rules, 2005 and the submission on behalf of the purchasing dealers that under the provisions of the Rules 2005, more particularly under Rules 27 & 29, the only requirement is to issue the tax invoice and to produce the same and

there is no other requirement is concerned, the aforesaid has no substance. Rule 27 cast an obligation on the dealers to issue tax invoice and the particulars of the tax invoice are provided under Rule 29. Merely because the tax invoice as per Rule 27 and Rule 29 might have been produced, that by itself cannot be said to be proving the actual physical movement of the goods, which is required to be proved, as observed hereinabove. Producing the invoices as per Rules 27 and 29 of the Rules 2005 can be said to be proving one of the documents, but not all the documents to discharge the burden to prove the genuineness of the transactions as per section 70 of the KVAT Act, 2003.

14. Now so far as the reliance upon the decision of the Delhi High Court in the case of On Quest Merchandising India Pvt. Ltd. v. Government of NCT of Delhi (Writ Petition (Civil) No. 6093/2017, decided on 26.10.2017), relying upon by the learned counsel appearing on behalf of the purchasing dealers is concerned, at the outset, it is required to be noted that before the Delhi High Court, Section 9(2)(g) of the Delhi Value Added Tax Act was under consideration, which reads as under:

> *"9(2)(g) to the dealers or class of dealers unless the tax paid by the purchasing dealer has actually been deposited by the selling dealer with the Government or has been lawfully adjusted against output tax liability and correctly reflected in the return filed for the respective tax period."*

The burden of proof as per Section 70 of the KVAT Act, 2003 was not an issue before the Delhi High Court. How and when the burden of proof can be said to have been discharged to prove the genuineness of the transactions was not the issue before the Delhi High Court. As observed hereinabove, while claiming ITC as per section 70 of the KVAT Act, 2003, the purchasing dealer has to prove the genuineness of the transaction and as per section 70 of the KVAT Act, 2003, the burden is upon the purchasing dealer to prove the same while claiming ITC.

15. In view of the above and for the reasons stated above and in absence of any further cogent material like furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. and the actual physical movement of the goods by producing the cogent materials, the Assessing Officer was absolutely justified in denying the ITC, which was confirmed by the first Appellate Authority. Both, the second Appellate Authority as well as the High Court have materially erred in allowing the ITC despite the concerned purchasing dealers failed to prove the genuineness of the transactions and failed to discharge the burden of proof as per section 70 of the KVAT Act, 2003. The impugned judgment(s) and order(s) passed by the High Court and the second Appellate Authority allowing the ITC are unsustainable and deserve to be quashed and set aside and are hereby quashed and set aside. The orders passed by the Assessing

> Officer denying the ITC to the concerned purchasing dealers, confirmed by the first Appellate Authority are hereby restored.
>
> 16. The instant appeals are accordingly allowed. However, there shall be no order as to costs."
>
> (emphasis added)

The principle flowing from the above judgement as applicable in the present context is very lucid and emphatic. The burden of proving to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, the correctness of CENVAT credit sought to be claimed/ availed, as per proviso to Rule 9(2) ibid, remains upon the output service provider, who seeks to take such credit. Such a burden of proof cannot get shifted to Revenue. Credit can be claimed and availed only on genuine transactions. Mere production of the invoices and/or payment by cheque is not sufficient and cannot be said to be proving the burden as required by the Rules. The situation in the present case gets compounded as it is the appellant himself who has devised the fraudulent scheme and is also the one availing the credit. To repeat the general principle of law, a person ought not to be able to profit from his or her own wrong.

42.4 Hence the appellant being the provider of output service, while taking CENVAT credit, on the impugned invoices, has not satisfied the proper officer regarding the admissibility of the credit, as required under proviso to Rule 9(2) of the CCR 2004 and the credit has hence been irregularly availed.

43. **No penalty proceedings have been initiated against the car dealers hence the service provided by dealers is not disputed.**

43.1 The appellant is of the view that since no penalty proceedings has been initiated against the car dealers for incorrect issuance of invoice, the department is not disputing the fact of providing the service as described in the invoice or remittance of duty on the same.

43.2 This averment of the appellant is not correct. The SCN does not disclose that no action has been taken against the car dealers. The appellant's claim is hence not substantiated and is not a part of the dispute in this case. Moreover, the present case has been made by officers of DGCEI and not by the Commissionerate. The action taken by Division officers who are doing the normal assessment functions are not know and are a separate cause of action. No inference can be drawn on the bald statement made by the appellant. The action in this case is appellant specific based on Rule 9 of CCR 2004. Moreover, in **Basawaraj & Anr. vs Special Land Acquisition Officer** [(2013) 14 SCC 81], the Apex Court ruled that:

> "8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated."
>
> (emphasis added)

Further, in **The State of Odisha v. Anup Kumar Senapati** [2019 SCC Online SC 1207] the Supreme court observed as follows:

> "If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a similarly wrong order. A wrong

> order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision."

Hence even if there has been no action on the dealer, that benefit cannot be relied upon as a principle of parity or equality by the appellant. No inference can be drawn from the alleged and unsubstantiated claim of inaction against the car dealers, even if it is found true. Their plea in this regard fails.

44.A The appellant submits that they are eligible to avail and utilize the CENVAT credit of the services in question because they qualify as input services.

44.B The appellant is entitled for availment of credit of service tax paid based on the invoices in questions. In any case, the substantive benefit of CENVAT credit cannot be denied on technical issues

44.C Without prejudice, the dealers are providing "Business Auxiliary Services" and the appellant is entitled to the CENVAT credit of the same

44.D The appellant submits services classified under the taxable category of "business support service" have been provided to appellant. Contractual supply is the essence of applicability of service tax.

44.E Cost of input service is included in the assessable value of the final services.

44.1 I take up the issues raised by the appellant listed as points 44 A to E above, together as they are related. It has been seen in the para above that the appellant being the provider of output service, has not satisfied the proper officer regarding the admissibility of the credit, as required under Rule 9 of the CCR 1994. Hence the averment that

they qualify as input services is not correct. Contractual supply may be the essence of applicability of service tax only if there is a proper agreement which is executed in letter in spirit by the parties concerned. Illegality cannot get the cover of an agreement/ contract and succeed. Further no taxable activity was performed by the dealers as described in the invoice, as discussed above, hence the question of eligibility for the mis-declared invoice to qualify as an input service-related document does not arise. The matter has been discussed elaborately at para 37 above. To put it briefly in 'Intercontinental Consultants and Technocrats Private Limited' (supra), the Hon'ble Apex court held that as per section 67 of the FA 1994 service tax is with reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon. Any other amount which is calculated not for providing such taxable service, in this case the 'service' as declared in the invoice, cannot be a part of that valuation as that amount is not calculated for providing such 'taxable service'. The issue is not merely technical as stated by the appellant, but goes to the heart of the law of taxation.

45. **The issue is no longer res integra and stands settled by the adjudicating authority in the case of M/s. Cholamandalam MS General Insurance Company Limited.**

45.1 The appellant submits that the very same issue was the subject matter of dispute in the Show Cause Notice No. 309/2011 (C) dated 24.10.2011 issued to M/s. Cholamandalam MS General

Insurance Company Ltd. This Show Cause Notice alleged that additional amounts over and above the permitted IRDA commission were being paid on the basis of 'referral agreements'. Since the department has also not filed any appeal against these findings and as such they have attained finality. In the above circumstances, the issuance of present Show Cause Notice is not sustainable in any manner and the same merits to be dropped. During the oral submissions made they have further referred to the judgments listed below in their favour;

a. Modular Auto Ltd. Vs. CCE, Chennai reported in 2018 (8) TMI 691 Madras High Court

b. Commissioner of Income Tax Vs. Walchand & Co. Ltd. reported in [1967] 65 ITR 381 (SC)

c. Sarvesh Refractories (P) Ltd. Vs. CCE, Chennai reported in 2007 (218) ELT 488 (SC)

d. CCE Vs. Nahar Granites reported in 2014 (305) ELT 9 (Guj.)

e. M/s Ford India Pvt. Ltd. Vs. CGST & CE reported in 20190-VIL-182-CESTAT-CHE-ST

f. Karur Vysa Bank Ltd. Vs. CCE, Trichy reported in 2019 (22) GSTL 63 (Tri. Chennai)

g. Automax Vs. CCE, Delhi reported in 2018 (363) ELT 1121 (Tri. Chan)

h. Poornam Info Vision Vs. CCE, Cochin reported in 2019 (365) ELT 592 (Tri. Bang.)

i. CCE Cochin Vs. A.B. Mauri India Pvt. Ltd. reported in 2018 (8) GSTL 209 (Tri. Bang.)

j. ICICI Lombard General Insurance Company Ltd. Vs. CGST & CE reported in 2023 (2) TMI 1093 – CESTAT Mumbai

k. CCE Vs. MDS Switchgear Ltd. reported in 2008 (8) TMI 37 – Supreme Court

l. Cable vision Vs. CCE reported in 2023 (3) TMI 13 CESTAT Chennai

m. Shreeraj Panmasala Pvt. Ltd. Vs. Commissioner of Customs, Jodhpur reported in 2018 (12) TMI 1237 CESTAT, New Delhi

n. Cholamandalam MS General Insurance Co. Ltd. Vs. CCE reported in 2021 (3) TMI 24 – CESTAT Chennai

o. Continental Foundation Jt. Venture Vs. CCE, Chandigarh reported in 2007 (216) ELT 177 (SC)

p. Padmini Products Vs. Collector of Central Excise reported in 1989 (43) ELT 195 (SC)

I shall discuss the implications and applicability of the said judgements as per the facts emerging from them and applicable to the facts in issue in this case below, on the accepted principle that it is neither desirable nor permissible to pick out a word or a sentence from a judgment divorced from the context of the question under consideration and treat it to be complete law.

45.2 In the 'Modular Auto Ltd' (supra) the Hon'ble High Court examined the following questions of law;

> a) When the service provider was not before the Tribunal, whether the Tribunal can go into the question as to whether the said service provider had provided service to the appellant or not, more so when the said service provider has been assessed to service tax under Business Support Service for the service rendered by them to the appellant.
>
> b) Is the Tribunal not in error in refusing credit to the appellant for service tax paid by them to service provider when payment of service tax by the appellant for the service rendered by service provider is not in dispute and that it is settled, the assessment to tax at the hands of the service provider end cannot be questioned in the hand of service receiver (appellant in this case)
>
> (emphasis added)

The matter examined by the Hon'ble High Court relates to a question where the payment of service tax by the appellant for the service

rendered by service provider was not in dispute. The issue here is of an activity which was not a taxable service rendered to the appellant as mentioned in the invoice, which is in dispute. Moreover, the question of law pertaining to the 'burden of proof' cast on the recipient of service before availing credit, as in Rule 9(5) of the CCR, 2004, was not an issue before the Hon'ble High Court. This principle, which is relevant to the present case, has been examined later by the Apex Court in The State of Karnataka Vs M/s Ecom Gill Coffee Trading Private Limited (supra) under Section 70 of the KVAT Act, 2003, which is similar to Rule 9(5). Similarly, an important principle was stated by a Coordinate Bench of the Hon'ble Madras High Court in its later judgment in Pinstar Automotive India Private Limited v. Addl. Commissioner CGST & CE and referred to in para 42.3 above. The Hon'ble Court while examining an issue under section 16 Of the Central Goods and Services Tax Act, 2017 held that there can be no dispute on the position that the provisions of the said Section are to be observed strictly, such that, there is no jeopardy to the interests of the revenue. Further that while substantive liability falls on the supplier, protective liability lies upon the purchaser (recipient). This legal point was also not an issue for consideration before the Hon'ble High Court in 'Modular Auto Ltd'. Both these subsequent judgments have been discussed at para 45 of this order. In 'Walchand and Co' (supra), the Hon'ble Supreme Court felt, that increased renumeration can only be justified if there be corresponding increase in the profits of the employer is erroneous. The current issue which deals with claim to input credit by the service provider of final output service and the illegality of using an agreement

to cover up a payment as being consideration towards 'data processing and policy servicing', and is distinguished. In 'Sarvesh Refractories' (supra), and similarly in 'M/s Ford India', the issue involve was whether reclassification of goods can be done at the receiver's end. The issue here relates to the provider of output service satisfying, with proof, the proper officer that the input service on which credit is taken has actually been received by him. The question of law pertaining to the 'burden of proof' as per Rule 9(5) of the CENVAT Credit Rules, 2004 on the recipient was also not an issue in the cited judgment. The matter has been discussed at para 45. In 'Nahar Granites' (supra), the Hon'ble High Court dealt with an issue pertaining to a case where the department did not dispute the classification by the manufacturer and accepted the declaration and duty. It was held that CENVAT credit cannot be denied to the purchaser who otherwise fulfill all conditions. In the instant case the issue's include the dispute regarding the taxability of a 'service' and that the appellant did not discharge the burden of proof that all the conditions required for taking CENVAT credit have been fulfilled. In 'Karur Vysya Bank' (supra) again a coordinate Bench of this Tribunal examined an issue where the appellant was providing services such as supply of infrastructure like, table, chair, network, electricity, telephone etc. to an insurance company. It's the appellants averment that in this case the department themselves had demanded service tax under 'Business Support Services' on infrastructure support services provided to insurance companies and the same was upheld by this Hon'ble Tribunal. That being the case, there is no merit in stating that the no services, as described in the

dealer's invoices, have been provided to the Appellant in the present case. I find that each case is decided on the peculiar facts involved. The dispute in the said case was the classification of the service either as 'Insurance Auxiliary Service' as claimed by the appellants who were corporate agents of a insurance company and 'Business Support Service' as claimed by the department. In the present case the question is not with regard to the classification of a service provided by a person holding himself to be a corporate agent of an insurance company. Hence the judgment is distinguished. In 'Automax' (supra) the issue related to the issue was the discrepancy in description of the goods not being a reason to deny CENVAT credit in the facts and circumstances of the case. They are not similar to the appellants case, as can be seen from the discussions above and are hence distinguished. In 'Poornam Info Vision' (supra) and 'M/s Cable Vision' (supra) relates to denial of CENVAT credit on non-submission of original invoices and the lack of signature on computer generated invoices. Similarly in 'A.B. Mauri' the Hon'ble Tribunal again examined an issue related to a claim based on computer generated documents and has been discussed elaborately at para 46 below. In 'ICICI Lombard' (supra) the Hon'ble Tribunal the undisputed fact was that the automotive dealers had paid service tax on the nature of service described in the invoice issued to the appellant. Availment of such credit was found in conformity with the CENVAT statute. In the instant case the provision of a taxable service itself is under challenge and is distinguished. In 'MDS Switchgear' (supra) the Hon'ble Supreme Court relates to the quantum of duty already determined by the jurisdictional

officers cannot be challenged by revenue officials in charge of the recipient unit. The issue is distinguished being similar to the one discussed at para 45. Further, the question pertaining to the 'burden of proof' on the recipient of service and whether substantive liability falls on the supplier and the protective liability upon the purchaser (recipient) was also not an issue before the Hon'ble Court. 'Shreeraj Panmasala' (supra) relates to clandestine removal. Since allegations were not collaborated and the SCN was based on assumptions and presumptions they have no leg to stand on. In contrast the present matter the departmental officers have established their case based on facts, documents and statements in a proper manner and the allegations were found to sustain as discussed elaborately above. In 'M/s Cholamandalam' (supra) a Coordinate Bench of this Tribunal examined the issue was that credit was availed by an Insurance Co. on the basis of invoices issued by the dealers of motor vehicles containing description of service which was allegedly never provided by them. Since the appellant has placed great stress on the said judgment, paras 6.2 to 7.3 which is important to understand the basis of the decision is reproduced below;

> "6.2 From the above, it can be seen that the case of the Department is that the payout paid by the appellant to the dealers on the OD premium collected by the dealers from the customers is camouflaged as service provided by the dealers to the appellant; that therefore, the services contained in the invoices have actually not been provided by the dealers to the appellant and thus, CENVAT Credit is not eligible.
>
> 7.1 Though in the Show Cause Notice the main allegation is that the description of services in the documents on which credit has been availed is not correct, at the time of adjudication, the main finding is that no services have been provided by the dealers to the appellant and that therefore credit is not eligible. At this juncture, it needs to be pointed out that the Department has no dispute with the Service Tax

> collected from the appellant by the dealer and remitted to the Government. The assessment of Service Tax paid at the dealer's end has not been disturbed/questioned by the Department; only the credit availed at the service recipient's end has been questioned by issuing the present Show Cause Notice.
>
> 7.2 If the Department contends that no service has been provided, the crucial question arises as to why Service Tax was collected from the dealer. The discussion by the Original Authority at paragraph 37 countering this argument is as under :
>
> "37. As regards their contention in Para N.1 to N.7 that if no service is provided by the Dealer there is no requirement to pay service tax; that at the time of accepting service tax from the dealer, the department chooses to look at the form of transaction and accept service tax. In this regard, I find that the issue involved is not about the service tax payable by the Dealer. It is about the mentioning of true description of services in the 10 Appeal. No.: ST/40938/2017-DB invoice and the services mentioned in the invoices in the instant case admittedly were not provided by the Dealers. Only after the in-depth investigation conducted with the Dealers, the fact of Dealers issuing invoice with the description suggested by the Taxpayer have come to light. Hence their contention that department cannot approbate and reprobate in the same case is not valid."
>
> 7.3 It is not disputed that the dealer has paid Service Tax on the services described in the invoices. If that be so, the denial of credit at the recipient's end cannot be justified by the Department without reopening the assessment at the dealer's end."
>
> (emphasis added)

It is seen that the questions raised by appellants in the said case and which were also raised by the appellant in this case, have been answered by me at para 39.1 above.

> 10.2 The appellant has raised two issues of law here;
>
> (i) When there are no services being provided by the dealer to the appellant, then why the service tax paid on such transactions were accepted by the department.
>
> (ii) When there is no requirement to pay service tax by the dealer to the department, the amounts collected should be refunded.

It was concluded that as per Section 73A(2) of the Finance Act, 1994, even if tax is not liable to be collected from a person, if collected, the collected amount has to be paid to the credit of the government. In

this case, it does not mean that department has accepted the taxpayer's assessment and that the actions of the taxpayer have been ratified. Further taking guidance from the Hon'ble Apex Courts judgment in 'Mafatlal Industries' (supra) that it is for the person who is aggrieved to initiate the process of refund in terms of Section 11B, if he feels that he has paid tax not due and it's not for the department to so *suo-moto* refund the same. A refund can only be processed when an applicant for refund sets out the context of his claim satisfying the requirements of law, which is then examined and found eligible by the department. I find that neither Section 73A(2) of the Finance Act, 1994 nor the Apex Courts decision in 'Mafatlal Industries' was brought to the notice of the Hon'ble Tribunal. Similarly, neither was Rule 9(5) of the CCR, 2004 or the Apex Courts judgment in 'M/s Ecom Gill Coffee Trading' (supra) brought up for discussion and consideration by the contesting parties before them and if done, it was not discussed. Further there is nothing in the proceedings to show that no action has been taken against the car dealers as stated by the appellant here and even so a wrong committed by another person cannot be perpetuated or equality of action/ parity sought. Hence the decision was rendered considering only the peculiar facts and limited law relating to the matter. In this context in **D.P. Chadha vs Triyugi Narain Mishra, [(2001) 2 SCC 221]**, the Hon'ble Supreme Court, held as follows;

> "26. A lawyer must not hesitate in telling the court the correct position of law when it is undisputed and admits of no exception. A view of the law settled by the ruling of a superior court or a binding precedent even if it does not serve the cause of his client, must be brought to the notice of court unhesitatingly. This obligation of a counsel flows from the confidence reposed by the court in the

> counsel appearing for any of the two sides. A counsel, being an officer of court, shall apprise the Judge with the correct position of law whether for or against either party."

This position, of the contesting parties in the appeal not bringing up the relevant Rules and case laws governing the subject before the Hon'ble Tribunal for consideration has, I feel, deprived the judgment in 'M/s Cholamandalam' (supra) of its precedential value. They do not help in the development of correct law. The issue does not involve reclassification of a service but proof by the person who wants to avail credit that the invoice on which credit is sought to be availed, satisfies the provisions of the Rules. The Hon'ble Supreme Court's judgment in 'Continental Foundation' (supra) relates to the interpretation of the expression 'suppression' used in section 11A of the Central Excise Act and will be taken up in the appropriate para below. Similarly, the Apex Courts judgment in 'Padmini Products' (supra) states that the extended period of 5 years is inapplicable for mere failure or negligence. This too will be discussed later in this order. I have discussed the facts and law of each case cited before us, and have tried to demonstrate that these cases cannot serve as a precedent in this case for reasons discussed. In **Escorts Ltd. Vs Commissioner of Central Excise, Delhi – II** [2004 (173) E.L.T. 113 (S.C.)], the Apex Court held;

> "10. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.
>
> 11.The following words of Lord Denning in the matter of applying precedents have become locus classicus :
>
> > "Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding

> such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."
>
> * * * * * * * * *
>
> "Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."
>
> 12. This aspect has been highlighted in Collector of Central Excise, Calcutta v. M/s. Alnoori Tobacco Products and Anr. [Civil Appeal Nos. 4502-4503 of 1998 decided on 21-7-2004]."

46. **Availment of CENVAT credit by the appellant on the basis of irregular invoices without signature, issued by the automobile manufacturer viz. Honda Cars India Ltd.**

46.1 The appellant has submitted that the invoices are system generated and hence do not require signature. The signature of the service provider could not be affixed as the invoice was system generated and sent over electronic means. Rule 9(2) of the CENVAT Credit Rules, 2004 which deals with documents on the basis of which CENVAT credit can be claimed states that if the DC/ AC of Central Excise is satisfied that the documents have been received and accounted for in the books of accounts he may allow the CENVAT credit. Hence this contravention is if at all a procedural defect and hence credit may be allowed. They have relied upon the Tribunal judgments in 'Poornam Info Vision', 'A.B. Mauri' and 'Cable Vision' (supra) in support of their averments.

46.2 The facts are that the appellant availed credit to the tune of Rs.69,35,403/- based on unsigned invoices issued by the car

manufacturer M/s Honda Cars India Ltd through email. The invoice was in soft copy and not in the proper format as prescribed under Rule 4A(1) of the Service Tax Rules 1994 and was being received by them in this mode since 2010. Shri Venkatachalam Sekar, Financial Controller of the appellants company who was questioned in this regard accepted that the invoice was not in the proper format, he further reversed the said CENVAT credit availed. The reversal is now contested.

46.3 Issue of invoices and maintenance of records in electronic media had come into effect from 6.7.2015 onwards. Notification No. 18/2015-CE(NT) dated 6.7.2015 specifies certain conditions, safeguards and procedures for issue of invoices, preserving records in electronic media and authentication of invoices by digital signatures. Board vide instruction in F.No. 224/44/2014-Cx.6 dated 6.7.2015 had brought out the salient features of the above Notification for guidance. Relevant portions are reproduced below;

> ". . . . the Central Board of Excise and Customs hereby specifies the following conditions, safeguards and procedures for issue of invoices, preserving records in electronic form and authentication of records and invoices by digital signatures, namely:-
>
> 1. Every assessee proposing to use digital signature shall use Class 2 or Class 3 Digital Signature Certificate duly issued by the Certifying Authority in India.
>
> 2. (i) Every assessee proposing to use digital signatures shall intimate the following details to the jurisdictional Deputy Commissioner or Assistant Commissioner of Central Excise, at least fifteen days in advance:-
>
> a) name, e-mail id, office address and designation of the person authorised to use the digital signature certificate;
>
> b) name of the Certifying Authority;
>
> c) date of issue of digital certificate and validity of the digital signature with a copy of the certificate issued by the Certifying Authority along with the complete address of the said Authority: Provided that in case

of any change in the details submitted to the jurisdictional Deputy Commissioner or Assistant Commissioner, complete details shall be submitted afresh within fifteen days of such change.

(ii) Every assessee already using digital signature shall intimate to the jurisdictional Deputy Commissioner or Assistant Commissioner of Central Excise the above details within fifteen days of issue of this notification.

3. Every assessee who opts to maintain records in electronic form and who has more than one factory or service tax registration shall maintain separate electronic records for each factory or each service tax registration.

4. Every assessee who opts to maintain records in electronic form, shall on request by a Central Excise Officer, produce the specified records in electronic form and invoices through e-mail or on a specified storage device in an electronically readable format for verification of the authenticity of the document and the request for such records and invoices shall be specified in the letter or e-mail by the Central Excise Officer.

5. A Central Excise Officer, during an enquiry, investigation or audit, in accordance with the provisions of section 14 of the Central Excise Act, 1944 and as made applicable to Service Tax as per the provisions contained in section 83 of the Finance Act, 1994, may direct an assessee to furnish printouts of the records in electronic form and invoices and may resume printouts of such records and invoices after verifying the correctness of the same in electronic format; and after the print outs of such records in electronic form have been signed by the assessee or any other person authorised by the assessee in this regard, if so requested by such Central Excise Officer.

6. Every assessee who opts to maintain records in electronic form shall ensure that appropriate backup of records in electronic form is maintained and preserved for a period of 5 years immediately after the financial year to which such records pertain."

(emphasis added)

46.4 An invoice is an important document, it serves as an agreement between a business and its customers, evidencing goods sold or services rendered, tax paid and payment owed or received. In the context of Indirect Taxation, they assume even more importance in the MODVAT/ CENVAT/ GST credit era in as much as, when taken as credit in the books of account, they are instantaneously equivalent to

liquid cash for payment of duty. An invoice showing a payment of duty of Rs. one crore when taken into the books of a manufacturer or service provider can be instantly used for the discharge of duty payable of the same amount at the same time of entry into books of account. The temptation for creating a fake or irregular document so as to avoid availing a costly loan facility is great and has to be guarded against, by a strict adherence to Rules. System generated invoices created without legal safeguards are easy to manipulate much more so than manual document. If the government treasury is allowed to be bled in this manner, the statute would be seen not to have been followed sufficiently by the officers so as to carry out the intent for which FA 1994 was enacted. This cannot thus merely be a procedural matter. Apart from the field of taxation, government has introduced facilities like the online platform TReDS (Trade Receivables Discounting System) that facilitate the financing of invoices of vendors drawn on big organizations and other corporates, including Public Sector Undertakings (PSUs) and Government Departments, by discounting the invoices through financiers. These two activities itself reveal the importance and value of an invoice. In daily life no person, including the appellant, would be prepared to freely allow the bank to encash a cheque even for a paltry amount, bearing the company's name if it is not signed by an authorized representative. There is no reason why government finances and tax payment should be handled differently and in a cavalier manner. A signature placed on an invoice physically or digitally inculcates faith in the document and gives it credibility and value in matters of taxation, business operations and day to day

transactions. Dishonesty in the issue of such an instrument is an offence under relevant statutes. It is on the basis of this trust that day to day business thrives. The menace of fake invoicing and its deleterious effect on the economy is well known. Rule 4A of Service Tax Rules, 1994 (STR 1994) has to be understood in this context. The Rule itself makes it mandatory that the invoice is signed by a person providing taxable service or a person authorized by him in respect of such taxable service. In **The State of U.P. & Ors. v. Babu Ram Upadhya** [(1961) 2 SCR 679(CB)], it was observed by the Apex Court as under:

> "Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation: see Maxwell "On the Interpretation of Statutes", 10th edn., pp. 50-51."
>
> (emphasis added)

Rule 4A of STR, 1994 deals with the manner in which invoice has to be issued by a service provider. Extract of the relevant rule is reproduced below:-

> "**Rule 4A. Taxable service to be provided or credit to be distributed on invoice, bill or challan-**
>
> (1) Every person providing taxable service shall, not later than thirty days from the date of completion of such taxable service or receipt of any payment towards the value of such taxable service, whichever is earlier issue an invoice, a bill or, as the case may be, a challan signed by such person or a person authorized by him in respect of taxable service provided or agreed to be provided and such invoice, bill or, as the case may be, challan shall be serially numbered and shall contain the following, namely :-
>
> (i) the name, address and the registration number of such person;
>
> (ii) the name and address of the person receiving taxable service;
>
> (iii) description and value of taxable service provided or agreed to be provided; and

(iv) the service tax payable thereon: . . . .”

(emphasis added)

Rule 9 of the CENVAT Credit Rules 1994, extracted above is again reproduced for juxtaposition and convenience of reference. It states;

> **RULE 9. Documents and accounts. –**
>
> (1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely : . . . .
>
> (2) No CENVAT credit under sub-rule (1) shall be taken unless all the particulars as prescribed under the Central Excise Rules, 2002 or the Service Tax Rules, 1994, as the case may be, are contained in the said document:
>
> Provided that if the said document does not contain all the particulars but contains the details of duty or service tax payable, description of the goods or taxable service, assessable value, Central Excise or Service tax registration number of the person issuing the invoice, as the case may be, name and address of the factory or warehouse or premises of first or second stage dealers or provider of output service, and the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, is satisfied that the goods or services covered by the said document have been received and accounted for in the books of the account of the receiver, he may allow the CENVAT credit.
>
> (emphasis added)

It is necessary to examine every word of a statute in its context, more so considering the instant liquidity given by the said document when taken into the books of account. A easy facility far removed from the rigors and checks involved in getting a loan from the bank. In the light of the mandatory provision for affixing of signature under Rule 4A of STR, 1994, which is the heart of the Rule, proviso to Rule 9(2) of the CCR, 1994 which creates an exception to the main rule cannot be seen to be controlling the main provision. In case a conflict among the Rules is perceived, then as per the Apex Courts judgment in **Commercial Tax Officer, Rajasthan Vs M/s Binani Cement Ltd & Anr. ([2014]**

3 S.C.R.1), when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. Further it is for the appellant in this case to claim the benefit of proviso to Rule 9(2) before the proper officer at the time of receipt of a defective invoice. The proper officer who is also the guardian of government revenues has to satisfy himself that the request of the assessee who has come to him with clean hands, can be acceded to, based on the facts and circumstances of each case. It is seen that the invoice received in soft copy, not in the proper format as prescribed under Rule 4A(1) of the Service Tax Rules 1994 and without a signature was being received by the appellant since 2010. They should have corrected the situation by taking up the matter with the supplier and also taken pro-active steps to approach the DC/ AC and appraise him of the issue and get his approval. By not doing so they have suppressed this fact till they were called out and have thus violated the Rule. Secondly Rule 9(2) ibid clearly mandates that the document should contain the details of the correct description of the goods or taxable service, among other things. The proper officer does not have the discretion to overlook this important fact. The impugned invoices fails both these tests. As per the guidelines of the Hon'ble Apex Court in 'Gazi Saduddin v. State' (supra), this Tribunal cannot go into the merits of the AA's satisfaction so long as it is not perverse or without proper reason. The satisfaction has to be of the authority passing the order. It is seen from para 46.3 above that maintenance of records in

electronic media had come into effect only from 6.7.2015. Hence prior to that date, without the safeguards prescribed for an electronic signature, the jurisdictional officer would not be aware that the appellant was taking credit on electronic documents and such a modus operandi could be unearthed only after a search of the office by the officers. Even otherwise if this pernicious practice is accepted it will allow all assesses to take credit on incomplete documents and when found out seek the benefit of proviso to Rule 9(2) of CCR 1994. A situation not envisaged by the Rules. Proviso to a Rule cannot become the Rule. In the instant case the position becomes even more adverse as the appellant has been found indulging in blame worthy conduct.

46.5 Further it is observed that Notification No. 18/2015-Central Excise (N.T.), Dated 01/07/2015 while specifying the safeguards and procedures for issue of digital invoices lays out more stringent conditions, like use of only Class 2 or Class 3 Digital Signature Certificate duly issued by the Certifying Authority in India, preservation of appropriate back up of records in electronic form for a period of 5 years, document modification history, access to key information from the signature panel and acceptance of signer post verification of necessary particulars etc. Hence the appellants plea that the error is only procedural and hence credit may be allowed, cannot be accepted and fails.

46.6 With regard to the case laws cited by the appellant and mentioned at para 46.1 above, it is to be stated that Tribunals cannot legislate or amend the Rule. Statutory authorities also cannot pass a general order that militates against / or nullifies the specific provisions

of the Rules for all times. It is seen that the orders are cryptic and do not examine the full magnitude of the legal issues involved and are hence distinguished. They are relevant to the facts and circumstances of the cited cases and do not come to the help of the appellant.

47. **Irregular availment of CENVAT by the appellant credit on the basis of invoices issued by the automobile dealer, viz. M/s. TVS Sundaram Motors.**

47.1 During the course of investigation at the appellants Head Office, it appeared that they had availed CENVAT credit amounting to Rs 1,72,63,912 based on invoices issued by one of their Car Dealer namely M/s. TVS Sundaram Motors (herein after called as TSM). It was noticed that TSM had issued two sets of invoices for the same transaction. One set of invoice issued to the appellant as "Data Processing and Policy Servicing Services" based on which CENVAT credit was availed by the appellant. The other set of invoice issued by TSM was for their own internal accounting purpose mentioning the nature of service as "Additional Incentive".

47.2 The appellant submits that TSM for some reason chose to issue an invoice containing different description of service for their office use and a different one to them. They are not aware of the reason for the same. The appellant has referred to Boards Circular Np 120/1/2010 dated 19/01/2010, which states that in case of incomplete invoices, the department should take a liberal view in view of various judicial pronouncements by courts. The contravention if at all, is a procedural defect and hence credit may be allowed.

47.3 Ordinarily credit taken on invoices that give the correct description of a service when complete in all respects is valid. A liberal view can also be taken of minor discrepancies in normal cases. However, in this case firstly there is another set of documents for "additional incentive" available with the service provider casting aspersions on the actual taxable activity stated on the credit availed invoice. They point towards transactions that are not genuine. Having found the credit irregular as a part of the full-scale investigation done by DGCEI and examined by the AA, the decision cannot be faulted.

48. **The appellant humbly submits that the service tax department cannot act as a super-regulator and hold the appellant responsible for violation, if any, under other laws and regulations**

48.1 The appellant submits that firstly, there has been no violation of IRDA principles. From the statements of the personnel of the dealers, the department has concluded that the payment made to the dealer by the appellant constitutes "commission" and therefore, since the appellant is in violation of the IRDA regulations in this regard, there is no separate service provided by the dealer, therefore, the credit of the same is not available to the appellant. The appellant submits that the service tax department cannot act as regulator for other laws in force. In the present case, the service tax has been discharged on the invoices raised by the dealers in this case. However, the violation of the IRDAI regulation, if any, cannot be a ground for denying the credit otherwise available to the appellant. Without

prejudice, the illegality of a transaction does not determine or alter its tax implications. Therefore, the credit is available to the appellant in the present scenario. The appellant has further submitted that the IRDAI itself issued a letter dated 12.8.2015 wherein the said authority stated that they have notified 'Guidelines on Outsourcing activities' in February 2011 in terms of which all other activities which support the core activities (such as policy servicing and related activities) and non-core activities can be outsourced. Thus, the allegation in the Show Cause Notice that the appellant has violated the IRDA Regulations is incorrect, besides being irrelevant for the purposes of service tax. In view of the above submissions, the impugned order merits to be set aside for this reason itself.

48.2 Revenue per contra has stated that IRDA Circular Ref.011/IRDA/Brok-Comm/August 2008 dated 25.8.2008 issued under Section 14 of IRDA Act, 1999, limits the payment of commission or brokerage to 10%. The circular specifically state, "No payment of any kind including "administrative or servicing charges" is permitted to be made to the agent or broker in respect of the business in respect of which he is paid agency commission or brokerage." Further the Insurance Regulatory and Development Authority of India vide Final Order in Ref. No. IRDA/ENF/ORD/ONS/086/05/2016, dated 11/05/2016 in 'Decision on 21 and 32' has examined the tripartite agreement and found the appellant guilty of outsourcing the core activities due to which the Authority in exercise of powers conferred under section 102(b) of Insurance Act, imposed a penalty of Rs.5 lakh on the appellant. The appellant-Insurer was further advised to revise

the clauses of agreements to comply with the all clauses of Guidelines on Outsourcing of activities by the Insurance Company. (Circular Number IRDA/LIFE/CIR/GLD/013/02/2011 dated 1st Feb. 2011). This Revenue states, goes on to show that what the department has been alleging regarding the non-providing of taxable service is correct.

48.3 it is seen from para 5.7.18 of the impugned order that during the investigation one of the very senior officials admitted that while making payment to the dealers as payout, they have to give a description of the services as 'data processing and policy servicing and related activities' in the invoices. This is because they cannot term such a payment as commission. Commission can only be given to the insurance dealers / brokers / intermediaries, who are duly approved by IRDA (or by insurance companies), that since the dealers are not the approved persons / agencies for selling the insurance polices and hence can't be officially allowed to sell the insurance policies, they cannot call such payouts as commission as it will be in violation of the IRDA guidelines. That the maximum commission fixed by IRDA is 10% of OD premium and the payout are far more, hence they cannot bill the amount as commission. That the car dealers are not authorized to sell the car insurance policies according to IRDA however there is no separate sale of insurance policies to car customers because it is automatically sold with the sale of the new car as price of insurance is inbuilt in the 'on road price' of the car. This statement was recorded while the official was confronted with documentary evidence and cannot be ignored.

48.4 Any person, let alone an officer of the tax department, aware of the commission of an offence or intention thereof, including an economic offence, is duty bound to give information to the authorities concerned. I find that the allegations made by Revenue were meant in that direction and to show that the huge payouts by the appellant to the car dealers were not on account of 'Data Processing and Policy Servicing and related activities'. I find that Revenue has succeeded in this limited objective. It does not make them a super regulator. To find whether the amounts paid by the appellant to car dealers were within or in violation of IRDAI guidelines is not the remit of this authority. It suffices to say that both the appellant and the car dealers understood that the payments made and received were towards the sale of insurance policy and for which the dealers were being renumerated as a percentage of the OD premium of the car insurance policy and the activity was not what the invoice made it out to be.

48.5 The appellant has made a submission to the effect that, without prejudice, the illegality of a transaction does not determine or alter its tax implications. I find that the concept has met with legal traction in matters relating to Income Tax laws, where the illegal gains are to be taxed at the hands of those who financially gained from these illegal actions. However, in the case of Indirect Taxes where the burden of tax rests on the final consumer, while those who perpetuate the illegality are beneficiaries of the illegal monies collected as 'tax' - due to input credit schemes meant to neutralize the cascading effect of tax - needs to be tested against the legal principle that a person ought not

to be able to profit from his or her own wrong. In any case the issue in the impugned matter is, the burden of the output service provider (appellant) failing to prove to the proper officer, the correctness of CENVAT credit sought to be claimed/ availed, as per proviso to Rule 9(2) off CCR 2004. Hence an admission of illegality and the suggestion of an alternative classification under FA 1994, which fits the activity could have been tested before the lower authority, while considering their specific request in permitting input credit, under proviso to Rule 9(2) ibid.

49. **The extended period of limitation is not invocable in the present case since the appellant had not wilfully suppressed any fact much less with intention to evade payment of duty. Further, the demand is also in continuation of earlier proceedings.**

49.1 The appellant states that in the present case, the Show Cause Notice is dated 16.10.2015. Whereas the period involved in the present case is from 2010 to 2015. Therefore, the majority of the demand in the present Show Cause Notice is beyond the normal period of limitation. The extended period of limitation for raising a demand is not invocable as there was no suppression of facts much less with intent to evade payment of duty. The appellant was under bona fide belief that they are entitled to avail and utilize credit of service tax paid on various input services for the reasons mentioned in this reply. Hence, allegation of suppression of facts with intention to evade is erroneous. They have relied upon the judgments (i) 'Shreeraj

Panmasala Pvt. Ltd.' (supra) to state that when Revenue has not collaborated its allegations with sufficient reliable evidence, the allegations have no legs to stand on, in (ii) 'Continental Foundation Jt. Venture' (supra) to state that the expression 'suppression' has to be construed strictly. There cannot be suppression that is not willful, and (iii) Padmini Products Vs. Collector of Central Excise (supra), to state that fraud, collusion, willful mis-statement postulate a positive act and mere non observance of Rules etc. will amount to a failure under the provision.

49.2 Revenue submitted that the appellant is on a wrong footing that the demand proposed in the SCN and confirmed by the AA in the impugned order is interpretational in nature, inasmuch as, it is a case of well pre-planned and pre-meditated act of multiple offence involving fraud, collusion and suppression of facts committed by the appellant. Revenue submits that even after the irregularity was pointed out and SCN issued, M/s RSAICL had continued the same practice resulting to issuance of Statement of Demand for the period from April 2015 to June 2017 which showed that M/s RSAICL and motor dealers had scant regard for CENVAT Credit Rules 2004. Hence the extended period for issue of SCN has correctly been invoked.

49.3 The discussions above have led to the conclusion that the entire scheme as unraveled by Revenue points to fraud, collusion with dealers, willful misstatement in the invoices at the behest of the appellant and suppression of facts by contravention of the Act and the Rules made thereunder with intention to evade payment of duty using ineligible credit. This misconduct is deliberate and with the intent to

enrich themselves unjustly at the cost of the car customer who bears the ultimate incidence of the 'non-tax'. The matter could not have been unraveled by supervisory checks of the jurisdictional Division / Range staff and without an investigation by departmental officers based on documents, agreements and statements from officials concerned explaining the whole matter, as was done by DGCEI. Hence the extended period of time under proviso to section 73 of the Finance Act, 1994, for issue of SCN has been correctly invoked. The judgments cited by the appellant do not come to their rescue as the substance of the whole scheme planned and perpetuated by the appellant satisfies proviso to Section 73 of the Finance Act 1994, as submitted by Revenue and held in the impugned order. In **Commissioner of Customs, Kandla Vs M/s Essar Oil Limited & Ors.** [2004 (172) E.L.T. 433 (S.C.)] it was held;

> "Fraud" in relation to statute must be a colourable transaction to evade the provisions of a statute. If a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope."

It is now well settled that fraud vitiates all solemn acts. Any advantage obtained by practicing fraud is a nullity. Hence the extended period of time has been rightly invoked in this case.

50. **Penalty under section 78 of the Finance Act, 1994 read with Rule 15 of Credit Rules is not attracted in the present case**

50.1 The appellant is of the view that since they are eligible to avail CENVAT credit, and as the issue is technical in nature, no penalties can be imposed.

50.2 This averment has been contested by Revenue. Once it is found that the issue involves any one of the ingredients like fraud, collusion, suppression of facts etc with intention to evade payment of duty, penalty has to be imposed as has been correctly done in the impugned order.

50.3 The discussions above show that the appellant has wrongly and knowingly availed of CENVAT credit for which he was not eligible. It is a general principle of law that a person ought not to be able to profit from his or her own wrong. The use of legal instruments to subvert law was examined by the Hon'ble Supreme Court in **Suraj Lamp & Industries Pvt. Ltd. vs. State of Haryana & Anr., [(2012) 1 SCC 656].** The Hon'ble Court in that case felt that whatever be the intention, the consequences are disturbing and far reaching, adversely affecting the economy, civil society and law and order. It is felt that a similar situation will prevail if tax laws are subverted by using colourable legal devices like tailor made agreements meant to serve as a legal cover for blame worthy conduct. Hence penalty was correctly imposed. In an apt quotation which also applies to this case the Patna High Court in **Syed Askari Hadi Ali Augustine vs Union Of India And Ors. [1994 (42) BLJR 1389]** at para 20 mentioned the following quote with approval;

> "20. In Howard De Walden (Lord) v. IRC [1942] 1 All ER 287 (CA) at page 289, Lord Greene observed : "For years a battle of manoeuvre has been waged between the Legislature and those who are minded

> to throw the burden of taxation off their own shoulders on to those of their fellow-subjects. In that battle, the Legislature has often been worsted by the skill, determination and resourcefulness of its opponents, of whom the present appellant has not been the least successful. It would not shock us in the least to find that the Legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers."
>
> (emphasis added)

In the circumstances the imposition of penalty is justified as per law.

51. **No interest payable**

54.1 It's the appellant's view that since CENVAT credit was properly taken and no amount is recoverable from the appellant in the first place, the question of payment of interest does not arise.

51.2 We have earlier elaborately discussed and found that the CENVAT credit was not availed properly. It is seen that interest is necessarily linked to the duty payable, such liability arises automatically by operation of law. As per the Hon'ble Supreme Court's judgment in **Commissioner of Central Excise, Pune Vs M/s SKF India [2009-TIOL-82-SC-CX]** interest is to be paid on delayed or deferred payment of duty for whatever reasons. The relevant portion is as below;

> "9. Section 11A puts the cases of non-levy or short levy, non-payment or short payment or erroneous refund of duty in two categories. One in which the non-payment or short payment etc. of duty is for a reason other than deceit; the default is due to oversight or some mistake and it is not intentional. The second in which the non-payment or short payment etc. of duty is "by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty"; that is to say, it is intentional, deliberate and/or by deceitful means. Naturally, the cases falling in the two groups lead to different consequences and are dealt with differently. Section 11A, however allow the assessees in default in both kinds of cases to make amends, subject of course to certain terms and conditions. The cases where the non-payment or short payment etc. of duty is by reason of fraud collusion etc. are dealt with under sub-section (1A) of section 11A and the cases where the non-payment or short payment of duty is not intentional under sub-section (2B).

> 10. Sub-section (2B) of section 11A provides that the assessee in default may, before the notice issued under sub-section (1) is served on him, make payment of the unpaid duty on the basis of his own ascertainment or as ascertained by a Central Excise Officer and inform the Central Excise Officer in writing about the payment made by him and in that event he would not be given the demand notice under sub-section (1). But Explanation 2 to the sub-section makes it expressly clear that such payment would not be exempt from interest chargeable under section 11AB, that is, for the period from the first date of the month succeeding the month in which the duty ought to have been paid till the date of payment of the duty. What is stated in Explanation 2 to sub-section (2B) is reiterated in section 11AB that states where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person who has paid the duty under sub-section (2B) of section 11A, shall, in addition to the duty, be liable to pay interest. It is thus to be seen that unlike penalty that is attracted to the category of cases in which the non-payment or short payment etc. of duty is "by reason of fraud, collusion or any wilful mis- statement or suppression of facts, or contravention of any of the provisions of the Act or of Rules made thereunder with intent to evade payment of duty", under the scheme of the four sections (11A, 11AA, 11AB & 11AC) interest is leviable on delayed or deferred payment of duty for whatever reasons."
>
> (emphasis added)

SUMMARY OF FINDINGS

52. I now summarise my findings on the various issue of law and fact arising from the appeal.

A) Tax liability does not arise due to consent of parties. There has to be a legally valid levy.

B) As per proviso to Rule 9(2) of CCR 2004 the appellant being the provider of output service, is required to satisfy the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, that the input services on which CENVAT credit is sought to be taken has been received and is covered by the description given in the invoice and accounted for in the books of the appellant.

C) Rule 9(5) of CCR, 2004 makes the principle clear that the burden of proof regarding the admissibility of CENVAT, while taking input credit, falls on the recipient of service i.e. the appellant.

D) As per the general rule in legal proceedings also, he who asserts must prove. The appellant who is asserting the taxability of the activity received by him, if any, should have shown that the activity described in the invoice was indeed received and secondly that it was a taxable service eligible for being claimed as CENVAT credit.

E) For the reasons cited at (A), (B) and (C) above the SCN had rightly required the appellant to show cause as to why the credit availed should not be denied and on failure to do so the impugned has confirmed the demand.

F) As per section 67 of the FA 1994 service tax is collected with reference to the value of service. As a necessary corollary, it is the value of the service which is actually rendered which is to be ascertained for the purpose of calculating the service tax payable thereupon. Any other amount which is calculated not for providing such taxable service, in this case the 'service' as declared in the invoice, cannot be a part of that valuation as that amount is not calculated for providing such 'taxable service'.

G) As per Section 73A(2) of the FA, 1994, even if the tax is not liable to be collected from a person, if collected, the collected amount has to be paid to the credit of government. This does not mean that department has accepted the taxpayer's assessment and that the actions of the taxpayer have been ratified.

H) Any 'tax' collected, retained or not refunded by the department in accordance with the provisions of a statute must be held to be collected, retained or not refunded, as the case may be, under the authority of law. Hence any excess money collected as tax and paid to government is seen to have been retained under the authority of law.

I) The Finance Act, 1994, is a self-contained enactment. It contains provisions for collecting the taxes which are due according to law but have not been collected and also for refunding the taxes which have been collected contrary to law. It, therefore, follows that any and every claim for a refund of service tax can be made only under and in accordance with the provisions of the Act and in the forums provided by the Act. Hence in this case it is for the person who remitted tax to government to claim any eligible refund, if he feels so, only in terms of Section 11B of the Central Excise Act,1944 (CEA 1944) as made applicable to FA,1994 by virtue of Section 83 of the said Act.

J) A fact asserted by a person which is within his knowledge must be proved by him, as the burden of proof is cast upon him. Moreso, when he is confronted with documents and manner of working which are within his special knowledge. Section 106 of the Indian Evidence Act., 1872 gives statutory recognition to this universally accepted rule of evidence. The appellant in the present case has shown remarkable shyness in showing physical / documentary proof which would establish that the activities mentioned in the agreements with dealers were being actually performed.

K) The belief, knowledge and intention of the parties are a part of evidence. Documents do not always speak in a language understood

by the layman. These are effectively brought to life through the statements of officials who are in the know of things. Based on this evidence the learned AA has to form his own conclusion.

L) Persons claiming that statements were obtained under threat / duress must, for that ground to operate, establish that the threat is such that the person in making the statement believed or supposed that by making it he would pin any advantage or avoid any evil of temporal nature in reference to the proceedings against him. This has not been done by the officials concerned.

M) In spite of a large list of 25 activities that were to be performed by the automobile dealers as per the "Service Provider Agreement" listed at para 33 above, the officials of both the appellant and the dealers' company, when questioned were unable to list out the activities that were actually performed. In fact, they admitted that no service at all was performed.

N) Appellants company officials have stated in legally admissible statements that they have no option but to pay the 'payouts' to the car dealers due to their agreement with the car manufacturers and that there is no separate sale of insurance policies because it is automatically sold with the sale of the new car as the price of the insurance is in-built in the 'On Road Price' of the car.

O) It is relevant to note that the Service Charge paid to infra–companies for their service is in the range of 1.75 to 4% of OD premium and the dealer, who cannot recall having provided any service activity as per the agreement, to the Insurance Company gets paid a percentage between 10 to 55 % on the OD premium amount for the

insurance policies booked, allegedly for providing 'services'. These cannot be held to be genuine consideration towards transactions for 'data processing and policy servicing'. When examined in totality the payments do not satisfy the test of what a reasonable person of ordinary prudence would do while hiring services. They signify something more.

P) What monies were received by the car dealers' based on invoice prepared and sent to them by the appellant was not the fruit of a taxable activity as declared in the invoice. In such a situation the service tax shown to be paid on the invoices was not a tax.

Q) The SCN does not disclose that no action has been taken against the car dealers. The appellant's claim is hence not substantiated and is not a part of the dispute. Further if an illegality or irregularity has been committed in favour of an individual or a group of individuals and even if there has been no action on the said individual or group of individuals, that benefit cannot be relied upon as a principle of parity or equality by the appellant.

R) System generated invoices created without legal safeguards are easy to manipulate, much more easily than manual document. In daily life no person, including the appellant, would be prepared to freely allow the bank to encash a cheque even for a paltry amount, bearing the company's name if it is not signed by an authorized representative. There is no reason why government finances and tax payment should be handled differently and in a cavalier manner. Even otherwise if this pernicious practice is accepted it will allow all assesses to take credit on incomplete documents and when found out seek the benefit of

proviso to Rule 9(2) of CCR 1994. A situation not envisaged by the Rules. Proviso to a Rule cannot become the Rule. It has to be applied to the facts of each case as per the satisfaction of the proper officer, when approached by assessee's with clean hands. Secondly proviso to Rule 9(2) ibid clearly mandates that the document should contain the details of the correct description of the goods or taxable service, among other things. The proper officer does not have the discretion to overlook this important fact.

S) Allegations made by Revenue regarding non-compliance with IRDAI guidelines, were only meant to show that the huge payouts by the appellant to the car dealers were not on account of 'Data Processing and Policy Servicing and related activities'. Revenue has succeeded in this limited objective. To find whether the amounts paid by the appellant to car dealers were within or in violation of IRDAI guidelines is not the remit of this Authority.

T) The appellant has made a submission to the effect that, without prejudice, the illegality of a transaction does not determine or alter its tax implications. The concept has met with legal traction in matters relating to Income Tax laws, where the illegal gains are to be taxed at the hands of those who financially gained from these actions. However, in the case of Indirect Taxes where the burden of tax rests on the final consumer, while those who perpetuate the illegality are beneficiaries of the illegal monies collected as 'tax' - due to input credit schemes meant to neutralize the cascading effect of tax - needs to be tested against the legal principle that a person ought not to be able to profit from his or her own wrong.

U) The entire scheme as unraveled by Revenue points to fraud, collusion, willful misstatement in the invoices at the behest of the appellant and suppression of facts by contravention of the Act and the Rules made thereunder with intention to evade payment of duty, using ineligible credit. The blame worthy act by the appellant is deliberate and with the intent to enrich themselves unjustly at the cost of the car customer who bears the ultimate incidence of the 'non-tax'. The matter could not have been unraveled by supervisory checks of the jurisdictional Division / Range staff and without an in-depth investigation by departmental officers based on documents, agreements and statements from officials concerned explaining the whole matter, as was done by DGCEI. Hence the extended period of time under proviso to section 73 of the Finance Act, 1994, for issue of SCN has been correctly invoked.

V) This is a case where tax laws have been subverted by using colourable legal devices like agreements tailor made to serve as a legal cover for blame worthy conduct. Hence penalty has been correctly imposed for a deliberate act of fraud by the appellant. In this situation it scarcely lies in the mouth of the appellant, who played with fire, to complain of burnt fingers.

W) Under the scheme of the Finance Act 1994, interest liability arises automatically by operation of law and has to be paid on delayed or deferred payment of duty for whatever reasons.

53. Based on the above discussions, I find myself unable to concur with the views of the learned Member (Judicial).

54. I hereby reject both the appeals ST/40810/2017 and ST/40198/2020 filed by the appellant and uphold the impugned order.

Sd/-
(**M. AJIT KUMAR**)
Member (Technical)

Rex

DIFFERENCE OF OPINION

In view of the difference of opinion between the Members, the following questions are framed for resolving the difference: -

Whether the appeals is to be allowed by setting aside the impugned orders as held by Member (Judicial)?

(OR)

Whether the appeals is to be dismissed by upholding the impugned orders as held by Member (Technical)?

(Pronounced in court on 25.07.2023)

Sd/-
(M. AJIT KUMAR)
Member (Technical)

Sd/-
(SULEKHA BEEVI C.S.)
Member (Judicial)

Rex