CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.55429 of 2013

(Arising out of Order-in-Original No.38/Commissioner/Meerut-I/2012 dated 23/10/2012 passed by Commissioner of Customs & Central Excise, Meerut-I)

M/s Patanjali Yogpeeth Trust, ...Appellant
(Maharishi Dayanand Gram, Delhi, Haridwar-NH)

VERSUS

Commissioner of Central Excise, Meerut-I ....Respondent
(Opposite CCS University, Mangal Pandey Nagar, Meerut)

APPEARANCE:

Shri Atul Gupta, Advocate &

Shri Prakhar Shukla, Advocate for the Appellant

Shri Sarweshwar T. Khairnar, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70104/2023

DATE OF HEARING : 28 August, 2023
DATE OF PRONOUNCEMENT : 05 October, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original No.38/Commissioner/Meerut-I/2012 dated 23/10/2012 passed by Commissioner of Customs & Central Excise, Meerut-I. By the impugned order following has been held:-

ORDER

i. I hereby confirm the demand of Service Tax amounting to **Rs.4,94,33,027/- (Four Crore Ninety Four Lac**

Thirty Three Thousand and Twenty Seven Only) including E. Cess & S.H.E Cess, under proviso to Section-73(1) of the Finance Act, 1994.

ii. The above said noticee is also liable to pay interest at applicable rates on above said confirmed demand of Service Tax amount, under Section 75 of the Finance Act, 1994.

iii. I hereby impose a penalty on noticee under Section 76 of the Act, for their failure to pay service tax by due dates. The penalty is imposed @ Rs. 200/- (Rs. Two hundred only) for every day (up to 09.05.2008) during which such failure continues or at the rate of 2% of such tax, per month, whichever is higher starting with the first day after the due date till the date of actual payment of the outstanding amount of Service Tax. However, the total amount of the penalty payable in terms of this section shall not exceed the amount of Service Tax payable upto 09.05.2008.

iv. I further, impose a penalty of **Rs.4,94,33,027/- (Four Crore Ninety Four Lac Thirty Three Thousand and Twenty Seven Only)** under Section 78 of the Finance Act, 1994 for their failure to pay Service Tax by suppressing the value of taxable service & also various acts of omission and commission.

v. I also impose a penalty under Section 77 for their failure to take registration in accordance with the provisions of Section 69/ rules made thereunder at the rate of two hundred rupees for every day during which such failure continued, starting with the first day after the due date, till the date of actual compliance;"

2.1 The appellant is engaged in activity of providing services relating to health & fitness by way of teaching yoga and meditation. During the relevant period in dispute appellant had not taken any registration, which is requisite under the Finance Act, 1994 as amended. They were not paying any service tax on the services provided by them.

2.2 Based on the intelligence that appellant-trust working under the aegis of Baba Ramdev and Acharya Balkrishna are inter-alia engaged in providing Yoga training to various residential and non-residential camps. For participation in such camps, a charge of participation fees from the participants on the name of donation was taken. Though this amount was collected at donation but it was fees for providing the said services and hence covered under the definition of consideration.

2.3 Inquiries/investigations were made by Directorate General of Central Excise Intelligence and statements of Shri Shyamvir Singh Saini, Chief Accounts Officer of appellant and Shri Acharya Balkrishna were recorded. Enquiries were made from the various Yog Shivir Ayojan Samities at Varanasi. On the basis of above investigations a show cause notice dated 24.04.2012 was issued to the appellant, asking them to show cause as to why-

*31.1 "An amounting to **Rs.4,94,33,027/- (Four Crore Ninety Four Lac Thirty Three Thousand and Twenty Seven Only)** being Service Tax, E. Cess & H.E Cess, not paid during the period from 01.10.2006 to 31.03.2011, should not be demanded from them under proviso to Section-73(1) of the Finance Act, 1994;*

31.2 Interest under Section 75 of Finance Act, 1994 should not be demanded from them; and

31.3 Penalty should not be imposed upon them under Section 76, 77 & 78 for their various acts of omission and commission as detailed in the previous paras."

2.4 This show cause notice was adjudicated through the impugned Order-in-Original referred in para-1 above. Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Atul Gupta & Shri Prakhar Shukla learned advocates appearing for the appellant and Shri Sarweshwar T. Khairnar learned Authorised Representative appearing for the revenue.

3.2 Arguing for the appellant learned Counsel submits that

- following questions need to be determined in the present case:-
  - Whether providing education to patients regarding Yoga falls under "health and fitness service" defined under Section 65 (51) of the Finance Act, 1994?
  - Whether the donation received in respect of yoga camp was not in quid pro quo for educating regarding yoga because such education was provided free of cost also?
  - Whether the donation received in respect of residential Yoga camp was not in quid pro quo for educating regarding yoga as such amount was used to meet various costs such as food, lodging, medicines, medical tests, etc. and education regarding yoga was free of cost?
  - Whether the amount received as donation was charity and such amount does not form consideration for providing any health and fitness service?
  - When the fact regarding such alleged service/or activity was known to the department then extended period of limitation is available to the department for issuance of the show cause notice?
  - Whether the appellant was entertaining a bona fide belief that the alleged activity was not a taxable service in the facts where the department made a thorough investigation during 2002 to 2005 for the same activities and on contest the department did not take any action to raise a demand of service tax?
  - When the alleged activity was known to public in general as the same was highly publicized activity, then the department was unaware about same activity, so, whether the demand under extended period of limitation can be raised?
  - Whether penalties imposed are sustainable in the facts and circumstances of the case and benefit of Section 80 is not available?

- The activities of the appellant are not taxable under the category of Health and Fitness Services as defined by Section 65 (105) (zw) read with Section 65 (51) and 65 (52) of the Finance Act, 1994 for the reason that word 'yoga' in the said definition has been used in connection with various other words like sauna and steam bath, Turkish bath, solarium, spas, reducing or slimming salons, gymnasium, meditation, massage etc. by applying the principle of noscitur a sociis. It would be evident that only such yoga courses which are for general well-being and not for curing specific ailments not covered yet. Appellant was providing cure for specific agents so not covered under this definition. In residential yoga camps the amounts were charged only for lodging and boarding and not for imparting instructions of yoga which were free of cost. It is evident from the facts that there was no difference in imparting instructions during residential camp to the participants in respect of donations paid by them even some of the participants were not paying any donations.
- Donation was voluntary and was not a consideration for any service to be provided. Income Tax Appellate Tribunal in appellant's own case has held that such receipt of the amount was for charitable purpose and this finding of ITAT was upheld by Hon'ble Delhi High Court.
- Most of the demand is barred by limitation as there was no case for alleging suppression etc. for invoking extended period of limitation, only a small portion of demand of Rs.1,62,957/- falls within the normal period of limitation.
- During 2004-05 certain detailed correspondence were made by the department and M/s Divya Yog Mandir (DYM) in which Shri Acharya Balkrishna, Secretary General of the appellant-trust is also the Secretary of DYM and that time it was stand of DYM that the services are not taxable and all the relevant information has persuaded by the department was furnished and no show cause notice was issued. Accordingly, the appellant-trust headed by the

same person Shri Acharya Balkrishna was under impression that the services are not taxable. Accordingly, invocation of extended period as per proviso to Section 73 (1) is erroneous.

- As extended period cannot be invoked so penalty under Section 78 cannot be imposed on them.
- Further, all the activities in respect of these camps were well advertised in the media and through the news-papers. Any of such residential and non-residential camps were also telecasted all the activities of the trust in relation to organization of these camps was well within the knowledge of public atlases including Department. Hence, extended period could not have been invoked. In support of the above proposition that extended period could not have been invoked, reliance is placed on following judgments:-
  - Shriram Chits Pvt. Ltd. [2023 (69) G.S.T.L. 397 (Tri.-Hyd.)] upheld by dismissing the Civil Appeal filed by the department as reported at 2023 (69) G.S.T.L. 338 (SC);
  - DCM Textiles [2012 (26) S.T.R. 359 (Tri.-Del.)];
  - Hindalco Industries Ltd. [2003 (161) ELT 346 (Tri.-Del.)];
  - Zee Media Corporation Ltd. [2008 (18) GSTL 32 (All.)];
  - M/s. Mount Everest Breweries Limited [FINAL ORDER NO. 50802/2023 dated 03.07.2023];
  - Anand Nishikawa Co. Ltd. [2005 (188) E.L.T. 149 (S.C.)];
  - Cosmic Dye Chemical [1995 (75) E.L.T. 721 (S.C.)];
  - Uniworth Textiles [2013 (288) E.LT. 161(S.C.)];
  - Padmini Products [1989 (43) ELT 195 (SC)];
  - Chemphar Drugs & Liniments [1989 (40) ELT 276 (SC)];
  - Continental Foundation Jt. Venture [2007 (216) ELT 177 (SC)];

- Pushpam Pharmaceuticals Company [1995 (78) ELT 401 (SC)];
- Bharat Hotels Ltd. [2018 (12) GSTL 368 (Del.)];

3.3 Arguing for the revenue learned Authorised Representative submits that-

- Appellant's first length of argument that they are providing these yoga teaching as specific cure for specific diseases. However, such claim is not supported by any documentary or any other evidence. These yoga camps are attended by a general public and the numbers of people attending such camps were resulted into 20 to 25 thousand. The appellant is an establishment as defined under Section 65 (52) for providing health and fitness services from their permanent establishment and through various camps organized at various locations. Thus, even if they are a trust they qualify to be termed as health and fitness establish center under the provisions of service tax law. Hence, they are liable to pay service tax on the amounts collected by them for providing these services.
- The appellants were charging fees under the name of donation and the same has been confirmed by Shri Shyam Singh Saini, Chief Accounts Officer in his statement dated 17.10.2011 & 17.11.2011.
- Different types of members are entitled to participate in residential yoga science camps or any other person is entitled, subject to payment of a fees of Rs.7,000/- or Rs.11,000/-, for which, a receipt is being issued. Though these amounts are termed as donation and in actual, they are consideration for providing these services.
- From the different types of donation coupons issued for participation in non-residential yog science camps and the different or donation coupons carry

seating privileges, this facts has been confirmed by Shri Shyamvir Singh Saini as well as from Shri Alok Jain of Ayojan Samiti in their statement recorded stating that sitting arrangements are of three or four types and sitting arrangements were made according to the denomination of donation coupons i.e. donation coupons of higher denominations puts the person in the front seating and people with lower denominations were made to sit in the back seat of the camp.

- Contention of the appellant that these amounts were collected as donation to the trust, hence, cannot be considered as consideration for providing these services is itself pointing to the suppression made by the appellant. Appellant have been very cleverly taking the consideration received by use of these donation coupons in order to get exemption from payment of service tax.
- Appellant neither registered themselves with the Department nor paid any service tax, a case for suppression is clearly made out against them. Accordingly, extended period of limitation cannot be invoked.
- Contention of the appellant that the investigation/inquiries were made in the year 2004-05 by the department against DYM in which Shri Balkrishna were Secretary General do not obligate the charge of suppression made against the appellant. Charge of suppression is to be examined on the facts of which case and the view taken in the present case when all the evidences pointed that the appellant has wilfully disguised the consideration received as donation, charge of suppression established against them extended period of limitation has been rightly invoked for the confirmed demand.

- As extended period of limitation has been invoked penalties under Section 78 of the Act are justified.
- Commissioner has given appropriate reasons for imposition of penalties under Section 76 and also the demand of interest under Section 75. Appeal needs to be dismissed.

4.1 We have considered the impugned order alongwith the submissions made in the appeal and during the course of arguments.

4.2 In the impugned order Commissioner has observed as follows:-

> *"4.6 The perusal of case record, show cause notice as well defence reply has revealed that the noticee is engaged in rendering the activity of teaching Yoga. It has been admitted by the noticee in their defence reply dated 24.09.2012 stating therein that they are providing services which are for curing ailments but such services are not taxable under "health and fitness service".*
>
> *Section 65(51) defines the "health and fitness service" as under:*
>
> *"health and fitness service" means service for physical well-being such as, sauna and steam bath, turkish bath, solarium, spas, reducing or slimming salons, gymnasium, yoga, meditation, massage (excluding therapeutic massage) or any other like service;*
>
> *A bare perusal of definition reveals that it is a service for physical well being encompassing sauna and steam bath, Turkish bath, solarium, spas, reducing or slimming salons, gymnasium, yoga, meditation, massage (excluding therapeutic massage). The only exception is with regard to massage as it does not cover the therapeutic massage.*

4.7 The noticee has contended that the term 'yoga' in the said definition would include such yoga, which is being provided for physical wellbeing and therefore, it would not include services which are therapeutic in nature, whether it is in the nature of yoga or otherwise. It has further submitted that for a service to be covered under 'health or fitness' service, it is, first of all quintessential that it should be for physical well-being. Thus, yoga provided for such purposes would be covered and not yoga for therapeutic purposes.

4.8 I observe that dispute revolved on the word yoga as appearing in above said definition of "health and fitness service". The notice has alleged that the noticee is providing the health and fitness service by teaching yoga whereas noticee contends that yoga provided for physical well being would only be covered and not yoga for therapeutic purposes.

4.9 I find that the above definition encompasses the activity of Yoga among others, as falling under the category of 'Health and Fitness Services' and the provision of 'health & fitness service' attracts Service tax. Therefore, it is necessary to understand as to what the yoga means in terms of definition of health and fitness service in view of claims of notice and the noticee. It is observed that the meaning of Yoga as described in Wikipedia, (the free encyclopaedia) is as under:

a. *"Yoga (Sanskrit, Päli: jaoga/yoga) is a commonly known generic term for physical, mental and spiritual disciplines which originated in ancient India. Specifically, yoga is one of the six ästika ("orthodox") schools of Hindu philosophy. It is based on the Yoga Sutras of Patanjali. Various traditions of yoga are found in Hinduism, Buddhism, Jainism and Sikhism".*

The website further details that in contemporary times, the physical postures of yoga are used to alleviate health problems, reduce stress and make the spine supple. Yoga is also used as a complete exercise programme and physical therapy routine.

4.10 Essentially, Yoga means union of the mind, body and spirit with the Divine and while this refers to a certain state of consciousness both individual and Universal, it is also a method to help one reach that goal. The teaching of Yoga philosophy can be summarized in 5 principles or the Five Points of Yoga, so as to enable the complex teachings of yoga easy to understand. The following are the five points of yoga:

FIVE POINTS OF YOGA

1. ***Proper Exercise (Asanas) -*** *Yoga poses help develop a strong, healthy body by enhancing flexibility and improving circulation.*
2. ***Proper Breathing (Pranayama) -*** *Deep, conscious breathing reduces stress and many diseases.*
3. ***Proper Relaxation -*** *Helps keep the body from going into overload mode, easing worry and fatigue.*
4. ***Proper Diet-*** *Eating simple, healthy and vegetarian foods that are easy to digest notably have a positive effect on the mind and body, as well as the environment and other living beings.*
5. ***Positive Thinking (Vedanta) and Meditation (Dhyana)-*** *These are the true keys to achieving peace of mind and eliminating negativity in our lives.*

The above points are basics to the teachings imparted in respect of yoga. In fact, these are essential to teach a traditional, exact and easy-to-learn system that aims at naturally achieving the goal through creating a healthy body and mind that leads to spiritual evolvement.

4.11 It is observed that the detailed narrations as above about yoga simply reveal that it cannot be undertaken by

anyone without first gaining the in-depth knowledge of the yoga as enumerated above. The yoga encompasses a tough curriculum which has to be gone through meticulously in order to achieve the benefits of yoga in longer term. The knowledge/teaching about yoga essentially has to be imparted by someone who is adept in such teachings. Further, the study of five points of yoga reveals that it is a curriculum/system of functioning which helps to keep and maintain the physical well being. It is also true that practicing yoga help in curing specific ailment depending upon the body resistance of the person concerned.

4.12 In view of above backdrop, the contention of noticee, that yoga for therapeutic purposes will not be covered by the said definition of "health and fitness service" only tends to impart a new meaning to the definition not provided by the statute. The noticee argues that yoga provided for physical well being would only be covered and not yoga for therapeutic purposes. I find that the definition provides exception only in respect of massage and not to any other activity be it yoga or any other, included in the definition. Thus, it is clear that yoga of all sorts is included in the definition of "health and fitness service". Moreover, had it been the case, the provision would have been made in the statute itself, as had been done in the case of massage (excluding therapeutic massage). Accordingly, the contention of noticee runs contrary to the statutory definition of the 'health and fitness service' and therefore cannot be accepted.

4.13 In this regard, it is observed that the services of Health and Fitness Services, which came under service tax net with effect from 16-08-2002. Accordingly, a Circular F. No. B11/1/2002-TRU, dated 01-08-2002 was issued by the Board on the issue pertaining to Health and fitness services. The said circular has interalia clarified as under:

3. Health and fitness services are provided by clubs, fitness centers, health saloons, hotels, gymnasium and massage centers. The services which fall under this category might be for weight reduction and slimming, physical fitness exercise, gyms, aerobics, yoga, meditation, reiki, sauna and steam bath, Turkish bath, sun bath and massage for general well being. However, therapeutic massage does not come in the ambit of taxable service. Therapeutic massage basically means a massage provided by qualified professionals under medical supervision for curing diseases such as arthritis, chronic low back pain and sciatica etc. Ayurvedic massages, acupressure therapy, etc. given by qualified professionals under medical supervision for curing diseases/disorders will come under the category of therapeutic massages. If the massage is performed without any medical supervision or advice but for the general physical well being of a person, such massages do not come under the purview of therapeutic massages and they would be liable to service tax.

Thus, it is very much clear that the contention of noticee that yoga provided for physical well being would only be covered and not yoga for therapeutic purposes is untenable and therefore cannot be accepted as there no separate demarcation for yoga has been provided, one for physical well being and other for therapeutic purposes. There is no blanket exemption to the activities of therapeutic nature in respect of any other activity in the statutory definition, except of massage. Thus, I find that the activity of teaching yoga undertaken by the noticee would correctly fall under the category of 'Health and Fitness Services'.

The case law relied upon by the noticee is not of much help since the statutory provision are very much clear and do not support their contention.

4.14 Further, as regards the issue of taxability of the service, the taxable service is defined under Section 65(105) (zw) as below:

> *Section 65(105) - "taxable service" means any service provided or to be provided "(zw) - to any person, by a health club and fitness centre in relation to health and fitness services"*
>
> *The definition of 'health club and fitness centre' under Section 65(52) is as under: (52) "health club and fitness centre" means any establishment, including a hotel or a resort, providing health and fitness service;*
>
> *Accordingly, 'health and fitness services' will be taxable only if it is provided by a health club and fitness centre in relation to health and fitness services".*

4.15 It is observed that the service of health and fitness are liable to service tax if the same are provided by a health club and fitness centre. The issue to be decided is as to whether M/s PYPT situated at Maharishi Dayanand Gram, Delhi Haridwar NH, Near Bhadarabad, Haridwar is a health club and fitness centre or not.

ii. It is an admitted fact that M/s Patanjali Yog Peeth Trust is an organization interalia carrying out the activities of teaching yoga at the above said place. The notice has alleged that M/s Patanjali Yogpeeth Trust is covered under the ambit of 'any establishment', as provided under health club and fitness centre, subject to the condition that they must be providing the services of health and fitness. Since they are providing services of health and

fitness by teaching Yoga, therefore it is to be decided whether they would come under the ambit of 'any establishment within the meaning of health club and fitness centre.

iii. The meaning of Establishment is not defined in the Finance Act, 1994 therefore the dictionary meaning has to be seen. The meaning of establishment under various dictionaries is as under:

a. Accurate and Reliable dictionary (a free English-English online dictionary)

i. establishment - an organization founded and united for a specific purpose.

ii. establishment a public or private building structure (business or governmental or educational) including buildings and equipment for business or residence.

iii. establishment - any large organization

iv. establishment the persons (or committees or departments etc) who makeup a body for the purpose of administering something.

b. dictionary.com-an online dictionary

i. establishment - a business organization or large institution

ii. establishment any large organization, institution, or system

iii. establishment - A household or place of residence

iv. establishment - a body of employees of servants

4.16 Thus, from above it can be summarized that an 'establishment' is essentially a large organization or institution founded for a specific purposes. M/s Patanjali Yog Peeth Trust, is no doubt an organization engaged in providing the service of health and fitness by way of teaching yoga. There is no denying of the fact that it is a large organization. Thus, from above, discussion, it is established that M/s PYPT situated at Maharishi Dayanand

Gram, Delhi Haridwar-NH, Near Bhadarabad, Haridwar is an establishment and would come under the purview of health club and fitness centre. Thus, I find that M/s PYPT is an establishment falling under the definition of 'health club and fitness centre', rendering the services of health and fitness by way of teaching Yoga and is therefore, liable to pay service tax in accordance with the provisions of service tax.

4.17 Further as regards the receipt of consideration by the noticee is concerned there is denying of the fact that Chief Accounts Officer of noticee-company, Shri Shyamvir Singh Saini in his statements dated 17.10.2011 and 17.11.2011 has admitted that the main source of income of M/s Patanjali Yogpeeth Trust is from different types of donation, such as the donations received for participation in residential and non-residential yoga shivirs; as membership; and as general donations. The statement and evidences on record like their website http://www.divyayoga.com/free-services.html, which mentions that they are organizing Yoga Science Camps and the people below poverty line are permitted to participate in the Residential and Non Residential Yoga Science Camps held in towns and cities of India from time to time in the benign presence of Yogrishi Swami Ramdevji Maharaj. This clearly goes on to show that other persons have to pay an entry fees for attending the Yog -Science camps. The fees collected from participant ranges from Rs.7000/- onwards and the facilities provided during the camp varies with the amount of entry fees such as AC Rooms, sitting in front row.etc. Thus, it is amply clear that noticee is charging the said fees in the name of donation in rendering the teaching of Yoga. Accordingly, the receipt of money for providing the above said services is nothing but "consideration".

4.18 In the light of discussion as in above said paras, I am of the view that the noticee has admittedly rendered the activity of teaching yoga, which falls under the health and fitness service. As the definition of above said service includes the activity of Yoga as a taxable service, therefore the noticee is liable to pay the service tax amounting to ***Rs.4,94,33,027/- (Four Crore Ninety Four Lac Thirty Three Thousand and Twenty Seven Only)*** *in respect of services of health and fitness rendered by them during the period from 01.10.2006 to 31.03.2011, as demanded in the instant SCN, under proviso to Section 73(1) of the Finance Act, 1994.*

4.19 As regards charging of interest, since the demand of service tax stands confirmed, therefore the assessee is also liable to pay interest under Section 75 of the Finance Act, 1994, as applicable during the relevant period on the above said confirmed amount of service tax.

4.20 Regarding issue of imposition of penalty under Section 76 of the Finance Act, 1994 (upto 09.05.2008), the perusal of case records has revealed that the noticee has not paid service tax on services rendered by them by due date in violation of Section 68 of the Finance Act, 994.

4.21 I find that the noticee has a liability as well responsibility to discharge service tax on services rendered by them but they failed to pay the service tax in time continuously for such a long period. Since, they have violated the provisions of Section 68 of the Finance Act, 1994, therefore they have rendered themselves liable for imposition of penalty under Section 76 of the said Act.

Further, I find that the Section 78 has undergone an amendment in the year 2008, wherein vide Finance Act, 2008, following proviso was inserted:

> *F) in section 78, after the fourth proviso, the following proviso shall be inserted, namely:-*

"Provided also that if the penalty is payable under this section, the provisions of section 76 shall not apply".

In view of above proviso w.e.f. 10.05.2008, the penalty under this Section shall be liable to be imposed only up to 09.05.2008).

4.22 As regards imposition of penalty under Section 77, I find that noticee has failed to take registration in accordance with the provisions of Section 69 or rules made thereunder, therefore the noticee is also liable to pay a penalty under this Section.

4.23 Further, as regards the imposition of penalty under Section 78 of the Act, the noticee has submitted that penalty under Section 78 of the Act can be imposed only for reasons identical to those required for invoking extended period or suppression of any fact with an intention to evade payment of service tax. Therefore, penalty under Section 78 of the Act cannot be imposed.

4.24 It is observed that a trust has been reposed on the service provider so far as the service tax is concerned & accordingly measures like self assessment based on mutual trust & confidence have been put in place. As a result, the private records maintained by the service provider for transacting the normal business are accepted for the service tax purposes. From the evidence laid before me, I find that the assessee had not taken into account the consideration received by them for rendering taxable service for the purpose of payment of service tax and thereby refrained from paying their tax liabilities. The non-payment of service tax on the above said services was a deliberate, conscious attempt to suppress the material fact of receipt of consideration against services rendered by the noticee so as to avoid payment of due service tax as envisaged under Section 68 in utter disregard of Law. Thus, such an act in defiance of law had rendered them

liable for stringent penal action in terms of provisions of Section 78 of the Act, ibid for suppression, concealment and furnishing of incorrect value of taxable service with an intent to evade payment of service tax. In the light of above said discussion, the noticee is liable for penalty under Section 78 of the Finance Act, 1994.

4.25 Further, the noticee has pleaded that penalty under Section 76 & 78 are not imposable simultaneously and has cited a number of case law.

4.26 I have seen the case laws cited by the noticee. However, I find that Hon'ble Kerala High Court in the case of ACCE, vs. Krishna Poduval 2006 (1) STR 185 on the above issue has held as under:

a. *"Penalty (Service tax) Sections 76 and 78 of Finance Act, 1994 Incidents of imposition of penalty are distinct and separate under two provisions and even if offences are committed in course of same transaction or arise out of same act, penalty imposable for ingredients of both offences Person who is guilty of suppression deserve no sympathy under Section 80 ibid Order of Single Judge withdrawing penalty under Section 76 ibid, set aside. [para 11]"*
b. *Similarly, the Hon'ble High Court of Delhi in another case of Bajaj Travels Ltd. vs. CST- 2012 (25) S.T.R. 417 (Del.) has held as under:*

   "Penalty Imposition of Under Sections 76 and 78 of Finance Act, 1994, prior to amendment of Section 78 w.e.f. 16-5-2008 HELD: They operated in two different fields- Penalty was imposable under both separately, even if offences were committed in course of same transactions or arose out of same act" [paras 15, 16]

4.27 Thus, in view of above judgements, I find that there is no bar as to not impose the penalty under both the sections simultaneously since both are separate and for

distinct purposes. Therefore, in view of above, the plea of noticee fails to sustain."

4.3 It is very clear that appellant itself observed that at the time of hearing the stay application after considering the various arguments on the issue of taxability of activities undertaken by the appellant, the Bench had observed as follows:-

"6. The subject matter of dispute in this case is various residential as well as non-residential yoga courses being organized by the appellant. There is no dispute that in respect of residential as well as non- residential yoga courses being organized by the appellant some amount are being collected from the participants. Section 65 (105) (zw) of the Finance Act, 1994 makes the services provided by "health club and fitness centre", as defined under Section 65 (52) to any person taxable. Under Section 65 (52) of the Finance Act, 1994 'health club and fitness centre means any establishment including the hotel or a resort, providing health and fitness service. Under Section 65 (51), 'health and fitness service' means "service for physical well being such as sauna and steam bath, Turkish bath, solarium, spas, reducing or slimming salons, gymnasium, yoga, meditation, massage (excluding therapeutic massage) or any other like service. Thus, what is covered under the definition of health and fitness service' is basically the services for physical well being and the definition specifically mentions yoga as the service meant for physical well being. Therefore, we are of the prima facie view that the various yoga courses, residential as well as non- residential, being organized by the appellant are for general physical well being and there is nothing on record to prove, that these courses are meant for specific element. In view of this, we do not accept the appellant's plea that their services are not covered by the definition of health and fitness service. Beside this, there is also no dispute that the appellant, which are a trust, are

covered by the definition of "health, club and fitness centre" as this definition covers any establishment including a hotel or a resort providing the health and fitness service. We also of prima facie view that there is no substance in the appellant's plea that the amounts being charged by them in respect of residential courses are not for yoga courses but are the amount charged only for food and accommodation, and for this reason, no service tax is payable, as in terms of provisions of Section 67, the service tax on this services is chargeable on the gross amount charged, which, in any case, would include even the expenses incurred accommodation as well as for organizing the courses."

4.4 We do not have any reasons before us to differ with the findings recorded by the bench earlier. In our view the appellant was engaged in providing the services that were classifiable under the taxable category of services provided by "health club and fitness centre", as defined under Section 65 (52) to any person. The phrase *"Yoga"* and *"Meditation"* have been specifically mentioned in the definition of *'health and fitness service'* as defined under Section 65 (51) of the Finance Act, 1994. The claim of the appellant that they are providing treatment for specific ailments being suffered by the person is not supported by any positive evidence. Instructions on 'Yoga' and "Meditation" in these camps are not imparted to individual but to the entire gathering together. No prescriptions are made for any individual in writing, diagnosing and treating the specific ailment/ complaint of any individual. In para 4.6 to 4.16 of the impugned order, Commissioner has thread bare discussed this aspect and we are in complete agreement with the findings recorded.

4.5 Appellant has in fact collected the entry fee to event organized as Yoga camp - both residential and non residential from the participants, disguising it as "Donation". They issued the entry ticket of various denominations. The holder of the

ticket was granted different privileges depending on the denomination of the ticket. In return the appellant provided the person entry to camp where, Swami Baba Ramdev would give instructions in respect of Yoga and Meditation. Appellant has relied upon the decision rendered by the Hon'ble Delhi High Court in their own case in ITA 886/2017, (Order date 23.10.2017). The said order is in respect of series of question of law framed by the Income Tax department and finding that many of the questions do not give rise to the question of law or the decision of ITAT was based on appreciation of fact in hand have refused to admit some of these questions and have admitted only following questions for their consideration-

"12. So far as the other issues are concerned, the following questions of law arise:

I. "Whether ld. ITAT erred in law in holding that assessee is entitled to exemption u/s 11 & 12 of the Income Tax Act, 1961?

II. Whether ld. ITAT has erred in law in allowing capital expenditure though the assessee has no legal right on the land on which capital expenditure has been incurred?

III. Whether ld. ITAT has erred in law and on the facts of the case in holding that the corpus donations received by the assessee in the form of immovable properties will not be liable to tax?"

13. The appeal is admitted, restricted to the above questions of law."

4.6 Word Donation has roots in Latin word *donationem* "give as a gift" from Sanskrit *danam* "offering, present" a voluntary gift, to give without wanting anything in exchange, a voluntary and anonymous financial gift. As per general understanding A donation is a gift - usually one of a charitable nature. A donation is a voluntary transfer of property (often money) from the transferor (donor) to the transferee (donee) with no exchange of value (consideration) on the part of the recipient (donee). The

recipient gives nothing in exchange for the donated money/ property.

4.7 Fee, originally denoting an estate held on condition of feudal service: from Old French feu, from Latin feodum; related to FEUDAL, FIEF. A fixed charge for a privilege or for professional services, for entrance or a payment made in exchange for advice or services, a charge made for a privilege such as admission.

4.8 Explanation given on University of Cambridge, Finance Division webpage assessed at *https://www.finance.admin.cam.ac.uk/policy-and-procedures/financial-procedures/chapter-14-accounting-donations-and-grants/scope-2, reads as follows:*

> *"**Definition - What is a donation?***
> *To be classed as a donation or grant, a receipt of funds or assets must have been freely given, with no consequent obligation on the University to provide goods or services to the benefit of the donor.*
>
> *Income is often described as a 'donation' when in reality, if you look a little deeper into where it has come from and why you may find that it is not. Therefore, in deciding whether income may be treated as donation income, Departments need:*
>
> - *to identify whether the funded activity is research which needs to be processed through the Research Operations Office (ROO); and*
> - *whether the funded activity creates a trading relationship with the funder.*
>
> ***What income should be processed through ROO?***
>
> *It is not always easy to differentiate a donation from a research grant. As a general rule, a research grant will be for a specific piece of research activity e.g. to examine the relationship between shark migration and global warming, whereas a donation will be much more general e.g. to fund the research and other activities of Professor Plum.*

…..

What makes income a trading activity?

Trading income is income earned by a department from either another university department or an external customer, for the provision of goods or services, or for the use of space or facilities. ***Therefore, for the income to be a donation it is important to ensure that a funder, or provider of a grant, receives nothing in return."***

From the above it is quite evident that the amounts received by the appellant as donation, was nothing but the consideration for the provision of service taxable under the category of Health and Fitness services. This fact these donations were the source of income of the trust has been admitted by the Chief Accounts Officer of noticee-company, Shri Shyamvir Singh Saini in his statements dated 17.10.2011 and 17.11.2011. The entire submission made by the appellant in their defence is contrary to the Income & Expenditure Statement which is part of their balance sheet for the period 2010-11. The relevant extract from the said statement is reproduced below:

		Schedule No	Current Year 2010-11	Previous Year 2009-10
1	**2**	**3**	**4**	**5**
I	Income			
	Donation Received	11	800026159.91	559026871.31
	Patient Treatment Charges		22723603.00	6637023.00
	Interest Income	12	1129205.63	271922.35
	Other Income	13	6984409.00	548561.00
	Total		830863377.54	566484377.66
II	Expenditure			
	Shivir Expenses		426603.00	1911484.00
	Total		235733760.18	114301467.46
Excess of Income over Expenditure T/T Balance Sheet			595129617.36	452182910.20

From the above it is quite evident that the patient treatment charges are which collect from their patients for providing specific treatments is not the part of the donation received and is accounted separately. Thus the argument that these amounts collected by them as donations in the residential camp and non

residential camps is towards the patients treatment is demolished by their balance sheet. Further it is observed that the appellant is earning profits reflected as excess income over expenditure and same is reflected in their balance sheet. As per the balance Sheet for the year ending 31.03.2009, Appellant has received total donation of Rs 69,88,84,257/-. As per the Certificate of their Chartered Accountant dated 09.04.2012 (page 177 of paper book) the breakup of donation is as follows:

	Particulars	Amount (Rs)
1	General Donations	39,32,81,331.00
2	Donation Membership	14,76,01,036.00
3	Donation Received in Camps	15,80,01,890.50
	Total	69,88,84,257.50

From the annexure 1 to show cause notice it is quite evident that the demand for the year 2008-09 is made only by taking the donations received in camps and not any other donations. The entire case of the revenue is that these amounts received as donation for the camps are nothing but consideration charge from the participants for the taxable service provided by the appellant in these residential and non residential camps.

4.9 The demand has been made on the amounts received by the trust in the garb of donation. Annexure 1 to the Show Cause Notice whereby the amount of demand has been worked out is reproduced below:

Period	Amount of Camp Donations (In Rs)	Value taxable Service	Rate of Service tax, Education Cess & Higher Education Cess	Service Tax (In Rs)	Education Cess (In Rs)	Higher Education Cess (In Rs)	Total (In Rs)
01.10.06 - 10.05.07	148301133.8	132128593.9	12% + 2%	15855431	317109	0	16172540
11.05.07 - 23.02.09	254166461.2	226207245.7	12% + 2% + 1%	27144869	542897	271449	27959216
24.02.09- 31.03.11	56769930.1	51468658.3	12% + 2% + 1%	5146866	102937	51469	5301272
TOTAL	459237525	409804498		48147167	962943	322917	49433027

Figures of donations have been worked out in the Annexure 1 a to the Show Cause Notice. Relevant parts of said Annexure is reproduced below:

	Period	Amount of Donation Received During the period	Remark
I	01.10.2006 to 31.03.2007	134589683.64	
	01.04.2007 to 10.05.2007	13711450.16	Pro-rata 40 days
	01.10.2006 to 10.05.2007	148301133.8	
II	11.05.2007 to 31.03.2008	111748318.84	Pro-rata 326 days
	01.04.2008 to 23.02.2009	142418142.40	Pro-rata 329 days
	11.05.2007 to 23.02.2009	254166461.24	
III	24.02.2009 to 31.03.2009	15583748.10	Pro rata 36 days
	01.04.2009 to 31.03.2010	29604372.00	As per CA Certificate
	01.04.2010 to 31.03.2011	11581810.00	As per CA Certificate
	24.02.2009 to 31.03.2011	56769930.10	

The figures of donations received at camp have been furnished by the appellant as per the Chartered Accountant Certificate dated 21.01.2012 (Page 355 of Paper Book) as per the following table:

Period	Residential Camps	Non Residential Camps		Donation Received Yoga Teacher	Total Amount as per Books of Accounts
		Coupons Donation	General Donation		
2006-07 From 01.10.2006)	5538171	99936219	3441845	1000	108917235
2007-08	1245000	86962528	7878630	29373611	125459769
2008-09	22899200	72137521	713854	62251316	158001891
2009-10	0	0	0	29604372	29604372
01.04.10 to 30.09.10	7126930	0	0	2879375	10006305
1.10.10 to 31.03.11	7000	0	0	1568505	1575505
Total	36816301	259036268	12034329	125678179	433565077

From the figures as indicated in the two tables above it is quite evident that the total value of donations received during the period from 01.04.2007 to 31.03.2011 are completely tallying. There is some difference in the value of donation as indicated in the table for making the demand for period from 01.10.2006 to 31.03.2007, which needs to be reconciled. Further benefit of cum tax price as per Section 67 has been allowed while working out the value of taxable service in Annexure 1. Entire issue of determination of taxable value and quantification of service tax demand has been dealt in para 4.17 of the impugned order.

4.10 The serious challenge has been made to the demand on the issue of Limitation. Appellant submit that they were under a bonafide belief that no service tax was leviable on the activities of rendering services of teaching of yoga and meditation. This belief was based on certain correspondences undertaken between Divya Yoga Mandir (DVM) in which Shri Acharya Balkrishna was Secretary General and the department in the year 2004-05. They have produced the copies of the correspondence which are at page 304 to 400 of the paper book.

They have placed reliance on a series of the decisions to buttress their argument that extended period of limitation could not have been invoked in this case. It is settled principle in law that existence of ingredients leading to invocation of extended period of limitation is a "question of the fact" and the facts of the case in hand will determine whether the extended period of limitation could have been invoked, unlike the "question of law" where the determination can be made on the basis of the available judicial precedents. Further being a charitable trust or body is not the certificate for holding that the appellant cannot have any intention to evade payment of taxes. In case of Bhatnagar Education and Research Trust [(2021) 9 SCC 439], Hon'ble Supreme Court has upheld the order cancellation of the registration as trust by Commissioner Income Tax on finding the irregularities committed by the trust. Hon'ble Supreme Court held as follows:

> *"11. The answers given to the questionnaire by the Managing Trustee of the Trust show the extent of misuse of the status enjoyed by the Trust by virtue of registration under Section 12AA of the Act.*
>
> *These answers also show that donations were received by way of cheques out of which substantial money was ploughed back or returned to the donors in cash. The facts thus clearly show that those were bogus donations and that the registration conferred upon it under Sections 12AA and 80G of the Act was completely being misused by the Trust. An entity which is misusing the status conferred upon it by Section 12AA of the Act is not entitled to retain and enjoy said status. The authorities were therefore, right and justified in cancelling the registration under Sections 12AA and 80G of the Act.*
>
> *12 The High Court completely erred in entertaining the appeal under Section 260A of the Act. It did not even attempt to deal with the answers to the questions as*

aforesaid and whether the conclusions drawn by the CIT and the Tribunal were in any way incorrect or invalid."

4.11 The fact that in case of sister concern in which Shri Acharya Balkrishna was Secretary General certain investigations/ enquiries were being made will not make the appellant immune from the charge of suppression etc., required to be establish for invoking the extended period of limitation. Each case and each period has to be examined for the existence of these ingredients on the facts and evidence available for the said period. More so over in the case of self assessment where the complete trsut has been placed on the assesses to conduct their business transparently and file their tax returns accordingly. Any misdemeanor to suppress the income in guise of donation if established is enough to invoke the charge of suppression for that period. In our view the appellant has suppressed the fact that they have received consideration for the provision of these services and collected the same from the participants in residential and non residential camps by reflecting the same as donation on the receipts and the book of accounts. This suppression was clearly with the intent to evade payment of service tax. Commissioner has while discussing the issue for imposition of penalty under Section 78, has in para 4.23 and 4.24 considered the issue of suppression and has rendered the finding against the appellant in this respect. We also place reliance on the following decisions wherein various courts and tribunal has held in invocation of extended period of limitation in similar circumstances. In case of Neminath Fabrics [2010 (256) E.L.T. 369 (Guj.)], Hon'ble Gujarat High Court has held as follows:

"14. Thus the scheme that unfolds is that in case of non levy where there is no fraud, collusion, etc., it is open to the Central Excise Officer to issue a show cause notice for recovery of duty of excise which has not been levied, etc. The show cause notice for recovery has to be served within one year from the relevant date. However, where fraud,

collusion, etc., stands established the period within which the show cause notice has to be served stands enlarged by substitution of the words "one year" by the words "five years". In other words the show cause notice for recovery of such duty of excise not levied etc., can be served within five years from the relevant date.

15. To put it differently, the proviso merely provides for a situation whereunder the provisions of sub-section (1) are recast by the legislature itself extending the period within which the show cause notice for recovery of duty of excise not levied etc. gets enlarged. This position becomes clear when one reads the Explanation in the said sub-section which only says that the period stated as to service of notice shall be excluded in computing the aforesaid period of "one year" or "five years" as the case may be.

16. The termini from which the period of "one year" or "five years" has to be computed is the relevant date which has been defined in sub-section (3)(ii) of Section 11A of the Act. A plain reading of the said definition shows that the concept of knowledge by the departmental authority is entirely absent. Hence, if one imports such concept in sub-section (1) of Section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court. If it is not open to the superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal.

17. The proviso cannot be read to mean that because there is knowledge the suppression which stands established disappears. Similarly the concept of reasonable period of limitation which is sought to be read into the provision by some of the orders of the Tribunal also cannot be permitted in law when the statute itself has provided for a fixed period of limitation. It is equally well settled that it is not open to the Court while reading a provision to either

rewrite the period of limitation or curtail the prescribed period of limitation.

18. The Proviso comes into play only when suppression etc. is established or stands admitted. It would differ from a case where fraud, etc. are merely alleged and are disputed by an assessee. Hence, by no stretch of imagination the concept of knowledge can be read into the provisions because that would tantamount to rendering the defined term "relevant date" nugatory and such an interpretation is not permissible.

19. The language employed in the proviso to sub-section (1) of Section 11A, is, clear and unambiguous and makes it abundantly clear that moment there is non-levy or short levy etc. of central excise duty with intention to evade payment of duty for any of the reasons specified thereunder, the proviso would come into operation and the period of limitation would stand extended from one year to five years. This is the only requirement of the provision. Once it is found that the ingredients of the proviso are satisfied, all that has to be seen as to what is the relevant date and as to whether the show cause notice has been served within a period of five years therefrom.

20. Thus, what has been prescribed under the statute is that upon the reasons stipulated under the proviso being satisfied, the period of limitation for service of show cause notice under sub-section (1) of Section 11A, stands extended to five years from the relevant date. The period cannot by reason of any decision of a Court or even by subordinate legislation be either curtailed or enhanced. In the present case as well as in the decisions on which reliance has been placed by the learned advocate for the respondent, the Tribunal has introduced a novel concept of date of knowledge and has imported into the proviso a new period of limitation of six months from the date of knowledge. The reasoning appears to be that once

knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of Section 11A would be applicable. However such reasoning appears to be fallacious inasmuch as once the suppression is admitted, merely because the department acquires knowledge of the irregularities the suppression would not be obliterated."

4.12 In case of Usha Rectifier [2011 (263) E.L.T. 655 (S.C.)], Hon'ble Supreme Court observed as follows:

"12. *Submission was also made regarding use of the extended period limitation contending inter alia that such extended period of limitation could not have been used by the respondent. The aforesaid contention is also found to be without any merit as the appellant has not obtained L-4 licence nor they had disclosed the fact of manufacturing of the aforesaid goods to the department. The aforesaid knowledge of manufacture came to be acquired by the department only subsequently and in view of non-disclosure of such information by the appellant and suppression of relevant facts, the extended period of limitation was rightly invoked by the department."*

4.13 In the case of Mehta & Co [2011 (264) E.L.T. 481 (S.C.)], Hon'ble Apex Court has held as follows:

"22. *Consequently, we propose to look into the first issue in the light of the background facts as stated hereinbefore. The specific case of the appellant is that the respondent having manufactured the excisable goods covered under different chapter headings, removed them without payment of proper duty of excise and that from the aforesaid action it is explicit that there was an intention on the part of the respondent to evade payment of duty particularly when the contract clause between the respondent and M/s. Adyar Gate Hotel Ltd. clearly*

mentioned that the contractors quoted rate would also include excise duty.

23. *Although, the respondent has pleaded that it was done out of ignorance, but in our considered opinion there appears to be an intention to evade excise duty and contravention of the provisions of the Act. Therefore, proviso of Section 11A (1) of the Act would get attracted to the facts and circumstances of the present case.*

24. *The cause of action, i.e., date of knowledge could be attributed to the appellant in the year 1997 when in compliance of the memo issued by the appellant and also the summons issued, the hotel furnished its reply setting out the details of the work done by the appellant amounting to Rs. 991.66 lakhs and at that stage only the department came to know that the work order was to carry out the job for furniture also. A bare perusal of the records shows that the aforesaid reply was sent by the respondent on receipt of a letter issued by the Commissioner of Central Excise on 27-2-1997. If the period of limitation of five years is computed from the aforesaid date, the show cause notice having been issued on 15-5-2000, the demand made was clearly within the period of limitation as prescribed, which is five years."*

4.14 In the case of ICICI Econet Internet & Technology Fund [2021 (51) G.S.T.L. 36 (Tri. - Bang.)], Bangalore bench has observed as follows:

46. We find that the appellants have argued that this is a matter of interpretation and all the information being in public domain, suppression of any material fact with intent to evade payment of duty cannot be alleged. The appellants have relied upon this Bench's decision in the case of Gateway Hotels, 2020 (37) G.S.T.L. 210 (Tri. - Bang.). We find that in that case, the fact was that the appellants have been filing the returns regularly and there was a confusion regarding the correct position of law

during the relevant time. The facts of the case are different. ***It cannot be argued that suppression cannot be alleged as the information is in the public domain. Information being in the public domain is not of any consequence. The information should be in the knowledge or made available to the authorities concerned who need to take a certain decision depending on such information. It is not the case of the appellants that they have been paying applicable service tax on getting registered and have been submitting regular returns to service tax authorities. It is not the case of the appellants that the material information available in the form of various contracts/agreements and balance sheets/ledgers have been submitted to the Department suo motu by the appellants. It is only after investigation has been initiated, the necessary documents were submitted. Thus, the information available in the public domain is of no avail.*** *We find that Learned Adjudicating Authority has rightly relied upon in the case of CCE, Calicut v. Steel Industries Kerala Ltd., 2005 (188) E.L.T. 33 (Tri. - Bang.) wherein it is held at Para 3 as under :*

> *"3. We find that in the case of Maruti Udyog Ltd. v. CCE, New Delhi, 2001 (134) E.L.T. 269, the Tribunal has upheld the invocation of the extended period of limitation when the assessees did not declare waste and scrap of iron and steel and aluminium and availment of credit therein either in their classification list or modvat declaration or in the statutory records. The Tribunal held that the theory of universal knowledge cannot be attributed to the department in the absence of any declaration."*

4.15 In case of Air India Ltd. [2017 (3) G.S.T.L. 374 (Tri. – Del)], Delhi Bench has held as follows:

> ***"12.*** *Next, we consider the ground of limitation raised by AIL. The contention of AIL is that no allegation of suppression can be fastened against them since the activities of AIL were within the knowledge of the department during the relevant period. Specifically the appellant had cited a letter dated 7-3-2006 written to the Joint Director of Service Tax to inform the various heads under which it was raising bills on AASL. Further, it has been contended that AIL had not paid service tax under the bona fide belief that it is not payable since AIL had not received payment from AASL.*
>
> *In the annual report 2003-04, it is mentioned "Non-charging of service tax on certain services". This implies that even where service tax has been collected the same was not deposited pending registration. It has also been recorded by the statutory auditors that service tax was payable on the services rendered by AIL to AASL. However, on the pretext that consideration has not been received (despite realization of the same from sale of tickets conducted on behalf of AASL), AIL has not discharged the service tax liability. In the light of the observations of the statutory auditors, We are not convinced with the argument taken by appellants that service tax was not paid on the basis of bona fide belief that service tax was not payable. Consequently, we are concluding that Revenue is entitled to invoke the extended period of limitation in this case."*

4.16 In case of TATA Steel Ltd. [2016 (41) S.T.R. 689 (Tri. - Mumbai)], Mumbai bench held as follows:

> *"48. The invocation of the extended period of limitation is a mixed question of facts and law and is mainly based upon the facts of individual cases. During the relevant period the appellant had not taken registration under the Banking and Financial Services and hence they did not file the ST-3 returns. In the absence of registration and the*

non-filing of the return, the material fact about the receipt of the above mentioned services was completely suppressed from the department. It is noted that, in the present case, the demand being confirmed is for the period 1-4-2006 to 31-3-2007. Even in this period, a demand of ` 69,132/- is for the period 1-4-2006 to 30-9-2006 and the remaining demand is for the period 1-10-2006 to 31-3-2007. I find from the chronological sequence of events submitted by the appellant along with the appeal that, department, as early as 12-7-2007 asked the details of overseas payments towards external commercial borrowings for three years. Certain details were furnished by the appellant on 22-8-2007. Thereafter, on 27-8-2007 department informed the appellant, that they are liable to pay Service Tax under Banking and Financial Services as recipient of the service. The appellants, however, did not follow the directions of the department. In the meantime, similar issue relating to convertible alternative reference securities and letter of credit also came up for which the appellant made payments on 12-10-2007 and on 4-1-2008. Since the appellant did not pay the service tax on the MLA and Agent Bank's service under consideration, the department issued summons to Shri Praveen Sood, an officer of the appellant. The department again asked the appellant for furnishing the details on 21-7-2008 and from the chronology of events it is evident that the appellant submitted all the required details vide their letter dated 5-11-2008. Thereafter on 1-4-2009, the demand notice was issued. It would thus be seen that the department had informed the appellant as early as on 27-8-2007 about the duty liability and asked them to pay the service tax and the delay in the issuance of the show cause notice was only because of the information required for issuance of the show cause notice was submitted by the appellant vide their letter dated 5-11-2008 received in the department on 14-11-2008. Further, it is observed that the appellant did

not take any registration for the said service and no returns were filed for the relevant period and in the absence of the information either from the return or submission from the appellant it is practically not possible for the department to issue show cause notice. In view of the above factual matrix it is not possible to accept the contention that the appellant had a bona fide doubt. In my view, even if they had a bona fide doubt, they should have provided the precise information in July, 2007 itself so that the show cause notice could have been issued within the normal period of limitation. I also find that the Member (Judicial) has observed that the information was available in the balance sheet, etc. In my considered view, the information should be provided to the concerned jurisdictional assessing authority. The balance sheet may be providing some details but these generally do not provide the precise details to enable the department to issue demand notice. In any case the balance sheet may be a public document but the question is whether the balance sheet or information was given to the assessing authorities. In the present case, the appellants did not provide the information in July, 2007. They did not pay the tax as per the direction of the letter dated 27-8-2007. Under the circumstances, I am of the view that the relevant information was suppressed from the department and extended period of limitation has been correctly invoked."

4.17 In case of Ideal Security [2011 (23) S.T.R. 66 (Tri. - Del.)], Delhi bench held as follows:

"7. When we look into para 7 of the appellate order, we are able to confirm that there was difference in two sets of documents that were relied upon by the appellant. One such document was ST-3 return and the second one is its own balance sheet and profit and loss account. The authority recorded that the appellant failed to explain the

difference. Therefore, the disclosure being found to be faulty, adjudication was completed on the basis of figures appearing in its financial statements. The authority did not give any concession on the statutory dues. It comes out from Para 8 & 9 of the appellate order at page 10.

8. So far as the contention of the appellant in respect of time bar issue and also adjudication under Section 73 is concerned, the appellate authority dealt with the issue in para 10 and he found that one of the element like suppression, which is essential ingredient in Section 73 is present. Therefore, he held that the proceeding was well within time. When he found all these aspects, he made the appellant liable to pay penalty also. He did not give any concession in respect of penalty.

9. We do agree with the ld. Appellate Authority in the matter of the discrepancy noticed by him in respect of the considerations received and appearing in different manner in two different statutory documents. While the ST 3 return was statutory document under Finance Act, 1994, the balance-sheet and profit and loss account were statutory documents under Companies Act, 1956. Therefore, when the public documents bring the discrepancy, the onus of proof was on the assessee to come out with clean hand to prove its stand. When we did not find any merit on the part of appellant, we agree with ld. appellate authority that invoking Section 73 is appropriate."

4.18 Since we have concluded that appellant had suppressed the material facts with intent to evade payment of service tax, the penalty under Section 78 shall be natural consequence as has been held by Hon'ble Supreme Court in case of Rajasthan Spinning and Weaving Mills [2008 (239) ELT 3 (SC)]. Relevant extract of the said decision is reproduced below:

"17. The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject

to which and the extent to which the penalty may be reduced.

18. One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "....by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assessees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of deception by the assessee by adopting a means as indicated in Section 11AC.

19. From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section.

20. At this stage, we need to examine the recent decision of this Court in Dharamendra Textile (supra). In almost every case relating to penalty, the decision is referred to on behalf of the Revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textile and we see no reason to understand or read that decision in that manner. In Dharamendra Textile the court framed the issues before it, in paragraph 2 of the decision, as follows :

> *"2. A Division Bench of this Court has referred the controversy involved in these appeals to a larger Bench doubting the correctness of the view expressed in Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai & Anr. [2007 (8) SCALE 304]. The question which arises for determination in all these appeals is whether Section 11AC of the Central Excise Act, 1944 (in short the "Act') inserted by Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain mens rea as an essential ingredient and whether there is a scope for levying penalty below the prescribed minimum. Before the Division Bench, stand of the revenue was that said section should be read as penalty for statutory offence and the authority imposing penalty has no discretion in the matter of imposition of penalty and the adjudicating authority in such cases was duty bound to impose penalty equal to the duties so determined. The assessee on the other hand referred to Section 271(1)(c) of the Income Tax Act, 1961 (in short the IT Act') taking the stand that Section 11AC of the Act is identically worded and in a given case it was open to the assessing officer not to impose any penalty. The Division Bench*

made reference to Rule 96ZQ and Rule 96ZO of the Central Excise Rules, 1944 (in short the "Rules') and a decision of this Court in Chairman, SEBI v. Shriram Mutual Fund & Anr. [2006 (5) SCC 361] and was of the view that the basic scheme for imposition of penalty under section 271(1)(c) of IT Act, Section 11AC of the Act and Rule 96ZQ(5) of the Rules is common. According to the Division Bench the correct position in law was laid down in Chairman, SEBI's case (supra) and not in Dilip Shroff's case (supra). Therefore, the matter was referred to a larger Bench."

After referring to a number of decisions on interpretation and construction of statutory provisions, in paragraphs 26 and 27 of the decision, the court observed and held as follows :

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

"27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered.....".

21. From the above, we fail to see how the decision in Dharamendra Textile can be said to hold that Section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

22. There is another very strong reason for holding that Dharamendra Textile could not have interpreted Section 11AC in the manner as suggested because in that case that was not even the stand of the revenue. In paragraph 5 of the decision the court noted the submission made on behalf of the revenue as follows :

> *"5. Mr. Chandrashekharan, Additional Solicitor General submitted that in Rules 96ZQ and 96ZO there is no reference to any mens rea as in section 11AC where mens rea is prescribed statutorily. This is clear from the extended period of limitation permissible under Section 11A of the Act. It is in essence submitted that the penalty is for statutory offence. It is pointed out that the proviso to Section 11A deals with the time for initiation of action. Section 11AC is only a mechanism for computation and the quantum of penalty. It is stated that the consequences of fraud etc. relate to the extended period of limitation and the onus is on the revenue to establish that the extended period of limitation is applicable. Once that hurdle is crossed by the revenue, the assessee is exposed to penalty and the quantum of penalty is fixed. It is pointed out that even if in some statues mens rea is specifically provided for, so is the limit or imposition of penalty, that is the maximum fixed or the quantum has to be between two limits fixed. In the cases at hand, there is no variable and, therefore, no discretion. It is pointed out that prior to insertion of Section 11AC, Rule 173Q was in vogue in which no mens rea was provided for. It only stated "which he knows or has reason to believe". The said clause referred to wilful action. According to learned counsel what was inferentially provided in some respects in Rule 173Q, now stands explicitly provided in Section 11AC. Where the outer limit of penalty is fixed and the*

statute provides that it should not exceed a particular limit, that itself indicates scope for discretion but that is not the case here."

23. The decision in Dharamendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides."

4.18 Relying on certain decisions, Commissioner has in the impugned order concluded that penalty can simultaneously imposed under Section 76 and Section 78 of Finance Act, 1994 upto 09.05.2008. In view of the amendments made effective from 10.05.2008 by the Finance Act, 2008, the penalty if imposed under Section 78 the same could not have been imposed under 76. The text of the amendment as effective from 10.05.2008 is reproduced below:

''90 In the Finance Act, 1994,-

(F) in section 78, after the fourth proviso, the following proviso shall be inserted, namely:—

Provided also that if the penalty is payable under this section, the provisions of section 76 shall not apply.";

Thus impugned order to the extent it imposes penalty under Section 76 for the period prior to10.05.2008 cannot be faulted as it is based on the decisions of High Courts as referred in the impugned order. Hon'ble Gujarat High Court has in case of Port Officer [2010 (257) E.L.T. 37 (Guj.)] held as follows:

"10. A plain reading of Section 76 of the Act indicates that a person who is liable to pay service tax and who has failed to pay such tax is under an obligation to pay, in addition to the tax so payable and interest on such tax, a

penalty for such failure. The quantum of penalty has been specified in the provision by laying down the minimum and the maximum limits with a further cap in so far as the maximum limit is concerned. The provision stipulates that the person, who has failed to pay service tax, shall pay, in addition to the tax and interest, a penalty which shall not be less than one hundred rupees per day but which may extend to two hundred rupees for everyday during which the failure continues, subject to the maximum penalty not exceeding the amount of service tax which was not paid. So far as Section 76 of the Act is concerned, it is not possible to read any further discretion, further than the discretion provided by the legislature when legislature has prescribed the minimum and the maximum limits. The discretion vested in the authority is to levy minimum penalty commencing from one hundred rupees per day on default, which is extendable to two hundred rupees per day, subject to a cap of not exceeding the amount of service tax payable. From this discretion it is not possible to read a further discretion being vested in the authority so as to entitle the authority to levy a penalty below the stipulated limit of one hundred rupees per day. The moment one reads such further discretion in the provision it would amount to re-writing the provision which, as per settled canon of interpretation, is not permissible. It is not as if the provision is couched in a manner so as to lead to absurdity if it is read in a plain manner. Nor is it possible to state that the provision does not further the object of the Statute or violates the legislative intent when read as it stands. Hence, Section 76 of the Act as it stands does not give any discretion to the authority to reduce the penalty below the minimum prescribed."

4.19 It is also noticed that the penalties under Section 76 and 77 are for the violation done and are absolute in nature if certain violations are attributable to the appellant. In the present case undoubtedly appellant had failed to take registration as required

even though he was providing the taxable services. It is also the fact that they were not paying service tax and not filing the returns as required under provisions of Service Tax law, i.e Chapter V of Finance Act, 1994 and Service Tax Rules, 1994. For the contraventions of these provisions penalty imposed on the appellant under Section 76 and 77 cannot be faulted with. In case of Gujarat Travancore Agency [1989 (42) ELT 350 (SC)], Hon'ble Supreme Court has held as follows:

> *"3. At the instance of the Revenue the Appellate Tribunal referred the question set forth earlier to the High Court of Kerala. It may be mentioned that another question was also referred, which related to the Appellate Tribunal entertaining the additional ground of appeal, but the appeals before us are not concerned with that question. The question with which we are concerned was referred to a Full Bench of the High Court, and the High Court has taken the view that mens rea need not be established before penalty is imposed under Section 271(1)(a) of the Act, and that, therefore, the Appellate Tribunal was not justified in cancelling the penalties levied for the two assessment years.*
>
> *4. Learned Counsel for the assessee has addressed an exhaustive argument before us on the question whether a penalty imposed under Section 271(1)(a) of the Act involves the element of mens rea and in support of his submission that it does he has placed before us several cases decided by this Court and the High Courts in order to demonstrate that the proceedings by way of penalty under Section 271(1)(a) of the Act are quasi criminal in nature and that, therefore, the element of mens rea is a mandatory requirement before a penalty can be imposed under Section 271(1)(a). We are relieved of the necessity of referring to all those decisions. Indeed, many of them were considered by the High Court and are referred to in the judgment under appeal. It is sufficient for us to refer to*

Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what it intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by Statute proceeds on the assumption that society suffers injury by and the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum Volume 85, page 580, Paragraph 1023 :

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

5. Accordingly, we hold that the element of mens rea was not required to be proved in the proceedings taken by the Income Tax Officer under Section 271(1)(a) of the Income-tax Act against the assessee for the assessment years 1965-66 and 1966-67."

4.20 The interest liability for delayed payment of service tax also cannot be disputed. Appellant has not paid the service tax, payable by them on the taxable services provided by them by the due date and hence demand of interest on the delayed payment of service tax is justified. Hon'ble Bombay High court has in case of P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)]. stated as follows:

"10. So far as interest u/s. 11AB is concerned, on reference to text of Section 11AB, it is evident that there is no discretion regarding the rate of interest. Language of Section 11AB(1) is clear. The interest has to be at the rate not below 10% and not exceeding 36% p.a. The actual rate of interest applicable from time to time by fluctuations between 10% to 36% is as determined by the Central Government by notification in the Official Gazette from time to time. There would be discretion, if at all the same is incorporated in such notification in the gazette by which rates of interest chargeable u/s. 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest u/s. 11AB at all and we are afraid, language of Section 11AB is unambiguous. The person, who is liable to pay duty short levied/short paid/non-levied/unpaid etc., is liable to pay interest at the rate as may be determined by the Central Government

from time to time. This is evident from the opening part of sub-section (1) of Section 11, which runs thus :

"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 is liable to pay duty as determined under subsection (2) or has paid the duty under sub-section (2B) of Section 11A, shall in addition to the duty be liable to pay interest at such rate ....."

The terminal part in the quotation above, which is couched with the words "shall" and "be liable" clearly indicates that there is no option. As discussed earlier, this is a civil liability of the assessee, who has retained the amount of public exchequer with himself and which ought to have gone in the pockets of the Central Government much earlier. Upon reading Section 11AB together with Sections 11A and 11AA, we are of firm view that interest on the duty evaded is payable and the same is compulsory and even though the evasion of duty is not mala fide or intentional."

Similar views have been expressed in the following decisions:

a) Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)]
b) TCP Limited [2006 (1) STR 134 (T-Ahd)]
c) Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)]
d) Ballarpur Industries Limited [2007 (5) STR 197 (T-Mum)]

4.21 In view of the above we do not find any merits in the submissions made by the appellant in the appeal filed. However as we have observed in para 4.9 that demand for the period 01.10.2006 to 31.03.2007 needs to be recomputed after reconciling the amounts received by the appellant during that period with the accounts of appellant and the certificate dated 21.01.2012 of the Chartered Accountant (Anil Ashok & Associates). According the impugned order is upheld in all respects, but remanded back to original authority for re-computation of demand and penalty under Section 78 only for

period 01.10.2006 to 31.03.2007 after taking into account the afore-stated certificate of Chartered Accountant.

5.1 Appeal is thus,-

i. Dismissed for the period 01.04.2007 to 31.03.2011 and the demand of Service tax along with the interest and penalties imposed are upheld.

ii. Partly allowed for the period 01.10.2006 to 31.03.2007 and the matter is remanded for limited purpose of re-computing the demand of Service Tax after taking into account the certificate dated 21.01.2012 of the Chartered Accountant (Anil Ashok & Associates). Penalty under Section 78 for the said period also will be modified accordingly.

(Pronounced in open court on-05/10/2023)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp