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INDIRECT TAX REVIEW
JANUARY 2015

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GST: NEW TALK OF THE TOWN- PART 2

After almost 5-6 years of discussions and deliberations, there appears a positive movement on the introduction of much awaited and anticipated, Goods and Services Tax (GST). GST would be a comprehensive tax on supply of goods and services, which would subsume various Central and State levies. A stepping stone towards the introduction of GST was the clearance of Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014 ("Constitution Amendment Bill") by the Union Cabinet. The Constitution Amendment Bill has been tabled in the Lok Sabha in the winter session, 2014. It is expected that the same would be discussed in the budget session of the parliament.

Sl. No. 18 of the Constitution Amendment Bill, provides for levy of an additional tax on supply of goods in the course of interstate trade and commerce, at a rate not exceeding 1 percent. The said tax would be collected by the Government of India, for a period of two years and would be assigned to States from where the supply of goods originates. The period of two years could be extended on recommendations of the GST council. The parliament would also be formulating necessary principles for determining the place of origin of the goods. A point that needs a mention is that the additional tax is only in relation to the supply of goods. Supply of interstate services would not attract additional tax.

The following observations could be made with regard to the above proposed additional tax in the Constitution Amendment Bill

Central Sales Tax (CST) in disguise?

The very thought of introduction of GST right from the First Discussion Paper is clearly on the distortions that are created because of the existence of CST. Here are certain excerpts of the First Discussion Paper, for easy reference.

Moreover, with the introduction of GST, burden of Central Sales Tax (CST) will also be removed. [Para 1.14]. GST will give more relief to industry, trade and agriculture through a more comprehensive and wider coverage of input tax set-off and service tax set-off, subsuming of several Central and State taxes in the GST and phasing out of CST. [Para 1.15]

While making this preparation of GST, it was also necessary, as mentioned earlier, to phase out the CST, because it did not carry any

set-off relief and there was a distortion in the VAT regime due to export of tax from one State to other State. [Para 2.2]

These are merely certain extracts but the fact of the matter is that the GST is thought as a welcome measure only because of the problems that CST creates in the VAT regime, by being a non vatable tax.

Further, it can be observed from the scheme and mechanism for levy of additional tax that it is akin to Central Sales Tax (CST). The same is also substantiated by the fact that it is levied only in relation to goods; and services has been kept out of the ambit of this tax. Further, as per the press release dated 19 December 2014 of the Ministry of Finance, it is evident that the additional tax would be non-vatable and thus would be an additional cost.

A question arises whether the above levy of additional tax can be considered as CST on interstate transactions for a period of 2 years, which could be extended for a further period by the GST council.

Levy of Additional Tax on imports?

The proposed Article 269A of the Constitution of India provides that supply of goods and services or both in the course of interstate trade or commerce would be under the exclusive domain of the Central Government and the revenue collected thereof would be partly appropriated to the States in the manner to be prescribed by the parliament.

The Explanation to the proposed Article 269A of the Constitution of India, has treated the supply of goods and services in the course of import into the territory of India, at par with the supply of goods and services in course of interstate trade and commerce. Though, considering the fact that there would not be any originating states in case of import of goods, the same may not be leviable to additional tax. However, it would be necessary to understand, how the principles in relation to determining the place of origin are drafted to exclude the import of goods from outside India.

GST a destination based tax

It is a common understanding that GST is a destination based consumption tax. It is proposed that the additional tax would be assigned to the State from where the supply originates. Thus, in a way tax that is payable at a place where the supply originates, would be against the basic principle of GST, to be a destination based consumption tax.

Additional Tax - A boon for manufacturing/ producing states

The objective of introducing proposed additional tax could be to get consent of the manufacturing/ producing States, who would tend to lose on account of introduction of GST. The destination principle of GST gives no incentive to producing states to promote manufacturing as the tax would be levied on the basis of the consumption and not supply/production. Thus, the manufacturing/ producing States like Maharashtra, Gujarat, and Tamil Nadu etc. may be compensated by this additional tax on the supply of goods in course of interstate trade and commerce, for a limited period.

Conclusion

If the additional tax is levied in the GST regime, it would be a clear U-Turn by the Government on introduction of GST, which seeks to eliminate the cascading effect of taxes prevalent in the current indirect tax regime. With this kind of change, the future GST can be labelled as an old wine in a new bottle. Also, there is no change that can be evidenced by the manufacturers of goods / traders as the additional tax will ensure that the current problems created by the non vatable CST continue in GST regime.

The moot question remains is whether levy of one percent would dilute the very purpose of introduction of GST or could it be a stepping stone toward the long run GST regime. It is left to the industry to digest the above introduction, as the same could be an additional cost, if the credit for the same is not allowed.

Considering the apprehensions of the States and the stance of the government, it would be imperative to understand and track the developments of this additional levy during the interim period before some concrete discussions can be seen in the upcoming budget session.

SEARCH & SEIZURE UNDER SERVICE TAX

The power to search the premises of the service providers are contained in section 82 of the Finance Act, 1994 which deals with provisions relating to search and seizure of articles, documents etc, as a consequence of search.

Search and seizure provisions contained in tax statutes are provided to act as a restraint on evasion of taxes. Such powers are within the constitutional frame work and cannot be considered as violative of Article 19 of Constitution of India.

Power of search and seizure in any system of jurisprudence is an overriding power of the State to provide security and that power is necessarily regulated by law – *M.P. Sharma v. Satish Chandra, District Magistrate 1954 AIR 300; (1954) 2 ELT 287 (SC).*

In *Baboo Ram Hari Chand v. Union of India (2014) 304 ELT 371 (*Gujarat*),* it has been held that powers to seize and confiscate are quite drastic powers, such that authority exercising the same should have reasons to believe that goods were liable therefor. It was held that passing of a composite order, i.e. panchnama –cum-seizure order is impermissible in law.

Statutory Provisions

The power to search for documents, papers or things is contained in section 82 of the Finance Act, 1994. subject to the provisions of Code of Criminal Procedure, 1973. This section provides for search of documents, books or things by Commissioner of Central Excise or any other officer authorized by him. The pre-condition to search is that the CCE should have reason to believe that there are certain books etc. in secret possession at any place which may be useful for any proceedings under this Act. Such reasons may or may not be recorded in writing. Search can be done at any place which would include any house, office, building, vehicle etc. search is supposed to be an invasion into person's privacy and it must be guided by certain principles under normal human tendency.

Finance Act, 2002 had amended section 82 to provide specifically for the power to seize documents relevant to any proceedings under the service tax law. He may authorize Assistant or Deputy Commissioner of Central Excise to search for and seize or for himself search for and seize documents or books or things which in his opening may be useful for or relevant to any proceeding under the Act.

Under section 82(1), the power for authorization for conducting search of any premises vests in the Commissioner of Central Excise. However, since under section 83 of the Finance Act, 1944 has been made applicable to service tax, provision of Customs Act, 1962 also become applicable to service tax matters. Accordingly, as per section 105 of Customs Act, the Assistant Commissioner or Deputy Commissioner of Central Excise is empowered to authorize any Central Excise Officer not

below the rank of Sub-Inspector for search of any premises or he may himself search.

Finance Act, 2011 (w.e.f. 8.4.2011) amended the power to issue search warrant at the level of Joint Commissioner and the execution of search warrant at the level of Superintendent of Central Excise.

In *M/s Innovation, Secunderabad & Others v. CBEC & Others (1984) 15 ELT 91 (AP),* it was held that it is well settled that an officer cannot search any premises or of seize any goods, in the hope of ultimately discovering some basis or ground to justify the search or seizure.

In line with section 12F of the Central Excise Act, 1944, Finance Act, 2014 has amended section 82(1) of the Finance Act, 1994 relating to search provisions whereby powers have now been granted to Joint Commissioner or Additional Commissioner or any other officer notified by the Board, to authorize any Central Excise Officer to search and seize.

According to 'Notes on Clauses' to Finance Bill 2014, the amendment seeks to amend sub-section (1) of section 82 so as to provide that where the Joint Commissioner of Central Excise or Additional Commissioner of Central Excise or such other Central Excise officer as may be notified by the Board has reasons to believe that any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Chapter, are secreted in any place, he may authorize in writing any Central Excise officer to search for and seize or may himself search and seize such documents or books or things.

The erstwhile sub-section has been thus, substituted as under:

"(1) Where the Joint Commissioner of Central Excise or Additional Commissioner of Central Excise or such other Central Excise officer as may be notified by the Board has reasons to believe that any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Chapter, are secreted in any place, he may authorise in writing any Central Excise officer to search for and seize or may himself search and seize such documents or books or things."

The amendment enhances the power of officers to authorize search and seizure. Now instead of Joint Commissioner, Additional Commissioner and any other officer notified by Board can also authorize the undertaking of search and seizure. The persons who can be authorized to do so can be any Central Excise Officer.

CASE UPDATE: CENTRAL EXCISE

Time spent in pursuing remedy before wrong forum is excludible in determining period of limitation

Commissioner of Central Excise, Visakhapatnam-II Vs. Cairn Energy India Pvt. Ltd. [(2014) 52 taxmann.com 371 (High Court of Andhra Pradesh)]

Cairn Energy India Pvt. Ltd. (the Assessee) was engaged in manufacturer of Excisable goods, clearance of which required payment of Excise duty and cess. The Adjudication Authority vide its Order dated March 23, 2006, raised the demand of Excise duty amounting to Rs. 19,96,410/- along with interest under Section 11AB of the Central Excise Act, 1944. The copy of the said order was furnished to the Assessee on May 9, 2006 against which the Assessee filed an appeal before the Hon'ble Tribunal. The Hon'ble Tribunal vide its Order dated September 28, 2006 rejected the appeal on the ground that the appeal should have been filed before the Commissioner (Appeals).

Thereafter, the Assessee filed an appeal before the Commissioner (Appeals) on October 9, 2006 which was rejected on the ground of time barred. Being aggrieved, the Assessee filed an appeal before the Hon'ble Tribunal.

The Hon'ble Tribunal allowed the appeal in favour of the Assessee and held that the he was entitled to the benefit of Section 14 of the Limitation Act, 1963 (the Limitation Act) against which the Department filed an appeal before the Hon'ble High Court of Andhra Pradesh.

The Hon'ble High Court of Andhra Pradesh relied upon the following judgments of the Hon'ble Apex Court:

- Singh Enterprises CCE [(2008) 12 STT 21]
- CC&CE Hongo India (P.) Ltd. [2009 taxmann.com 547 (SC)] and
- Amchong Tea Estate Union of India [(2010) 1 taxmann.com 789 (SC)]

And held that in terms of Section 29 of Limitation Act, provisions of the Limitation Act are applicable, except when specifically excluded and as per Section 14 ibid, time spent in pursuing remedy bona fidely before wrong forum is excludible. It was further held by the Hon'ble High Court that there is difference between 'condonation of delay' and

'exclusion of period'. The condonation of delay is in the discretion of the Court or Forum, whereas exclusion of time under Section 14 of the Limitation Act is a mandate under law, without leaving any scope for subjectivity. Hence, the appeal filed before Commissioner (Appeals) was within time-limit.

Rebate on Supply of aviation fuel to foreign going aircraft from fuelling Station registered as warehouse

Indian Oil Corporation Ltd. Vs. Union of India [(2014) 52 taxmann.com 294 (High Court of Bombay)]

Indian Oil Corporation Ltd. (the Petitioner) had procured Aviation Turbine Fuel (ATF or the fuel) from the refinery of Bharat Petroleum Corporation Ltd (BPCL) on payment of Excise duty. The fuel was initially stored at the terminal and thereafter it was sold at NITC, IGI Airport, Delhi. A part quantity of ATF purchased from the BPCL was for supply to the foreign going aircraft. The safety requirements and lack of space at airport permits storage facility to BPCL at IGI Airport, New Delhi.

In this case, ATF was purchased from BPCL and part of it was sold to BPCL itself. The other part of ATF acquired from BPCL was sold to foreign going aircraft. The Petitioner obtained a joint certificate and thereafter proceeded to lodge a claim for refund of Rs. 10,93,745/- under Rule 18 of the Central Excise Rules, 2002, being the duty paid on ATF supplied to foreign going aircraft, from NITC, IGI Airport, Delhi, Aviation Fuelling Station, Delhi (AFS).

However, the refund claim was rejected on the ground that export was not directly from factory/ warehouse violating condition in Para 2(a) of the Notification No. 19/2004-CE (NT) dated September 6, 2004 (the Notification). On appeal being filed to the Commissioner of Central Excise (Appeals), the same was dismissed on June 21, 2006.

Thereafter, a Revision Application was filed before the Joint Secretary to the Government of India which has been rejected vide the Order November 11, 2009. Being aggrieved, the Petitioner filed a Writ Petition before the Hon'ble High Court of Bombay.

The Hon'ble High Court held as under:

- The Petitioner had supplied the fuel to aircrafts on foreign run by transferring duty paid products to the AFS (Mumbai-Delhi) which has been registered as a warehouse of Excisable goods. Hence, condition in Para 2(a) of the Notification is satisfied;

- Since the Excisable goods are exported after payment of duty directly from a factory or warehouse, then nothing more is required to be considered and verified;
- The Department had not produced any document, which superseded the Notification or modifies or amends the same in any manner;

In terms of the above finding the Hon'ble High Court allowed the rebate claim to the Petitioner.

Assessee can choose most beneficial Exemption Notification where two or more Exemption Notifications are available

Bharat Vijay Mills Vs. Commissioner of Central Excise, Ahmedabad-III [(2014) 51 taxmann.com 266 (Ahmedabad – CESTAT)]

Bharat Vijay Mills (**the Appellant**) was engaged in manufacturing of cotton fabric which was cleared to the domestic market as well as for export after the payment of Central Excise Duty. Such export of cotton fabric was made under claim of rebate of duty at the rate of 4% in terms of the Notification No. 59/2008-CE dated December 7, 2008 (**the Notification 59/08**). The Appellant had also availed Cenvat credit in respect of the Inputs, Capital goods and Input services used in the manufacture of the finished goods during the period from December 07, 2008 to July 06, 2009.

There was simultaneously full exemption i.e. Nil rate of duty available under another Notification No. 58/08-CE dated December 07, 2008 (**the Notification 58/08**) for the same period. Both the Notifications i.e. Notification No. 58/08 and Notification No. 59/08 were issued under Section 5A(1) of the Central Excise Act, 1944 (**the Excise Act**).

The Department contended that the Appellant was required to reverse the Cenvat credit involved on the Inputs lying in their stock or in process of the finished goods or contained in finished goods lying in stock as on December 7, 2008, as the Appellant was not eligible for such Cenvat credit in accordance with the provisions of the Notifications No. 58/08.

The Department relied upon Section 5A(1A) of the Excise Act, which provides that where an absolute exemption is available under sub-section (1) of Section 5A of the Excise Act in respect of any excisable

goods from the whole of the duty of Excise leviable thereon, the manufacturer of such excisable goods shall not pay the duty of Excise on such goods.

Further, as per Rule 6(1) and Rule 6(4) of the Cenvat Credit Rules, 2004 (**the Credit Rules**), the Cenvat credit shall not be allowed on such quantity of Inputs, Input services used in the manufacturing of exempted goods and Capital goods used exclusively in manufacturing of exempted goods.

Accordingly, Show Cause Notice was issued to the Appellant which was duly confirmed by the Adjudicating Authority. Being aggrieved, the Appellant filed an appeal before the Hon'ble CESTAT, Ahmedabad.

The Hon'ble CESTAT, Ahmedabad relied upon its own decision in the case of *Arvind Ltd. Vs. CCE [(2014) 47 taxmann.com 91/46 GST 566 (*Ahd*. – CESTAT)]* and held that where two Exemption Notifications, one granting absolute unconditional exemption and other granting unconditional partial exemption, is available to the Assessee, the Assessee has an option to opt the Exemption Notification which is more beneficial to him. Accordingly, Section 5A(1A) of the Excise Act is inapplicable in such a case and the Cenvat credit availed by the Appellant is valid.

Assessee eligible to avail remaining 50% of Cenvat credit on Capital Goods which were cleared during year of receipt

Nilkamal Ltd. Vs. CCE, Bolpur [2015 (1) TMI 588 – CESTAT KOLKATA]

Nilkamal Ltd. (the Appellant) was engaged in the manufacture of excisable goods and for the manufacture of these goods, they had purchased some moulds as Capital Goods. Upon receipt of the said moulds in the factory, the Appellant availed 50% of the eligible Cenvat credit on the moulds as Capital Goods and the moulds were put to use for some time in the factory for further manufacturing of excisable goods. Thereafter, these modules were cleared to other units of the Appellant during the same Financial Year. Accordingly, the Appellant availed the remaining 50% of the Cenvat credit on the said moulds and cleared the said moulds, as such, by debiting the entire amount of Cenvat credit availed on such moulds.

The Department denied the availment of the remaining 50% of the Cenvat credit in the same Financial Year on the ground that once moulds were put to use, the same looses the character as such and

their clearance from the factory after some time cannot be called 'as such', under Rule 4(2)(a) of the Cenvat Credit Rules, 2004 (the Credit Rules).Hence the Appellant was not eligible to avail remaining 50% of Cenvat credit at the time of its clearance in the same Financial Year.

Resultantly, a Show Cause Notice dated February 14, 2008 was issued to the Appellant alleging irregular availment of 50% Cenvat credit on moulds amounting to Rs. 3,01,95,614/-, which was further upheld by the Adjudication Authority confirming the demand of recovery of Cenvat credit along with interest and penalty. Being aggrieved the Appellant preferred an appeal before the Hon'ble CESTAT, Kolkata.

The Hon'ble CESTAT, Kolkata relying upon the following case laws:

- Modernova Plastyles Pvt. Ltd. [2008 (232) ELT 29 (Tri-LB)] duly upheld by the Hon'ble Bombay High Court also vide its order dated November 4, 2009;
- CCE, Hyderabad-III Vs. Navodhaya Plastic Industries Ltd. [2013 (298) E.L.T. 541 (Tri.-LB)];
- CCE, Salem Vs. Rogini Mills Ltd. [2011 (264) E.L.T. 367 (Madras)].

and held that the Capital Goods which were put to use and when cleared from the factory, would be eligible to the balance 50% of Cenvat credit available on such Capital Goods on its clearance from the factory in the same financial year

CASE UPDATE: SERVICE TAX

Services received by SEZ prior to commencement of authorized operations eligible for exemption/ refund

Commissioner of* Service Tax *Vs. Zydus Technologies Ltd [(2014) 52 taxmann.com 376 (*Gujarat*)]

Zydus Technologies Ltd. (**the Assessee**) filed a refund claim of Rs. 1,75,53,497/- for the services received by Special Economic Zones/ Developers (**SEZ**) vide application dated May 31, 2010 in terms of the Notification No. 9/2009-ST dated March 3, 2009, submitting that the Development Commissioner, Kandla SEZ under letter dated June 29, 2009 had permitted setting up a SEZ unit and the said approval letter was valid for a period of one year from the date of issue.

The Department argued that as such up to June 28, 2012, the Assessee continued to submit application/ sought extension for permitting to set

up a unit in SEZ and accordingly, denied exemption/ refund on the ground that the services were not actually used for authorized operations, as the Assessee had not started manufacturing activity/ authorized operations.

Being aggrieved, the Assessee preferred an appeal before the Hon'ble Tribunal.

The Hon'ble Tribunal held that to start the production, it is necessary for SEZ to procure support services from initial stage, hence decided the matter in favour of the Assessee. Being aggrieved, the Department preferred an appeal before Hon'ble High Court of Gujarat.

The High Court of Gujarat relied upon the judgement in the case of *Commissioner of C. Ex., Ahmadabad-II Vs. Cadila Healthcare Ltd. [2013 (30) STR 3 (Gujarat)]* and held that services received even for period prior to actual manufacture of final product can be regarded as 'commercial activity/ production', if said service is necessary prior to actual manufacturing activity. Hence, in the instant case, the Assessee is eligible for refund/ exemption.

Service Tax on hiring expatriate employees of Foreign Group Companies under a contract of employment

Commissioner of Central Excise Vs. Computer Sciences Corporation India (P.) Ltd. [2014] 52 taxmann.com 256 (*Allahabad*)]

Sciences Corporation India (P.) Ltd. (**the Assessee**) is a part of a Group of Companies situated in US, UK and Singapore among other countries The Assessee in the course of its business operations hired certain expatriate employees overseas. These employees were either directly employed by the Assessee or were transferred from other Group Companies to the Assessee in India. A letter of employment was entered into between the expatriate employee and the Assessee from the date when the employee was transferred to India for the duration of the employment in the country.

The Assessee incurred expenditure on social security benefits of the expatriate employees in India including by way of provident fund. Tax was deducted from the salaries payable to the expatriate employees on the basis of the total income earned, on behalf of the employees and the assessee issued relevant Forms to the employees, in its status as an employer. The Assessee also remitted to its Group Companies

certain social security and other benefits that were payable to the accounts of the expatriate employees under the laws of the foreign jurisdiction and had booked expenses during Financial years 2006-07 to 2010-11.

The Adjudicating Authority confirmed the demand of Service tax along with interest and penalties under 'Manpower recruitment or supply agency services' taxable under Section 65(105)(k) of the Finance Act, 1994 (**the Finance Act**). On appeal being filed, the Hon'ble Tribunal allowed the appeal filed by the Assessee. Being aggrieved, the Revenue filed an appeal before the Hon'ble High Court of Allahabad.

The Hon'ble High Court of Allahabad after observing that the Assessee obtained from its Group companies directly or by transfer of the employees, the services of expatriate employees for which the Assessee paid the salaries of the employees in India, deducted tax and contributed to statutory social security benefits, held that there was no basis whatsoever to hold that in such a transaction, a taxable service involving the recruitment or supply of manpower was provided by a manpower recruitment or supply agency. Hence, the matter was decided in favour of the Assessee.

Contention that assessee was service-recipient & not a provider cannot be termed as additional evidence.

Astron Polymers (P.) Ltd. Vs. Commissioner of Central Excise, Delhi-IV [(2014) 52 taxmann.com 372 (*New Delhi – *CESTAT)]

In the instant case, the Department demanded Service tax for the periods 2005-06 to 2007-08 on Rs. 14,40,000/- paid by Astron Polymers (P.) Ltd. (**the Appellant**) towards factory rent to one of its director. The Appellant denied liability to Service tax citing that levy was unconstitutional. However, the Appellant failed to submit that it was not a service provider, but was merely recipient of services from one of its directors.

The Department confirmed the demand along with interest and penalty. Against the Adjudication Order, the Appellant preferred an appeal before the Commissioner (Appeals) specifically contending that rent was being charged by Directors of the Appellant individually and not by the Appellant. The Commissioner (Appeals), relying upon Rule 5 of Central Excise (Appeals) Rules, 2001 (**the Excise Appeal Rules**), rejected the Appellant's contention on the ground that this was a new ground raised for the first time in the appeal and was not raised either

in reply to the Show Cause Notice or during course of the Adjudication proceedings. Being aggrieved, the Appellant preferred an appeal before the Hon'ble CESTAT, Delhi.

The Hon'ble CESTAT, Delhi held that Rule 5 of the Excise Appeals Rules has no application in the instant case because a contention that the Appellant was not provider of service but was recipient of service is not 'a piece of evidence', it is a 'pleading, a ground of appeal' and goes to root of jurisdiction. Hence, such an additional ground is admissible and ought to be entertained and the Appellant must be called upon to substantiate this plea. Hence, the matter was remanded back for afresh adjudication

If Demand is due to retrospective amendment then no malafide can be attributable to assessee, hence extended period cannot be invoked

Commissioner of Central Excise, Raipur Vs. Lloyd Tar Products [(2014) 52 taxmann.com 433 (New Delhi – CESTAT)]

Lloyd Tar Products (the Assessee) was engaged in manufacture of different kind of excisable goods. During the period from November 16, 1997 to June 1, 1998, the Assessee received the services of Goods transport operator (GTA) but did not pay Service tax under Reverse Charge as was required under erstwhile Rule 2(i)(d)(xvi) and (xvii) of the Service Tax Rules, 1994 (the Service Tax Rules) which was later struck down by the Hon'ble Supreme Court in the case of Laghu Udyog Bharati Vs. Union of India [1999 (112) ELT 365].

Thereafter, the law was amended retrospectively vide the Finance Act, 2000 & the Finance Act, 2003 and the recipient of GTA services were made liable to pay the tax from the beginning. In the light of the above amendment, Show Cause Notice was issued to the Assessee in November, 2002 which culminated into an Order passed by the Adjudicating Authority confirming the demand but dropping the penalties on observing that no suppression can be attributed to the Assessee.

The Assessee challenged the said Order before the Commissioner (Appeals), wherein the Commissioner (Appeals) relying upon the decision in the case of L. H. Sugar factories Ltd. Vs. CCE [(2007) 8 STT 295 (New Delhi – Cestat)] (L.H. Sugar case) held that even though a person receiving taxable services of GTA are deemed to pay Service tax under Section 69 of the Finance Act, 1994 (the Finance Act), but liability to file return is cast on them only under Section 71A of the

Finance Act and not under Section 70 thereof. Accordingly, they are not covered under Section 73 of the Finance Act and hence, not liable to pay Service tax.

Thereafter, on appeal being filed before the Hon'ble Tribunal by the Revenue, the same was rejected. Being aggrieved, the Revenue filed an appeal before the Hon'ble High Court of Chhattisgarh where the Hon'ble High Court directed the Tribunal to consider the law declared by the Hon'ble Supreme Court in the case of Gujarat Ambuja Cements Ltd. Vs. Union of India [(2005) 1 STT 41] (Ambuja case). Therefore, the matter was listed again before the Hon'ble CESTAT, Delhi.

The Hon'ble CESTAT, Delhi after observing that the matter in the present case differs from the Ambuja case, held that:

- In view of judgment in L.H. Sugar case, since recipient of GTA services were liable to file return under Section 71Aof the Finance Act and Section 73 thereof, as amended by the Finance Act, 2003, did not refer to Section 71A of the Finance Act, hence, the Assessee was not covered by Section 73 of the Finance Act and the SCN is bad;
- Even otherwise, since there was no suppression on part of the Assessee and the Adjudicating Authority had itself waived penalties on that count, extended period was not invocable;
- When the SCN was issued after the retrospective amendment, no malafide can be attributed to the Assessee and the SCN is barred by limitation

No penalty imposable U/s. 77 / 78 of Finance Act, 1994 when penalty U/s. 76 thereof was waived on the ground of reasonable cause

Garodia Special Steels Ltd Vs. Commissioner of Central Excise, Raigad [2014-TIOL-2638-CESTAT-MUM]

In the instant case, Garodia Special Steels Ltd. (the Appellant) paid Service tax under the category of Goods Transport Agency on Reverse Charge basis. However, during the audit of their unit, the reconciliation of ledger accounts with the Service Tax Returns revealed that the Appellant had not paid the Service tax during the periods 2007-2008 and April 2008 to December 2009. The

Appellant paid the entire amount of Service tax before the issuance of Show Cause Notice.

Nonetheless proceedings were initiated and apart from upholding the Service tax demand, penalties were imposed under Sections 77 and 78 of the Finance Act, 1994 (the Finance Act) along with interest. However, the Adjudicating Authority waived off the penalty under Section 76 of the Finance Act on the ground of reasonable cause. On appeal being filed to the Commissioner (Appeals) against imposition of penalty, the same was rejected. Being aggrieved, the Appellant filed an appeal before the Hon'ble CESTAT, Mumbai.

The Hon'ble CESTAT, Mumbai while setting aside the penalties imposed under Section 77 and 78 of the Finance Act held as under:

- Detection of non-payment of Service tax from the books of accounts maintained by the Appellant, indicates that the Appellant could not have any mala fide intention to evade payment of Service tax;
- The Adjudicating Authority waived penalty under Section 76 of the Finance Act by taking cover of Section 80 thereof. Having found reasonable cause for waiving penalty under Section 76 of the Finance Act, there is no justification for imposing penalty under Section 77 and Section 78 thereof.

Therefore, the penalties imposed upon the Appellant were set aside.

Amount paid subsequent to Adjudication Order cannot be hit by Doctrine of Unjust Enrichment

Raasi Refractories Ltd. Vs. Commissioner of Central Excise, Customs And* Service Tax *Hyderabad-III [2015 (1) TMI 283 – CESTAT* BANGALORE*]

Raasi Refractories Ltd. (**the Appellant**) provided Management services to its customer M/s Visakhapatnam Steel Plant (**client**) during the period 2003-04 to 2005-06. The Adjudicating Authority confirmed demand of Service tax under the taxable category of 'Business Auxiliary Service'. The adjudged dues were paid by the Appellant on January 28, 2009.

However, being aggrieved by the Order of the Adjudicating Authority, the Appellant filed an appeal before the Commissioner (Appeals) contending that the activities undertaken at client's premises were not falling under the purview of 'Business Auxiliary Service'. The

Commissioner (Appeals) set aside the Order of the Adjudication Authority. The said Order of the Commissioner (Appeals) was accepted by the Committee of Commissioners on June 19, 2009, and accordingly, no appeal was preferred by the Revenue.

Pursuant to the Order of the Commissioner (Appeals), the Appellant filed refund claim of the amount so deposited, which was adjudicated by the Deputy Commissioner by sanctioning the refund amount and adjusting the same against the tax arrears dues from the Appellant to the Government exchequer.

Subsequently, in exercise of the powers conferred under Section 84 of the Finance Act, 1994 (**the Finance Act**), the Commissioner of Central Excise and Service tax sought to revise the Order passed by the Deputy Commissioner on the ground that while sanctioning refund claim, the said Original Authority did not examine the unjust enrichment aspect.

Accordingly, Show Cause Notice was issued and adjudicated by the Commissioner denying refund to the Appellant. Being aggrieved, the Appellant preferred an appeal before the Hon'ble CESTAT, Bangalore.

The Hon'ble CESTAT, Bangalore relying on the case of Gujarat State *Fertilizers & Chemicals Ltd. Vs. Commissioner of Central Excise, Vadodara [2006 (205) ELT 458 (Tri.-Mumbai)]*, held that the amount paid subsequent to the Order of the Adjudication Authority cannot be hit by the doctrine of unjust enrichment, and as such, the Appellant is eligible for refund of the amount.

Where Stay application against the Order sanctioning refund claim has been rejected, there is no reason for Revenue to stop refund

Madura Coats (P.) Ltd.Vs. Union of India [(2015) 53 taxmann.com 152 (Karnataka)]

During the period from September 10, 2004 to December 31, 2004, Madura Coats (P) Ltd. (**the Petitioner**) received certain services from abroad and paid Service tax thereon under reverse charge on January 25, 2005 on insistence of the Department.

Since the services received from abroad were not chargeable to Service tax under reverse charge prior to introduction of Section 66A of the Finance Act, 1994 (**the Finance Act**), the Petitioner applied for refund claim on September 26, 2005. The said refund claim was allowed by the Hon'ble Tribunal vide its Order dated June 17, 2009 which became final and binding.

Later, the Petitioner, armed with the order of the Hon'ble Tribunal, made yet another representation for refund of Rs. 15,16,992/-, whereupon the Department by letter dated August 27, 2009, directed the Petitioner to file a refund claim in Form R supported by documents. The Petitioner, by letter dated September 4, 2009, once again requested for the refund supported by documents. The Department by Order dated October 15, 2009, sanctioned the refund and credited it to the Consumer Welfare Fund on the premise of unjust enrichment. Aggrieved by this Order, the Petitioner preferred an appeal to the Commissioner (Appeals), which was allowed by Order dated December 28, 2011.

Thereafter, the Petitioner made several representations requesting for refund but the same were not responded by the Department. Nevertheless, the Department preferred an appeal before the Hon'ble CESTAT together with a Stay application. The Stay application was dismissed by Order dated September 10, 2012 but no refund was sanctioned to the Petitioner by the Department. It was argued by the Department that in the light of pendency of appeal before the Hon'ble CESTAT, the Petitioner must await the decision. Being aggrieved, the Petitioner filed a Petition before the Hon'ble High Court of Karnataka for a Writ of Mandamus directing the Department to effect payment of refund.

The Hon'ble High Court of Karnataka held that there was no reason for the Department not to effect refund. The question as to unjust enrichment is before the Tribunal and all arguments in that regard would be considered by the Tribunal. In the absence of any stay, the Department was directed to refund the amount to the Petitioner with interest at the rate of 12% per annum and not at 6% per annum as prescribed by Section 11BB of the Central Excise Act, 1944, as it is not a case of mere delay in refund

Issue of Service Tax on Renting of Immovable property still not attained finality – Penalty Waived

Shri Mahesh Vaktawarmal Rathod Vs. Commissioner Of Central Excise, Pune-III [2015-TIOL-178-CESTAT-MUM]

Shri Mahesh Vaktawarmal Rathod (**the Appellant**) rented out their premises to M/s Loot India Pvt. Ltd. Renting of immovable property was brought under the Service tax net under erstwhile Section 65(105)(zzzz) of the Finance Act, 1994 (**the Finance Act**) w.e.f. June 1, 2007. The levy was challenged by M/s Retailers Association of India and

the matter travelled to the Hon'ble Supreme Court. The Hon'ble Supreme Court vide its Order dated October 14, 2011 stayed the operation of levy (only in respect of Service tax liability from June 1, 2007 to September 30, 2011) subject to certain conditions, such as payment of specified portion of the Service tax to be in installments. In the present case, the Appellant paid the Service tax on December 12, 2012 with interest and also filed the Service tax returns.

However, the Appellant was asked to deposit penalty under Section 76 of the Finance Act, which was upheld by the Ld. Commissioner (Appeals). Being aggrieved, the Appellant filed an appeal before the Hon'ble CESTAT, Mumbai.

The Appellant relying upon the decisions in *The Agricultural* Produce Market *Committee Vs. Commissioner or Central Excise, Ahmedabad-III [2014-TIOL-1242-CESTAT-AHMD]* and *Commissioner of Service Tax, Bangalore Vs. Motor World [2012-TIOL-418-HC-KAR-ST],*submitted that since the issue was in dispute upto the level of Supreme Court and the matter has not attained finality, there is reasonable cause for invoking Section 80 of the Finance Act and waiving the penalty under Section 76 thereof. It was further submitted that in view of the decision in the case of *Vinayaka Securities and* Detective Agency *Vs. Commissioner of Central Excise [2014-TIOL-1242-HC-KAR-ST]*(**Vinayaka Securities**), the Appellant are entitled to waiver of penalty under Voluntary Compliance Encouragement Scheme (**the VCES**) introduced in 2013.

On the other hand the Department argued that in the matter of Renting of Immovable property, penalty under Section 76 of the Finance Act could be waived under Section 80(2) of the Finance Act subject to the condition that the amount of Service tax along with interest is paid in full within a period of six months on which the Finance Bill, 2012 was passed i.e. before November 26, 2012. Inasmuch as since the tax has been paid only on December 12, 2012 the benefit is not available to the Appellant.

The Hon'ble CESTAT, Mumbai after observing provisions of Section 80(2) of the Finance Act and Circular No. 174/9/2013-ST dated November 25, 2013 (**the VCES Circular**) issued in respect of the VCES, held as under:

- It is evident from the VCES Circular, that normally the VCES is not applicable when the tax had already been paid before its introduction but at the same time, the Government has left a window open for taking a lenient view in the issue of penalties in some circumstances under Section 80 of the Finance Act;
- Since, in the instant case, the matter was pending in Courts and has still not attained finality, the Appellant deserves a lenient view following the judgment in the case of Vinayaka Securities.

Therefore, the Hon'ble Tribunal allowed the appeal in favour of the Appellant and waived the penalty imposed under Section 76 of the Finance Act

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