

## Constitutional And Legal Issues Of Service Tax

Article 265 of the Constitution of India lays down that no tax shall be levied or collected except by the authority of law. The structure of indirect taxes is defined by the Constitution in its two Lists [List I (Union List) and List II (State List)] in the Seventh Schedule. Any reforms of indirect taxes are dependent on provisions of the Constitution. The Union Government has imposed such tax in terms of residuary Entry 97 of List I in the Seventh Schedule to the Constitution. Then, the Union Gov-

ernment made a constitutional amendment vide Constitution (95th Amendment) Act, 2003. Consequently, the new Article 268A has been inserted for Service Tax levy by the Union Government and the amendment of the Seventh Schedule to the Constitution, in List I after Entry 92B, Entry 92C has been inserted for taxes on services as well as in Article 270 of the Constitution, the

clause (1) Article 268A has been included. The constitutional validity of Service Tax has been challenged in various courts of India, who in their decisions have more than once upheld the legality of the levy.

The Gujarat High Court in the case of *Addition Advertising Vs. Union of India (UOI 1998 (98) ELT 14 (Guj.)* has held that levy of tax on advertising services is not unconstitutional. It was held that this is not a tax on any profession, trade, calling or employment, but in respect of service ren-

dered. If there is no service, there is no tax. It was further held that 'the tax is not on advertisement', but on the services rendered with reference to the advertisement and there is a clear distinction between the advertisement service and advertisement. The levy of Service Tax on advertising services has been upheld in the *Advertising Club Vs. Central Board of Excise & Customs*

2001 (131) ELT 35 (Mad.); *Zodiac Advertisers Vs. UOI 2004 (166) ELT 25 (Ker.)*. The Constitutional validity of the levy of Service Tax on Chartered Accountants, Consulting Engineers and Architects has been upheld in the *Chartered Accountants Association Vs. UOI 2001 (115) Taxman 543 (Guj.)*. The levy of Service Tax on Chartered Accountants has also been upheld in the *All India Federation of Tax Practitioners Vs. UOI 2001 (116) Taxman 418 (Bom.)*; *Jodhpur Chartered Accountants Society Vs. UOI 2002 (176) CTR 177 (Raj.)*; *All Kerala Chartered Accountants Association Vs. UOI 2002 (121) Taxman 486 (Ker.)*. The levy of Service Tax on Consulting Engineers has been upheld also in the *V. Shanmugavel Vs. CCE 2001 (131) ELT 14 (Mad.)*. The levy of Service Tax on Architects has been upheld also in the *Indian Institute of Architects Vs. UOI 2002 (139) ELT 245 (Mad.)*.

The Constitutional validity of the levy of Service Tax on Courier Agencies has been upheld in the *INI Express Worldwide Pvt. Ltd. Vs. UOI 1998 (97) ELT 406 (Bom.)*.

The Constitutional validity of the levy of Service Tax on Catering Services has been upheld in the *Tamil Nadu Ho-*

*tels Association Vs. UOI 2001 (133) ELT 265 (Mad.)*.

The Constitutional validity of the levy of Service Tax on Mandap Keeper Services has been upheld in the *Tamil Nadu Kalyana Msandapam Association Vs. UOI 2001 (133) ELT 36 (Mad.)*. The Supreme Court held that a tax cannot be struck down on the grounds of lack of legislative competence, by enquiring whether the definition accords what the layman's view of the service is - *Tamil Nadu Kalyana Mandapam Association Vs. UOI 2004 (167) ELT 3 (SC)*.

Recently, the Supreme Court in the case of *Gujarat Ambuja Cements and another Vs. UOI and another 2005 SCCL COM 221(SC)* has upheld the constitutional validity of the levy of Service Tax on those availing services rendered by the goods transport operators, and forwarding and clearing agents. It was held that since Service Tax was not a levy on passengers and goods, but on the event of service in connection with the carriage of goods, it was not possible to hold that the power to levy such a tax vested with the States. It was also held that the legislature enjoys a large discretion in the classification of tax regime and the Courts "are extremely circumspect on questioning the reasonability of such classification." Previously, the Supreme Court held that the person who is receiving the service cannot be made responsible for filing the return and paying the tax and provisions of Rules 2(d)(xii) and (xvii), as it makes persons other than goods transport operator, as being responsible for collect-

ing Service Tax are *ultra vires* - *Laghu Udyog Bharati Vs. UOI 1999 (89) ELT 247 (SC)*.

### Legal issues

A number of contentious legal issues between the service providers and the Commissioners of Central Excise (CCEs) about Service Tax such as Appeal, Interest, Penalty, Refund, Stay etc. are decided in various Customs and Central Excise and Gold Appellate Tribunals (CEGATs), and Customs and Central Excise Appellate Tribunal (CESTATs), Tribunals and Courts. Few important legal decisions are summarised below:

### Appeal

Failure to pre-deposit tax condoned since the Appellate Commissioner had not even observed that the appellant had a tourist permit to be liable to tax - *Dhairiyashil Kapse Patil Vs. CCE, Aurangabad 2004 (163) ELT 381 (CEGAT)*.

When the Order-in-Original passed by the Commissioner of Central Excise under Section 73(1), the Appeal lies to Commissioner (Appeals) and not to the Tribunal. Appeal to the Tribunal would lie only when the order is passed by the Commissioner under Section 84 or the Commissioner (Appeals) under Section 85 of the Finance Act, 1994 - *RPG Cellular Services Ltd. Vs. CCE, Chennai 2000 (120) ELT 461 (CEGAT)*.

Dismissal of appeal without notice to appellant for failure to pre-deposit tax and penalty in full violates natural justice, when the tax disputed and penalty quantified had been deposited - *Guru Nanak*

*Cold Drinks Vs. CCE, Jalandhar 2004 (166) ELT 267. (CEGAT)*.

### Interest

Interest to be paid on pre-deposit from the date of Final Order - *Jindal Electric & Machinery Corporation Vs. CCE, Ludhiana 2004 (166) ELT 276. (CEGAT)*.

### Penalty

Penalty is not mandatory and can be waived in deserving cases - *CCE Vs. Milan Tent Palace 2001 (131) ELT 274 (CEGAT)*; *Mohan Industrial Security Services Vs. CCE 2002 (139) ELT 722 (CEGAT)*.

It is mandatory on part of the department to follow the principles of natural justice viz., the *audi alteram partem* rule (i.e., hear the other party) before imposition of the penalty and provide the assessee an opportunity to prove that there was reasonable cause - *Ashwani & Associates Vs. CCE, New Delhi 2000 (118) ELT 57 (CEGAT)*; *CCE, Calcutta-IVs. Suraj Ratan Mohta 1999 (113) ELT 260 (CEGAT)*.

Maximum penalty not to be imposed in all cases. Quantum depends on facts and circumstances of each case - *CCE, Bangalore Vs. S.B. Gopalakrishna 2004 (166) ELT 185. (CEGAT)*.

Penalty for delayed payment of Service Tax under section 76 has been condoned on the ground that initially there is bound to be a lack of clear understanding, Service tax being a new concept - *Re: Oriental Insurance Co. Ltd. (1998) 103 ELT 459 (Commr. Appl)*.

*Prima facie* no case for imposing penalty when delay in

**Payment of duty under protest is valid only when formally communicated to the Assessing Officer**



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The legal basis for the imposition of Service Tax in India is provided in Chapter V (Sections 64 to 96) of the Finance Act, 1994 (Act 32 of 1994). The Finance Acts of the subsequent years added more services to the tax net by way of amendments from time to time, to the Finance Act, 1994.

ernment made a constitutional amendment vide Constitution (95th Amendment) Act, 2003. Consequently, the new Article 268A has been inserted for Service Tax levy by the Union Government and the amendment of the Seventh Schedule to the Constitution, in List I after Entry 92B, Entry 92C has been inserted for taxes on services as well as in Article 270 of the Constitution, the

dered. If there is no service, there is no tax. It was further held that 'the tax is not on advertisement', but on the services rendered with reference to the advertisement and there is a clear distinction between the advertisement service and advertisement. The levy of Service Tax on advertising services has been upheld in the *Advertising Club Vs. Central Board of Excise & Customs*

filing quarterly returns is during the initial imposition of Service Tax - *Ashwani & Associates Vs. Collector of Customs, New Delhi 1999 (105) ELT 40 (CEGAT)*.

Penalty for failure to file the returns under Section 77 was reduced on the basis of the law amended subsequent to the date of filing of the return. Thus, the Tribunal took cognizance of the reduction of penalty by the legislature subsequent to the date of filing the return - *Anchor Shipping Agencies Vs. CCE, Mumbai-I 2000 (118) ELT 719 (CEGAT)*.

Penalty for failure to file returns under Section 77 has been condoned on the grounds that Service Tax was new and the assessee was not conversant with the provisions; the assessee did not carry on any business; the return for the period was a 'nil' return; Service Tax was introduced for the first time and it was the assessee's first delay - *Sri Sajjan Kumar Kariwala Vs. CCE, Allahabad (1997) 20 RLT 885 (CEGAT)*.

Even if a minimum penalty is prescribed, e.g. Rs. 100 per day under section 76 or under section 77 of the Act [as it stood prior to 16-10-1998], the authority competent to impose penalty will be justified in refusing to impose any penalty, when there is a technical or judicial breach of the provisions of the Act or where the breach flows from a *bona fide* belief that the offender is not liable to act in the manner prescribed by the statute - *Smitha Shetty Vs. CCE, Bangalore (2003) 156 ELT 84 (CEGAT)*; *CCE, Jaipur Vs. Milan Tent Palace (2001) 131*

*ELT 274 (CEGAT)*.

Penalty under Section 77 has not been condoned, though reduced since tax was deposited on time and the default took place during the initial period of the imposition of the new tax - *Vijaya Clearing and Forwarding Agency Vs. CCE, Mumbai-I (2000) 123 ELT 930 (CEGAT)*; *Sundeep Goyal & Co. Vs. CCE, Calcutta - I (2001) 133 ELT 785 (CEGAT)*.

Delay in filing quarterly returns during the initial imposition of Service Tax when the tax liability is already discharged calls for leniency in imposition of penalty - *Harilal & co. Vs. CCE, Mumbai-I 2000 (115) ELT 375 (CEGAT)*.

Delay in filing quarterly returns is subject to penalty after issue of showcause notice. No service rendered during the period and no liability to pay Service Tax grounds for leniency in imposition of penalty. Penalty has not been condoned though reduced even where the return is a 'nil' return, but there has been consistent failure on part of the assessee to submit the returns - *Rajinder Kumar Somani Vs. CCE, Kanpur 1999 (113) ELT 111 (CEGAT)*.

The action on the part of the appellants in not depositing Service Tax during the period of stay cannot be called *mala fide* so as to justify the imposition of penalties upon them - *Chitrita Virnave Vs. CCE, Patna (2002) 145 ELT 622 (CEGAT)*.

Procedural lapse of delay in filing return under impression that return of period in question is not required to be filed since no business is carried



during that period is condonable and penalty not imposable - *Ashok Rastogi Vs. CCE, Kanpur 1998 (104) ELT 480 (CEGAT)*.

When Appellant is under impression that he was not required to file a return or even to take registration, penalty is not imposable as the law permitted regularisation of a past error - *Ramesh Chandra Khanna Vs. CCE, Kanpur 1998 (103) ELT 51 (CEGAT)*.

The penalty for delay in filing the returns was reduced to a token figure of Rs. 5,000 since the appellants were under a *bona fide* belief that they were exempted from Service Tax - *Palika Palace Vs. CCE, Chandigarh (2001) 134 ELT 677 (CEGAT)*.

Question of mandatory penalty for late submission of ST 3 return under Section 77 of Finance Act, 1994 referred to High Court under Section 35G of Central Excise Act, 1944 - *CCE, Calcutta-I Vs. B.L. Company 2000 (117) ELT 696 (CEGAT)*.

The respondent company was a non-resident in India and was directly under the Ministry of Economic Affairs and Trade of Russian Federation, and hence there cannot be any intention on the part

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of the assessee company to evade payment of Service Tax. Further, as per the terms of the contract it was the Indian company, which was to bear the burden of the taxes. Hence, the respondent's default was not intentional and they had reasonable cause as envisaged under Section 80 and accordingly no penalty is imposable - *CCE, Bhubaneswar-II Vs. Tyazhprom Export 2003 (157) ELT 576 (CEGAT)*.

Penalty under Section 77 has also been condoned where Service Tax was deposited along with interest as provided in Section 75 without collecting it from the clients. No penalty is imposable for delay in filing quarterly ST 3 return as the Service Tax was imposed for the very first time and the quarter in question was also very first quarter and, the appellant, too, was new to Service tax. Benefit of Section 80 of the Finance Act, 1994 to be given - *Re: B.M. Rehan 1999 (108) ELT 859 (Commr. App.)*

When the entire tax liability had been met in time and no notice was served on the appellants under Section 70(2) the penalty cannot be imposed - *Mukund K. Roongta Vs. CCE, Jaipur 1999 (107) ELT 38 (CEGAT)*.

Set aside since dispute related to a legal issue of interpretation of provisions of different statutes and also considering the conduct of the appellant in registering and submitting returns under protest - *Zee Telefilms Limited Vs. CCE, Mumbai 2004 (166) ELT 34 (CESTAT)*.

Minimum penalty for non-payment of tax is Rs. 100 and not Rs. 100 per day. Levy of

penalty for failure to register is mandatory, while it is discretionary for failure to pay tax and for failure to file returns - *R.B. Babutule Vs. CCE, Mumbai 2004 (166) ELT 233 (CEGAT)*.

Voluntary Returns filed, though belatedly, by a charitable organisation on occasional letting out of mandap is reasonable cause for waiver of penalty - *Moga Veera Vya Vasthapaka Mandali Vs. CCE, Mumbai 2004 (166) ELT 476 (CEGAT)*.

#### Refund

Even if tax/duty is not paid under protest, filing of appeal is itself a protest and claim of refund is not time barred - *Hutchison Max Telecom Private Limited Vs. CCE, Mumbai 2004 (165) ELT 175 (CEGAT)*.

Assessee may file documentary evidence at a later date where claim of refund is made within time - *TVS Suzuki Limited Vs. CCE, Trichy 2004 (165) ELT 192 (CEGAT)*.

Payment of duty under protest is valid only when formally communicated to the Assessing Officer. Where duty is collected from the customer, it is undue enrichment - *Gujarat State Fertilizers and Chemicals Limited Vs. CCE, Vadadora 2004 (166) ELT 193 (CEGAT)*.

Endorsement in TR6 challan of payment under protest is sufficient compliance in the circumstances and limitation for claim does not apply - *Star Forging Private Limited Vs. CCE, Rajkot 2004 (167) ELT 316 (CEGAT)*.

Where incidence of duty is not passed on to the custom-

ers there is no undue enrichment and refund is eligible - *Flex Industries Vs. CCE, Noida (168) ELT 187 (CEGAT)*.

Not eligible based on the decision the Supreme Court when the assessee had not disputed his case - *M.K. Dyeing Vs. CCE, Mumbai (168) ELT 279 (CEGAT)*.

#### Stay

Dispensation of pre-deposit is rejected since no *prima facie* case made out against levy of Service Tax and no financial hardship pleaded - *Mukta Arts Limited Vs. CCE, Mumbai-IV 2004 (165) ELT 85 (CEGAT)*.

Dispensation of pre-deposit is allowed when order of Superintendent is not indicating that best judgment under Section 72 of Finance Act, 1994 resorted to or that accounts of assessee is rejected as incorrect or incomplete - *Chandravadan Desai Vs. CCE, Calcutta-I 1998 (98) ELT 515 (CEGAT)*.

#### Advertising agency services

Levy of Service Tax on advertisement charges for products displayed in the film was disputed in appeal. Since no *prima facie* case is made out for non-levy, dispensation of pre-deposit is rejected - *Mukta Arts Limited Vs. CCE, Mumbai-IV 2004 (167) ELT 85 (CEGAT)*.

Commission received by Advertising Agency (from newspapers, magazines, Door-darshan, AIR, etc.) would be includible in the value of taxable service and the Authorities have only to consider what is the actual amount received from the client, and how the Agency appropriates it is not

their concern - *Adwise Advertising Agency Pvt. Ltd. Vs. UOI 1998 (97) ELT 35 (Mad.)*. Confirmed in appeal - *Adwise Advertising Agency Pvt. Ltd. Vs. UOI 2001 (131) ELT 529 (Mad.)*.

The activity of printing and publishing of telephone directories, yellow pages or business directories will not attract Service Tax - *Contact Advertising Agency Vs. CCE 2001 (132) ELT 245 (CEGAT)*.

Person preparing neon signboards is not an advertising agency providing advertising service - *Star Neon Signs Vs. CCE 2002 (141) ELT 770 (CEGAT)*.

Activity of Production of TV serial is not an activity of advertising agency - *Vision Technology India Ltd. Vs. CCE, Bangalore 2005 (182) ELT 214 (CESTAT)*.

#### Broadcasting service

Activity of selling time slots or obtaining sponsorships for broadcasting or collecting of the broadcasting charges of a foreign broadcaster is liable to Service Tax - *Zee Telefilms Limited Vs. CCE 2004 (166) ELT 34 (CESTAT)*.

#### Consulting engineer

Contract for construction, erection and installation of desulphurisation plant on payment of lump sum price was on turnkey basis and not a consultancy contract. Work contract cannot be vivisected and part of it is subject to Service Tax - *Daelim Industrial Co. Vs. CCE 2003 (155) ELT 457 (CEGAT)*. Appeal filed by the Department against Tribunal's decision was dismissed - *Daelim Industrial Co.*

*Vs. CCE 2004 (170) ELT A181 (SC)*.

Design element of a work contract is not to be subjected to Service Tax by vivisecting the contract allowed - *Larsen and Toubro Ltd. Vs. CCE 2004 (174) ELT 322 (CESTAT)*.

Deemed definition of sale for inclusion of transfer of property in work contracts does not apply to job works for sake of imposition of Service Tax - *Rolls Royce Industrial Power (I) Ltd. Vs. CCE, Visakhapatnam 2004 (171) ELT 189 (CEGAT)*.

Turnkey project is not liable to Service Tax as Consulting Engineer - *Re: Ishikawajima-Harima Heavy Ind. Co. Ltd. 2005 (182) ELT 281 (Commr. App.)*.

#### Goods transport

Showcause Notice issued under Section 73 is not sustainable - *L.H. Sugar Factories Limited Vs. CCE, Meerut-II 2004 (165) ELT 161 (CEGAT)*.

#### Insurance

Payment of Excess Service Tax for same period to be adjusted, while computing the demand for short payment of Service Tax - *Oriental Insurance Co. Ltd. Vs. CCE, New Delhi 2005 (182) ELT 463 (CESTAT)*.

#### Mandap keepers

The value of taxable service is in relation to the services provided by a mandap keeper to a client, shall be the gross amount charged by such keeper from the client for the



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use of the mandap, including facilities provided to the clients is in relation to such use and also the charges of catering, if any. The 10 per cent of the bill amount charged as service charges are to be included in the gross amount liable for Service Tax - *Hotel Mela Plaza Vs. CCE, Ghaziabad 2005 (183) ELT 190 (CESTAT)*.

#### Tour operators

Contract carriage vehicles are covered under the definition of Tourist Vehicle are liable to Service Tax - *Sri Pandyan Travels Vs. CCE, Chennai-II 2004 (167) ELT 409 (CEGAT)*.

#### Conclusion

The Service Tax net is widening year-by-year and it is growing both in terms of number of services covered and the revenue generated. There is much more scope for extending the levy of Service Tax to more and more new services and increasing the rate of tax over a period of time. The said services will contribute a fair amount to the Government exchequer and Gross Domestic Product of the country. □