

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL No. ST/87813/2014

(Arising out of Order-in-Original No. PUN-EXCUS-003-COM-044-13-14 dated 14.2.2014 passed by Commissioner of Central Excise, Pune-III)

Tech Mahindra Ltd.

Appellant

Vs.

Commissioner of Central Excise, Pune-III

Respondent

Appearance:

Shri Vinay Jain, Advocate, for appellant

Shri Vivek Dwivedi, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 18.6.2018

Date of Decision: 18.6.2018

ORDER No. **A / 86893 / 2018**

Per: Sanjiv Srivastava

The appeal is directed against the order in original dated dated 17.02.2018 of Commissioner of Central Excise Pune – III.

2. Facts leading to present appeal are as stated below:

a. Appellant is engaged in the business of providing software development services to its Indian as well as

overseas clients. For providing the said services they were receiving certain Information Technology Software Services (herein after referred as "ITSS") from their overseas associate enterprises on a continuous basis. The billing of the continuous services was done at the end of each month based on actual cost of providing the services including the agreed mark up. They were discharging the service tax liability in respect of the services so received from overseas on reverse charge basis. They were also taking the credit of the service tax so paid on reverse charge basis.

b. The rate of service tax in respect of ITSS, received by them was changed from 12% to 10% with effect from 24th February 2009. Accordingly for the services received by them during the month of February 2009, they paid service tax and applicable cess at reduced rate, as the bill for the services received by them during the month of April 2009, was raised by the provider of service only on 28th February 2009.

c. On being pointed out by the Audit subsequently, they paid the differential amount of Service Tax due i.e. Rs 74,92,646/- (Rupees Seventy Four Lakhs Ninety Two Thousand and Six Hundred Forty Six Only) vide e-challan No 51948 dated 04.10.2012 and intimated to the department vide their letter dated 18.10.2012 on

19.10.2012. They also took the credit of the tax so paid on reverse charge basis.

d. Sine they did not pay the interest amount due in terms of Section 75 of the Finance act 1994, a show cause notice dated 28/08/2013 was issued to the Appellant, demanding interest on the delayed payment of service tax and also proposing to impose penalty on the appellant under Section 78 for short payment of the Service Tax due by suppressing material facts in respect of the Information Technology Software Services received by them. Show Cause Notice also proposed penalty under Section 77(1)(a) for contravention of the provisions Section 69(2) of the Act read with Rule 4 of Service Tax Rules, 1994 as they have not obtained registration in respect of Information Technology Software Services received by them from their overseas provider of services.

e. The said show cause notice has been adjudicated by the Commissioner Central Excise Pune –III. The text of the order is reproduced below:

- (i) I order that the noticee shall pay the interest amounting to Rs 40,58,140/- (Rupees Forty Lakhs Fifty Eight Thousand One Hundred Forty only) under Section 75 of Act.
- (ii) I hereby impose a penalty of Rs 74,92,646/- (Rupees Seventy Four Lakhs Ninety Two Thousand Six Hundred and Forty Six Only) under the provisions of Section 78 of the Act.

I further order that, the penalty shall stand reduced to Rs 18,73,162/- (Rupees Eighteen Lakhs Seventy Three Thousand One Hundred and Sixty two only) if the interest under clause (i), along with the said reduced penalty is paid within 30 days from the date of communication of this order.

- (iii) I hereby impose a penalty @ Rs 200/- per day under the provisions of Section 77(1) of the Act, totally amounting to Rs 1,81,200/- (Rupees One Lakh Eighty One Thousand Two Hundred only) under the provisions of Section 77(1)(a) of the Act.

3. Arguing on the behalf of Appellant, their Counsel Shri Vinay Jain Advocate submitted-

- (i) Service Tax is payable at the rate prevailing on the date of completion of provision of service, and the date of invoice is suitable indicator for completion of the provision of the services. Hence tax rate as applicable on the date of invoice should be applicable in respect of the services received under the said invoice.
- (ii) In support of his argument he relied on the provisions of Point Of Taxation Rules, which were issued much later but albeit in his view provided a suitable guidance in this regard for the past period when there was no indication in the Finance Act, 1994 or Service Tax Rules at the relevant time.

- (iii) He also relied on the CBEC Circular No 114/13/2011-ST dated 18.07.2011 and D O F No 334/1/2012-TRU dated 12th March 2012 to argue that the changes brought by way of introduction of Point Of Taxation Rules were to bring uniformity in the system.
- (iv) He stated that since they have paid service tax under protest, therefore interest is not leviable. He argued that it has been their stand throughout that they were not required to pay differential tax, but have paid the same as they were entitled to the credit of the tax paid by them on reverse charge basis.
- (v) He submitted that the notice issued to them demanding the interest is barred by limitation as it has been issued much beyond the prescribed period from the February 2009. The show cause notice has sought to invoke extended period of limitation to demand interest and penalty.
- (vi) Since there is no suppression on their part, extended period cannot be invoked and also no penalty could have been imposed under Section 78 of the Finance Act, 1994.
- (vii) Since they were regularly discharging the service tax liability in respect of Information

Technology Software Services, received by them from their overseas provider of service, the act of not obtaining registration in respect of the said service cannot be but a procedural lapse and hence no penalty should be imposed under section 77(1)(a).

4. Shri Vivek Dwivedi, Authorized Representative appeared on behalf of the department. He submitted that it is fact that there was delay in payment of the service tax from the due date. Since there was delay in payment of service tax, in terms of Section 75 of the Finance Act, 1994 interest at the prescribed rate also was required to be paid for the period of delay. Further appellant has failed to obtain registration in respect of these services received by them at the appropriate time and hence have contravened the provisions of Section 69(2) of the Act read with Rule 4 of Service Tax Rules, 1994 and hence penalty has been rightly imposed under Section 77(1)(a) of the Finance Act, 1994. Further since appellant has short paid the service tax due at the time when it was required to be paid, by suppressing material facts from the department penalty under section 78 is justified. He reiterated the findings recorded by the Commissioner in her order.

5. We have considered the submissions made.

6. Since the issue is primarily in relation to the demand of interest as appellant has admitted and paid the differential tax due the issue the issue with regards to tax liability is not being dealt in much detail. However it is pointed out that various authorities as detailed below have held that for determination of service tax liability, the relevant date for determination of the rate of taxation is the date on which service is received by the service recipient and not the date on which payment is received by the service provider.

- i. *Lumax Samlip Industries v. CCE* (2007) 8 STT 82 (CESTAT-Chennai)
- ii. *Reliance Industries Ltd. vs. CCE* (2008) 10 STR 243 (Tri-Ahmd.) **affirmed in** *CCE vs. Reliance Industries Ltd.* (2010) 19 STR 807 (Guj.);
- iii. *CST vs. Consulting Engineering Services (I) Pvt. Ltd.* (2013) 30 STR 561 (Tri-Del) **upheld in** *CST vs. Consulting Engineering Services (I) Pvt. Ltd.* (2013) 30 STR 586 (Del)
- iv. *CST v. Epic India Pvt. Ltd.*, (2014) 35 STR 948 (Tri. – Del.)
- v. *CST v. Union Bank of India* (2014) 36 STR 470 (Tri-Mum)
- vi. *CST v. Lea Associates South Asia P.Ltd* (2014)36 STR 909 (Tri-Del)

vii. CCE, Vadodara-II Vs Schott Glass India Pvt. Ltd.
2009 (14) STR 146 (GUJ)

7. Counsel for appellant has while arguing the matter relied on the CBEC Circular No 114/13/2011-ST dated 18.07.2011 and D O F No 334/1/2012-TRU dated 12th March 2012. In view of the authorities as referred above, the reliance placed on any para of the circular which may go contrary to the above decisions is totally misplaced in view of the Apex Court decision in case of Rattan Melting [2008 (231) ELT 22 (SC)], wherein constitutional bench of Apex Court has observed as follows:

“6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.”

8. Further in terms of Section 67A of the Finance Act, 1994, inserted w.e.f 2012, the rate of service tax, value of a taxable service and rate of exchange, if any, shall be the rate of service tax or value of a taxable service or rate of exchange, as the case may be, in force or as applicable at the time when the taxable service has been provided or agreed to be provided.' Thus in terms of this Section, the applicable rate of service tax shall be the one prevailing at the time when a taxable service is provided or agreed to be provided. Thus even in terms of the amendments made subsequently by way of insertion in terms of Section 67A, the rate of service tax shall be the rate in force at the time when service is provided.

9. Hence in our considered view there is no dispute with reference to applicable rate of tax in respect of the Information Technology Software Services received by the Appellant during the month of 2009. Since the rate of taxation was reduced from 12% to 10% with effect from 24th February 2009, the rate of taxation in respect of services received prior to the said date has to be 12% and in respect of services received from that date 10%. Appellant too has paid the differential amount of tax due from them as pointed out in para 2(c) above.

10. Since the service tax short paid on the due date, and made good only subsequently interest at the prescribed rate under section 75 too was payable. However Appellant did not agree to pay the interest due and have contested the same. On the said issue based on the contentions raised following questions are framed for answer by this bench:

- i. What is the nature of interest under a Fiscal Statue which arises on the account of delayed payment of tax?
- ii. Whether a separate notice demanding interest is required in case of delayed payment? Or the interest becomes statutorily payable on determination of the tax dues.
- iii. If a notice is required to be issued demanding interest then in that case what will be the relevant date for computing the limitation for issue of such a notice.

11. Arguing against interest the learned counsel submitted relying on various decisions that demand in respect of interest is barred by limitation, as the notice under section 73 demanding interest has been issued much beyond the prescribed period of limitation computed from the date when the tax was short paid. Since there is no case for suppression, fraud etc., there is no justification for invoking the extended period of

limitation in this case. He relied on the following authorities:-

- a. Hindalco Industries Ltd. Vs Commissioner Central Excise Allahabad [2003 (161) ELT 346 (T)];
- b. Collector of Customs Madras Vs T V S Whirlpool Ltd. [1996 (86) ELT 144 (T)] affirmed by the Supreme Court in 2000 (119) ELT A177 (SC)
- c. Jain Irrigation Systems Ltd. Vs Commissioner Central Excise Nasihik [2015 (40) STR 752 (T)]
- d. Mahindra & Mahindra Vs Commissioner Central Excise Mumbai V [2017-VIL-435-CESTAT-MUM-CE].

12 Section 75 of Finance Act 1994 provides as under:

“75. Interest on delayed payment of service tax

Every person, liable to pay the tax in accordance with the provisions of section 68 or rules made thereunder, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest at such rate not below ten percent. and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette] for the period] by which such crediting of the tax or any part thereof is delayed.

Provided *that in the case of a service provider, whose value of taxable services provided in a financial year does not exceed sixty lakh rupees during any of the financial years covered by the*

notice or during the last preceding financial year, as the case may be, such rate of interest, shall be reduced by three per cent per annum.”

From plain reading of the above provision it is quite evident that interest is compensatory in nature and is required to be paid by the tax payer in case of any default in payment of tax for the period of default. Issue with regards to statutory levy of interest is no longer res integra. Bombay High Court has in case of Commissioner Of Central Excise vs Padmashri V.V. Patil Sahakari Sakhar Karkhana Ltd. [2007 (215) ELT 23 Bom] has held as follows:

“10. So far as interest Under Section 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 Under Section 11AB are declared.

The second aspect would be whether there is any discretion not to charge the interest Under Section 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 Sub-section (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."

13. Hon'ble Supreme Court has in case of Commissioner of Trade Tax Vs Kanhai Ram 2005 (4) SCC 472 has held that in similar situation the liability to pay interest arises on account of operation of the statute and no separate demand in respect of such interest was required to be made. In the same decision

court also observed that in case the demand of interest was to be made it was to be made within reasonable time from the date of assessment order creating the tax liability. The relevant paras of the said decision are reproduced below:

“12. In the case of STO v. Dwarika Prasad Sheo Karan Dass 1977 1 SCC 22 this Court has held that the assessee is liable to pay interest under section 8(1-a) of the u.p sales tax act, 1948 on unpaid amount of tax and that such liability arises automatically by operation of law. This Court also held that fresh notice of demand was not necessary where amount of tax or other dues were reduced as a result of the appeal, revision or other proceedings.1

13. This Court had occasion to consider sub-section (1-A) of Section 8 of the Act in the case of Haji Lal Mohd. Biri Works v. State of U.P 1974 3 SCC 137 and held that the liability to pay interest under Section 8(1-A) of the Act is automatic and arises by operation of law. It was further observed in that case that it is not necessary for the Sales Tax Officer to specify the amount of interest in the recovery certificate.

14. This Court had also considered the question whether it was necessary for the Sales Tax Officer to issue a fresh notice of demand to the respondent after the tax assessed by the Sales Tax Officer was reduced on appeal and further reduced on revision. This Court after considering sub-section (9) which has been added in Section 8 of the Act by the U.P Sales Tax (Amendment) Act (3 of 1971) held that it shall not be necessary for

the assessing authority to serve upon the dealer a fresh notice. Similar view was taken by the Allahabad High Court in the case of Parshuram Rameshwar Lal v. State of U.P 1974 33 STC 540 All, which has also been referred to in this judgment.

15. In view of the above, this Court accepted the appeal filed by the Sales Tax Officer and set aside the judgment of the High Court and dismissed the writ petition filed by the assessee.

16. In the case of Prahlad Rai v. STO 1991 Supp 2 SCC 612 this Court had occasion to consider the payment of interest on arrears of sales tax. In this case, the assessee contended that he had admittedly paid the entire arrears of sales tax voluntarily and, therefore, they did not become defaulters and not liable to pay interest. Rejecting the said argument, this Court held that the accrual of interest is automatic and no separate notice of demand was required to be served in that respect.

17. Thus, we are of the opinion that the High Court was not justified in deleting the interest levied by the authorities on the ground that no notice was served. In this view, the impugned judgment would normally be unsustainable. However, as already noticed, the respondent assessee has specifically urged that the subsequent proceedings to the assessment are barred by limitation and that even though the order was passed on 6-6-1986 imposing tax liability, etc., the assessing authority had passed another order only on 30-7-1990 holding that on admitted amount of tax, the assessee was liable to pay interest at 24% p.a from 1-5-1978 and,

therefore, on the question of delay in demanding interest, the demand has to be set aside. This argument of the learned counsel appearing for the respondent merits acceptance. In this case, the assessment relates to Assessment Year 1977-78. The respondent furnished his return to the assessing authority and the assessing authority passed an assessment order against the respondent and in accordance with the assessment order, the assessee has deposited the entire amount of tax amounting to Rs 15,236.98 paise on 30-8-1986 and Rs 2817 on 26-6-1982. However, on 30-7-1990, the assessing authority passed an order imposing interest against the respondent. Thus the demand was after nearly four years. There was no demand of interest in the assessment order which, in our opinion, forms part of the assessment order. As the assessment order did not include a claim for interest, the demand for interest had to be made within a reasonable period thereafter. To be noted that for rectification of the assessment order, a limitation period of three years is laid down. Since the demand of interest was made after almost four years, we hold that the demand is not within a reasonable period and the assessee is not liable to pay the interest as demanded. The Department is not entitled to recover the interest from the respondent assessee but is at liberty to recover the amount of interest demanded from the assessing officer concerned who has not taken steps for four years.”

14. Hon'ble Supreme Court has in case Haji Lal Mohd.Biri Works, Allahabad Through Abdul Hamid Versus State Of Uttar Pradesh [1974 (3) SCC 137] has held as follows:

“6 Mr. Sen on behalf of the appellant has argued that it was essential for the Sales Tax Officer to make an assessment order in respect of the interest before he could issue recovery certificate against the appellant. In any case, according to Mr. Sen, recovery certificate in respect of the interest could not be issued till such time a notice of demand in respect of the interest had been issued by the Sales Tax Officer to the appellant firm. These contentions, in our opinion, are not well founded. There is no provision in the Act which makes it obligatory on the part of the Sales tax Officer to make an assessment in respect of the interest which the amount of sales tax would carry u/s. 8 (1-A) of the Act. There is also no provision in the Act which requires the issue of a notice of demand in respect of the interest by the Sales Tax Officer to the assessee before the Sales Tax Officer forwards recovery certificate to the Collector. Reference has been made by Mr. Sen to sub-sec. (1-A) of Section 8, according to which interest shall be added to the amount of tax and shall be deemed for all purposes to be part of the tax. The above deeming provision, in our opinion, has been added only for the purpose of recovery. The object apparently was that the amount of interest should be recovered in the same manner as the amount of sales tax. The amount of sales tax and other dues under sub-sec. (8) of sec. 8 can

be recovered as arrears of land revenue. It was with a view to put the matter beyond any pale of controversy and to obviate any objection that the interest on sales tax cannot be recovered as land revenue that sub-sec. (1-A) provided that the interest shall be added to the amount of tax and be deemed for all purposes to be a part of the tax.

7 *According to Section 8 (1-A), simple interest at the rate of 18 per cent per annum shall run on the amount of arrears of sales tax from the date specified in that sub-section. It would thus appear that the liability to pay interest is automatic and arises by operation of law. The amount of interest on the date of payment of tax is not constant but increases from day to day. The amount of interest can, therefore, be not predicated till such time as the arrears of sales tax are paid and it is consequently not possible to specify a definite figure in respect of the interest in the recovery certificate. At the time the arrears of sales tax are paid, there can be no difficulty in finding the amount of interest which has become due. The amount of tax on which interest is to accrue, the rate of interest, the date from which interest is to commence and the date up to which interest is to be counted are all known. It is, therefore, a matter of mere arithmetical calculation to arrive at the figure of interest. We find nothing in any of the provisions of the Act as may warrant making of another assessment order by the Sales Tax Officer regarding the amount of interest or making it obligatory for him to issue a demand notice in respect of the interest before sending the recovery certificate to the Collector.*

8 *We are also not impressed by Mr. Sen's argument that the Sales Tax Officer should specify the amount of interest in the recovery certificate. As the amount of interest would go on increasing every day till the recovery of the sales tax, it is plainly not possible to specify the exact amount of interest in the recovery certificate. The exact amount of interest can only be known on the day the arrears of sales tax are paid. No elaborate procedure is required for determining the amount of interest because, as mentioned earlier, it is a matter of simple arithmetical calculation."*

15. In light of the above decisions of the Apex Court the propositions raised can be answered as follows:

- i. In a Fiscal statute the interest is levied as statutory liability and arises on account of delayed payment of taxes.
- ii. No separate notice is necessary for the purpose of recovery of interest and same has to be recovered along with the tax as arrears of tax.
- iii. The demand for interest cannot be quantified till the arrears of tax are paid and it is consequently not possible to specify a definite figure in the recovery certificate. However in case of nonpayment of the interest along with the tax arrears if a notice demanding such interest is to be issued the same should be issued within reasonable time from the date of payment of tax arrears.

16. In view of our findings as above there cannot be no dispute that interest on the service tax short paid and paid subsequently either on own volition or on being pointed out by the department, is required to be paid and if not paid suitable action for the recovery of the interest needs to be initiated against the defaulting entity.

17.1 Commissioner has vide her order imposed penalty of Rs 74,92,646/- on the appellant under Section 78 of the Finance Act, 1994 and of Rs 1,81,200/- (@ Rs 200/- per day) under Section 77(1)(a) of the Finance Act, 1994.

17.2 Appellants have argued The present case is not a case where the charge for suppression, fraud, misstatement with the intent to evade payment of taxes can be invoked against the party. The case is pure of short payment of taxes due on the due on the due date. It is not the case of the department that appellant has suppressed the value of taxable service or has not declared the same to the department. Further entire amount of tax paid by the appellant on reverse charge was available to the Appellant as CENVAT credit there can be no question of intention to evade payment of tax. Thus they had contested that since the issue in dispute was not free from doubt their act of short payment of tax cannot be termed as an act of deliberate

suppression, misstatement, fraud etc with intent to evade payment of tax and there by liable to penalty under section 78. The case of department is that Appellant has received the said services continuously during the entire period (February 2009), but while paying the taxes in respect of these services received not paid the tax at applicable rate for the part of month as during that month. The rate of tax had been reduced from 12% to 10% with effect from 24.02.2009, Appellant had paid the tax in respect of all the services received during the month of February 2009 paid the tax @ 10% which was applicable on the date when the overseas supplier had raised the invoice. Even if we hold that the act of short payment of taxes was in contravention of the provisions of the Finance Act, 1994 and rules made there under, we are of the opinion that this case is fit case for allowing the benefit under section 80.

17.3 Appellant had been paying the taxes in respect of Information Technology Software Services received by them from their overseas service provider and were also declaring the same in the return filed by them. The only mistake they committed was that they had not taken the registration in respect of the said services. Since Appellant was paying the taxes on reverse charge basis in respect of Information Technology Software Services, the delay in seeking registration for the same can be

condoned without any penal consequences in term of Section 80 of the Finance Act, 1994.

17.4 Section 80 of the Finance Act, 1994 reads as follows:

“Notwithstanding anything contained in the provisions of Section 76 or Section 77 or Section 78, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.”

Since the issue with regards to applicable rate of tax during the period February 2009 was itself not free from doubt and also the fact that what so ever amounts were to be paid as taxes were admissible as credit to them there is enough justification for invoking section 80 in this case.

18.0 In view of the above, appeal filed by the Appellants is allowed to the extent of penalties imposed and order in original upheld in respect of the demand of interest.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)