CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 88336 of 2018

[Arising out of Order-in-Original No. 18-19/VR/COMMR/ME/2018-19 dated 2nd May 2018 passed by the Commissioner of CGST & Central Excise, Mumbai East.]

Securities Exchange Board of India
SEBI Bhavan, Plot No. C4-A, 'G' Block,
Bandra-Kurla Complex, Bandra (E), Mumbai - 400051 …***Appellant***

versus

Commissioner of CGST
Mumbai East, 9th Floor, Lotus Infor Centre, JB Marg,
Near Parel Station, Mumbai – 400001 ***…Respondent***

APPEARANCE:

Shri DB Shroff, Senior Advocate with Shri Shehaab Roshan, Advocate for the appellant

Shri SK Mathur, Special Counsel for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/85821 / 2020

DATE OF HEARING:	23/08/2019
DATE OF DECISION:	23/07/2020

PER: C J MATHEW

In this appeal of the Securities and Exchange Board of India

(SEBI), we are called upon to respond to their plea for setting aside of order-in-original no. 18-19/VR/COMMR/ME/2018-19 dated 2nd May 2018 of Commissioner of CGST & Central Excise, Mumbai East on the ground that the exclusions contemplated in Finance Act, 1994 concomitant with the notification of 'negative list regime' rendered them beyond the scope of liability to service tax.

2. The tax authorities had scrutinized several revenue streams of the appellant during the period of dispute and, having excluded the penalties recovered by the appellant in the discharge of its regulatory/ adjudicating jurisdictions that were deposited in the Consolidated Fund of India, proposed demand of tax on the fees collected, under the authority of the various Rules and Regulations notified for administration of the financial market in India, and retained in the General Fund of the appellant. The adjudicating authority confirmed the demands in the two notices dated 16th March 2016, pertaining to the period from July 2012 to March 2015 for recovery of ₹75,22,81,847, and dated 21st February 2018, pertaining to the period from April 2015 to March 2016 for recovery of ₹55,07,78,305, under section 73 of Finance Act, 1994, along with applicable interest under section 75 of Finance Act, 1994, besides imposing penalties under section 76, 77 and 78 of Finance Act, 1994. The penalty under section 78 of Finance Act, 1994 relates to the first notice while the penalty under section 76 of Finance Act, 1994 pertains to the second.

3. The adjudicating authority has rendered the findings in the impugned order by superimposing the functions of the appellant on the statutory definition of service to conclude that the activities engaged in by Securities Exchange Board of India (SEBI) conform to the several elements that combine as

> *'(44)." service" means any activity carried out by a person for another consideration and includes a declared service…'*

in section 65B of Finance Act, 1944 without being

> *'…………*
>
> *(a) an activity which constitutes merely, –*
>
> *(i) a transfer of title and goods or immovable property, by way of sale, gift or in any other manner; or*
>
> *(ii) such transfer, delivery order supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution, or*
>
> *(iii) a transaction money or actionable claim;*
>
> *(b) a provision of service by an employee to the employer in the course of all in relation to his employment;*
>
> *(c) fees taken any Court or tribunal established under any law for the time being in force.…'*

Thereafter, with the inference, built on the obligation of registration before carrying on of any business operations enumerated in the Securities Exchange Board of India Act, 1992, that the fee collected from registrants is *quid pro quo*, it was concluded that service had been rendered for this consideration. To fit the conclusion within the ambit of taxable activity, 'regulating', owing to absence of definition in the governing statute or in Finance Act, 1994, was disambiguated, by recourse to the lexicon, as excluding collection of fee which could only be attributed to rendering of service. Taking note of the want of definition of 'government', till inserted, by Finance Act, 2015, as section 65B(26A) of Finance Act, 1994, and the lack of conformity with it even thereafter, it was held that the exclusion afforded by section 66D(a) of Finance Act, 1994 (more familiarly known as 'negative list') could not be claimed by the noticee. It was also held that, with the obvious absence of the impugned activity, not conforming even to the restricted definition of 'governmental authority', in notification no. 25/2012-ST dated 20th June 2012 (generally known as 'mega exemption'), the final opportunity for escapement from tax liability was also not open to them. The impugned order, referring to the decision of the Tribunal in *Star India Pvt Ltd v. Commissioner of Central Excise, Thane-I [2015 (038) STR 0884 (Tri-Bom)],* discarded the further claim of the noticee that the ingredients, necessary for invoking the extended period of limitation under section 73 of Finance Act, 1994, as well as for imposing penalty under section 78 of Finance Act, 1994, were non-existent.

4. The impugned order concedes that discharge of sovereign function is beyond the scope of levy under Finance Act, 1994 and, from a perusal of the impugned order, it would appear that the adjudicating authority was inclined to consider only government and

activities undertaken for governance to be the sum and substance of the sovereign. In the light of the appellants herein having drawn attention of the adjudicating authority to the insertion of

> *'51. Services provided by Securities and Exchange Board of India (SEBI) setup under the Securities and Exchange Board of India Act, 1992 (15 of 1992) by way of protecting the interest of investors in securities and to promote the development of, and to regulate, the securities market;'*

in notification no. 25/2012-ST dated 20th June 2012 *vide* notification no. 9/2016-ST dated 1st of March 2016, we do not propose to, as elaborated later, render any finding on the impact of that on the demand. However, at this stage, an elucidation of the broad scheme of taxation of services and sovereign immunity may not be a digression.

5. At its most fundamental level, service is best described as the engagement of another individual or entity for the performance of an activity that could, conceivably and but for the constraints of practical impossibility or economic burden, have been undertaken by oneself. To take an example, a person could treat himself for illness or act as his own counsel in legal proceedings by undergoing the prescribed academic courses that are precursors for acknowledging entitlement to practice those professions but, almost to a person, such recourse is not practically feasible. The ease with which professionals, well-versed and in sufficiently large numbers, can be approached for solutions renders performance by self to be unattractive and, indeed, avoidable.

Nevertheless, the freedom of choice to outsource activity combined with the capacity to pay the provider for it is discernible as the essence of any service transaction.

6. It was only with the elapse of much time, and, that too, with the diffusion of education particularly, though not entirely, technical and kickstarting of entrepreneurial instincts, that large manufacturing ventures were presented with options to hive out some of their internal functions to outside entities and to be able to concentrating on their core competencies for optimal allocation of resources. We can, thus, enunciate that most services indirectly contribute to the production of worldly goods. With that scale of contribution to the national income of the country, tax policy was, sooner than later, bound to tap into that source. However, compulsions of non-acceptability and constraints of enforcement, undoubtedly, pushed back its introduction for several years with the curtains finally going up with Finance Act, 1994.

7. The disruptive potential (an expression then unknown in the discourse on social change and management theory) of a new impost, particularly as manumission from the extreme rigours of commodity tax was, yet, within living memory, prompted a calibrated strategy of creeping expansion from a very narrow, and almost imperceptible, base. The curbing of enthusiastic overreach on the part of the administration and securing of acquiescence, even if reluctant, on the

part of the citizenry warranted definitional certitude. That certainly did not pose an unresolvable problem in the early years when the charge was fastened on enumerated 'taxable services' and, finite as these were, could be identified from description in the statute on occurrence between provider and recipient with consideration as the measure of its value. Even with the enlarging base inevitably leading to necessity of definitions for restricting interpretation of descriptions of newer 'taxable services' within legislative intent, the progress of tax expansion was not impeded. The provider, from the very concept of service, is *sine qua non* to any transaction. The enumeration of taxable services, typical of classificatory regime, had to include the recipient for completing the definition. The recipient, being the destination of the service and the source of the consideration, made manifest the rendering of service. The description of the levy as 'destination based consumption tax' by the Hon'ble Supreme Court in *All India Federation of Tax Practitioners v. Union of India [(2007) 7 SCC 527)]* inspired the decision of the Tribunal in *Paul Merchants Ltd v. Commissioner of Central Excise, Chandigarh [2012-TIOL-1877-CESTAT-DEL]* to place the recipient inextricably within the context of tax on services and with the decision of the Hon'ble Supreme Court in *Union of India v. Intercontinental Consultants and Technocrats Pvt Ltd [2018 (10) GSTL 401 (SC)]* that restricted the taxable value to the extent of description of the taxable transaction manifested through provider and recipient, the classificatory regime of taxation of service was, by now, reasonably familiar and stable.

8. As the tax itself emerged from nonage into adulthood, and coincidentally at the age of majority, the 'negative list' regime substituted the enumerations in section 65(105) with the generalized definition in section 65B(44) of Finance Act, 1994 that closely approximated to the essence of service as an economic activity. Not unnaturally, compulsions of one sort or the other yet continue to fence some services out of reach of the tax collector. The scheme, from our analysis of the pertinent provisions, envisages a hierarchy of four tiers for escapement: exogenic to the definition of 'service' in section 65B(44) of Finance Act, 1994, exceptions within the definition itself, exclusions listed in section 66D of Finance Act, 1994 and exemptions notified under section 93 of Finance Act, 1994.

9. While the latter three, enunciated in the statute – parent and subordinate – are generally pleaded before, and considered by, adjudicating authorities, the first often goes unnoticed, and unanswered, even if pleaded laterally, requiring us to pause and dwell upon it. As we have premised in our narrative of the evolution of the levy to the point of conformity with the commonplace understanding of 'service', the 'near' congruence was achieved by substitution of the descriptions deployed in the definition of 'taxable service' in the

classificatory regime by 'service' in the successor regime. Though the subtlety of the transposition may often pass unnoticed, that is no justification for ignoring its significance. Our intent in drawing attention to the seminal decisions handed down by the appellate mechanism of the statute is to highlight the indispensability of the expression 'to any other person', in the classificatory regime, as the destination which evidences fulfilment of the rendering of service. The existence of such destination was no longer warranted in the scheme of section 66B of Finance Act, 1994 that fastened liability on such services as were within the ambit of the definition in section 65B (44) of Finance Act, 1994 and did not find enumeration in section 66D of Finance Act, 1994 or the exemption notifications. As service, conceptually, is the alienation, from oneself, of responsibility for undertaking an activity beneficial to oneself and the tax being leviable on the commercial engagement of a provider, the expression 'for', in contrast with the expression 'to', in section 65B of Finance Act, 1994 brings about alignment of the concept with the object of the tax. The definitional focus is no longer on the recipient but on the transference of responsibility for undertaking an activity that would be taxed for having been performed in the geographical jurisdiction. The default, as well as particular, assignment of location by Place of Provision of Service Rules, 2012 was the natural, and inevitable, adjunct mechanism for enforcing the levy in the new regime. Taxing of the sovereign, in the classificatory regime, was a possibility only if intended by enactment and such controversy did not have opportunity to surface.

10. Sovereignty exists in a restricted sphere within governance. It is of interest to note that, in assigning his own reasons for concurring with the dismissal of the appeal in *Bangalore Water-Supply & Sewerage v. R Rajappa & Others [1978 SCR (3) 207]*, the observation of Hon'ble Chief Justice MH Beg that

> *'…… I would also like to make a few observations about the so called "sovereign functions" which have been placed outside the field of industry. I do not feel happy about the use of the term "sovereign" here. I think that the term 'sovereign' should be reserved, technically and more correctly, for the sphere of ultimate decisions. Sovereignty operates on a sovereign plane of its own as I suggested in Keshavananda Bharati's case supported by a quotation from Ernest Barker's "Social and Political Theory". Again, the term "Regal", from which the term "sovereign" functions appears to be derived, seems to be a misfit in a Republic were the citizen shares the political sovereignty in which he has even a legal share; however small, in as much as he exercises the right to vote. What is meant by the use of the term "sovereign", in relation to the activities of the State, is more accurately brought out by using the term "governmental" functions although there are difficulties here also in as much as the Government has entered largely now into fields of industry. Therefore, only those services which are governed by separate rules and the constitutional provisions, such as Article 310 and 311 should, strictly speaking, be excluded from the sphere of industry by*

necessary implication.'

has been similarly echoed in several decisions since then. Apparently, extending the privilege of absolute sovereignty to governance, even as more acceptable label for it, did not find judicial favour.

11. Not surprisingly, while the Hon'ble Supreme Court, almost from the very beginning, had been called upon to decide on the extent to which immunity of the sovereign was permissible in public interest, there was no call to do so on immunity from tax. Some of these related to immunity claimed by the State, in the operation of its departmental undertakings and public sector enterprises, to escape from the prescriptions of statutes enacted for harmony in industrial relations while others, pertaining to the immunity of the State in suits seeking compensation for tortuous acts of its servants which dealt with the claim of the government that agencies, even when exceeding the law, acted in discharge of sovereign function, do not throw much light on the extent to which activities of the government could be freed from the burden of tax on services. Though the judgement of the Hon'ble High Court of Allahabad in *Commissioner of Income Tax v. Nawab of Rampur [AIR 1966 All 440]* did originate in the reference made by the Income Tax Appellate Tribunal on the claim of the respondent therein to be immune from income tax as an international person following the lapse of paramountcy over the princely states under the Indian Independence Act, 1947, it was even so as an

assessee without immunity on the date of merger. We are, thus, compelled to traverse through the decisions, that applied tests for determination of the claim of public authorities that the pedestal of sovereignty could not ever be removed from under its feet, for validation of our conclusions on the taxability of sovereign functions. Before we do so, it may be of advantage to tarry awhile on the statutory basis of sovereignty.

12. The prerogative of the sovereign to impose taxes is, inalienably, to be exercised by the constitutionally empowered organ of the State. It is stipulated in Article 265 of the Constitution of India that any levy, to be valid, should have the authority of legislative organ. The universally accepted canon of not subordinating the sovereign to the municipal law of any country, including its own, begs the question of tax jurisdiction over itself. To suggest that the State may tax itself or subject itself to its own subordinate, for assessment, or to its constituent judicial organ, for determination of the legality, and propriety, of such assessment is to detract from the sovereignty of the sovereign. Sovereign, not being a person but the embodiment of supreme power, the source of power - whether from divine right as in absolute monarchy, contractual transmission as by the Magna Carta or by self-conferment as in republics – is not relevant to its immutability and the permanence of immunity from jurisdiction of municipal law. Such vestment, neither retractable nor alienable, is manifest in

unquestioned authority over foreign relations, domestic law and order and defence of territory to be exercised by delegates of sovereign which may terminate, wholly, only by dissolution or, partially, by annexation or secession. The attributes of sovereignty, *viz*., police power, power to tax and eminent domain, are exercised under the authority of statutes by delegates of the sovereign. The status of the delegate, not being immutable, is irrelevant unlike the immutability of authority so vested. Therefore, it would be far-fetched to subject sovereign functioning to a law enacted by itself. Though Article 300 of the Constitution of India, relating to institution of suits and proceedings, is a restriction on sovereignty, bringing of the suit against itself for recovery of tax liability is not contemplated in the provision intended to entitle other persons to sue the Union, or a state, government. In the Government of India Act, 1935, the basis for governance of British India immediately before the Constitution of India came into force, a similar provision to sue and be sued had engaged the attention of higher judicial institutions to determine the extent of claims that would lie for wrongful acts by the servants of the government but it must be taken note of that the sovereignty of the King-Emperor was never the issue in question. The Republic of India, while denying itself that absolute supremacy, did not, in the absence of taxation of intangibles, have to envisage effect of then prevailing tax on the discharge of its sovereign functions. Nonetheless, there is no bar on specific legislation equating government with any other person to confer taxing jurisdiction. Within the several taxes, Customs Act, 1962 and the erstwhile Central Excise Act, 1944 categorically subject any goods imported, or manufactured, by the government to the respective duties on the premise that non-sovereign, alienable activities are also undertaken by the government; here, the instrument of the State is deemed to be a separate entity stripped off the privilege of the sovereign. Such definitive acknowledgement of performance of service, even other than as sovereign, is conspicuous by its absence in Finance Act, 1994.

13. Though the dispute in *re Bangalore Water Supply & Sewerage Board* arose from the inclusion of the appellant therein within the expression ‘industry’, for applicability of the provisions of Industrial Disputes Act, 1947, the Hon’ble Supreme Court was called upon to examine the limits on the ‘sovereign’ aspect that elevated the government to rarefied heights of non-accountability and disdain for procedure laid down by law. The scope of this expression had been interpreted by the Hon’ble Supreme Court in *DN Banerji v. PR Mukherjee and Others [1953 AIR 58]* as all activities *‘analogous to the carrying out of trade or business’* and, having observed that several decisions since then which subjected various claims to test for exclusion from this standpoint may, if taken together, be perceived as having cast a veil of confusion detracting from the clarity the decision

in *re* DN Banerji, as, in the inimitable narrative of Hon'ble Justice VR Krishna Iyer,

> *'the leading case on the point, which perhaps may be treated as the mariner's compass for judicial navigation'*

makes it a unique reference point and as observed by the then Hon'ble Chief Justice in office who presided over the seven-judge bench, had

> *'actually restored the tests laid down by this Court in D. N. Banerji's, and, after that, in the Corporation of the City of Nagpur v. Its Employees* and *State of Bombay & Ors. v. The Hospital Mazdoor Sabha & Ors., to their pristine glory'.*

For our purposes, the decision in *re Bangalore Water Supply & Sewerage Board*, with authority of its numerical superiority and its elaborate references to the jurisprudential evolution, suffices. While the bench itself had varying opinions on the scope of application of the disputed law to several business, professional and social organizations, the consensus, notwithstanding the viewpoints therein, on the nature of sovereign and the limits to *princeps solutus legibus est*, is of guidance here. While accepting the proposition that every aspect of 'government' - inherent, enacted or delegated - need not lie within the subordination to 'general law' that does not envisage discrimination of jurisdiction, it was observed that

> *'One such criterion, in the monarchical vocabulary of English Jurisprudence, is Crown exemption, reincarnating in a Republic as inalienable functions of constitutional government. No government no order; no order no rule of*

> *law; no rule of law no industrial relations. So court functions of the State are paramount and paramountcy is paramountcy. But this doctrinal exemption is not expansionist but strictly narrowed of necessitous functions. Isaacs and Rich JJ. dwell on this topic and after quoting Lord Watson's test of inalienable functions of a Constitutional government state… Is lawfully empowered to perform and does perform any function which constitutionally is inalienably a Crown function as, for instance the administration of justice the municipality is in law, presumed to represent the Crown……*
>
> *….For instance, sovereign functions of the State cannot be included although what such functions are has been aptly termed 'the primary and in a liberal functions of constitutional government.'*

may be inferred from the decision *in The Corporation of the City of Nagpur v. Its Employees [1960 SCR (2) 942]* and we would be better enlightened by referring to the elaboration there, in the words of Hon'ble Justice K Subbarao, writing for the bench, that

> *'Lord Watson, in Coomber v. Justices of Berks, describes the functions such as administration of justice, maintenance of order and repression of crime, as among the primary inalienable functions of a constitutional Government….'*

and after adverting to the dissenting judgement of Isaacs, J in which regal functions, described as inescapable and inalienable, including the legislative power, the administration of laws, the exercise of judicial power, is distinguished from non-regal functions assumed by means of the legislative power, went on to clarify that

> *'These words clearly mark out the ambit of the regal functions as distinguished from the other powers of State. It could not have been, therefore, in the contemplation of the Legislature to bring in the regal functions of the State within the definition of industry…… This leads to the question whether the Corporation can be set to exercise the regal function by legislative delegation. The Corporation functions under the statute…… The statute constituting it may confer upon it some strictly regal functions and other municipal functions.…'*

14. From these, it is clear that legislation, enforcement of laws and administration of justice are sovereign functions. We also deduce that the discharge of these functions may be subject to such laws as the competent legislative authority intends it to be so; consequently, statutes, not especially dealing with these specifically, do not immunize the discharge of sovereign functions if the legislative intent, stated or implied, does not exclude such subordination. The requirement of goods in the operating establishments of government cannot be equated with the discharge of sovereign obligations. The consequent ease with which the distinguishability of goods from functioning as a sovereign affords the latitude of transaction - of manufacture, of import and of sale and purchase – in goods to be carved out for assigning to designated subordinates or entities, with attendant accountability to authorities under normal tax laws, is not discerned in the tax relating to services.

15. To start with, services do not lend themselves to such distinctive identification for subordinating an official or body of the sovereign, and, thereby avoiding the irony of subjecting the sovereign itself, to the taxing statute, as well as the authorities appointed thereunder and, more so, in a regime that has replaced enumerated 'taxable service' with a general definition. Further, the charging provision has not been qualified with assertion of taxability of services rendered by the government. Even if taxability of sovereign function is conceded, the rooting of authority to delegate any regulatory or enforcement power being in the vestment of sovereignty, only such services, as are alienated from itself in favour an agency and performed for, and in return for consideration from, the government or performed by the government, in return for consideration, as agent for sovereign bear the essence of section 65B(44) of Finance Act, 1994 and can be subject to the impost after ascertainment of lack of coverage by exclusion, exception and exemption. That is our mandate here.

16. Even in the absence of the definitive intent of taxability in the statute, the eager, and ever observant, eye of service tax authorities on sovereign functioning, intangible and invisible as these are, could not have been warded off for long. That was not so much of a problem in the classificatory regime of defined 'taxable services' as only a few were couched in general phraseology. The generalized definition of

'services' in the 'negative list' regime appears to have been the clarion call for tax intrusion into activities of government. Much of these, not being individual-specific deliveries and, moreover, without perceptible consideration could not have held the attention of tax authorities for long but others, in which government bodies were empowered to receive fees, did. Thus, it, probably, was that the focus of the adjudicating authority rested upon the autonomy of Securities and Exchange Board of India (SEBI), the participants in the financial markets and the fees charged from them as 'provider', 'recipient' and 'consideration' respectively. Clearly, the concept of 'service' and, particularly, the legislative reliance on the expression 'for' in section 65B (44) of Finance Act, 1994, to substitute 'to' in section 65 (105), did not make any impression on the adjudicating authority. The premise that there is no pale of 'service' outside Finance Act, 1994, and the fitment thereon within the definition, admittedly, without finding a place in the exclusions or exemptions, though eminently convenient, is, nevertheless in error for this reason.

17. In adjudication proceedings, claims of escapement cannot be deemed to have been accorded proper disposal unless, and until, subjected to the test of all of four sources of escapement in sequence. We take note that the adjudicating authority has limited the evaluation of the impugned activity to only three of these. The adjudicating authority has subjected the claim of sovereignty to the test of

conformity with governmental activity or the government itself and, that too, within the restricted definition inserted later in notification no. 25/2012-ST dated 20th June 2012 as well as the insertion of definition of ‘government’ in section 65B(26A) of Finance Act, 1994 by Finance Act, 2015.

18. On behalf of the appellant, it was pointed out that the impugned order disposed off two show cause notices though the personal hearing was granted consequent upon response to the first of the two notices. On examination of the record, we find this to be so. We have no doubt that the factual matrix in the two notices are not much in variance but the sanctity of adjudication proceedings is contingent upon each notice following the prescriptions of natural justice and, owing to which, lack of notice of hearing is certainly a breach. Not unnaturally, the noticee was unable to anticipate the disposal of the second notice and the claim of being unprepared, and thereby unheard, is not to be discarded summarily. In rendering the findings, too, the adjudicating authority has not dealt with the second notice independently. In the circumstances, it would be appropriate for us to restrict ourselves to the detriment fastened as a consequence of the first notice. The confirmation of demand arising from the second notice is set aside along with the attendant penalties to enable the adjudicating authority to decide that dispute afresh.

19. Mr DB Shroff, Learned Senior Counsel appearing for the appellant, took us through the evolution of the regulatory institution as well as the Securities and Exchange Board of India Act, 1992 to demonstrate that the registration, a necessary procedure for fulfilment of its regulatory assignment, and monitoring were conducted under the control of the Central Government. According to him, the establishment of Securities and Exchange Board of India (SEBI) under the enactment was preceded by its operation as a creature of a Resolution of the Government of India in the Department of Economic Affairs from 12th April 1988 to take over the regulatory function hitherto exercised by that department. He argued that this ordered succession, coupled with the clarification in circular no. 29/7/2006-ST dated 18th December 2006 of Central Board of Excise & Customs (as it then was), sufficed to exclude the appellant from the ambit of tax as surrogate of a government department. Referring to section 15 of the enactment establishing the appellant as a statutory regulator, Mr Shroff submitted that substantive compliance of conformity with Article 150 of the Constitution of India encompassed the appellant within the scope of exemption from tax.

20. To sustain his contentions, reliance is placed in the decision of the Hon'ble Supreme Court in *Securities and Exchange Board of India v. Ajay Agarwal [(2010) 3 SCC 765]*, in *BSE Brokers' Forum, Bombay & Ors v. Securities and Exchange Board of India & Ors*

[(2001) 3 SCC 482] and in *State of Bihar & Ors v. Shree Baidyanath Ayurved Bhawan (P) Ltd & Ors [(2005) 2 SCC 762]*. Further reliance is placed in the decision of the Hon'ble High Court of Bombay in *Commissioner of Central Excise, Nashik v. Maharashtra Industrial Development Corp [order dated 23rd August 2017 in Central Excise appeal no. 164/2015, 63-66/2016]*, and of the Tribunal in *Bureau of Energy Efficiency v. Commissioner of Service Tax, Delhi [final order no. 50937/2018 dated 27th February 2018 disposing off appeal no. ST/55226/2014]* and that of the Hon'ble High Court of Karnataka in *Karnataka Government Insurance Department v. Assistant Commissioner of Central Excise & Ors [(2012) 54 VST 226]*. Advancing the plea that the bar of limitation comes into play, reliance is placed on the decision the Tribunal in *Telebrands (India) Pvt Ltd v. Commissioner of Central Excise, Mumbai-III [2017 SCC Online CESTAT 2818]* and in *Atul Kaushik & Ors v. Commissioner of Customs (Export), New Delhi [2015 SCC Online CESTAT 1680].*

21. Countering these arguments, Learned Special Counsel for Revenue, Mr SK Mathur urged us to sustain the impugned order in view of the statutory provisions contained in Finance Act, 1994 and as the appellant was not a government body. He reiterated that the fee which were subject to tax in the impugned order was consideration for the benefit of registration which enabled the applicants to participate in the financial market. It was also contended that the decisions in *re*

Telebrands (India) Pvt Ltd and in *re Atul Kaushik* were handed down in the context of a different regime of taxation of services and, hence, not applicable in the present instance.

22. To sustain his contention that fees charged by public authorities are *quid pro quo* and, hence, consideration for some service received, Mr Mathur places reliance on several decisions which, in the context of our exposition *supra* on 'service' and taxation thereon, are not pertinent to resolution of the present dispute. The reliance placed by him on the decision of the Authority for Advance Ruling on an issue raised by the Banking Codes and Standards Board of India is not germane to the facts of the appeal before us; we are also not convinced that an institution functioning under, and entirely within, the executive branch of government and, that too, for according comfort within a nascent law can serve to persuade us. The decision of the Tribunal in *Delhi International Airport Ltd v. Commissioner of GST, Delhi-III [final order no. 50064/2019 dated 18th January 2019 disposing of appeal no. ST/52815/2016]* is not a precedent in as much as appellant therein, though claiming to be the successor of a department of the Government of India, acquired the authority therein from a commercial activity of the government that bears remote kinship with sovereign power. Likewise, the decision of the Tribunal in *Rajdhani Krishi Upaj Mandi Samiti v. Commissioner of Central Excise & Service Tax, Jaipur-I [2019 (24) GSTL 623 (Tri-Del)]* is

also not applicable dealing, as it does, with tax on commercial usage of property.

23. We must confess that we find ourselves in a quandary on the disposal of this appeal owing to certain limitations of jurisdiction and competence. Having drawn attention to the shortcoming in the impugned order, and considering the plea of delegated sovereign authority made by Learned Senior Counsel for the appellant, it would, normally, have devolved upon us to fill that want in the interests of justice. That was our purpose in laying the ground, so to speak, by the narrative, and our observations thereon, *supra.* However, it is on record that serial no. 51, inserted, by notification no. 9/2016-ST dated 1st March 2016, in notification no. 25/2012-ST dated 20 June 2012 (generally referred to as the 'mega exemption notification') issued under section 93 of Finance Act, 1994, entitled the appellant herein to exemption from service tax on all the fees charged by them. We are disinclined to consider this notification to be clarificatory, and thus allow retrospective effect, as it is clearly laid down that this insertion would come into effect only from 1st April 2016 among the several effective dates for the different insertions therein. By according escapement from tax by recourse to the discretion vested in the Central Government, to be exercised in public interest, which is the least assertive in the hierarchy described by us *supra*, *ab initio* liability is not discharged even though the tax was not sought to be

levied under the erstwhile regime and despite having been exercised through a department of the Central Government before that.

24. This Tribunal has been established to adjudge appeals arising from adjudication orders of Commissioners and appellate orders of Commissioners (Appeals). In appropriate circumstances, we may be called upon to construe circulars and instructions as beyond the scope of enforceability; however, statutory instruments issued by the Central Government in exercise of power to exempt tax conferred by Parliament are beyond the scope of such negation by us. Neither is the continued existence of such statutory instrument dependent on our approval; to do so would be frittering away of judicial resources. Consequently, any decision on the plea of having exercised sovereign, and thereby not requiring recourse to the exemption power vested in the Central Government, would either be in conflict with implied assertion of leviability of tax on the fees collected by Securities and Exchange Board of India (SEBI) or be an exercise in superfluity.

25. With that notification, the Central Government, a custodian of the sovereignty assigned to the Republic by the people of India, has distanced the authority wielded over the financial markets by the appellant, notwithstanding duly acknowledged succession, through creation under an executive order, from a department exercising that authority, from sovereign power. This abnegation, coupled as it is, with

the renunciation of future tax liability arising therefrom, is cleansed of the stain of vested interest. We cannot but withhold our ascertainment of the legality of the claim made by the appellant before us.

26. We now turn to the plea of the appellant that the demand is barred by limitation and that section 78 of Finance Act, 1994 should not have been invoked for imposition of penalty. Admittedly, Securities and Exchange Board of India (SEBI) is the exclusive regulator of financial markets in the country and among the trendsetting establishments created for separation of policy-making from enforcing of best practices - both, doubtlessly, being two sides of the governance disc. The composition of the Board is determined by the Government of India and the organization is staffed in accordance with rules framed under the governing statute. The receipts accruing to the appellant, in accordance with procedures laid down by law, are retained in a designated fund and scrutinized by the constitutionally established auditor. The retention of such fee in the assigned fund has been prompted by the principle of separation of powers much in the same way that the three organs of State are compartmentalised. Therefore, it is difficult to conceive of any motive in not complying with tax liabilities. There is also no allegation of suppression or misrepresentation by the appellant.

27. The appellant is statutorily empowered to impose fiscal

penalties for breaches enumerated in the statute and the proceeds of such imposition are credited to the Consolidated Fund of India - no different from the deposit of fines imposed by adjudicating authorities under Finance Act, 1994. As the successor, in due course, of the Government of India in Department of Economic Affairs substituting for the abolished Controller of Capital Issues, its role in the scheme of governance for the larger public interest is not a matter of mere conjecture.

28. Service tax authorities had raised the issue of taxability of the fees charged by the appellant within a few months of the transition to the 'negative list regime' and the appellant had been in correspondence with appropriate levels in the tax administration seeking acceptance of their interpretation. It, therefore, does not behoove the tax administration to claim that there has been suppression or misrepresentation on the part of the appellant. The delay on the part of tax authorities in issuing show cause notice cannot be justified by the argument that the bar of limitation extends to five years past from the date of issue of show cause notice; the jurisdictional tax authority was cognizant of the non-payment, and the reasons thereof, well before the normal period of limitation had lapsed.

29. Indeed, the impugned order also makes it clear that the adjudicating

authority was receptive enough to reschedule the hearings to enable the noticee to furnish the outcome of representations made to the Ministry of Finance. All of these were undertaken in the light of day and not under cover of the darkness of night. Furthermore, despite the pendency of proceedings for recovery of tax, the Central Government was not averse to excluding the appellant, even if prospectively, from the burden of tax.

30. From all of these, it would appear that the mantle of sovereign power was not easily deniable and we cannot but conclude that the impugned order erred in concluding that the ingredients for invoking the extended period, and for imposition of penalty under section 78 of Finance Act, 1994 were, directly and indirectly, evidenced. The demand for the period beyond normal limitation, therefore, does not sustain. Consequently, the penalty under section 78 of Finance Act, 1994 is set aside.

31. The appeal is, accordingly, disposed off on the above terms.

(Order pronounced in the open court on 23/07/2020)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

**/as*