Part-109-One Pager Snapshot to cases in Service Tax regime on invoking extended period-(Section 73 of Finance Act, 1994 which was similar to Section 73/74 of CGST Act, 2017)-Part-IV

CA Arpit Haldia

S.N.	Case Subject	Case	Held
1.	Availing of ITC cannot be termed as illegal when Tax was paid under RCM on services which were exempted from tax	**Petro Carbon & Chemicals (P.) Ltd. *v.* Commissioner of CGST & CX, Haldia [2021] 130 taxmann.com 252 (Kolkata - CESTAT)**	**The issue involved** was whether appellant was entitled to Cenvat credit of Service Tax under Reverse Charge on services when as per lower authorities the said services were exempted from levy of Service Tax. **The Tribunal observed** that it was an admitted fact that the Appellant was not liable to pay Service Tax under RCM on the transportation of goods by vessel services. However, the tax was paid and accordingly the Appellant had availed Cenvat credit of the same. Tribunal relied upon the judgement in the matter of *CCE & ST v. Tamil Nadu Petro Products Ltd. [C.M.A. No. 2939 of 2008, dated 4-9-2015*, wherein it was held that If, upon a misconception of the legal position, the assessee had paid the tax that he was not liable to pay and such assessee also happens to be an assessee entitled to certain credits such as Cenvat credit, the availing of the said benefit cannot be termed as illegal. Tribunal by following the aforesaid judgement held that the Appellant assessee cannot be asked to reverse the Cenvat credit availed on tax paid under Reverse Charge basis when the payment is not disputed. Further, the Revenue was not able to prove beyond reasonable doubt, presence of fraud, collusion, wilful misstatement or suppression of facts on the part of the appellant assessee. Therefore, imposition of penalty under section 11AC of the Act was held to be unwarranted.
2.	When relevant facts are in the knowledge of the authorities, when the first SCN was issued, the subsequent SCN cannot allege suppression of facts.	**Ishvarya Publicities (P.) Ltd. *v.* Commissioner of Service Tax, Chennai-II [2016] 71 taxmann.com 227 (Chennai - CESTAT)**	**Appellant's unit was** audited by the department during Jan 2009. Thereafter, two SCN vide SCN No.39/2007 dt. 05.03.2007 and SCN No. 143/2007, dt. 23.08.2007 were issued for the period July, 2003 to March 2006 and April, 2006 to March, 2007. Proposed demands were confirmed by adjudicating authority and same were duly paid. Thereafter, liability was worked out for April 2008 to December 2008 and that was also discharged. Thereafter, although entire service tax demand from April, 2008 to December 2008 along with applicable interest was paid, appellant were issued SCN on 28.3.2011 invoking extended period. Department contended that under self-assessment scheme, it was onus of the tax payer to discharge liability without any flaw and it is the responsibility to discharge tax and not take shelter under the same though blaming the department based on some procedural irregularities. **The Tribunal observed** that this was a repetitive SCN and Supreme Court held in the case of *Nizam Sugar Factory* v. *Collector of Central Excise* 2006 (197) ELT 465, when relevant facts are in the knowledge of the authorities, when the first SCN was issued, the subsequent SCN cannot allege suppression of facts. The ratio appeared to be applicable to the appellant's case. The penalty under Section 78 could be imposed only when there was fraud or collusion or wilful misstatement or suppression of facts. In the instant case when tax along with interest stood paid, the need for imposition of penalty was unsustainable. The appellant succeeded in so far as imposition of penalty under Section 78.
3.	Extended period not invokable when the relevant entry itself is subject matter of litigation at various Judicial Forums	**Krishi Upaj Mandi Samiti *v.* Commissioner of Central Excise & Service Tax [2017] 84 taxmann.com 160 (New Delhi - CESTAT)**	**The issue involved was** regarding levy of tax on letting out of land and shops to traders and collection of allotment fee/lease amount for such land/shop. The Tribunal held that tax entry "renting of immovable property service" itself was subject matter of serious litigation in various judicial forum. In fact, the Hon'ble Delhi High Court in the case of *Home Solutions (India) Retail Ltd.* v. *Union of India* [2011] 13 taxmann.com 188/33 STT 95 held that the activity of the rent *per se* cannot be subjected to service tax levy, whereas the activities in relation to renting are liable to service tax. The decision of the Delhi High Court led to legislative changes including retrospective amendment of the concerned legal provisions in the Finance Act, 1994. In fact, for non-payment of service tax under this tax entry, special provision was made under Section 80(2) to waive the penalties. Considering the background and the status of the appellant as a Government Organisation, it was held that ingredients for invoking demand for extended period were not present.
4.	Initial burden is on department to prove that the situations visualised by the proviso existed. However, once it is discharged, burden shifts upon assessee	**ICRA Ltd. *v.* Commissioner of Central Excise, Chennai [2017] 79 taxmann.com 148 (Chennai - CESTAT)**	**Tribunal observed that** the proviso to Section 73(1) extended the period of limitation from six months to five years, therefore it had to be construed strictly. The initial burden was on the department to prove that the situations visualised by the proviso existed. But once the department was able to bring on record material to show that the appellant was guilty of any of those situations which are visualised by the section, the burden shifted and then applicability of the proviso had to be construed liberally. When the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word 'evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word 'intent'. In other words the assessee must deliberately avoid payment of duty which is payable in accordance with law. Thus, where there was scope for doubt whether case for duty was made out or not the proviso to Section 11-A of the Act would not be attracted.
5.	When entire dispute is revenue neutral, there could be no intention to evade payment of duty	**Reliance Industries Ltd. *v.* Commissioner of Central Excise & Service Tax LTU, Mumbai [2016] 72 taxmann.com 6 (Mumbai - CESTAT)**	**Tribunal observed that** entire dispute being revenue neutral, there could be no intention to evade payment of duty and consequently extended period of limitation was per se not invokable. In case where credit is available to an assessee itself it cannot be said that there is any intention to evade payment of duty, which is a pre-requisite for invoking the extending period of limitation. In the instant case, if any tax was payable, it could have been available immediately to Appellant, thereby rendering entire dispute revenue neutral. Thus, invocation of extended period of limitation was clearly not justified. Cases Referred-Reliance Industries Ltd. v. CCE & C 2009 (244) ELT 254 (Tri. - Ahd.), CCE & C v. Indeos ABS Ltd. 2010 (254) ELT 628 (Guj.), Mafatlal Industries Ltd. v. CCE 2009 taxmann.com 493 (Ahd. - CESTAT); affirmed by the Apex Court by dismissing the Civil Appeal reported in 2010 (255) ELT A77 (SC), Nirlon Ltd. v. CCE [2015] 58 taxmann.com 28/51 GST 177 (SC)