Replevy the R.I.P Levy

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"NO TAX SHALL BE LEVIED OR COLLECTED EXCEPT BY THE AUTHORITY OF LAW"

- Article 265 to the Constitution of India

Service Tax or for that matter any Tax or Duty, paid voluntarily or otherwise, which is not liable to be paid at all at the first place, under the statute is whether a tax or duty? And if so, whether the refund of the same would be governed by the provisions of Section 11B of the Central Excise Act, 1944 or not?

Article 265 forbids the State from making any unlawful levy or collecting taxes unlawfully. The bar is absolute. It protects the citizens from any unlawful exaction of tax. So long as Article 265 is there, the State cannot be permitted to levy any tax without authority of law and if any tax has been collected unlawfully that must be restored to the person from whom it was collected. If the tax has been collected from any person unlawfully, it is the tax- payer's money which is in unlawful possession of the State. The State has a Constitutional obligation to give back the money to the tax-payer. An act done in violation of Constitutional mandate is void *ab initio* and no right flows out of that void act to the State. The State is in unlawful possession of the tax-payer's property. The State cannot retain it on any equitable ground nor can it give it to any other person out of any supposed equitable consideration. The Constitutional mandate cannot be ignored on the pretext of any rule of equity or on the ground of what is perceived as substantive justice. Every word of the Constitution has to be treated as sacrosanct and respected and obeyed by the State and the Legislature and enforced by the Court.

A new chapter in the world of Indian taxation has started from 01.07.1994 with the passing of Finance Bill, 1994 into Finance Act, 1994 and Chapter V and VA a.k.a. the Service Tax Act. The debut of Service Tax is slow and steady and it entered into the sea of taxation without even causing a ripple. Over a period of nearly 16 years, this particular levy has raised like a Trivikram / meteor and now it has become omnipotent and omnipresent at every level of Indian Business and Industry.

My intention in this piece is not to bring to the notice of the readers the oft repeated increase of Service Tax in the sphere of indirect taxation of this country, but, whether the Government is entitled to levy, collect and retain Service Tax which has no sanction of the Constitution?

All over the country of mandarins of Indirect Taxation (read the Officers of Customs, Central Excise & Service Tax) have issued thousands of Show Cause Notices basing on Rule 2(d)(iv) of Service Tax Rules, 1994, which has metamorphosed many a time. The Rule in its first *avatar* was interted by the Service Tax (Amendment)Rules, 2002 with effect from 16.8.2002 and reads as under:

"(d) "person liable for paying the service tax" means –
(iv) in relation to any taxable service provided by any person who is a non-resident or is from outside India, does not have any office in India, the person receiving taxable service in India."

The above Rule after tests and turmoil and after traveling from the mighty Himalayas to the plains finally now settled with the amendment to Section 66A of Chapter V of Finance Act, 1994, as amended. In the meanwhile, the enthusiastic revenue authorities have jumped on various organizations, which might have received services under various sectors like Banking, Erection, Commissioning or Installation, Consulting Engineering, Architect so on and so forth. The adjudicating authorities dutifully confirmed the demands of Service Tax along with interest and found all the un-suspected service receivers, who have received the services from an Off-shore service providers to whom they have paid in forex through RBI, as persons suppressed the fact of receipt of service with an intention to evade Service Tax!!! Needless to state that all the demands are from 16.8.2002 till the date of the order issued.

There were conflicting decisions on this particular aspect of levy and various Hon'ble Tribunals and Hon'ble High Courts have held that the said levy is liable from 01.01.2005 or 18.4.2006. The legal chaos created by this particular Rule is unbelievable and in my opinion unfathomable. Reference is drawn to the decision in the case of *M/s. Indian Shipoweners Association - 2009 (13) S.T.R. 235 (Bom.) – Levy from 18.4.2006 also affirmed by the Hon'ble Supreme Court of India.*

The unanimous opinion in all the decisions is that no tax can be levied under the provisions or the strength of Rule 2(d)(iv) of the Service Tax Rules, 1994, as amended. It is now settled law that the particular levy will come into force from the date of insertion of Section 66A of the Act, i.e., 18.4.2006. In other words whatever the Service Tax levied and collected prior to this particular date has no sanctity of the Constitution and shall automatically becomes tax collected illegally.

Likewise, Site Preparation Services were brought under the Service Tax net by the Finance Act, 2005 with effect from 16.6.2005. Again, the revenue swung into action and notices have been given to all the contractors who are providing Mining Service to various Companies like Coal India Ltd., and all other subsidiaries of Coal India Ltd., Singareni Collieries Company Ltd., etc., The central idea behind these demands is that the contractors are providing a service of excavation and hence they are all liable to pay Service Tax and accordingy Crores of Rupees have been demanded and collected towards Service Tax, Interest and penalties, including the omnipresent penalty equivalent to tax under Section 78 of the Act.

The concept of the department is incorrect and legally not tenable for the simple reason that the essential character of the Service being provided by a Contrator to a Mining Company is not excavate but winning mineral, albeit, excavation is a part of such service. It is now settled law that vivisecting a Service for the purpose of levy and collection of Service Tax is bad in law. This fact would have gone unnoticed, but for the fact that the Government came up with a new service under the category of "Mining Services" under Section 65 (105)(zzzy). The Hon'ble C.E.S.T.A.T. South Zonal Bench in the case of *M/s. M. Ramakrishna Reddy Vs. Commissioner of CE, Tirupathi* as reported in *2008-TIOL-2337-CESTAT-BANG* has held that the essential character of the service in the instant case is mining and by applying the mother of all decisions Daliem Industries has come to a conclusion that the levy of Service Tax on a Mining Contractor is only from 01.06.2007 and not from 16.6.2005 under the category of "Site Preparation Services".

Similarly, there are many services under which though no Service Tax is liable to be paid the Department has collected sizable amounts towards Service Tax, interest and icing on the cake, penalties. Notices and Orders-in-Original have been issued demanding and confirming Service Tax under the category of

services like Business Auxiliary Service, Survey and Exploration, Mining, Site Preparation, Consulting Engineering etc.

The moot point here is, whether the Government retain these amounts which have been collected as Service Tax from various Service Providers, when the higher Appellate Authorities have finally held that such demands are not sustainable, since the levy itself is contrary to law and liable to be treated as tax collected without the authority of law. Is it not the bounden duty of the Government to return these sums, irrespective of the provisions of Section 11B of the Central Excise Act, 1944 as made applicable to the provisions of Chapter V of Finance Act, 1994, as amended a.k.a. Service Tax Act.

The issue is well settled by the Hon'ble Supreme Court in the case of *Union of India vs ITC Limited as reported in 1993 (67) E.L.T. 3 (S.C),* wherein the Apex Court has held that 'money realized in excess of what is permissible in law is outside the provisions of such money not covered under 'duty of excise'. The Hon'ble High Court of Madras answered this question in the case of *M/s. Natraj and Venkat Associates Vs. Assistant Commissioner of S.T., Chennai II 2010 (17) S.T.R. 3 (Mad.)* basing on the above decision and has held that 'Limitation under Section 11B would not apply. In a very forthcoming decision, the Hon'ble High Court of Karnataka in the case of M/s. K.V.R. Constructions Vs. Commissioner of Central Excise,Bangalore [2010 (17) S.T.R. 6 (Kar)] it was held that 'sums deposited when held as deposit and not duty, no necessity to make claim invoking Section 11B ibid.
Hence it can be safely concluded that the amounts collected and illegally retained by the department on the foregoing instances has to be returned to the parties, without insisting on any formal claim under Section 11B of the Central Excise Act.

Before parting...

Having safely concluded that the provisions of Section 11B would not apply to the refund of amounts illegally retained by the department, now the corollary question is whether the refund of such amounts shall be subjected to the acid test of "unjust enrichment", not under the provisions of Section 11B of the Act but by the principles of equity. The answer is a big YES. Reference is drawn to the judgement of the Apex Court in the case of *SAHAKARI KHAND UDYOG MANDAL LTD vs COMMISSIONER OF C. EX. & CUS* as reported in *2005 (181) E.L.T. 328 (S.C.), wherein it has been held as:*

"From the above discussion, it is clear that the doctrine of 'unjust enrichment' is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the Act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the petitioner/appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss".