Dimensions – 32nd Edition

Ruling / judgment under GST era:

1. M/s Indo Thai Securities Limited - Madhya Pradesh[1]	
Issues for Consideration	• What will be the principal supply when interest is charged by the stock broker on the delayed payment of cost of securities and brokerage charges? • Whether such interest would be exempt under Sl. no. 27 of notification no. 12/2017-Central Tax (Rate) dated June 28, 2017 (exemption notification)? If not, then whether GST is liable to be paid on such interest charged by the stock broker?
Discussion & Ruling	**Discussion:** • The Applicant is a registered stock broker dealing in the purchase and sale of securities on behalf of its client for which a separate consideration is charged in the form of brokerage. • The Applicant charges interest from its customers for not making payments within the stipulated time on "total due amount". The total due amount consists of purchase cost of securities and brokerage. • The Applicant contended that no GST is payable on such interest charged on the basis of the following grounds: - In terms of section 15(2)(d) of the CGST Act, only the interest charged on the brokerage should be added to the value of the supply; - The amount due for the purchase of securities does not constitute supply and interest on such purchase of securities is in the nature of interest on loans/deposits which are exempted vide the exemption notification;

[1] Order no. 08/2019 dated June 25, 2019

	- Such transaction being in ordinary course of trade, thus constitutes composite supply with the principal supply being of amount outstanding towards securities. The same being exempted no tax is payable on the interest. • The Authority observed the following: - In terms of section 15(2)(d) of CGST Act, the classification of interest / late fee / penalty should be the same as that of the goods or services; - The principal supply is the stock broking services for which consideration is charged in the form of brokerage. The interest / late fee being charged on the brokerage and value of securities cannot be bifurcated, as such additional payment does not have its own classification and takes colour from the original supply i.e. stock broking services; - The explanation inserted to the definition of services u/s 2(102) of CGST Act, states that facilitating and arranging transaction in securities is included in the expression of “services”; - Based on the nature of the transaction, the Applicant has not extended any deposits, loans or advances to its clients while it provides stock broking services and thus, the additional amount charged cannot be regarded as ‘interest’ in terms of the exemption notification; - The additional amount charged as interest / late fee / penalty charged from customer shall form part of the transaction value of the principal supply i.e. stock broking service. **Ruling:** • Stock broking service is the principal supply and all other ancillary supplies shall take colours from the principal supply itself and it shall be classified as principal supply i.e. stock broking services; • Interest / late fee collected would not be exempted under the exemption notification and should be added to the value of the principal supply and thereby leviable to GST.
Dhruva Comments / Observations	• The CBIC vide its FAQ issued on stock broking service has clarified that any interest/ delayed payment charges charged for delay in payment of brokerage amount/ settlement obligations/ margin trading facility shall **not be leviable to GST** since settlement obligations/ margin trading facilities are transactions which are in the nature of extending loans or advances and are covered under the exemption notification. Thus, the ruling appears to be contradictory to the clarification issued. • Further, there have been various rulings in the past which have classified such interest / late fee / penalty as a separate supply (i.e. agreeing to tolerate an act) and accordingly, demanded GST on the same by classifying it under a different category than the main supply.

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2. Bai Mamubai Trust, Vithaldas Laxmidas Bhatia, Smt. Indu Vithaldas Bhatia v. Suchitra WD/O Sadhu Koraga Shetty – Commercial Suit (L) in Bombay High Court[2]	
Issue for Consideration	Whether there was a ‘supply’ arising out of the payment of royalty by the Defendant to the Court Receiver as a condition for remaining in possession of the suit premises and consequently whether GST was applicable on the amount of Royalty, whether under forward or reverse charge?
Discussion & Ruling	**Discussion:** • The Plaintiff claimed his right over a disputed property on which the Court found the Defendant to have no *prima facie* right to the premises. The Court appointed a Court Receiver to take possession of the property and directed the Defendant to pay royalty / compensation to remain in possession of the disputed property as Court Receiver’s agent. • The Plaintiff claimed that in case his right over the property is proved in Court and the royalty amount collected by the Court Receiver is paid to him then the same will be an income earned by him for letting out the premises which will be a taxable income under the GST law. Therefore, the Plaintiff moved an application to the Court to direct the Defendant to pay royalty along with GST so that when the income is finally transferred to the Plaintiff, there is no difficulty in recovering the GST from the Defendant. • The Revenue argues that the order permitting the Defendant to remain in possession of disputed premises gives rise to a notional contract between the Defendant and the Plaintiff and payment of royalty is a consideration for the supply of premises to the Defendant and hence, GST will be liable to be paid under the GST law. • The Court observed the following: - It was clarified that any service provided by the Court Receiver comes under the purview of Item number 2 of Schedule III to the CGST Act i.e., it will be an activity which can neither be treated as a service nor as supply of goods. This was clarified irrespective of the fact that the consideration of royalty cannot be attributed to any supply from the Court Receiver. - The Court brought out the following key points to determine whether there is a ‘supply’ arising on the payment of royalty by the Defendant for the premises under the control of the Court Receiver: o The payment of royalty by the Defendant is for the purpose of remaining in possession of the premises and since he had no *prima facie* right on the property, the order directing him to make payment of royalty to keep possession of the premises is to balance the equities of the case and there is no element of reciprocity which is essential to make it a ‘supply’; o When a dispute is regarding the price or payment of a taxable supply then any amount paid under a Court’s order may partake the character of the payment made for the supply because in such cases, the fact that there is a ‘supply’ is

[2] 2019-VIL-454-BOM

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	already established. However, in this present case, the Plaintiff has alleged violation of a legal right and a compensation paid to Court is only to make good violation of the right and a 'supply' cannot be presumed in such cases; o The payment made by the Defendant is in the nature of damages and the doctrine of 'supply' does not encompass a wrongful unilateral act which results in payment of damages; o The quantification of royalty using the market value of rent payable for that property has no bearing on the nature of the supply. **Ruling:** In the absence of reciprocal enforceable obligations, payment of Royalty by the Defendant cannot be characterised as payment against a 'Supply'.
Dhruva Comments / Observations	• The ruling being a first of its kind clarifies that damages paid for an act of illegal occupation does not amount to a voluntary act of allowing, permitting or granting access, entry, occupation or use of the property. The Court has emphasized on the importance of reciprocity and a positive act for an activity to be considered as a 'supply'. • The Court has not dwelled on the issue of whether the damages paid fall under clause 5(e) of Schedule II of CGST Act i.e., agreement to the obligation to refrain from the act, or to tolerate an act or a situation or to do an act. However, it is to be noted that pursuant to the amendment in scope of 'supply' under section 7 of the CGST Act, all activities which are specified in Schedule II would have to first qualify as a supply in terms of section 7(1) of CGST Act. Therefore, reference to clause 5(e) of Schedule II will not be relevant in cases where supply is absent. • Thus, the principles laid down in this judgement will go a long way to determine taxability of payments where an underlying supply is ambiguous and not expressly agreed between the parties.

Judgment under Pre-GST era:

3. ITC Limited v. Commissioner of Central Excise, Kolkata IV[3]	
Issue for Consideration	Whether in the absence of any challenge to the Order of assessment in appeal, any refund application against the assessed duty can be entertained?
Discussion & Judgment	**Discussion:** • The CESTAT, Kolkata in case of the Appellant opined that unless the order of assessment is appealed, no refund application against the assessed duty can be entertained. The Appellant had filed an appeal before the Hon'ble Supreme Court against the impugned Order of the CESTAT, Kolkata. • It was brought to the attention of the Hon'ble Supreme Court that while interpreting the provisions contained in section 27 of the Customs Act, 1962 ('the Act') the Delhi High Court opined that when there is no assessment order for being challenged in appeal,

[3] 2019-VIL-32-SC-CU – The Supreme Court of India

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which is passed under section 27(1)(i) of the Act, because there is no contest or *lis* and hence no adversarial assessment order, the cases would be covered by the provision of section 27(1)(ii) and refund application can be maintained by the assessee even in the absence of filing appeals against the assessed bill of entry. The High Court of Madras has opined similarly.

- The facts of the case are as follows:
  - The Appellant Company is *inter alia* engaged in manufacture of paper from both conventional and unconventional raw materials. The Appellant paid excise duty on clearance of waste paper / broke from May 2001 onwards. The assessments for the period in question (July 2001 to March 2002) were provisional and the entries were finalized on January 30, 2003 by way of final assessment order. The Appellant claimed that at the time of the said final assessment order, it was not aware of the Notification No. 10/1996-CE and as such, no claim thereunder was made by it till final assessment order was passed.
  - The Appellant filed a refund claim under section 11(b) of the Central Excise Act, 1944 (“the 1944 Act”) for an amount of ₹ 28,73,120/- being the amount of duty paid on clearance of waste paper / broke during the period from July 2001 to March 2002, which was filed within the statutory period of limitation. The claim of the Appellant was rejected, and successive appeal was preferred before the CESTAT, Kolkata where also the refund claim of the appellant was rejected.
  - In *UOI v. Micromax Informatics Limited* [2016 (335) ELT 446 (Del)] the Delhi High Court opined that under section 27 of the Act as amended, it is not open to an authority to refuse to consider the application for refund only because no appeal has been filed against the assessment order, if there is one.
- The contentions raised by the Appellant are as follows:
  - It was pointed out by the Appellant that prior to amendment by the Finance Act, 2011 the scheme of assessment under section 17 of the Act was such that once a bill of entry was filed, examination and testing of the imported goods were done by the proper officer and thereafter an order of assessment was passed after physical examination. However, after the amendment to the Act in 2011, the bill of entry is to be self-assessed by the importer or exporter and is subject to verification. The requirement to pass an order arises only when it is found that the self-assessment of duty has not been done correctly by an importer or exporter;
  - It was argued that it would be retrograde step to interpret the amended provision otherwise and to deny the refund claim which is not adjudicatory when the bill of entry has been passed. In case of self-assessment, the duty paid under a mistake can always be claimed without filing an appeal and in that event concerned officer should look into the matter whether the claim of refund was justified;
  - The judgment in *Priya Blue Industries v. CC* [2004 (172) ELT 145 (SC)] is based upon the unamended provisions, thus, cannot hold the field and is inapplicable in view of the amendments made in the provisions;

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- It was further urged that the amended section 17 and section 27 of the Act needs to be read together. Section 27 (as amended) provides that an application for refund of duty can be filed by any person who has paid the duty or by any person who has borne the duty whereas earlier the refund could be claimed only by the person who has paid the duty;
- *Vide* the amendment the words "in pursuance to the order of assessment" have been deleted and a refund claim is therefore maintainable by the assessee in case duty has been "paid by him". Hence, the order of assessment has been made irrelevant and a re-assessment to an order is no longer a prerequisite for maintaining a refund claim;
- Section 27 of the Act does not contain any stipulation which suggests that refunds can only be filed after the Bill of Entry has been appealed against. It was argued that in the absence of such a statutory condition, a restriction on refund claim cannot be imported into the statute;
- It was also argued that section 27 of the Act is a remedy available to the assessee for the refund of duty paid and section 28 of the Act is a remedy available to the Department on the recovery of duty not levied and short levied or erroneously levied. Therefore, both the remedies can be availed without filing the appeals.
- It was further argued that no appeal can be filed under section 128 of the Act against the bill of entry. Under the scheme of assessment under section 17 of the Act, an order is passed by the proper officer only when the self-assessment made is disputed by the Department and not otherwise. The bill of entry is merely stamped to allow clearance of the goods and it cannot be regarded as an order which can be subjected to appeal under section 128 of the Act.

- The department contended as follows:
  - It was contended that self-assessment is an assessment and without questioning the self-assessment made, a claim for refund cannot be entertained. It was submitted that once the self-assessment / assessment attains finality, it cannot be reopened at any point of time;
  - The refund claim filed is not an appellate proceeding and the officer considering the refund claim cannot sit in appeal over an assessment made by a competent officer. The officer who will consider the refund claim is not empowered to review an assessment order;
  - It was submitted that even after the amendment in 2011, the conditionality of payment having been made pursuant to an order of assessment continue to exist. The self-assessed bill of entry is an order of assessment *per se*, and unless the order of assessment passed is appealed before appellate forums for modification, no claim for refund can be entertained. It was argued that section 128 of the Act cannot be rendered otiose;
  - It was further submitted that the amendment has been made in order to simplify the procedure but the legal effect of the self-assessment is that of assessment. While

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	processing self-assessment some exercise has to be done. Once it is accepted, it becomes an order of assessment; - Therefore, unless the assessment order is modified and a fresh order of assessment is passed and duty re-determined, the refund cannot be granted by way of refund application. The officer considering the refund claim cannot reassess an assessment order and such order has to be questioned within the stipulated period of limitation. **Judgment:** • The Hon'ble Supreme Court referred to section 2(2) of the Act where the term "assessment" is defined to include self-assessment. Relying on the judgment of the Hon'ble Supreme Court in *Escorts Limited v. UOI* [1994 Supp. 3 SCC 86] it was held that the endorsement made on the bill of entry is an order of assessment. It was further noted that where there is no *lis*, speaking order is not required to be passed in "across the counter affair"; • The deletion of the expression "in pursuance of an order of assessment" which existed in section 27(1)(i) of the Act was deleted *vide* Finance Act, 2011 due to introduction of the provision as regards self-assessment. However, as self-assessment is nonetheless an order of assessment, no difference is made by deletion of afore-said expression as no separate reasoned assessment order is required to be passed; • It was noted that the provisions of refund are in the nature of execution proceedings and therefore it is not open to the authority which processes the refund to make a fresh assessment on merits and to correct assessment on the basis of mistake or otherwise; • Upon perusal of section 128 of the Act, the Hon'ble Supreme Court noted that the self-assessment is an assessment order which is appealable by any person aggrieved thereby. The expression "any person" is of wider amplitude and the revenue as well as the assessee can prefer an appeal aggrieved by an order of assessment; • It was held that "*The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27.*" It was further held that in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under section 128 or under other relevant provisions of the Act.
Dhruva Comments / observations	• The Hon'ble Supreme Court relied on various judicial pronouncements including the decision of the Supreme Court in *Priya Blue Industries Limited (Supra)* and of the Bombay High Court in *Hero Cycles Limited v. UOI [2009 (240) ELT 490 (Bom)]* to conclude that the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under section 27 of the Act. Per the decision, in the absence of challenge to the Final Assessment Order, the assessee could not have directly filed a claim for refund of duties paid under such assessment.

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- It is relevant to note that the availability of the exemption was not a subject matter of the assessment and hence, the question which arises is can such order be considered as achieving finality qua the claim for exemption.

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