2013 (2) ECS (186) (Tri - Mum)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

WEST REGIONAL BENCH AT MUMBAI

M/s Standard Chartered Bank & others

Versus

Commissioner of Service Tax, Mumbai

Applications No. ST/MA (Ors)/1664/10; 1581, 1903, 1744, 1813, 1815, 1887, 1814, 1897, 1557, 1558 & 1559/11, 1482, 432, 252, 19, 251, 377, 250, 959, 989, 714, 375, 978, 1015; 1022, 1034, 1071, 1563, 1570, 1572, 1582, 1021, 1101/12; 92110, 92402, 92403, 92404, 92405, 92178, 92179/13

In Appeal No. ST/112/09; ST/117,384,60,446,130, 407, 445, 429, 177, 366, 08, 443, 200, 211, 283/10; ST/17, 275, 435, 231, 546, 609, 647, 540/11; ST/218, 25, 541, 672, 636, 410, 275, 276, 277, 273, 32, 252, 546, 357, 520,142/12

Arising out of : Order – in – Original NO. 06/BR-06/Th-1/2010 dated 29.1.2010

Passed by: The Commissioner of Central Excise, Thane – I

Date of Hearing: 07.02.2013

Date of Decision:21.02.2013

M/s Standard Chartered Bank & others — Appellant

Versus

Commissioner of Service Tax, Mumbai — Respondent

Represented by:

Shri Bharat Raichandani, Advocate
Shri Prakash Shah, Advocate,

Shri S.S. Gupta, C.A. & Others – Appellant

Shri K.M. Mondal, Spl. Consultant – Respondent

CORAM

HON'BLE SHRI P.R. CHANDRASEKHARAN, MEMBER (TECHNICAL)
HON'BLE SHRI ANIL COUDHARY, MEMBER (JUDICIAL)

ORDER NO. M/322-362/13/CSTB/C-I

"Therefore, when the Board exercises the power under Rule 3 of the Service Tax Rules, it is implicit that the officer appointed is a Central Excise Officer and the power invested on him is the powers under Chapter V of the Finance Act, 1994 within the jurisdiction specified. Therefore, the expression, " Commissioner and other officers sub-ordinate to him" mentioned in the said order refers to a Commissioner of Central Excise and other central officers subordinate to him." [Para 5.3]

"The purpose and object of appointment of officer under Rule 3 of the Service Tax Rules, 1994, is to implement the provisions of Chapter V of the Finance Act, 1994 which relates to levy and collection of Service Tax. Therefore, the orders issued under the provisions of law have to be read and interpreted in a harmonious way so as to effectuate the purpose of the Act and to achieve its objective. Appointment of officer is only a machinery provision for achieving the object of the Act and in respect of such provisions, the executive has a wide attitude and flexibility as has been held in a large number of judicial pronouncements. The principle of strict construction does not apply in respect of machinery provisions. ……..

It is well settled position in law that "a construction that results in hardships, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system has to be rejected and preference should be given to that construction which avoids such results" [Para 5.5]

"If an officer was not assigned the function, he could not perform those functions. In the case before us, Section 73 which deals with issue of notice for determination of non – levy, short – levy or erroneous refund

does not use the term 'proper officer' at all. It merely says that Central Excise Officer may issue a notice in case there is non – levy or short levy or erroneous refund. There is no assignment of function specifically for the purpose of Section 73. Therefore, any officer which has been vested with the powers for the levy and collection of Service Tax under Rule 3 of the Service Tax Rules, 1994, can issue the notice within his jurisdiction."[Para 5.6]

"From the reading of the above provisions, it may be seen that the penalty imposable under Section 76 and 78 are directly dependent upon the quantum of Service Tax defaulted or evaded. Therefore, if the penalty is imposed under these Sections, it is necessary to determine the quantum or Service Tax defaulted or evaded. Thus, determination of penalty is integrally connected with the determination of Service Tax liability. Therefore, these issues, that is, determination of service tax liability and imposition of penalty cannot be separated."[Para 6.2]

Per: Shri P.R. Chandrasekharan, Member (Technical)

1. There are 41 miscellaneous applications in 40 appeals and a common issue has been raised in all these applications. Therefore, they are being taken up together for consideration.

2. There are mainly two issues raised in these applications. The first issue is whether the Commissioner of Service Tax, Mumbai has jurisdiction to issue show – cause notice to the assesses/applicants under section 73 of the Finance Act, 1994 and can adjudicate the said notices. The second issue is whether the Chief Commissioner of Central Excise Mumbai has the powers under Section 83 A of the said Finance Act to nominate any other Commissioner within his jurisdiction to adjudicate the case pertaining to Commissioner of Service Tax, Mumbai.

3. The learned Counsel for the applicants submits that under Section 73 of the Finance Act, 1994 where any Service Tax is not levied or not paid or short levied or short paid or erroneously refunded, the Central Excise Officer has to issue a notice to the assessee asking him to show cause is to why the amount specified in the notice should not be paid by the noticee. The terms 'Central Excise Officer' has not been defined under the Finance Act, 1994 and as per Section 65 (121), in respect of words and expressions used but not defined in Chapter V of the said Finance Act, definition under Central Excise Act, 1944 or the Rules made thereunder shall apply in relation to Service Tax as they apply in relation to

Central Excise duty. Section 2 (b) of the Central Excise Act defines the term "Central Excise Officer" as Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise or any other officer of the Central Excise department. Further, vide Notification No. 38/2001 – C.E. (N.T.) dated 26.06.2001, Additional Director General has been appointed as "central Excise officer". As per Rule 3 of the Service Tax Rules, 1994, the Central Board of Excise and Customs (CBEC) may appoint such Central Excise officer for exercising the powers under Chapter V of the Finance Act within such local limits as it may assign to them as also specify the taxable service in relation to which any such Central Excise Officer shall exercise his powers.

3.1. A plain reading of the above rule indicates that the CBEC needs to appoint 'Central Excise Officer' who shall exercise powers under the Finance Act, 1994 within the territorial jurisdiction specified therein as also for the taxable services specified. It is the contention of the learned Counsel that no such notification or appointment order has been issued by the CBEC appointing Commissioner of Service Tax, Mumbai as the Central Excise Officer in terms of Rule 3 of the Service Tax Rules, 1994 and, therefore, the show – cause notices issued by the Commissioner of Service Tax, Mumbai, is void ab initio inasmuch as he does not have any jurisdiction. As per Rule 3 of Central Excise Rules, 1944, CBEC can appoint such person as it thinks fit to be a Central Excise Officer by way of a notification; however, no such notification is required under Rule 3 of the Service Tax Rules, 1994. However, under Rule 3 of the Service tax Rules, the CBEC has to appoint such Central Excise Officer as it thinks fit for exercising the powers under Chapter V of the Finance Act, 1994 within such local limits as also specify the taxable services. It is the contention of the appellants that no such appointment has been made by the CBE & C appointing Commissioner of Service Tax, Mumbai as the 'Central Excise Officer'. If one looks at the legislative history since the introduction of Finance Act, 1994, it may be seen that vide order No. 1/1/1994 dated 29.6.1994, CBE & C had appointed Central Excise Officers for the purpose of assessment and collection of Service Tax in terms of Rule 3 of the Service Tax Rules, 1994. In the said order, the designation of the officer along with jurisdiction was specified apart from the taxable services. The said order was amended vide Order No. 2/2/1994 dated 4.7.1994 and 3/3/1994/ST dated 11.10.1994.The Commissioner of Serviced Tax, Mumbai has not been notified or appointed as Central Excise Officer thereunder.

3.2. The learned Counsel relies on the decision of the Hon'ble Apex Court in the case of Commissioner of Customs Vs. Sayed Ali – 2011 (265) ELT 17 (SC), wherein it was held that the Commissioner of Customs (Prev.), though a Customs Officer, was not a 'proper officer' for the purposes of Section 28 of the Customs Act and, therefore, could not exercise the function under the said Section 28. In the light of this decision of the Hon'ble Supreme Court, the contention of the Revenue that all Service Tax Commissioners are already Central Excise Officers and there is no need for a separate appointment once again for the purposes of Service Tax is not tenable. If this view of the Revenue is accepted, it will lead to serious absurdity. If that be so, there was no need to issue notifications defining jurisdictional limits or the powers of the any of the Central Excise Officer under Notification No. 14/2002-CE (NT) defining the territorial limit of Central Excise Officer. Similarly, there was no need to issue Notification No. 26/2006 – ST dated 28.7.2006 and Notification No. 30/2006 – ST dated 11.12.2006 appointing the Commissioner of Service Tax as a Central Excise Officer for the purpose of investigation and adjudication of cases being investigated by DGOEI in the case of M/s First Flight Courier Ltd. and M/s Tata Consultancy Services Ltd.

3.3. The Order No. 4/4/2004 dated 18.5.2004 relied upon by the Revenue is not for the purpose of levy and collection of Service Tax. The said order merely notifies creation of six exclusive Service Tax Commissionerates along with their territorial jurisdiction. The said order has been issued for creating six exclusive Service Tax Commissionerates only and not for appointing Commissioner of Service Tax as the Central Excise Officer in terms of Rule 3 of the Service Tax Rule, 1994.

3.4. The argument of the Revenue that the term 'Commissioner' occurring in the main paragraph of the order dated 18.5.04 should be read as 'Commissioner of Central Excise' is not acceptable for the reason that while interpreting a provision, regard must be had to the clear meaning of the words and there is no room for any intendment. Therefore, the Courts and the appellate authorities can not read words into the provision/statute/ notification which the legislative body in its wisdom has deliberately not incorporated. Further, the said order no where refers to Commissioner of Central Excise. Besides, even if the said term 'Commissioner' is to be construed as 'Commissioner of Central Excise', the said order would not be an order appointing Commissioner of Service Tax as Central Excise Officer for the purpose of exercising the powers under Chapter V of the Finance Act, 1994. It is also evident from Notification No. 7/2004 – CE dated 11.3.2004 issued by the CBE & C wherein in the opening paragraph of said notification, the CBE & C has appointed the officers of the Central Excise Intelligence mentioned in the table therein, as Central Excise Officers and

invested them with all the powers to be exercised by them throughout the territory of India, such powers being the powers of a Central Excise Officer conferred under Chapter V of the Finance Act, 1994 and Service Tax Rules, 1994 regarding any taxable service. There is no parallel between order No. 4/2/2004 – ST and Notification No. 7/2004 – CE (NT) and, therefore, in the absence of any such appointment, the Commissioner of Service Tax cannot have jurisdiction to issue and adjudicate the show – cause notices involved in the present applications. Letter No. A/11013/43/2004 – Ad IV dated 14.9.2004 relied upon by the Revenue is also not sufficient as the said letter clearly stipulates that the CBE & C has decided to divert the post of Commissioner of Central Excise (Appeals)-I, Mumbai as Commissioner of Service Tax, Mumbai. The diversion of a post of Commissioner of Central Excise (Appeals)-I, Mumbai as Commissioner of Service Tax, Mumbai cannot be construed as appointment of the Commissioner of Service Tax, Mumbai as "central excise officer" in terms of Rule 3 of the Service Tax Rules. Reliance placed by the Revenue on the decision of the Hon'ble Allahabad High Court in the case of Raghunath International Ltd. V/s. Union of India 2012 (280) ELT 321 (All) is misplaced as the facts were completely different in that case. In the present case though the notices were made answerable to Commissioner of Service Tax, Mumbai, corrigenda were issued by the Commissioner of Service Tax, Mumbai wherein the applicants/noticees were asked to show cause to Commissioner of Central Excise, Thane – I. The said corrigendum was purportedly issued in exercise of the powers conferred under Notification No. 6/2009 – ST dated 30.1.2009. The said notification has been issued under Section 37 A of the Central Excise Act as made applicable to service tax by Section 83 of the Finance Act, 1994. In terms of Notification No. 6/2009 the Central Government has directed that the powers exercisable by the CBEC under Section 83 A read with Notification No. 16/2007 – ST dated 19.4.2007 shall also be exercised by the Chief Commissioner of Central Excise for the purpose of assigning the adjudication of cases under the provisions of Finance Act, 1994 or the rules made there under within the jurisdiction.

3.5. It is the contention of the learned Counsel that Section 83 A of the Finance Act provides for adjudication of penalty only. Therefore, adjudication of service tax liability by the Commissioner of Central Excise, Thane-I pursuant to the above Notification is bad and void. Once the service tax demand does not survive, penalty cannot stand. Further, Notification No. 16/2007 – ST has also been issued under Section 83 A of the Finance Act, 1994, 1994 whereby the CBE & C has appointed the Commissioner of Central Excise having jurisdiction throughout the territory of India for investigation and adjudication of cases as may be

assigned by the Board. This notification also provides for adjudication of penalty only. In any case, Notification No. 16/2007 dated 19.4.2007 has been issued under Section 83 A of the Finance Act, 1994 read with Rule 3 of the Service Tax Rules, 1994 and the same has been issued for the purpose of assigning special cases for investigation and adjudication as deemed fit by CBE & C. The said notification does not appoint Commissioner of Service Tax, Mumbai as Central Excise Officer. Since Section 83 A of the Finance Act, 1994 refers to only penalty. It is a well settled position in law that tax, interest and penalty are independent charges. In the absence of statutory provisions, tax and interest liability cannot be determined as has been held by the Hon'ble Supreme Court in the case of India Carbon case and Vs Sugar case. Even under the scheme of the Finance Act, 1994, Section 73 refers to Service Tax, Section 75 refers to interest and Section 76,77, and 78 refer to penalty. Thus, when there is reference to penalty only under Section 83 A, it cannot be read to mean as reference to tax and interest as well. Further, Notification No. 16/2007 – ST does not define local limits within which the adjudication has to take place which is contrary to the rule making powers under Rule 3 of the Service Tax Rules. This is evident from reading of Notification No. 26/2006 – ST dated 28.7.2006 and Notification No. 30/2006 – ST dated 11.12.2006 wherein the Commissioner of Serviced Tax has been appointed by the CBEC as Central Excise officer for the purposes of investigation and adjudication of cases in respect of the assesses mentioned therein. It is further submitted that once the power has been exercised and exhausted by the CBEC under section 37 A of the Central Excise Act, the same cannot be exercised by the Chief Commissioner of Central Excise.

3.6. As regards the reliance placed by the Revenue on the opinion given by the Additional Solicitor General of India, the same is not binding on this Tribunal and in any case the same does not advance the case of the Revenue. Even though the legislation has to be interpreted to make it workable and the purposive construction has to be resorted to, it is equally true that in matter relating to jurisdiction of authority, the same cannot be lightly assumed as the issue of jurisdiction goes to the root of the matter and hence, is fundamental in nature.

3.7. In the light of these submissions, it is prayed that the Commissioner of Service Tax, Mumbai is not a Central Excise Officer for the purpose of Chapter V of the Finance Act, 1944 and Chief Commissioner of Central Excise, Mumbai cannot delegate the powers of adjudication for determination of Service Tax and interest liability and, therefore, exercise of such power without authority is bad in law and therefore, the orders issued merit to be set aside.

4. The learned Special Consultant appearing for the Revenue strongly refutes the contentions made by the learned Counsel for the applicants. He submits that Section 2 (b) of the Central Excise Act, 1944 defines the term 'Central Excise Officer'. Rule 3 of the Service Tax Rules, 1994 provides for appointment of such Central Excise Officers as CBE & C thinks fit for exercising the powers under Chapter V of the Act within such local limits as it may assign to them and also specify the taxable services in relation to which such powers may be exercised. It is accordance with these provisions of law, CBE & C has issued Order No. 4/2/2004 – ST dated 18.5.2004 regarding appointment of officers for assessment and collection of service Tax. A plain reading of the said order indicates that there are two parts to the said order. By the first part of the order, the CBE & C has notified creation of six exclusive Service Tax Commissionerates with the territorial jurisdiction. By the second part of the order, the Commissioner and other officer subordinate to him have been duly empowered as proper officer under Rule 3 of the Service Tax Rules, 1994 read with the Chapter V of the Finance Act, 1994. The word 'Commissioner' mentioned the said order is none other than the Commissioner of Central Excise inasmuch as the order does not refer to the word 'Commissioner' as Commissioner of Service Tax. With the creation of six exclusive Service Tax Commissionerates, the powers which were earlier exercised by Commissioner of Central Excise are now to be exercised by officers who are now rechristened as Commissioner of Service Tax. Thus, the word Commissioner as referred to in CBEC & C's order dated 18.5.2004 is nothing but Commissioner of Central Excise, who would, by virtue of this order become an exclusive Service Tax Commissioner. Therefore, there was no need to declare them as Central Excise Officer in term of Section 2 (b) of the Central Excise Act, 1944 because they are already Central Excise Officers. Further, vide the Circular No. A/11013/47/2004/Ad-IV dated 14.9.2004, the post Commissioner of Central Excise (Appeals)-I, Mumbai has been diverted as the Commissioner of Service Tax, Mumbai. As per section 2 (b) of the Central Excise Act, 1944, Commissioner of Central Excise (Appeals) is also a Central Excise Officer and accordingly, there was no need to appoint Commissioner of Service Tax, Mumbai as a Central Excise Officer all over again. He relies on the decision of the Hon'ble High Court of Allahabad in the case of Raghunath International Ltd. vs. UOI [2012 (280) ELT 321 (All)] in support of this contention.

4.1. The learned Special Consultant submits that as per Notification No. 16/2007 – ST, CBE&C can appoint any Commissioner of Central Excise and Commissioner of Central Excise (Adjn.) as Commissioner of Central Excise throughout India for the purpose of investigation and adjudication in terms of Section 83 A of the

Finance Act, 1994 read with Rule 3 of the Service Tax Rules, 1994. This power of the CBE & C has been delegated to the Chief Commissioner of Central Excise in terms of Notification No. 6/2009 – ST dated 30.1.2009 for the purpose of assigning adjudication of the cases under the provisions of Finance Act, 1994 and the rules made there under within his jurisdiction. Since Chief Commissioner of Central Excise, Mumbai – I has exercised this power vide order No. 1/2009 – ST dated 10.2.2009 and assigned the case to adjudicate by Commissioner of Central Excise, Thane – I who is working under him, the assigning of adjudication by the Chief Commissioner is in accordance with law and cannot be subjected to any legal challenge.

4.2. As regards the reliance placed by the appellant on Notification No. 26/06 – ST and 30/06 – ST, these notifications are nor relevant to the issue involved in the present case. Vide Notification No. 6/2009 – ST, the power of the CBE & C has been delegated to the Chief Commissioner of Central Excise for the purpose of assigning of cases for adjudication. Once the power is exercised in accordance with law, there cannot be any challenge to the same.

4.3. As regard the contention of the applicants that Section 83 A confers power of adjudication with respect to only penalty, this contention ignores the fact that Notification No. 16/07- ST dated 19.4.2007 refers not only to Section 83 A of the Finance Act, 1994 but also to Rule 3 of the Service Tax Rules,1994 and, therefore, Notification No. 6/2009 – ST dated 30.1.2009 has to be read along with Notification No. 16/07. In other words, the power delegated to the Chief Commissioner covers not only the power under Section 83 A but also the powers under Rule 3 which provides for levy and collection of Service Tax. Accordingly, in the present case, the Commissioner of Service Tax, Mumbai is a Central Excise Officer for the purposes of provisions of Chapter V of the Finance Act, 1994 and the Commissioner of Central Excise, Thane – I, who was appointed as adjudicating authority in respect of the show – cause notices issued by the Commissioner of Service Tax, Mumbai has exercised the power in accordance with law.

4.4. The legal opinion received from the Additional Solicitor General of India vide opinion dated 26.5.2012 also supports the above view and accordingly, it is prayed that the contention raised in the miscellaneous applications are devoid of merits should be dismissed accordingly.

5. We have carefully considered the rival submissions. Our findings and conclusions are discussed in the ensuring paragraphs.

5.1. Rule 3 of the Service Tax Rules, 1994 reads as follows:-

> "The Central Board of Excise and Customs may appoint such Central Excise Officers as it thinks fit for exercising the powers under Chapter V of the Act within such local limits as it may assign to them as also specify the taxable service in relation to which any such Central Excise Officers shall exercise his powers."

5.2. In pursuance thereto, the CBEC has issued Order No. 4/2/2004 – Service Tax dated 18.5.2004 which reads as under :-

"F.No. 137/43/2003 – CX. 4
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
CENTRAL BOARD OF EXCISE & CUSTOMS

New Delhi: the 14th May 2004

Order No. 4/1/ 2004 – Service Tax
Service Tax Rule (3)

Sub:- **Appointment of Officers for assessment and collection of Service Tax**

With the approval of Government of India, Central Board of Excise and Customs hereby notifies the creation of following six exclusives Service Tax Commissionerate along with their territorial jurisdiction. **The officers namely Commissioner and other officers subordinate to him are hereby duly empowered as proper officer, under Rule 3 of Service Tax Rules, 1994 read with Chapter V of the Finance Act, 1994.**

S.No	Designation	Jurisdiction
1	Commissonerate of Service Tax, Mumbai	Central Excise Zone of Mumbai – I & II except Raigad Commissionerate
2	Commissonerate of Service Tax, Delhi	Central Excise Zone of Delhi except Commissionerates of Panchkula and Rohtak.

3	Commissonerate of Service Tax, Chennai	Commissionerate of Central Excise Chennai – I & II
4	Commissonerate of Service Tax, Kolkata	Central Excise Zone of Kolkata except Bolpur, Siliguri and Haldia Commissionerate.
5	Commissonerate of Service Tax, Bangalore	Central Excise Zone of Bangalore.
6	Commissonerate of Service Tax, Ahmedabad	Commissionerate of Central Excise Ahmedabad – I & II.

1. The officers mentioned in the Column 2 above will be reporting to the jurisdictional Chief Commissionerates in all matters relating to Service Tax except for the officer mentioned at Sr. No. 1. Who would be reporting to Chief Commissioner, Mumbai- I

2. The earlier Order No. 1/1/94 – Service Tax Rules (3) dated 29.9.1994 and Order No. 2/2/94 – Service Tax Rules (3) dated 4.7.1994 as amended by Order No. 1/1/98 – STR (3) dated 7.10.1998 and Order No. 3/1/2004 – Service Tax Rules (3) dated 1st March 2004, stands amended as above.

Sd/-
Manish Mohan
Under Secretary of the Government of India"

5.3. A perusal of the order indicates that it has been issued for appointment of the officers for assessment and collection of Service Tax under Rule 3 of the Service Tax Rules, 1994 read with Chapter V of the Finance Act, 1994 and the Commissioner and other officer subordinate to have been duly empowered as proper officer for the said purpose. Under Rule 3 of the Service Tax Rules, 1994 only a Central Excise Officer can be appointed for the purpose of levy and collection of Service Tax. The said Rule does not envisage appointment of an officer as Central Excise Officer and, thereafter vest in him with the power of levy and collection of Service Tax. What the rule envisages is appointment of a Central Excise Officer for exercising the powers under Chapter V of the Finance Act, 1994. It is in this context, the above order has to be interpreted. Therefore, when the Board exercises the power under Rule 3 of the Service Tax Rules, it is

implicit that the officer appointed is a Central Excise Officer and the power invested on him is the powers under Chapter V of the Finance Act, 1994 within the jurisdiction specified. Therefore, the expression, " Commissioner and other officers sub-ordinate to him" mentioned in the said order refers to a Commissioner of Central Excise and other central officers subordinate to him. It, therefore, goes without saying that the Commissioner of Central excise and officers subordinate to him have been appointed as officers of Commissionerate of Service Tax, Mumbai with the jurisdiction of Central Excise, Mumbai – I & II except Raigad Commissionerate. Any other interpretation, as suggested by the Id. Counsel for the appellants, would render the said Order infructuous.

5.4. Further , from Circular No. A/11013/47/04/Ad – IV dated 14.9.2004 it can be seen that the CBE & C has diverted the post of Commissioner of Central Excise (Appeals) – I, Mumbai as Commissioner of Service Tax, Mumbai. Under Section 2 (b) of the Central Excise Act, 1944 'Central Excise Officer' includes 'Commissioner of Central Excise (Appeals)'. It, therefore, follow that the Commissioner of Service Tax, Mumbai is none other than Commissioner of Central Excise (Appeals) – I, Mumbai. Therefore, the argument of the applicants that the Board has to appoint an officer as "Central Excise Officer" first and then invest with him the powers for assessment and collection of Service Tax, is without any basis and accordingly, we reject the same.

5.5. The purpose and object of appointment of officer under Rule 3 of the Service Tax Rules, 1994, is to implement the provisions of Chapter V of the Finance Act, 1994 which relates to levy and collection of Service Tax. Therefore, the orders issued under the provisions of law have to be read and interpreted in a harmonious way so as to effectuate the purpose of the Act and to achieve its objective. Appointment of officer is only a machinery provision for achieving the object of the Act and in respect of such provisions, the executive has a wide attitude and flexibility as has been held in a large number of judicial pronouncements. The principle of strict construction does not apply in respect of machinery provisions. Therefore, even if there is some lacuna/shortcoming in the order issued, which we do not think exist in the present case, the said lacuna may be made good by the Court by reading words, if necessary, into the notification, so that the purpose and object of the notification is achieved. It is well settled position in law that "a construction that results in hardships, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system has to be rejected and preference should be given to that construction which avoids such results" [Modern School vs UOI AIR 2004 SC 2236]. The Hon'ble apex court in the case of New India Sugar Mills

vs. Commissioner of Sales Tax, Bihar [AIR 1963 SC 1207] laid down the principle that "it is a recognized rule of interpretation of statutes that expressions used therein should ordinarily be under stood in a sense which they best harmonize with the object of statute and which effectuate the object of legislature". If we adopt these principles to the facts of the present case, there can be no doubt that the Commissioner and officers subordinate to him referred to in the order dated 18.5.2004 are 'central excise officers' who have been empowered to assess and collect service tax under the provisions of Chapter V of the Finance Act, 1994.

5.6. The reliance placed by the appellant in the Sayed Ali case has no application to the facts of the present case. The dispute in the Sayed Ali case was that whether the Commissioner of Customs (Prev.) can be considered as 'proper officer' for the purpose of Section 28 of the Customs Act, 1962. Section 28 envisaged issue of a notice by the "proper officer" whenever there was any short levy or short payment, non – levy or non – payment or erroneous refund of duty. Section 2 (34) of the said Customs Act defined 'proper officer' as an officer of customs who has been assigned those functions by the Board and the Commissioner of Customs in relation of any function to be performed under the Customs Act. In other words, Section 28 envisaged that the function thereunder should be performed by an officer who has been assigned those functions. If an officer was not assigned the function, he could not perform those functions. In the case before us, Section 73 which deals with issue of notice for determination of non – levy, short – levy or erroneous refund does not use the term 'proper officer' at all. It merely says that Central Excise Officer may issue a notice in case there is non – levy or short levy or erroneous refund. There is no assignment of function specifically for the purpose of Section 73. Therefore, any officer which has been vested with the powers for the levy and collection of Service Tax under Rule 3 of the Service Tax Rules, 1994, can issue the notice within his jurisdiction. Therefore, Commissioner of Service Tax, Mumbai who has been duly empowered with function of assessment and collection of Service Tax can legitimately issue notice for determination of service tax not levied/short levied/erroneously refunded and so of under Section 73. Since the Commissioner of Service Tax, Mumbai is a Central Excise Officer, he has the power to issue show – cause notice and adjudicate there upon whenever, there is a short levy or short payment, non – levy or non – payment or erroneous refund of Service Tax within his jurisdiction and we hold accordingly.

5.7. The ratio of the decision of the hon'ble Allahabad High Court in the case of Raghunath International Ltd. is relevant to the facts of the present case. In the

said case, the jurisdiction of Additional Director General, Directorate of Central Intelligence was questioned in issuing a show cause notice for determination and recovery of central excise duty not paid along with interest thereon and for imposition of penalty. The argument advanced by the appellant therein was that the Addl. Director General was not appointed as Central Excise Officer under Rule 3 of the Central Excise Rules, 2002, and therefore, he could not have issued the said notice. The hon'ble High Court held as follows: -

> "23. The Scheme of Section 2 (b) of the Act, 1944 never contemplates appointment of the Officers of the Central Excise Department under the Rules. The Rules have to be read to supplement the provisions of the Act and to carry the purpose and object of the Act.
>
> 24. In case, Rule 3 of 2002 Rules is interpreted to mean that the Board even if the Officer is Chief Commissioner of Central Excise or the Commissioner of Central Excise is to be invested with power by the Board to work as Central Excise Officer, the same is wholly redundant and useless exercise. The Chief Commissioner, Central Excise is the highest officer of the department and the Chief Commissioner, Central Excise or the Commissioner, Central Excise undoubtedly can exercise all the powers of the Central Excise Officer under the Act. If the argument of the petitioner's counsel is accepted then even when the Commissioner, Central Excise issues notice under section 11 A of the Act 1944 there has to be notification in the Official Gazette of his appointment as Central Excise Officer, this interpretation leads to absurdity since neither section 2 (b) of the Act, 1944, nor Rule 3 of the 2002 Rules can be read to mean that even appointment of Commissioner of Central Excise is to be notified in the Official Gazette before he exercises power under section 11 A of the Act, 1944. This reinforces our view that appointment by notification which is to be published in the Official Gazette is contemplated only with regard to persons who are not already officers of the Central Excise Department. Since investing of power by the Board s contemplated in only last category in the definition of section 2 (b) of the Act, 1944 and all three categories are joined by the "or" which is disjunctive".

In our considered view, the ratio of the above decision applies squarely to the facts of the case before us and accordingly there was no need to appoint a Commissioner of Central Excise as 'Central Excise Officer' before he is invested with the powers under Chapter V of the Finance Act, 1944.

5.8. In AIR 1997 SC 1006, after referring to number of decisions on the issue, the Supreme Court laid down the principles to be adopted on the rule of construction when there is inconsistency between two sections.

The principles are as follows:-

"1. It is the duty of the Court to avoid a head on clash between two sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonize them.

1. The provisions of one section of s Statute can not be used to defeat the other provisions unless the Court, in spite of its efforts, finds it impossible to effect reconciliation between them.

2. It has to be borne in mind by all the Courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given both. This is the rule of 'harmonious construction'.

3. The Courts have also to keep in mind that an interpretation which reduces one of the provisions as 'dead letter' or 'useless lumber' is not harmonious construction.

4. To harmonise is not to destroy any statutory provision or to render it otiose."

If we apply the above principles to the facts of the case before us, there is only one way to interpret the order dated 18.5.2004. That is, Commissioner of Service Tax and the officers subordinate to him are all 'central excise officers' duly empowered to exercise the power under chapter V of the Finance Act, 1944.

6. The next issue for consideration is whether the Chief Commissioner of Central Excise has the power to assign adjudication of specific cases to any other officer within his jurisdiction. The CBE & C vide the Notification No. 6/2009 – ST dated 30.1.2009 issued under Section 37 A of the Central Excise Act, as made applicable to service tax by Section 83 of the Finance Act, 1994, read with the provisions of Section 83 A and Notification No. 16/07 – ST dated 19.4.2007 has delegated the power of assigning adjudication of cases to the Chief Commissioner of Central Excise within his jurisdiction. Vide the Notification No. 16/07 – ST dated 19.4.2007, the CBE & C has appointed all Commissioners of

Central Excise and Commissioners of Central Excise (Adjn.) throughout the territory of India, the power of a Commissioner of Central Excise for investigation and adjudication of such cases as may be assigned by the Board. In other words, the Chief Commissioner of Central Excise has been delegated the power of the Board to assign investigation and adjudication of cases to any other Commissioner of Central Excise within his jurisdiction in respect of Service Tax. A combined reading of Section 37 A of the Central Excise Act, 1944, Section 83 and 83 A of the Finance Act, 1994, Rule 3 of the Service Tax Rules, 1994 and Notification No. 16/07 read with Notification No. 6/2009 dated 30.1.2009 make it abundantly clear that the Chief Commissioner of Central Excise can assign adjudication of Service Tax cases to any Commissioner of Central Excise within his jurisdiction. In exercise of those powers, Order No. 1/2009 – ST dated 10.2.2009 has been issued by the Chief Commissioner of Central Excise, Mumbai –I assigning the specific cases as mentioned in the said order for adjudication by Commissioner of Central Excise, Mumbai – IV, Commissioners of Central Excise, Thane – I and Thane –II. There is no dispute about the fact that the above Commissioners fall within the jurisdiction of Chief Commissioner of Central Excise, Mumbai – I. Therefore, the assignment of cases by the Chief Commissioner of Central Excise, Mumbai- I has been validly exercised in accordance with the law and we hold accordingly.

6.1. The next issue for consideration is whether the powers of adjudication under Section 83 A of the Finance Act, 1994 is confined only adjudication of penalties or does it also cover adjudication of service Tax liability and interest liability under Section 73 and 75 of the Finance Act, 1994. Section 83 A read as follows : -

> "Where under this Chapter or the rules made thereunder any person is liable to a penalty, such penalty may be adjudged by the Central Excise Officer conferred with such power as the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963), may be notification in the Official Gazette, specify."

6.2. A perusal of Section 83 A indicates that when any person is liable to any penalty, such penalty may be adjudged by the Central Excise Officer. The question is when is a person liable to penalty. The penal provisions in respect of Service Tax are governed by Sections 76, 77 and 78 of the Finance Act, 1994. Section 76 provides for penalty for failure to pay Service Tax. Section 77 provides for imposition of penalty for contravention of Service Tax Rules and provisions of Chapter V of the Finance Act, 1944 for which no penalty is specified elsewhere. Section 78 provides for penalty in situations where Service Tax is not levied or

not paid or short levied or short paid or erroneously refunded by the reasons of – (a) fraud; (b) collusion; (c) willful mis – statement; (d) suppression of fact; and (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with and intent to evade payment of service tax. Section 78 is a mandatory provision and the penalty payable is equal to the Service Tax evaded. From the reading of the above provisions, it may be seen that the penalty imposable under Section 76 and 78 are directly dependent upon the quantum of Service Tax defaulted or evaded. Therefore, if the penalty is imposed under these Sections, it is necessary to determine the quantum or Service Tax defaulted or evaded. Thus, determination of penalty is integrally connected with the determination of Service Tax liability. Therefore, these issues, that is, determination of service tax liability and imposition of penalty cannot be separated. In other words, the power under Section 83 A for adjudging penalty includes inherently the power of determination of Service Tax liability; otherwise the entire purpose of Section 83 A would be rendered futile. It is a well accepted principle of statutory interpretation that no Section of statute should be interpreted in such a way so as to make it a nullity. The whole purpose of interpretation of statute is to achieve the object and purpose of statute. Viewed from this angle, the argument of the appellant that the Chief Commissioner of Central Excise does not have power to assign cases for adjudication of Service Tax liability along with interest thereon and imposition of penalty to Commissioner of Central Excise, Thane – I or any other Commissioner of Central Excise within his jurisdiction is devoid of merits and has to be rejected outright.

6.3. This Tribunal in the case of Northern India Woollen Mills vs. Collector of Customs – 1991 (53) ELT 81 (Tri), in the context of an exemption notification under DEEC Scheme, held that “demand of duty, confiscation and levy of penalty have to be done in a composite manner and duty demand cannot be segregated from confiscation and penalty. Severing the demand for duty from the levy of penalty and confiscation would amount to truncation and it would create an anomalous situation because there cannot be two parallel processes of adjudication, one for demand of duty and other for confiscation and penalty.” The ratio of the above decisions applies squarely to the facts of the present case and accordingly, we hold that the power to impose penalty necessarily includes in itself the power of determining of duty.

6.4. The Hon’ble High Court of Karnataka in the case of Doddaballapur Spinning Mills Ltd. Vs. Asstt. Collector of Central Excise – 1992 (81) ELT 539 (Kar) examined the issue of a show – cause notice under Section 11 A of the Central Excise Act,

which also proposed to imposed penalty and in the said case it was held as follows: -

> "It was then further argued that the notice was defective as it was also a notice under Section 11 A of the Act as it called upon the petitioner to make goods certain sum which was said to be the amount short levied for the specified period between 16th June, 1984 and 5th December, 1984. But then we do not find real substance in that argument, that the show – cause notice was without jurisdiction because it combined both penalty to be imposed under Section 33as well as recover the short levy under Section 11 A of the Act. As long as the notice make the person liable to answer the queries in the notice whether they were by separate notice or by a single notice would not make a difference and that cannot be a ground. There is no law which prohibits issuance of a notice proposing more than one action against the same person who is liable to answer both the queries pertaining to the proposed actions."

6.5. Section 83 A was inserted into Chapter V of the Finance Act 1994 vide clause 88 of the Finance Bill, 2005 which was subsequently enacted. The notes on clauses of the said Finance Gill relating to section 83 A reads as follows:-

> "(ix) sub – clause (j) seeks to insert section 83 A so as to provide power of adjudication in service tax cases"

Thus the purpose and object of section 83 A is to provide powers of adjudication in service tax cases, which includes the power of determination of service tax and interest liability thereon in addition to the power of imposition of penalty. Therefore, the said section cannot be interpreted in an narrow sense to restrict the power to imposition of penalty alone. The said section 83 A does not read as "only penalty" or "solely penalty". It simply read as " when …… any person is liable to penalty". A similar issue arose in the case of UOI vs. Tata Iron & Steel Co. Ltd. [1977 (1) ELT J 61 (SC)] in the context of interpretation of notification No. 30/60 – CE dated 1.3.1960. The said notification provided for a concessional rate of excise duty on "steel ingots if produced out of scrap obtained from duty paid pig iron". The respondent therein claimed set – off of duty on steel ingots manufactured from duty paid pig iron scrap in admixture with other non – duty paid materials which was sought to be denied by the Revenue but which was allowed by the High Court and the matter went to hon'ble apex court for decision and the Supreme Court held as follows :-

> "The High Court rightly said that the notification does not say that the exemption is granted only when duty paid pig iron is used and that the exemption would not be available if duty paid pig iron is mixed with other non- duty paid materials. If the intention of the Government were to exclude the exemption to duty paid pig iron when mixed with other materials then the notification would have used to expression "only" or "exclusively" in regard to duty – paid pig iron ……..."

In the present case also, section 83 A does not speak of "only" penalty or "solely penalty". Therefore, adopting the ratio of the above decision of the hon'ble apex court, section 83 A can not be interpreted in a narrow sense so as to exclude determination of service tax liability or interest liability. Such an interpretation would destroy the section and would render it otiose. As observed earlier, such an interpretation is not permissible. A question arose before the hon'ble high court of Bombay in the case of Commissioner of Central Excise vs. J.K. Saboo [2008 (224) ELT 34 (Bom)] wherein the maintainability of the appeal before the hon'ble high court was challenged in the context of section 35 G of the Central Excise Act, 1944. In the said case, this Tribunal passed on order in the matter of determination of rate of duty and on such determination, penalty was imposed. The hon'ble High Court held that the appeal against the Tribunal's order lies before the Supreme Court as "penalty is only incidental to determination of the main question, namely rate of duty". Applying the ratio of these decisions of the facts of the present case, we are of the considered view that section 83 A envisages not only determination of penalty but also determination of service tax liability as the former is incidental to the determination of the latter and is integrally connected with the latter.

6.6. In the light of the above discussions, we are of the opinion that the delegation of powers of adjudication to the chief Commissioner of Central Excise, Mumbai and assigning of cases by him for the purpose of adjudication for both determination of Service Tax and imposition of penalty are sustainable in law.

7. To sum up, we answer the questions raised before us as follows :-

1. The Commissioner of Service Tax, Mumbai, and officers subordinate to him are 'Central Excise Officer', duly empowered to assess and collect service tax within their jurisdiction.

2. The Chief Commissioner of Central Excise can assign adjudication of service tax case to any Central Excise Officer within his jurisdiction.

3. Section 83 A of the Finance Act, 1994, envisages adjudication of not only penalty but also determination of service tax liability and interest thereon.

Accordingly, we dismiss the miscellaneous application as devoid of merits.

(Pronounced in the court on 21/02/2013)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

WEST REGIONAL BENCH AT MUMBAI

M/s Shoppers Stop Ltd.

Versus

Commissioner of Service Tax, Mumbai - II

Applications No. : ST/S/1330/12 in Appeal No. ST/401/12

Arising out of : Order – in – Original NO. 35/ST/SB/2011-12 dated 14.03.2012.

Passed by: The Commissioner (TAR) od Service Tax, Mumbai

Date of Hearing: 21.03.2013

Date of Decision: 21.03.2013

M/s Shoppers Stop Ltd. Appellant

Versus

Commissioner of Service Tax, Mumbai - II Respondent

Represented by:

Shri S.S. Gupta, C.A. – Appellant

Shri Rakesh Goyal, Addl. Cmmr. – Respondent

CORAM

HON'BLE SHRI P.R. CHANDRASEKHARAN, MEMBER (TECHNICAL)
HON'BLE SHRI ANIL COUDHARY, MEMBER (JUDICIAL)

ORDER NO. S/447/13/CSTB/C-I

"Thus the service provided by the appellant prima facie come under the category of BSS as the appellant seems to provide both infrastructural support services and accounting and processing of transactions." [Para 5.4]

"From the facts available on record it is seen that the matter came to light only when the department started investigation into the activities of the appellant. Therefore, it can not be concluded at this stage that there was no suppression of facts on the part of the appellant." [Para 5.5]

Per: Shri P.R. Chandrasekharan, Member (Technical)

1. The appeal and stay application are directed against Order – in – Original No. 35/ST/SB/2011-12 dated 1.3 2012 passed by the Commissioner (TAR), Mumbai.

2. The appellant M/s Shoppers Stop Ltd., Malad West, Mumbai, (SSL in short) are in the business of operating and running retail stores where goods of various brands, varieties, description, etc. are sold under one roof. They grant concession to various concessionaires for the display, demonstration and sale of the products from the retail stores operated by SSL. The consideration for the concession is received as a percentage of the value of the goods sold subject to a minimum amount. The appellant did not discharge any service tax on a consideration of Rs. 27,86,81,505/- received during 1.5.06 to 31.05.07. The department was of the view that the said service rendered by M/s SSL falls within the category of 'Business Support Services' (BSS in short) and accordingly, a show cause notice dated 22.10.2009 was issued, to the appellant demanding service tax of Rs. 3,44,45,034/- along with interest thereon and also proposing to impose penalties under the provisions of Finance act, 1994. The notice was adjudicated and the service rendered was classified under BSS and the service tax demand was confirmed along with interest thereon and penalties were also imposed. Aggrieved of the same the appellant is before us.

3. The ld. Consultant for the appellant made the following submissions : -

    1) The adjudication by the Commissioner is without jurisdiction as the Chief Commissioner of Central Excise does not have the power to delegate the adjudication to the said Commissioner;

2) The transaction is one of sale and purchase of goods and VAT has been paid by the appellant. As per the concessionaire agreement, the products will be sold by the concessionaire to the appellant and the appellant will in turn sell the products to the customers and VAT has been paid on these transactions and therefore, there is no scope for service tax levy.

3) With effect from 1.6.07, they are discharging service tax on the same activity under the category of "renting of immovable property" and the department has not disputed the payment of service tax under the category of renting of immovable property and therefore, the department cannot classify the same activity under a different category of service for the pervious period.

4) The service provided by the appellant does not include telephone and interest services, security services, etc. or infrastructural support services as contemplated under BSS.

5) The entire demand is time barred as the appellant was under the bona fide belief that they were not liable to service for the period prior to 1.6.07 when renting of immovable property was brought under the tax net and the payment of service tax under the said category was not objected to by the department.

6) The penalty should have been waived under section 80 of the Finance Act, 1994.

4. The ld. Additional Commissioner (AR) appearing for the Revenue on the other hand strongly refutes the contentions raised by the ld. Consultant and submits as follows:-

a) From the concessionaire agreement, it can be seen that the agreement provides for the right to display and sell the concessionaire's products in appellant's premises and there is no renting of space involved.

b) The concessionaires use the common facility provided by the appellant for the billing and collection of the sale proceeds of the goods sold.

c) The consideration received is either by way of a minimum guarantee amount or as a percentage of the value of goods sold which clearly

indicates that there is no renting of any space and the consideration has no linkage to the area of the space rented.

d) The concessionaires use the infrastructural facility provided by the appellant by way of air – conditional atmosphere, common lighting, security and other facilities.

Accordingly he submits that the service rendered by the appellant merits classification under BSS and the appellant be put to terms.

5. We have carefully considered the submissions made by both the sides and have also perused the concessionaire agreement entered into with one of the concessionaires, M/s Luxor Writing Instruments Pvt. Ltd.

5.1. The issue relating to jurisdiction has already been considered by this Tribunal vide Order No. M/322-362/13/CSTB/C – I dated 21.02.2013 and has been held in favour of Revenue.

5.2. The argument of the appellant that the transaction is one of sale and not of service is not borne out from the conduct of the appellant. From 1.6.07 onwards, the appellant has discharged service tax on the said activity under "renting the immovable property" service. If that be so, they can not contend that for the previous period, the activity is one of sale and not of service.

5.3. As per the concession agreement, the appellant has permitted and granted to the Concessionaire, a right to display and demonstrate the Products from the Stores operated by the appellant from the Display counters demarcated in the Stores and therefore to sell the Products to the appellant. In consideration thereof, the concessionaire is obliged to pay a percentage of the sale on a monthly basis to the appellant, subject to a minimum guarantee amount. From the above agreement, it is seen that there is no renting of space per se to the concessionaire and there is no charging of any rental amount based on the area of space rented out. Therefore, the activity undertaken by the appellant prima facie does not come under the category of renting of immovable property.

5.4. Though as per the agreement, the concessionaire has to insure the goods kept for display and sale on their own account and has to design/decorate the display counters and should pay for their own telephone connections, the concessionaires use the Retail Store facility of the appellant which includes a host a common facilities such as air – conditioned and well – lit atmosphere,

security and insurance for the entire building, common facility for the customers who are visiting the retail mall such as drinking water, toilet, lift / escalator facility for easy movement, common billing and collection facilities in respect of the goods sold, and so on. Customers visit a retail man because of the variety of goods offered for sale of reputed brands under one roof, the comfortable atmosphere for shopping, facility for small children by way of play area, etc. who accompany the parents, facility for food / beverages etc. by way of food courts and so on. There is no denial of the fact it is because of these facilities, customers are attracted to Retail Malls. All these come under the category of infrastructural facilities. As per section 65 (104c) of the Finance Act, 1994, "support services for business or commerce" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship[management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing. "As per Explanation, " infrastructural support services" includes providing office space along with office utilities, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security. Thus the service provided by the appellant prima facie come under the category of BSS as the appellant seems to provide both infrastructural support services and accounting and processing of transactions.

5.5. As regards the time bar issue raised by the appellant, it is a question of both fact and law and can be gone into in detail at the time of final hearing. In any case, it is not the case of the appellant that they had disclosed the facts relating to their activities to the department on their own. From the facts available on record it is seen that the matter came to light only when the department started investigation into the activities of the appellant. Therefore, it can not be concluded at this stage that there was no suppression of facts on the part of the appellant.

5.6. The appellant has not pleaded any financial hardship. As per the decision of the Hon'ble High Court of Andhra Pradesh in the case of SQL Star International Ltd. – 2012 (25) STR 113 (AP) prima facie case, balance of convenience and irreparable loss of Revenue have to be taken into account while considering grant of interim stay.

6. From the foregoing discussion, we have come to the preliminary conclusion that there is no prima facie case in favour of the appellant and there is no financial hardship pleaded. Therefore, the balance of convenience lies in favour of Revenue. Accordingly we direct the appellant to make a pre – deposit of 50% of the service tax demand confirmed against the appellant within a period of eight weeks and report compliance on 22nd May 2013. On such compliance, pre – deposit of balance of dues adjudged against the appellant shall stand waived and recovery thereof stayed during the pendency of the appeal.

(Operative part pronounced in the court)