

GOOD, BAD and the UGLY

(By S. Jaikumar, Advocate, Swamy Associates)

While signing off 2011, I am tempted to rosary few decisions, which had cast a lasting footprint on one and all. The pearls of wisdom (or otherwise) are:

1. Bail, No Jail:

In a significant judgement, the Larger bench of the Supreme Court, in the case of **OM PRAKASH CHOITH NANIKRAM HARCHANDANI Vs UOI (2011-TIOL-95-SC-CX-LB)**, had held that the offences under the Customs and Central Excise laws are Non – cognizable and bailable.

In other words, an excise/customs officer, will have no authority to make an arrest without obtaining a warrant and if the person arrested offers bail, he shall be released on bail.

2. The p-AND-OR-a box:

In the most disturbing decision of the year, the Apex Court in the case of **UOI vs M/s Ind- Swift Laboratories Limited (2011-TIOL-21-SC-CX)** has held that a bare reading of the Rule 14 of the Cenvat Credit Rules 2004 would indicate that the manufacturer or the provider of the output service becomes liable to pay interest along with the credit where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded and that in the case of the aforesaid nature the provision of Section 11AB would apply for demanding interest. In fine, it has been held that even the Cenvat credit wrongly taken in the books shall become recoverable along with interest, despite such credit has never been utilized by the hapless assessee.

Though, in a subsequent decision in the case of **CCE & ST, LTU vs M/s Bill Forge Pvt Limited, Bangalore (2011-TIOL-799-HC-KAR-CX)** the High Court of Karnataka has distinguished the above ratio and has provided a reprieve, I feel the above decision of the Apex Court needs an immediate review.

3. Supportless Structures:

Hammering almost the last nail in the coffin, the Supreme Court in the case of **Sarawati Sugar Mills vs CCE, Delhi III, (2011-TIOL-73-SC-CX)**, has held that the Iron and Steel structures manufactured and used captively in the factory for installation of the sugar factory are not capital Goods and thereby succinctly upheld the ratio of the Larger bench decision of the Tribunal in the case of **Vandana Global Ltd vs CCE, Raipur (2010-TIOL-624-CESTAT-DEL-LB)**.

4. Machine Impossible:

In the most sensible judgement of the year, the Supreme Court in the case of **M/s Grasim Industries Limited vs UOI (2011-TIOL-100-SC-CX)** has set aside the decision of the Rajasthan High Court in the case of **UOI vs M/s Grasim Industries Limited & Anr (2008-TIOL-396-HC-RAJ-CX)** and held that the metal scrap and waste generated while repairing worn out machinery does not amount to manufacture and thus not excisable. While holding so, the Apex Court also held that the repairing activity in any possible manner cannot be called as a part of manufacturing activity in relation to production of end product and therefore, the M.S. scrap and Iron scrap cannot be said to be a by-product of the final product.

5. Ghast Protocol

Breaking the shackles cast on the PSU's over decades, whereby the litigating PSU had to get the clearance from the Committee of Disputes (CoD), the Constitutional bench of the Supreme Court in the case of **Electronics Corporation of India Limited vs UOI (2011-TIOL-18-SC-CX-CB)** has abolished this system of clearance from COD.

While doing so, the Apex Court observed that, whilst the principle and the object is unexceptionable and laudatory, experience has shown that despite best efforts of the CoD, the mechanism has not achieved the results for which it was constituted and has in fact led to delays in litigation, causing loss of revenue and the mechanism has outlived its utility.

6. The Lords Must Be Crazy:

While addressing the question on limitation under proviso to Section 11A of the Central Excise Act, the Supreme Court in the case of **CCE, Vishakapatnam vs M/s Mehta & Co (2011-TIOL-17-SC-CX)** has further extended the extended period of limitation of 5 years available under the Section by observing that the period of limitation of five years shall start from the 'cause of action' i.e. "date of knowledge", thus redefining the "relevant date!"

7. TO-LET INTO NET:

Overruling the judgement of the Delhi High Court in the case of **First Home Solutions case (2009-TIOL-196-HC-DEL-ST)**, the Larger bench of the Delhi High Court in the case of **Home Solutions Retails (India) Limited vs UOI & Ors (2011-TIOL-610-HC-DEL-ST-LB)**, has held that the provisions, namely, Section 65(105)(zzzz) and Section 66 of the Finance Act, 1994 and as amended by the Finance Act, 2010, are *intra vires* the Constitution of India and the

challenge to the amendment giving it retrospective effect is unsustainable and also held that the retrospective amendment is constitutionally valid.

8. Frieght-end Credit:

In a remarkable judgement in the case of **CCE & ST, Bangalore vs M/s ABB Limited (2011-TIOL-395-HC-KAR-ST)**, the Karnataka High Court has upheld the decision of the Larger bench of the Tribunal in the case of **M/s ABB Limited vs CCE & ST Bangalore (2009-TIOL-830-CESTAT-BANG-LB)** holding that the outward transportation of finished goods from the place of removal covered by definition of 'input service' upto 31.03.2008 and the service tax paid thereon is eligible as CENVAT Credit., thus putting the most debated issue to rest, maybe provisionally!

9. ISD roaming:

In a fine judgement in the case of **CCE, Bangalore I vs M/s ECOF Industries Pvt Limited (2011-TIOL-770-HC-KAR-ST)**, dispensing the doubts as to whether the service tax paid in respect of services obtained by a unit at one place can be utilized by a unit situated at another place, belonging to the same manufacturer, the Karnataka High Court has held that there are only two limitations to the assessee for the distribution of credit as an input service distributor, namely, the credit cannot exceed the amount of service tax paid and secondly, the credit of service tax shall not be distributed in a unit exclusively engaged in the manufacture of exempted goods or providing of exempted services. It further held that, merely because the input service tax is paid at a particular unit and the benefit sought to be availed at another unit, the same is not prohibited under law and the assessee is entitled to distribution of credit.

10. Out-of-the-pocket:

The Larger bench of the CESTAT in the case of **Shri Bhagavathy Traders vs CCE, Cochin (2011-TIOL-1155-CESTAT-BANG-LB)** has held that only when the service recipient has an obligation legal or contractual to pay certain amount to any third party and the said amount is paid by the service provider on behalf of the service recipient, the question of reimbursing the expenses incurred on behalf of the recipient shall arise and what are costs for input services and inputs used in rendering services cannot be treated as reimbursable costs and that there is no justification on legal authority to artificially split the cost towards providing services partly as cost of services and the rest as reimbursable expenses.

11. Mr. Confusious (not Confucius):

In a decision which require a skilled cryptographer to decode the ratio, the Larger bench of the Tribunal in the case of **Agrawal Colour Advance Photo System Vs CCE, Bhopal (2011-TIOL-1208-CESTAT-DEL-LB)** has held that, for the

purpose of Section 67 of the Finance Act, 1994, the value of service in relation to photography would be the gross amount charged including cost of goods and material used and consumed in the course of rendering such service and the cost of unexposed film etc. would stand excluded in terms of Explanation to section 67 if sold to the client. It is also further held that the value of other goods and material, if sold separately would be excluded under exemption Notification No.12/2003 and the term 'sold' appearing thereunder has to be interpreted using the definition of 'sale' in the Central Excise Act, 1944 and not as per the meaning of deemed sale under Article 366 (29A) (b) of the Constitution.

12. The BEST judgement:

Among the mighty Goliaths, here comes the young David! In one of the finest decisions of all time, CESTAT had delivered a very well analysed decision backed by a sound reasoning in the case of **M/s Sujana Metal Products Limited vs CCE, Hyderabad (2011-TIOL-1173-CESTAT-BANG)**, whereby, the Tribunal held that:

- For the period upto 9/2/2006, the supplies made to SEZ units are to be treated as export both for extending export benefits and for levy of duty in terms of SEZ provisions contained in Chapter XA of the Customs Act and for the period from 10/2/2006, the definition of the term "export" under the Customs Act is not consistent with the definition of the term "export" under the SEZ Act. However, the definition of the term "export" under the SEZ Act shall prevail over the definition of term "export" under the Customs Act. Therefore, supplies made to SEZ from DTA units shall be treated as export.
- The amendment to Rule 6(1) of the CCR, 2004 by the amending Notification No.50/2008-CE (NT) dt. 31/12/2008 shall be applicable w.e.f. 10/9/2004 when the CCR, 2004 came into existence and, therefore, exception provided under Rule 6(6) of Cenvat Credit Rules, 2004 shall be applicable to supply of exempted goods both to SEZ units and SEZ developers / promoters.

Baker's Dozen:

In a soothing judgement to the perennial wounds of the harassed community, the Karnataka High Court in the case of **CCE & ST, LTU, Bangalore vs M/s Adecco Flexione Workforce Solutions Limited (2011-TIOL-635-HC-KAR-ST)**, has held that when tax with interest is paid under Section 73(3), no notice to be issued. It is further held that Sub-Sec.(3) of Sec. 73 of the Finance Act, 1994 categorically states, after the payment of service tax and interest is made and the said information is furnished to the authorities, then the authorities shall not serve any notice under Sub-Sec.(1) in respect of the amount so paid and therefore, authorities have no authority to initiate proceedings for recovery of penalty under Sec. 76 of the Act.

The High Court also went on to express its displeasure by observing:

We take that, in ignorance of law, the authorities are indulging in this extravaganza and wasting their precious time and also the time of the Tribunal and this Court. It is high time that the authorities shall issue appropriate directions to see that such tax payers are not harassed. If such instances are noticed by this Court here after, certainly it will be a case for taking proper action against those law breakers."

Before Parting...

Whoever dares to classify the above decisions as per the title of this piece shall be getting the coveted **"O-SCAR"** trophy in whichever Court they appear in 2012!