

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3246 OF 2015

ICICI Bank Limited.	)	
a company incorporated under the	)	
Companies Act, 1956 having its	)	
office at ICICI Bank Towers,	)	
Bandra-Kurla Complex,	)	
Mumbai 400 051.	)	... Petitioner.

Versus

1	The Union of India	)	
	through the Secretary	)	
	Ministry of Finance Department	)	
	of Revenue, North Block,	)	
	New Delhi 110 001.	)	
2	The Commissioner of Service	)	
	Tax-IV, having his office at	)	
	5 th Floor, Central Excise Building	)	
	M.K. Road, Churchgate,	)	
	Mumbai 400 020.	)	... Respondents.

Mr. V. Shridharan, Sr. Counsel a/w. Mr. L. Badrinarayan a/w. Mr. Sanjay Agarwal a/w. Mr. Asish Philips a/w. Ms. Niyati Hakani i/b. Prompt Legal, advocate for petitioner.

Mr. Pradeep S. Jetly a/w. Ms. Suchitra Kamble, advocate for respondents.

CORAM : B.R. GAVAI & A.S. GADKARI, JJ
DATE : APRIL 20, 2015

JUDGMENT :(Per B.R. Gavai, J)

1 Rule. Rule made returnable forthwith. Heard by consent of the parties.

2 A short question that falls for consideration in the present petition is, as to whether, without there being any adjudication in any of the proceedings as provided under Chapter 5 of the Finance Act, 1994 (hereinafter referred to as “the said Act”) coercive steps can be taken by the Revenue, for recovery of service tax or penalty or interest.

3 The undisputed facts which give rise to filing of the present Petition are as under :

 The Petitioner is a scheduled bank as notified by Second Schedule of the Reserve Bank of India Act, 1934 and is undertaking banking activities in India as well as overseas. One of the services offered by the Petitioner bank is regarding credit card transaction. In the credit card transactions, two banks are involved i.e. acquiring bank and issuing bank. It is the contention of the Petitioner that the

issuing bank that issues the credit card and charges the customer a fee, which could be in the nature of membership fee etc. It is further contended that the issuing bank issues a monthly billing statement to the customer as per the pre-defined billing cycle. According to the Petitioner, the issuing bank pays service tax on the various fees and charges collected from the cardholder. According to the scheme, the acquiring bank is the bank with which the Merchant Establishment has a contract to honour the credit cards by using its infrastructure. The acquiring bank makes the payments to Merchant Establishment based on the credit slip indicating the credit given by Merchant Establishment to the customer. The Merchant Establishment provides goods and services on credit, to the credit card customers under the payment assurance with the acquiring bank. As per practice, the acquiring bank makes payment to the Merchant Establishment after deducting the acquiring charges/Merchant Service Fee(for short hereinafter referred to as "MSF"). The MSF is the fee which has been agreed to be paid by the Merchant Establishment to the acquiring bank for receiving payment against the use of the credit card at its establishment. The acquiring bank pays service tax on the

gross MSF collected from Merchant Establishment. After making the payment to the Merchant Establishment, the acquiring bank submits the transaction details to the Card Association (viz. VISA/Master Card) for settlement of the dues including the merchant service fees. The Card Association then submits the said details to the issuing bank. The issuing bank pays the Card Association an amount equal to the gross value including merchant service fees minus its share of MSF. The issuing bank's share of merchant service fees is referred as Interchange refund fees. It is the case of the appellant which is an issuing bank, that the interchange fees received by an issuing bank are not taxable to service charge in as much as the entire service tax is paid by the acquiring bank.

4 It is further contention of the Petitioner that on the basis of the communication addressed by the Revenue Authorities, the payments have been made by the Petitioner albeit under protest. It is the case of the Petitioner that though they are not liable to pay service tax on interchange fees, under duress and coercion, they have paid the said tax. It is submitted that though from the communications

placed on record, it is clear that taking into consideration the complicity of the transactions, guidance was to be sought from the Central Board of Direct Taxes (CBDT) and though such clarification has not come from CBDT, the Petitioner is now called upon to make payment of interest vide communication dated 25/3/2015 for the alleged delay in payment of service tax.

5 In this background, the Petitioner has approached this Court praying for quashing and setting aside the communication dated 25/3/2015.

6 Shri Shridharan, learned Senior Counsel appearing on behalf of the Petitioner, submits that though the liability of the Petitioner to pay the service tax on interchange fees is not decided by the respondent authorities, the Petitioner is coerced to make payment towards service tax as well as the interest on the delayed payment. The learned Senior Counsel submits that on the demand made by the respondent authorities, service tax was paid under protest. It is categorically submitted by the learned Senior Counsel that in the

return filed by the Petitioner for the relevant years, the petitioner has categorically shown in the return, that no service tax is payable on account of interchange fees. The learned Senior Counsel submits that neither there is an adjudication on the return filed by the Petitioner nor an action is taken by the respondent as required under Section 73 of the said Act by issuing a show cause notice to the Petitioner. It is the contention of the learned Senior Counsel that unless a show cause notice is issued to the Petitioner, in view of the provisions of the said Act, the Petitioner is not liable to discharge its liabilities, as required, as per the provisions of the said Act. It is further contended that unless there is an adjudication under Section 73 of the said Act, no amount can be said to be due to revenue, so as to permit them to take coercive action under Section 87 of the said Act.

7 The learned Senior Counsel relies on the Judgment of the Constitution Bench of the Apex Court in the case of **State of Rajasthan v/s. Ghasilal reported in AIR 1965 SC 1454** in support of his submission that unless there is an adjudication of the claim, the amount cannot be said to be due. The learned Senior Counsel

also relies on the judgment of the **Andhra Pradesh vs. Sri Ganesh Bhavan Hotel reported in (1983) 53 STC 169(AP)**. The learned Counsel also relies on the order passed by the Division Bench of this Court in the **Writ Petition No. 11258 of 2014 in the case of Lawson Tours and Travels (India) Pvt. Ltd. v/s. The Deputy Director, DGCEI, Zonal Unit, Mumbai & ors., decided on 16/12/2014** arising out of almost similar facts.

8 Learned Senior Counsel submits that unless the liability of the Petitioner to pay either tax or interest is determined, the Petitioner cannot be coerced by taking recourse to Section 87 of the said Act to make payment. The learned Senior Counsel further submits that if the respondent authority adjudicates as to the liability of the Petitioner, the Petitioner cannot run away with the liability to make payment, subject to statutory remedy of appeal etc. available to it. The learned Senior Counsel therefore, prays that the communication deserves to be quashed and set aside.

9 Per contra, Shri Pradeep Jetly submits that the provisions of Section 73 of the said Act are not at all applicable to the facts of the present case. The learned Counsel submits that section 73 of the said Act would be applicable when the tax has not been levied or paid or short-levied short-paid or erroneously refunded. He submits that the assessee understanding the law, as laid down by the learned Tribunal, has himself paid the taxes. It is therefore, submitted that the assessee having admitted the liability to pay the service tax, cannot be heard to run away from the liability to pay the interest charges. The learned Counsel submits that the Petitioner is not filing refund application, as is provided to them under Section 11B of the Central Excise Act, 1944. It is submitted that this is being done with dishonest intention by not paying interest and utilising the said amount because under the act, there is no provision for interest on interest. The learned Counsel submits that even under Section 11B of the Central Excise Act, 1944, there is a provision for adjudication by authority and as such the Petitioners would have full right to put up their case, which authority is bound to decide in accordance with law.

However, with the malafide intention, recourse to said provision is not taken to and the Petitioners have approached this Court.

10 The learned Counsel further submits that in case of Petitioner, there has been adjudication in so far as the liabilities of the Petitioner for a period post 2006 is concerned and as such when there is adjudication in the case of Petitioner itself, no errors could be found with the action taken by the respondent in taking recourse to section 87 of the said Act. He submits that the Petitioner having paid the service tax for the relevant period, the amount of interest is an amount due and payable and as such action under Section 87 of the said Act is justifiable and warrants no interference.

11 Shri Pradeep Jetly further states that though Petitioner was liable to pay the service tax, they have not paid the same and in the audit which was conducted by the department, it was found that the Petitioner had evaded to pay duty. It is submitted that in this background, the Petitioner was informed to make payments. It is therefore, submitted that having accepted the version of the

department, the Petitioner having paid service tax, it does not now fall in the mouth of the Petitioner, to contend that they are not liable to pay the interest on delayed payment.

12 At the outset, though Shri Shridharan strenuously argued in support of his submission, as to how the Petitioner is not liable to pay service tax on the interchange service fees, we do not find it necessary to go into that aspect. We are of the considered view that in so far as the liability of the Petitioner to pay service tax on “interchange fees” is concerned, it is not even determined in the present case by the original authority. In that view of the matter, adjudication in that regard in writ jurisdiction would not be in the interest of either the assessee or the revenue.

13 We are therefore, addressing ourselves to the limited issue, as to whether the action of the department in directing the Petitioner to pay interest, as is being done under the impugned communication, is permissible in law or not.

14 For appreciating rival controversies, it will be necessary to refer to certain provisions of Chapter 5 of the Finance Act, 1994, by virtue of which, provisions of Service Tax came to be introduced for the first time. Section 66A is charging section. Since we have already observed that we do not find it necessary to go into the question as to whether contention of the Petitioner that the Petitioner is not liable to pay service charges on “interchange fees”, it will not be necessary to refer to Section 66. Sections 68, 69, 70, 72, 72A, 73, 73C, 75, 76 and 87 read thus :

“68. Payment of Service Tax.

(1) Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), in respect of any taxable service notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified at the rate specified in section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider.

69. Registration -

(1)] Every person liable to pay the service tax under this chapter or the rules made there under shall, within such time and in such such manner and in such form as may be prescribed, make an application for registration to the ¹⁰[Superintendent of Central Excise.]

¹[(2) The person or class of persons notified under sub-section (2) of section 69, shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed.]

70. Furnishing of Returns

(1) Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency [and with such late fee not exceeding 6[twenty thousand rupees], for delayed furnishing of return, as may be prescribed.]

[(2) The person or class of persons notified under sub-section (2) of section 69, shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed.]”

72. Best judgment assessment

If any person, liable to pay service tax,-

(a) fails to furnish the return under Section 70;

(b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder,

the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the

person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

72A. Special audit

(1) If the Commissioner of Central Excise, has reasons to believe that any person liable to pay service tax (herein referred to as “such person”),-

- (i) has failed to declare or determine the value of a taxable service correctly; or
- (ii) has availed and utilised credit of duty or tax paid-
 - (a) which is not within the normal limits having regard to the nature of taxable service provided the extent of capital goods used or the type of inputs or input services used, or any other relevant factors as he may deem appropriate; or
 - (b) by means of fraud, collusion, or any willful misstatement or suppression of facts; or
- (iii) has operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises falling under the jurisdiction of the said Commissioner,

he may direct such person to get his accounts audited by a chartered accountant or cost accountant nominated by him, to the extent and for the period as may be specified by the Commissioner.

(2) The chartered accountant or cost accountant referred to in sub-section (1) shall, within the period specified by the said Commissioner, submit a report duly signed and certified by him to the said Commissioner mentioning therein such other particulars as may be specified by him.

(3) The provisions of sub-section (1) shall have effect notwithstanding that the accounts of such person have been audited under any other law for the time being in force.

(4) The person liable to pay tax shall be given an opportunity of being heard in respect of any material gathered on the basis of the audit under sub-section (1) and proposed to be utilised in any proceeding under the provisions of this Chapter or rules made thereunder.

Explanation: For the purposes of this section,-

- (i) “chartered accountant” shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of Chartered Accountants Act, 1949 (38 of 1949);
- (ii) “cost accountant” shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 (23 of 1959)]”

73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within [eighteen months] from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has been erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of -

- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words [eighteen months], the words 'five years' has been substituted.

Explanation : Where the service of notice is stayed by an order of court, the period of such stay shall be excluded in computing the aforesaid period of [eighteen months] or five years, as the case may be.

[(1A) Notwithstanding anything contained in sub-section (1), (except the period of eighteen months of serving the notice for recovery of service tax), the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short-levied or short-paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.]

(2) The [Central Excise Officer] shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

[(2A) Where any appellate authority or tribunal or court concludes that the notice issued under the proviso to sub-section (1) is not sustainable for the reason that the charge of,-

- (a) fraud; or
- (b) collusion; or
- (c) wilful misstatement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Chapter or the rules made thereunder with intent to evade payment of service tax.

has been established against the person chargeable with the service tax, to whom the notice was issued, the Central Excise Officer shall determine the service tax payable by such person for the period of eighteen months, as if the notice was issued for the offences for which limitation of eighteen months applies under sub-section (1).]

(3) where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid.

PROVIDED that the [Central Excise Officer] may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the [Central Excise Officer] shall proceed to recover such amount in the manner specified in this section, and the period of [eighteen months] referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

[Explanation 1]: For removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [Central Excise Officer] but for this sub-section.

[Explanation 2]: For removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service-tax under this sub-section and interest thereon.]

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-

- (a) fraud; or
- (b) collusion; or

- (c) wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

[(4A) Notwithstanding anything contained in [sub-section (4)], where during the course of any audit, investigation or verification, it is found that any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, but the true and complete details of transactions are available in the specified records, the person chargeable to service tax or to whom erroneous refund has been made, may pay the service-tax in full or in part, as he may accept to be the amount of tax chargeable or erroneously refunded along with interest payable thereon under Section 75 and penalty equal to one per cent. of such tax, for each month, for the period during which the default continues, up to a maximum of twenty-five per cent. of the tax amount, before service of notice on him and inform the Central Excise Officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the amount so paid and proceedings in respect of the said amount of service tax shall be deemed to have been concluded.

PROVIDED that the Central Excise Officer may determine the amount of service tax, if any, due from such person, which in his opinion remains to be paid by such person and shall proceed to recover such amount in the manner specified in sub-section (1).

Explanation: For the purposes of this sub-s and section 78, “specified records” means records including computerised data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement, the invoices recorded by the assessee in the books of account shall be considered as the specified records.]

[(4B) The Central Excise Officer shall determine the amount of service-tax due under sub-section(2)-

- (a) within six months from the date of notice where it is possible to do so, in respect of cases whose limitation is specified as eighteen months.
- (b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under the proviso to sub-section (1) or the proviso to sub-section (4A);]
- (5) The provisions of sub-section (3) shall not apply to any case where the service tax had become payable or ought to have been paid before the 14th day of May, 2003.
- (6) For the purposes of this section, “relevant date” means, —
 - (i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid —
 - (a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;
 - (b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;
 - (c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made there under;
 - (ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made there under, the date of adjustment of the service tax after the final assessment thereof;
 - (iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund.]

73C. Provisional attachment to protect revenue in certain cases

- (1) Where, during the pendency of any proceeding under section 73 or section 73A, the Central Excise Officer is of the opinion that for the purpose of protecting the interests of

revenue, it is necessary so to do, he may, with the previous approval of the Commissioner of Central Excise, by order in writing, attach provisionally any property belonging to the person on whom notice is served under sub-section (1) of section 73 or sub-section (3) of section 73A, as the case may be, in such manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under subsection (1):

PROVIDED that the Chief Commissioner of Central Excise may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years.]

75. Interest on delayed payment of service tax

Every person, liable to pay the tax in accordance with the provisions of section 68 or rules made there under, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest 5 [at such rate not below ten per cent and not exceeding thirty six per cent per annum as is for the time being fixed by the Central Government, by Notification in the Official Gazette] for the period] by which such crediting of the tax or any part thereof is delayed.

PROVIDED that in the case of a service provider, whose value of taxable services provided in a financial year does not exceed sixty lakh rupees during any of the financial years covered by the notice or during the last preceding financial year, as the case may be, such rate of interest, shall be reduced by three per cent. per annum]

[76. Penalty for failure to pay service tax

Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax amount in accordance with the

provisions of section 75, a penalty which shall not be less than 9[one hundred rupees] for every day during which such failure continues or at the rate of 10[two per cent.] of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax:

PROVIDED that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable in terms of this section shall not exceed [fifty per cent. of] the service tax payable.

[87 Recovery of any amount due to Central Government. -

Where any amount payable by a person to the credit of the Central Government under any of the provisions of this Chapter or of the rules made thereunder is not paid, the Central Excise Officer shall proceed to recover the amount by one or more of the modes mentioned below:—

- (a) the Central Excise Officer may deduct or may require any other Central Excise Officer or any officer of customs to deduct the amount so payable from any money owing to such person which may be under the control of the said Central Excise Officer or any officer of customs;
- (b) (i) the Central Excise Officer may, by notice in writing, require any other person from whom money is due or may become due to such person, or who holds or may subsequently hold money for or on account of such person, to pay to the credit of the Central Government either forthwith upon the money becoming due or being held or at or within the time specified in the notice, not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;
- (ii) every person to whom a notice is issued under this section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary

to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary;

(iii) in a case where the person to whom a notice under this section is sent, fails to make the payment in pursuance thereof to the Central Government, he shall be deemed to be an assessee in default in respect of the amount specified in the notice and all the consequences of this Chapter shall follow;

(c) the Central Excise Officer may, on an authorisation by the Commissioner of Central Excise, in accordance with the rules made in this behalf, distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus amount, if any, to such person;

[PROVIDED that where the person (hereinafter referred to as predecessor) from whom the service tax or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any person, all goods, in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining the written approval of the Commissioner of Central Excise, for the purpose of recovering such service tax or other sums recoverable or due from such

predecessor at the time of such transfer or otherwise disposal or change.]

(d) the Central Excise Officer may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business and the said Collector, on receipt of such certificate, shall proceed to recover from such person the amount specified thereunder as if it were an arrear of land revenue.]”

15 Perusal of Section 68 of the Said Act would reveal that every person who is providing taxable service to any person is required to pay service tax at the rate specified in Section 66 in such manner and within such period, as may be prescribed. Sub-section 2 which is a non- abstante clause provides that the service tax in respect of such taxable service, as may be notified by the Central Government shall be paid by such a person in such a manner, as may be prescribed at the rate specified in Section 66 and all provisions of the said Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service. Proviso to said sub-section provides that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of the said Chapter shall apply to such

person to the extent so specified and the remaining part of the service tax shall be paid by the service provider.

16 Section 69 provides that every person liable to pay the service tax under the said Chapter or the rules made thereunder shall, within such time and in such manner and in such form, as may be prescribed, make an application for registration to the Superintendent of Central Excise. Sub-section 2 thereof provides that the Central Government may, by notification in the Official Gazette, specify such other person or class of persons, who shall make an application for registration within such time and in such manner and in such form, as may be prescribed.

17 Section 70 deals with furnishing of returns. Sub-section 1 thereof provides that every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee not exceeding twenty thousand rupees for delayed furnishing of return, as

may be prescribed. Sub-section 2 thereof provides that the person or class of persons notified under sub-section (2) of section 69, shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency, as may be prescribed.

18 Section 72 of the said Act provides for best judgment assessment. It provides that if any person liable to pay service tax, fails to furnish the return under Section 70, or having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder, the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

19 Section 72A which has been inserted by the amendment in the year 2012, provides that if the Commissioner of Central Excise, has reasons to believe that any person liable to pay service tax has failed to declare or determine the value of a taxable service correctly; or has availed and utilised credit of duty or tax paid, which is not within the normal limits having regard to the nature of taxable service provided etc. or by means of fraud, collusion, or any willful misstatement or suppression of facts; or has operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises, falling under the jurisdiction of the said Commissioner, he may direct such person to get his accounts audited by a chartered accountant or cost accountant nominated by him, to the extent and for the period as may be specified by the Commissioner. The chartered accountant or cost accountant referred to in sub-section (1) shall, within the period specified by the said Commissioner, submit a report duly signed and certified by him to the said Commissioner mentioning therein such other particulars as may be specified by him. Sub-section 4 of said section provides that the person liable to pay tax shall be

given an opportunity of being heard in respect of any material gathered on the basis of the audit under sub-section (1) and proposed to be utilised in any proceeding under the provisions of the said Chapter or rules made thereunder.

20 Section 73 of the said Act deals with the recovery of service tax, not levied or paid or short-levied or short-paid or erroneously refunded. Sub-section 1 of said section provides that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within 18 months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has been erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice. The proviso thereto increases the limitation period to 5 years instead of 18 months in case of fraud or collusion or willful misstatement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with

intent to evade payment of service tax. The explanation thereto provides that the period during which the service of notice is stayed by an order of a Court, shall be excluded in computing the period of limitation as aforesaid. Sub-clause 1A thereto provides that notwithstanding anything contained in sub-section (1), the Central Excise Officer may serve subsequent to any notice or notices served under sub-section (1), a statement, containing the details of service tax not levied or paid or short-levied or short-paid or erroneously refunded for the subsequent period, on the person chargeable to service tax. It further provides that then service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices. Sub-section 2 of the said section provides that the Central Excise Officer shall after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person not being in excess of the amount specified in the notice and thereupon such person shall pay the amount so determined.

21 Perusal of sub-section 3 of section 73 of the said Act would reveal that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid. The proviso thereto provides that the Central Excise Officer may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in the said section, and the period of 18 months referred to in sub-section (1) shall be counted from the date of receipt of such information of

payment. The explanation 1 thereto provides that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the Central Excise Officer, but for this sub-section. The explanation 2 further provides that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service-tax under the said sub-section and interest thereon.

22 Perusal of sub-section 4 of the said section would reveal that in case of eventualities mentioned therein like fraud etc. the provisions of sub-section 3 shall not apply.

23 Sub-section 4A of Section 73 provides that notwithstanding anything contained in sub-section 4, where during the course of any audit, investigation or verification, it is found that any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, but the true and complete details

of transactions are available in the specified records, the person chargeable to service tax or to whom erroneous refund has been made, may pay the service-tax in full or in part, as he may accept to be the amount of tax chargeable or erroneously refunded alongwith interest payable thereon under Section 75 and penalty equal to one per cent of such tax, for each month, for the period during which the default continues, upto a maximum of twenty-five per cent. of the tax amount before service of notice on him and inform the Central Excise Officer of such payment in writing, who on receipt of such information, shall not serve any notice under sub-section (1) in respect of the amount so paid and proceedings in respect of the said amount of service-tax shall be deemed to have been concluded. The proviso thereto provides that the Central Excise Officer may determine the amount of service tax, if any, due from such person, which in his opinion remains to be paid by such person and shall proceed to recover such amount in the manner specified in sub-section (1).

24 Sub-section 4B of Section 73 of the Act provides that the Central Excise Officer shall determine the amount of service-tax due under sub-section(2) within six months from the date of notice where it is possible to do so, in respect of cases whose limitation is specified as 18 months. In the rest of the cases, it is required to be done within one year.

25 Sub-section 5 would not be relevant for the purpose of this petition in as much as it deals with the situation prior to 14th May, 2003. Sub-section 6 provides as to what would be the relevant date for the purpose of this section. Since there is no issue regarding the said date, the same would also not be relevant for the purpose of the present petition.

26 Section 73C of the said Act takes care of a situation wherein the Central Excise Officer finds it necessary to attach provisionally any property belonging to a person against whom proceedings under Section 73 or 73A are initiated, is empowered to provisionally attach the property of any such person, however, by

passing order in writing and with the previous approval of the Commissioner of Central Excise.

27 Section 75 deals with interest on delayed payment of service tax. The said section provides that a person who is liable to pay tax in accordance with the provisions of section 68 or rules made thereunder, fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest at such rate not below 10 per cent, and not exceeding 36 per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette for the period by which such crediting of the tax or any part thereof is delayed. Proviso thereto provides that in the case of a service provider, whose value of taxable services provided in a financial year does not exceed sixty lakh rupees during any of the financial year covered by the notice or during the last preceding financial year, as the case may be, such rate of interest, shall be reduced by three per cent per annum.

28 Section 76 deals with penalty for failure to pay service tax. It provides that any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under the said Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on the tax in accordance with the provisions of section 75, a penalty which shall not be less than one hundred rupees for every day during which such failure continues or at the rate of one per cent of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax. Proviso to the said section provides that the total amount of the penalty payable in terms of the said section shall not exceed 50 per cent of the service tax payable.

29 Section 87 provides for recovery of any amount due to Central Government. It provides that where any amount payable by a person to the credit of the Central Government under any of the provisions of the said Chapter or of the rules made thereunder is not paid, the Central Excise Officer shall proceed to recover the amount

by one or more of the modes mentioned therein. Various modes of recovery are provided including the recovery of land revenue, causing movable or immovable property to be sold.

30 Perusal of the aforesaid provisions would reveal that the same are complete Code in the matter of imposition of service tax, the duty cast upon a person providing taxable service to pay the service tax, furnishing return, determination of the liability to pay tax on the best judgment assessment and recovery of service tax not levied or not paid or short-levied or short-paid or erroneously refunded, interest, penalty on account of non-payment of service tax etc. Perusal of the provisions of section 68 would reveal that every person providing taxable service to any person, is required to pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed. Not only that the person who is liable to pay service tax is required to himself assess the tax due on the services provided by him and is required to furnish to Superintendent of Central Exercise, return in such form and in such a manner and within such period as is prescribed. Section 72 provides that a

person who is liable to pay service tax and who is required to file return, if he fails to file the return or having filed a return, fails to assess the tax, in accordance with the provisions of the said Chapter or the rules made thereunder, the Central Excise Officer is empowered to require such a person to produce such accounts, documents or other evidence as deemed necessary. It further provides that after taking into account all the relevant material which is available or which has been gathered the assessing authority by an order in writing after giving the person an opportunity of being heard is required to make assessment of the value of taxable service, to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

31 Section 72A would not be of much relevance for the purpose of this Petition in as much as the Commissioner of Central Excise is empowered to direct the person who is liable to pay service tax to get his account audited by chartered accountant or cost accountant nominated by the Commissioner, if the Commissioner believes that requirement as provided in the said section for exercise

of such power exists. However, it appears that the purpose of the said audit appears to use that material gathered by invoking provisions thereof for certain proceedings, for the provisions of the said Chapter or the rules made thereunder. Not only that the said provision also requires an opportunity of being heard to be given to a person liable to pay tax, if such material is proposed to be used against such person, in any proceedings under the said act.

32 Section 73 of the said Act will be most relevant for the purpose of the present petition. The said provision enables the Central Excise Officer to serve notice on the person chargeable with the service tax within 18 months from the relevant date, where any service tax has not been levied or paid or short-levied or short paid or erroneously refunded, requiring him to show cause why he should not pay the amount specified in the notice. Proviso thereto extends limitation of 18 months to 5 years in the circumstances as mentioned in the proviso. Sub-section 1A provides for a statement containing the details of service tax not levied or paid or short-levied or short-paid or erroneously refunded for the subsequent period, subject to the

condition that the grounds relied upon for the subsequent period are the same as mentioned in the earlier notice. Sub-section 2 thereof empowers the Central Excise Officer to consider the representation, if any made by the person to whom notice is served and determine the amount of service tax due or erroneously refunded and thereupon such person is required to pay the amount so determined. Sub-section 3 thereto deals with the situation where the assessee may voluntarily pay the amount of service tax on the basis of the tax ascertained by the Central Excise Officer or on the basis of his own assessment thereof before the service of notice in respect of the such service tax and in such eventuality, inform the Central Excise Officer of such payment in writing, who, on receipt of such information can not serve any notice under sub-section (1) in respect of the amount so paid. The proviso thereto provides that even after the payment as aforesaid, if the Central Excise Officer, is of the opinion, that the amount which is due has not been paid by such person, he may determine the amount as short-payment of service tax or erroneously refunded service tax. The explanation to the said proviso would clarify that the interest as required under Section 75 is required to be

payable on the amount paid by the person under said sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the Central Excise Officer but for the said sub-section. However, it would be clear from the explanation-2 that a person who pays tax and the interest in accordance with the options available to him under the said sub-section, is saved from the rigours of penal provisions, in as much as no penalty is to be imposed in respect of the payment of service tax under the said sub-section and the interest thereon. Sub-section 4A again gives an option to an assessee to pay the service tax if during course of any audit, investigation or verification, it is found that any service tax is not levied or paid or short-levied or short-paid or erroneously refunded and on the basis of true and complete details of transactions available in the specified records, the correct levy can be ascertained. While paying the tax voluntarily under the said provision, the assessee will also have to pay interest under Section 75 and penalty for each month for the period during which default continued, however upto a maximum of 25 per cent of the tax amount. Even in such eventuality, if an assessee informs the Central

Excise Officer of such payment in writing, on receipt of such information, the Central Excise Officer shall not serve any notice under sub-section (1) in respect of the amount so paid. Again the proviso makes it clear that, if in the opinion of the Central Excise Officer, once amount due from such person has remained unpaid even after making payment, he shall determine the amount of service tax and proceed to recover such amount in the manner as specified in sub-section (1).

33 It would thus be abundantly clear that the Statute casts a duty upon a person who is providing taxable service to any person, to pay service tax at the rate prescribed as specified in section 66. The Statute mandates every person who is liable to pay service tax, to assess the tax himself, due on the services provided by him. The Statute casts a duty upon a person who is liable to pay service tax, to himself assess the tax due on the services provided by him and submit to the Superintendent of Central Excise, a return in such form as prescribed. Section 72 enables the Central Excise Officer in case of person who fails to furnish return under section 70 or having made a

return, fails to assess the tax in accordance with the provisions of the said chapter or rule made therein, to require the person to produce such accounts, documents or other evidence, as may be deemed necessary. It further enables the said officer to pass an order after taking into account all the relevant material which is available or which he has gathered and after giving an opportunity to the person concerned of being heard, to make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment. It can thus be seen that the scheme provides that a person who is liable to pay the service tax is required to pay service tax himself on the basis of assessment made by him and furnish a return to the Superintendent of Central Excise. The Central Excise Officer in case such a return is filed or even if when no such return is filed, is empowered to assess the value of taxable services rendered by such person, to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment. It can thus be clearly seen that when an assessee is liable to pay tax in either of the situations i.e. filing a return or not

filing a return, the Central Excise Officer is empowered to assess the value of taxable services, to the best of his judgment and determine the sum payable by assessee or refundable to the assessee.

34 The provisions of section 73 would come into play when the service tax is not levied or paid or short-levied or short-paid or erroneously refunded. In this situation, the Central Excise Officer would be empowered to serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or erroneously refunded, within 18 months and may call upon him to show cause as to why he should not pay the amount specified in the notice. Sub-section 2 thereof mandate the Central Excise Officer to consider the representation, if any made by the person on whom notice is served under sub-section (1) and to determine the amount of service tax due from, or erroneously refunded to, such person and thereupon such person is required to pay the amount so determined. The rider in the said sub-section is that the amount of service tax shall not be in excess of the amount specified in the notice. As already discussed hereinabove, sub-section

3 and sub-section 4A provide for the situation in which the assessee voluntarily makes payment of service tax. Subsection 3 deals with the situation wherein the assessee is entitled to pay the service tax as per either his own assessment or as per the assessment ascertained by the Central Excise Officer, before service of notice under sub-section (1). It provides that if such a payment is made, notice under sub-section (1) will not be issued to the assessee in respect of the amount paid. However, even in this eventuality, if the Central Excise Officer is of the view that the amount of service tax so paid has not been paid in full, is empowered to proceed against assessee and determine the amount and proceed to recover the sum in the manner provided in sub-section(1). The benefit that the assessee would get by voluntarily paying service tax under the scheme provided is that he would be saved from the rigours of penalty payable on account of non payment of service tax payable and interest thereon. Similarly, sub-section 4A would deal with the situation wherein in the course of any audit, investigation or verification, it is found that service tax is not levied or paid or short-levied or short-paid or erroneously refunded. The said sub-section would deal with an eventuality when true and complete

details of transactions are available in the specified records. In this case, an assessee is again having an option to pay service tax in full or in part, as he may accept to be the amount of tax chargeable or erroneously refunded alongwith interest payable thereon under section 75 and penalty provided therein. It further appears that under the said provision the assessee would be entitled to the benefit, in as much as maximum penalty that would be leviable is only 25 per cent, whereas otherwise it would be 50 per cent. Again under the said provision, the Central Excise Officer is empowered to proceed as provided under sub-section (1), if he is of the opinion that the amount so paid by the assessee has not been paid fully and more amount is due and payable by him.

35 It would thus clearly reveal that provisions of section 72 and 73 involve complete adjudicatory process. Under section 72 the Central Excise Officer is required to assess value of taxable services to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment. The said power can be exercised by the Central Excise Officer in

either of the eventualities, i.e. when the return is filed under Section 70 or even it is not filed as required in the said section. The said provision specifically provides for giving an opportunity of being heard to the assessee before final orders are passed by the authority. The provisions of Section 73, specifically sub-section 1 and 2 would also show that where in opinion of Central Excise Officer, service tax has not been levied, paid or short-levied or short paid or erroneously refunded, the Central Excise Officer is empowered to serve notice on the person chargeable with the service tax, requiring him to show-cause why he should not pay the amount specified in the notice. Sub-section 2 thereof empowers the Central Excise Officer to determine the amount of service tax due from or erroneously refunded to such person and thereupon requiring such person to pay the amount so determined. However, prior to that, the Central Excise Officer is required to consider representation, if any, made by the assessee. Provisions of sub-section 3 and 4A appears to have enacted so as to enable the assessee to voluntarily pay the service tax in two eventualities (1) when in the opinion of Central Excise Officer, the service tax is payable and (2) in the course of any audit, investigation

or verification, it is found that any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded. If an assessee voluntarily pays service tax in either of these provisions, he saves himself from the rigours of penalty. In the first case, no penalty is leviable whereas in the second case penalty is leviable only to the maximum extent of 25 per cent as against 50 per cent in the normal case. Again in either of these eventualities, if the Central Excise Officer is of the opinion that the service tax has not been paid as per the liability which is cast upon such an assessee, again the said Central Excise Officer is empowered to conduct an enquiry as provided under sub-section 2 of section 73 of the Act and is further required to determine the amount payable by an assessee, upon which the assessee will be liable to pay the said amount. It can thus be seen that though in the aforesaid two eventualities, assessee voluntarily accepts the liability and makes the payment, proceedings under Section 73(1) and (2) cannot be initiated against such assessee, atleast in so far as the duty which is admitted by him and paid. However, even in these eventualities, in respect of service tax, which is disputed by him and not paid is the procedure as required under

sub-section 1 and 2 is required to be followed. It could thus be seen that prior to determination of the amount of service tax due from assessee or erroneously refunded to such person, an enquiry as contemplated either under the provisions of Section 72 or sub-section 1 and sub-section 2 of section 73 is required to be conducted. The amount of tax shall be payable, only after the determination by authority either under Section 72 or section 73. Not only that, even in case of voluntary option to pay the service tax as is available under sub-section 3 or 4A of section 73, except the admitted liability the amount payable would be required to be determined by an authority under sub-section 2 of section 73.

36 It is to be noted that in both the provisions, the legislature has taken care to ensure that before the assessment is made and the amount payable is determined, the assessee is given complete opportunity of either being heard or represented.

37 The Constitution Bench of the Apex Court in the case of **State of Rajasthan (supra)** had an occasion to consider the

provisions of section 7 and 16 of the Rajasthan Sales Tax Act. It was contended on behalf of the Petitioner therein that imposition of penalty in respect of certain periods was not sustainable in law. The Hon'ble High Court accepted the contention of the assessee. The Hon'ble High Court had allowed the Writ Petition. Being aggrieved thereby, State of Rajasthan went in appeal before the Apex Court. It will be appropriate to refer to the following observations of the Hon'ble Apex Court.

“10. In our opinion, there has been no breach of s. 16(1)(b) of the Act, and consequently, the orders imposing the penalties cannot be sustained. According to the terms of s. 16(1)(b), there must 810 be a tax due and there must be a failure to pay the tax due within the time allowed. There was some discussion before us as to the meaning of the words 'time allowed' but we need not decide in this case whether the words 'time allowed' connote time allowed by an assessing authority or time allowed by a provision in the Rules or the Act, or all these things, as we are of the view that no tax was due within the terms of s. 16(1)(b) of the Act. Section 3, the charging section, read with s. 5, makes tax payable, i.e., creates a liability to pay the tax. That is the normal function of a charging section in a taxing statute. But till the tax payable is ascertained by the assessing authority

under S. 10, or by the assessee under s. 7(2), no tax can be said to be due within s. 16(1)(b) of the Act, for till then there is only a liability to be assessed to tax. .”

It was contended before their Lordship of the Apex Court, that there was no breach of section 16(1)(b) of the Act. No tax was due till the assessee filed returns under Section 7(1) of the Act. It was further contended that there cannot be non-compliance of section 7(2), unless a return is filed without depositing the tax due on the basis of the return, and as no return was filed earlier than 18th December, 1959, there had been no violation of the requirements of Section 7(2). It was further contended that no further tax was due till assessment is made under Section 10 of the Act. However, it was contended by the learned Advocate-General, that the tax becomes due because of the charging sections of the Act i.e. section 3 with section 5. It was contended that a show cause notice had been given on December 4, 1959, and as there was delay in complying with the notice, there was breach of section 16(1)(b) of the Act. As such the order imposing penalty could not be sustained. The Lordship of the Apex Court found that the charging sections create a liability to pay

the tax as was a normal function of a charging section in a taxing statute. It was held that until tax payable is ascertained by the assessing authority under section 10 or by the assessee under Section 7(2), no tax can be said to be due within section 16(1)(b) of the Act, for till then there is only a liability to be assessed to tax.

38 The Apex Court again in the case of **Harshad Shantilal Mehta v/s. Custodian & ors. reported in (1998) 5 SCC 1** had an occasion to consider the following question amongst others.

“(1) What is meant by revenues, taxes, cesses and rates due? Does the word "due" refer merely to the liability to pay such taxes etc., or does it refer to a liability which has crystalised into a legally ascertained sum immediately payable?”

Answering the aforesaid question and taking into consideration its earlier judgments, the Bench of the Apex Court consisting of three Hon'ble Judges observed thus :

“19. The first question on which the arguments have been advanced, relates to the meaning of the phrase "tax due" used in Section 11(2)(a). Block's Law Dictionary at page 499 defines the word `due', inter alia, as:

"Owing; payable; justly owed. Owed, or owing, as distinguished from payable. A debt is often said to be due from a person where he is the party owing it, or primarily bound to pay, whether the time for payment has or has not arrived. The word 'due' always imports a fixed and settled obligation or liability, but with reference to the time for its payment there is considerable ambiguity in the use of the term, the precise signification being determined in each case from the context."

Jowitt's Dictionary of English Law Vol. I, 2nd Edn. at page 669 defines 'due' as:

"Anything owing, that which one contracts to pay or perform to another. ... As applied to a sum of money, 'due' means either that it is owing or that it is payable; in other words, it may mean that the debt is payable at once or at a future time. It is a question of construction which of these two meanings the word 'due' has in a given case".

20. Wharton's Law Lexicon, 14th Edn. at page 365 defines 'due' as anything owing. It has the following comment:

"It should be observed that a debt is said to be due the instant that it has existence as a debt; it may be payable at a future time".

21 Our attention has been drawn to Section 530(1)(a) of the Companies Act where the language used in "taxes, cesses and

rates due and payable" and Section 61(1)(a) of the Provincial Insolvency Act, 1920 which refers to all debts due to the [Crown](#). [In the State of Rajasthan & Ors. v. Ghasilal](#) (1965 (2) SCR 805), this Court considered the provisions of the Rajasthan Sales Tax Act, 1955. It observed, that Section 3 which is the charging section of the Rajasthan Sales Tax Act, read with Section 1, makes tax payable i.e. creates a liability to pay the tax. That is the normal function of a charging section in a taxing statute. But till the tax payable is ascertained by the Assessing Authority under Section 10 or by the assessee under Section 7(2), no tax can be said to be due. For till then there is only a liability to be assessed to tax. A similar view was taken by this Court in its later decision in [Associated Cement Co. Ltd. v. Commercial Tax Officer, Kota & Ors.](#) (1981 (48) S.T.C. 466 at page 480) holding that until the tax payable is ascertained by the Assessing Authority or by the assessee, no tax can be said to be due; for till then there is only a liability to be assessed to tax.

22. The Federal Court in the case of *Chatturam and Ors. v. Commissioner of Income-Tax, Bihar* (1947 (15) ITR 302 at page 308) held that the liability to pay the tax is founded on Sections 3 and 4 of the Income Tax Act which are the charging sections. Section 22 etc. are the machinery sections to determine the amount of tax. It cited the observations of Lord Dunedin in *Whitney v. Commissioners of Inland Revenue* (1926 AC 37) as follows :-

"Now, there are three stages in the imposition of a tax. There is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment, that ex hypothesi has already been fixed. But assessment particularizes that exact sum which a person liable has to pay. Lastly, come the methods of recovery if the person taxed does not voluntarily pay."

(See in this connection, [Kalwa Devadattam and Ors. v. Union of India and Ors.](#) (1963 (49) ITR 165, 171); *Doorga Prosad v. The Secretary of State* (13 ITR 285, 289) and [Ramond Synthetics Ltd. and Ors. v. Union of India and Ors.](#) (1992 (2) SCC 255 at 286-288).

23. "Tax due" usually refers to an ascertained liability. However, the meaning of the words 'taxes due' will ultimately depend upon the context in which these words are used.

24. In the present case, the words 'taxes due' occur in a section dealing with distribution of property. At this stage the taxes 'due' have to be actually paid out. Therefore, the phrase 'taxes due' cannot refer merely to a liability created by the charging section to pay the tax under the relevant law. It must refer to an ascertained liability for payment of taxes quantified in accordance with law. In other word, taxes as assessed which

are presently payable by the notified person are taxes which have to be taken into account under Section 11(2)(a) while distributing the property of the notified person. Taxes which are not legally assessed or assessments which have not become final and binding on the assessee, are not covered under Section 11(2)(a) because unless it is an ascertained and quantified liability, disbursement cannot be made. In the context of Section 11(2), therefore, "the taxes due" refer to "taxes as finally assessed".

It could thus be seen that the Apex Court held that the tax due would mean an ascertained liability. Their Lordships of the Apex Court have held that meaning of the words "taxes due" will have to be ultimately depend upon the context in which these words are used. The Apex Court found that the phrase "taxes due" cannot refer merely to a liability created by the charging section to pay the tax under the relevant law. It must refer to an ascertained liability for payment of taxes quantified in accordance with law. It is further held that taxes which are not legally assessed or assessments which have not become final and binding on the assessee, are not covered under section 11(2)(a) of the said Act.

39 In the present case also, as could be seen from aforesaid discussion that the scheme of the act is that the tax would be held to be payable only after adjudication either under Section 72 or sub-section 2 of section 73 of the said Act. As already stated by us hereinabove that even when an assessee voluntarily pays tax under sub-section (3) and 4A of section 73, even in that case, in so far as disputed amount is concerned, determination as required under subsection 2 of section 73 is required to be done. By now it is settled principle of law that when a law requires a particular things to be done, in a particular manner, it has to be done in that manner alone and not at all. Reference could be made to the Judgment of the Apex Court in the case of **Dhanajaya Reddy v/s. State of Karnataka reported in (2001) 4 SCC 9.**

40 Though in the present case, it is strenuously urged by Shri Pradeep Jetly that there is already adjudication by the learned Tribunal regarding the liability of the Petitioner to make the payment, we are unable to accept the said contention. Firstly, it

would reveal that both the judgment of the learned Tribunal either in the case of **ABN Amro Bank vs. Commissioner of Central Excise, Noida** 2011(23) STR 529 (Tri.-Del) and also in the case of **Commissioner of Service Tax, Mumbai vs. HDFC Bank Ltd.**, 2013-TIOL-1363-CESTAT-MUMBAI, wherein according to Shri Pradeep Jetly, present Petitioner is also a party, are pertaining to assessment for the period between 1/6/2002 and 30/4/2006. In the present case, undisputedly the period of assessment is post 30/4/2006. As such we are unable to accept the said contention. In any case, perusal of the order passed by the learned Tribunal in the case of **Commissioner of Service Tax, Mumbai (Supra)** would reveal that it has disagreed with the view taken by the Tribunal in the case of **ABN Amro(supra)**. However, that would not have much effect in as much as both these cases pertain to the period prior to 30th April, 2006, whereas the present case is concerned, the period of assessment is after 30th April, 2006.

41 Undisputedly, in the present case though the Petitioners have filed return, there has been no adjudication under section 72 of

the said Act. After the Petitioners have filed return that they are not liable to pay the service tax, the authorities are not bound to take a decision, deciding the said issue. If the authority is of the considered view that the services rendered by the Petitioners are chargeable to service tax and Petitioner has not paid the same, in exercise of the power vested in him, the Central Excise Officer is very well empowered to make assessment of the value of taxable services to the best of his judgment and determine sum payable by the petitioner or refundable to it. Admittedly, this has not been done.

42 It is contended by Shri Pradeep Jetly that section 73 of the said Act would not be applicable to the present case, in as much as, the very first line shows that the provisions can be invoked when the tax has not been “levied or paid”. The learned Counsel submits that when the assessee has paid the tax, provisions of section 73 cannot be invoked. We find that the said contention deserves to be heard only to be rejected. On one hand, revenue coerces assessee to pay service tax on threat of taking action under Section 87 of the said Act, which can have drastic consequences, such as sealing, attaching

accounts of bank etc. and when an assessee succumbs to the said pressure and deposits the sum under protest, innocuous argument is made that since now payment is made, provisions of section 73 cannot be invoked. It is to be noted that the consequences of not paying service tax when assessee is liable to pay service tax are very drastic in nature. Not only that under the provisions of Section 76 of the said Act, the assessee is liable to pay penalty, which can be upto 50 per cent of the service tax payable, the penal provisions as contained in Section 77 and 78 provides for severe penalties even on the directors of the company. If it is a view of the revenue that the petitioners though liable to pay service tax are evading payment of service tax, they can very well take recourse to section 73 and determine the amount of service tax payable by them. In any case the Petitioner has already filed his return claiming therein that the services rendered by him are not liable to service-tax. There is nothing which precludes the authority from taking decision on the return filed by the petitioner in accordance with the provisions of section 72 of the said Act. Upon determination of proceedings either under section 72 or 73, not only that the petitioner would be liable to

pay tax but will also be liable to pay interest in accordance with the section 75 and also penalty if a case for levy of penalty is made out. However, on one hand, the respondents are not even taking decision on the return filed by the petitioner as provided under Section 72 and also not taking action under Section 73 on the pretext that the payment is already made and on the other hand, now when the Petitioner has made the payment under protest, the provisions of section 87 are not now sought to be invoked on the ground that the tax liability is determined.

43 We are of the considered view that the amount which is payable by a person can be said to be payable only after, there is determination as provided under Section 72 or section 73 of the said Act. We find that neither of that has been done.

44 In so far as the contention of Shri Pradeep Jetley that the Petitioners have not filed an application for refund under Section 11B of the Central Excise Act, which by virtue of section 83 will have to be read as a part of the said Act, is concerned, again we are at pains to

say that the said contention atleast at the behest of the revenue does not merit consideration. Perusal of provisions of Section 11B of the Central Excise Act in contradiction with the provisions of section 72 and 73 would reveal that, section 72 and 73 of the said Act provide a complete inbuilt machinery thereby giving safeguard to the assessee of personally being heard or representation of the assessee being considered prior to determination of the amount payable on account of service tax. However, under Section 11(b), the only provisions which can be said to have some safeguard in case of assessee is that the authority has to arrive at a satisfaction. However, no such provision of either giving personal hearing as provided under Section 72 or the representation of an assessee being considered as provided in section 73 could be found in Section 11(b) of the said Act. We are again at pains to say that the conduct of the revenue, firstly coercing the assessee to make payment and thereafter not deciding the returns under Section 72 or not taking recourse to section 73, and asking the assessee to take recourse to section 11B can not be said to be just, fair and reasonable approach. In that view of the matter, contention in that regard, in our considered view also needs to be rejected.

45 We may gainfully refer to observations of the Division Bench of this Court in the case of **Lawson Tours and Travels (India) Pvt.Ltd (supra)**, which arose in the similar circumstances. Though the Division Bench has not elaborately adverted to the provisions of Statute, the view taken by the Division Bench is the same that has been taken by us. It will be appropriate to refer to paragraphs - 3 and 4 of the said judgment, which read as under :

“3) Notice was issued on this Writ Petition by the Petitioner's Advocate and Mr. Thorat appearing on behalf of the contesting Respondent Nos. 1 and 2, on instructions, states that the adjudication order will be passed within a period of two months from today. Needless to clarify that the said order shall be passed in accordance with law.

4) We are not concerned as much with the adjudicating proceedings, the outcome thereof, leave alone the merits. But, we do find that there was no reason for the authority to hastily freeze and attach the bank account. If the Petitioner has a huge liability and which is towards taxes due to the Government, then, the least that was expected is that the competent authority decides the adjudication proceedings and by an appropriate order. It is

only thereafter that the dues could be said to be crystallized and adjudicated. Presently, merely on issuance of show cause cum demand notice, copy of which is at Annexure 'B', the bank account could not have frozen and attached. More so, when the Petitioner claims to have made some payments. As a result of the above discussion, the Writ Petition succeeds. Both communications at Annexures 'A1' and 'A2' are quashed and set aside. The bank account of the Petitioner with South Indian Bank shall stand released from the attachment. However, we clarify that it would be open for the Revenue to initiate such proceedings and for recovery of the sums which are due and payable to it in the event of an order in adjudication proceedings being passed and the dues being finalised in terms thereof. All such measures are open for being initiated and undertaken irrespective of disposal of this Writ Petition. We clarify that we have not expressed any opinion on the rival contentions as far as merits of the show cause notice.”

(emphasis supplied)

46 We may make it clear that we are deciding the present matter only on the basis of interpretation of statutory provisions as aforesaid. No doubt that if the Statute permits an authority to make a

demand on the basis of the preliminary assessment made by it, even prior to there being adjudication, the matter would have been different. Though we have made pertinent query to Shri Pradeep Jetly in that regard and asked as to whether there is any provision in the Statute which would empower the authority to make demand of service tax from an assessee, on the basis of their preliminary assessment prior to there being adjudication regarding liability to pay tax and the determination of the amount, the learned Counsel fairly conceded that except the provisions brought to our notice by him and by Shri Shridharan, there is no other provisions which would permit the authority to do so. At the cost of repetition, we may say that if a tax payer fraudulently or in order to deprive revenue from the amount which the revenue is entitled to, fails to pay tax, it is not as if, the authorities are without any power. The Statute vests ample power with the authorities to deal sternly with such of the assessee who either fraudulently or with intention to deprive revenue of its legitimate dues evades payment thereof. Not only that, but if the Central Excise Officer is of the opinion that for the purpose of protecting interest of the revenue, it is necessary to attach

provisionally any property belonging to a person on whom notice is served under Section 73 or section 73 of the said Act, he is empowered to do so, however, with previous approval of the Commissioner of Central Excise. However, at the same time, the law enforcers cannot be permitted to do something which is not permissible within the four corners of law.

47 In that view of the matter, we are of the considered view that the impugned communication which demands the Petitioner to make payment of the interest and also threatens them that in the event the said payment of interest is not made, coercive action under Section 87 would be taken against them, would not be sustainable in law.

48 At the outset, we may also state that before hearing, we had given proposal to the Revenue as to whether Revenue was inclined to adjudicate either under the provisions of section 72 or 73 of the said Act within reasonable period so that some workable order could have been passed. However, since it was the insistence of the

revenue that the action taken by them is within four corners of the law, we are required to decide the same.

49 In that view of the matter, we find that the impugned action is not sustainable in law. Rule is made absolute by quashing and setting aside the impugned communication dated 25/3/2015. In the facts and circumstances, no orders as to costs.

(A.S. GADKARI, J)

(B.R.GAVAI,J)