$~25

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **SERTA 7/2017 & C.M. No. 36005/2017 (stay)**

THE PR. COMMISSIONER OF GST,
DELHI -SOUTH COMMISSIONERATE ..... Appellant
Through: Mr. Harpreet Singh, Sr. Standing Counsel with Ms. Namrata Bharti, Advocate.

versus

McDONALDS INDIA PVT. LTD. ..... Respondent
Through: Mr. Nikhil Nayyar, Advocate with Mr. N. Sai Vinod, Ms. Smriti Shah, Advocates.

CORAM: JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% **09.10.2017**

C.M. No. 36007/2017 (Exemptions)

1. Allowed, subject to all just exceptions.

C.M. No. 36006/2017 (delay of 41 days in filing)

2. For the reasons explained in the application, the delay in filing is condoned. The application is allowed.

SERTA No. 7/2017 & CM No. 36005/2017 (stay)

3. This is an appeal by the Service Tax Department through the Principal Commissioner of GST under Section 35 of the Central Excise Act, 1944 ('CE Act') read with Section 83 of the Finance Act ('FA'), 1994 against an

order dated 16th December 2016 passed by the Customs, Excise & Service Tax Appellate Tribunal ('CESTAT') in Appeal No. ST/60163/2013 whereby the appeal of the Respondent-Assessee was allowed and the order in appeal dated 25th July, 2013 of the Commissioner (Appeals) was set aside.

4. The Respondent-Assessee is a subsidiary of McDonald's Corporation, USA ('the holding Company') which also happens to be its Associated Enterprise ('AE'). During the Financial Years ('FY') 2006-07 and 2007-08, the Assessee provided management services or business consultancy services to its AE for undertaking franchise business in India. The Assessee was registered with the Service Tax Department under the taxable category of 'Management or Business Consultant's Services'. As a consideration for providing such services, the Assessee received a service fee and discharged the corresponding service tax liability on the basis of the receipt of payments from the AE. In its books of accounts for the aforementioned FYs, the Assessee showed Rs. 3,28,00,378/- as receivable. However, since the payment had not yet been received, it did not pay the corresponding service tax.

5. By the FA 2008 effective from 10th May 2008, an amendment was made in Explanation (c) to Section 67 of the FA 1994 which defined the expression "gross amount charged" as under:-

> "(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of accounts of a person liable to pay service

> tax, where the transaction of taxable service is with any associated enterprise.”

6. Correspondingly, an explanation was added to sub-rule (1) under Rule 6 of the Service Tax Rules, 1994 (‘ST Rules’) by Notification No. 19/2008/ST dated 10^{th} May 2008 as under:

> “Explanation- For the removal of doubts, it is hereby declared that where the transaction of taxable service is with any associate enterprise, any payment received towards the value of taxable service, in such case shall include, any amount credited or debited, whether called 'suspense account’ or by any other name, in the books of account of a person liable to pay service tax.”

7. As a consequence of the above amendments, service tax was required to be paid on taxable service provided to AEs even where the consideration of such tax and services had not actually been received but had been shown in books of accounts as ‘outstanding’.

8. The question that arises in the present case is whether the amount shown as outstanding in the books of accounts of the Assessee as on 10^{th} May 2008 would be amenable to service tax by virtue of the above amendments. According to the Service Tax Department, the question had to be answered in the affirmative and as a result a show cause notice (SCN) dated 24^{th} October 2011 was issued to the Assessee raising a service tax demand of Rs. 39,36,044/- along with interest and penalty. An adjudication order was passed on 28^{th} March 2012 confirming the above demand of tax, interest and penalty against which the Assessee went in appeal before the Commissioner (Appeals) who, by the order dated 25^{th} July 2013, dismissed the appeal. The Assessee then went in appeal before the CESTAT which, by the impugned

order, has allowed the appeal and set aside the adjudication orders as well as the order in appeal.

9. The CESTAT has, in the impugned order, held that the amendment was made to Section 67 of the FA 1994 as well as Rule 6 of the ST Rules only with effect from 10th May 2008 and not retrospectively. It was noted that the explanation to Rule 6 being prejudicial to the interest of the AE would, therefore, not apply retrospectively.

10. The learned counsel for the Appellant-Department sought to urge that the explanation is merely a clarification and did not change the position that existed even prior to 10th May 2008. According to him, the service tax liability always arose and the added Explanation to Rule 6 of the ST Rules only made the position even more explicit particularly since it opens with the words "for the removal of doubts". He also sought to urge that since the amounts are being carried forward even post the amendment to Section 67 and Rule 6, the Assessee was liable to pay service tax.

11. The Court finds that a similarly worded explanation to Section 65 (19) of the FA 1994, in the context of service tax payable on rendering service of promotion and marketing of lottery tickets, was held by the Supreme Court in ***Union of India v. Martin Lottery Agencies Limited (2009) 12 SCC 209*** to be not merely clarificatory. The following observations of the Court in paras 34 and 52 of the said decision are relevant in this context:

> "34. No doubt, the explanation begins with the words "for removal of doubts". Does it mean that it is conclusive in nature? In law, it is not. It is not a case where by reason of a judgment of a court, the law was found to be vague or

> ambiguous. There is also nothing to show that it was found to be vague or ambiguous by the executive. In fact, the Board circular shows that invocation of clause (ii) had never been in contemplation of the taxing authorities."
>
> xxx xxx xxx
>
> 52. As stated hereinbefore, for the aforementioned purpose, the expressions like "for the removal of doubts" are not conclusive. The said expressions appear to have been used under assumption that organizing games of chance would be rendition of service. We are herein not concerned as to whether it was constitutionally permissible for the Parliament to do so as we are not called upon to determine the said question but for our purpose, it would be suffice to hold that the explanation is not clarificatory or declaratory in nature."

12. In the present case, the Court finds that although the intention behind the insertion of the above Explanation to Rule 6 of ST Rules corresponding to the amended Explanation (c) to Section 67 of the FA was to bring amounts receivable from the AEs of the Assessees to tax, the intention was not to make it retrospective, i.e. to tax the transactions that have taken place prior to 10th May 2008. Admittedly, the amount shown outstanding in the books of accounts of the Assessee pertained to the transactions that had taken place prior to 10th May 2008. As per Rule 6, it is the date when the amount is credited/debited that is relevant and not the fact that the amount remains in the books. Any contrary interpretation would result in the provision being made retrospective, which was not the intention.

13. In that view of the matter and particularly, in view of the settled legal position explained by the Supreme Court in ***Martin Lottery Agencies Ltd.*** (*supra*), the Court is satisfied that no error has been committed by the

CESTAT in answering the issue in favour of the Assessee, viz., that the aforementioned amendments to the FA 1994 as well as the ST Rules cannot be made retrospective. Consequently, no substantial question of law arises for consideration.

14. The appeal as well as the pending application is dismissed but, in the circumstances, without any order as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

OCTOBER 09, 2017
'anb'