SC order in Retailers Association case might require Review or curative petition … – Oct 25, 2011

THE decision of the Hon'ble Supreme Court delivered on October 14, 2011, in respect of the SLP filed against the decision of the Bombay High Court in the Retailers Association case (**2011-TIOL-104-SC-ST)** raises several issues including the one related to its implementation.

As per the order, 50% of the 'arrears of service tax due' from the members of the Retailers Association of India, in respect of the period ending September 30, 2011 shall have to be deposited with the Department, in three equated instalments , on or before 1st November,2011, 1st January 2012 and 1st March, 2012. As we know, the members of the Retailers Association of India, who are the petitioners, are not service providers and are under no obligation to pay service tax. In fact, they are not defaulters in terms of the non-payment of service. On the other hand, it is the landlords/lessors, who, as service providers, are required to discharge the service tax liability to the Government. How then, can this order be implemented, vis-à-vis the petitioners? Can this order be interpreted to mean that, the landlords/lessors qua the petitioners, are required to deposited the service tax amounts? I have no clues as to how this order could work.

The same reasoning would work, vis-à-vis the affidavits that are required to be filed by the petitioners as well as, in terms of the surety required to be furnished, as directed by the Supreme Court in this order, as how can the Retailers who are not required to pay service tax in the first place, be required to file these affidavits.

Now, taking our discussion forward, the Apex Court's order asks for 50% of the service tax arrears 'to be deposited with the concerned Department'. Assuming that, the intention of the Apex Court is to ensure that the Government is not deprived of its share of revenue, pending the disposal of this SLP and further assuming that, the Apex Court's order is qua the service tax arrears and not necessarily qua the petitioners, can it be said that the usage of the word 'deposit' would necessarily mean that the service tax arrears would have to be paid in 'cash' and not through cenvat credit. This would look highly unjustifiable, as the service provider is legally allowed to discharge his service tax liability by utilizing cenvat credit. As we know, the Government, on the basis of Circular No. 98/1/2008-ST dated January 4, 2008, has been denying the availment of cenvat credit of the service tax paid in respect of the commercial or industrial construction services and the duties paid on goods and materials which have gone into the construction of the commercial complexes, on a rather obnoxious stand that, these inputs and input services have gone into creating immovable property, which is not subject to the levy of central excise or service tax. Several cases, including some mine, are already pending before the CESTAT, on the validity of this Circular. It doesn't look that, the direction to 'deposit' 50% of the arrears which could mean that, this arrears has to be paid in cash, is justified, as this could mean that, cenvat credit is denied.

Another interesting issue that opens up here is, whether, this order, has applicability to cases not covered in the decision of the Bombay High Court. In my view, this order of the Apex Court is restricted to the cases originally covered by the Bombay High Court, this order cannot have applicability to immovable properties which do not fall within the jurisdiction of the Bombay High Court. Taking a specific example of a retailer who is an original party before the Bombay High and who is to be regarded as a petitioner and who has taken immovable properties on lease in Mumbai and Bangalore, this order will have applicability only in respect of the immovable property located in Mumbai, as the one located in Bangalore is outside the original jurisdiction of the Bombay High Court.

Taking this order a bit further…. can it be interpreted that, the 50% arrears service tax arrears is to be paid by the landlord/lessor after collecting the same from the Retailers? Though this could be a logical interpretation, without a clear indication to this effect in the order, this interpretation would be unsustainable.

And, how about the Department, Sir? I don't think, the Department can, based on this order, ask the Retailers to pay the service tax arrears, as service tax can be demanded only from service providers and not service receivers, except in cases like the import of services, Sponsorship service, etc., where, the law provides for the service tax to be paid by the service receivers.

Again, with due regards and respects to the Hon'ble Apex Court…. how can this order be implemented? My guess is as good as anybody else's. I wonder as to why, the learned Government Advocates have not pointed out the relevant issues to the Hon'ble Apex Court, even when the order was being pronounced.

Going forward… what could be the way out?

Can the Apex Court, perhaps, review its own order? Yes, in my view. As Article 137 of the Constitution,subject to the provisions of any law and rules made under Article 145, theSupreme Court has the power to review any judgment pronounced ororder made by it. Under Supreme Court Rules, 1966 such a petition isto be filed within thirty days from the date of judgment or order and asfar as practicable, it is to be circulated, without oral arguments, to thesame Bench of Judges who delivered the judgment or order sought tobe reviewed. The Central Government should think of filing a petition, requesting the Apex Court, to review this order.

Also, a curative petition can be filed, vis-à-vis this order. The Apex Court, in *Rupa Ashok Hurrahvs. Ashok Hurrah* ***(2002-TIOL-469-SC-MISC-CB)***, has held that even after dismissal of a reviewpetition under Article 137 of the Constitution, the Supreme Court, mayentertain a curative petition and reconsider its judgment/order, inexercise of its inherent powers in order to prevent abuse of its process,to cure gross miscarriage of justice and such a petition can be filedonly if a Senior Advocate certifies that it meets the requirements of thiscase. Such a petition is to be first circulated, in chambers, before aBench comprising of three senior most judges and such serving judgeswho were members of the Bench which passed the judgment/order,subject matter of the petition.
Can the Department, based on the usage of the word' deposit' take the view that, cenvat credit cannot be utilized to discharge the service tax liability for the period prior to March 31, 2011 (in any case, with effect from April 1, 2011, the Government has amended the definition of 'input service' to exclude commercial or industrial construction services for the purpose of denial of cenvat credit to landlords/lessors)? Not quite so, as this order only deals with cases covered by the original Bombay High Court decision and also, only in cases, where there are arrears of service tax.

There could be several other issues emanating out of this order. In my view, only a review or curative order from the Apex Court can correct the confusion that would seem to have been created by this order.

Before parting …
As far as my knowledge goes, most landlords/lessors in the South have utilized cenvat credit, to pay their service tax liability in respect of premises leased out to Retailers, even when the Retailers have been refusing to pay the service tax, not-withstanding the fact that the Department is all out to deny cenvat credit based on Circular No. 98/1/2008-ST dated January 4, 2011. Since this order talks of only the arrears to be deposited, this order will have no applicability even in cases falling within the original jurisdiction of Bombay High Court, wherein, the service tax liability has been discharged through utilization of cenvat credit.

The Government, on its part, should withdraw its controversial Circular No, 98/1/2008 and allow for the service tax liability on renting services to be discharged through utilization of cenvat credit for the period prior to April 1, 2011. In any case, it has ensured through a statutory amendment that cenvat credit is denied to landlords/lessors with effect from April 1, 2011. This could put an end to the litigation as most landlords/lessors would have significant cenvat credit which can be utilized to discharge their service tax liability.

Where does this order from the Hon'ble Supreme Court deal with interest and penalties on the 50% ordered to be paid? It does seems that, the amount paid under this order cannot partake the character of 'service tax' and that, this amount can only be treated as a deposit, pending the disposal of the case by the Apex Court. If the Apex Court upholds the service tax levy on renting services, interest would have to be paid, as there is no provision under the service tax for waiver of interest. Of course, penalties cannot get levied, as till such time, the Apex Court decides on the matter, the law on the subject matter is still open.

From, purely, a practical perspective….. it would be better for the landlords/lessors and their retail tenants, to sit across the table and take a commercial view of the subject matter, in the light of this order, considering the fact that, the interest meter would run at a very stiff 18% per annum, with effect from April 1, 2011, if the case were to finally get decided in favour of the Revenue (which I believe, is very likely to happen).

In some cases, some landlords/lessors have paid the service tax 'under protest'. I wonder if, armed with this order, the Department can insist on further payments, taking the view that the earlier payments made 'under protest' are not to be treated as service tax payments.

And, in some cases…..the landlords/lessors might start 'reading between the lines', the clauses contained in the lease/rental agreements and try to recover the service tax element, from their retail tenants, in cases, where they have already discharged the service tax liability on the rentals, as this order could be interpreted from a business point of view, as well.

This order, as compared to the earlier one giving a blanket stay for the period prior to October 1, 2011, would seem to be a bit of anti-climax and could be seen as the Department winning the battle. Of course, it remains to be seen as to who would win the war, when the Apex Court pronounces its final judgement on the levy of service tax on renting service, which is perhaps, one of the most litigated subjects in indirect taxes in recent times.