CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 50893 OF 2015
(Arising out of Order-in-Original No. Commissioner/RPR/ST/60/2014 dated 23/12/2014 passed by the Commissioner of Customs, Raipur(CG)-492001)

M/s Jayaswal Neco Industries Ltd. ..... **Appellant**
Siltara Growth Centre,
Siltara,
Raipur (CG)-493221

VERSUS

Commissioner of Customs, Central Excise and Service Tax, ... **Respondent**
Raipur

APPEARANCE:

Shri B.L. Narasimhan, Advocate for the Appellant
Shri R.K. Manjhi, Authorized Representative of the Department

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 51630 / 2020

DATE OF HEARING/DECISION: October 07, 2020

JUSTICE DILIP GUPTA

M/s Jayaswal Neco Industries Ltd.[1] has sought the quashing of the order dated December 23, 2014 passed by the Commissioner of Customs, Central Excise and Service Tax, Raipur[2].

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1. the Appellant
2. the Commissioner

The order confirms the demand of service tax under section 73 of the Finance Act, 1994[3] with interest and penalties.

2. The Appellant, a manufacturer of excisable goods, is engaged in providing services of 'goods transport agency' and 'business auxiliary service'. During the relevant period from October 2007 to June, 2009 the Appellant had taken on lease the manufacturing plants of M/s Abhijeet Infrastructure Ltd.[4] and Corporate Ispat Alloys Ltd.[5]. These plants were mentioned in the Central Excise registration of the Appellant. At these manufacturing plants, the Appellant manufactured DRI, Pig Iron and billets, which were sold to Abhijeet Ltd. and Corporate Ltd., who further sold these goods to independent buyers at the same price as they were sister concerns of the Appellant. The Appellant claims to have shared the profits with Abhijeet Ltd. and Corporate Ltd. by way of discounts and incentives. The discount was a fixed discount, based on the quantity of goods sold by Abhijeet Ltd. and Corporate Ltd. Incentives were in the form of additional discounts, if the sales made by Abhijit Ltd. and Corporate Ltd. met a certain sales target mutually agreed upon by the Appellant and the two concerns. These incentives and discounts were paid on a monthly basis by way of debit notes issued by Abhijeet Ltd. and Corporate Ltd. The Appellant settled the account of Abhijeet Ltd. and Corporate Ltd. after adjusting the aforesaid discounts/incentives. These discounts/incentives were also recorded in the books of accounts of

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3. the Finance Act
4. Abhijeet Ltd.
5. Corporate Ltd.

the Appellant as "COMM.SALES PIG IRON & DRI and "COMMISSION OF SALES".

3. It transpires that the plants of Abhijeet Ltd. and Corporate Ltd. were demerged from the legal entities of Abhijeet Ltd. and Corporate Ltd. and were merged into the Appellant w.e.f April 1, 2008 in terms of an order dated November 13, 2009 passed by the Bombay High Court. The Appellant contends that Abhijeet Ltd. and Corporate Ltd. continued to exist and operate as separate legal entities and only their manufacturing unit plants based in Siltara were merged with the Appellant.

4. During the course of audit of the books of account of the Appellant for the period September 2006 to December 2008 it was noticed that Abhijeet Ltd. and Corporate Ltd. had received commission on account of sale of DRI and Pig Iron from the Appellant but had not paid service tax on such commission. Accordingly, a show cause notice dated April 17, 2013 was issued to the Appellant proposing service tax on commission / discounts paid to Abhijeet Ltd. and Corporate Ltd., alleging that they acted as commission agents of the Appellant and had received commission from the Appellant, which was taxable under "business auxiliary service"[6]. The reason for demanding tax from the Appellant was that Abhijeet Ltd. and Corporate Ltd. had merged with the Appellant and, therefore, the Appellant was liable to pay the service tax that was payable by the Abhijeet Ltd. and Corporate ltd.

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6. BAS

5. The Appellant filed a reply to the aforesaid show cause notice. Apart from making submissions on merit, it was also asserted by the Appellant that the authority did not have the jurisdiction to issue show cause notice. The relevant paragraphs of the reply filed by the Appellant on this issue are reproduced below:-

> **"A. Show Cause Notice Issued Without Jurisdiction**
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> A.1 The Noticee submits that the instant show cause notice dated April 17,2013 has been issued without jurisdiction on the Noticee and is liable to be quashed on this ground itself. It is submitted that the alleged taxable service, if any, has been provided by Abhijeet and Corporate, who are separate legal entities and the assesses under the Service Tax laws. That even assuming without admitting that the instant transaction is taxable, since the Noticee is merely the service receiver and is neither the assessee nor liable to pay the tax to the revenue exchequer in any manner, the instant show cause notice is without jurisdiction and could not have been issued to the Noticee in the first place under section 73 of the Act.
>
> A.2. To elucidate, the Noticee submits that it is not the case of the revenue authorities that Noticee was liable to pay service tax during the disputed period as a recipient of service. The entire basis of the show cause notice dated April 17, 2013 is that the demerged undertakings of Abhijeet & Corporate have been merged with the Noticee and thus all liabilities of demerged undertaking lie with Noticee. Based on the aforesaid allegation of Para 19 of the show cause notice dated April 17, 2013, instant proceedings have been initiated against the Noticee.
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> A.3. The demerged undertakings as defined in the scheme of merger were specified to be the DRI/Sponge iron plants of Abhijeet & Corporate. The legal entities i.e. body corporate of Abhijeet & Corporate did not merge with Noticee. The aforesaid legal entities continue to be operating as going concerns and executing their business transactions.
>
> A.4. At the outset the Noticee submits that during the disputed period payment of service tax was the liability of Abhijeet & Corporate legal entities i.e. the legal person required to be registered under service tax laws.
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> A.5. During the disputed period, the section 69 of the Act required every person liable to pay service tax to get registered in the manner prescribed in rule 4 of the Service Tax Rules, 1994. As per section 68 of the Act, every person providing taxable service was required to pay service tax. An exception to section 68(1) was created wherein person notified by the Government (other than the service provider) will be required to pay service tax. The aforesaid exceptions were carved out under rule 2(1) (d) the Rules.

> A.6. In the entire scheme, the Act or the rules did not define "person". The rules only defined "person liable to pay service tax" for the purpose of exception created under section 68(2).
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> A.7. Thus, under normal circumstances, the person liable to pay tax was the service provider and such service provider was required to take registration with service tax authorities. Since person was not defined, it's meaning has to be adopted from General Clauses Act, 1987 wherein it has been defined to include any company, association or body of individuals whether incorporate or not. Thus, apart from natural person the defined artificial judicial entities have been defined to be person.
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> A.8. Accordingly, under service tax laws only a natural person or artificial judicial person was liable to pay service tax. Factories of Abhijeet & Corporate which merged with Noticee were never judicial person required to take registration with service tax authorities. The aforesaid fact of merger of factories was intimated along with copies of orders of the High Court to revenue authorities. It was the body corporate, the legal entities Abhijeet & Corporate who were required to take registration & pay service tax (assuming without admitting that other allegations in the show cause notice dated April 17, 2013 are correct).
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> A.9. As per section 73 read with proviso, the Central Excise officer was empowered to serve a show cause notice only on the person chargeable to service tax. In the instant case, the persons chargeable to service tax for the allegedly taxable transactions were Abhijeet & Corporate. Accordingly, show cause notice has been issued in violation of section 73 of the Act to the recipient of service. Accordingly, the same is without jurisdiction & is liable to be dropped on this ground itself."

6. The reply filed by the Appellant, however, did not find favour of the Commissioner, who by the order dated 23 December, 2014, confirmed the demand on service tax under section 73 of the Finance Act read with sections 68 and 70 of the Finance Act with interest and penalties under sections 77 and 78 of the Finance Act. The relevant portion of the order of the Commissioner is reproduced below:-

> "7.1.10. Thus, from the above, it is clear that the Party No.1 and Party No.2 has provided services as "Commission Agent" to the Noticee, which are taxable under the category of "Business Auxiliary Services". Accordingly, service tax in respect of services provided by them are recoverable. However, in this regard, I would like to resolve the dispute raised by Noticee as to from whom this Tax will be recoverable, whether from the Party No.1 and Party No. 2 or from the Noticee. In this context, I rely on the order dated November 13, 2009 of Hon'ble High Court of Judicature at

> Bombay, Bench at Nagpur. As per the said Order the Hon'ble High Court the Party No.1 and Party No. 2 merged with the Noticee w.e.f. April 01, 2008. As per section VI point 5 of the Hon'ble High Court's order dated November 13, 2009 "Without prejudice to the generality of the above and upon the coming into force of the scheme, all assets, properties, rights, entitlements, benefits, liabilities, contingent liabilities and obligations pertaining to Demerged Undertakings hereby transferred to and vested in the Resulting Company, shall belong to and be owned, controlled and managed by the Resulting Company, together with charges and encumbrances, if any, thereon. Para 4.2.2 provides" All the liabilities including contingent liabilities relatable to and forming part of the "Demerged Undertakings" immediately before the Demerger shall become the liabilities of the Resulting Company by virtue of the Demerger". Thus, in pursuance of the above order all the liabilities has been transferred to the Noticee. Therefore, the Noticee is liable to pay the service tax payable by the Party No.1 and Party No.2."

7. This Appeal has, accordingly been filed to assail the aforesaid order passed by the Commissioner.

8. Shri B.L. Narasimhan, learned Counsel appearing for the Appellant made the following submissions:-

i. The Appellant is not liable to pay service tax as the legal entities of the service providers had not merged with the Appellant. The Appellant only took over the factories of Abhijeet Ltd. and Corporate Ltd. located in Siltara but Abhijeet Ltd. and Corporate Ltd. continued to exist and operate as separate legal entities in their own right. Therefore, the very basis for proceeding is based on an assumption which is factually and legally untenable;

ii. The Appellant did not receive BAS from Abhijeet Ltd. and Corporate Ltd. The transaction between the Appellant and Abhijeet Ltd. /Corporate Ltd. was that of sale/purchase, on a principal to principal basis. The definition of commission agent is, therefore, not satisfied in

the present case, and hence the service is not a taxable service under section 65 (105) (zzb) of the Finance Act;

iii. Even otherwise, services received from the demergerd undertakings would be considered as service to self from the 'appointed date';

iv. The computation of demand is incorrect as cum-tax benefit should have been given; and

v. The show cause notice is dated April 17, 2013 and the period covered is October 01, 2007 to June 30, 2009. The show cause notice as well the impugned order have failed to establish suppression/mis-declaration on the part of the Appellant. Therefore, the extended period of limitation is not invokable in the instant matter.

9. Shri R.K. Majhi, learned Authorized Representative of the Department has, however, supported the impugned order and made the following submissions.

i. The order dated November 13, 2009 of the Bombay High Court relating to merger categorically mentions that all the liabilities, including contingent liabilities relating to and forming part of the demerged undertaking immediately before demerger shall become the liabilities of the demerger company and, therefore, the Appellant is not justified in contending that the Appellant is not liable to pay service tax as the legal entities of the service provider have not merged with the Appellant;

ii. The Appellant is also not justified in asserting that it did not receive BAS from Abhijeet Ltd. and Corporate Ltd. The goods were delivered directly to the consumers and not to Abhijeet Ltd. and Corporate Ltd. The Appellant has accepted that it had appointed Abhijeet Ltd. and Corporate Ltd. as marketing partners for the sale of the products to procure orders from the customers and to sell the goods, for which a fixed discount was allowed to Abhijeet Ltd. and Corporate Ltd. In addition to above discount, additional discount was also provided if they achieved monthly target. The discount is retained by Abhijeet Ltd. and Corporate Ltd. and not passed on to the buyers. Further, the accounting entry in the ledger was "COMM and Commission on sales". In this connection learned Authorized Representative placed reliance on the decision of the Tribunal in **IRIS Computers Ltd. v. Commissioner of Service Tax, Jaipur**[7]**.**

10. The submissions advanced by learned Counsel for the Appellant and the learned Authorized Representative of the Department have been considered.

11. It is not in dispute that the Appellant had taken on lease the manufacturing plants of Abhijeet Ltd. and Corporate Ltd. and the manufactured products DRI, Pig Iron and billets were sold to Abhijeet Ltd. and Corporate Ltd. The Appellant shared profits with Abhijeet Ltd. and Corporate Ltd. by way of discounts and incentives, which were recorded in the books of account of the

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7. 2017 (6) GSTL 525 (Tri.-Del.)

Appellant as "COMM. SALES PIG IRON & DRI" and "COMMISSION OF SALES".

12. In order to resolve the issue that has arisen for consideration in this Appeal, it would be appropriate to refer to the Scheme of Arrangement between Abhijeet Infrastructure Limited (Demerged Company) with the Jayaswal Neco Industries Limited (Resulting Company) and their respective share holders and creditors. The Scheme of Arrangement between Corporate Ispat Alloys Limited (Demerged Company) and the Appellant (Resulting Company) and their respective share holders and creditors is almost identical.

13. As noted above, the Company Petition filed for sanction of the Scheme of Arrangement was allowed by the Bombay High Court by order dated November 13, 2009. The relevant portion of the order is reproduced below:

> "1. This is a petition by Abhijeet Infrastructures Ltd., praying for sanction of scheme of arrangement for merger annexed to the petition as Annexure-5, whereby the de-merged Undertaking will be merged along with its assets and liabilities with that of Jayaswal Neco Industries Ltd.
>
> 6. This Court hereby sanctions the arrangement, allowed in terms of prayer Clause (1) of para 24.
>
> 7. A copy of Scheme of arrangement as sanctioned by the Court and duly signed by Adv. Mr. Anjan de, is annexed to this order, which is marked as 'X' for identification."

14. It would be appropriate to reproduce the relevant paragraphs of the Scheme of Arrangement that was sanctioned by the Bombay High Court.

15. Paragraph 1 of the Scheme of Arrangement between Abhijeet Ltd. and the Appellant deals with definitions and the relevant clauses are as follows:-

" **1.7 "Demerged Company"** shall mean Abhijeet Infrastructure Limited. (Company Identification Number U27108MH1984PLC033473) a Company incorporated on 19/08/1984 (Nineteenth July Nineteen Eighty Four) under the Companies Act, 1958 having its Registered Office at F.S. MIDC Industrial Area, Hingna Road, Nagpur – 440016.

1.8 'Demerger' shall mean the transfer of the **"Demerged Undertakings"** from the **"Demerged Company"** and vesting them in the Resulting Company in accordance with the Scheme.

1.9 "Demerged Undertakings" shall mean the "Sponge iron Plant and Power Plant" of the **"Demerged Company"** and include all its industrial undertaking, business, activities, operations and infrastructure, tangible and intangible assets, rights, properties, all movable and immovable assets, obligations, liabilities including contingent liabilities pertaining to its **"Demerged Undertakings"** on a going concern basis, and without prejudice to the generality of the foregoing, specifically includes the following:

a. The whole of the fixed assets pertaining to the **"Demerged Undertakings"** shown in the statement of assets and liabilities of **"Demerged Company"** as at 01/04/2008 which is enclosed as **Schedule – A.**

b. All intangible properties, licenses, approvals, benefits incentives and rights pertaining to Demerged Undertakings, more fully described in **Schedule – A1.**

c. All that piece and parcel of the immovable properties being the land pertaining to the **"Demerged Undertakings"** more specifically described in the enclosed **Schedules – A2.**

d. All records, files, papers, discs, data storing devices, data and documents pertaining to the **"Demerged Undertakings"**.

e. All stocks of present and future goods such as raw materials, semi finished goods, finished goods, stock in process including documents of title to the goods, outstanding moneys, receivable arising from sale of goods, receivables by way of cash assistance and / or incentives under various incentive Schemes, claims including claims by way of refund of customs/excise duties under the duty drawback credit scheme or any other scheme, bills, invoices, documents, insurance policies, guarantees, engagements and rights pertaining to **"Demerged Undertakings"** as on the effective date; and

f. All employees engaged in or relating to **"Demerged Undertakings"** and its business, activities and operations as on the Effective Date."

16. Paragraph 2 deals with BACKGROUND and is reproduced below:-

" **2. BACKGROUND**

2.1 The Scheme of Arrangement, inter alia, envisages Demerger of Demerged Undertakings of the **"Demerged Company"** and transfer and vesting the Demerged Undertakings in the Resulting has set up a Sponge Iron Plant (DRI) of 350 TPD capacity and 15 MW Waste Heat Company.

2.2 The **"Demerged Company"** Recovery based Power Plant established at Sitara Growth Centre, Raipur, Chandigarh.

2.3 The Resulting Company is engaged in the business of production of Pig Iron, Cast Iron and Steel Castings required for Automotive, Engineering, Construction and other applications. It gets manufactured sponge Iron, Billets and rolled Steel Products from the assets owned by the Demerged Company and taken on Lease by it. The Resulting Company has an annual capacity of 550000 MT of Pig Iron, 255000 MT of Sponge Iron, 205000 MT of Iron and Steel Castings and 260000 MT of billets. Further, the Company also has Coal Mining blocks for captive use. The Company has 15.5 MW Blast Furnace Gas based power generation facilities for meeting a part of its own power requirements. In the immediately preceding Financial Year, the Resulting Company has shown very good prospects. However, the Resulting Company has accumulated losses and unabsorbed depreciation arising from of operations in the years previous to those Financial Years. Apart from physical resources the Resulting Company has valuable human resources and systems."

17. Paragraph 4 deals with Specific Benefits of The Scheme of Arrangement and the relevant clauses are reproduced below:-

" **4. SPECIFIC BENEFITS OF THE SCHEME OF ARRANGEMENT**

4.1 Scheme intends to cause a Demerger of the **"Demerged Undertakings"** from **"Demerged Company"** and transfer and vest them in the Resulting Company.

4.2 The Scheme results in:

4.2.1. All the properties comprised in the "Demerged Undertakings immediately before the Demerger shall become the properties of the Resulting Company by virtue of the Demerger.

4.2.2. All the liabilities including contingent liabilities relatable to **and forming part of the "Demerged Undertakings",** immediately before the Demerger shall become the liabilities of the Resulting Company by virtue of the Demerger.

4.2.3. The properties and the liabilities, if any, relatable to and **forming part of the "Demerged Undertakings"** shall stand transferred to and vested with the Resulting Company at the values appearing in the books of account of the **"Demerged Company"** immediately before the Demerger.

4.2.4. The Resulting Company shall issue shares to the shareholders of the **"Demerged Company"** in consideration of the Demerger in accordance with the Scheme to all Eligible Shareholders as on a Record Date on a proportionate basis, and

4.2.5. The transfer and vesting of **"Demerged Undertakings"** to the Resulting Company is on a going concern basis.

4.3 The Demerger is in the interests of the shareholders, creditors and all those who deal with the Demerged Undertakings and will not affect the status of any person in any manner.

> **4.4** The Demerger of the **"Demerged Undertakings"** will create enhanced value for all the stakeholders and the Board of both the companies would focus their whole attention at all times in achieving organizational goals effectively and efficiently in the best interests of the shareholders, creditors and all persons connected with the Demerged Company and the Resulting Company.
> **4.5.** The Demerger would naturally create larger scope for modernization, expansion and independent value addition."

18. Paragraph 5 deals with Transfer and Vesting of the Undertakings and other Components of the Scheme of Arrangement. Clause 5.22 is reproduced below:-

> "**5.22** Without prejudice to the generally of the above and upon the coming into Force of the Scheme, all assets, properties, rights, entitlements, benefits, liabilities, contingent liabilities, and obligations pertaining to Demerged Undertakings hereby transferred to and vested in the Resulting Company, shall belong to and be owned, controlled and managed by the Resulting Company, together with charges and encumbrances, if any, thereon."

19. Schedule A referred to in clause 1.9(a) and Schedule A1 referred to in clause 1.9(b) are reproduced below:-

> **SCHEDULE-A**
> "Fixed Assets and Liabilities pertaining to the Demerged Undertakings
> of the "Demerged Company" as shown in its audited Balance Sheet asat the commencement of business hours on 01/04/2008, being.
> 1. 350 TPD DRI Plant together with all lands described in Schedule A2, buildings, structures, infrastructure, utilities and auxiliaries, situated at Village Siltara, Raipur.
> 2. 15 MW Waste Heat Recovery Based Power Plant together with all lands described in Schedule A2, buildings, structures, infrastructure, utilities and auxiliaries, situated at Village Siltara, Raipur.
>
> **SCHEDULE- A1**
> All intangible properties, licences, consents, approvals, clearances, certificates, authorizations, benefits, incentives, rights, agreements, contracts, permits, entitlements, engagements, concessions, privileges, subsidies, trademarks, systems, data, designs, drawings, specifications, resources, modules and assets of every kind, nature and description pertaining to Demerged Undertakings."

20. The "Demerged Company" are Abhijeet Ltd. and Corporate Ltd. The "Demerged Undertakings" are the Sponge Iron Plant and

Power Plant of the "Demerged Company", namely Abhijeet Ltd. and Corporate Ltd. The Scheme of Arrangement inter alia, envisages "Demerger" of "Demerged Undertakings" of the "Demerged Company" and transfer and vesting of the "Demerged Undertakings" in the "Resulting Company", which is the Appellant.

21. It is, therefore, clear from the Scheme of Arrangement that only the "Demerged Undertakings" comprising the Sponge Iron Plants and Power Plants of Abhijeet Ltd. and Corporate Ltd. that alone were merged with the Appellant. The body corporate of Abhijeet Ltd. and Corporate Ltd. did not merge with the Appellant and they continued to execute their business transactions.

22. It is in the light of the aforesaid facts that the contentions advanced on behalf of the parties need to be examined.

23. The show cause notice proposed a demand of service tax from the Appellant on commission/ discounts paid to Abhijeet Ltd. and Corporate Ltd. alleging that they had acted as commission agents of the Appellant and had received commission from the Appellant which was taxable under BAS, but as Abhijeet Ltd. and Corporate Ltd. had merged with the Appellant, it was the Appellant that was liable to pay service tax that would otherwise have been payable by Abhijeet Ltd. and Corporate Ltd.

24. The Commissioner has placed emphasis on paragraph 5.22 and paragraph 4.2.2 of the Scheme of Arrangement to conclude that all the liabilities of Abhijeet Ltd. and Corporate Ltd. stood transferred to the Appellant and, therefore, the Appellant was

liable to pay service tax payable by Abhijeet Ltd. and Corporate Ltd.

25. This understanding of the Scheme of Arrangement is clearly erroneous. Paragraph 4.1 of Scheme of Arrangement intends to cause a Demerger of the "Demerged Undertakings"from"Demerged Company" and vesting of them in the Resulting Company. Paragraph 4.2.1 provides that all the properties comprised in the "Demerged Undertakings" immediately before the Demerger shall become the properties of the Resulting Company by virtue of the Demerger. Paragraph 4.2.2 provides that all the liabilities, including contingent liabilities, relatable to and forming part of the "Demerged Undertakings", immediately before the Demerger shall become the liabilities of the Resulting Company by virtue of the Demerger. Paragraph 5.2.2 provides that all assets, properties, rights, entitlements, benefits, liabilities, contingent liabilities, and obligations pertaining to Demerged Undertakings transferred to and vested in the Resulting Company, shall belong to and be owned, controlled and managed by the Resulting Company, together with charges and encumbrances, if any. All the fixed assets pertaining to the "Demerged Undertakings"and the liabilities of the "Demerged Company" are shown in Schedule A, while all the intangible properties have been described in Schedule A-I.

26. It is, therefore, more than apparent that only the Sponge Iron Plants and Power Plants of Abhijeet Ltd. and Corporate Ltd. merged with the Appellant and it was not a merger of Abhijeet Ltd.

merged with the Appellant and it was not a merger of Abhijeet Ltd. and Corporate Ltd with the Appellant. The Demerged Companies, namely Abhijeet Ltd. and Corporate Ltd., continue to operate as going concerns. Thus, the liabilities of Abhijeet Ltd. and Corporate Ltd. could not have been fastened upon the Appellant.

27. However, even if it is assumed that BAS was provided, then too only Abhijeet Ltd. and Corporate Ltd. were liable to pay service tax and not the Power Plants and Sponge Iron Plants, which constituted "the Demerged Undertakings" and which alone stood merged with the Appellant. Even in such a situation, it is doubtful whether the Appellant could be held to be liable for discharge service tax liability of the "Demerged Undertakings" in view of the decision of the Supreme Court in **Deputy Commercial Tax Officer, Park Town Division, Madras and another** v/s **Sha Sukraj Peerajee[8].**

28. The issue that had arisen before the Supreme Court was whether the purchaser of business carried on by a dealer can be held liable for arrears of sales-tax dues from the dealer in respect of transactions of sale that took place before the transfer of the business. The Supreme Court held that even if it is assumed that the purchaser had undertaken to pay the arrears of sales-tax dues to the dealer, it will not follow that a liability had been created interse between the State Government on the one hand and the purchasers on the other hand. Thus, the State Government could not have relied on the transfer instrument to realise the sales-tax

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8 1967 (4) TMI 173- Supreme Court

dues of the dealer, since there was no contractual obligation between the purchaser and the State Government, particularly when the State Government was not even a party to the instrument. The observations of the Supreme Court are as under:-

> "1. The question of law involved in this appeal is **whether the purchaser of business carried on by a dealer as** defined in the Madras General Sales Tax Act, 1939 (Madras Act No. IX of 1939), hereinafter called the 'Act', **can be made liable for arrears of sales-tax due from the dealer in respect of transactions of sale which took place before** the, transfer of the business under Rule 21-A of the Rules framed in exercise of the powers conferred on the State Government by s. 19 of the Act.
>
> 2. The respondent purchased, by a registered instrument dated October 5, 1956, the business carried on by one Purushottam Raju under the name-All India Trading Company. Purushottam Raju was the sole proprietor of the business and had been assessed to sales-tax in respect of his turnover for the years 1948-49 and 1949-50. The assessee paid some amounts towards sales-tax thus determined, but there remained some arrears of sales-tax i.e., Rs. 3836-4-0 for 1948-49 and Rs. 1218-1-9 for 1949-50. The Sales-tax authorities attempted to recover the arrears of tax from the respondent as the purchaser of the business.
>
> Xxxxxxxxxx
>
> 3. It was next argued on behalf of the appellants that upon a true construction of the registered instrument dated October 5, 1956, the respondent undertook to pay not only Schedule 1 liabilities but also other liabilities like sales tax imposed in regard to the business. It was, however, disputed by Mr. Ganapathy Iyer on behalf of the respondent that there was any undertaking on the part of the respondent to discharge the liabilities in regard to arrears of sales tax. **But even on the assumption that the respondent undertook to pay the arrears of sales tax due by the transferor, it does not follow that there is a liability created inter se between the State Government on the one hand and the transferee on the other hand. To put it differently, it is not open to the State Government to rely on the instrument inter vivos between the transferor and the transferee and to contend that there is any contractual obligation between the transferee and the State Government who is not a party to the instrument.** We accordingly reject the argument of the appellants on this aspect of the case also. "
>
> **[emphasis supplied]**

29. The Delhi High Court in **Delhi Transport Corporation v/s Commissioner Service Tax**[9] examined this position and observed as under:-

> "20. The above ruling of Supreme Court in the case of Rashtriya Ispat Nigam Limited (supra), however, cannot detract from the fact that in terms of the statutory provisions it is the appellant which is to discharge the liability towards the Revenue on account of service tax. Undoubtedly, the service tax burden can be transferred by contractual arrangement to the other party. But, on account of such contractual arrangement, the assessee cannot ask the Revenue to recover the tax dues from a third party or wait for discharge of the liability by the assessee till it has recovered the amount from its contractors."

30. It also needs to be noted that the Appellant is a service recipient. Under section 68 of the Finance Act, every person providing taxable service is required to pay service tax. It would be appropriate to reproduce section 68 of the Finance Act and it is as follows:

> "**68 (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 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."

31. The show cause notice, therefore, also could have been served only upon the person chargeable to service tax. This is also clear from a perusal of section 73 (1) of the Finance Act which is reproduced below:

> "**73.** (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 one year from the

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9. 2015 (38) STR 673 (Del.)

> 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 erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
>
> Provided that xxxxxxxxx "

32. Thus, the show cause notice could have been issued to Abhijeet Ltd. and Corporate Ltd. and not to the appellant, which is a service recipient and not "a person" liable to pay service tax under section 68 of the Finance Act.

33. In this connection reference can be made to the judgement of the Madras High Court in **Deputy Commissioner of Service Tax, Chennai v/s Service Care Pvt. Ltd[10].** After referring to the provisions of section 73 of the Finance Act, the Madras High Court observed as under:-

> " 24. From the bare reading of the aforesaid provisions, The following would emerge:
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> xxxxxxxxx
>
> 2 In section 73(1) as has been extracted above, certain words are very important from the context of the issue raised herein. The first one is 'person chargeable' the second one is 'person to whom such tax refund has erroneously been made'.
>
> 25. The word 'person chargeable' and the words 'the person to whom such tax refund has erroneously been made' means the actual assessee, to whom, after show cause notice, if assessment is made, would be the person liable to pay the chargeable amount of service tax. So, notice seeking to show cause should be issued under section 73 only to the person chargeable. Admittedly, M/s Service Care Chennai is a proprietorship concern of a sole proprietor who is no more. So if at all any show cause notice to be issued under section 73 of the Act, the notice must be given only to the person chargeable i.e. M/s Service Case, Chennai and not to anyone. '
>
> **[emphasis supplied]**

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34. The confirmation of demand for this reason is also bad in law.

35. It is, therefore, not possible to sustain the order passed by the Commissioner confirming the demand of service tax.

36. In such a situation, it is not necessary to examine the remaining contentions advanced on behalf of the Appellant for setting aside the impugned order.

37. The impugned order dated December 23, 2014 is, accordingly, set aside and the appeal is **allowed**.

(Order pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

Rekha