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Directorate General of Audit

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MONTHLY AUDIT BULLETIN – AUGUST, 2013

CENTRAL EXCISE

- (1) **GIST OF THE OBJECTION : Short payment of duty due to undervaluation**
COMMISSIONERATE : Central Excise Commissionerate, Ranchi
CONTRAVENTION OF PROVISION : Section 4 of the Central Excise Act, 1944 read with Central Excise Valuation (Determination of Price of Goods) Rules, 2000

The assessee being a nationalised Coal Company had cleared Coal and Washery Grade Reject Coal (CET – 27011990 of the CETA, 1985) to different buyers including one electricity generating Company. It has been observed by the auditors that the price of rejects charged by the assessee is much lower than the price charged for it from the independent buyers. The assessee vide agreement dated 14.10.2005 with the electricity generating Company, New Delhi leased out their Kathara Captive power Plant (based on washery rejects). As per the above agreement, the assessee had supplied washery grade reject coal to electricity generating Company and had received the supply of electricity from the said electricity generating Company. The tariff payable for electricity supplied by the said electricity generating Company i.e. Operation and Maintenance Component (O&M component) and Fuel component (i.e. washery grade coal rejects). As such, the tariff of electricity supplied is influenced by the cost of fuel i.e. washery rejects supplied by the assessee. Thus, both the units are having mutuality of interest in the business of each other and hence are "related persons" for the purpose of determination of duty of Central Excise. In view of the above facts the value of reject coal taken for calculation of Central Excise duty payable by the assessee on its removal to the said electricity generating Company is not correct. As per Section 4 (1) (b) of the Central Excise Act, 1944 states that in a situation where price charged is not the sole consideration between the parties, valuation of goods is to be determined according to the provisions of Central Excise Valuation (Determination of Price of Goods) Rules,

2000. The provision of Rule 11 of the Central Excise Valuation (Determination of Price of Goods) Rules, 2000, is applicable in the present situation. The situation prevailing in the instant case is not covered by any other rule of the said Rules. As per Rule 11 of the Central Excise Valuation (Determination of Price of Goods) Rules, 2000, if the value of the excisable goods cannot be determined in accordance with its other rules, value is to be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of section 4 of Central Excise Act. In light of above, the average price charged from the independent buyers on clearance of such coal rejects is to be taken as price for determination of Central Excise Duty liability in respect of clearances made to the said electricity generating Company by the assessee. The total short payment of Central Excise duty (Including Cess) made by the assessee on account of incorrect assessable value comes to Rs.3,31,40,095/- (Including cess).

- (2) **GIST OF THE OBJECTION : Short payment of duty due to undervaluation**
COMMISSIONERATE : Central Excise Commissionerate, Ranchi
CONTRAVENTION OF PROVISION : Section 4 of the Central Excise Act, 1944 read with Central Excise Valuation (Determination of Price of Goods) Rules, 2000

The assessee is engaged in production of Coal and also transferring Coal produced from Colliery to their washery on payment of duty. In course of audit and on test checking of month wise actual Excise duty statement submitted by the assessee to the audit team, it was found that they are transferring Coal to washery @ 790per MT from March, 11 to Dec.,11 and Rs.1,140.00per MT from Jan,12 to Feb, 12 and accordingly paid Central Excise Duty for the same. The washery falls outside the jurisdiction of colliery Area. Coal of Grade G-8 4901-5200 is dispatched from Colliery to Washery and the same grade is also sent to independent buyers. According to Hon'ble Supreme Court Judgment delivered in CCE Vs. Aquamall Water Solution Ltd — 2006 (193) ELT A197 (SC), the Hon'ble Supreme Court has accepted the principle that where goods are partly sold to related person & partly to independent third parties, assessment shall be made on the basis of sale made to third parties. It has been

noticed from the monthly actual Excise duty statement provided to audit that assessee transfer above grade coal at the average rate of Rs.790/- per MT from March '11 to Dec. 11 and 1140/-per MT from Jan.'11 to Feb, 12 and pay duty accordingly, whereas they sell the same grade coal to other parties by rail at much higher rate and pay duty thereon. According to above Hon'ble Supreme Court judgment they should have paid duty in respect of coal transferred to washery on the same rate at which they sell to other parties. Accordingly, Central Excise duty liability has been worked out which comes to Rs.54,39.821/-.

- (3) **GIST OF THE OBJECTION : Wrong availment of input Cenvat in respect of imported coal on which duty was paid @ 1% adv**
COMMISSIONERATE : Central Excise Commissionerate, Bhopal
CONTRAVENTION OF PROVISION : Rule 3 (1) of the CENVAT Credit Rules, 2004

The assessee is a large manufacturer of Cement Clinkers and having multi location units in the State of Madhya Pradesh and other States. They are availing CENVAT Credit on input, input service and capital goods used in the manufacture of their final product, under the provisions of the CENVAT Credit Rules, 2004. During the course of audit on scrutiny of input credit invoice it was observed that the assessee had taken CENVAT Credit of Rs.18,62,071/- on imported coal against a bill of entry. The CVD on imported goods is leviable equivalent to duty of excise. Under the provision of rule 3 (1) of the CENVAT Credit Rules, 2004, CENVAT Credit on goods which are subjected to the levy of 1% would not be available to a manufacturer or Service provider who buys them. On being pointing out the assessee agreed and reversed the Credit.

- (4) **GIST OF THE OBJECTION : Non - inclusion of Royalty Income earned in the assessable value**
COMMISSIONERATE : Central Excise Commissionerate, Bhubaneswar-I
CONTRAVENTION OF PROVISION : Section 4 (3) (d) of the Central Excise Act, 1944, read with Board's circular F.No. 6 / 52 / 88 - CX. 1, dated 06.04.1989

During the course of audit, the audit verified the Profit and loss account, Balance Sheet sample sale invoices, sales abstract, ER-1 returns of the assessee for the year 2011-12, and

noticed that the assessee had cleared 11961674.06 MT of goods during the year 2011-12 and earned an income of Rs.104.37 Crores towards 'Royalty', collected from the customers over and above the price of goods. However, they did not include these Royalty charges in the assessable value of goods cleared, resulting in undervaluation and short payment of excise duty of Rs. 537.53 lakhs. The audit pointed out that the Royalty income is includible in the assessable value of final goods cleared, in terms of Section 4(3)(d) of the Central Excise Act, 1944, read with Board's circular in F.No.6/52/88-CX.1 dated 06.04.1989. On being pointed out by the audit, the assessee agreed to the objection and an amount of Rs. 13.69 Crores was recovered from the assessee.

- (5) **GIST OF THE OBJECTION : Short payment of excise duty on paper sold in 'Reel form'**
COMMISSIONERATE : Central Excise Commissionerate, Bhubaneswar I
CONTRAVENTION : Section 11A of the Central Excise Act, 1944 read
OF PROVISION : with Central Excise Valuation (Determination of
Price of Goods) Rules, 2000

During the course of verification, the audit verified the price circulars and sales invoices for the period 2011-12 and noticed that the assessee cleared 27484.512 MT of paper in reel form on stock transfer basis to cutting centers located at various places, on payment of duty, for cutting into required sizes in sheet form. The paper in sheet form is sold either to independent buyers or transferred to different depots for further sale to various independent customers. The audit noticed from the price list fixed by the assessee that papers in reel form were cleared to the cutting centers after allowing discount of Rs.750/-PMT. The audit observed that since it was known to the assessee that the subject paper in reel form would be converted to sheet form before actual sale, the discount of Rs.750/-PMT in respect of paper sold in reel form would not be admissible. Deduction of inadmissible discounts from the assessable value resulted in short payment of duty of Rs.11.01 lakhs, which has to be paid along with interest and penalty.

- (6) **GIST OF THE OBJECTION : Wrong availment of CENVAT Credit on forged**
steel grinding media balls and sodium cyanide

COMMISSIONERATE : Central Excise Commissionerate, Bangalore-II
CONTRAVENTION
OF PROVISION : Rule 3 of the CENVAT Credit rules , 2004

The assessee is manufacturer of Furnance Ovens & Spares falling under CSH 85149000. During the course of verification of purchase invoice and CENVAT Credit documents it was noticed that the assessee has availed CENVAT Credit on forged steel grinding media balls and sodium cyanide 98% falling under CSH 73259100 & 28371100. On detail study of the manufacturing process of the assessee, it was understood that the assessee was not using the above referred raw materials in the manufacture of furnance ovens & spares. As per the definition of 'inputs' the said goods are neither input for the manufacture of final product not have any relationship with the manufacture of final product. Therefore, the CENVAT Credit availed is irregular required to be reversed. The irregular availment amounts to Rs.1,65,30,378/-. The assessee accepted and partly paid Rs.49,60,820/- in challan and reversed Rs.13,10,400/- and paid an interest of Rs.3,66,548/-.

(7) **GIST OF THE OBJECTION: Wrong availment of exemption notification No-67/1995 CE on End Cuttings not used within the factory**
COMMISSIONERATE : Central Excise Commissionerate, Chennai – II
CONTRAVENTION
OF PROVISION : Notification No. 67/95-CE dated 16.03.1995

During the course of audit, it is noticed from the ER1 Returns that the assessee claimed exemption from payment of duty on End Cuttings in terms of Notification No. 67/95-CE dated 16.03.1995. End cuttings arise during the course of manufacture of TMT Bars in their factory. The said goods are capable of being re-melted into MS Ingots. However, the assessee is not having any melting facility within their factory. It is obvious that the end cuttings could not be used within the factory of production in the manufacture of dutiable goods by the assessee. The assessee is, therefore, not eligible to claim the benefit of exemption Notification No. 67/95-CE. However, the assessee removed end cuttings to his job worker by incorrectly claiming the benefit of exemption Notification No. 67/95-CE for conversion into MS Ingots. The quantity of end cuttings cleared without payment of duty during the period from April, 2012 to March, 2013 was 120.55 MT and the duty involved works out to CENVAT of Rs. 3,47,184/- Edu Cess of Rs.6944/- & SHE Cess of Rs. 3472/-.

SERVICE TAX

- (8) **GIST OF THE OBJECTION : Service Tax not paid on Domain Registration charges**
COMMISSIONERATE : Service Tax Commissionerate, Delhi
CONTRAVENTION
OF PROVISION : Section 66 of Chapter V of the Finance Act, 1994

The assessee has been engaged in providing taxable services of online information and Data, Business Auxiliary Services & internet telephone services. During the course of audit and scrutiny of records it was observed that the assessee had not discharged the Service Tax liability of Rs.5,91,40,035/- on Domain Registration charges during 2008-09 to 2010-11 on the total amount received of Rs.54,11,31,182/-. Therefore Service Tax liability amounting to Rs.59140035/- stands recoverable from the assessee along with applicable interest.

- (9) **GIST OF OBJECTION : Non-payment of Service Tax on Business Auxiliary Service**
COMMISSIONERATE : Central Excise Commissionerate, Visakhapatnam I

**CONTRAVENTION
OF PROVISION**

: Section 66 of Chapter V of the Finance Act, 1994

The assessee is manufacturer of MS Angles /MS Channels. During the course of audit, the audit verified the ledgers of the assessee and noticed that during the year 2010-11 the assessee received an amount of Rs. 11.26 Crores from M/s. Cronimet Alloys towards charges for metal recovery from slag. It was observed that the assessee deployed his labour to recover metal from slag and M/s. Cronimet Alloys paid recovery charges on per MT basis. The audit pointed out that the transaction falls under the category of 'Business Auxiliary services' and that the assessee is liable to pay Service Tax of Rs. 1.16 Crores on the said services, along with applicable interest and penalty.

- (10) GIST OF OBJECTION : Short payment of Service Tax on "Air Port services" by availing inadmissible abatements**
COMMISSIONERATE : Central Excise Commissionerate, Hyderabad-II
CONTRAVENTION OF PROVISION : Section 66 read with Section 67 of Chapter V of the Finance Act, 1994

The tax payers is engaged in the business of providing of lounge services from his premises at GMR International Airport, Hyderabad and Air Port, New Delhi. The assessee was paying Service Tax under the category of 'Restaurant services' and 'accommodation services' by availing abatement of 30% and 50% respectively. The assessee also claimed exemption from payment of Service Tax on liquor sales, dormitory sales etc.

The audit pointed out that the abatements availed in the present case were irregular, in view of the definition of 'Air Port service' given vide the TRU' s letter in D.O.F.No.334/1/2010-TRU, dated 26.02.20120 read with Board's DOF No. 334/03/2010-TRU, dated 01.07.2010. The turnover details of the assessee were verified and the differential Service Tax payable under the category of 'Air Port service' has been worked out to be Rs.5.58 Crores.

(11) GIST OF OBJECTION : Short payment of Service Tax in respect of additional amount collected as 'cost of space segment charges' through debit notes

COMMISSIONERAT : LTU Commissionerate, Bangalore

CONTRAVENTION

OF PROVISION : Section 67 of Chapter V of the Finance Act, 1994

The assessee is interalia engaged in acquiring the leasing rights to use the space segments in the satellites owned by the overseas parties (normally termed as transponder leasing) and the rights so acquired are leased to the Indian companies. The assessee is discharging the Service Tax in respect of the subject activity under the category 'Supply of the Tangible Goods Service'. The assessee enters into agreement with the overseas service provider for acquiring the lease rights of a particular space segment and a separate agreement is entered into with the local customer for leasing out the space segment acquired from the overseas service provider which they term it as back to back to agreements.

In respect of the service bills charged by the overseas service provider, the assessee is required to deduct the Income Tax at source (which is termed as withholding tax) at the time of payment of bills and remit the same to the Income Tax department. It is observed from some of the agreements entered into with the overseas service provider, that an explicit clause is incorporated according to which the assessee is required to pay to the overseas service provider the amount specified in the agreement as a net payment and the Income Tax liability involved thereon is to be borne by the assessee.

As per some of the agreements, entered into with the Indian customers the consideration payable will be as follows:-

- 1) The amount of Rupees equivalent to the foreign currency amount specified in the agreement,
- 2) The amount of specified percentage of the amount noted at serial number (1) as contract management fee, and
- 3) The amount equivalent to the withholding tax (i.e. Income Tax TDS amount) paid to the overseas service provider which will be charged along with the monthly lease charges (The agreement specifically states that the price fixed does not include the withholding tax)

The assessee is paying the Service Tax in respect of the amount collected mentioned at serial number 1 & 2 by raising invoices. However, they are not discharging the Service Tax in respect of service amount collected mentioned at S.No.3. The amount mentioned at S.No.3 is collected by raising debit notes.

The amount collected by the assessee in accordance with the service agreement through the debit notes mentioned above will form part of the consideration over and above the invoice value and therefore the same needs to be included in the gross amount charged by the service provider in accordance with the statutory provisions noted supra. The total Service Tax payable by the assessee on this count will be Rs.2,47,54,081/- towards Service Tax and Rs.77,96,442/- towards interest. The assessee agreed and paid the same.

- (12) **GIST OF OBJECTION : Short payment of Service Tax under category of
'Commercial Training or Coaching'
COMMISSIONERAT : Central Excise Commissionerate, Calicut
CONTRAVENTION
OF PROVISION : Section 66 of Chapter V of the Finance Act, 1994**

The assessee is an autonomous institute established by the Ministry of Human Resources Development, Government of India for imparting Management education of higher level and registered as a Society under Societies Registration Act, 1860. The assessee is conducting Post Graduate Programmes (equivalent to MBA) to their regular students who are admitted as per Government of India guidelines, which can be treated as a qualification recognized by law in force and is therefore out of the purview of Service Tax. Apart from this, the assessee provides various education programmes to working professionals who have a minimum working experience, through Interactive Distance Learning (IDL), a satellite based virtual class room sessions, with the support of M/s Hughes Communication India Ltd. coupled with contact classes at assessee's institute. On successful completion after a two year/one year course, the candidates are awarded with Executive post graduate diploma/certificate as the case may be. The power to establish these courses by the assessee is derived from the clause (ix) of Rule 12 of the Rules of the institute's Society alone and is not backed by any statutory provision for considering the said course as recognized by the law for the time being in force. The institute was established through a Union Cabinet approval in 1996 and thereafter a Society was formed with eminent

personalities to govern the Institute. The Memorandum of Association (MoA) and Rules have stipulated the powers of Board of Governors, one of such rules gives the power to develop and establish new programmes of study in Management and other subjects in any part of the world. The approval from MHRD to this MoA & Rules cannot be construed as a statutory approval to any course offered by the IIM, as the same is not backed by the approval of Parliament.

2. In the Finance Act, 2011, w.e.f, 1.5.2011, the definition of Commercial Training or Coaching Centre as provided under Section 65(27) of the Finance Act, 1994 has been amended to mean - *any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes*. The exclusion clause available earlier for the Coaching centre awarding recognized qualification has thus been dispensed with. However, vide notification No.33/2011-ST, dated 25-4-2011, exemption has been provided to two categories which are -

(i) *any pre-school coaching or training;*

(ii) *any coaching or training leading to grant of a certificate or diploma or degree or any educational qualification which is recognised by any law for the time being in force.*

3. On perusal of the explanatory letter of CBEC, JS (TRU -II) D.O.F. No. 334/3/2011 - TRU, dated 28-2-2011 wherein at Para 3.3 it has been mentioned that the scope of the service is proposed to be expanded to include all the coaching and training that is not recognised by law, irrespective of whether the institute is providing any other course(s) recognised by law. Para 3.1 of annexure B to the said letter goes on to say in detail that, *the levy in the earlier form kept outside its purview unrecognized education which is imparted by an institute that issues any certificate or diploma or degree or any educational qualification recognized by law. Thus two identical courses may be treated differently merely because one of the institutes also conducts another course that is recognized by law. This anomaly is proposed to be corrected by subjecting all such unrecognized education to tax.* (Verbatim of the explanatory letter).

4. Board vide F.No.137/132/2010-Service Tax dt.11.5.2011, has clarified that, *for the purposes of Service Tax exemption, unless and until the course per se is specifically recognized*

by law the exemption cannot be given. The Circular further says that there are several judicial pronouncements which lay down that the specific wording of law have to be interpreted strictly and thus, the term recognized by law has to construe a direct nexus only between the degree/certificate being awarded by the Coaching centre and the statute. Board, again vide Circular No.164/15/2012-ST dt.28.8.2012 has clarified that the words recognized by any law will include such courses as are approved or recognized by any entity established under a Central or State law including delegated legislation, for the purpose of granting recognition to any education course including a VEC (vocational education centre).

5. In order to fit in the phrase recognized by law, the course by itself should have the authority derived either from the Constitution of India or through enactment by the Parliament or State Legislature, Education being in the Concurrent list of the Constitution. The assessee is admitting students to their Post graduate programme (PGP) as per the principles and policies of Government of India and the selections are promptly being done through the much acclaimed Common Admission Test (CAT). On the contrary, the courses, the number of seats and the admissions to the Executive Education Programmes are devised by Institute's Society as approved by their Board of Governors without any statutory approval and hence such Programmes are not qualified to be included under category (ii) to the Notification No. 33/2011-ST dated 25.04.2011 for exemption. The statutory provisions under The Central Educational Institutions (Reservation in Admission) Act, 2006 has also not been found observed while admitting candidates to the EPGPs, unlike the PGP and hence on this count also the EPGPs cannot be considered as courses recognized by law in force. Further there would not be any change on the taxability after the introduction of negative list regime w.e.f.1.7.2012 in respect of Executive Education Programmes offered by the assessee as the list says Education as a part of curriculum for obtaining a qualification recognized by any law for the time being in force. It is worth highlighting here that other IIMs conducting Executive education programmes are collecting Service Tax from the candidates as detailed in their brochures available in the websites.

6. It therefore appears that the assessee has to pay Service Tax on the gross amount collected towards fees for providing Executive education programmes, under the category of

‘Commercial training or coaching’ with effect from 01.05.2011, i.e. the date on which the amendment to the definition under S.65(27) of Finance Act, 1994 has come into effect. The taxable value for the period 2011-12 and 2012-13 works out to Rs.40,77,56,596/- and the Service Tax liability works out to Rs.4,63,21,667/-. This has to be paid with interest and penalty.

(13) GIST OF OBJECTION : Non - payment of Service Tax on charges collected towards ‘Registration of vehicles’
COMMISSIONERATE : Service Tax Commissionerate, Chennai
CONTRAVENTION OF PROVISION : Section 66B of Finance Act, 1994

The assessee is engaged in providing services namely Servicing of Motor Vehicle, Business Auxiliary Service and Renting of Immovable Property Service. The assessee obtained Registration from Service Tax department under Servicing of Motor Vehicle, Business Auxiliary Service and Renting of Immovable Property Service on 10.03.2008. Subsequently they obtained Centralised Registration on 01.07.2011 under the above said services. Their PAN based Registration Number is AAACL7624GST002, with location code SF0401.

It was noticed during audit that the assessee is collecting certain charges namely Registration Charges which includes Road Tax, Road Safety Tax and Registration Fee. On enquiry, the assessee replied that the said charges relate to expenses incurred for registering new vehicles at Regional Transport Office and that they are nothing but statutory dues such as Life Tax, Road Safety Tax and Registration Fee which are collected from customers on actual basis. However, it was observed that the assessee has included a mark-up on the said expenses. Though the assessee argued that the same are towards incidental charges incurred by him, it is seen from the invoices and proforma invoices raised by the assessee that the same are not indicated separately in the said documents. On the other hand, the total amount including the mark-up is shown as “Registration Charges” in the documents issued to customers and the same is collected as “Registration Charges”.

As per Section 66B of Finance Act, 1994, with effect from 01.07.2012, any activity or service provided by a person to another person for a consideration and which is not covered under the Negative List of Services is a taxable service. In the present case, the assessee, on

behalf of the customers, registers the vehicles with the RTO for which he had received consideration from the customers by collecting extra charges apart from statutory dues paid to the registration authority and the same is bundled as “Registration Charges”. Hence, the mark-up/consideration received by the assessee is liable to Service Tax. The amount of Service Tax liability on the mark-up received during the period from 01.07.2012 to 31.03.2013 works out to Rs.50,24,799/-. The assessee did not agree to pay the Service Tax liability on the ground that they only act as a pure agent on behalf of the customer and that the mark up is only towards incidental expenses such as number plate, free accessories, petrol/diesel charges, vehicle cleaning charges, driver bata, conveyance, sweets, pooja expenses, gift items, etc. The contention of the assessee is incorrect and misleading since the above expenses relate only to the sale of the vehicle and the same are to be adjusted against the trade margin for sale of the vehicles. Hence, the assessee is liable to pay Service Tax of Rs.50,24,799/- along with interest due.

(14) GIST OF OBJECTION : Non - payment of Service Tax towards charges paid to foreign agencies for Software Testing services
COMMISSIONERAT : Service Tax Commissionerate, Chennai
CONTRAVENTION OF PROVISION : Section 66A of the Finance Act, 1994

The assessee is providing Software Testing services for Banking Financial Services and Insurance related Software testing to the clients, like M/s.RBI, Ratnakar Bank, ICICI Bank in India. The assessee is also providing services to the Clients situated in other countries like Australia, Singapore, Malaysia, USA and Europe. The assessee is having branches at Bangalore, Mumbai and MEPZ Chennai and is registered with the Service Tax under Technical Inspection and Certification vide Regn.No.AABCT0976GST001 dated 23-10-2006 and further amended vide certificate dated 24-11-2011. The assessee is maintaining centralised accounting system at Chennai. The assessee imported ‘Software’ as Capital goods, for which he paid the Service Tax as import of services. The assessee had also availed CENVAT Credit such on capital goods purchased solely for the purpose of rendering the ‘Software Testing Services’.

During the course of audit of accounts of Balance sheet and ledger accounts, it was noticed that the assessee had remitted charges to the foreign agencies in convertible currencies

for the services received in India during the period from 2007-08 to 2011-12, whereas no appropriate Service Tax has been paid.

Section 66A.Charge of Service Tax on services received from outside India, - (1) Where any service specified in clause (105) of section 65 is,—(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

As per sections 68, 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. Accordingly, the assessee is liable to pay the above Service Tax liabilities along with interest as per sections 68 & 75 of the Act respectively.

Hence the assessee is liable to pay Service Tax on the charges paid to the foreign agencies in convertible currencies for the services received in India during the period from 2007-08 to 2011-12. The payment of Service Tax has worked out to Rs.24,90,132/- with the interest amount of Rs.15,83,000/-.

OSPCA

- (15) **GIST OF THE OBJECTION: Payment of duty on ‘Concrete boom pump s 36 x’ on a value less than the cost of manufacture resulting in short payment of duty**
- COMMISSIONERATE : LTU Commissionerate, Chennai**
- CONTRAVENTION OF PROVISION : Section 4 of the Central Excise Act, 1944**

The assessee is a manufacturer of concrete pumps, concrete mixers, batching plants and parts for the aforementioned goods.

During the course of On Site Post Clearance Audit, it was noticed that the assessee had imported ‘concrete boom pump s36 x’ from their parent company in Germany on payment of duty and has availed credit of duty paid on the same. The imported concrete boom pumps falling under chapter 84 is used in the manufacture of ‘truck mounted concrete boom pump s36 x’, falling under chapter heading no. 8705, by assembling pump kit and hopper in the imported pump and mounting the total unit on the chassis of a truck.

On verification of the bills of entry in respect of import of ‘concrete boom pump s36 x’, it was noticed that the credit of duty paid on the imported pumps availed by the assessee was higher than the duty paid on the ‘truck mounted concrete boom pump s36 x’ manufactured and cleared by them. It was also noticed that the truck mounted concrete pumps were cleared at a value even less than the material cost of the goods sold. It was further noticed that the truck mounted concrete boom pumps, were sold at a lower price when compared to the price of ‘concrete boom pump s36 x’ sold by them during high seas sales. On enquiry, it was informed that the truck mounted concrete pumps were sold at a lesser price to penetrate the market.

When the cost of production in respect of ‘concrete boom pump s36 x’ was called for, the assessee has produced the same. As per the statement, the cost of production per unit of ‘concrete

boom pump s36 x' works out to Rs.1,27,48,192/-. It was noticed that the assessee had paid duty on the boom pumps cleared by them on a value which is less than the cost of production.

As per the judgment of the supreme court in the case of Fiat India pvt. Ltd., reported in 2012 (283) elt 161 (s.c.), the value at which the truck mounted concrete boom pumps were cleared cannot be regarded as the 'transaction value' since the requirements relating thereto was not satisfied in as much as the goods were sold by the assessee below the cost of manufacture in order to penetrate the market.

In view of the aforesaid judgment of the supreme court, the value of clearance cannot be regarded as the transaction value in as much as the same is not the sole consideration for the sale and the assessee is liable to pay duty on the value which is not less than the manufacturing cost.

The assessee, during the period from September 2009 to December 2012, had cleared 32 Nos. of 'Concrete Boom Pump S36 X' to their customers for a value of Rs. 29,78,09,744/- on payment of duty. However, the assessee ought to have paid duty on the cost of manufacture, as per the Apex Court judgement, which works out to Rs. 40,79,42,144/- (Rs. 1,27,48,192/- x 32).

Hence, the assessee is liable to pay duty on the differential value of Rs. 11,01,32,400 which works out to Rs.1,19,67,171/-, Education Cess Rs. 2,39,343/- and SHE Cess Rs. 1,19,672/- along with interest.

