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

\+ **W.P.(C) 525/2016 & CM 2153/2016**

Reserved on 16th May 2016
Decided on: 1st September, 2016

MAKEMYTRIP (INDIA) PVT LTD ..... Petitioner

Through: Mr. V. Lakshmikumaran, with Mr. M.P. Devnath, Mr. Abhishek Anand, Mr. Yogendra Aldak and Mr. Mukesh Bhutani, Advocates.

versus

UNION OF INDIA & ORS ..... Respondents

Through: Mr. Virender Pratap Singh Charak, Adv. with Mr. Shubhra Parashar and Mr. Pushpendev Singh Charak, Advocates for R-1.
Mr. Satish Aggarwala, Advocate for R-2

With

\+ **W.P.(C) 1283/2016 & CM 5642/2016**

IBIBO GROUP PVT LTD ..... Petitioner

Through: Mr V. Lakshmikumaran, Advocate with Mr M.P. Devnath, Mr Abhishek Anand, Mr Yogendra Aldak and Mr Mukesh Bhutani, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Virender Pratap Singh Charak, Adv. with Mr. Shubhra Parashar and Mr. Pushpendev Singh Charak, Advs. for

R-1.
Mr Satish Aggarwala, Advocate for R-2

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

J U D G M E N T

% **01.09.2016**

Dr. S. Muralidhar, J.:

Introduction

1. These writ petitions by two entities operating on-line platforms/web portals raise important questions involving the powers of the Directorate General of Central Excise Intelligence (DGCEI) of arrest, investigation and assessment of service tax under the provisions of the Finance Act, 1994 ('FA').

2. Writ Petition (Civil) No. 525 of 2016 is by MakeMyTrip (India) Private Limited ('MMT') against Union of India ('UOI') through the Secretary, Ministry of Finance, [Respondent No. 1], the Director, DGCEI, [Respondent No. 2], The Additional Director General ('ADG'), DGCEI [Respondent No. 3] and The Senior Intelligence Officer, DGCEI [Respondent No. 4] seeking to restrain Respondent Nos. 2, 3 and 4 from taking any coercive action including threat of arrest against MMT and its officials for recovery of alleged service tax dues in terms of Section 73/73A of the FA. MMT also seeks a declaration that Respondent Nos. 2, 3 and 4 do not have the power to arrest the officials of MMT under Section 91 read with Section 89 of the FA and Section 9AA of the Central Excise Act, 1944 ('CE Act').

3. Writ Petition (Civil) No. 1283 of 2016 is filed by IBIBO Group Private

Limited (‘IBIBO’) against the UOI through the Secretary, Ministry of Finance [Respondent No. 1], the Director and the Senior Intelligence Officer, DGCEI [Respondent Nos. 2 and 3 respectively]. The prayer in this writ petition by IBIBO is identical to the prayers in Writ Petition (Civil) No. 525 of 2016 filed by MMT.

4. In both writ petitions, applications were filed for interim directions to restrain the DGCEI from taking any coercive steps against the entities and their officers.

Common issues

5. A common issue that arises in both writ petitions is about the nature of service rendered by the Petitioners, MMT and IBIBO. The case of MMT and IBIBO is that they host web portals that facilitate the booking of rooms in hotels throughout the country and collect a charge for rendering such service. The two Petitioners characterise themselves as 'tour operators'. They state that they are registered with the concerned Service Tax Department (‘ST Department’), have regularly been filing returns, have been assessed and are paying the corresponding service tax under the FA. They state that they collect the room charges inclusive of taxes on the basis of the invoices raised by the concerned hotel and pass on the amount so collected to the concerned hotel which in turn pays service tax and other taxes. What is retained by the Petitioners is only the service tax component corresponding to the booking service rendered and this is paid by each Petitioner to the ST Department of the Central Government.

6. The case of the DGCEI, however, is that the two Petitioners are themselves running hotels online. It is urged that once the Petitioners admit

that they collect the service tax, even on behalf of the hotels whose rooms are booked online, it is incumbent on the Petitioners to themselves deposit the entire service tax collected. The failure to do so, according to the DGCEI, has resulted in violation of various provisions of the FA by the two Petitioners and deliberate evasion of service tax on their part, warranting initiation of the coercive measure of arrest of their respective officials.

7. The note on the file prepared on 7th January, 2016 by the officer of the DGCEI in the case of MMT mentions that there could be other similar online providers viz., (i) M/s. Cleartrip Private Limited ('Cleartrip') at Mumbai, (ii) IBIBO, and (iii) M/s. Yatra Online Private Limited ('Yatra') at Gurgaon which were also alleged to be involved in similar service tax evasion. The investigation as far as MMT is concerned, appears to have commenced on the basis of an 'intelligence' received by DGCEI.

8. In the case of MMT, the order for arrest of Mr. M.K. Pallai, Vice-President (Finance) of MMT, was issued on 8th January 2016 and the arrest was made on that date itself. Whereas in the case of IBIBO, a note was prepared on 12th January, 2016 and on 13th January, 2016 searches were undertaken of the premises of IBIBO and Yatra. Simultaneously, searches were also undertaken in the premises of Cleartrip at Mumbai. Thus, there is a common pattern emerging in both cases and it is in that background that the scope of powers of DGCEI under Section 91 read with Section 90 and 89 of the FA require to be examined.

9. Another aspect which is required to be adverted to at the outset is that the arrest of Mr. Pallai, Vice President (Finance) of MMT on 8th January,

2016 led to his subsequent release on bail by the Court of Chief Metropolitan Magistrate ('CMM') on 11th January, 2016. While prior to the said order, a sum of Rs. Rs. 15.33 crores was paid by MMT towards 'admitted' service tax dues (which assertion of the DGCEI is contested by MMT), a further sum of Rs. 25 crores was paid in terms during and after the bail proceedings. MMT's Vice President has filed a separate petition in this Court in its criminal jurisdiction assailing the arrest and initiation of criminal proceedings. Since the petition is pending, the Court in the present petition by MMT only proposes to interpret the scope of the provisions of the FA.

10. As far IBIBO is concerned, this Court by its order dated 16th February, 2016 directed that no coercive steps be taken against it and its officers.

11. It also requires to be noted that as far as Cleartrip is concerned, it filed Writ Petition No. 1088 of 2016 in the High Court of Bombay and by an order dated 26th April, 2016, the High Court of Bombay came to the conclusion that coercive measures would not straightway be permissible. It also noted the stand of the DGCEI that they were not proceeding with further coercive steps in the matter and disposed of the writ petition on that basis.

12. It is in the above background that the scope of powers of search of DGCEI under Section 82 of the FA, and power of arrest and of taking coercive measures for recovery of service tax dues in terms of Section 91 of the FA, without resorting to the issuance of a show cause notice (SCN) under Sections 73 or 73A of the FA, requires to be examined.

Averments in MMT's writ petition

13. MMT states that it is carrying on the business of a 'tour operator' primarily operating through its website www.makemytrip.com. As a 'tour operator', MMT has been offering the service of booking rooms in hotels for its customers for more than a decade. The business of MMT is described as providing an online platform (website) whereby it makes available hotel accommodation services to its customers. It is stated that the customers intending to book a hotel room visit the website and enter the details. The website then displays a list of hotels along with the tariff, including taxes and fees, location, facilities etc. Depending on their preference, the customers book the room and get a voucher showing the applicable room tariff and the fees and taxes (levied and collected by the hotels). It is further stated that on booking the hotel room, the customer has the option of either paying the full amount of the room charges in advance (inclusive of room tariff, tax and fees) and this amount is remitted by MMT to the concerned hotel after retaining its commission. The other option is for the customer to directly make payment to the hotel in which case the customer is issued a voucher by MMT mentioning room tariff, taxes and fees. MMT subsequently receives commission from the hotel. MMT discharges its service tax liability on gross amount paid by the customer to it in terms of the first option or the commission paid to it by the hotel concerned as per the second option. MMT states that it is registered with the ST Department under the provisions of the FA and has a Service Tax Registration No. AADCM5146RST006. It states that it has been promptly depositing with the ST Department, the service tax collected by it corresponding to the service rendered by it.

14. MMT states that in terms of Rule 11 (ii) of Notification No. 26/2012-ST dated 20th June, 2012, it claimed 90% abatement on such gross amount. It states that prior to 1st July, 2012, it was claiming abatement under Notification No. 1/2006-ST dated 1st March, 2006. It is stated that the officers of the DGCEI visited the office premises of MMT and issued summons dated 20th November, 2015. Thereafter summons dated 23rd November, 2015, 9th, 10th and 14th December, 2015 and 13th January, 2016 were issued to MMT for tendering statements and providing information. Two of the summons dated 9th December 2015 and 8th January 2016 were issued to Mr. M.K. Pallai, Vice President (Finance), MMT for tendering his statement under Section 14 of the CE Act as made applicable to service tax in terms of Section 83 of the FA.

15. MMT states that during the investigation, the officials of DGCEI conveyed that some hotels for whom the booking was made by MMT had not deposited service tax with the Government thus causing loss of revenue and that such taxes were to be recovered from MMT. The specific allegation conveyed by the officers of DGCEI to MMT officials was that the services provided by MMT are not in the nature of tour operator but are in the nature of hotel services and, therefore, the Petitioner should have paid service tax on the gross amount as a hotel service. The further allegation was that since MMT had collected the service tax from the customers, it was in terms of Section 73A of the FA bound to deposit the amount with the government exchequer.

16. It is stated that Mr. Pallai received a telephone call on 7th January, 2016 from SIO in the Office of the Additional Director General, DGCEI at R.K.

Puram, New Delhi requiring him, along with other officers of MMT who might possess the relevant information relating to the above transactions, to appear before the DGCEI. It is further stated that Mr. Pallai duly appeared before the SIO along with other officials and also met the ADG.

17. The case of MMT is that on 8th January, 2016 the officers of DGCEI compelled MMT to immediately deposit the service tax collected by it from its customers failing which its officers would be arrested. It is stated that in the absence of any SCN, MMT did not deposit the amount demanded.

Arrest of Mr. Pallai

18. On 8th January, 2016, the officers of DGCEI arrested Mr. Pallai at the office of the ADG at R.K. Puram, New Delhi. The grounds of arrest dated 8th January, 2016 as communicated to MMT by the DGCEI has been enclosed as Annexure-3 to the Writ Petition (Civil) No. 525 of 2016. Therein it is stated that MMT had collected service tax to the tune of Rs. 82.78 crore approximately from the recipients of hotel/short-term accommodation service during the period October 2010 to September 2015 by way of renting hotel rooms of various hotels with whom they had agreements, but had paid an amount of Rs. 15.34 crores only to the credit of the Central Government, by fraudulently treating themselves as tour-operator/intermediate/agent of such hotels, resulting in loss of government revenue to the tune of Rs. 67.44 crore approximately. By failing to deposit the said amount of service tax collected by MMT with the Central Government, MMT appeared to have contravened the provisions of Section 68 of the FA, rendering themselves liable to punishment under

Section 89 (1) (d) read with Section 89 (1) (ii) of the FA.

19. The DGCEI rejected the stand of MMT that it was only a 'tour operator' and that it was the obligation of the concerned hotels to pay the service tax to the government account. According to the DGCEI, "the hotels are mere input service providers to M/s. MMT and M/s. MMT's Service Tax liability cannot be fastened on the hotels." It was further mentioned in the grounds of arrest that "besides, a large number of such hotels are not even registered Service Tax Assessees and do not appear to have deposited the service tax claimed to have been remitted by M/s. MMT to such hotels, in the government account." The grounds of arrest then stated that Mr. Pallai, in his statement recorded on 10th December, 2015 and 8th January, 2016, had stated that he and Mr. Mohit Kabra, Director and CFO of MMT were responsible for taking service tax related decisions in MMT. The grounds stated that Mr. Pallai further admitted that "they had collected service tax but instead of paying it to the government account, had remitted such service tax to the hotels." In the grounds of arrest dated 8th January, 2016 communicated to MMT, the liability of MMT for payment of service tax worked out to Rs. 82.78 crores for the period from October 2010 to September 2015. It is stated that MMT was orally directed to immediately deposit Rs. 25 crores failing which the directors/officials of MMT would be arrested.

20. Mr. Jatinder Singh, SIO, Central Excise Intelligence belonging to the Ludhiana Regional Unit of DGCEI, having been authorized by the ADG, DGCEI proceeded to arrest Mr. Pallai under Section 91 of the FA for an alleged cognizable and non-bailable offence committed by him under

Section 89 (1) (d) read with Section 89 (1) (ii) of the FA read with Section 9AA of the CE Act as made applicable to service tax matters under Section 83 of the FA on 8th January, 2016.

Proceedings before the CMM

21. After his arrest, Mr. Pallai was produced before the CMM. The DGCEI tendered an application seeking remand to judicial custody. The CMM on 9th January, 2016 remanded Mr. Pallai to judicial custody. The application for judicial remand submitted by the DGCEI to the CMM on 9th January, 2016 stated *inter alia* that MMT had agreements with different hotels and they are paying service tax arbitrarily by treating themselves as 'agent of hotels.' It was mentioned that in terms of the agreement, they block certain number of rooms at a certain price. MMT is free to use any mark-up on the net rate or discount on the published tariff. It was stated that MMT claiming that they are agents of hotels "is without any legal basis". A reference was made to Rule 2 (f) of the Place of Provision of Service Rules, 2012 which defines the intermediary as "a broker or an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods between two or more persons, but does not include a person who provides the main service or supplies the goods on his account." A reference was made to para 5.9.6 of the 'Taxation of Services: An Education Guide' by CBEC to determine whether a person is acting as an intermediary or not. One of the factors mentioned therein was that an intermediary "cannot alter the nature or value of the service" and that "the principal must know the exact value at which the service is applied on his behalf, and any discounts obtained must be passed back to the principal." It

was alleged that MMT was charging their own rate for renting of hotel room which was shown on the customer voucher and which is different from the rates negotiated by MMT with the hotels. The customer voucher was not supplied to hotels. Instead, hotels were given 'Hotelier's Vouchers' on which the amount charged for booking a hotel room was different from what was charged by MMT from its customers. It was concluded that in terms of the agreements with the hotels and customers, MMT was not acting as the agent of hotels. Since it had further rented the hotel rooms at the price negotiated with the customers, MMT was also providing the services of renting of hotel rooms to the customers and the hotels were merely input service providers providing services of renting hotel rooms to MMT. Thus, MMT was liable to pay service tax on 60% of the amount charged from the customers for provision of short-term accommodation services (renting of hotel rooms) in terms of the Notification No. 26/2012-ST dated 20th June, 2012, as amended. It was noted in the application for judicial remand that MMT had provided data for the period upto September 2015 in terms of which MMT had not paid service tax amounting to Rs. 82,78,03,760 and had only arbitrarily paid Rs. 15,33,84,593 (approximately). Thus, MMT had not paid service tax which they had collected from its customers to the tune of Rs. 67,44,19,167. It was further mentioned that Mr. M.K. Pallai, Vice President (Finance) was one of the main persons responsible for MMT's non-payment of service tax thereby committing a cognizable and non-bailable offence. It is mentioned in the judicial remand application that Mr. Pallai along with others, who were/are immediately not available for enquiries had "successfully robbed India of Rs. more than 67 crores, as detected so far."

22. In the bail application of Mr. Pallai, it was explained that MMT had obtained centralized service tax registration with effect from 3rd June, 2010 with the Service Tax Commissionerate, Delhi under the taxable categories of 'Air Travel Agent,' 'Business Auxiliary', 'Tour Operator' services under the FA. It was reiterated that MMT itself did not provide any hotel or other services on its account but merely acted as a travel agent/tour operator between the hotels/airlines/other services and customers for bookings the hotel accommodation/air tickets only. It was mentioned that MMT did not have or own any aircraft/property for provision of air transportation or hotel accommodation services. It was stated that customers accessing MMT's website themselves made a conscious decision as to which flight/hotel as well as other preferences of dates of booking, class of booking, luxury type etc. It was pointed out that the ST Department itself had recognized MMT as a travel agent or tour operator over the years and had been assessing the service tax payments of MMT accordingly. In the bail application it is further pointed out that MMT is recognized as a tour operator by the Ministry of Tourism, Government of India. MMT is a member of the Travel Agents Association of India and Travel Agents Federation of India. MMT states that it was registered with the International Air Travel Agents Association and had won several travel agency awards.

23. Mr. Pallai in his bail application further explained that MMT was allowed to book rooms for the customers through MMT's website. It is legally bound to remit the room rent along with the taxes charged by the hotels, which is accordingly remitted to these hotels. To the best of knowledge of Mr. Pallai, the said hotels had already discharged their

service tax liability on the said amount. It is also pointed out that since March 2011, MMT had contributed huge sums of service tax to the Central Government exchequer from March 2011 to September 2015 inasmuch as Rs. 2,99,85,99,891 as service tax. It is further pointed out that the DGCEI had arbitrarily, and without giving an opportunity of a hearing or an SCN, considered MMT as a 'hotel' providing renting services to the customers and not as a tour operator. The DGCEI insisted that MMT should discharge service tax on the entire amount collected from the customers.

24. On 11th January, 2016, a detailed order was passed by the learned CMM granting bail to Mr. Pallai. The learned CMM recorded *inter alia* that out of Rs. 82.78 crores, a sum of Rs. 15.34 crore had already been deposited and subsequently a further sum of Rs. 15 crores had also been deposited on that date itself thus making total deposit of Rs. 30.34 crores. It is noted that the same amount was deposited without prejudice to the rights and remedies available to MMT. Directions were sought to the concerned department to furnish the correct calculated amount depicting the actual liability towards service tax. The CMM noted the submission of the Investigating Officer ('IO') of the case that he had no objection to the proposal and was ready to calculate the amount afresh. The CMM also recorded the undertaking on behalf of the accused that within one week from that date he would further make payment of Rs. 10 crores towards the service tax liability and that he would require additional time to make further payment. The CMM noted that no purpose would be served in keeping Mr. Pallai behind bars. Mr. Pallai was admitted to interim bail on furnishing a personal bond in the sum of Rs. 5 lakhs with one surety for the same amount till 11th February, 2016 subject to the condition that he would

not leave the country without the permission of the CMM. He was directed to neither directly or indirectly induce or threaten the prosecution witnesses nor tamper with the evidence. He had to join the investigation as and when required and also surrender his passport in the court.

25. It is stated that MMT had paid a sum of Rs. 25 crores apart from a sum of Rs. 15,33,84,593 already paid, in the following manner:

(i)	Rs. 2.5 crores	9th January 2016
(ii)	Rs. 12.5 crores	11th January 2016
(iii)	Rs. 10 crores	16th January 2016

26. Thus, out of the total alleged service tax dues of Rs. 67.44 crores, more than Rs. 40 crores has already been paid and yet an SCN had not been issued under Section 73A(3) of the FA. In was in those circumstances, this Court by its order dated 20th January 2016 passed an interim order directing that no further coercive steps shall be taken against MMT or any of its officers by the DGCEI. It was clarified that this order should not be read as relieving Mr. M.K. Pallai from complying with the conditions of the bail order dated 11th January, 2016 passed by the learned CMM.

27. It is contended by MMT that with the investigation not having been completed at that stage, it was erroneous on the part of the DGCEI to treat MMT as a hotel when it was only facilitating bookings of hotel rooms through its website. It is contended that there is a clear distinction under the FA between a 'tour operator' and a hotel service provider. MMT has enclosed with its writ petition copies of the certificates issued to it by some of the hotels confirming that they were discharging their service tax liability on the amount remitted by MMT. It is asserted that MMT has merely received the gross amount and remitted the same to the hotels. It is

further asserted that MMT has not 'collected' and 'retained' any amount in any manner as representing service tax. It is asserted that the failure to consider the above factors, the arrest of Mr. Pallai without issuance of an SCN and issuance of threats of further coercive action were all in violation of the requirement of due process under Sections 73/73A of the FA.

Counter affidavit of the DGCEI

28. A counter-affidavit has been filed by Mr. Samanjasa Das, ADG, DGCEI, Delhi Zonal Unit, New Delhi. A reference is made in the counter affidavit to the 'intelligence' received in the DGCEI which indicated that MMT was providing services relating to renting of hotel rooms through its website www.makemytrip.com and was not discharging its service tax liability 'properly'. It is stated that the investigation was thereafter initiated by visiting the premises of MMT under Rule 5A of the Service Tax Rules, 1994' ('ST Rules'). It is stated that the investigation conducted till then revealed that MMT had entered into agreements with several hotels on a principal-to-principal basis for purchase of hotel rooms for further renting to the ultimate customers. In terms of the said agreements, MMT purchased the hotel rooms at the rate negotiated with the hotels on which MMT was free to add a mark up or offer a discount on the published tariff. Subsequently, the pre-purchased rooms were rented by MMT to the ultimate customers at the rates determined by MMT as shown in the 'customer vouchers'. The taxes shown on the customer vouchers included service tax, luxury tax and VAT, as applicable. The amount reflected in the customer vouchers was different from the base price shown in the hotel vouchers with the same identification numbers. Therefore, it was concluded that MMT could not be treated as an 'agent' of the hotels. In the

"Hotelier's Voucher" issued by MMT, the hotels were referred to as 'partners/vendors' of MMT.

29. The counter affidavit of the DGCEI further states that during the visits undertaken by the officials of the DGCEI to the premises of MMT in November/December 2015, MMT supplied the data in respect of the hotel bookings (India Only) for the period October 2010 to September 2015. The analysis of the data so supplied revealed that the service tax collected by MMT had two components; (i) service tax on 60% of the rate negotiated by MMT with hotels, in terms of Notification No. 26/2012-ST dated 20th June, 2012 towards renting of hotel rooms; and (ii) service tax on 10% of the gross value on the customer vouchers, by treating themselves as tour operator in terms of Serial No. 11 (ii) of the same notification which they called as MMT Service Tax. It is then stated that "though they were depositing the MMT service tax in the government account, they did not deposit the service tax collected from the customers towards renting of hotel rooms on the plea that as agents of the hotels, they had remitted the same to the hotels by Hotelier Vouchers and that it was the responsibility of the hotels to deposit the service tax remitted by MMT." It is then stated that in order to verify the plea of MMT that they were the agents of the hotels, certain follow-up enquiries were conducted and it was noticed that hotels had not appointed MMT as their agents and they were providing services to MMT on the basis of the rates negotiated with MMT for booking of hotel rooms. It is stated that in the event of cancellation, MMT's customers approached MMT, and not the hotel, for redressal of their complaints.

30. It is asserted by the DGCEI that there was no statutory provision under which MMT could collect service tax on behalf of the others. A reference is made to Rule 4A of the ST Rules which provides that every person providing any taxable service shall issue an invoice, a bill or a challan signed by such person in respect of such taxable service. It is further stated that there is no statutory provision which allowed MMT to shift their service tax liability in respect of service tax collected from customers and that any service tax collected from the customer by MMT had to be deposited in the government exchequer by MMT only. It is stated that MMT's claim that it had entered into agreements with more than 30,000 hotels in terms of which it was the responsibility of the hotels to pay the service tax which MMT remitted to the hotels was not in accordance with Rule 4A of the ST Rules since the hotels were not raising any invoice or challan on the customers. It is stated that MMT had provided the PAN details of only 3922 hotels. It is then asserted that when verification was conducted in respect of these 3922 hotels from the EASIEST/NSDL website, it was found that 1728 hotels were not even registered with the service tax authorities. The enquiries conducted with one of the hotels revealed that although they were registered with the ST department, they were not paying service tax on the plea that since MMT had collected service tax, it was the responsibility of MMT to deposit the same. During the further enquires with some hotels, it had been found that they were not even registered with the ST Department but MMT was collecting service tax from the customers against renting of rooms in such hotels.

31. Further, while the FA was not applicable to the state of Jammu & Kashmir, MMT had collected service tax from the customers for renting of

hotel rooms in Jammu & Kashmir. MMT was also collecting service tax for renting of hotel rooms having tariff of less than Rs. 1,000 which was otherwise exempted from service tax. Service tax so collected had not been deposited in the government account. A reference is then made to the statement dated 08.02.2016 made by Mr. Deepak Katyal, Manager (Taxation), MMT, who admitted that the amount negotiated with hotels for procurement of inventory was shown in the Hotelier's Voucher and it was taken as purchase in its financial accounts. According to the DGCEI, this fact was also admitted by Mr. Pallai in his statement on 3rd February, 2016. A reference was made to Note 19 titled 'Revenue from Operations' in the statutorily audited Annual Report for the Financial Year (FY) 2013-14 of MMT which revealed that MMT had earned revenue from two major heads i.e., 'Sale of Services' and 'Other Operating Income'. The revenue earned under the head 'Sale of Services' had been shown as earned from 'Sale of Services - Hotels and Packages' and was Rs. 9,13,27,11,294. Further, Note 21 titled 'Service Costs' in the Annual Report showed that MMT had incurred an amount of Rs. 7,57,57,68,604 towards 'Procurement cost of hotel and packages services during the Financial Year 2013-14'. Further, the annual report for FY 2014-15 showed that revenue from sale of services (hotels and packages) was shown as Rs. 1,07,364 lakh in Note 20 of the Notes to the Financial Accounts, and service costs towards procurement cost of hotel and package services was shown as Rs. 85,655 lakh in Note 22 of the said Notes. Similes figures were shown for the FY 2012-13. According to the DGCEI, all these entries of booking of revenue and expenses in relation to sale and purchase of hotel rooms by MMT clearly showed that MMT had been selling or providing services of booking of hotel rooms after procuring the same from the hotels against

which they had booked expenses. Therefore, MMT was not acting as an agent of the hotels.

32. It is stated by the DGCEI that till September 2015, MMT had collected service tax to the tune of RS. 82,78,03,760 from its customers, out of which Rs. 67,44,19,167 was not deposited in the government account. It is further stated that the Vice-President of MMT was arrested under Section 91 of the FA for the cognizable and non-bailable offence covered under Section 89 (1) (d) of the FA read with Section 89 (1) (ii) and Section 90(1) of the FA and Section 9AA of the CE Act as was made applicable to the service tax matters under Section 83 of the FA. It is asserted that the sums paid by MMT prior to and subsequent to the appellate order were all made voluntarily.

33. It is pointed out by the DGCEI that Mr. Pallai filed Writ Petition (Criminal) No. 357 of 2016 in this Court which was listed on 3rd February, 2016 and the next date of hearing was 28th March, 2016. In para 23 of the counter affidavit it is stated that the learned CMM "enforced payment of Rs. 42,44,19,167 and on payment of this amount, granted regular bail to Mr. M.K. Pallai subject to the terms and conditions contained in his earlier order dated 11th January, 2016." It is denied in the counter-affidavit that the DGCEI had forced the MMT to deposit the additional service tax without following the due process of law. It is repeatedly stated that it was done voluntarily.

MMT's rejoinder

34. A rejoinder has been filed by MMT in response to the above counter-affidavit where the assertions in the writ petition are reiterated. It is

submitted that the amount shown in the Hotelier's Voucher is after reduction of MMT's commission that can be either by way of fixed percentage or mark-up. Therefore, there would always be a difference between the amount shown on the Customer's voucher and Hotelier's voucher. The said mark-up or discount would not change the nature of the relationship between MMT and the hotel and would not make MMT a hotel. It is stated that MMT cannot own or operate 30,000 hotels and that it was only acting as a travel agent/tour operator. This was further evident from the recital-clauses of the agreements entered into by MMT with the hotels.

35. It is further pointed out by MMT that out of the total booking of hotel rooms in the country, approximately less than 3% was done by MMT. As regards the verification of 2278 hotels supposed to have been undertaken by the DGCEI, it is pointed out that no specific instance had in fact been stated in the counter affidavit. It is further pointed out that 1039 out of 2278 hotels which are not registered with the ST Department may have been enjoying the benefit of Notification No. 26/2012-ST dated 20th June, 2012 (Serial No. 18). Further, on an inquiry conducted of the 2278 hotels, only one hotel was enquired and they are supposed to have said that they were not discharging service tax liability. MMT asserts its right to cross-examine the officers of the DGCEI who conducted the aforesaid enquiry and also the hotel which gave such statement. It is stated that close to 2000 hotels had already given their confirmation that they were discharging their service tax liability on the hotel service provided. Representative copies of confirmation certificates have been enclosed with the rejoinder affidavit as Annexure-I. It is further stated that since the FA was not applicable to the

State of Jammu & Kashmir, there was no question of hotels charging service tax and further there was no collection of service tax. It is pointed out that DGCEI had wrongly construed 'hotel taxes' as including service tax. The affidavits from the hotels situated in the State of Jammu & Kashmir, copies of which are enclosed as Annexure-2 to the rejoinder affidavit, confirmed that they were not charging service tax from their customers and further that the 'hotel taxes' did not contain any service tax element. As regards the hotels having tariffs at less than Rs. 1,000, with its rejoinder MMT has enclosed as Annexure-3 affidavits of such hotels confirming that they were not charging service tax from their customers and further that 'hotel taxes' did not include any service tax.

36. It is pointed out by MMT that para 5.9.6 of the Education Guide, Rule 2(f) of the Place of Provision of Service Rules, 2012 and the provisions from Chapter X of the Indian Contract Act, 1872 do not apply to the case on hand. It is pointed out that said Education Guide has no statutory basis and is, therefore, not binding. A reference is made to the CBEC clarification issued under Notification F.No. 354/311/2015-TRU dated 20th January, 2016 in this regard. It is submitted that even assuming that MMT was providing hotel services, it would be eligible to claim Cenvat Credit of service tax paid by the hotels in terms of Serial No. 6 of the Notification No. 26/2012-ST dated 20th June, 2012 and therefore, MMT would be liable to pay service tax only on the net income. Therefore, the liability as calculated by the DGCEI would be required to be recomputed. It is further pointed out that the customer vouchers would be produced by the customers at the time of check-in and therefore, the hotel concerned would know at what price the hotel room is booked. Further, the tariff of the hotel

is displayed on MMT's website. It is accordingly asserted that MMT was actually acting as an agent of the hotel concerned and was itself not a hotel services provider.

37. While referring to the service income and service costs of MMT, it has set out under Note 2 (iv) of MMT's revenue recognition policy which states that as regards airline and hotel bookings, MMT was acting as an agent and did not assume any risk of performance of services. A reference was also made to Note 32 which gives the break-up of gross money received by MMT and the amount paid to the hotels. Only the service fee or commission earned by MMT on such booking transactions forms part of the service income of MMT. It is asserted that throughout the financial statement, MMT recognizes itself only as an agent and accordingly books only its service income/commission as its revenue. It is asserted that during the entire investigation process, the DGCEI had not made an attempt to understand the obvious facts relating to the business of MMT.

38. MMT points out that it has been registered under the category of 'Tour Operator' service since 2005. Throughout it has been discharging its service tax liability as a tour operator by claiming an abatement of 90% in terms of Notification No. 1/2006-ST dated 1st March, 2006 which has since been replaced by Notification No. 26/2012-ST dated 20th June, 2012. MMT has been audited twice by the ST Department – first in 2007-08 and for a second time in 2012-13. It is pointed out that every time the ST Department conducted an audit, MMT had provided a detailed note of its activities, including the activities of hotel booking. A copy of one such Note has been enclosed as Annexure-6 to the rejoinder affidavit. It is stated

that in June 2014 an audit was conducted by the Central Excise Regulatory Authority ('CERA') for the period from FYs 2010-11 to 2013-14. MMT had been issued the SCN on the basis of CENVAT credit eligibility where the ST Department had specifically recognized the activities performed by MMT. A reference is made to the SCN dated 25th October, 2010 and 18th October, 2011. In para 6.1 of the SCNs dated 25th October, 2010 and 18th October, 2011, it is noted that MMT had been availing benefit of abatement from paying service tax on packaged tour (inbound) and booking of hotel accommodation in India under Notification No. 1/2006 dated 1st March, 2006, as amended. Thus, the ST Department was aware of the activities undertaken by MMT and the service tax position followed by it. It is further pointed out that the SCN issued on 18th October, 2011 was after the introduction of service tax on hotel services. However, the ST Department never challenged the classification of its services adopted by MMT. This was again acknowledged in the SCN dated 21st May, 2014.

39. It is also pointed out that MMT was investigated by the Anti-Evasion Office of the Commissioner of Service Tax, New Delhi in December 2011 wherein MMT had provided the required information along with a detailed note on its activities, including the activity of booking of hotels for its customers. It is pointed out that DGCEI itself had conducted investigations into MMT's operations twice, once in 2010 and second in 2013 but no dispute with regard to the classification as 'tour operator' services was raised. Therefore, it is denied that ST Department was not aware of the activities of MMT.

40. It is pointed out that there was no occasion to arrest Mr. Pallai, since

MMT and its officials were cooperating with DGCEI in its investigation by supplying all the necessary information whenever demanded. It is submitted that the reason mentioned in the arrest memo dated 8th January, 2016 was not that more information was required. It is pointed out that MMT is a listed company and its data is audited and finances are disclosed in the public domain. There was no question of manipulation. It is asserted that the arrest of Mr. Pallai was entirely without the authority of law.

Additional affidavits

41. At the hearing of W.P. (C) No.525/2016 on 3rd March, 2016, a written note of submissions was handed over in the Court by Mr. Lakshmikumaran, learned counsel appearing for MMT in which it was stated that the officers of the DGCEI had on more than one occasion, "compelled, forced and threatened" the officers of the MMT into depositing the alleged service tax dues under the threat of facing arrest. Mr. Lakshmikumaran then stated that responsible officers of both MMT and IBIBO, whose petition was also being heard, would file affidavits giving the names of the officers of the DGCEI as well as the date and place of making such threats. The Court then directed that such affidavits be filed by 11th March, 2016 and the response thereto filed by 21st March, 2016. The said affidavits were filed by Mr. Pallai and Mr. Deepak Katyal on 8th March, 2016. Among the officers named were Mr. Jatinder Singh (SIO), Mr. Samanjasa Das (ADG), Mr. Ashwani Kapoor (SIO), Mr. Ajay Kumar (Intelligence Officer), Mr. Praveen (Intelligence Officer), Mr. Rajeev Dhawan and Mr. Rajesh Arora. Mr. Das, Mr. Jatinder Singh, Mr. Kapoor, Mr. Ajay Kumar and Mr. Praveen filed their affidavits in response to the above affidavits. Supplementary affidavits have been filed by Mr.

Pallai and Mr. Kataria to which replies were again filed by the aforementioned officers. The above affidavits will be discussed further in examining the contention of MMT and IBIBO that their officers had been threatened by the officers of the DGCEI during interrogation.

Averments in the petition by IBIBO

42. Turning to the facts of W.P. (C) No.1283/2016 by IBIBO, it is stated that IBIBO acts as an online travel agent/ tour operator for booking hotels for its customers and is registered with the ST Department under the relevant provisions of the FA vide service tax registration number AAHCP1178LSD001. IBIBO provides an online platform (website/mobile application) whereby various hotel service providers can make available hotel accommodation services to customers. Just like in the case of MMT, it is stated that the customers intending to book a hotel room visit the website/mobile application and enter the details required for booking a room upon which the website would display the list of hotels along with its tariff (including hotel taxes), location, facilities etc. Depending on their preference, the customers book the room and get a hotel confirmation voucher showing the amount paid, inclusive of taxes.

43. Identical to the system being followed by MMT, an option is available to the customers to either directly make the payment to the hotels in which case the hotels make payment of commission to IBIBO or pay a lump sum amount to IBIBO, which is remitted to the account of the hotel after retaining its commission.

44. It is stated that the Intelligence Team of the DGCEI visited the office of IBIBO on 13th January, 2016 and interrogated the officials of IBIBO till

4 a.m. on 14th January, 2016. It is alleged that prior to leaving the premises, a summons back-dated to 13th January, 2016, was issued to Mr. Pankaj Jain, Chief Financial Officer for appearance before the ADG for tendering a statement under Section 14 of the CE Act. Summons dated 13th January, 2016, was also issued to Mr. Sanjay Bhasin, CEO of IBIBO. It is stated that on 14th January, 2016, Mr. Sanjay Bhasin, appeared at 12 noon and was continuously interrogated. It is further alleged that during such interrogation he was orally threatened that they (IBIBO) should either compute and deposit the service tax or face arrest. He was again called on 15th January, 2016 and compelled to deposit Rs. 5 crores (Rs. 2.5 crores in cash and Rs.2.5 crore through CENVAT credit). Since IBIBO was not having sufficient CENVAT balance, on 22nd January, 2016 a sum of Rs. 2.5 crore was paid in cash. Both Mr. Jain and Mr. Bhasin were again called on 5th February, 2016 and again threatened to make immediate payment towards service tax to avoid coercive action. This was repeated on telephone on 9th February, 2016 and 11th February, 2016. It is stated that on 12th February, 2016, a further sum of Rs.1.5 crores was paid. It is in the above circumstances that the writ petition was filed in this Court in which, as already noted, an order was passed on 16th February, 2016, restraining the DGCEI from taking coercive steps and this order continued.

45. With its writ petition, IBIBO enclosed a copy of an order dated 25th January, 2016, passed by the High Court of Bombay in Writ Petition No.1088/2016 titled ***Cleartrip Private Limited v. The Union of India*** where an ad interim order was passed restraining the Respondents from taking coercive action against Cleartrip. A reference was also made to the order passed in MMT's case.

Counter affidavit of DGCEI in IBIBO's petition

46. The counter affidavit filed by the DGCEI in W.P. (C) No. 1283/2016, is on the same lines as the one filed in W.P. (C) No.525/2016. It is asserted that IBIBO was in the business of running a hotel room booking service and collecting service tax from their customers and entered into agreements with more than 25,000 hotels on a 'Principal-to-Principal basis'. It is stated that the service tax could not have been collected on behalf of the hotels and was required to be deposited with the Central Government. The allegations of threat and coercion are denied. It is stated that all the deposits were made voluntarily by IBIBO.

IBIBO's rejoinder

47. In the rejoinder filed by IBIBO it is again pointed out that since 200 hotels have already given confirmation to IBIBO that they were discharging the liability of service tax with regard to the hotel service provided, copies of such confirmation certificates were annexed as Annexure-6 to the writ petition. It is pointed out that IBIBO started providing services even prior to 2014 and is registered under the category of Tour Operator/Air Travel Agent service. It is asserted that IBIBO has always been discharging its service tax liability under the taxable category of Air Travel Agent/Tour Operator on the commission retained by it. It has been audited by the ST Department for the period up to March, 2013 in the erstwhile company IBIBO Web (i.e., prior to demerger of the business). It is accordingly denied that the ST Department was not aware of the activities of IBIBO. The allegation that IBIBO was collecting amounts inclusive of service tax, from customers for providing hotel rooms is not

correct. It is asserted that IBIBO is discharging its service tax liability on the commission retained by it, which is inclusive of service tax and the remaining amount is remitted to the hotel.

Supplementary affidavits

48. In support of the allegation that they were subjected to threat and coercion by the officials of the DGCEI, affidavits have been filed by both Mr. Sanjay Bhasin and Mr. Pankaj Jain, naming Mr. Yashwant Mahawar, ADG, Mr. Anil Chandela, Mr. Ashutosh Singh and Mr. Rohit Issar, Intelligence Officers of the DGCEI. The said officers have filed their response to the said affidavits. Further, supplementary affidavits have been filed by Mr. Bhasin and Mr. Jain to which further replies have been filed by the said officers.

Analysis of the relevant provisions for assessment of service tax

49. The relevant provisions for assessment and recovery of service tax are Sections 72 and 73 of the FA, which read as under:

> "**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 on 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.

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 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 there under 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" had been substituted.

Explanation: Where the service of the notice is stayed by an order of a 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 has 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 the subsequent period are same as are mentioned in the earlier notices.

(1B). Notwithstanding anything contained in sub-section (1), in a case where the amount of service tax payable has been self-assessed in the return furnished under sub-section (1) of Section 70, but not paid either in full or in part, the same shall be recovered along with interest thereon in any of the modes specified in Section 87, without service of notice under sub-Section (1).

(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 not 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 the 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 the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made there under 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.

(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 in sub-section (1);

(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 thereunder;

(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made thereunder, 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.

50. In the present case, both Petitioners have been regularly filing service tax returns and have been paying service tax. It is the admitted case of the Respondents themselves. None of the Petitioners fall under the category of a person not filing a return under Section 70 of the FA as envisaged under Section 72 (a) of the FA. Under Section 72 (b) of the FA, the return filed by the Assessee can be scrutinized by the Central Excise Officer who has been assigned his functions in terms of the provisions of the FA read with CE Act.

51. Proceedings were initiated by the ST Department against each of the Petitioners in respect of the returns filed by them and SCNs were also issued to them. In other words, the power of assessment has been and is continued to be exercised by the concerned designated offices of the ST Commissionerate in respect of each of the Petitioners. If in terms of Section 72 of the FA, the Assessing Officer (AO) was of the view that any of these Petitioners acted in violation of any of the provisions of the FA, then it was open to the said AO to require the person to produce documents and other evidence and therefore to make an assessment of the value of the 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". Section 72 of the FA requires the AO to give such person an opportunity of being heard.

52. It is perhaps a peculiar feature of the FA that there is no power of reopening the assessment like for instance under Sections 147 and 148 of the Income Tax Act, 1961 ('IT Act'). What is provided for is an audit in

terms of Section 72A of the FA. Proceedings for recovery of service tax not levied or paid, or short-levied or short-paid or erroneously refunded can be initiated under in Section 73 of the FA Act. Section 73 (1) stipulates the time limit of eighteen months within the time SCN should be served on the person who is stated to be liable to service tax which has been not levied or paid or has been short-levied, or short-paid or to whom the said tax has been erroneously refunded. Where the failure to levy or short-levy or payment or short-paid or erroneously refunded has resulted by reason 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 V of the FA or the Rules made thereunder "with intent to evade payment of service tax" the period of limitation is enlarged from 18 months to five years. Section 73 (2) of the FA envisages adjudication proceedings pursuant to the SCN being issued. It premised on the fact that it is not possible for an adjudication officer to determine beforehand the extent of evasion of service tax.

Analysis of Section 73A of the FA

53. Next, it is necessary to examine in some depth Section 73A of the FA particularly since the case of the DGCEI is that both Petitioners have collected service tax from their customers and have not deposited it with the Central Government. Section 73A of the FA reads thus:

> "**73A. Service Tax collected from any person to be deposited with Central Government:**
>
> (1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the

rules made there under from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.

(2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.

(3) Where any amount is required to be paid to the credit of the Central Government under sub-section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.

(4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub- section (3), determine the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined.

(5) The amount paid to the credit of the Central Government under sub-section (1) or subsection (2) or sub-section (4), shall be adjusted against the service tax payable by the person on finalisation of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1).

(6) Where any surplus amount is left after the adjustment under sub-section (5), such amount shall either be credited to the Consumer Welfare Fund referred to in section 12C of the Central Excise Act, 1944 or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B of the said Act and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Central Excise Officer for the refund of such surplus amount."

54. Section 73A (1) requires any person liable to pay service tax who has

"collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made thereunder from the recipient of taxable service in any manner as representing service tax" to forthwith pay the amount so collected to the credit of the Central Government. The crucial words are "collected any amount in excess of the service tax assessed or determined." The other expression which has significance is: "in any manner as representing service tax." The case of the DGCEI is that service tax is being collected by the Petitioners from the recipient of taxable service "in any manner as representing service tax".

55. The Petitioners state that as far as they are concerned, they have collected service tax only to the extent that they are required to pay service tax on the service charges collected by them and further that they have paid the service tax so collected to the credit of the Central Government. They say that as far as the service tax payable by the hotels are concerned, it is collected from the recipient of the taxable services i.e., the customers who book the hotel room using the portal of the Petitioners, and pass it on to the hotels who in turn pay it to the credit of the Central Government. Therefore, the Petitioners contend that they have not "collected any amount" from the recipient of taxable service "in any manner as representing service tax" and have not retained such amount without passing it on to the Central Government.

56. The case of the DGCEI on the other hand is that irrespective of whether the hotels have paid the service tax passed on to them by the Petitioners, since it is the Petitioners who have 'collected' the said

component service tax, it is the Petitioners who are liable to, under Section 73A (1) of the FA, to credit the tax so collected to the account of the Central Government and their failure to do so results in violation of Section 73A of the FA.

57. The case of the Petitioners that they have included the service tax to the extent payable by the hotels in the bills raised on the customers but have not retained such service tax and have passed it on to the hotels appears to have not been considered by the DGCEI in the correct perspective. The understanding of the DGCEI of the transaction of online booking of hotel rooms using the web portals of the Petitioners appears to be *prima facie* incorrect.

58. In the context of Section 73-A (2) of the FA, the person against whom the proceedings are initiated should be shown to have "collected any amount, which is not required to be collected, from any other person, in any manner **as representing service tax."** (emphasis supplied) In a similar context while interpreting a provision using the same words in the U.P. Sales Tax Act, 1948 the Supreme Court in ***CST v. Mool Chand Shyam Lal, (1988) 4 SCC 486*** observed as under:

> "4. Therefore, it is necessary that realisation must be of the sales tax or purchase tax, secondly, that realisation must be in excess and thirdly the amount of tax should be legally payable under the Act. The High Court has construed the expression "as" in the beginning of the sub-clause as significant. Penalty is leviable for excess realisation of tax, therefore, realisation of the amount *should be as tax* and *not in any other manner*. Then excess should be over and above the amount of tax legally payable. This expression obviously means tax payable under the Act, rules or notification. Therefore,

realisation by the assessee from customers should not be of only sales or purchases but it *should be of the tax legally payable.* If the purchaser realises more money that by itself will not attract the penal provisions.

6. This is a method of realisation in case of indirect tax. Penalty can be levied or is leviable for realisation of excess of tax legally payable and not for contravention of Section 8-A(2)(*b*). Realisation of excess amount is not impermissible but what *is not permissible is realisation of excess amount as tax.* .....It has to be borne in mind that the imposition of a penalty under the Act is quasi-criminal and unless strictly proved the assessee is not liable for the same." (emphasis in original)

59. In ***R.S. Joshi, Sales Tax Officer, Gujarat v. Ajit Mills Limited (1977) 4 SCC 98***, the Supreme Court was analysing what the expression "collected' meant in the context of the sales tax legislation of Gujarat. It observed as under:

> "Section 37 (1) uses the expressions, in relation to forfeiture, 'any sum collected by the person - shall be forfeited'. What does 'collected' mean here? Words cannot be construed effectively without reference to their context. The setting colours the sense of the word. The spirit of the provision lends force to the construction that "**collected" means "collected and kept as his"** by the trader. If the dealer merely gathered the sum by way of tax and kept it in suspense account because of dispute about taxability or was ready to return if eventually it was not taxable, it is not collected. "Collected", in an Australian Customs Tariff Act, was held by Griffth C.J., not 'to include money deposited under an agreement that if it was not legally payable it will be returned' (Words & Phrases p. 274). We therefore, semanticise 'Collected' not to cover amounts gathered tentatively to be given back if found non-exigible from the dealer." (emphasis supplied)

60. In the present case, the DGCEI fails to make out even a *prima facie* case that some portion of the service tax collected by the Petitioners from

the customers 'as representing service tax' or otherwise has been 'retained' by them. Without such *prima facie* conclusion, it cannot be inferred that the Petitioners have violated Section 73A (1) of the FA.

61. The above determination becomes relevant even for the purpose of Section 89 (1) (d) which again requires, for the purpose of attracting the offence, the person concerned to 'collect any amount as service tax' and 'fails to pay the amount so collected to the credit of the Central Government'. Without coming to the above determination in clear terms, it would not be permissible for the Department to straightway presume that Section 89 (1) (d) read with Section 73A (1) of the FA is attracted. That brings us to a discussion of the provisions concerning offences and penalties.

Offences and penalties

62. There are two kinds of penalties envisaged. Sections 78 of the FA speaks of imposition of penalty for failure to pay service tax for reasons of fraud etc. This is as a consequence of proceedings under Section 73 of the FA. Section 78 A of the FA fastens the liability for the penalty on the director, manager, secretary of the company evading payment of service tax as long as they were in charge of or responsible to the company for the conduct of its business. The adjudication in regard to penalty proceedings is envisaged in Section 83 A of the FA. Thus this adjudication of penalty is sequentially subsequent to the assessment of the service tax returns or of proceedings under Section 73 of the FA.

63. Section 89 of the FA Act prescribes offences and penalties therefor as

'punishment' and is therefore in the criminal jurisdiction. Section 89 reads as under:

"**89**. **Offences and penalties**

(1) Whoever commits any of the following offences, namely, -

(a) knowingly evades the payment of service tax under this Chapter; or

(b) avails and utilizes credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of this Chapter; or

(c) maintains false books of account or fails to supply any information which he is required to supply under this Chapter or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or

(d) collects any amount as service tax but fails to pay the amount so collected to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due.

shall be punishable, -

(i) in the case of an offence specified in clause (a), (b) or (c) where the amount exceeds fifty lakh rupees, with imprisonment for a term which may extend to three years:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for a terms of less than six months;

(ii) In the case of the offence specified in clause (d), where the amount exceeds fifty lakh rupees, with imprisonment for a

term which may extend to seven years;

PROVIDED that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for a period of less than six months;

(iii) in the case of any other offences, which imprisonment for a term, which may extend to one year.

(2) If any person is convicted of an offence punishable under –

(a) clause (i) or clause (iii), then, he shall be punished for the second and for every subsequent offence with imprisonment for a term which may extend to three years;

(b) clause (ii), then, he shall be punished for the second and for every subsequence offence, with imprisonment for a term which may extend to seven years.

(3) For the purposes of sub-sections (1) and (2), the following shall not be considered as special and adequate reasons for awarding a sentence of imprisonment for a term of less than six months, namely: -

(i) the fact that the accused has been convicted for the first time for an offence under this Chapter;

(ii) the fact that in any proceeding under this Act, other than prosecution, the accused has been ordered to pay a penalty or any other action has been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a secondary party in the commission of offence;

(iv) the age of the accused.

(4) A person shall not be prosecuted for any offence under this

section except with the previous sanction of the Chief Commissioner of Central Excise."

64. A plain reading of Section 89 reveals that a distinction is sought to be made in the first instance between the offence where the amount exceeds Rs. 50 lakhs (raised to Rs. 1 crore by a Circular dated 23rd October, 2015 and now Rs. 2 crore by the 2016 amendment) and where it is less than Rs. 50 lakhs. In the case of the offences under Section 89 (1) (a), (b) and (c), which are treated as one class of offence and where the amount exceeds Rs. 50 lakhs, the maximum period of punishment is three years and the mandatory punishment of six months unless special and adequate reasons are recorded by the Court which convicts the person. The determination of commission of the offence has to be made by the Court and not by any of the officers of the Department. Where in terms of Section 89 (1) (d), a person collects the due amount of service tax but fails to pay the amount to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due, then in terms of Section 89 (1) (d), that person is punishable in the manner indicated in sub-clause (ii) of Section 89 (1) of the FA Act. Where the amount exceeds Rs. 50 lakh, the punishment is of imprisonment for a period which may extend to seven years and not less than six months unless the special and adequate reasons are recorded by the Court which convicts the person. Where the amount does not exceed Rs. 50 lakhs, then in terms of Section 89 (1) (iii) the punishment is of imprisonment for a term which may extend to one year. Section 89 (2) (b) further states that if a person convicted of an offence punishable under Section 89 (1) (ii) commits a subsequent offence, the imprisonment shall be for a period which may extend to seven years. Section 89 (4) requires previous sanction of the Chief Commissioner of

Central Excise for any prosecution under Section 89 of the FA.

65. It is important to note that determination of the commission of an offence for the purposes of Section 89 has to be made by the Court. Prior thereto, there can only be *prima facie* determination of such commission of offence. It may also be noted that by the amendments of 2013 the structure of Section 89 underwent a change. A distinction was drawn between the offences of the type described under Section 89 (1) (a), (b) and (c) on the one hand and Section 89 (1) (d) of the FA on the other. The former would be a non-cognizable whereas the latter was made cognizable and linked to Section 91 (1) regarding the power of arrest.

66. There are two aspects of the proceedings as far as Section 73A and Section 89 (1) (d) of the FA is concerned. Section 73A sets out the procedure for determination whether the situation envisaged thereunder exists. That procedure requires notice to be served on the person liable to pay such amount requiring him "to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government." Therefore, under Section 73A (4), the Central Excise Officer concerned shall, after considering the representation made by such person, determine the amount due from such person, not being in excess of the amount specified in the notice. Those two steps are essential before it can be concluded that a person has collected service tax which is payable to the Central Government and has not paid it.

67. The second part of the procedure concerns the levy of penalty under Section 89(1) (d) of the FA. Here, two things are necessary apart from first determining that a person has committed the offence of collecting an

amount of service tax but has failed to pay the amount collected. One is that it should not be paid beyond a period of six months from the date on which such payment becomes due. The second aspect is that the sentence as provided under Section 89 (1) (ii) of the FA, where the amount exceeds Rs. 50 lakhs, is imprisonment for a term which may extend to seven years. The proviso thereto suggests that for special and adequate reasons, the imprisonment can be lesser than six months in such cases. Where the amount does not exceed Rs. 50 lakhs, the imprisonment is for a term which may extend to one year. Where the person is again convicted for the subsequent offence, then the imprisonment is for a term which may extend to seven years. The above analysis is relevant for considering whether an offence is cognizable or not and consequently whether the provisions concerning arrest get attracted.

Power to arrest

68. The power to arrest is specified in Section 91 of the FA, and that is linked to the question whether a cognizable offence as described in Section 90 of the FA has been committed. Sections 90 and 91 of the FA read as under:

> "**90. Cognizance of offences**
> (1) An offence under clause (ii) of sub-section (1) of Section 89 shall be cognizable.
>
> (2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 all offences, except the offences specified in sub-section (1), shall be non-cognizable and bailable.
>
> **91. Power to arrest**
> (1) If the Commissioner of Central Excise has reason to believe that any person has committed an offence specified in clause (i) or clause (ii) of sub-section (1) of Section 89, he may, by general or special

order, authorize any officer of Central Excise, not below the rank of Superintendent of Central Excise, to arrest such person.

(2) Where a person is arrested for any cognizable offence, every officer authorized to arrest a person shall, inform such person of the grounds of arrest and produce him before a magistrate within twenty-four hours.

(3) In the case of a non-cognizable and bailable offence, the Assistant Commissioner, or the Deputy Commissioner, as the case may be, shall for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer in charge of a police station has, and is subject to, under Section 436 of the Code of Criminal Procedure, 1973 (2 of 1974).

(4) All arrests under this Section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to arrests."

69. Section 90 (1) makes it clear that only an offence which is punishable in terms of Section 89 (1) (ii) would be cognizable. Section 89 (1) (ii) in turn refers to Section 89 (1) (d) which refers to a case wherein the amount involved is more than Rs. 50 lakhs. In other words, it is only the offence under Section 89 (1) (d), where a person after collection of service tax fails to pay the amount so collected to the credit of the Central Government beyond a period of six months from the date from which it is due and where such amount exceeds Rs. 50 lakhs, which is cognizable under Section 90 (1) of the FA. All other offences i.e., offences other than described as Section 89 (1) (ii) of the FA, "shall be non-cognizable and bailable", notwithstanding anything contained in the Code of Criminal Procedure 1973 ('Cr PC'). It is only when the offence is cognizable that, in terms of Cr PC, the power of arrest is attracted. In ***Om Prakash v. Union***

of India ***(2011) 14 SCC 1***, the Supreme Court was considering the very expression as used in the Cr PC and observed as under:

> "41. In our view, the definition of 'non-cognizable offence' in Section 2(1) of the Code makes it clear that a non-cognizable offence is an offence for which a police officer has no authority to arrest without warrant. As we have also noticed hereinbefore, the expression 'cognizable offence' in Section 2 (c) of the Code means an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. In other words, on a construction of the definitions of the different expressions used in the Code and also in connected enactments in respect of a non-cognizable offence, a police officer, and, in the instant case an excise officer, will have no authority to make an arrest without obtaining a warrant for the said purpose. The same provision is contained in Section 4 of the Code which specifies when a police officer may arrest without order from a Magistrate or without warrant."

70. Consistent with this understanding, Section 91(1) of the FA provides that where the offence has been committed under Section 89 (1) (ii) of the FA, the Commissioner of Central Excise may authorize any officer of the Central Excise not below the rank of Superintendent of Central Excise to arrest such person. Where the arrest is of a person for any non-cognizable and bailable offence, the Assistant Commissioner (AC) or the Deputy Commissioner (DC), as the case may be, has the same powers as an officer-in-charge of a police station has under Section 436 of the Cr PC for the purpose of releasing such arrested person on a bail. This contemplates the offences under Section 89 (1) (d) read with Section 89 (1) (ii) of the FA as being cognizable and the commission of offences other than that under Section 89 (1) (d) read with Section 89 (1) (ii) of the FA as being non-cognizable.

71. Under Section 91 (2), where a person is arrested for any cognizable offence i.e., the offence prescribed under Section 89 (1)(ii), the officer making arrest has to inform such person of the grounds of arrest and produce him before a Magistrate within twenty four hours. Section 91 (4) is more important. It states that all arrests under Section 91 "shall be carried out in accordance with the provisions of the Cr PC relating to arrests". In other words the entire Chapter V of the Cr PC on 'Arrests', comprising Sections from 41 to 60A would apply to any arrest made of a person in exercise of the powers under Section 91 of the FA. The determination by a Court that a person has committed an offence cannot possibly be arrived at till the completion of the process envisaged under the Cr PC**.**

72. It is difficult to conceive of the DGCEI or for that matter the ST Department being able to by-pass the procedure as set out in Section 73A (3) and (4) of the FA before going ahead with the arrest of a person under Section 90 and 91 of the FA. The power of arrest is, therefore, to be used with great circumspection and not casually. It is not to be straightway presumed by the DGCEI, without following the procedure under Section 73A (3) and (4) of the FA, that a person has collected service tax and retained such amount without depositing it to the credit of the Central Government.

73. It is sought to be suggested by the DGCEI that, for the purposes of arrest, it is not necessary for the adjudication proceedings to have concluded. However, when the scheme of the provisions in the FA is carefully analysed, the said submission appears to be legally untenable.

There are statutes concerning both direct and indirect taxes. The Income Tax Act, 1961 is an example of a direct tax statute. The Customs Act, 1962 and the Central Excise Act, 1944 are two of the many indirect tax statutes. These statutes have specific provisions which describe offences and the corresponding punishments. However, the scheme of the Income Tax Act, 1961, in regard to offences and penalties, is distinct from the scheme under the Central Excise Act, 1944 or the Customs Act, 1962. Under the Income Tax Act, 1961 there is a detailed procedure for assessment and it is only at the conclusion of the assessment that the Assessing Officer ('AO') decides whether penalty proceedings should be initiated. It is only at that stage a decision is taken on initiating prosecution against the Assessee for the commission of any of the offences under that statute. It is inconceivable that an Assessee is straightway sought to be arrested without there being an assessment and a determination as to evasion of tax.

74. The Customs Act, 1962, has a different approach to the question of offences. Chapter XVI thereof describes with specificity the types of offences and the procedure adopted in prosecuting such offences. Section 138A enables the court to draw a presumption, which is rebuttable, of the culpable mental state of the person charged with an offence under the Customs Act, 1962 which requires such culpable mental state. Even for the purposes of confiscation of smuggled goods, Section 123 of the Customs Act, 1962 shifts the burden of proof in the case of 'smuggling', to the person from whom the goods are seized to show that they are not smuggled goods. Powers are given to the Customs Officer under Section 108 to record statements which are admissible in law. The point to be noted is that coercive powers under taxing statutes are hedged in by limits

on the use of that power by in-built restrictions and limitations.

75. It is for this reason that the powers of a Central Excise Officer under the FA cannot be compared with the powers exercised by the same officer either under the Customs Act or the Central Excise Act. Each of those statutes has a different and distinct scheme which does not bear comparison with the FA. For example, the FA envisages filing of periodic returns which is comparable to the Income Tax Act, whereas the assessment under the Customs Act is of individual bills of entry. AS noticed earlier, the scheme of the FA provisions points to an assessment, followed by an adjudication of penalty under Section 83 A of the FA. There are a separate set of provisions for launching prosecution.

76. The Supreme Court by a 2:1 majority in ***Radheyshyam Kejriwal v. State of West Bengal (2011) 3 SCC 581*** summarised the law as explained in ***Standard Chartered Bank v. Directorate of Enforcement (2006) 4 SCC 278*** and the earlier decisions in ***G. L. Didwania v. Income Tax Officer 1995 Supp (2) SCC 724*** and ***K. C. Builders v. Assistant CIT (2004) 2 SCC 731*** and *inter alia* held that(i) Adjudication proceedings and criminal prosecution can be launched simultaneously; (ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution and (iii) Adjudication proceedings and criminal proceedings are independent in nature to each other.

77. In the context of the provisions of the FA where an assessee has been regularly filing service tax returns which have been accepted by the ST Department or which in any event have been examined by it, as in the case

of the two Petitioners, it is difficult to imagine that without the commencement of the process of adjudication of penalty in terms of Section 83-A of the FA, another agency like the DGCEI can without an SCN or enquiry or investigation straightway go ahead to make an arrest merely on the suspicion of evasion of service tax or failure to deposit service tax that has been collected. Therefore, for a Central Excise officer or an officer of the DGCEI duly empowered and authorised in that behalf to be satisfied that a person has committed an offence under Section 89 (1) (d) of the FA, it would require an enquiry to be conducted by giving an opportunity to the person sought to be arrested to explain the materials and circumstances gathered against such person, which according to the officer points to the commission of an offence. Specific to Section 89 (1) (d) of the FA, it has to be determined with some degree of certainty that a person has collected service tax but has failed to pay the amount so collected to the Central Government beyond the period of six months from the date on which such payment is due and further that the amount exceeds Rs. 50 lakhs.

78. Therefore, while the prosecution for the purposes of determining the commission of an offence under Section 89 (1) (d) of the FA and adjudication proceedings for penalty under Section 83 A of the FA can go on simultaneously, both will have to be preceded by the adjudication for the purposes of determining the evasion of service tax. The Petitioners are, therefore, right that without any such determination, to straightaway conclude that the Petitioners had collected and not deposited service tax in excess of Rs. 50 lakhs and thereby had committed a cognizable offence would be putting the cart before the horse. This is all the more so because

one consequence of such determination is the triggering of the power to arrest under Section 90 (1) of the FA.

79. The Court notes that the Bombay High Court in ***ICICI Bank Ltd. v. Union of India 2015 (38) S.T.R. 907 (Bom)*** answered in the negative the following question: "Whether, without there being any adjudication in any of the proceedings as provided under Chapter 5 of the Finance Act, 1994 coercive steps can be taken by the Revenue, for recovery of service tax or penalty or interest." The Court there was dealing with a case where the Assessee had made payments under protest of alleged service tax dues under threat by the ST Department of taking drastic action under Section 87 of the FA in the form of sealing of the business premises, attachment of bank accounts and so on. The Court held that "the amount 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 Act." It further held, "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 11-B cannot be said to be just fair and reasonable approach."

80. One caveat, however, may be where a person is shown to be a habitual evader of service tax. Such person would have to be one who has not filed a service tax return for a continuous length of time, who has a history of repeated defaults for which there have been fines, penalties imposed and prosecutions launched etc. That history can be gleaned only from past records of the ST Department. In such instance, it might be possible to justify resorting to the coercive provisions straightaway. But then the notes

on file must offer a convincing justification for resorting to that extreme a measure. What, however, requires reiteration is that the potent power of arrest should not be lightly and casually exercised to induce fear into an assessee and the consequential submission to the unreasonable demands made by officers of the investigating agency during the interrogation and while in custody. To again quote the Bombay High Court in ***ICICI Bank Ltd. v. Union of India*** (*supra*):

> "At the cost of repetition we may say that if a tax payer fraudulently or with the intention to deprive Revenue of its legitimate dues evades payment thereof not only that, if the Central Excise Officer is of the opinion that for the purpose of protecting the interest of the Revenue it is necessary provisionally to attach any property belonging to the person on whom the notice is served under Section 73 or Section 73 A of the Act, he is empowered to do so, however with the previous approval of the Commissioner of Central Excise. However, at the same time, law enforcers cannot be permitted to do something that is not permitted within the four corners of law."

81. In ***Technomaint Contractors Ltd. v. Union of India 2014 (36) S.T.R. 488 (Guj)***, the Gujarat High Court held that Section 73 C of the FA cannot be activated for making a recovery even before adjudication.

82. In the context of the provisions for arrest under the Central Excise Act, 1944, the DGCEI has published a Manual in 2004 containing guidelines to the CE Officers on when and in what circumstances resort should be had to the coercive step of arrest. In Chapter X para 7 of the said Manual, it is stated that arrest can be made prior to the issue of an SCN but only "where fraudulent intent is clear (*prima facie* there is evidence of *mens rea*) or where the evidence is enough to secure a conviction or where the person is likely to abscond, tamper with evidence or influence the witnesses if left at

large. **Arrest at the investigation stage should be resorted to only when it is unavoidable**." (emphasis supplied)

83. At this stage it also requires to be recalled that since the provisions of the Cr PC stand attracted in terms of Section 90(2) as well as Section 91(4) of the FA, all the safeguards that are available to a person under Chapter V of the Cr PC are also available to a person sought to be arrested by Central Excise Officer under the provisions of the FA. These safeguards have been judicially evolved by reading constitutional limitations into the width and ambit of these powers.

Constitutional safeguards

84.1 The safeguards are traceable to the Constitution of India and in particular Article 22 which pertains to arrest and Article 21 which mandates that no person shall be deprived of his life and liberty without the authority of law. The safeguards pertaining to arrest have been spelt out in the decision of the Supreme Court in ***D.K. Basu v. State of West Bengal (1997) 1 SCC 416***. The directions issued by the Supreme Court included setting out in the arrest memo – (i) the brief facts of the case, (ii) the details of the persons arrested, (iii) the gist of evidence against the person, and (iv) relevant sections of the statute under which the action is proposed to be taken. The Court mandated that the grounds of arrest must be explained to the person arrested and this fact be noted in the arrest memo. Further the nominated person, as per details provided by the person arrested, should be informed immediately and this fact should also be mentioned in the arrest memo. The date and time of arrest may be mentioned in the arrest memo and copy of memo should be given to the

person arrested after obtaining the proper acknowledgment. It must be mentioned herein that in 2008, the Cr PC was amended by inserting Sections 41A , 41B, 41C, 41D, 50A, 55A and 60A and amending Sections 41, 46 and 54 to provide for the above safeguards.

84.2 It is significant in the decision in ***D.K. Basu*** *(supra)*, the Supreme Court did not confine itself to the actions of police officers taken in terms of powers vested in them under Cr PC but also of the officers of the Enforcement Directorate including the Directorate of Revenue Intelligence ('DRI'). This also included officers exercising powers under the Customs Act, 1962 the Central Excise Act, 1944 and the Foreign Exchange Regulation Act, 1973 ('FERA') now replaced by the Foreign Exchange Management Act, 1999 ('FEMA') as well. It observed:

> "30. Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Costal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, R.A.W, Central Bureau of Investigation (CBI) , CID, Tariff Police, Mounted Police and ITBP which have the power to detain a person and to interrogated him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act. Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well, In re Death of Sawinder Singh Grover [1995 Supp (4) SCC 450], (to which Kuldip Singh, J. was a party) this Court took suo moto notice of the death of Sawinder Singh Grover during his custody with the Directorate of Enforcement. After getting an enquiry conducted by the additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge a FIR and initiate criminal proceeding against all persons named in the report of the Additional District Judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to

> pay sum of Rs. 2 lacs to the widow of the deceased by was of the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.
>
> .....
>
> 33. There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statures has been upheld by the Courts. The right to interrogate the detenues, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The latin maxim *salus populi est suprema lex* (the safety of the people is the supreme law) and *salus republicae est suprema lex* (safety of the state is the supreme law) co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated - indeed subjected to sustained and scientific interrogation determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or drive knowledge about his accomplices, weapons etc. His Constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be qualitative difference in the methods of interrogation of such a person as compared to an ordinary criminal...."

84.3 These constitutional safeguards emphasised in the context of the powers of police officers under the Cr PC and of officers of central excise, customs and enforcement directorates, are applicable to the exercise of powers under the FA in equal measure. An officer whether of the Central Excise department or another agency like the DGCEI, authorised to exercise powers under the CE Act and/or the FA will have to be conscious

of the constitutional limitations on the exercise of such power. This has been implicitly acknowledged in the circulars issued from time to time by the Central Board of Excise and Customs ('CBEC'). Insofar as officers of the Central Excise are concerned, the Service Tax Wing of the CBEC initially issued Circular No. 171/6/2013-Service Tax dated 17th September, 2013 where specific attention has been drawn to the types of cases covered under Section 89 (1) (i) and 89 (1) (ii). In the latter case, it has been mandated that after following the due procedure of arrest, the arrested person must be produced before the Magistrate without unnecessary delay and definitely within 24 hours. Para 2 of the said circular specifies 'conditions precedent'. Para 2.1 states that, since arrest impinges on the personal liberty of an individual "this power must be exercised carefully". It has been mandated that an officer of the Central Excise not below the rank of the Superintendent can carry out an arrest on being authorised by the Commissioner of Central Excise. It is further stated that to authorise the arrest, the "Commissioner should have reason to believe that the person proposed to be arrested has committed an offence specified in clause (i) or clause (ii) of sub-section (1) of Section 89" of the FA. Importantly, it states "the reason to believe must be based on credible material which will stand judicial scrutiny". The further criterion is spelt out in para 2.3 which reads thus:

> "2.3 Apart from fulfilling the legal requirements, the need to ensure proper investigation, prevention of the possibility of tampering with evidence of intimidating or influencing witnesses and large amounts of service tax evaded are relevant factors before deciding to arrest a person."

85. It is, therefore, plain that the decision to arrest a person must not be taken on whimsical grounds. To recapitulate, reasons to believe must be

based on 'credible material'. The decision must also be conveyed at the earliest to a superior officer who will constantly monitor the progress in the investigations. He will ensure that there is no tampering of the evidence gathered and at the same time ensure that there is no intimidation or coercion of the suspects and/or witnesses.

The notings on file

86. The Court has perused the records produced in both the petitions in order to examine whether the decision to go in for an arrest in these cases satisfies the requirement of the law.

87. As far as MMT is concerned, a copy of the arrest memo furnished to its Vice-President (Finance), Mr. Pallai has been placed on record. Preceding the said arrest memo was a handwritten note prepared on the file by Mr. Ashwani Kapoor on 9th January, 2016. It refers to 'intelligence received' which indicated that MMT "were not paying service tax properly" and that the credible information revealed that MMT generated revenues through two lines of business; air ticketing and hotel business. Under the sub-heading 'Hotel Business' in para 2.2 of this note, it is mentioned that in terms of the agreements entered into with the hotels, MMT blocks a certain number of rooms at a certain price but MMT is free to use any mark-up on the net rate or discount the published tariff.

88. The agreement between MMT and Hotel Maharaja Regency (P) Ltd. has been referred to in the said note. It is stated that the claim of MMT that they are agents of hotels is without any legal basis and MMT is paying service tax arbitrarily on that basis. Reference is then made to Rule 2(f) of the Place of Provision of Service Rules, 2012 which defines 'intermediary'

and para 5.9.6 of the Education Guide referred above which helps to determine whether a person is acting as an intermediary. Para 2.2.3 of the said note then gives the reasons why MMT is not acting as a hotel agent but is itself providing services of renting hotel rooms. Thus, it is stated that they were liable to pay service tax on the renting of hotel rooms at a value of 60% of the amount charged. Para 2.2.4 then states that MMT is not paying service tax to the government which they have collected for the service provided by them. The reference is made with the help of the data provided by MMT for the period from October 2010 to September 2015 and the calculations showed that they had not paid service tax amounting to Rs.82,78,03,760 and paid service tax only to an extent of Rs.15,33,84,593. Para 2.3.4 of the note is critical since it states that Mr. M.K. Pallai, Vice President (Finance) of MMT, in a statement dated 10th December, 2015, has stated that in case of service tax matters they took a legal opinion and that based on such legal opinion, he and Mr. Mohit Kabra, CFO of MMT, took the decision on taxation issues.

89. From the above it is concluded in para 3 that Mr. Pallai and Mr. Kabra were the main persons responsible for non-payment of service tax by MMT to the tune of Rs. 67 crores for the period from October 2010 to September 2015, which a cognizable and non-bailable offence under Section 89 (1) (d) of the FA read with Section 89 (1) (ii) and Section 90 (1) of the FA and Section 9AA of the CE Act. Para 4 is interesting inasmuch as it states as under:

> "4. Further, it is also apprehended that some of other similar online service providers namely (1) M/s. Cleartrip Private Limited, Unit No. 001, Ground Floor, DTC Building, Sitaram mills, Derise Road, NM Joshi Marg, Mumbai (2)

> Ibibo Group (P) Ltd., Pearl Tower, 4th Floor, Plot No. 51, Sector 32, Gurgaon (3) M/s. Yatra Online Private Limited 1101-1103, 11th Floor Unitech Cyber Park, Tower B, Sector-39, Gurgaon, may also be involved in similar service tax evasion. Hence, investigation against these service providers may also be initiated through summons proceedings."

90. It is, therefore, apparent that the decision to go in for the extreme coercive step of arrest of the key persons of MMT as well as two others viz., 'Cleartrip' and 'Yatra Online' were more or less taken at the same time and for the same reasons. This is also why separate teams were constituted around the same time and took the same action. What is significant in this note for arrest is that there is no reference whatsoever to the circular dated 17th September, 2013.

91. In the said note, Mr. Samanjasa Das, Additional Director General, DGCEI made a further note on 8th January, 2016 authorising Mr. Jatinder Singh, SIA to place Mr. Pallai under arrest stating that he had reason to believe that Mr. Pallai has committed an offence under Section 89 (1) (ii) of the FA.

92. At this stage, it is required to be noticed that it had to be first satisfied that MMT itself had committed an offence and, therefore, Mr. Pallai, being in charge of the affairs of the MMT, had committed an offence. Significantly, with there being no reference whatsoever to the circular dated 17th September, 2013 or the further amendment brought out to the said circular by the Circular No. 1010/17/2015 dated 23rd October, 2015, there was a clear non-application of mind. The circular dated 23rd October, 2015 prescribes the revised monetary limit in Central Excise and Service

Tax cases. This is issued by the CBEC and refers in turn to Circular No. 1009/16/2015-CX of the same date where monetary limits have been prescribed for launching prosecution. It has been decided that prosecution should be launched where the evasion of the central excise duty was more than Rs. 1 crore. Henceforth, arrest of a person for the offence under Section 89 (1) (d) read with 89 (1) (ii) of the FA would be made only in cases where the service tax evasion is equal to or more than Rs.1 crore.

93. It appears that a decision to launch prosecution and a decision to arrest have to be taken more or less simultaneously. In other words, without a decision to launch prosecution there cannot be a decision taken to arrest a person. The decision to launch prosecution must be informed by the safeguards spelt out in Circular No. 1009/16/2015-CX dated 23rd October, 2015. This circular, apart from raising monetary limit, also talks of 'habitual evaders'. Para 4.2 of this circular states that prosecution can be launched "in the case of a company/assessee habitually evading tax/duty or misusing Cenvat Credit facility. A company/assessee would be treated as habitually evading tax/duty or misusing Cenvat Credit facility if it has been involved in three or more cases of confirmed demand (at the first appellate level or above) of Central Excise duty or Service Tax or misuse of Cenvat Credit involving fraud, suppression of facts etc. in the five years from the date of the decision such that the total duty or tax evaded or total credit misused is equal to or more than Rs. One Crore. Offence register (335J) may be used to monitor and identify assessees who can be considered to be habitually evading duty."

94. The circular also acknowledges at para 4.3 that sanction of prosecution

has "serious repercussions for the assessee and therefore along with the above monetary limits the nature of evidence collected during the investigation should be carefully assessed. The evidences collected should be adequate to establish beyond reasonable doubt that the person, company or individual had guilty mind, knowledge of the offence, or had fraudulent intention or in any manner possessed mens-rea (guilty mind) for committing the offence."

95. There is a detailed procedure set out in para 6 regarding procedure to sanction a prosecution. Para 6.2, 6.3 and 6.4 of this circular are significant and read as under:

> "6.2 Prosecution should not be launched in cases of technical nature, or where the additional claim of duty/tax is based totally on a difference of opinion regarding interpretation of law. Before launching any prosecution, it is necessary that the department should have evidence to prove that the person, company or individual had guilty knowledge of the offence, or had fraudulent intention to commit the offence, or in any manner possessed mens rea (guilty mind) which would indicate his guilt. It follows, therefore, that in the case of public limited companies, prosecution should not be launched indiscriminately against all the Directors of the company but it should be restricted to only against persons who were in charge of day-to-day operations of the factory and have taken active part in committing the duty/tax evasion or had connived at it.
>
> 6.3 Prosecution should not be filed merely because a demand has been confirmed in the adjudication proceedings particularly in cases of technical nature or where interpretation of law is involved. One of the important considerations for deciding whether prosecution should be launched is the availability of adequate evidence. The standard of proof required in a criminal prosecution is higher as the case has to be established beyond reasonable

> doubt whereas the adjudication proceedings are decided on the basis of preponderance of probability. Therefore, even cases where demand is confirmed in adjudication proceedings, evidence collected should be weighed so as to likely meet the test of being beyond reasonable doubt for recommending prosecution. Decision should be taken on case-to-case basis considering various factors, such as, nature and gravity of offence, quantum of duty/tax evaded or Cenvat credit wrongly availed and the nature as well as quality of evidence collected.
>
> 6.4 Decision on prosecution should be normally taken immediately on completion of the adjudication proceedings. However, Hon'ble Supreme Court of India in the case of ***Radheyshyam Kejriwal [2011 (266) ELT 294 (SC)]*** has *inter alia*, observed the following (i) adjudication proceedings and criminal proceedings can be launched simultaneously; (ii) decision in adjudication proceedings is not necessary before initiating criminal prosecution; (iii) adjudication proceedings and criminal proceedings are independent in nature to each other and (iv) the findings against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution. Therefore, prosecution may even be launched before the adjudication of the case, especially where offence involved is grave, qualitative evidences are available and it is also apprehended that party may delay completion of adjudication proceedings."

96. What this circular again underscores is that there should be a comprehensive analysis of the evidence gathered before deciding to go in for prosecution. Importantly, prosecution should not be launched merely because a demand has been confirmed or particularly where the cases are of technical nature or where interpretation of law is involved. It is also not to be launched where additional claim of duty/tax is only based on difference of opinion regarding interpretation of law. Importantly, it has to

be normally taken only “immediately upon completion of adjudication proceedings”.

97. There is a reason behind this stipulation that prosecution should normally be launched only after the adjudication is complete. The 'adjudication' in this context is the adjudication of the penalty under Section 83 A of the FA. That provision mandates that there must be in the first place a determination that a person is "liable to a penalty", which cannot happen till there is in the first place a determination in terms of Section 72 or 73 or 73 A of the FA. Till that point, the entire case proceeds on the basis that there must be an apprehended evasion of tax by the Assessee. This apprehension hinges upon the analysis of the evidence gathered by the investigating agency. It is possible that the officer will take a different view because he has the opportunity of hearing both the sides and to more carefully analyze the evidence that has been gathered. Where prosecution is sought to be launched even before the adjudication of the penalty it has to be shown that (a) the offence involved is grave (b) qualitative evidence is available and (c) it is apprehended that the Assessee may delay the completion of adjudication proceedings. This underscores the importance of obtaining sanction for prosecution both in cases of MMT and IBIBO. A reference will be made to that shortly.

98. Turning to the grounds of the arrest that were communicated to Mr. Samanjasa Das, it appears that Mr. Jatinder Singh, who was delegated the authority to arrest by the former, himself added certain paragraphs in the grounds of arrest which were not mentioned in the notes prepared and sanctioned by Mr. Samanjasa Das, the Additional Director General of the

DGCEI. Importantly, the paragraphs added by him in the grounds of arrest read as under:

> "Whereas the contention of M/s. MMT that since they have remitted the Service Tax collected by them to the concerned hotels, it is the obligation of the hotel to pay Service Tax to the Government account, does not appear acceptable in view of the fact that as the provider of renting of hotel room service/short-term accommodation service, it is the statutory obligation of M/s MMT to discharge their due Service Tax liability. The hotels are mere input service providers to M/s MMT and M/s MMT's Service Tax liability cannot be fastened on the hotels. Besides, a large number of such hotels are not even registered Service Tax assesses and do not appear to have deposited the Service Tax claimed to have been remitted by M/s MMT to such hotels, in the Government account."

99. This is a significant addition to the so-called reasons why it is decided to arrest Mr. Pallai. The conclusion in this paragraph that "a large number of such hotels are not even registered Service Tax assessees and do not appear to have deposited the Service Tax" is on the unilateral searches conducted on the website by Mr. Jatinder Singh and his team which were obviously not confronted to Mr. Pallai at that stage. It now transpires from the pleading that the DGCEI officers were perhaps mistaken about the large number of hotels that were not found registered because the reasons why they may have failed to have been registered have been examined.

100. In terms of CBEC's own procedures, for the launch of prosecution there has to be a determination that a person is a habitual offender. There is no such determination in any of these cases. There cannot be a habitual offender if there is no discussion by the DGCEI with the ST Department regarding the history of such Assessee. Assuming that, for whatever

reasons, if the DGCEI does not talk to ST Department, certainly it needs to access the service tax record of such Assessee. Without even requisitioning that record, it could not have been possible for the DGCEI to arrive at a reasonable conclusion whether there was a deliberate attempt of evading payment of service tax. The failure by the DGCEI to look into the service tax records of these entities has led to a totally erroneous conclusion that they are habitual offenders. In fact, both these Assessees have been regularly paying service tax. It is also not that the ST Department was not aware that rebate may be availed by these Assessees in their respective returns. It is also not as if the ST Department has not been examining the books of accounts or records of these Assessees. In the case of MMT, there were SCNs issued in the past which were adjudicated.

101. In these circumstances, to go in for extreme step of launching prosecution and going for arrest without issuing an SCN under Section 73 or 73-A (3) of the FA, appears to be totally unwarranted.

Search of the premises

102. The Court would at this stage like to comment on the decision to search the premises. This is governed by Section 82 of the Act which reads as under:

> "**82. Power to search premises**
> (1) Where the Joint Commissioner of Central Excise or Additional Commissioner of Central Excise or such other Central Excise Officer as may be notified by the Board has reasons to believe that any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Chapter, are secreted in any place, he may authorise in writing any Central Excise Officer to search for and seize or

> may himself search and seize such documents or books or things.
>
> (2) The provisions of the Code of Criminal Procedure, 1973, relating to searches, shall, so far as may be, apply to searches under this section as they apply to searches under that Code."

103. It is seen that there are two essential requirements as far as Section 82 of the FA is concerned. An opinion has to be formed by the Joint Commissioner or Additional Commissioner or other officers notified by the Board that "any documents or books or things" which are useful for or relevant for any proceedings under this Chapter are secreted in any place. Therefore, the note preceding the search of the premises has to specify the above requirement of the law. In ***Mapsa Tapes Pvt. Ltd. v. Union of India 2006 (201) E.L.T. 7 (P&H)***it was held in the context of the power of search under Section 105 of the Customs Act 1962, which is similar to Section 82 of the FA, is that: " while existence power of seizure may be justified but its exercise will be liable to be struck down unless 'reasons to believe' were duly recorded before action of search and seizure is taken." In none of the present cases does the note on file mention the fact that any document has been secreted away and is relevant for the proceedings. There appears to be no application of mind to the circulars and Section 82 of the FA at all. The officers of the DGCEI, without referring to the requirements of the FA, have entered the premises and made the Assessees agree to pay the alleged service tax dues without even an SCN. This conduct, in the considered view of the Court, is wholly unacceptable. Not only is this in clear violation of the mandate of Section 82 of the FA, but is also unconstitutional since it impinges on the life and liberty of the

employees of the entities involved. The Court, therefore, finds that the search of the premises of the two Petitioners in the instant case was contrary to law and, therefore, legally unsustainable.

Payments were not 'Voluntary'

104. It is repeatedly urged by Mr. Satish Aggarwala that in the bail proceedings before the Magistrate, the Senior counsel representing Mr. Pallai volunteered that MMT would make payment of the arrears of service tax dues and, therefore, it cannot be said that there was any coercion or compulsion on MMT to make such payment. At the same time, he urged that such payment was not a pre-condition for the grant of bail and that in principle the DGCEI would oppose grant of bail in criminal proceedings only because an offer is made to pay the arrears of service tax dues in such proceedings.

105. In the first place, the Court is unable to accept that when an offer is made in the circumstances outlined before a criminal court for payment of alleged service tax arrears without even a show cause notice in this regard being issued, it is plain that the offer is made only to avoid the further consequences of continued detention. Such a statement can hardly be said to be voluntary even though it may be made before a Court. Secondly, there appears a contradiction because the DGCEI did not decline to receive the offer of payment of alleged service tax arrears.

106. In a different context, while interpreting the provisions of the Delhi Value Added Tax Act, 2004 ('DVAT Act'), this Court in ***Capri Bathaid Pvt. Ltd. v. Commissioner of Trade & Taxes 2016 (155) DRJ 526 (DB)*** took exception to the officials of the Department of Trade and Taxes

collecting arrears of sales tax from dealers at the time of survey and search. The Court pointed out that the said practice was illegal and there could be no collection without there being an assessment. The same principle would apply here as well. Without even an SCN being issued and without there being any determination of the amount of service tax arrears, the resort to the extreme coercive measure of arrest followed by detention was impermissible in law. Consequently, the amount that was paid by the Petitioners as a result of the search of their premises by the DGCEI, without an adjudication much less an SCN, is required to be returned to them forthwith. It is clarified that since the payment was collected by the DGCEI illegally, the refund in terms of this order will not affect the bail already granted to Mr. Pallai.

Conduct of the officers of the DGCEI

107. The Court was not a little surprised that the DGCEI did not think it appropriate to check with the ST Department whether the Petitioners were regular in filing their returns and whether such returns had been assessed. In the present case, both the Petitioners have been filing returns. The ST Department has a record of the filing of returns and the corresponding assessments. Whatever may be the secret nature of the operation, it was imperative for the DGCEI to first check whether the entity whose employees are sought to be arrested has regularly been filing service tax returns or is a habitual offender in that regard. It is only after checking the entire records and seeking clarification where necessary, that the investigating agency can possibly come to a conclusion that Section 89 (1) (d) is attracted.

108. None of the above safeguards were observed in the present case. There are presumptions drawn on the documents seized and are without appropriate notice to the Petitioners under Section 73A (3) of the FA asking them to explain why they should not be proceeded against under Section 89 (1) (d) of the FA. There was no consultation with the ST Department. Even the records of the ST returns filed by the two Petitioners were not called for and examined. The Court is, therefore, satisfied that in the present case the DGCEI acted with undue haste and in a reckless manner.

Additional and supplementary affidavits

109. The conduct of the officials of the DGCEI in undertaking the entire exercise of searching the premises of the Petitioner and then proceeding to arrest Mr. Pallai are the subject matter not only of the writ petition itself but the supplementary affidavits and the replies to those supplementary affidavits of Mr. Pallai and Mr. Deepak Katyal of MMT by the officials of the DGCEI. Detailed charts have been presented to the Court in regard to the specific aspects of these affidavits.

110. The Court is of the view that with there being no meeting point or common ground in the versions presented by these affidavits, it is difficult to adjudicate this aspect in the present proceedings. There will have to be an enquiry in which an opportunity is granted for cross-examination of the deponents of the various affidavits. Consequently, the Court grants liberty to officials of MMT to institute appropriate proceedings in accordance with law in which the affidavits filed in these proceedings can be relied on. This holds good for the officials of the DGCEI as well when called upon to

defend those proceedings in accordance with law. The Court accordingly refrains from examining that aspect of the matter any further.

Pendency of separate criminal proceedings not a bar

111. At this stage, the Court also deals with another objection raised by Mr. Satish Aggarwala. He urges that as proceedings have been separately instituted by the Assessees in the criminal jurisdiction to challenge the arrest and detention of the officers, this Court should not deal with that aspect of the matter at all.

112. The case of the Petitioners has been that the decision to arrest was based on a wrong interpretation of law and which is why they have come to the Court seeking interpretation of the scope and ambit of the powers under Sections 89, 90 and 91 of the FA. This is clearly within the realm of powers of this Court. The Court cannot decline to exercise its jurisdiction and must clarify the legal position so that future errors and exercise of such powers of the officers of the DGCEI or, as the case may be, the ST Department can be prevented. This Court decided, therefore, to proceed with these petitions notwithstanding that petitions may be pending in the criminal jurisdiction of this Court.

113. The possibility of misuse of statutory powers by officers was commented upon noticed by the Supreme Court in ***Dabur India Limited v. State of Uttar Pradesh (1990) 4 SCC 113*** in the following passage:

> "31. Before we part this case, two aspects have to be adverted to – one was regarding the allegation of the Petitioner that in order to compel the Petitioners to pay the duties which the Petitioners contended that they were not liable to pay, the licence was not being renewed for a period and the Petitioners were constantly kept under

threat of closing down their business in order to coerce them to make the payment. This is unfortunate. We would not like to hear from a litigant in this country that the government is coercing citizens of this country to make payment of duties which the litigant is contending not to be leviable. Government, of course, is entitled to enforce payment and for that purpose to take all legal steps but the government, Central or State, cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizen were not legally obliged to make. If any money is due to the government, the government should take steps but not take extra legal steps or manoeuvre. Therefore, we direct that the right of renewal of the Petitioner of licence must be judged and attended to in accordance with law and the occasion not utilized to coerce the Petitioners to a course of action not warranted by law and procedure....."

114. The Bombay High Court in the context of abuse of the powers vested in officers under the Customs Act, 1962 observed in ***Vodafone Essar South Limited v. Union of India 2009 (237) ELT 35 (Bom)***, as under:

> "22. In these circumstances, we are clearly of the opinion that in the present case, the conduct of the DRI Officers is not only high handed but it is in gross abuse of the powers vested in them under the Customs Act. It is apparent that the DRI officers in utter disregard to the order passed by the Commissioner of Customs (A), Mumbai have forced the Petitioners to pay the amount by threat and coercion which is not permissible in law. Thus, the conduct of the DRI officers in the present case in collecting the amount from the Petitioners towards the alleged differential duty is wholly arbitrary, illegal and contrary to law. Having terrorised the Petitioners with the threat of arrest, it is not open to the DRI Officers to contend that the amount has been paid by the Petitioners voluntarily. We strongly condemn the high handed action of the DRI Officers in totally flouting the norms laid down under the Customs Act in relation to reassessment proceedings and purporting to collect the amount even before reassessment. We hope that such incidents do not occur in the future."

115. The Court is satisfied that in the present case the action of the DGCEI

in proceeding to arrest Mr. Pallai was contrary to law and that Mr. Pallai's constitutional and fundamental rights under Article 21 of the Constitution have been violated. The Court is conscious that Mr. Pallai has instituted separate proceedings for quashing of the criminal case and, therefore, this Court does not propose to deal with that aspect of the matter.

Summary of conclusions

116. To summarise the conclusions in this judgment:

(i) The scheme of the provisions of the Finance Act 1994 (FA), do not permit the DGCEI or for that matter the Service Tax Department (ST Department) to by-pass the procedure as set out in Section 73A (3) and (4) of the FA before going ahead with the arrest of a person under Sections 90 and 91 of the FA. The power of arrest is to be used with great circumspection and not casually. It is not to be straightway presumed by the DGCEI, without following the procedure under Section 73A (3) and (4) of the FA, that a person has collected service tax and retained such amount without depositing it to the credit of the Central Government.

(ii) Where an assessee has been regularly filing service tax returns which have been accepted by the ST Department or which in any event have been examined by it, as in the case of the two Petitioners, without commencement of the process of adjudication of penalty under Section 83 A of the FA, another agency like the DGCEI cannot without an SCN or enquiry straightway go ahead to make an arrest merely on the suspicion of evasion of service tax or failure to deposit service tax that has been collected. Section 83 A of the FA which provides for adjudication of

penalty provision mandates that there must be in the first place a determination that a person is "liable to a penalty", which cannot happen till there is in the first place a determination in terms of Section 72 or 73 or 73 A of the FA.

(iii) For a Central Excise officer or an officer of the DGCEI duly empowered and authorised in that behalf to be satisfied that a person has committed an offence under Section 89 (1) (d) of the FA, it would require an enquiry to be conducted by giving an opportunity to the person sought to be arrested to explain the materials and circumstances gathered against such person, which according to the officer points to the commission of an offence. Specific to Section 89 (1) (d) of the FA, it has to be determined with some degree of certainty that a person has collected service tax but has failed to pay the amount so collected to the Central Government beyond the period of six months from the date on which such payment is due and further that the amount exceeds Rs. 50 lakhs (now enhanced to Rs. 1 crore).

(iv) A possible exception could be where a person is shown to be a habitual evader of service tax. Such person would have to be one who has not filed a service tax return for a continuous length of time, who has a history of repeated defaults for which there have been fines, penalties imposed and prosecutions launched etc. That history can be gleaned only from past records of the ST Department. In such instances, it might be possible to justify resorting to the coercive provisions straightaway, but then the notes on file must offer a convincing justification for resorting to that extreme measure.

(v) The decision to arrest a person must not be taken on whimsical grounds; it must be based on 'credible material'. The constitutional safeguards laid out in ***D K. Basu's case*** (*supra*) in the context of the powers of police officers under the Cr PC and of officers of central excise, customs and enforcement directorates, are applicable to the exercise of powers under the FA in equal measure. An officer whether of the Central Excise department or another agency like the DGCEI, authorised to exercise powers under the CE Act and/or the FA will have to be conscious of the constitutional limitations on the exercise of such power.

(vi) In the case of MMT, without even an SCN being issued and without there being any determination of the amount of service tax arrears, the resort to the extreme coercive measure of arrest followed by the detention of Mr. Pallai was impermissible in law.

(vii) In terms of CBEC's own procedures, for the launch of prosecution there has to be a determination that a person is a habitual offender. There is no such determination in any of these cases. There cannot be a habitual offender if there is no discussion by the DGCEI with the ST Department regarding the history of such Assessee. Assuming that, for whatever reasons, if the DGCEI does not talk to ST Department, certainly it needs to access the service tax record of such Assessee. Without even requisitioning that record, it could not have been possible for the DGCEI to arrive at a reasonable conclusion whether there was a deliberate attempt of evading payment of service tax. In the case of MMT, the decision to go in for the extreme step of arrest without issuing an SCN under Section 73 or 73A (3) of the FA, appears to be totally unwarranted.

(viii) For the exercise of powers of search under Section 82 of the FA, (i) an opinion has to be formed by the Joint Commissioner or Additional Commissioner or other officers notified by the Board that "any documents or books or things" which are useful for or relevant for any proceedings under this Chapter are secreted in any place, and (ii) the note preceding the search of a premises has to specify the above requirement of the law. The search of the premises of the two Petitioners is in clear violation of the mandate of Section 82 of the FA. It is unconstitutional and legally unsustainable.

(ix) The Court is unable to accept that payment by the two Petitioners of alleged service tax arrears was voluntary. Consequently, the amount that was paid by the Petitioners as a result of the search of their premises by the DGCEI, without an adjudication much less an SCN, is required to be returned to them forthwith.

(x) It was imperative for the DGCEI to first check whether the entity whose employees are sought to be arrested has regularly been filing service tax returns or is a habitual offender in that regard. It is only after checking the entire records and seeking clarification where necessary, that the investigating agency can possibly come to a conclusion that Section 89 (1) (d) is attracted. None of the above safeguards were observed in the present case. The DGCEI acted with undue haste and in a reckless manner.

(xi) Liberty is granted to the officials of MMT and IBIBO to institute appropriate proceedings in accordance with law against the officers of the DGCEI in which the supplementary affidavits filed in these proceedings

and the replies thereto can be relied on. This holds good for the officials of the DGCEI as well when called upon to defend those proceedings in accordance with law.

(xii) The Court cannot decline to exercise its jurisdiction and clarify the legal position as regards the interpretation of the scope and ambit of the powers under Sections 89, 90 and 91 of the FA. This is clearly within the powers of this Court. That is why this Court has decided to proceed with these petitions notwithstanding that the criminal petitions may be pending in the criminal jurisdiction of this Court.

(xiii) The Court is satisfied that in the present case the action of the DGCEI in proceeding to arrest Mr. Pallai, Vice-President of MMT, was contrary to law and that Mr. Pallai's constitutional and fundamental rights under Article 21 of the Constitution have been violated. The Court is conscious that Mr. Pallai has instituted separate proceedings for quashing of the criminal case and, therefore, this Court does not propose to deal with that aspect of the matter.

117. The interim directions issued in the two writ petitions are made absolute. It is directed that the DGCEI will refund to each of the Petitioners forthwith the respective amounts deposited by them towards alleged dues of service tax forthwith and in any event not later than four weeks from today. Any delay in refund beyond the said period will make the DGCEI liable to pay simple interest at 6 % per annum on the respective amounts from the date on which they became due in terms of this order till the date of payment. The refund in terms of this order will not affect the bail granted to Mr. Pallai of MMT.

118. The Court clarifies that it has in this decision examined and determined the legality of the DGCEI in proceeding to search the premises of the two Petitioners and then deciding to arrest senior officials of the two Petitioners. The observations made by the Court on the merits of the contentions of either party is in the above context. This is not intended to influence the adjudication proceedings that might ensue if an SCN is issued in accordance with law by the DGCEI to either Petitioner. Further, the right of the Petitioners and any of their officials aggrieved by the actions of the officials of the DGCEI to institute appropriate proceedings in accordance with law to recover damages and/or compensation is reserved.

119. The writ petitions are disposed of in the above terms with costs of Rs. 1 lakh in each petition which will be paid by the DGCEI to each Petitioner within four weeks.

S.MURALIDHAR, J

VIBHU BAKHRU, J

SEPTEMBER 1, 2016
Rm/b'nesh/dn