By-pass HC – For Good and Bad

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Our budgets are known for retrospective amendments. Many a time such retrospective amendments are resorted, to overcome the effect of certain judicial pronouncements which were in favour of the tax paying public and occasionally, such retrospective amendments also brought cheers to them.

This year budget has two unique retrospective amendments, of which one shows the grace of the Government and the other having consequences, which are grave.

First the good one.

Rule 6 of the Cenvat Credit Rules, 2004 and its various previous avatars (Rule 57 CC of the Central Excise Rules, 1944, Rule 57 AD of the Central Excise Rules, 1944, Rule 6 of the Cenvat Credit Rules, 2001 / 2002 / 2004) deals with the obligation of a manufacturer availing cenvat credit on inputs and input services and manufacturer manufacturing both dutiable and exempted final products.

Till the amendments made with effect from 01.04.2008, they had an option either to pay a % (which varied from 10 % to 5 % during different periods) of the price of the exempted goods (hereinafter referred to as the "amount"). The other option of maintaining separate records is a cumbersome one. Very often, for availing a small amount of cenvat credit on certain common inputs / input services, the department used to slap hefty demands at the prescribed percentage of the value of the exempted goods.

There were umpteen number of decisions, holding that if proportionate credit attributable to the exempted goods is reversed, there is no need to pay any "amount". These decisions were based on the rationale laid down by the Hon'ble Supreme Court in the case of Chandrpur Magnet case, to the effect that once the credit is reversed, it is as good as non availment of credit. Then came the ghost in the form of the decision of the Hon'ble High Court of Mumbai in the case of CCE Vs - Nicholas Piramal (India) Limited, where it is held that there is no escape from payment of the "amount" and reversal of proportionate credit is not sufficient, if one opted not to maintain separate records.

It is in this context, the Finance Bill 2010 proposes certain retrospective amendments in the various provisions dealing with the subject, to the effect that in case of any pending proceedings on the subject, the assesses can choose to calculate the proportionate credit attributable to the manufacture of exempted goods and pay the same within 6 months from the date of Presidential assent to the Finance Bill, 2010 along with interest @ 24 % p.a.. This has brought succour to large number of assesses, who were having sleepless nights ever since the Mumbai High Court decision in Nicholas Piramal, supra.

Now to the bad one.

The Delhi High Court decision in the case of Home Solutions Retail India Limited Vs UOI, holding that there is no service tax on "renting of immovable property per se" but the levy could be imposed only on services in relation to renting of immovable property, brought lot of cheers in the field. The decision was followed by beleaguered Revenue rushing to the Apex Court and tenants and landlords rejoicing.

But, it has now been retrospectively amended that "renting of immovable property" by itself would be a taxable service.

In a way, the widespread confusion prevailing in the field, where tenants refusing to pay service tax, department issuing notices of demand, the High Court restraining the department from recovering service tax, has now been put to rest, albeit in favour of the Government.

Now the only remaining silver line is to pursue the defence that renting of immovable property is not at all a service, but is a transaction in immovable property, which is the State's domain, which question was left unanswered by the Hon'ble High Court of Delhi.