
(2016) 09 DEL CK 0112
In the Delhi High Court
Case No : W.P.(C) 756 of 2016

eBIZ. Com Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 01-09-2016

Acts Referred:

Finance Act, 1994 — Section 70, 72, 73-A

Citation : (2016) 288 CurTR 609

Hon'ble Judges : S. Muralidhar and Vibhu Bakhru, JJ.

Bench : Division Bench

Advocate : Mr. J.K. Mittal with Mr. Rajveer Singh and Mr. Rajesh Kumar, Advocates, for the Petitioner; Mr. Jasmeet Singh, CGSC with Ms. Astha Sharma, Mr. Srivats Kaushal, Ms. Nishtha Kishore, Ms. Gayatri Aryan, Ms. Abha Malhotra and Mr. Gaurang Bindra, Advocates, for the Respondent.

Final Decision : Disposed Off

Judgement

Dr. S. Muralidhar, J.—This writ petition by eBIZ. Com Private Limited ("eBIZ"), directed against Union of India (Respondent No. 1), the Director General of Central Excise Intelligence ("DGCEI" - Respondent No. 2) and the Commissioner Audit-II of the Ghaziabad Commissionerate (Respondent No.3), seeks a declaration that the search conducted by the DGCEI on the business premises of the Petitioner eBIZ on 19th January, 2016 apprehending evasion of payment of service tax, as well as the summons issued to eBIZ on 19th and 21st January 2016 by the DGCEI are illegal and ultra vires the provisions of the Finance Act, 1994 ("FA"). Respondent No. 3 was impleaded pursuant to the order dated 28th January, 2016 passed by this Court.

Background facts

2. eBIZ is engaged in the business of developing and selling various online/offline educational software packages as well as providing holiday accommodation booking packages. eBIZ is registered with the Service Tax Department (ST Department) and has been paying service tax since the year 2001. eBIZ

describes the services rendered by it of booking of tour packages as that of a "tour operator". It has been filing its ST returns regularly. It is stated that in every half-yearly return filed by the Petitioner, exemption available to tour operators under Notification no. 26/2012-ST dated 20th June 2012 has been claimed. eBIZ states that the said returns have been duly verified by the ST Department.

3. It is stated that on 12th January 2007, the ST Department conducted a search in the premises of eBIZ as a result of which eBIZ was compelled to deposit service tax of Rs. 25,55,000/- and interest thereon amounting to Rs. 2,59,000/-. eBIZ further states that consequent upon the said search, the ST Department issued a show cause notice ("SCN") dated 3rd July 2007. Pursuant thereto, an adjudication order was passed and eBIZ paid a penalty amount of Rs. 6,37,500 without prejudice to its right to go in appeal against the said order. By an order dated 29th August 2012, the Commissioner, Service Tax (Appeals) set aside the order passed by the adjudicating authority on the aforesaid SCN. Consequently, on 27th January 2014 eBIZ applied for the refund of the amount paid in the sum of Rs. 34,51,500/-. It is stated that till date the said refund application has not been disposed of by the ST Department.

4. eBIZ states that for a second time, on 4th October 2012, a search was conducted by the ST Department in its premises. The statement of Mr. Pawan Malhan, Managing Director (MD), eBIZ was recorded and various documents were seized/resumed. However, no SCN was issued pursuant to the said search. A copy of the panchnama dated 4th October 2012 revealed that inter alia the documents seized included the file containing the ST-3 returns from April 2009 to March 2012; copies of balance sheets from Assessment Year (AY) 2007-2008 to 2011-2012 and the trial balance for 2012-2013; a file containing miscellaneous papers and two brochures. Summons were issued on the same date to eBIZ requiring it to produce the ST returns for 2007-2008 and 2008-2009; copy of agreement entered into with M/s. Balaji Digital Solutions (P) Limited; copy of agreements/contracts entered into with Hotels or Travel agents for tour packages and list of associates of Noida and Bulandshahr for FY 2011-2012.

5. eBIZ states that in 2014 the ST Department conducted an audit of the records of eBIZ for the years 2011-2012 and 2013-2014. eBIZ was asked to deposit Rs. 73,387/- together with interest and penalty. It is stated that on 12th December 2014, eBIZ deposited Rs. 75,589/-. When discrepancies were pointed out by the ST Department for other years, they too were similarly rectified. Further, whenever there was a dispute, SCNs were issued which were then adjudicated. It is pointed out that in every half-yearly return filed by eBIZ, on the gross amount received by it, it was claiming exemption under Notification No. 26/2012-ST and the balance taxable amount as well as the computation of service tax thereon and the tax payments made duly reflected in the returns were verified by the officers of the ST Department. Copies of such ST returns are enclosed along with the petition.

6. On 13th October 2015, the ST Department proposed, by a letter of that date by the Superintendent (Group-4E), Audit-II of the Meerut Commissionerate, conducting a service tax audit of the accounts/records of eBIZ for the period up to March 2015. The said letter further asked eBIZ to provide copies of balance sheet, trial balance and annual financial report for financial years ("FYs") 2010-2011 to 2014-2015 along with all the schedules, tax audit report (Form 3CD), TDS detail (Form 26AS), copies of ST-3 returns submitted for the years 2010-2011 to 2014-2015; value and payment of service tax (service wise/month wise) through cash and credit for the last five years and soft copies of the aforesaid records and documents. All the above information was submitted by eBIZ on 15th December 2015. It is pointed out that since they were audited every year, therefore, it was enclosing copy of balance sheet, P&L account along with all the schedules, tax reports, Form 3CD, TDS details, ST-3; and value and payment of service tax (service wise/month wise) only for the relevant year i.e., 2014-2015. The ST returns filed by eBIZ for all the aforementioned years have been enclosed with the petition.

7. It is pointed out that after conducting the verification audit of eBIZ in 2015, a notice dated 6th January 2016 was issued for examining the admissibility of the exemption claimed under Notification No. 26/2012-ST dated 20th June 2012. However, before the records could be submitted, a search was conducted on 19th January 2016 by the DGCEI.

8. eBIZ states that throughout the above mentioned periods, it was availing abatement of 90% of the service tax payable by it as "tour operator" with the approval of the ST Department. It further states that all its records were verified and its service tax payments under the category "tour operator" services for booking of tour packages was never disputed. This was despite the audit and searches conducted on several occasions as referred to hereinbefore. Reference is made to an SCN dated 17th November 2014 demanding service tax of Rs. 34,00,425/- on the ground of reversal of amount of unclaimed commission. This demand was subsequently confirmed by the adjudicating authority on 21st December 2015. eBIZ was filing appeal against the said order. Reference is also made to another SCN dated 2nd November 2015, demanding service tax of Rs. 5,33,341/-, which is yet to be adjudicated.

Search and arrest proceedings

9. In the above background, a search was conducted in the premises of eBIZ on 19th January 2016 by the officers of the DGCEI and various documents/records were seized with a panchnama being prepared on the same date. Five summons dated 19th January 2016 were also issued to various officers of eBIZ including Mr. Pawan Malhan, MD by the Senior Intelligence Officer ("SIO"), DGCEI. It is stated that the SIO forced Mr. Pawan Malhan to record in his statement that he has evaded Rs. 17 crores service tax. When Mr. Malhan refused to do so, he was arrested late in the evening at 7:40 pm on 20th January 2016 under Section 91 of the FA and sent to judicial custody. It was alleged that eBIZ had committed an

offence under Section 89 (1) (ii) of the FA. The bail application of Mr. Malhan dated 21st January 2016 was rejected by the learned Metropolitan Magistrate (MM) by an order dated 25th January 2016. While Mr. Malhan was still in custody, two more summons were issued to two officers of eBIZ by the DGCEI on 21st January 2016.

10. It is pointed out that on the basis of Notification No. 26/2012-ST and an earlier Notification No. 01/2006-ST, exemption was being consistently claimed by eBIZ and not disputed by the ST Department. eBIZ contends that the action of the DGCEI in terming the said claim to be unlawful and estimating the ST liability at Rs. 17 crores for the last five years was based only on the change of opinion and illegal search conducted in the premises of eBIZ.

11. It is on the above basis that the present writ petition was filed praying inter alia for a declaration that the action of the DGCEI was arbitrary, malicious and motivated and against the provisions of the FA and to declare the summons dated 19th and 21st January 2016 to be without authority of law.

Proceedings before the Court

12. In this writ petition, the Court issued notice to the Respondents on 28th January 2016. At that stage, Mr. Malhan was still in custody and his bail application was to be taken up on 29th January 2016 by the ASJ. Mr. Atul Singh, Deputy Director, DGCEI and Mr. Sunil Joshi, SI-6, DGCEI were present along with the records, which were perused by the Court. This included a note proposing search in the premises of eBIZ and a separate note proposing the arrest of Mr. Malhan. In para 8 of the order passed by the Court on 28th January 2016, it was recorded as under:

"8. It is not clear from these notes that prior to going in for the extreme measure of arresting the MD of the Petitioner, the DGCEI examined the entire previous records of the Petitioner and in particular the assessments in relation to the years 2011-12 onwards. In particular, it is not clear whether the DGCEI was conscious of the pending proceedings and show cause notices issued by the CST under Section 73 (1) of the Finance Act, 1994 and the proceedings consequent thereto. This aspect is significant since the invocation of the powers of arrest without warrant under Section 90 (1) read with Section 89 (1) (ii) of the Finance Act 1994 presupposes the arrival of a satisfaction regarding the Assessee having collected service tax but failing to pay to the Department as envisaged in Section 89 (1) (d) thereof. The question that would arise is whether there can be a pre-determination regarding the offence under Section 89 (1) (d) of the Finance Act 1994 without issuance of a notice under Section 73 (1) regarding the alleged evasion of payment of service tax in the sum of Rs. 17 crores, followed by an adjudication."

13. The Court accordingly issued an interim direction restraining the DGCEI from taking any further coercive action against eBIZ or its officials. Thereafter, in para 10 it was clarified as under:

"10. It is clarified that as far as the proceedings consequent upon the arrest of the MD of the Petitioner pending in the Court of the learned ASJ is concerned, it will proceed in accordance with law and this Court expresses no opinion in that regard. Further, it is made clear that the Petitioner will continue to cooperate with the DGCEI, answer the queries and provide whatever documents are available in its possession as and when required by the DGCEI."

14. The Court was informed that a notice dated 21st/22nd January 2016 had been received from the ST Commissionerate, Ghaziabad asking for documents relating to FYs 2013-2014 and 2014-2015, which had already been seized by the DGCEI. In those circumstances, the Court directed the Service Tax Commissionerate, Ghaziabad, to be impleaded as Respondent No. 3 and further directed that the proceedings consequent upon such notice shall remain stayed till the next date.

15. On the hearing on 2nd May 2016, the records produced by the DGCEI included a note dated 18th January 2016, proposing the arrest of Mr. Malhan. The first line of the said note read thus: "An information has been received in this Directorate General that M/s. Ebiz Com. Private Ltd. B-18, Sector-63, Noida, Uttar Pradesh 201301 are not discharging their service tax liability properly". When the Court enquired whether the DGCEI had verified such information with the Commissionerate of Service Tax in whose jurisdiction the eBIZ was functioning and had been assessed and paying service tax, Mr. Satish Aggarwala, learned counsel for the DGCEI stated, on instructions, that DGCEI never contacted the Commissionerate of Service Tax at any stage prior to the search, seizure and arrest of Mr. Malhan. He added that the DGCEI was not obliged to do so. When asked what was the "information" received. Mr. Aggarwala stated that this had been kept in another file in a sealed cover in the custody of Mr. Vivek Pandey, Joint Director, DGCEI. In the circumstances, the Court passed an order on 2nd May 2016, directing Mr. Pandey to remain present in the Court on the next date along with the file which carried the information on the basis of which the decision was taken to arrest Mr. Malhan.

16. In the meanwhile, since the counter affidavit had been filed by the DGCEI and the rejoinder thereto filed by the Petitioner, further permission at the request of Mr. Aggarwala was granted for the DGCEI to file a further short affidavit which would only deal with any new point made in the rejoinder which required such response.

17. On 18th May 2016, Mr. Vivek Pandey brought the above-mentioned file containing the information in a sealed cover. Although Mr. Aggarwala requested the Court to not open the sealed cover in the Court, since according to him even the mere sight of the papers in the file might give an indication to the counsel for the Petitioner the nature of the documents contained therein and might reveal the identity of the informer who gave the information, the Court on opening the packet found that there was absolutely nothing in the said documents, which were actually photocopies and a booklet, which could convey any such further

information on mere sight as suggested by Mr. Aggarwala.

18. The Court nevertheless perused the papers itself. It was found that the information from the file was reduced to computer printed sheet containing information recording the functioning of eBIZ, which was undated. There was a thumb impression purportedly of the informant at the bottom of the page without disclosing the name of the informer. The packet also contained a declaration purportedly given by the informer to the DGCEI, which again only bore a thumb print without any name and without any date or place. The Court found nothing in the said information which was not already part of the record of the case. In any event, it was not information which was not already available with the ST Department.

19. Three separate counter affidavits have been filed. The counter affidavits filed by Respondent No. 1/Union of India and Respondent No. 2/DGCEI are word to word identical. A separate counter affidavit has been filed by the ST Department/Respondent No. 3, which was impleaded by the order dated 28th January 2016. Interestingly, Mr. Satish Aggarwala, learned counsel appearing for all three Respondents although stated that the stand of the ST Department was different from that of the Union of India and the DGCEI.

Counter affidavit of Respondent No. 3

20. The counter affidavit on behalf of the ST Department (Respondent No. 3) has been filed by Mr. Udai Bhan Singh, Assistant Commissioner, Circle-4, Audit-II, Commissionerate, Central Excise & Service Tax, Ghaziabad. It confirms that eBIZ is registered with the Service Tax Commissionerate at Noida with the registration number AABCE3009PST001. It further confirms that eBIZ has obtained service tax registration in respect of following services:

- i. Tour operator service.
- ii. Online information and database access or retrieval.

21. It is stated that the Central Excise & Service, Audit-II Commissionerate, Ghaziabad came into existence with effect from 15th October 2014. It is pointed out that the Assessments are selected for audit from time to time as per audit norms specified in the Audit Manual. It is stated that in the year 2014-2015, for the first time, the Audit Commissionerate, Ghaziabad conducted an audit of eBIZ in terms of Rule 5A of the Service Tax Rules, 1994 ("ST Rules"). It is stated that in response to the letter sent to eBIZ informing them about the scheduled audit and requesting them to produce the relevant documents, eBIZ submitted the balance sheet for FY 2013-2014, half-yearly service tax returns for the same year, registration certificate in Form ST-2, the statement of CENVAT credit etc. Thereafter, the audit team visited the business premises of eBIZ in the months of November and December and conducted the service tax audit. The list of financial records produced before the audit team has also been set out in the counter affidavit.

22. It is further stated that on examination of the sale invoices issued by eBIZ in respect of its tour operator services, it was seen that it had specifically mentioned the description of services as "eBIZ Holiday Accommodation Package" in its sale invoices and the same were issued in favour of clients desirous to avail a "Holiday accommodation package". The invoices also contained a declaration by the client inter alia stating that the client has "read and completely understood the terms and conditions" for availing the holiday accommodation package and had agreed to them. The declaration from the client further read: "I have received eBIZ Special Educational package (Free) online immediately after registration."

23. Respondent No. 3 also acknowledged that 90% abatement from the gross value of "Tour Operator Service" is admissible under Notification No. 26/2012-ST subject to the following conditions:

"i) CENVAT credit on inputs, capital goods and (input services other than the input service of a tour operator) (input services), used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.

ii) The invoice, bill or challan issued indicates that it is towards the charges for such accommodation.

(iii) This exemption shall not apply in such cases where the invoice, bill or challan issued by the tour operator, in relation to a tour, only includes the service charges for arranging or booking accommodation for any person and does not include the cost of such accommodation."

24. It is specifically stated that the audit team accepted the said documents, viz., sale invoices issued by eBIZ in respect of "Tour Operator Service" as valid and genuine documents and further that since the conditions for availing exemption under Notification No. 26/2012-ST stood satisfied, the audit had no reason or any basis to challenge the admissibility of exemption availed by eBIZ in respect of "Tour Operator Service". The audit team also examined the brochure/catalogue of eBIZ which gave details of the various packages offered by eBIZ. The brochure also provided the details of 48 hotels with domestic destinations and five international destinations for "holiday accommodation package". The invoices showed the gross amount inclusive of all taxes charged towards price of such hotel holiday accommodation. The income from such service was booked under the head "Hotel Holiday accommodation" by eBIZ in their financial accounts and appropriate service tax based on such claims was paid and also shown in the statutory returns submitted to the Department. In that view of the matter, there was no reason for the audit team to challenge the admissibility of the exemption availed by the Petitioner under Notification No. 26/2012-ST.

25. Para 11 of the counter affidavit of the ST Department mentions eight audit objections of which five were accepted by eBIZ and these five involved service tax to the tune of Rs. 15.68 lakh. This was deposited by eBIZ on the spot. The

remaining objections were not accepted and an SCN dated 2nd November 2015 was issued for recovery of service tax of Rs. 5,33,541/- and the said SCN is stated to be pending adjudication.

26. Respondent No. 3 further states that eBIZ was again selected for audit in 2014-2015 and again asked by a letter dated 13th October 2015 issued by the audit team to submit the relevant documents/records. After some of the information/records were submitted on 15th December 2015, the audit of the Unit was initiated but the same could not be completed. This was followed by a written request on 6th January 2016 from the Audit Group-4E to eBIZ asking it to produce vouchers in respect of all types of holiday packages and related bills raised by respective hotels for the accommodation arranged by eBIZ for its customers for the FYs 2013-2014 and 2014-2015.

27. In its counter-affidavit, Respondent No. 3 states that the documents required by notice dated 6th January 2016 were only to examine and verify the quantum of abatement availed by eBIZ and not for examining the issue of admissibility of exemption. Another reminder was sent on 22nd January 2016. However, in view of the order dated 28th January 2016 of this Court, no further action was taken.

28. Respondent No. 3 points out that the functioning of the audit is different from the functioning of the DGCEI and that "both work in their respective exclusive domain." It is sought to be suggested that private records maintained by eBIZ are normally accepted as valid for the purposes of computation of tax liability and no further assessment of tax liability as declared by the Assessee is done by the ST Department. However, to ensure that service tax liability is discharged correctly and that there is no escaping of tax liability due to "ignorance, bona fide mistake or otherwise, audit of the financial and statutory records maintained by the Assessee is carried out from time to time." It is stated that the audit report issued after the audit "certifies the correctness of tax assessment only so far as it is based on the records/documents as produced by the Assessee. Further, the authenticity of such records/documents, produced by the Assessee, is generally accepted and not challenged unless and until there is any apparent and obvious reason to disbelieve." It is stated that for unearthing any such planned and deliberate evasion of tax as is done by the DGCEI, the audit is not equipped and that such deliberate evasion can be detected only with some specific input/information against the Assessee and on carrying out further investigation including search of business premises and other related premises, seizure of records including incriminating records, recording of statements of related persons and further follow-up investigation.

29. It is, however, repeatedly stressed by the ST Department that when the audit was conducted "there was no reason to suspect the authenticity of the records/documents produced by the party and the exemption under Notification No. 26/2012-ST was found to be admissible to the Petitioner, on the basis of audit of their records produced before the audit". The Audit Department has nothing to say about the SCN issued by the jurisdictional Service Tax Commissionerate,

which has been referred to in para 9 of the writ petition and that it pertained to some other issue and the same is not related to the issue of admissibility of exemption under Notification No. 26/2012-ST. It is pointed out that under Section 70(1) of the FA, the Assessee has to declare the true and correct nature of the services provided and has to pay service tax due thereon. It is stated that fresh proceedings for recovery of service tax for the same period are warranted, if the issues of classification of services declared by the Assessee are found to be false or different on the basis of facts not disclosed earlier in any of the statutory record by the party.

Counter affidavits of Respondent Nos. 1 and 2

30. As earlier mentioned, two separate identically worded counter affidavits have been filed by Respondent Nos. 1 and 2 respectively. The same officer, viz., Mr. Samanjasa Das, Additional Director General ("ADG"), DGCEI has filed both these affidavits.

31. The DGCEI states that the competent authority had reasons to believe on the basis of the material available before him, that certain incriminating documents showing large scale service tax evasion had been secreted away in the premises of eBIZ. Therefore, a search was conducted in the premises of eBIZ under Section 82 of the FA. Similarly, the arrest of Mr. Malhan was also stated to be just and proper and in terms of Section 91 of FA.

32. It is sought to be suggested that although this Court by its order dated 28th January 2016 required eBIZ to cooperate with the DGCEI, the MD of eBIZ had still not provided data of individual associates regarding the amount received from individual associates and date of receipt etc. till date. A reference is made to the statement made by Mr. Sulabh Jain, Accountant of eBIZ on 14th March 2016, to the effect that in "Tally", the data of individual associates was not maintained and that it was not accessible. It was stated by Mr. Jain that the revenue data was provided by the technical team headed by Mr. Dharendra. It is then stated that on 6th April 2016, Mr. Dharendra was summoned and in his statement he stated that he was not dealing with the records. On 9th April 2016, the MD submitted a letter that the entire data with respect to details of business associates was available in the CPU, which had been taken away during the search and seizure operation. It was then acknowledged vide letter dated 18th April 2016 by the son of the MD and advocate for eBIZ, Mr. Rajveer Singh, stating that they had brought 123 cartons of documents relating to the associates of eBIZ in a truck. It was then stated that DGCEI did not call for the said documents and only certain details of individual associates had been called for. It was decided to verify the documents on sample basis. It was stated that two of the 123 cartons were opened and nothing relevant was found. This, it is stated, is a glaring instance of non-cooperation.

Rejoinder Affidavit by the Petitioner

33. A rejoinder affidavit dated 30th April 2016 was filed on behalf of eBIZ by Ms.

Rajinder Kaur, Administrative Officer, in response to the counter affidavits of the Respondent Nos. 2 and 3.

34. It must be pointed out at this stage that a letter dated 8th April 2016 was written by Dr. Puneeta Bedi, Deputy Director, DGCEI, to Mr. Pawan Malhan, MD of the Petitioner to submit the details requested therein. The above-said letter dated 8th April 2016 has been placed on record and it is noted that the following details had been requested by the DGCEI:

"i. Name, address & code number of all the associates who availed Education Package, Holiday Accommodation Package-I & II from October 2011 to till date.

ii. List of associates who have not availed Holiday Accommodation Package-I & II from Oct 2011 to till date.

iii. List of associates who availed Holiday Accommodation Package - I & II from Oct 2011 to till date.

iv. List of associates who cancelled their request or who did not check in hotel after submitting request of availment of Holiday Accommodation Package-I & II from Oct 2011 to till date.

v. Ledgers of all associates individually who availed Holiday Accommodation Package-I & II from Oct 2011 to till date."

35. It is pointed out in the rejoinder affidavit that the MD of eBIZ and its officers had appeared whenever they were summoned by the DGCEI and also submitted "original documents" as sought by the DGCEI in respect of "all the associates who availed education packages, holiday accommodation packages ?I & II from Oct 2011 till date" on 18th April 2016 through its counsel, Mr. Rajveer Singh. However it is stated that the DGCEI officials had refused to take delivery of the said documents and also seized the mobile phone of Mr. Singh.

Affidavit of the counsel of the Petitioner

36. An affidavit dated 16th May 2016 has been filed by Mr. Rajveer Singh, counsel for eBIZ. Consequent to the letter dated 8th April 2016 of the DGCEI requiring the MD of eBIZ to submit documents requested therein, Mr. Rajveer Singh along with the Mr. Hitik Malhan, visited the office of the DGCEI on 18th April 2016 carrying the documents in original in 123 cartons loaded in a truck. It is stated that at the reception of the DGCEI office, the deponent's as well as Mr. Malhan's mobile phones were seized by the officer present at the reception citing rules and regulations that had to be followed by anyone entering the office of the DGCEI. It is stated that one Mr. Ravindra Tyagi, Intelligence Officer was directed to take possession of the documents. However, Mr. Tyagi on reaching the truck was stated to have used abusive language and made the advocate and the client wait till 4:30 p.m. and thereafter stated that they would not be taking possession of the documents since they were irrelevant. It is stated that some wrong statements were recorded in the panchnama and therefore the advocate and his

client requested for a change to be made. It is stated that Mr. Tyagi was again abusive at that stage. With the intervention of Mr. Shivendu Pandey, SIO, the officer, Mr. Tyagi, was made to apologise and thereafter the panchnama was signed after necessary modification.

37. Thus, it is stated that since the information sought was extensive it was decided to take all the original documents to the DGCEI and yet this was refused by the DGCEI.

Reply by DGCEI to the Rejoinder Affidavit

38. In response to the rejoinder affidavit filed by eBIZ, a reply has been filed by Dr. Puneeta Bedi alleging non-cooperation by eBIZ. In the said affidavit dated 12th May 2016, Dr. Bedi states that eBIZ was asked only to submit a list of associates (name, address and code number) who availed Education Package and Holiday Accommodation Package-I & II from October, 2011 till date and that instead of submitting the said list, eBIZ sent a truck full of 123 cartons to the office of the DGCEI.

39. The decision to arrest the MD of the Petitioner is sought to be justified by the DGCEI by referring to Section 89 (1) (d) read with Section 90 (1) and 91 (1) of the FA. It is further asserted that in order to satisfy that there has been a commission of the offence of collecting an amount of service tax and the failure to deposit the amount so collected to the credit of the Central Government beyond six months from the date on which such payment is due in terms of Section 89 (1) (d) of the FA, there is no requirement for issuance of SCN as contemplated under Section 73 (1) and 73A (3) of the FA.

Submissions of counsel for the Petitioner

40. Mr. J.K. Mittal, learned counsel for the Petitioner, made the following submissions:

(i) The search conducted by the DGCEI was arbitrary and in complete breach of the provisions of law inasmuch as it was authorised without placing any material on record and without any application of mind and formation of an "opinion" which are held to be essential ingredients for authorising search under Section 82 of the FA and arrest under Section 91 of the FA.

(ii) The DGCEI, without issuing any SCN, has alleged service tax evasion by disputing the eligibility of eBIZ to avail the exemption under Notification No. 26/2012-ST dated 20th June 2012. This does not attract an offence in terms of Section 89 of the FA. Therefore, the DGCEI falsely alleged that eBIZ had committed an offence under Section 89 (1) (ii)/89 (1) (d) of the FA and forced it to deposit Rs. 17 crores to seek release of its MD, Mr. Malhan.

(iii) The exercise of powers under Section 82 and 91 by the DGCEI without consultation with the Commissionerate of Service Tax tantamounted to re-opening the assessment of FYs for which there was no power in the FA. Further, it

is sought to arm the officers of the DGCEI with powers of "review" and "reassessment" which are not available to them under the FA.

(iv) For authorising a search under Section 82 of the FA, the competent authority should have "reason to believe" and not "reason to suspect". There had to be some material for the formation of such belief. Reliance is placed on the decision of *Bishnu Krishna Shrestha v. Union of India* 1987 (27) ELT 369 (Cal.). The expression "reason to believe" postulates application of mind and assigning of reasons. Unless "reasons to believe" were duly recorded prior to the search and seizure, they were liable to be declared illegal. Reliance is placed on the decision in *Mapsa Tapes Pvt. Ltd. v. UOI* 2006 (201) ELT 7 (P&H).

(v) The actions of the DGCEI had caused serious invasion of privacy, rights and freedom of the MD of eBIZ and eBIZ itself and harmed their reputation. The actions of the DGCEI and other Respondents were violative of Articles 14, 19 and 21 of the Constitution of India.

(vi) This was a proven case of illegal search, seizure and arrest. The facts concerning the two earlier searches were not found mentioned in the note prepared for proceeding with the arrest of Mr. Malhan. If only the DGCEI had called for information from the ST Department, it would have been informed that on 12th January 2007 a search had taken place as a result of which a SCN dated 13th July 2007 had been issued. The adjudication order as a result of the said SCN was set aside by the Commissioner (Appeals) by an order dated 29th August 2012. This entailed a refund to eBIZ of Rs. 25,55,000 as service tax, Rs. 2,59,000 as interest, Rs. 6,37,000 as penalty totalling Rs. 34,51,500. Despite an application dated 27th January 2014, the said amount, which had been deposited under protest by eBIZ, had not been refunded to it.

(vii) The arrest memo also did not mention that a second search had taken place on 4th October 2012 of the premises of eBIZ by the Anti-Evasion Wing of the Noida Commissionerate. However, till date no demand has been raised as a result of the said search.

(viii) The ST Department has in its counter affidavit admitted to the fact that for the past 10 years it had been regularly conducting audit of eBIZ's books of accounts and records while deputing its officers in exercise of the power under Rule 5A of the Service Tax Rules, 1994. While there was no evidence regarding any tax evasion, the discrepancies pointed out were immediately rectified. Throughout, eBIZ's claim for entitlement of exemption under Notification 29/2006-ST was not disputed. In other words, even during the course of the audit, the ST Department acknowledged that eBIZ was availing of 90% abatement under the said notification.

(ix) In every half-yearly service tax return, copies of which have been placed on record, eBIZ disclosed the full receipt of the charges collected for hotel bookings as a "tour operator" with full computation by claiming exemption under Notification No. 26/2012-ST. The records from 2009 till 2015 during which such

returns had been filed have been duly verified by the ST Department and no discrepancy had been pointed out. The SCN issued on 17th November 2014 demanding service tax of Rs. 34,00,425 and the SCN dated 2nd November 2015 demanding service tax of Rs. 5,33,341 covered the periods 2009-10 and 2013-14. The disputed tax amount was around Rs. 40 lakhs whereas the refund claimed by Petitioner was around Rs. 35 lakhs. There was no occasion whatsoever and it was impermissible in law for the DGCEI to seek to invoke Section 89 read with Sections 90 and 91 and arrest of Mr. Malhan.

(x) There was no provision in the FA for reopening of completed assessments of earlier years. The DGCEI was wrong to allege that eBIZ had not cooperated with the ST Department or the DGCEI on the numerous queries raised and during the course of repeated audits. Referring to the decision in Mahesh Chandra v. Regional Manager, U.P. Financial Corporation (1993) 2 SCC 279 and Uniworth Textiles Ltd. v. CCE, Raipur, 2013 (288) ELT 161 (SC), it was submitted that the mere non-payment of dues would not amount to suppression of material facts. Reliance was also placed on the decisions in Parashuram Pottery Works Co. Ltd. v. Income-tax Officer (1977) 1 SCC 408 and Calcutta Discount Company Ltd. v. ITO AIR 1961 SC 372 which held that as far as the Assessee is concerned, his duty was limited to providing the necessary documents whereas the analysis of such documents was a responsibility of the Authority.

(xi) In support of the submission that DGCEI was liable in law for its arbitrary actions, reliance was placed on the decision in Dabur India Ltd. v. State of Uttar Pradesh (1990) 4 SCC 113, ICICI Bank Ltd. v. Union of India 2015 (38) STR 907 (Bom) and Technomaint Contractors Ltd. v. Union of India 2014 (36) STR 488 (Guj). Reliance was placed on the decision in N.R. Management Consultants P. Ltd. v. Commissioner of Service Tax, Delhi 2014 (33) STR 371 (Del) to urge that repeated issuance of SCNs when the earlier SCNs were pending adjudication was arbitrary.

(xii) It is emphasised that without there being any provision for reopening of assessments, the resort to the coercive steps of search, seizure and arrest without even an SCN was illegal.

Submissions of counsel for the Respondents

41. Mr. Satish Aggarwala, learned counsel of the Respondents made the following submissions:

(i) eBIZ, in order to evade the leviable service tax at the full rate, rechristened its education package as "eBIZ" Holiday Accommodation Packages I and II and fraudulently claimed exemption at 90% available to "tour operators" when it was not one.

(ii) The Competent Authority had reasonable grounds of belief, on the basis of a thorough examination of the material on file which included the specific information as provided by an informer, that eBIZ was only providing online

coaching service and not "tour operating service". It is submitted that the decision to go in for a search operation was not arbitrary. The information received is developed by a senior officer and then discussed with superior officers. It is only after a brainstorming exercise by the officers on the information received that the decision was taken. Accordingly, authorisation to search the premises of eBIZ was issued following the due procedure of law as laid down under Section 82 of the FA. Reliance was placed on the decision of the Madras High Court in *Chitra Construction Co. v. Addl. Commr. of CCE & ST, Coimbatore* 2013 (31) S.T.R. 385 (Mad.) to urge that it is not for the Court to go into the sufficiency or relevance of materials before the Authority concerned to order search and seizure.

(iii) The documents seized during search showed that eBIZ was not rendering any services as a "tour operator". It was essentially engaged in the business of providing educational packages camouflaging them as "tour operators services". Therefore, eBIZ had committed fraud by claiming exemption under Notification No. 26/2012. Inasmuch as eBIZ had not arranged for a tour which was an essential ingredient of the service provided by a "tour operator" in terms of Section 65 (105) (n) of the FA and which was admitted by the officials of the eBIZ during the course of investigation, the Competent Authority was justified in authorising the arrest of Mr. Malhan. It is urged that the legality of the arrest of Mr. Malhan is not the subject matter of the present petition. Nevertheless, the arrest had been approved by the Competent Authority under Section 91 of the FA and which in turn had duly authorised the SIO to effect the arrest. The procedure established by law had been duly followed while carrying out the arrest.

(iv) The details disclosed during the course of search reflected that against the total income of Rs. 170 crores from December 2011 till 19th January 2016, the expenses on account of hotel bookings was only 0.09%. The contents of the educational packages were provided free under the garb of "holiday accommodation packages" while the price of Rs. 10,880 (inclusive of all taxes) was same for both the education packages as well as the holiday accommodation packages. This was, therefore, a clear fraud committed by eBIZ to evade paying service tax at the full applicable rate.

(v) Rule 5A of the ST Rules provided limited access to the declared records whereas Section 82 of the FA gave the power to search and seize documents or books or things secreted in the premises which would be useful for or relevant to any proceedings. Thus the scope of the audit by the Audit Team of the ST Department was different from the search that could be undertaken by the DGCEI. The audit party in the present case accepted the documents presented before it by an Assessee as genuine without information of any fraud committed by such Assessee. The regular/routine audit cannot be construed as immunity against any other action which can be taken on the basis of "some specific information/inputs regarding evasion of tax."

(vi) Under Section 73 of FA, the ST Department could make enquiries covering a

period of past five years in the event the Assessee had not paid service tax by reason of "fraud" or "collusion" or "wilful misstatement" or "suppression of facts" or "contravention of any of the provisions of this Chapter or of the rules made thereunder with an intent to evade payment of service tax".

(vii) While the DGCEI did not contact the Jurisdictional Service Tax or Audit Commissionerate at any stage prior to the search, seizure and arrest of Mr. Malhan since "any such action would lead to the threat to the life of the informer", however, after the case was booked against eBIZ, both the Jurisdictional Service Tax and Audit Commissionerate were contacted to provide various details.

(viii) Referring to the note sheets on file, it was submitted that the impugned action of the DGCEI was justified. As regards the past searches undertaken by the officers of Anti-Evasion, Jurisdictional Commissionerate, Noida, it was submitted that the search conducted in 2007 was on the issue of non-payment of service tax on handling charges for preparation of cheques, courier charges and other support services related to payment of commission issued by eBIZ to its associates. As far as the 2012 search was concerned, it was on the issue that eBIZ was receiving services from foreign service providers and not discharging its service tax liability on the amount paid to such service provider under the reverse charge mechanism.

(ix) Reliance is placed on the decisions in *State of Gujarat v. Shri Mohanlal Jitmalji Porwal* 1987 (29) ELT 483 (SC), *Union of India v. Shyamsunder* 1994 (74) ELT 197 (SC) and *Chitra Construction Co. v. Addl. Commr. of CCE & ST Coimbatore* (supra) to urge that it was not open to the Court to examine the sufficiency or relevancy of the materials which were available with the Competent Authority for forming a reasonable belief that there was evasion of service tax by eBIZ. Reliance is placed on the decision in *Pooran Mal v. Director of Inspection (Investigation) of Income-Tax* AIR 1974 SC 348 to urge that material obtained even as a result of illegal search or seizure can be taken into consideration for proceeding against an Assessee.

(x) The two business associates of eBIZ, Mr. Pawan Mishra and Mr. Shubham Chaudhary and the two Accountants, Mr. Sulabh Jain and Mr. Narender Kumar gave statements that substantiated the case of DGCEI against eBIZ. The payments towards holiday bookings after 7th March 2014 were made to "Clear Trip" through the credit card of Mr. Malhan. Since it was a classic case of fraud committed by the Petitioner wherein they had wilfully mis-declared their services of online education as "tour operator" in their service tax returns with an intent to evade the payment of service tax at the full applicable rate, the action of DGCEI was legal and tenable. Reliance is placed on the decision in *Nizam Sugar Factory v. CCE* 2006 (197) ELT 465 (SC) to urge that a second or third SCN in the same or similar facts is not impermissible as long as DGCEI was able to show that a fraud had been committed by eBIZ. Since investigation was still in progress, no SCN was issued in the matter.

(xi) The sum of Rs. 17 crores was voluntarily paid by Mr. Malhan and not under coercion or threat as alleged. Mr. Aggarwala sought to distinguish the decisions in *Mahesh Chandra v. Regional Manager, U.P. Financial Corporation* (supra) *Uniworth Textiles Ltd. v. CCE, Raipur* (supra) and *Parashuram Pottery Works Co. Ltd. v. Income-tax Officer and Calcutta Discount Company v. ITO* (supra).

Analysis of the relevant provisions

42. The Court proposes to begin the analysis of the above submissions by first referring to the relevant statutory provisions. For the purposes of the present case, a reference is required to be made to the relevant provisions of the FA. Section 65 (105) (n) of the FA defines "taxable service" as "any service provided or to be provided to any person by a "tour operator" in relation to a "tour". Section 65B (44) defines "service" as any activity carried out by a person for another for consideration, and includes a declared service. It then proceeds to set out the negative list of those activities that are not covered by the definition. Section 65 (115) defines "tour operator" thus:

""tour Operator" means any person engaged in the business of planning, scheduling, organising or arranging tours (which may include arrangements for accommodation, sightseeing or other similar services) by any mode of transport, and includes any person engaged in the business of operating tours in a tourist vehicle or a contract carriage by whatever name called, covered by a permit, other than a stage carriage permit, granted under the Motor Vehicles Act, 1988 (59 of 1988) or the rules made thereunder;

Explanation:- For the purposes of this clause, the expression "tour" does not include a journey organised or arranged for use by an educational body, other than a commercial training or coaching centre, imparting skill or knowledge or lessons on any subject or field."

43. Sections 72 and 73 of the FA 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 misstatement; 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.?"

44. In the present case, eBIZ has been regularly filing service tax returns and has been paying service tax. It is not a person who has not filed 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 scrutinised by the Central Excise Officer who has been assigned his functions in terms of the provisions of the FA read with CE Act. The narration of facts shows that the ST Department undertook scrutiny of the returns in which the exemption was claimed describing eBIZ as a "tour operator". Searches and audits were also undertaken. SCNs were issued to eBIZ. In other words, the power of assessment has been and is continued to be exercised by the ST Commissionerate. If in terms of Section 72 of the FA, the Assessing Officer (AO) was of the view that eBIZ was wrongly availing exemption as a "tour operator" or evading service tax, it was open to the said AO to require such person to produce documents and other evidence 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.

45. In a decision rendered today in *MakeMy Trip (India) Pvt. Ltd. v. Union of India* (decision dated 1st September 2016 in W.P. (C) No. 521 of 2016), this Court has while analysing Sections 72 and 73 of the FA held as under:

"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."

46. As far as the present case is concerned, the DGCEI proceeded to compute the extent of evasion of service tax for a past period without even so much as an SCN being issued to eBIZ and without reference to the service tax returns filed by eBIZ and scrutinised by the ST Department. What effectively the DGCEI has sought to do is to reassess the service tax liability of eBIZ for a past period without resorting to any known procedure under the FA.

Analysis of Section 73A of the FA

47. Section 73A of the FA is also relevant since it is the case of DGCEI that eBIZ has collected service tax and 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 sub-section (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."

48. Again, in *MakeMy Trip (India) Pvt. Ltd. v. Union of India* (supra), this Court has held:

"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".

.....

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 tax-ability 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 Griffith 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...."

49. In the present case, there is no determination by the DGCEI after issuing an SCN that eBIZ has collected service tax which it has failed to deposit with the Central Government. There is only a presumption drawn by calculating what the probable evasion would be if the exemption had not been availed by eBIZ as a "tour operator".

Analysis of Section 72 A of the FA and the corresponding Rules

50. The FA does provide for special audits where there is reason to believe that there has been an evasion of service tax by an Assessee. Section 72 A of the FA provides for a special audit to be ordered by the Commissioner where he has reason to believe that any person liable to pay service tax has failed to declare or determine the value of a taxable service correctly, or has availed and utilised credit of duty or tax paid inter alia by means of fraud, collusion, or any wilful misstatement or suppression of facts. In such instances, the Commissioner may direct such person to get his accounts audited by a chartered accountant or cost accountant nominated by him.

51. The power of the Commissioner to order a search has to be read together with Rule 5A (1) of the Service Tax Rules 1994 which permits the officer

authorised to carry out the search to "have access to any premises registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue."

52. Thus the audit of the accounts can be undertaken by the ST Department but a "special audit" can be undertaken only by the professionals that are mentioned in Section 72 A of the FA. The above provisions are being referred to in the context of DGCEI seeking to make out a case that scope of the audit carried out on two occasions of the records and accounts of eBIZ by the ST Department was different from the scope of the search carried out by DGCEI. It is sought to be suggested that the audit party accepted at face value the information provided by eBIZ without inquiring further into the matter. The Court finds it difficult to accept this contention since it finds that the scope of the powers available to an officer authorised by the Commissioner to carry out a search under Rule 5A (1) is wide enough to have "access" to the records of an Assessee since it empowers the officer to carry out "any scrutiny, verification and checks as may be necessary to safeguard the interest of revenue." Therefore, the audit already carried out by the anti-evasion wing of the ST Commissionerate cannot be brushed off by the DGCEI as either insignificant or of a lesser scope for the purposes of the determination whether there has been evasion of service tax. It is one thing to say, after examining the records of past searches and audits, that there is still reason to believe that there has been evasion of tax for the grounds recorded but it is another to come to such conclusion without even referring to the records of the audit and searches carried out earlier. The latter would be vulnerable to being assailed on ground of lack of application of mind to relevant material which would enable an officer vested with the power in that behalf to come to a just, fair and reasonable conclusion. The present case falls in the latter category.

53. The Court also finds that the fear that if the DGCEI had contacted the ST Department prior to the search, the security of the informer would have been compromised appears to be a red herring. The notes on file show that after the search was concluded, the DGCEI wrote to the ST Department seeking the relevant records. This could have easily have been done prior to the search without making any mention of any informer. The fact remains that at the time the search was contemplated by the DGCEI, there was no attempt at finding out what the history of the Assessee was as far as its compliance with the requirements of the FA was concerned. The records of the earlier searches and audits were certainly relevant material as far as the decision to order a fresh search was concerned.

Power to search premises

54. In the present cases one of the main grounds on which eBIZ assails the action of the DGCEI is that the search ordered on its premises was itself illegal. Section 82 of the FA which is relevant 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."

55. In interpreting the above provision, this Court in *MakeMy Trip (India) Pvt. Ltd. v. Union of India* (supra) held thus:

"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 *Mapsas 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 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."...."

56. As was noted in the case of the Petitioners in that case, here too, the notes on file mentioned the fact that any document secreted away by eBIZ and was relevant for the proceedings. The officers of the DGCEI, without referring to the requirements of the FA, entered the premises and made the Assessee agree to pay the alleged service tax dues without even an SCN. This is in violation of Section 82 of the FA and 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 eBIZ was contrary to law and, therefore, legally unsustainable.

Analysis of Section 89

57. For the purposes of justifying the arrest and detention of Mr. Malhan, the DGCEI has sought to bring the case within Section 89 (1) (ii) of the FA. Section 89 of the FA Act prescribes offences and penalties. 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 term 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, with 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 subsequent 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."

58. In *MakeMy Trip (India) Pvt. Ltd. v. Union of India* (supra), this Court analysed Section 89 of the FA as under:

"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-cognisable whereas the latter was made cognisable 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 cognisable or not and consequently whether the provisions concerning arrest get attracted."

Power to arrest

59. The Court next proceeds to examine Sections 90 and 91 of the FA that provide for arrest and read as under:

"90. Cognizance of offences - (1) An offence under clause (ii) of sub-section (1) of Section 89 shall be cognisable.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 all offences, except the offences specified in sub-section (1), shall be non-cognisable 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, authorise 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 cognisable offence, every officer authorised 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-cognisable 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."

60. In *MakeMy Trip (India) Pvt. Ltd. v. Union of India* (supra) this Court analysed the above provisions and held:

"69. Section 90 (1) makes it clear that only an offence which is punishable in terms of Section 89 (1) (ii) would be cognisable. 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 cognisable 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-cognisable and bailable", notwithstanding anything contained in the Code of Criminal Procedure 1973 ("Cr PC"). It is only when the offence is cognisable that, in terms of Cr.P.C., 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.P.C. and observed as under:

"41. In our view, the definition of "non-cognisable offence" in Section 2(1) of the Code makes it clear that a non-cognisable offence is an offence for which a police officer has no authority to arrest without warrant. As we have also noticed hereinbefore, the expression "cognisable 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-cognisable 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 authorise 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-cognisable 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.P.C. 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 cognisable 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-cognisable.

71. Under Section 91 (2), where a person is arrested for any cognisable 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.P.C. relating to arrests". In other words the entire Chapter V of the Cr.P.C. 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.P.C.

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 cognisable 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)

Constitutional safeguards

61. At this stage it also requires to be recalled that since the provisions of the Cr.P.C. 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.P.C. 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. This Court in *MakeMy Trip (India) Pvt. Ltd. v. Union of India* (supra) held thus:

"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.P.C. 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.P.C. 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, Coastal 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 way 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 statutes has been upheld by the Courts. The right to interrogate the detainees, 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 reipublicae 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.P.C. 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 CBECE 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."

Notes on file

62. The Court next proceeds to analyse the notes on file, which according to the DGCEI fully justify the decisions of the DGCEI that are the subject matter of this petition. The question is not so much about the existence of powers but the proper exercise of those powers by the DGCEI. Court would begin by a caveat that it is not concerned here with the sufficiency or relevance of the materials available with the DGCEI. The Court is called upon to determine whether on the basis of the materials available to it, the DGCEI could have proceeded to form a prima facie opinion regarding the commission of an offence by eBIZ under Section 89 (1) (d) read with 89 (1) (ii) of the FA.

63. There are two notes in the file of the DGCEI. The first is the note dated 18th January 2016 prepared by Mr. Shivendu Pandey, SIO regarding the search of the premises of eBIZ. The note begins by referring to "an information" that has been received that eBIZ is not discharging its service tax liability properly. It is this information that was asked to be seen by the Court when it asked for its production by Mr. Pandey in a sealed cover. This sealed cover was separately produced. On opening the sealed cover, the Court did not find anything incriminating that would indicate that an offence had been committed. Interestingly, the name of the informer is not mentioned in the statement given by the informer. The time and date when the information was given is also not indicated. There is also no signature of the informer. There is only a thumb impression, again without indicating whether it is a left or right thumb impression. The declaration given by the informer does not appear to be on a prescribed proforma but on a computed printed sheet. Further, the information itself is not reduced in writing. It is typed. It does not disclose any specific information other than those already set out in the notes prepared by the DGCEI.

64. The note dated 18th January 2016 suggests that 90% rebate is claimed by eBIZ by describing itself as a "tour operator". There is a discussion on this wrongful claim of rebate in terms of the Notification No. 26/2012. It proceeds to compute the service tax that would have been payable if the rebate was not availed of and then concludes that there is an evasion of service tax to that extent. Significantly, the note does not acknowledge that eBIZ is regularly filing service tax returns and paying service tax on that basis. There is no mention of the fact that there had been two earlier searches in the premises of eBIZ by the ST Department. Admittedly, at this stage no attempt was made by the DGCEI to even contact the ST Department. That happened later, after the case against

eBIZ had been "booked".

65. Another note was prepared on 20th January 2016 proposing the arrest of Mr. Malhan. This note again sets out the position of the DGCEI that eBIZ could not have availed of 90% rebate in terms of the above Notification. It then states in paras 13 and 14 as under:

"13. After enactment of Finance Act, 2013, offences under Finance Act, 1994 become cognisable and non-bailable w.e.f. 10.05.2013 as per Section 89 (1)(ii) of Finance Act, 1994. Such offences should be related to collection of Service tax exceeding Rs. 50 Lakh and not depositing the same to the Government exchequer beyond a period of six months from the date on which such payment becomes due (the limit was later enhanced to Rs. 1 Crores w.e.f. vide Circular No. 101/17/2015-CX dated 23.10.2015. In this regard, it is observed during 2014-15 alone the company has collected Rs. 41,69,09,298/- inclusive of taxes (only Service tax is applicable on the said value) in the garb of Holiday packages while in the 9 months of 2015-16, the company have collected Rs. 40,19,75,322/-) in the garb of Holiday packages. The company has not disclosed the amount of Service tax they have collected from the customers as in both of the package shown by the party i.e. advanced eBiz educational package and Holiday Package, they are charging Rs. 10,880/- inclusive of taxes. It is found that the company had collected Rs. 4,12,75,356/- as Service tax in 2014-15 but not deposited the same with the Government exchequer. Similarly Service Tax of Rs. 4,44,28,851/- for 2015-16 but not deposited to the Government exchequer (much higher than the limit of Rs. 1 crore). In fact, in this way they have collected and not deposited approximately Service Tax to the tune of Rs. 17 Crores for the period 2011-12 to December 2015 for providing service of "Online information and database access service and/or retrieval service through computer network" of their e-education packages in the garb of holiday package by mis declaring their services provided to the department.

14. It is therefore, proposed that Shri Pawan Malhan, Managing Director of M/s eBiz.com Pvt. Ltd. may be arrested under Section 89 (1)(ii) of the Finance Act, 1994 for his role in evasion of Service Tax."

66. It was repeatedly stressed by Mr. Satish Aggarwala that the reference to Circular No. 101/17/2015 dated 23rd October 2015 was a typographical error and in fact referred to Circular No. 1010/17/2015 dated 23rd October 2015. Be that as it may, what is significant is that there is no reference to the Circular No. 171/6/2013-Service Tax dated 17th September 2013 which sets out the "Guidelines for arrest and bail in relation to offences punishable under the Finance Act, 1994".

67. It cannot be presumed that merely because there is a reference to the enlarged monetary limit in terms of the circular dated 23rd October 2015, the Officer proposing the arrest and the officers who approved it consciously applied their minds to the requirements of the above mentioned circular dated 17th

September 2013. Importantly, there is no determination whether there was any evasion of duty or possibility of evidence being tampered or witnesses being influenced or non-cooperation in the investigation. The above prescriptions spelt out in para 2.2 of the said circular dated 17th September 2013 were not even adverted to. Importantly, for the purposes of deciding whether somebody is a habitual offender or is likely to evade service tax, some enquiry has to be made with the ST Department. There is no other way with the DGCEI to determine if the persons they are dealing with satisfy the profile of the person who should be arrested.

68. In this context, the following passages in the decision of this Court in *MakeMy Trip (India) Pvt. Ltd. v. Union of India* (supra) are relevant:

"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 analyse 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...."

69. Significantly, in the present case, no attempt was made by the DGCEI even to talk to the ST Department before proceeding to search the premises of eBIZ and soon thereafter arrest Mr. Malhan.

70. The explanation offered in Court by Mr. Satish Aggarwala, on instructions, was that these Departments have to act "secretly" to the extent that the DGCEI will not even tell the ST Department of their proposed actions. To the Court, it seems unacceptable that with the guidelines issued for launching of prosecution and procedure for arrest, the DGCEI or any other agency other than the ST Department can form any reasonable opinion regarding such launch of prosecution or go for arrest.

71. 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."

Payments were not "Voluntary"

72. It has been mentioned in the notes on file in more than one place that Mr. Malhan voluntarily paid Rs. 17 crores as arrears of service tax dues. Mr.

Aggarwala repeatedly stressed 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. The case of eBIZ on the other hand is that such payment was made under extreme duress. The action of the DGCEI has been described by it as malafide and "just to harass" eBIZ and its officers.

73. This Court has already observed that in the present case the DGCEI did not observe any of the statutory or constitutional safeguards. Not only was the search contrary to Section 82 of the FA, the subsequent action of arrest of Mr. Malhan was undertaken contrary to the legal requirement of Section 89 read with Sections 90 and 91 of the FA. It is a case of overkill by the officers of the DGCEI. The existence of powers is one thing and its exercise, another.

74. In the circumstances outlined earlier, when the MD of a company is in judicial custody, the offer made to pay the alleged arrears of service tax dues of such company even without an SCN can hardly be characterised as "voluntary". The loss of liberty, and more disconcertingly, the loss of reputation, is bound to compel even the most rational person to succumb to the extreme pressure that such circumstance subjects him to. In more or less similar circumstances, this Court in *MakeMy Trip (India) Pvt. Ltd. v. Union of India* (supra) held:

"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 practise 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."

75. The Court is satisfied that in the present case the payment of Rs. 17 crores

by eBIZ was not "voluntary" but under coercion and duress and is required to be returned to eBIZ by the DGCEI forthwith and in any event not later than four weeks from today. It is clarified that this will not in any manner affect the bail already granted to Mr. Malhan. Those proceedings will be taken to their logical end.

Non-cooperation by eBIZ

76. The case of the DGCEI in its affidavits before the Court is that eBIZ was failing to co-operate in the investigation. In particular, it is complained that eBIZ was not providing the information sought by the DGCEI. It is stated that a whole truckload of documents were submitted which according to the DGCEI were not relevant.

77. The above submission appears to be contrary to the letter dated 8th April, 2016 issued to eBIZ by the DGCEI. If indeed only limited information was sought, then the letter dated 8th April 2016 should have been worded differently. What eBIZ was asked to submit was the information in a certain format designed by the DGCEI itself. This format is appended to the letter dated 11th May 2016, issued by Dr. Bedi to eBIZ. There is no requirement in law that eBIZ should maintain the information in a particular format. Mr. Aggarwala was unable to point out any provision in the FA or the ST Rules that required eBIZ to maintain information in a particular format.

78. It appears to the Court after carefully considering the affidavits on record that the conduct of the officers of the DGCEI in refusing to receive the documents tendered to them and terming the conduct of eBIZ to be non-cooperative is not justified in the facts and circumstances. At the same time, the Court would reiterate the direction that eBIZ and its officers including Mr. Malhan will continue to co-operate with the DGCEI in carrying the investigations to their logical end.

Summary of Conclusions

79. To summarise the conclusions in this judgment:

(i) The scheme of the provisions of the Finance Act 1994 (FA), does not permit the DGCEI or for that matter the Service Tax Department (ST Department) to bypass 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 a 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.P.C. 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 present case, 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 of Mr. Malhan 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 the present case. The DGCEI cannot possibly come to a

conclusion that an Assessee is an 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.

(viii) The search undertaken by the DGCEI of the premises of eBIZ on 19th January 2016 was illegal. 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 in the present case was in violation 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) The payment of Rs. 17 crores by eBIZ was not "voluntary" but under coercion and duress and is required to be returned to eBIZ by the DGCEI forthwith and in any event not later than four weeks from today. It is clarified that this will not in any manner affect the bail already granted to Mr. Malhan. Those proceedings will be taken to their logical end.

(xi) The conduct of the officers of the DGCEI in refusing to receive the documents tendered to them and terming the conduct of eBIZ to be non-cooperative is not justified in the facts and circumstances. At the same time, the Court would reiterate the direction that eBIZ and its officers including Mr. Malhan will continue to co-operate with the DGCEI in carrying the investigations to their logical end.

80. The interim directions issued on 28th January 2016 are made absolute. It is directed that the DGCEI will refund to eBIZ forthwith the sum of Rs. 17 crores deposited by it towards alleged dues of service tax 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 said amount from the date on which it becomes 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. Malhan.

81. The Court clarifies that it has in this decision determined the legality of the DGCEI in proceeding to search the premises of eBIZ and then deciding to arrest Mr. Malhan. 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 eBIZ. Further, the right of eBIZ or Mr. Malhan to institute appropriate proceedings in accordance with law to recover damages and/or compensation is reserved.

82. The writ petition is disposed of in the above terms with costs of Rs. 1 lakh which will be paid by the DGCEI to eBIZ within four weeks.