A flawed and eminently appealable decision

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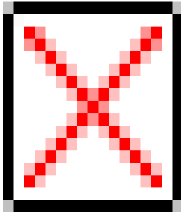 **THIS**

article is a brief critique of the judgement of the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. Vs. UOI & Ors - 2021-TIOL-2112-HC-MUM-GST

. In order to keep the article short, an idle parade of familiar case laws and the avoidable quotes from the statute have been eschewed. Vide the said judgement, Bombay High Court, in exercise of its power under Art. 226, has quashed the show cause notice, [issued to deny the transition of the education cess under s. 140 of the CGST Act], essentially on the following grounds:

> (i) Explanation 3 in section 140 ibid is not applicable to subsection (1) thereof because that explanation pertains to ***"eligible duties and taxes"*** (as distinct from ***"eligible duties"***) while section 140(1) deals only with ***"eligible duties"***.
>
> (ii) The officer who issued the SCN lacked jurisdiction because he based his SCN on Explanation 3 treating it to be applicable to section 140(1) ibid.

2. The purpose of this article is to show that:

> (i) the High Court erred in concluding that Explanation 3 was not applicable to s.140(1);
>
> and
>
> (ii) the High Court failed to appreciate that the applicability (or inapplicability) of Explanation 3 to section 140(1) casts no shadow on, and indeed has no relevance with regard to, the jurisdiction of the officer who issued the SCN.

3. It is important to note that the expressions 'eligible duties' and 'eligible duties and taxes" are just expressions; these are not proper nouns. These expressions appear in subsection (1) and subsection (5) of s. 140 in running sentences and not in inverted commas. In other words, expression 'eligible duties and taxes' simply means eligible duties and eligible taxes. Even if it is argued that as the expression 'eligible duties and taxes' appears in s.140(5) in a running sentence, it cannot be presumed that the word 'eligible' necessarily qualifies the word 'taxes' also but this need not detain us for our purpose because there is no doubt that the word 'duties' is certainly qualified by the word 'eligible' and that is sufficient for the purpose of this article. It is also pertinent to dispel a possible creative argument that each of these expressions should be taken as indivisible, a la 'works contract'. The fallacy of this argument is self-evident but just to elucidate, e.g. if the aggregate credit available on 30.6.2017 was of both, eligible and ineligible, duties, even then the credit of eligible duties can be culled out of the total and the credit of eligible duties so culled out of the aggregate whole would be transitionable under s. 140(1). It shows that the expression 'eligible duties' is not indivisible and the word 'eligible' merely qualifies the word 'duties'.

4. It is axiomatic that if A+B does not cover C , then neither A can cover C nor B can cover C. At this juncture, it is helpful to reproduce Explanation 3:

"Explanation 3. - For removal of doubts, it is hereby clarified that the expression "eligible duties and taxes" excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under subsection (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975)."

When as per Explanation 3 both, eligible duties and taxes, (admittedly) exclude education cess, then it is a logically and mathematically impossible to hold that 'eligible duties' may not (leave alone will not) exclude education cess. It may be noted that in this analysis, it is immaterial whether the amended Explanation 1 or Explanation 2 were notified to come into effect or not because none of the two versions (i.e. amended as well as unamended) specified education cess. What is also important to note is that although the definition of eligible duties in Explanation 1 is not applicable to s. 140(1) because the amended version thereof has not been brought into effect, that makes no difference to the foregoing analysis because (by virtue of the fact that eligible duties and taxes contains the expression eligible duties), the expression eligible duties conspicuously occurs in both Explanation 3 as well as in s. 140(1) and would have to have the same meaning at both places Therefore, even in the absence of the definition of eligible duties, whatever that expression (eligible duties) may mean, education cess cannot be covered thereunder because of its specific exclusion therefrom by virtue of Explanation 3 (as explained above).

3. From the above analysis, it is evident that the Hon'ble High Court erred in holding that Explanation 3 does not apply to s. 140(1).

4. Going forward, non-applicability of Explanation 3 to s. 140(1), (as held by Bombay High Court), does not in any way affect the jurisdiction of the officer who issued the SCN. It is so because the SCN is issued under s. 73 ibid. Section 73 duly and unequivocally bestows jurisdiction upon the proper officer to issue SCN if it appears to him that input tax credit has been wrongly availed or utilised. It is not in dispute that the officer who issued the SCN was the proper officer and to him it certainly appeared that the impugned credit was wrongly availed or utilised. Thus inapplicability of Explanation 3 to s. 140(1) casts no shadow on, and indeed has no relevance with regard to, the jurisdiction of the proper officer who issued the SCN. It is a different matter that the interpretation or understanding of the proper officer may be incorrect rendering the SCN unsustainable but that is not an issue of jurisdiction. In other words, so long as the officer issuing the SCN was 'proper officer' to whom it appeared that the input tax credit was wrongly availed or utilised, the SCN can not be held to have been issued without jurisdiction [and that too and more so on the basis of the reverse swing i.e by first determining that the SCN is based on incorrect application of law and then on that basis declaring that the officer, though a proper officer, did not have jurisdiction]. Indeed, by this reasoning every SCN which is held to be unsustainable on the ground of incorrect interpretation of law may possibly be rendered to have been issued without jurisdiction.

5. The Hon'ble Bombay High Court has (merely) mentioned the Supreme Court decision in the case of Special Director vs Mohd. Ghulam Ghouse ***- 2004-TIOL-05-SC-FEMA.***]. Therefore it is pertinent to reproduce a para from that judgement :

"This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless, the High Court is satisfied that the show cause notice was totally non est in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts , writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. Whether the show cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially , before the aggrieved could approach the Court. Further, when the Court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is accorded to the writ petitioner even at the threshold by the interim protection, granted." (Underlines added)

Viewed in the light of the analysis contained in this article, it would appear that in the given circumstances, the above judgement of Supreme Court categorically and strongly discourages quashing of the SCN; the words ***"would appear"*** (instead of 'is evident') have been used in deference to Bombay High Court which has referred to the said Supreme Court judgement in support of quashing the SCN [while, to repeat, quite to the contrary, it clearly seems to oppose such quashing].

7. What is argued in this article is that the said Bombay High Court judgement is (or to put it deferentially, appears to be) clearly flawed at least on two crucial counts mentioned above and, therefore, is eminently challengeable before the Hon'ble Supreme Court.

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