

# Bimal Jain

FCA, FCS, LLB, B.Com (Hons)

Dear Professional Colleague,

## Non Bailable offences under Service Tax do not have retrospective effect

We are sharing with you an important judgement of the Hon'ble High Court of Calcutta, in the case of **Sudip Das, {[2014] 44 taxmann.com 48 (Calcutta)}** on following issue:

### Issue:

Whether assessee can be denied bail under Section 89(1)(d)(ii) of the Finance Act, 1994 (**"the Finance Act"**) read with Sections 90 and 91 thereof as amended/ introduced vide the Finance Act, 2013 (w.e.f May 10, 2013), for non - payment of service tax exceeding Rs. 50 lakhs collected during the period prior to May 10, 2013, on pretext that the offence being a continuing one?

### Facts & Background:

Mr. Sudip Das (**"the assessee"** or **"the Petitioner"**) was arrested by the Department under Section 89(1)(d)(ii) of the Finance Act read with Sections 90 and 91 thereof, as amended/ introduced by the Finance Act 2013, for non-payment of service tax exceeding Rs. 50 lakhs collected from the customers during the period 2008–2012.

Relevant extracts of the said Sections of the Finance Act are reproduced below for ease of reference:

### **"89. Offences and penalties.—**

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

*a) .....;or*

*b) .....; or*

*c) .....; 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) .....*

*(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....."*

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## **"90. Cognizance of offences**

- (1) *An offence under clause (ii) of sub-section (1) of section 89 shall be cognizable.*
- (2) *Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974), all offences, except the offences specified in sub-section (1), shall be non-cognizable and bailable."*

## **"91. Power to arrest**

- (1) *If the Commissioner of Central Excise has reason to believe that any person has committed an offence specified in clause (i) or clause (ii) of sub-section (1) of section 89, he may, by general or special order, authorise any officer of Central Excise, not below the rank of Superintendent of Central Excise, to arrest such person....."*

The assessee argued that since the alleged offence arose between the period 2008-2012, was Bailable and cognizability/ non-bailability was introduced vide the Finance Act, 2013 which was effective from May 10, 2013 and not retrospective. Therefore, assessee was eligible for bail. The Department denied bail to the assessee alleging that the offence is a continuing one and is alive even today, therefore, amended provisions are applicable.

Being aggrieved by the Contention of the Department, the assessee filed petition before the Hon'ble High Court of Calcutta.

### **Held:**

It is held by the Hon'ble High Court of Calcutta ***that the amendment brought vide the Finance Act, 2013 does not have any retrospective effect, therefore, question of bailability and non-bailability almost comes to a point of merger, benefit of which should be extended to accused person.***

It was further held by the Hon'ble High Court of Calcutta that even though the alleged offence is alive till now but it is equally correct that ***when it was originated, alleged offence was bailable as per law. Hence, bail was granted subject to certain conditions.***

Therefore, the Hon'ble High Court of Calcutta rejected the contention of the Department and decided the case in favour of the assessee/ Petitioner.

*Hope the information will assist you in your Professional endeavours. In case of any query/ information, please do not hesitate to write back to us.*

Thanks & Best Regards.

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