CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70439 of 2018

(Arising out of Order-in-Appeal No.24-ST/APPL/LKO/2018 dated 17/01/2018 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow)

M/s Kailash Associates, **.....Appellant**
(S-13, Block No.-E-136,
Raman Tower, Sanjay Place, Agra)

VERSUS

Commissioner of Customs, Central Excise & CGST **....Respondent**
(Lucknow)

APPEARANCE:

Ms Stuti Saggi, Advocate for the Appellant
Shri Sandeep Pandey, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70024/2023

DATE OF HEARING : 02 August, 2023
DATE OF DECISION : 02 August, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.24-ST/APPL/LKO/2018 dated 17/01/2018 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow, vide the impugned order Commissioner (Appeals) has held as follows:

> *"6. The appellant could not produce any evidence in support of their claim to be Pure Agent of the recipient of service. Therefore the gross amount received by them is taxable.*

7. From the record it is apparent that the appellant have not received service tax amount separately. Department has to re-check this aspect and extend the benefit of cum tax value as provided under Section 67 (2) of the said Act. The re-calculated service tax amount will be paid by the appellant alongwith interest and equal penalty under section 78 of the said Act. The option paying reduced penalty at 25% will be available to them if service tax and interest is paid within thirty days of receipt of this order, as provided under second proviso to Section 78 of the said Act. However as penalty under Section 78 has been imposed, penalty under Section 70 and 77 are not warranted and the same is set aside.

In view of above I pass the following order.

ORDER

The appeal is partly allowed and the O-I-O is modified in above terms."

2.1 Appellant, a recovery agent for ICICI Bank and for undertaking the job assigned they are getting certain reimbursements on account of salaries paid to their employees engaged in the work of recovery during the period 01.04.2010 to 10.07.2014. Appellant claimed that they received certain charges as Pure Agent, and hence in terms of Rule 5 (2) of Valuation Rules, 2006, these charges will not form the part of taxable value of services. If these charges are excluded then the value of taxable service provided by them is within the exemption limit prescribed throughout.

2.2 Investigations were undertaken by the revenue. A show cause notice dated 21.10.2015 was issued to the appellant asking to show cause"-

"(i) An amount of Service Tax of Rs.11,87,873/- (including Edu. Cesses) [Rupees Eleven Lakhs Eighty Seven Thousand Eight Hundred Seventy Three only] being Service Tax not paid, during the period from 01.04.2010 to 10.07.2014, should not be demanded and recovered from them under proviso to sub-section (1) of Section 73(1) of Finance Act, 1994.

(ii) Interest at appropriate rates under Section 75 of Finance Act, 1994 should not be demanded and recovered from them on the amount of Service Tax confirmed;

(iii) Penalty should not be imposed upon them under Section 78 of the Act for suppression of facts and the value of taxable service and for contravention of various provisions of the Act and the Rules made there under with intent to evade payment of Service Tax;

(iv) Penalty should not be imposed upon them under Section 77 of the Act for contravention of the provisions of the Act and Rules made there under, for failure in appearing to tender the statement in compliance of Summon issued by the Officer of Central Excise & Service Tax.

(v) Amount as prescribed under rule 7(C) of Service tax Rules, 1994 should not be demanded and recovered from them for delayed submission of ST-3 returns."

2.3 This show cause notice has been adjudicated by the Deputy Commissioner, holding as follows:

(i) I hereby confirm the demand of service tax amounting to Rs 11,87,873.00 (including Edu. Cesses) [Rupees Eleven Lakh Eighty Seven Thousand Eight Hundred and Seventy Three only] against M/s Kailash Associates, S-13, Block No E-136 raman Tower, sanjay Place, Agra under proviso to sub-section (1) of Section 73 of Finance Act, 1994.

(ii) I also confirm demand of interest at appropriate rate against said M/s Kailash Associates, Agra under section 75 of the Finance Act, 1994.

(iii) I impose a penalty of Rs 11,87,873.00 [Rupees Eleven Lakh Eighty Seven Thousand Eight Hundred and Seventy Three only] upon said M/s Kailash Associates, Agra under section 78 of the Act.

(iv) I impose a penalty of Rs 10,000.00 [Rupees Ten Thousand only] upon M/s Kailash Associates, Agra under Section 77 of the Act.

(v) I confirm the demand Late Fee amounting to Rs 2,00,000.00 (Rupees Two lakhs only) against said

M/s Kailash Associates, Agra under Rule 7C of the Service Tax Rules, 1994 read with section 70 of the Act, as discussed above."

2.4 Being aggrieved, appellant filed appeal before Commissioner (Appeals) who have by the impugned order disposed of the appeal as per the order stated in para-1. Hence, this appeal.

3.1 We have heard Ms Stuti Saggi Advocate appearing for the appellant and Shri Sandeep Pandey Authorized Representative appearing for the Revenue.

3.2 Arguing for the appellant Learned Counsel submits that the issue involved in the manner is respect of the inclusion of reimbursable expenses in the value of taxable service for the period prior to amendments made in section 67 of the Finance Act, 1994 in 2015. This is no longer res-Integra and has been decided in a number of cases by the various Courts and Tribunal. She referred the following decisions:-

- P.G. Associates [Final Order No 70736/2019 dated 22.02.2019 of Allahabad Bench]
- Adhikrut Jabti Evam Vasuli [2017 (6) GSTL 529 (T-Del)]
- Intercontinental Consultants & Technocrats Pvt. Ltd. [2013 (29) STR 9 (Del)]
- Intercontinental Consultants & Technocrats Pvt. Ltd. [2018 (10) GSTL 401 (SC)]

3.3 Learned Authorized Representative reiterates the findings recorded in the impugned order and the order of the Deputy Commissioner.

4.1 We have considered the impugned order along with the submissions made in appeal and submissions made during the course of argument.

4.2 The payment Clause 3(c) of the agreement dated 25.09.2008 provides as under:-

"All such costs which are required to be incurred by the service provider in relation to the services and which have been agreed to be borne by ICICI Bank shall be incurred with the approval of ICICI Bank and the service provider

shall furnish to the ICICI Bank all necessary receipts and other documents evidencing the incurrence of such costs, in a form and manner satisfactory to ICICI Bank.”

As is evident from the above condition of the agreement it is clear that the appellant is incurring certain expenditures on behalf of ICICI Bank for which it is reimbursed. Deputy Commissioner, while rejecting the contentions of appellant in his Order-in-Original has observed as follows:-

“22.1. The Noticee also pleaded that they acted as Pure Agent to M/s ICICI Bank Ltd. and the reimbursable expenditures made by them as Pure Agent is deductible from the Gross Value/amount received from the Bank in terms of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006. The Noticee also claimed that the words i.e. "for such service” used in Section 67 of the Act clearly show that only consideration received for providing service is taxable, as Explanation to Section 67 defining the term "Consideration" was amended only from 14.05.2015 by the Finance Act, 2015. Therefore, the reimbursable expenditures are excludible from the taxable value. The Noticee also submitted copy of Contract/ Agreement made between them and the Bank.

22.2. I find that the Noticee has accepted that they have provided Recovery Agent's service to the Bank and the Bank has also confirmed the fact that the Noticee has provided such services to them, during the course of investigation of the case by the officers of the Department, as alleged in the impugned Show Cause Notice. As regard the plea of the Noticee that they acted as 'Pure Agent' and reimbursable expenditures should be excluded from the gross receipts, I have gone through the 'Service Provider Agreement made between the Noticee and the Bank, excerpts thereof are reproduced below:-

"6 PAYMENT

(a) The Service Provider will, unless disputed by ICICI Bank, be paid charges specified in Schedule I hereto for the Services.......

(c) All such costs which are required to be incurred by the Service Provider in relation to the Services and which have been agreed to be borne by ICICI

Bank shall be incurred with approval of ICICI Bank and the Service Provider shall furnish to ICICI Bank all necessary receipts and other documents evidencing the incurrence of such costs, in a form and manner satisfactory to ICICI Bank."

Terms and conditions are prescribed in "Standard Terms (07-VI) as applicable to the Services provided to ICICI Bank Limited by Service Provider". The relevant terms & conditions are reproduced below:-

"2. REPRESENTATIONS, WARRANTIES, CONFIRMATIONS AND UNDERTAKINGS BY THE SERVICE PROVIDER

The following representation, warranties, confirmations are made by the Service Provider:

Confirmations, covenants, undertakings

(iii) The Service Provider shall, at its own costs, undertake all repair, replacement, upgradation or procurement of equipment/infrastructural facilities necessary for the provision of the Services.

3. PERSONNEL, SUB-CONTRACTORS AND AGENTS

(a) The Service Provider shall be responsible for the selection, hiring, assigning and supervising/ due diligence of the personnel and shall employ sufficient number of personnel to provide the Services in a prompt and efficient manner. All such personnel shall work under the supervision, control and direction of the Service Provider. The Service Provider shall be solely responsible for all negotiations with personnel relating to salaries and benefits, and shall be responsible for assessments and monitoring of performance and for all disciplinary matters. All personnel engaged by the Service Provider shall be in sole employment/control of the Service Provider and the Service Provider shall be solely responsible for their salaries, wages, statutory payments, etc. Under no circumstances shall ICICI Bank be liable for any payment or claim or compensation...

(b) The personnel of the Service Provider shall continue to be the personnel of the Service Provider and work under its directions and shall not become or claim any employment from ICICI Bank/ or any customer of ICICI Bank on whose behalf the Service

> *Provider is appointed by ICICI Bank, by virtue of providing the Services, irrespective of the location of the performance of the Services*
> *(c) The Service Provider shall be solely liable for the acts, deeds and things done by the personnel of the Service Provider."*

22.3. The Noticee has claimed that they acted as 'Pure Agent' for the Bank and work expenditures has been paid to third party through cheques. In order to further clarify the matter, it is necessary to go through the definition of 'Pure Agent' given in Explanation-1 Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006 which is reproduced below:-

> *"Explanation1.-For the purposes of sub- rule (2), "pure agent" means a person who-*
> *(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;*
> *(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;*
> *(c) does not use such goods or services so procured; and*
> *(d) receives only the actual amount incurred to procure such goods or services."*

22.4. I further find that the Noticee is Collection Agent for the Bank and the services of Recovery Agent provided by them to the Bank are enumerated in Schedule-I of the Agreement which includes Collection of due from the Borrower and also take possession of assets from the Borrower as per the terms of the loan agreement etc. and deposit the amount so collected in the Bank. From the terms and conditions mentioned in the 'Service Provider's Agreement', the relation between the Noticee and the Bank is on principal to principal basis i.e. both are independent to each other in their working and the employees of the Noticee cannot be treated as employees of the Bank. Further, as per the Agreement, the Noticee is liable for payment of salaries, wages, statutory payments, etc. to their employees/ employed personnel and the Bank has no obligation to make any type of payment to the such personnel or employees of the Noticee. Further, as per the Agreement they have to procure and maintain all equipments and infrastructural facilities on their own cost. I also find that there is no condition in the Agreement that the Noticee acted as 'Pure Agent' for the Bank for any purpose. Further, if the Noticee has maintained any office for any purpose, that is their own decision to run their business from any place either front their own residence or office or any other place and this has no bearing on the service provided by them and all the maintenance cost incurred for maintenance of office is their own expenditure and as per the Agreement with the Bank, the Bank was not responsible for making any payment for maintenance of office. However, there is provision in the said Agreement regarding reimbursement of expenditures made by the Noticee on behalf of the Bank, but it does not include the salaries of employees of the Noticee or maintenance cost of office etc. Moreover, the Noticee failed to produce any evidence to show that the considerations received by the, from the Bank also include reimbursable expenses with details of such expenses approved by the Bank. Merely mentioning any amount in their defence submissions as reimbursable expenditure is not suffice to accept it, without any corroborative evidence. Therefore, I hold that entire consideration received by the Noticee from the Bank is for the provision of service of Recovery Agent and the gross amount received by them from the Bank by the Noticee is the taxable value for the service provided by them and leviable to Service Tax and the Noticee cannot be treated as Pure Agent of the Bank."

4.3 Further, In case of M/s Adhikrut Jabti Evam Vasuli [2017 (6) GSTL 529 (T-Del) in similar facts of case, Tribunal has by majority order held as follows:-

"19. *The present appeal is referred to third Member in view of difference of opinion between the members in the Division Bench on certain aspects. The brief facts of the case are that the appellant is in the business of providing services as "Recovery Agent" to various nationalized banks for the past many years. The services rendered by them were subjected to service tax w.e.f. 1-5-2006. One of the disputes involved in the present appeal is relating to valuation of the taxable services provide by the appellant. The difference of opinion also is only with reference to such valuation and question of limitation.*

20. *During the course of providing services as "Recovery Agent" to the client banks, the appellants incurred certain expenditure like parking charges, arrangement of security guards, insurance premium, videography, police escorts, publication in newspaper, etc. The appellant claimed that in terms of the agreement with the banks, these are reimbursed on actual basis. Hence, these expenses are not to be included in the value for service tax purposes. The appellant claimed that in terms of Rule 5(2) of Service Tax (Determination of Value) Rules, 2006, the expenditure incurred by the service provider as a 'pure agent' of the recipient of the services is excludible from the value for the tax purposes. It is further claimed that they have fulfilled all the conditions for being such 'pure agent'.*

23. *Ld. Member (T) reproduced, at length, the findings of the ld. Commissioner (Appeals) in the impugned order. It is seen that the impugned order as well as the ld. Member (T) placed reliance on the decision of the Larger Bench in Bhagvathy Traders - 2011-TIOL-1155-CESTAT-BANG.LB = 2011 (24) S.T.R. 290 (Tri.-LB). The said decision is not a ratio for disallowing reimbursable expenses for exclusion from the taxable service. In fact, the said decision only framed certain guidelines stating that reimbursable expenses can be excluded only when the service provider was not under any obligation to incur such expenses and the same is done on behalf of the service recipient. In other words, the excludability of any expenses claimed to be reimbursed depends on the facts and circumstances of each case and the terms of the agreement relevant to the said case. In the present appeal, the appellant categorically claimed that in terms of the agreement with client banks, they are incurring various expenses during the course of providing service as recovery agent. These expenses were reimbursed to them on actual basis. This aspect can be verified in terms of the agreement, documents/invoices supporting the claim of the appellant.*

24.*I note that the decision of the Hon'ble Delhi High Court in Intercontinental Consultants & Technocrafts Pvt. Ltd. - 2013 (29) S.T.R. 9 (Delhi) has not been considered, before a decision is arrived at by the ld. Member (T). The Hon'ble Delhi High Court held that the Rule 5(1) of the Valuation Rules, 2006 is ultra virus of the substantive legal provisions of Section 67 and 68 of Finance Act, 1994. The*

> *High Court was dealing with similar reimburseable expenditure regarding travel or accommodation. The facts of the present case along with connected documentary evidences are to be examined in line with the observation of the Tribunal in Shree Bhagvathy Traders (supra) and Hon'ble Delhi High Court in Intercontinental Consultants & Technocrafts Pvt. Ltd. (supra). This can be done by the Original Authority for a fresh decision. As such, the findings of the ld. Member (J) with reference to remand of the matter to the Original Authority is correct."*

4.4 Issue in regards to levy of service tax on the reimbursement expenses prior to amendment of Section 67 and Rule 5 has been considered by Hon'ble Supreme Court in the case of Union of India Vs Intercontinental Consultants And Technocrats Pvt. Ltd. 2018 (10) G.S.T.L. 401 (S.C.) while deciding the Appeal filed by revenue challenging the order of Hon'ble High Court of Delhi, referred to by in the order of CESTAT referred above. Hon'ble Supreme Court while upholding the order of Hon'ble Delhi Court has observed as follows:-

> ***"22.*** *Section 66 of the Act is the charging Section which reads as under:*
>
> > *"there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clauses of Section 65 and collected in such manner as may be prescribed."*
>
> ***23.*** *Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the 'value of taxable services'. Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.*
>
> ***24.*** *In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning*

which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.

25. *This position did not change even in the amended Section 67 which was inserted on May 1, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider.*

26. *It is trite that rules cannot go beyond the statute. In Babaji Kondaji Garad, this rule was enunciated in the following manner :*

> *"Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the byelaw, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."*

27. *The aforesaid principle is reiterated in Chenniappa Mudaliar holding that a rule which comes in conflict with the main enactment has to give way to the provisions of the Act.*

28. *It is also well established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held in Taj Mahal Hotel :*

> *"the Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect."*

29. *In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for* *providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature. On this aspect of the matter, we may usefully refer to the Constitution Bench judgment in the case of Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited [(2015) 1 SCC 1] wherein it was observed as under :*

> *"27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-a-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.*
>
> *28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR*

> *6 QB 1], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.*
>
> *29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."*

4.5 In view of the above decision of the Hon'ble Supreme Court for the period prior to 2015 the demand or service tax in respect of reimbursable expenses cannot be sustained. Accordingly, the same is set aside, demand and penalties imposed on the appellant are also set aside.

5.1 Appeal is disposed of in above terms.

(Dictated and pronounced in open court)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp