**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**ALLAHABAD**

REGIONAL BENCH - COURT No. I

**Service Tax Appeal No.91 of 2008**

(Arising out of Order-in-Appeal No.260-CE/MRT-II/2007 dated 17.12.2007 passed by Commissioner (Appeals) Customs & Central Excise, Meerut-II)

**M/s Anand Enterprises, .....Appellant**
(51, Kishan Ganj, Hapur, Ghaziabad)

*VERSUS*

**Commissioner of Central Excise, Meerut-II ....Respondent**
(Meerut-II)

**APPEARANCE:**

Shri Rajesh Chhibber, Advocate for the Appellant
Shri A. K. Choudhary, Authorized Representative for the Respondent

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

**FINAL ORDER NO.- 70878/2024**

DATE OF HEARING : 18.12.2024
DATE OF DECISION : 18.12.2024

**SANJIV SRIVASTAVA:**

This appeal is directed against Order-in-Appeal No.260-CE/MRT-II/2007 dated 17.12.2007 passed by Commissioner (Appeals) Customs & Central Excise, Meerut-II. By the impugned order Order-in-Original No.137-ST/Anand/HPR/2007 dated 09.08.2007 holding as follows has been upheld:-

***"ORDER***

*a) Service Tax amounting to Rs.2,27,292/- (Rs.2,29,606/- (-) Rs.2,314/-) is confirmed in terms of Section 68 during the year 2004-05.*
*b) Interest on the said amount of Service Tax in terms of Section 75 of the Finance Act, 1994 is confirmed.*
*c) Penalty amounting to Rs.500/- (Five Hundred only) in terms of Section 75A of the Finance Act, 1994 is imposed for failing to obtaining the Registration.*

*d) Penalty amounting to Rs.100/- (for everyday during which such failure continues but not exceed the amount of Service Tax payable) in terms of Section 76 of the Finance Act, 1994 is imposed for contravention of Section 68 of the Finance Act, 1994.*

*e) Penalty amounting to Rs.1000/- (One Thousand only) in terms of Section 77 of the Finance Act, 1994 is imposed.*

*f) Penalty amounting to Rs.2,27,292/- (Two lakhs twenty seven thousand two hundred ninety two only) in terms of Section 78 of the Finance Act, 1994 is imposed."*

2.1 Appellant was working as loading and unloading agent to M/s Simbhaoli Sugar Mills Ltd., Ghaziabad they were not registered with the Department and were not paying the service tax.

2.2 On the of intelligence investigations were initiated against the Appellant and it was observed that the Appellant had not paid service tax of amounting to Rs.24,41,043/- received from the Appellant's clients as the commission as for being C & F Agents.

2.3 Show cause notice dated 13.03.2006 issued to the Appellant asking them as to why:-

*a) The Service Tax amounting to Rs.2,29,606/- (not paid) during the 2004-05 should not be demanded in terms of Section 73(a) and 73(1) of the Finance Act, 1994.*

*b) The interest on the said amount of service tax of Rs.2,29,606/- should not be demanded in terms of Section 75 of the Finance Act, 1994.*

*c) Penalty should not be imposed in terms of Section 75A, 76, 77 & 78 of the Finance Act, 1994 for contravention of Section 68, 69, 70 of Finance Act, 1994.*

2.4 Show cause notice has been adjudicated as per the Order-in-Original referred in para 1 above.

2.5 Aggrieved Appellant filed this appeal before Commissioner (Appeals), which has been dismissed as per the impugned order. Hence this appeal.

3.1 We have heard Shri Rajesh Chhibber learned Advocate appearing on behalf of the Appellant and Shri A. K. Choudhary learned Departmental Authorized Representative appearing for the Revenue.

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

4.2 For holding against the appellant, Commissioner (Appeal) observed as follows:-

> *"8. I have carefully gone through the facts of the case and the record of personal hearing. In the present case the Department has alleged that the appellants were working as C & F Agents for SSML and did not pay service tax due on the payments received from SSML in lieu of the said activity performed for them. On the other hand the appellants have refuted the allegation saying that they had separate contracts for loading and unloading of the goods and reimbursement of expenses for other jobs performed at two godowns at Bulandshahar and Muzaffarnagar. They have enclosed the copies of the contracts entered with SSML against which payments were received. They have also said that only in one case they received commission on which they have paid service tax now. They have also said that the activities of loading and unloading and the other jobs undertaken for which reimbursement of expenses has been made by SSML are not covered under the purview of service tax.*
>
> *9. I, however, find that in reply to the show cause notice, the appellants have said that apart from providing loading – unloading service, they were also providing marketing consultancy for which a retainership fee was received by them under a separate contract. The copies of these contracts have not been provided by them with the appeal. They have further said that they incur expenses towards marketing in the form of entertainment, postage, telegram, godown rent, printing & stationery, travelling, telephone and freight for which they receive payment from*

*SSML in the form of reimbursement of expenses under a separate contract. They have added that the activity of brand promotion of the liquor of SSML by collecting data regarding market size, customer feedback, devising of sales promotion schemes etc. were not covered within the ambit of C & F Agents and as such no service tax was payable by them. In this regard they have relied upon the CBEC circular No.43/7/97-TRU dated 11.07.1997. They have also relied upon the and the decision of Hon'ble Tribunal in case of E.V. Mathai & Co. stating since the services were rendered under different contract they were not liable for service tax on loading and unloading.*

*10. The adjudicating authority has also relied upon the Board's circular No.B-43/7/97-TRU dated 11.07.1997 wherein it has been provided that a C & F Agent undertakes activities namely-*

*(a) receives the goods from principal or his agent*
*(b) warehouses these goods*
*(c) receives dispatch orders from the principal*
*(d) arrange dispatches of goods as per directions of the principal*
*(e) maintains records of receipt and dispatch of goods*
*(f) Preparation of invoices*

*He has mentioned in the order that Shri Sanjeev Kumar Garg, Proprietor in his statement has admitted that all these activities were undertaken by him. Thus he has found that in addition to receiving of commission they were also receiving payments for carrying out the above mentioned activities and thus were acting as a C & F Agent for SSML and the total amount was divided into separate contracts to mislead the Department and to evade payment of service tax.*

*11. I find that though an amount of Rs.25000/- has admittedly been received as commission and the service tax has also been paid by them now after the issue of the show cause notice, yet there is no mention of this amount* *in ledger or the chart in form annexure 'B' submitted with the appeal. A perusal of the statement given by the proprietor to the Department I find that he has admitted to have provided services mentioned in para 11 above which have been defined by CBEC as the services normally undertaken by a C & F Agent. From the perusal of loading unloading contract between the appellant and SSML I find that a fixed amount per BL is payable against the said contract subject to the condition that a sale of minimum guaranteed quantity is done by them and for sales more than a guaranteed quantity, additional incentive as per mutually agreed rates would be payable. This shows that it is not a simple loading unloading contract but a fixed amount upto the sale of minimum agreed quantity is payable in the name of loading unloading contract and for sale above that quantity payment at mutually agreed rates, not disclosed would be payable. There is a similar condition in case of another contract for reimbursement of expenses where also an agreed amount is payable per BL subject to the same condition of sale of minimum guaranteed quantity of liquor. Further this amount is payable in addition to the commission being paid to them. It clearly shows that they have been receiving commission for arranging sales of the goods and in addition they are carrying out activities namely loading unloading of goods at godowns, payment of godown charges, marketing and sales promotion activities, maintenance of records at godowns, raising of invoices on behalf of the principal, other clerical jobs at godowns. It is also evident from the contracts that they have an agreement for making an agreed quantity of sale from the godowns but this agreement has not been disclosed to the Department. It is further evident from the contracts between the appellant and SSML that the charges in the name of reimbursement of expenses are at fixed rates and not the actual expenses and also that the charges are based on another contract* *for arranging minimum quantity of sale of liquor from the godowns.*

*12. As per definition of C & F Agent as provided in 65 of the Finance Act, 1994, any person who is engaged in providing any service, either directly or indirectly, connected with the clearing and forwarding operations in any manner to any other person and includes a consignment agent is covered. From the facts of the case I find that the appellants are providing godowns for depositing of the goods by paying godown rent, are providing loading and unloading of the goods at godown thereby handling the goods, are providing marketing consultancy, providing telephone, paying freight, maintaining records, and providing several other services to M/s SSML related to the sale of country liquor for SSML. There is also an agreement that a minimum sale of the goods would be ensured by them on the basis of which fixed charges per unit would be payable to them by SSML. It leaves no room for any doubt that they are not acting as consignment agent or C & F Agents for M/s SSML. Regarding Board's circular relied upon by them, I find that the Adjudicating Authority has also concluded on the basis of the same Board's circular that the activities carried out by them are covered within the ambit of C & F Agent and thus I do not find any force in their contention on the ground of Board's circular. Further regarding the decision of Hon'ble CESTAT in case of E.V. Mathai, I find that the adjudicating authority has given the finding that in that case the issue was sent back to the adjudicating authority and therefore there was not conclusive decision of the court. Hence, I agree with the finding in the order under appeal that the said decision is not applicable in this case.*

*13. Regarding the decision of Hon'ble Tribunal in case of U.M. Tharaiath & Company, relied upon by the appellant, I find that the facts of the case are not identical to the present issue. In that case the appellants were collecting* *commission from the third parties on behalf of the principal and on this amount service tax was duly discharged by the principal. Under these circumstances, Hon'ble Court held that this activity was not covered under "C & F Agent". I find that the issue in the present case is different. Here no amounts are being collected on behalf of the principal on which principal pays tax but here principal itself is paying amount in the name of loading – unloading activity which is a part of C & F activity carried out by the appellants. Thus I feel that the findings in the said relied upon decision of Hon'ble Tribunal are of no relief to the appellants as the same are not applicable here."*

4.3 We find that the basic issue for consideration in the present appeal is with regard to addition of certain reimbursable expenses in the value of taxable services provided by the appellant. These amounts are received under separate contract, as observed in para 9 of the impugned order.

4.4 The issue with regard to the addition of such reimbursable expenses in the value of the taxable services provided for the period prior to 2015 has been considered by Hon'ble Delhi High Court and then by Hon'ble Supreme Court in the case of Inter Continental Technocrat Consultancy 2018 (10) G.S.T.L. 401 (S.C.). By the said decision Hon'ble Supreme Court have quashed the provisions of Rule 5 provided for addition of such reimbursable expenses in value of taxable services is beyond the power conferred under Section 67. Relevant portion of the decision is reproduced below:-

***"21.*** *Undoubtedly, Rule 5 of the Rules, 2006 brings within its sweep the expenses which are incurred while rendering the service and are reimbursed, that is, for which the service receiver has made the payments to the assessees. As per these Rules, these reimbursable expenses also form part of 'gross amount charged'. Therefore, the core issue is as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5. As noted above, prior to April 19, 2006, i.e., in the* *absence of any such Rule, the valuation was to be done as per the provisions of Section 67 of the Act.*

***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."*

> ***30.****As a result, we do not find any merit in any of those appeals which are accordingly dismissed."*

4.5 We find that earlier this appeal was kept pending for decision in the matter of Bhagwati Traders pending in appeal before the Hon'ble Supreme Court. However, we find that the issue has been decided and is squarely covered by the above referred decision of Hon'ble Supreme Court in favour of the Appellant. This decision has been followed in the case of Boeing India Defense Pvt. Ltd. [2024 (388) E.L.T. 37 (S.C.)]. Accordingly this appeal has been taken up for consideration.

5.1 Appeal allowed.

(Dictated and pronounced in open court)

**(P. K. CHOUDHARY)**
**MEMBER (JUDICIAL)**

**(SANJIV SRIVASTAVA)**
**MEMBER (TECHNICAL)**

*LKS*