CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 439 of 2012

[Arising out of Order-in-Original No. 01/AKM/CST/ADJ/2012 dated 11.01.2012 passed by the Commissioner (Adjudication), Service Tax, New Delhi]

Coca Cola India Inc **......Appellant**
Enkay Towers, Udyog Vihar,
Gurgaon, Haryana 122016

VERSUS

Commissioner of Service Tax, Delhi **......Respondent**
IAEA House, 17-B, IP Estate, MG Marg,
New Delhi 110002

APPEARANCE:

Sh. Jitendra Motwani, Advocate for the Appellant

Sh. Siddharth Jaiswal and Sh. Aneesh Dewan, Authorized Representatives for the Respondent

CORAM:

HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 60586/2024

DATE OF HEARING: 14.10.2024
DATE OF DECISION: 18.10.2024

PER : P. ANJANI KUMAR

The present appeal is directed against the Order-in-Original No. 01/AKM/CST/ADJ/2012 dated 11.01.2012 passed by the Commissioner (Adjudication), Service Tax, New Delhi.

2. Briefly stated facts of the present case are that the appellant M/s Coca Cola India Inc, a branch office of Coca Cola India Inc,

Delaware, USA, are engaged in the business of providing advisory services to their group companies namely Coca Cola India Pvt Ltd, Coca Cola Beverages Pvt Ltd and Hindustan Coca Cola Marketing Company Pvt Ltd as per the service agreement; in terms of the agreement, the appellant received a consolidated consideration which is actual cost plus 5% service fee; the expenses like conveyance, rent, telephone, repairs, insurance, sponsorship etc incurred in the course of rendering the services were reimbursed to the appellant at actual basis. The department conducted an audit of the accounts of the appellant for the period 01.04.2001 to 30.03.2005 and it was observed that the appellant have not paid service tax on the expenditure reimbursed to them by the group companies. A show cause notice covering the period 01.04.2003 to 30.04.2006 was issued to the appellant and was confirmed by the impugned order dated 11.01.2012 by invoking extended period. The impugned order held that :

- The reimbursable expenses are consideration for providing services and are subjected to be taxed.
- The Circular dated 07.10.1998 issued on the occasion of budget is only informatory in nature and effective in that year alone.
- The expenses being incurred and charged only in course of provision of service, hence service tax is payable.
- Trade notices from different Commissionerates are not applicable.

- Rule 5 of Service Tax (Determination of Value) Rules, 2005 is categorical in holding that the expenses of reimbursement are to be included.

Aggrieved by the impugned order, the appellant are before us.

3. Shri Jitendra Motwani, ld. Counsel for the appellant submits that the issue of includability of reimbursable expenses in the assessable value is no longer *res integra*; the impugned order is beyond the scope of show cause notice; whereas the show cause notice seeks 'inclusion of reimbursable expenses' in the assessable value for payment of service tax, the impugned order considers the same as 'consideration' for the provision of service. He further submits that the said expenses were incurred by the appellant and were reimbursed on actual basis; all the payments were made by the appellant to the third parties; Shri A.K. Sorcar, Director Taxation in his statement categorically stated that the expenses were incurred on behalf of the service recipients and thus were reimbursed on actual basis. The ld. Counsel submits that there was no suppression of facts whatsoever with intent to evade payment of duty and therefore, extended period cannot be invoked. In support of his submissions, the ld. Counsel relies on the following case laws:

- UOI vs. Intercontinental Consultants & Techmnocrats Pvt Ltd – 2018 (10) GSTL 401 (SC)
- Tetra Pack India Pvt Ltd vs. CCE, Pune III – 2015 (39) STR 995 (Tri. Mum.)
- Indian Institute for Production Management vs. CCE – 2021 (46) GSTL 55 (Tri. Kol.)

- Dream Loanz vs. CCE, Coimbatore – 2017 (6) GSTL 443 (Tri. Chennai)
- CCE, Indore vs. Mahendra Kumar Jain – 2018 (8) GSTL 72 (Tri. Del.)
- Global Coal & Mining Pvt Ltd vs. CST, New Delhi – 2020 (36) GSTL 77 (Tri. Del.) affirmed by S.C. as 2021 (54) GSTL J10 (SC)
- Scott Wilson Krikpatrick India Pvt Ltd vs. CCE, Jaipur – 2013 (39) STR 652 (Tri. Del.)
- Anand Nishikawa Co. Ltd vs. CCE, Meerut – 2005 (188) ELT 149 (SC)
- Nestle India Ltd vs. CCE, Chandigarh – 2009 (235) ELT 577 (SC)

He further submits that the adjudication order cannot travel beyond the show cause notice as held by the Hon'ble Supreme Court in the case of CCE, Nagpur vs. Ballarpur Industries Ltd – 2007 (215) ELT 489 (SC). He further submits that the impugned order relies on Rule 5 of Service Tax (Determination of Value) Rules, 2005 is incorrect as most of the period involved in the case is before the introduction of the said rule.

4. As an alternate argument, the ld. Counsel submits that the service provided by the appellant during the period of dispute cannot be classified under 'Management Consultancy Services' and service tax is not payable on even the 5% of the amount received as mark up; the appellant provided all day-to-day assistance required to carry on the business of their customers; thus, they were rendering 'Support Services' which are taxable from 01.05.2006.

5. The ld. Counsel further submits that introduction of a new entry and inclusion of certain services in that entry pre-supposes that the said entry was not taxable before such introduction. In this regard, he relies on the following cases:

- Indian National Ship Owners' Association vs. UOI – 2009 (14) STR 289 (Bom.)
- SRF Ltd vs. Commissioner - 2016 (331) ELT A138 (SC)
- Anand Automotive Ltd vs. CST – 2022 (59) GSTL 66 (Tri. Delhi)
- CCE & ST (LTU), Mumbai vs. Shipping Corporation of India Ltd – 2016 (46) STR 835 (Tri. Mum.) affirmed by SC as 2018 (8) GSTL J68 (SC)
- Dr. Lal Path Labs Pvt Ltd vs. CCE, Ludhiana – 2006 (4) STR 527 (Tri. Del.)

6. The ld. Counsel also submits that entire exercise is revenue neutral as held in the cases of CCE vs. Coca Cola India Pvt Ltd - 2007 (213) ELT 490 (SC) and Mafatlal Industries Ltd vs. CCE – 2009 (241) ELT 153 (Tri.) maintained by Hon'ble Supreme Court in 2010 (255) ELT A77 (SC). He further submits that extended period cannot be extended in the instant case as there is no positive act of suppression with intent to evade tax; it can be seen that various Courts and Tribunal were holding different opinions which came to be settled by the Hon'ble Apex Court in the case of Intercontinental Consultants (supra); therefore, the appellant have reasons to have a *bona fide* belief that the expenses are not includable and hence extended period cannot be invoked.

7. Sh. Siddharth Jaiswal assisted with Sh. Aneesh Dewan, the ld. Authorized Representative for the Revenue reiterates the findings of the impugned order and submits that though the Hon'ble Supreme Court held that value of service tax cannot be anything more than or less than consideration paid as *quid pro quo* for rendering such services and therefore, reimbursable expenses cannot be includable; however, what constitutes 'reimbursable expenses' is to be decided in the light of the decision of the Larger Bench of the Tribunal in the case of Sri Bhagavathy Traders vs. CCE, Cochin – 2011 (24) STR 290 (Tri. LB). He further submits that the adjudicating authority has given a categorical finding that the appellant have not produced any documentary evidences are maintained in any separate account to justify the exclusion of these expenses from the gross taxable value.

8. Heard both sides and perused the records of the case.

9. The ld. Counsel has submitted that the issue involved is no longer *res integra*. He relies on the decision of the Hon'ble Apex Court in the case of Intercontinental Consultants (supra). We find that the Hon'ble Apex Court in the case of Intercontinental Consultants (supra) has held as follows:

> ***"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 the gross amount is 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 astatutory 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."*

10. Further, we find that the Tribunal in the case of Dream Loanz (supra) has held as follows:

> ***"7.*** *The judgment in the case of Malabar Management (supra) as well as Intercontinental Technocrats (supra) is also pending decision before the Hon'ble Supreme Court and the same, to our understanding, has not been stayed by the Hon'ble Supreme Court.*
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> ***8.*** *In such circumstances, following judicial discipline, we are of the view that the judgment in the case of Intercontinental Technocrats (supra) as well as Bevan Desai (supra) and the Malabar Management (supra) would squarely apply to the issue on hand. Following the same, we hold that the appellants are not liable to pay service tax on the reimbursable out-of-pocket expenses."*

11. Further, the Tribunal in the case of Global Coal & Mining Pvt Ltd (supra) has held as under:

> ***"37.*** *Section 67 of the Act was considered and explained by the Supreme Court in Union of India and Others v. Intercontinental Consultants and Technocrats Private Limited - (2018) 4 SCC 669 = 2018 (10) G.S.T.L. 401 (S.C.). The appellant therein was providing consulting engineering services. It received payment not only for the services provided by it but was also reimbursed for the expenses incurred by it on air travel, hotel stay, etc. It paid Service Tax on the amount received by it for services rendered to its clients but did not pay any Service Tax in respect of expenses incurred by it which were reimbursed by the clients. A show cause notice was issued to it to explain why Service Tax should not be charged on the gross value including reimbursable and out of pocket expenses. The provisions of Rule 5(1) of the Rules were resorted to for this purpose by the Department.*

38. *A writ petition was filed before the High Court challenging the vires of Rule 5 as being unconstitutional as well as ultra vires the provisions of Sections 66 and 67 of the Act. The High Court of Delhi accepted the said contention and declared Rule 5 to be ultra vires the provisions of Sections 66 and 67 of the Act. The High Court noted that both the amended and unamended Section 67 authorised the determination of value of taxable services for the purpose of charging Service Tax under Section 66 as the gross amount charged by the service provider for such services provided or to be provided by him in a case where consideration for such service is money. The High Court placed emphasis on the words "for such service" and took the view that the charge of Service Tax under Section 66 has to be on the value of taxable service i.e. the value of service rendered by the assessee and the quantification of the value of service can, therefore, never exceed the gross amount charged by the service provider for the service provided by him. On that analogy, the High Court opined that the scope of Rule 5 goes beyond the scope of Section 67 which was impermissible as rules could be framed only for carrying out the provisions of the Act. In taking this view, the High Court observed that the expenditure or cost incurred by the service provider for providing the taxable service can never be considered as the gross amount charged by the service provider "for such service" provided by him.*

39. *The Supreme Court noticed the various reimbursable claims which were included in the gross value. The Supreme Court noted that Rule 5 does bring within its sweep the expenses which are incurred while rendering the service and are reimbursed and, therefore, what was required to be decided was whether Section 67 of the Act permits subordinate legislation to be enacted as done by Rule 5. It needs to be noted that prior to 19 April, 2006, in the absence of a Rule, the valuation was required to be done as per the provisions of Section 67 of the Act. The Supreme Court noticed that the charging Section 66 provides that there shall be levied Service Tax @ 12% of the value of taxable services referred to in the sub-clauses of Section 65 and collected in such manner as may be prescribed. Thus, the Service Tax is on the "value of*

> *taxable services" and, therefore, it is the value of the services which are actually rendered which has to be ascertained for the purpose of calculating the Service Tax. It is for this reason that the Supreme Court observed that the expression "such" occurring in Section 67 of the Act assumes importance. It is in this context that the Supreme Court observed in Paragraph 26 that the authority has to find what is the gross amount charged for providing "such" taxable services and so any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as the amount is not calculated for providing "such taxable service". This according to the Supreme Court is the plain meaning attached to Section 67 either prior to its amendment on 1 May, 2006 or after this amendment and if this be so, then Rule 5 went much beyond the mandate of Section 67. The Supreme Court, therefore, held that the value of material which is supplied free by the service recipient cannot be treated as "gross amount charged" as that is not a "consideration" for rendering the service.*
>
> ***40.*** *Thus, the reimbursement charges could not have been included in the taxable value. The order passed by the Principal Commissioner confirming the demand for the reimbursement charges, therefore, needs to be set aside."*

12. In view of the above, we find that the impugned issue is no longer *res integra* as has been decided by the Hon'ble Apex Court and the Tribunal in the cases cited above. We find that as long as the expenses reimbursed are not shown to be a consideration towards the provisions of service, the same cannot be included for the purposes of arriving at the taxable value. The department has not brought out anything on record to show that the said expenses are indeed a consideration but were shown artificially as expenses. The finding of the adjudicating authority that the appellant could not produced any evidence or document to show that these are

'reimbursed expenses', is not a valid finding. It is for the department who alleged to prove the same with evidence; it is not for the appellant to disprove the same. The ld. AR while accepting the contention of the appellant's Counsel that reimbursed expenses are not includable in the assessable value in view of the decision of the Hon'ble Apex Court in the case of Intercontinental Consultants (supra), has submitted that in view of the decision of the Larger Bench of the Tribunal in the case of Sri Bhagavathy Traders (supra), it is to be examined as to the nature of the reimbursed expenses and only when they qualify as such, their includibilty in the assessable value can be decided. However, as we found above, it is for the department to prove the allegation with the evidence; moreover, we find that the decision of the Hon'ble Apex Court in the case of Intercontinental Consultants (supra) is after the decision of Larger Bench of the Tribunal in the case of Sri Bhagavathy Traders (supra) and therefore, reliance on the decision of the Larger Bench is misplaced. In the light of the judgment of the Hon'ble Supreme Court in the case of Intercontinental Consultants (supra) and in terms of Section 67 of the Finance Act, 1994, service tax is to be levied on the consideration for the services rendered and not for any reimbursement of expenses particularly paid to third parties. Moreover, we find that the show cause notice does not dispute the nature of the reimbursed expenses and their includibilty; the show cause notice merely avers that the said assessee evaded payment of service tax including education cess on the reimbursed expenses from its subsidiaries in spite of numerous letters issued to them.

13. The ld. Counsel for the appellant has raised that the objection that services rendered by the appellant fall under 'Business Support Services' and not under 'Management Consultancy Services'. We find that the plea has no relevance to the impugned proceedings as the same was not subject matter of the impugned case.

14. In view of the above, we find that the findings of the adjudicating authority as well as the submission of the ld. AR are not acceptable as they travelled beyond the scope of show cause notice which is not permissible in view of the Hon'ble Apex Court decision in the case of Ballarpur Industries Ltd (supra).

15. In view of our discussion above, we allow the appeal with consequential relief, if any, as per law.

(Order pronounced in the court on 18.10.2024)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

RA_Saifi