IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

Appeal No. ST/00342/2011

(Arising out of Order-in-Appeal No. 116/2010 dated 21.06.2010 passed by the Commissioner of Central Excise (Appeals), Chennai)

M/s. Kumaran Enterprises : Appellant

Vs.

The Commissioner of Central Excise, Puducherry : Respondent

Appearance:-

Ms. S. Sridevi, Advocate
for the Appellant

Shri. K. P. Muralidharan, AC (AR)
for the Respondent

CORAM:

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P Dinesha, Member (Judicial)

Date of Hearing/Decision:**13.06.2018**

Final Order No. 42275 / 2018

Per Bench,

Appellant is engaged in providing "Clearing and Forwarding Services" to M/s. Cavin Kare (P) Ltd. Appellant is registered with Service Tax Department and is discharging service tax on the taxable income provided and is regularly filing ST-3 returns; was paid monthly remunerations in the form of commissions and was also reimbursed expenses incurred by them during the course of providing the said taxable services. However, the appellant is claiming threshold exemption of Rs. 4 lacs for the year 2005-06 and 2006-07 in terms of Notification No. 6/2005-ST dt. 01.03.2005. The Department based on the receipts shown in the Balance Sheet and P&L of the appellant company, issued Show Cause Notice stating that during the year 2005-06 the appellant crossed the threshold exemption of Rs. 4 lacs, thus the appellant is liable to pay total service tax of Rs. 52,132/-. The demands proposed in the Show Cause Notice have been confirmed in the Order-in-Original and the appellant did not succeed in his appeal before the Commissioner (Appeals). Hence, the appellant is now before the Tribunal. The dispute in this appeal relates to the period 01.04.2005 to 30.09.2006.

2. Heard Ms. S. Sridevi, Ld. Advocate for the appellant and Shri. K. P. Muralidharan, Ld. Department Representative for the Revenue.

3. The submissions of Ld. Advocate for the assessee could be broadly summarized as below:

(i) The appellant received remuneration in the form of fixed commission of Rs. 8,000/- per month in terms of C&G agreement,

(ii) The remuneration was increased to Rs. 10,500/- for the subsequent period i.e. 01.08.2005 to 31.03.2006,

(iii) The other receipts are only the reimbursement of expenses towards transportation charges, loading or unloading charges, maintenance and gardening, which are not taxable,

(iv) The appellant had even paid service tax for the period 2006-07 under protest at the instance of the Revenue,

(v) Reliance is placed on the following decisions :

a. *Commissioner of S.T., Chennai Vs. Sangamitra Services Agency – 2014 (33) S.T.R. 137 (Mad.),*
b. *Amit Sales Vs. Commissioner of Central Excise, Jaipur-I – 2017 (47) S.T.R. 156 (Tri. – Del.),*
c. *Pinnacle Shares Registry Pvt. Ltd. Vs, Commissioner of S.T. Ahmedabad – 2015 (40) S.T.R. 194 (Tri. – Ahmd.),*

to say that the service tax liability could not be fastened on the reimbursement of expenses and therefore the impugned order is liable to be set aside.

(vi) Without prejudice to the above, Ld. Advocate also submitted that the reimbursement is not liable to service tax since the relevant Rule 5 of the Service Tax (Determination of Value)

Rules, 2006 has been struck down by the Delhi High Court in the case of *Union of India Vs. Intercontinental Consultants and Technocrats Pvt. Ltd.– 2013 (29) S.T.R. 9 Del.* which has been approved by the Hon'ble Supreme court in *2018 (10) G.S.T.L. 401 (S.C.).*

4. *Per contra*, the Ld. DR supported the findings of the lower authorities, but however, accepted the law as laid down in case of *M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. (supra).*

5.1 We have considered the rival contentions and have also gone through the judgments relied on by the Ld. Advocate. The Hon'ble Supreme Court in the case of *M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. (supra)* after analyzing the scope of Rule 5 of the Service Tax (Determination of Value) Rules, 2006, has observed as under :

> *"**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.*
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> ***22.** Section 66 of the Act is the charging Section which reads as under:*
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> *"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."*

5.2 In the case on hand, the lower authorities have solely relied upon Rule 5 of the Service Tax Rules, 2006 to say that any expenditure or cost incurred by the service provider in the course of providing taxable service of such expenditure or cost shall be treated as consideration which shall be included in the value for the purposes of charging service tax and this was in terms of Section 67 of the Finance Act which prescribed the value of payment of service tax which is on the gross amount by the service provider.

5.3 From the interpretation of the Hon'ble Supreme Court in the case of *M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. (supra)*, the findings of the lower authorities are clearly incorrect and we find that the same are unsustainable.

6. We therefore set aside the orders of the lower authorities following the decision of the Hon'ble Supreme Court (*supra*) and allow the appeal, with consequential reliefs, if any.

(Operative part of the order was pronounced in open Court)

(P Dinesha)	**(Madhu Mohan Damodhar)**
Member (Judicial)	Member (Technical)

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