CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT No. III

Service Tax Appeal No. 425 of 2012

(Arising out of Order-in-Appeal No. 66/2012 (M-ST) dated 10.04.2012 passed by Commissioner of Central Excise (Appeals), No. 26/1, Mahatma Gandhi Road, Chennai – 600 034)

M/s. Dependable Security Bureau, **...Appellant**
Flat-D, Divya Complex,
Block-1, 56/1,
Nerkundram Pathai (West),
Vadapalani,
Chennai – 600 026.

Versus

Commissioner of GST and Central Excise **...Respondent**
Chennai North Commissionerate,
No. 26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai – 600 034.

APPEARANCE:

For the Appellant : Shri M.S. Krishna Kumar, Advocate
For the Respondent : Shri M. Selvakumar, Authorised Representative

CORAM:
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER No. 41519 / 2024

DATE OF HEARING : 27.09.2024
DATE OF DECISION : 28.11.2024

Order :- Per Mr. VASA SESHAGIRI RAO

M/s. Dependable Security Bureau, Chennai (the Appellant herein) has filed the above appeal which was directed against the Order-in-Appeal No. 66/2012 (M-ST) dated 10.04.2012 of the Commissioner of Central Excise (Appeals), Chennai by which he upheld the Order-in-Original No. 16/2009 dated 29.06.2009 passed by the Assistant Commissioner of Service Tax, Chennai who demanded Service Tax of Rs.3,97,101/- under proviso to Section 73(1) of the Finance Act, 1994 along with interest and also imposed equal penalty under Section 78 of the Finance Act, 1994.

2.1 Briefly stated the facts are that the Appellant primarily engaged in rendering Security Agency Service, were also supplying security personnel, drivers, nursing assistants to Delphi-TVS(DT) and civil employees to Madras Regimental Centre (MRC). During the course of Audit, it appeared that the Appellant collected amounts towards ESI and Provident Fund (PF) charges as reimbursements from its Customer- M/s. Delphi TVS during the period from 2003-04 to 2007-08 on which the Service Tax payable was quantified to be Rs.98,421/-. Further, it was also pointed out that the Appellant was liable to pay service tax of Rs.2,95,070/- under Manpower Recruitment or Supply agency service (MRS) w.e.f 16.06.2005 for supply of manpower to MRC and drivers/ nurses to DT. Besides, it appeared that the Appellant was liable to pay service tax on uniform reimbursement to staff by DT amounting to Rs.2,109/-from July 2006 to 2007-08, service tax of Rs.1,088/- on reimbursement of tea expenses from M/s Forgings during 2006-07 & 2007-08, demand on reimbursement of insurance amounting to Rs.412/-, interest on belated payment of Service tax amounting to Rs.1514/- during 2005-06 and recovery of Cenvat credit of Rs.707/- wrongly availed by the Appellant.

2.2 Therefore, the Appellant was issued with a Show Cause Notice dated 14.11.2008 proposing to demand service tax of Rs.3,97,101/- under Section 73(1) of the Finance Act, 1994 (ACT) with interest under Section 75 of the Act ibid and to recover the Cenvat Credit wrongly availed under Rule

14 of Cenvat Credit Rules, 2004 (CCR), besides seeking to impose penalty under Section 76/78 of the Act *ibid*. The adjudicating authority confirmed all the demands proposed in the SCN and imposed equal penalty under Section 78 of the Act ibid. Aggrieved, the Appellant had filed an appeal before the Commissioner (Appeals) who, *vide* the impugned Order-in-Appeal No. 66/2012 (M-ST) dated 10.04.2012, dismissed the appeal filed by the Appellant and hence, the present appeal filed before this Forum.

3. The CESTAT *vide* Final Order dated No. 40450/2023 dated 19.06.2023 dismissed the appeal for non-prosecution. Subsequently, the Appellant filed a petition for restoration of appeal in ST/ROA/40325/2024 which was allowed *vide* Miscellaneous Order No. 40189/2024 dated 09.07.2024 and accordingly, this appeal is taken up for disposal.

4.1 The Ld. Counsel for the Appellant reiterated the grounds of appeal and submitted that amounts reimbursable from DT towards ESI & PF could not be taxed in view of the ratio of the Apex Court judgement in the case of *Intercontinental Consultant & Technocrats [2018 (10) GSTL 401 (SC)]* wherein it was held that amendment to Section 67 of the ACT from 14.05.2005 is only prospective, thereby affirming the decision of the Hon'ble High Court of Delhi in the same case reported in *[2013 (29) STR 9]*. Hence it was averred that the amount of Rs.98,378/- paid and appropriated in the Order-in-Original would be liable to be refunded to the Appellant. The Ld. Counsel also submitted that the service tax demand on reimbursement of uniform expenses, tea expenses and insurance was also not sustainable in view of the above decisions.

4.2 Regarding the demand on MRS, it was contended that the Appellant merely acted as a Pure Agent of MRC, as the salary to the pre-existing employees of MRC were routed through the Appellant and no part of which was retained and therefore the reimbursable salary was not taxable during the material period of demand in view of the judgements cited supra in Para 4.1 above. It was submitted that the salary was pre-determined by MRC while the Appellant was allowed a service charge of 11% initially and subsequently 14%.

4.3 Also, it was submitted that the Appellant being a Proprietary firm was not liable to Service Tax on MRS prior to 01.05.2006 as levy was only with regard to a commercial concern and hence Service tax demand was not legally sustainable in terms of the Hon'ble Tribunal decision in *P.S. Murugesan Vs. CCE [2018 (9) GSTL 99 (Tri.-Chennai)].*

4.4 The Ld. Counsel has argued that the extended period of demand on MRS and reimbursable expenses was not invokable in view of the CESTAT's decision in the case of *M/s. Hi Tech Manpower Consultants Pvt. Ltd. Vs. CCE [Final Order No. 40701/2019 dated 29.04.2019]* which relied on the Supreme Court's decision cited in Para 4.1 above. The Appellant has also placed reliance on the decisions of the Hon'ble Apex Court in *International Merchandising Co Vs. CST [2022 (67) GSTL 129 (SC)] and CCE Vs. Northern Operating Systems [2022 (61) (GSTL) 129 (SC)].*

5. The Ld. Authorised Representative Shri M. Selvakumar representing the Department has reiterated the findings in the impugned order and submitted that the demand on reimbursable expenses and MRS was sustainable and as the Appellant had not disclosed the material facts to the department with an intent to evade payment of service tax due and extended period of demand was rightly invoked in the impugned order and hence prayed for dismissal of the appeal filed by the Appellant.

6. Heard both sides and carefully considered the submissions and evidences on record.

7. The issues which arise for consideration in this appeal pertain to:-

i. Whether the demand of service tax on reimbursable expenses towards ESI & PF, Insurance, tea and uniform expenses is sustainable?
ii. Whether the demand of service tax on MRS is sustainable? and,
iii. Whether extended period of demand is invokable?

8. It is ascertained from the facts that the appellant is registered with the Department for rendering security services. It is the case of Revenue that the appellants have not paid service tax on expenses reimbursed by Customers towards PF/ESI and on MRS rendered by the Appellant. The demand has been raised for contravention of provisions of Section 67 of the Finance Act,1994 read with Rule 5(1) and 5(2) of Service Tax (Determination of value Rules,2006) for alleged non-inclusion of expenditure or costs incurred during the course of providing taxable service.

The adjudicating authority, after following due process of law, confirmed the demands raised along with interest and imposed penalties and the lower appellate authority also upheld the impugned order. This appeal is against the findings in the said order.

9.1 We find that the issue at Sl.No. (i) above is no more *res integra* in view of the Apex Court's decision in *Intercontinental Consultant & Technocrats [2018 (10) GSTL 401 (SC)]* which has been extracted below for ease of reference: -

> *"5. The assessee-M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. is a provider of consulting engineering services. It specialises in highways, structures, airports, urban and rural infrastructural projects and is engaged in various road projects outside and inside India. In the course of the carrying on of its business, the petitioner rendered consultancy services in respect of highway projects to the National Highway Authority of India (NHAI). The petitioner receives payments not only for its service but is also reimbursed expenses incurred by it such as air travel, hotel stay, etc. It was paying service tax in respect of amounts received by it for services rendered to its clients. It was not paying any service tax in respect of the expenses incurred by it, which was reimbursed by the clients. On 19-10-2007, the Superintendent (Audit) Group II (Service Tax), New Delhi issued a letter to the petitioner on the subject "service tax audit for the financial year 2002-03 to 2006-07. In this letter, it was mentioned by the appellant that service tax was liable to be charged on the gross value including reimbursable and out of pocket expenses like travelling, lodging and boarding etc. and the respondent was directed to deposit the due service tax along with interest @ 13% under Sections 73 and 75 respectively of the Act. In response, the respondent provided month-wise detail of the professional income as well as reimbursable out of pocket expenses for the period mentioned in the aforesaid letter. Thereafter, a show cause notice dated March 17, 2008 was issued by the Commissioner, Service Tax, Commissionerate vide which the respondent was asked to show cause as to why the service tax should not be recovered by including the amounts of reimbursible which were received by the respondent, pointing out these were to be included while arriving at the gross value as per provisions of Rule 5(1) of the Rules.*
>
> *6. Rule 5 was brought into existence w.e.f. June 1, 2007. The demand which was made in the show cause notice was covered by the period from October, 2002 to March, 2007. Against this show cause notice, the respondent preferred Writ Petition No. 6370 of 2008 in the High Court of Delhi challenging the vires thereof with three prayers, namely :*
>
> *(i) for quashing Rule 5 in its entirety of the Service Tax (Determination of Value) Rules, 2006 to the extent it includes the reimbursement of expenses in the value of taxable service for the purpose of charging service tax; and*

(ii) for declaring the rule to be unconstitutional and ultra vires Sections 66 and 67 of the Finance Act, 1994; and

(iii) for quashing the impugned show-cause notice-cum-demand dated 17-3-2008 holding that it is illegal, arbitrary, without jurisdiction and unconstitutional.

7. Rule 5, which provides for 'inclusion in or exclusion from the value of certain expenditure or costs', is reproduced below in order to understand its full implication :

> *"5. Inclusion in or exclusion from value of certain expenditure or costs. -*
>
> *(1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service.*
>
> *(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely :*
>
> - *the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;*
> - *the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;*
> - *the recipient of service is liable to make payment to the third party;*
> - *the recipient of service [authorises] the service provider to make payment on his behalf;*
> - *the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;*
> - *the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;*
> - *the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and*
> - *the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.*
>
> *Explanation 1: For the purposes of sub-rule (2), "pure agent" means a person who -*
>
> - *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;*

- *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;*

- *does not use such goods or services so procured; and*

- *receives only the actual amount incurred to procure such goods or services.*

Explanation 2 : For the removal of doubts it is clarified that the value of the taxable service is the total amount of consideration consisting of all components of the taxable service and it is immaterial that the details of individual components of the total consideration is indicated separately in the invoice.

Illustration 1 : X contracts with Y, a real estate agent to sell his house and thereupon Y gives an advertisement in television. Y billed X including charges for Television advertisement and paid service tax on the total consideration billed. In such a case, consideration for the service provided is what X pays to Y. Y does not act as an agent behalf of X when obtaining the television advertisement even if the cost of television advertisement is mentioned separately in the invoice issued by X. Advertising service is an input service for the estate agent in order to enable or facilitate him to perform his services as an estate agent.

Illustration 2 : In the course of providing a taxable service, a service provider incurs costs such as traveling expenses, postage, telephone, etc., and may indicate these items separately on the invoice issued to the recipient of service. In such a case, the service provider is not acting as an agent of the recipient of service but procures such inputs or input service on his own account for providing the taxable service. Such expenses do not become reimbursable expenditure merely because they are indicated separately in the invoice issued by the service provider to the recipient of service.

Illustration 3 : A contracts with B, an architect for building a house. During the course of providing the taxable service, B incurs expenses such as telephone charges, air travel tickets, hotel accommodation, etc., to enable him to effectively perform the provision of services to A. In such a case, in whatever form B recovers such expenditure from A, whether as a separately itemised expense or as part of an inclusive overall fee, service tax is payable on the total amount charged by B. Value of the taxable service for charging service tax is what A pays to B.

Illustration 4 : Company X provides a taxable service of rent cab by providing chauffeur driven cars for overseas visitors. The chauffeur is given a lump sum amount to cover his food and overnight accommodation and any other incidental expenses such as parking fees by the Company X during the tour. At the end of the tour, the chauffeur returns the balance of the amount with a statement of his expenses and the relevant bills. Company X charges these amounts from the recipients of service. The cost incurred by the chauffeur and billed to the recipient of service constitutes part of gross amount charged for the provision of services by the company X."

8. The case set up by the respondent in the writ petition was that Rule 5(1) of the Rules, which provides that all expenditure or cost incurred by the service provider in the course of providing the taxable services shall be treated as consideration for the taxable services and shall be included in the *value for the purpose of charging service tax, goes beyond the mandate of Section 67. It was argued that Section 67 which deals with valuation of taxable services for charging service tax does not provide for inclusion of the aforesaid expenditure or cost incurred while providing the services as they cannot be treated as element/components of service. Section 67 was amended by Finance Act, 2006 w.e.f. May 1, 2006. Since the cases before us involve period prior to the aforesaid amendment as well as post amendment period, it would apt to take note of both unamended and amended provisions. Unamended Section 67 was in the following form :*

> *"67. Valuation of taxable services for charging service tax. -*
>
> *For the purposes of this Chapter, the value of any taxable service shall be the gross amount charged by the service provider for such service provided or to be provided by him.*
>
> *Explanation 1. For the removal of doubts, it is hereby declared that the value of a taxable service, as the case may be, includes,*
>
> *(a) the aggregate of commission or brokerage charges by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock broker to any sub broker.*
>
> *(b) the adjustments made by the telegraph authority from any deposits made by the subscriber at the time of application for telephone connection or pager or facsimile or telegraph or telex or for leased circuit;*
>
> *(c) the amount of premium charged by the insurer from the policy holder;*
>
> *(d) the commission received by the air travel agent from the airline;*
>
> *(e) the commission, fee or any other sum received by an actuary, or intermediary or insurance intermediary or insurance agent from the insurer;*
>
> *(f) the reimbursement received by the authorized service station from manufacturer for carrying out any service of any motor car, light motor vehicle or two wheeled motor vehicle manufactured by such manufacturer; and*
>
> *(g) the commission or any amount received by the rail travel agent from the Railways or the customer.*
>
> *But does not include -*
>
> *(i) initial deposit made by the subscriber at the time of application for telephone connection or pager or facsimile (FAX) or telephone or telex or for leased circuit;*
>
> *(ii) the cost of unexposed photography film, unrecorded magnetic tape or such other storage devices, if any, sold to the client during the course of providing the service;*
>
> *(iii) the cost of parts or accessories, or consumable such as lubricants and coolants, if any, sold to the customer during the course of service or repair of motor cars, light motor vehicle or two wheeled motor vehicles;*
>
> *(iv) the airfare collected by air travel agent in respect of service provided by him;*

(v) the rail fare collected by rail travel agent in respect of service provided by him;

(vi) the cost of parts or other material, if any, sold to the customer during the course of providing maintenance or repair service;

(vii) the cost of parts or other material, if any, sold to the customer during the course of providing erection, commissioning or installation service; and

(viii) interest on loan.

Explanation 2 - Where the gross amount charged by a service provider is inclusive of service tax payable, the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged.

Explanation 3. For the removal of doubts, it is hereby declared that the gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service."

9. After its amendment w.e.f. May 1, 2006, a much shorter version was introduced which reads as under :

"67. Valuation of taxable services for charging service tax. -

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation: For the purpose of this section,

(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;

(b) "money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travelers cheque, money order, postal

remittance and other similar instruments but does not include currency that is held for its numismatic value;

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of accounts of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise."

10. The High Court, after taking note of the aforesaid provisions, noted that the provisions both amended and unamended Section 67 authorised the determination of value of taxable services for the purpose of charging service tax under Section 66 (which is a charging section) as the gross amount charged by the service provider for such services provided or to be provided by him, in a case where the consideration for the service is money. Emphasising on the words 'for such service', the High Court 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 to the NHAI, which is that of a consulting engineer, that can be brought to charge and nothing more. The quantification of the value of the 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 has opined that scope of Rule 5 goes beyond the Section which was impermissible as the Rules which have been made under Section 94 of the Act can only be made 'for carrying out the provisions of this Chapter' (Chapter V of the Act) which provides for levy quantification and collection of the service tax. In the process, the High Court observed that the expenditure or cost incurred by the service provider in the course of providing the taxable service can never be considered as the gross amount charged by the service provider 'for such service' provided by him, and illustration 3 given below the Rule which included the value of such services was a clear example of breaching the boundaries of Section 67. The High Court even went on to hold further pointed out that it may even result in double taxation inasmuch as expenses on air travel tickets are already subject to service tax and are included in the bill. No doubt, double taxation was permissible in law but it could only be done if it was categorically provided for and intended; and could not be enforced by implication as held in Jain Brothers v. Union of India [(1970) 77 ITR 107]. The High Court has also referred to many judgments of this Court for the proposition that Rules cannot be over-ride or over-reach the provisions of the main enactment [Central Bank of India & Ors. v. Workmen, etc., (1960) 1 SCR 200; Babaji Kondaji Garad v. Nasik Merchants Co-Operative Bank Ltd., (1984) 2 SCC 50; State of U.P. & Ors. v. Babu Ram Upadhya, (1961) 2 SCR 679; CIT v. S. Chenniappa Mudaliar, (1969) 74 ITR 41; Bimal Chandra Banerjee v. State of M.P. & Ors., (1971) 81 ITR 105 and CIT, Andhra Pradesh v. Taj Mahal Hotel, (1971) 82 ITR 44]. The High Court also referred to the judgment of Queens Bench of England in the case of Commissioner of Customs and Excise v. Cure and Deeley Ltd. [(1961) 3 WLR 788 (QB)].

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."*

9.2 The Tribunal in the case of *P.S. Murugesan Vs. CCE [2018 (9) GSTL 99 (Tri.-Chennai)]* held as follows: -

"2. The appellant was engaged in providing Manpower to their clients and the said services became taxable with effect from 16-6-2005. On scrutiny of records as well as the contracts it was noticed that Wages, Bonus, Incentives, Contribution to Provident Fund, etc., was to be paid by their clients directly to the employees and it was the liability of their clients. Department was of the view that appellants being service providers are liable to pay Service Tax on such reimbursable expenses also. The show cause notice issued, after adjudication confirmed the demand, interest and imposed penalties. In appeal, Commissioner (Appeals) upheld the same. Hence this appeal.

3. On behalf of appellant the ld. Counsel Shri V.S. Manoj referred to the C.B.E. & C. Circular No. B/43/5/97-TRU, dated 2-7-1997 (para 1.3) and argued that Board has clarified that such expenses are not includible in arriving at the taxable value. He relied upon the judgment in the case of 'Sangamitra Services Agency v. Commissioner of Central Excise - 2007 (8) S.T.R. 233 (Mad.)'. The 2nd contention put forward by him is that the period involved is 16-6-2005 to 30-9-2005. The definition of MPR & S.A. services as it stood during the relevant period was not applicable to an individual engaged in providing such service as the definition used the words 'commercial concern'. To canvass this argument he relied upon the judgment in the case of Mehraj Khan v. Commissioner of Central Excise, Jaipur, 2014 (33) S.T.R. 691 (Tri.-Del).

4. Against this, the ld. AR Shri K.P. Muralidharan reiterated the findings in the impugned order.

5. Heard both sides. The fact that appellant is an individual and not a commercial concern, engaged in providing services is not disputed. The definition of 'Manpower Recruitment and Supply Services' during the relevant period used the words 'commercial concern' which was amended with effect from 1-5-2006. The disputed period is from 16-6-2005 to 30-9-2005 and therefore the argument of the appellant's counsel is not without force. The words 'commercial concern' in the definition was substituted by the words 'any person' only with effect from 1-5-2006. The period involved being prior to 1-5-2006 the appellant succeeds on this ground. The second contention whether reimbursable expenses are includible in taxable value is settled by the judgment in the case of Sangamitra Services Agency (supra). From the

> *above discussions the demand is unsustainable. The impugned order is set aside. Appeal is allowed with consequential reliefs, if any."*

9.3 In the present case, we find that the Appellant is getting several expenses reimbursed which are in the nature of ESI/PF Charges, Uniform expenses, tea expenses and the said reimbursements are akin to the issues decided in the Apex Court's judgement cited supra. Since the Appellants had collected ESI and PF charges which are indicated separately in the invoices as reimbursements from customer (DT) no abatement on statutory levy like ESI/PF could be extended as per extant Board circular and so the department has entertained the view that the amount was taxable. However, as per the Apex Court's decision, such reimbursements are taxable only w.e.f. 14th May 2015, the date on which the amendment to Section 67 came into force. Hence in view of the above discussions and judicial precedents pointed above, we are inclined to hold that reimbursements in the nature of ESI/PF charges/ Uniform charges, tea expenses and insurance does not fall within the ambit of levy of service tax during the material period (2003-04-2007-08 in the present case) and hence the demand is not legally sustainable. As the demand itself is unsustainable, question of imposition of penalty does not arise.

10.1 Regarding issue at (ii) above, We find that in the present appeal, the period involved in respect of Manpower Recruitment and Supply Service is between 29.06.2005 to 31.03.2008 for MRC and 26.05.2005 to 27.12.2005 for Nursing Assistants provided to Delphi- TVS. The Ld. Counsel for the Appellant has contended that the demand prior to 01.05.2006 is not sustainable as the Appellant was a sole proprietary concern and not a commercial concern. We find that, an amount of Rs.93,261/- pertaining to

MRC and entire demand of Rs.13,566/- on Delphi TVS is not legally sustainable, in view of the ratio of the decision discussed at Para 9.2 above, as we find the above demand period was prior to 01.05.2006 during which period the Appellant was not a commercial concern but only a sole proprietary concern.

10.2 For the period from 01.05.2006, We find that MRC and the Appellant have entered in to a deed of contract / agreement periodically as per which the Appellant have provided manpower to MRC for which bills were periodically raised by Appellant on MRC indicating "charges for outsourcing civilian employees' and the gross amount for each month have been charged in the bill including salary, allowances and service charges @11% /14%.As Service Tax liability is applicable from 01.05.2006, the Appellant is liable to pay service tax on the gross amount charged for rendering MRS in terms of Section 67 of the Service Tax.

10.3 The Show Cause Notice has been issued on 14.11.2008 to demand service tax for the period from 2003-04 to 2007-08 invoking extended period. Hence, it is required to be examined whether such invocation sustains in the facts and circumstances of this case.

10.4 A perusal of Section 73 makes it amply clear that any tax not levied or paid, short levied or short paid is recoverable from the petitioner. The show cause notice for realization of tax not levied or paid or short levied or short paid could be issued within one year from the relevant date. After amendment with effect from 28th May,2012 by the Finance Act, 2012, the period of limitation is 18 months instead of one year. However, where Service Tax has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud, collusion, willful mis-statement, suppression of facts or contravention of any of the provisions of Chapter V of the Finance Act, 1994 with intention to evade Service Tax notice may be issued within five years instead of one year. Admittedly, in this case, notice has been issued on 14.11.2008 for the period from 26.05.2005 to 31.03.2008. Hence demand for the period from 01.05.2006 to the extent of Rs.1,88,243/- only requires to be examined in the subject appeal in view of observations at Para 10.1 above.

10.5 The question is whether the conditions precedent for invocation of the extended period of limitation existed or not? We find that no specific reasons have been mentioned for invoking the extended period of time in paragraph 9 of the Show Cause Notice. The Appellant has been regularly filing periodical returns and discharging applicable service tax. The department was aware of the facts and the issue was detected only upon audit conducted by the department. It is to mention that the ST 3 returns filed by the Appellant periodically are subject to examination and scrutiny by proper officers before whom the returns are filed. The Appellants were under *bona fide* belief that no service tax was liable to be paid and hence the appellant also did not charge any service tax. Only after departments stand, the Appellant has raised debit notes on MRC towards service tax. We find that the adjudicating authority in his findings has pointed out to audit findings and non-disclosure by the Appellant, when it was pleaded specifically by the Appellant that they were not aware of the lapses which were unintentional. As such we are of the view that no *malafide* intent has been brought out. The Hon'ble Apex court in *CCE Vs Northern Operating Systems [(2022 (61) G.S.T.L. 129 (S.C.)]* held as follows: -

> *"62. The revenue's argument that the assessee had indulged in wilful suppression, in this Court's considered view, is insubstantial. The view of a previous three judge ruling, in Cosmic Dye Chemical v. Collector of Central Excise [(1995) 6 SCC 117 = 1995 (75) E.L.T. 721 (S.C.)] - in the context of Section 11A of the Central Excise Act, 1944, which is in identical terms with Section 73 of the Finance Act, 1994 was that: -*
>
> *"Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Misstatement or suppression of fact must be wilful."*
>
> *63. This decision was followed in Uniworth Textiles v. Commissioner of Central Excise [(2013) 9 SCC 753 = 2013 (288) E.L.T. 161 (S.C.)] where it was observed that "(t)he conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts" is "untenable". This view was also followed in Escorts v. Commissioner of Central Excise [(2015) 9 SCC 109 = 2015 (319) E.L.T. 406 (S.C.)], Commissioner of Customs v. Magus Metals [(2017) 16 SCC 491 = 2017 (355) E.L.T. 323 (S.C.)] and other judgments.*
>
> *64. The fact that the CESTAT in the present case, relied upon two of its previous orders, which were pressed into service, and also that in the present case itself, the revenue discharged the later two show cause notices, evidences that the view held by the assessee about its liability was neither untenable, nor mala fide. This is sufficient to turn down the revenue's contention about the existence of "wilful suppression" of facts, or deliberate misstatement. For these reasons, the revenue was not justified in invoking the extended period of limitation to fasten liability on the assessee."*

Hence by appreciating the above facts and in compliance to judicial discipline, we are inclined to hold that invocation of extended period in respect of MRS is not legally sustainable in this case. As per Rule 7 of Service Tax Rules,1994 every assessee shall submit the half yearly return by the 25th of the month following the particular half-year. Hence demand of service tax for the period from October 2007- March 2008 amounting to Rs.49,784/- is only sustainable and the interest payment under Section 75 automatically flows from such duty demand. We find that the lower authority has imposed penalty only under Section 78 for the total demand. As the demand for extended period is unsustainable. The penalty imposed under Section 78 is set aside. The Appellant has pleaded sufficient cause for non-imposition of penalty and hence penalty for the normal period is also set aside.

11. Regarding disallowance of Cenvat credit of Rs.707/-, the assessee had failed to provide valid documents for availing of such Cenvat Credit and hence the recovery of Cenvat Credit along with interest is sustained. The Appellant has not disputed payment of interest towards belated payment of service tax.

12. To summarise, demand on reimbursements of PF/ESI/Uniform /Tea expenses is not legally sustainable and demand on MRS service is upheld only for the normal period. The appeal is partly allowed, with consequential benefits, if any on the above terms.

(Order pronounced in open court on 28.11.2024)

Sd/-	Sd/-
(VASA SESHAGIRI RAO)	**(P. DINESHA)**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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