

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT No. I

Service Tax Appeal No. 41089 of 2015

(Arising out of Order-in-Appeal No. 108/2015(STA-I) dated 20.04.2015 passed by Commissioner of Service Tax (Appeals-I), Newry Towers, 2054/1, II Avenue, 12th Main Road, Anna Nagar, Chennai – 600 040)

M/s. S. Vaidhyanathan Iyer & Co.

Sri Venkatesh Bhavan, 2nd Floor,
New No. 71, Old No. 35,
Armenian Street,
Chennai – 600 001.

...Appellant

Versus

Commissioner of GST and Central Excise

Chennai Outer Commissionerate,
Newry Towers, 2054/1, II Avenue,
12th Main Road, Anna Nagar,
Chennai – 600 040.

...Respondent

APPEARANCE:

For the Appellant : Shri S. Murugappan, Advocate

For the Respondent : Shri Harendra Singh Pal, Authorised Representative

CORAM:

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

HON'BLE MR. AJAYAN T.V., MEMBER (JUDICIAL)

FINAL ORDER No. 40193 / 2025

DATE OF HEARING : 29.01.2025

DATE OF DECISION : 10.02.2025

Per Mr. AJAYAN T.V.

The appellant has assailed the impugned Order-in-Appeal No.108/2015 (STA-I) dated 20.04.2015 (OIA in short) whereby the appellate authority has upheld the Order-in-Original No.185/2012 dated 31.10.2012 (OIO in short) of the adjudicating authority confirming the demand of

Rs.17,72,506/- being the service tax payable from April 2006 to September 2009 under Section 73(2) of the Finance Act 1994 (Act in short) read with proviso to Section 73(1) of the Act along with applicable interest and imposing an equivalent penalty under Section 78 of the Act as well as penalty of Rs.10,000/- under Section 77 of the Act.

2. Brief facts are that the appellant is registered with the service tax department for providing Customs House Agent service (CHA service in short). During the course of audit conducted by the Internal Audit Party it was noticed that the Appellant apart from collecting service charges for providing CHA service, also collected charges such documentation charges, Misc. Ex for S/B, B/E, Examination Expenses, Misc. Exp for T.B, opening and repacking charges, Misc. Exp for A.R.1 copy and EP copy, misc. Exp for bonding/debonding, loading and unloading charges, petties and sundries, sundry expenses, seal verification charges, delivery expenses, EDI coupon, Customs duty, AAI Charges, DO/ LCL charges, survey fees etc. from the clients. However, the appellant has not included the aforementioned charges collected in the gross taxable value for the purpose of payment of service tax and did not pay service tax on the same claiming the said charges to be reimbursable expenditure and not exigible to service tax.

3. The Department was of the view that as per section 67(1) of the Act, where the provision of service is for a consideration in money, the taxable value of service is the gross amount charged by the service provider for providing service and according to Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 (Valuation Rules in short), expenditure or cost incurred by the service provider in the course of providing taxable

service shall be treated as consideration for the taxable service and is includible in the taxable value. Again, Rule 5(2) of the Valuation Rules provided that the expenditure or costs incurred by the service provider as a "Pure Agent" of the recipient of service is liable to be excluded from the taxable service, provided the service provider qualifies as a "Pure Agent" by satisfying the conditions specified in explanation 1 to Rule 5(2) of the Valuation Rules.

4. The Department was of the opinion that the appellant has procured the services for himself and payments were made to the third party as a recipient of service and not as a "Pure Agent" and since the appellant has not fulfilled the conditions specified in Rule 5(2) of the Valuation Rules read with explanation 1 of the said rules so as to qualify as a pure agent, the above charges collected from the clients are to be treated as expenditure or costs incurred by the appellant in the course of providing taxable service and are liable to be included in the gross value for the purposes of charging service tax on the taxable service rendered by the appellant as per provisions of Section 67 of the Act read with Rule 5(1) of the Valuation Rules. Therefore, alleging contravention of provisions of Section 68 of the Act read with Rule 6 of Service Tax Rules, 1994 for failing to pay appropriate amount of service tax and invoking extended period of limitation on the grounds that but for the verification conducted by the audit party such information would not have come to light; a show cause notice was issued demanding the aforementioned service tax payable along with appropriate interest as well as proposals to impose penalties. Consequent to the reply filed by the appellant, a personal hearing was granted, subsequent to which the adjudicating authority issued the impugned Order-in-Original

No.185/2012 dated 31.10.2012 rendering a finding that the said reimbursable expenses cannot be excluded from the gross amount and consequently the appellant is liable to pay service tax along with interest on such reimbursable expenses reimbursed by their clients. Accordingly, the demand proposed in the show cause notice was confirmed along with demand of appropriate interest and imposition of penalties under Section 77 and Section 78 of the Act. Aggrieved by the said impugned order in original the appellant preferred an appeal before the Commissioner of Service Tax (Appeals-I), who however, *vide* the impugned OIA No. 108/2015 (STA-I) dated 20.04.2015, upheld the impugned OIO of the adjudicating authority. The appellant has preferred the present appeal assailing the impugned OIA and is thus before this Tribunal.

5. The learned counsel, Shri. S. Murugappan appeared and argued for the appellant. The learned counsel submitted that the appellant is in the business of providing service as a CHA and has discharged service tax on the consideration received for providing CHA services. It is submitted that during the course of providing CHA services the appellant has incurred expenses such as EDI charges, AAI charges, DLO charges, transport charges, survey charges etc. paid to third parties and Customs Department on behalf of the client. These expenses are reimbursed by the client on actuals. The appellant did not discharge service tax on the reimbursable expenses as it is not a consideration for any services rendered. The learned counsel submits that only the service charges received as consideration for the services provided or to be provided would form part of the taxable value for the purposes of service tax and reimbursements are not liable to tax.

6. The learned counsel submits that the Honourable Supreme Court has in the case of *UOI v Intercontinental Consultants and Technocrats Pvt Ltd*, reported in [(2018) TIOL 76-SC-ST : 2018 (10) GSTL 401 (SC)], affirmed the decision of the Delhi High Court wherein Rule 5(1) of the Service Tax Valuation Rules, 2006 which provided for inclusion of expenditures or costs incurred by the service provider in the course of providing taxable services, in the value of such taxable services, was struck down as ultra vires Section 66 and Section 67 of the Act and as travelling beyond the scope of the said sections. The learned counsel also submits that the show cause notice was time barred as none of the ingredients required to invoke the extended period of limitation are present in this case. The learned counsel submits that the extended period in terms of proviso to Section 73(1) can be invoked only when there is fraud, collusion, wilful misstatement, suppression of facts or contravention of any of the provisions of the chapter of the Act or the rules made thereunder with intent to evade payment of duty. The learned counsel submits that the question involved in the present matter is on interpretation of the provisions of the rules to determine the liability of the CHA to pay service tax on reimbursable expenses and moreover they have been filing returns regularly providing all details. Further the alleged short payment was pointed out on the auditing of the records maintained by the appellant and thus there is no basis to invoke the proviso to section 73(1) by alleging suppression of facts or misstatement. He places reliance on the decision of this Tribunal in the case of *International Clearing & Shipping Agency*, [(2024) 15 Centax 357 (Tri-Mad.)].

7. Learned Authorised Representative, Shri. Harendra Singh Pal appeared for the Department and reiterated the findings in the impugned order in appeal.

8. We have heard both sides, perused the appeal records and the case law cited by the appellant.

9. We find that the issue is no more res-integra in view of the decision of the Honourable Supreme Court in the case of ***UOI v Intercontinental Consultants and Technocrats Pvt Ltd, 2018 (10) GSTL 401 (SC)*** which has considered the issue of liability to pay service tax on reimbursable expenses received by the service provider in the course of rendering services for the client, apart from the consideration received for rendering the services on which the client has discharged the liability to pay service tax. The Honourable Supreme Court affirmed the decision of the Delhi High Court in *Intercontinental Consultants & Technocrats Pvt Ltd v UOI*, 2013 (29) STR 9 (Del), wherein Rule 5(1) of the Service Tax Valuation Rules, 2006 which provided for inclusion of expenditures or costs incurred by the service provider in the course of providing taxable services, in the value of such taxable services, was struck down as ultra vires Section 66 and Section 67 of the Act and as travelling beyond the scope of the said sections. The Honourable Supreme Court had also noticed the nature of reimbursable expenses that arose for consideration in the facts of the case as well as that in connected appeals before it, and has gone on to hold 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*

assesseees. 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.”*

10. In light of the Honourable Supreme Court’s decision reproduced supra, which has also been followed by this Tribunal in *International Clearing & Shipping Agency, [(2024) 15 Centax 357 (Tri-Mad.)]*, we are of the considered view that the impugned order in appeal upholding the impugned order in original cannot sustain. Accordingly, the impugned order in appeal is set aside and the appeal is allowed with consequential relief if any, in law.

(Order pronounced in open court on 10.02.2025)

Sd/-
(AJAYAN T.V.)
MEMBER (JUDICIAL)

MK

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)