

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. ST/771 /2007

Date 27/08/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S UNITECH LTD
UNITECH HOUSE, SOUTH CITY-1, GURGAON-122001

M/S UNITECH LTD

C.S.T. DELHI

Appellant

Vs
Respondent

I am directed to transmit herewith a certified copy of Final order No. ST/221 2008 Customs dated 25.08.08
passed by the Tribunal under Section 129, (B) of the Customs Act, 1962 & Financial Act 1994 relating to Service Tax


Assistant Registrar

(Customs Appeal Branch)

Copy to :

1. Respondent

C.S.T. DELHI

17-B, I.P. ESTATE, IAEA HOUSE, NEW DELHI.

2. Adv. / Consult

MR.J.K.MITTAL &CO

A-15, THIRD FLOOR FLAT NO 3A, PRIYADARSHINIVIHAR DELHI

3. S.D.R.

4. J.C.D.R.

5. Bar association, CESTAT, New Delhi

6. M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017

7. Centax Publications (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -

8. Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)

9. Raghuraman's 44-B, Regal Flat, Shipra Suncity, Indirapuram - 201010, Ghaziabad, DT, U.P.

10. Nidheshak publications, I.P. Estate, new Delhi

11. Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026

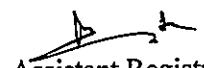
12. Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar, Chennai 60017

13. Taxindiaonline.com Pvt.Ltd, B-XI/8183, Vasant Kunj, New Delhi - 110070

14. Easy Service Tax Online Dot Com Pvt. Ltd. 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad - 15

15. Office Copy

16. Guard file


Assistant Registrar
(Customs Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi**

**COURT NO. II
Service Tax Appeal No. 771 of 2007**

[Arising out of the Order-in-Original No. 34/VKG/2007 dated 25/09/2007 passed by The Commissioner of Service Tax, New Delhi.]

For Approval and signature :

Hon'ble Shri S.S. Kang, Vice President

Hon'ble Shri Rakesh Kumar, Member (Technical)

1. Whether Press Reporters may be allowed to see :
the Order for publication as per Rule 27 of the
CESTAT (Procedure) Rules, 1982?
 2. Whether it would be released under Rule 27 of :
the CESTAT (Procedure) Rules, 1982 for
publication in any authoritative report or not?
 3. Whether their Lordships wish to see the fair :
copy of the order?
 4. Whether order is to be circulated to the :
Department Authorities?
-

M/s Unitech Limited

Appellant

Versus

CST, Delhi

Respondent

Appearance

S/Shri J.K. Mittal & Sunil Upadhyay, Advocates – for the
appellant.

Shri A.K. Madan, Authorized Representative (DR) – for the
Respondent.

CORAM: Hon'ble Shri S.S. Kang, Vice President

Hon'ble Sh. Rakesh Kumar, Member (Technical)

DATE OF HEARING : 31/07/2008.
DATE OF DECISION: 25/08/2008.

Final Order No. 57/221/08 Dated : 25/8/08

Per. Rakesh Kumar :-

The main point of dispute in this case is as to whether during the period from 01/8/02 to 16/6/05, the Appellants received Architect's services from M/s Callison Architecture Inc., U.S.A. (hereinafter referred to as M/s Callison), who do not have any office or business establishment in India and whether the Appellants, as recipient of a taxable service from an offshore service provider are liable, in term of Rule 2 (1) (d) (iv) of the Serviced Tax Rules, 1994, to pay service tax amounting to Rs. 1,83,10,592/- on an amount of Rs. 22,61,54,796/- paid by them to M/s Callison. The Commissioner by the impugned order has -

(a) confirmed the Service tax demand of Rs. 1,83,10,592/- under Section 73 (1) of the Finance Act, 1994, by invoking extended period of limitation, along with interest at the applicable rate on this amount as per the provisions of Section 75,

(b) imposed penalty of Rs. 1,000/- under Section 77 of the Act and penalty of Rs. 100/- per day under Section 76 of

the Act for failure to pay the service tax till the payment of the entire amount of tax and

(c) penalty of Rs. 1,83,10,592/- on the Appellant under Section 78 of the Act.

2. Heard both the sides.

2.1 Shri J.K. Mittal, Advocate, the learned counsel on behalf of the Appellants, made the following submissions :-

- (1) M/s Callison, not being registered as an Architect in the register of Architects maintained under Section 23 of the Architects Act, 1972, is not an Architect within the meaning of this term, as defined under Section 65 (6) of the Act and, therefore, the services received by the Appellants are not the services received from an Architect and hence the same are not taxable.
- (2) Under entry 92C of the List I of 7th Schedule of Constitution of India, the Government of India has powers to levy tax only on the service provided in India – it has no power to tax the service provided by an offshore service provider from outside India to a person in India.
- (3) In any case, the specific provisions for levy of service tax on import of services came w.e.f. 18/4/06, when Section 66A was introduced together with Taxation of Services (Provided from outside India and Received

in India) Rules, 2006. Explanation to Section 65 (105) of the Act, added w.e.f. 16/6/05 did not empower the Government to levy service tax on import of services, as, as held by Hon'ble Supreme Court in case of **Sulochana Amma vs. Narayanan Nair**, reported in **1995 (77) E.L.T. 785 (S.C.)**, Explanation to a Section is not a substantive provision by itself, that it is meant for explaining the meaning of the words contained in the section or clarify certain ambiguities or clear them up and that an explanation, normally, should be so read as to harmonise with and to clear up any ambiguity in the same Section. Therefore, during the period of dispute, when there was no provision in the Finance Act, 1994 for levy of service tax on import of taxable services, confirmation of the service tax demand against the Appellants is illegal.

- (4) The judgment of Kerala High Court in case of **CCE, Thiruvananthapuram vs. Kerala State Electricity Board** reported in **2006 (3) S.T.R. 625 (Ker.)**, relied upon by the Revenue was with reference to second proviso to Rule 6 (2) of the Service Tax Rules, 1994, which existed during period prior to 16/08/01. Second Proviso to Rule 6 (2) provided for payment of Service tax by a person in India authorized for this purpose by a foreign service provider, not having any office in India, who had provided some taxable service in India. But w.e.f. 16/8/02, second proviso to Rule 6 (2) was deleted and Rule 2 (1) (d) (iv) was introduced. The Hon'ble High Court upheld the Service Tax

liability of Kerala State Electricity Board as (KSEB) as per the agreement of KSEB with the foreign service provider, it is KSEB who was to discharge service tax liability on behalf of the foreign service provider. In the present, there is no such agreement between the Appellants and M/s Callison. Therefore, the above-mentioned Kerala High Court's judgement is not applicable to this case.

- (5) The show cause notice for allegedly non-paid service tax during period from 1/8/02 to 16/6/05 was issued on 27/1/07 by invoking extended limitation period under Section 73 (1). There is no suppression or intention to evade the tax in this case. Moreover during the period of dispute, on account of conflicting judgements on the issue of liability of service recipient in case of import of service, to pay the service tax, the Appellants were under bonafide belief that they were not liable to pay the tax. Moreover Hon'ble Supreme Court in case of **Continental Foundation Jt. Venture vs. CCE, Chandigarh**, reported in 2007 (216) E.L.T. – 177 has held that mere omission to give correct information is not suppression of facts unless it was deliberate with intention to evade the payment of tax and that when due to certain reasons, there is doubt about liability to pay the duty, extended period under Section 11A is not invokable.

2.2 Shri A.K. Madan, the learned Departmental Representative, made the following submissions.

(1) In view of a specific provision in agreement between the Appellant and M/s Callison that all the taxes and levies imposed outside the US are the responsibility of the client, i.e. the Appellants, the Appellants are liable to pay the service tax. In this regard, reliance is placed in Hon'ble Kerala High Court's judgement in case of CCE, Thiruvananthapuram vs. Kerala State Electricity Board (Supra), which has been upheld by the Apex Court vide judgement reported in 2008 (9) S.T.R. 3 (S.C.).

(2) M/s Callison, USA being a commercial concern are covered by the second part of the definition of "Architect" – 'and also includes any commercial concern engaged in any manner, whether directly or indirectly, in rendering services in the field of architecture'.

(3) The Appellants have suppressed the relevant facts and information from the Department and therefore extended limitation period under Section 73 (1) has been rightly invoked and penalty under Section 78 has been rightly imposed.

(4) Since in course of providing Architectural service, the officials of M/s Callison, U.S.A. had visited the Appellant's office and the project site, the service had been provided by M/s Callison, in India and the same attracted Service Tax under Section 66 read with Section 65 (105) (p) of the Act

and in term of Rule 2 (1) (d) (iv) of Service Tax Rules, it is the Appellants who were liable to pay the same. The provisions of Section 66A which came into force w.e.f. 18/4/06 are not relevant in this case.

3. We have given careful consideration to the submissions from both the sides.

3.1 First point of dispute is as to whether M/s Callison, U.S.A. is an architect within the meaning of this term, as defined under Section 65 (6) of the Act. The Appellant's plea is that M/s Callison are not an architect, as they are not registered in the register of architects maintained in India under Section 23 of the Architect's Act 1972 and therefore any service provided by them would not attract service tax under Section 65 (105) (p) of the Act.

3.2 Section 65 (6) of the Act defines "architect" as under :-

"Architect means any person whose name is, for the time being, entered in the register of architects maintained under Section 23 of Architect's Act, 1972 [20 of 1972] and also includes any commercial concern engaged in any manner, whether directly or indirectly in rendering the services in the field of architecture."

3.2.1 The taxable service in relation to architect has been defined under Section 65 (105) (p) as any service provided to a client, by an architect in his professional capacity, in any manner.

3.3 From the above definition of architect, it will be seen that there are two parts of definition. The first part covers any person whose name is entered in the register of architects maintained under Section 23 of the Architect's Act, 1972 and the second part i.e. the inclusive part, covers any commercial concern engaged in any manner, whether directly or indirectly in rendering the service in the field of architecture. While there is requirement of registration in the register of architects maintained under Section 23 of the Architect's Act, 1972 for individual persons covered by the first part of the definition, there is no such registration requirement for the second part of the definition, which covers the commercial concern engaged in any manner, whether directly or indirectly in rendering the services in the field of architecture. M/s Callison, without any doubt, are a commercial concern engaged in rendering services in the field of architecture and therefore they are covered by the second part of the definition of architect. Since M/s Callison are covered by the definition of "architect", the service provided by them to the Appellants is a taxable service under Section 65 (105) (p) of the Act.

3.4 The second plea of the Appellants is that even if the service provided by M/s Callison, U.S.A. is held to be a taxable service, since M/s Callison, U.S.A. is an offshore service provider not having any office or business establishment in India, the service tax liability cannot be fastened on to the appellants by invoking Rule 2 (1) (d) (iv) of the Service Tax Rules, 1944, as Section 66A providing for levy of service tax on import of services, together with taxation of services (provided from outside India and received in India) Rules, 2006 came into force w.e.f. 18/4/06 only and the entire service tax demand in this case is for the period prior to 18/4/06 i.e. from 16/8/02 to 16/6/05. It has also been pleaded that during the period prior to 18/4/06, without any provision in the Finance Act, 1994 empowering the levy of service tax on the import of services, service tax liability in case of import of services cannot be fastened on to the service receiver by invoking Rule 2 (1) (d) (iv) of the Service Tax Rules. We do not agree with this plea of the Appellants. The charging Section is Section 66 which provides that there shall be levied a tax at the rate prescribed in it on the value of taxable services referred to in various clauses of sub-Section 105 of Section 65 and shall be collected in such manner, as may be prescribed. Sub-Section 105 of Section 65 defines the word "taxable service" with regard to

various services mentioned in different clause and as per this sub-Section, "taxable service" means any service provided to any person by various categories of service providers. "Since the definition of "taxable service", as given in Section 65 (105) is silent about the nationality or resident or non-resident status of the provider of the taxable service, it implies that even if a foreigner, not having permanent residence, office or business establishment in India, or a person not resident in India, provides a taxable service in India, the same would attract the service tax. A question arises as to who will pay service tax in such cases. Prior to 16/8/02, second proviso to Rule 6 (1) of the Service Tax Rules provided that in case of a person who is non-resident or is from outside India, not having any office in India and is liable to pay service tax on taxable services provided in India, the service tax thereon shall be paid by such person himself or on his behalf by any other person authorized by him, who shall submit to the Commissioner of Central Excise, in whose jurisdiction the taxable services have been rendered, a return containing prescribed details. The very existence of proviso to Rule 6 (2) of Service Tax Rules, 1994 indicates that even prior to 18/04/06, the date on which Section 66A was introduced, import of taxable service by a mode, where foreigner/non-resident service provider not having

any office in India provide^{from India} some taxable service to a person in India, was taxable under Section 66 read with Section 65 (105) of the Finance Act and during period prior to 16/8/02, in such cases either the foreign/non-resident service provider could pay the service tax himself or he could authorize some other person to pay the service tax on his behalf. But since the ^{system of payment of} service tax either by the foreigner/non-resident service provider ^{or} by a person authorized by him did not ^{work} ~~with~~, this proviso to Rule 6 (1) was deleted and Rule 2 (1) (d) (iv) was introduced by Notification No. 12/02-ST dated 01/08/02 issued under Section 94 of the Central Excise Rules (effective from 16/8/02) which provided that "person liable for paying service tax" in relation to any taxable service provided by a person who is non-resident or is from outside India not having any office in India, means the person receiving taxable service in India. Thus, by amending the definition of "person liable for paying service tax" in Rule 2 (d) of Service Tax Rules, in case the taxable service provided by a person who is non-resident or is from outside India not having any office in India, liability to pay service tax in such cases was fastened on to the "person receiving the service in India". But, while doing so, no notification in this regard was issued under sub-Section (2) of Section 68, as while under sub-Section (1) of Section 68, the

person liable to pay the service tax is the person providing the taxable service, sub-Section (2) of Section 68 empowers the Central Government to notify any taxable service, in respect of which the service tax shall be paid by some person other than the service provider. Such Notification No. 36/04-ST was issued only on 31/12/04 effective from 01/1/05. Thus so far as liability to service tax of a person resident in India or having office/business established in India, in respect of taxable services provided to him in India by a foreign or a non-resident person not having any office in India, is concerned, there is no doubt in this regard for the period from 01/1/05 onward. There was dispute as to whether during period from 16/8/02 to 31/12/04, in such cases the liability to pay service tax could be fastened on to the service receiver in India. A single member bench of the Tribunal in case of **Aditya Cement vs. CCE 2007 (7) S.T.R. – 153** held that service receiver was not liable to pay service tax during period prior to 01/1/05 and Tribunal in case of **Ispat Industries vs. CCE [2007 (8) S.T.R. – 282]** followed this judgment. Since the correctness of these decisions was doubted, this issue in the case of **M/s Hindustan Zinc Ltd. vs. CCE, Jaipur** was referred to a Larger Bench. The Larger Bench of the Tribunal vide judgement dated 27/6/08 reported in **2008 TIOL 1149 (CESTAT DEL-LB)**, held

that it is only w.e.f. 1/1/05, the date from which the Notification No. 36/04-ST dated 31/12/06 issued under Section 68 (2) of the Act came into force, the recipient of taxable service from service provider who is non-resident or is from outside India not having any office in India, would be liable to pay the service tax.

3.5 It is true that comprehensive provisions for taxing the import of service by all possible modes came w.e.f. 18/4/06 when Section 66A was introduced in the Finance Act, 1994 and simultaneously Taxation of Services (Provided from outside India and Received in India) Rules, 2006 were notified vide Notification 11/2006-ST dated 18/4/06. But as discussed above, so far as the taxable services provided from India by a foreigner or non-resident, not having any officer or business establishment in India to a person in India are concerned, these services were taxable even prior to 18/4/06 under Section 66 read with Section 65 (105) of the Finance Act, 1994 and by virtue of Rule 2 (1) (d) (iv) of the Service Tax Rules, 1994 read with Notification 36/04-ST dated 31/12/04 issued under Section 68 (2) of the Finance Act, 1994, the recipient in India, was liable to pay the service tax.

4. In this case, from the agreement of the Appellants with M/s Callison, U.S.A., it is clear that the officials of M/s Callison had

visited the Appellant's project site and the office and had a series of meetings with the Appellants, from which it is clear that the taxable service had been provided by M/s Callison to the Appellants from India. Since M/s Callison do not have any office or business establishment in India, in terms of the provision of Rule 2 (1) (d) (iv), it is the Appellants as recipient of the service who would be liable to pay the service tax. However, in terms of the Tribunal's judgement in case of Hindustan Zinc Ltd. (Supra), the Appellants would be liable to pay the service tax only for the period from 01/1/05 onwards and they would not be liable to pay the service tax for the period prior to 01/1/05.

5. The next point of dispute is, as to whether the longer period of limitation of five years under proviso to Section 73 (1) of the Act is available to the Revenue for recovery of non-paid service tax for the period from 1/1/05 to 16/6/05, as the show cause notice had been issued on 22/1/07. The contention of the Appellants is that during the period of dispute, on account of contradicting decisions on the issue of liability of the service recipient to pay the service tax in respect of taxable service received from a foreign/non-resident service provider, they were under bonafide belief that they are not liable to pay the service tax. In this regard, the Appellant have relied upon Hon'ble Supreme Court's

judgement in case of Continental Foundation Jt. Venture (Supra).

We find that the Appellant during the period of dispute had taken registration with the jurisdictional service tax authorities under the category of construction, real estate consultant services and architect services but in the ST-3 returns filed by them, the fact that they were receiving architectural consultancy from foreign consultants, not having any office in India and the payments made to foreign consultants in this regard, were never declared, while w.e.f. 1/1/05 there was no scope for doubt on the issue of their ^{liability} ~~liable~~ to pay the service tax on the taxable services received by them - M/s Callison, U.S.A. At least in the ST-3 returns for the six monthly period ~~from~~ ^{on} ending 31/3/05, due in April, 2005, the payments made to M/s Callison, U.S.A. and service tax payable should have been declared but no such information was disclosed.

The Department came to know about receipt of taxable services by the Appellants, from M/s Callison, U.S.A. and non-payment of service tax on the same only when inquiry in this regard was initiated in October, 2005. The Appellants, therefore, ^{are} ~~are~~ guilty of wilful suppressing the relevant information from the Department and therefore longer limitation period of five years under proviso to Section 73 (1) of the Act has been rightly invoked and penalties under Section 76 and 78 of the Act have been rightly imposed.

However, the quantum of penalty to be imposed under Section 78 of the Act has to be redetermined in view of reduced tax liability.

6. In view of our above findings, while we hold that the Appellants are liable to pay the service tax on the Architectural consultancy service received by them from M/s Callison, U.S.A. for period from 01/1/05 onwards and that for recovery of non-paid service tax longer limitation period under proviso to Section 73 (1) of the Act has been rightly invoked and they are liable for penalty under Section 76 & 78 of the Finance Act, 1994, we remand the matter to the Commissioner for –

- (a) quantification of service tax demand in the light of our findings in para 4 above ; and
- (b) redetermination of the quantum of penalty under Section 78 of the Act.

The penalty of Rs. 100/- per day under Section 76 is upheld.

The appeal stand disposed off as above.

(Pronounced in open court on 25.8.08)

(S.S. Kang)
Vice President

(Rakesh Kumar)
Member (Technical)

PK