

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD**

REGIONAL BENCH

SERVICE TAX APPEAL NO. 1957 of 2011

[Arising out of Order-in-Original No. 01/2011/ADJN (ST)/(COMMR.) dated 22/04/2011 passed by The Commissioner of Customs, Central Excise and Service Tax, Hyderabad.]

M/s KFin Technologies Private Limited,

Karvy Selenium Tower B, Plot No. 31 & 32,
Financial District, Nanakramguda,
Serilingampally, Hyderabad, Rangareddi,
Telangana – 500 032.

...Appellant

Versus

The Commissioner of Central Tax,

Hyderabad GST Commissionerate,
GST Bhavan, L.B. Stadium Road, Basheerbagh,
Hyderabad – 500 004

...Respondent

APPEARANCE:

Shri S. Thirumalai, Advocate for the appellant.

Shri S. Hanuma Prasad, Authorised Representative for the Department.

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
 HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 16.07.2021

DATE OF DECISION: 11.10.2021

FINAL ORDER No. 30319/2021

P.V. SUBBA RAO

In this appeal the appellant is assailing order-in-original dated 22.04.2011¹ passed by the Commissioner of Customs, Central Excise & Service Tax, Hyderabad – II whereby he adjudicated the show cause notice² dated 13.10.2009 (covering the period 10.09.2004 to 31.12.2007) issued by the Director General of Central Excise Intelligence³. Both the SCN and the

¹ Impugned order

² SCN

³ DGCEI

impugned order were issued in the name of the former name of the appellant M/s. KCPL Computershare Pvt. Ltd. As proposed in the show cause notice, the learned Commissioner confirmed the demand of service tax, interest and imposed penalty upon the appellant under section 78 of the Finance Act, 1994. The operative part of the order is as follows:-

- “(i) I confirm the demand of Service Tax of Rs. 11,46,11,071/- inclusive of Education cess and SHE cess, being the Service Tax short paid by M/s KCPL Computershare Pvt. Ltd. on the value of Business Auxiliary Services, Share Transfer Agent services and Registrar to an Issue services rendered by them during the period 10.09.2004 to 31.01.2007 under Section 73 (1) of the Finance Act, 1994 readwith the proviso thereto ;
- (ii) The amount of Rs. 2,16,65,028/- already paid by M/s KCPL is appropriated towards the demand at (i) supra ;
- (iii) I drop the demand of Service Tax of Rs. 3,38,371/- on the value of “Intellectual Property services” received by them from foreign service providers on the basis of discussion supra ;
- (iv) I confirm the demand of Rs. 2,94,640/-, including Education cess and SHE cess, being the Service Tax not paid by M/s KCPL on the value of Manpower Recruitment or Supply agency services received by them from foreign service provider under Section 73 (1) of the Finance Act, 1994 readwith the proviso thereto ;
- (v) I confirm the demand for interest under Section 75 of the Finance Act, 1994, at the applicable rates on the demand of Service Tax made at (i) and (iv) supra ;
- (vi) The amount of Rs. 25,00,000/- and Rs. 54,650/- already paid by them, is appropriated towards their interest liability at (v) supra;
- (vii) The amount of Rs. 3,38,371/- paid towards “Intellectual Property Services” is appropriated and adjusted towards the amount of service tax demanded at Sl. No. (i) above; and
- (viii) I impose a penalty of Rs. 11,49,05,711/-, under Section 78 of the Finance Act, 1994 on M/s KCPL for the evasion of Service Tax by suppression and wilful mis-statement of the material facts, as discussed herein above”.

2. The appellant is registered with the Securities and Exchange Board of India (SEBI) as Category I Registrar and has been providing Share Transfer Agency Services and Registrar to Issue Services since 1 February 2004. The Registrar to Issue refers to a

person who carries out for a corporate body, various activities relating to an offer of sale or purchase of securities to, or from the public or the holder of securities. A 'Share Transfer Agent' refers to a person who, on behalf of any body corporate, maintains the record of holders of securities issued by such body corporate and deals with all matters connected with transfer and redemption of its securities.

3. Earlier, Revenue demanded service tax on these services for the period prior to 10.9.2004 under the head 'Business Auxiliary Service' under clause (iv) of Section 65(19) of the Finance Act, 1994⁴, as it stood prior to 10.9.2004. On appeal, **CESTAT had, by Final Order dated 20.12.2007⁵ set aside the demand and held that these services were brought into tax net only on 1.5.2006 and prior to this date, they were not chargeable to service tax.** Paragraph 6 of this order is as follows:

"6. On a very careful consideration of the issue, we find that there is no dispute regarding the fact that the appellants are engage in the services of share transfer agent and registrar official. They first brought into service tax net only w.e.f. 1-5-2006. The Tribunal in the case of Ankit Consultancy[2007 (6) STR 101] cited by the learned Advocate elaborately dealt with this issue and has given a finding that prior to this period, it would not come fall within the category of 'Business Auxiliary Services'..... Therefore, both on merits and also on limitation there is no justification in the impugned order. The same is liable to be set aside. Hence, we allow the appeal with consequential relief".

4. Thus, for the period prior to 10.9.2004, the issue has been decided. On 10.09.2004, the definition of 'Business Auxiliary Services' under Section 65 (19) of the Finance Act, which is a taxable service, was enlarged and a new clause "**(vi) provision**

⁴ the Finance Act

⁵ Karvy Consultants Ltd vs Commissioner of Cus. C. Ex, Hyderabad 2008 (10) STR 166(Tri-Bang)

of service on behalf of the client;” was also included. The case of the Revenue in this case is that the services provided by the appellant from 10.9.2004 were taxable under the revised head of Business Auxiliary Services. The definition of Business Auxiliary Services prior to 10.09.2004 and after this date are as follows :-

Definition of “Business Auxiliary Service” (BAS)

For the period from July 1, 2003 to September 9, 2004

Business Auxiliary service means any service in relation to, -

- (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
- (ii) promotion or marketing of service provided by the client; or
- (iii) any customer care service provided on behalf of the client; or
- (iv) any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation service,

and includes services as a commission agent, but does not include any information technology service. Explanation – For the removal of doubts, it is hereby declared that for the purposes of this clause “information technology service” means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer system”.

For the period from 10 September 2004 to 16 May 2008

“Business Auxiliary Service means any service in relation to, -

- (i) promotion or marketing or sale of goods produced or provided by or belonging to the client ; or
- (ii) promotion or marketing of service provided by the client ; or
- (iii) any customer care service provided on behalf of the client; or
- (iv) procurement of goods or services, which are inputs for the client ; or

Explanation – For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, “inputs” means all goods or services intended for use by the client ; **(Explanation inserted with effect from 16.06.2005)**

- (v) production or processing of goods for, or on behalf of, the client; or
- (vi) **provision of service on behalf of the client; or**
- (vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments,

maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, but does not include any information technology service or any activity that amounts to “manufacture” within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944

Explanation – For the removal of doubts, it is hereby declared that for the purposes of this clause, -

- (a) “commission agent” means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person –
 - (i) Deals with goods or services or documents of title to such goods or services; or
 - (ii) Collects payment of sale price of such goods or services; or
 - (iii) Guarantees for collection or payment for such goods or services ; or
 - (iv) Undertakes any activities relating to such sale or purchase of such goods or services; **(amended definition effective from 16.06.2005)**
- (b) “information technology service” means
 - (i) any service in relation to designing, or developing or maintaining of computer software or computerized data processing or system networking, or any other service primarily in relation to operation of computer system; **Prior to 01.05.2006 ;**
 - (ii) any service in relation to designing, or developing of computer software, or system networking, or any other service primarily in relation to operation of computer systems **From 01.05.2006 till 15.05.2008”.**

5. Thereafter, from 1 May, 2006 **any service provided or to be provided to any person for a share transfer agent in relation to securities** was also included as a taxable service. Similarly, from 1 May, 2006 **any service provided or to be provided to any person by a Registrar to issue in relation to sale or purchase of securities** was also included as a taxable service.

6. For the period 10.9.2004 to 1.5.2006, the appellant paid service tax under the head “Business Auxiliary Services” under protest. However, it did not pay any service tax on the reimbursable expenses, which it received from its clients.

7. On 20.09.2006, the Superintendent (Audit) sent a letter to the appellant stating the services were covered under the category of “Registrar to Issue Services”, “share transfer agent services” from 1 May 2006. The appellant requested the Jurisdictional Assistant Commissioner to amend the service tax registration accordingly and has been paying service tax on such services under these two heads.

8. The appellant filed a refund claim for the service tax which it paid under the head of Business Auxiliary Services from 10.09.2004 to 30.04.2006 on the ground that no service tax was payable under this head. This claim was rejected by the Assistant Commissioner on 12.11.2007 and on appeal Commissioner (Appeals) had, by order dated 25.07.2008, held that the appellant was entitled to the refund. This order of Commissioner (Appeals) was not challenged by the Revenue. Consequently, the appellant filed four claims and was sanctioned refund by the Assistant Commissioner. These orders sanctioning the refund claim were also not appealed against by the Revenue. Therefore, the service tax liability in so far as the period from 10.09.2004 to 30.04.2006 under the Business Auxiliary Service attained finality. To sum up:

- a) For the period prior to 10.9.2004, the appellant’s services were held by CESTAT Final Order dated 20.12.2007 to be not chargeable to service tax under Business Auxiliary

Services. It was also held that these services were brought under tax net only with effect from 1.5.2006 under the heads of Share Transfer Agents Services and Registrar to Issue services and no service tax can be levied prior to his period under the Business Auxiliary Services.

- b) For the period 10.9.2004 to 1.5.2006 the appellant paid service tax under protest which was refunded to it by the department and the orders sanctioning the refund were not challenged by the Revenue.
- c) For the period post, 1.5.2006, the appellant is paying service tax and there is no dispute.

9. Thereafter, on 11.06.2007 the officers of Director General of Central Excise Intelligence initiated investigation against the appellant and came to the conclusion that it was liable to pay service tax under the head of Business Auxiliary Services for the period 10.09.2004 to 30.04.2006, including on all reimbursable expenses. They also concluded that the appellant was liable to pay service tax under 'share transfer agency' service and 'registrar to issue' services for the period from 01 May 2006 including on all reimbursable expenses. The appellant had, during investigation clarified by letter dated 08.05.2008 that it had charged service tax on reimbursable of expenses, except postage expenses from December 2006 and on all reimbursable expenses including the postage from February 2007. The CFO of the appellant sent a letter dated 11.05.2007 submitting that it had issued debit notes whereby the service tax was charged from the clients on all reimbursable expenses on actual basis and paid the same to the Department. It was also mentioned the service tax on reimbursable expenses for the period prior to 1 May 2006 was not

paid as the demand itself under the head of Business Auxiliary Services was not sustainable.

10. Not agreeing with the contention of the appellant, the Additional Director General (DGCEI), issued the show cause notice dated 12.10.2009 demanding service tax of Rs. 11,46,11,071/- of which Rs. 9,37,41,285/- was under the head 'Business Auxiliary Service' for the period 10.09.2004 to 30.04.2006 and an amount of Rs. 2,08,69,786/- on the reimbursable expenses received by the appellant under the heads of 'share transfer agent' service and 'registrar to issue' service. The show cause notice also demanded service tax of Rs. 3,38,371/- on 'Intellectual Property' services, which demand was dropped in the impugned order and there is no departmental appeal on this head. The third demand was an amount of Rs. 2,94,640/- on 'manpower recruitment and supply agency' services, which was confirmed in the impugned order. In addition to demand of service tax, as above, along with interest, the show cause notice also proposed imposition of penalty equivalent to the amount of service tax demanded under Section 78 of the Finance Act.

11. Learned Counsel for the appellant submits as follows :-

- (i) The main demand is under the head of Business Auxiliary Services for the period 10.09.2004 to 30.04.2006. In this regard, it had already paid service tax under protest and thereafter claimed refund on the ground that no such service tax is payable. The orders sanctioning the refund have attained finality because the Revenue has not appealed against them.

The DGCEI could not have raised a demand again on the same issue under the same head and also demanded service tax on reimbursable expenses received from clients with respect to this service. It is a well-settled position in law that once a service tax is chargeable under one head by virtue of a new entry, it cannot be presumed to have been chargeable to service tax under a different entry prior to that date. This contention of the appellant was accepted by the Revenue and refunds have been sanctioned. This was also the order of the Tribunal in its own case **Karvy Consultants Ltd.** It is not open for the DGCEI to take a different view and raise a demand under the head of 'Business Auxiliary Services' at this stage. If no service tax is chargeable under the head of Business Auxiliary Services, any reimbursable expenses paid by the clients with reference to such services also cannot be taxed. Therefore, the demand in the impugned order on this count that should be set aside.

- (ii) For the period 1.5.2006 to 30.1.2007, undisputedly, the appellant has been paying service tax under the heads 'Share Transfer Agent' Service and 'Registrar to Issue' Service on the service charges collected by the appellant.
- (iii) For some period, it had paid service tax even on the reimbursable expenses paid by clients and has

collected such service tax from clients, although it is now a well settled legal position by **Inter-Continental Consultants**⁶ decision of the Supreme Court that no service tax is payable on reimbursable expenses. Nevertheless, to buy peace, it had paid service tax on all reimbursable expenses collected from clients after 1.5.2006 and also collected such service tax from clients by issuing debit notes. It does not intend to claim any refund as it has collected the service tax from its clients.

- (iv) It also paid interest on the service tax on reimbursable expenses and collected the same from clients for issue of debit notes.
- (v) Notwithstanding the above, learned Counsel submits that no service tax is payable on reimbursable expenses as held by the Supreme Court in **Intercontinental Consultants**.
- (vi) In this appeal, the appellant is only contesting the demand of service tax for period 10.09.2004 to 30.04.2006 and imposition of penalties under Section 78 of the Finance Act on the following grounds :
 - (a) Service tax paid for the same services under the head Business Auxiliary Services for the period 10.09.2004 to 30.04.2006 has been originally paid under protest and was then refunded by the Assistant Commissioner as per the order of the

⁶ Union of India versus Intercontinental Consultants and Techno Craft Pvt. Ltd. – 2018 (10) G.S.T.L. 401 (S.C.)

Commissioner (Appeals). Neither the order of Commissioner (Appeals) dated 25 July 2008 holding that it was eligible for refund since no tax is liable under Business Auxiliary Services, nor the consequential orders of the Assistant Commissioner sanctioning refund have been appealed against by the Revenue. **Therefore, the issue that no service tax is chargeable has reached finality.**

(b) So far as the demand of Service Tax of Rs. 2,94,640/- under the head of Manpower Recruitment or supply agency service is concerned, it has been confirmed on the salary of a person sent on secondment by the Australian firm whose salary the appellant reimbursed. There is nothing on record to show that the company which sent the person on secondment is a manpower recruitment or supply agency or that the appellant had hired the agency for recruitment or supply of manpower. It is now a well-settled legal position that no service tax can be levied under the head 'manpower recruitment or supply agency service' on the salaries of the persons sent on secondment reimbursed to the parent organisation. Therefore, the demand on this count needs to be dropped.

(c) The fact that it was rendering these services were known to the Department for a long time and there is no evidence of fraud or collusion or wilful

statement or suppression of facts which are essential to attract penalty under section 78; therefore, no penalty can be imposed upon them under Section 78.

12. Learned Counsel for the appellant, therefore, prays that the impugned order may be set aside and the appeal be allowed.

13. Learned Departmental Representative reiterated the findings of the Commissioner in the impugned order.

14. We have considered the arguments of both sides and perused the records.

15. Undisputedly, the appellant is rendering the service of 'Registrar to Issue' services and 'Share transfer agent' services, both of which became chargeable to service tax w.e.f. 01 May 2006 and it has been paying service tax from that date. As far as the reimbursable expenses recovered by the appellant from its clients for this period is concerned, it has now been settled by the Supreme Court in **Intercontinental Consultants**, that no service tax can be levied on reimbursable expenses recovered by a service provider. The service tax has to be levied only for consideration received for service. The relevant paragraphs of this judgment are reproduced below :-

"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 quo* for rendering such a service.

.....

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.”

16. Therefore, the entire demand of service tax on reimbursable expenses collected from clients for the period post 1.5.2006 cannot sustain and needs to be set aside and we do so.

17. However, to the extent the appellant has collected any amount representing service tax on such expenses and interest thereon from clients, the same needs to be deposited with the Government in terms of Section 73A of the Finance Act.

18. The learned Counsel for the appellant affirms that it had already deposited the amount. We do note that the demand is NOT CONFIRMED under section 73A (as amount collected as representing tax) but under section 73 (as tax payable on the reimbursable expenses), which is not sustainable. However, the appellant will not be entitled to any refund of such amount even if

no service tax or interest was payable, in view of the obligation under Section 73A to deposit the same.

19. As far as the period 10.09.2004 to 30.04.2006 is concerned, the impugned order charges service tax under the head **Business Auxiliary Services** on the services rendered by the appellant. This issue has already been settled by the Tribunal in appellant's own case in previous name of **Karvy Consultants Ltd.** reported in **2008 (10) S.T.R. 166 (Tri. – Bang.)**, in which relevant paragraph is as follows :-

“6. On a very careful consideration of the issue, we find that there is no dispute regarding the fact that the appellants are engaged in the services of share transfer agent and registrar official. **They first brought into service tax net only w.e.f. 1-5-2006. The Tribunal in the case of Ankit Consultancy [2007 (6) S.T.R. 101]** cited by the learned Advocate elaborately dealt with this issue and has given a finding that prior to this period it would not come fall within the category of ‘Business Auxiliary Services’. Moreover, in the present case the show cause notice is time barred, as the longer period cannot be invoked. In view of the fact, that there was no suppression of fact. Therefore, both on merits and also on limitation there is no justification in the impugned order. The same is liable to be set aside. Hence, we allow the appeal with consequential relief”.

20. The current demand is for a subsequent period (10.09.2004 to 30.04.2006) and there was a change in the definition of ‘Business Auxiliary Service’. Nevertheless, it has been categorically held by the Tribunal that no service tax can be charged prior to introduction of the heads of ‘Share Transfer Agent’ Service and ‘Registrar to Issue’ Service from 1.5.2006. Nevertheless, the appellant paid service tax under protest during this period and thereafter claimed refund which was sanctioned by the Assistant Commissioner as per the Order of the Commissioner (Appeals). Neither the order of the Commissioner (Appeals) nor

the consequential order of Assistant Commissioner sanctioning refund were assailed by the Department. Thus, the issue has not only been decided by the Tribunal, refunds have also been granted by the Department.

21. Nevertheless, DGCEI has its own views distinct from the decision of the Tribunal and the orders of the officers who sanctioned refund. It issued a show cause notice demanding Service Tax under section 73 of the Finance Act by invoking the extended period of limitation and in the impugned order, the learned Commissioner confirmed the demand. He has, in the impugned order, noted and explicitly defied the order of the Tribunal and held that the appellant is liable to pay service on its services under the head of Business Auxiliary Services. The relevant paragraph of the impugned order is as under :-

"9.8 I find that the previous Show Cause Notice on the subject, which was the base for the CESTAT Final Order No. 42/2008, and the Appellate Commissioner's Order, proposed to classify the services of Karvy under sub clause (iv) of unamended Section 65 (105) of the Finance Act, 1994, i.e. for the period prior to 10.09.2004, and pertained to the period 01.07.2003 to 31.01.2004. The period of contention in the present Notice pertains to the period from 10.09.2004 (i.e. from the date of amendment of the definition of Business Auxiliary Service to include clause (iv) to 01.05.2006, i.e. the date of introduction of clauses (zzzi) and (zzzj) of Section 65 (105) of the Finance Act, 1994 in as much as the assessee has taken registration under the said clauses with effect from 01.05.2006. Further, the earlier order of Hon'ble CESTAT in respect of M/s Karvy Consultancy Ltd. vide Final Order No. 42/2008, pertains to period 01.07.2000 to 30.01.2004. It relied upon the ratio of the Sathguru case law, which in turn relied heavily on the Ankit Consultancy case. However, it is seen that the facts and circumstances of the Ankit case are totally different from the present case in as much as it pertains to the period prior to the introduction of new sub clause (vi) to the definition of Business Auxiliary Service with effect from 10.09.2004. The Department's case in the above issue had also suffered on grounds of limitation of time. **Therefore, I beg to differ from the ratio of the Hon'ble CESTAT judgements in this regard and hold that the services rendered by M/s**

KCPL very much fall under the purview of Business Auxiliary Service from 10.09.2004 onwards”.

22. The Commissioner has not stated that the facts are different or the ratio of the Order of CESTAT does not apply. The law has changed but nevertheless all the changes in the law including the imposition of service tax under the head ‘Share Transfer Agent’ Service and ‘Registrar to Issue’ service with effect from 1.5.2006 were in place at the time the Final Order was passed by the CESTAT and it was held that prior to this period, no service tax can be charged under the head of BAS. The learned Commissioner said that ‘He **begs to differ from the ratio of the Hon’ble CESTAT**’. Since he differs from CESTAT, he did not follow order of the CESTAT in the appellant’s own case on the same issue for an earlier period which is clearly against judicial discipline. **As a quasi-judicial authority, he was bound to follow the decision of the Tribunal and could not have taken a different view.**

23. Even otherwise, it is a now well established principle that after a tax has been levied under a particular head from a date, it is presumed that it was not taxable prior to that date. Since the appellant’s services were made taxable under ‘Share Transfer Agent’ Service and ‘Registrar to Issue’ Service from 1 May 2006, they were not taxable prior to this date. For the period prior to 1 May 2006, the appellant paid service tax under protest. The Superintendent Audit advised the appellant that its services were chargeable to Service Tax under these services with effect from 1 May 2006 based on which, a request was made and the Assistant

Commissioner amended the registration. When the appellant filed a refund application for the tax paid for the previous period, it was allowed by the Commissioner (Appeals) and consequently, sanctioned by the Assistant Commissioner. Learned Counsel submits that neither of these orders were appealed against by the Revenue. Learned Departmental Representative has not controverted this factual submission.

24. Even if DGCEI holds a different view, it does not make services rendered by the appellant prior to the 1 May, 2006 taxable. In the impugned order, the Commissioner has not only ignored the ratio of the order passed by the Tribunal but also the fact that Revenue itself has agreed with such decision and has even refunded the tax so paid.

25. As far as the demand of service tax under the head 'Manpower Recruitment Agency' Service is concerned, it has been confirmed on the amount paid by the appellant to its overseas partner M/s Computershare Investor Services Pty. Ltd., Australia, who provided the services of one M/s Susan Kitchener. As per the agreement between M/s Computershare and the appellant, Ms. Kitchener was deputed/seconded to the appellant but her salary was paid by M/s Computershare and the appellant reimbursed these amount. This is not a case of 'Manpower Supply Agency' Service rendered by Manpower Agency Service to the appellant. Therefore, the same cannot be charged to service tax under reverse charge mechanism merely because one person was sent on deputation by M/s Computershare, Australia to the appellant and the appellant had reimbursed her salary to M/s

Computershare. Therefore, the demand on this count also needs to be set aside and we do so.

26. In the impugned order, an amount equal to service tax confirmed was imposed as penalty on the appellant under section 78 of the Finance Act. We find that this penalty cannot be sustained and needs to be set aside on more than two grounds.

section 78 of the Finance Act reads as follows :-

“78. Penalty for suppressing value of taxable service. —

If the Central Excise Officer in the course of any proceedings under this Chapter is satisfied that any person has, with intent to evade payment of service tax, suppressed or concealed the value of taxable service or has furnished inaccurate value of such taxable service, he may direct that such person shall pay by way of penalty, in addition to service tax and interest, if any, payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of service tax sought to be evaded by reason of suppression or concealment of the value of taxable service or the furnishing of inaccurate value of such taxable service :

Provided that if the value of taxable service (as determined by the Central Excise Officer on assessment) in respect of which value has been suppressed or concealed or inaccurate value has been furnished exceeds a sum of twenty-five thousand rupees, the Central Excise Officer shall not issue any direction for payment by way of penalty without the previous approval of the Collector of Central Excise”.

27. Firstly, the elements required for imposition of penalty under section 78 viz., fraud or collusion or wilful statement or suppression of facts have not been established in the present case. All facts were known to the Department from the beginning. The only thing which changed is that the DGCEI has chosen to take a different view from the one already taken and accepted by the Department and the learned Commissioner has chosen to agree with that view ignoring the fact that the issue was settled.

28. Secondly, penalty under section 78 of the Finance Act is equal to the tax evaded. We have already held that the entire demand of tax in this case is not sustainable. Therefore, there cannot be any penalty under section 78.

29. In view of the above, the appeal is allowed and the impugned order is set aside with consequential relief, if any. However, if any amount not payable as service tax or interest on it has already been paid by the appellant and collected from its clients, the appellant will not be entitled to refund of the same in view of section 73A of the Finance Act.

(Order pronounced in court on 11/10/2021.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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