IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.166 of 2010

(Arising out of Order-in-Original No.49/Commr/ST/Kol/2009-10 dated 26.02.2010 passed by Commissioner of Service Tax, Kolkata.)

M/s. Lee and Muirhead Private Limited
(26, Shakespear Sarani, Kolkata-700017.)

...Appellant

VERSUS

Commissioner of Service Tax, Kolkata

.....Respondent

(Kendriya Utpad Shulk Bhawan, 3rd Floor, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

APPEARANCE

Shri R.G. Sheth, Advocate for the Appellant (s)
Shri A.Roy, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P. ANJANI KUMAR, MEMBER(TECHNICAL)

FINAL ORDER NO. 75378/2022

DATE OF HEARING : 14 June 2022
DATE OF DECISION : 06 July 2022

P.K. CHOUDHARY :

The instant appeal is directed against the Order-in-Original dated 04.03.2010 passed by the Ld. Commissioner of Service Tax, Kolkata, whereby he has confirmed demand of service tax of Rs.74,93,416/- along with interest and penalty as proposed in the Show Cause Notice dated 22.10.2008 (SCN) for the period from April 2003 to March 2007.

2. The Appellant is engaged in providing 'Customs House Agent' services and is accordingly depositing the applicable service tax. They have also filed periodical returns as required in the Service Tax Rules. The impugned demand of Service Tax has been raised on amount of reimbursement claimed by the Appellant from the clients during the

course of providing the aforesaid services by invoking Rule 5 of the Service Tax Rules, 1994. In the course of adjudication, the assessee has submitted that the said expenses cannot form part of the value of taxable services for the purpose of ascertainment of value of taxable services as per various clarifications issued by the Board from time to time. The Appellant has deposited an amount of Rs.8,45,853/- out of the aforesaid demanded tax amount which has been claimed by the Department to be short paid. Without accepting the submissions made by the Appellant, the Ld.Commissioner has upheld the demand along with interest and imposed penalty.

3. Shri R. G. Sheth, Ld. Advocate appeared for the Appellant and Shri A. Roy, Ld. Authorized Representative appeared for the Revenue.

4. The Ld. Advocate submitted that the issue stands decided in their favour inasmuch as the very Rule 5 has been held to be *ultra vires* by the Hon'ble Supreme Court in the case of UOI vs. Intercontinental Consultants & Technocrats Pvt Ltd [2018 (10) GSTL 401 (SC)]. He also relied on various decisions of the Tribunal which has consistently held that reimbursable expenses cannot be included in the value of taxable services as below:

- Sai Shipping Services vs. CCE Jaipur 2011 (22) STR 153 (Tri-Del)
- Cargolinks vs. CCE Mangalore 2010 (19) STR 548 (Tri-Bang)
- Reliance Industries Ld. Vs. CCE 2008 (12) STR 345 (Tri-Ahm)
- GAC Shipping (India) Pvt Ltd vs. CCE 2008 (9) STR 524 (Tri Bang)

The Appellant has also contested the demand on the ground of limitation.

5. The Ld. Authorized Representative for the Department reiterated the findings made by the Ld. Commissioner and submitted that the Appeal be rejected being devoid of any merit.

6. Heard both sides through video conferencing and perused the appeal records. The Learned Advocate has also filed written submissions.

7. We find that the issue is no longer *res integra* inasmuch as the very Rule on the basis of which impugned demand has been raised has been held to be *ultra vires* the provisions of the Finance Act, 1994. The Hon'ble Supreme Court in the case of Intercontinental Consultants & Technocrats Pvt Ltd (Supra) has held as under:-

> ***"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.*
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> ***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.*
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> ***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."*

> ***..................................***

> ***...................................***

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."*

Following the above law laid down by the Hon'ble Supreme Court, we are of the view that the impugned demand raised by the Ld. Commissioner cannot be sustained, except for the short payment of service tax which has already been deposited by the Appellant.

Penalty imposed is set aside.

Thus, the appeal is allowed in the above terms.

(Order pronounced in the open court on 06 July 2022.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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