

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

Service Tax Appeal No: 86293 of 2017

[Arising out of Order-in- Original No: MUM-SVTAX-006-COM-51-16-17 dated 15th December 2016 passed by the Commissioner of Service Tax-VI, Mumbai.]

Heligo Charters Pvt Ltd
Hanger 3A, Juhu Airport, SA Road, Vile Parle
Mumbai – 400 056

... *Appellant*

versus

Commissioner of Service Tax
Mumbai – VI
Mahavir Jain Vidyalaya, CD Burfiwala Marg, Juhu Galli,
Andheri (W), Mumbai – 400 058

...*Respondent*

APPEARANCE:

Shri Aneesh Mittal, Advocate for the appellant

Shri M Suresh, Joint Commissioner (AR) for the respondent

CORAM:

**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)**

FINAL ORDER NO: A/85483 / 2020

DATE OF HEARING:	18/07/2019
DATE OF DECISION:	24/01/2020

PER: C J MATHEW

M/s Heligo Charters Pvt Ltd is in the business of contracting to

provide transportation by helicopter to offshore locations of companies in the oil and gas industry on 'time charter' inclusive of all charges. The dispute with service tax authorities, for the period from June 2012 to March 2015, is restricted to the contract with M/s ONGC Ltd who, among the various clients, required the provider to use 'aviation turbine fuel' of theirs when at Mumbai or at offshore platforms with reimbursement of the actual spending at other locations. The case of the tax authorities is built upon the framework of valuation, enacted in section 67 of Finance Act, 1994, requiring the determination of non-monetary consideration for inclusion in the assessable value. Furthermore, sustenance has been drawn from the rule 5 of Service Tax (Determination of Valuation) Rules, 2006 mandating all expenditure/costs incurred for providing the services to be includable in the consideration. For the period prior to 1st July 2012, the chartering company had been discharging its tax liability as provider of 'supply of tangible goods' services.

2. In the show cause notice, it was proposed that, in addition to 'fixed charges' and 'flying hourly charges', 30,82,360 litres of 'aviation turbine fuel', valued at ₹ 26,03,43,725, had been consumed on 5973 hours and 34 minutes of flying which, having been excluded from the assessable value, be subject to tax amounting to ₹ 3,21,78,484. Aggrieved by the confirmation of this demand under section 73(1) of Finance Act, 1994, along with interest as prescribed in section 75 of

Finance Act, 1994, besides imposition of penalty of like amount under section 78 of Finance Act, 1994, in order in-original no. MUM-SVTAX-006-COM-51-16-17 dated 15th December 2016 of Commissioner of Service Tax-VI, Mumbai, M/s Heligo Charters Pvt Ltd is now before us.

3. Urging us to disregard rule 5 of Service Tax (Determination of Valuation) Rules, 2006 as an acceptable recourse, in the light of the decision of the Hon'ble Supreme Court in *Union of India v. Intercontinental Consultants & Technocrats (P) Ltd [(2018) 4 SCC 669]* that the amendment in section 67 of Finance Act, 1994 effected on 14th May 2015 validates rule 5 of Service Tax (Determination of Valuation) Rules, 2006 only prospectively, Learned Counsel further contended that, in employing the expression 'gross amount charged' in section 67 of Finance Act, 1994, the legislature did not intend to include supply effected by a recipient to a provider of service as consideration as held by the Hon'ble Supreme Court in *Commissioner of Service Tax v. Bhayana Builders Pvt Ltd [2018 (10) GSTL 118 (SC)]*.

4. According to Learned Authorised Representative, the decision in *re Intercontinental Consultants & Technocrats (P) Ltd* pertains to the inclusion of reimbursable expenses in the context of taxable services specifically enumerated in section 65(105) of Finance Act, 1994 and, therefore, has limited utility in the 'negative list' regime applicable to

almost the entirety of the period of dispute and that, in the said decision, it was the claim of the tax authorities that the disputed supply was essential for rendering the service which was held to be untenable whereas the requirement of fuelling cannot be so distanced from operation of charter services. Referring to the decision of the Tribunal in *Sercon India Pvt Ltd v. Commissioner of Service Tax, Delhi* [2018 (14) GSTL 375 (Tri-Del)], he submitted that it was clear therefrom that, notwithstanding the Hon'ble High Court of Delhi having held rule 5(1) of Service Tax Rules, 1994 to be *ultra vires*, the principle of inclusion of costs incurred for providing a service in taxable consideration cannot be left out of the scheme of assessment under Finance Act, 1994. It was also pointed out by him that the Tribunal in *Modern Business Solutions v. Commissioner of Service Tax, Ahmedabad* [2019-TIOL-1135-CESTAT-AHM] had laid down that, even for applying the decision in *re Intercontinental Consultants & Technocrats (P) Ltd*, the test of being a reimbursable expense as laid down by the Larger Bench of the Tribunal in *Bhagawathy Traders v. Commissioner of Central Excise* [2011-TIOL-1155-CESTAT-BANG-LB] must be overcome which is the crux of the finding in the impugned order.

5. We take note that the dispute before us is limited to the includability of cost of fuel supplied, or reimbursement for fuel made, by M/s ONGC Ltd with whom the appellant has entered into an agreement for charter of helicopters, in the taxable value of service that,

for a short period at the commencement of the dispute, was subject to levy as 'supply of tangible goods' service. There was no dispute on any of the other charter agreements as these did not include such a provision.

6. In its commercial wisdom, the charter agreement entered into by M/s ONGC Ltd provided for the supply of 'aviation turbine fuel' for operation of the helicopters belonging to the appellant from Mumbai and from its offshore locations. At other places, the cost of fuel procured for operations was to be reimbursed by M/s ONGC Ltd. The impugned order has relied upon two different statutory provisions to confirm the differential tax arising from these two modes of fuel cost borne by the recipient of service. The supply of fuel was held to be a non-monetary form of consideration warranting the determination of its money equivalent as per section 67 of Finance Act, 1994. The reimbursement of cost incurred by the appellant for procuring fuel was held to be includable as prescribed in rule 5(1) of Service Tax Rules, 1994. Furthermore, the adjudicating authority drew attention to the absence of such provisioning, either free or by reimbursement, in the other charter agreements to conclude that the service could not have been rendered without such fuel and that the deviation from the norm of operations was intended to evade the liability.

7. It appears, to us, that the determination by the adjudicating

authority is premised on a conceptualization of service as a product and existence of a standard for evaluation-the distinguishing characteristics of the sibling tax statutes viz., Central Excise Act, 1944 and Customs Act, 1962 - or, more generically, from the legacy of commodity taxation. We shall address that presently as, in the context of the submission of Learned Authorised Representative that the paradigms shift to 'negative list' stultifies all judicial findings emanating from the erstwhile scheme, we must.

8. The decision of the Hon'ble Supreme Court in *re Bhayana Builders (P) Ltd* resolved the controversy over the inclusion of goods/materials supplied by recipient of service, with consequent reduction of cost of contracted undertaking, in the consideration to be taxed for provision of the service. Doubtlessly, the issue arose from the claim for the benefit of abatement of 67% of 'gross amount charged' in notification no. 15/2004-ST dated 10th September 2004 which was amended to explain the expression 'gross amount charged' by notification no. 4/2005-ST dated 1st March 2005. It is without doubt that the dispute now before us does not pertain to the availment of the said abatement but is on the includability of similar supply in the consideration for assessment. Nevertheless, the decision of the Hon'ble Supreme Court, having gone into the scope of includability of non-monetary receipts in consideration, does establish the principle that applies across-the-board.

9. The issue itself was framed thus

'3. It is a matter of common knowledge that for undertaking construction projects, the assesseees not only render services, lot of materials/goods are also used in the construction of building or civil structure etc. For valuation of taxable services, the material/goods element has to be excluded. In order to make the things easier for the assesseees as well as the Assessing Officers (AOs), the Government issued the Notification No. 15/2004-S.T., dated September 10, 2004 as per which service tax is to be calculated on the value which is equivalent to 33% of the gross amount charged from any person by such commercial concern for providing the taxable service. This notification was amended vide another Notification No. 4/2005-S.T., dated March 1, 2005 whereby an explanation was added to the original notification. This explanation mentions that the 'gross amount charged' shall include the value of goods and material supplied and provided or used by the provider of construction services for providing such service. It is made optional for the assesseees to take advantage of the aforesaid notification and get the value calculated as per the aforesaid formula provided therein. The assesseees have availed the benefit and paid the service tax @ 33% of the gross amount which they have charged from the persons for whom construction was carried out, i.e., the service recipients. It so happened that in all these cases where the construction projects were undertaken by the assesseees, some of the goods/materials (particularly, steel and cement) were supplied or provided by the service recipients. As these materials were to be utilised in the projects meant for service recipients themselves, obviously, no costs thereof was charged from the assesseees. The Department wants that value of such goods/materials even when supplied or provided free should

be included, while calculating the “gross value” and 33% thereof be treated as value for the purpose of levying service tax.’

and places the finding thereof in the context of the decision of the Larger Bench of the Tribunal which was impugned in the appeal. Taking note of section 67 of Finance Act, before and after the amendment, the expression ‘gross amount charged by the service provider for such service’ was interpreted to be restricted to

‘13. A plain meaning of the expression ‘the gross amount charged by the service provider for such service provided or to be provided by him’ would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the ‘gross amount’ simply, because of the reason that no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words ‘for such service provided or to be provided’ by the service provider/assessee. Again, obviously, in respect of the goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to sub-section (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient, naturally, no amount is received by the service provider /assessee. Though, sub-section (4) of Section 67 states that the value shall be determined in such manner as may be

prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed which includes the value of free goods/material supplied by the service recipient for determination of the gross value.

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16. In fact, the definition of “gross amount charged” given in Explanation (c) to Section 67 only provides for the modes of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the term “gross amount charged” to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider.’

10. Proceeding further to examine the constitutionally demarcated tax jurisdiction of the legislative organ of the Union which is limited to

provision of services without being extendable to transfer of goods, and thereby to exemptions under section 93 of Finance Act, 1994, it was held that

‘20. It is to be borne in mind that the notifications in questions are exemption notifications which have been issued under Section 93 of the Act. As per Section 93, the Central Government is empowered to grant exemption from the levy of service tax either wholly or partially, which is leviable on any ‘taxable service’ defined in any of sub-clauses of clause (105) of Section 65. Thus, exemption under Section 93 can only be granted in respect of those activities which the Parliament is competent to levy service tax and covered by sub-clause (zzq) of clause (105) and sub-clause (zzzh) of clause (105) of Section 65 of Chapter V of the Act under which such notifications were issued.’

11. It necessarily follows that the scope of exemptions cannot be perceived in isolation of the scope of the levy. The levy itself is limited to the service component of the transaction and the addition of goods/materials that have no bearing on the cost of service rendered is an exercise in superfluity as found by the Hon’ble Supreme Court thus

‘18. Thirdly, even when the explanation was added vide notification dated March 1, 2005, it only explained that the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount charged, it did not deal with any

eventuality whereby value of goods and material supplied or provided by the service recipient were also to be included in arriving at gross amount 'gross amount charged'.

12. From this disposition of the controversy, there can be no room for doubt that the goods supplied by the recipient of the service without any charge and which, in consequence, does not find inclusion in the recompense for the taxable service is not includable for the purposes of assessment of tax on services.

13. Adverting to the contours of the plea of Union of India in their writ appeal challenging the nullifying of rule 5(1) of Service Tax Rules, 1994, incorporated for the specific purpose of including 'reimbursable expenses' in 'gross amount charged' except in circumstances enumerated in rule 5(2), and the statutory provisions, the Hon'ble Supreme Court, finding that

'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.’

in re Intercontinental Consultants & Technocrats (P) Ltd rejected the contention of Revenue by holding that

‘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.’*

14. It was also held that the curative legislation effected from 14th May 2015 may, if at all, be applied only prospectively without going into the legality thereof.

15. The submission of Learned Authorized Representative that later decisions of the Tribunal have acknowledged the scope for inclusion after examining the applicability of the above decision does not merit consideration by us. There is no allegation that the appellants were at any stage entitled to use the fuel for operation of other contracts on which higher amounts were charged.

16. In the light of the above, we find that the impugned order is not correct in law and must be set aside. Appeal is, consequently, allowed.

(Order pronounced in the open court on 24/01/2020)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)