CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Service Tax Appeal No. 86598 of 2015

(Arising out of Order-in-Original No. 6/STC-IV/MRRR/15-16 dated 30.04.2015 passed by the Commissioner of Service Tax, Audit - I Mumbai)

M/s. DNV GL AS **…..Appellant**
Equinox Business Park
Tower 3, 6th Floor Wing,
LBS Road,
Off BKC Road, Kurla (W)
Mumbai

Vs.

Commissioner of Service Tax, Audit I **…..Respondent**
2nd Floor, Madhu Indl. Estate
PB Marg,
Worli, Mumbai

APPEARANCE:

Shri S. Tirumalai, Advocate for the appellant
Shri Dilip Shinde, AC (AR) for the respondent

CORAM: **Hon'ble Mr C J Mathew, Member (Technical)**
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

FINAL ORDER No: A/ 87602 /2019

DATE OF HEARING : 31.07.2019
DATE OF DECISION : 31.07.2019

PER: C J MATHEW

M/s Det Norske Veritas As GL is in appeal against order-in-original no. 6/STC-IV/MRRR/15-16 dated 30th April 2015 of

Commissioner of Service Tax, Audit-I, Mumbai in which they have been held liable to tax of ₹1,81,58,071/- under section 73 of Finance Act, 1994, along with appropriate interest under section 75 of Finance Act, 1994, besides being imposed with penalty of like amount under section 78 of Finance Act, 1994. It was alleged that the appellant had, between April 2006 and March 2010, incurred expenditure in connection with 'technical inspection and certification service' and 'commercial training and coaching service' which were not included in the taxable value of services.

2. Learned Counsel for the appellant places reliance on the decision of the Hon'ble Supreme Court in *Union of India v. Intercontinental Consultants and Technocrats Pvt Ltd [2018 (10) GSTL 401 (SC)]* which has upheld the decision of the Hon'ble High Court of Delhi in *Intercontinental Consultants & Technocrats (P) Ltd v. Union of India [2013 (29) STR 9 (Del)]* that was discarded by the adjudicating authority owing to pendency of appeal of Revenue. It was further pointed out that the Tribunal has followed this decision in *Hitech Manpower Consultant Pvt Ltd v. Commissioner of GST & Central Excise [2019 (5) TMI 159-CESTAT Chennai]*.

3. Learned Authorised Representative points are that the terms of payment are explicitly incorporated in annexure 3 of the contract and that reimbursements for the facilities and conveniences have been

provided for therein. In this connection, he points out that the Hon'ble Supreme Court had, in *re Intercontinental Consultants and Technocrats Pvt Ltd*, narrated the background to the dispute before it thus

> *'5. The assessee-M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. is a provider of consulting engineering services. It specialises in highways, structures, airports, urban and rural infrastructural projects and is engaged in various road projects outside and inside India. In the course of the carrying on of its business, the petitioner rendered consultancy services in respect of highway projects to the National Highway Authority of India (NHAI). The petitioner receives payments not only for its service but is also reimbursed expenses incurred by it such as air travel, hotel stay, etc. It was paying service tax in respect of amounts received by it for services rendered to its clients. It was not paying any service tax in respect of the expenses incurred by it, which was reimbursed by the clients. On 19-10-2007, the Superintendent (Audit) Group II (Service Tax), New Delhi issued a letter to the petitioner on the subject "service tax audit for the financial year 2002-03 to 2006-07. In this letter, it was mentioned by the appellant that service tax was liable to be charged on the gross value including reimbursable and out of pocket expenses like travelling, lodging and boarding etc. and the respondent was directed to deposit the due service tax along with interest @ 13% under Sections 73 and 75 respectively of the Act. In response, the respondent provided month-wise*

> *detail of the professional income as well as reimbursable out of pocket expenses for the period mentioned in the aforesaid letter. Thereafter, a show cause notice dated March 17, 2008 was issued by the Commissioner, Service Tax, Commissionerate vide which the respondent was asked to show cause as to why the service tax should not be recovered by including the amounts of reimbursible which were received by the respondent, pointing out these were to be included while arriving at the gross value as per provisions of Rule 5(1) of the Rules.'*

and submitted that, even with the declaration of rule 5 (1) of Service Tax (Determination of Value) Rules, 2006 as *ultra vires*, the provisions of section 67 of Finance Act, 1994 are applicable.

4. It is seen from the impugned order that the adjudicating authority has confirmed the demand on the finding that the agreement referred to in rule 5(2) of Service Tax (Determination of Value) Rules, 2006 is not available and that the impugned expenditure were incurred for effective provision of service. The proposal in the show cause notice, and the non-acceptance of claim to be 'pure agent', as envisaged in rule 5(2) of Service Tax (Determination of Value) Rules, 2006 which serves to qualify exclusion from rule 5 (1) of the said Rules were based on the prescriptions that have been judicially erased. It is seen that rule 5(1) of the said Rules is a deeming provision for enhancement of the taxable value by including expenditure incurred

for providing taxable service but charged separately, and not as consideration, from the recipient of service. The Hon'ble Supreme Court, in *re Intercontinental Consultants and Technocrats Pvt Ltd*, has described this as

> *'21. Undoubtedly, Rule 5 of the Rules, 2006 brings within its sweep the expenses which are incurred while rendering the service and are reimbursed, that is, for which the service receiver has made the payments to the assessees. As per these Rules, these reimbursable expenses also form part of 'gross amount charged'. Therefore, the core issue is as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5. As noted above, prior to April 19, 2006, i.e., in the absence of any such Rule, the valuation was to be done as per the provisions of Section 67 of the Act.'*

before going on to hold that

> *'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.

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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.*
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> *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."

5. The expenses that are under dispute were charged, and collected, independent of the consideration, from the recipient of service. Other than referring to the inclusions mandated by rule 5(1) of Service Tax (Determination of Value) Rules, 2006, we do not find

any evaluation of the several expenditures as being indispensable for rendering of the service by the appellant. On the other hand, the reimbursement of these expenses by the recipient of the service against separate billings should, in the absence of any other evidence to the contrary, be considered as in pursuance of 'pure agency' and, therefore, not liable to tax for the provision of service.

6. Consequently, we set aside the impugned order and allow the appeal.

(Operative part pronounced in Court)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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