CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 85289 of 2016

[Arising out of Order-in-Appeal No: MUM-II-STAX-000-APP-23-15-16 dated 26th November 2015 passed by the Commissioner of Service Tax (Appeals-II), Mumbai.]

CMS Securitas Ltd
T-151, 6th Floor, Tower No. 10, Railway Station Complex
Sector 11, CBD Belapur, Navi Mumbai – 400 614 … ***Appellant***

versus

Commissioner of Service Tax
Service Tax– VII
Maharashtra State Electricity Building, 2nd Floor,
Estrella Battery Compound, Daravi, Matunga,
Mumbai – 400 019 ***…Respondent***

APPEARANCE:

Shri Sachin Chitnis, Advocate for the appellant

Shri Dharmendra Singh, Superintendent (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/85766 / 2020

DATE OF HEARING: 04/09/2019
DATE OF DECISION: 11/09/2020

PER: C J MATHEW

This dispute of M/s CMS Securitas Ltd against order-in-appeal no. MUM-II-STAX-000-APP-23-15-16 dated 26th November 2015 of

Commissioner of Service Tax (Appeals-II), Mumbai challenges the upholding of demand of ₹ 13,13,768 under section 73 of Finance Act, 1994, along with applicable interest under section 75 of Finance Act, 1994, and the imposition of penalties under section 76, 77 and 78 of Finance Act, 1994 by the original authority on the finding that expenditure of ₹ 1,19,85,544, incurred by them between 2006-07 and 2008-09 for providing of 'automated teller machine operation, maintenance and management services' defined in section 65 (9a) and section 65 (9b) of Finance Act, 1994, had not been included in the assessable value for discharge of liability to tax by section 65 (105) (zzzk) of Finance Act, 1994.

2. During the course of investigations, appellant deposited tax of ₹ 13,13,768 and interest of ₹ 2,06,428 which was appropriated by the original authority towards the confirmed demand. Appellant undertakes the cash replenishment in the machines of their clients which involves a series of activities and functions that are elements of 'standard operating procedure' in the banking industry and discharges tax liability on the service charges billed by them. In addition, they raise separate invoices for charges towards 'insurance premium', 'courier' and 'rent' that, on the claim of being reimbursements, were not included for self-assessment even though, as held by the lower authorities, these were routinely incurred expenses in the course of rendering of the taxable service. Admittedly, general insurance premium had not been

excluded from computation and only the premium towards comprehensive cover, obtained on specific requirement of clients, has been.

3. Before the first appellate authority, it was contended by the appellant that, in transacting these additional charges, they were merely 'pure agent', within the scope of rule 5(2) of Service Tax (Determination of Value) Rules, 2006, and, hence, not covered by rule 5(1) of the said Rules. Having discharged the computed liability, along with interest, before the issue of notice, it was also contended that the imposition of penalties was unwarranted. Furthermore, it was also argued that there was no justification for invoking the extended period as the interpretation of the impugned Rules was yet under dispute before the constitutional courts.

4. Reiterating these submissions before us, Learned Counsel for appellant urged us to set aside the impugned order in the light of 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 was delivered after the impugned order was issued. It was also argued that the decision of the Hon'ble High Court of Delhi in *Intercontinental Consultants & Technocrats Pvt Ltd v. Union of India [2013 (29) STR 9 (Del)]*, which had been unsuccessfully carried in appeal by Revenue, was not considered by the first appellate authority in the impugned proceedings.

5. Drawing our attention to the agreement of the appellant with clients, typified by the contract entered into with M/s Bank of America, NA and introduced as one the exhibits attached to the appeal, Learned Authorized Representative harped on paragraph no. 3.15 and no. 3.19 therein, pertaining to the compensations arising from loss or damage and liabilities arising from claims of employees of the appellant, as demonstrative of the essentiality of insurance cover to mitigate the risks faced by the appellant in the execution of the contract. Placing reliance upon the decision of the Tribunal in *Modern Business Solutions v. Commissioner of Service Tax, Ahmedabad [2019-TIOL-1135=CESTAT-AHM]* and of a Larger Bench in *Sri Bhagavathy Traders v. Commissioner of Central Excise, Cochin [2011 (24) STR 290 (Tri-LB)]*, it was urged that the appeal be dismissed.

6. It is not in dispute that the amount charged from the clients that is in dispute were being billed separately by the appellants. Despite this, the plea of recovery of these amounts in the discharge of obligation 'pure agent' did not evidently find favour in the impugned order which observes that

> '*9. It is pertinent to note that the appellant has raised separate invoices for recovering extra charges incurred towards courier, insurance premium, rent charges etc. from their clients. The said charges were recovered as extra amount over and above their service charges and such charges were incurred during the course of providing taxable service under*

the category of ATM Operation, Maintenance or Management Services, but service tax was not paid on the same…..

10. ……………….In certain case, keeping in view the quantum of cash or on the request of the service recipient, the appellant had obtained comprehensive insurance cover instead of general insurance cover for cash amount handled by them and recovered extra amount over and above normal service charge under separate invoice and no service tax was paid. I find that cost of insurance for safety of cash is the expense in relation to providing the service of safe transportation of cash hence same needs to be included in the gross amount of service charge in terms of rule 5 of said Rules, for the purpose of payment of service tax. Moreover, the appellant had included the cost of general insurance cover in their normal service charges and paid service tax on the same……..Hence, I do not find any reason to interfere with the finding of the adjudicating authority in this regard and hold that the said extra charges are includible in the taxable value for the purpose of payment of service tax.

11. Further, as regards the appellant's claim regarding pure agent, it is evident from the Agreement copy entered into between ABN AMRO Bank N.V. and the Appellant, nowhere it is forthcoming that, the appellant would act as a ***"Pure Agent"*** *for the service recipient. It is expressly provided in the meaning of 'pure agent' in the explanation to rule 5(2) of Service Tax (determination of value) Rules, 2006 that "pure agent" means a person who-(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service. No such stipulation or provision could be found in the said agreement copy submitted by the appellant. For this reason, the case laws relied upon by the appellant also do not come to*

> *their rescue. In view of the foregoing, it is clear that the appellant failed to qualify as pure agent……..*
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> *12. As far as amounts collected towards 'courier charges are concerned, I find that the appellant has admitted that the amount was collected for making arrangement for transmission of certain secret documents/ information pertaining to cash from one place to another and delivery thereof. Similarly, charges collected by the appellant for providing space to be used in relation to cash transportation has to be included in the taxable value and service tax is payable on the said charges......'*

after extracting rule 5(2) of Service Tax (Determination of Value) Rules, 2006 and relying upon the expression 'gross value' in section 67 of Finance Act, 1994. At this stage, it is appropriate to mark that that very issue of the scope of section 67 of Finance Act, 1994 and rule 5 of Service Tax (Determination of Value) Rules, 2006 had been subject to judicial review in its entirety in *re Intercontinental Consultants and Technocrats Pvt Ltd* even though the notice under section 73 of Finance Act, 1994 that was challenged in writ proceedings related to the period prior to incorporation of rule 5 in the said Rules. The plea of Revenue pleaded before the Hon'ble Supreme Court that

> *'11. Mr. K. Radhakrishnan, Learned Senior Counsel argued for the appellant, ably assisted by Ms. Nisha Bagchi, Advocate who also made significant contribution by arguing some of the nuances of the issue involved. Submission of the Learned Counsel appearing for the appellant/Department was that prior to April 19, 2006 i.e. in the absence of Rule 5 of the Rules,*

the value of taxable services was covered by Section 67 of the Act. As per this Section, the value of taxable services in relation to consulting engineering services provided or to be provided by a consulting engineer to the client shall be the gross amount charged for a consideration or in money from the client in respect of engineering services. The expression 'gross amount charged' would clearly include all the amounts which were charged by the service provider and would not be limited to the remuneration received from the customer. The very connotation 'gross amount charged' denotes the total amount which is received in rendering those services and would include the other amounts like transportation, office rent, office appliances, furniture and equipments, etc. It was submitted that this expenditure or cost would be part of consideration for taxable services. It was, thus, argued that essential input cost had to be included in arriving at gross amount charged by a service provider.

12. It was further submitted that Section 67 of the Act was amended w.e.f. May 1, 2006 and this also retained the concept of 'the gross amount charged' for the purpose of arriving at valuation on which the service tax is to be paid. The learned counsel pointed out that sub-section (4) of amended Section 67 categorically provides that the value has to be determined in such a manner as may be prescribed and in pursuant thereto, Rule 5 of the Rules which came into effect from June 1, 2007, provided for 'inclusion in or exclusion from value of certain expenditure or costs'. It was submitted that there was no dispute that as per this Rule, all such expenditure or costs which are incurred by the service provider in the course of providing taxable services are to be treated as consideration for the taxable services provided or to be provided for arriving at valuation for the purpose of charging service tax, except those costs which were specifically excluded under sub-rule (2) *of Rule 5. Submission was that since Section 67 specifically lays down the principle of gross amount charged by a service provider for the services provided or to be provided, Rule 5 did not go contrary to Section 67 as it only mentions what would be the meaning of gross amount charged.*

13. In the aid of this submission, the Learned Counsel sought to take help from principle laid down in excise law and submitted that it is held by this Court in Union of India & Ors. v. Bengal Shrachi Housing Development Limited & Anr. [(2018) 1 SCC 311 = 2017 (6) GSTL 356 (SC)] that same principles as applicable in excise law are applicable while examining service tax matters. Reliance was placed on paragraph 22 of the said judgment to support this proposition. However, we may point out at this stage itself that the context in which the observations were made were entirely different. The issue was as to whether service tax, which is an indirect tax, can be passed on by the service provider to the recipient of the service and, in this hue, the matter was discussed, as can be seen from the combined reading of paragraphs 21 and 22 which are to the following effect:

> *"21. It is thus clear that the judgments of this Court which referred to service tax being an indirect tax have reference only to service tax being an indirect tax in economic theory and not constitutional law. The fact that service tax may not, in given circumstances, be passed on by the service provider to the recipient of the service would not, therefore, make such tax any the less a service tax. It is important to bear this in mind, as the main prop of Shri Jaideep Gupta's argument is that service tax being an indirect tax which must be passed on by virtue of the judgments of this Court, would make the recipient of the service the person on whom the tax is primarily leviable.*
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> *22. Let us now examine some of the judgments relating to another indirect tax, namely, excise duty. Like service tax, excise duty is also in the economic sense, an indirect tax. The levy is on manufacture of goods; and the taxable person is usually the manufacturer of those goods. In Centra/*

> *Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, In re, the Federal Court decided, through Maurice Gwyer, C.J., that excise duty under the Government of India Act, 1935 is a power to impose duty of excise upon the manufacturer of excisable articles at the stage of or in connection with manufacture or production. In a separate judgment, Jayakar, J. held that all duties of excise are levied on manufacture of excisable goods and can be levied and collected at any subsequent stage up to consumption."'*

should be seen in that context. The Hon'ble Supreme Court discarded these submissions in a significant finding that distinguished the relationship between the charging and valuation provisions in Central Excise Act, 1944 from that in Finance Act, 1994 to erase the application of the flexibility afforded by the former to the latter.

7. Refining upon the distinction, it was held that

> *'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.*
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> *22. Section 66 of the Act is the charging Section which reads as under:*

> *"there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clauses of Section 65 and collected in such manner as may be prescribed."*

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.'

8. That the bedrock of such finding was not to have not any impact even after rule-making powers were delegated by amending section 67 of Finance Act, 1994 with effect from 1st May 2006 is emphasized thus

> *'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:*
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> > *"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."*
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> *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.*
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> *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:*
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> > *"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."

to categorically exclude assessment of reimbursable expenses from tax that authorities sought to collect merely because the recipient of taxable service happens to the principal for whom the agency function was also undertaken.

9. It is thus unambiguously clear that all expenses, charged from the recipient of service, does not, merely by authority of rule 5 of Service Tax (Determination of Value) Rules, 2006, become includible in the assessable value without ascertainment that the claim of being reimbursable is incorrect. Undoubtedly, recovery of expenses inheres in costing of the charges for service but that should not be construed as applicable to every charge raised by the provider of a taxable service on the recipient. Implicit in the blurred contour lines of tax on specified intangible offerings is the legal mandate, as set out by the decision in *re Intercontinental Consultants and Technocrats Pvt Ltd*, to forbear from according judicial, and even adjudicatory, approval for levy beyond the specificity of enumeration in section 65(105) of Finance Act, 1994. On preference by an assessee of the claim that some expense is, by reimbursability, not includible in assessable value, it is for the tax authority to establish the contrary and, in the absence of such evincing, addition of such to assessable value lacks authority of law.

10. On examination of the impugned order, and, indeed, the proceedings initiated by the show cause notice, it would appear that the core of the service has been assumed to be the entirety of the business engagement between the clients and the appellant. That a contract which includes performance of a taxable service could also require the parties to undertake other activities that may not be regular commercial aspect of such service has been ignored in the investigations as well as

the findings of the lower authorities. The findings in the impugned order, adverted *supra*, are demonstrative of absence of such delineation.

11. That these impugned activities were not essential to every billing for the taxable service is no less apparent in the findings. That tax liability was discharged on some occasions establishes the appreciation of the nuances on the part of the appellant. There is also no evidence that the recovery of such amounts was not 'back-to-back' and the absence of 'mark-up' precludes undertaking of such activity for clients other than as 'pure agent.'

12. In these circumstances, the enhancement of assessable value is inconsistent with the decision in *re Intercontinental Consultants and Technocrats Pvt Ltd*.

13. Appeal is, therefore, allowed.

(Order pronounced in the open court on 11/09/2020)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*