CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 85072 of 2016

(Arising out of Order-in-Original No. 17-19/ST-V/SKD/2015 dated 14.10.2015 passed by the Commissioner of Service Tax, Mumbai-V)

M/s ASP Ship Management (India) Pvt. Ltd. .... Appellant
Atrium 215, A Wing, Unit No. 201-203,
Andheri Kurla Road, Andheri (East), Mumbai-400093

Versus

Commissioner of Service Tax, Mumbai-V .... Respondent
4th Floor, Utpad Shulk Bhawan,
Bandra Kurla Complex, Bandra (E), Mumbai-400051

Appearance:

Shri V. Sridharan, Aditya Jain & Vinay Jain, Advocates for the Appellant

Shri Shambhoo Nath, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86178/2023

Date of Hearing: 11.04.2023
Date of Decision: 10.08.2023

Per: M.M. Parthiban

This appeal has been filed by M/s ASP Ship Management (India) Private Limited (herein referred to as 'appellants' for short) with address at Atrium 215, A Wing, Unit No.201-203, Andheri Kurla Road, Andheri (East), Mumbai-400093, against Order-in-Original No. 17-19/ST-V/SKD/2015 dated 14.10.2015 (referred to as 'impugned order') passed by Commissioner, Service Tax-V, Mumbai.

2.1. Briefly stated, the facts of the case are that the appellants herein are *inter alia*, engaged in rendering "ship management services" and are registered under service tax registration No. AABCV3134CST001. On the basis of investigation conducted by anti-evasion wing of Service Tax-I Commissionerate, Mumbai, it was found that the appellants were rendering the services of ship management, commercial management, technical management and crew management services to vessel owners and are

receiving fixed cost equivalent to monthly management fees and are getting reimbursed the cost incurred by them for ship/vessel crew, cost of purchase of vessel consumables, repairs and maintenance of ships/vessels, and administrative costs etc. The appellants assessee is paying service tax on management fees for service rendered to Indian shipowners for which payment is received in Indian currency and in respect of foreign owners where payment is received in foreign currency, the appellants are not paying service tax claiming it as export of service. The investigation concluded that various reimbursable expenses received during October 2006 to March 2011, on which service tax is liable to be paid has not been paid by the appellants. Accordingly show cause proceedings were initiated by issue of three show cause notices dated 20.04.2012, 16.10.2012 and 16.09.2014 as per the Finance Act, 1994, as detailed below:

SCN reference	Period	Service Tax demand in Rs.
F. No. V/ST/HQ/AE/H/308/2011 dated 20.04.2012	October, 2006 to March, 2011	35,45,13,320/-
F. No. ST/MUM/DIV.III/Gr.V/SCN-ASP/SHIP/19/2012 dt.16.10.2012	2011 - 2012	6,57,90.902/-
F. No. ST/MUM/DIV.III/Gr.V/SCN-ASP/SHIP/19/2012 dt.16.09.2014	July, 2012 to March, 2014	13,19,45,406/-

2.2. Learned Commissioner, Service Tax-V, Mumbai vide impugned order dated 14.10.2015 had confirmed the adjudged demands besides imposition of penalty under Sections 76, 77 and 78 of the Finance Act, 1994. The appellants having been aggrieved by the impugned order passed by the learned Commissioner, have filed this appeal before the Tribunal.

3.1. Learned Counsel appearing for appellants submits that they were engaged in the business of global third-party ship management service which is provided to both Indian and Foreign Flag Ships. For undertaking this business they had entered into agreement for ship management with Vessel Owners as per standard contract of Baltic and International Maritime Council (BIMCO). The BIMCO agreement provides for various management services for which the parties can enter into an agreement, such as Technical Management, Commercial Management, Crew Management and Crew Insurance. For the management services provided by the appellants, they received management fees and discharged service tax liability thereon, as applicable, and filed periodical ST-3 returns. The learned Counsel also stated that appellants carried out management activities as agents for and on behalf of the Ship Owners. Money received by the Appellants was credited in a separate bank account and the interest accrued on the same was credited to the ship owners.

3.2. Further, the Learned Counsel stated that appellants were responsible only for the acts of their employees and not for the acts of the crew, as they are not in employment of the appellants. The appellants had also employed their own employees for undertaking management activity and the appellants had incurred their own establishment expenses. Such expenditure was not claimed as reimbursement of employee cost of the establishment expenditure by the appellants. The appellants had made disclosure of the amount of expenditure incurred on behalf of the vessel owners and the amount reimbursed, and such disclosures were made in the financial statements to comply with the requirements of BIMCO agreement and statutory disclosure requirements. The said amount was not claimed by the appellants as income or expenditure in their books of accounts. In further explaining the nature of reimbursement expenses, the learned counsel had stated that the appellants receive monthly advance from the Vessel/ship Owners for procuring various goods and services for and on behalf of Vessel/ship Owners such as crew salary, vessel consumables, repair and maintenance, etc. The following process was adopted for incurring expenditure for and on behalf of vessel owner:

> (i) The budget of expenses was prepared by the Appellants, which was approved by the Vessel/ship Owners. The Vessel/ship Owners monitored actual expenses for procurement of goods and services and for payment to the crew of the ship, against the budgeted cost.
>
> (ii) All purchase orders issued to vendors and the bills issued by the vendors were issued in the name of Master/Owner of the Vessel/ship and c/o the Appellants. Further, the crew was recruited by the Appellants for and on behalf of the Vessel/Ship Owners.
>
> (ii) For the purpose of facilitating payment of expenses, on behalf of the owners, the Appellants had opened separate bank accounts for each of the owners under their management.
>
> (iv) Vessel/ship Owners, at the beginning of every month, granted advance for expenses to be incurred on behalf of them. The advance was kept in a separate bank account. From this account, payment was made to various vendors.
>
> (v) After end of a month, a debit note was prepared by them for all the payments made on behalf of the owners.
>
> (vii) The ship/vessel owners scrutinized these debit notes to ensure that they were well supported by documents and did not contain element of profit. The expenses were reimbursed on cost-to-cost basis. Further, the agreement also provided that all discounts obtained by the Appellants would be credited to owner of the vessel.
>
> (viii) While the bank accounts (wherein advances from owners were deposited) were maintained for and on behalf of the Vessel/ship Owners, a corresponding liability was always shown towards the Vessel Owners in the books of accounts.
>
> (ix) In short, it is the owner’s money that is used to make payment of operations and maintenance expenses of vessels/ships.

3.3. Further, learned Counsel stated that in respect of crew management, the agreement with the Vessel/Ship Owners specify that the appellants will provide the services of selecting, recruiting and providing administration of the crew, ensuring that they have passed medical examination, arranging transportation of crew etc. Accordingly, the appellants entered into agreements with crew/seafarers on behalf of the owner of the vessel as agents only. The appointment letter clearly states the terms and conditions of the employment which provides that the master of the vessel can at their sole discretion summarily dismiss the employee on account of certain misconduct or non-performance. Further, it provides that the master of the vessel would be responsible to undertake the reasonable maintenance of seafarers as per the rules issued under the Merchant Shipping Act, 1958. Thus, the seafarers/crew are the employee of the master/owner of the vessel.

3.4. In view of the above the learned Counsel stated that the appellants were not required to pay service tax on the reimbursement of the expenses received from the Ship Owners. They also relied on the following decisions in support of their stand and prayed for setting aside the order dated 14.10.2015 passed by the Commissioner of Service Tax, Mumbai-V.

(i) PI Shipping and Logistics Ltd. Vs. Commissioner of Central Excise and Service Tax, Chennai – 2018 – TIOL – 3112 – CESTAT-MAD.
(ii) Prime Consultancy Services Vs. Commissioner of Service Tax, Chennai – 2018 – TIOL – 2291 – CESTAT-MAD.
(iii) Commissioner of Service Tax, New Delhi Vs. Karam Freight Movers – 2017 (2) G.S.T.L. 215 (Tri. – Del.)
(iv) Intercontinental Consultants & Technocrats Pvt. Ltd. Vs. Union of India – 2013 (29) STR 9 (Del.)
(v) Union of India Vs. Intercontinental Consultants & Technocrats Pvt. Ltd. – 2018 (10) GSTL 401 (SC)

4.1. Learned Authorised Representative for Revenue submits that the activity of the appellants is covered under the 'ship management service' and are rightly chargeable to service tax on the reimbursement charges. He further submitted that the amount recovered by the appellants cannot be considered as reimbursable expenses or amount received as pure agent as this amount has been received for providing the ship management services per se. By referring to the definition of ship management to highlight the clause (ii) of sub section 96A of section 65 of the Finance Act, 1994, he stated that the said clause reads "engagement or providing of crews", and thus covers within the

scope of both situations viz. engagement as well as providing of crews. He submitted that that the issue of taxability of the salary paid by the ship management service provider to the employees working in the ship in the capacity of manager / agent of the ship owner has been considered in the case of Jubilant Enpro Pvt. Ltd. [2016(46) STR 448(Tri-Mum)] in favour of Revenue.

4.2. With regard to victualling of ship, it was submitted that the said services is covered within the scope of providing for victualling or storing of ship which is different from the other words used in the said definition of services under Sec 65 of the Finance Act, 1994. Learned AR further stated, that only two sub clauses viz. (ii) & (iv) of section 65 of Finance Act, 1994 uses the word 'provided' and thus, covers within its scope the whole gamut of activities. It was, therefore, submitted that till the time the appellant is treated as providing ship management services and it is held that they are not pure agent (as detailed above), the entire value recovered by them from the ship owner is to be treated as taxable value under section 67 of Finance Act, 1994.

4.3. In view of the above submissions made by him, the Learned AR by reiterating the findings made in the impugned order, had stated that the appellants are liable to pay service tax on the reimbursement charges received by the appellants from vessel/ship owners during the relevant period as part of taxable services under ship management services.

5. The submissions advanced by the learned Advocate appearing for the appellants and the learned Authorized Representative of the Department have been considered. We have also perused the records of the case.

6. On perusal of the impugned order dated 14.10.2015, it is seen that the learned Commissioner had recorded that the following facts are not under dispute and the only point of dispute is whether the amounts recovered by the appellants through debit notes are to be treated as part of taxable value for the purpose of levy of service tax or not, and on which he had passed an order confirming the adjudged demands. The relevant paragraphs of the impugned order are extracted below:

> *"32. The following aspects are not under dispute:*
>
> - *The noticee is rendering "Ship Management Services" as defined under Section 65(96a) and as referred to in Section 65(105)(zzzt) as a taxable service liable to Service Tax under Section 66 of the Finance Act, 1994. The taxability of the service provided by the noticee is not in doubt.*

- *The noticee had in their ST-3 returns declared and paid Service Tax on the amount billed to their clients under their invoices.*

- *The noticee had, in addition to invoices, raised debit notes on their clients. Service Tax was not paid by the noticee on the consideration recovered by the noticee from their clients through such debit notes.*

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35. Therefore, the only point of dispute is whether the amounts recovered by the noticee through debit notes are to be treated as part of "Gross Amount" (taxable value) as defied under Section 67 of the Finance Act, 1994 or as Pure agent expenses in terms of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006."

7. We find that the dispute in this case lies in the narrow compass of deciding whether service tax is liable to be paid or not, in respect of the amounts collected by the appellants from ship owners, as reimbursement charges, through debit notes, under the Finance Act, 1994 and the Rules made there under. The Revenue has claimed that the amounts collected by appellants are part of the taxable value for rendering 'ship management services', as the service tax is liable to be paid on the gross amount collected in terms of Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006. On the other hand, the appellants have claimed that they had paid service tax on the value of services billed to their clients i.e., on 'ship management fees' collected from the owner of the ships and had filed periodical returns; in respect of reimbursement expenses, the appellants had claimed that they had raised debit notes as 'pure agent' of the service recipient, thereby excluding these from the value of taxable services in terms of Rule 5(2) ibid.

8.1. It is seen that the Finance Act, 2006 introduced certain changes in a number of provisions of the Finance Act, 1994 and Service Tax Rules, 1994. In respect of the issue before us, the relevant changes are amendment of Section 65 for specifically including "ship management service" in the list of taxable services under Section 65(105) and to define the same under Section 65 (96a).

"*Section 65 (105). "taxable service" means any service provided or to be provided,-*
(zzzt) to any person, under a contract or an agreement, by any other person, in relation to ship management service;

65(96a) "ship management service" includes,—
(i) the supervision of the maintenance, survey and repair of ship;
(ii) engagement or providing of crews;

(iii) receiving the hire or freight charges on behalf of the owner;
(iv) arrangements for loading and unloading;
(v) providing for victualling or storing of ship;
(vi) negotiating contracts for bunker fuel and lubricating oil;
(vii) payment, on behalf of the owner, of expenses incurred in providing services or in relation to the management of ship;
(viii) the entry of ship in a protection or indemnity association;
(ix) dealing with insurance, salvage and other claims; and
(x) arranging of insurance in relation to ship;"

8.2. The charge of service tax is effectuated in Section 66 of the Act. It says that "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 (a) (d) (e) ...(zzzt) ... (zzzzv) and (zzzzw) of Section 65 and collected in such manner as may be prescribed". Further, the provisions of Section 67 of the Act, as it stood before being substituted by the Finance Act, 2006, w. e. f. 01.05.2006 was as under:

"67. Valuation of taxable services for charging service tax:-

For the purposes of this Chapter, the value of any taxable service shall be the gross amount charged by the service provider for such service provided or to be provided by him.

Explanation 1.- For the removal of doubts, it is hereby declared that the value of a taxable service, as the case may be, includes,-

(a) the aggregate of commission or brokerage charges by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock-broker to any sub-broker.

(b) the adjustments made by the telegraph authority from any deposits made by the subscriber at the time of application for telephone connection or pager or facsimile or telegraph or telex or for leased circuit;

(c)the amount of premium charged by the insurer from the policy holder;

(d) the commission received by the air travel agent from the airline;

(e) the commission, fee or any other sum received by an actuary, or intermediary or insurance intermediary or insurance agent from the insurer;

(f) the reimbursement received by the authorized service station from manufacturer for carrying out any service of any motor car, light motor vehicle or two wheeled motor vehicle manufactured by such manufacturer; and

(g) the commission or any amount received by the rail travel agent from the Railways or the customer, But does not include-

(i) initial deposit made by the subscriber at the time of application for telephone connection or pager or facsimile (FAX) or telephone or telex or for leased circuit;

(ii) the cost of unexposed photography film, unrecorded magnetic tape or such other storage devices, if any, sold to the client during the course of providing the service;

(iii) the cost of parts or accessories, or consumable such as lubricants and coolants, if any, sold to the customer during the course of service or repair of motor cars, light motor vehicle or two wheeled motor vehicles;

(iv) the airfare collected by air travel agent in respect of service provided by him;

(v) the rail fare collected by rail travel agent in respect of service provided by him;

(vi) the cost of parts or other material, if any, sold to the customer during the course of providing maintenance or repair service;

(vii) the cost of parts or other material, if any, sold to the customer during the course of providing erection, commissioning or installation service; and

(viii) interest on loan.

Explanation 2 - Where the gross amount charged by a service provider is inclusive of service tax payable, the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged.

Explanation 3.- For the removal of doubts, it is hereby declared that the gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service."

8.3. The new Section 67 which came into effect from 01.05.2006 is shorter and later amended in 2008 and 2012, is as follows: -

'Section 67. Valuation of taxable services for charging service tax
(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,—
(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;
(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.
(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.
(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.
(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.
Explanation.—For the purposes of this section,—
(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;
(b) "money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travellers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value (omitted w.e.f. 1.7.2012 through Finance Act, 2018);
(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, (added w.e.f. 16.5.2008 through Finance Act, 2008) and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of accounts of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.';

9.1. From the plain reading of the above legal provisions, it transpires that "Ship Management Service" was brought into service tax net in Union Budget 2006 by specifically including it as taxable service and explained the

same by providing an inclusive definition. Owners or operators of ships may enter into an agreement with ship managers for provision of a wide range of services in respect of running and operations of ships. Indicative list of services provided under this category are mentioned under the definition of "ship management service". Further, the existing section 67 was substituted with a new section 67 to provide for determination of value of taxable service. Prior to this, service tax was charged on the gross amount received. The proposed section provides for determination of taxable value in cases where the consideration received for taxable services provided is not wholly in money terms and the consideration received is in money terms but not known explicitly. Separate valuation rules were also brought out for this purpose. Hence, it is desirable to examine the above legal provisions along with the rules.

9.2. The Service Tax (Determination of Value) Rules, 2006, was brought into effect from 01.06.2007. Rule 5 provided for "inclusion in or exclusion from value of certain expenditure or costs". The relevant portion of the rule, is extracted as follows: -

> *"5. Inclusion in or exclusion from value of certain expenditure or costs:*
>
> *(1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service.*
>
> *(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely: -*
>
> *• the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;*
>
> *• the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;*
>
> *• the recipient of service is liable to make payment to the third party;*
>
> *• the recipient of service authorities the service provider to make payment on his behalf;*
>
> *• the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;*
>
> *• the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;*

• the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and • the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

Explanation 1 : For the purposes of sub-rule (2), "pure agent" means a person who -

• 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;

• neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;

• does not use such goods or services so procured; and • receives only the actual amount incurred to procure such goods or services.

Explanation 2 : For the removal of doubts it is clarified that the value of the taxable service is the total amount of consideration consisting of all components of the taxable service and it is immaterial that the details of individual components of the total consideration is indicated separately in the invoice.

Illustration 1 : X contracts with Y, a real estate agent to sell his house and thereupon Y gives an advertisement in television. Y billed X including charges for Television advertisement and paid service tax on the total consideration billed. In such a case, consideration for the service provided is what X pays to Y. Y does not act as an agent behalf of X when obtaining the television advertisement even if the cost of television advertisement is mentioned separately in the invoice issued by X. Advertising service is an input service for the estate agent in order to enable or facilitate him to perform his services as an estate agent.

Illustration 2 : In the course of providing a taxable service, a service provider incurs costs such as traveling expenses, postage, telephone, etc., and may indicate these items separately on the invoice issued to the recipient of service. In such a case, the service provider is not acting as an agent of the recipient of service but procures such inputs or input service on his own account for providing the taxable service. Such expenses do not become reimbursable expenditure merely because they are indicated separately in the invoice issued by the service provider to the recipient of service.

Illustration 3 : A contracts with B, an architect for building a house. During the course of providing the taxable service, B incurs expenses such as telephone charges, air travel tickets, hotel accommodation, etc., to enable him to effectively perform the provision of services to A. In such a case, in whatever form B recovers such expenditure from A, whether as a separately itemised expense or as part of an inclusive overall fee, service tax is payable on the total amount charged by B. Value of the taxable service for charging service tax is what A pays to B.

Illustration 4 : Company X provides a taxable service of rent-a-cab by providing chauffeur-driven cars for overseas visitors. The chauffeur is given a lump sum amount to cover his food and overnight accommodation and any other incidental expenses such as parking fees by the Company X during the tour. At the end of the tour, the chauffeur returns the balance of the amount with a statement of his expenses and the relevant bills. Company X charges these amounts from the recipients of service. The

cost incurred by the chauffeur and billed to the recipient of service constitutes part of gross amount charged for the provision of services by the company X."

10. The comprehensive reading of the above provisions of the Finance Act, 1994, particularly Section 65 (105)(zzzt), 66 and 67 read with Service Tax (Determination of Value) Rules, 2006, specify that 'ship management service' provided by one person, i.e., service provider to another, i.e., service receiver is liable for payment of service tax levy at the rate of 12%, in respect of the value of such taxable services as determined in accordance with the said Rules. It is made clear in the sections 66 and 67, that the gross amount charged for taxable services alone would be liable to service tax and not any other amount charged or collected by the service provider. Further, Service Tax (Determination of Value) Rules, 2006, in sub-rule (1) provide for including any expenditure or costs incurred by service provider in the course of providing taxable service, as consideration for charging service tax; and in the next sub-rule (2) specifically exclude all expenditure or costs incurred by the service provider as a 'pure agent' of the recipient of service, from the value of the taxable service, subject to certain prescribed conditions. Hence, in order to determine the includability or exclusion from the taxable value for levy of service tax, these conditions are to be examined for coming to a conclusion. The requirement of such conditions and whether the appellants have fulfilled the same, in order to treat him as 'pure agent' are tabulated below:

Description of the condition	**Whether the conditions were fulfilled in the present case**
The service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;	The appellants are acting as 'pure agent' of the recipient of the service. The BIMCO contract entered specifically defines the scope of the authority as agent acting on behalf of ship owner. All purchase orders issued to vendors and the bills issued by the vendors are issued in the name of master / owner of the ship and C/o the appellants. Further, appellants are making payment to seafarer/workers on behalf of the owner of the ship. The agreement with the seafarer is made by the appellants on behalf of 0wner of the ship. This fact is illustrated from the agreement with the seafarer. It is specifically mentioned in the agreement that the said seafarers are hired for and on behalf of the ship owner.
The recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;	Goods and services procured are effectively used by the ship owners only, the appellants have not utilized any services and goods procured under pure agent for their own personal use or work.

Description of the condition	**Whether the conditions were fulfilled in the present case**
The recipient of service is liable to make payment to the third party;	The purchase orders are issued to vendors and the bills issued by the vendors are in the name of master / owner of the ship and C/o the Appellants. Therefore, the liability to make the payment is on the ship owners and not on the appellants. Further, the Ship owner is liable to pay wages to the seafarer as they are the employee of the ship owner.
The recipient of service authorizes the service provider to make payment on his behalf	The Appellants are being authorized by the ship owner to pay such expenditure to the vendors/ seafarer.
The recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;	As the ship owners authorizes the appellants to make payment on their behalf under BIMCO contract, the ship owners know that the goods and services for which payment has been made by the services provider shall be provided by the third party. The ship owner also scrutinizes the details of the expenses incurred by the appellants in order to ensure that the appellants have charged only the actual amount incurred. Thus the ship owner is fully aware of the fact that the services will be provided by the third party vendors. Further, the ship owner is aware that the seafarer are working in ship and undertaking the work given by ship owner /master of the ship.
The payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;	The appellants issues separate debit note for such recovery. The detailed break-up of the amounts incurred by the appellants on various sub-heads, against the budget amount, actuals incurred is given to the ship owners indicate that the amounts incurred are only for reimbursement of the same, to the appellants.
The service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and	The appellants makes the payment from separate bank account maintained by them. The appellants gets reimbursement of the amount paid on actual basis and no mark-up/ profit is added on such amount.
The goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.	The goods or services procured by the appellants from the third party are in addition to the services of ship management. In respect of ship management service, the appellants had paid the service tax and have also indicated the said value of services separately in the documents to be provided to the ship owner.

The above factual position indicates that the appellants are fulfilling the conditions prescribed under Rule 5 (2) ibid, and hence the reimbursement expenditure collected by appellants have to be treated as expenditure or costs incurred by the service provider as a 'pure agent' of the recipient of service on behalf of ship owner.

11. On perusal of the records of the case, it transpires the appellants had entered into an agreement for ship management with ship/vessel owners as per standard contract of Baltic and International Maritime Council (BIMCO). The BIMCO agreement provides for various management services such as technical management, commercial management, crew management and crew insurance etc., for which the parties to contract have to enter into agreement. For the ship management services provided by the appellants, they had received management fees and discharged service tax liability thereon, as applicable, and filed a periodical ST-3 returns. In case of foreign vessels (owned by foreign vessel owners) when the management fees was received in convertible foreign exchange, the appellants had treated the same as export of services and accordingly did not pay any service tax. This is not a matter of dispute and the department has accepted that such services qualify as export of service in asmuchas the impugned order confirmed only the demand of service tax for Rs.5,65,051/- on account of expenditure incurred on foreign currency in respect of services received from abroad on RCM basis, which was paid along with interest by the appellants during the course of investigation.

12. On the subject of ship management services, we find that ship owners and ship managers operate in a myriad of different laws and customs. At the level of international maritime law, there are four basic acts/conventions regulating shipping trade. United Nations Convention on the Law of the Sea (UNCLOS), signed on 10th December 1982, effective as of 16th November 1994, to which India is a signatory, provides the core element of international legislation for maritime industry. The other important international conventions that are required to be complied with by the shipping industry are International Convention for the Prevention of Pollution (MARPOL) covering prevention of pollution of the marine environment by ships due to either operational or accidental causes; International Convention and Code on Standards of Training, Certification and Watch keeping for Seafarers (STCW), International Management Code for the Safe Operation of Ships and for Pollution prevention (ISM Code). In order to ensure compliance with various legal requirements of international maritime law, the ship owners first and foremost, generally enter into a contractual relationship with terms agreed between them and with a ship manager or ship management agents, by adopting the standard agreements. BIMCO in their efforts to complement the global regulatory regime developed by the International Maritime Organization (IMO) have created standard contracts and clauses that address the commercial and practical implications of global regulations on charter parties and other shipping contracts that allocate

obligations, responsibilities and liabilities fairly. SHIPMAN is one such model agreement covering various aspects such as crew, technical, commercial management as well as insurance arrangements. The latest edition of such contract/ agreement is SHIPMAN 2009. The advantage are of such contract is that all potential specifics of ship management are included in this form thus, allowing the contracting parties to shape a unique business relationship between the Owner and the Ship Manager. The main structure of the SHIPMAN 2009 Contract is as follows:

Structure of the BIMCO standard ship management agreement SHIPMAN 2009	
Part -I	Standard information concerning parties to the agreement
Part -II	
Section 1	Basis of the agreement
Section 2	Services
Section 3	Obligations
Section 4	Insurance, budgets, income, expenses and fees
Section 5	Legal, general and duration of agreement
Annex A	Details of vessel or vessels
Annex B	Details of crew
Annex C	Budget
Annex D	Associated vessels
Annex E	Fee schedule

Considering the complexity of crew management and the need for proper management by ship owners, BIMCO has also brought out separate agreement CREWMAN 2009 designated for larger crew administration services. From the above contractual arrangements, it can be inferred that in order to comply with various legal compliance requirements over various countries in the voyage of the ship, and for the upkeep of the ship and employing the crew, commercial and technical management, the Ship owner have entered into contractual arrangement with a Ship Manager, who conducts the same functions as the former used to perform, on the basis of the standard BIMCO contract provisions and upon receiving a fee.

13. In India, while consolidating the laws and generally amending the laws relating to merchant shipping, the Merchant Shipping Act, 1958 had been enacted to foster the development and ensure the efficient maintenance of an Indian mercantile marine in a manner best suited to serve the national interests and for that purpose to establish a National Shipping Board who will provide for the registration, certification, safety, security of Indian ships and also for the engagement and discharge of seamen, their wages and welfare, working conditions etc. Further, we find that in order to consolidate the laws relating to admiralty jurisdiction, legal proceedings in connection with vessels, their arrest, detention, sale and other matters connected therewith or incidental thereon the Government had brought out the Admiralty (Jurisdiction

and Settlement of Maritime Claims) Act, 2017. Section 96 of the Merchant Shipping Act, 1958 provide for engagement of seamen only by a ship owner or his agent. The relevant section is extracted below:

"96. Supply or engagement of seamen in contravention of Act prohibited.—

(1) A person shall not engage or supply a seaman to be entered on board any ship in India unless that person is the owner, master or mate of the ship, or is the agent of the owner or is bona fide the servant and in the constant employ of the owner, or is a director of a seaman's employment office, or a shipping master.

(2) A person shall not employ for the purpose of engaging or supplying a seaman to be entered on board any ship in India, any persons unless that person is the owner, master or mate of the ship, or is the agent of the owner or is bona fide the servant and in the constant employ of the owner, or is a director of a seamen's employment office, or a shipping master.

(3) A person shall not receive or accept to be entered on board any ship any seaman, if that person knows that the seaman has been engaged or supplied in contravention of this section or section 95."

From the above international conventions, BIMCO standard contracts and the provisions of Merchant Shipping Act, it is clear that the arrangement of contract between the ship owner and ship management agent, is a well-accepted commercial arrangement in the maritime trade. Supply of sea crew by the ship manager on behalf of the ship owner is also recognized by the Merchant Shipping Act, 1958.

14. We also find that certain specific clauses of the agreement provide the contractual relationship between the ship owner and the ship manager in clear terms.

"3. Authority of the Managers

Subject to the terms and conditions herein provided, during the period of this Agreement ***the Managers shall carry out the Management Services in respect of the Vessel as agents for and on behalf of the Owners.*** *The Managers shall have authority to take such actions as they may from time to time in their absolute discretion consider necessary to enable them to perform the Management Services in accordance with sound ship management practice, including but not limited to compliance with all relevant rules and regulations.*

…

11. Income Collected and Expenses Paid on behalf of Owners

(a) Except as provided in Sub-clause 11(c) ***all monies collected by the Managers under the terms of this Agreement*** *(other than monies payable by the Owners to the Managers)* ***and any interest thereon shall be held to the credit of the Owners in a separate bank account****.*

(b) All expenses incurred by the Managers under the terms of this Agreement on behalf of the Owners (including expenses as provided in Clause 12(c)) may be debited against the owners in the account referred to under Sub-clause

11(a) but shall in any event remain payable by the Owners to the Managers on demand.

(c) All monies collected by the Managers under Clause 6 (Commercial Management) shall be paid into a bank account in the name of the owners or as may be otherwise advised by the Owners in writing.

12. Management Fee and Expenses

..

(e) Save as otherwise provided in this Agreement, ***all discounts and commissions obtained by the Managers in the course of the performance of the Management Services shall be credited to the Owners.***

…

17. Responsibilities

(b) Liability of Owners

(I) Without prejudice to Sub-clause 17(a), ***the Managers shall be under no liability whatsoever to the Owners*** *for any loss, damage, delay or expense of whatsoever nature whether direct or indirect, (including but not limited to loss of profit arising out of or in connection with detention of or delay of the Vessel) and howsoever arising in the course of performance of the Management Services* ***UNLESS same is proved to have resulted solely from the negligence, gross negligence or willful default of the Managers or their employees or agents, or subcontractors employed by them*** *in connection with the Vessel, in which case (save where loss, damage, delay or expense has resulted from the Managers' personal act or omission committed with the intent to cause same or recklessly and with knowledge that such loss, damage, delay or expense has resulted from the Managers' personal act or omission committed with the intent to cause same or recklessly and with the knowledge that such loss, damage, delay or expense would probably result) the Managers' liability for each Incident or series of Incidents giving rise to a claim or claims shall never exceed a total of ten (10) times the annual management fee payable hereunder.*

(II) Acts or omission of the Crew – Notwithstanding anything that may appear to the contrary in this Agreement, ***the Managers shall not be liable for any acts or omissions of the crew, even if such acts or omissions are negligent, grossly negligent or willful,*** *except only to the extent that they are shown to have resulted from a failure by the Managers to discharge their obligations under Clause 5(a) (Crew Management), in which case their liability shall be limited in accordance with the terms of this Clause 17 (Responsibilities).*"

15. From the records placed before us, it is also seen that in rendering ship management services, the appellants have incurred various expenditures for and on behalf of the ship owners and claimed reimbursement for the same. In terms of the above specific clauses of the agreement, the appellants have carried out their responsibilities as agents, for and on behalf of the owners. Accordingly, all monies received by the appellants was credited in a separate bank account and the interest accrued on the same was also credited to the owners. Commission and discount obtained by the appellants was also credited to the owner's bank account. We also find that in one of the Debit Note No.112 dated 28.02.2013 in respect of ship owner M/s Sunshine LLC, Marshall Islands, the total reimbursement of expenses in respect of the vessel M V Global Triumph for the period 01.02.2013 to 28.02.2013 have been shown under

various categories of budget heads such as (I) Running costs consisting of (i) salaries and wages (ii) victualling (iii) personnel costs (II) Lube oil & greases consumption (III) Stores and Spares consumption for ship's deck, cabin, engine room, radio, safety equipments, medicines, IT equipments and consumption of paints, gases, chemicals, water, charts & publication, spares (IV) Docking expenses including dry docking, (V) Repairs and Maintenance, Survey expenses (V) Agency fees such as bank fees, port charges (VI) Other operating expenses (VII) Administration Overheads such as printing & stationery, out of budget expenses, sundry expenses, bank charges where specific sub-heading provided for ship management fees. These expenses were shown for the month as per budget allotted/agreed to, actual expenses, variation and the total expenditure incurred up to the month for the financial year with full year budget as compared to last year actual expenditure.

16. In view of the above discussions, we are of the considered view, that both on the facts of the case and on the interpretation of legal provisions of the Finance Act, 1994, the demand of service tax on reimbursement expenses goes beyond the mandate of Section 67, which is a charging section for levy of service tax. Section 67, both before and after 01.05.2006 amendment authorises the determination of the value of the taxable service for the purpose of charging service tax under Section 66 as the gross amount charged by the service provider for such service provided or to be provided by him, in a case where the consideration for the service is money. The underlined words i.e. "for such service" are important in the setting of Section 66 and 67. The charge of service tax under Section 66 is on the value of taxable services. The taxable services are listed in Section 65(105). The service provided by the petitioner falls under clause (zzzt). It is only the value of such service that is to say, the value of the service rendered by the appellants to ship owner, which is that of a ship management service, that can be brought to charge and nothing more. It is not the case of the Revenue that on ship management fees, for the services rendered by the appellants, they have failed to pay the service tax. Thus the quantification of the value of the service can therefore never exceed the gross amount charged by the service provider for the ship management service provided by them.

17. We also find that validity of Rule 5(1) ibid, in as much as it provides that all expenditure or costs incurred by the service provider in the course of providing the taxable service shall be treated as consideration for the

taxable service and shall be included in the value for the purpose of charging service tax was examined by the Hon'ble High Court of Delhi in the case of Intercontinental Consultants and Technocrats Pvt. Ltd. Vs. Union of India in W.P. (C) 6370/2008 reported in 2013(29) S.T.R. 9 (Del.) by holding that Rule 5 (1) of the Rules runs counter and is repugnant to Sections 66 and 67 of the Act and to that extent it is ultra vires. As the Hon'ble High Court viewed that it purports to tax not what is due from the service provider under the charging Section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure and costs which are incurred by the service provider "in the course of providing taxable service". Further, it was held by the Hon'ble High Court that what is brought to charge under the relevant Sections is only the consideration for the taxable service; thus by including the expenditure and costs, Rule 5(1) goes far beyond the charging provisions and cannot be upheld.

18. This case was appealed by the Revenue in Civil Appeal No. 2013 of 2014 and the Hon'ble Supreme Court by upholding the interpretation of the Hon'ble High Court of Delhi had held that the value of taxable service shall be the gross amount charged by service provider "for such service" and the valuation of taxable service cannot be anything more or less than the consideration paid as *quid pro qua* for rendering such a service. The relevant portion of the said order of the Apex Court is extracted below:

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

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.*

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 respicitFinF: 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."*

19. We further find that the Principal Bench of this Tribunal had dealt with the similar issue in the case of M/s Seher Vs. Commissioner of Service Tax, Delhi – II by holding that the service tax demands confirmed under Rule 5 do not survive, in asmuchas Rule 5 itself has been held to be ultra vires of Section 67 by the Hon'ble Supreme Court in the case of Intercontinental Consultants and Technocrats Pvt. Ltd. (supra). The relevant paragraphs of the Final Order No.50509/2022 dated 13.06.2022 in the above case is extracted below:

"*15. In this arrangement, the only reason the Revenue sought service tax on the amounts reimbursed to the appellant by the client is that*

the appellant did not fulfill the conditions laid down in Rule 5 to qualify as a pure agent. However, we find that Rule 5 itself has been held to be ultra vires of Section 67 by the Supreme Court in the case of ***Intercontinental Consultants and Technocrats Pvt. Ltd****. The Commissioner sought to distinguish the appellant's case on the ground that the nature of services for which reimbursements were made in Intercontinental case were different from the case of the appellant. In our considered view, the nature of service should make no difference to the taxability of reimbursements when Rule 5 under which the tax was demanded itself has been ultra vires by Supreme Court in the case of* ***Intercontinental Consultants and Technocrats Pvt. Ltd.***

16. Consequently, the demands confirmed against the appellant do not survive. The penalty imposed upon the appellant also needs to be set aside and we do so. The appeal is allowed and the impugned order is set aside with consequential relief to the appellant."

20. On the basis of above discussions and findings recorded in the preceding paragraphs, as well as on the basis of decision of the Tribunal and higher judicial forum, we are of the considered view that the impugned order cannot be sustained.

21. In view of the above, the appeal filed by the appellants is allowed by setting aside the impugned order dated 14th October, 2015.

(Order pronounced in the open court on 10.08.2023)

(S.K. Mohanty)
Member(Judicial)

(M. M. Parthiban)
Member (Technical)

Sinha