CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70240 of 2023

(Arising out of Order-in-Original No.51/PC/2022-23 dated 28.02.2023 passed by Principal Commissioner of CGST & Central Excise, Noida)

M/s Adept, **.....Appellant**
(2/148, Vishal Khand, Gomti Nagar, Lucknowo-226016)

VERSUS

Principal Commissioner of CGST &
Central Excise, Lucknow **....Respondent**
(7-A, Ashok Marg, Lucknow-226001)

APPEARANCE:

Shri Bharat B. Raichandani, Advocate for the Appellant
Shri Sandeep Pandey, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.- 70012/2024

DATE OF HEARING : 19 October, 2023
DATE OF DECISION : 19 October, 2023

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original No.51/PC/2022-23 dated 28.02.2023 of the Principal Commissioner CGST and Central Excise, Lucknow. By the impugned order following has been held:

"ORDER

(1) I confirm the demand and order recovery of Service Tax amounting to Rs.5,13,91,838/- (Rupees Five Crore Thirteen Lakh Ninety-One Thousand Eight Hundred and Thirty-Eight only) inclusive of Cess against M/s Adept, 2/148, Vishal Khand, Gomti Nagar, Lucknow under proviso to Section 73 (1) of the Finance Act, 1994, read with Section 173, 174 & 142 of Central Goods & Services Tax Act, 2017 (hereinafter referred as "CGST Act");

(2) I also demand and confirm interest due thereon at the applicable rate from the Noticee under Section 75 of the Act read with Section 173, 174 & 142 of CGST Act on the amount of Service Tax being confirmed at (1) above;

(3) *I impose a penalty of Rs.5,13,91,838/- (Rupees Five Crore Thirteen Lakh Ninety-One Thousand Eight Hundred and Thirty-Eight only) upon M/s Adept, 2/148, Vishal Khand, Gomti Nagar, Lucknow under Section 78 of the Act for non-payment of due Service Tax by suppressing the value of taxable services with intent to evade the payment c of Service Tax from the department read with Section 173, 174 & 142 of CGST Act. The penalty imposed herein shall be further reduced to 25% of the demand of Service Tax confirmed herein subject to the condition that the benefit of reduced penalty shall be applicable only if the amount of such reduced penalty is also paid along with the Service Tax confirmed and the interest payable thereon within a period of 30 days of receipt of this order."*

2.1 Appellant is a partnership firm, registered with registration number AAQFA8925JSD001. During the audit of the records of the Party for the F.Y. 2015-16 & 2016-17, it was observed that Appellant was engaged in Operation & Maintenance of Telecom/Mobile towers. Services provided included Diesel Filling services for M/s VIOM Networks Limited (abbreviated as 'VNL'). After introduction of 'Negative List Based Taxation of Services' w.e.f. 01.07.2012, the said services were neither included under the negative list of Services (under Section 66D) nor exempted under any notification

2.2 During the course of scrutiny of the Profit and Loss Statements of the Party for the period from the F.Y. 2015-16 to F.Y. 2016-17, it was observed that the Party had shown following incomes in their Profit/Loss Statements:-

F.Y.	Income Particulars as per P&L Statements	Figures as per P/L Statements (in Rs.)
2015-16	By Operation and Maintenance Charges	7325300

	Supply of Diesel (Rs.18,49,19,554/-) Less Cost of Diesel (Rs. 1 8,06,08,766/-)	4310788
	Interest on FD	253
	Interest on RD	160115
	Sub Total-1	11796456
2016-17	By Opration and Maintenance Charges	9473324
	Supply of Diesel (Rs.18,49,19,554/-) Less Cost of Diesel (Rs. 1 8,06,08,766/-)	2049048
	Interest on FD	79930
	Sub Total-2	1,16,02,302

2.3 On examination of the ST-3 Returns and Service Tax payment challans for F.Y.2015-16 and F.Y.2016-17, it was observed that the Party, on their self-assessment, considered following figures as Taxable Value for payment of Service Tax during said years:-

F.Y.	Taxable Value (in Rs.)	Service Tax paid (in Rs.)
2015-16	7325300	1032843
2016-17	9473325	1410244

2.4 Upon reconciliation of the figures of income reflected in P & L Statements vis-à-vis the figures of gross taxable value considered by the Party for payment of Service Tax on self-assessment, it was observed that the Party was paying Service Tax only on the income booked by them under "Operation and Maintenance Charges' whereas they were not paying any Service Tax on the gross income booked under 'Supply of Diesel'.

2.5 After making enquiries and investigations in the matter a show cause notice dated 26.11.2020 was issued to the Appellant asking them to show cause as to why:

a) Service Tax (including Cess) amounting to Rs.5,13,91,838/- (Rupees Five Crore Thirteen Lakh Ninety One Thousand, Eight Hundred and Thirty Eight only) should not be demanded and recovered from them under proviso to Section 73(1) of the Finance Act, 1994, read with Section 6 of The Taxation And Other Laws (Relaxation And Amendment Of Certain Provisions) Act, 2020 and Notification dated 30.09.2020 issued by CBIC under F. No.450/61/2020-Cus.IV(Part-1), for the reasons detailed here-in-above;

b) Interest at the applicable rates, on the demand of Service Tax mentioned at Para 12(i) above, should not be demanded and recovered from them under Section 75 of the Finance Act, 1994, for the reasons detailed here-in-above;

c) Penalty under Section 78(1) of the Finance Act, 1994 should not be imposed upon them, for the reasons discussed here-in-above;

d) *Penalty under Section 76(1) of the Finance Act, 1994 should not be imposed upon them for the reasons discussed here-in-above;*

2.6 This show cause notice has been adjudicated as per the impugned order referred in para 1 above. Aggrieved Appellants have filed this appeal.

3.1 We have heard Shri Bharat B. Raichandani Advocate for the Appellant and Shri Sandeep Pandey, Authorized Representative for the Revenue.

3.2 Arguing for the Appellant learned counsel submits that:

- The Appellant were, inter alia, engaged in the business of providing taxable service i.e. "Operation and Maintenance of Telecom/Mobile towers". During the period in dispute, the Appellant provided service of diesel filling in the DG sets installed near the telecom towers maintained by BCL Secure Premises Private Limited. For providing such service, the parties entered in to a memorandum of understanding ("'MOU').
- The Appellant received agreed service charges for providing the above service and also paid the applicable service tax. Independently they had supplied diesel to be filled in the DG Sets at telecom tower site of the recipient. For the same they received agreed diesel charges. The supply of diesel has no connection/relation with the above output services. In any case, the recovery of diesel charges is almost on a cost to cost basis. Further, the

supply of diesel is a supply of goods. Therefore, the same is outside the purview of service tax.

- Apart the above services and supply of diesel, the Appellant, during the period of dispute, also provided mobile DG Sets for rent to the company in case of malfunctioning of the DG Sets installed at the tower sites of the company. The appellant received agreed rental charges for the mobile DG sets arranged by the Appellant. The Appellant has paid applicable service tax on provision of such rending service. This fact is also not in dispute
- Department issued a notice dated 12.03.2019, the whereby, it was alleged that upon scrutiny of ST-3 returns for the period FY 2014-15 to 2017-18 (upto June 2017), total service tax dues against the appellant is Rs.4,68,552/- Therefore, it was requested to pay the same along with interest. Thereafter, based on the information received from the Income Tax Department, a show cause notice dated 08.11.2019 was issued to the appellants for the period FY 2014-15 upon the same issue.
- Issue is well settled in the favour of the appellant as per the following decision:
    - M/s Ganpati Associates (Service Tax Appeal No. 51074 of 2014 [DB] - order dated 12.04.2019)
    - ICC Reality (India) Pvt. Ltd. [2013 (32) STR 427],
    - Anandram Developers Pvt. Ltd. [2017 (6) GSTL 75 (Tri. Chennai)
    - Kiran Gems Pvt. Ltd. [2019 (25) GSTL 62 (Tri. - Ahmd.)]
- The Service Tax cannot be levied on the value of goods. Service Tax law provides for levy of Service Tax only on provision of services. Supply of goods, whether deemed sale or not, it out of the purview of Service Tax. As per Section 2(v) of the UPVAT Act, 2008, Diesel is provided as Non-VAT goods as per Schedule IV. Schedule IV says that

the tax should be collected at the first point of sale. Thus, the dealer (manufacturer) has to pay VAT on such supply of diesel at the first point of sale. Irrespective of the fact whether VAT is payable or not, admittedly, these are goods. This was the clear stipulation, at the time of introduction of Notification No.12/2003-ST dated 20.06.2003, which stands deleted with the introduction of the negative list regime.

- The Appellant submits that the diesel was purchased by the Appellant in his own name, it was not purchased on behalf of the service receiver. There is an independent sale and purchase transaction. The Appellant had purchased the diesel and supplied the diesel to the service recipient Admittedly, no TDS has been deducted by the service recipient on these diesel charges. Therefore, no Service Tax can be demanded from the Appellants.
- Section 67 of the Finance Act, 1994 states that the value of taxable service shall be the gross amount charged by the service provider for such service provided by him. The value of taxable service rendered by a person is for service provided by him. CBEC Circular No.65/14/2003-ST dated 05.11.2003; Rolex Logistics Private Limited 2009 (13) S.T.R. 147 (Para 5).
- Reliance placed on Rule 5(1) of the Service Tax (Determination of value) Rules, 2006 is bad in law. The appellant submits that Rule 5(1) has been struck down as ultra vires the Act by the Hon'ble Delhi High Court in the case of Intercontinental Consultants & technocrats Private limited 2013 (29) S.T.R. 9 (Del) affirmed by the Hon'ble Supreme Court in 2018-TIOL-76-SC-ST. In that case, the Hon'ble Delhi High Court held that Section 67(1) of Finance Act, 1994 can include in the value of taxable services only and nothing else (to be read in consonance with Section 66). It was further, observed that it is inbuilt mechanism to ensure that only taxable service shall be evaluated

under Section 67, where under value of taxable service is gross amount charged by service provider ‘for such service'. Accordingly, it was concluded that expenditure/costs such as air travel, hotel stay, etc. incurred for service provided shall not be includible in gross amount charged under taxable head of "consulting engineer" service.

- the recovery of diesel charges by the appellant is nothing but a reimbursement. The slight deviation in the recovery is on account of discounts obtained at the time of procurement and price escalation. This cannot be a reason to discard the submission of the Appellant. The intention and the understanding of the parties is and has always been the recovery is on a cost to cost basis. In fact, the company/customer has even endorsed a certificate in favor of the appellant certifying that the recovery of diesel charges is at actual. Copy of the certificate is enclosed as Annexure 29 of the appeal memo.
- The service recipient has deducted TDS on the service charges paid to the Appellant for services. However, no TDS gas been deducted on the diesel recovery charges. The Appellant submits that services of O&M and diesel filing are of contractual nature and hence, TDS as provided under Section 194C of the Income Tax Act, 1961 has been deducted by the recipient of service on the same. However, no TDS has been deducted on the cost of diesel paid/reimbursed which proves that cost of diesel is not the part of service agreement. This is an indicator of the fact that both parties to the contract understand and acknowledge that there is a difference in service vis-à-vis supply of goods. The Ld. Principal Commissioner has failed to consider
- telecommunication service provider has included the cost of diesel in the value of their output service. Once this is the case, no demand of service tax can lie at the hands of

the appellant. This, in as much as, the same would amount to double taxation. It is well settled law that the as held in the case of BSNL vs. Union of India - 2006 (2) S.T.R. 161, that the same value cannot be brought to tax, both as the value of goods as well as the value of services.

- supply of diesel is a sale of goods and hence cannot be brought under the ambit of service tax. The Appellant submits that there is no service element involved.
- there are two limbs of the contract viz. supply of services and supply of diesel which needs to be vivisected for levy of service tax. In support of this submission, the Appellant relies on the judgment in the case of Bharat Sanchar Nigam Limited V/s Union of India 2006 (145) STC 91 (SC). Therefore, the value of diesel is not includible in the assessable value of the operation and maintenance service.
- no service tax can be demanded on the value of diesel i.e. goods. If the interpretation canvassed in the show cause notice and the impugned order that the Appellants are liable to pay service tax on the material value as well, it would lead to an anomalous situation. The power to levy 'tax on sale of goods' is vested with the State Government under Entry 54 of List to Schedule VII of the Constitution. Therefore, goods supplied (in whatever form) can never be subject matter of levy of service tax. Hence, the appellants are not liable to pay service tax on the material component, as held by the Ld. Principal Commissioner. Kindly see; Godfrey Phillips India Ltd. [2005 (139) STC 537]
- show cause notice has been issued pursuant to audit conducted by the department. It is well settled that when an allegation is based on an audit observation / objection, there cannot be any allegation of suppression on the part of the appellants. In support of the same the Appellant relies on the case of Graphite India Limited 2018-TIOL-

1028 (Para 6). Thus, there cannot be any allegation of suppression on the part of the Appellant. Hence, the show cause notice being entirely time barred is liable to be dropped forthwith.

- extended period of limitation is not invokable in the present case as there was no suppression of facts with intent to evade payment of service tax. A show cause notice No.425/AC/CGST/D-III/TP.14-15/LKO/2019-20 dated 08.11.2019 for the period 2014-15 was issued to the appellants. Therefore, this is a periodical show cause notice. The appellant submits that when earlier show cause notice has been issued, second show cause notice cannot be issued invoking extended period. See: Nizam Sugar Factory vs. Collector of Central Excise -2006 (197) E.L.T. 465 (SC); Master Circular F. No.96/1/2017-CX dated 19.01.2017.
- the issue involved is purely interpretational in nature. The issue involved is purely legal in nature. Further, the contraventions, if any, were not with the intention to willfully evade payment of service tax. Reliance is placed on the judgments of the Hon'ble Supreme Court in the case of Pushpam Pharmaceuticals Company vs. CCE 1995 (78) E.L.T. 401 (SC). Similar was the view of the Honorable Supreme Court in the case in CCE vs. Chemphar Drugs and Liniments 1989 (40) E.L.T. 276 (SC), (Supra).
- Thus extended period of limitation could not have been invoked.
- Since the demand cannot be sustained on merits or limitation there is no case for demand of interest or penalty.

3.3 Arguing for the Revenue, leaned authorized representative reiterated the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in the appeal and during the course of arguments.

4.2 For confirming the demand of service tax with interest and penalties, impugned order records the findings as follows:

"6.2 The period in dispute in the instant case in Financial Year 2015-16 and 2016-17.

The issue in brief is that the Noticee, M/s Adept, Gomti Nagar, Lucknow, a partnership firm, registered with the department under the provisions of service tax entered into an agreement with their service recipient, M/s VION Networks Limited for providing "Diesel Filling Services" for generators installed at telecom towers. During audit of the records of the Noticee for the F.Y. 2015-16 and 2016-17, it was noticed by the Department / Audit Team that the Noticee was paying service tax on the service charges received in lieu of providing aforesaid output services of operation & maintenance. The Noticee was also paying service tax on the income accrued against service charges for diesel filling but they were not paying any service tax on the receipts by way of reimbursement of expenditure incurred for cost of diesel. It is relevant to mention here that the Notice was reimbursed as per the agreed fixed consumption matrix and not on the basis of actual cost of diesel supplied/consumed in DG sets at telecom tower sites of service recipients.

The department's contention was that as per the agreement the Party was required to provide Operation and Maintenance services at various telecom towers sites wherein, they performed all activities required to always keep the telecom tower/infrastructure, installed at those sites, In working condition without disruption in telecom services, including the activities of filling of diesel in DG sets installed at those sites. AS per Section 67(1)(i) of the Finance Act, 1994, value for the purpose of payment of service tax is the gross amount charged by the service provider for such service provided including any reimbursement expenditure Or Cost incurred and charged. In the

course of providing Or agreeing to provide taxable service. As per Rule 5(1) of Service Tax (Determination of Value) Rules, 2006, all the expenditures or COSts incurred by the service provider in the Course of providing taxable service shall be treated as consideration for the taxable service provided and the same shall be included in the value for the purpose of charging service tax. However, if the expenditure or COSts are Incurred by a service provider as "Pure Agent" of service recipient under the provisions of Rule 5(2) ibid. satisfying all conditions given there under, then such expenditures shall be excluded from the value of taxable service. In the light of above provisions, it is the contention of the department that all the receipts of the Noticee during the impugned period against provision of Operation and Maintenance services, including reimbursement for supply of diesel should be part of taxable value since the Noticee was not acting as an agent for t the service recipient. Further, the O&M services, Diesel Filing Services as well as supply of diesel were all limbs of same taxable service i.e. Operation and maintenance of Telecom Tower Sites and by excluding the value of Reimbursement for supply of diesel, the Noticee undervalued the output services provided by them and accordingly applicable service tax is liable to be recovered from the Noticee

6.3. The Noticee has contested the demand of service tax during the material period. The main contention is that cost of diesel is not the part of service and the same is paid on the actual basis. The Noticee's contention is that the responsibility of supply of diesel is separate from the Diesel Filling Services and cost of diesel does not form part of the service provided. Supply of Diesel has no relation with output service of operation and maintenance provided by the Noticee and it is a distinct supply. The Noticee also contended that TDS under the provisions of Income Tax Act, 1961 has been deducted by the service recipient on the services of contractual nature like O&M and diesel filling but no TDS under Income Tax Act, 1961 has been deducted on cost of diesel paid / reimbursed which proves that the cost of diesel is not the part of service agreement. The

Noticee has also contested the demand of service tax stating that there is no provision for inclusion of value of material (diesel) to the value of taxable service under Section 67 ibid and value of the material / diesel supplied by the Noticee cannot form part of the gross amount charged by the Noticee for the service provided by them. The department overlooked the fact that a person can be a service provider cum trader. Some shown in the invoice could be towards reimbursement of costs. charges The reliance placed by the Department on Rule 5(1) of the Valuation Rules is bad in law as the value of taxable services has to be ascertained and or determined in terms of provisions of Section 67(1)() ibid. The entire consideration Is received by the Noticee in money The provisions of Valuation Rules cannot apply in a case covered by Section 67(1)(i) ibid which is applicable in the instant case. The diesel cost is not an expenditure or ibid cost cannot incurred be by invoked the Noticee in the course of providing taxable service, hence, Rule 5(1) The Noticee further contended that present transaction of supply of goods is excluded from the definition of service and no service tax can be demanded on value of diesel i.e., goods The Noticee also contested that audit report cannot be the sole basis for demand of service tax as there is no independent inquiry and demand is based on EA-2000 Audit only which is not permissible in law. The Noticee also contested the demand of tax on the ground that the SCN has been issued, without authority of law, invoking provisions of section 73(1), 75, 77, and 78 of the repealed / omitted Finance Act, 1994 and provisions of Section 174 of CGST Act, 2017, have no saving provisions in such manner that fresh proceedings could be initiated in exercise of powers under the erstwhile provisions. The Noticee also contested the instant demand of service tax for the period 2015-16 & 2016-17 by invoking extended period under Section 73(1) ibid stating that an earlier SCN for the F.Y. 2014-15 has already been issued by the department invoking extended period and invoking extended period again in the 2nd SCN for Demand of tax for 2015-16 and

2016-17 is contrary to the guidelines of para 3.7 of Master Circular F. .No.96/1/2017-CX-1 dt. 19.01.2017.

6.4 On the basis of discussion above, I find that the following issues are pending before me for consideration and decision in the present case: Whether the Service Tax amounting to Rs.5,13,91,838/- as demanded in the impugned Show cause Notice is liable to be confirmed in the instant case? (i) Whether, the extended period provisions as provided under Section 73(1) of the Act, are invokable for demand of the Service Tax, alleged to have been short paid? (ii) Whether, the Noticee are liable for payment of interest, in terms of Section 75 of the Act, on the Service Tax, alleged not to have been paid? (iv) Whether the Noticee are liable for penal action under section 78(1) of the Finance Act, 1994 for willful suppression of facts with intent to evade payment of Service Tax? (v) Whether the Noticee are liable for penal action under section 76(1) of the Finance Act, 1994 and whether penalties under Section 76 & Section 78 of the Finance Act, 1994 are imposable simultaneously? I take up these issues one by one as under:-

6.5. first set out to consider the issue listed at paragraph 6.4 () above relating to the demand of Service Tax of Rs.5,13,91,838/- I note that basically, the Party is under obligation for operation and maintenance of telecom/ mobile towers for M/s. VIOM Networks Ltd. (herein after referred to as VNL). It was observed as a result of scrutiny of the documents of the Party that the Party had entered into agreement with the service recipient namely VNL. The scope of work included to undertake all general maintenance activities as specified in the said agreement including supervision/ liaison with the OEMs for breakdown maintenance, preventive maintenance, corrective maintenance, preventive of all passive infrastructure equipment at site etc. The Party was also required to checks more than 99.98% uptime per site of all infrastructure equipment maintained on ensure monthly attending the basis. alarms The Party generated was in also FMC/ required NOC/ to TOC ensure or from round cell the

sites, clock timely monitoring informing and all the concerned including OEM for routine checking and maintenance of all listed passive infrastructure assets, Viz DG Sets, Air Conditioners, Servo Stabilizers etc. During the course of such operation and maintenance the Party was also solely responsible to carry out required diesel to filing ensure activity services on all during DG 24 sites hrs. or X listed sites shared by VNL. The Party was 7days on all days of the calendar year irrespective of Sundays a holidays The Party was also required to ensure that minimum diesel balance in tank of DG Sets shall be maintained. The Party was also under obligation for many activities as provided under the agreement.

6.6. The Party was to provide daily diesel filling report site wise in the mutually agreed format. Fortnightly diesel fling debit notes with reference to fund provided for diesel filing and actual consumed at site (as per fixed matrix provided by VNL) needed to be settled

6.7. Thus, it was observed that the Party was not only providing operation and maintenance service at various power sites, but the scope of such service also included various types of maintenance activities including diesel filing services at various sites. In nutshell, the Party was required to always keep the telecom tower in working/ operating condition so that there was no disruption in telecom services.

6.8. The consideration of the said activity was including operation and maintenance charges diesel filing charges, reimbursement of diesel filled by the Party in the DG sets and rental charges for mobile DG sets arranged by the Party in case of malfunctioning of DG Sets installed at the sites. On the basis of these facts, it has been alleged in the Show cause Notice that the Party was required to pay the Service Tax on entire consideration received by them, including diesel charges which has been termed as reimbursement of diesel.

6.9. On the contrary the Party has contested that the firm is registered with the Service Tax department having Service Tax

Registration No. AAQFA8925SD001. They are providing services of operation and maintenance of telecom towers. They received and paid Service Tax on service charges for operation and maintenance of tower. They have also stated that they have also supplied diesel to be filled in the DG Sets at different telecom tower sites which is an independent activity of service of operation and maintenance. They neither received nor paid Service Tax on supply of diesel as it has no relation to the output service provided by them. The supply of diesel is a distinct activity, as diesel is not used for providing operation and maintenance service.

6.10. They have also contended that as per provisions of Section 67 of the Finance Act, 1994, the value of taxable service shall be gross amount charged by the service provider for the services provided by him. They have also strongly submitted that the term "gross amount" cannot be constituted to mean whatever amount is billed would become the value of taxable service. The department has overlooked the fact that a person can be service provider as well as trader. Some charges shown in the invoice are towards reimbursement of costs. They have supplied diesel to the service recipient company for the DG Sets in terms of the agreement and hence the value of said material supplied by them cannot form a part of gross amount charged by them for the service provided by them. The Party has also emphasized that the service recipient has deducted TDS only on service charges paid under Section 194C of the Income Tax Act and not on the value of diesel supplied and the Act restricts the deduction of TDS on sale.

6.11. On the basis of the allegations in the Show cause Notice and the defense reply submitted by the Party, 1 observe that the main contention of the Party in their written reply is that supply of diesel for DG Sets at Telecom Tower sites cannot be treated as service and that it is simply sale of diesel i.e., trading of goods which is outside the purview of Service Tax.

6.12. I have to therefore examine, if the activity of supply of diesel by the Party is part of taxable activity or is a distinct activity independent from the operation and maintenance service being rendered by the Noticee. I have also to examine, if the value of the diesel so supplied by the Party is part of the taxable value or not under the provisions of Finance Act, 1994 and Rules made thereunder.

6.13. In order to examine if the activity of diesel filing by the Party is part of the taxable activity or not, it is important to discuss the relevant clauses of the service agreement between the Party and the service recipient namely VNL. Following clauses appears to be relevant in this regard:

- *In definition and interpretation clause, the definition of active telecom infrastructure shall include (but not limited to) BTS, Radio access network, Antena, Feeder cable and transmission system owned and installed by the operators at specifically identified cell sites.*
- *Cell sites shall mean such built up sites/ locations owned/ acquired by VNL across India where telecom towers have been installed.*
- *Passive Telecom Infrastructure shall mean and include (but not limited to) towers shelter, DG sets, Air Conditioners, Electrical and civil work placed on the cell sites, owned, leased or otherwise acquired by VNL, which enables the operators to install their active telecom infrastructure at the cell sites*
- *Service shall mean the operation and maintenance services to be performed by service provider including but not limited to supervision, telecom assistance and technical guidance related to the Passive Telecom Infrastructure under this agreement in accordance with SOW.*
- *Scope of work*

  The scope of services going to be followed is a non-comprehensive. In this model, service provider has to

undertake all the general maintenance activity as specified in responsibility matrix and service schedules including supervision/liasioning with the OEM'S for breakdown maintenance, corrective maintenance, preventive maintenance, routine checks of all Passive Infrastructure equipments at site, ensure uninterrupted power either from utility provider (EB) or from back up DG set, safety & security of all equipment at sites, ensure environment condition specified, liasioning with various government and statutory agencies. The service provider has to ensure more than 99.98% uptime per site of all infrastructure equipments maintained on monthly basis. (Note: The total permissible downtime is be less than 8.64 minutes per site per month considering 30 days a month).

Service Provider shall ensure round the clock monitoring (if circle requires) and attending the alarms generated in FMC/NOC/TOC or from Cell sites, timely informing all the concerned including OEM for routine checking & maintenance of all listed Passive Infrastructure assets viz. DG Sets, Air Conditioners, Servo Stabilizers, PIU, Shelter, earthing system including chambers, utility power connection, Fuse Boxes, Meter Boxes, Power Plant, Battery Banks, Aviation Lamps and cable, lightning arrester, all power cables and wires, ACDB, MCBs, electrical installation, Fire Alarm system, DCEMs, ACEMs, FCU, TOC installations and sensors, housekeeping in and around the shelter, DG and VNL premises, fuel economizers, fuel cells, invertors etc. (The list is indicative and not restricted to this), as per periodic schedule.

- *Scope for Diesel Filling on DG Sets at Sites*

The Service Provider shall be solely responsible to carry out diesel filling activity on all sites or list of sites shared by VNL. The service provider ensures services during the DG 24 hrs X 7 days on all days of the calendar year irrespective of Sundays and holidays. The Service provider shall ensure that minimum diesel

balance in tank (as decided by the circle O& M head) shall be maintained. The service provider shall ensure while doing Diesel Filing Activity there should be no damage to DG or any other equipment at site. The Service Provider shall always ensure there should not be any damage to the premises Or the passage provided by the landlord or neighbours. The Service provider has to ensure that any diesel filling reports are not shared with the landlord or any persons not concerned with the activity at the Cell Sites.

There should be a separate dedicated team appointed by the Service Provider to carry out diesel filling activity. Such team should not carry out any O&M activity directly or indirectly. Service provider shall make sure that the foreign matter does not go into the fuel tank. All diesel filling activity to be carried out during the day time as per the beat plan finalized between the Circle O&M team & Service Provider. Service Provider's representative will be responsible for maintenance of diesel log book with dual verification of Viom representative

The Service Provider has to make his own arrangement for filling diesel in sites & provide dedicated diesel filler. No subleting of Diesel Filling and Maintenance activity will be done by service provider. Further it is required hat diesel filling team will be rotated periodically and no diesel filling team will be in one cluster for more than 06 months.

VNL has right to test the quality of diesel at any point in time. If required any external agency can be engaged by VNL to carry out the test on behalf of VNL. Quality of Diesel will be as per the specifications of Bureau of Indian Standards ("BIS").

Service provider has to provide daily diesel filling report site-wise in the mutually agreed format signed SPR of previous month should also be submitted with the current cycle invoices. Fortnightly diesel filling-debit notes w.r.t. fund provided for diesel filling and actual consumed at Site (as per the fix matrix provided by the VNL) need to be settled by the service vendor. Measurement for the fuel will be based on number of DG running

hours taken from TOC. Till such time the TOC becomes fully operational, existing practice will continue i.e., HMR and GCU readings should be submitted along with FMC report showing EB start and end alarms, duration of EB availability, DG start and end alarms, duration of DG run hours, to calculate DG running hours SFC to be considered as mentioned in clause 7 of Schedule Al, SLA, until and unless otherwise specified in writing by VNL, after due testing. The testing has to be done by the O&M service provider.

6.14. I also specifically observe in this regard that the scope of diesel filling of DG Sets at sites specifically provides that the Party (service provider) shall be solely responsible to carry out diesel filing activity on all the DG sets. The service provider shall ensure services during 24 hrs x 7 days in all days of the calendar year irrespective of Sundays and holidays. The service provider shall ensure that minimum diesel balance in tank shall be maintained.

6.15. I have thoughtfully considered various clauses of the agreement and I observe that the Party is basically engaged in operation and maintenance of telecom towers owned by the service recipient. also take note that the Passive Infrastructure required for proper functioning of telecom towers includes diesel generator set. I also take note that in order to provide uninterrupted supply of services of telecom towers, DG Sets have been installed and the maintenance of such DG Sets is also a pre-condition of the service agreement. The Party also gets the service charges for such maintenance. The scope of work also includes that the parties shall ensure diesel filing activity with utmost safety at sites as mentioned in the agreement. " It is 15 also a" the " duty of the Party to ensure the minimum balance of the diesel in considered the tanks opinion of DG that Sets DG SO as sets to are ensure an important uninterrupted infrastructure working for thereof maintenance Thus, am Of towers. Thus, the activity of diesel filing and maintenance of DG sets is an integral telecom and essential part for rendering the services of

operation and maintenance of telecom towers. 6.16. Having reached the conclusion that activity of filing of diesel and maintenance of DG sets is integral and essential for rendering the services of operation and maintenance of telecom towers and that the activity of diesel filling is in relation to operation and maintenance of telecom towers, I have to now examine if the value of diesel will form part of taxable value of service rendered by the party or not.

6.17. Provisions of Valuation of taxable services for charging Service Tax are contained in Section 67 of the Finance Act, 1994. It provides that in case the provision of service is for consideration of money, it be the gross amount charged by the service provider for such service provided or to be provided by him. 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. It further provides that-

'consideration" includes

(i) any amount that is payable for the taxable services provided or to be provided;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;

6.18. Further, Rule 5 of Service Tax (Determination of Value) Rules, 2006 provides for inclusion and exclusion from the value of certain expenditure or cost. The said rule reads as under:

(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:

(i) 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;

(ii) 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;

(iii) the recipient of service is liable to make payment to the third Party;

(iv) the recipient of service authorizes the service provider to make payment on his behalf;

(v) 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,

(vi) 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;

(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third Party; and

(viii) the goods or services are procured in by the service provider from the third Party as pure agent of the recipient service are in addition to the services he provides on his own a account.

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

(a) enters into 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;

(b) 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;

(c) does not use such goods or services so procured; and

(d) 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.

(emphasis supplied)

6.19. I observe from the provisions of Section 67 of the Finance Act, 1994 read with Rule 5 Service Tax (Determination of Value) Rules, 2006 reproduced above, that the consideration includes any amount of expenditure or cost incurred by the service provider (may be reimbursable) charged, in the course of providing a taxable service. The conditions prescribed for exclusion of certain expenditure or cost has to satisfy the conditions prescribed in Rule 5 ibid. I observe from the facts involved in the present case that the Party is not acting as a pure agent of the service recipient for diesel filing in as much as no third Party is involved in the transaction. I also take note from the Profit & Loss A/c of the Party that the amount charged by the Party as a cost of diesel from the service recipient is much higher than the cost incurred by them. Thus, the Party has recovered for the diesel more than the expenditure incurred by them to procure such goods. I am, therefore, more than satisfied that it is not case of the Party that they were acting as pure agent while recovering the amount of diesel from the service recipient.

6.20. Another argument advanced by the Party for exclusion of the cost of diesel recovered by them from the service recipient is that they were acting as service provider as well as a trader i.e., the cost of diesel recovered by them was sale of goods which is outside the purview of Service Tax. I have carefully considered this argument of the Party and now set out to determine as to whether in the facts and circumstances of the case, supply of diesel can be treated as sale of goods. I observe that the Party has raised the debit notes upon the service recipient for recovering the cost of diesel. The description given by the Party to these debit notes is- "debit note__ Nos. of Site of VIOM (W+Q) Diesel Filing Cell Sites in UPE state (description of sites) as per consumption sheet. I thus find that it is not the actual cost of diesel which has been recovered by the Party from the service recipient, but rather the Party has recovered the amount for diesel consumed during the course of providing operation and maintenance services including diesel filing in DG sets. Further, this amount is not on actual cost basis. I also observe that no sale bill has been issued by the Party. I also take note that the Party has not taken pains to produce evidence that the diesel was sold by them to the service provider as a trader. Rather, the facts and documents on record proves beyond doubt that the Party has recovered the amount for diesel (much (much higher than the actual cost incurred by them as is evident from P & L A/c) consumed during the course of providing service. Thus, the amount of diesel recovered by the Party is includible in the gross amount charged by them from the service recipient. I have therefore, no hesitation in holding that the amount of diesel charged by the Party from the service recipient is liable to be included in the taxable value

6.21 I have also examined the CBEC Circular No.65/14/2003-ST dated 05.11.2003 relied upon by the Party in their defense. I do not find any reason for relying on the said circular in the facts and circumstances of the case. The said circular is in respect of advance payment of Service Tax and the adjustment thereof

under Rule 6 of the Service Tax Rules, 1994, which obviously is not the subject matter in the present case.

6.22 I have also examined the decision of Hon'ble tribunal in the case of E.V. Mathai & Co. 2003 (157) ELT 101 (T) relied upon by the Party in their defense. I find that the case in the said decision was that of a C & F Agent. The dispute was regarding transportation cost for which a separate agreement was there. It was held by Hon'ble Tribunal that the said transportation cost is not in relation to activity of C& F Agent. However, in the instant case the consumption of diesel in DG sets installed as Passive Infrastructure elements at operation sites is essentially in relation to operation and maintenance of telecom towers. Thus, the said case law is not applicable in the said facts and circumstances of the present case.

6.23. I have also examined the decision of Hon'ble Tribunal in the case of Rolex Logistics Pvt. Ltd. 2009 (13) S.T.R. 147 (T) relied upon by the Party in their defense. In the said case Hon'ble Tribunal has held that any expenditure incurred on behalf of service recipient and reimbursed by the service recipient shall not form part of the taxable value. However in the instant case, that is not the issue that the Party incurred the expenditure on behalf of service recipient rather the expenditure on diesel by the Party was on account of diesel consumed during the course of providing the service of operation and maintenance of telecom towers including diesel filing in DG sets. Thus, the case law relied upon by the Party is not applicable in the facts and circumstances of the case.

6.24. On the contrary, I place reliance on the decision of Hon'ble Tribunal in the case of P.K. Gosh & Sons v/s Commissioner of Service Tax, Kolkata 2017 (3) GSTL 429 (Tri. Kolkata) wherein Hon'ble Tribunal observed and held as under: -

Valuation (Service Tax) - CHA services - Service Tax payable on gross amount received which includes amount received before, during or after service Reimbursable expenses and commission

not to be excluded from taxable value if assessee not a pure agent - Section 67 of Finance Act, 1994.

6.25 With reference to the quantification of the service tax amount liable to be confirmed, observe that the party was claiming reimbursement of the expenses incurred against the cost of diesel consumed from VNL. In this context, it is important to mention the landmark judgment passed by the Hon'ble Supreme Court in case of M/s Intercontinental Consultants & Technocrats Pvt. Ltd. Vs. UOI, whereby the court has laid down that the reimbursements shall be taxable under service tax and accordingly with effect from 14th May 2015 (with prospective effect), the reimbursements came under purview of service tax. Because of the same, one Debit Note dated 27.04.2015 has not been taken into consideration while calculating service tax liability of the party. For this reason, the taxable value for 2015-16 has been taken only as Rs.16,9063,231/- as against the gross receipt for the said period., amounting to Rs.18,49,19,554/-. I therefore hold that demand amounting to Rs.5,13,91,838/- is liable to be confirmed and recovered from the party."

4.3 We find that the issue involved in the matter is covered on all fours with decision rendered by CESTAT in case of Ganpati Associates [Final Order No.50686-50688/2019 dated 12.04.2019 in ST/51074 & 55554/2014]. Tribunal in this case was considering a similar issue with supply of similar services under a similar contract. Though this order is for the period prior to the amendments made in Section 67 in 2015 as consequence of the decision of the Hon'ble Delhi High Court in case of Intercontinental Consultants in our view the principles, enunciated in the said order are applicable to facts of the present case. After examination of the issue in terms of the provisions of law and the terms of agreement tribunal held as follow:

"16. Section 67 of the Act deals with valuation of taxable services for charging service tax. Sub-section (1) and Explanation (a) are reproduced below:

SECTION 67 (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such 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 as, 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) -----

(3) -----

(4) -----

Explanation. — For the purposes of this section,

(a) "consideration" includes (i) any amount that is payable for the taxable services provided or to be provided;

(b) -----

(c) ----- —

17. Service (Determination of Value) Rules, 2006 have been framed by the Central Government under Section 94 of the Act. Rule 5(1) is reproduced below:

> *"5(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."*

18. The agreements in the three Appeals are almost similar in nature. The terms of the agreement dated 27 April, 2010 entered into between M/s Bharti Infratel Limited and M/s Ganpati Associates can, therefore, be examined. Clause 2 of the Agreement deals with Appointment, Clause 3 deals with Delivery of Services, while Clause 4 deals with Service Charges and Payment. Clause 2.1 provides that the service provider has been appointed for providing services as detailed in Annexure A. Clause 3.1 provides that the service provider shall at all times deliver the services under the agreement as detailed in Annexure A through its own resources, men and materials based on the requirements spelt out by INFRATEL from time to time. Clause 4.1 provides that the service charges for the services shall be set out in Annexure A.

19. It has therefore become necessary to refer to the terms set out in Annexure A.

20. The fees indicated in the agreement is Rs. 500/- per site per month for diesel filling at DHQ sites and Rs. 750/- per site per month for diesel filling at non-DHQ sites.

*21. The clause in the normal agreement for the terms of payment is: **"Payment Terms***

Monthly billing will be done and payment will be made within 10 days of submission of invoice, properly approved by technical for diesel filling you will raise bills after 7 days as per diesel consumption chart and the payment will be made within 10 days. For spares you will raise bills once a month which will be paid in consolidated list of spares with prices, which will be paid to vendor on monthly basis. DG rent will be paid extra @ Rs.1,150/- per day which will be claimed on monthly basis."

22. The normal scope of work/ services has also been provided in the agreement and is as follows:

SCOPE OF WORK/SERVICES – A

This contract will be applicable for six months (01 Aug – 09 to 31 Mar 10). Contract can be terminated with one month's notice.

The contract will be reviewed after three months and can be extended upto one year after mutual discussion and understanding based on performance.

1. The service provider shall provide round the clock (24x7) a) Operation b) Maintenance (Preventive and breakdown) c) Ensuring a more than 99.95% uptime to the equipment for BTS cell sites

2. Site Inventory may consist of accessories/ equipment as follows:

a) -----

b) -----

c) -----

d) -----

e) -----

f) -----

g) -----

h) -----

i) -----

j) -----

3. ***In addition, following would also form part of scope of work/ service***

a) -----

b) -----

c) -----

d) -----

e) -----

f) -----

g) -----

h) -----

i) -----

j) -----

k) -----

l) Diesel filling, cleaning of DG sets and keep the record of fuel average and DG hrs.

m) Service provider will fill the diesel as per the laid down process. They will ensure that the DG should have the adequate diesel all the time. They will also keep track of site wise diesel consumption and no. of hours DG ST/51074/2014 with running through monthly MIS. Diesel to be procured from Bharti authorised filling stations.

n) -----

23. The process for filling diesel has also been provided in the agreement and is as follows: —

32 Diesel Filling Process

- *Bharti Technical team shall provide the list of site with the detailed LPH consumptions.*
- *Service provider shall fill the diesel at site as per the daily consumptions. Service provider shall update site status to Bharti nominated officials on a daily basis.*
- *Service provider shall ensure that there is no shortfall of diesel at any of the sites. In the event of any loss(s) incurred by Bharti for any site going down (becoming un-operational) due to shortfall of diesel, vendor shall be liable to pay for the damages incurred by Bharti on this account as per the damage/ penalty clause.*
- *Service provider will submit comprehensive MIS report for each site with the bills.*
- *Cleanliness of the DG area shall be the responsibility of the vendor. The vendor supervisor will be responsible for entire diesel filling operation at site including the quality/quantity/ safe locking of DG canopy and ensuring that all the locking device are in place including all inbuilt*

locks, bolts etc. including auto tower sites. In no case any lock/boiling locking device is to be broken or tempered.

- *Purity of diesel. Service provider has to ensure the purity and quality of diesel being filled at site. If vendor observed any quality issue at the time of buying from the Bharti nominated oil companies, they should immediately inform to local Bharti office, Bharti shall not allow any adulteration at any cost from the origin to site.*
- *To ensure the quality of diesel, vendor may procure necessary tools, to verify the purity of the diesel and standard ISI approved measuring pot and shall keep the tools on the diesel filling vehicle itself.*
- *The DG tank capacity may be measured and highlighted in the MIS- report for the reference. Adulteration and Contamination may be investigated prior to cleaning of tank under intimation to Bharti O&M Manager and CTO.*
- *Service provider shall submit record of HR meter/ GCU/ PIU reading for cumulative DG run hours as prescribed format of each month for comparison with OMCR readings and verification of his monthly bill (as per the defined format).*
- *No subletting of the contract, in any form, will be done by the "service provider under any circumstances without proper written permission of the customer."*

24. Clause 33 of the agreement relates to payment process for diesel and is as follows:

33. Payment process for Diesel: *Service provider shall raise the bill based on the average consumption rate which is predefined by Bharti and PIU reading or actual consumption whichever less however before releasing payment Bharti signatory authority must match the LPH MIS report with the petro card statement in case petro card system is running in circle (hour meter reading shall be multiplied with the average hourly consumptions of the DG (to be defined by concerned*

Bharti technical member, depending on the shared/non shared) to calculate the amount.)॥

25. Management, Maintenance or Repair Service has been defined to mean any service provided by any person under a contract or an agreement. A perusal of the aforesaid agreement between M/s Bharti Infratel Limited and M/s Ganpati Associates indicates that the scope of work to be performed includes electrical operation and management of BTS sites, diesel filling, general site maintenance and electricity bill collection and payment. In regard to filling of diesel, the fees to be paid to the appellant is Rs.500/- per site per month for diesel filling at DHQ sites (District Headquarters) and Rs.750/- per site per month for diesel filling at non DHQ sites. For diesel filling, the appellant has to raise bills after 7 days as per diesel consumption chart and the payment has to be made within 10 days. The agreement further stipulates that the service provider will fill the diesel as per the laid down process and ensure that the DG sets have adequate diesel at all times. The service provider is also required to keep track of diesel consumption and the number of hours DG sets run site wise. The diesel has to be procured from Bharti authorised filling stations and the payment mode is also described in Clause 33 of the agreement.

26. It would thus be seen that in respect of diesel filling services, the appellant was entitled to receive two amount from the service recipients. The first was for the service charges per site for filling of diesel and for this purpose the appellant was required to raise "service invoice" on the service recipient. The second amount was for reimbursement in respect of value of diesel procured from the authorised filling stations for which a separate document was issued by the Appellant. The Appellant has placed the bill issued in the month of December 2011 that raises an invoice for Rs.3,11,929/- in which Rs.1,16,000/- is towards filling of diesel at 125 sites. For the same month, the appellant also issued a reimbursement document claiming Rs.49,95,668/- towards the value of diesel. The Department

seeks to levy service tax on the value of diesel as according to it, diesel is used by the appellants as an input for providing Management, Maintenance and Repair Services. The impugned orders also hold that diesel is an input used for provision of the services and, accordingly, the value of diesel procured by the Appellant has been included in the total taxable value of service.

27. The submission of learned Counsel for the Appellants is that the amount received towards reimbursement of diesel cost cannot be treated as a consideration for provision of service in terms of Section 67 of the Act. This Section deals with valuation of taxable services for charging service tax. Sub-section (1) of Section 67 provides that where service tax is chargeable on any taxable service with reference to its value, then such value shall 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 the service provider. It is, therefore, clear that only such amount is subject to service tax which represents consideration for provision of service and any other amount which is not a consideration for provision of service cannot be subjected to service tax.

28. Section 67 of the Act was considered and explained by the Supreme Court in Intercontinental Consultants. The Appellant therein was providing consulting engineering services. It received payment not only for the services provided by it but was also reimbursed for the expenses incurred by it on air travel, hotel stay, etc. It paid service tax on the amount received by it for services rendered to its clients but did not pay any service tax in respect of expenses incurred by it which were reimbursed by the clients. A show cause notice was issued to it to explain why service tax should not be charged on the gross value including reimbursable and out of pocket expenses. The provisions of Rule 5(1) of the Rules were resorted to for this purpose. A Writ Petition was filed challenging the vires of Rule 5 as being unconstitutional as well as ultra vires the provisions of Section 66 and 67 of the Act. The High Court of Delhi accepted

the said contention and declared Rule 5 to be ultra vires the provisions of Section 66 and 67 of the Act. The High Court noted that both the amended and unamended Section 67 authorised the determination of value of taxable services for the purpose of charging service tax under Section 66 as the gross amount charged by the service provider for such services provided or to be provided by him in a case where consideration for such service is money. The High Court placed emphasis on the words "for such service" and took the view that the charge of service tax under Section 66 has to be on the value of taxable service i.e. the value of service rendered by the assessee and the quantification of the value of service can, therefore, never exceed the gross amount charged by the service provider for the service provided by him. On that analogy, the High Court opined that the scope of Rule 5 goes beyond the scope of Section 67 which was impermissible as rules could be framed only for carrying out the provisions of Chapter 5 of the Act. In taking this view, the High Court observed that the expenditure or cost incurred by the service provider for providing the taxable service can never be considered as the gross amount charged by the service provider "for such service" provided by him. The Supreme Court noticed the various reimbursable claims which were included in the gross value and in respect of certain Appeals, the value of diesel supplied free of cost by the service recipient was also considered. The Supreme Court noted that Rule 5 does bring within its sweep the expenses which are incurred while rendering the service and are reimbursed and, therefore, what was required to be decided was whether Section 67 of the Act permits subordinate legislation to be enacted as done by Rule 5. It needs to be noted that prior to 19 April, 2006, in the absence of a Rule, the valuation was required to be done as per the provisions of Section 67 of the Act. The Supreme Court noticed that the charging Section 66 provides that there shall be levied service tax @ 12% of the value of taxable services referred to in the sub-clauses of Section 65 and collected in such manner as may be prescribed. Thus, the

service tax is on the "value of taxable services" and, therefore, it is the value of the services which are actually rendered which has to be ascertained for the purpose of calculating the service tax. It is for this reason that the Supreme Court observed that the expression "such" occurring in Section 67 of the Act assumes importance. It is in this context that the Supreme Court in paragraph 26 observed that the authority has to find what is the gross amount charged for providing "such" taxable services and so any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as the amount is not calculated for providing "such taxable service." This according to the Supreme Court is the plain meaning attached to Section 67 either prior to its amendment on 1 May, 2006 or after this amendment and if this be so, then Rule 5 went much beyond the mandate of Section 67. The Supreme Court, therefore, held that the value of material which is supplied free by the service recipient cannot be treated as "gross amount charged" as that is not a "consideration" for rendering the service. In fact, in regard to free supply of diesel and explosives, the Supreme Court specifically observed that they would not warrant inclusion while arriving at the gross amount charged on the service tax to be paid.

29. It will also be useful to refer to the decision of the Supreme Court in Bhayana Builders. Section 67 either prior to its amendment or subsequent to its amendment was interpreted by the Supreme Court and it was held that the cost of free supply of goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as "a consideration for the service provided by the service provider." The Supreme Court further held that on first principle also a value which is not a part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider. The Supreme Court also repelled the contention of the Revenue based on Explanation (c) to sub-section (4) of Section 67 that payment received in "any form"

and "any amount credited or debited as the case may be" is to be included for the purposes of arriving at a gross amount charges and is leviable to service tax. Paragraphs 12, 13, 14, 15 and 16 dealing with this aspect are reproduced below:

> *"12. On a reading of the above definition, it is clear that both prior and after amendment, the value on which service tax is payable has to satisfy the following ingredients: a. Service tax is payable on the gross amount charged:- the words "gross amount" only refers to the entire contract value between the service provider and the service recipient. The word "gross" is only meant to indicate that it is the total amount charged without deduction of any expenses. Merely by use of the word "gross" the Department does not get any jurisdiction to go beyond the contract value to arrive at the value of taxable services. Further, by the use of the word "charged", it is clear that the same refers to the amount billed by the service provider to the service receiver. Therefore, in terms of Section 67, unless an amount is charged by the service provider to the service recipient, it does not enter into the equation for determining the value on which service tax is payable. b. The amount charged should be for "for such service provided": Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words "for such service provided" the Act has provided for a nexus between the amount charged and the service provided. Therefore, any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67. The cost of free supply goods provided by the*

service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined"

13. A plain meaning of the expression 'the gross amount charged by the service provider for such service provided or to be provided by him' would lead to the obvious conclusion that the value of goods/material that is provided by the service recipient free of charge is not to be included while arriving at the 'gross amount' simply, because of the reason that no price is charged by the assessee/service provider from the service recipient in respect of such goods/materials. This further gets strengthened from the words 'for such service provided or to be provided' by the service provider/assessee. Again, obviously, in respect of the goods/materials supplied by the service recipient, no service is provided by the assessee/service provider. Explanation 3 to subsection (1) of Section 67 removes any doubt by clarifying that the gross amount charged for the taxable service shall include the amount received towards the taxable service before, during or after provision of such service, implying thereby that where no amount is charged that has not to be included in respect of such materials/goods which are supplied by the service recipient, naturally, no amount is received by the service provider/assessee. Though, subsection (4) of Section 67 states that the value shall be determined in such manner as may be prescribed, however, it is subject to the provisions of sub-sections (1), (2) and (3). Moreover, no such manner is prescribed which includes the value of free goods/material supplied by the service recipient for determination of the gross value.

14. We may note at this stage that Explanation (c) to subsection (4) was relied upon by the learned counsel for the Revenue to buttress the stand taken by the Revenue and we again reproduce the said Explanation herein below in order to understand the contention: (c) "gross amount charges" 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, 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 account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise."

15. It was argued that payment received in 'any form' and 'any amount credited or debited, as the case may be...' is to be included for the purposes of arriving at gross amount charges and is leviable to pay service tax. On that basis, it was sought to argue that the value of goods/materials supplied free is a form of payment and, therefore, should be added. We fail to understand the logic behind the aforesaid argument. A plain reading of Explanation (c) which makes the 'gross amount charges' inclusive of certain other payments would make it clear that the purpose is to include other modes of payments, in whatever form received; be it through cheque, credit card, deduction from account etc. It is in that hue, the provisions mentions that any form of payment by issue of credit notes or debit notes and book adjustment is also to be included. Therefore, the words 'in any form of payment' are by means of issue of credit notes or debit notes and book adjustment. With the supply of free goods/materials by the service recipient, no case is made out that any credit notes or debit notes were issued or any book adjustments were made. Likewise, the words, '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' would not include the value of the goods supplied free as no amount was credited or debited in any account. In fact, this last portion is related to the debit or credit of the account of an associate enterprise and, therefore, takes care of those amounts which are received by the associated enterprise for the services rendered by the service provider.

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

30. The finding recorded in the impugned order that the cost of diesel which is reimbursed has to be included in the gross amount charged by the service provider has to be examined in

the light of the aforesaid two decisions of the Supreme Court in Intercontinental and Bhayana Builders. As noted above, the appellants were required to perform various services including diesel filing. It needs to be remembered that the scope of this service was limited to the activity of "filling" the diesel in DG sets for which the appellants were paid service fee of Rs.500/- or Rs.750/- per site. The diesel was to be procured from the filling stations authorised by the service recipients and the value of diesel was paid to the appellants only upon appropriate verification. The value of diesel was in the nature of reimbursement. The appellants had paid service tax on the element of service involved in "filling of diesel" and by no stretch of imagination it can be urged that any "service" was rendered by the appellants corresponding to the value of diesel. The valuation of taxable service for charging service tax could only be the gross amount charged for providing such "taxable services" which in the present case is the filing of diesel and any other amount cannot be a part of the valuation as it cannot be an amount for such "taxable services". The Department cannot go beyond the contract value and arrive at the value of taxable service merely because of the use of the word "gross" in Section 67 of the Act. The use of the word "charged" makes it clear that it refers to the amount billed by the service provider to the service recipient and, therefore, unless an amount is charged by the service provider to the service recipient, it does not enter into the equation for determining value on which service tax is payable as was observed by the Supreme Court in Bhayana Builders. The cost of free supply of goods provided by the service recipients to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. It has no nexus with the taxable services for which value is sought to be determined.

31. Even if diesel is considered to be free of cost supplied by the service recipient to the service provider, no service tax can be levied on it in view of the decision of the Supreme Court in

Bhayana Builders. The impugned order proceeds on the footing that diesel is an input required for provision of the output services. This is a completely wrong impression as the diesel filling is 'the service' for which a separate consideration has been provided in the contract and diesel cannot be considered as an input for the provision of this service. What further needs to be noted is that the total amount raised in the Bill issued in the month of December, 2011 is Rs.1,16,000/- towards filling of diesel at 125 sites, while the reimbursement claimed by the Appellants towards value of diesel is Rs.49,95,668/-. The Department is seeking to levy service tax on this value of diesel as according to it, the Appellant has used the diesel as input for providing the service."

4.4 In view of the decision of the CESTAT on the same issue we are not inclined to uphold the impugned order. Since we are not holding the issue on the merits we do not render the findings on the other issues of limitation etc. in this case.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

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

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS