CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 10546 of 2013-DB

[Arising out of Order-in-Original/Appeal No 10-VDR-II-DHIL-CARGO-D-BRH-ADJ-COMMR-2012-13 dated 19.12.2012 passed by Commissioner of Central Excise-VADODARA-II]

Dahej Harbour Infrastructure Ltd .... Appellant
PO. Dahej, Lakhigam, BHARUCH
GUJARAT-392130

VERSUS

Commissioner of Central Excise & ST, Vadodara-ii .... Respondent
1st Floor Room No.101, New Central Excise Building,
Vadodara, Gujarat-390023

WITH

(i) SERVICE TAX Appeal No. 11296 of 2016-DB (Dahej Harbour Infrastructure Ltd)

(ii) SERVICE TAX Appeal No. 11940 of 2016-DB (Dahej Harbour Infrastructure Ltd)

(iii) SERVICE TAX Appeal No. 11941 of 2016-DB (Dahej Harbour Infrastructure Ltd)

(iii) SERVICE TAX Appeal No. 12143 of 2016-DB (Dahej Harbour Infrastructure Ltd)

(iv) SERVICE TAX Appeal No. 12450 of 2019-DB (Dahej Harbour Infrastructure Ltd)

[Arising out of Order-in-Original/Appeal No BHR-EXCUS-000-COM-085-15-16 dated 31.03.2016 passed by Commissioner of Central Excise, Customs and Service Tax-Bharuch, Arising out of Order-in-Original/Appeal No CCESA-VAD-APP-II-VK-189-2016-17 dated 08.08.2016 passed by Commissioner of Central Excise and Service Tax-VADODARA-II, Arising out of Order-in-Original/Appeal No CCESA-VAD-APP--II-VK-190-2016-17 dated 08.08.2016 passed by Commissioner of Central Excise and Service Tax-VADODARA-II, [Arising out of Order-in-Original/Appeal No BHR-EXCUS-000-COM-069-2016-17 dated 16.09.2016 passed by Commissioner of Central Excise and Service Tax-Bharuch, Arising out of Order-in-Original/Appeal No VAD-EXCUS-002-APP-76-2019-20 dated 28.05.2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-II]

APPEARANCE :

Shri Jigar Shah, Advocate for the Appellant
Shri Tara Prakash, Deputy Commissioner (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 02.03.2023
DATE OF DECISION:13.06.2023

FINAL ORDER NO. 11240-11245/2023

C L MAHAR :

The appellants are engaged in the business of providing port service and registered with the Service Tax Department for the same. The appellants have been providing Port Service, Cargo Handling service etc. The appellants are subsidiary company of M/s. Hindalco Industries Limited. The appellant has been issued license by Gujarat Maritime Board to administer, develop and maintain the port, captive jetty at Dahej for the purpose of handling, storage and transportation of the cargo.

2. As mentioned above, the captive jetty was constructed by M/s. Hindalco Industries Limited and ownership of the jetty including its fixed assets such as Mobile crane, etc. remained with the Gujarat Maritime Board as per clause 8 and 24 of the agreement between M/s. Hindalco Industries Limited and Gujarat Maritime Board dated 20.06.1994.

2.1 The appellant are engaged in handling two types of cargo at the above mentioned captive jetty

(a) Captive cargo of M/s. Hindalco Industries Limited

(b) Commercial Cargo other than captive cargo of M/s. Gujarat Alkalies & Chemicals Limited (M/s. GACL for short) and M/s. Gujarat Narmada Valley Fertilizer Company Limited (M/s. GNFC for short) and other parties for handling cargo.

The appellant have entered into Cargo Handling agreement with M/s. Hindalco Industries Limited on 11th August 1999. The appellant have also entered into separate agreements to provide similar services to M/s. GACL and M/s. GNFC.

2.2 The appellant have entered into a separate agreement for using M/s. Hindalco Industries Limited's equipments at jetty by an agreement named "Agreement for access to equipment" dated 11.08.1999. Under this agreement the appellant have to pay an amount of Rs. 20 per Metric ton for use of equipments which belongs to M/s. Hindalco Industries Limited when cargo belonging to third parties namely M/s. GACL and M/s. GNFC is undertaken by the appellant. The cargoes of Rs. 20 per Metric ton are names as Equipment Operating Charges and same is shown on the recipient bills of M/s. GACL and M/s. GNFC.

2.3 It has been the contention of the department that taxable value as regard to services provided by the appellant to M/s. Hindalco Industries Limited has not been worked out correctly as the appellant have failed to include the value of Rs. 20 per Metric ton in the service charges charged by the appellant from M/s. Hindalco Industries Limited. Accordingly, a show cause notice dated 14.10.2011 came to be issued wherein, the provision of Section 67 of the Finance Act, 1994 read with Rule 3A of Service Tax (Determination of Value) Rules 2006 have been issued demanding service tax of Rs. 5,17,53,962/-. The matter got adjudicated vide impugned order-in-original dated 14.12.2012 where under, all the charges invoked in the show cause notice has been confirmed. The appellants are before us against the above mentioned Order-In-Original.

3. Learned Advocate appearing for the appellants submitted that Section 67 of the Finance Act, 1994 defines the value of taxable service for charging service tax. It provides that the value of taxable service shall be a gross amount charged by the service provider for such service and therefore, the value of the taxable service is the taxable value of the amount charged by the service provider from the service recipient. It has been contended that if

something has not been charged by the service provider from the service recipient it cannot form part of the taxable value of service for levy of duty. The appellants have relied upon the judgment of Hon'ble Supreme Court in the case of **UNION OF INDIA vs. INTERCONTINENTAL CONSULTATION AND TECHNOCRATS PVT. LTD**. reported under 2018 (10) GSTL 401 (SC) which had upheld the Hon'ble High Court decision in case of **INTERCONTINENTAL CONSULTATION AND TECHNOCRATS PVT. LTD. vs. UOI reported under 2013 (29) STR 9 (Del.).**

3.1 It has also been argued by the learned Counsel that the Hon'ble Supreme Court in the case of **CST VS. BHAYANA BUILDERS PVT. LIMITED REPORTED UNDER 2018 (10) GSTL 118 (SC)** has held that materials supplied free of cost by a service recipient to the provider of taxable construction service being neither monetary, non-monetary consideration would be outside the taxable value of the "Gross amount charged" within the meaning of Section 67 of the Finance Act, 1994.

3.2 It has further been submitted that the provisions under the Finance Act 1994 are directed towards the contractual applicant and arrangements between the parties. The consideration accrual to the service provider under the Contractual arrangements alone is liable to service tax and thus the terms of contract would determine the service which is provided and the value of such service which is charged from the service recipient. Further in terms of Section 67(1) of the Finance Act, 1994 the value of taxable service shall be the gross amount charged by the service provider if the provision of service is for consideration in money. The explanation (a) of Section 67 provides that "consideration" includes any amount that is payable for taxable service provided or to be provided. In this regard, it has been submitted that Section 67 only talks about the value of taxable service provided by the

service provider and not about the value of the product resulting from such service. The learned advocate has cited the decision of Hon'ble Supreme court in the case of **Moriroku UT India vs. State of UP - 2008 (224) ELT 365 (SC).**

3.3 Thus it has been the main contention of the learned advocate that the free supply of equipment would not be construed as a monetary consideration paid by HILBC to the appellants and therefore, would not be includable in the gross value for the purpose of charging service tax as held by the Hon'ble Supreme Court in the case of M/s. Bhayana Builders Pvt. Limited (supra) - 2022 (1) TMI 317-CESTAT Ahd.

3.4 It has further been argued that the department has wrongly invoked the provisions of the Rule 3A of Service Tax (Determination of Value) Rules 2006 is only applicable when the value of service is not ascertainable in terms of provision of Section 67 of the Finance Act, 1994. Since as per the provision of Section 67 of the Finance Act, 1994 the gross amount charged by the service provider is the sole consideration for the services provided to the service recipient therefore, the provision of Rule 3 of the Service Tax (Determination of Value) Rules 2006 are not applicable. The learned advocate has cited the decision of this tribunal in the case of **CCE vs. Essar Bulk Terminal Limited - 2022 (1) TMI 317 (CESTAT-Ahd.)**. The learned Advocate has also challenged the invocation of penal provisions of Section 76 & 78 contending that since it is a matter of interpretation and the appellants have been under the bona fide belief that the service charges collected by the service provider from M/s. Hindalco Industries Limited are the only consideration received by the service provider and therefore they have rightly paid the service tax and there has been no element of any fraud, willful mis-statement or suppression of facts to invoke the provision of

extended time limit under Section 73 of the Finance Act, 1994 and thus it has also been mentioned that extended time proviso under Section 73 is not applicable in this particular case as there was no suppression of fact or mis-statement on the part of the appellants.

4. We have also heard the learned Departmental representative in detail who has primarily reiterated the findings of the Order-In-Original.

5. We have heard both the sides and we find that the only question which need to be answered in this appeal is whether the notional rental value of jetty equipments need to be included into the taxable value of the service recipient for the purpose of levy of service tax in case of M/s. Hindalco Industries Limited as it has been contended by the show cause notice that the additional consideration has flown to the service provider in the form of providing various jetty equipments to the service provider by the service recipient. Before proceeding further let us recapitulate the facts which are as follows:-

(i) The appellant is operating a captive jetty at Dahej on the basis of license granted by Gujarat Maritime Board. The said captive jetty was constructed by M/s. Hindalco Industries Limited at Dahej and later handed over to the appellant for its handling and maintenance. The appellants have been operating the captive jetty and providing port services and cargo handling services to M/s. Hindalco Industries Limited and other parties namely GNFC and GACL.

(ii) The concession of 80% and ware fare charges has been given to M/s. Hindalco Industries Limited having constructed the jetty and providing other equipments. The department is of the view that had the jetty not been belonging to the service recipient M/s. Hindalco Industries Limited, the service provider namely appellant would have

charged cargo handling/port/wharfage charges at the full rate and thereby the service recipient would not have been entitled for 80% discount from the ware fare charges. On the basis of this fact, it is the main contention of the department that construction of the jetty by the service recipient namely M/s. Hindalco Industries Limited and providing the same to the service provider amounts to consideration flowing from the service recipient to the appellant and therefore, the appellants could have paid the service tax on the normal ware far charges which are otherwise charged from other service recipient from the same service.

5.1 The department has thus invoked provision of Section 67 of the Finance Act, 1994 read with Rule 3(A) of the Service Tax (Determination of Value) Rules 2006. Considering that undiscounted wharfage charge are the normal value of the service being provided at the Jetty at Dahej and thus the appellant having discharged its service tax liability not as per law.

5.2 Before proceeding further in the matter it will be relevant to have a glance at the provision of Section 67 of the Finance Act, 1994 as well as Rule 3 of the Service Tax (Determination of Value) Rules 2006. It can be noticed that for the levy of service tax, the consideration in money and if consideration is not wholly or partly consisting of money be such amount as an addition of service tax charged is equivalent to consideration will be taxable value for levy of service tax. Thus, it can be seen that for providing "such" service the consideration which is in the form of money or in any form has to form the part of the taxable value for charging service tax. The Rule 3 of Service Tax (Determination of Value) Rules, 2006 under sub-Rule (a) also provides that value of such taxable service shall be equivalent to gross amount charged by the service provider to provide similar service to

any other person. The gross amount has been defined under the provision of Section 67 which is as under :-

> **Valuation of taxable services for charging service tax.** "67. - 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 charged 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 authorised 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 telegraph 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 loans.

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."

(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, bet he amount as may be determined in the prescribed manner.

Where the gross amount charged by a service (2) 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.

The gross amount charged for the taxable (3) service shall include any amount received towards the taxable service before, during or after provision of such service.

Subject to the provisions of sub-sections (4) (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;

(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.]"

8. After the amendment, Section 67 of the Act is as follows :

Valuation of taxable services Section 67. 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 serviceprovider, 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 taxableservice 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, -

["consideration" includes - (a)

(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;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.]

(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, 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.]"

5.3 We find that the gross amount charged by the service provider namely the appellant from M/s. Hindalco Industries Limited is the amount which is the invoice value of the service which have been paid by HIL to the appellant. Apart from this, no other amount or consideration has flown back to this appellant for providing "such" service i.e. port service/cargo handling service, etc. We also take note of the fact that service which have been

provided by the appellant at the Jetty need not to include the notional charges of jetty, crane, goods handling equipments, etc because by no stretch of imagination these cannot form the part of the service which is being undertaken by the appellant at the jetty.

5.4 We find that Hon'ble Supreme court decision in the case of **UOI Vs. Intercontinental Consultants & Techocrats Pvt. Limited (supra)** has already explained this aspect in their decision. The relevant extract of the decision is reproduced hereunder:-

> **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.
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> **"26.** It is trite that rules cannot go beyond the statute. In *Babaji Kondaji Garad*, this rule was enunciated in the following manner :

"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 respicit : law looks forward not backward. As was observed in Phillips v. Eyre [(1870)

LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectively 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.

Civil Appeal No. 6865 of 2014, Civil Appeal No. 6864 of 2014, Civil Appeal No. 4975 of 2016, Civil Appeal No. 5130 of 2016 and Civil Appeal Nos. 4536-4537 of 2016

5.5 Similarly in the case of CST Vs. Bhayana Builders Pvt. Limited - 2018 (10) GSTL 118 (SC) it has been held that value of taxable service cannot be dependent on the value of the goods supplied free of cost by the service recipient. Thus the value which is not part of the contract between the service provider and the service recipient cannot form the part of the taxable value of the service provided by the appellant to the service recipient. The relevant extract of the above decision is reproduced here below:-

14. We may note at this stage that Explanation (c) to sub-section (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 hereinbelow in order to understand the contention :

"gross amount charges" includes payment by (c) 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.]"

[emphasis supplied]

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.**"**

5.6 Similarly, this tribunal in the case of **CCE & ST vs. ESSAR BULK TERMINAL LIMITED** reported under 2022 (1) TMI 317 (CESTAT-Ahd.) held as under:-

"9.4 The capital expenditure incurred by M/s. UCL cannot constitute 'consideration' flowing from M/s. UCL to GMB for the reason that such expenditure was not incurred at the desire and request of GMB but was incurred by the end user for own benefit without there being a stipulation for such amount to be incurred. The Privy Council in the case of Raja of Venkatagiri v. Sri Krishnayya, - 1948 PC 150, interpreted the words 'at the desire of the promisor appearing in Section 2(d) of the Contract Act, 1872 held that where the monies were advanced not as a result of the desire of the promisor who executed the promissory note, the same cannot constitute consideration for the promissory note. As such, applying the ratio of this decision, it will flow that since the construction of the jetties by the user industry was not at the request or desire of GMB but by the company's own volition, such expenditure would not constitute consideration. This is clear from the definition of 'consideration' in Section 2(d) of the Contract Act, which reads thus :

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise."

9.6 Even if the capital expenditure incurred for development of waterfront is regarded as 'construction', the next logical question that will arise is whether the entirety of such construction is liable to be included in the value. As per the understanding between GMB and its user industry, the infrastructure developed by the user industry goes into the possession and exclusive control of GMB even after the expiry of 20 years or thereabout. Significantly, the Agreement between GMB and the user industry does not require or stipulate the user industry to construct the infrastructure of such quality and type which can last beyond the concession period of 20 years or so. The Agreement between GMB and the user industry does not require the user industry to ensure that the facilities and infrastructure so created are of such quality that they outlive the concession period so as to become usable for GMB at a later date. Therefore, if the user industry decides to construct a temporary jetty or a ro-ro jetty or an SPM whose shelf life is less than 20 years, the benefit that would accrue to GMB at the end of concession period would be nil as the facilities would have become unusable by that time. This itself shows that the understanding between GMB and the user industry did not contemplate the passing on of any benefit to GMB at the end of concession period. Any such benefit, even if it accrues to GMB, is clearly contingent for industry and in the absence of any mechanism or machinery provision for following the present value of such contingent benefit, no addition can be made to the assessable value on account of such contingent benefit. Since the provisions of the Finance Act, 1994 do not contain any machinery provision to determine the present value of such future or contingent benefit, any addition on this account would be an arbitrary one. The question of adding the value of full capital expenditure as additional consideration is in any case absurd as most of the benefits from such capital expenditure would have accrued to the user industry during the concession period and would not be to the account of GMB. In other words, the capital expenditure incurred by the user industry is an expenditure incurred by the user industry in its own benefit and it is clear on the intention of the two parties that GMB would have been entitled only to a contingent benefit at the end of the concession period and the value of that contingent benefit cannot be quantified particularly in the absence of a machinery provision to that effect in the Finance Act, 1994 or in the rules framed thereunder. In this regard, the judgement of the Supreme court in the case of B.C. Srinivas Shetty is relevant, which provides that where a taxing statute does not provide or prescribe a machinery provision, in the absence of such machinery provision to cover a particular type of transaction, it is the absence of such a machinery provision itself sufficient indication that the legislature did not intend to tax that transaction. Though the judgment was rendered in the context of the Income Tax Act, 1961, the principle arising therefrom is equally applicable in the present situation where there is no method available to determine the present value of a contingent benefit which may or may not accrue to GMB at a future date.

9.7 The Revenue's case is even otherwise illogical and absurd as it seeks to assess the services rendered by GMB with reference to the normal wharfage charges which it recovers from users at the full-fledged ports developed and operated by GMB, such as the Kandla Port. This is clearly illogical as in the present case the service rendered by GMB was limited and confined to the grant of licence to use the waterfront for which it charged a limited amount (20% of the usual wharfage). Considering the limited nature of the service rendered, GMB could only charge a limited consideration. This amount, which happens to be 20% of the usual wharfage charge, is the amount actually paid and in the absence of any book adjustment or deduction from the account constitutes the 'gross amount' actually charged for the service.

06. Thus, in view of the above discussion, we hold that the invoice value charged by the appellant is the correct value for the services provided by them to M/s. HIL. We find that there is no other consideration which have flown back to the appellant from the service recipient and therefore, we are of the view that the appellant has discharged their service tax liability correctly and as per service tax law. In view of above, we hold that impugned orders-in-original are without any merit and therefore, we set-aside the same. Thus, we allow the appeals.

(Pronounced in the open court on 13.06.2023*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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