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

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 10042 of 2015-DB

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-001-APP-377-2014-15 dated 03.09.2014 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

Niko Resources **.... Appellant**

Landmark, 6th Floor,
Race Course, VADODARA, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Vadodara-i **.... Respondent**

1st Floor, Central Excise Building,
Race Course Circle, Vadodara,
Gujarat -390007

APPEARANCE :

Shri Mrugesh G. Pandya, Advocate for the Appellant
Shri P. Ganesan, Superintendent (AR) for the Respondent

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

DATE OF HEARING : 01.02.2024
DATE OF DECISION: 23.02.2024

FINAL ORDER NO. 10459/2024

C.L. MAHAR :

The brief facts of the matter are that during the course of audit it was noticed by the department that the appellant has received consulting engineering service from outside of India and has incurred certain expenses such as accommodation, travelling, food expenses etc. on engineers on behalf of their service provider during the provision of service. The appellant has discharged service tax liability on the bill amount which was paid by them to the service provider under reverse charge mechanism as provided under Section 66A of the Finance Act, 1994. The appellant did not include the value of expenses incurred by them for accommodation, travelling and foods expenses which were incurred on the visiting engineers of the service provider. The department has entertained a view that the value of these services provided by them free of cost to the engineers and staff of service provider should have been included in the taxable value of Consulting Engineering service received by them as per the provisions of Section 67 of Finance Act, 1994. Accordingly, a show cause notice dated 08.04.2013 was

issued demanding service tax of Rs. 3,58,274/- as per the provisions of Section 73(1) of Finance Act, 1994. The penal provisions and provisions for charging interest were also invoked. The Adjudicating Authority has confirmed all the charges which have been invoked in the show cause notice. The appellant have filed appeal before the Commissioner (Appeals) who vide impugned order-in-appeal dated 03.09.2014 has rejected the appeal of the appellant. Accordingly the appellant is before us.

2. We have heard both sides. We find that the matter is no longer *res-integra* as Hon'ble Delhi High Court in the case of *Intercontinental Consultants and Technocrats Pvt. Limited vs. UOI* reported at 2013 (29) STR 9 (Delhi) has held as follows:-

> **"10.** The contention of the petitioner that Rule 5(1) of the Rules, in as much as it provides that all expenditure or costs incurred by the service provider in the course of providing the taxable service shall be treated as consideration for the taxable service and shall be included in the value for the purpose of charging service tax goes beyond the mandate of Section 67 merits acceptance. Section 67 as it stood both before 1-5-2006 and after has been set out hereinabove. This section quantifies the charge of service tax provided in Section 66, which is the charging section. Section 67, both before and after 1-5-2006 authorises the determination of the value of the taxable service for the purpose of charging service tax under Section 66 as the gross amount charged by the service provider *for such service* provided or to be provided by him, in a case where the consideration for the service is money. The underlined words i.e. *"*for such service*"* are important in the setting of Sections 66 and 67. The charge of service tax under Section 66 is on the value of taxable services. The taxable services are listed in Section 65(105). The service provided by the petitioner falls under clause (g). It is only the value of such service that is to say, the value of the service rendered by the petitioner to NHAI, which is that of a consulting engineer, that can be brought to charge and nothing more. The quantification of the value of the service can therefore never exceed the gross amount charged by the service provider for the service provided by him. Even if the rule has been made under Section 94 of the Act which provides for delegated legislation and authorises the Central Government to make rules by notification in the official gazette, such rules can only be made *"*for carrying out the provisions of this Chapter*"* i.e. Chapter V of the Act which provides for the levy, quantification and collection of the service tax. The power to make rules can never exceed or go beyond the section which provides for the charge or collection of the service tax.**"**

The above order of Hon'ble Delhi High Court has also been endorsed by Hon'ble Supreme Court in the case of *UOI vs. Intercontinental Consultants and Technocrats Pvt. Limited* reported in 2018 (10) GSTL 401 (SC). The relevant portion of the above mentioned order is reproduced as under:-

> **"24.** In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for

providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as *quid pro qua* for rendering such a service.

25. This position did not change even in the amended Section 67 which was inserted on May 1, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider.

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

> *"Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the byelaw, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."*

27. The aforesaid principle is reiterated in *Chenniappa Mudaliar* holding that a rule which comes in conflict with the main enactment has to give way to the provisions of the Act.

28. It is also well established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held in *Taj Mahal Hotel* :

> *"the Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect."*

29. In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature. On this aspect of the matter, we may usefully refer to the Constitution Bench judgment in the case of *Commissioner of Income Tax (Central)-I, New Delhi* v. *Vatika Township Private Limited* [(2015) 1 SCC 1] wherein it was observed as under :

> *"27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However,*

conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-a-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

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***

31. In the aforesaid appeals, the issue is as to whether the value of free supplies of diesel and explosives in respect of the service of 'Site Formation and Clearance Service' can be included for the purpose of assessment to service tax under Section 67 of the Act. These assessees had not availed the benefit of aforesaid Notifications Nos. 15/2004 and 4/2005. Therefore, the issue has to be adjudged simply by referring to Section 67 of the Act. We have already held above that the value of such material which is supplied free by the service recipient cannot be treated as 'gross amount charged' and that is not the 'consideration' for rendering the services. Therefore, value of free supplies of diesel and explosives would not warrant inclusion while arriving at the gross amount charged on its service tax is to be paid. Therefore, all these appeals are also dismissed.**"**

3. Following the above decisions of the Hon'ble Courts, we hold that impugned order-in-appeal is not sustainable and therefore, we set-aside the same. Accordingly, the appeal is allowed.

(Pronounced in the open court on 23.02.2024*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

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