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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No. 5267 of 2013**

Reserved on: August 03, 2017

Date of decision: August 31, 2017

INDIAN ASSOCIATION OF TOUR OPERATORS Petitioners
Through: Mr. J.K. Mittal & Mr. Rajveer Singh,
Advocates.

versus

UNION OF INDIA & ANR. Respondents
Through: Mr. Anuj Aggarwal and Mr. Gaurav
Singhal, Advocates for Respondent Nos.1 &
2.
Mr. Amit Bansal and Mr. Amit Kulshrestha,
Advocates for Respondent No.3.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

J U D G M E N T

Dr. S. Muralidhar, J.:

Introduction

1. This writ petition by the Indian Association of Tour Operators, seeks a declaration that Rule 6A of the Service Tax Rules, 1994 ('ST Rules'), concerning 'Export of services' is *ultra vires* the Finance Act 1994 ('FA'). The validity of Section 94 2 (f) of the FA is also challenged on the ground that it gives unguided and uncontrolled power to the central government to frame rules regarding 'provisions for determining export of taxable

services’.

2. The members of the Petitioner, who are Indian tour operators, are *inter alia* engaged in the business of arranging tours for foreign tourists visiting India as well as her neighbouring countries. They state that they enter into contracts with the foreign clients either directly or through foreign tour operators. Such contracts/bookings are generally made through phone calls or *emails*. The bookings are confirmed generally in writing by stating the cost and other terms and conditions. They make all arrangements for the foreign tourist including hotel accommodation, transport by all modes such as rail, tourist buses, monuments visits including entrance tickets, entertainment, food and restaurant bookings etc. Members of the Petitioner organize package tours which include a bouquet of services. It is stated that the foreign tourists/foreign tour operators make the entire payment for the package tour in convertible foreign exchange through bank transfer, or bank draft or credit card payment etc.

3. Sample copies of the invoices issued by the Indian tour operators to the foreign tourists for the period prior to 1st July 2012 and thereafter have been placed on record. Prior to insertion of Section 6A of the ST Rules with effect from 1st July 2012 tour operator services provided to foreign tourists was treated as ‘Export of services’ and exempted from the levy of service. The invoices raised after 1st July 2012 reveal that service tax @ 3.09% is charged on the cost of services provided by the Indian tour operators to foreign tourists.

4. At the outset, a caveat requires to be entered. With the introduction of the

Goods and Service Tax regime with effect from 1st July 2017, the provisions of the earlier FA and the rules thereunder stand repealed. We are in the present petition concerned with the legal position as it existed prior to 1st July 2017. In other words, the present petition is concerned with the question of payment of service tax by the Indian tour operators in respect of the services provided by them to foreign tourists during the period between 1st July 2012 and 1st July 2017.

Position prior to 1st July 2012

5. Service tax was introduced for the first time by the FA with effect from 1st July 1994. The relevant provisions concerning service tax were set out in Chapter V of the FA. Section 64 (1) of the FA stated that Chapter V would apply to the whole of India except Jammu and Kashmir. Section 64 (3) provided that it would apply to 'taxable services provided on or after the commencement of this Chapter'.

6. Section 65 (105) of the FA defined 'taxable service' to mean "any service provided or to be provided" to a whole range of persons as mentioned in clauses (a) to (zzzzw). Clause (n) of Section 65 (105) of the FA, which is relevant for the present petition, stated that the provision of service to any person "by a tour operator in relation to a tour" would be a taxable service. Section 66 of the FA provided for the 'charge of service tax.' Again, relevant for the present petition is the fact that Section 66 provided *inter alia* that service tax at the rate of 12% of the value of the taxable service referred to in Section 65 (105) (n) of the FA shall be levied and "collected in such manner as may be prescribed."

7. Section 93 (1) of the FA empowered the central government to exempt generally, or subject to such conditions as may be specified, a taxable service of any specified description from the whole or part of the service tax leviable thereon. Section 93 (2) permitted the central government to grant exemption from payment of service tax by a special order in each case under circumstances of exceptional nature.

8. The rule making power of the central government is provided in Section 94. Section 94 (1) states that the central government may make rules for carrying out the provisions of Chapter V of the FA which pertained to service tax. Section 94 (2) permits the central government to make rules on matters specified therein "without prejudice to the generality of " the power under Section 94 (1). Section 94 (2) (f) permits the central government to make rules 'for determining export of taxable services'.

9. On the strength of Sections 93 and 94 (2) (f) of the FA, the central government issued the Export of Services Rules 2005 ('ESR 2005'). Rule 3 (1) (ii) ESR 2005 *inter alia* stated that "export of taxable services shall in relation to taxable services specified in sub-clause (n) of clause (105) of Section 65 of the Act, be provision of such services as are performed outside India". The proviso thereto stated that where such taxable service is partly performed outside India, "it shall be treated as performed outside India."

10. Rule 3 (2) of ESR 2005 initially stated that the provision of any taxable service specified in Rule 3 (1) shall be treated as export of service when the following conditions are satisfied, viz.:

- (a) such service is delivered outside India and used outside India; and
- (b) payment for such service provided outside India is received by the service provider in convertible foreign exchange.

11. The Explanation to the Rule 3 (2) stated: “for the purposes of this rule ‘India’ includes the installations, structures and vessels in the continental shelf of India and the exclusive economic zone of India.”

12. Rule 3 (2) of ESR 2005 underwent changes first in 2007 and then again in 2010. As a result of these amendments, Rule 3 (2) ESR read thus:

"3 (2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely:

- (a) (omitted)
- (b) payment for such service is received by the service provider in convertible foreign exchange.

13. The Explanation to Rule 3 (2) too underwent a change and read thus after the 2010 amendment: “For the purposes of this rule ‘India’ includes the installations, structures and vessels in the continental shelf of India and the exclusive economic zone of India, for the purposes of prospecting or extraction or production of mineral, oil and natural gas supply thereof.”

14. Rule 4 of the ESR 2005 stated: “Any service, which is taxable under clause (105) of Section 65 of the Act, may be exported without payment of

service tax.”

15. The resultant position, prior to 1st July 2012, as far as export of tour operator services was that even if a part thereof was performed outside India and the remaining in India, it would still be treated as having been performed outside India and thereby be construed as an export of service. Such export of tour operator service was not exigible to service tax. This position continued till 1st July 2012.

Position after 1st July 2012

16. Significant changes were introduced in Chapter V of the FA with effect from 1st July 2012 by the Finance Act, 2012. Section 65 was omitted and substituted by Section 65 B titled ‘Interpretations’. Section 65 B (51) of the FA defined the expression ‘taxable service’ to mean any service on which service tax is leviable under Section 66B. Section 66B is the charging provision.

17. Section 66 B of the FA, inserted by the FA 2012 with effect from 1st July 2012, provided that: “there shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.” Prior to its omission by way FA 2013, with effect from 1st May 2013, there was an Explanation to Section 66B which stated that “for the removal of doubts, it is hereby clarified that the references to the provisions of Section 66 in Chapter V of the Finance Act, 1994 or any other Act, for the purpose of levy and collection of service tax,

shall be construed as references to the provisions of Section 66B.” This entire Explanation has now been inserted as a separate provision, Section 66 BA.

18. A plain reading of the charging provision, Section 66 B of the FA, brings out the following facets:

(i) Service tax is leviable on the value of all services “other than those services specified in the negative list.” The negative list of services are set out in Section 66D of the FA, inserted again with effect from 1st July 2012. Tour operator services is not part of the negative list.

(ii) Such service should be “provided or agreed to be provided” by one person to another and collected in such manner as may be prescribed.

(iii) Such service should be provided or agreed to be provided in the “taxable territory”. The expression ‘taxable territory’ has been defined under Section 65B (52) to mean “the territory to which the provisions of this Chapter apply.” Section 64 (1) of the FA states that Chapter V “extends to the whole of India except the State of Jammu and Kashmir.”

19. A collective reading of Section 66B read with Section 64 (1) and Section 65B (52) makes it plain that service tax is leviable only on services provided or agreed to be provided in the ‘taxable territory’ i.e. the whole of India except Jammu and Kashmir. Such service alone is ‘taxable service’ which is defined under Section 65 B (51) to mean that “any service on which service tax is leviable under Section 66B.” The net result is that services rendered

outside the taxable territory of India would not be a ‘taxable service’ for the purposes of the FA. This is of utmost significance since the entire Chapter V applies, in terms of Section 64 (3) of the FA only to “taxable services provided on or after the commencement of this Chapter.”

Rule making powers

20. The rule-making power of the central government is contained in Section 94 of the FA. Section 94 (1) talks of the general power of making rules to carry out the provisions of Chapter V of the FA. Section 94 (2) is a specific power and is without prejudice to the generality of the power under Section 94 (2) (f) permits the central government to make rules for “determining export of taxable services.” In other words, while such rules can describe what would constitute ‘export of taxable services’ they cannot possibly determine the taxability of such export of services.

21. Another provision of the FA which grants the central government a rule making power for a specific purpose is Section 66 C of the FA which too was inserted by the FA 2012. It empowers the central government to make rules for determining the place of provision of service. It states that the central government may “having regard to the nature and description of various services, by rules made in this regard, determine the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided.” The expression ‘such services’ in the above provision has to necessarily refer only to ‘taxable services.’ This is because in terms of Section 64 (3) of the FA Chapter V, in which Section 66 C is located, applies only to ‘taxable

services’.

22. In terms of Section 66C of the FA, the central government had made Place of Provision of Services Rules 2012 (‘PPSR 2012’). Under Rule 3 of PPSR 2012, it is stated that “the place of provision of a service shall be the location of the recipient of service.” The proviso thereto states that in case of services “other than online information and database access or retrieval services” where the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service. PPSR 2012 envisages the provision of service relating to the immovable property, events, and also performance based services. Rule 7 talks of place of services provided at more than one location. All these provisions talk of services in the taxable territory. They do not seek to describe export of services.

Analysis of Rule 6A

23. It in the above background that Rule 6A of the ST Rules, inserted with effect from 1st July 2012, requires to be examined. Rule 6A reads as under:

“6A Export of services –

(1) The provision of any service provided or agreed to be provided shall be treated as export of service when –

(a) the provider of service is located in the taxable territory

(b) the recipient of service is locate outside India

(c) the service is not a service specified in the Section 66D of the Act,

(d) the place of provision of the service is outside India

(e) the payment for such service has been received by the provider of service in convertible foreign exchange and

(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by Notification.”

24. The above insertion of Rule 6A was made by the Service Tax (Second Amendment) Rules 2012 by Notification No. 36/2012-ST dated 20th June 2012. A significant change is that Rule 6A brings within its ambit export of even non-taxable services whereas Section 94 (2) (f) permits making rules only in respect of ‘taxable service’. As already noted, prior to 1st July 2012 export of service was not a ‘taxable service’.

25. Rule 6A (1) of the ST Rules creates two problems for the Indian tour operator organising tours for foreign clients. While clauses (a) (b) and (c) are satisfied inasmuch as the tour operator is located in India, the recipient is located outside India, and the service is not included in the negative list under Section 66 D of the FA, clause (d) may not be satisfied where the service provided is a composite one viz., the place of provision of a part of the service is inside India and the remaining part outside India. Thus clause (d) is satisfied, if at all, only in part. The second issue that arises is that such service provided outside India cannot be made amenable to service tax under the FA since it is not a service rendered in the ‘taxable territory’.

26. Rule 6A is a departure from the earlier regime governing export of services. It may be recalled that under Rule 4 of the ESR 2005, tour operator service could be exported without payment of service tax. Further the proviso to Rule 3 (1) (ii) of ESR 2005 stated that where such taxable service is partly performed outside India, "it shall be treated as performed outside India." This took care of composite tour operator services which may have been provided partly outside India and partly within India. They were entirely outside the ambit of service tax. Rule 6A of the ST Rules, which substitutes the repealed ESR 2005, however, changes this position. While clauses (a) to (c) of sub-rule (1) of Rule 6A is consistent with the earlier description of 'export of services', clause (d) brings about a change inasmuch as it recognises only such tour operator service rendered outside India as 'export of service'. Further sub-rule (2) of Rule 6A states that the central government may by notification grant rebate of service tax or duty paid input services or inputs subject to conditions where there is an export of services. This pre-supposes that such provision of service outside India is in fact amenable to service tax. However, as already noticed, the entire Chapter V of the FA applies only to taxable services and taxable services are those provided in the taxable territory i.e. the whole of India except Jammu and Kashmir.

27. A further and more serious difficulty for the Indian tour operator, after 1st July 2012, stems from Rule 9 of the PPSR 2012 which states that where services provided are intermediary services, then the place of provision of service "is the location of service provider." For the purposes of the PPSR

2012, tour operator services are a species of 'intermediary services'. This has been clarified by the central government itself in the document titled: *Taxation of Services: An Education Guide* dated 20th June 2012 published by the Tax Research Unit (TRU) of the Central Board of Excise and Customs. Para 5.9.6 of this Guide prepared by the TRU clarifies that services provided by a tour operator will qualify as 'intermediary services.' Thus even where in terms of Rule 6A of the ST Rules, the service provided outside India by the Indian tour operator it is an 'export of service', under Rule 9 of the PPSR 2012 the place of provision even for such service would be "the location of the service provider" which would make it a service provided in India, when in fact it is not. Thus services provided to a foreign tourist both inside India and outside India are brought within the net of service tax by virtue of the combined operation of Rule 6A (1) and (2) ST Rules and Rule 9 of the PPSR 2012.

Foreign Trade Policy

28. At this stage, it is necessary to examine Foreign Trade Policy (FTP) for years 2009-14 regarding export and import of goods and services. Para 3.11 talks of 'Services Exports'. As per para 3.11.1 (a) thereof, all tradable services covered under the General Agreement on Trade in Services (GATS) are listed in Appendix 10 of Hand Book Procedure v1. If consideration is received in free foreign exchange, these tradable services would be considered as service exports. Clause (b) states that "all provisions of this Policy shall apply *mutatis mutandis* to export of services as they apply to goods." GATS includes 'tour operator services' which is covered under the sector 'Tourism and Travel Related Services'. If consideration is received in

free foreign exchange, these would be considered as service exports. Thus the policy of the Government of India was to encourage export of tour operator services as it earned valuable foreign exchange.

Representations by the Petitioner

29. It is stated that Indian tour operators through the Petitioner Association sought the extension of the benefit of export of services to tour operators. The Petitioner made a representation dated 22nd May 2012 to the Joint Secretary, TRU in the Ministry of Finance seeking exemption to the tour operators under the amended provisions based on foreign exchange earnings. It was *inter alia* contended that the principle of Export of Services cannot be changed year after year and that it should be defined through legislation by Parliament and not by the Rules. Since tour operators were earning huge foreign exchange for the country, they ought to be given the status of exporters of service. However, there was no response thereto.

30. It may be noted here that pursuant to an order dated 23rd August 2013 passed in the present case, the Petitioner filed an additional affidavit on 27th August 2013 bringing on record certain facts relevant to the functioning of the members of the Petitioner and the services provided by them. *Inter alia* it was pointed out that although payments were received in convertible foreign exchange the members of the Petitioner Association did not get the benefit of exports since the place of provision of service was treated as India.

31. According to the Petitioner, the action of the Respondent adversely affected the interests of tour operators. They had to suffer huge service tax

liability without being extended the benefit of 'Export of Service'. The net result was that in terms of PPSR 2012, the place of provision of service was deemed to be the location of the service provider which is in India. In order to qualify as an export of service under Rule 6 A the place of provision of service had to be outside India. Thus tour operator services provided to foreign tourists, part of which was provided outside India and part within, could not be treated as export of services.

Submissions on behalf of the Petitioner

32. Mr. J.K. Mittal, learned counsel appearing for the Petitioner, submitted that there was an anomalous situation where provision of package tour services to foreign tourists outside India, for instance in the neighbouring countries, were also sought to be taxed in India. Mr. Mittal referred to the decision of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) in ***Cox & Kings India Limited v. Commissioner 2014 (35) STR 817 (Tri-Del)*** where it was held that service tax cannot be levied with regard to outbound tours arranged for Indians by the Indian tour operators since it was a service provided outside the taxable territory of India. It was held that the FA did not have extra-territorial operation.

33. The central thrust of the submissions of Mr. Mittal is that Rule 6A suffers from the vice of excessive delegation. This is because as non-taxable services such as services provided outside the taxable territory to foreign tourists, are sought to be brought within the ambit of service tax. Rule 6A is assailed as being *ultra vires* the FA. Reference was made to the decisions of the Supreme Court in ***Union of India v. S. Srinivasan (2012) 7 SCC 683***

and ***General Officer Commanding-in-Chief v. Subhash Chandra Yadav (1988) 2 SCC 35***. Mr. Mittal pointed out that Section 94 (2) (f) of the FA enabled the central government to make rules only for determining export of taxable services. No tax thereon could be levied by the central government in terms of the said provision. That was an essential legislative function which could not have been delegated to the central government. Reference was made to the decisions in ***Municipal Corporation of Delhi v. Birla Cotton Spinning & Weaving Mills AIR 1968 SC 1232*** and ***Union of India v. Indian Charge Chrome 1999 (112) ELT 753 (SC)***.

34. Mr. Mittal submitted that if Section 94 (2) (f) of the FA was interpreted as permitting such delegation of essential legislative function, then Section 94 (2) (f) of the FA too would be vulnerable to invalidation on the ground that it was *ultra vires* the FA. Mr. Mittal submitted that as a result of having to pay service tax, which had to be passed on to the customers i.e. foreign tourists, the Indian tour operators were losing business to their foreign counterparts. It was further contended that Rule 6A was arbitrary, discriminatory and violative of Articles 14 and 19 (1) (g) of the Constitution of India.

Submissions on behalf of the Respondents

35. Mr. Amit Bansal, learned counsel appearing for Respondent No. 3, Commissioner of Service Tax, submitted that in terms of Section 94 (1) of the FA it was permissible for the central government to make rules as long as they were consistent with the object and purpose of the FA. Mr. Bansal referred to the decisions in ***Pratap Chandra Mehta v. State Bar Council of Madhya Pradesh (2011) 9 SCC 573***, and ***Kunj Behari Lal Butail v. State of***

H.P. AIR 2000 SC 1069. He maintained that Rule 6A of the ST Rules was validly made in terms of the power granted to the central government under Section 94 (2) (f) of the FA. Reliance was placed on the decision in ***State of T.N. v P. Krishnamurthy (2006) 4 SCC 517.***

36. Mr. Bansal did not dispute that the services provided outside the taxable territory cannot be made amenable to service tax under Section 66B of the FA. He also was unable to dispute that in the counter affidavit filed in the present case there is an admission by the Respondents that no service tax is leviable on export of services. He submitted that *de hors* Section 66B, the central government could make rules for determining the place of provision of services. Rule 9 of the PPSR 2012 read with Rule 6A of the ST Rules permitted levy of service tax since the service to the foreign tourist was provided in India by the tour operator located in India. Mr Bansal pointed out that if service tax was paid on such services then under Rule 6A (2) the corresponding input tax credit would also be available. According to Mr. Bansal, Rule 6A did not alter the taxability or non-taxability of a service provided by a tour operator.

37. Mr. Bansal submitted that under Section 93A of the FA, rebate was granted in cases “where any goods or services are exported.” Section 93B of the FA stated that all rules made under Section 94 and applicable to the taxable services shall also be applicable to any other service insofar as they are relevant to the determination of any tax liability, refund, credit of service tax or duties paid on inputs and input services or for carrying out the provisions of Chapter V of the Finance Act.

38. Mr. Bansal submitted that the principle of purposive construction of statutes should be applied. He referred to the decision in ***K.P. Varghese v. ITO, Ernakulam AIR 1981 SC 1922***. He submitted that Rule 6A of the ST Rules was not beyond rule making power of the central government and was not *ultra vires* the FA. He further submitted that Section 66C read with Section 94 (2) (hhh) of the FA gave the central government power to determine the rate of service tax and the place of provision of taxable service. Therefore, it could not be said that the Parliament has established no criteria, or no standard or that there was plenary, unguided and uncontrolled delegation of the essential legislative function to the central government. The mere receipt of convertible foreign currency from foreigners cannot be the only criteria for determining whether the provision of services by tour operators to foreign tourists in India should be considered as export of services. Reliance was placed by Mr. Bansal on the decision in ***Subhash Photographics v. Union of India 1993 (66) ELT 3 (SC)*** where it was held that the Courts should not question the wisdom of government's policy and interfere with delegated legislation. Reference was also made to the decision in ***Avinder Singh v. State of Punjab (1979) 1 SCC 137***.

Challenge to Rule 6 A on the ground of excessive delegation

39. Rule 6A of the ST Rules is a piece of delegated of legislation. It is a rule made by the central government in exercise of the powers under Section 94 (1) read with Section 94 (2) (f) of the FA. The grounds on which delegated legislation can be challenged are well-settled and set out in G. P. Singh's Principles of Statutory Interpretation, 10th Edition as under:

“Grounds for judicial review

Delegated legislation is open to the scrutiny of courts and may be declared invalid particularly on two grounds: (a) violation of the Constitution; and (b) violation of the enabling Act. The second ground includes within itself not only cases of violation of the substantive provisions of the enabling Act, but also cases of violation of the mandatory procedure prescribed. It may also be challenged on the ground that it is contrary to other statutory provisions or that it is so arbitrary that it cannot be said to be in conformity with the statute or Article 14 of the Constitution or that it has been exercised in bad faith. The limitations which apply to the exercise of administrative or quasi-judicial power conferred by a statute except the requirement of natural justice also apply to the exercise of power of delegated legislation. Rules made under the Constitution do not qualify as legislation in true sense and are treated as subordinate legislation and can be challenged in judicial review like delegated legislation. Compliance with the laying requirement or even approval by a resolution of Parliament does not confer any immunity to the delegated legislation but it may be a circumstance to be taken into account along with other factors to uphold its validity although as earlier seen a laying clause may prevent the enabling Act being declared invalid for excessive delegation."

40. In ***General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav*** (*supra*), the Supreme Court explained the position thus:

"It is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."

41. In ***Union of India v. S. Srinivasan*** (2012) 7 SCC 683 the above principles were reiterated in the following words:

“16. At this stage, it is apposite to state about the rule making powers of a delegating authority. If a rule goes beyond the rule making power conferred by the statute, the same has to be declared *ultra vires*. If a rule supplants any provision for which power has not been conferred, it becomes *ultra vires*. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it.”

42. An essential legislative function cannot be delegated to the executive. It has to be exercised by the legislature. This was emphasized in the decision in *Vasu Dev Singh v. Union of India (2006) 12 SCC 753* in the following words:

“118. A statute can be amended, partially repealed or wholly repealed by the legislature only. The philosophy underlying a statute or the legislative policy, with the passage of time, may be altered but therefor only the legislature has the requisite power and not the executive. The delegated legislation must be exercised, it is trite, within the parameters of essential legislative policy. The question must be considered from another angle. Delegation of essential legislative function is impermissible. It is essential for the legislature to declare its legislative policy which can be gathered from the express words used in the statute or by necessary implication, having regard to the attending circumstances. It is impermissible for the legislature to abdicate its essential legislative functions. The legislature cannot delegate its power to repeal the law or modify its essential features.”

43. The question that requires to be answered is whether the levy of tax on services is an essential legislative function that cannot be delegated? The answer perhaps lies in the language of Section 94 of the FA itself. Section 94 (1) is the general power given to the central government to make rules to carry out the provisions of Chapter V of the FA. The words 'carry out' necessarily imply providing a mechanism for the levy enforcement and

collection of service tax. The Rules in this sense are instrumental and intended to achieve the objects of the main statute.

Rule 6A is ultra vires Section 94 (2) (f)

44. Turning to Section 94 (2), it basically lists out the topics on which rules can be made. It talks of laying down the procedure for carrying out various tasks set out in the FA or to provide the form in which returns are to be filed, appeals preferred. Specific to the case on hand, Section 94 (2) (f) empowers central government to make rules for 'determining' when export of 'taxable services' can be said to take place. It does not empower the central government to determine whether there can be an export of non-taxable services viz., services provided outside the taxable territory. Secondly, it does not empower the central government to make rules levying or making amenable the provision of certain services to service tax. Section 94 (2) (hhh) also permits making rules regarding the 'date for determination of rate of service tax' and 'place of provision of taxable service'. It does not provide for making rules on determination of taxability of a service. 'Subjecting certain types of services to tax is an essential legislative function. In this case, since the FA envisages Chapter V applying only to taxable services, bringing non-taxable services within the ambit of service tax, is impermissible.

45. Section 93 B of the FA states that the Rules made under Section 94 would also apply to any other service "in so far as they are relevant to the determination of any tax liability...or for carrying out the provisions of Chapter V" of the FA. However the whole of Chapter V applies only to taxable service. If by means of rules under Section 94, what is not taxable

under the FA cannot be made taxable, equally they cannot even by rules under Section 93 B. The words 'any other service' occurring in Section 93 B is subject to Section 64 (3) of the FA that precedes it. It cannot expand the scope of Chapter V itself. As already noted, this is an essential legislative function and cannot be delegated to the central government.

46. As already noticed Rule 6A (1) (d) treats even services provided outside the taxable territory i.e. where the place of provision of service is outside India, as an export of 'taxable' service. Since such service by virtue of Section 66B read with Section 65 (51) and (52) read with Section 64 (1) and (3) of the FA is not amenable to service tax in the first place, and is therefore not 'taxable' service, Rule 6A is *ultra vires* the FA. Even Section 94 (2) (hh) of the FA permits central government to determine when there would be an export of 'taxable service' and not 'non-taxable service.' Something which is impermissible under the FA cannot, by means of the rules made thereunder, be brought within the net of service tax.

47. Viewed from another angle, since tour operator services are intermediary services and under Rule 9 of the PPSR 2012 the place of provision of service is the location of the service provider, the package tours service provided by an Indian tour operator to a foreign tourist will, notwithstanding that some part of it is provided outside India, be treated as service provided in India. As a result no Indian tour operator can expect the service rendered by him to a foreign tourist to be considered as an 'export of service' under Rule 6A as he will never be able to meet the requirement of Rule 6A (1) (d) of the ST Rules. Thus under a combination of Rule 6A of the ST Rules and

Rule 9 of the PPSR 2012 something which is non-taxable under the FA is sought to be brought to tax.

48. As already noticed since by virtue of Section 64 (3) the whole of Chapter V applies only to taxable services, and Section 66 C of the FA falls in that very chapter, the rules made by the central government under Section 66 C has to necessarily be only in relation to taxable services viz., services provided in the taxable territory of India. The legal fiction of treating service rendered outside India to be a service rendered in India cannot be introduced by way of rules. That too would partake the character of an essential legislative function, which cannot be delegated to the central government. In fact such service cannot be brought to tax without amending Section 64 (3) of the FA.

49. Parliament has for the first time under the Constitution (One Hundred and First Amendment) Act, 2016 effective 8th September 2016 amended Article 286 (1) to provide that there will be tax on the export of services out of the territory of India. Article 286 (2) of the Constitution of India has been amended simultaneously to provide that Parliament may by law formulate the principles to determine when an export of services takes place in any of the ways mentioned in Article 286 (1). This is another indication that these tasks cannot be delegated to the central government to determine by rules.

50. While it is one thing to say that tour operator service provided in India is not in the negative list under Section 66 D of the FA and is, therefore, amenable to service tax, it is another to contend that notwithstanding that Chapter V of the FA applies only to taxable services by virtue of Section 64

(3) FA, a non-taxable service that is provided outside the taxable territory can also be included by Rule 6A of the ST Rules in determining what constitutes export of services. Thus not only Rule 6A but even Section 94 (2) (f) of the FA would also be unconstitutional if it were to be interpreted to permit determination of even export of non-taxable services not to talk of bringing to tax what is non-taxable under the FA.

Taxability of composite services

51. At this juncture it is necessary to examine what is the types of service provided by the Indian tour operator to a foreign tourists when arranging for package tours not only in India but in the neighbouring countries as well. Let us take the example of an Indian tour operator organising a package tour for foreign tourists in India and its neighbouring countries say Nepal and Bhutan. Undoubtedly this would comprise a composite bouquet of services. This might involve several steps at each stage such as planning, scheduling and organising the tour. Incidental steps would include fixing the probable dates and venues, finalising the itinerary, booking of accommodation in hotels in India and foreign countries, making travel and transport arrangements, arranging visa and travel insurance, sight-seeing trips, catering arrangements, providing services of tourist guides, providing a tour leader to accompany the touring party; arranging for complementary bags/snacks hampers, shopping bags, passport pouches etc. The tasks might involve co-ordinating with foreign counterparts or directly the clients themselves through e-mails, phone calls etc. Some of these services are provided in the territory outside India, some possibly within India. When the service is composite and a payment therefor is charged and made in a

lumpsum, it is difficult to make the apportionment of the charges as being towards services rendered in the taxable territory i.e. India and the balance towards those provided outside India.

52. Therefore, apart from the fact that the provision for taxing export of services has to be found in the statute itself (and not in the rules) the statute must also provide the machinery by which it can be determined with some certainty how much of the composite service can be said to be rendered in the taxable territory and of what value for the purposes of levy and collection of tax. If there is no such machinery provided, that would be an additional ground of invalidation of the levy itself. In ***Govind Saran Ganga Saran v. Commissioner of Sales Tax AIR 1985 SC 1041*** the Supreme Court explained in para 6, as under:

“6. The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity.”

53. Section 6A (1) of the ST Rules, insofar as it applies to export of tour operator services, suffers from the vice of excessive delegation inasmuch as the central government has been permitted to determine what shall constitute export of services, both taxable and non-taxable. Such an essential legislative function could not have been delegated to the central government.

Once the Parliament determines by law what is amendable and not amenable to service tax, the modalities for working out the procedure for levy and collection of such tax can be left to the Rules. However, the question of whether certain services should be amenable to tax cannot be left to be determined by rules made by the central government.

54. The Courts will not ordinarily question legislative wisdom. However, the Courts will strike down delegated legislation that is *ultra vires* the parent statute. Even a legislative policy has to conform to the Constitution. In ***State of Rajasthan v. Basant Nahata (2005) 12 SCC 77*** the Supreme Court explained:

“66. The contention raised to the effect that this Court would not interfere with the policy decision is again devoid of any merit. A legislative policy must conform to the provisions of the constitutional mandates. Even otherwise a policy decision can be subjected to judicial review.”

Conclusion

55. For all the aforementioned reasons, the Court declares that:

(i) Rule 6A (1) read with Section 6A (2) of the ST Rules, insofar as it seeks to describe export of tour operator services to include non-taxable services provided by tour operators, is *ultra vires* the FA and in particular Section 94 (2) (f) of the FA and is, therefore, invalid.

(ii) Section 94 (2) (f) or (hhh) of the FA does not empower the central government to decide taxability of the tour operator services provided outside the taxable territory. They only enable the central government to determine what constitutes export of service, the date for determination of

the rate of service or the place of provision of taxable service.

(iii) Section 66 C of the FA enables the central government only to make rules to determine the place of provision of taxable service but not non-taxable service.

56. The net result is that the services provided by Indian tour operators to foreign tourists during the period 1st July 2012 to 1st July 2017, which has been paid for in convertible foreign exchange would not be amenable to service tax.

57. Mr. Bansal urged that this Court should apply the principle of prospective overruling so that the central government does not have to refund the service tax collected on the services provided by Indian tour operators to foreign tourists. This Court would only like to observe that if as a result of this judgment any service tax becomes refundable, the claim for refund will be processed and paid in terms of the extant provisions of the FA read with the Central Excise Act 1944 and the rules thereunder.

58. The writ petition is disposed of in the above terms with no order as to costs.

S.MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 31, 2017

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