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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 16.07.2018

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W.P.(C) 4740/2017

DUTTMENON DUNMORRSETT

..... Petitioner

Through: Mr. Tushar Jarwal, Adv. with Mr. Rahul Sateerja, Adv.

Ms. Priyadarshi Manish, Ms. Anjali J. Manish, Ms. Nidhi Saini, Adv.

Versus

UNION OF INDIA & ORS.

..... Respondent

Through: Mr. Sanjeev Narula, SSC with Mr. Abhishek Ghai, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J. (ORAL)

1. The petitioner has questioned a demand of ₹38,30,003/- made by the learned Assistant Commissioner of Service Tax consequent upon an adjudication, resulting in the order in original dated 31.03.2017. The petitioner, a law firm submits that the amounts paid to senior counsel for services rendered to third party clients in the form of representation in Courts etc., cannot be subjected to service tax levy under the Finance Act, 1994, in its hands. In this case, the impugned order, i.e. the order in original dated 31.03.2017 of the learned Assistant Commissioner relied upon Rule 5 of the Service Tax (Determination of Value) Rules, 2006 (hereafter referred to as

‘the Rules’) to hold that the reimbursement, by its clients to the petitioner, had to be included in the value of services that was subjected to levy.

2. The levy in this case was, for the first time, introduced on 01.09.2009 by insertion of Section 65(105)(zzzzm) of the Finance Act, 1994 by way of substitution. The two show cause notices issued to the petitioner cover the period from 01.09.2009 to 30.06.2012. The petitioner relies upon a Division Bench ruling of this Court in *Intercontinental Consultants & Technocrats Pvt. Ltd. v. Union of India* 2013 (29) STR 9 (Del.). In this judgment, the Court had declared that Rule 5(1) of the Rules to the extent it mandates inclusion of reimbursements to the assessee, in respect of payments made to third parties cannot be subjected to service tax levy. The judgment was later affirmed by the Supreme Court in *Union of India v. Intercontinental Consultants Pvt. Ltd.* (2018) 4 SCC 669 (CA 2013/2014 and connected cases). This Court had in its judgment in *Intercontinental Consultants & Technocrats Pvt. Ltd.* (supra), held as follows:

“18. Section 66 levies service tax at a particular rate on the value of taxable services. Section 67(1) makes the provisions of the section subject to the provisions of Chapter V, which includes Section 66. This is a clear mandate that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies a tax only on the taxable service and nothing else. There is thus inbuilt mechanism to ensure that only the taxable service shall be evaluated under the provisions of 67. Clause (i) of sub-section (1) of Section 67 provides that the value of the taxable service shall be the gross amount

*charged by the service provider "for such service". Reading Section 66 and Section 67(1)(i) together and harmoniously, it seems clear to us that in the valuation of the taxable service, nothing more and nothing less than the consideration paid as quid pro quo for the service can be brought to charge. Sub-section (4) of Section 67 which enables the determination of the value of the taxable service "in such manner as may be prescribed" is expressly made subject to the provisions of sub-section (1). The thread which runs through Sections 66, 67 and Section 94, which empowers the Central Government to make rules for carrying out the provisions of Chapter V of the Act is manifest, in the sense that only the service actually provided by the service provider can be valued and assessed to service tax. We are, therefore, undoubtedly of the opinion that Rule 5(1) of the Rules runs counter and is repugnant to Sections 66 and 67 of the Act and to that extent it is ultra vires. It purports to tax not what is due from the service provider under the charging Section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure and costs which are incurred by the service provider "in the course of providing taxable service". What is brought to charge under the relevant Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes far beyond the charging provisions and cannot be upheld. It is no answer to say that under sub-section (4) of Section 94 of the Act, every rule framed by the Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule. As pointed out by the Supreme Court in *Hukam Chand v. Union of India*, AIR 1972 SC 2427 :-*

"The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act."

Thus Section 94(4) does not add any greater force to the Rules than what they ordinarily have as species of subordinate legislation.

19. For the above reasons we quash the impugned show-cause notice and allow the writ petition with no order as to costs.”

3. These findings were affirmed by the Supreme Court, in the following terms:

“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.

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 01, 2006) or after its amendment, with effect from, May 01, 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.

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."

4. In view of these developments, this Court is of the opinion that the Revenue could not have included the payments received as reimbursements, payments made by the assessee/petitioner or received through reimbursements towards Senior Counsel fee, in the value of services rendered by it. Consequently, the impugned order in original dated 31.03.2017 is hereby quashed. The Assessing Officer is hereby directed to initiate fresh proceedings for assessment during the relevant period in respect of any other claims that may be maintainable in law. All rights and contentions of the parties are

hereby reserved.

The writ petition is allowed in the above terms.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JULY 16, 2018

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