IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.02.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.2220 of 2016

The Principal Commissioner of Service Tax,
Newry Towers, Plot No.2054, I Block,
2nd Avenue, 12th Main Road,
Anna Nagar, Chennai-600 040. .. Appellant

-vs-

1.JSA Forwarders,
Old No.81, New No.163,
Thambu Chetty Street,
Chennai-600 001.

2.Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhawan Annexe,
I Floor, 26, Haddows Road, Chennai-600 006. .. Respondents

APPEAL under Section 35-G of the Central Excise Act, 1944 to set aside the order dated 09.03.2016 made in Final Order No.40457 of 2016 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.A.P.Srinvias,
Senior Standing Counsel

For Respondent-1 : Mr.J.Shankarraman

JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

This appeal has been filed by the Revenue under Section 35-G of the Central Excise Act, 1944, challenging the order of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai in Final Order No.40457 of 2016, dated 09.03.2016.

2.The above appeal was admitted, on 07.10.2016, on the following substantial question of law:-

"Whether the CESTAT is right in holding that reimbursement charges are not liable to Service Tax when Sec.67(1)(i) of the Finance Act provides that where service tax is chargeable on any taxable service with reference to its value, then such value shall in a case where the provision of service tax is for a consideration in money, be the gross amount charges by the service providers for such service provided."

3.Heard Mr.A.P.Srinivas, learned Senior Standing Counsel for the appellant/Revenue; and Mr.J.Shankarraman, learned counsel for the respondent/assessee.

4.The learned counsel for the respondent/assessee pointed out that the substantial question of law framed for consideration in this appeal has been answered in favour of the assessee by the Hon'ble Supreme Court in the case of Union of India vs. Intercontinental Consultants & Technocrats (P) Ltd., [(2018) 4 SCC 669].

5.Mr.A.P.Srinivas, learned Senior Standing Counsel for the appellant does not have any instructions from the Department.

6.However, having regard to the submission made by the learned counsel for the respondent/assessee, we have gone through the decision of the Hon'ble Supreme Court in the case of Intercontinental Consultants & Technocrats (P) Ltd. (supra) and we find that the substantial question of law raised in this appeal is covered by the said decision. For better appreciation, the operative portion of the said decision are quoted hereinbelow:-

"23.Undoubtedly, Rule 5 of the Rules, 2006 brings within its sweep the expenses which are incurred while rendering the service and are reimbursed, that is, for which the service receiver has made the payments to the assessees. As per these Rules, these reimbursable expenses also form part of gross amount charged. Therefore, the core issue is as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5. As noted above, prior to April 19, 2006, i.e., in the absence of any such Rule, the valuation was to be done as per the provisions of Section 67 of the Act.

....

25.Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various subclauses 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.

26.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.

27.This position did not change even in the amended Section 67 which was inserted on May 01, 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 subsection (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.

....

....

31.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 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-à-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.
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> 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 8 (2015) 1 SCC 1 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.”

32.As a result, we do not find any merit in any of those appeals which are accordingly dismissed.”

7.In the light of the decision of the Hon'ble Supreme Court referred above, the appeal filed by the Revenue is dismissed and the substantial question of law is answered against the Revenue. No costs.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

abr

To

1.Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhawan Annexe 1st Floor,
26, Haddows Road, Chennai-600 006.

2.The Commissioner,
O/o The Commissioner of Service Tax,
MHU Complex, 692, Anna Salai,
Nandanam, Chennai-35.

+1cc to Mr.A.P.Srinivas, Advocate SR.No.19528

C.M.A.No.2220 of 2016

CNR (CO)
GMY(20/05/2019)