IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.03.2020

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THE HONOURABLE MR.JUSTICE R.MAHADEVAN

W.P.No.10268 of 2006
and
WP.MP.No.11603 of 2006

M/s.Intimate Fashions (India) Pvt. Ltd
represented by its Head - Corporate Finance,
K.R.Narayanan.

... Petitioner

Vs.

1. The Union of India,
   represented by the Secretary to Government,
   Ministry of Finance,
   Department of Revenue,
   New Delhi.

2. The Central Board of Excise & Customs,
   North Block, Ministry of Finance,
   Department of Revenue,
   Government of India,
   New Delhi.

3. The Commissioner of Central Excise,
   Chennai - III Commissionerate,
   No.121, Mahatma Gandhi Road,
   Nungambakkam, Chennai - 600 034.

... Respondents

Prayer:

Petition filed under Article 226 of the Constitution of India to issue a Writ of Declaration, declaring that Explanation to Section 65(105) of the Finance Act, 1994 read with amended Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 coming into effect from 16.6.2005 is ultra vires Sections 64, 65, 66, 67 and 68 of the Finance Act, 1994 and therefore requires to be declared invalid.

For Petitioner : Mr.R.Karthikeyan
For Respondents : Mr.A.P.Srinivas,SGC & R1

O R D E R

According to the petitioner, they are engaged in the business of manufacturing undergarments. They are 100% Export Oriented Unit holding Registration No.AAACI CX M 001 with Maraimalai Nagar II Range of Tambaram Division. On 01.01.1999, they entered into an Agency agreement with one M/s.Triumph International Overseas Ltd (TIOL), a corporation organised and existing under the laws of Liechtenstein as a non-exclusive selling agent, to sell the products in the territories outside the India with an automatic extension clause, for the period of five years. Be that as it may, the officers of Central Excise Headquarters (Preventive Unit), Chennai-III Commissionerate, visited the factory of the petitioner on 15.10.2005 and 29.11.2005. After scrutinizing the accounts, it was found that the petitioner had paid Rs.5.18 crores and Rs.7.81 crores towards agency commission to TIOL, for the period 2003-04 and 2004-05 respectively. Based on the same, the third respondent issued a show cause notice dated 28.02.2006 to the petitioner, demanding payment of service tax and education cess due on the commission paid to the foreign commission agents for the period from 09.07.2004 to 31.10.2005, along with penalty and interest. Feeling aggrieved, the petitioner has filed this writ petition seeking declaration, declaring Explanation to Section 65(105) of the Finance Act, 1994 r/w amended Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 as ultra vires Sections 64, 65, 66, 67 and 68 of the Finance Act, 1994 and the show cause notice as invalid.

2.Upon notice, the respondents filed a detailed counter affidavit,inter alia stating that Explanation to Section 65(105) is only a clarification to the already existing service tax; the service tax in respect of services rendered by a commission agent is classified under Business Auxillary Services as early as 1.7.2003 and the concept of collecting service tax from the service recipient is not new, which has been introduced with effect from 16.6.2005. It is further averred therein that the services provided by the commission agent to the petitioner are covered under the taxable service of Business Auxiliary service as defined in Section 65(19) of the Act; as per Rule 2(1)(d)(iv) of the Service Tax Rules, 1994, the service receiver i.e., the petitioner is the person liable for paying the service tax for the period from 09.07.2004 in view of the Service Tax Rules, 2002 as well as the Service Tax Rules, 2005; and hence, the show cause notice dated 28.02.2006 came to be issued to the petitioner demanding service tax along with interest and penalty.

3.However, when the matter was taken up for hearing, the learned counsel appearing for both sides jointly submitted that the issue involved herein had already been considered in T.Abdul Wahid & Co. v. Union of India [2017 (47) STR 123 (Mad.)], wherein, this Court, after following the decision of a Division Bench of the Bombay High Court in Indian National Shipowners Association v. Union of India [2009 (13) STR 235 (Bombay)] which was affirmed by the Supreme Court in SLP(Civil) No.18932 of 2009 by order dated 14.12.2009 [2010 (17) STR. J57 (SC)], has disposed of the writ petitions, holding that the respondents therein are not entitled to levy service tax on the petitioners upto 17.04.2006, in respect of the services availed by them, as it is clear that Section 66A had been inserted in the Finance Act, 1994 by way of an amendment, by the Finance Act, 2006 only with effect from 18.04.2006, enabling the authorities concerned to levy service tax on the recipients of the taxable service.

4.For better appreciation, the relevant portion of the aforesaid order is extracted hereunder:

> "2. At this stage of the hearing of the writ petitions, the learned counsel appearing on behalf of the petitioners had submitted that the issues arising for the consideration of this Court, in the present writ petitions, had already been considered by a Division Bench of the High Court of Bombay, in Indian National Shipowners Association V. Union of India [2009(13) STR 235 (Bombay)], wherein it had been held as follows:
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> > "20. It appears that a similar provision in the rules was made applicable by the Government in relation to the Clearing Agents by making customers of the Clearing Agent liable for levy of the service tax. That question has been decided by the Supreme Court by its judgment in the case of Laghu Udyog Bharati (supra) and the Supreme Court has clearly laid down that the imposition of the service tax is on the persons rendering the services and by making a provision in the Rules, levy of tax cannot be shifted to the recipients of the services and the Rule framed which brought about this situation has been declared by the Supreme Court to be invalid. The law laid down by the Supreme Court in its judgment in Laghu Udyog (supra) is squarely applicable to Rule 2 (1)(d)(iv), which is relied on in this case. It appears that it is first time when the Act was amended and Section 66A was inserted by Finance Act, 2006

w.e.f.18-4-2006, the Respondents got legal authority to levy service tax on the recipients of the taxable service. Now, because of the enactment of Section 66A, a person who is resident in India or business in India becomes liable to be levied service tax when he receives service outside India from a person who is non-resident or is from outside India. Before enactment of Section 66A it is apparent that there was no authority vested by law in the Respondents to levy service tax on a person who is resident in India, but who receives services outside India. In that case till Section 66-A was enacted a person liable was the one who rendered the services. In otherwords, it is only after enactment of Section 66-A that taxable services received from abroad by a person belonging to India are taxed in the hands of the Indian residents. In such cases, the Indian recipient of the taxable services is deemed to be a service provider. Before enactment of Section 66-A, there was no such provision in the Act and therefore, the Respondents had no authority to levy service tax on the members of the Petitioners-association.

21. In the result, therefore, the petition succeeds and is allowed. Respondents are restrained from levying service tax from the members of the Petitioners-association for the period from 1-3-2002 till 17-4-2006, in relation to the services received by the vessels and ships of the members of the Petitioners-association outside India, from persons who are non-residents of India and are from outside India."

3. The learned counsel appearing on behalf of the petitioners had also submitted that the above decision of the Division Bench of the High Court of Bombay had been confirmed by the Supreme Court, in S.L.P. (Civil) No.18932 of 2009, by an order, dated 14.12.2009.

4. The said submissions made by the learned

counsel appearing on behalf of the petitioners had not been refuted by the learned counsels appearing on behalf of the respondents.

5. In such circumstances, the present writ petitions are disposed of holding that the respondents are not entitled to levy service tax on the petitioners upto 17.4.2006, in respect of the services availed by them, as it is clear that Section 66A had been inserted in the Finance Act, 1994, by way of an amendment, by the Finance Act, 2006, only with effect from 18.4.2006, enabling the authorities concerned to levy service tax on the recipients of the taxable service."

5.Following the aforesaid decision, which holds good in respect of the prayer made in this writ petition, this Court has no hesitation to hold that the respondent authorities has no power to levy service tax prior to 17.04.2006 and therefore, the impugned show cause notice is liable to be quashed. Further, having regard to the admitted fact that after the introduction of Section 66A, the explanation to Section 65(105) was also deleted, the show cause notice issued on the basis of the said explanation to Section 65(105) of the Finance Act, 1994 r/w amended Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 is not valid in law.

6.Accordingly, the writ petition stands allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

1. The Secretary to Government,
   Union of India,
   Ministry of Finance,
   Department of Revenue,
   New Delhi.

2. The Central Board of Excise & Customs,
   North Block, Ministry of Finance,
   Department of Revenue,
   Government of India,
   New Delhi.

3. The Commissioner of Central Excise,
   Chennai - III Commissionerate,
   No.121, Mahatma Gandhi Road,
   Nungambakkam, Chennai - 600 034.

+1cc to Mr.R.Karthikeyan, Advocate, Sr.No.22218
+1cc to Mr.A.P.Srinivas, Advocate, Sr.No.22858

W.P.No.10268 of 2006

SSV(CO)
GS(08/07/2020)