

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.01.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

C.M.A.Nos.2340 and 2341 of 2012

M/s.Pioneer Services,
Rep., by its Partner,
Shri.I.Mohammed Khalifathualla,
No.56-57, II Floor,
Rajaji Salai, Chennai-600 001.

.... Appellant in both Appeals

-vs-

1.The Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhawan Annexe, 1st Floor,
No.26, Haddows Road, Chennai-600 006.

2.The Commissioner of Service Tax,
Service Tax Commissionerate,
692, Anna Salai, MHU Complex,
Nandanam, Chennai-600 035.

.... Respondents in both Appeals

Appeals under Section 35G of the Central Excise Act, 1944
against the order dated 20.03.2012 made in Final Order Nos.277 &
278/2012 on the file of the Customs, Excise & Service Tax
Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.S.Murugappan
(In both Appeals)

For Respondents : R1 - Tribunal
(In both Appeals)
: R2 - Mr.A.P.Srinivas,
Senior Standing Counsel

COMMON JUDGMENT

(Judgment of the Court was delivered by T.S.Sivagnanam, J.)

These appeals, by the assessee, filed under Section 35G of the Central Excise Act, 1944, are directed against the order dated 20.03.2012, made in Final Order Nos.277 & 278/2012 on the file of the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

2.The appeals were admitted, on 02.08.2012, on the following substantial questions of law:-

"1.When the issue is revenue neutral without involving of any out flow of net tax to the Government, can there be finding of suppression with intent to evade tax for invoking the extended period of limitation for demanding tax?

2.When actual expenses paid to another service provider are reimbursed by the service receiver, can still the authorities hold that that service also ought to have been provided by the appellant and therefore, the charges in this regard cannot be excluded as charges paid in the capacity as a 'Pure Agent'?

3.Whether the omission to mention certain details in the periodical returns to be filed with the authorities can, by itself, constitute evidence of suppression of facts with a deliberate and wilful intention to evade tax?"

3.We have heard Mr.S.Murugappan, learned counsel for the appellant/assessee and Mr.A.P.Srinivas, learned Senior Standing Counsel for the 2nd respondent/Revenue in both the appeals.

4.We first take up substantial question of law no.2 for consideration and a decision on the said question would have a direct bearing on substantial question of law nos.1 and 3.

5.It cannot be disputed by the Revenue that substantial question of law no.2, as framed above, was held in favour of the assessee in a decision of the Hon'ble Supreme Court in Union of India vs. Intercontinental Consultants and Technocrats Pvt. Ltd., [2018 (10) G.S.T.L. 401 (SC)]. Relevant portion of the judgment reads as follows:-

"21) 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 assesseees. 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.

22) Section 66 of the Act is the charging Section which reads as under:

"there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clausesof Section 65 and collected in such manner as may be prescribed."

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 thereupon.

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.

25) 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 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 bye-law, 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 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.

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."

30) As a result, we do not find any merit in any of those appeals which are accordingly dismissed."

सत्यमेव जयते

6.Thus, by applying the above decision, substantial question of law no.2 is answered in favour of the assessee.

7.As we have answered substantial question of law no.2 in favour of the assessee, substantial question of law nos.1 and 3 would become irrelevant, as the assessee has succeeded in the appeal on the legal issue as framed in substantial question of law no.2.

8.In the result, the appeals are allowed and the substantial question of law no.2 is answered in favour of the assessee and substantial question of law nos.1 and 3 are held to be not required to be decided in the instant case and they are left open. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

abr
To

1.The Customs, Excise and Service Tax
Appellate Tribunal,
South Zonal Bench,
Shastri Bhawan Annexe, 1st Floor,
No.26, Haddows Road, Chennai-600 006.

2.The Commissioner of Service Tax,
Service Tax Commissionerate,
692, Anna Salai, MHU Complex,
Nandanam, Chennai-600 035.

Copy to

The Section Officer,
VR Section, High Court,
Madras.

+1cc to M/s.S.Murugappan, Advocate Sr.480

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