IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.03.2022

CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE J.SATHYANARAYANA PRASAD

Writ Appeal Nos.2807, 2808 & 2857 of 2021
and
C.M.P. Nos. 18512, 19051, 18516 of 2021

W.A. No. 2807 of 2021

M/s. Trinity's Clearing and Shipping Agencies,
represented by its Partner S.Alexander
No.20, II Lane Beach, III Floor, Room No.6,
Chennai 600 001. .. Appellant

Versus

1. Union of India,
represented by its Secretary to Govt.,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi

2. The Assistant Commissioner of GST
& Central Excise,
Egmore Division, Chennai North
Commissionerate, Newry Towers,
1st Floor, Plot No.2054, I Block,
II Avenue, 12th Main Road, Anna Nagar,
Chennai 600 040 .. Respondents

W.A. No. 2808 of 2021

M/s. Trinity's Clearing and Shipping Agencies,
represented by its Partner S.Alexander
No.20, II Lane Beach, III Floor, Room No.6,
Chennai 600 001. .. Appellant

Versus

1. Union of India,
represented by its Secretary to Govt.,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi

2. The Additional Commissioner of GST
and Central Excise,
Chennai North Commissionerate,
No.26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai 600 034 .. Respondents

W.A. No. 2857 of 2021

M/s. Trinity's Clearing and Shipping Agencies,
represented by its Partner S.Alexander
No.20, II Lane Beach, III Floor, Room No.6,
Chennai 600 001. .. Appellant

Versus

1. Union of India,
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2. The Assistant Commissioner of GST
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Egmore Division, Chennai North
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1st Floor, Plot No.2054, I Block,
II Avenue, 12th Main Road, Anna Nagar,
Chennai 600 040 .. Respondents

Writ Appeals filed under Clause 15 of Letters Patent against the common order dated 17.6.2021 passed by this Court in W.P.Nos.10179, 11268 and 10178 of 2020.

Prayer in W.P.No.11268 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of certorari calling for the records relating to the impugned order in original No.04/2020 dated 06.02.2020 issued by the 2nd respondent and quash the same.

Prayer in WP.No.10178 & 10179 of 2020: Writ Petitions filed under Article 226 of the Constitution of India praying to Writ of certorari calling relating to the impugned statements of demand

No.18/2019 and 05/2020 dated 15.04.2019 & 11.02.2020 respectively, issued by the 2nd respondent and quash the same.

For Appellant	:	Mr. K. Jeyachandran in all the Writ Appeals
For Respondent	:	No appearance for R1 in all the appeals
		Mr.A.P.Srinivas, Senior Standing Counsel for R2 in all the appeals

COMMON JUDGMENT

[Judgment of the Court was delivered by R. Mahadevan, J)

These Writ Appeals are directed against the common order dated 17.06.2021 passed in W.P. Nos. 10179, 11268 and 10178 of 2020, in and by which, the learned Judge directed the appellant herein to file statutory appeals before the appellate authority.

2. It is the case of the appellant that they are engaged in the business of providing Custom House Agent Service, Transport of Goods by Road Service and Business Support Services with valid Service Tax registration. Apart from collecting applicable service tax from the customers, they also collected bank charges, Chennai Container Terminal P Ltd (CCTL) charges and container freight station charges by raising invoices mentioning such charges as “Non Taxable Service”. While so, the Commissioner of Service Tax, Chennai issued show cause notices along with statement of demand proposing to levy service tax on the value of “non taxable services” by invoking Rule 5(1) of Service Tax (Determination of Value) Rules for the different periods. The appellant therefore filed WP. Nos. 14747 to 14749 of 2016 challenging the validity of Rule 5 of the said Rules, order-in-original dated 21.01.2016 along with statement of demand dated 04.06.2015. On 22.04.2016, this Court following the earlier order dated 04.04.2016 in WP.Nos.10765 and 10766 of 2016, admitted the said writ petitions and granted an order of interim stay.

3. The appellant further stated that in an identical case, in Intercontinental Consultants reported in 2013 (29) STR 9 the Delhi High Court passed an order to the effect that Rule 5 of Service Tax (Determination of Value) Rules was held to be ultra vires and void. Aggrieved by the said order passed by the Delhi High Court, the Department preferred an appeal before the Honourable Supreme Court, which affirmed the order of the Delhi

High Court in the case of Union of India v. Intercontinental Consultants and Technocrafts Private Limited reported in 2018 (10) G.S.T. L. 401 (SC). During the pendency of the appeal before the Honourable Supreme Court, the writ petitions, which were pending before all the High Courts, were ordered to be transferred to the Honourable Supreme Court and accordingly, WP Nos. 14747 to 14749 of 2016 were also transferred and disposed of by the Honourable Supreme Court, in favour of the assessee.

4. However, the respective second respondent(s) in these writ appeals issued notices along with statement of demands dated 15.04.2019 and 11.02.2020 with respect to levy of service tax for different periods on the non taxable service invoking section 67 of the Finance Act read with Rule 5 of the Service Tax (Determination of Value) Rules and passed order-in-original dated 06.02.2020 for the period from October 2006 to 2007-08. Aggrieved over the same, the appellant preferred Writ Petition Nos.10178, 10179 and 11268 of 2020.

5. The learned Judge, by the order dated 17.06.2021 impugned herein, disposed of the aforesaid writ petitions by concluding that the issues involved are factual and there is a clear finding that break up of service charge received by the appellant has not been produced by them and hence, the appellant was directed to file statutory appeal(s) within a period of 30 days and if any appeal (s) is/are filed by the appellant, the appellate authority shall take it on file, without reference to the limitation and consider on merits and in accordance with law. Challenging the said order dated 17.06.2021 passed by the learned Judge, the appellant has come up with these writ appeals.

6. Heard both sides and perused the materials placed before this court.

7. According to the appellant, though they collected Bank charges, CCTL charges, CFS charges from their clients payable to the respective Banks, it was specifically mentioned in the invoices that these charges are 'Non Taxable Services' claiming as reimbursement of expenses incurred. However, the department issued show cause notices to the appellant on the ground that such amounts collected by them would be liable for service tax as per Rule 5 of Service Tax (Determination of Value) Rules, 2006, without reference to the order passed by the Honourable Apex Court, confirming the order of the Delhi High Court holding that Rule 5 of the said Rules was held to be ultra vires and unconstitutional. When the action so taken by the department was put to challenge, by filing writ petitions, the learned Judge, without appreciating the said aspect, directed the appellant to file statutory appeals before the appellate authority.

8. On the other hand, it is the submission of the learned Senior Standing Counsel appearing for the respondents that the respondent authorities levied service tax against the appellant in accordance with the relevant provisions of law and hence, the same need not be interfered with by this court.

9. Be it noted that the issue involved herein is squarely covered by the decision of the Honourable Supreme Court in Union of India v. Intercontinental Consultants and Technocrafts Private Limited reported in 2018 (10) G.S.T. L. 401 (SC), in which, the order of the Delhi High Court declaring Rule 5 of Service Tax (Determination of Value) Rules as ultra vires and unconstitutional, was affirmed. For better appreciation, the relevant paragraphs of the same are extracted below:

> "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 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.
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> 22) Section 66 of the Act is the charging Section which reads as under:
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> > "there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clauses of 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 ahs 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 Limited8 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.”

However, on a perusal of the order impugned herein, it is seen that the aforesaid decision was not taken into consideration by the learned Judge, while hearing the writ petitions filed by the appellant questioning the order / notices issued by the respondent authorities, demanding service tax towards 'non taxable services'; and the appellant was simply directed to approach the appellate authority by filing statutory appeals, after having observed that the issues involved are factual in nature. This court is of the view that such course adopted by the learned Judge cannot be countenanced. Therefore, the order of the learned Judge dated 17.06.2021 passed in the writ petitions is liable to be set aside and is accordingly, set aside. Consequently, the matters are remanded back to the authority concerned for fresh consideration.

10.As regards WA.Nos.2857 and 2807 of 2021 arising from the order made in WP.Nos.10179 and 10178 of 2020, the challenge was made only to the statements of demand dated 15.04.2019 and 11.02.2020, with respect of levy of service tax, it is for the appellant to submit their explanations to the same within a period of two weeks from the date of receipt of a copy of this judgment. On such submission, the authority concerned shall consider the same and pass orders on merits and in accordance with law and also in the light of the decision of the Hon'ble Supreme Court, after providing an opportunity of being heard to the appellant, within a period of four weeks thereafter.

11.With respect to WA.No.2808 of 2021, arising from the order made in WP.No.11268 of 2020, in which, the appellant questioned the order-in-original No.4/2020 dated 06.02.2020 levying service tax for the period from October 2006 to 2007-08, we set aside the same and remand the matter to the authority concerned for passing orders afresh. It is open to the appellant to submit all the material documents if any to the authority concerned within a period of two weeks from the date of receipt of a copy of this judgment. On such submission, the authority concerned shall consider the same and pass orders on merits and in accordance with law and also in the light of the decision of the Hon'ble Supreme Court, after providing an opportunity of being heard to the appellant, within a period of four weeks thereafter. However, it is made clear that in the event of the failure on the part of the appellant to submit their explanations within the time stipulated, the authority concerned shall proceed further and pass orders afresh, as per law, on the basis of the available materials.

12.Accordingly, all the writ appeals stand disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

gba

To

1. The Secretary to Govt.,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi.

2. The Assistant Commissioner of GST & Central Excise,
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3. The Additional Commissioner of GST and Central Excise,
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+2cc to Mr. K. Jeyachandran, Advocate, S.R.No.21624,21623
+4cc to Mr.A.P.Srinivas, Advocate, S.R.No.21499

WA. Nos. 2807, 2808
and 2857 of 2021

AD(CO)
CT 10/05/2022