



WEB COPY



W.P.No.2147 of 2017 etc. batch

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.11.2022

PRONOUNCED ON : 28.03.2023

CORAM

THE HON'BLE MR. JUSTICE S.VAIDYANATHAN

AND

THE HON'BLE MR. JUSTICE C. SARAVANAN

W.P.Nos.2147 to 2151 of 2017, 14643 of 2017, 9118 of 2019, 9120 of 2019, 19009 of 2019, 19011 of 2019, 35435 of 2019, 35445 of 2019, 8809 of 2020, 14929 of 2020, 141 of 2021, 400 of 2021, 12467 of 2021, 12976 of 2021, 13476 of 2021, 15394 of 2021, 15395 of 2021, 15398 of 2021

and

W.M.P.Nos.9629 of 2019, 9662 of 2019, 18346 of 2019, 28303 of 2019, 36269 of 2019, 36276 of 2019, 18549 of 2020, 197 of 2021, 470 of 2021, 13780 of 2021, 13780 of 2021, 14343 of 2021

W.P.No.2147 of 2017

The Chennai and Ennore Ports
Steamer Agents Association
New No.63, Old No.32,
Pophams Broadway,
George Town, Chennai 600 018
Represented by its Chairman
Y.Leeladharan

... Petitioner



W.P.No.2147 of 2017 etc. batch

Vs.

1. Union of India,
Ministry of Finance,
(Department of Revenue)
No.137, North Block,
New Delhi, 110 001
Represented by its Under Secretary
2. The Chairman,
Central Board of Excise and Customs,
North Block, New Delhi 110 001.
Represented by its Chairman.
3. The Chief Commissioner of Service Tax
(Chennai Zone)
Newry Towers, 2054/1,
II Avenue, Anna Nagar,
Chennai 600 040.

... Respondents

Writ Petition under Article 226 of the Constitution of India praying for issue of a Writ of declaration to declare Section 66C(2) of Chapter V of the Finance Act, 1994 (as amended) as null, void and ultra vires Article 14,19,246, 248, 265, 268A and 302 read with Entry 41 and 83 of List 1 of VII Schedule of the Constitution of India and also being beyond the legislative competence of Parliament under Articles 246 and 248 of the Constitution of India.

For Petitioner in : Mrs.Radhika Chandra Sekhar
W.P.Nos,141 of 2021, 9118
of 2019, 9120 of 2019 and
400 of 2021

: Mr.Joseph Prabakar



W.P.No.2147 of 2017 etc. batch

WEB COPY

For Petitioner in
W.P.No.8809 of 2020

For Petitioner in
W.P.Nos.12976 of 2021, : Mr.M.A.Mudimannan
12467 of 2021, 13476 of
2021, 19009 of 2019 and
19011 of 2019

For Petitioner in
W.P.Nos.15394, 15395 & : Mr.Hari Radhakrishnan
15398 of 2021

For Petitioner in
W.P.No.14929 of 2020 : Mr.T.Ramesh

For Petitioner in
W.P.Nos.2147 to 2151 of : Mr.P.Giridharan
2017

For Petitioner in
W.P.Nos.35435 & 35445 of : Mr.M.N.Bharathi
2019

.....

For R1
in W.P.Nos.141 of 2021 and : Mr.S.Diwakar
15394 of 2021 Senior Panel Counsel

For R2 to R4 in
W.P.No.141 of 202,
For R1 and R2 in
W.P.No.9120 of 2019,
For R1 and R4 in
W.P.Nos.12976 of 2021,



W.P.No.2147 of 2017 etc. batch

15395 of 2021, 15398 of 2021,

For R2 to R4 in
W.P.No.15394 of 2021,
For Respondents in
W.P.Nos.19009 of 2019 &
19011 of 2019, &
For R1 to R4 in
W.P.No.12467 of 2021

: Mr.V.Sundareswaran
Senior Panel Counsel

For R1 & R2 in
W.P.No.9118 of 2019,
For Respondents in
W.P.No.13476 of 2021,
For R2 to R4 in
W.P.No.400 of 2021, &
For Respondents in
W.P.Nos.2147 to 2151/2017

: Mr.Hema Muralikrishnan
Senior Standing Counsel

For R1 and R2 in
W.P.No.8809 of 2020,
For Respondent in
W.P.No.14929 of 2020, &
For R2 in
W.P.Nos.35435 and 35445
of 2019

: Mr.A.P.Srinivas
Senior Standing Counsel and
Mr.K.S.Ramasamy

For R1 in
W.P.No.400 of 2021

: Mr.K.Subbu Ranga Bharathi

For R1 in
W.P.Nos.35435 & 35445 of
2019

: Mr.Venkataswamy Babu
Senior Panel Counsel



W.P.No.2147 of 2017 etc. batch

COMMON ORDER

WEB COPY

By this common order, all these 22 cases are being disposed.

Broadly, there are 2 categories of Writ Petition. Details of the Writ Petitions are given below:-

Category No.1: Steamer Agents

2. These Writ Petitions have been filed by and on behalf of Steamer Agents. These petitioners have challenged the vires of Notification No.28/12-ST dated 20.6.2012, Notification Nos.1/2017-ST, 02/2017-ST & 03/2017-ST, all dated 12.01.2017 and Section 66C(2) of Chapter V of the Finance Act, 1994 (as amended) as ultra vires provision of the Constitution. They have also challenged the clarification of the Board in Para 4 & 4.1 of the Circular No.206/4/2017 – Service Tax, dated 13.04.2017.

3. Table Nos.1, 2 and 3 below give the details of the writ petitions filed by these writ petitioners wherein vires of these notifications, provision and the circulars have been challenged.



W.P.No.2147 of 2017 etc. batch

WEB COPY

Table No.1 : Notifications under Challenge.

Sl. No.	W.P. Nos.	Notifications			
		28/12 dt.20.6.12	01/2017 dt.1201.17	02/2017 dt.12.01.17	03/2017 dt.12.01.17
1	2148/2017	*	-	-	-
2	2149/2017	-	*	-	-
3	2150/2017	-	-	*	-
4	2151/2017	-	-	-	*

(* Represents challenge to the respective notifications)

Table No.2: Challenge to Section 66C(2) of Chapter V of the Finance Act, 1994.

Sl. No	W.P.No.	Prayer
5	2147/2017	To declare Section 66C(2) of Chapter V of the Finance Act, 1994 (as amended) as null, void and <i>ultra vires</i> Article 14, 19, 246, 248, 265, 268A and 302 read with Entry 41 and 83 of List I of VII Schedule of the Constitution of India and as also being beyond the legislative competence of Parliament under Articles 246 and 248 of the Constitution of India.



W.P.No.2147 of 2017 etc. batch

Table No.3: Challenge to the Circular No.206/4/2017 – Service Tax, dated 13.04.2017.

WEB COPY

Sl. No.	W.P.No.	Prayer
6	14643/2017	To declare that Para 4 & 4.1 of the Circular No.206/4/2017 – Service Tax, dated 13.04.2017 as null, void and ultra vires Article 14, 19, 265, 268A and 302 of the Constitution of India, ultra vires Section 83 of the Finance Act, 1994 read with Section 37B of the Finance Act, 1994, as well as Notification No.26/2012-ST, dated 20.06.2012.

Category No.2 : Importers

4. Rest of the Writ Petitions have been filed by the importers. These petitioners have challenged the vires of Notification Nos.30/2012-ST dated 20.06.2012, Notification No.03/2017-ST, dated 12.01.2017, Notification Nos.14/2017-ST, 15/2017-ST & 16/2017-ST, all dated 13.04.2017.

5. Some of the Writ Petitioners have also challenged show cause notices issued to them while some of them have called upon the respondent to refund the service tax paid by them. The details of the writ petitions filed by these petitioners are in Table Nos.4, 5 and 6.



W.P.No.2147 of 2017 etc. batch

Table No.4: Challenge to the Notification.

Sl. No.	W.P.No.	Notifications				
		30/2012 dt. 20.6.12	03/2017 dt.12.01.17	14/2017 dt.13.04.17	15/2017 dt.13.04.17	16/2017 dt.13.04.17
7	141/2021	-	*	-	*	*
8	9118/2019	-	*	-	*	*
9	9120/2019	-	*	-	*	*
10	400/2021	-	*	-	*	*
11	12467/2021	-	*	-	*	*
12	19009/2019	-	*	*	*	*
13	15394/2021	-	-	-	*	*
14	35445/2019	-	-	*	*	*
15	15395/2021	*	-	-	-	-

[* represents the challenge to the respective Notifications]

Table No.5 : Challenge to Show Cause Notice

Show Cause Notice			
Sl. No.	W.P.No.	S.C.N.No.	Date
16	19011/2019	S.C.N.No.03/2019-ST	30.01.2019
17	13476/2021	S.C.N.No.03/2021	26.02.2021
18	12976/2021	S.C.N.No.03/2021 (Audit-I)	21.01.2021
19	14929/2020	S.C.N.No.10/2020-21	10.06.2020
20	35435/2019	S.C.N.No.07/2019-ST	25.11.2019

Table No.6 : For a refund of service tax paid by the petitioners and for and interest.



W.P.No.2147 of 2017 etc. batch

For a direction to refund the amount		
Sl. No.	W.P.No.	Amount
21	8809/2020	Rs.47,26,342/- [Ocean Freight Service Tax of Rs.36,50,054/- + interest of Rs.10,76,288/-]
22	15398/2021	Rs.14,72,796/- [Service Tax of Rs.12,58,605/- + interest of Rs.2,14,191/-]

6. The grounds on challenge to the impugned notifications by the petitioners in Category-I are broadly as follows:-

- i. It is submitted that, by issuance of Notification Nos. 1, 2 and 3 of 2017. ST all dated 12.01.2017, the respondent has exceeded the powers delegated under Section 66 C (2) of Chapter V of the Finance Act, 1994 and Rule 10 of the Place of Provisions of Service Rules, 2012.
- ii. It is submitted that the tax cannot be imposed on a person who would never be liable for it in the first place, even if the deeming fiction under Sec 66B and 66C of Chapter V of the Finance Act is used to justify the levy.
- iii. It is submitted that there is no rational connection between levy of Service tax on international ocean



WEB COPY



W.P.No.2147 of 2017 etc. batch

freight when both the service provider and service recipient are located outside India, on the steamer agent who only performs limited functions as authorized under the Customs Act once the goods reach the customs frontiers of India.

- iv. It is submitted that, Service tax is sought to be levied on the steamer agent qua the freight element which is subject to levy of customs duty as part of the value of the imported goods in terms of Section 14 of the Customs Act, 1962 read with the provisions of Rule 10(2) of the Customs Valuation (Determination of Price of Imported Goods) Rules, 2007. Therefore, the imposition of service tax on goods already subject to Customs Duty is unconstitutional Customs Duty.
- v. It is submitted that in all cases of transportation by CIF basis (Cost Insurance and Freight), (which is the basis on which cargo is imported into India), the importer/consignee pays only the price for the goods.
- vi. When goods are imported on CIF basis, the importer/consignee does not pay for the freight. The invoice under which the importer/consignee imports the goods is a CIF invoice, i.e. is a consolidated invoice for the goods, insurance and freight. Hence, the distinct element of freight is not known even to the importer. Therefore, the basis of charge for



W.P.No.2147 of 2017 etc. batch

Service Tax is unknown. Further, the importer pays Customs Duty on the CIF value of the goods imported.

- vii. It is submitted that, the attempt to make the steamer agent as the person liable to pay 'Service tax', who has no rational connection with the service transaction is discriminatory, violative of Article 14 of the Constitution and contrary to all established tenets of Service tax law.
- viii. It is submitted that, in case of FOB (Free on Board), the duty to pay freight is on the importer, who is merely recipient of the service. Hence the importer pays Service Tax directly to the vessel owner.
- ix. It is submitted that, the Steamer Agent is not the receiver of the service and only acts as an agent for the Vessel Owner and facilitates in vessel berthing and co-ordination with the Customs House Agents of the Consignee. The Steamer Agents already incurs the liability of paying service tax on the Steamer Agent Services provided.
- x. It is submitted that, the receiver of the service of carriage of goods by sea (for sale of goods on CIF basis), is the shipper. Reverse Charge mechanism normally contemplates that the receiver of the service is liable to pay the tax directly to the Service Tax



WEB COPY



W.P.No.2147 of 2017 etc. batch

Department.

- xi. By virtue of Notification No. 1-3 of 2017, the liability to pay Service Tax is imposed on Reverse Charge mechanism basis on the steamer agent. This goes against the principle on which Reverse Charge mechanism works, since the liability to pay the Service Tax is imposed on a person who is neither the provider of the service, nor receiver of the service or in any manner connected with such transaction.
- xii. Therefore, the duty to pay the service tax especially by Reverse Charge mechanism, cannot be levied on the steamer agent, since the steamer agent is neither the provider nor the receiver of the service, nor in any manner connected with such service transaction.
- xiii. It is submitted that the Steamer Agent is appointed only for the purposes of compliance of the provisions of the Customs Act, in terms of Sec 148 of the Customs Act. Hence, the duty of the Steamer Agent is very limited, i.e. comply with the provisions of the Customs Act.

7. Broadly the Writ Petitions in Category-1 are opposed by the respondents. :-

- i. It is submitted that, the contention of the petitioners is



WEB COPY



W.P.No.2147 of 2017 etc. batch

on the wrong notion that the liability to pay service tax cannot be fastened on them as they are not "service recipient" was incorrect more particularly in view of the recent decision of the Apex Court in the case of **Uol Vs Mohit Minerals**, 2022 SCC OnLine SC 657.

- ii. It is submitted that the service provided by the foreign shipping line is a service of transportation of goods in a vessel. The said service is completed only when the goods are offloaded from the vessel (ship) to a land mass in the country.
- iii. The service of transportation of goods cannot be said to have been provided or completed when the goods are put on board the vessel. It is the responsibility of the shipping liner to deliver the goods safely to the port of destination.
- iv. When the destination is in India, the service of transportation can be said to have been completed or provided only when the goods are landed in India. Service tax, being a destination based tax, Sec.66C of the Finance Act, 1994 grants the power to the Government to frame rules as to determining the place of provision of Service.
- v. It is submitted that, when a service of transportation of goods is with respect to transporting of goods to



W.P.No.2147 of 2017 etc. batch

India, the said service has a 'nexus' with India and therefore service tax is leviable and payable in India as Sec.66B, Sec.66C and 68 read with Sec.64 does not restrict the levy and payment of service tax to only the service provider and service recipient.

- vi. The steamer agents are attempting to artificially bifurcate a single transaction of transportation of goods into two different transactions for the purpose of contending that the services provided by them are restricted to steamer agent service as defined in Sec.65(97), 65(100) and Sec.65(105(i) as they existed prior to 01.07.2012.
- vii. It is submitted that the service of transportation of goods /by sea is complete only when the goods cross the customs frontiers of the country and all the services provided by the steamer agents before the goods cross the customs frontiers of the country.
- viii. The steamer agents collect service fees alongwith service tax from the Shipping Line for services provided by them. In addition the steamer agents have to collect service tax on transportation services from the shipping lines and pay the same to the Government.
- ix. It is submitted that Customs Duty is levied in order to protect the domestic industry. When goods



W.P.No.2147 of 2017 etc. batch

manufactured in the country are sold on FOR Delivery in the country, excise duty is levied on the FOR value and service tax is paid on the transportation service. Likewise, when goods are delivered in the country on CIF basis, it is permissible for the Government to levy customs duty on the CIF value and levy service tax on the ocean freight for transportation service.

- x. It is submitted that, the charging section for levy of service tax as on 31.06.2012 was "service specific", under Sec.66 and Sec.66A (on recipient of services from abroad) of the Finance Act, 1994. Section 66 is charging section on forward charge and section 68(2) is the charging section on reverse charge.
- xi. It is submitted that all the Sections and Rules in a Statute have to be read harmoniously and in a manner that none of the Sections made redundant or made otiose. It is submitted that Sec.66C nor does or POPSR, 2012 render any of the other sections or Rules in the Act, redundant or otiose nor does it authorize the levy of service tax on any event that takes place outside the whole of India.

8. The learned counsel for the Petitioners in Category- 1 has relied on the following case laws:-

- i. **Imagic Creative Pvt Ltd v. CCT**, (2008) 2 SCC 614



W.P.No.2147 of 2017 etc. batch

- ii. **BSNL v. Union of India**, 2006 (2) STR 161
- iii. **All India Federation of Tax Practitioners v. Union of India**, (2007) 7 SCC 527
- iv. **K Damodaraswamy Nadar and Bros V. State of Tamil Nadu**, AIR 1999 SC 3909
- v. **United Shippers Ltd v. CCE**, 2015 (37) STR 1043 (T-Mum)
- vi. **CCE v. United Shippers**, 2015 (39) S.T.R. J369 (S.C.)
- vii. **Gujarat Ambuja Cements v. UOI**, 2005 (182) ELT 33 (SC)
- viii. **Uol Vs Mohit Minerals**, 2022 SCC OnLine SC 657

9. The learned counsel for the Respondent in Category- 1 has relied on the following case laws:-

- i. **All India Haj Umrah Tour Organiser Association vs Uol** reported in MANU/SC/0921/2022
- ii. **Uol Vs Mohit Minerals**, 2022 SCC OnLine SC 657

10. The grounds on challenge to the impugned notification by the petitioners in Category-2 are broadly as follows:-

- i. It is submitted that when a consolidated amount is paid for an import on CIF basis, it is not possible to determine the portion representing ocean freight. Further, both in the case of import on CIF basis or on FOB basis, the cost of freight is captured in the value of goods and on which the importer is already discharging basic customs duty.
- ii. It is submitted that the impugned Notifications makes an attempt to levy tax on a transaction which does not have any nexus with the Indian importer and also seeks to levy tax twice on the cost of freight.



WEB COPY



W.P.No.2147 of 2017 etc. batch

- iii. It is submitted that the levy on the importer who is not even privy to the service between two foreign entities is violative of the law.
- iv. It is submitted that the levy of service tax on the importer through impugned notifications is violative of Section 65B(52) and 68(2) of the Finance Act, 1994 since there is no import of service and the importer is not the recipient of the service of transportation of goods by vessel.
- v. It is submitted that Section 66B provides for forward charge whereby a service provider in the taxable territory is liable to pay service tax on the consideration received for the services provided by him to another person.
- vi. It is submitted that Section 94 of the Finance Act provides for “power to make rules”. None of the items enumerated under the Central Government is empowered to fix the tariff value of any services. Therefore the impugned Notification No. 16/2017 dated 13.04.2017 which provides for an option to pay the amount calculated at the rate of 1.4% of sum of cost, insurance and freight (CIF) value is de hors the powers conferred under Section 94(2) of Finance Act, 1994.
- vii. It is submitted that even under Section 67 of Finance Act, 1994 which provides for valuation of taxable services there is no power to fix tariff as done by virtue of Notification No 16/2017 dated 13.04.2017.
- viii. It is submitted that the impugned Notifications are violative of Article 245 of the Constitution of India since it seeks to make laws for transactions taking place outside India.
- ix. It is submitted that the Gujarat High Court in the case of Sal Steel Ltd Vs Union of India (2020) 37 GSTL 3 has struck down the entries in the Notifications levying service tax on ocean freight under reverse charge mechanism when goods are imported on CIF basis.



W.P.No.2147 of 2017 etc. batch

11. No Counter has been filed in all the writ petitions. However, the cases were argued and written submission were filed. Broadly the writ petitions in Category-2 are opposed by the learned counsel for the department on the ground that:-

- i. The person liable to pay Service Tax as per Section 68 of the Finance Act, 1994 shall be such person as may be notified by the government and in such manner as may be prescribed. Section 68 of the Finance Act, 1994 reads as under:-

(1) 'Every person providing taxable service to any person shall pay Service Tax at the rate specified in section/66B) in such manner and within such period as may be prescribed and

(2) Notwithstanding anything contained in sub-section (1), in respect of such taxable services as may be notified by the Central Government in the Official Gazette, the Service Tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66B) and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the Service Tax in relation to such service..'

- ii. It is submitted that persons liable to pay tax in terms of amendment to notification on Reverse charge mechanism Vide Notification No 30/2012-Service



WEB COPY



W.P.No.2147 of 2017 etc. batch

Tax dated 20.6.2012, Government notified the 'percentage of Service Tax payable by the person providing service' and 'percentage of Service Tax payable by the person receiving the service.

- iii. However, this notification was amended on 01.03.2015, vide Notification No 7/2015- Service Tax, and the wordings 'percentage of Service Tax payable by the person receiving the service' was replaced by the wordings 'Percentage of Service Tax payable by any person liable for paying Service Tax other than the service provider.'
- iv. It is submitted that the respondent has the authority to tax when both Service Provider and Service Recipient are located outside the taxable territory since the CIF Value includes the Cost, Insurance & Freight of the Goods imported by the taxpayer.
- v. It is submitted that the consideration paid to the supplier of goods by the importer on the terms of CIF includes the freight charges collected by the Foreign Liner for transportation of goods by a vessel from a place outside India up to the customs station of clearance in India.
- vi. It is submitted that the freight Charge is collected by the Supplier of the goods included in the Invoice Value. The importer makes payment as per the agreed



W.P.No.2147 of 2017 etc. batch

CIF Rate. Hence the cost of freight included in the CIF is borne by the importer indirectly.

vii. It is a kind of import of Service received from Non-taxable Territory to Taxable Territory. Hence, the liability of paying the Service Tax under RCM is with the importer of the goods though the petitioner has contractual liability as per Notification No 14/2017, the Importers of goods on CIF value basis is liable to pay the Ocean freight on goods imported vide Notification No 15/2017.

12. In support of the present writ petition, the learned counsel for the petitioners has relied on the following case laws (for Category-II) : -

- i. **Sal Steel Ltd. and Ors. vs. Union of India**, (2020) 37 GSTL 3
- ii. **Kothari Sugars and Chemicals Ltd**, W. P. No. 9131 of 2019
- iii. **GVK Industries Ltd another v. Income tax officer and Anr.**, (2011) 332 ITR 130.
- iv. **Gujarat Ambuja Cements v. Union of India**, (2006) 3 STR 608.
- v. **Kusum Ingots and Alloys Ltd v. Union of India** 2004 (168) E.L.T. 3 (SC)
- vi. **United Shippers Ltd v. CCE**, 2015 (37) STR 104
- vii. **CCE v. United Shippers**, 2015 (39) S.T.R. J369
- viii. **Vodafone International Holdings B.V v. Union of India and Anr.**, (2012) 341 ITR 1.
- ix. **All India Federation of Tax Practitioners v. Union**



WEB COPY



W.P.No.2147 of 2017 etc. batch

- of India (2007) 7 SCC 527**
x. **Govind Saran Ganga Saran v. Commissioner of Sales Tax and Others (1985) 60 STC 1.**

13. In support of these writ petitions, the learned counsel for the Respondent has relied on the following case laws:-

- i. **Union of India v. VKC**, C.A No. 4810 of 2021
- ii. **Godfrey Philips India ltd v. State of UP**, (2005) 5 SCC 515.

14. To understand the scope of the challenge to the impugned notification, provision and circulars and the dispute, it will be useful to refer to a brief history of the Finance Act, 1994. The Chapter V of the Finance Act, 1994 came into force way back in 1994.

15. The levy of service tax was never under a separate enactment. There was no standalone enactment for levy and collection of Service Tax. Chapter V A of the Finance Act, 1994 was inserted w.e.f 14.5.2003 *vide* Finance Act, 2003. It was levied and collected under Chapter V and VA of the Finance Act, 1994.

16. The provisions of Chapter V of the Finance Act, 1994, were initially made applicable to 3 services viz. Telephone Services, Non-Life



W.P.No.2147 of 2017 etc. batch

Insurance Services and Stock Brokers' Services. The Finance Act, 1994 was periodically amended, updated and levy was expanded from time to time by successive amendments to Chapter V of the Finance Act, 1994 *vide* successive Finance Acts till, Finance Act, 2017.

17. Provisions of the Central Excise Act, 1944 were made applicable to provision of Chapter V and VA of the Finance Act, 1994. Powers were vested with the Central Government to issue notification to give effect to the provisions of the Act.

18. Section 64 of the Finance Act, 1994, limits the extent of the application of the provisions of Chapter V of the Finance Act, 1994. Section 64 sets the contour for Application of Chapter V of the Finance Act, 1994. As per Section 64 of the Finance Act, 1994, the Chapter V of the Finance Act, 1994, extends to the whole of India except to the State of Jammu and Kashmir.

19. Though, Section 64 of the Finance Act, 1994 of Chapter V of the Finance Act, 1994 applies to the whole of India of other than State of



W.P.No.2147 of 2017 etc. batch

Jammu and Kashmir, as a thumb rule, service tax was initially levied only on those services which were provided and consumed within India.

20. However, over a period of time, there was a dilution to the above restrictions by periodical amendments to the provisions of the Finance Act, 1994, the Rules thereunder and Notifications issued thereunder.

21. Over a period of time, import of service from outside the territory of India for being consumed in India for business was made liable to tax. The liability to pay service tax was however on the recipient of service on reverse charge basis as it was impossible to collect tax from an overseas service provider for services consumed in India.

22. However, till 30.6.2012, service tax was payable on only "taxable services" as defined in various sub clauses to Section 65(105) of the Finance Act, 1994. Service tax was payable under Section 66 of the Finance Act, 1994 at the rates prescribed for those "taxable



W.P.No.2147 of 2017 etc. batch

services" alone. There was no definition of “service” in the Finance Act, 1994.

23. For the first time, the Parliament introduced a definition for the expression of “Service” in Section 65(B)(44) of the Finance Act, 1994 *vide* Finance Act, 2012. The definition underwent few changes. We are not concerned in the changes in the definition in these writ petitions.

24. During the period in dispute, the definition of “Service” in Section 65(B)(44) of the Finance Act, 1994 read as under:-

(44) “**service**” means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

- (a) an activity which constitutes merely,—
 - (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
 - (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution; or
 - (iii) a transaction in money or actionable claim;
- (b) a provision of service by an employee to the employer in the course of or in relation to his employment;



WEB COPY



W.P.No.2147 of 2017 etc. batch

- (c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1. — For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,—

- (A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or
- (B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or
- (C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

Explanation 2.- For the purposes of this clause, the expression “transaction in money or actionable claim” shall not include —

- (i) any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;
- (ii) any activity carried out, for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out —
 - (a) by a lottery distributor or selling agent on behalf of the State Government, in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner, in accordance with the provisions of the Lotteries (Regulation) Act, 1998;
 - (b) by a foreman of chit fund for conducting or



W.P.No.2147 of 2017 etc. batch

organising a chit in any manner.

WEB COPY

Explanation 3. — For the purposes of this Chapter,—

- (a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;
- (b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

Explanation 4. — A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory.

25. With the introduction of the above definition of “Service”, in Section 65B(44) of the Finance Act, 1994 *vide* Finance Act, 2012 with effect from 01.07.2012, there was a paradigm shift. Any activity for consideration by a person to another person was a “service”. Any activity which qualified the above definition was liable to tax under Section 66B of the Finance Act, 1994, if it was provided or deemed to be provided in India. The definition of service excluded few activities from its purview. Section 66 B of Finance Act, 1994 is the charging provision for levy of Service Tax. It reads as under:-

SECTION 66B. Charge of service tax on and after Finance Act, 2012. —

There shall be levied a tax (hereinafter referred to as



WEB COPY



W.P.No.2147 of 2017 etc. batch

the service tax) at the rate of fourteen per cent. on the value of all services, other than those services specified in the negative list, provided or agreed to be provided **in the taxable territory** by one person to another and collected in such manner as may be prescribed.

26. It will suffice to keep in mind that under Section 66B of the Finance Act 1994, no service tax was chargeable on those services which were in the negative list in Section 66B of the Finance Act, 1994. We shall refer to the same in the course of the discussion.

27. We have considered the arguments advanced by the learned counsel for the Category I & Category II Writ Petitioners. We have also considered the arguments advanced by the learned counsel for the respondents. We have also considered the provisions of Chapter V of the Finance Act, 1994 as amended from time to time. We have also considered Rule framed under the Finance Act, 1994, notifications issued thereunder and the impugned notifications.

28. Service tax was levied and collected in India under provision of Chapter V and VA of the Finance Act, 1994. Service tax was levied and collected on those services which were either provided in India or



W.P.No.2147 of 2017 etc. batch

consumed in India or aid in the provision of one or more service or
consumed in India.

29. Ordinarily, service tax was payable by the service provided in India. Under the scheme of the Finance Act, 1994, the burden to pay tax could be shifted on any person including a recipient of a taxable service under a notification issued under Section 68(2) of the Finance Act, 1994.

30. The provisions of the Finance Act, 1994 are flexible. Wide powers were vested with the Central Government to levy service tax not only on those services which are actually provided and consumed in India but also on those which are provided outside India but had territorial nexus with activities in India.

31. Service provided outside the land mass of India, for being consumed in India is ordinarily a zero rated in the country from where it is provided. Such services are not ordinarily taxed in the country from where such services are provided as most of the countries want their



W.P.No.2147 of 2017 etc. batch

exports not to be burdened with tax as they bring in much desired foreign exchange into their country.

32. However, such services are taxed in the country of their consumption like custom duty on import of the goods. Since such services are consumed in India both directly and indirectly, they are taxed in India under the scheme of the Finance Act, 1994.

33. The philosophy to impose service tax on import of service is to tax it at the place of its consumption i.e. at the destination of its consumption. This also satisfies the philosophy that service tax is a destination based tax.

34. Thus, if a service is provided outside India and consumed in India for business and commerce, the provisions of the Finance Act, 1994 enable the Government to tax such service.

35. To legitimize the collection of tax, Rule 2(1)(d) of the Service



W.P.No.2147 of 2017 etc. batch

Tax Rules, 1994 was provided and was amended from time to time.

Thus, under the scheme of the Finance Act, 1994, tax can also be levied on the services rendered beyond the territory of India and consumed in India whether directly or indirectly and collected from a person under notification issued under Section 68(2) of the Finance Act, 1994 read with the provisions of the Service Tax Rules, 1994.

36. Further, elasticity was provided under Section 66C(1) of the Finance Act, 1994. Though a generic provision, it applied not only to service provided in India but also provided outside India.

37. Under Section 66C(1) of the Finance Act, 1994, the Central Government, by a fiction, under Rules, could determine the place of provision of service to fasten service tax liability on any person including a recipient of service. Specifically, under the provisions Section 66C(1) of the Finance Act, 1994, the Central Government can, having regard to the nature of service, determine the place of the provision of service. Thus, even if a service was actually provided outside the territory of India and consumed outside India could be deemed to have been



W.P.No.2147 of 2017 etc. batch

provided in India.

WEB COPY

38. Under Section 68(2) of the Finance Act, 1994, Rules framed under Section 66C(1) of the Finance Act, 1994, the Central Government cannot be challenged on the ground that actual service was provided outside the territory of India.

39. In terms of Sub-Section (2) to Section 66C of the Finance Act, 1994, Rules made under Sub-Section (1) shall not be invalid merely on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory. Sub-Section (2) to Section 66C of the Finance Act, 1994 has been challenged in W.P No.2147 of 2017 by the Category I Writ Petitioners.

40. This is what the Central Government has done *vide* other impugned Notifications of the year 2017, after it withdrew the exemption granted earlier *vide* Sl.No.34(c) of Mega Exemption Notification No.25/2012-ST dated 20.06.2012 *vide* impugned Notification No.1/2017-ST dated 12.01.2017 with effect from



W.P.No.2147 of 2017 etc. batch

22.01.2017.

WEB COPY

41. Under Section 66C(1) of the Finance Act, 1994, the Central Government framed “**The Place of Provisions of Service Rules, 2012**” *vide* Notification No.28/2012-ST dated 20.06.2012.

42. When the **Place of Provisions of Service Rules, 2012** is read in conjunction with **Service Tax Rules Act, 1994** and the notifications issued under Section 68(2) the Finance Act, 1994, service tax could be levied and collected from any person other than the provider of service.

43. As mentioned above, services rendered by way of transportation of goods in a vessel from a place outside India up to the customs station of clearance in India were specifically made taxable for the first time with effect from 22.01.2017 in view of withdrawal of exemption under Mega Exemption Notification No.25/2012-ST dated 20.06.2012 *vide* impugned Notification No.1/2017-ST dated 12.01.2017 with effect from 22.01.2017.

44. Though the petitioners have challenged several notifications in



W.P.No.2147 of 2017 etc. batch

these Writ Petitions, they are really aggrieved by the impugned Notification No.1/2017-ST dated 12.01.2017 with effect from 22.01.2017 withdrawing exemption under Sl.No.34(c) to Mega Exemption Notification No.25/2012-ST dated 20.6.2012, for the other Notifications impugned in these writ petitions are merely intended to implement the amendment to the latter notification *vide* former notification withdrawing the above exemption.

45. Challenge to the other notifications are however intertwined with the challenge to Sub-Section (2) to Section 66C of the Finance Act, 1994 in W.P.No.2147 of 2017. The challenge made to the Sub-Section (2) to Section 66C of the Finance Act, 1994 is misconceived. The law on this aspect is clear. We shall make it clear as we discuss further.

46. In 2012, there was tectonic change to the provision of the Finance Act, 1994. Apart from the introduction of definition of “service”, for the first time under Section 65B(44) of the Finance Act, 1994, several new provisions were introduced to suit the new ecosystem under which



W.P.No.2147 of 2017 etc. batch

service tax was to be levied and collected with effect from 01.07.2012 under the Finance Act, 1994. One of the important introductions was under Section 66C of the Finance Act, 1994 *vide* Finance Act, 2012. Section 66C of the Finance Act, 1994 was to complement the other provisions of the Finance Act, 1994 under the changes brought to it *vide* the Finance Act, 2012.

47. In a way, Section 66C of the Finance Act, 1994 diluted Section 64 of the Finance Act, 1994. For the sake of clarity, Section 64 and Section 66C of the Finance Act, 1994 as in force during the period in dispute are reproduced below for comparison:-

Table No:7

Section 64 of the Finance Act, 1994	Section 66C of the Finance Act 1994
1. This Chapter extends 1 to the whole of India except the State of Jammu and Kashmir. 2. It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. 3. It shall apply to taxable services provided on or after	1. The Central Government may, having regard to the nature and description of various services, by rules made in this regard, determine the place where such services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided. 2. Any rule made under sub-



W.P.No.2147 of 2017 etc. batch

Section 64 of the Finance Act, 1994	Section 66C of the Finance Act 1994
the commencement of this chapter.	section (1) shall not be invalid merely on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory.

48. The broad definition of ‘service’ in Section 65B(44) of the Finance Act, 1994 with effect from 01.07.2012 was intended to fulfil the avowed object of the Parliament to impose tax on every service consumed whether directly and/or indirectly in India and on the premises that the service sector had surpassed the manufacturing sector and contributed to the Gross Domestic Product (GDP) of the country and therefore should be taxed.

49. However, the broad definition of ‘service’ in Section 65B(44) of the Finance Act, 1994 with effect from 01.07.2012 made every activity for consideration by one person to another person under the sun as “service”. Therefore, to reduce to the vigour of the broad definition of “service” in Section 65B(44) of the Finance Act, 1994, Mega Exemption



W.P.No.2147 of 2017 etc. batch

Notification No.25/2012-ST dated 20.6.2012 was issued in public interest. Sl.No.34(c) of the Mega Exemption Notification No.25/2012-ST dated 20.6.2012 exempted services rendered by way of transportation of goods in a vessel from a place outside India up to the customs station of clearance in India.

50. As mentioned above, even prior to the changes brought in the Finance Act, 2012 to Chapter V of the Finance Act, 1994, Section 64 of the Finance Act, 1994 which set the contours for its applicability was construed as having no extra territorial operation. It was however systematically diluted over a period of time. For the first time, it was diluted *vide* Finance Act, 2005 with effect from 16.02.2005 by inserting an Explanation to Section 65(105) to levy service tax on import of service.

51. Later, in 2006, Section 66A of the Finance Act, 1994 substituted Explanation to Section 65(105) with effect from 18.05.2006. To implement Section 66A of the Finance Act, 1994, the Taxation of Services (Provided from outside India and Received in India) Rules, 2006 was also issued under Sections 93 & 94 of the Finance Act,



W.P.No.2147 of 2017 etc. batch

1994 *vide* Notification No.11 of 2006-ST dated 19.04.2006.

WEB COPY

52. Notifications under Section 68(2) of the Finance Act, 1994 which were issued were also amended from time to time to suit the changes and thus give teeth to the Central Government to levy tax on the recipient of imported service.

53. These amendments to the provisions of the Finance Act, 1994, in 2005 and 2006 and the provisions of the Taxation of Services (Provided from outside India and Received in India) Rules, 2006 are not relevant for the period in dispute as Section 66A of the Finance Act, 1994 ceased to apply with effect from 01.07.2012 *vide* Notification No.23/2012 – ST dated 05.06.2012.

54. However, these developments are to be kept in mind to answer the issues before us. The Parliament was steadfast in taxing service provided from outside India and consumed in India. Thus, the Parliament introduced new provisions to Chapter V of the Finance Act, 1994 *vide* Finance Act, 2012.



W.P.No.2147 of 2017 etc. batch

WEB COPY

55. Apart from amending Notifications issued under Section 68(2) of the Finance Act, 1994, the provisions of the Service Tax Rules, 1994 were also amended in 2012. Notification No.30/2012-ST dated 20.06.2012 was issued under Section 68(2) of the Finance Act, 1994 for this purpose.

56. Withdrawal of the exemption in Notification No.1/2017- dated 12.01.2017 with effect from 22.01.2017 witnessed the issue of the impugned Notification No.3/2017-ST dated 12.01.2017 with effect from 22.01.2017 for the period between 22.01.2017 and 22.04.2017 and later by Notification No.15/2017-ST dated 13.04.2017 for the period between 23.04.2017 and 30.06.2017. These Notifications amended Notification No.30/2012-ST, dated 20.06.2012 issue under Section 68(2) of the Finance Act, 1994. They shifted the burden on these petitioners to pay service tax during the respective period. Thus, an attempt was made to shift the burden on these two categories of writ petitioners during the respective period.



W.P.No.2147 of 2017 etc. batch

57. The **Place of Provisions of Services Rules, 2012** which was issued under Notification No.28/2012-S.T., dated 20.06.2012 with effect from 01.07.2012 was intended to implement the object of Section 66C(1) of the Finance Act, 1994.

58. There has been no amendment to the **Place of Provision of Services Rules, 2012** since its introduction. The **Place of Provision of Services Rules, 2012** has been challenged in W.P.No.2148 of 2017 by Category I Writ Petitioners.

59. Neither Section 66C of the Finance Act, 1994 nor the **Place of Provision of Services Rules, 2012** issued by the Central Government under Section 66C(1) read with Section 94(2)(hhh) of the Finance Act, 1994 with effect from 01.07.2012 *vide* Notification No.28/2012-ST dated 20.06.2012 can be challenged. They are generic provisions. They are attracted and come into play once an activity satisfies the definition of “service” in Section 65B(44) of the Finance Act, 1994 and exemption given is withdrawn.



W.P.No.2147 of 2017 etc. batch

60. As mentioned above, under Section 66C(1) of the Finance Act, 1994, the Central Government can, by Rule, determine the place where services are provided or deemed to have been provided or agreed to be provided or deemed to have been agreed to be provided having regard to the nature and description of various services. Though generic, it was wide enough to be taken within its fold services provided from outside the territory of India for being made liable to tax.

61. Under Rule 10 of the **Place of Provision of Services Rules, 2012**, the “place of provision of services of transportation of goods,” other than by way of “mail” or “courier”, shall be the place of destination of the goods. Rule 10 of the Place of Provision of Services Rules, 2012 reads as under:-

Table No.8

Rule 10. Place of provision of goods transportation services.
-
The place of provision of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of the goods:
Provided that the place of provision of services of goods



W.P.No.2147 of 2017 etc. batch

transportation agency shall be the location of the person liable to pay tax.

WEB COPY

62. Rule 10 of the **Place of Provision of Services Rules, 2012** applies without any distinction between inland transportation of goods service provided in India and services provided from outside the country.

63. Under Section 66D(p)(ii) of the Finance Act, 1994, services by way of transportation of goods in an aircraft or a vessel from a place outside India to the customs station of clearance in India was in the negative list with effect from 01.07.2012.

64. Thus, such a service was outside the purview of the service tax levy under Section 66B of the Finance Act, 1994. This exclusion in Section 66D(p)(ii) of the Finance Act, 1994 was later withdrawn *vide* Section 149 of Finance Act, 2016.

65. Sub Clause (ii) to Clause (p) to Section 66D of the Finance



W.P.No.2147 of 2017 etc. batch

Act, 1994 as in force with effect from 01.07.2012 which placed “**service by way of transportation of goods by an aircraft or a vessel from the a place outside India**” to the Customs Station for clearance in India under the negative list was omitted from the “negative list” with effect from 01.06.2016 by Section 149(b)(ii) of the Finance Act, 2016.

66. Thus, the aforesaid service of transportation of goods through an aircraft or a vessel from a place outside India up to the Customs Station of clearance in India ceased to be excluded from the negative list and would have become liable to service tax under Section 66B of the Finance Act, 1994. In these writ petitions, we are not concerned with amendment to Section 66D of the Finance Act, 1994 *vide* Section 149 (b)(ii) of the Finance Act, 2016.

67. It will be useful refer to changes in the following Table which gives the position as on 01.07.2012 after the amendment to Finance Act, 1994 *vide* the Finance Act, 2012 came into force with effect from 01.07.2012 before the impugned amendment to the Notification:-

Table No. 9



W.P.No.2147 of 2017 etc. batch

Section 66D(p)(ii) of the Finance Act, 1994 prior to its deletion <i>vide</i> Section 149 of the Finance Act 2016.	Amendment to Sl.No.34(c) of the Mega Exemption Notification No.25/2012-ST dated 20.6.2012 after impugned Notification No. 1/2017ST dated 12.01.2017 with effect from 22.01.2017
(p) services by way of transportation of goods— (i) by road except the services of— (A) a goods transportation agency; or (B) a courier agency; (ii) by an aircraft or a vessel from a place outside India up to the customs station of clearance in India; or (iii) by inland waterways;	Provided that the exemption shall not apply to- i. online information and database access or retrieval services received by persons specified in clause (a); or ii. services by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India;

68. A specie of transportation service was in the negative list in Section 66D of the Finance Act, 1994 with effect from 01.07.2012 and therefore no service tax was leviable under Section 66B of the Finance Act, 1994 with effect from 1.7.2012 on services by way of transportation of goods by an aircraft or a vessel from a place outside India up to the customs station of clearance in India.



W.P.No.2147 of 2017 etc. batch

WEB COPY

69. Simultaneously, under Sl.No.34(c) of the Mega Exemption Notification No.25/2012 - ST dated 20.06.2012, services received from a provider of service located in a non-taxable territory by a person located in a non-taxable territory was withdrawn *vide* the impugned Notification No.1/2017-ST dated 12.01.2017 with effect from 22.01.2017 was exempted.

70. This exemption *vide* Sl.No.34(c) to Mega Exemption Notification No.25/2012-ST dated 20.6.2012 with effect from 01.07.2012 was withdrawn *vide* the impugned Notification No.1/2017-ST dated 12.01.2017 with effect from 22.01.2017 by adding a proviso to the Sl.No.34 (c) of Mega Exemption Notification No.25/2012-ST, dated 20.06.2012 with effect from 22.01.2017.

71. This withdrawal of exemption *vide* Notification No.1/2017-ST dated 12.01.2017 along with collateral amendments to the provisions of the Service Tax Rules, 1994 and Notification No.30/2012-ST dated 20.6.2017 *vide* impugned notification have made these petitioners liable



W.P.No.2147 of 2017 etc. batch

to tax. Some of the petitioners have also received show cause notices which have been challenged in the Writ Petitions in Table 5 of this Order.

72. Exemption to services received from a provider of service located in a non- taxable territory by a person located in a non-taxable territory, by way of transportation of goods in a vessel from a place outside India up to the customs station of clearance in India ceased to be exempted in view of the impugned Notification No.1/2017-ST dated 12.01.2017 with effect from 22.01.2017. Thus, there is a challenge to the impugned Notification No.1/2017-ST dated 12.01.2017 in W.P.No.2149 of 2017.

73. Therefore, services by way of transportation of goods by a vessel from a place outside India up to the Customs Station of clearance in India which was exempted from 1.7.2012 became liable to pay service tax under Section 66B of the Finance Act, 1994, in view of the above amendment.



W.P.No.2147 of 2017 etc. batch

74. Thus, intermediate services provided and consumed in the course of import of goods through a vessel or a Shipping liner in connection with transportation of goods from outside the territory of India into India was made liable to service tax in view of the changes. Thus, the collateral notifications impugned in these writ petitions were issued.

75. At best, the petitioners can be said to be aggrieved by the withdrawal exemption in Sl.No.34(c) of Mega Exemption Notification No.25/2012-ST dated 20.06.2012 *vide* the impugned Notification No.1/2017-ST dated 12.01.2017 with effect from 22.01.2017. However, the law on the subject is well settled against the petitioner.

76. The Hon'ble Supreme Court in the case of **Kasinka Trading Vs. Union of India**, 1995 (1) SCC 274 : 1994 (74) E.L.T.782 (S.C.) has clarified the position. The power to grant exemption implies power to withdraw the exemption. A reference is made to some of the paras from the said judgment which is extracted under:-



WEB COPY



W.P.No.2147 of 2017 etc. batch

20. The power to grant exemption from payment of duty, additional duty etc. under the Act, as already noticed, flows from the provisions of Section 25(1) of the Act. The power to exempt includes the power to modify or withdraw the same. The liability to pay customs duty or additional duty under the Act arises when the taxable event occurs. They are then subject to the payment of duty as prevalent on the date of the entry of the goods. An exemption notification issued under Section 25 of the Act had the effect of suspending the collection of Customs duty. It does not make items which are subject to levy of customs duty etc. as items not leviable to such duty. It only suspends the levy and collection of customs duty etc., wholly or partially and subject to such conditions as may be laid down in the Notification by the Government in “public interest”. Such an exemption by its very nature is susceptible of being revoked or modified or subjected to other conditions. The supersession or revocation of an exemption notification, in the “public interest”, is an exercise of the statutory power of the State under the law itself as is obvious from the language of Section 25 of the Act. Under the General Clauses Act an authority which has the power to issue a notification has the undoubted power to rescind or modify the notification in a like manner. From the very nature of power of exemption granted to the Government under Section 25 of the Act, it follows that the same is with a view to enabling the Government to regulate, control and promote the industries and industrial production in the country. Notification No. 66 of 1979 in our opinion, was not designed or issued to induce the appellants to import PVC resin. Admittedly, the said Notification was not even intended as an incentive for import. The Notification on the plain language of it was conceived and issued on the Central Government



WEB COPY



W.P.No.2147 of 2017 etc. batch

“being satisfied that it is necessary in the public interest so to do.” Strictly speaking, therefore, the Notification cannot be said to have extended any “representation” much less a “promise” to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel against the State. It would bear repetition that in order to invoke the doctrine of promissory estoppel, it is necessary that the promise which is sought to be enforced must be shown to be an unequivocal promise to the other party intended to create a legal relationship and that it was acted upon as such by the party to whom the same was made. A Notification issued under Section 25 of the Act cannot be said to be holding out of any such unequivocal promise by the Government which was intended to create any legal relationship between the Government and the party drawing benefit flowing from the said Notification. It is, therefore, futile to contend that even if the public interest so demanded and the Central Government was satisfied that the exemption did not require to be extended any further, it could still not withdraw the exemption.

.....

23.It needs no emphasis that the power of exemption under Section 25(1) of the Act has been granted to the Government by the Legislature with a view to enabling it to regulate, control and promote the industries and industrial productions in the country. Where the Government on the basis of the material available before it, bona fide, is satisfied that the “public interest” would be served by either granting exemption or by withdrawing, modifying or rescinding an exemption already granted, it should be allowed a free hand to do so. We are unable to agree with the learned counsel for the appellants



WEB COPY



W.P.No.2147 of 2017 etc. batch

that Notification 66/79 could not be withdrawn before 31-3-1981. First, because the exemption Notification having been issued under Section 25(1) of the Act, it was implicit in it that it could be rescinded or modified at any time if the public interest so demands and secondly it is not permissible to postpone the compulsions of “public interest” till after 31st March 1981 if the Government is satisfied as to the change in the circumstances before that date. Since, the Government in the instant case was satisfied that the very public interest which had demanded a total exemption from payment of customs duty now demanded that the exemption should be withdrawn it was free to act in the manner it did. It would bear a notice that though Notification 66/79 was initially valid only upto 31-3-1979 but that date was extended in “public interest”, we see no reason why it could not be curtailed in public interest. Individual interest must yield in favour of societal interest.

24. In our considered opinion therefore the High Court was perfectly right in holding that the doctrine of promissory estoppel had no application to the impugned notification issued by the Central Government in exercise of its powers under Section 25(1) of the Act in view of the facts and circumstances, as established on the record.

.....

26. In our opinion, no justifiable prejudice was caused to the appellants in the absence of any unequivocal promise by the Government not to act and review its policy even if the necessity warranted and the “public interest” so demanded. Thus, in the facts and circumstances of these cases, the



W.P.No.2147 of 2017 etc. batch

appellants cannot invoke the doctrine of promissory estoppel to question the withdrawal notification issued under Section 25 of the Act.

77. This view has been followed by the Hon'ble Supreme Court in the following cases also:-

- i. **Darshan Oils Private Limited vs. Union of India**, 1995 (75) E.L.T.32 (S.C.);
- ii. **S.B.International Limited vs. Assistant Director General of F.T.**, 1996 (82) E.L.T. 164 (S.C.);
- iii. **Union of India vs. Victory Plastic Private Limited**, 1996 (E.L.T.) 481 (S.C.);
- iv. **Shrijee Sales Corporation vs. Union of India**, 1997 (89) E.L.T. 452 (S.C.);
- v. **D.P.F.Textiles Limited vs. Union of India**, 1997 (92) E.L.T.28 (S.C.);
- vi. **Sales Tax Officer vs. Shree Durga Oil Mills**, 1998 (97) E.L.T. 202 (S.C.);
- vii. **Union of India vs. Bharat Commerce & Industries Limited**, 1999 (107) E.L.T.582 (S.C.).
- viii. **Union of India vs. Indian Charge Chrome**, 1999 (112) E.L.T.753 (S.C.);
- ix. **Union of India vs. Unicorn Industries**, 2019 (368) E.L.T.202 (S.C.);
- x. **Hero Motocorp Limited vs. Union of India**, 2022 (66) G.S.T.L.129 (S.C.).

78. Therefore, challenge to notification No.1/2017-ST dated 12.01.2017 w.e.f 22.01.2017 in W.P.No.2149 of 2017 also has to fail.

79. Service tax would have been payable right from inception i.e.



W.P.No.2147 of 2017 etc. batch

from 1.7.2012 either on the Steamer Agents or on the importer as the case may be but for the concession given by the parliament under the negative list in Section 66D and by the Central Government *vide* Sl.No.34(c) to Mega Exemption Notification 25/2012 ST dated 20.06.2012.

80. It cannot be said that the Place of Provision of Services Rules, 2012 issued *vide* Notification No.28/2012-ST dated 20.12.2012 was invalid, merely because exemption that was earlier granted *vide* Sl.No.34(c) to Mega Exemption Notification 25/2012 ST dated 20.06.2012 was withdrawn *vide* Notification No.1/2017-S.T., dated 12.01.2017.

81. The petitioners in W.P.No.2147 of 2017 (Category I) had no occasion earlier to challenge the vires of Section 66C of the Finance Act, 1994 as services provided in connection with the transportation of goods by a service provider located outside the territory of India to a person located in a "non taxable territory" was exempted with effect from 01.07.2012 *vide* Sl.34(c) to Mega Exemption Notification No.25/2012-



W.P.No.2147 of 2017 etc. batch

ST dated 20.06.2012.

WEB COPY

82. Challenge to 66C(2) of the Finance Act, 1994 is perhaps on account of the fact that the challenge to Rule 10 of the Place of Provision Rules, 2012 is barred under Section 66C(2) of the Finance Act, 1994.

83. This challenge to Section 66C of the Finance Act, 1994 is long after it was incorporated into the Finance Act, 1994 after the withdrawal of exemption by amendment to Mega Exemption Notification No.25/2012-ST dated 20.6.2012 *vide* the impugned Notification No.1/2017-ST dated 12.01.2017 with effect from 22.01.2017.

84. Therefore, challenge to Section 66C(2) of the Finance Act, 1994 has to be answered against the petitioners. Challenge to Section 66C(2) of Finance Act, 1994 has to fail in view of the law settled by the Hon'ble Supreme Court in **Electronics Corporation of India Vs. Commissioner of Income Tax and Another**, AIR 1989 SC 1707, **GVK Industries Vs. Income Tax Officers**, 2011 (4) SCC 36 and in **Union of**



W.P.No.2147 of 2017 etc. batch

India Vs. Mohit Minerals Private Limited, 2022 SCC OnLine SC 657, 2022 (61) G.S.T.L. 257 (S.C.). It cannot be said that the Parliament exceeded its power under the Article 245 of the Constitution.

85. As long as there is a territorial nexus between the service being taxed and its consumption in India whether directly or indirectly, the challenge to Section 66C(2) of the Finance Act, 1994 cannot be countenanced. Consequently, challenge to provisions of the **Place of Provision of Services Rules, 2012** has to fail.

86. If at all, at best, the petitioners could be aggrieved by Rule 10 of the **Place of Provision of Services Rules, 2012**. However, as mentioned above, Rule 10 of the **Place of Provision of Services Rules, 2012** is a generic Rule. It applies to all specie of service of transportation of goods other than by way of “mail” or “courier service”.

87. In this connection, it will be useful to refer to the decision of the Hon'ble Supreme Court in **Electronics Corporation Of India vs Commissioner Of Income Tax & Anr**, AIR1989 SC 1707, wherein, it



W.P.No.2147 of 2017 etc. batch

was held as follows:-

WEB COPY

*“8. Now it is perfectly clear that it is envisaged under our constitutional scheme that Parliament in India may make laws which operate extra-territorially. Art. 245(1) of the Constitution prescribes the extent of laws made by Parliament. They may be made for the whole or any part of the territory of India. Art. 245(2) declares that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. **Therefore, a Parliamentary statute having extra-territorial operation cannot be ruled out from contemplation. The operation of the law can extend to persons, things and acts outside the territory of India. The general principle, flowing from the sovereignty of States, is that laws made by one State can have no operation in another State. The apparent opposition between the two positions is reconciled by the statement found in **British Columbia Electric Railway Company Limited v. The King**, [1946] A.C. 527:***

"A legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account, and the courts of its country must enforce the law with the machinery available to them."

In other words, while the enforcement of the law cannot be contemplated in a foreign State, it can, nonetheless, be enforced by the courts of the enacting State to the degree that is permissible with the machinery available to them. They will not be regarded by such courts as invalid on the ground of such extra-territoriality."



WEB COPY



W.P.No.2147 of 2017 etc. batch

88. The Hon'ble Supreme Court in **GVK Industries Vs. Income Tax Officers**, 2011 (4) SCC 36 has clearly held that the Parliament has power to legislate over events which occur outside the territory of India provided that such an event has a real nexus/connection with event in India.

89. In fact, dealing with an identical situation under the GST Regime under Section 13(9) of the Integrated Goods and Service Tax Act, 2017, the Hon'ble Supreme Court in **Union of India Vs. Mohit Minerals Private Limited**, 2022 SCC OnLine SC 657, 2022 (61) G.S.T.L. 257 (S.C.) held as follows:-

109.As an alternative, the respondents submitted that though the levy may have a nexus with the Indian territory, the levy of tax extra-territorial must be provided by Parliament through statute and not by the Union Government through delegated legislation. We do not find any applicability of this submission to the facts at hand. As stated above, the IGST Act under Section 13(9) recognizes the place of supply of services as the destination of goods is India, the statute itself is broad enough to



WEB COPY



W.P.No.2147 of 2017 etc. batch

cover a taxable event that has extra-territorial aspects, which bears a nexus to India"

90. We therefore hold that the challenge to the vires to Section 66C(2) of the Finance Act, 1994 has to fail. Therefore, W.P No.2147 of 2017 is liable to be dismissed. For the same reason, challenge to Notification No.28/2012-ST dated 20.6.2012 *vide* W.P No.2147 of 2018 has also to fail. Consequently, the challenge to Notification No. 28/2012-ST dated 20.6.2012 has also to fail.

91. Thus, with effect from 01.07.2012, services provided in connection with the transportation of goods by a service provider located outside the territory of India to a person located in a “non taxable territory” were exempted under Sl.No.34(c) of Mega Exemption Notification No.25/2012-ST, dated 20.06.2012.

92. For comparison, Entry No.34 as it stood prior to the amendment vide impugned Notification No.1/2017-ST, dated 12.01.2017 and after the amendment with effect from 22.01.2017 are extracted as under:-



W.P.No.2147 of 2017 etc. batch

WEB COPY

Table No.10

Entry 34 Mega Exemption Notification No.25/2012-ST, dated 20.06.2012, w.e.f. 01.07.2012	
34. Services received from a provider of service located in a non-taxable territory by – a. Government, a local authority, a governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession; b. an entity registered under section 12AA of the Income Tax Act, 1961 (43 of 1961) for the purposes of providing charitable activities; or c. a person located in a non-taxable territory;	
Provided that the exemption shall not apply to online information and database access or retrieval services received by persons specified in clause (a).	Provided that the exemption shall not apply to – i. online information and database access or retrieval services received by persons specified in clause (a); or ii. <u>services by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India.</u>
Note: The above Proviso as it read when Mega Exemption Notification No.25/2012-ST, dated 20.06.2012 was introduced w.e.f. 01.07.2012	Note: The above Proviso as amended by Notification No.1/2017, dated 12.01.2017 effect from 22.01.2017.



W.P.No.2147 of 2017 etc. batch

93. As mentioned in the earlier part of this order, the other notifications which have been issued are only consequential notifications issued to shift the burden of tax on the "Steamer Agents" [**Category I Writ Petitioners**] for a period between 22.01.2017 and 22.04.2017 and thereafter on the "Importers [**Category II Writ Petitioners**] between 23.04.2017 and 30.06.2017.

94. The activity of transportation of goods qualified as a "service" within the meaning of Section 65B(44) of the Finance Act, 1994 and provision of service in India in view of Rule 10 of the **Place of Provision of Services Rules, 2012**. Such an activity was merely exempted in terms of Sl.No.34(c) of Exemption Notification No.25/2012-ST dated 20.06.2012.

95. We will therefore, examine whether on account of the withdrawal of the exemption, the Central Government was justified in shifting the burden to pay service tax on the "Steamer Agents" viz., **Category I Writ Petitioners** and later on the importer viz., **Category II Writ Petitioners** and results in impossibility, arbitrary and impractical



W.P.No.2147 of 2017 etc. batch

levy in view of impugned Notification No.1/2017-ST dated 12.1.2017 with effect from 22.1.2017 withdrawing the exemption under Clause 34 (C) to Mega Exemption Notification No. 25/2012-ST dated 20.06.2012.

96. The other notifications which have been challenged are detailed in the Table below. Column B gives the details of the Parent Notification. Column C lists out the Notification impugned by the Steamer Agents (Category I Writ Petitioners) and Column D lists out the Notification impugned by the Importer (Category II Writ Petitioners):-

Table No.11

Sl. No.	Parent Notification(s)	Impugned Notifications	
		C	D
		Category I Writ Petitioners	Category II Writ Petitioners.
		Steamer Agents	Importers
1	2/1994-ST dt 28.6.1994. [STR, 1994]	2/2017-ST dt 12.1.2017 with effect from 22.1.2017	16/2017-ST dt 13.4.2017 with effect from 23.4.217
		W.P.No.2150 of 2017	W.P. in Sl.Nos.7 to 12 of Table 4



WEB COPY



W.P.No.2147 of 2017 etc. batch

		- Both the impugned Notifications insert clauses and substitute clauses in STR, 1994* and impact Rule 2(1)(d) of the STR, 1994* which defines the expression “person liable to pay tax”. - Both the impugned Notifications shift the burden to discharge service tax liability on: - Introduces and later substitutes Rule 2(1)(d)(EEB) to STR, 1994.	
		Person Liable to pay Tax.	
		The person who complies with the provision of Section 29,30 or 38 of the Customs Act, 1962. ie. Steamer Agents .	The person who imports i.e. importer .
2	30/2012-ST dated 20.6.2012-with effect from 1.7.2012.	3/20170ST dt 12.1.2017 with effect from 22.1.2017.	15/2017-ST dt 13.4.2017 with effect from 23.4.217
		W.P.No.2151 of 2017	W.P. at Sl.Nos.7 to 14 of Table 4
The parent notification 30/2012-ST dated 20.6.2012-with effect from 1.7.2012 was issued under Section 68(2) of the Finance Act, 1994 to shift the burden.			
		Impugned Notifications 3/20170ST dt 12.1.2017 with effect from 22.1.2017 15/2017-ST dt 13.4.2017 with effect from 23.4.217 give effect to the above amendments in the Notification in Column C &D as above to parent Notification No. 30/2012-ST dated 20.6.2012-with effect from 1.7.2012 issue under notification issued under Section 68(2) of the Finance Act, 1994 by shifting the burden to	



W.P.No.2147 of 2017 etc. batch

		pay service tax.	
		Person Liable to pay Tax	
		The person who complies with the provision of Section 29, 30 or 38 of the Customs Act,1962 ie. Steamer Agents.)	The importer.
3	28/2012-ST dated 20.6.2012-with effect from 01.07.2012. [POPR, 2012]	No amendment. Rule 10 makes it clear that the place of provision of service in case of transportation of goods shall be the place of destination.	challenged by Steamer Agents – Category I in W.P.No.2148 of 2017
4	18/2011-ST dated 1.3.2011 with effect from 01.04.2011. [POTR, 2011]		14/2017-ST dated 13.4.2017 with retrospective effect from 22.1.2017. W.P at S.No.14 of Table 4

STR, 1994 : Service Tax Rules, 1994

POTR, 2011 : Point of Taxation Rules, 2011

97. The changes brought to the Rules and other Notifications under the rest of the impugned Notification are only consequential. They by themselves do not make the activity taxable. They merely shift the burden to pay service tax on these petitioners during the period in



W.P.No.2147 of 2017 etc. batch

dispute.

WEB COPY

98. But, for the withdrawal of the exemption *vide* impugned Notification No.1/2017-ST dated, 12.01.2017, the petitioners would have no cause for complaint. The amendments to the parent notifications in the above table are only the consequential changes to the Rules and the enabling Notifications issued under Section 68(2) and Section 67A of the Finance Act, 1994. The impugned notifications were only meant to implement the withdrawal of the exemption *vide* impugned Notification No.1/2017-ST dated, 12.01.2017. They by themselves do not create any liability on these petitioners.

99. To give effect to the above amendment, the definition of “**person liable to pay tax**” in Sub Clause (EEC) to Rule 2(1)(d)(i) of the **Service Tax Rules, 1994** was inserted *vide* impugned Notification No.02 of 2017-ST dated 12.01.2017 with effect from 22.01.2017. It shifted the burden on the "Steamer Agents" to pay tax. Later, the **Service Tax Rules, 1994** was further amended *vide* impugned Notification No.16/2017-ST, dated 13.04.2017 w.e.f. 23.04.2017 and thereby shifted



W.P.No.2147 of 2017 etc. batch

the burden on the importer of the goods.

WEB COPY

100. Relevant portion of Rule 2(1)(d)(i) EEC of Sales Tax Rules, 1994 with effect from 22.01.2017 in terms of Notification No.2/2017-ST, dated 12.01.2017 and in terms of Notification No.16/2017-ST, dated 13.04.2017 with effect from 23.04.2017 read as under:-

Table No.12

Not.No.2/2017-ST, dated 12.01.2017, w.e.f. 22.01.2017	Not.No.16/2017-ST, dated 13.04.2017, w.e.f. 23.04.2017
2(1) In these rules, In these rules, unless, the context otherwise requires:-	
(d) “ person liable for paying service tax ” :-	
(i) in respect of the taxable services notified under sub-section (2) of Section 68 of the Act, means;-	
(EEC) in relation to services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, the person in India who complies with Sections 29, 30 or 38 read with Section 148 of the Customs Act, 1962 (52 of 1962) with respect to such goods;	(EEC) in relation to services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, the importer as defined under clause (26) of Section 2 of the Customs Act, 1962 (52 of 1962) of such goods;



W.P.No.2147 of 2017 etc. batch

101. A further amendment was also made to the **Service Tax Rules, 1994** *vide* impugned Notification No.16/2017-ST, dated 13.04.2017 by inserting sub-rule (7CA) to Rule 6 read as follows with effect from 22.01.2017.

Rule 6:-Payment of Service Tax:

- 1.....
- 2.....
-
- 7A.....
- 7B
- 7(C).....

(7CA) The person liable for paying service tax for the taxable services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, shall have the option to pay an amount calculated at the rate of 1.4% of the sum of cost, insurance and freight (CIF) value of such imported goods."

102. Rule 6(7CA) of the Service Tax Rules, 1994 as inserted *vide* Notification No.16/2017-ST, dated 13.04.2017 gave an option to the person liable for paying service tax to pay an amount calculated at the rate of 1.4% of cost, insurance and freight (CIF) value of such imported



W.P.No.2147 of 2017 etc. batch

goods.”

WEB COPY

103. Thus, from 23.04.2017, a person liable to pay Sales Tax for the taxable services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, shall have the option to pay an amount calculated at the rate of 1.4% of the sum of cost, insurance and freight (CIF) value of such imported goods.

104. As a *sequitur* to the impugned Notification No.02/2017-ST dated 12.01.2017 with effect from 22.01.2017, impugned Notification No.3/2017-ST dated 12.01.2017 was issued with effect from 22.01.2017. It amended Notification No.30/2012-ST dated 20.6.2012 issued under Section 68(2) of the Act. Thus, attempt was made to shift the burden on the Steamer Agents.

105. Later, by the impugned Notification No.15/2017-ST, dated 13.04.2017, there was further amendment to Notification No.30/2012-



W.P.No.2147 of 2017 etc. batch

ST, dated 20.06.2012 issued under Section 68(2) of the Finance Act, 1994 to shift the burden of paying service tax on the recipient of services on reverse charge basis.

106. Notification No.30/2012- ST, dated 20.06.2012 issued under Section 68(2) of the Finance Act, 1994 prescribed the extent of service tax payable by person liable to pay tax for the purpose of Section 68(2) of the Act.

107. Relevant portion of Notification No.30/2012- ST, dated 20.06.2012 as it stood after the impugned Notification No.3/2017-ST dated 12.01.2017 during the period in dispute reads as follows:-

Notification No.30/2012- ST, dated 20.06.2012

I.The taxable services,—

In exercise of the powers conferred by sub-section (2) of section 68 of the Finance Act, 1994 (32 of 1994) and in supersession of (i) notification of the Government of India in the Ministry of Finance (Department of Revenue),



WEB COPY



W.P.No.2147 of 2017 etc. batch

No.15/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-Section (i) vide number G.S.R 213(E) dated the 17th March, 2012 and (ii) notification of the Government of India in the Ministry of Finance (Department of Revenue) No.36/204, Service Tax, dated the 31st December, 2004, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R.849(E) dated the 31st December, 2004, except as respects things done or omitted to be done before such supersession, the Central Government hereby notifies the following taxable services and the extent of service tax payable thereon by the person liable to pay service tax for the purposes of the said sub-section namely:-

- (A) (i)...
- (ii) ...
 - (a)...
 - (b)...
 - (c)...
 - (d)...
 - (e)...
 - (f)...
- (iii)...
- (iv)...
- (A)...
- (B)...
- (C)...
- (1)...
- (2)...
- (v) ...
- (vi).....



WEB COPY



W.P.No.2147 of 2017 etc. batch

(vii) **provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India,**

(B) provided or agreed to be provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory;

(II) **The extent of service tax payable thereon by the person who provides the service and the person who receives the service for the taxable services specified in (I) shall be as specified in the following Table, namely:-**

Table

Sl. No.	Description of a service	Percentage of service tax payable by the person providing service	Percentage of service tax payable by the person receiving the service
12.	in respect of services provided or agreed to be provided by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India	Nil	100%

[Sl.No.12 inserted *vide* impugned **Notification**



WEB COPY



W.P.No.2147 of 2017 etc. batch

No.03/2017-ST, dated 12.01.2017 with effect from 22.1.2017]

108. By the impugned Notification No.03/2017-ST, dated 12.01.2017, Explanation No.IV was inserted. Realizing difficulties in collecting service tax from Steamer Agent in terms of Notification Nos.1 to 3/2017- ST dated 12.01.2017, the Government decided to shift the burden of tax in relation to goods imported into India, on the importer *vide* impugned Notifications in Category II with effect from 23.04.2017.

109. The amendments to the Explanation to Notification No.30/2012 as amended by **Notification No.03/2017-ST**, dated **12.01.2017** and **Notification No.15/2017-ST**, dated **13.04.2017** are reproduced below:-

Table No.13

Notification No.03/2017-ST, dated 12.01.2017	Notification No.15/2017-ST, dated 13.04.2017
	“Explanation III.- The business entity located in the taxable territory who is litigant, applicant or petitioner, as the case may be, shall be treated as the person who receives the legal services



WEB COPY



W.P.No.2147 of 2017 etc. batch

for the purpose of this notification.

Explanation IV.- For the purposes of this notification, “non-assesse online recipient” has the same meaning as assigned to it in clause (ccba) of sub-rule 1 of rule 2 of Service Tax Rules, 1994.

Explanation IV.- For the purposes of this notification, in respect of services provided or agreed to be provided by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, person liable for paying service tax other than the service provider shall be the person in India who complies with sections 29, 30 or 38 read with section 148 of the Customs Act, 1962 (52 of 1962) with respect to such goods.”.

Explanation V.- For the purposes of this notification, in respect of services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, person liable for paying service tax other than the service provider shall be the importer as defined under clause (26) of section 2 of the Customs Act, 1962 (52 of 1962) of such goods.”.

110. Section 29 of the Customs Act, 1962 refers to the obligations of the person-in charge of a vessel or an aircraft entering India from any place outside India. Section 30 of the Customs Act, 1962 also refers to the obligations of such person for submitting Import General Manifest and the like documents. Section 38 of the Customs Act, 1962 refers to



W.P.No.2147 of 2017 etc. batch

the powers of the proper Customs Officer requiring person-in-charge of any conveyance carrying imported goods for production of any document or answer any questions.

111. Thus, burden for paying the service tax liability was attempted to be shifted on the person in India who complied with Section 29, 30 or 38 of the Customs Act, 1962 read with section 148 of the Customs Act, 1962 with respect to such goods by virtue of Notification No.2 of 2017-ST dated 12.01.2017 with effect from 22.01.2017 upto 22.42017 and thereafter on the importer of goods.

112. Thus, service tax initially became payable by “steamer agents” on ocean freight with effect from 22.01.2017 in view of the amendment by Notification No.1/2017-ST dated 12.01.2017. Later, by the impugned Notification No.15/2017-ST dated 13.04.2017, the burden was shifted on the importer.

113. Thus, the intention of the Government was to shift burden of tax on the “steamer agents” and later on the importers *vide* impugned



W.P.No.2147 of 2017 etc. batch

Notification No.15/2017-ST dated 13.04.2017 with effect from 23.04.2017, wherein, an Explanation V to Notification No.30/2012-ST dated 20.06.2012 was inserted. It impacted the second Category II of Writ Petitioners namely the "importers". There were further amendments to the Explanations to vide Notification No.03/2017-ST, dated 12.01.2017 and Notification No.15/2017-ST, dated 13.04.2017.

114. Explanation IV as inserted *vide* Notification No.03/2017-ST, dated 12.01.2017 impacted the Category I of the Writ Petitioners namely the "Steamer Agents".

115. The Point of Taxation Rules, 2011 which was introduced was issued by the Central Government in the powers vested with it under Section 67A of the Finance Act, 1994 *vide* Notification No.18/2011-ST dated 01.03.2011 was also amended.

116. Section 67A of the Finance Act, 1994 and Rule 8B of Point of Taxation Rules, 2011 as inserted *vide* impugned Notification No.14/2017-ST dated 13.04.2017 read as under:-



W.P.No.2147 of 2017 etc. batch

Table No.14

Section 67A of the Finance Act, 1994	Rule 8B of the Point of Taxation Rules, 2011
Date of determination of rate of tax, value of taxable service and rate of exchange. — (1) The rate of service tax, value of a taxable service and rate of exchange, if any, shall be the rate of service tax or value of a taxable service or rate of exchange, as the case may be, in force or as applicable at the time when the taxable service has been provided or agreed to be provided. For the purposes of this section, “rate of exchange” means the rate of exchange determined in accordance with such rules as may be prescribed. (2) The time or the point in time with respect to the rate of service tax shall be such as may be prescribed.	Determination of point of taxation in case of services provided by a person located in non-taxable territory to a person in non-taxable territory. — Notwithstanding anything contained in these rules, the point of taxation in respect of services provided by a person located in non-taxable territory to a person in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, shall be the date of bill of lading of such goods in the vessel at the port of export.”.

117. Prior to amendment to the Point of Taxation Rules, 2011 *vide* impugned Notification No.14/2017-ST dated 13.04.2017 with effect from 23.04.2017, the point of taxation was:-

- the time when the invoice for the service provided or agreed to be provided was issued;
- if no invoice was not issued within prescribed time period (30 days except for specified financial sector where it is 45 days) of completion of provision of service then the date of completion of service;



WEB COPY



W.P.No.2147 of 2017 etc. batch

- the date of receipt of payment where payment is received before issuance of invoice or completion of service.

118. Rule 8B was inserted to the Point of Taxation Rules, 2011, after Rule 8A *vide* impugned Notification No.14/2017-ST dated 13.04.2017. It came into force on 23.04.2017 with retrospective effect from 22.01.2017.

119. The purpose of the insertion of Rule 8B of the Point of Taxation Rules, 2011 with retrospective effect from 22.1.2017 was to fix the rate of tax, value of taxable service and rate of exchange as the date of bill of lading of goods in the vessel at the port of export.

120. The impugned Notification No.14/2017-ST dated 13.04.2017 was intended to enable the Department to levy and collect service tax on the steamer agents and also the importers at the prevailing rate for the respective period. The amendment was in compliance with the requirement of Section 67(A) of the Act. Thus, not only the importer but also the “steamer agents” were liable to pay tax at the rate and value from



W.P.No.2147 of 2017 etc. batch

22.01.2017. There are no merits in the challenge to it.

WEB COPY

121. In CIF contracts, the service of transportation of goods by vessel is received by the foreign exporters/overseas supplier from the foreign/overseas vessel owner/operator/Shipping Liners in the CIF contract. The value of all incidental services consumed in the course of import of goods is built into the import value of the import goods. Customs duty is already paid by the importers on these values. To that extent, there is no justification to burden the importers who will be forced to bear the incidence of the levy on again.

122. The transaction value for the purpose of custom duty and additional duty of custom equivalent to the excise duty (ADC), includes the value of ocean freight. Therefore, importers cannot be mulcted with the double tax on the ocean freight either directly or indirectly particularly in a CIF contracts.

123. The value of incidence of such intermediate services availed by the Shipping Liners will be passed on by the Shipping Liners to the



W.P.No.2147 of 2017 etc. batch

Foreign Shippers and eventually to the importers. This value gets taxed in the case of CIF Contract. In the case of FOB contracts, the importers have to in any event include the value under Section 14 of the Customs Act, 1962. Thus, to tax, the overseas freight twice is also uncalled.

124. Such cost of such transportation is factored into the price of the shipment and such cost of such shipment gets built into the transaction value of the import goods at the time and place of importation. Computation of service tax in CIF contract is impossible. That apart, in view of the Division Bench of the Gujarat High in **Sal Steel Ltd Vs. Union of India**, (2020) 37 GSTL 3, no tax can be demanded on an ocean freight or importers.

125. Neither the importer in India who imports the goods at the place of destination in India will have an idea as to the cost of such services which are in built and borne by the foreign shipping liners nor the steamer agents who book cargo for and behalf of a shipping liner.



W.P.No.2147 of 2017 etc. batch

126. Further, in the case of contracts on a CIF (Cost, Freight and Insurance), the foreign supplier-exporter engages the services of the Overseas Shipping Liner and is responsible for arranging transportation and insurance of the goods. The consideration for shipping the goods is payable by the foreign supplier in the case of CIF contracts to the foreign/Overseas Shipping Liner.

127. In case of CIF transaction, the value of ocean freight is not available with the importer as the ocean freight is paid by the overseas supplier. The value of a CIF contract is indivisible. The impugned notifications also have the propensity of spiraling the import value of the goods.

128. In CIF contracts, the "value" of sea transportation service is not made available either to the importers or the steamer agents. There is also no privity of contract between the importers and the Overseas Shipping Liner in CIF contracts nor does an Indian importer make any payment for such ocean freight to the Overseas Shipping Liners and its ancillary service provider who services are engaged enroute.



W.P.No.2147 of 2017 etc. batch

WEB COPY

129. The steamer agents (Category I Writ Petitioners) are already service providers and are already taxed under the provisions of the Finance Act, 1994 for the service provided by them to the shipping liners.

130. We therefore hold that service tax cannot be demanded from these petitioners as neither the “steamer agents” nor the “importers” in India are the recipient of service. They are not liable to pay tax.

131. The other impugned notifications which were issued as a consequence of withdrawal of the exemption under Mega Exemption Notification No.25/2012-ST dated 20.6.2012 *vide* Notification No.1/2017-ST dated 12.1.2017 with effect from 22.1.2017, *vide* Notification No.1/2017-ST dated 12.1.2017 with effect from 22.1.2017 also cannot be challenged as challenge to the latter notification has to fail.



W.P.No.2147 of 2017 etc. batch

132. The, Central Government had devised a mechanism, whereby, apart from those activities which were specifically excluded from the definition of “service” in Section 65B(44) of the Finance Act, 1994, few services were placed in the “negative list” in Section 66D of the Finance Act, 1994 while few services were specifically exempted with effect from 01.07.2012 under Mega Exemption Notification No.25/2012-ST dated 20.06.2012 with effect from 01.07.2012.

133. Along with these notifications, the Service Tax Rules, 1994 issued *vide* Notification No.2/1994 dated 28.6.1994 was amended first *vide* Notification No.2/2017-ST dated 12.01.2017 with effect from 22.01.2017 and by the impugned Notification No.16/2017-ST dated 13.04.2017 with effect from 23.4.2017 for the respective period. Those amendments *vide* the impugned notifications were intended to declare these petitioners as “persons liable to pay tax”.

134. Thus, a statutory framework for shifting the burden to pay tax was made. However, the Notification No.3 of 2017-ST, dated 12.01.2017 had defects right from the time of its inception.



W.P.No.2147 of 2017 etc. batch

WEB COPY

135. The other collateral notifications which have been challenged in these writ petitions are merely incidental and only consequential to withdrawal of exemption in Mega Exemption Notification No.25/2012-ST dated 20.06.2012 vide impugned No.1/2017-ST dated 12.01.2017 with effect from 22.01.2017. They have been issued with a view to implement the changes on account of withdrawal of exemption under impugned No.1/2017-ST dated 12.01.2017 with effect from 22.01.2017.

136. Although, Notification No.30/2012-ST dated 20.06.2012 issued under Section 68(2) of the Finance Act, 1994 has been amended by Notification No.3/2017- ST, dated 12.01.2017 with effect from 22.01.2017 and later by Notification No.15/2017-ST dated 13.04.2017, it is evident that as per Sl.No.12 to the above notification, it is only the “**recipient of service**” who can be made liable to pay tax. It is the “**recipient of service**” who is liable to 100% tax on such service. Sl.No.12 as inserted *vide* Notification No.3/2017- dated 12.01.2017 with effect from 22.1.2017 reads as follows:-



WEB COPY



W.P.No.2147 of 2017 etc. batch

Table No.15

Sl. No.	Description of a service	Percentage of service tax payable by the person providing service	Percentage of service tax payable by the <u>person receiving the service</u>
12.	in respect of services provided or agreed to be provided by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India	Nil	100%

137. Sl.No.12 to Notification No.30/2012-ST dated 20.06.2012 issued under Section 68(2) of the Finance Act, 1994 as amended by the impugned Notification No.3/2017- dated 12.01.2017 with effect from 22.1.2017 and Notification No.15/2017-ST dated 13.4.2017 with effect 23.4.2017 merely shifts the burden to pay service tax.



W.P.No.2147 of 2017 etc. batch

WEB COPY

138. As per Sl.No.12 to the above notification, it is the person receiving service who has to pay 100% of the service tax although in the amendment to parent notification No.30/2012-ST dated 20.6.2012 *vide* impugned Notification No.03/2017-ST dated 12.01.2017 and Notification No.15/2017-ST dated 13.04.2017, it is the steamer agent or the importers who are liable to pay service tax during the respective period as detailed below:-

Table No.16

Notification No.03/2017-ST dated 12.01.2017	Notification No.15/2017-ST dated 13.4.2017
The person in India who complies with Sections 29, 30 or 38 read with Section 148 of the Customs Act, 1962 (52 of 1962) with respect to such goods.	The importer as defined under clause (26) of Section 2 of the Customs Act, 1962 (52 of 1962) of such goods.

139. There is a flaw in the above Notification No.03/2017-ST dated 12.01.2017 and Notification No.15/2017-ST dated 13.04.2017. It is the foreign liner who engages the service of various other persons in the course of transport of service. It is the foreign shipping liner who receives service who can be taxed and not the importers or the steamer



W.P.No.2147 of 2017 etc. batch

agents although by virtue of the above two notifications, the person liable to pay tax has been also declared as the person who complies with Sections 29, 30 or 38 read with Section 148 of the Customs Act, 1962 (52 of 1962) with respect to such goods between 22.01.2017 and 22.04.2017 and thereafter the importer as defined under Clause (26) of Section 2 of the Customs Act, 1962 of such goods between 23.04.2017 and 30.06.2017.

140. The demand are incapable of being enforced in view of the above defects pointed out in the amendment to Notification No.30/2012-ST dated 20.06.2012 issued under Section 68(2) of the Finance Act, 1994 *vide* the impugned Notification No.3/2017, dated 12.01.2017 under the scheme of the Act, the Rules made thereunder and the Notifications issued.

141. We are therefore of the view that there is no scope for shifting the burden on these two categories of writ petitioners to pay service tax as things stand. Therefore, these collateral notifications which have been challenged need not be declared ultra vires as such.



W.P.No.2147 of 2017 etc. batch

WEB COPY

142. Further, there is no privity of contract between the petitioners and the ancillary service providers of the shipping liner who provide services to the Overseas Shipping Liners. Although the goods are exported by the foreign supplier-exporter who engages the service of the Overseas Shipping Liners, it is the overseas shipping liners who engages the service of ancillary service providers. The enroute petitioners cannot be construed as the recipients of service to make them liable to pay tax under the Scheme of the Act and under the Notification issued under Section 68(2) of the Finance Act, 1994. As such, no service is provided to these two categories of the writ petitioners to fasten liability on them.

143. Although under Notification No. 16/2017-S.T., dated 13.04.2017, an option to pay service tax on an amount calculated at the rate of 1.4% of the sum total of the cost, insurance and freight (CIF) value of the imported goods, again it is only the recipient of service who is liable to pay tax on this compounded rate if Notification No.03/2017-ST dated 12.01.2017 and Notification No.15/2017-ST dated 13.04.2017



W.P.No.2147 of 2017 etc. batch

are applied to the petitioners during the relevant period. In our view, it is the Overseas Shipping Liner who is the recipient of service from various service providers whose services are engaged enroute. Therefore, it cannot be said that these two categories of writ petitioners are the persons receiving service within the meaning of Notification No.3/2017-dated 12.01.2017 with effect from 22.1.2017 and later under Notification No.15/2017-ST dated 13.4.2017 with effect 23.4.2017 to fasten liability on them.

144. Thus, neither of the Category of writ petitioners are liable to pay tax in view of defect in Notification No.3/2017-ST dated 12.01.2017 w.e.f. 22.01.2017 and Notification No.15/2017, dated 13.04.2017.

145. While amending Notification No.30/2012-ST dated 20.06.2012 *vide* Notification No.3/2017-ST dated 12.01.2017 w.e.f. 22.01.2017 and Notification No.15/2017, dated 13.04.2017 and the burden was shifted on these writ petitioners by virtue of the amendment to the provisions of Service Tax Rules, 1994 *vide* Notification No.02/2017-ST dated 12.01.2017 w.e.f. 22.01.2017 and later by



W.P.No.2147 of 2017 etc. batch

Notification No.16/2017 dated 13.04.2017 w.e.f. 23.04.2017, the demand of service tax on these petitioners cannot be countenanced for the foregoing reasons.

146. The impugned notifications had a very short life with effect from 22.01.2017 upto 30.06.2017. With effect from 01.07.2017, the respective Goods and Service Tax Act, 2017 (GST Act, 2017) came into force and subsumed several indirect taxes including Chapter V of the Finance Act, 1994.

147. In **Sal Steel Ltd. Vs. Union of India**, 2019 SCC OnLine Guj 3706 : (2020) 37 GST1, the Division Bench of the Gujarat High Court held as follows:-

22. In the case on hand, indisputably, the overseas sellers/suppliers of the goods have made contracts with the shipping line/shipper for sea transportation of the goods, and such overseas sellers/suppliers have made payment of transportation charges to the shipping line; and admittedly there is no contract nor any arrangement between the Petitioners (who are Indian importers/buyers of the goods) and the shipping line for sea transportation. Thus, Ocean freight is admittedly paid by the overseas suppliers/sellers to



WEB COPY



W.P.No.2147 of 2017 etc. batch

the shipping line, and therefore the overseas suppliers i.e. the sellers of the goods located in foreign country are the persons who have received service of sea transportation from the shipping line, and the value of such service i.e. ocean freight is also paid by such overseas suppliers/sellers for receiving such service.

.....

30. All the three impugned provisions are made by the Central Government by way of amending Service Tax Rules, but there is no power conferred upon the Central Government under Section 94 of the Finance Act for charging and collecting tax on extraterritorial events. The impugned provisions allowing the Central Government to recover service tax on sea transportation occurring upto the land mass of the country are therefore ultra vires the Rule making power of Section 94 of the Finance Act.

31. A perusal of Section 94 shows that there is no power conferred upon the Central Government to make any Rules or Notifications for extraterritorial events; or in other words, for services rendered and consumed beyond the “taxable territory” i.e. beyond India. Obviously, the Act itself is not applicable to the territories other than India and therefore the Executives cannot have any power to make Rules for territories beyond India.

32. In Paras 16 to 24 of the Union of India v. S. Srinivasan, 2012 (281) ELT 3 (SC), and in para 14 of the General Officer Commanding in Chief v. Subhash Chandra Yadav, (1988) 2 SCC 351 : AIR 1988 SC 876, the Supreme Court has held that a Rule going beyond the Rule making power conferred by the Statute was ultra vires; a Rule supplanting



WEB COPY



W.P.No.2147 of 2017 etc. batch

any provision for which power has not been conferred was ultra vires; and a Rule which was not relatable to the source of power to make such rule was ultravires. In *Indian Association of Tour Operators 2017 (5) G.S.T.L. 4 (Del.)*, the Delhi High Court has considered validity of Rule 6A of the Service Tax Rules and held at paras 44, 47, 48 and 53 that a Rule made by the Central Government has to necessarily be only in relation to taxable services, namely, services provided in the taxable territory of India, and an essential legislative function of taxing an activity in non-taxable territory could not have been delegated to the Central Government. Rule 6A has been struck down as ultra-vires the Rule making power of Section 94 by the Delhi High Court.

33. The impugned provisions are also ultra vires the Rule making power of Section 94 of the Finance Act.

34. As observed above, the person receiving service of sea transportation in CIF contracts is the seller-supplier of the goods located in a foreign territory. The Indian importers like the writ applicants are not the persons receiving sea transportation service, because they receive the “goods” contracted by them, and they have no privity of contract with the shipping line nor does the Indian importer make any payment of ocean freight to the service provider. But the impugned provisions make such “importer” liable to pay service tax; and therefore such provisions allowing the Central Government to recover service tax from a third party are ultra vires the statutory provisions of the Finance Act, as discussed below.

.....

38. But the importers in CIF contracts i.e. the



WEB COPY



W.P.No.2147 of 2017 etc. batch

writ applicants herein are neither service providers nor service receivers in respect of transportation of goods by a vessel from a place outside India upto the Customs station of clearance in India. Section 68 (1) and also the reverse charge Notification under Section 68(2) permit the Central Government to collect and recover service tax only from the person providing the service or from the person receiving the service, and not from a third party. The rule making power of section 94 also does not permit the Central Government to make rules for recovering service tax from a third party who is neither the service provider nor the service receiver.

39. Therefore, the impugned provisions i.e. Rule 2(1)(d)(EEC) and Explanation V to Notification No. 30/2012-ST are ultra vires Section 65B(44) defining “service” and Section 68, and also Section 94 of the Finance Act.

Strict Interpretation of the charging Section:

It is not the case of the Respondents that importers like the Petitioners have received services of sea transportation from the shipping lines. The Respondents have however pleaded that in case of the Indian importers receiving goods on the land mass of the country by virtue of CIF arrangements, they “indirectly” receive sea transportation service also; and therefore obligation to pay service tax can be shifted to them.

40. First, the Indian importers like the Petitioners have contracted for purchase and delivery of goods, and under CIF contract where the lump sum amount is paid for delivery of the goods on the land mass of the country; and what the



WEB COPY



W.P.No.2147 of 2017 etc. batch

importers receive in India is the goods, and not any service. Secondly, liability to pay tax cannot be fastened on a person if the charging provision does not charge or levy the tax; because a charging section has to be strictly interpreted, and not by way of inferences or presumptions about any indirect benefit to a person.

41. ..

43. When the Respondents have admitted that the importers in India are not persons receiving service of sea transportation, and that it is the Respondent's case that the Indian importers were “indirectly” receiving such service and hence were persons liable to pay service tax on such service; it is clearly a case where the Respondents propose to charge service tax from the third parties i.e. the Indian importers by implication, and not by clear words of the charging section. The impugned provisions creating a charge of service tax on third parties though the Act of the Parliament provides for levy and collection of tax either from the person providing service or from the person receiving service are beyond the charging provision, and also beyond the Rule making power of Section 94 of the Finance Act. No machinery provision:

44. Even if it is assumed that service tax can be recovered from a third party like the Indian importers in CIF contracts, there is no machinery provision for valuation of the service, and therefore also the impugned Rules and Notifications are unenforceable. It is an admitted position of fact that the Petitioners do not have any information about the actual amount of ocean freight paid by the overseas sellers/suppliers to shipping lines. The invoices and purchase orders (Annexure-“D” to



WEB COPY



W.P.No.2147 of 2017 etc. batch

SCA No. 20785/2018) clearly show that the price of the goods was fixed on basis of quantity (i.e. DMT-Dry Metric Tton) for CIF Mundra Port basis. When service tax is to be computed and assessed on the “value” of the service as laid down under the machinery provision of Section 67 of the Finance Act, no service tax can be assessed and charged from third parties like the Indian importers in CIF contracts, because “value” of sea transportation service is not available with them in CIF contracts.

46. In the present cases, since the value of ocean freight is not available, Sub Rule (7CA) is inserted in Rule 6 of the Service Tax Rules thereby giving an option to the importer to pay service tax on 1.4% of CIF value of imported goods. But this insertion of Sub Rule (7CA) in Rule 6 is also ultra vires the machinery provision of Section 67, and also rule making power of Section 94.

47. There is no power conferred upon the Central Government under Section 94 to fix value of any service, the way such power is conferred upon the Board under Section 14(2) of the Customs Act, 1962. In absence of any power vested in the Central Government to fix value of any service by way of making a rule or a notification, Rule 6 (7CA) of the Service Tax Rules is ultra vires the Rule making power. Secondly, it is an option under Rule 6(7CA) to pay service tax on the amount calculated @1.5% of CIF value of the imported goods; but if the importer does not exercise this option, then there is void because actual value of this service i.e. ocean freight is not known even to the Revenue officers. Therefore, the scheme of taxation would fail and fall in absence of a machinery provision for valuation of the service when tax is proposed to be recovered from a third party not having any information about



WEB COPY



W.P.No.2147 of 2017 etc. batch

the value of such service.

48. Therefore, Rule 6(7CA) amended by the Central Government is also ultra vires Section 67 and Section 94 of the Finance Act.

148. For the period, under the GST regime with effect from 01.07.2017, the Hon'ble Supreme Court has answered the issue against the revenue in **Uol Vs Mohit Minerals**, 2022 SCC OnLine SC 657.

149. In **Kusum Ingots and Alloys Ltd. Vs. Union of India**, 2004 (168) E.L.T. 3 (S.C.), it was held that an order passed on writ petition questioning the constitutionality of a Parliamentary Act whether interim or final keeping in view the provisions contained in Clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act. If that be so, the notices which have been challenged by the category II writ petitioner in **Table 5** are also liable to be quashed. However, we would not go that far to hold all the notifications challenged as ultra-vires.

150. To implement the consequences of withdrawal of the exemption under Mega Exemption Notification No.25/2012-ST dated



W.P.No.2147 of 2017 etc. batch

20.6.2012 vide Notification No.1/2017-ST dated 12.1.2017 with effect from 22.1.2017, the burden to pay service tax was attempted to be shifted for a part of the period between **22.01.2017** and **22.04.2017** on the "**Steamer Agents**" (Category I W.Ps) and for the period between **23.04.2017** and **30.06.2017** on the "**Importer**" (Category II W.Ps) vide other impugned Notifications which have been challenged in these batch of the writ petitions.

151. Category I Writ Petitioners have also challenged the vires of para 4 and 4.1 of Circular No.206/4/2017-ST dated 12.4.2017 in W.P.No.14643 of 2017 as null and void and ultravires the various provisions of the Constitution and ultra vires Section 83 of the Finance Act, 1994, Section 37B of the Central Excise Act, 1994 as made applicable to Finance Act, 1994 as well as Notification No.26/2012-ST dated 20.06.2012.

152. Impugned Circular No. 206/4/2017-ST dated 12.4.2017 was issued in the background of withdrawal of exemption for services provided by a person located in a non-taxable territory to a person



W.P.No.2147 of 2017 etc. batch

located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India *vide* impugned Notification No. 1/2017-S.T., dated 12.1.2017 with effect from 22.1.2017.

153. Para 4 and 4.1 of Circular No. 206/4/2017-ST dated 12.4.2017 read as under:-

Table No.17

4. It is pertinent to point out here that under notification No. 26/2012-S.T., dated 20-6-2012 (Sl. No. 10), there is an exemption on 70% of value of services of transportation of goods in a vessel subject to the fulfillment of the condition that Cenvat credit on inputs and capital goods used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004. This conditional exemption has been extended for the reason that out of the full value of such services, the exempted value of service has already suffered taxes (Central Excise) which would have been available as Cenvat credit to set off service tax on full value of service. In effect, service tax is levied on the value added only. **However, in case of foreign shipping lines, their services being exports from their home country, are zero-rated in their home country and thus have suffered no taxes. Further the foreign shipping lines do not get registered in India and do not follow the provisions of Cenvat Credit Rules.**

4.1 Thus, the condition for availing exemption under notification No. 26/2012-S.T., dated 20-6-2012 (Sl. No. 10) is not fulfilled by the foreign shipping lines. Hence, benefit of conditional exemption will not be available to them and service tax will be paid on full value of services. Further, the amount of service tax payable under the option available under Service Tax Rules, 1994 has been prescribed



W.P.No.2147 of 2017 etc. batch

accordingly.

WEB COPY

154. Notification No.26/2012-S.T., dated 20.06.2012 gave abatement. Relevant portion of Notification No.26/2012-S.T., dated 20.06.2012 reads as under:-

Table No.18

Exemption from Service tax in relation to transport of goods and passengers tour operators, financial leasing, hire purchase, renting of hotels, inns, guest houses, clubs campsites or other places, chit funds, renting of cabs, construction of complex/building for sale — Notification No. 13/2012-S.T. Superseded

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act), and in supersession of notification number 13/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) *vide* number G.S.R. 211(E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service of the description specified in column (2) of the Table below, from so much of the service tax leviable thereon under section 66B of the said Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (3) of the said Table, of the amount charged by such service provider for providing the said taxable service, unless specified otherwise, subject to the relevant conditions specified in the corresponding entry in column (4) of the said Table, namely:-

Sl. No.	Description of taxable service	Percent-age	Conditions
(1)	(2)	(3)	(4)



W.P.No.2147 of 2017 etc. batch

10	Transport of goods in a vessel	50	Same as above*.
----	--------------------------------	----	-----------------

* CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.

155. Though, Notification No.26/2012-ST dated 20.06.2012, was in force from 01.07.2012, it did not impact these petitioners earlier as service provided outside the territory of India in relation to import of the goods through vessel till the customs port, was exempted *vide* Sl.No.34 (c) Mega Exemption Notification No.25/2012-ST dated 20.12.2012.

123. If it is the case of the petitioners that the clarification in Para 4 and 4.1 of Circular No. 206/4/2017-ST dated 12.4.2017 is incorrect, these petitioners are only questioning the denial of abatement in the above notification.

156. Further, in view of Notification No.16/2017-ST dated 13.04.2017, a compounded scheme for payment of service tax has been provided at 1.4% of the (CIF) value of the imported goods. Thus, these petitioners have thus tacitly admitted that the levy of service tax was valid save that they have not been given abatement under Notification



W.P.No.2147 of 2017 etc. batch

No.26/2012-ST dated 20.06.2012 since the overseas service providers could not have paid service tax in their country as such services are zero rated service in their home country.

157. The petitioners in W.P.No.2147 of 2017 on the other hand have chosen to challenge Sub-Section (2) to Section 66 C of the Finance Act, 1994 as Rule 10 of the Place of Provision of Service Rules, 2012 gets automatically attracted in view of the withdrawal of exemption.

158. Therefore, there is no necessity to declare the impugned notifications as ultra vires as there is no proper machinery provided under the impugned notifications issued under Section 68(2) of the Finance Act, 1994 to shift the burden to pay service tax on the petitioners as the petitioners are not either the recipients of the taxable service by way of transportation goods by a vessel from a space outside India up to the customs stations of clearance in India. They are not liable to tax as things stand.



W.P.No.2147 of 2017 etc. batch

WEB COPY

159. There are defects in the notifications as mentioned above.

They are curable defects. However, it is unwarranted, as the drift under the GST regime is also to not to burden the import with IGST under similar circumstances. Therefore challenges to Notifications in Table No.1 and Table No.4 fail and demand of sales tax on these petitioners also fail.

160. As far as refunds are concerned in Table No.6, the petitioners will have to file appropriate refund applications for refund of the amounts which are said to have been paid by them in accordance with the law laid down by the Hon'ble Supreme Court in **Mafatlal Industries Private Limited vs. Union of India**, 1997 (89) E.L.T.(S.C.).

161. In the light of the above discussion, the challenge to Section 66(2) of the Finance Act, 1994 and Circular dated 13.04.2017 bearing Circular No.206/4/2017-ST in Writ Petitions in **Table No.2** and **Table.No.3** respectively fails.



W.P.No.2147 of 2017 etc. batch

162. Challenge to Notification No.01/2017-ST dated 12.01.2017

has to fail in the light of the decision of the Hon'ble Supreme Court in

Kasinka Trading vs. Union of India, 1995 (1) SCC 274, 1994 (74)

E.L.T.782 (S.C.). The challenges to other notifications are unnecessary.

131. In the light of the above discussion, challenge to the impugned

Show Cause Notices in Table No.5 issued to the respective petitioners

succeeds and therefore they stand quashed.

163. As far as refunds are concerned in Table No.6, the petitioners shall file refund applications within a period of 30 days from the date of receipt of a copy of this order, if such refund applications have not been already filed. Such refund applications shall be disposed of in accordance with the decision of the Hon'ble Supreme Court in **Mafatlal Industries Private Limited vs. Union of India**, 1997 (89) E.L.T.(S.C.). within a period of 60 days thereafter. Wherever refund applications have already been filed, they shall be disposed of in terms of the above decision of the Hon'ble Supreme Court, within a period of 60 days from the date of receipt of a copy of this order.



WEB COPY



W.P.No.2147 of 2017 etc. batch

164. In the result, it is held as follow:-

- i. The challenges to Section 66(2) of the Finance Act, 1994, impugned Circular No.206/4/2017 – Service Tax, dated 13.04.2017 and impugned Notifications issued by the Central Government under the provisions of the Finance Act, 1994 fail. Therefore, Writ Petitions in **Table, 1,2,3 4** are liable to be dismissed and are accordingly dismissed.
- ii. These petitioners are however not the recipient of service for the purpose of the impugned Notification No.3/2017-ST dated 12.01.2017 amending Notification No.30/2012-ST dated 20.06.2012 issued under Section 68(2) of the Finance Act,1994.
- iii. Therefore, there is no scope for demanding service tax from these petitioners in view of the defects pointed out in the impugned Notification No.3/2017-ST dated 12.01.2017 amending Notification No.30/2012-ST dated 20.06.2012 issued under Section 68(2) of the Finance Act,1994. Therefore, there is no justification in the impugned Show Cause Notices in **Table-5**. These show cause notices are therefore quashed.
- iv. The respondents shall also not issue any show cause



W.P.No.2147 of 2017 etc. batch

notices to the importers and steamer agents for the period covered by this order ie. for the period between 22.01.2017 and 30.06.2017 for similar activity.

- v. As far as refunds in **Table 6** are concerned, the petitioners are directed to file refund claims within 30 days from the date of receipt of a copy of this order, if no claim has already been made.
- vi. All the refund claims shall be disposed of within a period of 60 days or 90 days, as the case may be, in accordance with the law laid down by the Hon'ble Supreme Court in **Mafatlal Industries Private Limited vs. Union of India**, 1997 (89) E.L.T.(S.C.).

165. These Writ Petitions stand disposed of with the above observations. No costs. Consequently, connected Miscellaneous Petitions are closed.

S.V.N., J. C.S.N., J.
28.03.2023

Index : Yes/No
Internet : Yes/No
Speaking : Non-speaking Order

kkd / rgm / jen



W.P.No.2147 of 2017 etc. batch

WEB COPY

To

1.The Customs, Excise & Service Tax
Appellate Tribunal,
South Zonal Bench,
Shastri Bhavan Annexe,
1st Floor, 26, Haddows Road,
Chennai 600 006.

2.The Commissioner of Central Excise,
Office of the Commissionerate of
Central Excise,
Chennai III Commissionerate,
121, Mahatma Gandhi Road,
Nungambakkam, Chennai 600 034.



WEB COPY



W.P.No.2147 of 2017 etc. batch

S.VAIDYANATHAN, J.
AND
C. SARAVANAN, J.

kcd/rgm/jen

Pre-delivery Common Order in
W.P.No.2147 of 2017 etc. batch

28.03.2023