CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH
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REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No.60105 Of 2022

[Arising out of OIO No. 03/GST (AUDIT) GGM/ COMMR/SC/2021 dated 20.12.2021 passed by the Commissioner (Audit) CGST, Gurugram]

M/s ATA Freight Line Private Limited : Appellant (s)
101, Block 4A, First Floor, DLF Corporate
Park, Phase-III, M.G. Road, DLF City,
Gurgaon-122002

Vs

The Commissioner of Central Excise
And Service Tax, Gurugram : Respondent (s)
GST Bhavan, Plot No.36-37,
Sector-32, Gurugram, Haryana-122001

APPEARANCE:
Shri Mahesh Raichandani, Advocate for the Appellant
Shri Nikhil Kumar Singh, Authorised Representative for the Respondent

CORAM :
HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No.60242/2023

Date of Hearing:27.06.2023

Date of Decision:07.08.2023

Per:P.ANJANI KUMAR

The appellants, M/s ATA Freight Line Private Limited, are duly registered with Service Tax; an Audit of the records of the appellant was conducted and it appeared that the appellants were engaged in the following transactions and that they did not pay appropriate Service Tax on the services rendered/availed:

(i) The appellants, under an Agreement with their principals i.e. ATA, USA provide services to them and
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receive services; they bifurcate the charges for ex-work services, handling charges and sea freight charges payable to each other; these services are in the nature of transportation of goods provided to the principals; the appellants were required to discharge Service Tax as the service is rendered in the country.

(ii) The appellants book space in the air/ sea crafts and sell the same to their prospective customers; the appellants receive certain commission from the air/ sea liners in respect of this activity; the appellants performed the activity falling under "Business Auxiliary Service".

(iii) The appellant recovers certain charges, from the Indian exporters, concerning the expenditure, on Custom duty, delivery order charges, port handling etc., at the destination in foreign ports.

2. A show-cause notice dated 24.10.2019 was issued to the appellant seeking to recover Service Tax of Rs.2,80,26,749/- along with interest while seeking to impose penalties under Sections 76, 77 & 78 of the Finance Act, 1994; the said show-cause notice has been confirmed by the Commissioner (Audit), CGST vide OIO No.03/GST(Audit)GGM/ Commr./SC/2021 dated 20.12.2021. Hence, the present appeal.

3. Shri Mahesh Raichandani, learned Counsel appearing for the appellants submits that the appellant reserves space in carrier vessels or aircrafts for export of cargo; the appellant does not have contract

with the carriers but reserves space on spot rates and books space on various vessels/ aircrafts; the container space booked by the appellant is at a discounted price; the discount is passed on to the appellants by the carriers/ airlines which is accounted by the appellant under the Head "ITA Commission and Incentive"; he submits that while they discharged Service Tax on the commission received, they do not pay Service Tax on the discount as it is not towards any service but an incentive earned in the purchase and sale of space. He submits that Department has erred in holding that the appellant was acting as an Agent of the airlines on the basis of the nomenclature used in the accounting. He submits that the issue is no longer *res integra,* as it is settled by larger bench of the Tribunal holding that there is no Service Tax on discounts, in *Kafila Hospitality and Travels Pvt. Limited – 2021 (47) GSTL 140 (Tri. LB)* and by Division Bench in *Asveen Air Travels Pvt. Ltd.- 2022 (64) GSTL 551 (Tri. Chennai).*

4. He submits that in the following cases, it was held that nomenclature or label given in the Agreement as advance is not is either decisive or immutable; exigibility to Service Tax depends on the nature of consideration received and not on how the assessee treated the monies received. He relies upon:

- *Sutlej Cotton Mills Ltd.- (1979) 116 ITR 1 (SC).*
- *Delhi Stock Exchange Association Ltd.- Delhi (1961) 41 ITR 495 (SC).*
- *V. Lakshmanan Vs. B.R Mangalagiri and others [1995 Supp. (2) SCC 33].*
- *Assam Small Scale Ind. Dev. Corp. Ltd.- [2005 (8) SCALE 298 = (2005) 13 SCC 19].*
- *Moped India Limited- 1986 (23) ELT 8 (SC).*

5. Regarding the demand on ex-works, he submits that the issue stands decided in their favour by CESTAT, Mumbai 2022 (GSTL) (64), in respect of their own branch at Pune. on the very same set of facts; he further submits that the contract with their principals is for facilitating transportation of cargo by land, sea and air; the contracts make it clear that it is the responsibility of the appellants to deliver the goods at the premises of overseas client; therefore, the service merits to be classified in terms of Rule 10 of POPS Rules, 2012; this contention is supported by Circular No.104/7/2008-ST dated 06.08.2008, wherein it was clarified GTA Service provided is a single composite service which may include intermediary/ ancillary service such as loading/ unloading, packing/ un-packing, transshipment, temporary warehousing; as the services provided to a foreign customer and remuneration is received in convertible foreign exchange, the service merits to be treated as export by virtue of Rule 10 of POPS Rules, 2012 read with Rule 6A of Service Tax, Rules, 1994. He further submits that Rule 4 of POPS Rules, 2012 covers situations where the work is performed on the goods, as in the case of repair of a machineand not with respect to the goods. The services undertaken by the appellant are bundled services where the essential character is given by the main service i.e. GTA rendered to the foreign customers in the instant case. It is not open for the Department to artificially divide the activity into various services and charge tax separately as held in:

- *Larsen &Tubro Ltd.- 2006 (3) STR 223.*
- *Ircon International Ltd.- 2006 (1) STR 46.*
- *CC Vs Shapoorji Pollanji& Co.- 2006 (1) STR 164.*

- *CC Vs Larson &Tubro Ltd.- 2006 (4) STR 63.*
- *Diebold Systems Pvt. Ltd.- 2008 (9) STR 546.*

6. Learned Counsel submits that the appellants have incurred expenditure such as Customs Duty, delivery order charges, port handling charges etc. of the shipment at the receiving port outside India; they termed it as 'Destination Charges'; these charges relate to service rendered outside India so are not liable to Service Tax in India; he submits that in the case of *Indian Association of Tour Operators Vs UOI-2017 (5) GSTL 4 (Del.)*, the Hon'ble High Court held that: "the rules made by Central Government under Section 66 have to be necessarily only in relation to taxable services provided in India and legal fiction of treating service rendered outside India to be a service rendered in India cannot be introduced by way of rules". Learned Counsel further submits, in addition, that the said receipts were nothing but reimbursement of expenses borne by the appellant on behalf of the customers; he relies on *Intercontinental Consultants and Technocrats Pvt. Limited- 2018 (10) GSTL 401 (SC).*

7. Learned Counsel submits that the show-cause notice has been issued based on the findings of the Audit; just because the Audit Team made some observations, it cannot be held that the appellants have suppressed or mis-declared with intent to evade payment of duty as held in *Aditya College of Competitive Exam- 2009 (16) STR 154* and *Graphite India Limited- 2018-TIOL-1028*. He submits that as multiple proceedings were initiated against the appellant at Pune and Gurgaon, it cannot be said that the Department was not aware of the

transactions of the appellant; moreover, the whole issue is about interpretation of POPS Rules, 2012 and as such, no mala fide intention can be attributed for holding a different opinion than the one held by Revenue. He relies upon *CCE Vs Sarup Tanneries Limited- 2005 (184) ELT 217, CCE Vs Explicit Trading- 2004 (169) ELT 205 (T)* and *Goyal M.G Gases Limited- 2004 (168) ELT 369 (T).* He submits that in view of the above, there is no duty payable; therefore, no penalty and interest are chargeable as held in *Coolade Beverages Limited- 2004 (172) ELT 451 (All.).*

8. Shri Nikhil Kumar Singh, learned Authorized Representative for the Department reiterates the findings of the impugned order and submits that the appellant's contention on the discount received for booking the space in aircrafts/ vessels is an accrual of gain and not consideration for an activity is mis-placed; there is no stipulation in the act that every activity should be under a contract; the elements of Section 65B (44) are satisfied as the appellant have promoted the sale of space of airlines/ vessels who have achieved the status of a recipient of a service and have paid remuneration to the appellants. He submits that the reliance on *Gray Worldwide (I) Pvt. Limited and Mahanagar Gas Limited, Sai Service Station Limited- 2013-TIOL-1436-CESTAT-MUMBAI, M/s Rohan Motors- 2020-110L-1676-CBSTAT-DBL, Kafta Hospitality and Travels Pvt. Limited- 2021 (47) GSTL 140 (Tri. LB),* to support the argument that incentives received to achieve a target are not a discount, is misplaced as the facts are different.

9. Adverting to the contentions of the appellant on the destination charges, learned AR submits that the same are incurred post-arrival at the foreign port of destination for services performed therein; the appellant's contention, that Rule 4 of POPS Rules, 2012 is applicable,is incorrect inasmuch as the appellants dealt with the goods which were handed over by the Indian customer. He submits that on the other hand, the appellants contend that Rule 4 of POPS Rules, 2012 is not applicable in respect of other services; there is an inherent contradiction in the submissions of the appellant; moreover, the appellants admitted that they have received the charges in Indian currency; though the appellants have contended that the destination charges were simple reimbursement, they have not submitted any tangible and concrete evidence to understand that the same were reimbursed. He further submits that the Adjudicating Authority has correctly held that extended period is invokable.

10. Heard both sides and perused the records of the case. We find that the appellants are engaged in providing Integrated Logistics Services and registered themselves for Cargo Handling Service and GTA Service. They have an agreement with ATA Freight Line Limited, New York, vide which they are providing logistics services via air, land and ocean; freight forwarding for each other and third-party logistics. On auditing the accounts of the appellants, Department was of the opinion that in addition to the above, the appellants were providing "Business Auxiliary Service" and have not paid appropriate service tax

on the services provided by them; the demand confirmed was on the following Heads:

(i) Incentive/ Commission: Discount received by the appellant from the shipping lines/ airlines on sale of space by the shipping line/ airline to the appellant which is reflected as incentive/ commission/ market price adjustment in the books of accounts of the appellant.

(ii) Ex-Works (EXW) Services: Providing logistic and allied/ ancillary services to the main service of transportation of cargo.

(iii) Destination Charges: Expenditures such as Custom Duty, Delivery order charges, port handling etc. incurred by the appellant post arrival of the shipment at a foreign port, nomenclature as "Destination Charges".

11. Coming to the first issue, the case of the Department is that the appellants collect charges from Indian exporters on account of picking up the goods from the shipper's factory, terminal handling charges, transportation charges, customs clearance charges and other local charges incurred at the Port (air/ sea); the said charges are towards service as defined under Clause 44 of Section 65B of Finance Act, 1994; they do not fall under negative list of services; they are chargeable under Section 66D of the Finance Act, 1994; Rule 4 of the Place of Provision of Service Rules, 2012 (POPS Rules). The assessee contends that the ex-work charges received by the appellant are in relation to transportation of goods from India to a place outside India; in terms of the Agreement, the entire activity starting from the premises of the sellers in India to delivery of the goods at the

destination outside India is a single item of work; the same is regarded commercially as a single transaction; since it is export of service, it is exempt in terms of Rule 10 of POPS Rules; Circular No.104/7/2008-ST dated 06.08.2008 clarified that GTA Service provided, though includes various intermediary and ancillary services such as loading/ un-loading, packing/ un-packing, transshipment, temporary warehousing, is a single composite service; Rule 10 of POPS Rules prevails over Rule 4 being more specific; in terms of Section 66F, the services though being bundled, essential character is of transportation.

11.1. Learned Counsel submits that the same issue has been raised by the Department in respect of their Pune Branch and the learned Commissioner, Pune confirmed the demand, as in the instant case, holding that Rule 10 of POPS Rules is not applicable and Rule 4 is applicable. On an appeal filed by the appellant, CESTAT Mumbai, in their case at Pune held-*2022 (64) GSTL 97 (Tri. Mumbai)* as follows:

> ***"15.****The question that arises, even assuming that the accounting treatment of 'consideration' is amenable to geographical segregation as markers of a series of activities that make up 'service', is the scope for disaggregation of 'service' without ascertainment of conformity of each of the segments with*
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> *'(44) …… any activity carried out by a person for another for consideration and includes ….'*
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> *in Section 65B of Finance Act, 1994 which is a pre-requisite for separate taxability, and exemption, under the authority of Section 66B of Finance Act, 1994. The crux of the determination of tax liability in the impugned order is the rendering of 'service' between the premises of exporter and loading on 'foreign going'*

vessel/aircraft which, according to the adjudicating authority, is implicit in the attribution of charges for that stage of transport. However, in terms of the definition, 'service' is not founded upon 'consideration' but is activity carried out by a person for another for consideration; impliedly, without the 'another' there can be no 'service' that is taxable. Unless the 'another' can be identified as 'another' other than the recipient outside the country, rendering of separate 'service' is not demonstrated.

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18. *Place of Provision of Services Rules, 2012 is not a provision for charging of tax; it is limited to determination of location of taxable entity as an adjunct to the charging provision in Section 66B of Finance Act, 1994. The impugned order has not evaluated the impugned activity from that perspective. In the context of identifiable recipient of service located outside the taxable territory, and concomitant absence of 'goods provided by recipient of service' as well as the marked absence of recipient of service in the truncated segment of impugned activity and of the goods being put to use for rendering of service, Rule 4 of Place of Provision of Services Rules, 2012 is not applicable. That the activity is transportation of goods is the foundation of the proceedings against the appellant, as is evident from the contrived segmentation of stages according to geography and from the unarguable existence of recipient outside India; Rule 10 of Place of Provision of Services Rules, 2012 is unambiguously clear about the consequent non-taxability*."

11.2. We find that the facts of the case are identical and involve the very same appellant. We find that the Revenue haspicked up some activities, from the bundle of services rendered by the appellants, in a convenient manner. One has to see the nature of the service in total. Segmenting the series of actions involved in the provision of a particular service, would result in ridiculous propositions. The Department has not viewed the service rendered by the appellants in

a holistic manner, ignoring the very fact that the services rendered by the appellants are not complete just by loading of the goods on a vessel or on an aircraft. They go beyond. If the case of the Department is accepted, the provisions of Section 66F of the Finance Act, 1994 would become redundant. Such an approach is not permissible under the law.

12. The second issue on which demand is raised pertains to the incentive or commission received by the appellants from the ship liners/ airlines. The Department argues that the commission received by the appellants from the ship liners/ airlines for booking of space for transportation of cargo is towards the "Business Auxiliary Service" rendered to the ship liners/ airlines. We find that other than alleging that the appellants have rendered "Business Auxiliary Service" to the ship liners/ airlines, it is not brought forth as to which category of the "Business Auxiliary Service" is rendered by the appellants. It is also not explained as to how the service rendered by the appellants enhances the business prospects of the ship liners/ airlines. It is a simple case of booking of space and selling of the same by the appellants. We find that the issue stands settled by the Tribunal in the case of *Kafila Hospitality and Travels Pvt. Ltd.* (supra) wherein it has been held that:

> *69. To appreciate this contention, it would be necessary to examine Section 65A of the Finance Act and it is reproduced below:-*
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> *For the purposes of this chapter, "65A (1) classification of taxable services shall be determined*

according to the terms of the sub-clauses (105) of section 65.

When for any reason, a taxable service is (2) prima facie, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows :-

(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;

(c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merits consideration."

(emphasissupplied)

70.The two competing entries are "air travel agent" service and "BAS". It would be seen from the definition of "air travel agent" that it includes all services connected with or in relation to the booking of passage for travel by air. The services in question are booking of airlines tickets and for achieving a pre-determined target, the air travel agent also receives an additional amount in the form of incentives/commission from the airlines or the CRS Companies. The receipt of incentives/commission would not change the nature of the services rendered by the travel agent.

71.This apart, the definition of BAS would also reveal that the service provider must promote or market the service of a client. As noticed above, it is not a case where the air travel agent is promoting the service of airlines/CRS Companies. The air travel agent is, by sale of airlines ticket, ensuring the promotion of its own business even though this may lead to incidental promotion of the business of the airlines/CRS Companies. Thus, in terms of the provision of Section 65A(2)(a) of the Finance Act, the classification of the

service would fall under "air travel agent" services and not BAS.

Whether incentives paid for achieving targets are taxable?

72.he contention advanced by Learned Counsel of the interveners is that incentives cannot be construed as "consideration" and if it is so, no service tax can be levied on this amount because under Section 67 of the Finance Act, service tax is leviable on "consideration", which is the gross amount charged by the service provider for rendering a particular taxable service.

73.It would, therefore, be appropriate to examine the scope of the term "incentives". Incentives are generally given to encourage performance of a party. The factual position described above, reveals that incentives have been paid by the airlines or CRS Companies to travel agents when they achieve a pre-determined target of sales.

74.The relevant portion of Section 67 of the Finance Act, on which reliance has been placed by Learned Counsel for the appellant, is reproduced below :-

Subject to the provisions of this "67. (1) Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, -

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner."

(emphasissupplied)

75.Section 67 of the Act deals with valuation of taxable services for charging service tax. Sub-section (1) of Section 67 provides that where service tax is chargeable on any taxable service with reference to its

value, then such value shall, where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by the service provider. It is, therefore, clear that only such amount is subject to service tax which represents consideration for provision of service and any other amount which is not a consideration for provision of service cannot be subjected to service tax.

76.In this connection, it would be appropriate to refer to the decision of the Supreme Court in Union of India v. Intercontinental Consultancy and Technocrats [2018 (10) G.S.T.L. 401 (S.C.)]. The Supreme Court observed that service tax is on the "value of taxable services" and, therefore, it is the value of the services which are actually rendered which has to be ascertained for the purpose of calculating the service tax. It is for this reason that the expression "such" occurring in Section 67 of the Act assumes importance. The Supreme Court, therefore, observed that the authority has to find what is the gross amount charged for providing "such" taxable services and so any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as the amount is not calculated for providing "such taxable service." This, according to the Supreme Court, is the plain meaning attached to Section 67, either prior to its amendment on 1 May, 2006 or after this amendment.

77.Consideration, which is taxable under Section 67 of the Finance Act, should be transaction specific. Incentives, on the other hand, are based on general performance of the service provider and are not to be related to any particular transaction of service. It needs to be noted that commission, on the other hand, is dependent on each booking and not on the target. If the air travel agent does not achieve the predetermined target, incentives will not be paid to the travel agents.

78.In this connection it will be appropriate to take note of the decision of the Federal Court of Australia AP Group. The Federal Court of Australia held that in order to levy tax, the payment must be attributable to a particular supply and not to supplies in general and so the target incentives paid by a motor vehicle manufacturer to a dealer would not qualify as consideration as the incentives would be in relation to all supplies and not in relation to a particular supply.

The relevant portion of the decision of the Federal Court is reproduced below: -

"17.Insofar as the Ford "retail target incentive" payments are concerned, Ford agreed with its dealers to pay certain sums of money to dealers which achieved monthly and quarterly sales targets that Ford set based on the dealer's size and past performance. Targets were based on the number of cars sold to eligible customers in the qualifying period, not the value of the cars sold. Once a car was sold and delivered to an eligible customer the details would be entered into the vehicle information system and, in about the middle of the following month, based on the information so entered Ford would issue the dealer with a tax invoice for the incentive payment plus 10% GST and shortly thereafter pay that amount to the dealer.

The Tribunal reached a different view about 30. the Ford "retail target incentive" payments. It reasoned as follows at [I06]-[I08]:

The last remaining payment type is Ford's I06. retail target incentive payment. It is clear from the "Drive for Success" program that the payment is triggered at the time, and by reason, of the Applicant's recording of a level of new sales for a relevant period of eligible vehicles to eligible customers in excess of a specified target set by Ford. Significantly, though, and unlike the fleet rebates and the run-out model support payments, the target incentive payment has no nexus with any one particular supply. It is a payment made in connection with supplies generally, or perhaps more accurately, it is a payment made in connection with the making of supplies generally.

53.On analysis, the so-called supplies for consideration identified by the Commissioner are nothing more than the encouragement of an overall business relationship between the manufacture and the dealer to the mutual benefit of both. The relationship involves a whole raft of obligation from one to the other all, presumably, with the ultimate objective of maximizing their respective commercial positions. As the AP Group put it, the overall relationship contemplates a continuing dialogue between wholesaler and retailer in which promises are routinely exchanged, but to characterize this dialogue as involving supply after supply is unrealistic and impractical. To

characterize the payment of the incentives intended to encourage the overall relationship to operate efficiently as involving supplies for consideration equally unpersuasive. A dealer will always wish to sell as many cars as practicable and to move old stock to make way for new stock. So too a dealer will always wish its ordering arrangements to be the most efficient and economically beneficial to it. The manufacture will have the same objectives. It is this context which underpins the Tribunal's conclusion that the payments are not for the supply of anything by the dealer. As the Tribunal said at [86] the dealer (which must be inferred to act in an economically rational manner in the ordinary course) will always want to run the business in this way. The fact that the dealer receives a payment as an incentive when certain thresholds associated with running the business in this way does not mean that the dealer is supplying a service to the manufacturer for consideration. If the incentive payment were not available there is no basis to infer that the dealer would not behave in the same way for free. For these reasons there cannot be said to be any supply for consideration in these arrangements."

(emphasis supplied)

79.Reference can also be made to the decision of this Tribunal in Rohan Motors Limited v. Commissioner of Central Excise, Dehradun [2020 (12) TMI 1014-CESTAT NEW DELHI]. The Tribunal held that incentives are not leviable to service tax. The relevant paragraph is reproduced below:-

9. The first issue that arises for consideration is whether service tax would be leviable on incentives prior to July, 2012.

10. As noticed above, the appellant purchases vehicles from MUL and sells the same to the buyers. It is clear from the agreement that the appellant works on a principal to principal basis and not as an agent of MUL. This is for the reason that the agreement itself provides that the appellant has to undertake certain sales promotion activities as well. The carrying out of such activities by the appellant is for the mutual benefit of the business of the appellant as well as the business of MUL. The amount of incentives received on such account cannot, therefore, be treated as consideration

> *for any service. The incentives received by the appellant cannot, therefore, be leviable to service tax.*
>
> *(emphasis supplied)*
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> *80.It, therefore, clearly transpires from the aforesaid decisions that incentives paid for achieving targets cannot termed as "consideration" and, therefore, are not leviable to service tax under Section 67 of the Finance Act.*
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> *---*
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> *83.These contentions as to whether the air travel agent is promoting the business of the airlines or the CRS Companies have been dealt with in the earlier portion of this order. The order also discusses whether the classification of service would fall under "air travel agents" services or under "BAS" and whether incentives paid for achieving the targets are taxable.*

13. It is the Revenue's contention that the appellants did not pay service tax on the amounts received as consideration from their clients in India towards delivery order charges, customs duty, port handling charges which are together referred to as destination charges. The appellants claim that they have not paid service tax on destination charges as they are incurred at the foreign port and are not taxable in India; the services rendered to the Indian customers are part of their main service rendered in terms of the Agreement with their foreign principals; moreover, these can be treated as reimbursement of expenses and therefore, are not taxable. We find that the amounts collected by the appellants from the Indian clients is towards the expenditure such as customs duty, delivery order charges, port handling at the foreign ports; as the charges pertain to the activity rendered at a foreign destination, the same cannot be charged in

India. Moreover, these are in the nature of reimbursement of expenses. Moreover, we see that under this Head too, Revenue does not specify as to which was the category under "Business Auxiliary Service", the services rendered by the appellants fall. We do not find any type of service rendered by the appellants in regards to promotion of the business of their Indian clients. Their activity and the payments received thereof squarely fall under the main activity of goods transport operator or cargo handler. By no stretch of imagination, it can be argued that the appellants have rendered "Business Auxiliary Service" to their customers.

13.1. We find that the Hon'ble Apex Court, in the case of Intercontinental *Consultants and Technocrats Private Limited(supra)*held that:

> *24.In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.*

29.In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature. On this aspect of the matter, we may usefully refer to the Constitution Bench judgment in the case of Commissioner of Income Tax (Central)-I, New Delhi v. Vatika Township Private Limited [(2015) 1 SCC 1] wherein it was observed as under:

27.A legislation, be it a statutory Act or a statutory rule or a"statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "interpretation of statutes". Vis-a-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

28. Of the various rules guiding how a legislation has to beinterpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation.

The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lexprospicit non respicit : law looks forward not backward. As was observed in Phillips v. Eyre [(1870) LR 6 QB 1], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in L'OfficeCherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

14. We also find that Coordinate Bench at Delhi in the case of Indian Association of Tour Operators Vs UOI (supra) has held that:

47.Viewed from another angle, since tour operator services are intermediary services and under Rule 9 of the PPSR, 2012 the place of provision of service is the location of the service provider, the package tours service provided by an Indian tour operator to a foreign tourist will, notwithstanding that some part of it is

provided outside India, be treated as service provided in India. As a result no Indian tour operator can expect the service rendered by him to a foreign tourist to be considered as an 'export of service' under Rule 6A as he will never be able to meet the requirement of Rule 6A(1)(d) of the ST Rules. Thus under a combination of Rule 6A of the ST Rules and Rule 9 of the PPSR 2012 something which is non-taxable under the FA is sought to be brought to tax.

48.As already noticed since by virtue of Section 64(3) the whole of Chapter V applies only to taxable services, and Section 66C of the FA falls in that very Chapter, the rules made by the Central Government under Section 66C has to necessarily be only in relation to taxable services viz., services provided in the taxable territory of India. The legal fiction of treating service rendered outside India to be a service rendered in India cannot be introduced by way of rules. That too would partake the character of an essential legislative function, which cannot be delegated to the Central Government. In fact, such service cannot be brought to tax without amending Section 64(3) of the FA.

55.For all the aforementioned reasons, the Court declares that :

(i) Rule 6A(1) read with Section 6A(2) of the ST Rules, insofar as it seeks to describe export of tour operator services to include non-taxable services provided by tour operators, is ultra vires the FA and in particular Section 94(2)(f) of the FA and is, therefore, invalid.

(ii) Section 94(2)(f) or (hhh) of the FA does not empower the Central Government to decide taxability of the tour operator services provided outside the taxable territory. They only enable the Central Government to determine what constitutes export of service, the date for determination of the rate of service or the place of provision of taxable service.

(iii) Section 66C of the FA enables the Central Government only to make rules to determine the place of provision of taxable service but not non-taxable service.

15. In view of the above, we find that the demands confirmed vide the impugned order cannot be sustained. Therefore, we allow the appeal.

(Pronounced on 07/08/2023)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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