IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, EASTERN ZONAL BENCH: KOLKATA

S.T.Appeal No.171/08

(Arising out of Order-in-Original No.03/Commr./ST/Kol/2008-09 dated 12.06.2008 passed by the Commissioner of Service Tax, Kolkata)

M/s IMRB International

Applicant (s)/Appellant (s)

Vs.

Commr. of Service Tax, Kolkata

Respondent (s)

Appearance:

Shri A. R.Krishnan, C.A. & Shri Girish Raman, Adv. for the Appellants(s)
Shri K. Chowdhury, Supdt. (AR) for the Revenue

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing : 15.11.2018
Date of Pronouncement : 06.12.2018

ORDER NO…FO/A/77050/2018

Per Bench :

The present appeal is against the Order-in-Original No. 03/Commr./ST/Kol/2008-09 dated 12.06.2008.

2.1 The appellant is engaged in rendering services under the category of "Market Research Agency Service". They have obtained Service Tax Registration under the said category and have been rendering such services to their clients situated in India as well as abroad. Similar services have been rendered to their clients situated in Nepal also. In respect of services rendered to clients situated in

India, they recovered the consideration in two parts : (a) one set of bills were issued for recovering what are known as "Project Cost", which included (i) Operating Expenses, (ii) Time Cost, (iii) Profit, (iv) Communication Expenses, Travelling Expenses and (b) on other set of bills were raised for "actuals". In these bills, the following amounts were recovered :

(i) Expenses towards travel and stay ;

(ii) For hiring of Halls ;

(iii) Gift ;

(iv) Product samples.

2.2 They discharged payment of service tax in respect of amounts recovered under the "Project Cost". They did not discharge the service tax on amounts recovered under the "Actuals". The Department was of the view that the amount recovered under "Actuals" also should be included in the consideration for payment of service tax under "Market Research Agency Service". Accordingly, show-cause notice was issued proposing the recovery of service tax totally amounting to Rs.12,97,618/- for the period from 01.10.1999 to 31.03.2004.

2.3 In respect of services rendered for the clients situated abroad, they received consideration for foreign exchange (in respect of clients situated in the country other than Nepal). In respect of the clients situated in Nepal, the consideration was received in Indian Rupees. The Department noticed that the appellant did not pay service tax on this amount received from foreign clients and the service tax due on such amount was proposed for recovery in the show-cause notice.

2.4 It was noticed by the Department that the appellant had availed cenvat credit of certain service tax paid, which was felt was not allowable for the following reasons :

(i) Cenvat credit was taken in many cases on the basis of photo copies of the relevant bills. All the original bills were said to be available in the regional office of the appellant.

(ii) Certain bills were not in the name of the appellant.

It was mentioned as "IMRB International". The correct name of the appellant was "Indian Market Research Bureau". Some more amounts were also alleged to have been wrongly availed in respect of certain services not qualifying as "input service". The demand made in the show-cause notice dated 21.03.2005 is summarized below :

Sl.No.	**Point on which demand raised**	**Amount of tax (Rs.)**
1.	Non-payment of service tax on reimbursement of out of pocket expenses	12,97,618/-
2.	Non-payment of service tax on certain foreign currency receipts	47,89,848/-
3.	Non-payment of service tax on payments received from clients in Nepal	2,54,248/-
4.	Disallowance of service tax credit availed and utilized	3,26,107/-

Total Rs.66,67,821/-

2.5 After due process of adjudication, the Adjudicating Authority ordered for payment of service tax totally amounting to Rs.66,67,821/- along with payment of interest. Penalties were also imposed under Sections 76,77 & 78 of the Finance Act, 1994. The impugned order is challenged in the present proceeding.

3. The appellant's case is argued by Shri A.R.Krishan, ld.C.A. and Revenue is represented by Shri K.Chowdhury, ld.D.R.

4. The grounds of appeal are elaborately argued by the ld.Representative for the appellant. The main arguments of the ld.C.A. for the Appellant are summarized below :

4.1 **On non-payment of service tax on reimbursement of out of pocket expenses**

(i) The ld.Counsel submitted that certain expenses incurred by the appellant on behalf of their clients during providing of service were claimed and reimbursed by their clients. Such expenses are in the nature of boarding, travel and lodging of the representatives ;

(ii) Hiring of hotel rooms/venues for conducting the interviews;

(iii) Gifts to interviewees ;

(iv) Purchasing Product samples etc.

The amount incurred towards the above expenses are recovered at "actuals" duly supported by vouchers. He submitted that no service tax is payable on such out of pocket expenses. In this case, he referred to the CBEC Circular F.No.B/11/1/98-TRU dated 07.10.1998. In Para 7.4 of the said Circular, it has been clarified that reimbursible out of pocket expenses charged to the client on actual basis will not be liable to payment of service tax provided documentary evidences are available. Further, he relied on the decision of the Hon'ble Supreme Court in the case of Union of India Vs. Intercontinental Consultants and Technocrats Pvt. Ltd. reported in 2018 (10) GSTL 401 (SC) (Para 24 & 29). He submitted that the Apex Court has held that

in terms of Section 67 of Finance Act, 1994, there is no scope for including reimbursable expenses for providing such services. Finally, he submitted that the demand for service tax on this ground may be set aside..

4.2 **Non-payment of service tax on certain foreign currency Receipts from other foreign clients**

He submitted that in respect of services provided to foreign clients, the consideration was received in foreign exchange in respect of the countries other than Nepal. In respect of clients situated in Nepal, the consideration was received in Indian Rupees. Since the entire consideration (where receipts in foreign currency or Indian Rupees from Nepal) is the payment for taxable services to foreign clients and these are in the nature of Export of Services, no service tax will be liable to be paid on such receipts. In this connection, he referred to the Notification No.6/99-ST dated 09.04.1999 (rescinded on 28.02.2003) which granted exemption from payment of service tax, if the consideration is received in convertible foreign exchange. The exemption was resumed w.e.f. 20.11.2003 in the form of Notification No.21/2003-ST dated 20.11.2003. For the period from 01.03.2003 to 19.11.2003, there was no exemption covering such receipts, but he pointed out that the CBEC has issued a clarification vide Circular No.56/5/2003 dated 25.04.2003. In the Circular, it was made clear that for the period for which there was no notification also, Export of Service would continue to remain tax free.

(v) The ld.Çounsel further argued that the adjudicating authority has denied the benefit of these Notifications for the reason

that part of the amount received in convertible foreign exchange was repatriated outside India. He further submitted that the adjudicating authority has unfairly denied the benefit of the exemption taking shelter under the proviso to the Notifications Nos. 6/99-ST dated 09.04.1999 and 21/2003-ST dated 20.11.2003. He argued that the appellant has made certain remittances in foreign exchange in connection with the foreign jobs of the appellant, purchase of software licences and other expenses. He emphasizes that this cannot be considered as repatriation in foreign currency, but were in the nature of remittances, which cannot attract the provisions of the above Notifications.

(vi) He submitted that the appellant will not be liable to payment of service tax in respect of the consideration received in case of Export of Services. In this connection, he relies on the following case laws :

(a) CST Vs. SGS India Pvt. Ltd. : 2014 (34) STR 554 (Bom) ;

(b) SGS India Pvt. Ltd. Vs. CST : 2011 (24) STR 60 (Tri.Mumbai) ;

(c) Tam Media Research Pvt. Ltd. Vs. CST : 2013-TIOL-1667-CESTAT-MUM ;

(d) CST Vs. Maersk India Pvt. Ltd. 2015 (38) STR 1121 (Bom.);

(e) Maersk India Pvt. Ltd. Vs. CST : 2013 (32) STR 546 (Tri.-Mumbai) ;

(f) Karvy Investors Services Ltd. Vs. CCEx. & S.Tax, : 2016 (43) STR 610 (Tri.-Hyd.).

(vii) He submitted that the services provided to overseas clients should be considered as services consumed abroad and hence not liable for service tax even during the period 01.03.2003 to 19.11.2003 when there was no exemption notification. He submitted that as a corollary, even for the period 01.10.1999 to 28.02.2003 and 20.11.2003 to 31.03.2004, service tax would not be applicable on the foreign exchange receipts whether the Notification Nos.6/1999-ST and 21/2003-ST existed or not. Hence the appellants need not take recourse to the exemption notification to claim immunity from payment of service tax on the foreign currency receipts. Hence, demand of Rs.47,89,548/- on the foreign currency receipts is not payable.

(vii) He submitted that substantial part of the cenvat credit denied is for the reason that the credit was taken on the basis of photo copies of the documents and the originals were not available in their office at Kolkata for verification. In this connection, he submitted that all the cenvat credits were taken on the basis of valid documents. In certain cases, the original set of documents were retained at the respective regional office. To support his contention, he relies on the following case laws :

(a) Shivam Electrical Industries Vs. Union of India : 2018 (359) ELT 46 (J & K) ;

(b) CCE Vs. JSW Steels Ltd. : 2011 (265) ELT 50 (Tri.-Che.)

(c) Pepsico India Holding Pvt. Ltd. Vs. CCE : 2017 (349) ELT 665 (Tri.-Mum.) ;

(d) Tecumseh Products India Pvt. Ltd. Vs. CCE : 2008 (221) ELT 129.

(viii) He submitted that the credit cannot be denied if taken on the basis of photo copies of the original documents.

(ix) Finally, he submitted that the impugned order may be set aside.

5. On behalf of the Revenue, the ld.D.R. put forth the following main grounds :

(i) Regarding levy of service tax on reimbursable expenses, the ld.D.R. submitted that the adjudicating authority has discussed CBEC's Circular dated 07.10.1998. He argued that all the reimbursable expenses claimed were not in the nature of out of pocket expenses. Even in respect of those expenses which are deductible in terms of the CBEC's Circular, the appellant has failed to produce documentary evidences to show that such expenses were "actuals".

(ii) Regarding demand of service tax on certain foreign currency receipts, he submitted that in terms of proviso to Notification No.6/1999-ST and 21/2003-ST (supra), the benefit will not allowable in respect of convertible foreign exchange received for taxable services but then sent outside India. Accordingly, he justified the demand of service tax on such amount.

(iii) He also referred to the observations of the adjudicating authority to the extent that in case of service charges received in convertible foreign exchange, these cannot be related to the export of services since a significant portion of the job undertaken by the appellant was completed in their Indian Office before final delivery to the clients located in foreign countries. Hence, he justified the service tax demand on such amount.

(iv) He also relied on the decision of the Hon'ble Apex Court in the case of Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar & Company reported in 2018 (361) ELT 577 (S.C.).

6. We have heard both sides at great length. The various issues are being dealt with and decided one by one :

(i) First, we take up the demand of service tax made on certain reimbursement received by the appellant from the customers for out of pocket expenses. This amount was received for hiring of hotel rooms, gift, purchasing product samples etc.; These amounts have been claimed from customers on "actuals" duly supported by vouchers. The question whether such reimbursable expenses should form part of the taxable value has been decided by the Hon'ble Supreme Court in the case of Intercontinental Consultants & Technocrafts Pvt. Ltd. (supra). The Hon'ble Apex Court, after detailed discussions, has held that the value of taxable services in terms of Section 67 does not include reimbursable expenses for providing such service until May, 2014-15, when Section 67 was suitably amended to make provision for the same. The observation of the Hon'ble Apex Court is reproduced below :

> "***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 be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something

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

The obvious basis of the principle against retrospectivity is the 29. principle of "fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. Thus, legislations which modified accrued rights or which 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."

By respectfully following the above decision of the Hon'ble Supreme Court , the demand for service tax made on this ground is set aside.

(ii) Next, we turn to the demand for service tax on amounts received from foreign clients as explained in Para 4.2 (supra),

Notification No.6/99 (ibid), granted exemption from payment of service tax if consideration is received in convertible foreign exchange. During the period from 01.03.2003 to 19.11.2003, this exemption was withdrawn. However, w.e.f.20.11.2003, the exemption was re-instated. This Notification carried out the provisio to the effect that the exemption will not be available when payment received in India in foreign exchange for taxable services is repatriated and sent outside India. For services rendered for foreign clients, the appellants have received payment in foreign exchange, when customers are situated in countries other than Nepal. Nepal based customers made payments in Indian rupees as permitted by RBI. The appellant makes certain remittances in foreign exchange for purchase of software licence as well as for expenses in connection with providing the service in foreign countries. The adjudicating authority has considered such amounts as "sent outside India" and has ordered payment of service tax for the entire amount received from foreign clients including those in Nepal.

(iii) CBEC has issued clarification vide Circular No.56/5/2003 dated 25.04.2003 to the effect that the intention of the Government is to keep the export free of service tax. The Circular has been issued in the context of withdrawal of Notification No.06/99 dated 09.04.1999 w.e.f. 01.03.2003.

It is not in dispute that the appellant has received payment for services provided to foreign clients either in foreign exchange or in Indian Rupees (for Nepal customer). Evidently, the payment for taxable services provided to foreign clients have been received and

such amounts cannot be charged to service tax, since they are in the nature of "Export of Services". It is on record that the appellant has made certain remittances in foreign currency for purchase of software licences and other expenses connected with providing services to foreign clients. We are of the view that such remittances will not incur the mischief of the proviso in Notification Nos.6/99 & 21/03 (supra). In this regard, we are guided by the intention of the Government not to tax "Export of Services". In any case, the appellant was fully entitled to make remittances in foreign exchange outside the country for legitimate business expenses as permitted by RBI from time to time. In the result, we find no justification to order payment of service tax on the export proceeds. This view finds supports in the various decisions cited by the appellant. In particular, we refer to the decision of the Tribunal in the case of SGS India Ltd. (supra), in which the Tribunal has observed as under :

> "***8.*** *The view taken by the Central Board of Excise and Customs vide Circular No. 66/2005-S.T., is that export of services would continue to remain tax-free even after withdrawal of Notification No. 6/94-S.T., dated 9-4-1999. The Board was examining the effect of withdrawal of Notification No. 6/99-S.T. This Notification exempted the taxable service specified in Section 65(48) of the Finance Act, 1994 provided to any person, in respect of which payment was received in India in convertible foreign exchange, from payment of service tax. The Notification, in a proviso, laid down that nothing contained in the Notification shall apply when the payment received in India in convertible foreign exchange for taxable services rendered was repatriated from or sent outside India. It was this Notification which was rescinded by Central Government by issuing Notification No.*

2/2003-S.T., dated 1-3-2003. The Board was called upon to consider representations received from service sector, wherein an apprehension was raised that export of service would be affected adversely in the international market on account of withdrawal of Notification No. 6/99-S.T. The Board dispelled this apprehension by clarifying that export of services would continue to remain tax-free even after withdrawal of Notification No. 6/99-S.T. This clarification is certainly binding on the Revenue. Consequently, it has to be held that the reinstatement of the above exemption through Notification No. 21/2003-S.T., dated 20-11-2003 cannot detract from the correct legal position clarified by the Board. For this reason, we hold that there can be no demand of service tax on the appellant on the ground that exemption Notification No. 6/99-S.T. was withdrawn in March 2003 and identical exemption was reintroduced in November 2003. As a matter of fact, none of the notifications referred to 'export of services'. Again, as a matter of fact, the Central Board of Excise & Customs held 'export of services' to be tax-free notwithstanding the notifications. The law which categorically exempted export of services from payment of service tax was brought into force for the first time through the Export of Services Rules, 2005. Undoubtedly, the period of demand, in the present case, is prior to 2005."

The above decision has been upheld by the Hon'ble Bombay High Court.

(iv) Lastly, we turn to the disallowance of Cenvat Credit. Substantial part of such credit is denied for the reason that this has been availed on the basis of photo copies of the original documents. It has been submitted by the appellant that the original documents have been retained in the respective Regional Office. From the record, we find that no allegations have been made by the Revenue of any fraud

or mis-use. No doubts have been cast on the authenticity of the photo copies based on which credit have been availed. In the case of Shivam Electrical Industries (supra), the Hon'ble High Court of Jammu & Kashmir has observed as follows :

> *"**7.**The aforesaid rule in our considered opinion nowhere provides that Cenvat credit cannot be availed on the basis of photocopy of the documents especially when the respondents have not disputed the correctness of the contents of the photocopies of the invoices produced by the petitioner. From the perusal of the certificate issued by the Superintendent, Customs and Central Excise, Range-III, Division-I, Ghaziabad, it is evident that the excise duty has been duly paid by the petitioner."*

By following the above decision, we find no reason to deny the cenvat credit on such flimsy grounds.

7. In view of the above detailed findings, we set aside the impugned order and allow the appeal.

(Pronounced in the open court on 06.12.2018)

Sd/ Sd/

(P.K.Choudhary) **(V.Padmanabhan)**
Member (Judicial) **Member (Technical)**
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