2012 (25) S.T.R. 459 (Tri. - Del.)

IN THE CESTAT, PRINCIPAL BENCH, NEW DELHI

Ms. Archana Wadhwa, Member (J) and Shri Mathew John, Member (T)

VIGYAN GURUKUL

Versus

COMMISSIONER OF C. EX., JAIPUR-I

Final Order No. ST/453/2011(PB), dated 9-9-2011 in Appeal No. ST/311/2007

CASES CITED

Commissioner of Income Tax v. Sirpur Paper Mills — [1999] 237 ITR 41 (SC) — *Referred* .....

Commissioner of Sales Tax v. Indra Industries — [2001] 248 ITR 338 (SC) — *Referred* .....

State Bank of Travancore v. Commissioner of Income Tax — 158 ITR 102 (SC) — *Referred* .....

DEPARTMENTAL CLARIFICATION CITED

C.B.E. & C. Circular No. 65/14/2003-S.T., dated 5-11-2003.....

REPRESENTED BY :None, for the Appellant.

Shri R.K. Gupta, SDR, for the Respondent.

[Order per : Mathew John, Member (T)]. - When the case was called out none was present to represent the Appellants. However there was letter dated 10-8-2011 from Shri Naresh Gupta, Advocate for the Appellants requesting that the case may be decided on the basis of written submissions already given.

2. The Appellants had filed a refund claim on 20-6-2006 claiming refund of Service Tax of Rs. 2,24,624/- on the ground that such amount of tax was paid erroneously, as directed by the Superintendent of Service Tax, but under protest. The Appellants were providing commercial coaching services during the year 2004. The rate of service tax on such services increased from 8% to 10.2% with effect from 10-9-2004. They had received advance payment before 10-9-2004 for providing services part of which was provided after 10-9-2004. They had paid Service Tax @ 8%, the rate prevalent at the time of paying service tax on the amounts received by them. However the Supdt. of Service Tax, vide his letters dated 11-4-2005 and 1-7-2005, requested the Appellants to deposit differential Service Tax on that part of the advance fee collected by them during the period from 1-4-2004 to 9-9-2004 against which services were rendered during the period from 10-9-2004 to 31-3-2005. Responding to this letter the Appellants deposited an amount of Rs. 2,24,624/- under protest, on 26-7-2005. They felt that they need not have paid tax on the higher rate as advised by the Supt. of Service Tax and they filed a refund claim. The Assistant Commissioner rejected such refund claim. Aggrieved by the said order, the Appellants filed appeal with the Commissioner (Appeals) who upheld the order of Assistant Commissioner. Aggrieved by the order of Commissioner (Appeals), the Appellants have filed this appeal.

3. The Appellants submit following arguments :

(i) The charging section under Finance Act, 1994 is Section 66. Under this

section tax is levied with reference to value of taxable services specified in Section 65(105). There is no express charge with reference to time of providing tax.

(ii) Under Section 65(105) "taxable service" means "services provided or to be provided". So the charge was with reference to receipt of value of service and not with reference to the time when service was provided.

(iii) Charging tax on the receipts of the Appellants received prior to 10-9-2004 with rates applicable after 10-9-2004, affects the vested subtantial rights of the Appellants which offends Article 14, 21, 19(l)(g), 265 and 301 of the Constitution of India because the Appellants cannot recover the additional tax amount from the students in view of the fact that the contracts with students were concluded.

(iv) They submitted that according to the maxim "*nova constitutio futuris forman imponere debet non praeteritis*" and as per settled law, any amendment made in law affecting the vested substantial rights or to impose new burdens or to impair existing obligation cannot be applied with retrospective effect unless legislative intent is manifested by clear terms of words in the legislation.

(v) According to Rule 6(1) of the Service Tax Rules, 1994 the Service Tax is to be paid by the 5th of the month immediately following the calendar month in which the payments are received, towards the value of taxable service. They had discharged their tax liability as per this rule and there cannot be any demand for any differential tax due to subsequent change of rate of tax.

(vi) According to the Appellants, Explanation-1 of Rule 6(1) of Service Tax Rules, 1994, relied upon by the lower authorities, will apply only to a situation where the service was not taxable when the value was received in advance but became taxable after some time. According to them this explanation cannot be relied upon in a situation where the service was taxable when money was received in advance and appropriate tax liability was discharged at the rate prevailing at the time of receipt of money.

(vii) Rule 6(1) is silent on the issue of the rate of tax to be applied. The rate of tax under Section 66 of the Act was 8% for charging of the receipts received during the period from 1-4-2006 to 9-9-2004 and therefore the Appellants are not liable to pay the differential amount demanded.

(viii) The argument of the adjudicating authority on page marked as 8 reading "The clear inference is that at time of receipt of payment towards the value of services is immaterial when question of leviability of service tax arises" is patently wrong because as per Rule 6 of Service Tax Rules, 1994, service tax is to be paid as and when value is realized.

(ix) With reference to argument given by lower authorities relying on Circular 65/2003-S.T. issued by C.B.E.C., the Appellants argue that a circular issued cannot override the provisions of the statute. In this matter they rely on the following case laws:-

(1) *State Bank of Travancore* v. *Commissioner of Income Tax* - 158 ITR 102 (SC)

(2) *Commissioner of Income Tax* v. *Sirpur Paper Mills* [1999] 237 ITR

41 (SC).

(3) *Commissioner of Sales Tax* v. *Indra Industries* [2001] 248 ITR 338 (SC).

4. The Ld. SDR on the other hand argues that service tax is levied on services and not just on receipt of money. So he argues that rate of tax as applicable at the time of providing the service will apply and not the rate of tax when the value was realized. He relies on Explanation in Rule 6(1) of Service Tax Rules, 1994 which reads as under :

> "6(1) The service tax shall be paid to the credit of the Central Government by the 5th of the month immediately following the calendar month in which the payments are received, towards the value of taxable services :
>
> Provided that where the assessee is an individual or proprietary firm or partnership firm, the service tax shall be paid to the credit of the Central Government by the 5th of the month immediately following the quarter in which the payments are received, towards the value of taxable services:
>
> Provided further that notwithstanding the time of receipt of payment towards the value of services, no service tax shall be payable for the part or whole of the value of services, which is attributable to services provided during the period when such services were not taxable:
>
> Provided also that the service tax on the value of taxable services received during the month of March, or the quarter ending in March, as the case may be, shall be paid to the credit of the Central Government by the 31st day of March of the calendar year :
>
> *Explanation* - For the removal of doubt it is hereby clarified that in case the value of taxable service is received before providing the said service, service tax shall be paid on the value of service attributable to the relevant month, or quarter, as the case may be."

5. The ld. SDR relies also on Circular 65/14/2003, dated 5-11-2003 issued from file F. No. B-3/7/2003-TRU (Part) which is reproduced below:

> *"Subject: Payment of service tax in case of advance payment of value of services.*
>
> I am directed to say that some doubts have been raised regarding payment of service tax in cases where a lump sum payment for a service to be provided in future over a certain period of time, is made in advance before the date on which the particular service came under the tax net, but the entire or part of such service is provided after the date on which it became taxable. The doubt appears to have arisen as Rule 6(1) of Service Tax Rules, 1994, provides for payment of tax on the value of service received during a month/quarter, and in the instant case, no payment is received after the date on which the tax came into force (for example a case where payments for coaching service is received before 1-7-2003 i.e. the date on which this service became taxable, but the entire or part of coaching is provided after that date).
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> 2. In this regard it may be noted that rule 6 only prescribes the procedure of payment of tax. The liability to tax is created by Section

66 of the Finance Act, 1994 as amended from time to time. The liability to pay tax is fastened on the service provider by Section 68 of the said Act. These two sections read together imply that service tax is payable by the service provider on the value of taxable services. Thus if a service provided is taxable, tax has to be paid on its value. Section 67 also clarifies value of service as the amount charged for the taxable service by the service provider. In other words, an amount becomes value of taxable service only when it has a nexus with the service provided. That is the reason why the expression used in rule 6 is "value of taxable services" and not amount. The implication is that the tax has to be paid on the value of taxable services attributable to the service provided in a month/quarter as and when it is received. Thus, rule 6(1) can not be read in isolation. When read along with the provisions of the Act, it becomes clear that where the value of taxable service has been received in advance for a service which became taxable subsequently, service tax has to be paid on the value of service attributable to the relevant month/quarter which may be worked out on *pro rata* basis.

3. In this context, attention is invited to para 2.3.1 of circular No. 59/8/2003, dated 20-6-2003 wherein it was clarified that in view of the notification 11/2003-S.T., dated 20-6-2003, no service tax would be payable where maintenance contracts are entered into before 1-7-2003, provided the invoices are raised and paid prior to 1-7-2003. It was further mentioned in the circular that similar would be the situation in case of continuing services. By continuing services what was meant was continuing maintenance services where there is an ongoing contract under which regular periodical payments are made. That para 2.3.1 was only in the context of maintenance and repair service is also quite clear from the heading, "MAINTENANCE AND REPAIR SERVICES" of para 2.3 in that circular. No similar exemption has been granted to any other service in case of advance payments."

6. We have considered arguments on both sides.

7. What we note is that unlike in the case of Customs Act, or Central Excises Act, there is no clear provision in Finance Act, 1994 as to the date with reference to which rate of tax applicable for calculating service tax was to be determined. (This lacuna was removed by Notification of Point of Taxation Rules, 2011 by Notification No. 18/2011-S.T., dated 1-3-11 which was further amended by Notification 25/2011-S.T., dated 31-3-11). There are further complications to the problem. Firstly service tax is payable only when value of service is realized. This is not the case with customs duty on goods imported or exported. In those cases duty is payable whether or not value is paid or realized. In the case of central excise duty also duty is not linked to realization of the value of goods. The second complication is that it is not easy to decide the date of performance of service, unlike in the case of date of import, export or clearance of goods. The issue at hand has to be examined keeping these complications in mind.

8. Since there were no specific provisions the Appellants plead for a harmonious construction of Section 65, 66, 67, 68 of Finance Act, 1994 and Rule 6 of Service Tax Rules, 1994. According to them such a harmonious construction would result in the interpretation that they are canvassing. Revenue is also relying on a harmonious construction of these provisions and according to them

such harmonious construction will result in the interpretation they are canvassing. They rely heavily on the Circular 65/2003-S.T., dated 5-11-2003 issued by CBEC.

9. What we notice is that the Circular 65/2003-ST was issued on 5-11-2003. At that time Section 65(105) defined "taxable service" to mean "any service provided" as defined in the said sub-section. With effect from 16-6-2005 the said sub-section was amended and thereafter taxable service means "any service provided or to be provided" as defined in the said sub-section. This amendment has very crucial relevance to the issue at hand and Revenue is relying on the circular issued in 2003 without taking this change in law into account.

10. For a harmonious construction of the relevant provisions it is necessary to quote them. They are quoted below :

> '**65(105)** "taxable service" means any service provided or to be provided' - as defined in the various clauses.
>
> **"66. Charge of service tax** - There shall be levied a tax (hereinafter referred to as the service tax) at the rate of eight* per cent, of the value of taxable services referred to in sub-clauses (a) …. ,…. ,… ,….."
>
> (this rate was increased w.e.f. 10-9-2004)
>
> "**67.** For the purposes of this Chapter, the value of any taxable service shall be gross amount charged by the service provider for such service provided or to be provided by him".
>
> **"68. Payment of service tax**. - (1) Every person providing taxable service to any person shall pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed.
>
> (2) Notwithstanding anything contained in sub-section (1), in respect of any taxable service 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 66 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."

11. Considering the fact that Section 65(105) of Finance Act, 1994, defines taxable services including service to be provided and Rule 6 of Service Tax Rules prescribes payment of tax on consideration received during the calendar month without any reference to actual providing of service we are not able to agree with the point of view canvassed by Revenue.

12. We have also examined the Explanation in Rule 6(1). This explanation does not make any provision as to which rate of tax will apply in situation like the one at hand (whether that on date of receipt of value or that on date of providing service). This explanation says that the service provider need to pay tax only on that portion of value for which service tax has been provided. In the instant case the Appellant paid tax on the full value received. The department did not take any objection to such payment in advance. So at a later date when the rate went up, there is no reason for the department to turn around and say that the Appellant should not have paid tax in advance. So we do not find it proper to rely on this explanation to conclude that the rate of tax as prevalent at the time of providing service (This date itself is not a clear date in this case) will apply. We are of the view that during the relevant time the rate that was applicable at the time of receipt of value of service will apply in a case where the assessee chose to pay tax on the advance amount received.

13. We also take note that provisions in Rule 4(b)(ii) and Rule 9 of the new Point of Taxation Rules, 2011 as amended by Notification 25/2011-S.T.,

dated 30-3-2011 have the same effect as our conclusion. For convenience Rule 9 of the said Rules is reproduced below :

"**9. Transitional Provisions.** - Nothing contained in this sub-rule shall be applicable,-

(i) where the provision of service is completed, or

(ii) where invoices are issued prior to the date on which these rules come into force.

Provided that services for which provision is completed on or before 30th day of June, 2011 or where the invoices are issued up to the 30th day of June, 2011, the point of taxation shall, at the option of the taxpayer, be the date on which the payment is received or made as the case may be."

14. For the reasons explained above we allow the appeal with consequential benefits.

(Pronounced in open court on 9-9-2011)

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