

(2001) 04 MAD CK 0026

In the Madras High Court

Case No : Writ Petition No"s. 3358, 4264, 4906 and 4907 of 1998 and WMP No"s. 5011, 6479, 7615, 7616 and 15206 of 1998

Airlines Agents Association

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 13-04-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 19(6), 366, 4
Finance Act, 1994 — Section 5(1), 65, 65(3), 65(48), 65(48)(1)
Sea Customs Act, 1878 — Section 202
Service Tax Rules, 1994 — Rule 2, 6, 6(7)

Citation : (2006) 3 STR 3

Hon'ble Judges : V.S. Sirpurkar, J;A. Kulasekaran, J

Bench : Division Bench

Advocate : C. Natarajan for M. Md. Ibrahim, for the Appellant; Chandrasekaran for K. Veeraraghavan, ACGSC, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Sirpurkar, J.—These writ petitions are filed by Airlines Agents Association, Chennai and some Air Travel Agents. The petitioners pray

for a writ of declaration or any other appropriate writ or order in the nature of writ by declaring the provisions contained in Section 65(3) and

Section 67(k) of the Finance Act, 1994 as amended in the year 1996 and Rule 2(d)(viii) of Service Tax Rules as amended in the as

unconstitutional and void.

2. During the year 1994, the then Union Finance Minister proposed to levy tax on the ""services"" provided by the non-life insurance agents, stock

brokers, telephone bills, etc. By and by, other service sectors like ""consulting engineers"", ""customs house agents"", ""steamer agents"", ""clearing and

forwarding agents", "advertising agencies" and many others came to be added and brought into the tax-net. The services provided by the "Air

Travel Agents" came to be brought into the tax-net by way of an amendment of Section 65 of the Finance Act. The "charging section" is Section

66(3) while the "measure of tax" is provided by Section 67(k).

3. We have deliberately quoted the prayer in the writ petitions because at the argument stage, the learned senior counsel did not address us on the

constitutional questions raised in the petitions. In the writ petitions, these provisions have been challenged on the ground that they violate Article

19(1)(g) and also Article 14 of the Constitution. There is also a challenge to be found to the "legislative competence" and on that ground Section

65(3) and Section 67(k) of the Finance Act have been challenged. However, at the argument stage, the learned senior counsel abandoned the

challenge regarding the "constitutionality" and restricted himself only to two propositions. The said propositions are :

I. That Section 67(k) of the Finance Act, 1994 which provides for valuation of taxable services for charging service tax is inconsistent with the

provisions of Section 65(3) and Section 65(48)(i) which provisions define "Air Travel Agents" and "Taxable Service" respectively. So also, the

said provision is also inconsistent with Section 66(3) which provides for the charge of service tax. Therefore, all these provisions are liable to be

declared "unenforceable".

II. Rule 6(7) of the Rules framed under the Finance Act, 1994 which provides for alternative mode of levy on the basic fare of passage for travel

by air, at the rate of 0.25% in case of domestic booking and 0.5% of the basic fare in case of international booking is ultra vires the rule making

power and void and unenforceable.

4. Though the challenges in the petitions are not precisely in the format, we permitted the learned Counsel to argue the matter since the contentions

relate to the legal propositions and involve interpretation of the statute, which task has fallen before us via hundreds of writ petitions in different

groups. We will, therefore, proceed to consider the challenge.

5. Before we proceed, it will be better to see the relevant provisions of the Finance Act, 1994. The relevant provisions are :

65. Definitions.

In this Chapter, unless the context otherwise requires,

(3) "air travel agent" means any person engaged in providing any service connected with the booking of passage for travel by air;

(6) "assessee" means a person liable for collecting the service tax and includes -

(i) his agent; or

(48) "taxable service" means any service provided,

(1) to a customer, by an air travel agent in relation to the booking of passage for travel by air;

66. Charge of service tax.

(3) On and from the 16th day of July, 1996, there shall be levied a tax at the rate of five per cent of the value of taxable services referred to in sub-

clauses (g), (h), (i), (j), (k), (l), (m), (ma), (n) and (o) of Clause (48) of Section 65 and collected in such manner as may be prescribed.

67. Valuation of taxable services for charging service tax.

For the purposes of this Chapter, the value of taxable services -

(k) in relation to service provided by an air travel agent to a customer, shall be the gross amount charged by such agent from the customer for

services in relation to the booking of passage for travel by air excluding the air fare but including the commission, if any, received from the airline in

relation to such booking.

Section 94 is the rule making power. In pursuance of that, Service Tax Rules have been framed. Rule 6 provides for "payment of service tax" and

Sub-rule (7) thereof runs as under :

6(7) The person liable for paying the service tax in relation to the services provided by an air travel agent, shall have the option, to pay an amount

calculated at the rate of 0.25% of the basic fare in the case of domestic bookings, and at the rate of 0.5% of the basic fare in the case of

international bookings, of passage for travel by air, during any calendar month or quarter, as the case may be, towards the discharge of his service

tax liability instead of paying service tax at the rate of five per cent of the value of taxable service rendered by him and the option, once exercised,

shall apply uniformly in respect of all the bookings of passage for travel by air made by him and shall not be changed during a financial year under

any circumstances.

Explanation. - For the purposes of this sub-rule, the expression "basic-fare" means that part of the air fare on which commission is normally paid to

the air travel agent by the airline.

6. On the backdrop of these provisions, it will be our task to test the claim of the petitioners.

7. Mr. C. Natarajan, the learned senior counsel while arguing on the first proposition contended that Section 67(k) which defines the "Value of taxable services provided by the air travel agents" is inconsistent with the provisions of Section 65(3) and more particularly Section 65(48)(i) as also Section 66(3) of the Act.

8. We have already pointed out that u/s 65(3) air travel agents are the persons who provide any service connected with the booking of the passage

for the travel by air. The words are very clear enough to suggest that the service essentially is provided to an air-traveller and the air travel agent

books the passage and makes it available to the traveller for which the traveller would be otherwise required to go to the Airport or the Airlines

office where alone the ticket would be available. The words "providing any service connected" would also include the service of advice regarding

the availability of the flights, their timings, the advice about the flight connections in between two flights as also the availability of the seats in the

nights, etc., and all these advice could be had by the traveller without his having to go to the Airport or Airlines office or bothering to enquire about

the same.

9. In short, this is the nature of the service provided by the air travel agents u/s 65(48)(i) which, while defining the "taxable service", says that it is a

service to a customer in relation to booking of passage for travel by air. Section 65(3) and Section 65(48)(i) have to be read together.

10. The submission made by the learned senior counsel is that when the value of this service is "measured" u/s 67(k), the service envisaged is left

out and instead the value is arrived at on the basis of the service, which is totally different from the service for booking the passage for travel by air.

The learned Counsel argues that Section 67(k) speaks of the "gross amount" charged from the customers excluding the air fare but including the

commission received from the airlines. From this, the learned Counsel argues

that the commission, against which the tax is inflicted, is in reality not for the services offered by the air travel agents to the customers but, because of the fact that the air travel agent has booked a passage for travel by air for a customer through a particular airlines. The learned Counsel argues that in effect though Section 66(3) and Section 65(48)(i) suggest that this is a tax on the services offered by the air travel agents to the customers in relation to booking of passages for travel by air, the "measure of the tax" is against the commission which the air travel agents earn not because of the services that they offer u/s 65(48)(i) but on the commission that they earn on account of their services to the airlines. The learned Counsel argues that the commission is given only to promote the business of the airlines or air-carriers on the basis of an agreement in between the air travel agents and the airlines. Therefore, the basic submission is that the commission received from the airlines by the air travel agents is basically for the promotion of the business of the airlines and the tax cannot be charged against this commission which has got nothing to do with the services offered by the air travel agents to their customers in booking of passages.

11. The further argument is that Section 66, which is the "charging Section", levies the tax at the rate of five per cent "on the value of taxable service" u/s 65(48)(i) and it must operate on the taxable service referred to in the definition clause. The further argument is that the tax then should be charged only on the basis of the taxable service while Section 67(k) is entirely different and operates in entirely distinct field as explained above.

The learned Counsel also relied on a Notification No. 22/97-S.T., dated 26-6-1997 which provides that it is only this commission received by the air travel agents from the airlines which is taken as a value for assessment with the result, that what is held as a basis for charging the tax is the commission earned by the air travel agent for the services that it has offered to the airlines and not to the customers which in fact, is a "taxable service". It is also urged that the transactions in between the air travel agent and the airlines are entirely different and independent of the transactions in between the air travel agent and the customers. The ultimate argument in this behalf is that the "measure" for collecting the tax must have a rationale or intelligent nexus between the tax and the persons on whom it

is imposed and it ought not to have disturbed the essence of the tax

and if there is no nexus between the charge and the measure adopted, such measure would obliterate the charge and become a different levy which would be impermissible.

12. Reliance is placed on the decisions reported in *Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others*, . The

learned Counsel relying on the aforementioned rulings submits that the ""measure"" should not only be relevant to the ""charge"" but should also have a rational nexus with it. Otherwise, it would be susceptible of becoming an independent subject for levy, which would be impermissible.

13. As against this, the learned senior counsel, Mr. Chandrasekaran, appearing on behalf of the respondents pointed out that it is completely

impermissible to judge the nature of the tax on the basis of the ""measure"" thereof. The learned Counsel argues that no fault can be found with the

charging section under which the levy is made or finding faults with the ""measure of the tax"" as against the law laid down by the Apex Court in

Buxa Dooars Tea Co. Ltd. case, cited *supra*. The learned senior counsel relied on the decision reported in *Goodricke Group Ltd. and Others Vs.*

State of W.B. and Others, .

14. In the first place, it will have to be seen as to whether the argument regarding the factual position involved is correct. The learned senior

counsel appearing on behalf of the petitioners argues that the commission that the air travel agents earn from the airlines is not on account of the

services that they give to the air-travellers but because they procure business for the airlines. This is the basic submission. Now, it is obvious that

the airlines give the commission to the air travel agents and undoubtedly the air travel agents provide business for the airlines. However, it has to be

noted that unless the air travel agents provide a service to the customers, there would be no question of their getting a commission from the airlines.

It is not as if the air travel agents get a fixed commission or income from the airlines irrespective of the passages booked by them in favour of the

customers in the nature of a ""retainer fee"" or ""guarantee money"", at least that is not the case pleaded before us. Therefore, unless the air travel

agents book the tickets and thereby unless they provide the services to the customers, they do not become entitled to any commission. Their

commission is entirely depended on and connected with the passage they book for the customers. It cannot, therefore, be said that the commission that the air travel agents get from the airlines is independent of and distinct from the services that they provide to the air-travellers and are relatable to the business that they provide to the airlines. On the other hand, since there is no guarantee money given or no fixed commission given, which has no nexus with the bookings that an air travel agent achieves for the airlines, it has to be said that the air travel agent's commission is integrally connected with the booking that he makes and in the process the services that he gives to the customers. Once this hurdle is cleared, the very basis of the argument on behalf of the petitioners' case goes away. From the specific language of the provisions, particularly of Section 65(3) and Section 65(48)(i), the nature of the service, which is taxed, is absolutely clear. It is only on the basis of the service that is provided which is made taxable. In our opinion, therefore, the commission that the air travel agents get is on account of this service because in the absence of this service being given to the customers, an air travel agent is not to get anything. We may also say that the customer gets the service not for any extra charges. The air travel agents are not supposed to charge anything more than the value fixed for the passages by the airlines. Therefore, the commission that is earned by the air travel agent has a direct nexus with the booking that he makes for the air-travellers. If, in the process, the airlines is benefited and offers some commission that would not change the nature of the service provided by the air travel agent and it cannot be said that the service is provided only to the airlines and not to the air-traveller. On the other hand, we may say that it is because the air travel agent gives service to the air-traveller that the airlines is benefited, the tax is intended and in reality is imposed as against the service provided by the air travel agent to the customer in the absence of which, there would be no question of any commission. The contention of the learned Counsel that because of Section 67(k), the nature of the tax itself changes is incorrect.

15. Reliance was placed on the observations made in paragraph 11 of the Buxa Dooars Tea Co. Ltd. case, cited supra. The said observations are to the following effect:

It is apparent that the standards laid down for measuring the liability under the

levy must bear a relationship to the nature of the levy. In the case before us, however, we find that the nexus with the tea estate is lost altogether in the provisions for exemption or reduction of the levy and that throughout the nexus is confined to despatches of tea rather than related to the tea estate....

...While there must always be a nexus between the subject of the levy and the measure of the levy that nexus extends into different dimensions.

Variations considered appropriate for the purpose of determining the measure must correspond to variations in the subject of the levy.

...When the provisions before us are examined in their totality, we find no such relationship or nexus between the tea estate and the varied

treatment accorded in respect of despatches of different kinds of tea.

16. In our opinion, the observations made in Buxa Dooars Tea Co. Ltd, case, cited supra, and more particularly those in paragraph 11 thereof

cannot be read out of context. The situation regarding the levy and the measure of the tax was entirely different. It was found as a fact that the

measure of the tax had no nexus with levy therein. In our case, however, such is not the position. We have already shown that the ""measure of the

tax"" provided by Section 67(k) cannot be said to be totally connected with the services offered by the air travel agents which is the main subject of

tax. Therefore, we hold that the observations in Buxa Dooars case, cited supra, in paragraph 11 which have been quoted by us would not be

applicable to the present situation. This is apart from the fact that the observations in paragraphs 10 and 11 of the Buxa Dooars case were not

approved by the Supreme Court in Goodricke Group Ltd. case, cited supra, was entirely different but, that is a different subject altogether. We

have already held that Section 67(k) which provides the ""measure of the tax"" is not unconnected with the main levy of the tax for the reasons that

we have already given above. .

17. We have already shown here that the provision of Section 67(k) does not in any manner alter the nature of tax and does not shift it from the

service rendered to the customer to the service rendered to the airlines. The contention, therefore, is clearly incorrect on facts.

18. The further argument that the notification dated 26-6-1997 restricts the tax to the commission alone is repugnant to the scheme of the tax is

obviously incorrect for the reasons given by us. The basis of the argument that the commission received from the airlines by the air travel agent is

taken a measure for imposing a levy on a different service rendered to the customer by the agent is itself incorrect. We, therefore, reject the

argument that the impugned provision of Section 67(k) is repugnant to the general scheme of the Act and, therefore, it should fail or that there is

anything repugnant in that provisions and the definition clause as also Section 67(k) which is a charging provision.

19. The learned senior counsel secondly contended that Rule 6(7) of the Service Tax Rules, which we have quoted above, is beyond the scope of

the section which conceives the same. The learned Counsel invited our attention to Section 66 in which the language is that the tax at the rate of

five per cent of the value of the taxable service would be collected in such manner as may be prescribed. The learned Counsel points out that

under Rule 6(7) an option is provided to pay the tax on the basis of different calculations. Under the said rule, the concerned air travel agent can

pay the amount calculated at the rate of 0.25% of the basic fare in case of domestic bookings and at the rate of 0.5% of the basic fare in case of

international bookings of passage of travel by air during any calendar month or quarter towards the discharge of his service tax liability, instead of

paying the service tax at the rate of five per cent of the value of the taxable service rendered by him and such option once exercised is to apply

uniformly in respect of the bookings of passages of travel by air made by such agent and is not to-be changed during the financial year under any

circumstances. This would in short mean that instead of calculating the tax at the rate of 5% of the commission that the air travel agent receives

from the airlines and then paying the tax, the air travel agent can have the option of paying the tax per month or per quarter calculating it in the

manner stated above. According to the learned Counsel, this rule is totally unconnected with and contradictory to the charging section and amounts

to a ""levy"". The argument goes further and suggests that this method amounts to a different levy than what is suggested by the main provision. It is

also suggested that this rule provides a substantive scheme for the tax different from and independent of the taxing scheme suggested and,

therefore, it is also beyond the rule making power u/s 94(2)(a) which provides only for framing of the rules enabling collection and recovery of

service tax under Sections 66 and 68. Heavy reliance is placed on the decision reported in Assistant Collector of Central Excise, Calcutta Division

Vs. National Tobacco Co. of India Ltd., , more particularly on the observations made in paragraph 20 thereof.

20. Another shade of argument is that the ""rate"" and the ""measure"" suggested by this rule are in the nature of independent system of levy, which is plenary in character. It is, therefore, submitted that the rule making does not enable such plenary exercise of power. Heavy reliance is placed on

the decision reported in Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., . For the same reasons, another decision reported in

Agricultural Market Committee Vs. Shalimar Chemical Works Ltd., is also cited by the learned Counsel. The learned Counsel also further cites the

decision reported in Kunj Behari Lal Butail and Others Vs. State of H.P. and Others, on the proposition that those petitioners who have opted for

being taxed by this rule have found certain detriment in excess of their liability which would have been as per the general scheme.

21. As against this, the learned Counsel for the Department argues that firstly, this argument cannot be raised in the present petitions. The learned

Counsel points out that it is an accepted position that almost all the members of the petitioner-association have exercised their option under Rule

6(7). Therefore, the argument is that once there is a voluntary option exercised in favour of Rule 6(7), that very rule cannot be challenged on any

ground and it cannot be contended that it is invalid. It is then pointed out that being an optional rule, it is quite open for any taxpayer not to act

upon the same and, therefore, there would be no question of attacking the validity of this rule. The petitioners may ignore the rule and choose to be

governed by the general rule is the contention. Heavy reliance is placed on the decision reported in State of Kerala and another Vs. Builders

Association of India and others, . As an alternative argument it is contended that the rule is provided for giving a benefit to a taxpayer and indeed

the taxpayers have chosen to go by these rules because it is beneficial to them to go by these rule.

22. The further argument is that there is a specific power u/s 93 of the Act whereby the Government can grant the exemption and this being a

beneficial rule amounts to a partial exemption. Therefore, when Section 93 is read with Section 94, there is ample powers in the Government to

enact and an argument that this rule is beyond the "rule making power" is totally incorrect.

23. It is then contended that the rule pertains to only the collection and cannot be said to be an independent levy. According to the learned

Counsel, as per Section 94(2)(a), the rule provides for an alternative way of collection which is of beneficial nature. The learned Counsel relies on

the decision reported in Chandrakant Krishnarao Pradhan and Another Vs. The Collector of Customs, Bombay and Others, .

24. We will first consider as to whether the petitioners can justifiably challenge the said rule, which is in the nature of an "option". In this behalf, the

Supreme Court in Builders' Association of India case, cited supra, while considering the "legislative competence" and the "constitutionality" of the

provisions of Kerala General Sales Tax Act has observed as under :

The first feature to be noticed is that the alternative method of taxation provided by Sub-section (7) or (7A) of Section 7 is optional. The sub-

sections expressly provide that the method of taxation provided thereunder is applicable only to a contractor who elects to be governed by the said

alternate method of taxation. There is no compulsion upon any contractor to opt for the method of taxation provided by Sub-section (7) or Sub-

section (7A). It is wholly within the choice and pleasure of the contractor. If he thinks it is beneficial for him to so opt, he will opt; otherwise, he will

be governed by the normal method of taxation provided by Section 5(1)(iv). Sub-section (8) provides that the option to come under Sub-section

(7) or (7A) has to be exercised by the contractor "either by an express provision in the agreement for the contract or by an application to the

assessing authority, to permit him to pay the tax in accordance with any of the said sub-sections". In these circumstances, it is evident that a

contractor who had not opted to this alternate method of taxation cannot complain against the said sub-sections, for he is in no way affected by

them. Nor can the contractor who has opted to the said alternate method of taxation, complain. Having voluntarily, and with the full knowledge of

the features of the alternate method of taxation, opted to be governed by it, a contractor cannot be heard to question the validity of the relevant

sub-sections or the rules.

(emphasis provided)

The emphasised portions do not need any further explanations. The observations are applicable on all fours to the situation here.

25. When we see Rule 6(7) of the Rules, the language thereof itself suggests that it is an optional matter. Therefore, the members of the petitioner-

association, who have not exercised the option will have no concern with the validity of that rule while those who have opted for it, and we have

been told that majority of them have done so, can also not challenge the said validity.

26. We appreciate the fairness on the part of Mr. C. Natarajan, the learned senior counsel who himself had pointed out this ruling to us.

27. The ruling also goes further and upholds the impugned provisions and gives a nod of approval to such alternate method of taxation. The

following observations of the Supreme Court in Builders' Association of India case, cited supra, are apposite in this behalf:

It must yet be remembered that the method of taxation introduced by subsections (7) and (7A) is in the nature of composition of tax payable u/s

5(1)(iv). The impugned sub-sections have evolved a convenient, hassle-free and simple method of assessment just as the system of levy of

entertainment tax on the gross collection capacity of the cinema theatres. By opting to this alternate method, the contractor saves himself the

botheration of book-keeping, assessment, appeals and all that it means. It is not necessary to enquire and determine the extent or value of goods

which have been transferred in the course of execution of a works contract, the rate applicable to them and so on. For example, under Sub-section

(7), the contractor pays two per cent of the total value of the contract by way of tax and he is done with all the above-mentioned botheration. The

rate of two per cent prescribed, by Sub-section (7) is far lower than the rates in First, Second and Fifth Schedules referred to in Section 5(1)(iv)

(a). In short, sub-sections (7) and (7A) evolve a rough and ready method of assessment of tax and leave it to the contractor either to opt to it or

be governed by the normal method. It is only an alternative method of ascertaining the tax payable, which may be availed of by a contractor if he

thinks it advantageous to him. It must be remembered that the analogous system of alternate method of taxation evolved by certain State

Legislatures in the matter of levy of entertainment tax has been upheld by this Court in Venkateswara Theatre v. State of Andhra Pradesh - 1995

(96) STC 130. The rough and ready method evolved by the impugned sub-sections for ascertaining the tax payable u/s 5(1)(iv) of the Act cannot

be said to be beyond the legislative competence of the State of violative of Clause (29A) of Article 366 either.

The observations are more than telling regarding the validity of such alternate assessment. Mr. Natarajan, however, tried to urge, relying on some

Apex Court rulings, that a levy would be deemed to be unconstitutional if the rule is beyond the rule making power. In that case, the levy via Rule

6(7) would be presumed to be unconstitutional and in contravention of Article 4 and Article 19(1)(g) of the Constitution of India. According to

him, the tax demand not founded on a valid provision is unreasonable restriction and cannot also be Saved by Article 19(6).

28. The further argument is that if there is a denial of fundamental rights then, the constitutional protection cannot be denied to the petitioner and

that it would still be open to the petitioner to assert his rights notwithstanding he has made a promise or has chosen to opt for being governed by

Rule 6(7). In short, the contention is that if there is a breach of constitutional provisions by Rule 6(7), then even if the petitioner has opted for the

same, it does not matter as such option is meaningless when there is a denial of fundamental rights or breach of the constitutional provisions.

29. Unfortunately, the petitioners may not be able to say this in view of the specific observations made in Builders' Association of India case, cited

supra, which we have quoted above. It was tried to be suggested that there cannot be a waiver of fundamental rights, which are matters of policy

and they are also abandoned by consent and that they are available whenever a person aggrieved complains against them.

30. Our attention was invited to the decisions reported in Behram Khurshed Pesikaka Vs. The State of Bombay, ; Basheshar Nath Vs. The

Commissioner of Income Tax, Delhi and Rajasthan and Another, ; Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, and

AIR 1998 SCC 507 (P.R. Deshpande v. Maruthi Balaram Haibatti) and it was suggested that since these cases were not taken into consideration

in the aforementioned decision of Builders' Association of India case, cited supra, it must be taken that the law laid down in Builders' Association

of India case is not correct.

31. It is not for us to comment on the Supreme Court judgment in the manner the petitioners would want us to do. In the decision reported in

Mahesh Kumar Saharia Vs. State of Nagaland and Others, , the Apex Court has specifically held and approved the earlier observations to the

following effect:

The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with

reference to which an argument was subsequently advanced was actually decided.

Again in the decision reported in *Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur*, , the Supreme Court has

specifically cautioned against such a course being adopted by the High Courts. The judgments are clearly binding on us and we would choose to

abide by the same by holding that the petitioners cannot raise any such objections to the validity of Rule 6(7) once the petitioners have opted for

the same.

32. In fact, it is not necessary for us now to take the stock of the petitioners' contention regarding the unconstitutionality of the rules but, even

otherwise, we are of the clear-cut opinion that there is absolutely no breach of any fundamental rights by passing Rule 6(7) and nothing wrong can

be found with that rule much less in the light of the submission made by the learned senior counsel for the petitioners. We are in complete

agreement with the learned senior counsel for the department that this rule will have to be viewed taking into consideration Section 93 and Section

94(2)(a) jointly. Indeed, there is a specific power u/s 93 of the Act to grant exemption in any manner. Section 94(2)(a) of the Finance Act speaks

of the rule making power on the subject of collection and recovery of service tax u/s 66 and Section 68. What is suggested by Rule 6(7) is nothing

but a probably more beneficial calculation, which would spare an air travel agent of so many other botherations as expressed by the Supreme

Court in the *Builders' Association of India* case, cited *supra*, which observations we have already quoted. It is, therefore, clear that no fault can be

found with the rule at least on the ground that it is beyond the rule making power. We have already found that it does not amount to an

independent levy again, because of the observations made by the Supreme

Court. It is only for that purpose, we have extensively quoted the observations from Builders' Association of India case wherein a specific reference is made to the earlier decision in Venkateshwara Theatres case, cited supra. The emphasised portions would highlight what we have said about the validity of such a rule.

33. Mr. Chandrasekaran, the learned senior counsel appearing for the respondents also relied on the decision reported in Chandrakant Krishnarao Pradhan and Another Vs. The Collector of Customs, Bombay and Others, and more particularly to the observations in paragraph 7. The

contention is that the rules which fell for consideration went beyond the general purpose of the section and the special topics mentioned there for

furthering some of the purposes of the other parts of the Act. The learned Counsel invited our attention to the following observations :

Thus, if it is necessary the agents must carry out certain provisions of the Act, a rule can be made in the exercise of the two powers together.

Though the impugned rules are headed as framed u/s 202 of the Sea Customs Act, they cannot be questioned, if they carry out not only the special

purposes of Section 202 but also certain other purposes of the Act because the two powers will concur to sustain them. It is only when a rule or

rules are pointed out which subserve neither the special purpose of the section nor the general purposes of the Act that they can be successfully

questioned.

Here also according to the learned Counsel the Rule 6(7) which is more beneficial to the taxpayer serves the purpose of Section 93 which is a

general power wherein there is a power to grant exemption or concession in the service tax. The learned Counsel argues and rightly that the rule is

obviously beneficial and that is why it was opted by most of the air travel agents. It is also pointed out that the impugned rule also emanates on the

basis of Section 94(2)(a) which pertains to collection and recovery of service tax u/s 66 and Section 68. We, therefore, hold that there is nothing

wrong with the rule in question.

34. Reliance was placed on the Supreme Court ruling reported in Kunj Behari Lal Butail and Others Vs. State of H.P. and Others, , wherein, in

paragraph 14, the Supreme Court has observed that where the delegation of the rule making power is circumscribed by the expression ""for

carrying out the purposes of the Act, then in exercise of such delegated powers to legislate the State Government cannot bring within the net of the

rules that has been excluded by the Act itself. There can be no dispute about the principles evolved but, we have already found that Rule 6(7) does

not tread upon an forbidden territory. The ruling is, therefore, of no consequence.

35. It was also tried to be argued, relying on the decision reported in Agricultural Market Committee Vs. Shalimar Chemical Works Ltd., that

under the rule-making power the Legislature cannot provide a new policy and cannot thereby present an alternate mode of tax payment.

According to the learned Counsel, this was only a matter of policy and could have been done only by the main provisions of the Act. We do not

think so. We have already shown that this rule can be viewed as a beneficial assessment and for that purpose Section 93 can be read with Section

94(2)(a). According to us, Rule 6(7) is only a modality for collection of tax. The ruling is, therefore, of no help.

36. In the case decision reported in Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., , the Apex Court has observed in paragraphs 17

and 18 that in the impugned legislation therein, the rule-making authority was not conferred with the power to levy duty on any articles which do

not fall within the scope the concerned Section. The Court, therefore, observed in paragraph 18 that no tax can be imposed by any bye-law or rule

or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the

power to tax can be delegated to the executive. We do not find any such transgression by the rule-making authority over the statutory power

conferred by the statute. We have already explained that the concerned rule cannot be viewed as an ""independent taxation"". The ruling is of no

value here.

37. We are in complete agreement with the learned senior counsel that this rule provides for an independent measure as the basic airfare. In fact,

the observations which are based on the decision in Venkateshwara Theatres case, cited supra are clear to suggest that such rule is not an

independent system of levy of tax. For this reason, it is not necessary for us to refer to the case relied upon by the learned Counsel vide the

decision in Bimal Chandra Banerjee, case cited supra.

38. For the reasons stated above, we do not find any merit in the writ petitions which are liable to be dismissed and are ordered to be dismissed.

No costs. Connected W.M.Ps are closed.