(2011) 04 GUJ CK 0046

In the Gujarat High Court

Case No : Tax Appeal No. 1300 of 2010 with Tax Appeal No. 1301 of 2010 to Tax Appeal No. 1303 of 2010

The Commissioner, Service Tax — APPELLANT

Vs

M/S Quintiles Data Processing Centre (I) Pvt. Ltd. — RESPONDENT

Date of Decision : 28-04-2011

Acts Referred:
Finance Act, 1994 — Section 54, 65, 65(105), 65(65), 66
Finance Act, 2006 — Section 66A
Service Tax Rules, 1994 — Rule 2, 2(1)

Citation : (2011) 23 STR 15

Hon'ble Judges : Sonia Gokani, J;Akil Kureshi, J

Bench : Division Bench

Advocate : Kalpesh N. Shastri, for the Appellant; Saurabh Soparkar with Mr. Paresh M Dave, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mr. Justice Akil Kureshi

1. These appeals arise out of the common background. Revenue is aggrieved by common judgment of the CESTAT dated 06/11/2009 raising following question for our consideration.

Whether the CESTAT, WZB, Ahmedabad is right in holding service tax leviability w.e.f. 18.04.2006 (as held in M/s Indian National Shipowners Association) when the facts of the present case are different than those of M/s Indian National Shipowners Association ?

2. Though the language used in the question is somewhat inaccurate the question is whether the respondent assessee which is a recipient of management service, liable to pay service tax on such services for a period prior to 18/04/2006.

3. Briefly stated facts are as follows:

For the purpose of these appeals, we may proceed on the footing that the respondent - assessee receives Management Consultant service by service provider stationed outside India. Though this aspect is also strongly disputed by the respondent.

4. It is not in dispute that under ordinary circumstances Management Consultant Service as defined in Section 65 (65) of the Finance Act, 1994 would attract service tax at the specified rates. It is equally not in dispute that under the provisions of Section 66 of the Finance Act, 1994, liability to pay such tax rests on the service provider.

5. The department, however, relying on Rule 2 (1) (d) (iv) of the Service Tax Rules, 1994 sought to recover such service tax from the respondent on the premise that the service was provided by a person from a country other than India but that such service was received by the assessee in India

6. The issue ultimately reached the Tribunal. Tribunal by the impugned judgment ruled in favour of assessee and allowed the appeal setting aside the tax demanded. The Tribunal relied on the decision of the Bombay High Court in case of Indian National Shipowners Association Vs. Union of India, 2009 (13) STR 23 (Bom.) and decision of Dehli High Court in case of Unitech Ltd. Vs. Commissioner of Service Tax, Delhi, 2009 (15) STR 385 (Del). The Tribunal came to the conclusion that in view of the above mentioned decisions of two High Courts, the assessee was not liable to pay any service tax for period prior to 18/04/2006, the date with effect from which Section 66A was introduced in the Finance Act, 1994.

7. Counsel for the appellant - department submitted that the facts in the case of Indian National Shipowners Association (Supra) and in case of Unitech Ltd (Supra) were different. He submitted that Bombay High Court decision was based on the facts where even the service was not received in India; whereas in the present case, the management consultant service was received in India.

8. He relied upon provisions contained in Rule 2 (1) (d) (iv) of the Service Tax Rules, 1994 to contend that in the present case department has correctly demanded service tax from the respondent.

9. On the other hand, learned Senior Counsel, Shri Soparkar, appearing for the respondent opposed the appeal contending that till 18/04/2006 when Section 66A was introduced, there was no provision by virtue of which the service tax can be levied from service recipient. It was contended that in absence of any charging Section permitting the revenue to levy service tax from the service recipient, reliance on Rule 2 (1) (d) (iv) of the Service Tax Rules, 1994 to levy service tax from the recipient would not be permissible.

10. Heavy reliance was placed on decision in case of Indian National Shipowners Association (Supra) and in case of Unitech Ltd (Supra).

11. It was pointed out to us that the decision of the Bombay High Court in case of Indian National Shipowners Association (Supra) was carried in appeal. Such

appeal, however was dismissed by the Apex Court.

12. Our attention was also drawn to the decision of the Apex Court in the case of Laghu Udyog Bharati and Another Vs. Union of India and Others, wherein the Apex Court observed that definitions contained in Rule 2 (d) (xii) and (xvii) which with regard to services rendered by clearing and forwarding agents and the goods transport operators seeks to make customers or the clients as the assessee is in conflict with Sections 65 and 66 of the Finance Act, 1994. Having thus heard learned Counsel for the parties and having perused orders on record, we find that undisputedly with effect from 18/04/2006 Section 66A has been introduced in Finance Act, 1994 which reads as under:

66A. (1) Where any service specified in clause (105) of section 54 is, --

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India,

such service shall, for the purpose of this section, be the taxable service, and such taxable service shall be treated as if the recipients had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that where the recipients of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply;

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall bee treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section

13. By virtue of the said provision, a major shift in certain situation has been introduced with respect to the question of collection of service tax. We are however concerned with the period prior to 18/04/2006 when said Section 66A was not in the Statute Book

14. Rule 2 (1) (d) (iv) of the Service Tax Rules, 1994 is at the relevant time read as under:

(iv) in relation to any taxable service provided or to be provided by a person, who has established a business or has a fixed establishment from which the service is provided or to be provided, or has his permanent address or usual place of residence, in a country other than India, and such service provider does not have any office in India, the person who receives such service and has his place of business, fixed establishment, permanent address or, as the case may be, usual place of residence, in India

15. This Rule for the period prior to 18/04/2006 and; in particular in absence of Section 66A of the Finance Act, 1994 came up for consideration before the Bombay High Court in case of Indian National Shipowners Association (Supra). Relying on the decision of the Apex Court in case of Laghu Udyog Bharti (Supra), Bombay High Court was of the opinion that before enactment of Section 66A of the Finance Act, 1994 there was no authority vested by law in the respondent to levy service tax on a person who is resident in India but who receives services outside India. It was observed that law laid down by the Apex Court in case of Laghu Udyog Bharti (Supra) is squarely applicable to Rule 2 (1) (d) (iv), which was relied by the revenue. Bombay High Court also considered the effect of explanation to Section 65 (105) of the Finance Act, 1994 which reads as under

Explanation - For the removal of doubts, it is hereby declared that where any service provided or to be provided by a person, who has established a business or has a fixed establishment from which the service is provided or to be provided, or has his permanent address or usual place or residence, in a country other than India and such service is received or to be received by a person who has his place of business, fixed establishment, permanent address or, as the case may be, usual place of residence, in India, such service shall be deemed to be taxable service for the purposes of this clause.

16. However, in absence of any charging Section the Court was of the opinion that merely by virtue of provisions contained in Rule 2 (1) (d) (iv) in the Service Tax Rules, recipient of service tax could not be made liable to pay the tax. It is of course true that in the concluding portion, the Bench observed that the person who receives service outside India from a person who is non-resident cannot be made to pay service tax. To our mind, however, this is not the ratio of the decision and the entire decision is based on the ratio laid down by the Apex Court in the case of Laghu Udyog Bharti (Supra)

17. Bombay High Court''s observations relevant for our purpose may be noted thus:

20. It appears that a similar provision in the rules was made applicable by the Government in relation to the Clearing Agents by making customers of the Clearing Agent liable for levy of the service tax. That question has been decided by the Supreme Court by its judgment in the case of Lagu Udyog Bharati (supra) and the Supreme Court has clearly laid down that the imposition of the service tax is on the persons rendering the services and by making a provision in the

Rules, levy of tax cannot be shifted to the recipients of the services and the rule framed which brought about this situation has been declared by the Supreme Court to be invalid. The law laid down by the Supreme Court in its judgment in Laghu Udyog (supra) is squarely applicable to Rule 2 (1) (d) (iv), which is relied on in this case. It appears that it is first time when the Act was amended and Section 66A was inserted by Finance Act, 2006 w.e.f. 18-4-2006, the Respondents got legal authority to levy service tax on the recipients of the taxable service. Now, because of the enactment of Section 66A, a person who is resident in India or business in India becomes liable to be levied service tax when he receives service outside India from a person who is non-resident or is from outside India. Before enactment of Section 66A it is apparent that there was no authority vested by law in the Respondents to levy service tax on a person who is resident in India, but who receives services outside India. In that case till Section 66A was enacted a person liable was the one who rendered the services. In other words, it is only after enactment of Section 66A that taxable services received from abroad by a person belonging to India are taxed in the hands of the Indian residents. In such cases, the Indian recipient of the taxable services is deemed to be a service provider. Before enactment of Section 66A, there was no such provision in the Act and therefore, the Respondents had no authority to levy service tax on the members of the petitioners - association.

18. We also notice that Delhi High Court in case of Unitech Ltd., (supra) relying on decision of the Bombay High Court in the case of Indian National Shipowners Association (Supra), deleted the tax demand from assessee who was a recipient of taxable services in the nature of architectural services from a non-resident.

19. In view of the above judicial pronouncement and in view of the facts on record, we do not find that the Tribunal committed any error in setting aside the service tax demand. When we find that the charging Section making service recipient liable to pay service tax, in certain circumstances was introduced by virtue of Section 66A of the Finance Act, 1994 with effect from 18/04/2006, any demand of service tax prior to the said period, merely relying on Rule 2 (1) (d) (iv) of the Service Tax Rules was wholly impermissible. Tribunal correctly ruled in favour of assessee.

20. Counsel for the respondent stated that even the basic fact whether the respondent receives management consultant service or not is not in dispute. Since this question does not arise for our consideration we have not adverted to the same.

21. In the result Tax Appeals are dismissed