# केंद्रीय कर आयुक्त (अपील)

**O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,**

सत्यमेव जयते

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

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क फाइल संख्या : File No : V2(ST)26/EA-2/Ahd-I/2017-18 / 2513-17
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-453-2017-18**
दिनाँक Date : **27-03-2018** जारी करने की तारीख Date of Issue 17/04/18

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **STC/01/KM/AC/D-III/17-18** दिनाँक: **18/4/2017** issued by Assistant Commissioner, Central Tax, Ahmedabad-South

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

**M/s. Gill Sonia Jogasing**
**Ahmedabad**

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person a aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

**Revision application to Government of India :**

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस **इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।**

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

## ORDER IN APPEAL

This appeal has been filed by Assistant Commissioner, Central GST, Division VI (Vastrapur), Ahmedabad South Commissionerate [for short –"appellant'] against OIO No. STC/01/KM/AC/D-III/17-18 dated 18.4.2017 passed by the Assistant Commissioner, Division III, Service Tax Commissionerate, Ahmedabad [for short –'adjudicating authority'].

2. Briefly the facts are that based on third party information, received from the Income Tax authorities, an investigation was conducted against Ms. Gill Sonia Jogasingh [for short –'respondent'] who was engaged in providing services falling under the category of 'Business Auxiliary Services". Further, for the period from 1.7.2012, the services provided by the respondent was not falling under the negative list in terms of Section 66D of the Finance Act, 1994. Consequent to completion of investigations, a show cause notice dated 14.10.2015, was issued, *inter alia*, alleging that the respondent had short paid service tax of Rs. 23,12,573/- . The notice therefore demanded the service tax short paid along with interest and further proposed imposition of penalty under sections 77 and 78 of the Finance Act, 1994.

3. This notice was adjudicated vide the impugned OIO dated 18.4.2017, wherein the adjudicating authority dropped the proceedings initiated vide notice dated 14.10.2015. However, he imposed a penalty of Rs. 20,000/- per return for non filing.

4. Feeling aggrieved, the impugned OIO was reviewed by the Commissioner, CGST, Ahmedabad South Commissionerate, vide his Review order No. 9/2017-18 dated 18.7.2017, wherein he directed the appellant to file this appeal. The following grounds, have been raised in the review order:

- that the adjudicating authority has considered the respondent as *pure agent*, which is not proper and legal as the same appears to be a superficial understanding of a serious situation at hand; that the adjudicating authority relied more upon assumption and suppositions instead of dealing with the factual matrix of the case;
- that it is not on record whether the respondent was under any legal obligation for the transportation of goods and was undertaking all the attendant risks; that the respondent has stated that they did not have any agreement;
- that in terms of para 2.1 and 2.2 of Board's circular no. 197/7/2016-Service Tax dated 12.8.2016, in the absence of an agreement with recipients of service the finding that the respondent was acting as a intermediary, is not legal and proper;
- the adjudicating authority erred in accepting the respondent's version regarding purchase invoices without cross verification, which was not submitted to the preventive section;
- the adjudicating authority's finding that the respondent is eligible for CENVAT credit of service tax is not justified since they had not filed any returns; that the impugned OIO does not contain any discussion as to whether the CENVAT credit claimed has been verified or otherwise;
- that a simple annexure containing year wise detail of CENVAT credit was produced which was accepted by the adjudicating authority without correlation with actual invoices, ledgers maintained by the respondent;
- the citation relied upon by the adjudicating authority viz. Broadcom India Research Private Limited, is not applicable to the present dispute as the respondent has not filed returns;
- the adjudicating authority further refrained from imposing penalty under section 78 of the Finance Act, 1994.

5. Personal hearing in the matter was held on 21.3.2018 wherein Shri Punit Prajapati, CA, appeared on behalf of the respondent. The learned CA explained the case, and the bifurcation of the amounts viz. Rs. 19,65,349/- and Rs. 3,47,224/- [para 6 and 9 of the show

cause notice]. He stated that for reimbursement all the papers were submitted and accordingly demand was dropped; that since the matter is of litigation, limitation should be allowed/applicable.

6. I have gone through the facts of the case, the grounds of appeal raised in the review order and the oral averments raised by the respondent during the course of personal hearing. The question to be decided is whether the adjudicating authority was correct in dropping the proceedings initiated vide show cause notice dated 14.10.2015.

7. I find that for the FY 2010-11 to 2013-14, the demand raised is in respect of differential amount of service tax worked out on the basis of income reflected in the balance sheet of the respondent. Further the demand of Rs. 3,47,224/- is in respect of differential amount towards ocean freight.

8. The adjudicating authority dropped the proceedings on the basis of the following findings:

- that the respondent is in the business of booking ocean freight; that they also pay various other services like terminal handling charges, EDI charges, CONCOR rail charges, transportation charges, etc. on behalf of the importers/exporter who book cargo through them;
- that the respondent pay such expenses on behalf of their clients and get it reimbursed; that they issue separate invoices for reimbursement of such expenses for arranging such services and also charge agency charges and pay service tax on the same;
- that the respondent has functioned as a pure agent by issuing reimbursement invoices and has charged commission in another invoice and had paid service tax on the same;
- that the respondent had provided purchase invoices later on to the preventive section;
- that if it is held that they are liable to include the value of reimbursement expenditure even then they are eligible for CENVAT credit, which as per the annexure, is more than the demand of the notice;
- that the case of M/s. Boradcom India Research P Ltd is applicable in the matter as they had not filed any ST-3 returns;
- that in respect of difference between ocean freight purchased and sold, ocean freight upto 31.5.2016 was not taxable in terms of section 66D(p)(ii) upto 31.5.2016; that in terms of section 10 of the Place of Provision of Service Rules, 2011, in case of transportation of goods shall be destination of the goods and hence as place of provision is outside taxable territory in the case of export cargo, no service tax is payable;
- that even in the case of Global Transportation Service P Ltd [2016(45) STR 574], it has been held by that the margin held on ocean freight is not subject to service tax.

9. I find that the department in its appeal has contended that the adjudicating authority erred in holding that the respondent is a pure agent; that in the present case it is not on record whether the respondent was under any legal obligation for the transportation of goods and undertaking all the attendant risks; that this has not been examined thoroughly; that even the respondent has stated that they do not have any agreement; that in terms of para 2.1 and 2.2 of Board's circular no. 197/7/2016-Service Tax dated 12.8.2016, in the absence of agreement with recipients of service the finding of the adjudicating authority that the respondent was acting as a intermediary, is not legal and proper. Further the department has also argued that in terms of Section 67 of the Finance Act, 1994 the bifurcation of the payments received by the respondent was in violation of section 67, ibid because the section clearly states that in case where the provision of service is for a consideration in money, it will be the gross amount charged by the service provider for such service provided or to be provided.

9.1 The adjudicating authority I find has through an example, explained as to how the respondent was issuing a *reimbursement invoice* in respect of expenses incurred and was also issuing a *separate invoice* of the same number, for agency charges on which service tax was paid. The adjudicating authority further held that demanding service tax again would [a] amount to double taxation; and [b] since the respondent has acted as a pure agent, the question of demanding tax on the reimbursed amount does not arise. I find that there is no dispute to **one fact** that the service tax demanded is on reimbursement of expenses, which has also been explained by the adjudicating authority, by way of an example in respect of M/s. Encore Natural. So it can be safely concluded that the demand is in respect of non-payment of service tax in respect of reimbursement of expenses. Now reimbursements form a part of valuation of service, by virtue of Section 67 of the Finance Act, 1994 read with Rule 5 of the Service Tax (Determination of Value) Rules, 2006. However, inclusion of reimbursements in the value for the purpose of determining service tax is no longer res integra. The Hon'ble Delhi High Court in the case of M/s. Intercontinental Consultants & Technocrats Pvt. Ltd.[ 2013 (29) S.T.R. 9 (Del.)], while deciding on the vires of Rule 5 of the Valuation Rules, ibid, held as follows: [relevant extracts]

> ***10.*** *The contention of the petitioner that Rule 5(1) of the Rules, in as much as it provides that all expenditure or costs incurred by the service provider in the course of providing the taxable service shall be treated as consideration for the taxable service and shall be included in the value for the purpose of charging service tax goes beyond the mandate of Section 67 merits acceptance. Section 67 as it stood both before 1-5-2006 and after has been set out hereinabove. This section quantifies the charge of service tax provided in Section 66, which is the charging section. Section 67, both before and after 1-5-2006 authorises the determination of the value of the taxable service for the purpose of charging service tax under Section 66 as the gross amount charged by the service provider for such service provided or to be provided by him, in a case where the consideration for the service is money. The underlined words i.e. "for such service" are important in the setting of Sections 66 and 67. The charge of service tax under Section 66 is on the value of taxable services. The taxable services are listed in Section 65(105). The service provided by the petitioner falls under clause (g). It is only the value of such service that is to say, the value of the service rendered by the petitioner to NHAI, which is that of a consulting engineer, that can be brought to charge and nothing more. The quantification of the value of the service can therefore never exceed the gross amount charged by the service provider for the service provided by him. Even if the rule has been made under Section 94 of the Act which provides for delegated legislation and authorises the Central Government to make rules by notification in the official gazette, such rules can only be made "for carrying out the provisions of this Chapter" i.e. Chapter V of the Act which provides for the levy, quantification and collection of the service tax. The power to make rules can never exceed or go beyond the section which provides for the charge or collection of the service tax.*
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> ***11.*** *In the aforesaid backdrop of the basic features of any legislation on tax, we have no hesitation in ruling that Rule 5(1) which provides for inclusion of the expenditure or costs incurred by the service provider in the course of providing the taxable service in the value for the purpose of charging service tax is ultra vires Section 66 and 67 and travels much beyond the scope of those sections. To that extent it has to be struck down as bad in law. The expenditure or costs incurred by the service provider in the course of providing the taxable service can never be considered as the gross amount charged by the service provider "for such service" provided by him. The illustration 3 given below the Rule amplifies what is meant by sub-rule (1). In the illustration given, the architect who renders the service incurs expenses such as telephone charges, air travel tickets, hotel accommodation, etc. to enable him to effectively perform the services. The illustration, therefore, says that these expenses are to be included in the value of the taxable service. The illustration clearly shows how the boundaries of Section 67 are breached by the Rule. Apart from travelling beyond the scope and mandate of the Section, the Rule may also result in double taxation. If the expenses on air travel tickets are already subject to service tax and is included in the bill, to charge service tax again on the expense would certainly amount to double taxation. It is true that there can be double taxation, but it is equally true that it should be*

*clearly provided for and intended; at any rate, double taxation cannot be enforced by implication. A Constitution Bench of the Supreme Court in Jain Brothers v. Union of India - (1970) 77 ITR 107 observed as follows, expounding the principles relating to double taxation ..... :-*

*18. Section 66 levies service tax at a particular rate on the value of taxable services. Section 67(1) makes the provisions of the section subject to the provisions of Chapter V, which includes Section 66. This is a clear mandate that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies a tax only on the taxable service and nothing else. There is thus inbuilt mechanism to ensure that only the taxable service shall be evaluated under the provisions of 67. Clause (i) of sub-section (1) of Section 67 provides that the value of the taxable service shall be the gross amount charged by the service provider "for such service". Reading Section 66 and Section 67(1)(i) together and harmoniously, it seems clear to us that in the valuation of the taxable service, nothing more and nothing less than the consideration paid as quid pro quo for the service can be brought to charge. Sub-section (4) of Section 67 which enables the determination of the value of the taxable service "in such manner as may be prescribed" is expressly made subject to the provisions of sub-section (1). The thread which runs through Sections 66, 67 and Section 94, which empowers the Central Government to make rules for carrying out the provisions of Chapter V of the Act is manifest, in the sense that only the service actually provided by the service provider can be valued and assessed to service tax. We are, therefore, undoubtedly of the opinion that Rule 5(1) of the Rules runs counter and is repugnant to Sections 66 and 67 of the Act and to that extent it is ultra vires. It purports to tax not what is due from the service provider under the charging Section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure and costs which are incurred by the service provider "in the course of providing taxable service". What is brought to charge under the relevant Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes far beyond the charging provisions and cannot be upheld. It is no answer to say that under sub-section (4) of Section 94 of the Act, every rule framed by the Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule. As pointed out by the Supreme Court in Hukam Chand v. Union of India, AIR 1972 SC 2427 :-*

*"The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act."*

*Thus Section 94(4) does not add any greater force to the Rules than what they ordinarily have as species of subordinate legislation.*

*[emphasis supplied]*

9.2 Feeling aggrieved by the aforementioned order of the Hon'ble High Court of Delhi, department filed an appeal before the Hon'ble Supreme Court of India, Civil Appeal No. 2013/2014, decided on 7.3.2018, wherein the Apex Court held as follows: [relevant extracts]

*21) Undoubtedly, Rule 5 of the Rules, 2006 brings within its sweep the expenses which are incurred while rendering the service and are reimbursed, that is, for which the service receiver has made the payments to the assessees. As per these Rules, these reimbursable expenses also form part of 'gross amount charged'. **Therefore, the core issue is as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5.** As noted above, prior to April 19, 2006, i.e., in the absence of any such Rule, the valuation was to be done as per the provisions of Section 67 of the Act*

*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 01, 2006) or after its amendment, with effect from, May 01, 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.***

*25) This position did not change even in the amended Section 67 which was inserted on May 01, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of subsection (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider.*

*26) It is trite that rules cannot go beyond the statute. In Babaji Kondaji Garad, this rule was enunciated in the following manner: "Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the byelaw, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision ahs precedence and must be complied with."*

*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.*

*[emphasis supplied]*

9.3 The Hon'ble Supreme Court of India has upheld the judgment of Delhi High Court declaring Rule 5 of the Valuation Rules, ibid, which mandated inclusion of all such expenditure or cost to be treated as consideration for taxable service for the purpose of charging service tax, as ultra vires. The judgement covers the period upto 14.5.2015 when Section 67 of the Finance Act, 1994, was again amended. The rationale of the judgement that reimbursed expenses would not form a part of value for determination of service tax, is squarely applicable in the present case more so since the present dispute covers the period upto March 2014 only [refer Annexure A of the show cause notice]. Hence, the question of adding the value of the reimbursement invoices, for which the departmental appeal has been filed, does not arise in view of the judgment of the Hon'ble Supreme Court, *ibid.* The departmental appeal, therefore does not survive and hence is rejected.

10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

10. The appeal filed by the appellant stands disposed of in above terms.

(उमा शंकर)
आयुक्त (अपील्स)

Date :27.3.2018

Attested

(Vinod Lukose)
Superintendent (Appeal),
Central Tax,
Ahmedabad.

By RPAD.

To,

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Opp. Jain Temple,
Navrangpura,
Ahmedabad.

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad South.
3. The Deputy/Assistant Commissioner, Central Tax, Division-VI, Ahmedabad South.
4. The Additional Commissioner, System, Central Tax, Ahmedabad South.
5. Guard File.
6. P.A.