

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL No. 495 of 2011****For Approval and Signature:**

HONOURABLE MR.JUSTICE V. M. SAHAI
HONOURABLE MR.JUSTICE N.V. ANJARIA

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1 Whether Reporters of Local Papers may be
allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair
copy of the judgment ?

4 Whether this case involves a substantial
question of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER CENTRAL EXCISE AND CUSTOMS -
Appellant(s)
Versus

M/S BAYER'S DIAGNOSTICS(I) LTDNOW M/S SIEMENS
HEALTHCARE - Opponent(s)

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Appearance :

MR RJ OZA, Senior counsel with Ms.Mital Ukani for the Appellant.
MR HARDIK P MODH for the Opponent.

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CORAM : HONOURABLE MR.JUSTICE V. M. SAHAI

and

HONOURABLE MR.JUSTICE N.V. ANJARIA

Date : 02/07/2012

ORAL JUDGMENT**(Per : HONOURABLE MR.JUSTICE V. M. SAHAI)**

1. M/s. Bayer Diagnostics India Ltd.(Now M/s. Seimens Healthcare Diagnostics Ltd.), is engaged in the manufacture of Diagnostic kits falling under Chapter 38 of CETA, 1985. The respondents were exporting their finished goods to various countries and for procurement of export orders they were receiving services of Overseas Commission Agents and paying commission to them for the services received. The services provided by the commission agents fall under the category of "Business Auxiliary Services" and was exempted from service tax vide Notification No.13/2003/ST dated 20.6.2003. However, the said Notification was amended vide Notification No.8/2004-ST dated 9.7.2004 wherein all services provided by commission agents except those in relation to sale and purchase of agricultural produce were made taxable. In the present case, the Overseas Commission Agents were not resident of India and also were not having their office in India, the liability to pay service tax was upon the respondents who were service receiver in terms of the provisions of Rule 2(d) read with Rule 6 of the Service Tax Rules, 1994.

2. The said services received by the respondents fall within the definition of "Business Auxiliary Services" as Commission agent as defined in Section 65 of the Finance Act, 1994, as amended and as per the provisions of Service Tax Rules, 1994 Rule 2 sub-rule 1(d)(iv) read with Notification No.12/2002-ST dated 1.8.2002, service provided by a person who is non-resident or a person from outside of India, who does not have any office in India, the person receiving taxable services in India shall be the person liable for paying service tax. Therefore, a Show Cause notice bearing No.St/Gr-VII/SCN/PREV/06/06-07 dated 18.3.2008 was issued to the Assessee by the Assistant Commissioner of Central

Excise, Customs and Service Tax, HQ, Vadodara-II demanding Service Tax of Rs. 4,90,606/- under Section 73 of the Finance Act, 1994 with appropriation of the same as already paid during the period from 9.7.2004 to 31.3.2006 alongwith interest under section 75 and proposing for imposition of penalty under Sections 76,77 and 78.

3. The respondents filed their defence reply dated 18.4.2008 to the show cause notice and raised various contentions of law and fact and opposed demand made by the department in the said show cause notice. The Assistant Commissioner, Central Excise and Customs, Vadodara-II passed an order on 18.9.2008 demanding service tax amounting to Rs. 4,81,000/- and education cess Rs. 9600/- with penalty of Rs. 4,90,606/- under section 78 of the Finance Act, 1994 and also imposed penalty of Rs. 5000/-for contravention of provisions of Service Tax Act, 1994 under section 77 of the said Act.

4. The respondents filed appeal before Commissioner (Appeals), Central Excise and Customs, Vadodara-II. The appellate commissioner on 5.10.2009 held that service tax on services received by the respondent from the foreign service provider abroad cannot be recovered from the service recipient in the present case and accordingly set aside the order passed by the adjudicating authority. The Commissioner, Central Excise and Customs, preferred an appeal before the Tribunal. The Tribunal held that the service tax could not be demanded from the recipient for the period 2004-2005 in respect of service provided by the person located abroad.

5. We have heard Mr.R.J.Oza, learned Senior counsel assisted by Ms. Mital Ukani for Central Excise and Customs and Mr.Hardik Modh, learned counsel appearing for the respondent.

This Tax Appeal has been filed by the Central Excise and Customs Commissioner on the following proposed substantial question of law.

"Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in confirming order of the appellate commissioner to set aside demand of service tax, on services provided by the service provider, not resident of India and also not having their office in India, even after 1.1.2005, when the law provides for levy of such Service Tax from 1.1.2005 vide Notification No.36/2004-ST dated 31.12.2004 read with Rule 2(i)(d)(iv) of Service Tax Rules 1994 and when Supreme Court has upheld levy of such service tax from 1.1.2005?"

6. Though Commissioner (Appeals) has relied on the decision of the Bombay High Court in Indian National Ship owners Association 2009 (13) S.T.R.235 (Bombay) and had allowed the appeal of the respondent holding that service tax could not be demanded from the respondents and therefore, there was no question of recovery of interest on account of delay in payment of tax or imposition of penalty. The appeal was allowed with consequential relief. When the matter was heard by the Tribunal, learned counsel for the parties agreed that the Appeal before the Tribunal was covered by the aforesaid decision of the Bombay High Court and the appeal was dismissed.

7. Mr.R.J.Oza, learned Senior counsel has vehemently urged that the appeal has been decided by the Tribunal on the concession given by the learned counsel for the department without considering his arguments. In the memo of appeal, we do not find that it had nowhere been stated that departmental counsel who appeared before the Tribunal malafidely made concession or that he had no authority to make such concession, but on the insistence of Mr.R.J.Oza, we have heard the matter at length.

8. It is not disputed that section 66A was inserted for the first time by Finance Act, 2006 with effect from 18.4.2006 on the Service Tax Act was amended. The new provision was introduced by section 66A which is reproduced as under:

"(1) 66A (1) Where any service specified in clause (105) of section 65 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 purposes of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India and accordingly all the provisions of this Chapter shall apply;

Provided that where the recipient 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 be 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 establishment shall be treated as separate persons for the purposes of this section.

Explanation:1.-A person carrying on a business

through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2.- Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted."

After enactment of section 66A by the Finance Act, 2006 with effect from 18.4.2006, services received from abroad by a person belonging to India became taxable in the hands of Indian residents and Indian recipients of taxable services was deemed to be a service provider. Therefore, on or after 18.4.2006, even if the service was rendered by a service provider who was situated outside India was not liable to tax as he had no office or establishment in India nor the recipient in India was liable to service tax as the service tax was required to be paid by a person who had been provided service. Prior to enactment of section 66A, there was no such provision in the Act nor the authorities could levy service tax in view of Article 265 of the Constitution of India. Whether service tax could be levied prior to 18.4.2006 at the hands of recipient of service who is in India of service provider who is outside India has been considered by the Bombay High Court in the case of **Indian National Shipowners Association vs. Union of India 2009(13) STR 235 (Bombay)**. Para 20 of the judgment of Bombay High Court is extracted below:

"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 *Laghu 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 66-A was enacted a person liable was the one who rendered the services. In other words, it is only after enactment of Section 66-A 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 66-A, 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."

Therefore, it is not necessary for us to re-examine the question again as we fully agree with the view taken by the Division Bench of the Bombay High Court. It will not be out of place to mention over here that the aforesaid Division Bench decision of the Bombay High Court has been affirmed by the Apex Court in **Union of India v. Indian National Shipowners Association 2010(17) STR J57(SC)**, wherein the Apex Court has dismissed the SLP after hearing the counsel for the parties. It will not be out of place to mention over here that the above-mentioned decision of the Bombay High Court has been followed by the Division Bench of this Court in *Commissioner, Service Tax, vs. Quintiles Data Processing Centre (I) P.Ltd.* 2011(23) S.T.R.15(Guj).

9. It appears that due to the decision of the Bombay High Court in *Indian National Shipowners Association* and other

decisions, the Government of India, Ministry of Finance (Department of Revenue), Central Board of Excise and Customs, New Delhi has issued a circular No.276/8/2009-CX.8A dated 26.9.2011. This circular is extracted below:

"Circular: 276/8/2009-CS.8A dated 26-Sep-2011.
Taxable Services-Service tax by non-resident to a recipient in India.
Instruction F.No.276/8/2009-CX.8A dated 26.9.2011
Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise and Customs, New Delhi.

Subject: Applicability of Service tax on taxable services provided by a non-resident or a person located outside India to a recipient in India-Regarding.

Kind attention is invited to instruction F.No.275/7/2010-CS8A, dated 30.6.2010, wherein the Board had communicated its view that services tax on a taxable service received in India, when provided by a non-resident/person located outside India, would be applicable on reverse charge basis with effect from 1.1.2005, and that the ratio of judgment in M/s Indian National Shipowners Association (INSA) case [2009 (13) STR 235 (Bombay)]SSS would not apply to such cases. Further, direction was issued to field formations to defend the levy of service tax on such services for the period on or after 1.1.2005, as post INSA judgment, it has been held by the High Courts/Tribunal in a large number of cases, applying ratio thereof, that service tax on such service is leviable only w.e.f. 18.4.2006. However, the appeals filed by the department before the Hon'ble Supreme Court, for defending the levy of service tax on such services w.e.f. 1.1.2005, have been dismissed recently (subsequent to the issuance of said instruction dated 30.6.2010) in the following cases.

- (i) SLP (C) No. 29539 of 2010 in CCE Vs Bhandari Hosiery Exports Ltd [2010 (20) STR(J99) (S.C.)]
- (ii) SLP (C)No. 18160 of 2010 in CST Vs Unitech Ltd
- (iii) SLP (C) No. 34208/09 of 2010 in UOI Vs S R Batliboi & Co.
- (iv) SLP (C)No. 328/332 of 2011 in UOI Vs Ernst & Young
- (v) SLP (C) No. 25687-25688/2011 in CCE Vs Needle

Industries

(vi) SLP (C) No. 25689-25690/2011 in UOI Vs SKM Engg Products

Further, Review Petition No. 1686 of 2011 filed in the case of Bhandari Hosiery has also been dismissed by the Hon'ble Supreme Court vide order dated 18/8/2011.

2. In view of the aforementioned judgments of the Hon'ble Supreme Court, the service tax liability on any taxable service provided by a non resident or a person located outside India, to a recipient in India, would arise w.e.f. 18.4.2006, i.e., the date of enactment of section 66A of the Finance Act, 1994. The Board has accepted this position. Accordingly, the instruction F No. 275/7/2010-CX8A, dated 30.6.2010 stands rescinded.

3. Appropriate action may please be taken accordingly in the pending disputes."

10. From the aforesaid circular, it is clear that Excise and Customs Department, in its circular has accepted legal position and in para-2, it has now instructed its departments that service tax could be levied on a service provided by a non-resident or a person located outside India to a recipient in India from or after 18.4.2006, the date of enactment by Section 66A of the Finance Act, 2006.

11. For the aforesaid reasons, we do not find that any substantial question of law arises for consideration of this Court. This Tax Appeal is accordingly dismissed. The parties shall bear their own cost.

(V.M.SAHAI,J)

(N.V.ANJARIA,J)

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