IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 20785 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 3123 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 20791 of 2018
With
R/SPECIAL CIVIL APPLICATION NO. 20796 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA **Sd/-**

and
HONOURABLE MR.JUSTICE A.C. RAO **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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MESSRS SAL STEEL LTD. & 1 other(s)
Versus
UNION OF INDIA

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Appearance:
MR PARESH M DAVE, LD ADV. with MR. ANAL DAVE with MR. ADITYA TRIPATHI for the Petitioner(s) No. 1,2
MR ANKIT SHAH(6371) for the Respondent(s) No. 2,3,4
NOTICE SERVED(4) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR.JUSTICE A.C. RAO

Date : 06/09/2019

COMMON ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. Since the issues raised in all the captioned writ applications are the same, those were heard analogously and are being disposed of by this common judgment and order.

2. For the sake of convenience, the Special Civil Application No.20785 of 2018 is treated as the lead matter.

Special Civil Application No.20785 of 2018

3. By this writ application under Article 226 of the Constitution of India, the writ applicant, a Company, engaged in the business of manufacturing goods like Sponge Iron, Ferro Chrome, Silico Manganese and Ferro Silicon, has prayed for the following reliefs;

> *"(A) That Your Lordships may be pleased to issue a writ of Mandamus or any other appropriate writ, order or direction thereby striking down Rule 2(1)(d) (EEC) of the Service Tax Rules and Notification Nos.15/2017-ST and 16/2017-ST as ultra vires Sections 66B, 67 and 94 of the Finance Act, 1994, and ultra vires Articles 14 and 265 of the Constitution of India;*
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> *(B) That Your Lordships may be pleased to issue a Writ of Mandamus or any other appropriate writ, order or direction striking down Rule (7CA) of the Rule 6 of the Service Tax Rules, 1994 and Explanation-V of Notification No.30/2012-ST dated 20.6.2012 as ultra vires Sections 66B, 67 and 94 of the Finance Act, 1994 and ultra vires Articles 14 and 265 of the Constitution of India;*

(C) That Your Lordships may be pleased to issue a writ of Mandamus or any other appropriate writ, order or direction thereby quashing and setting aside Circular No.206/4/2017-ST dated 13.4.2017 and Show Cause Notice No.VI(a)/8-38/CEA/CIR-VI/Gr.29/2017-18 dated 28.6.20189;

(D) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to stay the adjudication proceedings of Show Cause Notice No.VI(a)/8-38/CEA/CIR-V/Gr.29/2017-18 dated 28.6.2018 (Annexure-'H')

(E) An ex-parte ad-interim relief in terms of Para 18(D) above may kindly be granted.

(F) Any other further relief that may be deemed fit in the facts and circumstances of the case may also please be granted."

4. The case of the writ applicant, as pleaded in the writ application, is as under;

1. M/s. SAL Steel Ltd. (hereinafter referred to as the "Petitioner") is a Company inter alia engaged in the business of manufacturing goods like Sponge Iron, Ferro Chrome, Silico Manganese and Ferro Silicon, which were excisable goods classified under Chapter 72 of the Central Excise Tariff Act, 1985. The Petitioner has a factory for this purpose at the address shown in the cause title of the Petition. The 2nd Petitioner is one of the Directors and shareholder of the Petitioner, and he is a citizen of India entitled to the constitutional guarantees enshrined under Part–III of the Constitution of India. The 2nd Petitioner is joined as a party to the present proceedings because he is materially and substantially interested in the conduct and business affairs of the Petitioner.

2. The first Respondent is the Union of India, whereas Respondent Nos.2, 3 and 4 are employees, agents and servants of the Union of India. The 2nd Respondent is the chief officer of Gandhidham Commissionerate, whereas

Respondent Nos. 3 and 4 have been proper officers of Central Excise and Service Tax Department having jurisdiction over the area where the Petitioner's manufacturing activities are located. Respondent Nos. 2, 3 and 4 have jurisdiction over Gandhidham Kutch area for enforcement of the provisions of the Finance Act, 1994 in respect of levy of service tax; and the Petitioner's business activities having been located in Gandhidham-Kutch area, Respondent Nos. 2, 3 and 4 have jurisdiction over the Petitioner also for levy and recovery of service tax. The Respondents herein are "State" and "State Authorities" as contemplated under Article-12 of the Constitution of India, and are amenable to the writ jurisdiction of this Hon'ble Court.

2.1 The main challenge in the present petition is about constitutional validity of two Notifications issued by the Central Government thereby laying down that the importer was the person liable to pay service tax on services by way of transportation of goods by a vessel from a place outside India upto the Custom station of clearance in India even in case of cost, insurance and freight (CIF) contracts, even though the local importer in such CIF transactions is neither the service provider nor the service recipient for imported goods. The service provider is the vessel owner/operator whereas the service receiver is the overseas seller/supplier of the goods, and the entire service of transporting goods from a foreign location to an Indian Port is provided and consumed outside India. Under the provisions of the Finance Act, 1994, service tax can be charged and collected either from the service provider or from the service receiver, but not from a third party; and therefore the Notifications and the Rules made thereunder laying down that the importer was the person liable to pay service tax for ocean freight are ultra vires the charging section as well as the machinery section of the said Finance Act, and also beyond the rule making power of the Central Government. A fictional value at the rate of 1.4% of sum of cost, insurance and freight (CIF) of imported goods is laid down as the value of such service for assessing service tax thereon, because the importer in India would not have any information about actual ocean freight charged by the vessel owner/operator from the overseas supplier/seller of the goods; but this fiction about value is also beyond the machinery provision of

the Finance Act, 1994. Proceedings are initiated against the Petitioner Company for recovery of service tax as an importer of goods under CIF transactions in view of such invalid and unauthorized provisions, though such proceedings as well as the provisions invoked by the Service Tax authorities are ultra vires Articles 14 and 265 of the Constitution also.

A Petition being Special CA No.17804/2017 challenging all the above referred provisions of the Service Tax law filed by Kandla Port Steam Ship Agents Association has been admitted by this Hon'ble Court on 29.6.2018. The present petition involves challenge to the same provisions of Notification Nos.15/2017-ST and 16/2017-ST and also a Circular dated 13.4.2017 issued by the CBEC for implementing such provisions.

3. Brief facts relevant for the present petition are as under:-

The Petitioner has set up a factory at the address in the cause title of this Petition for manufacturing goods like Sponge Iron, Ferro Chrome, Silico Manganese and Ferro Silicon, which were excisable goods classified under various headings and sub headings of Chapter 72 of the Central Excise Tariff at the relevant time. The Petitioner had been conducting manufacturing activities in accordance with the provisions of the Central Excise Act, 1944 and the Rules framed thereunder, and the Petitioner had also been complying with the provisions of the Finance Act, 1994 as amended from time to time in respect of levy of service tax, and also the Service Tax Rules, 1994 framed under the said Finance Act.

4. For manufacture of the above referred goods, the Petitioner requires various raw materials and inputs, including Steam Coal, Chrome Ore, Iron Ore and Chrome Ore Concentrate; which are regularly imported also by the Petitioner. The orders for purchase of such materials are placed by the Petitioner to foreign suppliers on CIF basis. The responsibility and obligation of the sellers/suppliers under CIF contracts has been to deliver the concerned materials to the Petitioner by bearing cost, insurance and freight by such sellers/suppliers.

5. In international trade, goods are bought and sold by

way of two different modes/methods, namely, CIF contract and FOB contract.

***FOB** (i.e. Free on Board) is a contract of sale between the foreign supplier and the local importer, where the importer would engage the vessel/ship owner or operator for importing goods into India. In FOB contract, the service of transportation of goods by ship or vessel is received by the importer in India, whereas such service is rendered by the owner/operator of the foreign going vessel.*

*In case of **CIF** contract, the overseas supplier would engage the vessel owner/operator for transportation of goods to India. The appointment of the vessel/ship and also payment of transportation charges i.e. ocean freight of such vessel owner/operator are made by the overseas supplier in CIF contract. The service of transportation of goods by vessel is thus received by the overseas supplier from the foreign going vessel owner/operator in CIF contract.*

*5.1 Thus, the basic difference between FOB and CIF contract is that the service of transportation of goods by vessel/ship is received by the importer in FOB contract, whereas such service is received by the overseas supplier in case of CIF contract. The transportation charges for transporting goods by vessel or ship are colloquially known or called "**ocean freight**", and such ocean freight is paid by the local importer in case of FOB contract whereas ocean freight is paid by the overseas supplier in case of CIF contract.*

*6. The Parliament had put service of transportation of goods by an aircraft or a vessel in Negative List under Section 66D of the Finance Act, 1994 as amended on 1.7.2012. Extracts of Section 66D of the said Finance Act as the Section stood in July, 2012 is enclosed and marked as **Annexure-"A".***

By virtue of Clause (p)(ii) of Section 66D, services by way of transportation of goods by a vessel from a place outside India upto the Custom Station of clearance in

India were not chargeable to any service tax.

7. The Parliament omitted the above referred Clause (ii) of Clause (p) of Section 66D with effect from 1.6.2016. Accordingly, services by way of transportation of goods by an aircraft or a vessel from a place outside India upto the Custom station of clearance in India came to be excluded from the Negative List; and consequently such services were chargeable to service tax with effect from 1.6.2016.

However, the Central Government has issued a Notification No.25/2012-ST dated 20.6.2012, popularly known as the Mega Exemption Notification; and at Sl.No.34 of this mega exemption Notification, services received from a provider of service located in a non-taxable territory by a person located in a non-taxable territory was fully exempt. Since the overseas seller/supplier of the goods when the goods were exported to India was located in a non-taxable territory and the vessel owner/operator who actually transported the goods to India was also located in a non-taxable territory, ocean freight in case of CIF contracts still continued to be exempt from collection of service tax even after 1.6.2016 by virtue of Sl.No.34 of the above referred Notification. Extracts of Notification No.25/2012-ST along with relevant definitions of the Finance Act (for taxable territory and non-taxable territory) are enclosed and marked as ***Annexure-"B".***

8. The Central Government has framed Service Tax Rules vide Notification No.2/94-Service Tax dated 28.6.1994. These Rules have been amended from time to time.

Under Rule 2(1)(d) of the Service Tax Rules, the expression "person liable for paying service tax" has been defined. By virtue of Notification No.2/2017-ST dated 12.1.2017, the Central Government has inserted Clause (EEC) under Rule 2(1)(d) thereby laying down that the person in India who complied with Section 29, 30 or 38 read with Section 148 of the Customs Act, 1962 with respect to goods transported by a vessel from a place outside India upto the Custom Station of clearance in

India was the person liable to pay service tax on such services. For ready reference, extracts of Service Tax Rule (including Rule 2 and 6) with the relevant amendments including Clause (EEC) are enclosed and marked as ***Annexure-"C".***

8.1 Section 29 of the Customs Act refers to the obligations of the person-in charge of a vessel or an aircraft entering India from any place outside India. Section 30 of the Customs Act also refers to the obligations of such person for submitting Import General Manifest and the like documents. Section 38 refers to the powers of the proper Customs officer for requiring person-incharge of any conveyance carrying imported goods for production of any document or answer any questions.

By virtue of Clause (EEC) under Rule 2(1)(d) of the Service Tax Rules, the persons in charge of the vessel was deemed to be the person liable to pay service tax in situation covered under the said clause. Ordinarily, the shipping agent of the vessel owner is the person responsible for filing IGM and therefore, by virtue of the above referred provision of Rule 2(1)(d) (EEC), shipping agent of the vessel owner was the person liable to pay service tax on ocean freight.

8.2 However, by virtue of Notification No.26/2012-ST dated 20.6.2012, the Central Government has allowed abatement in value of the above referred taxable service to the extent of 70%, by providing at Sl.No.10 of the said Notification that service tax shall be paid on 30% of the value of transport of goods in a vehicle if Cenvat credit was not taken. The shipping agent or the vessel owner/operator was thus liable to pay service tax on 30% of ocean freight by virtue of the above referred provisions.

9. All the above referred provisions show that the importers like the Petitioner in India were not liable to pay any service tax on ocean freight in case of CIF contracts, because transportation service by using a vessel or ship was not rendered to the importers in CIF transactions.

10. The Petitioner has made CIF contracts for purchasing materials like Steam Coal, Chrome Ore, Iron Ore and Chrome Ore Concentrate, from the overseas sellers/suppliers. Specimen purchase contracts/orders on CIF basis are enclosed and marked as ***Annexure-"D".***

Accordingly, the Petitioner has never been the person liable to pay service tax on ocean freight, and accordingly the Petitioner has never paid service tax on ocean freight for purchasing goods in the international market on CIF basis. The Respondents have also never demanded any service tax from the Petitioner on the transportation charges for transporting goods in a vessel or ship from any foreign port to India in cases where the Petitioner imported goods on CIF basis.

11. However, on 13.4.2017, the Central Government has issued two Notifications being Notification Nos.15/2017-ST and 16/2017-ST. Both the Notifications dated 13.4.2017, however, have been brought into force from 23.4.2017.

By virtue of Notification No.15/2017-ST, the Central Government has substituted certain Explanations in the original Notification No.30/2012-ST dated 20.6.2012. Explanation-V so substituted/inserted vide this Notification No.15/2017-ST provides that the importer as defined under Section 2(26) of the Customs Act shall be the person liable to pay service tax in respect of services provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the Custom station of clearance in India. By virtue of Explanation-V so inserted, it would mean that the importer of goods would be liable for paying service tax on ocean freight in case where the service of transportation of goods in a vessel was provided by the vessel owner/operator to the overseas supplier-seller in CIF transactions.

By Notification No.16/2017-ST, Clause (EEC) of Rule 2(1)(d) of the Service Tax Rules has been substituted, and there also the importer as defined under Section 2(26) of the Customs Act is made liable to pay service tax on ocean freight in cases like CIF transactions. A new Sub

Rule i.e. Sub Rule (7CA) has also been inserted in Rule 6 of the Service Tax Rules by this Notification, thereby providing that the value of the ocean freight may be calculated at the rate of 1.4% of the sum total of CIF for paying service tax thereon. Thus, the effect of the amendments vide the other Notification No.16/2017-St is also the same i.e. an importer like the Petitioner is made the person liable to pay service tax on ocean freight in case of CIF transactions, though the service of transportation of goods in CIF transactions is rendered by the ship owner/operator to the overseas seller/supplier, and not to the local importer. Copies of these two Notification Nos.15/2017-ST and 16/2017-ST, both dated 13.4.2017 are enclosed and marked as ***Annexure-"E".***

Since amendments by the above two Notifications are made in Rule 2 of Service Tax Rules and original Notification No.30/2012-ST dated 20.6.2012, the Service Tax Rules and Notification No.30/2012-ST with these amendments are enclosed and marked as ***Annexure-"F" Colly.***

12. The Central Board of Excise & Customs, New Delhi has issued a Circular No.206/4/2017-ST dated 13.4.2017, in view of the above referred changes and amendments in respect of service tax on ocean freight. As regards abatement in value of such service to the extent of 70% otherwise allowed vide Sl.No.10 of Notification No.26/2012-ST, it is clarified at paras 4 and 4.1 of this circular that such abatement shall not be admissible in case of value of services of transportation of goods in a vessel because the condition of Notification No.26/2012-ST that no credit on inputs and capital goods should be taken under the Cenvat Rules was not fulfilled in the present scenario inasmuch as the service providers (i.e. the foreign shipping lines) were liable to zero rated tax in their home country and had thus suffered no taxes. A copy of this Circular No.206/4/2017-St dated 13.4.2017 is enclosed and marked as ***Annexure-"G".***

The effect of the above referred clarification, which is on face of it wrong and incorrect, is that a person liable to pay service tax on ocean freight is now liable to pay service tax on the entire value of transportation charges

i.e. the whole of ocean freight without any abatement in value that the Central Government has otherwise allowed vide Sl.No.10 of Notification No.26/2012-ST.

13. For value of this service, the Central Government has also amended Rule 6 of Service Tax Rules by inserting Sub Rule (7CA), thereby laying down that the person liable for service tax for ocean freight shall have option to pay service tax on 1.4% of sum of cost, insurance and freight (CIF) value of the imported goods. Thus, the Central Government has extended an option to pay service tax @1.4% of CIF value of the goods in case the person liable to pay service tax did not propose to discharge service tax on the actual value of ocean freight.

14. As aforesaid, the Petitioner's contracts are on CIF basis, and therefore the Petitioner had not been liable to pay service tax on ocean freight, because the importer who had not received the service of transportation of goods in a vessel from the owner/operator of such ocean going vessel was not the person liable to pay service tax in this case till 23.4.2017. But since the importer of the goods is made liable to pay service tax by virtue of Notification Nos.15/2017 and 16/2017, both dated 13.4.2017, from 23.4.2017, the Central Excise and Service Tax authorities initiated enquiry against the Petitioner as a result of audit verification of the Petitioner's records. The Audit officers noticed the imports made by the Petitioner and also the Bills of Entry filed for the goods imported on CIF basis. Upon noticing that service tax on ocean freight was not paid by the Petitioner as an importer even for the imports made on and after 23.4.2017, the Assistant Commissioner, GST Audit has issued a Show Cause Notice No. VI(a)/8-38/CEA/CIR-VI/Gr.29/2017-18 dated 28.6.2018, thereby proposing to recover Rs.33,09,220/- as service tax from the Petitioner on the ocean freight portion of imports made from 23.4.2017. This show cause notice is based on Notification Nos.15/2017-ST and 16/2017-ST, and proposals for charging interest and imposing penalties under various provisions of the Finance Act, 1944 have also been leveled in this show cause notice. A copy of this show cause notice No. VI(a)/8-38/CEA/CIR-VI/Gr.29/2017-18 dated 28.6.2018 is enclosed and

marked as ***Annexure-"H".***

The Petitioners submit that there has been no malafide or dishonest intention on their part in not paying service tax on ocean freight for the period from 23.4.2017 to 30.6.2017. The Petitioners have been under a genuine and bonafide impression that no service tax was chargeable on CIF transactions, and therefore service tax has not been paid by them. Several changes and amendments have been made by the Central Government with effect from 23.4.2017, but the Petitioners were not aware about such changes and amendments; and since the changes and amendments are even otherwise so complicated that a person of ordinary prudence would not be in a position to understand such actions of the Central Government. Since there was no liability to pay service tax on the importer on ocean freight component for CIF contracts for several years and the Petitioners genuinely believe that the importer cannot be made liable to pay service tax in a situation like the present one, the service tax has not been paid, and the same impression was apparently carried by the Divisional and Range officers also, until the Audit officers raised the objection.

The show cause notice above referred is pending before the adjudicating authority. The Petitioners have not filed any formal reply to the show cause notice, and no order has been made by the adjudicating authority on this show cause notice dated 28.6.2018.

15. The Petitioners submit that the provisions made by the Central Government for charging service tax on ocean freight and also for recovering service tax on ocean freight from the importer in respect of CIF transactions are ultra-vires the provisions of the Finance Act, 1994 as amended from time to time, and also ultra vires the Constitution of India, inasmuch as no tax in the nature of "service tax" can be levied and collected by the Union of India on the activities which occur outside the territory of India, and no recovery of a tax in the nature of "service tax" can be made from a person who is neither service provider nor service recipient. There is no machinery provision also for determining value of the

service in the nature of transportation of goods by vessel from a place outside India to a Custom Station in India, and therefore also the provisions made by the Central Government for seeking to charge service tax from an importer like the Petitioner on a fixed rate of 1.4% of the CIF value of the imported goods are ultra vires Articles 14 and 265 of the Constitution of India. The Petitioners are therefore constrained to approach this Hon'ble Court challenging such provisions for being declared unconstitutional and ultra vires on following main amongst other grounds that may be urged at the time of hearing of the present petition; grounds being set out hereunder without prejudice to one another:"

5. Thus, the subject matter of challenge is the validity of the following;

"(i) Rule 2(1)(d)(EEC) of the Service Tax Rules, which provides that the person liable to pay service tax in relation to service by way of transportation of goods by a vessel from a place outside India upto the Customs Station of clearance in India, shall be the importer as defined under Section 2(26) of the Customs Act.

(ii) Notification No.15/2017-ST which provides for reverse charge system for collecting service tax from the importer as defined under Section 2(26) of the Customs Act in case of service of transportation of goods by a vessel from a place outside India upto the Customs Station of clearance in India.

(iii) Notification No.16/2017-ST which inserts Sub Rule (7CA) in Rule 6 of Service Tax Rules thereby providing an option to pay an amount calculated @ 1.4% of the sum of cost, insurance and freight (CIF) in case of payment of service tax for the above types of transportation."

6. ***Submissions on behalf of the writ applicant;***

6.1 Mr. Paresh M. Dave, the learned counsel appearing for the writ applicants has put forward four propositions for the

purpose of challenging the above referred provisions as ultra vires the charging Section (Section 66B of the Finance Act) and the rule making power of the Central Government (Section 94 of the Finance Act). The four propositions canvassed are as under;

> *"(i) Under the Finance Act, 1994, levy of service tax is imposed on services rendered in India, and not for services rendered and/or consumed outside India, and therefore the above provisions providing for collection of service tax on extraterritorial events are ultra vires.*
>
> *(ii) Service tax can be collected from the service provider or service receiver (under reverse charge system); but the importer is a third party in CIF transactions, who is neither serviced provider nor recipient of service. Therefore, the provisions for payment of service tax by a third party are ultra vires.*
>
> *(iii) No power is conferred upon the Central Government under the Finance Act, 1994 for charging extraterritorial events, and therefore the provisions are ultra vires the rule making power of the Central Government.*
>
> *(iv) No power for fixing value of a taxable service is conferred upon the Central Government under the Finance Act, 1994, and therefore Rule 6(7CA) of the Service Tax Rules inserted vide Notification No.16/2017-ST is ultra vires the rule making powers and also the machinery provision of Section 66."*

7. **Submissions on behalf of the respondents Nos.1 to 4;**

7.1 The power of the Parliament to levy service tax under Entry No.97 of List 1 is not in dispute.

7.2 Under Section 64 of the Finance Act, 1994 read with Section 66B of the Finance Act, 1994, Service Tax is applicable

on taxable services provided in India, except the State of Jammu and Kashmir. Section 66C empowers the Central Government to make rules for determination of place of provision of service and Place of Provision of Services Rules, 2012 have been made accordingly.

7.3 Further, Section 66C(2) specifically provides that any rule made under sub-section (1) of Section 66C shall not be invalid merely on the ground that either the service provider or the service receiver or both are located at a place being outside the taxable territory.

7.4 Section 66C and the Place of Provision of Service Rules, 2012 are within the powers vested with the Parliament under the Constitution and also are in consonance with the law interpreted by the Supreme Court as well.

7.5 In terms of the applicable Rule 10 of the Place of Provision of Services Rules, 2012, the place of provision of services of transportation of goods by air/sea, other than by mail or courier, is the destination of the goods. Thus, with respect to goods destined for India, services by way of transportation of such goods by a vessel are taxable in India.

7.6 The Service Tax levy under question is on the services by way of transportation of goods by a vessel from a place outside India to the customs station of clearance in India. These services are provided by a person having a ship (either owned or arranged for his use) to another person (importer or exporter) receiving the services of transportation of goods whereas Custom duty is levied on the activity of bringing goods into India from a place outside India which is between the exporter and importer of goods Thus, it is evidently clear

that the import of goods and the service of transportation of imported goods are distinct activities between separate set of persons.

7.7 The same transaction (for example, activity of bringing goods into India i.e. import of goods) may involve two or more taxable events (such as Customs duty on the import aspect and service tax for the 'transportation services rendered' aspect) and such an overlapping of two 'aspects' does not take away the power to levy tax on both aspects.

7.8 In the facts obtaining from the present case, in so far as the power of Parliament to levy Service Tax under Entry 97 of List I is concerned, it is relatable to the 'service rendered' aspect of the transaction and not the aspect of 'import of goods' *per se* Therefore, the Parliament by subjecting the service aspect to the Service Tax, is levying a tax distinct from the Customs duty levied by it under Entry 83 of List I.

7.9 In the present case, 'import of goods' which is carried out by a person other than the importer himself is an activity, which gives rise to the aspect of providing transportation services of the said imported goods and as such it is giving rise to more than one taxing incident. Therefore, the taxing incidents in relation to Customs duty on imports (Entry 83 of List 1) is completely distinguishable and is not in conflict with the taxing incidents of service tax on transportation services (Entry 97 of List I) .

7.10 There is no constitutional bar in levying of taxes under different statutes on different aspects, if there are distinct

taxable events, eligible to different taxes (e.g. Central Excise and VAT on manufacture and sale of goods respectively, entertainment tax and service tax on entry to entertainment and service aspect, service tax and Central Excise/VAT on contract manufacturing, service tax and luxury tax on hotel stay etc.). The only question is whether demand of tax is sustainable under the particular statute or not.

7.11 In the instant case, the value of transportation services is includible in the assessable value of the goods in terms of the Customs Act, 1962 and the Rules made there under [Customs Valuation of imported goods, Rules, 2007]. However, there is no provision under Service tax provisions (Finance Act, 1994) wanting non-levy of service tax on service of transportation of imported goods on the grounds that Custom duty has been levied on ouch value being included in the value of goods under a different statute viz. Customs Act, 1962. Vice. Versa, there is no provision warranting exclusion of value of transportation services from the assessable value for customs purposes, on the ground that service tax has become levied on such services under a different statute.

7.12 In the case of FOB (Free on Board) imports, the freight amount which is the consideration for transportation services is available with the Indian importer and the shipping line and thus;

a. If the Indian importer avails transportation services from a foreign shipping line, the Indian importer pays service tax under reverse charge basis on the freight amount which is known to Indian importer.

b. If the Indian importer avails transportation services from an Indian shipping line, the Indian shipping line pays service tax on the freight charges recovered in lieu of transportation services provided by it.

7.13 In the case of CIF (Cost, insurance and freight) imports, the freight amount is available with the shipping line and through the shipping line with the shipping agent/importer and thus,

a. If the Indian shipping line provides transportation services in case of CIF (Cost, insurance and freight) imports, the Indian shipping line pays service tax on the freight charges recovered in lieu of transportation services provided by it.

b. If the foreign shipping line provides transportation services in case of CIF (Cost, insurance and freight) imports, the Indian shipping agent/importer has to pay service tax in following ways,

(i) by procuring the quantum of freight charges and accordingly receive service tax ® 15% (14% Service Tax + 0.5% Swachh Bharat Cess + 0.5% Krishi Kalyan Cess) on the freight value from its principal i.e. the foreign shipping line and depositing service tax in India.

(ii) vide notification No. 16/2017-ST dated 13th April, 2017 an optional alternate mechanism has been provided with effect from 22nd January, 2017 for calculating and paying service tax @ 1.4% of CIF value of the imported goods.

7.14 Under the notification No. 26/ 2012-ST dated 20.06.2012 (Sr. No. 10), there is an exemption on 70% of the value of services of transportation of goods in a vessel subject to the fulfillment of the condition that the Cenvat credit on inputs and capital goods used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004 This conditional exemption has been extended for the reason that out of the full value of such services, the exempted value of service has already suffered taxes (Central Excise) which would have been available as Cenvat credit to set off service tax on full value of service In effect, the service tax is levied on the added value only. However, in case of foreign shipping lines, their services being exports from their home country, are zero-rated in their home country and thus have suffered no taxes. Further the foreign shipping lines do not get registered in India and do not follow the provisions of the Cenvat Credit Rules.

7.15 Vide notification Nos 15/2017-ST and 16/2017-ST respectively dated 13th April, 2017, the importer of goods as defined in the Customs Act, 1962 has been made liable for paying service tax in cases of services of transportation of goods by sea provided by a foreign shipping line to a foreign charterer with respect to the goods destined for India. This change has come into effect from 23rd April, 2017. The Shipping/steamer agents are no longer liable to pay the service tax for the services provided on or after 23rd April, 2017.

8. On 27th December, 2018, a Coordinate Bench of this

Court passed the following order;

"1. Mr. Paresh Dave, learned advocate for the petitioners submitted that by virtue of the impugned notification dated 13.4.2017 issued in exercise of power under sub-section (2) of section 68 of the Finance Act, 1994, it has been provided that services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India upto the customs station of clearance in India, person liable for paying service tax other than the service provider shall be the importer as defined under section 26 (2) of the Customs Act, 1962 of such goods. It was pointed out that by virtue of Notification No.16/2017-S.T. Dated 13.4.2017 issued in exercise of powers under sub-section (2) of section 94 of the Finance Act, 1994 in the Service Tax Rules,1994, rule 2(1)(d) has been amended by inserting clause (EEC) and that in rule 6, with effect from 22.1.2017, that is, retrospectively, sub-rule 7(CA) has been inserted which provides that, the person liable for paying service tax for the taxable services provided or agreed to be provided by a person located in non-taxable territory to a person located in nontaxable territory by way of transportation of goods by a vessel from a place outside India upto the customs station of clearance in India, shall have an option to pay an amount calculated at the rate of 1.4% of the sum of cost, insurance and frieght (CIF) value of such imported goods. It was submitted that in a CIF contract, the ocean freight of such vessel owner/operator is paid by the overseas supplier. It was submitted that in case of CIF contact insofar as the transportation of the goods till the customs station in India is concerned, the importer is neither the service provider nor the recipient.

2. Referring to section 66B of Finance Act, 1994, which is the charging section, it was pointed out that the same provides for levy of tax provided in the taxable territory by one person to another. It was submitted that the same does not contemplate levy of service tax of a person other than the service provider and/or the recipient of such service. It was submitted that, moreover, tax can be levied provided such service is provided in the taxable territory.

3. Reference was made to section 65B(52) which defines "taxable territory" to mean the territory to which the provisions of that Chapter apply. Referring to Chapter V of the Act, it was contended that by virtue of sub-section (2) of section 64 thereof, the same extends to the whole of India except to the State of Jammu and Kashmir. It was submitted that, therefore, no service tax can be levied to service provided outside India.

4. It was submitted that, therefore, the impugned notifications to the extent they seek to make the importer liable for payment of service tax in respect of ocean freight is ultra vires the provisions of section 66B and section 68(2) of the Finance Act, 1994.

5. The attention of the court was invited to section 94 of the Finance Act which provides for "Power to make rules". It was submitted that in none of the items enumerated thereunder, is the Central Government empowered to fix the tariff value of any service. It was submitted that, therefore, the impugned notification dated 13.4.2017 which provides for an option to pay the amount calculated at the rate of 1.4% by way of sum of cost, insurance and freight value of the imported goods is de hors the powers conferred on the Central Government under sub-section (2) of section 94 of the Act.

6. Referring to section 67 of the Act which provides for "Valuation of taxable services for charging service tax", it was submitted that there is no such power to fix tariff as has been done by virtue of the notification dated 13.4.2017 which is beyond the machinery provision also.

7. Various other submissions have been advanced; however, at this stage it is not necessary to refer to the same.

8. Having regard to the submissions advanced by the learned advocate for the petitioners, Issue Notice returnable on 6th February, 2019. By way of ad-interim relief, further proceedings pursuant to the impugned show cause notice dated 28.6.2018 (Annexure-H to the petition) are hereby stayed.

9. Direct service is permitted to the respondents other

than the respondent Union of India."

ANALYSIS

9. Mr. Dave, the learned counsel appearing for the writ applicants invited our attention to few relevant provisions of law. We must make a reference of those provisions in our judgment. We first look into the Service Tax Rules, 1994 (Notification No.2/94-S.T., dated 28th June, 1994, as amended). Rule 2(d) defines the phrase "person liable for paying service tax". Rule 2(eec) reads thus;

> *"2(EEC) in relation to services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, the importer as defined under clause (26) of section 2 of the Customs Act, 1962 (52 of 1962) of such goods."*

10. Rule 6 is with regard to the payment of service tax. Rule 6(7CA) reads thus;

> *"6[7CA]: The person liable for paying service tax for the taxable services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, shall have the option to pay an amount calculated at the rate of 1.4% of the sum of cost, insurance and freight (CIF) value of such imported goods."*

11. Mr. Dave, thereafter, invited our attention to the Notification No.30/2012-S.T. dated 20th June, 2012. The notification reads thus;

> *"Service for which tax is payable or partially payable by*

persons receiving the service- Service Tax payable by Reverse Charge system in relation to insurance business, GTA, sponsorship, Arbitral Tribunal, legal services by Advocates, support services provided by Govt. or local authorities (except specified services), renting of motor vehicles on abated value, renting of motor vehicles on unabated value (partially also payable by service provider), manpower supply (partially also payable by service provider), work contract (partially also payable by service provider), service provide from non-taxable territory but received in taxable territory (partially also payable by service provider)- Notification Nos.15/2012-S.T. & 36/2004-S.T. Superseded.

In exercise of the powers conferred by sub-section (2) of section 68 of the Finance Act, 1994 (32 of 1994), and in supersession of (i) notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 15/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i),vide number G.S.R 213(E), dated the 17th March, 2012, and (ii) notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 36/2004-Service Tax, dated the 31st December, 2004, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R 849 (E), dated the 31st December, 2004, except as respects things done or omitted to be done before such supersession, the Central Government hereby notifies the following taxable services and the extent of service tax payable thereon by the person liable to pay service tax for the purposes of the said sub-section, namely:-

I. The taxable services,—

(A) *(i) provided or agreed to be provided by an insurance agent to any person carrying on the insurance business;*

(ii) provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is,—

(a)any factory registered under or governed by the Factories Act, 1948 (63 of 1948);

(b)any society registered under the Societies Registration

Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India;

(c) any co-operative society established by or under any law;

(d) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder;

(e) any body corporate established, by or under any law; or

(f) any partnership firm whether registered or not under any law including association of persons;

(iii) provided or agreed to be provided by way of sponsorship to anybody corporate or partnership firm located in the taxable territory;

(iv) provided or agreed to be provided by,—

(A) an arbitral tribunal, or

(B) an individual advocate or a firm of advocates by way of support services, or

(C) Government or local authority by way of support services excluding,—

(1) renting of immovable property, and

(2) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act,1994,

to any business entity located in the taxable territory;

(v) provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers to any person who is not in the similar line of business or supply of manpower for any purpose or service portion in execution of works contract by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory;

(B) *provided or agreed to be provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory;*

*(**II**) The extent of service tax payable thereon by the person who provides the service and the person who receives the service for the taxable services specified in paragraph I shall be as specified in the following Table,*

namely:—

TABLE

Sr. No.	*Description of a service*	*Percentage of service tax payable b the person providing service*	*Percentage of service tax payable by the person receiving the service*
1	*in respect of services provided or agreed to be provided by an insurance agent to any person carrying on insurance business*	*Nil*	*100%*
2	*In respect of services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road.*	*Nil*	*100%*
3	*in respect of services provided or agreed to be provided by way of sponsorship*	*Nil*	*100%*
4	*in respect of services provided or agreed to be provided by an arbitral tribunal*	*Nil*	*100%*
5	*in respect of services provided or agreed to be provided by an individual advocate or firm of advocates by way of legal services,*	*Nil*	*100%*
6	*in respect of services provided or agreed to be provided by Government or local authority by way of support services excluding,- (1) renting*	*Nil*	*100%*

	of immovable property, and (2) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act, 1994		
7	*(a) in respect of services provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on abated value to any person who is not engaged in the similar line of business*	*Nil*	*100%*
	(b) in respect of services provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on non abated value to any person who is not engaged in the similar line of business	*60%*	*40%*
8	*in respect of services provided or agreed to be provided by way of supply of manpower for any purpose*	*25%*	*75%*
9	*in respect of services provided or agreed to be provided in service portion in execution of works contract*	*50%*	*50%*
10	*in respect of any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any*	*Nil*	*100%*

	person located in the taxable territory		

Explanation I. – The person who pays or is liable to pay freight for the transportation of goods by road in goods carriage, located in the taxable territory shall be treated as the person who receives the service for the purpose of this notification.

Explanation II. – In works contract services, where both service provider and service recipient is the persons liable to pay tax, the service recipient has the option of choosing the valuation method as per choice, independent of valuation method adopted by the provider of service.

Explanation III.- The business entity located in the taxable territory who is litigant, applicant or petitioner, as the case may be, shall be treated as the person who receives the legal services for the purpose of this notification.

Explanation IV.- For the purposes of this notification, "non-assessee online recipient" has the same meaning as assigned to it in clause (ccba) of sub-rule 1 of rule 2 of Service Tax Rules, 1994.

Explanation V.- For the purposes of this notification, in respect of services provided or agreed to be provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, person liable for paying service tax other than the service provider shall be the importer as defined under clause (26) of section 2 of the Customs Act, 1962 (52 of 1962) of such goods.

2.This notification shall come into force on the 1st day of July, 2012."

12. Mr. Dave, thereafter, invited our attention to Chapter-V of the Finance Act, 1994 and Chapter- VA of the Finance Act, 2003. Section 65(52) defines the term "taxable territory". It reads thus;

"(52) 'taxable territory' means the territory to which the provisions of this Chapter apply."

13. Section 66B is with regard to the charge of service tax on and after the Finance Act, 2012. It reads thus;

***"(**66B):-There shall be levied a tax (hereinafter referred to as the service tax) at the rate of (fourteen) per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."*

14. Section 68 is with regard to the payment of service tax. It reads thus;

"***68. Payment of service tax:-***

(1) Every person providing taxable service to any person shall pay service tax at the rate specified in section [66B] in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), in respect of ***2****[such taxable services as may be notified] by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section [66B] and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.]*

*[**Provided** that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider.]"*

15. Section 94 provides for the power to make rules. It reads thus;

"Power to make rules.-

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Chapter.
(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :-

(a) collection and recovery of service tax under sections 66 and 68;

(aa) determination of the amount and value of taxable service, the manner thereof, and the circumstances and conditions under which an amount shall not be a consideration, under section 67;

(b) the time and manner and the form in which application for registration shall be made under sub-sections (1) and (2) of section 69

(c) the form, manner and frequency of the returns to be furnished under sub-sections (1) and (2) and the late fee for delayed furnishing of return under sub-section (1) of section 70

(cc) the manner of provisional attachment of property under sub-section (1) of section 73C;

(ccc) publication of name of any person and particulars relating to any proceeding under sub-section (1) of section 73D;

(d) the form in which appeal under section 85 or under sub-section (6) of section 86 may be filed and the manner in which they may be verified;

(e) the manner in which the memorandum of cross objections under sub-section (4) of section 86 may be verified;

(ee) [* * *]*

(eee) the credit of service tax paid on the services consumed or duties paid or deemed to have been paid on goods used for providing a taxable service;]

(eeee) the manner of recovery of any amount due to the Central Government under section 87;

(f) provisions for determining export of taxable services;
(g) grant of exemption to, or rebate of service tax paid on, taxable services which are exported out of India;

(h) rebate of service tax paid or payable on the taxable services consumed or duties paid or deemed to have been paid on goods used for providing taxable services which are exported out of India;

(hh) rebate of service tax paid or payable on the taxable services used as input services in the manufacturing or processing of goods exported out of India under section 93A;

(hhh) the date for determination of rate of service tax and the place of provision of taxable service under section 66C;

(i) provide for the amount to be paid for compounding and the manner of compounding of offences;

(j) provide for the settlement of cases, in accordance with sections 31, 32 and 32A to 32P (both inclusive), in Chapter V of the Central Excise Act, 1944 (1 of 1944) as made applicable to service tax vide section 83;

(k) imposition, on persons liable to pay service tax, for the proper levy and collection of the tax, of duty of furnishing information, keeping records and the manner in which such records shall be verified;

(l) make provisions for withdrawal of facilities or imposition of restrictions (including restrictions on utilisation of CENVAT credit) on provider of taxable service or exporter, for dealing with evasion of tax or misuse of CENVAT credit;

(m) authorisation of the Central Board of Excise and Customs or [Principal Chief Commissioners of Central Excise or Chief Commissioners of Central Excise] to issue instructions, for any incidental or supplemental matters for the implementation of the provisions of this Act;

(n)any other matter which by this Chapter is to be or may be prescribed.

(3) The power to make rules conferred by this section shall on the first occasion of the exercise thereof include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Chapter come into force.

(4) Every rule made under this Chapter, Scheme framed under section 71 and every notification issued under section 93 shall be laid, as soon as may be, after it is made or issued, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry ofthe session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or notification or both Houses agree that the rule should not be made or the notification should not be issued, the rule or notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification."

16. Since the challenge is to the provisions empowering the Central Government to collect and recover service tax on Ocean Freight and the Petitioners have challenged such provisions only in respect of the CIF contracts, it is necessary to consider what is "ocean freight", what is "CIF", and how the CIF is different from the FOB contracts.

17. In the international trade, the goods are bought and sold by way of two different modes/methods, namely, the CIF contract and FOB contract. Therefore, we must give a fair idea about both these modes/methods.

18. **FOB** (i.e. Free on Board) is a contract of sale between the foreign supplier and the local importer, where the importer would engage the vessel/ship owner or operator for importing goods into India. In the FOB contract, the service of transportation of goods by ship or vessel is received by the importer in India, whereas such service is rendered by the owner/operator of the foreign going vessel.

19. In the case of **CIF** contract, the overseas supplier would engage the vessel owner/operator for the transportation of goods to India. The hiring of the vessel/ship and also payment of the transportation charges i.e. ocean freight of such vessel owner/operator are made by the overseas supplier in the CIF contract. The service of transportation of goods by vessel is thus received by the overseas supplier from the foreign going vessel owner/operator in the CIF contract.

20. Thus, the basic difference between the FOB and CIF contract is that the service of transportation of goods by vessel/ship is received by the importer in the FOB contract, whereas such service is received by the overseas supplier in case of CIF contract. The transportation charges for transporting goods by vessel or ship are colloquially known or called "**ocean freight**", and such ocean freight is paid by the local importer in case of FOB contract whereas ocean freight is paid by the overseas supplier in case of CIF contract.

21. In the aforesaid context, we may refer to a decision of the Supreme Court in the case of ***Phulchand Exports Ltd. v. O.O.O. Patriot,*** *(2011) 10 SCC 300*, wherein the Supreme Court has explained what is CIF and what are the obligations upon

a seller under a CIF contract. We may quote the relevant observations;

> *"20. In C.I.F. and F.O.B. Contracts (Fourth Edition) by David M. Sassoon dealing with essence of C.I.F. contracts, it is stated that essential feature of a C.I.F. contract is that delivery is satisfied by delivery of documents and not by actual physical delivery of the goods. Shipping documents required under a C.I.F. contract are bill of lading, policy of insurance and an invoice.*
>
> *21. In Johnson v. Taylor Bros.6, Lord Atkinson in the House of Lords explained the meaning of C.I.F. contract as under :*
>
> *"..... when a vendor and purchaser of goods situated as they were in this case (Seller in Sweden and buyers in England) enter into a c.i.f. contract, such as that entered into in the present case, (Ordinary c.i.f. terms), the vendor in the absence of any special provision to the contrary is bound by his contract to do six things. First, to make out an invoice of the goods sold. Second, to ship at the port of shipment goods of the description contained in the contract. Third, to procure (There might be added the words "on shipment, see ante, '7") a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price.....".*
>
> *22. Section 26 of the 1930 Act upon which reliance was placed by the learned senior counsel for the sellers reads as follows :*
>
> *"S. 26. Risk prima facie passes with property.-- Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the*

goods are at the buyer's risk whether delivery has been made or not:

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault:

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as bailee of the goods of the other party."

23. The title of Section 26 shows that the rule provided there- under is the prima facie rule subject to the agreement otherwise between the parties. This is clearly indicated by the expression "unless otherwise agreed" with which the section begins. The parties to the contract are, thus, free to by-pass the prima facie rule provided in Section 26 by making agreement otherwise. The prima facie rule in Section 26 is that the goods remain at the seller's risk until the property in the goods is transferred to the buyer. But when the property in the goods is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not. The above rule has some exceptions. The first proviso provides that where delivery of goods has been delayed due to the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. The second proviso is further subject to the first proviso and provides that nothing in the section shall affect the duties or liabilities of either seller or buyer as bailee of the goods of the other party.

24. The obligations upon a seller under a C.I.F. contract are well known, some of which are in relation to goods and some of which are in relation to documents. In relation to goods, the seller must ship goods of contract description on board a ship bound to the contract destination. If there is a late shipment or the seller has put goods on board a ship not bound to the contract destination as stipulated, in our view, the logical inference that must necessarily follow is that the seller has not put on board goods conforming to a contract destination. "

22. In the case on hand, indisputably, the overseas sellers/suppliers of the goods have made contracts with the shipping line/shipper for sea transportation of the goods, and such overseas sellers/suppliers have made payment of transportation charges to the shipping line; and admittedly there is no contract nor any arrangement between the Petitioners (who are Indian importers/buyers of the goods) and the shipping line for sea transportation. Thus, Ocean freight is admittedly paid by the overseas suppliers/sellers to the shipping line, and therefore the overseas suppliers i.e. the sellers of the goods located in foreign country are the persons who have received service of sea transportation from the shipping line, and the value of such service i.e. ocean freight is also paid by such overseas suppliers/sellers for receiving such service.

23. "Ocean freight" is the colloquial expression; but the service for which service tax is proposed to be collected under the impugned provisions is described as the "transportation of goods by a vessel from a place outside India upto the Customs station of clearance in India....." in all the impugned provisions under Rule 2(1)(d)(EEC) of Service Tax Rules, Rule 6(7CA) of Service Tax Rules and also in Explanation V of reverse charge Notification No.30/2012-ST. The service for which tax is proposed to be collected under the impugned provisions is thus admittedly rendered and consumed outside the country, because the service is that of transportation of goods by a vessel from a place outside India upto the Customs station of clearance in India.

24. "Customs station" is defined under Section 2(13) of the

Customs Act, 1962 to mean any Customs port, Customs Airport, International Courier Terminal, Foreign Post Office or land Customs station; and thus "Customs station" is a place on the land mass of the country. In this case, the transportation of goods by a vessel is involved, and therefore the Customs station of clearance in India would be the "Port", where the goods are unloaded from the vessel and then assessed to customs duties under Section 46 and 47 of the Customs Act, and then clearance of the goods shall be allowed on payment of duties assessed. This Court has conclusively held in para 11 of Prabhat Cotton and Silk Mills Ltd. 1982 (1) ELT 203 (Guj.) that importation into India was with reference to the land mass of India, and not with reference to the territorial waters of India. The judgement of this Court and the judgements of the several other High Courts are referred to in Lucas TVS, Madras 1987 (28) ELT 266 (Mad.) by the Madras High Court, and while agreeing with the judgement of this High Court at para 18, other judgements are referred to from paras 19 to 24, and it is held by the Madras High Court also that import in India means import on the land mass of the country, and not merely in the territorial waters. The judgement of the Mumbai High Court in case of Apar Pvt. Ltd. (referred to in para 26 of the above Madras High Court judgement) is over-ruled by the Surpeme Court in UOI V/s Apart Pvt. Ltd. 199 (112) ELT 3 (SC).

25. Thus, the service proposed to be taxed under the impugned provisions is admittedly that of transportation of goods upto the Indian Port i.e. land mass of the country; and this service covering sea transportation of hundreds or thousands of KMs is an event occurring beyond the land mass of the country, and hence in the nature of an extraterritorial

event. The provisions of the Finance Act, 1994, which is an Act of the Parliament for levy of service tax, do not permit nor empower the Central Government to collect service tax on such extraterritorial events, and the services which are rendered and consumed beyond the land mass of the country.

Statutory provisions for levy of service tax:

26. By virtue of Chapter V of the Finance Act, 1994 and Chapter VA of the Finance Act, 2003, the Parliament has enacted provisions for service tax.

27. Section 64(1) of the above Finance Act provides that Chapter V extends to the whole of India, except the State of Jammu & Kashmir.

28. The charging provision i.e. Section 66B provides for levy of service tax on the value of services provided or agreed to be provided in the taxable territory by one person to another. Section 65B(52) defines "taxable territory" to mean the territory to which the provisions of this Chapter apply. As seen above, the provisions of this Chapter i.e. Chapter V, apply to the whole of India by virtue of Section 64(1) of the Finance Act; and thus it is the mandate of the Parliament for applying the provisions of Chapter V of the Finance Act for service tax to whole of India, and not to extraterritorial events occurring outside the land mass of India.

29. It is a settled legal position as held by a Constitution Bench of the Supreme Court in the case of ***GVK Industries Ltd***. vs. ***Income Tax Officer,*** *2017 (48) STR 177 (SC)* that the Parliament has power to enact laws for extraterritorial

events subject to three conditions as referred to in para 41 of the judgement; but the Executives having delegated powers under any Act of the Parliament do not possess any jurisdiction to make Rules or Notifications for taxing extraterritorial events. In the present case, the Parliament has restricted the provisions of Chapter-V of the Finance Act in respect of service tax to events occurring in the taxable territory i.e. India by virtue of Section 66B (the charging section), Section 66B(52) and Section 64(1) and therefore the impugned Notifications issued by the Executive i.e. the Central Government by way of Rules, are beyond Sections 64, Section 66B and Section 65B(52) of the Finance Act. The impugned Rules and Notifications seek to levy and collect service tax on services rendered and consumed outside India, and therefore these provisions are ultra-vires the above referred three provisions of the Act made by the Parliament.

30. All the three impugned provisions are made by the Central Government by way of amending Service Tax Rules, but there is no power conferred upon the Central Government under Section 94 of the Finance Act for charging and collecting tax on extraterritorial events. The impugned provisions allowing the Central Government to recover service tax on sea transportation occurring upto the land mass of the country are therefore ultra vires the Rule making power of Section 94 of the Finance Act.

31. A perusal of Section 94 shows that there is no power conferred upon the Central Government to make any Rules or Notifications for extraterritorial events; or in other words, for services rendered and consumed beyond the “taxable

territory" i.e. beyond India. Obviously, the Act itself is not applicable to the territories other than India and therefore the Executives cannot have any power to make Rules for territories beyond India.

32. In Paras 16 to 24 of the ***Union of India vs. S. Srinivasan,*** *2012 (281) ELT 3 (SC)*, and in para 14 of the ***General Officer Commanding in Chief vs. Subhash Chandra Yadav & Anr.***, *AIR 1988 SC 876*, the Supreme Court has held that a Rule going beyond the Rule making power conferred by the Statute was ultra vires; a Rule supplanting any provision for which power has not been conferred was ultra vires; and a Rule which was not relatable to the source of power to make such rule was ultra-vires. In Indian Association of Tour Operators 2017 (5) G.S.T.L. 4 (Del.), the Delhi High Court has considered validity of Rule 6A of the Service Tax Rules and held at paras 44, 47, 48 and 53 that a Rule made by the Central Government has to necessarily be only in relation to taxable services, namely, services provided in the taxable territory of India, and an essential legislative function of taxing an activity in non-taxable territory could not have been delegated to the Central Government. Rule 6A has been struck down as ultra-vires the Rule making power of Section 94 by the Delhi High Court.

33. The impugned provisions are also ultra vires the Rule making power of Section 94 of the Finance Act.

34. As observed above, the person receiving service of sea transportation in CIF contracts is the seller-supplier of the goods located in a foreign territory. The Indian importers like the writ applicants are not the persons receiving sea

transportation service, because they receive the "goods" contracted by them, and they have no privity of contract with the shipping line nor does the Indian importer make any payment of ocean freight to the service provider. But the impugned provisions make such "importer" liable to pay service tax; and therefore such provisions allowing the Central Government to recover service tax from a third party are ultra vires the statutory provisions of the Finance Act, as discussed below.

35. The charging section 66B provides for levy of service tax on the value of "services", other than those specified in the Negative List. The term "service" is defined under Section 65B(44) to mean any activity carried out by a person for another for consideration. Thus, service is an activity carried out by a person (i.e. the service provider) for another person (i.e. the receiver of service). Only two parties are recognized by the Parliament in regard to "service" viz. the service provider and the recipient of service.

36. Section 68(a) of the Finance Act lays down that every person providing taxable service to another person shall pay service tax; and thus the primary obligation to pay service tax is on the person providing such service.

37. By virtue of Sub Section (2) of Section 68, the Central Government has power to shift the liability to pay service tax; the method which is popularly known as reverse charge mechanism, under which service tax is collected from the recipient of service. Notification No.30/2012-ST issued under Section 65(2) of the Finance Act is for reverse charge system; and the table under para (II) of the Notification shows that the

Central Government has shifted the burden to pay service tax to the person receiving the service by virtue of Col.No.4 of the table. Thus, the reverse charge system under Section 68(2) of the Finance Act permits the Central Government to collect or recover service tax from the receiver of service, though the primary charge is on the person providing taxable service by virtue of Sub Section (1) of Section 68.

38. But the importers in CIF contracts i.e. the writ applicants herein are neither service providers nor service receivers in respect of transportation of goods by a vessel from a place outside India upto the Customs station of clearance in India. Section 68(1) and also the reverse charge Notification under Section 68(2) permit the Central Government to collect and recover service tax only from the person providing the service or from the person receiving the service, and not from a third party. The rule making power of section 94 also does not permit the Central Government to make rules for recovering service tax from a third party who is neither the service provider nor the service receiver.

39. Therefore, the impugned provisions i.e. Rule 2(1)(d)(EEC) and Explanation-V to Notification No.30/2012-ST are ultra vires Section 65B(44) defining "service" and Section 68, and also Section 94 of the Finance Act.

Strict Interpretation of the charging Section:

40. It is not the case of the Respondents that importers like the Petitioners have received services of sea transportation from the shipping lines. The Respondents have however pleaded that in case of the Indian importers receiving goods on

the land mass of the country by virtue of CIF arrangements, they "indirectly" receive sea transportation service also; and therefore obligation to pay service tax can be shifted to them.

41. First, the Indian importers like the Petitioners have contracted for purchase and delivery of goods, and under CIF contract where the lump sum amount is paid for delivery of the goods on the land mass of the country; and what the importers receive in India is the goods, and not any service. Secondly, liability to pay tax cannot be fastened on a person if the charging provision does not charge or levy the tax; because a charging section has to be strictly interpreted, and not by way of inferences or presumptions about any indirect benefit to a person.

42. In ***Commissioner, Surat-I V/s. Patel Vishnubhai Kantilal & Co.,*** *2012 (28) STR 113 (Guj.)*, this Court has considered relevant case law on this proposition in paras 19 to 22, and held at para 22 that the rule of construction of a charging section is that before taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the section. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all.

43. When the Respondents have admitted that the importers in India are not persons receiving service of sea transportation, and that it is the Respondent's case that the Indian importers were "indirectly" receiving such service and hence were persons liable to pay service tax on such service; it is clearly a case where the Respondents propose to charge service tax from the third parties i.e. the Indian importers by implication,

and not by clear words of the charging section. The impugned provisions creating a charge of service tax on third parties though the Act of the Parliament provides for levy and collection of tax either from the person providing service or from the person receiving service are beyond the charging provision, and also beyond the Rule making power of Section 94 of the Finance Act.

No machinery provision:

44. Even if it is assumed that service tax can be recovered from a third party like the Indian importers in CIF contracts, there is no machinery provision for valuation of the service, and therefore also the impugned Rules and Notifications are unenforceable. It is an admitted position of fact that the Petitioners do not have any information about the actual amount of ocean freight paid by the overseas sellers/suppliers to shipping lines. The invoices and purchase orders (Annexure-"D" to SCA No.20785/2018) clearly show that the price of the goods was fixed on basis of quantity (i.e. DMT –Dry Metric Tton) for CIF Mundra Port basis. When service tax is to be computed and assessed on the "value" of the service as laid down under the machinery provision of Section 67 of the Finance Act, no service tax can be assessed and charged from third parties like the Indian importers in CIF contracts, because "value" of sea transportation service is not available with them in CIF contracts.

45. A charging provision and the machinery provision are two sides of the same coin. A substantial provisions of chargeability and the machinery provisions of valuation have a navel relationship of cause and effect with the result that one cannot

survive without the other, and they are inseparable pillars of an integral tax code. The observations of the Mumbai High Court at para 41 in Satellite Television Asian Region Ltd. reported in MANU/IU/0002/2006, and by the Supreme Court at para 10 in ***CIT Bangalore V/s. B.C. Srinivas Setty,*** *AIR 1981 SC 972* are relevant in this regard, because it is held in these cases that if the computation provision cannot be applied, then the substantial provisions of chargeability become redundant.

46. In the present cases, since the value of ocean freight is not available, Sub Rule (7CA) is inserted in Rule 6 of the Service Tax Rules thereby giving an option to the importer to pay service tax on 1.4% of CIF value of imported goods. But this insertion of Sub Rule (7CA) in Rule 6 is also ultra vires the machinery provision of Section 67, and also rule making power of Section 94.

47. There is no power conferred upon the Central Government under Section 94 to fix value of any service, the way such power is conferred upon the Board under Section 14(2) of the Customs Act, 1962. In absence of any power vested in the Central Government to fix value of any service by way of making a rule or a notification, Rule 6(7CA) of the Service Tax Rules is ultra vires the Rule making power. Secondly, it is an option under Rule 6(7CA) to pay service tax on the amount calculated @1.5% of CIF value of the imported goods; but if the importer does not exercise this option, then there is void because actual value of this service i.e. ocean freight is not known even to the Revenue officers. Therefore, the scheme of taxation would fail and fall in absence of a

machinery provision for valuation of the service when tax is proposed to be recovered from a third party not having any information about the value of such service.

48. Therefore, Rule 6(7CA) amended by the Central Government is also ultra vires Section 67 and Section 94 of the Finance Act.

49. We shall now look into few decisions on the subject.

50. In ***Prabhat Cotton & Silk Mills Ltd. vs. Union of India***, reported in *1982 (10) E.L.T. 203 (Guj.)*, a Division Bench of this High Court while interpreting the expression “India” under Section 12 of the Customs Act, 1962, observed thus;

> *“11. The first answer to this argument is that as per section 12(1) duties of customs are levied on goods imported into or exported from India and the expression 'India' in so far as section 12 is concerned refers to the Indian landmass and not the Indian territorial waters. This becames evident on a true reading of section 12(1) which reads as under :-*
>
> *"12. Dutiable goods. - (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Indian Tariff Act, 1934 (32 of 1934), or any other law for the time being in force, on goods imported into, or exported from, India."*
>
> *What requires to be underlined is a reference to "goods imported into, or exported from, India". Surely the 'expression goods exported from India' cannot mean goods exported from the territorial waters of India. It cannot mean goods exported from the hypothetical line drawn on the boundary of the Indian territorial waters. It is susceptible to only one interpretation viz., the goods exported from the 'landmass' of India. Once this view is taken in the context of exportation from India, the expression 'imported into' which forms a part of the expression 'imported into or exported from India cannot*

carry any other meaning; the expression India must mean landmass of India whether it is in the context of 'exportation from India' or 'importation into India' of goods within the meaning of dutiable goods in the context of section 12(1) of the Act. To construe the expression 'goods exported from India' to mean goods exported from the landmass of India on the one hand and to interpret the expression following on its heels the goods imported into India' to mean goods imported into territorial waters of India and not the landmass of India would introduce an anachronism and so incongruity. Section 12 must, therefore, be read in a consistent manner so that the same meaning can be assigned to the expression 'India' when it is used in the context of exportation of goods from India as also when it is used in the next breath in the context of importation of goods into India. We have, therefore, no hesitation in holding that section 12 refers to exportation from, or importation into, of goods with reference to the landmass of India and not with reference to the territorial waters of India. Once we reach this conclusion the main plank of the submission urged on behalf of the petitioners must collapse. In paragraph 6 of the petition (Special Civil Application No. 1640/81) the argument has been structured in the following manner :

"The petitioner say that the duty which is imposed under the Customs Act is a tax charged on the entry of the goods into India. The petitioner states that taxable event occurs at the time when the goods enters into Indian territorial water and the duty becomes leviable at that stage."

The basis of the argument that the landing charges cannot be included in the assessable value in the premise that the taxable event occurs when the vessel carrying the goods for importation enters in the territorial waters of India. If the very basis of premise assumed by the petitioners is fallacious, the entire structure of the argument must fall to the ground. Landing charges of course cannot be included if the valuation of the goods were to be made as at the point of time when the ship enters territorial waters. In that event the goods must be valued on the "where and when basis" at the point of time of entry into territorial waters. Since the goods are being valued at the point of time when they are still on the ship, the question of including landing charges in the

assessable value cannot arise. For the reasons indicated by us a short while ago, we are of the opinion that the valuation of the goods has to be made not at the point of time or place when the ship carrying the goods for importation enters the waters but it has to be made at the point of time when the goods are landed on the landmass of India. If the goods are valued as and when they are landed on the landmass, the petitioners cannot succeed. The goods have to be valued not when they are in the ship and not when they are being unloaded from the ship or are suspended in the air on the hook or the unloading orane. They are to be valued at the point of time when they are landed on the landmass of India both from the time point of view as well as the place point of view. We may take a quick look backwards and recall the discussion made in the context of the analysis of section 14 of the Customs Act pertaining to valuation of goods for the purposes of assessment. As per the analysis made by us, the price of the goods has to be determined (1) on the basis of the price at which ordinarily such goods are offered for sale, (2) such price is required to be determined with reference to the time and place of importation of goods (i.e., when they are unloaded on the landmass of India), (3) the price must be the price at which the goods are ordinarily sold or offered for sale in accordance with the international trade, and (4) the price must be genuine price between a commercial seller and a commercial buyer unrelated to each other. Such being the position, proposition Nos. (2) & (3) must be called into aid for the purpose of determination of assessable value of the goods. And the goods will have to be valued at the point of time of being unloaded on the landmass of India and at the place where they are unloaded. Since the landing charges have to be paid to the Port authorities as soon as the goods are landed, and the sale can take place only after they are landed, the price at which the goods are sold or offered for sale would of necessity include the landing charges payable before the transaction of sale is effected. An argument as regards the post-importation charges was advanced in the Privy Council in Ford Motor Company of India Ltd. v. Secretary of State A.I.R. 1938 Privy Council 15 = ELT J 265. The Privy Council has expressed the opinion :

"That the Legislature intended to exclude post-importation expenses need not doubted but it had to do

this in a practicable manner without undue refinement, and it must be taken to have regarded the phrase which it employed as sufficient for the purpose if taken in a reasonable sense".

If this principle were to be applied, the only manner in which the interpretation can be made in the reasonable sense or commonsense manner is to apply the test of valuation of goods after they are unloaded on the Port on payment of landing charges incidental to the unloading of the goods on the wharf. In the said decision the phrase "at the place of importation" camp up for consideration and an argument was urged as to whether the valuation had to be made on the ex-ship basis. This argument was negatived by the Privy Council. Ultimately, the learned Counsel for the importer could not even contend that the valuation should be on the ex-ship basis but suggested that it should be on ex-wharf basis and that in any case place of imporation would not extend beyond the limits of the Port. It was in that context that the Privy Council made the aforesaid observation. We have, therefore, no hesitation in reaching the conclusion that the inclusion of landing charges in the assessable value cannot be regarded as inclusion of post-importation charges and that introduction of such undue refinement is not called for. When interpreted in a sensible and commonsense manner the view which commands to us appears to be the correct view. It is futile to contend that landing charges cannot be included in determining the assessable value of the imported goods for the purpose of computation of the customs duty. And that is how the provisions have been construed for more that 40 years. That is the interpretation which has prevailed in all quarters, namely, the revenue, the importer, the exporter and all concerned. All transaction have been made on this basis for all these years. We have already brought into focus innumerable complications which would arise if this construction which has come to be accepted by all concerned for such a long time is thrown overboard and a new and revolutionary construction which unsettles every settled position is accepted on the basis of a fancy or disingenuous argument. There is authority for the proposition that a different interpretation should not be placed on the words of a provision which disturbs the course of construction which has continued unchallenged for a considerable length of

time and has acquired the sanction of the continued decisions over a very long period [see Empress Mills v. Municipal Committee, Wardha, A.I.R. 1958 Supreme Court 341 (para 19)]. No doubt the proposition is adverted to in the context of sanction of continued decisions over a long period. So also no doubt the Supreme Court came to the conclusion that the said principle was not attracted in the case before the Court because the interpretation in question had not been acquiesced in for a long time. All the same this principle can be extended to a situation like the present one as well where sanctity must be accorded to an interpretation which has found acceptance by all concerned over such a long time without making any one unhappy (let alone considerations regarding desirability for pragmatism and undesirability for undue refinement and other weighty factors outlined earlier). We have therefore, no hesitation in repelling the contention urged on behalf of the petitioners in this behalf.

12. If the argument of the counsel for the petitioners were right, customs duty would be payable even if the ship were to stray in the territorial waters of India for it would amount to importation of goods into India. So also customs duty would be payable even when the ship which enters the territorial waters changes its course, turns back, and leaves the territorial waters before landing the goods on the landmass. Such a construction leading to absurdity should be avoided as observed in Meras Docks and Harbour Board v. Twigge, (1898) 67 LJQB 604. It would be difficult to countenance an interpretation which would lead to such results. So also it would be futile to contend that in the course of international trade the goods are being sold or being offered for sale on the basis of "where and when" formula at the point of time when the ship enters the territorial waters of India. It would be extremely unrealistic to accept a construction which would lead to such conclusion. Importation of goods is an integrated process which culminates when the goods are landed on the landmass of India and are so placed that the same can be introduced in the stream of supplies. We have, therefore, no doubt that the interpretation which has prevailed for numerous years and which commends itself to us is the only interpretation which can be legitimately placed on sections 12 and 14 and that there is no

illegality in including the landing charges payable to the Port authorities in the assessable value of the goods for the purpose of computation of customs duty. Learned standing counsel has called our attention to two decisions of English Courts which tend to support the view canvassed by the revenue. These two decisions are quoted with approval by the Supreme Court in Empress Mills v. Municipal Committee, Wardha, A.I.R. 1958 Supreme Court 341. Paragraph 23 extracted from the said decision may be quoted :-

"(23) Chief Justice Marshall dealing with the word "importation" said in Brown v. State of Maryland, (1927) 12 419 at p. 442 : 6 Law Ed. 678 : (at p. 686) :

"The practice of most commercial nations conforms to this idea. Duties, according to that practice are charged on those articles only which are intended for sale of consumption in the country. Thus sea-stores goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather and landed, but not for sale are exempted from the payment of duties. The whole course of legislation on the subject shows that in the opinion of the legislature the right to sell is connected with the payment of the duties."

Continuing, the learned Chief Justice at p. 447 observed :

"Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, than as importation itself..... This supports the contention raised that import is not merely the bringing into but comprises something more i.e., incommorating and mixing up of the goods imported with the mass of the property in the local areas. The concept of import as implying something brought for the purpose of sale or being kept is supported by the observations of Kalley C.B. in Harvey v. Corporation of Lyme toll was made under the Harbour Act and the words for construction were "goods landed or shipped within the same cobb or harbour".

Construing these words Kally C.F. said :

"The ordinary meaning and purport of the words is

perfectly clear, namely, that tolls are to be paid on goods substantially imported that is, in fact, carried into the port for the purpose of the town and neighbourhood.

This very position has been reiterated by the Supreme Court In re : Sea Customs Act, A.I.R. 1963 Supreme Court 1760, wherein Sinha, C.J. Speaking for the majority has observed in paragraph 26 of the judgment as under :-

"Similarly in the case of duties of customs including export duties though they are levied with reference to goods, the taxable event is either the import of goods within the customs barriers of their export outside the customs barriers. They are also indirect taxes like excise and cannot in our opinion be equated with direct taxes on goods themselves. Now, what is the true nature of an import or export duty ? Truly speaking, the imposition of an import duty, by and large, results in a condition which must be fulfilled before the goods can be brought inside the customs barriers, i.e. before they form part of the mass of goods within the country. Such a condition is imposed by way of the exercise of the power of the Union to regulate the manner and terms on which goods may be brought into the country from a foreign land".

It would, thus, mean that the valuation has to be made at the point of time and place where the goods are brought from foreign land and are so placed that they can form a part of the mass of the goods within the country.

13. *The counsel for the petitioners has however, sought support from M.S. Shawhney v. Messrs Sylvania and Laxman Ltd., 77 B.L.R. 380. The Bombay High Court in that case was concerned with the question as to when the importation of goods took place in the context of the fact that the ship carrying the goods for importation had crossed the territorial waters before March 31, 1967 which was the last date upto which the notification exempting the goods from customs duty was operative. The Bombay High Court has taken the view that the importation took place when the goods entered the territorial waters before March 31, 1967 and, therefore, the customs duty was not playable on the goods. The question arose in a different context and the question as to whether the landing charges were includible in the assessable value was not before the Bombay High Court. Besides, the considerations which we have outlined in the earlier part as our judgment were not highlighted*

before the Bombay High Court. We are not prepared to uphold the contention of the petitioners on the basis of the aforesaid decision rendered by the Bombay High Court. The learned standing counsel for the Union of India in this context called our attention to the decision in Prakash Cotton Mills (P.) Ltd. v. B. Sen, A.I.R. 1979 Supreme Court 75 = 1979 E.L.T. (J 241), wherein the Supreme Court has taken the view that the rate and valuation of goods for the purpose of section 15(1)(b) of the Customs Act was the rate and valuation in force on the date on which the warehoused goods were actually cleared from the warehouse. It was contended that the ratio of this decision lends support to the view point canvassed by the revenue. Since the question before us was not directly before the Supreme Court, we do not propose to dwell at length on the question which was posed before the Supreme Court in order to call out the ratio of the said decision for the purpose of the present discussion. "

51. A Division Bench of the Madras High Court in the case of ***Lucas TVS, Madras vs. Assistant Collector of Customs, Madras & Ors.***, reported in *1987 (28) E.L.T. 266 (Mad.)*, while following the aforesaid Division Bench decision of this High Court, observed as under;

"6. Mr. P. Narasimhan, learned Senior Central Government Standing Counsel, appearing for the respondents has vehemently contended that since India is defined as including the territorial waters of India, the goods cannot be said to have been exported unless they cross the territorial waters. Reliance is placed on the definition of the term "export goods" found in section 2(19) of the Act. The said section defines "export goods" as meaning any goods which are to be taken out of India to a place outside India. It is argued by the learned counsel that when the definition of the term "export goods" referred goods which are to be taken out of India to a place out of India, we must substitute the definition of "India" and must read the definitions of the term "export goods" as meaning those goods which are to be taken beyond the territorial waters of India to a place also beyond the territorial waters of India.

7. In order to decide these contentions, a reference is necessary to certain provisions of the Act. Section 2(18) of the Act defines "export" as meaning, with its grammatical variations and cognate expressions, taking out of India to a place outside India. We have already referred to the definition of the term "export goods". The definition of "India" is of an inclusive nature and says that India includes the territorial waters of India.

8. The concept of territorial waters of India is to be found in the statutory provision in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (hereinafter referred to as the 1976 Act). Under section 3 of the 1976 Act, it is declared that "the sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as the territorial waters) and to the seabed and suboil underlying, and the air space over such waters". Sub-section (2) of section 3 gives the limit of the territorial waters and it reads as follows :-

S. 3(2) "The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline".

We may also refer to Section 4 of the 1976 Act which may be relevant to the question which has arisen before us. Under Section 4, there is a statutory right on all foreign ships to enjoy the right of innocent passage into the territorial waters. The explanation in section 4(1) explains what is innocent passage and says that the passage is innocent so long as it is not prejudicial to the peace, good order or security of India. Section 4(1) with its explanation reads as follows :-

"S. 4 : Use of territorial waters by foreign Ships. - (1) Without prejudice to the provisions of any other law for the time being in force, all foreign ships (other than warships including submarines and other underwater vehicles) shall enjoy the right of innocent passage through the territorial waters.

Explanation. - For the purpose of this section, passage is innocent so long as it is not prejudicial to the peace, good order or security of India."

We are not concerned with the concept of "contiguous zone of India" which is defined in this Act.

9. We may also refer to section 2(16) of the Act which

defines "entry". It reads as follows :-

'S. 2(16) : "Entry" in relation to goods means an entry made in a bill of entry, shipping bill or bill of export and includes in the case of goods imported or to be exported by post, the entry referred to section 82 or the entry made under the regulations made under section 84.' It may be pointed out that the definition of "entry" includes reference to import or export by post."Import" is also defined in Section 2(23) as meaning, with its grammatical variations and cognate expressions, bringing into India from a place outside India.

10. The relevant statutory provisions with regard to levy of customs duties is to be found in section 12(1) which refers to the levy of customs duty on excisable goods, whether they are imported or exported. Section 12(1) reads as follows :-

"S. 12(1) : Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975, or any other law for the time being in force, on goods imported into, or exported from, India."

11. Section 14 deals with valuation of goods for purposes of assessment. Section 15 deals with the dates for the determination of rate of duty and tariff valuation of imported goods. Since we are dealing with the case of export, we may refer to section 16 of the Act. Section 16(1) and (2) reads as follows :-

"S. 16(1) : The rate of duty and tariff valuation, if any, applicable to any export goods, shall be the rate and valuation in force -

(a) in the case of goods entered for export under Section 50, on the date on which a shipping bill or a bill of export in respect of such goods is presented under that section;

(b) in the case of any other goods, on the date of payment of duty :

Provided that if the shipping bill has been presented before the date of entry outwards of the vessel by which the goods are to be exported, the shipping bill shall be deemed to have been presented on the date of such entry outwards.

(2) The provisions of this section shall not apply to

baggage and goods exported by post."

Under this section read with Section 12 of the Act, the duty is payable at the rate of duty and tariff valuation applicable to any export goods in the case of goods entered for export under section 50, on the date on which a shipping bill or a bill of export in respect of such goods is presented under that section, and in the case of any other goods, on the date of payment of duty. The proviso says that if the shipping bill has been presented before the date of entry outwards of the vessel by which the goods are to be exported, the shipping bill shall be deemed to have been presented on the date of such entry outwards. Sections 50 and 51 of the Act which deal with clearance of export goods, read as follows :-

"S. 50(1) : The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.

S. 51. Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation."

12. Section 50 laid down a pre-condition before the goods are exported. The exporter of the goods has to make an entry by presenting to the proper officer in the case of goods to be exported by a vessel or aircraft, a shipping bill and in the case of goods which are to be exported by land, a bill of export. For both the kinds of bills, a form has been prescribed. The exporter also while presenting a shipping bill or a bill of export has to make a declaration as to the truth of the contents of the entry.

13. Section 51, in our view, is an important provision. Under the provision, if the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under the Act in

respect of the same, he may make an order permitting clearance and loading of the goods for exportation. Once the exporter has complied with the provisions of these sections, so far as he is concerned, whatever is required to be done for the purpose of exportation of the goods has been done by him. As a matter of fact, Section 51 deals with the last stage upto which the exporter has control over the goods, and once the goods have been cleared and directed to be loaded for the purpose of exportation and the goods are subsequently loaded, the goods passed out of the control of the exporter.

14. At this stage, we may refer to section 75 of the Act which deal with drawback allowance. Section 75(1) is the repository of the right to got drawback allowance on import materials used in the manufacture of the goods which are exported. This section reads as follows :-

"S. 75(1) Where it appears to the Central Government that in respect of goods of any class or description manufactured in India and exported to any place outside India, a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture of such goods, the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with, and subject to, the rules made and subject to, the rules made under sub-section (2)."

This section, therefore, clearly provides that drawback is permitted in respect of goods which are manufactured in India and exported to any place outside India. The question now is when section 75(1) of the Act refers to goods exported outside India, what is the point of time when it can be said that the goods have been exported to any place outside India. Normally when once the goods are put in the ship, they will reach the country of destination. In this process, they will undoubtedly cross the territorial waters. But in a certain contingency such as the one which has arised in this case, namely, after having been loaded on the vessel after being cleared by the proper officer under section 51 and after having left the landmarks territory of India and were undoubtedly in the process of being carried to the country of destination, could it be said that the goods have been exported to any place outside India.

15. The Drawback Rules made under Section 75(2) of the Act are themselves not determinative of the controversy which arises in this case. These Rules are known as the Customs and Central Excise Duties Drawback Rules, 1971 and found at page 163 of Vol. I, Sixth Edition, of Customs Manual. In rule 2(a) of the said rules, there is a definition of "drawback" given as follows :-

"Drawback" in relation to any goods manufactured in India and exported, means -

(i) the rebate of duty chargeable on any imported materials or excisable materials used in the manufacture of such goods in India."

When the definition of "drawback" refers to goods exported, in rule 2(c) the definition of "export" has been given. The definition of "export" reads as follows :-

"Export" within its grammatical variations and cognate expressions, means taking out of India to a place outside India and includes loading of provisions or store or equipment for the use on board a vessel or aircraft proceeding to a foreign port."

The inclusive part of the definition is not relevant for our purpose. The substantive part of the definition is nothing but a reproduction of the definition found in the Act itself. Nothing therefore turns on these rules in so far as we are concerned with the determination of the question as to whether by loading the goods in the ship after having been cleared under section 51 of the Act, an export has taken place.

16. Normally, undoubtedly, where an Act defines any term used in the body of the Act, one must substitute the definition in places where the term defined is used. In accordance with this general principle of construction of statues, on the definition of "export" when it refers to taking out of India to a place outside India, if the contention of the learned counsel for the Department is accepted, then undoubtedly "taking out of India" will have to be read as meaning "taking into a place outside the territorial waters of India". The question, however, is whether in all cases where the court is concerned with the question as to whether there is an import or export, we must necessarily construe India as referring to not only the landmarks of the country, but also including the territorial waters of India.

17. The controversy as to when goods can be said to have been imported has been the subject of a series of decisions of different courts, and we would rather refer to these decisions than traverse once again, the same ground which is covered by the decisions while construing the concept of import. The question as to when goods can be said to have been imported came up for consideration for the first time in this Court in K.R. Ahmed Shah v. Additional Collector of Customs, Madras & Others [1981 ELT 153 (Mad.)]. The learned Judge (Padmanabhan, J.) after referring to the decision of the Supreme Court in Express Mills v. Municipal Committee and an unreported Division Bench decision of this Court in Writ Appeal No. 84 of 1968, culled out the following principles with regard to the meaning the word "import" in Sections 2(23) of the Act. In paragraph 11, the learned Judge observed as follows :-

"The principles that could be deducted from the above decisions can be summarised as follows :-

(1) Goods can be said to be imported to the country only when they are incorporated in and mixed up with the mass of goods in the country.

(2) It cannot be said that the moment an aircraft lands at an international airport in this country, the goods are imported and to hold otherwise would create inconvenience and confusion and would render the goods which are in the aircraft meant to be carried to other countries subject to the Customs laws of this country.

(3) Once a passenger enters the customs area and makes a declaration of what all he had brought and does not make any attempt to take the goods across the customs barrier in violation of the customs laws of this country, "it cannot be said that he had imported or attempted to import any goods contrary to any prohibition imposed by and under the Act or any other law for the time being in force."

We are referring to the decision which deals with the concept of import because just as in the case of export of goods outside India and contention is that goods must go beyond the territorial waters, it has been the contention of the Department sometimes, as and when it suits the Department that so far as import is concerned, the import is complete the moment the goods have been brought within the limits of the territorial waters. This

question assumes some importance when at the time of entry into territorial waters, the goods are either exempted from customs duty or the customs duty is less and at the point when they cross the customs barrier, either the exemption is taken away or the import duty has been enhanced. In such cases, courts have been called upon to decide as to when import takes place. In the decision referred above this court took the view that goods can be said to have been imported into the country only when they are incorporated in the mixed up with the mass of goods in the country.

18. The Gujarat High Court was called upon to construe the meaning to be given to "India" in the context of section 12 of the Act. As already pointed out, section 12 of the Act is a charging section, and it provides for a levy on goods imported into or exported from India. In Prabhat Cotton and Silk Mills Ltd. v. Union of India [1982 ELT 203 (Guj.)], the Division Bench of the Gujarat High Court positively took the view that when section 12 refers to "exportation from or importation into" of goods, the reference is to the landmass of India and onto to the territorial waters of India. The Division Bench pointed out that if the construction that India is to be equated with the area upto the territorial waters of India, then even a ship which will stray into the territorial waters or when the ship enters the territorial waters and changes it course, turns back and leaves the territorial waters before landing the goods on the landmass of India, would also have to be considered as importing goods into India. There it was the importer who took the stand that the import takes place when the ship entered the territorial waters. The question arose in the context of the valuation of the goods for the purpose of assessment to import duty. The department wanted certain landing charges to be included as a part of the assessable value of the articles. The argument of the assessee was that since the goods were imported as soon as they crossed the territorial waters the taxable event occurs at the point of time when the goods enter the Indian territorial water and the price of the goods has to be determined in the context of the said circumstance. Thus, according to the importer, the goods would have to be valued at the point of time when the vessel entered the Indian Customs water, and so the valuations to be made on the basis of the price at which the same would be sold and offered for

sale on the vessel before the goods are unloaded on the port, and since the valuation will have to be made on the basis of the valuation as on board of the ship at the point of time when the ship enters the Indian customs waters much before the goods are unloaded on the dock of the port, the charges payable to the Port authorities upon the unloading of the goods on the dock known as the landing charges cannot be included in the assessable value. Repelling that contention, the Division Bench after quoting section 12 of the Act observed as follows :-

'What requires to be underlined is a reference to 'goods imported into, or exported from, India'. 'Surely, the expression 'goods exported from India' cannot mean goods exported from the territorial waters of India. It cannot mean goods exported from the territorial waters of India. It cannot means goods exported from the hypothetical line drawn on the boundary of the Indian territorial waters. It is susceptible to only one interpretation, viz., the goods exported from the 'landmass' of India. Once this view if taken in the context of exportation from India, the expression 'imported into' which forms a part a of the expression 'imported into or exported from India cannot carry any other meaning : the expression India must mean landmass of India whether it is in the context of 'exportation from India' or 'importation into India' of goods within the meaning of dutiable goods in the context of section 12(1) of the Act. To construe the expression 'goods exported from India' to mean goods exported from the landmass of India on the one hand, and to interpret the expression following on its heels, the goods imported into India to mean goods imported into territorial waters of India and not the landmass of India would introduce an anachronism and so incongruity. Section 12 must, therefore, be read in a consistent manner so that the same meaning can be assigned to the expression 'India' when it is used in the context of importation of goods into India. We have, therefore, no hesitation in holding that section 12 refers to exportation from, or importation into, of goods with reference to the landmass of India and not with reference to the territorial waters of India. Once we reach this conclusion, the main plank of the submission urged on behalf of the petitioners must collapse."

We are in respectful agreement with the view taken by the Gujarat High Court that when section 12 of the Act

refers to goods exported from India, it does not mean goods exported from the territorial water of India. The export of the goods clearly takes place on the landmass of the country. If the construction canvassed on behalf of the respondents is to be accepted, then there is nothing in the Customs Act to indicate what is the position of the goods from the time of loading the goods on the ship till they cross the boundary line of the territorial waters. Within the region between the boundary of the landmass of India on one side and the outer limit of the territorial waters the goods are beyond the control of the exporter. The customs duty is payable on export, and if export takes place only at the place where the territorial waters of India cease, then strictly speaking the customs duty will have to be collected only at that place which is almost an impossibility.

19. We may also refer the decision of the Kerala High Court in Shri Ramalinga Mills (P) Ltd. v. Assistant Collector of Customs [1983 ELT 65 (Ker.)]. The learned Judge after elaborate discussion of the provisions of the Act and the decision of the Supreme Court in In re : Sea Customs Act (1878) (AIR 1963 SC.1760) observed as follows :-

"In this view of the matter, I am clearly of opinion that the mere entry of the vessel with the goods into the territorial waters or even berthing in the port of Bombay will not, vis-a-vis the petitioners importers at Cochin, constitute at completed import of the goods at Bombay. That was a matter of mere transit. Importation took place only when the vessel crossed the customs barriers at the intended port of importation, namely, Cochin.".

20. We may with advantage quote a passage from an Australian decision on which the learned Judge of the Kerala High Court has relied. In the Australian decision. The Qureen v. Bull and Others [1974 (48) A.L.J.R. 232], the concept of import was elaborately explained as follows :-

"However, whether or not the sea within three nautical miles of the coast should be regarded as part of Australia for other purposes, it is in my opinion, clear that goods are not imported simply by bringing them within the three miles limit. It does not conform to ordinary usage to say that goods are imported into a place if they are brought there in the course of transit but with no

intention that they should be unloaded there. For example, in ordinary understanding goods would not be thought to have been imported into Australia if they were carried through the waters within three miles of the Australian coast by a ship which did not put into port. Even if goods are brought into port, they are not necessarily imported, for example, a cargo being carried from England to New Zealand is not imported into Australia when the ship on which it is carried puts into an Australia and port on route".

21. In the same decision, Barwick, C.J., had observed as follows :-

"however, in any case, it is to my mind a completely impractical concept that importation of goods takes place so soon as and whenever the ship carrying them enters the marginal seals, perhaps only to leave them against for navigational purposes as it moves towards the port of discharge."

22. A Division Bench of the Delhi High Court also took a similar view of the concept of 'import' in Jain Shuda Vanaspathi Ltd. v. Union of India [1983 ELT 1688 (Del.)]. In that case, it was the argument of the importer that the ship having entered the territorial waters on 7.10.1980, the chargeability of the duty must be determined as on that date, and since an exemption notification was in operation on that date, the rate of duty should be considered as nil. This argument was rejected. In paragraph 23 of the judgment, the Division Bench observed as follows :-

"Import" therefore must necessarily mean at a point of time when the goods are to be off-loaded from the ship so that thereafter they form a part of the mass of goods in the country of consumption".

In paragraph 37, while observing that the goods coming within the territorial waters were undoubtedly subject to the control of the customs, the Division Bench pointed out that the entry in the territorial waters though amounting to import, will not for fiscal purposes determine the date and the time for the purpose of calculating the rate of duty which is leviable under section 15 of the Customs Act. The judgment also made it clear that it was settled law that unless the goods are brought into the country for the purpose of use, enjoyment, consumption, sale or distribution or

incorporated into or got mixed up with the totality of the properties of the country, they cannot be said to have been imported, and as such it cannot be said that the moment the aircraft passed through the country or a ship entered the territorial waters, the importation takes place. Importation can only be when the goods crossed the customs barriers.

23. In another decision in Aluminium Industries Ltd. v. Union of India [1984 (16) ELT 183 (Kerl)], the Kerala High Court also took a similar view.

24. The concept of import and export once again came up for consideration before a Division Bench of this Court in M. Jamal Company v. Union of India [1985 (21) ELT 369 (Mad.)]. After referring to the decisions cited above and noticing the controversy in the different courts, the Division Bench pointed out that the object of the Act was not to tax the goods which are passing, through the territorial waters, but only those which got mixed up with the mass of goods in India. The Division Bench then observed in paragraph 19 as follows :-

"It is thus abundantly clear that the definition of the word "India" as including the territorial waters under Section 2(27) of the Act, is compatible with S. 12(1) of a the Act. The context of S. 12(1) clearly requires that the word 'In India' in this section is not given the meaning it has as per S. 2(27) of the Act. It should instead be given the meaning as per the General Clauses Act, viz., the territory of India."

This decision specifically deals with the meaning to be given to the word 'India' occurring in Section 12(1) of a the Act which is also the question arising in this case before us. We do not see any reason why we should not accept the view taken by the Division Bench especially when it appears to us that when dealing with the question of export, the concept of exporting out of the territorial waters of India does not fit in with the scheme of the Act. The provisions of sections 50 and 51 of the Act, are in our view determinative of other time when the process of export commences, and when the good are loaded into the ship after being cleared by the appropriate officer, they must be treated as having been exported so far as the exporter is concerned.

25. We have referred earlier to the provisions of Section 4 of the 1976 Act. It is possible that several foreign ships

may be passing through the territorial waters enjoying the right of innocent passage, and if the constriction placed by the department that import takes place the moment a vesel crosses the territorial waters is accepted, then these foreign ships which are enjoying a statutory right will also be brought within the net of the Act, when obviously that is not the intention of the Act at all.

26. Mr. P. Narasimhan relied on a Full Bench decision of the Bombay High Court in Apar Private Ltd. v. Union of India - 1985 (22) ELT 644 (Bom.) = (1985 Vol. 6 Excise & Customs Cases 241). There is no doubt that the Full Bench has taken a positive view that under the Customs Act, 1962, the event of importation occurs when the goods from a place outside India enter the territorial waters of India. This decision undoubtedly is entitled to be noticed. But so far as we are concerned, we are not dealing with the case of import and it is to be pointed out that the Full Bench of the Bombay High Court was not inclined to apply the logic of this decision to a case of export. One of the arguments raised before the Full Bench was that if the goods become imported goods as soon as they entered the territorial waters of India, the goods also cannot become export goods until they are removed from the landmass and pass out of the territorial waters of India. This argument was rejected as will be clear from the following observation paragraph 37 :-

"It is argued that if the goods become imported goods as soon as they enter the territorial waters of India, the goods cannot become export goods until they are removed from the landmass and pass out of the territorial waters of India. We do not see how that follows. In the case of import, they are words used are 'imported goods' and in the case of export, they are 'export goods' and not exported goods. The duty in the case of export goods has to be paid before they are exported; in the case of imported goods, they become liable to duty no sooner than they are imported. While in the case of import the duty is attracted if the goods become imported goods, in the case of goods sought to be exported, duty has to be paid when they are still 'export' goods and not after they are exported. This distinction has been made and maintained throughout the Customs Act. An examination of these provisions further fortifies our conclusions that the goods become imported goods

no sooner than they are brought from outside the country into the territorial waters of India and the taxable event is not postponed till a bill of entry is filed or till they are sought to be cleared for home consumption."

Therefore, even though the Full Bench of the Bombay High Court took a view which runs counter to the decisions which we have earlier cited with reference to the concept of import, even the learned Judges who constituted the Full Bench have clearly taken the view that that analogy will not apply to the case of export and that the Act clearly makes a distinction between import of goods and export of goods. We are, therefore, inclined to take the view in this case that the goods having been loaded in the ship after they were duly cleared under Section 51, the goods must be described as goods exported for other purpose of Section 75 of the Act. For the purpose of Section 75 of the Act, when Section 75 refers "to any place outside India", it would be enough for the exporter to show that the goods were out of his control and were on their way to the country of destination. "

52. A Division Bench of this High Court in the case of ***Commr. Of C. Ex. & Cus, Surat-I vs. Patel Vishnubhai Kantilal & Co.***, reported in *2012 (28) S.T.R 113 (Guj.)*, has observed as under;

"22. The Supreme Court in CWT v. Ellis Bridge Gymkhana (supra), held that the rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section. No one can be taxed by implication. A charging section has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all.

23. *In the facts of the present case, the charging section is Section 66 which provides for charge of Service tax and lays down that there shall be levied a tax at the rate of twelve per cent of the value of taxable services referred to in* ***sub-clause (f) of Clause (105) of Section 65*** *and collected in such manner as may be prescribed.* ***sub-clause (f) of Clause (105) of Section***

65 *of the Act provides that "taxable service" means any service provided or to be provided to any person, by a courier agency in relation to door-to-door transportation of time sensitive documents, goods or articles. Thus, for the purpose of being chargeable to Service tax under Section 66 of the Act, taxable services of the nature provided under Clause (105) of Section 65 would be required to be provided by such person. Insofar as* ***sub-clause (f) of Clause (105) of Section 65*** *of the Act is concerned, the taxable services should be provided to any person by a courier agency in relation to door-to-door transportation of time sensitive documents, goods or articles. Thus, for the purpose of falling within the ambit of charging section, the taxable service should satisfy the ingredients of* ***sub-clause (f) of Clause (105) of Section 65*** *of the Act.*

24. *On a conjoint reading of the definition of "courier agency" as defined under Clause (33) of Section 65 of the Act with* ***sub-clause (f) of Clause (105) of Section 65*** *of the Act, it is apparent that it is only if a courier agency provides services in relation to door-to-door transportation of time-sensitive documents, goods or articles that the taxable event would take place. In the present case, the service receiver hands over cash in Indian currency at a recipient branch, which transfers instructions to the delivery branch, where payment is made from the corpus available at the delivery branch. Thus, there is no movement of the cash from the recipient branch to the delivery branch. There is no transportation of such cash as contemplated under Clause (33) of Section 65 or* ***sub-clause (f) of Clause (105) of Section 65*** *of the Act. In the aforesaid premises, the transfer of cash by the assessees in the manner aforesaid, does not fall within the ambit of "courier agency" as envisaged under Clause (33) or "taxable service" as contemplated under* ***Clause (105) (f) of Section 65*** *of the Act and as such would not be exigible to Service tax.*

25. *As held by the Supreme Court in Murarilal Mahabir Prasad v. B.R. Vad (supra), there is no equity about a tax in the sense that a provision by which a tax is imposed has to be construed strictly, regardless of the hardship that such a construction may cause either to the treasury or to the taxpayer. If the subject falls squarely within the letter of law he must be taxed, howsoever inequitable*

the consequences may appear to the judicial mind. If the Revenue seeking to tax cannot bring the subject within the letter of law, the subject is free no matter that such a construction may cause serious prejudice to the Revenue. As held by the w:st="on"Apex Court in the case of CWT v. Ellis Bridge Gymkhana (supra), no one can be taxed by implication. A charging section has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all. In the present case, insofar as the facility for transfer of money as provided by the assessees is concerned, the same has not been brought within the ambit of charging section by clear words and as such, the assessees cannot be taxed in respect of the same. The view taken by the Tribunal, therefore, is in consonance with the statutory provisions and as such, the Tribunal was justified in holding that the tender of Indian currencies and its transmission and compensatory payment would not be covered by the levy of Service tax under heading "courier agency".

26. *It may also be pertinent to note that insofar as the actual transportation of currency notes is concerned, the Tribunal held that the same would fall within the ambit of "courier agency" as defined under Clause (33) of Section 65 of the Act. Thus, any transaction which involves transportation of time-sensitive documents, goods or articles would fall within the ambit of Clause (33) of Section 65 of the Act."*

53. A Division Bench of the Delhi High Court in the case of ***Indian Association of Tour Operators vs. Union of India***, reported in *2007 (5) G.S.T.L 4 (Del.)*, while considering the challenge to Rule 6A of the Service Tax Rules, 1994 on the ground of excessive delegation, held as under;

"39. Rule 6A of the ST Rules is a piece of delegated of legislation. It is a rule made by the central government in exercise of the powers under Section 94 (1) read with Section 94 (2) (f) of the FA. The grounds on which delegated legislation can be challenged are well-settled and set out in G. P. Singh's Principles of Statutory Interpretation, 10th Edition as under:

"Grounds for judicial review Delegated legislation is open to the scrutiny of courts and may be declared invalid particularly on two grounds: (a) violation of the Constitution; and (b) violation of the enabling Act. The second ground includes within itself not only cases of violation of the substantive provisions of the enabling Act, but also cases of violation of the mandatory procedure prescribed. It may also be challenged on the ground that it is contrary to other statutory provisions or that it so arbitrary that it cannot be said to be in conformity with the statute or Article 14 of the Constitution or that it has been exercised in bad faith. The limitations which apply to the exercise of administrative or quasi- judicial power conferred by a statute except the requirement of natural justice also apply to the exercise of power of delegated legislation. Rules made under the Constitution do not qualify as legislation in true sense and are treated as subordinate legislation and can be challenged in judicial review like delegated legislation. Compliance with the laying requirement or even approval by a resolution of Parliament does not confer any immunity to the delegated legislation but it may be a circumstance to be taken into account along with other factors to uphold its validity although as earlier seen a laying clause may prevent the enabling Act being declared invalid for excessive delegation."

40. In General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav (supra), the Supreme Court explained the position thus:

"It is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."

41. In Union of India v. S. Srinivasan (2012) 7 SCC 683 the above principles were reiterated in the following words:

"16. At this stage, it is apposite to state about the rule making powers of a delegating authority. If a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it."

42. An essential legislative function cannot be delegated to the executive. It has to be exercised by the legislature. This was emphasized in the decision in Vasu Dev Singh v. Union of India (2006) 12 SCC 753 in the following words:

"118. A statute can be amended, partially repealed or wholly repealed by the legislature only. The philosophy underlying a statute or the legislative policy, with the passage of time, may be altered but therefor only the legislature has the requisite power and not the executive. The delegated legislation must be exercised, it is trite, within the parameters of essential legislative policy. The question must be considered from another angle. Delegation of essential legislative function is impermissible. It is essential for the legislature to declare its legislative policy which can be gathered from the express words used in the statute or by necessary implication, having regard to the attending circumstances. It is impermissible for the legislature to abdicate its essential legislative functions. The legislature cannot delegate its power to repeal the law or modify its essential features."

43. *The question that requires to be answered is whether the levy of tax on services is an essential legislative function that cannot be delegated? The answer perhaps lies in the language of Section 94 of the FA itself. Section 94 (1) is the general power given to the central government to make rules to carry out the provisions of Chapter V of the FA. The words 'carry out' necessarily imply providing a mechanism for the levy enforcement and WP (C) 5267 of 2013 Page 19 of 26 collection of service tax. The Rules in this sense are instrumental and intended to achieve the objects of the main statute. "*

54. The Delhi High Court, in the very same decision, held Section 6A as ultra vires Section 94(2)(f) of the Act holding as under;

> *"44. Turning to Section 94 (2), it basically lists out the topics on which rules can be made. It talks of laying down the procedure for carrying out various tasks set out in the FA or to provide the form in which returns are to be filed, appeals preferred. Specific to the case on hand, Section 94 (2) (f) empowers central government to make rules for 'determining' when export of 'taxable services' can be said to take place. It does not empower the central government to determine whether there can be an export of non-taxable services viz., services provided outside the taxable territory. Secondly, it does not empower the central government to make rules levying or making amenable the provision of certain services to service tax. Section 94 (2) (hhh) also permits making rules regarding the 'date for determination of rate of service tax' and 'place of provision of taxable service'. It does not provide for making rules on determination of taxability of a service. 'Subjecting certain types of services to tax is an essential legislative function. In this case, since the FA envisages Chapter V applying only to taxable services, bringing non-taxable services within the ambit of service tax, is impermissible.*
>
> *45. Section 93 B of the FA states that the Rules made under Section 94 would also apply to any other service "in so far as they are relevant to the determination of any tax liability...or for carrying out the provisions of Chapter V" of the FA. However the whole of Chapter V applies only to taxable service. If by means of rules under Section 94, what is not taxable under the FA cannot be made taxable, equally they cannot even by rules under Section 93 B. The words 'any other service' occurring in Section 93 B is subject to Section 64 (3) of the FA that precedes it. It cannot expand the scope of Chapter V itself. As already noted, this is an essential legislative function and cannot be delegated to the central government.*
>
> *46. As already noticed Rule 6A (1) (d) treats even services provided outside the taxable territory i.e. where the place of provision of service is outside India, as an export of 'taxable' service. Since such service by virtue of*

Section 66B read with Section 65 (51) and (52) read with Section 64 (1) and (3) of the FA is not amenable to service tax in the first place, and is therefore not 'taxable' service, Rule 6A is ultra vires the FA. Even Section 94 (2) (hh) of the FA permits central government to determine when there would be an export of 'taxable service' and not 'non-taxable service.' Something which is impermissible under the FA cannot, by means of the rules made thereunder, be brought within the net of service tax.

47. Viewed from another angle, since tour operator services are intermediary services and under Rule 9 of the PPSR 2012 the place of provision of service is the location of the service provider, the package tours service provided by an Indian tour operator to a foreign tourist will, notwithstanding that some part of it is provided outside India, be treated as service provided in India. As a result no Indian tour operator can expect the service rendered by him to a foreign tourist to be considered as an 'export of service' under Rule 6A as he will never be able to meet the requirement of Rule 6A (1) (d) of the ST Rules. Thus under a combination of Rule 6A of the ST Rules and Rule 9 of the PPSR 2012 something which is non-taxable under the FA is sought to be brought to tax.

48. As already noticed since by virtue of Section 64 (3) the whole of Chapter V applies only to taxable services, and Section 66 C of the FA falls in that very chapter, the rules made by the central government under Section 66 C has to necessarily be only in relation to taxable services viz., services provided in the taxable territory of India. The legal fiction of treating service rendered outside India to be a service rendered in India cannot be introduced by way of rules. That too would partake the character of an essential legislative function, which cannot be delegated to the central government. In fact such service cannot be brought to tax without amending Section 64 (3) of the FA.

49. Parliament has for the first time under the Constitution (One Hundred and First Amendment) Act, 2016 effective 8th September 2016 amended Article 286 (1) to provide that there will be tax on the export of services out of the territory of India. Article 286 (2) of the Constitution of India has been amended simultaneously

to provide that Parliament may by law formulate the principles to determine when an export of services takes place in any of the ways mentioned in Article 286 (1). This is another indication that these tasks cannot be delegated to the central government to determine by rules.

50. *While it is one thing to say that tour operator service provided in India is not in the negative list under Section 66 D of the FA and is, therefore, amenable to service tax, it is another to contend that notwithstanding that Chapter V of the FA applies only to taxable services by virtue of Section 64 (3) FA, a non-taxable service that is provided outside the taxable territory can also be included by Rule 6A of the ST Rules in determining what constitutes export of services. Thus not only Rule 6A but even Section 94 (2) (f) of the FA would also be unconstitutional if it were to be interpreted to permit determination of even export of non-taxable services not to talk of bringing to tax what is non-taxable under the FA. "*

55. The Supreme Court in the case of ***General Officer Commanding-in-Chief & Anr. vs. Dr. Subhash Chandra Yadav & Anr.***, reported in *AIR 1988 SC 876*, has observed in para-14 as under;

"This contention is unsound. It is well settled that rules framed under the provisions of a statute form part of the statute. In other words, rules have statutory force. But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void. The position remains the same even though sub-section (2) of section 281 of the Act has specifically provided that after the rules are framed and published they shall have effect as if enacted in the Act. In other words, in spite of the provision of sub-section (2) of section 281, any rule framed under the Cantonment Act has to fulfill the two conditions mentioned above for their validity. The

observation of this Court in Jestamani v. Scindia Steam Navigation Company, [1961] 2 SCR 811, 70 relied upon by Mr. Aggarwal, that a contract of service may be transferred by a statutory provision, does not at all help the appellants. There can be no doubt that a contract of service may be transferred by statutory provisions, but before a rule framed under a statute is regarded a statutory provision or a part of the statute, it must fulfill the above two conditions. Rule 5-C was framed by the Central Government in excess of its rule making power as contained in clause (c) of sub-section (2) of section 280 of the Cantonment Act before its amendment by the substitution of clause (c); it is, therefore, void. "

56. The Supreme Court in the case of ***Union of India vs. S. Srinivasan***, reported in *2012 (281) E.L.T. 3 (S.C.),* has observed in paras-16 to 26, as under;

"16. At this stage, it is apposite to state about the rule making powers of a delegating authority. If a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it. In this context, we may refer with profit to the decision in General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav, AIR 1988 SC 876, wherein it has been held as follows:-

".....Before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."

17. In Additional District Magistrate (Rev.) Delhi Administration v. Shri Ram, AIR 2000 SC 2143, it has been ruled that it is a well recognised principle that the conferment of rule making power by an Act does not

enable the rule making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

18. In Sukhdev Singh v. Bhagat Ram, AIR 1975 SC 1331 the Constitution Bench has held that the statutory bodies cannot use the power to make rules and regulations to enlarge the powers beyond the scope intended by the legislature. Rules and regulations made by reason of the specific power conferred by the statute to make rules and regulations establish the pattern of conduct to be followed.

19. In State of Karnataka and another v. H. Ganesh Kamath etc., AIR 1983 SC 550 it has been stated that it is a well settled principle of interpretation of statutes that the conferment of rule making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.

20. In Kunj Behari Lal Butail and others v. State of H.P. and others, AIR 2000 SC 1069 it has been ruled thus:-

"13. It is very common for the legislature to provide for a general rule making power to carry out the purpose of the Act. When such a power is given, it may be permissible to find out the object of the enactment and then see if the rules framed satisfy the test of having been so framed as to fall within the scope of such general power confirmed. If the rule making power is not expressed in such a usual general form then it shall have to be seen if the rules made are protected by the limits prescribed by the parent act... "

21. In St. Johns Teachers Training Institute v. Regional Director, AIR 2003 SC 1533 it has been observed that a regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and Regulations are all comprised in delegated legislation. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limit of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally

called, a power to fill up details.

22. In Global Energy Ltd. and another v. Central Electricity Regulatory Commission, (2009) 15 SCC 570 this Court was dealing with the validity of clauses (b) and

(f) of Regulation 6-A of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for Grant of Trading Licence and other Related Matters) Regulations, 2004. In that context, this Court expressed thus:-

"It is now a well-settled principle of law that the rule-making power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or disabilities which are not contemplated in terms of the provisions of the said Act."

23. In the said case, while discussing further about the discretionary power, delegated legislation and the requirement of law, the Bench observed thus:-

"The image of law which flows from this framework is its neutrality and objectivity: the ability of law to put sphere of general decision-making outside the discretionary power of those wielding governmental power. Law has to provide a basic level of "legal security" by assuring that law is knowable, dependable and shielded from excessive manipulation. In the contest of rule-making, delegated legislation should establish the structural conditions within which those processes can function effectively. The question which needs to be asked is whether delegated legislation promotes rational and accountable policy implementation. While we say so, we are not oblivious of the contours of the judicial review of the legislative Acts. But, we have made all endeavours to keep ourselves confined within the well-known parameters."

24. In this context, it would be apposite to refer to a passage from State of T.N. and another v. P. Krishnamurthy and others (2006) 4 SCC 517 wherein it has been held thus:-

"16. The court considering the validity of a subordinate

legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."

25. In Pratap Chandra Mehta v. State Bar Council of Madhya Pradesh and others, (2011) 9 SCC 573 while discussing about the conferment of extensive meaning, it has been opined that the Court would be justified in giving the provision a purposive construction to perpetuate the object of the Act while ensuring that such rules framed are within the field circumscribed by the parent Act. It is also clear that it may not always be absolutely necessary to spell out guidelines for delegated legislation when discretion is vested in such delegated bodies. In such cases, the language of the rule framed as well as the purpose sought to be achieved would be the relevant factors to be considered by the Court.

26. *Keeping in view the aforesaid enunciation of law, we think it appropriate to consider the nature, object and scheme of the enabling Act, the power conferred under the rule, the concept of purposive construction and the discretion vested in the delegated bodies. Before bringing the legislation in the year 1994, a task force was constituted to have an overall look on the subjects relating to foreign exchange and foreign trade to suggest the required changes. Considering the significant developments, namely, substantial increase in the foreign exchange reserve, growth in foreign trade, rationalization of tariffs, current account convertibility, liberalization of Indian investments abroad, increased access to external commercial borrowings by Indian Corporates and participation of foreign institutional investors in our stock markets and the spectrum of world economy, the Act was brought into force to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and*

for promoting the orderly development and maintenance of the foreign exchange market in India. To have a balance in the field of economic growth, the Parliament provided the hierarchical system under the Act itself. Section 20 deals with the composition of the Appellate Tribunal, the highest tribunal under the Act. Section 21 deals with the qualification for appointment of Chairperson, Member and Special Director (Appeals). Section 22 provides that the Chairperson and every other Member shall hold office for a term of five years from the date on which he enters upon office. Section 25 deals with resignation and removal. The removal can only take place by order of the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by such person as the President may appoint for this purpose in which the Chairperson or a Member concerned has been informed of the charges against him and given a reasonable opportunity of being heard in respect of such charges. Section 26 provides the Member to act as a Chairperson in certain circumstances. The senior most Member has been empowered to act as Chairperson until the date on which a new Chairperson is appointed in accordance with the provisions of the Act. "

57. The Supreme Court in the case of ***GVK Inds. Ltd. vs. Income Tax Officer***, *2017 (48) S.T.R. 177 (S.C.)*, has observed in paras 41 to 45 as under;

"41. Because of interdependencies and the fact that many extra- territorial aspects or causes have an impact on or nexus with the territory of the nation-state, it would be impossible to conceive legislative powers and competence of national parliaments as being limited only to aspects or causes that arise, occur or exist or may be expected to do so, within the territory of its own nation-state. Our Constitution has to be necessarily understood as imposing affirmative obligations on all the organs of the State to protect the interests, welfare and security of India. Consequently, we have to understand that the Parliament has been constituted, and empowered to, and that its core role would be to, enact laws that serve such purposes. Hence even those extra-territorial aspects or causes, provided they have a nexus with India, should be deemed to be within the domain of legislative

competence of the Parliament, except to the extent the Constitution itself specifies otherwise.

42. A question still remains, in light of the extreme conclusions that may arise on account of the propositions made by the learned Attorney General. Is the Parliament empowered to enact laws in respect of extra-territorial aspects or causes that have no nexus with India, and furthermore could such laws be bereft of any benefit to India? The answer would have to be no.

43. The word "for" again provides the clue. To legislate for a territory implies being responsible for the welfare of the people inhabiting that territory, deriving the powers to legislate from the same people, and acting in a capacity of trust. In that sense the Parliament belongs only to India; and its chief and sole responsibility is to act as the Parliament of India and of no other territory, nation or people. There are two related limitations that flow from this. The first one is with regard to the necessity, and the absolute base line condition, that all powers vested in any organ of the State, including Parliament, may only be exercised for the benefit of India. All of its energies and focus ought to only be directed to that end. It may be the case that an external aspect or cause, or welfare of the people elsewhere may also benefit the people of India. The laws enacted by Parliament may enhance the welfare of people in other territories too; nevertheless, the fundamental condition remains: that the benefit to or of India remain the central and primary purpose. That being the case, the logical corollary, and hence the second limitation that flows thereof, would be that an exercise of legislative powers by Parliament with regard to extra-territorial aspects or causes that do not have any, or may be expected to not have nexus with India, transgress the first condition. Consequently, we must hold that the Parliament's powers to enact legislation, pursuant to Clause (1) of Article 245 may not extend to those extra-territorial aspects or causes that have no impact on or nexus with India.

44. For a legislature to make laws for some other territory would be to act in a representative capacity of the people of such a territory. That would be an immediate transgression of the condition that the Parliament be a parliament for India. The word "for", that connects the territory of India to the legislative powers of

the Parliament in Clause (1) of Article 245, when viewed from the perspective of the people of India, implies that it is "our" Parliament, a jealously possessive construct that may not be tinkered with in any manner or form. The formation of the State, and its organs, implies the vesting of the powers of the people in trust; and that trust demands, and its continued existence is predicated upon the belief, that the institutions of the State shall always act completely, and only, on behalf of the people of India. While the people of India may repose, and continue to maintain their trust in the State, notwithstanding the abysmal conditions that many live in, and notwithstanding the differences the people may have with respect to socio-political choices being made within the country, the notion of the collective powers of the people of India being used for the benefit of some other people, including situations in which the interests of those other people may conflict with India's interests, is of an entirely different order. It is destructive of the very essence of the reason for which Parliament has been constituted: to act as the Parliament for, and only of, India.

45. The grant of the power to legislate, to the Parliament, in Clause (1) of Article 245 comes with a limitation that arises out of the very purpose for which it has been constituted. That purpose is to continuously, and forever be acting in the interests of the people of India. It is a primordial condition and limitation. Whatever else may be the merits or demerits of the Hobbesian notion of absolute sovereignty, even the Leviathan, within the scope of Hobbesian logic itself, sooner rather than later, has to realize that the legitimacy of his or her powers, and its actual continuance, is premised on such powers only being used for the welfare of the people. No organ of the Indian State can be the repository of the collective powers of the people of India, unless that power is being used exclusively for the welfare of India. Incidentally, the said power may be used to protect, or enhance, the welfare of some other people, also; however, even that goal has to relate to, and be justified by, the fact that such an exercise of power ultimately results in a benefit - either moral, material, spiritual or in some other tangible or intangible manner - to the people who constitute India."

58. In view of the aforesaid discussion, the writ application succeeds and is hereby allowed. The Notification Nos.15/2017-ST and 16/2017-ST making Rule 2(1)(d)(EEC) and Rule 6(7CA) of the Service Tax Rules and inserting Explanation-V to reverse charge Notification No.30/2012-ST is struck down as ultra vires Sections 64, 66B, 67 and 94 of the Finance Act, 1994; and consequently the proceedings initiated against the writ applicants by way of show cause notice and enquiries for collecting service tax from them as importers on sea transportation service in CIF contracts are hereby quashed and set aside with all consequential reliefs and benefits.

59. In view of the aforesaid, the connected three applications also succeed and are hereby allowed.

(J. B. PARDIWALA, J)

(A. C. RAO, J)

Vahid