IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 42183 of 2013

(Arising out of Order-in-Original No. 16/2013 dated 28.02.2013 passed by the Commissioner of Service Tax, Newry Towers, No. 2054-I, II Avenue, Anna Nagar, Chennai – 600 040)

M/s. Universal Power Systems Private Limited : Appellant
GEE GEE Universal,
No. 2, 2nd Floor, Mc Nicholas Road,
Chetpet, Chennai – 600 031

VERSUS

The Commissioner of Service Tax : Respondent
Newry Towers, No. 2054-I, II Avenue,
Anna Nagar, Chennai – 600 040

APPEARANCE:

Shri N. Viswanathan, Advocate for the Appellant

Smt. K. Komathi, Additional Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40309 / 2023

DATE OF HEARING: 23.03.2023

DATE OF DECISION: 26.04.2023

Order : [Per Hon'ble Mr. P. Dinesha]

This appeal is filed by the assessee against the impugned Order-in-Original No. 16/2013 dated 28.02.2013 passed by the Commissioner of Service Tax, Chennai and the period of dispute is from May 2006 to March 2011.

2.1 Brief, relevant and undisputed facts, as could be gathered from the Show Cause Notice as well as the Order-in-Original, are that during the course of audit of accounts

of the appellant by the Internal Audit Group, it appears that they had noticed the agreements entered into by the appellant with music directors / music companies' association for procuring ringtones and paid royalty charges at agreed rates per download. It appeared that there were separate agreements between the appellant and various mobile telecommunication operators to provide ringtones, pictures, etc., that could be downloaded by the customers from the mobile platform developed, installed and maintained by the appellant, for which the appellant was entitled for revenue sharing at agreed rates per download by those mobile operators. In addition to the above, it appears that the appellant also received the royalty amount payable / paid to the music directors / music companies from the said mobile operators. It further appeared to the Revenue that the appellant had paid Service Tax under business auxiliary service on the revenue share received, as above, and in certain cases, it appeared that the appellant had paid Service Tax on the gross amount received from the mobile telecommunication operators, which included the royalty charges payable / paid to the music directors / music companies.

2.2 It appears that to a query by the Revenue, the appellant responded vide letter dated 16.08.2011 that Service Tax was not payable on the royalty charges as the same was liable to be paid for the services under Intellectual Property Rights (IPR) service, that too only after the inclusion of "copyright" under IPR service which, however, was specifically excluded from the purview of IPR services prior to that inclusion, which happened in 2010.

2.3 On the above factual background, it appears that the Revenue, entertaining a doubt that since it was the responsibility of the appellant to create and supply ringtones from the mobile platforms and servers developed, installed and maintained by them, to the mobile operators, the expenditure incurred by the appellant, namely, royalty charges paid to the music directors / music

companies was for performing taxable service and hence, Service Tax should have been paid by the appellant on the gross amount including the payment of royalty charges; and further, that the appellant did not satisfy the conditions specified in Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006, read with Explanation 1 to the said Rule. Therefore, the above services rendered by the appellant appeared to the Revenue to be classifiable under 'business support service' with effect from 01.05.2006 to 31.05.2007 and under 'development and supply of content service' with effect from 01.06.2007 onwards.

3.1 Accordingly, a Show Cause Notice dated 14.10.2011 came to be issued. It appears that the authority, after taking note of the payment of Service Tax on the royalty charges under IPR service consequent to the amendment made vide the Finance Act, 2010, proposed to demand the differential Service Tax of Rs.1,13,50,388/- for the period from May 2006 to March 2011 along with applicable interest and penalties taking recourse to the valuation as per Section 67 of the Finance Act, 1994 read with Rule 5 of the Rules *ibid*. It also appears that the Commissioner, in the said Show Cause Notice, has alleged that the appellant had suppressed the facts of collection of royalty charges from their customers in the ST-3 returns filed, which fact would not have come to light but for the audit of accounts and therefore, has sought to justify the invocation of extended period of limitation under Section 73(1) of the Finance Act, 1994.

3.2.1 It appears that the appellant filed detailed objections, in reply to the Show Cause Notice, to each of the proposals therein, vide its letter dated 15.12.2011. It appears, as contended by the Learned Advocate before us, that there was a visit by the officers attached to the Audit Branch in 2009 and again, in 2010, during which it appears that the audit party raised the very same issue of non-payment of Service Tax on the royalty amount received

and paid by the appellant to the music directors / music companies.

3.2.2 It further appears that thereafter, a letter dated 08.08.2011 was also received from the Superintendent of Service Tax, Group V, Chennai-II Division asking for the details (year-wise) of the royalty paid by the appellant to the music directors / music companies for the period 2006-07 to 2010-11 with a similar allegation that Service Tax payable on the royalty amounts was not paid by the appellant, in response to which it appears that the appellant had also filed its detailed reply dated 16.08.2011.

3.2.3 It also appears that one more letter dated 07.09.2011 issued by the Assistant Commissioner of Service Tax, Chennai-III Division was received by the appellant, seeking details, to which also it appears that the appellant had dutifully responded to.

3.2.4 It appears that the appellant had raised a plea that the re-classification of their activity under business auxiliary service or business support service' prior to the introduction of 'development and supply of content service' was not proper, despite the fact of their registering themselves under business auxiliary service and remitting the tax from December 2003. Support on this contention is drawn from an order of the Chennai Bench of the CESTAT in the case of *M/s. Diebold Systems (P) Ltd. v. Commissioner of Service Tax, Chennai [2008 (9) S.T.R. 546 (Tribunal – Chennai)].* They have also referred to the clarification issued by the Ministry of Finance vide letter No. 334/4/2006-TRU dated 28.02.2006 and the Circular No. 109/3/2009-S.T. dated 23.02.2009.

3.2.5 It appears that they also took a plea that the copyright service was a secondary service obtained by them for use by the customers of the telecommunication operators, to whom the development and supply of content service was provided, for which reason they were not liable to Service Tax.

3.2.6 They also appear to have contended that in the Show Cause Notice, the proposal was to demand the differential tax on the ground that the value of taxable service determined by them was not correct since, in terms of Section 67 of the Finance Act, 1994 read with Rule 5 of the Rules *ibid.*, the amounts received as royalty and paid to the music directors / music companies was required to be included in the value. They appear to have further explained that the copyright held by the music associations was an Intellectual Property Right; that the activity of permitting the use of the copyright was specifically brought under the Service Tax net only from 2010 onwards and subjecting the same to Service Tax in their hands was totally improper. For the above reasons, it was also contended that the royalty payments could not be treated as part of the gross amounts received towards taxable service and hence, the invocation of Rule 5 of the Rules *ibid.* was also not proper.

3.2.7 It appears that they have also referred to difference in the ST-3 returns and their financial statements, from where the Revenue has apparently picked up and demanded the alleged differential Service Tax and therefore, there was nothing on record to suggest that there was any suppression to facts, to justify invoking the provisions of Section 73(1) *ibid.*

4. The Adjudicating Authority appears to have considered the explanation in the adjudication proceedings, but however, being not satisfied, has confirmed the demands proposed in the Show Cause Notice vide impugned Order-in-Original No. 16/2013 dated 28.02.2013. The appellant has, therefore, assailed the said Order-in-Original in its appeal before this forum.

5. Today, when the matter was taken up for hearing, Shri N. Viswanathan, Learned Advocate, appeared for the appellant and Smt. K. Komathi, Learned Additional Commissioner, appeared for the Revenue.

6. We have heard the rival contentions and have gone through the documents placed on record, including the order of the lower authority. We have also considered the decisions / orders relied upon by the Learned Advocate for the appellant.

7. After hearing both sides, we find that the issues to be decided by us are: -

(1) Whether the demand for the period from 01.05.2006 to 31.05.2007 under 'business support service' and from 01.06.2007 onwards under 'development and supply of content service' on the appellant is correct?

(2) Whether the royalty charges received and paid by the appellant to the music directors / music companies were includible in the taxable value? and

(3) Whether the Revenue is justified in invoking the larger period of limitation?

8. Paragraph 9.1 of the impugned order reveals that the appellant had offered the tax after registering with the Department under business auxiliary service since December 2003 and filing returns on regular basis. The grievance of the Revenue on this point is that the appellant did not show the collection of royalty from their customers in their ST-3 returns. Against this, the appellant has contended, while explaining the facts in detail, that they had obtained a licence from the South India Music Companies Association, a registered association of music companies holding the registered copyright of sound records, which was authorized to negotiate royalties on behalf of its members, authors, composers, producers and publishers and that no person without any valid licence from them could reproduce, record, synthesize, perform or broadcast the sound recordings and other licensed works

of their members, which otherwise would amount to violation of copyright. In order to deliver various value-added services of the contents of the Music Association referred to above, they had obtained necessary licence and they would, in turn, request their customers to also obtain similar licence from the appellant after paying royalty for using the copyrighted ringtones, etc., from the content belonging to the members of the Music Association. The royalty was collected from their customers i.e., the operators, in addition to the service charges, with the Service Tax payable, and the Service Tax so collected on the service charges was remitted to Government account. That is to say, they did not collect or pay any Service Tax on the amount of royalties collected by them since the same was relating to the copyrights held by the respective owners and that the same was payable only when the same was used / enjoyed.

9.1 It is also a fact borne on the record, at paragraph 9.1 of the Order-in-Original, that but for the audit, the issue could not have come to light. It is an undisputed fact that such audits took place in the years 2009 and 2010, during which time the fact of alleged non-offering of the Service Tax on the royalties was noticed by the audit party. Thus, the Revenue cannot stake a claim that the matter had remained suppressed.

9.2 It is also a matter of record that the differential Service Tax demanded was calculated based on the books of accounts / ST-3 returns maintained / filed by the appellant and no other material evidence was relied upon for invoking the extended period of limitation.

10. In the background of the above discussion, when each and every fact was very much available with the Revenue, what is that which was "suppressed" is not clear. We say so because, the non-payment of Service Tax on royalty having been noticed during audits conducted since 2009 appears to have been pointed to the appellant and

the appellant appears to have replied thereto. We, however, would not like to get into the merits or otherwise of such reply, but the fact remains that the Revenue was very much aware of these facts.

11. The proviso to Section 73(1) of the Act, which allows the invocation of extended period of limitation, reads as under: -

> *"Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —*
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> *(a) fraud; or*
>
> *(b) collusion; or*
>
> *(c) wilful mis-statement; or*
>
> *(d) suppression of facts; or*
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> *(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,*
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> *by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year" the words "five years" had been substituted."*

12.1 It is thus clear from the above proviso that the reason of fraud or collusion or suppression of facts, etc., "with intent to evade payment of service tax" is a necessary ingredient. However, the Revenue has only stated suppression of facts with an intention to evade payment of Service Tax when, clearly, the facts and figures were only collected from the books / ST-3 returns of the appellant.

12.2 Further, we also note that the books of accounts and financial records were periodically audited by the Revenue authorities right from the year 2009 onwards and for the

above reasons, it is very difficult for us to accede to the Revenue's stand that the appellant had suppressed facts with an intent to evade payment of Service Tax. It would have been a different matter altogether had the appellant even collected the Service Tax on the royalties as well and pocketed it, but it is not so here in the case on hand.

13.1 Be that as it may, the Show cause Notice proposed to demand the differential Service Tax alleging that they were liable to pay Service Tax on the gross amount including the expenditure incurred towards payment of royalty charges and thus, that the appellant had failed to satisfy the conditions under Explanation 1 to Rule 5(2) of the Valuation Rules *(supra).* The Revenue has referred to Section 67(3) *ibid.,* to say that the "gross amount" shall include any amount received towards taxable service and has also referred to Section 67(1) *ibid.,* to say that the Service Tax chargeable with reference to its value shall be the gross amount charged.

13.2 The Hon'ble Supreme Court has considered the scope of Rule 5 *ibid.,* with reference to Section 67 of the Act, in the case of *Union of India v. M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. [2018 (10) G.S.T.L 401 (S.C.)]* and has laid down the law, as under: -

> *"21. Undoubtedly, Rule 5 of the Rules, 2006 brings within its sweep the expenses which are incurred while rendering the service and are reimbursed, that is, for which the service receiver has made the payments to the assessees. As per these Rules, these reimbursable expenses also form part of 'gross amount charged'. Therefore, the core issue is as to whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as done by Rule 5. As noted above, prior to April 19, 2006, i.e., in the absence of any such Rule, the valuation was to be done as per the provisions of Section 67 of the Act.*
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> *24. In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other*

words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. ***We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service****.*

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26. It is trite that rules cannot go beyond the statute. In Babaji Kondaji Garad, this rule was enunciated in the following manner :

> *"Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the byelaw, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."*

27. The aforesaid principle is reiterated in Chenniappa Mudaliar holding that a rule which comes in conflict with the main enactment has to give way to the provisions of the Act.

28. It is also well established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held in Taj Mahal Hotel :

> *The Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect."*

(Emphasis supplied by us, for clarity)

The effect of the above decision of the Hon'ble Apex Court is that the decision of the Hon'ble Delhi High Court in the case of *M/s. Intercontinental Consultants & Technocrats Pvt. Ltd. v. Union of India* reported in *2013 (29) S.T.R. 9 (Del.),* wherein the Hon'ble High Court had struck down the provisions of Rule 5 *ibid.* as going beyond the charging provisions, has been upheld.

13.3 The demands were proposed, as indicated above, by the lower authority, by holding that the payment of royalty was an expenditure incurred by the appellant on behalf of the service recipient. The differential tax has been arrived at as per Section 67 of the Finance Act, 1994 read with Rule 5 of the Rules *ibid*. In view of the above decision of the Hon'ble Supreme Court, the Revenue could not have proposed and confirmed the demand under Section 67 of the Act read with Rule 5 *ibid.,* since it is by virtue of the mode of computation provided here that the differential tax was arrived at and demanded and this runs counter to the *ratio decidendi* of the Hon'ble Apex Court in *M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. (supra).* Hence, the demand cannot sustain on merits.

14. The cumulative effect of our above discussions is that neither on limitation nor on merit could the demand impugned before us be sustained and hence, the impugned order is set aside.

15. In the result, the appeal is allowed with consequential benefits, if any, as per law.

(Order pronounced in the open court on **26.04.2023**)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd