Service Tax: Ships whether ‘goods’ applicability of new taxing entry: third Member resolves differences

The respondents are engaged in providing taxable services under the categories of 'Maintenance or Repairs' and 'Business Auxiliary Service'. They filed refund claim on the ground that they had inadvertently paid service tax during the period from 16.6.2005 to 31.3.2006 on the entire amount paid to them by M/s. ONGC to whom they had provided services whereas the service tax was actually payable only on the commission received by them.

Respondent also informed the department that they had not received refund of service tax from ONGC and, therefore, the doctrine of unjust enrichment is not applicable as the amount was shown in their balance sheet as service tax receivable.

The adjudicating authority rejected the refund on the ground that the entire expenditure incurred by the respondent forms an integral part of the taxable value. The contention of the respondent that the costs incurred on reimbursable basis have to be excluded was held untenable on the ground that the respondent had not fulfilled the conditions of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006 to be qualified as a pure agent of the service recipient. Contention that the activity is covered under “Ship Management service” which became taxable w.e.f 1.5.2006 was also rejected.

The Commissioner (Appeals) held that the activity under the said contract was not confined to 'Maintenance or Repair' but was a composite service comprising Operations and Maintenance Management; that in view of Section 65A(2) of the Finance Act, 1994, 'Ship Management' service gives essential character to the service rendered by the respondent and, therefore, the tax paid inadvertently of Rs.16,40,79,318/- by the respondent under the category 'Maintenance or Repair' service for the period prior to 1.5.2006 is refundable.

This is the reason why Revenue is before the CESTAT

There was a difference of opinion between the Members of the Division Bench and, therefore, the matter came to be referred to the third Member.

The third Member (Technical) on reference heard the matter in December 2015 and the Majority order was issued recently.

At the outset, it was observed by the Member (T) that any discussion on the aspect of valuation is predicated only upon the tax being leviable during the relevant period.

Thereafter, the Member extracted the following provisions of the FA, 1994 –

- Section 65 (105) (zzg) incorporated in Finance Act, 1994 with effect from 1st July 2003, is:
    - “ To a customer by any person in relation to maintenance or repair”

And section 65(64) defined ‘maintenance or repair' thus:

'Means any service provided by –

(i) Any person under a contract or agreement; or

(ii) A manufacturer or any person authorized by him, in relation to maintenance or repair or servicing of any goods or equipment, excluding motor vehicle'

With goods having the meaning assigned to it in section 2(7) of Sale of Goods Act, 1930 which is:

'every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.'
& observed.

- The tax levy is not crystallized by the mere execution of a contract promising to render service on the agreed terms; section 65 (105) (zzg) makes it necessary that some repair or maintenance must have been undertaken for a consideration for the tax liability to arise.

- It may not be entirely correct in describing a ship or vessel as equipment though equipment may be fitted on board rendering the ascertainment thereof by the original authority to be that much more complex. It is also moot whether a ship or vessel may, with some degree of accuracy, be described as ‘goods.'

- During the relevant period, taxability was limited to repair, maintenance or servicing of goods which were restricted to moveable property; this itself is defined in the General Clauses Act as all property excluding immoveable property which does not, per se, enable resolution of the dilemma of being so described.

- Land is, undoubtedly, immoveable property, Definition of ‘goods' in the Sale of Goods Act, 1930 is, however, attracted to certain appendages of land to the extent that they can be separated from land before sale as part of contract of sale. Hence, structures that can be detached from the land are considered to be moveable.

- Logically, the oceans and the seas are equivalences of land and the inextricability of a vessel or ship from the waters should bring them within the ambit of immoveable. Ships before launch and for breaking up are goods but vessels or ships that are afloat are not goods except for the time that they are the subject of a sale agreement. That ships, vessels and motor vehicles need not exclusively be goods is also apparent in section 2 of Customs Act, 1962; they could also be conveyances.

- As conveyances, ships/vessels and motor vehicles move easily on water or land but, not being goods that are amenable to severance from land/water, are not distinguishable from immoveable property.

- Consequently, the legislative intent to tax ‘repairs or maintenance' of conveyance under section 65(105) (zzg) of Finance Act, 1994 may not be so apparent. Motor vehicles were specifically excluded from its purview owing to existence of another taxable entry on 1st July 2003.

- Exclusion may not have been considered to be necessary for ships/vessels because the taxable entry came into effect on a much later date.

  "To any person, under a contract or agreement, by any other person, in relation to ship management service"

  With effect from 1 st May 2006 and the definition of 'ship management service' includes repair of ships. This incorporation would, therefore, reinforce the conclusion that the scope of section 65 (105) (zzg) supra did not extend to conveyances including ships.

- It is clear that the later entry was not carved out of an existing entry; neither was there any partial recasting of an existing entry to bring any part of any existing entry within the newer entry. The two entries continue to have an independent existence after 1 st May 2006.

- From the decision in M/s Indian National Ship owners' Association - 2009-TIOL-150-HC-MUM-ST and the circumstances of the present dispute, it would appear that there is no alternative but to limit the tax to the new entry in section 65(105)(zzzt) with effect from 1 st May 2006 and, consequently, to desist from application of another entry that may have no proximate relation with activities under the contract.

Concurring with the Member (Judicial) in holding that the activities of respondent were not taxable during the period for which refund was sought, the third Member (T) viewed that the appeal of Revenue fails.

Consequently, the Majority decision is –

The impugned order passed by Commissioner (Appeals), upholding the classification of service in question under 'Ship Management Service' under Section 65(85a) of Finance Act, 1994, during the impugned period, is upheld and Revenue appeal is dismissed.

The service provided during the disputed period from 16.06.2005 to 31.03.2006, is not taxable, being composite service, and cannot be vivisected also on the ground that 'Ship Management Service' is not taxable prior to 01.05.2006.

The appellant is entitled to refund of service-tax paid for the period prior to 01.05.2006.

The adjudicating authority is directed to disburse the refundable amount with interest as per Rules, within 45 days from receipt of this order.

The interest on refund is payable from the date, on expiry of 3 months from the date of application of refund.