

**IN THE HIGH COURT OF SINDH, KARACHI**

Present: **Mr. Justice Muhammad Junaid Ghaffar**  
**Mr. Justice Agha Faisal**

1.	C. P. No. D-5220 / 2017	Sami Pharmaceuticals (Pvt) Ltd.	Petitioner
2.	C. P. No. D-5222 / 2017	Esquae Services (Pvt) Ltd.	Petitioner
3.	C. P. No. D-5223 / 2017	Hilton Pharma (Pvt) Ltd.	Petitioner
4.	C. P. No. D-5224 / 2017	M/s Healthtek (Pvt) Ltd	Petitioner
5.	C. P. No. D-5244 / 2017	M/s Archroma Pakistan Ltd.	Petitioner
6.	C. P. No. D-5273 / 2017	Dollar Industries (Pvt.) Ltd.	Petitioner
7.	C. P. No. D-5281 / 2017	M/s Connect Logistic (Pvt.) Ltd.	Petitioner
8.	C. P. No. D-5282 / 2017	M/S AGP Limited	Petitioner
9.	C. P. No. D-5283 / 2017	M/s Quick Food Industries (Pvt.) Ltd.	Petitioner
10.	C. P. No. D-5284 / 2017	M/s Medic aids Pakistan (Pvt.) Ltd.	Petitioner
11.	C. P. No. D-5285 / 2017	M/s Fulcrum (Pvt.) Ltd.	Petitioner
12.	C. P. No. D-5449 / 2017	M/s Aspin Pharma (Pvt.) Ltd.	Petitioner
13.	C. P. No. D-5450 / 2017	M/s SICPA Inks Pakistan (Pvt.) Ltd.	Petitioner
14.	C. P. No. D-5451 / 2017	M/s Credit & Commerce Consultants (Pvt.) Ltd.	Petitioner
15.	C. P. No. D-5452 / 2017	M/s OBS Pakistan (Pvt.) Ltd.	Petitioner
16.	C. P. No. D-5477 / 2017	M/s Shabbir Tiles & Ceramics Ltd.	Petitioner
17.	C. P. No. D-5478 / 2017	M/s Hasnain Tanveer Associates (Pvt.) Ltd.	Petitioner
18.	C. P. No. D-5479 / 2017	M/s Atco Laboratories Ltd.	Petitioner
19.	C. P. No. D-5586 / 2017	Uniferoz (Pvt.) Ltd.	Petitioner
20.	C. P. No. D-5587 / 2017	Gasco Engineering (Pvt.) Ltd.	Petitioner
21.	C. P. No. D-5588 / 2017	Aisha Steel Mills Ltd.	Petitioner
22.	C. P. No. D-5603 / 2017	Nabi Qasim Industries (Pvt.) Ltd.	Petitioner
23.	C. P. No. D-5612 / 2017	M/s Jeddah Polymer	Petitioner
24.	C. P. No. D-5613 / 2017	M/s Power Cement Ltd.	Petitioner
25.	C. P. No. D-5614 / 2017	M/s Institute of Business Management	Petitioner
26.	C. P. No. D-5645 / 2017	Martin Dow Ltd.	Petitioner
27.	C. P. No. D-5690 / 2017	M/s Human Resources Solution (Pvt.) Ltd.	Petitioner
28.	C. P. No. D-5691 / 2017	M/s Ask Development (Pvt.) Ltd.	Petitioner
29.	C. P. No. D-5692 / 2017	M/s HRSG Outsourcing (Pvt.) Ltd.	Petitioner
30.	C. P. No. D-5693 / 2017	M/s Shahsons (Pvt.) Ltd.	Petitioner
31.	C. P. No. D-5694 / 2017	Prime Human Resources Services (Pvt.) Ltd.	Petitioner
32.	C. P. No. D-5723 / 2017	Rondon Enterprises (Pvt.) Ltd.	Petitioner
33.	C. P. No. D-5733 / 2017	M/s Mehtab Hussain	Petitioner
34.	C. P. No. D-5734 / 2017	M/s HCMS Global (Pvt.) Ltd.	Petitioner
35.	C. P. No. D-5735 / 2017	M/s Geofam Pharmaceuticals & Others	Petitioner
36.	C. P. No. D-5856 / 2017	Getz Pharma (Pvt.) Ltd.	Petitioner
37.	C. P. No. D-5926 / 2017	Pak Qatar General Takaful Ltd.	Petitioner
38.	C. P. No. D-5927 / 2017	Pak Qatatr General Takaful Ltd.	Petitioner
39.	C. P. No. D-5936 / 2017	Indus Pharma (Pvt.) Ltd.	Petitioner
40.	C. P. No. D-5937 / 2017	National Refiner (Pvt.) Ltd.	Petitioner
41.	C. P. No. D-6017 / 2017	M/s Human Capital	Petitioner
42.	C. P. No. D-6220 / 2017	M/s 3-E Business Solution (Pvt.) Ltd.	Petitioner
43.	C. P. No. D-6226 / 2017	M/s Ilyas Associates	Petitioner
44.	C. P. No. D-6268 / 2017	M/s Pak Petrochemical Industries (Pvt.) Ltd.	Petitioner
45.	C. P. No. D-6453 / 2017	M/s Ashraf Ali & sons (Pvt.) Ltd.	Petitioner
46.	C. P. No. D-6611 / 2017	M/s UDL Distribution (Pvt.) Ltd.	Petitioner
47.	C. P. No. D-6622 / 2017	Prolink Consulting (Pvt.) Ltd.	Petitioner
48.	C. P. No. D-6866 / 2017	M/s ICI Pakistan Ltd & Others	Petitioner
49.	C. P. No. D-6888 / 2017	M/s Anwar Choudhry & Sons (Pvt.) Ltd.	
50.	C. P. No. D-7453 / 2017	M/s Bank Al-Habib Ltd.	Petitioner

51.	C. P. No. D-7610 / 2017	M/s Al-Hafiz & Co. (Pvt.) Ltd.	Petitioner
52.	C. P. No. D-7683 / 2017	M/s The Care Takers (Pvt.) Ltd.	Petitioner
53.	C. P. No. D-7987 / 2017	Soneri Bank Ltd.	Petitioner
54.	C. P. No. D-505 / 2018	GMB Ras Service (Pvt.) Ltd.	Petitioner
55.	C. P. No. D- 2968 / 2018	Cavish Security Service (Pvt.) Ltd.	Petitioner
56.	C. P. No. D-5146 / 2018	M/S Avalon Service (Pvt.) Ltd.	Petitioner
57.	C. P. No. D-5151 / 2018	M/s Fams Security Services	Petitioner
58.	C. P. No. D-6126 / 2018	M/s ACS HR Services (Pvt.) Ltd.	Petitioner
59.	C. P. No. D-6238 / 2018	M/s ATCO Healthcare (Pvt.) Ltd.	Petitioner
60..	C. P. No. D-443 / 2019	M/s General Tyre & Rubber Co.	Petitioner
61.	C. P. No. D-4472 / 2019	Data Runner (Pvt.) Ltd.	Petitioner
62.	C. P. No. D-4473 / 2019	3C Corporation (Pvt.) Ltd.	Petitioner
63.	C. P. No. D-5265 / 2019	Sanofi – Aventis Pakistan Ltd.	Petitioner
64.	C. P. No. D-6608 / 2019	Mehran Management Service	Petitioner
65.	C. P. No. D-6612 / 2019	SIR Consultants (Pvt.) Ltd.	Petitioner
66.	C. P. No. D-6613 / 2019	Sidat Hyder Morshed Associates (Pvt.) Ltd.	Petitioner
67.	C. P. No. D-8126 / 2019	M/s H R First (Pvt.) Ltd.	Petitioner
68.	C. P. No D-344 / 2020	M/s Meskey & Femtee (Pvt.) Ltd.	Petitioner
69.	C. P. No. D-494 / 2020	M/s Hillrest Solutions (Pvt.) Ltd.	Petitioner
70.	C. P. No. D-495 / 2020	M/s The Resources Expert (Pvt.) Ltd.	Petitioner
71.	C. P. No. D-1014 / 2020	AGP Ltd.	Petitioner
72.	C. P. No. D-1468 / 2020	M/s Aitkenstuart Pakistan (Pvt.) Ltd.	Petitioner

Vs.

Province of Sindh &amp; Others

Respondents

**Advocates for the Petitioners:**

M/s. Hyder Ali Khan, Ovais Ali Shah, Qazi Umair Ali, Anwar Kashif Mumtaz, Ammar Athar Saeed, Usman Alam, Ghazanfar Ali Jatoi, Khalid Mehmood Siddiqui, Ghulam Rasool Korai, Zaheer ul Hassan, Imran Ali Abro, Nadir Hussain Abro, Syed Hamza Hashmi, Jamshed Abbasi, Ajeet Kumar, Muhammad Altaf, S. Sultan Ahmed, Taimur Ahmed Qureshi Advocates for Petitioners.

**Advocates for the Respondents:**

M/s Malik Naeem Iqbal, Rashid Anwar, Ghulam Murtaza Korai, Dr. Shah Nawaz, Irfan Mir Halepota, Shamshad Ahmed Narejo.

Mr. Zamir Khalid Commissioner Legal SRB.  
Syed Zainul Abidin Shah, Deputy Commissioner, SRB  
Mr. Naeemullah Bhutto Assistant Commissioner.  
Mr. Rashid Ali Shaikh Assistant Commissioner.

**Dates of hearing:****27.10.2020, 17.11.2020.****Date of Order:****17.11.2020**

## J U D G M E N T

**Muhammad Junaid Ghaffar, J.** All these Petitions involve a common controversy, and are therefore, being decided through this common Judgment. The Petitioners are either service providers of labor and manpower and or its recipients and are aggrieved by Notification No. SRB-3-4/12//2017 dated 05.06.2017 issued by Sindh Revenue Board (“**SRB**”) pursuant to which, proviso to Rule 42(E) of the Sindh Sales Tax Rules, 2011 (“**2011 Rules**”) has been deleted / omitted, and as a consequence thereof, now the Petitioners have been asked to pay Sales Tax on such services on the gross amount of receipts, including the amounts which are reimbursed to the service providers in lieu of salaries and wages etc.

2. Mr. Anwar Kashif Mumtaz<sup>1</sup> Advocate has contended that the Petitioner is a service provider of manpower and human resources and enters into agreement with the recipient, which separately includes the reimbursed amount of expenses and the quantum of service charges and prior to the omission of the proviso in Rule 42(E) was paying Sales Tax on the quantum of such service charges, however, now SRB is demanding Sales Tax on the entire gross amount of the invoice; that in law the entire amount cannot be taxed; but only the service charges; that the Petitioner only renders services and has got nothing to do with the amount of salaries and wages reimbursed to the Petitioner; hence, is not liable to pay Sales Tax on the entire amount; that the act of SRB is in violation of Article 18 of the Constitution and beyond the mandate of the legislature; and therefore, the same be declared as unlawful and ultra vires.

3. Mr. Qazi Umair Ali<sup>2</sup> Advocate has contended that the amount of salary is already liable to Income Tax by the Federal Government and therefore, SRB has no lawful authority to tax such amount which otherwise is not a service; that in terms of Sindh Sales Tax on Services Act, 2011, (“**Act**”) reimbursed amounts cannot be taxed; that the amendment in Section 72 of the Act is also ultra vires as instead of the Government all legislative powers have been taken over by SRB; that this offends and violates Article 77, 127, 129 and 130 of the Constitution of

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<sup>1</sup> in C. P. No. D-6608/2019 and other connected Petitions

<sup>2</sup> in C. P. No. D-443/2019 and other connected Petitions

the Islamic Republic of Pakistan (“**Constitution**”); that through special procedure or rules, no tax can be imposed; that this deletion of proviso is otherwise discriminatory as in other categories of service providers including but not limited to Rule 37 of the 2011 Rules, all reimbursed amounts are excluded for the purpose of Sales Tax on services; hence the Petitions be allowed.

4. Mr. Hyder Ali Khan<sup>3</sup> Advocate has contended that even omission of the proviso cannot have any further effect as the levy of tax is to be governed by the Act and not by the Rules, inasmuch as the taxable event is the rendering of service and through Rules, value of taxable supply cannot be fixed or determined; that no charge or taxing event can be introduced through a Rule; that though ordinarily, it is only understood that a provision in the Act can be ultra vires to the Constitution, but there are Judgments to the effect that even an amendment to the Act can be ultra vires to the Act itself; that Section 2(55A) is a definition clause and cannot go beyond the scope of service and its value as provided in the Act, which are governed by Sections 3, 5 & 8 of the Act; that salary on its own is not a sale of service which otherwise, is being taxed as an income by the Federal Government; that the impugned action of SRB in introducing tax on the entire amount by implication and deletion of the proviso is ultra vires and unlawful and is liable to be declared so. In support he has relied upon the cases reported as<sup>4</sup>.

5. Mr. Ovais Ali Shah<sup>5</sup> Advocate in C. P. No. D- 6612/202019 and other connected matters has contended that the tax has to be charged on the amount of consideration received in lieu of the services provided and not otherwise; that Section 4(3)(a) of the Act while defining an economic activity excludes the activities of an employee providing services in that capacity to an employer and therefore, by implication or otherwise, such amount of salary paid to an employee cannot be taxed for rendering of services; that the tax as provided under the Act is to be charged on the amount of service and not on the amount of invoice or the revenue being generated by the service provider, and therefore, the impugned action of

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<sup>3</sup> In C. P. No. D-7453/2017 and other connected matters

<sup>4</sup> Cyanamid Pakistan Ltd. V. Collector of Customs (Appraisalment) & Others (PLD 2005 SC 495), Engineer Iqbal Zafar Jhagra and another V. Federation of Pakistan & another (2013 SCMR 1337), Muhammad Amin Muhammad Bashir Limited V. Government of Pakistan & Others (2015 SCMR 630), Zulfiqar Ahmed Bhuta and 15 others V. Federation of Pakistan & Others (PLD 2018 SC 370), Hirjina Salty Chemicals (Pak) Ltd. V. Union Council Gharo and Others (1982 SCMR 522) and All-India Federation of Tax Practitioners and Others V. Union of India & Others (2007 7 SCC 527).

<sup>5</sup> in C. P. No. D- 6612/202019 and other connected matters

the SRB is liable to be declared as illegal, unlawful and beyond the mandate of the Act.

6. Mr. Ajeet Sundar<sup>6</sup> Advocate has contended that the scope of Section 72 for making rules by SRB is to regulate the mechanism and to achieve the purpose of the Act; but not to impose any tax through rules, whereas, the machinery provision cannot override the act itself. In support he has relied upon<sup>7</sup>.

7. While controverting these submission, Mr. Rashid Anwar appearing on behalf of SRB has referred to Section 8 of the Act and has contended that it is the total amount received by the service provider which is to be taxed and the value of taxable service has been clearly provided in Section 5 *ibid*; that Rule 42(E) simply provides a procedure for calculation and payment of Sales Tax on Labor and Manpower Supply Services, whereas, the proviso is only omitted to bring the rules in conformity with the Act itself; that no new tax has been introduced through omission of the proviso; that even earlier also, the gross amount was taxable, but due to mistake in the proviso thereof, the service provider and recipient were being benefited unlawfully and when it was realized that the proviso was not in conformity with the Act; hence, has been omitted; that only a wrong benefit being availed has been taken away and it cannot be construed so as to imposition of any new tax; that in terms of Section 2(55A) a service provider providing service to someone else has to pay Sales Tax on the consideration received and in this case it is the entire consideration which is taxable; that the Petitioner which includes the service providers as well as the recipients by this mechanism are avoiding obligation of various acts and Labor Laws which are otherwise applicable upon such industrial establishments; that the service recipients are avoiding the liability of various payments to the workers as well as the Government which otherwise would have been applicable under the labor and other acts including but not limited to Provident Fund, Gratuity Fund, payments to Employees Old Age Benefit Institution and Sindh Social Security Department etc.; that in fact the proviso in question was not in conformity with the Act, which SRB is duly empowered under law to withdraw; hence, no case is made out; that

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<sup>6</sup> in C. P. No. 6783/2017

<sup>7</sup> Muhammad Amin Muhammad Bashir Limited V. Government of Pakistan (2015 PTD 1100), M/s Flying Cement Company Limited V. The Appellate Tribunal Inland Revenue (PTCL 2017 CL-146) and National Electric Power Regulatory Authority V. Faisalabad Electric Supply Company Limited (2016 SCMR 550).

some of the Petitioners also deal with unregistered service providers and hence, become withholding agents under the Sindh Sales Tax Special Procedure (Withholding) Rules 2014, (“**2014 Rules**”) and are therefore, required to withhold tax from the amount invoiced or billed or demanded or charged by such unregistered service providers and therefore, it is the entire gross amount which is taxable. That insofar as reliance on Rule 37 of the 2011 Rules is concerned, the same is misconceived inasmuch as the reimbursements which are being excluded are paid on behalf of the clients of the service providers and therefore, same has no application on the case of the Petitioners, and therefore all petitions are liable to be dismissed.

8. We have heard all the learned Counsel and perused the record. The Petitioners before us can be categorized into two. One set of petitioners are the service providers engaged in providing services of supply of labor and manpower. The other category includes various industries which are engaged in manufacturing and acquire service from various service providers by out sourcing different jobs; including the job of cleaning, maintenance and other requirements. Such services provided and rendered are defined under Section 2(55A)<sup>8</sup> of the Act which includes services provided or rendered by a person to another person for a **consideration** for use of the services of a person or an individual employed, hired or supplied by him. Similarly, a taxable service<sup>9</sup> is a service listed in the Second Schedule to this Act which is provided by a registered person from its registered office or place of business in Sindh in the

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<sup>8</sup> “Section 2(55A) “labor and manpower supply services” includes the services provided or rendered by a person to another person, for a consideration, for use of the services of a person or an individual, employed, hired or supplied by him;”

<sup>9</sup> “3. Taxable Service: (1) A taxable service is a service listed in the Second Schedule to this Act, which is provided:

- (a) by a registered person from his registered office or place of business in Sindh;
- (b) in the course of an economic activity, including in the commencement or termination of the activity.

*Explanation:* -- This sub-section deals with services provided by registered persons, regardless of whether those services are provided to resident persons or non-resident persons.

(2) A service that is not provided by a registered person shall be treated as a taxable service if the service is listed in the Second Schedule to this Act and [is provided to a resident person] by a non-resident person in the course of an economic activity]: --

- [(a) \* \* \*
- [(b) \* \* \*]

*Explanation:* This sub-section deals with services provided by non-resident persons to resident persons [whether or not the said person is an end consumer of such services].

(3) For the purposes of sub-section (2), where a person has a registered office or place of business in Sindh and another outside Sindh, the registered office or place of business in Sindh and that outside Sindh shall be treated as separate legal persons.

(4) The Board may, [\*\*\*] by notification in the official Gazette, prescribe rules for determining the conditions under which a particular service or class of services will be considered to have been provided by a person from his registered office or place of business in Sindh.”

course of an **economic activity** including in the commencement or termination of the activity and this includes services provided by registered persons, regardless of whether those services are provided to resident persons or non-resident persons. The other sub-sections for the present purposes are not of much significance. Value of a taxable service<sup>10</sup> is the **consideration** in money including all Federal and Provincial duties and taxes, if any, which the person providing a service receives from the recipient of the service but excluding the amount of sales tax under this Act, provided that in case the consideration for a service is in kind or is partly in kind and partly in money, the value of the service shall mean the open market price of the service as determined under section 6 of the Act. The provisions of other sub-sections are also not relevant for the present purposes. Finally, the scope of tax<sup>11</sup> provides that subject to the provisions of this Act, there shall be charged, levied and collected a tax known as sales tax **on the value of a taxable service** at the rate specified in the Schedule in which the taxable service is listed. Sub-section (2) then provides the authority to the Board or the Government

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<sup>10</sup> **“5. Value of a Taxable Service (1)** The value of a taxable service is:

(a) the consideration in money including all Federal and Provincial duties and taxes, if any, which the person providing a service receives from the recipient of the service but excluding the amount of sales tax under this Act:

Provided that—

- i. in case the consideration for a service is in kind or is partly in kind and partly in money, the value of the service shall mean the open market price of the service as determined under section 6 excluding the amount of sales tax under this Act; [\* \* \*]
  - (ii) in case the person provides the service and the recipient of the service are associated persons and the service is supplied for no consideration or for a consideration which is lower than the price at which the person provides the service to other persons who are not associated persons, the value of the service shall mean the price at which the service is provided to such other persons who are not associated persons excluding the amount of sales tax; [and]
  - (iii) in case a person provides a service for no consideration or for a consideration is lower than the price at which such a service is provided by other persons, the value of the service shall mean the open market price for such a service;
- (b) in case of trade discounts, the discounted price excluding the amount of sales tax under this Act, provided the tax invoice shows the discounted price and the related tax and the discount allowed is in conformity with customary business practice;
- (c) in case there is reason to believe that the value of a service has not been correctly declared in the invoice or for any special nature of transaction it is difficult to ascertain the value of a service, the open market price, as determined under section 6;
- (d) notwithstanding any of the above, where the Board deems it necessary it may, by notification in the official Gazette, fix the value of any service or class of services and for that purpose fix different values for different classes or description of the same or similar types of services;
- Provided that where the value at which the service is provided is higher than the value fixed by the Board, the value of the service shall, unless otherwise directed by the Board, be the value at which the service is provided.”

<sup>11</sup> **“8. Scope of tax: (1)** Subject to the provisions of this Act, there shall be charged, levied and collected a tax known as sales tax on the value of a taxable service at the rate specified in the Schedule in which the taxable service is listed.

(2) The [Board with the approval of Government] may, subject to such conditions and restrictions as it may impose, by notification in the official Gazette, declare that in respect of any taxable service provided by a registered person or a class of registered persons, the tax shall be charged, levied and collected at such higher or lower rate or rates as may be specified in the said notification for any given tax period.”

for a higher or lower rate of tax as may be specified through Notification. Insofar as the levy of charge and sales tax on services provided in question are concerned, there is no dispute that the service in question is covered under heading 9829.0000 of the Second Schedule to the Act in respect of taxable services. The Rule<sup>12</sup> (as of today after omission of the proviso) in dispute provides the procedure for calculation and payment of sales tax on Labor and Manpower supply services and states that the provisions of this rule shall apply to the persons providing or rendering Labor and Manpower Supply Services on the tariff heading 9829.0000 and the tax payable on the said services. Sub-rule (2) provides that every person providing or rendering Labor and Manpower Supply Service shall register himself under section 24 of the Act. Sub-Rule (3) provides that the value of taxable services for the purposes of levy of sales tax **shall be the gross amount charged for the services provided or rendered**. The proviso<sup>13</sup> before its omission (w.e.f. 1.7.2017) provided that the amount of salary and allowance of the labor and manpower supply by such persons to a service recipient where reimbursed by the service recipient on actual basis shall be excluded from the value of services for the purposes of payment of tax under this rule.

9. After 18<sup>th</sup> amendment through Act No. X of 2010, under Article 142(a) of the Constitution Majlis-e-Shoora (Parliament) i.e. Federal

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<sup>12</sup> **“42E. Procedure for cancellation and payment of sales tax on Labor and manpower Supply Services. ---(1)** The provisions of this rule shall apply to the persons providing or rendering labor and manpower supply services (tariff heading 9829.0000) and the tax payable on the said services.

(2) Every person providing or rendering labor and manpower supply service shall register himself under section 24 of the Act read with the provisions of Chapter-II of these rules.

(3) The value of taxable services for the purposes of levy of sales tax shall be the gross amount charged for the services provided or rendered.

[\* \* \*]

(4) The provisions of section 7 of the Act, read with sub section (2) of section 17 thereof shall apply in relation to the tax payable by person.

(5) Every such person shall issue a serially-numbered invoice or bill of charges or an electronically generated invoice or bill of charges for each transaction in terms of sub-rule (4) of this rule. The invoice or the bill of charges shall contain the particulars as specified in sub rule (1) of rule 29 of these rules. A copy of the invoice or the bill of charges shall be given to the person to whom such services are provided or rendered and one copy shall be retain by the service provider in the bound book of invoices or bill of charges.

[\* \* \*]

(6) Every such person (service provider) shall maintain account of all services provided or rendered by him and shall also maintain the record prescribed in section 26 of the Act and sub-rule (2A) of rule 29 of these rules. He shall also maintain record of the contract or the agreement made between the service provider and the service recipient.

(7) The tax involved on the services provided or rendered by persons engaged in the economic activity of labor and manpower supply service during a tax period shall be paid by the service provider in the manner prescribed in Chapter-III of these rules by the 15<sup>th</sup> day of the month following the tax period to which it relates. The tax return shall be filed by the service provider in the manner prescribed in Chapter-III of these rules within 3 days from the due date prescribed for payment of tax.”

<sup>13</sup> “Provided that the amount of salary and allowances of the labor and manpower supplied by such persons to a service recipient, where reimbursed by the service recipient on actual basis, shall be excluded from the value of the services for the purpose of payment of tax under this rule.”

Government shall have exclusive power to make laws with respect to any matter in the Federal Legislative List (Fourth Schedule), whereas, in terms of Article 142(c) a Provincial Assembly shall, and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List. This would mean that matters not mentioned in the Federal Legislative List would then be within the legislative powers of the Provinces. This in fact has changed the earlier position of the Constitution having legislative list for Federation and a Concurrent List both for Federation and Provinces. As of today, insofar as levy of sales tax on services and the enactment of any Act thereon is concerned, the power to do so is being derived from addition of the exception to Entry 49 *ibid*, whereby it has been categorically provided that in any circumstances the Federation will not have any authority to make laws for levy and collection of any sales tax on services. It is in this backdrop that the Act in question has been enacted as reflected from its preamble. After going through the aforesaid provisions of law as well as the rules, it clearly transpires that insofar as the authority to levy tax on service is concerned, though the same now rests with the Province pursuant to the exception to Entry 49<sup>14</sup> of the Fourth Schedule to the Constitution; but it needs to be appreciated that such authority to impose tax is only on services and not on goods or otherwise. It is only the quantum of service rendered or supplied which can be taxed by Province. By no stretch of imagination either by rules or otherwise, it can be extended to any other goods or amount which is not falling within services. Any other definition or attempt to levy such tax would then be in violation of the mandate provided as an exception in entry 49 of the Fourth Schedule to the Constitution.

10. It may also be observed that in absence of anything to the contrary, ordinarily, the quantum of service charge is a matter between the service provider and the recipient. For the present purposes no other value and taxable service in question has either been notified or otherwise fixed or determined by SRB. It is not the case of SRB that the service provider is hiding or concealing, or for that matter, is issuing an invoice of his service charges which is lesser than what the service recipient is paying to the service provider. The dispute which has now arisen is after the omission of the proviso from Rule 42(E) of the 2011 Rules as now SRB is

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<sup>14</sup> Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed [except sales tax on services]

demanding the service provider to charge sales tax on the entire gross amount of service, invoiced or billed to the service recipient. Such invoice includes the amount of expenses reimbursed by the service recipient in respect of salary and allowances of the labor and manpower supplied and the charges of services so rendered by the service provider. In fact, in our considered view, though the proviso had earlier provided certain clarification as to the levy of tax on services in question; however, to us it seems superfluous as whether the proviso remains there or not. We are fully in agreement with the contention of one of the Petitioners Counsel<sup>15</sup> that even the omission of the proviso cannot have any implication so as to require the Petitioners to pay sales tax on the entire gross amount in question as it is only the quantum of service rendered and the amount thereof which could be taxed under the Act. Such contention appears to be correct and in line with the spirit and the various provisions of the Act as discussed hereinabove. It is settled law that by a rule making power no tax could be imposed or levied as it is only the charging provision of the Act which can do so. If we are to read sub-rule 3 of Rule 42(E) after omission of the proviso, even then, it appears that what SRB is explaining through the rule is that the value of taxable service for the purpose of levy of sales tax shall be the gross amount charged for the services provided or rendered and in any case, it cannot, through the rule making power, require the service provider to charge sales tax on the amount which are being reimbursed in lieu of salary and wages. The tax would still remain to be chargeable for the services provided or rendered and in no way a service provider could be asked to charge sales tax even on the amount which does not include the value or the price for the services rendered; but only pertains to the reimbursed amounts of salary and wages. It is between the service provider and the recipient to arrive at a mechanism for issuing of a sales tax invoice. At best the service provider and the service recipient can mutually agree to have two separate invoices; one for the reimbursement of expenses i.e. salary and wages, and the other for the purposes of reimbursement of the actual service provided or rendered, or even a single invoice, showing both these amounts separately; but in any case the tax is only chargeable or payable on the amount of services rendered and not otherwise.

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<sup>15</sup> Mr. Hyder Ali Khan

11. Insofar as the argument of learned Counsel for SRB that Rule 37 pertaining to the services rendered by Customs House Clearing Agents and Ship-Chandlers is somewhat couched in a different language and would not apply to the present case of the Petitioners appears to be misconceived inasmuch as any service provider who issues an invoice which includes both the amounts; that of his services and any other reimbursement or charges paid by or on behalf of the service recipient, would not ipso facto render the entire invoice amount to be taxed. If that be so, then it would go beyond the mandate of the Province to levy tax only on service and would transgress into the domain of the Federation. By no means this could be permitted. At times, the service provider incurs expenses or pays for such expenses on behalf of the service recipient in different modes and manner, and if he issues an invoice to claim reimbursements along with the amount of services rendered; this would not make him liable to pay sales tax on the entire amount of invoice and as rightly contended by one the Petitioners Counsel<sup>16</sup> that the levy of tax is on the service and not either on the revenue or the amount of the invoice. It may also be noted that tax can only be levied pursuant to a charging provision. In the Act such incidence has been provided in s.3 i.e. taxable services listed in the 2<sup>nd</sup> Schedule provided by a registered person in the course of an economic activity, whereas, per s.4(3)(a), economic activity explicitly excludes the activities of an employee providing services in that capacity to an employer. Now merely for the reason that the service recipient is engaging service providers and is also paying for the salaries of employees engaged by the service provider, would that render such payments liable to sales tax. The answer is a big No. What the Act by itself has excluded under s.4(3)(a), cannot then be included by way of Rules or clarification so as to create a charging provision. It is not in dispute that the amount or payment in question is in respect of salary and wages of employees; be that paid by the service provider or the recipient. Once by law i.e. s.4(3)(a) it is out of the ambit of an economic activity, then in no manner it could be brought into a taxable service; hence, any clarification or rule could not require payment of sales tax on it. The salary and wages in question is being paid by the service provider to the employee, and then is being reimbursed. And that is it. By implication that since the amount is being paid to the service provider on issuance of an invoice or for the reason that by this

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<sup>16</sup> Mr. Ovias Ali Shah

methodology applicability of some other laws is being avoided, does not make it a taxable service or to be included in the value of taxable service.

12. The principles of delegated legislation are very clear and hardly require any reiteration. They are intended to enforce law and not to override it. In brief, they entitle the delegate to carry out the mandate of the legislature, either by framing rules, or regulations, which translate and apply substantive principles of law set out in the parent legislation or by recourse to detailed administrative directions and instructions for the implementation of the law<sup>17</sup>. It is by now a well-established principle of interpretation of statutes that Rules which are merely subordinate legislation, cannot override or prevail upon the provisions of the parent statute<sup>18</sup>. 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 bye-law, 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<sup>19</sup>. Rule which comes in conflict with the main enactment has to give way to the provisions of the Act<sup>20</sup>. 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<sup>21</sup>.

13. In India the Service Tax is levied and governed by Sections 66<sup>22</sup> & 67<sup>23</sup> of Chapter-V of the Finance Act, 1994 and provides for levy of tax and the valuation of taxable services. Section 67<sup>24</sup> was thereafter

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<sup>17</sup> 2015 SCMR 630 (Muhammad Amin Muhammad Bashir Ltd V Government of Pakistan)

<sup>18</sup> 1982 SCMR 522 (Harjina Salt Chemicals (Pak) Ltd., v Union Council Gharo)

<sup>19</sup> Babaji Kondaji Garad v. Nasik Merchants Co-operative Bank Ltd., (1984) 2 SCC 50

<sup>20</sup> C IT v. S. Chenniappa Mudaliar, (1969) 74 ITR 41

<sup>21</sup> Andhra Pradesh v Taj Mahal Hotel (1971) 82 ITR 44

<sup>22</sup> there shall be levy of tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in Sub-clauses...of Section 65 and collected in such manner as may be prescribed."

<sup>23</sup> For the purposes of this Chapter, the value of any taxable service shall be the gross amount charged by the service provider for such service provided or to be provided by him.

<sup>24</sup> (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable,

the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or

amended with effect from 01.05.2006. Similarly, at the relevant time, Rule-5<sup>25</sup> of the Service Tax (Determination of Value) Rules, 2006 defined the value of Service Tax and the reimbursable amount. Various services providers challenged the above Rule-5 before the High Court of Delhi by praying that such Rule was ultra vires to the Constitution and Sections 66 & 67 of the Finance Act, 1994 inasmuch as it had travelled beyond the scope of these two sections, which provided for chargeability and value of service tax. These petitions were allowed by Delhi High Court vide Judgment dated 30.11.2012<sup>26</sup>. The same was impugned before the Supreme Court of India and in the Judgment reported as<sup>27</sup> the Appeal filed by the Union of India was dismissed by upholding the judgment of the Delhi High Court. The precise reason for doing so and which has also nexus with the present proceedings was that Rule-5, instead of limiting itself within the mandate of the Act, had travelled beyond it and tried to levy tax on the value of service, which was not provided in the Act itself. The relevant finding<sup>28</sup> of the Supreme Court in the said judgment

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after provision of such service.

(4) Subject to the provisions of Sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Explanation: For the purpose of this section,

(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;

(b) "money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travelers cheque, money order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value;

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of accounts of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.

<sup>25</sup> (1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service.

(2) Subject to the provisions of sub Rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely:

- the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;
- the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;
- the recipient of service is liable to make payment to the third party;
- the recipient of service authorizes the service provider to make payment on his behalf;
- the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;
- the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;
- the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and
- the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

Explanation 1: For the purposes of sub Rule (2), "pure agent" means a person who -

- enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;
- neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;
- does not use such goods or services so procured; and
- receives only the actual amount incurred to procure such goods or services.

Explanation 2: For the removal of doubts it is clarified that the value of the taxable service is the total amount of consideration consisting of all components of the taxable service and it is immaterial that the details of individual components of the total consideration is indicated separately in the invoice.

<sup>26</sup> 196 (2013) DLT 17 (Intercontinental Consultants v Union of India)

<sup>27</sup> AIR 2018 Supreme Court 3754 (Union of India vs. M/s. Inter-continental Consultants and Technocrats Pvt. Ltd.),

<sup>28</sup> "23. Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various Sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of

squarely applies to the present case inasmuch as SRB also intends to enlarge the scope of value of service in question beyond what the Act provides after omission of the proviso to Rule 42(E) *ibid*. In fact, the amended provision of s.67 *ibid* had a much broader scope as against the Act in question before us; nonetheless, it was held that it is only the quantum of service which can be taxed and not otherwise. It may also be noted that subsequently s.67 was further amended by the legislature vide Finance Act, 2015, whereby clause (a) which dealt with “consideration” was suitably amended to by itself include the reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service.

14. In view of hereinabove facts and circumstances of the case and the law so discussed we are of the view that the impugned action and interpretation arrived at by SRB is contrary to the Act itself, whereas, even if the proviso stands omitted, in our considered view it is only the quantum and value of service which is taxable in these cases and not the amount being reimbursed by the service recipient and therefore by means of a short order dated 17.11.2020<sup>29</sup> we had allowed all listed petitions and these are the reasons thereof.

**J U D G E**

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the 'value of taxable services'. Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.

24. In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a *fortiori*, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 01, 2006) or after its amendment, with effect from, May 01, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasized that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as *quid pro qua* for rendering such a service.

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

<sup>29</sup> For reasons to be recorded later, all listed petitions are allowed by declaring that the value of service (of taxable supply) for the purposes of levy of sales tax on the petitioner's / service providers / recipient (in respect of Labor and Manpower) shall be the amount of net receipt of service charges received on actual basis exclusive of all reimbursed amounts of salary and allowances.

Arshad/

**J U D G E**