

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Reserved on: 1st November, 2012*
Date of Decision: 30th November, 2012

+ **W.P. (C) 6370/2008**

INTERCONTINENTAL CONSULTANTS AND
TECHNORATS PVT. LTD.

.....Petitioner

Through: Mr. J. K. Mittal, Mr. Arun Gulati and
Mr. V. K. Jha, Advocate.

versus

U.O.I. & ANR.

.....Respondents

Through: Ms. Sonia Sharma and Mr. V. C. Jha,
Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.:

In this writ petition, the petitioner challenges the constitutional validity of Rule 5 of the Service Tax (Determination of Value) Rules, 2006 to the extent it includes re-imburement of expenses in the value of taxable services for the purposes of levy of service tax. The petitioner also contends, in the alternative that the said rule is *ultra vires* of the provisions of Section 66 and 67 of Chapter V of the Finance Act, 1994.

2. The petitioner is a company providing consulting engineering services. It specialises in highways, structures, airports, urban and rural infrastructural projects and is engaged in various road projects outside and inside India. In the course of the carrying on of its business, the petitioner rendered consultancy services in respect of highway projects to the National Highway Authority of India (NHAI). The petitioner receives payments not only for its service but is also reimbursed

expenses incurred by it such as air travel, hotel stay, etc. It was paying service tax in respect of amounts received by it for services rendered to its clients. It was not paying any service tax in respect of the expenses incurred by it, which was reimbursed by the clients. On 19.10.2007, the Superintendent (Audit) Group II (Service Tax), New Delhi issued a letter to the petitioner on the subject “service tax audit for the financial year 2002-03 to 2006-07” and informed the petitioner as follows: -

“During the scrutiny of the records it was observed that you have been charging and depositing service tax on remuneration income only in the case of invoices issued in the name of M/s. NHAI (National Highway Authority of India). As per the provision of sub-rule (i) of Rule 5 of the Service Tax (Determination of value) Rules, (Notification number 12/2006-ST, dated 19.04.2006) the service tax is liable to be charged on the gross value including reimbursable and out of pocket expenses like travelling, lodging and boarding etc.

As per records, it was found that you have short paid Service Tax amounting to ₹1,30,26,572/- for the financial year 2006-07. You are hereby directed to deposit the due service tax along with interest @ 13% under section 73 and 75 respectively of the Finance Act, 1994 within 15 days.

The matter may please be treated MOST URGENT/ TIME BOUND.”

3. In response to the above letter the petitioner provided monthwise details of professional income as well as reimbursable out of pocket expenses for the period mentioned in the letter. On 17.03.2008, a show-cause notice was issued by the Commissioner, Service Tax Commissionerate by which the petitioner was asked to show-cause why service tax of ₹3,55,80,738/- should not be recovered from it along with interest and penalty under Sections 76 to 78 of the Finance Act, 1994. The aforesaid figure of service tax was arrived at in the following manner in the show-cause notice.

Period	Reimbursable Income	Rate of Service Tax	Service Tax Payable		Total
			Service Tax	Edu. Cess	
Oct'02 to April'03	99,42,433/-	5%	4,97,122/-	-	4,97,122/-
May'03 to Aug'04	4,87,83,282/-	8%	39,02,662/-	-	39,02,662/-
Sep'04 to March'06*	13,22,66,980/-	10.2%	1,32,26,698/-	2,64,534/-	1,34,91,232/-
April'06 to March'07	14,45,23,874/-	12.24%	1,73,42,865/-	3,46,857/-	1,76,89,722/-
<u>Total</u>	33,55,16,569/-		3,49,69,347/-	6,11,391/-	3,55,80,738/-

*(Note: - For the period prior to April'06, the reimbursable income on account of traveling lodging and boarding have not been taken into account).

4. The basis of the show-cause notice was the provisions of sub-rule (1) of Rule 5 of the Service Tax (Determination of Value) Rules, 2006. It was the case of the respondent that under the aforesaid rule, service tax was to be charged on the gross value including reimbursable and out of pocket expenses such as travelling, boarding and lodging, transportation, office rent, office supplies and utilities, testing charges, etc. which, according to the respondent, were “essential expenses for providing the taxable service of consulting engineers”. It was stated in the show-cause notice that prior to 19.04.2006, under Section 67 of the Finance Act, 1994, the value of taxable services in relation to consulting engineer services provided or to be provided by a consulting engineer to the client shall be the gross amount charged from the client in respect of engineering services.

5. The petitioner has filed the present writ petition with three prayers; (i) quashing rule 5 in its entirety of the Service Tax (Determination of Value) Rules, 2006 to the extent it includes the reimbursement of expenses in the value of taxable service for the purpose of charging service tax and (ii) declaring the rule to be unconstitutional and *ultra vires* Sections 66 and 67 of the Finance Act, 1994 and (iii) for quashing the impugned show-cause notice-cum-demand dated 17.03.2008 holding that it is illegal, arbitrary, without jurisdiction and unconstitutional.

6. There is no dispute that the petitioner obtained service tax code from service tax authorities for future payment of service tax w. e. f. 01.07.2002, nor is it in dispute that on 09.07.2007 the petitioner got itself registered with the service tax department as consulting engineering services and was paying service tax since 1997 regularly.

7. Service tax was introduced by Chapter V of the Finance Act, 1994. Section 65 (105) defined “taxable service”. It contains several clauses but, herein we are concerned only with clause (g) which is applicable to the petitioner. Any service provided to any person, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering including the discipline of computer hardware engineering is defined to be a taxable service under this clause. The charge of service tax is effectuated in Section 66 of the Act. It says that “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”. Section 67 of the Act as it stood before being substituted by the Finance Act, 2006, w. e. f. 01.05.2006 was as under: -

“67. Valuation of taxable services for charging service tax

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

Explanation 1.- For the removal of doubts, it is hereby declared that the value of a taxable service, as the case may be, includes,-

(a) the aggregate of commission or brokerage charges by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock-broker to any sub-broker.

(b) the adjustments made by the telegraph authority from any deposits made by the subscriber at the time of application for telephone connection or pager or facsimile or telegraph or telex or for leased circuit;

(c) the amount of premium charged by the insurer from the policy holder;

(d) the commission received by the air travel agent from the airline;

(e) the commission, fee or any other sum received by an actuary, or intermediary or insurance intermediary or insurance agent from the insurer;

(f) the reimbursement received by the authorized service station from manufacturer for carrying out any service of nay motor car, light motor vehicle or two wheeled motor vehicle manufactured by such manufacturer; and

(g) the commission or any amount received by the rail travel agent from the Railways or the customer,

But does not include-

(i) initial deposit made by the subscriber at the time of application for telephone connection or pager or facsimile (FAX) or telephone or telex or for leased circuit;

(ii) the cost of unexposed photography film, unrecorded magnetic tape or such other storage devices, if any, sold to the client during the course of providing the service;

(iii) the cost of parts or accessories, or consumable such as lubricants and coolants, if any, sold to the customer during the course of service or repair of motor cars, light motor vehicle or two wheeled motor vehicles;

(iv) the airfare collected by air travel agent in respect of service provided by him;

(v) the rail fare collected by rail travel agent in respect of service provided by him;

(vi) the cost of parts or other material, if any, sold to the customer during the course of providing maintenance or repair service;

(vii) the cost of parts or other material, if any, sold to the customer during the course of providing erection, commissioning or installation service; and

(viii) interest on loan.

Explanation 2 – Where the gross amount charged by a service provider is inclusive of service tax payable, the value of taxable service shall be such amount as with the addition of tax payable, is equal to the gross amount charged.

Explanation 3.- For the removal of doubts, it is hereby declared that the gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.”

8. The new Section 67 which came into effect from 01.05.2006 is shorter and it is as follows: -

“67. Valuation of taxable services for charging service tax

(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 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.”

9. The Service Tax (Determination of Value) Rules, 2006, hereinafter referred to as “Rules”, was brought into effect from 01.06.2007. Rule 5 provided for “inclusion in or exclusion from value of certain expenditure or costs”. It is necessary to reproduce the rule, which is as follows: -

“5. Inclusion in or exclusion from value of certain expenditure or costs

(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 authorises 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.

Illustration 1 : X contracts with Y, a real estate agent to sell his house and thereupon Y gives an advertisement in television. Y billed X including charges for Television advertisement and paid service tax on the total consideration billed. In such a case, consideration for the service provided is what X pays to Y. Y does not act as an agent behalf of X when obtaining the television advertisement even if the cost of television advertisement is mentioned separately in the invoice issued by X. Advertising service is an input service for the estate agent in order to enable or facilitate him to perform his services as an estate agent.

Illustration 2 : In the course of providing a taxable service, a service provider incurs costs such as traveling expenses, postage, telephone, etc., and may indicate these items separately on the invoice issued to the recipient of service. In such a case, the service provider is not acting as an agent of the recipient of service but procures such inputs or input service on his own account for providing the taxable service. Such expenses do not become reimbursable expenditure merely because they are indicated separately in the invoice issued by the service provider to the recipient of service.

Illustration 3 : A contracts with B, an architect for building a house. During the course of providing the taxable service, B incurs expenses such as telephone charges, air travel tickets, hotel accommodation, etc., to enable him to effectively perform the provision of services to A. In such a case, in whatever form B recovers such expenditure from A, whether as a separately itemised expense or as part of an inclusive overall fee, service tax is payable on the total amount charged by B. Value of the taxable service for charging service tax is what A pays to B.

Illustration 4 : Company X provides a taxable service of rent-a-cab by providing chauffeur-driven cars for overseas visitors. The chauffeur is given a lump sum amount to cover his food and overnight accommodation and any other incidental expenses such as parking fees by the Company X during the tour. At the end of the tour, the chauffeur returns the balance of the amount with a statement of his expenses and the relevant bills. Company X charges these amounts from the recipients of service. The cost incurred by the chauffeur and billed to the recipient of service constitutes part of gross amount charged for the provision of services by the company X.”

10. The contention of the petitioner that Rule 5(1) of the Rules, in as much as it provides that all expenditure or costs incurred by the service provider in the course of providing the taxable service shall be treated as consideration for the taxable service and shall be included in the value for the purpose of charging service tax goes beyond the mandate of Section 67 merits acceptance. Section 67 as it stood both before 01.05.2006 and after has been set out hereinabove. This section quantifies the charge of service tax provided in Section 66, which is the charging section. Section 67, both before and after 01.05.2006 authorises the determination of the value of the taxable service for the purpose of charging service tax under Section 66 as the gross amount charged by the service provider for such service provided or to be provided by him, in a case where the consideration for the service is money. The underlined words i.e. “for such service” are important in the setting of Section 66 and 67. The charge of service tax under Section 66 is on the value of taxable services. The taxable services are listed in Section 65(105). The service provided by the petitioner falls under clause (g). It is only the value of such service that is to say, the value of the service rendered by the petitioner to NHAI, which is that of a consulting engineer, that can be brought to charge and nothing more. The quantification of the value of the service can therefore never exceed the gross amount charged by the service provider for the service provided by him. Even if the rule has been made under Section 94 of the Act which provides for delegated legislation and authorises the Central Government to make rules by notification in the official gazette, such rules can only be made “for

carrying out the provisions of this Chapter” i.e. Chapter V of the Act which provides for the levy, quantification and collection of the service tax. The power to make rules can never exceed or go beyond the section which provides for the charge or collection of the service tax.

11. In the aforesaid backdrop of the basic features of any legislation on tax, we have no hesitation in ruling that Rule 5 (1) which provides for inclusion of the expenditure or costs incurred by the service provider in the course of providing the taxable service in the value for the purpose of charging service tax is *ultra vires* Section 66 and 67 and travels much beyond the scope of those sections. To that extent it has to be struck down as bad in law. The expenditure or costs incurred by the service provider in the course of providing the taxable service can never be considered as the gross amount charged by the service provider “for such service” provided by him. The illustration 3 given below the Rule amplifies what is meant by sub-rule (1). In the illustration given, the architect who renders the service incurs expenses such as telephone charges, air travel tickets, hotel accommodation, etc. to enable him to effectively perform the services. The illustration, therefore, says that these expenses are to be included in the value of the taxable service. The illustration clearly shows how the boundaries of Section 67 are breached by the Rule. Apart from travelling beyond the scope and mandate of the Section, the Rule may also result in double taxation. If the expenses on air travel tickets are already subject to service tax and is included in the bill, to charge service tax again on the expense would certainly amount to double taxation. It is true that there can be double taxation, but it is equally true that it should be clearly provided for and intended; at any rate, double taxation cannot be enforced by implication. A Constitution Bench of the Supreme court in *Jain Brothers v. Union of India*, (1970) 77 ITR 107 observed as follows, expounding the principles relating to double taxation: -

“It is not disputed that there can be double taxation if the legislature has distinctly enacted it. It is only when there are general words of taxation and they have to be interpreted, they

cannot be so interpreted as to tax the subject twice over to the same tax (vide Channell J. in Stevens v. Durban-Roodepoort Gold Mining Co. Ltd.). The Constitution does not contain any prohibition against double taxation even if it be assumed that such a taxation is involved in the case of a firm and its partners after the amendment of section 23(5) by the Act of 1956. Nor is there any other enactment which interdicts such taxation. It is true that section 3 is the general charging section. Even if section 23(5) provides for the machinery for collection and recovery of the tax, once the legislature has, in clear terms, indicated that the income of the firm can be taxed in accordance with the Finance Act of 1956 as also the income in the hands of the partners, the distinction between a charging and a machinery section is of no consequence. Both the sections have to be read together and construed harmoniously. It is significant that similar provisions have also been enacted in the Act of 1961. Sections 182 and 183 correspond substantially to section 23(5) except that the old section did not have a provision similar to sub-section (4) of section 182. After 1956, therefore, so far as registered firms are concerned the tax payable by the firm itself has to be assessed and the share of each partner in the income of the firm has to be included in his total income and assessed to tax accordingly. If any double taxation is involved the legislature itself has, in express words, sanctioned it. It is not open to any one thereafter to invoke the general principles that the subject cannot be taxed twice over.”

12. There is ample authority for the proposition that the rules cannot override or overreach the provisions of the main enactment. In *Central Bank of India v. Their Workmen*, AIR 1960 SC 12, a Constitution Bench of the Supreme Court was concerned with the Banking Companies Act, 1949. Section 10 of the Act prohibits the grant of industrial bonus to bank employees in as much as such bonus is remuneration which takes the form of a share in the profits of the banking company. Rule 5 of the Banking Companies Rules, 1949, which were statutory rules, required a banking company to send periodically to the principal office of the Reserve Bank a statement in Form-I showing the remuneration paid during the previous calendar year to officers of the company. In a footnote to the Form, it was stated that remuneration includes salary, house allowance, dearness allowance, bonus, fees and allowances to Directors, etc. The contention was that Rule 5 enlarged the meaning and content of Section 10. The contention was repelled but

not on the ground that the rule can validly enlarge the content of the Section, but on the ground that the Section itself used the word “remuneration” in the widest sense. It was however acknowledged by the Court that the Rule cannot go beyond the statute. The relevant observations are: -

“We do not say that a statutory rule can enlarge the meaning of S.10; if a rule goes beyond what the Section contemplates, the rule must yield to the statute. We have, however, pointed out earlier that S.10 itself uses the word “remuneration” in the widest sense, and R.5 and Form-I are to that extent in consonance with the Section.”

It has not been suggested in the present case that the words “consideration in money” or “the gross amount charged” themselves have been used in section 67 in the widest sense of including the amounts collected by the service provider for his travel, hotel stay, transportation and other out of pocket expenses. These words have been defined in the Explanation below the section and it is significant that the out of pocket expenses such as travel, hotel stay, transportation etc. have not been included in those expressions.

13. In *Babaji Kondaji Garad v. Nasik Merchants Co-operative Bank Ltd.*, (1984) 2 SCC 50, the Supreme Court (Three-Judge Bench) observed as under: -

“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.”

14. A learned single Judge of this Court in *Devi Datt v. Union of India*, AIR 1985 Delhi 195 held that though the language of Rule 102 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955 was wider in its ambit and covered the properties comprised in the compensation bill and entrusted to a managing officer for management, “*but obviously the said rule has to be construed*

in the light of the parent Section and it cannot be construed as enlarging the scope of Section 19 itself. It is a well settled canon of construction that the Rules made under a statute must be treated exactly as if they were in the Act and are of the same effect as if contained in the Act. There is another principle equally fundamental to the rules of construction, namely, that the Rules shall be consistent with the provisions of the Act. Hence, Rule 102 has to be construed in conformity with the scope and ambit of Section 19 and it must be ignored to the extent it appears to be inconsistent with provisions of Section 19". In making these observations, the learned single Judge referred to and followed the judgment of the Supreme Court in *State of Uttar Pradesh v. Babu Ram Upadhyay*, AIR 1961 SC 751.

15. In the tax jurisprudence the position is no different and it has been held in *CIT v. S.Chenniappa Mudaliar*, (1969) 74 ITR 41 that if a rule clearly comes into conflict with the main enactment or if there is any repugnancy between the substantive provisions of the Act and the Rules made therein, it is the rule which must give way to the provisions of the Act. In *Bimal Chandra Banerjee v. State of M.P. and Ors.*, (1971) 81 ITR 105, Hegde J. was examining the provisions of the M.P. Excise Act, 1915. The legislature levied excise duty only on those articles which came within the scope of Section 25 of that Act. The rule-making authority, which was the State Government, purported to levy duty on articles which did not fall within the scope of the Section. Holding this act of the State Government to be *ultra vires* the Section, it was observed as under: -

“No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule making authority. A rule making authority has no plenary power. It has to act within the limits of the power granted to it.

16. In *CIT, Andhra Pradesh v. Taj Mahal Hotel*, (1971) 82 ITR 44 it was held by the Supreme Court that

“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.”

17. In *Commissioners of Customs and Excise v. Cure and Deeley Ltd.*, (1961) 3 WLR 788 (QB) the facts were these. Section 33(1) of the Finance Act, 1940 of the United Kingdom enacted that the Commissioners might make regulations providing for any method for which provision appeared to them to be necessary for the purpose of giving effect to the provisions of the Act and of enabling them to discharge the functions. The Commissioners framed Regulation 12 of the Purchase Tax Regulations, 1945. It stated that if any person failed to furnish a return as required by the regulation or furnished an incomplete return, then the Commissioners could determine the amount of tax appearing to them to be due from such person, and demand payment thereof. Such amount determined by the Commissioners was to be deemed to be the proper tax due from such person and the tax had to be paid within 7 days of the demand. The regulations did not provide for any appeal or for taking up the decision of the Commissioners to any Court of law. The validity of the regulation came up for consideration before the Court. Sachs J., observed as follows: -

“To my mind a Court is bound before reaching a decision on the question whether a regulation is intra vires to examine the nature, objects, and scheme of the piece of legislation as a whole, and in the light of that examination to consider exactly what is the area over which powers are given by the section under which the competent authority is purporting to act.”

It was ultimately held by the Court that Regulation 12 was *ultra vires* on three grounds. One of the grounds, which is relevant for our purpose, was that the regulation rendered the subject liable to pay such tax as the Commissioner believed to be due whereas the charging Section imposed a liability to pay such tax as in law was due.

18. Section 66 levies service tax at a particular rate on the value of taxable services. Section 67 (1) makes the provisions of the section subject to the

provisions of Chapter V, which includes Section 66. This is a clear mandate that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies a tax only on the taxable service and nothing else. There is thus in built mechanism to ensure that only the taxable service shall be evaluated under the provisions of 67. Clause (i) of sub-section (1) of Section 67 provides that the value of the taxable service shall be the gross amount charged by the service provider “for such service”. Reading Section 66 and Section 67 (1) (i) together and harmoniously, it seems clear to us that in the valuation of the taxable service, nothing more and nothing less than the consideration paid as *quid pro quo* for the service can be brought to charge. Sub-section (4) of Section 67 which enables the determination of the value of the taxable service “in such manner as may be prescribed” is expressly made subject to the provisions of sub-section (1). The thread which runs through Sections 66, 67 and Section 94, which empowers the Central Government to make rules for carrying out the provisions of Chapter V of the Act is manifest, in the sense that only the service actually provided by the service provider can be valued and assessed to service tax. We are, therefore, undoubtedly of the opinion that Rule 5 (1) of the Rules runs counter and is repugnant to Sections 66 and 67 of the Act and to that extent it is *ultra vires*. It purports to tax not what is due from the service provider under the charging Section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure and costs which are incurred by the service provider “in the course of providing taxable service”. What is brought to charge under the relevant Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes far beyond the charging provisions and cannot be upheld. It is no answer to say that under sub-section (4) of Section 94 of the Act, every rule framed by the Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule. As pointed out by the Supreme Court in *Hukam Chand v. Union of India*, AIR 1972 SC 2427: -

“The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act.”

Thus Section 94 (4) does not add any greater force to the Rules than what they ordinarily have as species of subordinate legislation.

19. For the above reasons we quash the impugned show-cause notice and allow the writ petition with no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

NOVEMBER 30, 2012

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