Section 67 of the Act has made provision for valuation of taxableservice for charging service tax. According to Section 67(1)(a) of the Act where there is a monetary consideration paid to provide taxableservice, the assessable value for levy of service tax is 'gross amount' charged by the Service provider for thetaxable service provided. Sub-section (2) of the said section has made provision to include the amount ofservice tax to the gross valuie of consideration where taxable service provided is inclusive of service tax. The term 'consideration' for the valuation of taxable service is defined by explanation appearing under Section 67 meaning that consideration includes any amount that is payable for thetaxable service provided or to be provided.

The liability of the appellant arose under the Act in terms of Section 66A of the Act as recipient of service of Engineering Consultancy from the Consultant abroad. Rule 7 (1) of the Service tax(determination of value) Rules, 2006 which came into force with effect from 19.4.2006 has made provision in respect of services covered by Section 66A of the Act. According to this Rule, measure of value for taxation of service covered by that Section shall be such amount as is equal to the actual consideration charged for the services provided or to be provided.

Although the Show Cause Notice dated 19.11.2002 refers to para 5.1 at page 19 (Appendix 2 Terms and conditions) of the Agreement and a copy thereof was enclosed to the said notice, that paper was not available in the paper book filed by the appellant. The show cause notice indicates that on perusal of the agreement entered into between the assessee and M/s. Prodrive Automation Technology (Europe) Ltd (one of the service providers abroad) it appears that the price set out in the Consultancy Agreement as was examined by notice issuing authority noticed that to be net of all duties, taxes and other Government charges which, where applicable were payable in addition to the price. Accordingly, Revenue held that income deducted at source formed part of gross amount of consideration paid to foreign consultant. It appears that there were 22 service providers as per Annexure to Show Cause Notice appearing at page 58 to 61 of the Paper Book filed by the appellant. But no agreement copy was available on record or Paper Book. There was no pleading on material facts by the appellant as to how the facts in issue suggest and support defence of appellant that income tax deducted at source shall not form part of the gross amount of taxable service received when Rule 7(1) of Service Tax (Determination of Value) Rules, 2006 provides that actual consideration charged for the service provided or to be provided shall be assessable value in respect of services covered by Section 66A of the Act. Therefore, the expression what is 'actual consideration charged for service provided or to be provided' shall depend on the facts and circumstances of each case. Further, in terms of Section 66A of the Act the service covered by that section is treated as if the recipient had himself provided the service in India. Thus by such legal fiction the consideration inclusive of income tax deducted at source shall be assessable value for the purpose of the Act in the hands of the service recipient. Since the Show Cause Notice states that the agreement with M/s. Prodirve Automation Technology (Europe) Ltd. in terms of para 5.1 at page 19 (Appendix 2 Terms and Conditions) of the agreement speaks of the price of contract payable was net of taxes and taxes if any payable in addition to the price of contract was payable by the payer thereon as price of the contract and such factual aspect remaining unrebutted by appellant clearly establishes that tax payable in India was to form part of contract price. Thus consideration charged for the service provided shall include income taxdeducted at source as per terms of contract and is in accord with Section 66A read with Rule 7(1) of the Service Tax (Determination of Value) Rules 2006 for the

reason that net price of contract agreed to be paid to foreign consultant was to include income deducted at source thereon to be price also. Thus the tax demand on the assessable value comprising the consideration inclusive of income tax deducted at source relating to the period (9.4.2006 to September 2007) which was agreed to be price of the contract sustains.

CESTAT, CHENNAI BENCH

T.V.S. Motor Company Ltd.

v.

Commissioner of Central Excise, Chennai – III

FINAL ORDER NO. 652 OF 2012

JUNE 13, 2012

ORDER

D.N. Panda, Judicial Member – Pursuant to Miscellaneous Order No.258/2011 passed by the Bench on 6.6.2011 against Revenue's application dated 30.11.2009 for early hearing, this matter came up for hearing today after 3 (Three) years of passing Stay order vide No.411/2009 dt. 18.5.2009 granting full waiver of predeposit to the appellant against service tax demand of Rs. 1,65,53,563/- followed by levy of equal amount of penalty imposed under Section 78 of Finance Act, 1994 (hereinafter referred to as 'the Act') and interest on the said service taxdemanded.

2. None present for Appellant even though the matter was repeatedly called and stay order as well as Miscellaneous order aforesaid disclosed name of Shri K.S. Venkatagiri and Shri V. Panchanathan learned Counsels respectively in the case.

3. An application addressed to the Assistant Registrar of Tribunal and signed by an unnamed person for Lakshmikumaran and Sridhanan was filed in Court today and none was found to be present to state reasons of default of Appellant or its Authorized Representative. The application stated that the matter is listed today for final hearing at serial number 37 and Shri K.S. Venkatagiri, Advocate who is authorized to appear in this matter is unable to appear due to his personal reasons. Prayer was made therein to adjourn to a short date after two weeks.

4. The application aforesaid not being signed naming the signatory, an enquiry was made from record to ascertain whether any Vakalatnama of Sri K.S. Venkatagiri is existing on record. But on thorough scrutiny of record containing 8 pages of order sheets and 278 pages appeal memo and other papers (in appeal folder I) no vakalatnama was found on record. The Court Master accordingly noted as under:

'No vakalatnma has been filed by any one in this case. Shri K.S. Venkatagiri, Advocate who sought for adjournment has also not filed vakalat.'

5. Record further revealed that although early hearing application of Revenue was allowed on 6.6.2011, for hearing the matter on 11.8.2011, due to no Benches available, the matter was adjourned from time to time on 3 (three) occasions and finally came up to Board today. It is also apparent from record that the adjournments were noted under some signatures.

6. Law is laid down by Apex Court in para 21 of the judgment in the case of *Uday Sankar Triyar*v. *Ram Kalesawar Prasad Singh* AIR 2006 SC 269 with regard to filing up proper Vakalatnama in a proceeding before Courts which reads as under:

'21. We may at this juncture digress and express our concern in regard to the manner in which defective Vakalatnamas are routinely filed in courts. Vakalatnama, a species of Power of Attorney, is an important

document, which enables and authorizes the pleader appearing for a litigant to do several acts as an Agent, which are binding on the litigant who is the principal. It is a document which creates the special relationship between the lawyer and the client. It regulates and governs the extent of delegation of authority to the pleader and the terms and conditions governing such delegation. It should, therefore, be properly filled/attested/accepted with care and caution. Obtaining the signature of the litigant on blank Vakalatnamas and filling them subsequently should be avoided. We may take judicial notice of the following defects routinely found in Vakalatnamas filed in courts :

(*a*) Failure to mention the name/s of the person/s executing the Vakalatnama, and leaving the relevant column blank;

(*b*) Failure to disclose the name, designation or authority of the person executing the Vakalatnama on behalf of the grantor (where the Vakalatnama is signed on behalf of a company, society or body) by either affixing a seal or by mentioning the name and designation below the signature of the executant (and failure to annex a copy of such authority with the Vakalatnama).

(*c*) Failure on the part of the pleader in whose favour the Vakalatnama is executed, to sign it in token of its acceptance.

(*d*) Failure to identify the person executing the Vakalatnama or failure to certify that the pleader has satisfied himself about the due execution of the Vakalatnama.

(*e*) Failure to mention the address of the pleader for purpose of service (in particular in cases of outstation counsel).

(*f*) Where the Vakalatnama is executed by someone for self and on behalf of someone else, failure to mention the fact that it is being so executed. For example, when a father and the minor children are parties, invariably there is a single signature of the father alone in the Vakalatnama without any endorsement/statement that the signature is for 'self and as guardian of his minor children'. Similarly, where a firm and its partner, or a company and its Director, or a Trust and its trustee, or an organisation and its office bearer, execute a Vakalatnama, invariably there will be only one signature without even an endorsement that the signature is both in his/her personal capacity and as the person authorized to sign on behalf of the corporate body/firm/society /organisation.

(*g*) Where the Vakalatnama is executed by a power-of-attorney holder of a party, failure to disclose that it is being executed by an Attorney-holder and failure to annex a copy of the power of attorney;

(*h*) Where several persons sign a single vakalatnama, failure to affix the signatures seriatim, without mentioning their serial numbers or names in brackets. (Many a time it is not possible to know who have signed the Vakalatnama where the signatures are illegible scrawls);

(*i*) Pleaders engaged by a client, in turn, executing vakalatnamas in favour of other pleaders for appearing in the same matter or for filing an appeal or revision. (It is not uncommon in some areas for mofussil lawyers to obtain signature of a litigant on a vakalatnama and come to the seat of the High Court, and engage a pleader for appearance in a higher court and execute a Vakalatnama in favour of such pleader).

We have referred to the above routine defects, as Registries/Offices do not verify the Vakalatnamas with the care and caution they deserve. Such failure many a time leads to avoidable complications at later stages, as in the present case. The need to issue appropriate instructions to the Registries/Offices to properly check and verify the Vakalatnamas filed requires emphasis. Be that as it may.' [Emphasis supplied]

7. Following aforesaid rulings of Apex Court, Hon'ble High Court of Delhi disposing a writ petition W.P.No.2651 of 2009 on 8.10.2009 in the case of *Deepak Khosla* v. *Union of India*directed as under:

'13. We direct that henceforth while scrutinizing the vakalatnamas filed, be it in the Registry of this Court, the Subordinate Courts in Delhi or the Tribunals, Authorities and Foras in Delhi, failure/defect in the vakalatnamas, noted in sub-paras 'a' to 'e' of Para 21 of the decision of the Supreme Court in *Uday Shankar's* case (*supra*), shall be treated as a deficiency in the execution of the vakalatnamas making liable the said vakalatnama to be returned Further, in the situation contemplated by sub-paras 'f' to 'i' of Para 21 of the decision in *Uday Shankar's*case (*supra*), vakalatnamas not executed in the manner indicated in the said sub paras shall also be treated as a deficiency in the execution of the vakalatnama, making liable said vakalatnama to be returned.

14.? We are passing the directions in public interest for the reason even we have come across vakalatnamas which are filed in a most lackadaisical manner. Many a times, precious judicial time is lost in determining whether a proper representation is being made under a proper authority'. [Emphasis supplied]

The Hon'ble Court further directed as under;

'16. The Registrar General of this Court is directed to make available a copy of this order to the Registry of this Court and to forward a copy thereof to all the District Judges in Delhi with a direction that strict compliance should be made with the letter and spirit of the law and our directions pertaining to execution of vakalatnamas. Similarly, to the Registrars of the Tribunals and Foras functioning in Delhi, a copy of this order may be sent for compliance.' [Emphasis supplied]

8. It is surprising that in this case, Advocates from the cited law firm have appeared earlier and have obtained waiver of pre-deposit and stay without there being any vakalatnama in their favour. In the absence of a valid vakalatnama, they can neither be allowed to represent the appellants nor any adjournment request from them can be entertained. Hence, the adjournment request is declined.

9. Considering that the appeal is already 3 years old and prayer of Revenue was to expeditiously dispose the appeal due to blockage of crores of rupees of tax and penalty involved in the appeal as well as Appellant's knowledge of hearing granted by the Miscellaneous order aforesaid, the matter was taken up for hearing with assistance of Representative for Revenue.

10. Heard Revenue.

11. Shri V.V. Hariharan, ld. Commissioner (AR) for Revenue submitted that for the period March 2004 to September 2007, the Appellant was recipient of technical consultancy and project consultancy services from service providers abroad having no place of business in India and such service falls under Consultancy Engineering Service. The service so received being taxable service under the Act, the recipient was liable to pay service tax in terms of Section 66A of the Act read with Rule 2(1)(d)(v) of the Service Tax Rules, 1994. Admittedly the appellant paid service tax on the reduced value of such taxable service without including the income tax deducted at source under Income tax Law to the consultancy fees paid to foreign consultant. That resulted in short payment of service tax for which adjudication was made and that resulted in proper demand by adjudication order. It was categorically submitted by Revenue that there was difference between the value paid to foreign service provider and value disclosed in the service tax return giving rise to understatement of gross amount resulting in short payment of service tax. Tax deducted at source under income tax law was not included in gross payment. Therefore,

adjudication order which levied service tax on the gross value of taxable service was correct and invocation of proviso to Section 73(1) of the Act was justified for which that does not call for interference in the present appeal. According tax, interest and penalty levied in adjudication should be upheld.

12. Examined the adjudication order thoroughly in absence of Appellant.

13. Record reveals that Learned Adjudicating Authority examined the Service tax Returns of the appellant for the admitted period i.e. March 2004 to September 2007 and considered pleadings of the appellant to complete adjudication to the best of his judgment when there was no proper disclosure of gross amount in the return. He confirmed adjudication for above period during which technical consultancy and project consultancy services were availed by appellant from abroad and nature of service remained undisputed.

14. One of the grounds of present appeal of appellant is that services rendered outside India were not liable to service tax prior to 18.4.2006 in view of no provision in that regard existed to realize service tax from service recipient. There is no difference to this proposition when there was no law to tax the impugned service received from abroad prior to 18.4.2006. Section 66A was incorporated into the statute book with effect from 18.4.2006 to tax the taxable services provided by foreign service providers having no permanent address or usual place of residence in India. The service so provided made recipients of the service in India who have their place of business or fixed establishment or permanent address or usual place of residence is in India, liable to pay the service tax as if such service is provided by the recipients in India. Also Rule 2(i)(d)(iv) of Service tax Rules, 1994 made provision for recovery of service tax from such recipients. Thus the value of service received by the appellant prior to 18.4.2006 shall not be liable to tax and adjudication order to such extent shall get modified following the decision of Apex Court in *Union of India* v. *Indian National Shipowners Association* [2010] 24 STT 366 (SC) where the decision of Hon'ble High Court of Bombay in *Indian National Shipowners Association* v. *Union of India* [2009] 18 STT 212 (Bom.) holding no liability arises against assessee was merged.

15. The crucial ground of appeal which caused anxiety to Revenue is valuation of taxable service. While appellant claimed that assessable value of Consultancy Engineering service provided by the foreign consultant shall be exclusive of income tax deducted at source under the Income tax law for levy of service tax if there shall be levy at all, Revenue claims that gross amount to be exigible to service tax shall be before deduction of income tax at source therefrom to tax. Appellant's further claim was that as per contract it was obligation of appellant to make payment to the service provider the engineering consultancy fees net of tax for which the amount actually remitted to the service provider shall be basis of levy.

16. Section 67 of the Act has made provision for valuation of taxable service for charging service tax. According to Section 67(1)(a) of the Act where there is a monetary consideration paid to provide taxable service, the assessable value for levy of service tax is 'gross amount' charged by the Service provider for the taxable service provided. Sub-section (2) of the said section has made provision to include the amount of service tax to the gross valuie of consideration where taxable service provided is inclusive of service tax. The term 'consideration' for the valuation of taxable service is defined by explanation appearing under Section 67 meaning that consideration includes any amount that is payable for the taxable service provided or to be provided.

17. The liability of the appellant arose under the Act in terms of Section 66A of the Act as recipient of service of Engineering Consultancy from the Consultant abroad. Rule 7 (1) of the Service tax (determination of value) Rules, 2006 which came into force with effect from 19.4.2006 has made provision in respect of services covered by Section 66A of the Act. According to this Rule, measure of

value for taxation of service covered by that Section shall be such amount as is equal to the actual consideration charged for the services provided or to be provided.

18. Although the Show Cause Notice dated 19.11.2002 refers to para 5.1 at page 19 (Appendix 2 Terms and conditions) of the Agreement and a copy thereof was enclosed to the said notice, that paper was not available in the paper book filed by the appellant. The show cause notice indicates that on perusal of the agreement entered into between the assessee and M/s. Prodrive Automation Technology (Europe) Ltd (one of the service providers abroad) it appears that the price set out in the Consultancy Agreement as was examined by notice issuing authority noticed that to be net of all duties, taxes and other Government charges which, where applicable were payable in addition to the price. Accordingly, Revenue held that income deducted at source formed part of gross amount of consideration paid to foreign consultant. It appears that there were 22 service providers as per Annexure to Show Cause Notice appearing at page 58 to 61 of the Paper Book filed by the appellant. But no agreement copy was available on record or Paper Book. There was no pleading on material facts by the appellant as to how the facts in issue suggest and support defence of appellant that income tax deducted at source shall not form part of the gross amount of taxable service received when Rule 7(1) of Service Tax (Determination of Value) Rules, 2006 provides that actual consideration charged for the service provided or to be provided shall be assessable value in respect of services covered by Section 66A of the Act. Therefore, the expression what is 'actual consideration charged for service provided or to be provided' shall depend on the facts and circumstances of each case. Further, in terms of Section 66A of the Act the service covered by that section is treated as if the recipient had himself provided the service in India. Thus by such legal fiction the consideration inclusive of income tax deducted at source shall be assessable value for the purpose of the Act in the hands of the service recipient. Since the Show Cause Notice states that the agreement with M/s. Prodirve Automation Technology (Europe) Ltd. in terms of para 5.1 at page 19 (Appendix 2 Terms and Conditions) of the agreement speaks of the price of contract payable was net of taxes and taxes if any payable in addition to the price of contract was payable by the payer thereon as price of the contract and such factual aspect remaining unrebutted by appellant clearly establishes that tax payable in India was to form part of contract price. Thus consideration charged for the service provided shall include income tax deducted at source as per terms of contract and is in accord with Section 66A read with Rule 7(1) of the Service Tax (Determination of Value) Rules 2006 for the reason that net price of contract agreed to be paid to foreign consultant was to include income deducted at source thereon to be price also. Thus the tax demand on the assessable value comprising the consideration inclusive of income tax deducted at source relating to the period (9.4.2006 to September 2007) which was agreed to be price of the contract sustains.

19. The appellant in para 22 of appeal memorandum stated that in reply to Show Cause Notice dated 19.11.2007 it was pleaded that the notice was barred by limitation upto 30.9.2006. There is no quarrel to such proposition since law was not in force prior to 18.4.2006 to bring the appellant to the purview of service tax on the disputed issue following apex court decision in*National Shipowners Association* case (*supra*). Therefore, the appellant shall be liable to tax for the normal period covered by the Show Cause Notice and tax demand with interest if any shall be computable for such period and the adjudication order gets suitably modified to this extent.

20. One of the grounds of Appeal is to grant cum-tax benefit. The Authority may consider such grounds at the time of raising modified demand in accordance with law.

21. So far as levy of penalty under Section 78 is concerned, considering the difficulty in understanding the law applicable at inception and date of incidence to taxability, it would be proper to waive the penalty imposed under that Section.

22. In the light of the aforesaid discussions it is ordered:-

(1) That there shall not be levy of service tax on the engineering consultancy services availed from foreign consultant abroad prior to 18.4.2006.

(2) There shall be levy of service tax at the applicable rate for the period 19.4.2006 to 30.9.2007 on the gross amount of consideration inclusive of income tax deducted at source involved in availing engineering consultancy service availed under Section 66A of the Act.

(3) Adjudication order gets modified by the extent indicated in (1) and (2) above.

(4) Cum tax benefit if any admissible shall be granted in accordance with law.

(5) There shall not be penalty under Section 78 of Finance Act, 1994.