CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
Allahabad

REGIONAL BENCH

Service Tax Appeal No. 70702 of 2016

(Arising out of Order-in-Original No. 13/Comm./ST/GZB/2015-16 dated 01.02.2016 passed by the Commissioner, Central Excise & Service Tax, Ghaziabad)

M/s Five Vision Promoters ....**Appellant**

Versus

Commissioner, Central Excise & Service Tax, Ghaziabad ...**Respondent**

APPEARANCE:

Shri Bhusan Kumar Bansal, Advocate & Shri Sharan Bansal, Advocate for the Appellant

Shri B.K. Jain, Authorized Representative for the Respondent

CORAM :
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : 24.01.2022
DATE OF DECISION: 28.02.2022

FINAL ORDER NO. 70075/2022

P.V. SUBBA RAO

M/s Five Vision Promoters Private Limited[1] is the owner of Opulent Mall, GT Road, Ghaziabad and is registered with the Service Tax Department. Its records were audited by the Department on 25.01.2012, 27.01.2012, 13.02.2012 and 15.02.2012 and it was felt that the appellant had not discharged service tax on the following two services:

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1 The appellant

(i) Renting of immovable property – Rs. 29,91,662/-on the shops which it rented in the mall.
(ii) Business Support Services – Rs. 1,31,21,900/- on the amount it received as a share of the Net Box office collections from screening movies in the cinemas.

The appellant did not dispute the demand of service tax on renting of immovable property service and paid the same during audit itself. This demand was on account of the rent which it had received by renting shops in the mall. The appellant is disputing the second demand.

2. Commissioner, Central Excise And Service Tax, Ghaziabad issued a show Cause notice dated 30.01.2015 to the appellant demanding service tax on both along with interest and further proposing to impose penalties. After following the due process, the Commissioner has by Order in Original dated 8.02.2016[2] confirmed the demand on both the services and imposed penalties. Aggrieved by the impugned order, the appellant filed this appeal.

3. We have heard learned Counsel for the appellant and learned Departmental Representative and perused the records.

4. As far as the demand of service tax amounting to Rs. 29,91,662/- **on renting of immovable property service** and interest thereon is concerned, the appellant submits that it had paid the service tax during audit itself. Later, it had also paid interest after the issue of the show cause notice. It is only contesting the penalty imposed upon it in respect of this amount. It is the assertion of the learned Counsel for the appellant that the appellant should not have been issued any show cause notice as it had already paid service tax as per Section 73(3) and that section 73(4) which makes section 73(3) inapplicable in certain cases does not apply to its case. He

2 Impugned order

further submits that no penalty is imposable upon the appellant because there is no evidence of any of the elements required under Section 73(4) to impose penalty in case where service tax and interest have already been paid. His specific assertions were as follows:

(i) The case covered under Section 73(3) of the Finance Act, 1994.

(ii) The SCN should not have been issued as the Appellant deposited the entire amount of demand along with interest before issue of SCN.

(iii) Demand amount of Rs. 29,91,662/- through various challans dated 25.01.2012, 30.01.2012 and 22.02.2012 during the course of Audit itself. This fact is also acknowledged in the SCN.

(iv) Interest of Rs. 5,31,954/- vide challans 50047 dated 01.10.2014 and challan no. 50048 dated 01.10.2014. However, the SCN states a wrong fact that the interest was not deposited by the Appellant. But the fact of payment of interest is admitted in the OIO.

(v) Interest should have also been appropriated.

(vi) Even if SCN issued, no penalty is imposable in terms of provisions of Explanation 2 of Section 73(3).

(vii) Section 73(4) is inapplicable, since there is no intent to evade payment of service tax.

(viii) There is no short payment of tax. The only issue is delayed payment of tax. Appellant paid service tax immediately after being pointed out by the audit. Hence, it cannot be said that facts were suppressed by Appellant.

(ix) The demand is also time-barred. They rely on the following case laws:

a) *Commissioner of Central Excise & Service Tax, Bangalore v. M/s Adecco Flexione Workforce Solutions Ltd.,* 2011-TIOL-635-HC-KAR-ST

b) *Commissioner of Service Tax, Bangalore v. Master Kleen*, 2012(25) S.T.R. 439 (Kar.)

c) *CCE, Indore, MP v. Shri Mukesh Jain,* 2012-TIOL-84-CESTAT-DEL.

5. Learned Departmental Representative agrees that the appellant had paid service tax on renting of immovable property service but asserts had not paid interest before the issue of show cause notice. Therefore, the show cause notice was issued in respect of this amount. He further submits that the appellant is not entitled to the benefit of Section 73(3) as the appellant had not disclosed that it had been rendering the service of renting of immovable property and therefore, the appellant's case is squarely covered by section 73(4).

He reiterates the findings of the learned Commissioner in this regard which are as follows:

> "6. As regards short payment of Service Tax on renting of shops, it is found that Renting of Immovable Property was taxable service as defined under erstwhile Section 65(105)(zzzz) of the Finance Act, 1994 and it was admitted by the party that in a number cases Service Tax was not paid on aforesaid activity by them. It has been argued by the party that in view of provisions of Rule 9 of the POTA, Service Tax was payable on accrual basis till 30.06.2011 in respect of services which were completed before 30.06.2011 or in respect of services for which invoices were issued before the aforesaid date. It has been stated by the party that short paid Service Tax in regard to Renting of Immovable Properties, as indicated in the Show Cause Notice, was in respect of services for which invoices were issued prior to 30.06.2011. In this regard, I find that the party have not produced any documentary evidence to prove that short payment of Service Tax was in respect of services which were already rendered prior to 30.06.2011. It is also fact that the party admitted the short payment and voluntarily paid the whole amount of short paid Service Tax to the tune of Rs. 29,91,662/-. In the Show Cause Notice it has been brought out that interest was not paid by them on the aforesaid short paid Service Tax but the party in their written brief submitted that interest amounting to Rs. 5,31,954/- was already deposited. It indicates that the party not only admitted short payment of Service Tax but also admitted late payment of aforesaid amount of Service Tax. In view of the above, I hold that the party had deliberately not paid Service Tax to the tune of Rs. 29,91,662/- on Renting of Immovable Property by due date but the same with interest was deposited by them when pointed out by the department during the Audit."

6. We have considered the submissions on both sides with respect to this issue. It is undisputed that the appellant had paid service tax prior to the issue of show cause notice itself. It has also paid interest after the issue of the show cause notice. Appellant claims benefit of section 73(3) according to which no SCN should have been issued to it at all while department's case is that the appellant is not covered by section 73(3) in view of the exception provided in section 73(4). We reproduce these two provisions below:

> **SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.**
> (1)

(2)

(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid :

Provided that the Central Excise Officer may determine the amount of short-payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been 18 paid by such person and, then, the Central Excise Officer shall proceed to recover such amount in the manner specified in this section, and the period of “thirty months” referred to in sub- section (1) shall be counted from the date of receipt of such information of payment.

Explanation.1— For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [Central Excise Officer], but for this sub-section.

Explanation 2. — For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service tax under this sub-section and interest thereon.

(4) **Nothing contained in sub-section (3) shall apply to a case where** any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of —
(a) fraud; or
(b) collusion; or
(c) wilful mis-statement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

7. We find that the period involved in this case is 1.04.2010 to 31.12.2014 and the show cause notice was issued on 13.01.2015. When the audit was conducted, the appellant had paid service tax on the rent received as on 24.01.2012 in respect of the shops in the mall. This amount has already been appropriated. We therefore, find ourselves in agreement with the appellant that section 73(3) applies to this case and no SCN should have been issued. We do not find anything in the findings of the learned Commissioner in the impugned order with respect to this demand as reproduced above which establishes any element of fraud or collusion or willful mis-statement or suppression of facts or violation of provisions of act or rules with an intent to evade payment of service tax. Therefore, section 73(4) does not apply to this part of the demand. All that the impugned order shows is that the appellant had not paid service tax and when pointed out by the audit, it paid it forthwith. For the same reason, we find that no case has been made out by the Revenue to justify the imposition of penalty upon the appellant under section 78 insofar as this part of the demand is concerned. The appellant has not contested and is still not contesting the demand of service tax.

Demand of Rs. 1,31,21,900/- on Business Support Services

8. The appellant has three movie theatres in its mall to screen movies. It appointed M/s PVR Limited as Business Manager for operation and management of multiplexes through the PVR. The appellant entered into agreements with the distributors of films for temporary transfer of copyrights through assignment or licensing for exhibition of movies. The Net Box Office Collection (Gross

revenue from sale of tickets minus some expenses like taxes) are, as per the agreements, shared between the distributors of the films and the appellant. The allegation in the show cause notice is that this arrangement has resulted in creation of an association of persons, i.e., an unincorporated joint venture and that the appellant was providing business support services in the form of infrastructural support and operational or administrative assistance to such joint a venture. The appellant's share of Net Box Office collections is the consideration received for such services which are in the nature of Business support services and service tax is proposed to be charged on the services. Learned Commissioner has, in the impugned order, confirmed the demand as such along with interest invoking extended period of limitation and has also imposed penalty under Section 78 upon the appellant. Learned Counsel for the appellant submits that the arrangement between the appellant and the distributors has not resulted in emergence of an unincorporated joint venture. The transaction is one of transfer of copyright of the film temporarily by way of license/assignment to the appellant by the distributor which is not exigible to service tax. He further asserts that no service was rendered by the appellant. On the question as to whether any unincorporated joint venture has emerged, the appellant submits that the arrangement between Appellant and the distributors does not result in the emergence of unincorporated joint ventures. From CBEC's Circular No. 148/17/2011-S.T. dated 13.12.2011 and the Supreme Court decisions in the case of New Horizons [195 SCC (1) 478: 1994-TMI-836861] and Faqir Chand Gulati Vs. Uppal Agencies Pvt. Ltd.

and Anr., [(2008)10 SCC 345] the following cumulative factors, no single of which is controlling factor, indicate the emergence and features of a joint venture:

(i) an express or implied agreement

(ii) combine their property, money, effects, skill, and knowledge all contribute assets; sharing of expenses; joint ownership and control of property

(iii) a common purpose that the group intends to carry out

(iv) community of interest in the performance of the subject- matter

(v) duty, which may be altered by agreement, to share profits and losses and exercising some voice in determining division of net earnings

(vi) each member's equal voice in controlling the project; community of control over, and active participation in, management and direction of business enterprise

(vii) Accountable to each other for their respective acts with reference to the project; each joint-venture must stand in the relation of principal, as well as agent, as to each of the other coventurers within the general scope of the enterprises.

(viii) intention of parties, express or implied.

9. When examined in the light of the above criteria it clearly emerges that there was no joint venture between the Appellant and the Distributors as:

(i) The agreements are for transfer of copyrights for exhibiting films and not for creating any joint venture.

(ii) The Appellant is the theatre owner and exhibitor of the films.

(iii) The arrangement is on Principal-to-Principal basis.

(iv) The films are exhibited by the Appellant on their own account under a theatre license granted to them by the Uttar Pradesh State Authorities and not on behalf of the Distributor.

(v) Each member does not have an equal voice in controlling the project.

(vi) The distributors do not control the screening of the film. The Distributor does not share the loss and risk.

(vii) Intention of parties is not to create a new entity.

(viii) When read as whole, the agreement, it emerges that the intention of the parties is that Appellant screens the films on its own account.

(ix) The agreement is signed with a clear intention to screen the movie and not to either rent the theatre or create any partnership between the Parties.

(x) Each member is not accountable to each other for their respective acts.

(xi) Appellant and distributors do not act as principal and agent to one another, which is one of the features of a partnership/joint venture.

(xii) Appellant does not act as an agent of the distributor while screening the film.

(xiii) The conditions relating to cancellation of the show, unauthorized use of copying of film, loss or theft of the print etc. in the agreements with the distributors are in the nature of conditions to ensure that the copyright in the film is projected, and not infringed.

(xiv) Other restrictions are nothing but the general/usual clauses in the agreement whereby the distributor, as the owner of the copyright, has taken the precaution to safeguard his goodwill and reputation in permitting Appellant to exhibit the film.

(xv) Appellant never hands over the control or possession of the theatre building.

(xvi) Gross revenue from sale of tickets is being recognized on the revenue side in the books (Profit & Loss Account) of Appellant.

(xvii) The amount paid to the Distributors is being booked as Direct Expense (Film Hire Charges) in the books (Profit & Loss Account) of Appellant.

(xviii) Responsibility for payment of entertainment and other taxes, payment of electricity and other overheads, any risk to audience and civil or criminal liabilities for any acts of omission or commission during the screening of the movie are of Appellant.

(xix) The distributor has no role in screening the films in its theatre, has no control over the business of Appellant and does not have the applicable legal, regulatory or tax liabilities arising out of the business of screening of movie by Appellant.

(xx) Only because the revenue is shared between Appellant and the distributor, it cannot be said that it is a joint venture. It is a method a calculation of consideration to be the distributors.

(xxi) If service is provided to Joint Venture, then the joint venture should exhibit the film; joint venture must have the license to exhibit the film; joint venture must pay the entertainment tax etc. However, in the present case, all this is being done by Appellant."

10. On the question as to whether service tax can be levied on the cinema owner's share of the Net Box office collections, learned counsel submits that this issue is no longer res integra and it has been decided in several cases that no service tax is payable on these amounts.

11. Learned Departmental Representative reiterates the findings of the impugned order.

12. We have considered the submissions on both sides with respect to this part of the demand. Movies are made by producers investing money and the producer acquires the copy right to the movies which, he then transfers to various distributors across the country for a consideration. The distributors, in turn, enter into agreements with various cinema/ theater owners and provide license/ right to screen the movie in their theaters. The Net Box Office collections, i.e, the proceeds of sales of tickets minus some expenses such as taxes are shared between the cinema owners and

the distributors. The question as to whether the share of collections received by the cinema owners can be taxed has been decided in negative by this Tribunal in the case of **Service Tax Appeal No. 30488-30489 of 2016 in the case of Inox Leisure Ltd Vs. Commissioner of Service Tax, Hyderabad** and it has also been decided in the following other cases:

> **(a) M/s. PVS Multiplex India Pvt. Ltd. vs. Commissioner of Central Excise, Meerut-I - 2017 (11) TMI-156-CESTAT Allahabad;**
>
> **(b) M/s. Moti Talkies vs. Commissioner of Service Tax, Delhi-I – 2020 (6) TMI 87 – CESTAT New Delhi;**
>
> **(c) M/s. The Asian Art Printers (Sheila Theatre) vs. Principal Commissioner of Service Tax, Delhi-I - 2020 (12) TMI 1012 – CESTAT New Delhi;**
>
> **(d) Shri Vinay Kumar, Proprietor of M/s. Regal Theatre vs. Principal Commissioner of Service Tax, Delhi-I – 2020 (11) TMI 436-CESTAT New Delhi;**
>
> **(e) M/s. Golcha Properties Pvt. Ltd. vs. Principal Commissioner of Service Tax, Delhi-I – 2020)11) TMI 137 – CESTAT New Delhi; and**
>
> **(f) Satyam Cineplexes Ltd. vs. Principal Commissioner of Service Tax, Delhi-I – 2020 (8) TMI 1222 – CESTAT, New Delhi**

13. No case law has been brought before us where the share of the cinema owners in the Box Office collections is held to be exigible to service tax. Therefore, the issue stands decided that no service tax can be charged. The only additional twist in this case is the allegation that a joint venture has been created and that joint venture is an unincorporated business entity and the service has been rendered by the appellant to such a business entity and that business entity is paying the appellant for allowing the business entity to use the appellant's premises and other support. We do not find anything in the records to indicate that there was an express or implied agreement to form a joint venture. There is no

joint ownership or control of the property the appellant is the owner of the distributors. The distributors own the licensing rights to the movies. They lease the rights temporarily to the appellant. The distributor has no control over how the movies will be screened which is completely up to the appellant. Since the distributor is giving rights to screen the movies, as a consideration, it receives a share of the net box office collections. There is nothing on record to show that there is an agreement to share profits and losses. Only the collections are shared after some deductions. If, for instance, the total expenses incurred by the appellant in running the theatre is much more than its collections from the movie, it will incur losses. The distributor has no responsibility to share the losses. The distributor gets its share of the net Box Office collections even though the collections may be small. Hence the nature of the agreement here is one in which the distributor gives permission to screen the movies and gets a consideration. The quantum of consideration is not a fixed amount but a share of collections. The distributor does not assume any business risks in screening the movies. Therefore, we find no evidence whatsoever in this arrangement of forming an unincorporated joint venture.

14. In view of the above, the appeal is allowed and the impugned order is modified by setting aside the demand of service tax under the category of business support services along with interest. The demand of service tax on renting of immovable property service is upheld and the same stands already paid by the appellant along

with interest. All penalties imposed upon the appellant are set aside.

(Pronounced in Court on 28.02.2022)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

RM