

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

~~~~~

REGIONAL BENCH – COURT NO. 1

**Service Tax Appeal No.373 Of 2012**

[Arising out of OIA No.511-512/BK/GGN/2011 dated 23.12.2011 passed by the Commissioner (Appeals), Central Excise, Delhi-III, Gurgaon]

**M/s Liberty Group Marketing  
Division (LGMD)**

Railway Road, Karnal (Haryana)

**: Appellant (s)**

Vs

**The Commissioner of Central Excise  
And Service Tax, Panchkula**

SCO 407-408, Sector 8, Panchkula-134119

**: Respondent (s)**

**With**

**Service Tax Appeal No.374 Of 2012**

[Arising out of OIA No.511-512/BK/GGN/2011 dated 23.12.2011 passed by the Commissioner (Appeals), Central Excise, Delhi-III, Gurgaon]

**M/s Liberty Enterprises**

G.T. Road, Gharaunda, Karnal (Haryana)

**: Appellant (s)**

Vs

**The Commissioner of Central Excise  
And Service Tax, Panchkula**

SCO 407-408, Sector 8, Panchkula-134119

**: Respondent (s)**

**APPEARANCE:**

Shri R.K. Hasija and Shri Shivang Puri, Advocates for the Appellant  
Shri Nikhil Kumar Singh and Ms. Shivani, Authorised Representatives  
for the Respondent

**CORAM:**

**HON'BLE Mr. S. S. GARG, MEMBER (JUDICIAL)**

**HON'BLE Mr. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER Nos.60583-60584/2023**

Date of Hearing: 08.09.2023

Date of Decision: 03.11.2023

**Per: P. ANJANI KUMAR**

M/s Liberty Group Marketing Division (ST/373/2012) and Liberty Enterprises (ST/374/2012), the appellants, are engaged in the manufacturing and distribution of footwear and have entered into separate agreements dated 31.03.2003 with M/s Liberty Shoes Ltd. for transfer of their business of the respective manufacturing units; accordingly, they have received payments from M/s Liberty Shoes Ltd. and have paid service under the category of "Intellectual Property Service" up to 15.06.2005. For the period after 15.06.2005, they started paying service tax under the category of "Franchise Service". Department entertained a view that both the appellants are required to pay service tax under the Head "Franchise Service" even before 15.06.2005, as they fulfilled all the criteria required to be so categorized. Two separate show-cause notices both dated 21.04.2010 were issued to the appellants and were confirmed by OIOs dated 29.04.2011; on an appeal filed by the appellants, Commissioner (Appeals) vide impugned order dated 23.12.2011 upheld the OIOs confirming the demands raised along with penalties. Hence, these appeals.

2. Shri R.K Hasija assisted by Shri Shivang Puri, learned Counsel for the appellants, submits that till 15.06.2005, the definition of "Franchise" as per Section 65 (47) of the Finance Act, 1994 was as under:

(47) "franchise" means an agreement by which-

(i) franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved;

(ii) the franchisor provides concepts of business operation to franchisee, including know-how, method of operation, managerial expertise, marketing technique or training and standards of quality control except passing on the ownership of all know-how to franchisee;

(iii) the franchisee is required to pay to the franchisor, directly or indirectly, a fee; and

(iv) the franchisee is under an obligation not to engage in selling or providing similar goods or services or process, identified with any other person.

3. Learned Counsel submits that as per the definition above, all the four conditions have to be satisfied; however, in their case, condition no. (iv) is not satisfied. After the amendment in the definition of "Franchise" w.e.f. 16.05.2005, they have been discharging duty under Franchise Service. He submits that Circular No.59/08/2003 dated 20.06.2003 issued by CBEC clarified that unless all the ingredients are satisfied, the agreement cannot be said to be a Franchise Agreement. The appellants' agreement did not satisfy the condition no. (iv) that the franchisee is under an obligation not to engage in selling or providing similar goods or services or processes, identified with any other person was not satisfied. He submits that the Department relies heavily on Clause 7(j) of the Agreement to come to a conclusion that they fulfilled condition no. (iv); however, it is clear from the Clause that the franchisee cannot, without prior approval of the appellant, permit any other business venture to operate or trade at the premises

or extend the business at the premises leased to M/s Liberty Shoes Ltd. (the franchisee); by no stretch of imagination, it can be treated that the agreement prohibits the franchisee for carrying out selling or providing similar goods or services. He relies on Dewsoft Overseas Pvt. Ltd. – 2008 (12) STR 730 and Saanj and Savera Educational Welfare Trust- 2016 (41) STR 458 (Tri. Del.)

4. Learned Counsel submits that they have submitted the copies of respective agreements dated 31.03.2003 to the jurisdictional Assistant Commissioner while surrendering the existing Central Excise registrations vide their letter dated 01.04.2004; the authorities were also informed that M/s Liberty Shoes Ltd. was taking over the business of the appellants; this being the fact, show-cause notice covering the period 01.07.2004 to 15.06.2005 was issued on 21.04.2010 invoking the extended period. He submits that as per the facts of the case, there was no suppression or wilful mis-statement on the part of the appellants as they have informed the jurisdictional Central Excise authorities in 2003 itself and have been submitting ST-3 Forms after paying service tax under the Head "Intellectual Property Service". He further submits that the issue is revenue neutral as M/s Liberty Shoes Ltd. would have been eligible for the service tax paid by the appellants under any Head. He relies on the following:

- Standard Grease & Specialities Pvt. Ltd. – 2014 (303) ELT 434 (Tri.)
- Commissioner Vs Tarapur Grease India Pvt. Ltd.- 2016 (334) ELT 416 (Bom.)
- Standard Drum & Barrel Mfg. Co. – 2017 (&) TMI 392-CESTAT Mumbai

- Sanvijay Rolling & Engineering Ltd. – 2018 (11) GSTL 344 (Bom.)

5. Shri Nikhil Kumar Singh, assisted by Ms. Shivani, learned Authorized Representatives for the Department, reiterates the findings of the OIO and OIA highlighting various clauses in the argument to show that the agreement is a Franchise Agreement. He submits that condition No. (iv) in the definition of Franchise, as it existed before 16.05.2005, is satisfied by the Clause 7(j) of the Agreement. He relies on the following cases:

- Global Transgene Ltd.- 2013 (32) STR 86 (Tri. Mumbai).
- Timken India Ltd. – 2019 (22) GSTL 282 (Tri. Kolkata)
- Amway India Enterprises Pvt. Ltd.- 2015 (39) STR 1006
- Delhi Public School Society – 2013 (32) STR 179 (Tri. Del.)

6. Heard both sides and perused the records of the case. The case of the Department is that various clauses of the agreement leave no doubt that the services received by the appellant are not IPR Services because in addition to the use of intangible property, the transaction under the agreement involves right to sell or manufacture the goods are undertake a process identified with franchisor. It is not the case of the appellants that the agreements do not satisfy the other conditions of the definition; they are only on the issue that the condition No. (iv) of the definition of "Franchise" is not satisfied. Condition No. (iv) of the definition of "Franchise" as it existed before 16.05.2005 reads as under:

"(iv) the franchisee is under an obligation not to engage in selling or providing similar goods or services or process, identified with any other person."

7. The case of the Department is that while the other conditions are satisfied, condition No. (iv) is also satisfied in view of the Clause 7 (j) which reads as under:

"7 (j) No other Business

"Not without prior written approval of the LE to permit any other business venture to operate or trade at the Premises nor without such approval to extend the scope or range of the Business at the Premises and if the LE approves any such sharing or extension to procure that the gross sales of the same shall be subject to this Agreement and to pay the Continuing Fees."

8. We find that the agreement itself is settled agreement for transfer of business on franchise basis. We find on going through the various clauses of the agreement are in the nature of Franchise Agreement. The agreement includes conditions for following the concept of business operation, manufacture or technical specifications, marketing etc. in addition to the restriction on selling, producing or providing similar goods or services identified with any other person. The appellants argue that the condition put forth under Clause 7(j) is not absolute as envisaged under condition No.(iv) and it is subject to the written consent of the franchisor. Be it so, the appellants did not submit any proof, whatsoever, to indicate that such permission was sought and given permitting the franchisee to engage him in the business of others or in other goods from the same premises. In the absence of example to the contrary, Clause No.7(j) is akin to the condition laid down under No.(iv). Therefore, we have no hesitation in concluding that the impugned agreement is in the nature of Franchise Agreement wherein the appellants have total control of the business,

the process, the product and the premises. We find that this Bench in the case of Timken India Ltd. (supra) held that:

11. In view of the above ingredients which are there in the contract, we find that the services availed by the appellant are more akin to franchise services rather than intellectual property right service. While holding the above view, we also refer to the Hon'ble Delhi High Court judgment in the case of Delhi International Airport P. Ltd. v. Union of India - 2017 (50) S.T.R. 275 (Del.). The relevant extract of this judgment is reproduced below

57. The term "representational right" would necessarily qualify all the three possibilities i.e., (i).to sell or manufacture goods, (ii) to provide service, and (iii) undertake any process identified with the franchisor.

58. A representational right would mean that a right is available with the franchisee to represent the franchisor. When the Franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor. The individual identity of the franchisee is subsumed in the identity of the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor".

We feel that above decisions squarely covers the situation as present in the case at hand and we feel that the services received by the appellant are correctly classifiable under 'Franchise service'. Thus we don't find any reason to interfere with the impugned order on this issue.

9. In view of the above, we find that the appellants' contentions are not acceptable and the impugned orders do not merit any intervention as far as the merits of the case are concerned. Coming to the issue of limitation, it is on record that the appellants have submitted the copies of the agreements to the jurisdictional Central Excise authorities as early as in 2003. They have surrendered their Central Excise registrations and have obtained Service Tax

registrations and have discharged the duty under "Intellectual Property Rights"; they have regularly submitted the ST-3 Returns. Therefore, it cannot be alleged that the appellants have suppressed any material fact from the Department with intent to evade payment of duty. It was for the Department to take note of the agreements and initiate necessary proceedings in time. Having not done so, it is not open to them to issue a show-cause notice in 2010 covering a period 2004-05 whereas the information was very much available with them in 2003. Moreover, during the relevant time, there were some ambiguities with the fast-changing Service Tax Law; CBEC have also been issuing galore of clarifications to educate the public. Under the circumstances, there are reasons to believe that the appellants, who have been paying service tax under the Head "Intellectual Property Service", had a bona fide doubt on the classification of the service. Therefore, we are of the considered opinion that the appellants succeed on limitation.

10. In the result, the appeals are allowed on limitation.

*(Pronounced on 03/11/2023)*

**(S. S. GARG)**  
MEMBER (JUDICIAL)

**(P. ANJANI KUMAR)**  
MEMBER (TECHNICAL)

PK