

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI**

ST/Misc./41100/2017 and ST/551/2010

(Arising out of Order-in-Appeal No. 89/2010 (MST) dated 30.4.2010 passed by the Commissioner of Central Excise (Appeals), Chennai)

M/s. Consim Info Pvt. Ltd. (formerly known as M/s. BharatMatrimony.com Pvt. Ltd.)	Appellant
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Vs.

Commissioner of GST & Central Excise Chennai South Commissionerate	Respondent
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Appearance

Shri Akhil Suresh, Advocate for the Appellant
Shri S. Govindarajan, AC (AR) for the Respondent

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Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **23.07.2018**

Final Order No. **42186 / 2018**

Per Bench

Brief facts are that the appellant is a private limited company having branches all over India and are providing matrimonial services through online information on website, providing private employment exchange for employers and job seekers to find the candidates and jobs respectively. They are

also aiding property transactions in the websites by creating a common meeting ground for those dealing in real estate business and providing information on buying and selling of automobiles. For all these services, they had registration under the category of Advertisement Services. During the course of audit by the departmental officers, it was noticed that during 2005 – 06, appellant had outsourced their matrimony activity to other associate centers and had entered into franchise agreement with these associate centers. These associate centers are identified by the trademark 'Bharatmatrimony.com". The appellant had given representational right as well as right to use trademark to these associate centers. They collect license fee from these franchisee as per the agreement. Such collection includes non-refundable deposit and subsequent collection of royalties. According to department, the said activity was classifiable under 'franchise service' which is brought into service tax net with effect from 1.7.2003. The appellants were not discharging service tax on such activity for which show cause notice was issued raising allegations and also demanding service tax for the period January 2006 to March 2007. After due process of law, the original authority confirmed the demand and dropped the penalty under section 76 of the Finance Act, 1994, however, confirmed the penalty under section 78 of the said

Act. In appeal, Commissioner (Appeals) upheld the same. Hence this appeal.

2. On behalf of the appellant, Id. counsel Shri Akhil Suresh appeared and argued the matter. He adverted to the agreement entered into by the appellant with their associate centers and submitted that the agreement is mere granting of right to use the trademark of appellant company. As per the definition of franchise service, as it stood prior to 16.6.2005, there was specific condition and characteristics in order to classify the services under franchise service. After the introduction of Intellectual Property Service from 10.9.2004, the definition of franchise service underwent a change with effect from 16.6.2005 covering only those services of granting representative right to use the process identified with trademark, logo or symbol. Thus from 10.9.2004, difference has been drawn, through Intellectual Property Service were temporarily right is granted to use all intangible properties like trademark, technical know-how etc. He argued that as per the agreement, it is transfer of intellectual property right and would not fall under Franchise Service. It can be seen that promotional materials are to be supplied by franchisor and training facilities has to be arranged by franchisor which go beyond the scope of franchise service as amended from 16.6.2005. So also clause 6 of the agreement stipulates

service obligations on the part of franchisee. Clause 45 stipulates obligations on the part of franchisor. These obligations are beyond the scope of definition of franchise service and thus the activities cannot fall within the definition. He submitted that the essentials of franchise agreement is not fulfilled in the instant case and does not make the activity a taxable service under this category. He placed reliance in Ashok Enterprises reported in 2007 (5) STR 153 (Commr. Appl.) which held that where agreements are lacking concept business operation, managerial expertise and market techniques of franchisor to be followed by franchisee, then the agreement grants limited use of intellectual property of trademark and would be covered under Intellectual Property service. Thus, the Id. counsel has argued that the services would not fall under franchise service but would be more akin to Intellectual Property service.

3. In addition, it was submitted that the demand cannot sustain as the show cause notice has been issued invoking the extended period alleging suppression of facts. That the appellant has not suppressed any facts. In fact, an internal audit was conducted in 2006 wherein the agreement was scrutinized by the officers during the course of audit and there was no objection raised with regard to the said agreement to be taxable under franchise service. Subsequently, in

September 2007, another internal audit took place and the department has scrutinized the agreement, balance sheet and profit and loss account and thereafter has raised the demand invoking the extended period of limitation. In the alternative, he prayed that in any case, since the appellant was under bonafide belief that the said activity does not fall under franchise service and the department having not raised any objection in the audit conducted in 2006, he prayed that the penalties may be set aside.

4. The Id. AR Shri S. Govindarajan supported the findings in the impugned order. He adverted to the various conditions in the agreement and argued that the agreement falls within the definition of franchise service as amended with effect from 16.6.2005. Merely because the appellants have given the right to use the logo/symbol, which is Bharatmatrimony.com, it cannot be said that the agreement is for transfer of intellectual property service. The agreement shows that the franchisor agreed to the franchisee to establish and administer bharatmatrimony.com center for providing a matrimony service in the name of franchisor. Further, there is a fee charged by the franchisor in the name of royalty upon the franchisee for continuous use of the name together with the past and present goodwill of the franchisor along with minimum support service like design of marketing know-how,

technical know-how etc. That these would clearly show that it is not an agreement for transfer of intellectual property but an agreement for franchise service. With regard to limitation, he submitted that the appellant have suppressed the activity of rendering franchise service, with intent to evade payment of service, the show cause notice issued invoking the extended period is proper.

5. Heard both sides.

6. The main ground that has been argued by the Id. counsel is that the activity does not fall under franchise service and that it would more rightly be classified under transfer of intellectual property service. We have perused the agreement dated 4.9.2006 furnished by the Id. counsel for appellant. The recital of the agreement in the first paragraph itself states that the appellant (formerly Bharatmatrimony.com) is referred as a franchisor and the associate member with whom the agreement is entered is referred to as the franchisee. The first clause is reproduced as under for better appreciation:-

“WHEREAS Franchisor is engaged, amongst other activities, in the business of providing matrimony services and has developed business plans and procedures relating to the promotion and operation of the said centers etc. for providing the above mentioned matrimony and internet based services.

WHEREAS as the result of the expenditure of time, effort and money, FRANCHISOR has acquired unique experience, special skills, technique and knowledge with reference to the development, opening and operating of various BharatMatrimony Centers

throughout the country. The FRANCHISEE acknowledges that he does not presently know the special skills, techniques or business policies, nor does the FRANCHISEE have business forms or access to the FRANCHISOR'S body of knowledge"

7. The above would show that it is not an agreement for mere transfer of intellectual property. In fact, the franchise agreement stipulates for payment of franchise fee charged by the franchisor upon the franchisee. The argument of the Id. counsel that it involves only transfer of intellectual property cannot be accepted for the reason that the agreement involves conditions wherein the manner of functioning and operation of the associate center is laid down. Thus the franchisor has a right to dictate or direct how the franchisee has to carry on the business. There is also a condition for the franchisee to attend the training conducted by them. Clause 5.3 states that the administration of centre shall be by the Centre Manager, the counselors etc. This shows that the franchisor issues guidelines to the franchisee as to how the business has to run, how the staff and employees have to be recruited etc. After going through the agreement, we are convinced that the agreement is a franchise agreement. For the same reason, we hold that the demand sustains on merits.

8. The Id. counsel has argued on the ground of limitation. It is his case that there was an audit in the office of the appellant in 2006 whereupon the agreement was scrutinized by the

officers and that they had no objection. The mere fact that audit was conducted cannot be a ground to contend that the extended period cannot be invoked. Further, in the present case, show cause notice is issued on 14.3.2008 for the period January 2006 to March 2007. The appellants have not disclosed in the ST-3 returns that they were engaged in franchise service. For all these reasons, we are not able to accept the contention of the appellant that the demand cannot sustain on the ground of limitation. However, taking note of the fact that the audit had occasion to see the agreement in 2006, we are of the view that the penalties are unwarranted and requires to be set aside, which we hereby do.

9. From the above discussions, we hold that the impugned order is modified to the extent of setting aside the penalties only without disturbing the demand or interest thereof. The appeal is partly allowed in the above terms.

10. The miscellaneous application filed by Revenue for change of cause title is allowed.

(Operative portion of the order was
pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

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