IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT : Division Bench B1]

Application No.: ST/Misc[CT]/40901/2017
Appeal Nos.: ST/185/2011, ST/40551/2016, ST/40678, 40679/2017

Sl. No.	Appeal No.	Appellant	Respondent
1.	ST/185/2011	M/s. Kasturi & Sons Ltd., Chennai	The Commissioner of G.S.T. & C.Ex., Chennai North
Arising out of Order-in-Original No. 21/2010-S.Tax./Ch. IV. dated 31.12.2010 passed by the Commissioner of Central Excise, Chennai-IV Commissionerate, Nandanam			
2.	ST/Misc[CT]/ 40901/2017, ST/40551/2016	M/s. Kasturi & Sons Ltd., Chennai	The Commissioner of G.S.T. & C.Ex., Chennai North
Arising out of Order-in-Appeal No. 236/2015 (STA-I) dated 27.10.2015 passed by the Commissioner of Service Tax (Appeals-I), Newry Towers, Anna Nagar, Chennai			
3.	ST/40678/2017	M/s. Kasturi & Sons Ltd., Chennai	The Commissioner of G.S.T. & C.Ex., Chennai North
4.	ST/40679/2017	M/s. Kasturi & Sons Ltd., Chennai	The Commissioner of G.S.T. & C.Ex., Chennai North
Arising out of Order-in-Appeal No. 674/2016 (STA-I) dated 26.11.2016 passed by the Commissioner of Service Tax (Appeals-I), Newry Towers, Anna Nagar, Chennai			

Appearance:-
Shri. T.R. Ramesh, Advocate
for the Appellant

Shri. K. Veerabhadra Reddy, ADC (AR)
for the Respondent

CORAM:
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing/Decision: **12.03.2019**

Final Order Nos. 40548-40551 / 2019

Per Madhu Mohan Damodhar :

The facts of the case are that the appellants are publishers of newspapers like "The Hindu", "Business Line" and Magazines "Front Line" and "Sportstar". They also own a number of websites where all content and site-based advertisements are grouped by Google Adsense and displayed with links, wherever applicable, to end users of the sites.

2.1 Pursuant to audit of accounts of the appellants, it emerged that appellants were collecting money for flashing advertisements on their websites from various parties and Google Adsense . It appeared that the said amounts collected for flashing such advertisements were liable to service tax under the head "Sale of Space or Time for Advertisement" under Section 65(105)(zzzm) of the Finance Act, 1994. It therefore appeared that the appellants were liable to discharge service tax liability under this category in respect of such amounts collected by them, which was not done so.

2.2 It further emerged that appellants had received Affiliate Commission from one Mercado Online Pvt. Ltd., Bangalore. That appellants promote the business of Mercado by partnering with them and linking their website www.thehindushopping.com. That for any purchase order executed, when an order is placed through the said website, the appellants get a share of the net margins. It therefore appeared that this activity of the appellants falls under the category of "Business Support Services" in terms of Section 65(104c) of the Finance Act, 1994. Hence, service tax liability would require to be discharged on the amounts received by the appellants, which was not done so.

2.3 Accordingly, a number of Show Cause Notices were issued to the appellants which culminated in the impugned Orders confirming the tax liabilities under Sale of Space or Time for Advertisement Service and Business Support Service with interest thereon and imposition of penalties. Aggrieved by such orders, the appellants have filed these appeals before this forum.

2.4 The brief details of the Show Cause Notices, periods involved, impugned Orders and related appeals is given in the chart below :

Sl. No	Appeal No.	Impugned Order No. & Dt.	SCN/ SOD No. & Dt.	Period	Service tax (in Rs.)	Penalty (in Rs.)
1.	ST/185/ 2011	O-I-O No. 21/2010 dt. 31.12.2010	104/2009 Dt. 01.04.2009	01.05.2006 to 31.03.2008	72,84,602/- (72,32,995/- under Sale of Space for Advertisement Service + Rs. 51,606/- under Business Support Service) with interest	72,48,602/- under Sec. 78 of the Finance Act, 1994
			442/2009 dt. 12.10.2009	01.04.2008 To 31.03.2009	39,46,368/- (38,73,853/- under Sale of Space for Advertisement Service + Rs. 72,505/- under Business Support Service) with interest	Rs. 200/- per day under Sec. 76 of the Finance Act, 1994
2.	ST/40551/ 2016	O-I-A No. 236/2015	484/2010 dt.	01.04.2009 to	24,27,348/- (23,96,603/- under	Rs. 200/- per day

		dt. 27.10.2015	09.09.2010	31.03.2010	Sale of Space for Advertisement Service + Rs. 30,745/- under Business Support Service) with interest	under Sec. 76 of the Finance Act, 1994
			285/2011 Dt. 26.08.2011	01.04.2010 To 31.03.2011	24,03,669/- (23,76,706/- under Sale of Space for Advertisement Service + 29,963/- under Business Support Service) with interest	Rs. 200/- per day under Sec. 76 of the Finance Act, 1994
3.	ST/40678-40679/ 2017	O-I-A No. 674/2016 dated 26.11.2016	241/2012 dt. 24.07.2012	01.04.2011 to 31.03.2012	28,09,997/- (28,07,834/- under Sale of Space for Advertisement Service + 2,163/- under Business Support Service) with interest	Rs. 100/- per day under Sec. 76 of the Finance Act, 1994
			20/2013 dt. 01.11.2013	01.04.2012 to 30.06.2012	4,71,867/- with interest + refund of Rs. 7,59,226/- paid under protest with interest under Sale of Space for Advertisement service.	Rs. 100/- per day under Sec. 76 of the Finance Act, 1994

3. When the matter came up for hearing, on behalf of the appellants, Ld. Advocate Shri. T.R. Ramesh made oral and written submissions which are summarized as under :

(i) The appellant was merely providing space in their website and was nowhere involved in any service in relation to sale of space or time for advertisement. In other words, the appellant merely sold the space in the website and the service tax would get attracted only if somebody provides services in relation to sale of space or time for advertisement under Section 65(105)(zzzm) of the Finance Act, 1994. Nowhere in the provision it was stated that mere sale of space in the website would amount to rendition of service. On the other hand, space in the internet being 'goods', capable of being bought and sold, cannot be treated as service.

(ii) Even assuming but not conceding that the transaction attracts service tax, in respect of payments received from M/s. Google Inc. in foreign currency, the same would amount to Export of Service and consequently, the service tax demand on this score is not sustainable in view of Rule 3(1)(iii) of Export of Services Rules, 2005.

(iii) For the demand under Business Auxiliary Service, nothing was available on record that the appellant was providing any operation marketing assistance to M/s. Mercado. On the other hand, as can be seen from salient points of the MoU extracted in Order-in-Original No. 3 and 3/2014 dated 29.10.2014, it was a mere joint venture with Mercado in the nature of partnership for which the net margin shall be shared equally. Reliance is placed on the decision of the Tribunal in the case of ***M/s.***

Mormugao Port Trust Vs. Commr. of Cus., C.Ex. & S.T., Goa reported in 2017 (48) S.T.R. 69 (Tri. – Mum.) wherein at para 21 it was held as follows :-

> *"…What the partner/co-venturer does is for his own benefit cannot ipso facto be considered as a service rendered to the partnership (joint venture). The mere fact that the partnership (joint venture) may also benefit from the same is irrelevant as there is no contract of service agreed upon or performed by the partner (co-venturer) to the partnership (joint venture). Additionally, there is no consideration agreed upon or provided. In the absence of there being a quid pro quo the essential requirement of the definition of service is not met with."*

When the transaction is a joint venture, no service tax would be attracted since there is no *quid pro quo* requirement of appellant with that of joint venture.

(iv) When the issue involves interpretation, the appellant was under the impression that the impugned transactions would not attract service tax. All the information was gathered from the appellant's Books of Accounts and there was no clandestine operation. That being the case, the invocation of extended period of limitation in respect of part of demand is wholly unsustainable. On that basis, part of the demand is barred by limitation. When there is no suppression, the imposition of penalty under Section 78 is also unsustainable. When there is reasonable cause for not paying tax due to interpretation of statutory provision/taxability, appellant prays for waiving the penalties under Section 76 and 78 of the Finance Act, 1994, in terms of Section 80 of the Finance Act, 1994.

4. On the other hand, on behalf of the respondent, Ld. AR Shri. K. Veerabhadra Reddy makes oral and written submissions which can be summarized as under :

(i) As in the case of advertisement in print media, M/s. Google Inc. acts as an advertising agent to sell space and time on behalf of "The Hindu". Hence, the argument that third person causing or effecting the sale of space or time for advertisement is only applicable in the case of advertising agency services in print media and not applicable to advertisement in the website/internet, is the appellant's own interpretation. It is an undisputed fact that clicks enable a viewer to enter into M/s. Google Inc. site displaying their client's products/services. These clicks are the resultant measure of accounting the payment viz., payable by M/s. Google Inc. or receivable by "The Hindu".

(ii) The appellants had entered into an agreement with M/s. Google Inc. to provide an exclusive search box to browse the advertisement displayed by M/s. Google Inc. At times, the space provided in the web page invites internet users to click them which leads to the web page of the concerned client whose advertisement is flashed. As per the agreement, they cannot display any Ad Unit on a page that contains advertisements associated with another Google Adsense customer, unless authorized to do so by M/s. Google Inc.

(iii) Payment is not made for the provision extended to M/s. Google Inc. by putting up a search box to enable users to access Google web content or space for advertisement or teaser but for valid clicks, valid impressions, the browser make in the search box to view the advertisements and/or valid completions of Referral Events initiated through Referral buttons as per Clause 11 of the Agreement.

(iv) Tax is attracted for provision of service in relation to Sale of Space or Time for Advertisement in the different media referred to in the Section. Because of the appellant providing space in their webpage, the browser/user is able to view the advertisement of M/s. Google Inc. clients.

(v) The appellant cannot claim that there is no sale of space to M/s. Google Inc. by them. There is no doubt that the appellant receives payments from M/s. Google Inc. for providing exclusive search box of M/s. Google Inc. and quantum to be paid is measured based on the valid clicks made by the user as per Clause II of the Agreement.

(vi) Appellant is providing operational assistance for marketing the business of Mercado by entering into a Memorandum of Understanding (MoU) by offering their website to include online shopping among others and thus have partnered with the said company with a mutual arrangement to share the net margins equally on all executed orders that emanate from their website.

(vii) It is a very clear business transaction providing operational assistance for marketing the products/services of M/s. Mercado. According to Clause 4 of the MoU, Mercado will track, process and execute all orders and also be responsible for all pre-sales and post-sales customer queries over email and phone. This becomes a reality only with the operational assistance made available by the appellant in their website and therefore, the services provided to Mercado falls under Business Support Service w.e.f. 01.05.2006.

(viii) Regarding Business Support Service, the appellant has entered into a Memorandum of Understanding with Mercado

Online Pvt. Ltd., Bangalore to offer the users of the Hindu website the facility to do online shopping.

(ix) As per Clause 4 of the MoU, "Mercado will trace, process and execute all orders and also be responsible for all pre-sale and post-sale customer queries over email and phone". There is no dispute that the website belongs to the appellant and Mercado pay the appellant a margin out of the sale proceeds. The object of the Business Support Service is that the service provided would ultimately render the service receiver to make profit or growth oriented business venture. It is evident from the payment received from Mercado that the support service extended by the appellant has benefited M/s. Mercado.

(x) Invocation of extended proviso to Section 73(1) is justifiable in respect of Show Cause Notice No. 104/2009 dated 01.04.2009

5. Heard both sides and have gone through the facts.

6. We intend to take up the issues one by one.

7.1 To understand the issue better, the relevant provisions of Section 65(105)(zzzm) of the Finance Act, 1994 in respect of the category "Sale of Space or Time for Advertisement" brought into the service tax net with effect from 01.05.2006, is reproduced as under :

"(zzzm) to any person, by any other person, in relation to sale of space or time for advertisement, in any manner; but does not include sale of space for advertisement in print media and sale of time slots by a broadcasting agency or organisation.

Explanation 1. *— For the purposes of this sub-clause, "sale of space or time for advertisement" includes, —*

(i) providing space or time, as the case may be, for display, advertising, showcasing of any product or service in video programmes, television programmes or motion pictures or music albums, or on billboards, public places, buildings, conveyances, cell phones, automated teller machines, internet;

(ii) selling of time slots on radio or television by a person, other than a broadcasting agency or organisation; and

(iii) aerial advertising.

*[**Explanation 2.** — For the purposes of this sub-clause, ''print media'' means, —*

(i) ''newspaper'' as defined in sub-section (1) of section 1 of the Press and Registration of Books Act, 1867 (25 of 1867);

(ii) ''book'' as defined in sub-section (1) of section 1 of the Press and Registration of Books Act, 1867 (25 of 1867), but does not include business directories, yellow pages and trade catalogues which are primarily meant for commercial purposes;]"

7.2.1 At first blush, it would appear that any service provided/to be provided to any person in relation to Sale of Space or Time for Advertisement, etc., would come under the fold of the aforesaid service category. However, on closer analysis, it is evident that the service tax can be levied only in respect of the services provided "in relation to Sale of Space or Time …" and not <u>for</u> – "Sale of Space or Time..". This has to be so, since service tax is an indirect tax, leviable only on 'service' and not on 'sale of goods'.

7.2.2 Such an interpretation is supported by the judgement of the Hon'ble High Court of Delhi in the case of ***M/s. Home Solutions Retails (India) Ltd. Vs. Union of India – 2011 (24) S.T.R. 129 (Del.),*** where the Hon'ble Court laid down principles regarding service tax as under :

> ***"52.*** *From the aforesaid pronouncements in the field, the following principles regarding service tax can be fruitfully culled out :*
>
> *(i) The measure of taxation does not affect the nature of taxation and, therefore, the manner of quantification of the levy of service tax has no bearing on the factum of legislative competence.*
>
> *(ii) Taxable services can include providing of premises on a temporary basis for organizing any official, social or business function but also other facilities supplied in relation thereto.*
>
> *(iii) Levy of service tax on a particular kind of service cannot be struck down on the ground that it does not conform to a common understanding of the word 'service' as long as it does not transgress any specific restriction embodied in the Constitution.*
>
> *(iv) Service tax is a levy on the event of service.*
>
> *(v) The concept of service tax is an economic concept.*
>
> *(vi) 'Consumption of service' as in case of 'consumption of goods' satisfies human needs.*
>
> *(vii) Service tax is a value added tax which, in turn, is a general tax applicable to all commercial activities involving provision of service.*
>
> *(viii) Value added tax is a general tax as well as destination based consumption tax leviable on services provided within the country.*
>
> *(ix) The principle of equivalence is in-built into the concept of service tax.*
>
> *(x) The activity undertaken in a transaction can have two components, namely, activity undertaken by a person pertaining to his performance and skill and, secondly the person who avails the benefit of the said performance and skill. In the said context, the two concepts, namely, activity and the service provider and service recipient gain significance."*

7.2.3 The Finance Act, 1994 provides only for taxation of services connected with Sale of Space or Time for Advertisement and not the Sale of Space or Time *per se.* True, the inclusive definition of "Sale of Space or Time for Advertisement" in Explanation-1 to Section 65(105)(zzzm) ibid includes providing space or time, as the case may be, for display, advertising or showcasing of any product or service, *inter alia,* on the internet. However, this definition is only for amplifying the meaning of the words "Sale of Space or Time per Advertisement" in Section 65(105)(zzzm) ibid., and not to convey, in any manner, that such 'sale' will be exigible to service tax liability.

7.2.4 The combined takeaway from the analysis of the above legal provisions will only result in the conclusion that only services provided 'in relation to' Sale of Space or Time for Advertisement on the internet attract service tax liability under Section 65(105)(zzzm) ibid. However, the Sale of Space or Time for Advertisement simpliciter, being only a sale of goods, that cannot be brought into the fold of taxability under the above provisions of the Finance Act, 1994.

7.3 From the impugned Orders, it is seen that the lower authorities have confirmed the tax liability on this activity of the appellant on the mistaken premise that "any person who provides space in their website for advertisement through internet is squarely covered as providing a taxable service under this category of service". The lower authorities have also taken a view that "this mere provision of space itself is covered under the inclusive definition of Section 65(105)(zzzm) as a taxable service provided to any person by any person". In our opinion, if such an interpretation of the lower authorities is to be upheld, it would be tantamount to upholding service tax liability on sale of goods. It therefore appears that the lower authorities have misread the definition of "Sale of Space or Time for Advertisement" in Explanation-1 to Section 65(105)(zzzm) ibid., to be the same as service provided/to be provided by any person to any other person **in relation to** "Sale of Time or Space for Advertisement…"

8. In the light of the discussions, findings and conclusions hereinabove, as the very premises and interpretations of the lower authorities have been found to be erroneous and without any legal basis, the following impugned demands viz., Rs. 72,32,995/- with interest thereon and Rs. 38,73,853/- with interest thereon (Appeal No. ST/185/2011), Rs. 23,96,603/- with interest thereon and Rs. 23,76,706/- with interest thereon (Appeal No. ST/40551/2016) and Rs.

28,07,834/- with interest thereon and Rs. 4,71,867/- with interest thereon (Appeal Nos. ST/40678-40679/2017) along with related penalties imposed, cannot be sustained and will require to be set aside, which we hereby do.

9. The appeals in respect of these demands are therefore allowed with consequential benefits, if any, as per law.

10.1 The second set of demands have been made under the service tax category of Support Services of Business of Commerce under Section 65(104c) of the Finance Act, 1994. The said provision as extracted by the lower authority, reads as under :

> *"[(104c) "**support services of business or commerce**" means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, **operational assistance for marketing**, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.*
>
> ***Explanation**. — For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security;]"*

(Emphasis added)

10.2 From the facts on record, the appellants were in understanding with M/s. Mercado. They had entered into a Memorandum of Understanding (MoU) offering their website to include online shopping amongst others. In our view, this would be a clear case of providing operational assistance for marketing to M/s. Mercado, albeit on the internet. It is pertinent to note that in the cyber world of today, operational assistance can surely go beyond the normally understood 'assistance' by a business support provider using logistics, provision of office utilities with competent personnel, etc., to support the client in their marketing efforts. The internet has already become a very important medium of marketing or selling of goods or services. For Mercado, the access given by the appellants to their website is surely a clear case of the latter providing operational assistance for internet marketing of sales.

10.3 As admitted by the appellants themselves in their reply dated 27.07.2009 to the Show Cause Notice dated 01.04.2009, "The website belongs to them (assessee), where various e-transactions are concluded and executed by Mercado. Since the transactions emanate from their website, they are entitled for a margin out of the sale proceeds". The arrangement of sharing of net margins equally on all executive orders is only a quantification of the charges that would be payable to the appellant by Mercado for each successful transaction. Mercado is only paying the appellant for the support provided by the latter for supporting their business in the cyber world.

11. In the circumstances, we are unable to find any infirmity in the impugned Orders of the lower authorities which have confirmed/upheld the tax liabilities in respect of these transactions under the category of Support Services of Business or Commerce. We also find merit in the argument of the Revenue that the object of Business Support Service is that service provided would ultimately render the service recipient to make profit or growth oriented business, which is the fact of the transactions between appellant and Mercado. We are therefore of the considered opinion that the income generated by appellant from Mercado in respect of the above transactions are liable to service tax under Business Support Services as per the provisions of Section 65(104c) ibid.

12.1 In the event, the amounts demanded under Business Support Service of Rs. 51,606/- with interest thereon and Rs. 72,505/- with interest thereon (Appeal No. ST/185/2011), Rs. 30,745/- with interest thereon and Rs. 26,963/- with interest thereon (Appeal No. ST/40551/2016) and Rs. 2,163/- with interest (Appeal Nos. ST/40678-40679/2017) are sustained. Consequently, the appeals filed by the appellants in respect of these demands are dismissed.

12.2 However, coming to the penalties imposed in respect of the tax demands under Business Support Services, as has already been discussed hereinabove, the provision of Business Support Service on the internet world is definitely a new business concept and understandably, a recent business foray for the appellants. It is evident that the appellants were under the *bona fide* belief that it was a mere joint venture with Mercado in the nature of partnership and no service tax would be attracted on that account. Hence, there is a case for setting aside the penalties imposed in respect of these demands. This being so, while we confirm the demands with interest under the category of Business Support Service in all these three appeals, the related penalties imposed in respect of those demands under the Finance Act, 1994 cannot be sustained and are set aside. The appeals against imposition of penalties is allowed.

13. To sum up :

I. **<u>Appeal No. ST/185/2011 :</u>**

(a) Demands of Rs. 72,32,995/- for the period from 01.05.2006 to 31.03.2008 and Rs. 38,73,853/- for the period from 01.04.2008 to 31.03.2009 under Sale of Space or Time for

Advertisement Service in respect of this appeal are set aside. Appeal on this issue is allowed *in toto.*

(b) Demand of Rs. 51,606/- for the period from 01.05.2006 to 31.03.2008 and Rs. 72,505/- for the period from 01.04.2008 to 31.03.2009 under Business Support Service with interest thereon are sustained. Appeal against this demand is dismissed.

II. <u>Appeal No. ST/40551/2016 :</u>

(a) Demands of Rs. 23,96,603/- for the period from 01.04.2009 to 31.03.2010 and Rs. 23,76,706/- for the period from 01.04.2010 to 31.03.2011 under Sale of Space or Time for Advertisement Service are set aside. Appeal on this issue is allowed *in toto.*

(b) Demands of Rs. 30,745/- for the period from 01.04.2009 to 31.03.2010 and Rs. 26,963/- for the period from 01.04.2010 to 31.03.2011 under Business Support Service with interest thereon are sustained. Appeal against this demand is dismissed.

III. <u>Appeal No. ST/40678-40679/2017 :</u>

(a) Demands of Rs. 28,07,834/- for the period from 01.04.2011 to 31.03.2012 and Rs. 4,71,867/- for the period from

01.04.2012 to 30.06.2012 under Sale of Space or Time for Advertisement Service are set aside. Appeal on this issue is allowed *in toto.*

(b) Demand of Rs. 2,164/- under Business Support Service for the period from 01.04.2011 to 31.03.2012 is sustained. Appeal against this demand is dismissed.

IV. <u>Penalty :</u>

(a) However, the penalties in respect of the aforesaid demands under Business Support Service for these periods are set aside.

14. All the appeals are disposed of on above terms. The Miscellaneous Application filed by the Department for change of cause title is allowed.

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

(P Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

Sdd