IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH, COURT NO. IV

Appeal No. ST/58724/2013- Cu(DB)

[Arising out of Order-in-Appeal No. 29/ST/Appl/DLH-IV/2013 dated 07.05.2013, passed by the Commissioner of Central Excise, Delhi]

S.K. Education Pvt. Limited : **Appellant**

Vs

Commissioner of Service Tax, Delhi : **Respondent**

AND

Appeal Nos. ST/53103-53105/2014-CU(DB)

Commissioner of Service Tax, Delhi : **Appellant**

Vs

S.K. Education Pvt. Limited : **Respondent**

Appearance:
Sh. Sudhir Malhotra, Sh. A.S. Harija, Advocate for the Appellant
Sh. Amresh Jain, DR for the Respondent

<u>CORAM</u>:
Hon'ble Shri Ashok Jindal, Member (Judicial)
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing/Decision : 23.02.2017

Final Order No.52996-52999-CU(DB)

Per V. Padmanabhan

M/s S.K. Education Pvt. Ltd.(assessee) has two units namely "Height Institute of Fashion & Technology" and "Bachpan" and are undertaking activities as under:

(a) "Heights Institute of Fashion & Technology" (Heights) are engaged in imparting vocational training in the field of fashion designing, interior designing, painting, English speaking courses, accountancy learning courses and various computer software & hardware courses etc. This unit had also entered into agreement with various entities to provide business know-how to these entities and authorized them to use brand name "Heights".

(b) "Bachpan" units are merely providing their brand name "Bachpan" and business know-how to its customer for running play schools. The Business patterns of "Bachpan" is different from "Heights" unit as it does not run any school or impart any education/training to children.

3. The assessee was receiving amounts towards franchise fee, royalty, cost of manual supplied, certificate charges and advertisement reimbursement charges in respect of above units. The assessee is holding service tax registration on "franchise service" with effect from01.07.2003.

4. The service tax has been demanded under the category of “franchise services” for the period July 2003 to June 2012 in respect of amounts received towards royalty, cost of manual supplied, certificate charges and advertisement reimbursement charges in respect of above units.

5. The Franchise Services have been brought under service tax net with effect from01.07.2003 (vide notification no. 7/2003 ST dated 20.06.2003) vide Section 65(47), 65(48) and Section 65(105)(zze). The relevant definitions read as under:

Section 65(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.

Section 65(48)

"**Franchisor**" means any person who enters into franchise with a franchisee and includes any associate of franchisor or a person designated by franchisor to enter into franchise on his behalf and the term "franchisee" shall be constructed accordingly.

Section 65(105)(zze)

"Taxable Service" means any service provided to a franchisee, by the franchisor in relation to franchise.

The Section 65(47) was substituted vide Finance Act, 2005 with effect from16.06.2005 by which sub-clause (ii) to (iv) were deleted. Prior to 16.06.2005, all the four conditions specified therein were required to be cumulatively satisfied. The CBEC vide Circular no. 59/8/2003 dated 20.06.2003 have clarified that unless all the ingredient mention at (i) to (iv) of Section 65(47) are satisfied, the agreement cannot be called franchisee agreement.

7. The Bachpan Unit allowed their brand name "Bachpan" to be used by the licencee and also provided know-how for functioning of play school. Assessee claimed that the Bachpan Unit did not satisfy the conditions of Section 65(47) prior to and after 16.06.2005, accordingly, claimed that they were not liable to service tax under Section 65(47).It is their view that "Bachpan" & "Heights" Units are liable to Service Tax, in respect of amounts

received towards allowing use of its brand name by the licencee under category of “Intellectual Property Service” only with effect from 10.09.2004.

8. The “Intellectual Property Service” have been brought under Service tax ambit with effect from10.09.2004 vide Section 65(55a), 65(55b) read with Section 65(105)(zzr) and it reads as under:

Section 65(55b)

“Intellectual Property service” means-

a) Transferring, temporarily; or
b) Permitting the use or enjoyment of, any Intellectual Property Right;

Section 65(55a)

“Intellectual Property Right” means any right to intangible property, namely, trademarks, designs patents, or any other similar intangible property, under any law for the time being in force, but does not include copyright;

Section 65(105) (zzr)

Taxable service means any service provided or to be provided to any person, by the holder of Intellectual Property Right, in relation to Intellectual Property Service.

It is submitted that trademark is in the nature of property and the right to use trademark is a transaction in property. The trade-mark are goods and licence to use trademark is nothing but a right to use property and the grant of licence to use trademark is a transaction of sale. It is a share of product or profit reserved by owner for permitting another the use of his property.

9. The dispute which is the subject matter of the present appeals is whether amounts recovered by the assessee's towards royalty, advertising plan, cost of manual supplied and certificates issued under the franchise agreements both on account of "Bachpan" and "Heights" were part of the gross value under Section 67 for the purpose of payment of Service Tax. In the proceedings covered by Appeal No. ST-58724/2013, the Original Adjudicating authority (Additional Commissioner) as well as the First Appellate Authority viz. Commissioner (Appeals) held that the above amounts are required to be included in the gross value and the Service Tax demand was confirmed along with a direction to pay interest as well as penalties under various sections. However, in respect of the proceedings covered by Appeal Nos. ST/53103-105/2014, which is the subject matter of Order-in-Original dated 31.01.2014 passed by the Commissioner Central Excise, Delhi, it has been held that such amounts are not required to be included and the entire Service Tax demand raised for the periods 01.10.2008 to 30.06.2012 has been dropped. Wherever, Service Tax demands stand upheld, the assessee is in appeal before us and wherever the Service Tax demands have been dropped, the Revenue is in appeal before us. All these appeals are being disposed of by this common order.

10. With the above background, we heard Shri Sudhir Malhotra and Shri Rajeev Gupta, ld. DR for the appellant as well as Shri Amresh Jain, ld. DR for the respondent.

11. As already extracted above, the definition of Franchise Service under Section 65(47) was amended with effect from 16.06.2005. For the period prior to this date four conditions have been specified, which are required to be cumulatively satisfied for levy of Service Tax under Franchise service. The assessee has claimed that the brand name “Bachpan” is allowed to be utilized by the licensee and also the necessary know-how for functioning of play school is provided to the licencee as per the agreement. The claim of the assessee is that the agreement does not satisfy the requirements of 65(47) both prior to 16.06.2005 as well as for the subsequent period. Consequently, they have claimed that no service tax will be liable in respect of “Bachpan”. In respect of “Heights” also the royalty fee charged for supplying the Know-how etc will not be liable to service tax for the entire period. They have also submitted that the amounts charged towards giving the permission for the use of the brand names “Bachpan” and “Heights” along with the technical Know-how, are not covered under Franchise services but are covered under the category of support services of Business or Commerce under Section 65(4c), which has been introduced with effect from 01.05.2011 and the assessee is already paying Service Tax with effect from 01.05.2011.

12. The ld. DR supports the findings of the first appellate authority in the first proceedings in the series, and submitted that the departmental appeals may be allowed and the parties appeals dismissed.

13. We have gone through the relevant agreements entered into by the assessee. The assessee is getting payment for providing Technical Know-how to the franchisee and supplying the manual and certificates. It has also been alleged in the Show Cause Notice that advertisement expenditure has been reimbursed by the assessee. The question for decision is whether the amounts charged as above are required to be included in the gross amount charged for taxable services under Section 67.

14. We find that the assessee provides the complete know-how to the franchisees to enable them to set up the pre-schools and to run them. The dispute is whether amounts received are to be included in the gross amount to be charged for service tax under franchise services.

15. The First issue for consideration is whether the advertisement reimbursement charges should be included in the gross amount for charging service tax. The assessee has disputed the fact that the advertisement expenditure of the franchise has been received. It is settled provision of law that any expenditure incurred by the service provider in the course of providing

taxable services and reimbursed cannot be considered as consideration for taxable services. This view has been settled by the **Hon'ble High Court of Delhi in case of *Sercon India Pvt. Ltd. Vs Commissioner (Adjudication) Service Tax reported as 2013(30)STR(454)(Del.).*** In view of the above, there is no justification for including reimbursable expenditure in the taxable service tax.

16. Next, we consider the issue of the amounts received by the assessee towards cost of manuals and certificates supplied. The allegation raised is that such costs recovered are to be considered as part of the gross value for charging Service Tax. However, we note that the invoices raised for supply of manual and certificates indicate that the assessee has paid VAT for such sales covering the value of manual and certificates supplied. It is settled law that no service tax is leviable in cases where goods have been sold on payment of VAT/ Sales tax. Consequently, we conclude that no Service Tax is leviable on the amounts received for manuals and certificates.

17. The Revenue has also disputed dropping of demand of Service tax on the Royalty Charges i.e. "Royalty" recovered by the assessees in respect of 'Bachpan'. Revenue was of the view that service tax will be payable on such consideration which have been received towards allowing the license to use the trade name of Bachpan. However, the assessee has argued that such amounts have been charged for transfer of technical know-how on running of Play

School by franchisees. The ld. Commissioner has dropped such demand of service tax. He observed as under:-

> **"78.** I find that the noticee provides the complete know-how to their franchisees which helps the franchisees in their regular functioning and also in the setting up of the preschools and noticee receives the payment for this and the department has alleged in the impugned show cause notice that the payment received for providing the technical know-how should be get included in the gross value charged for providing the taxable services. To this the noticee contended that it is the substance and not the form of the thing that matter in the eye of the law and the activities mentioned in the above write up proves this beyond doubt that the noticee is providing complete technical know-how to their franchisees and the payments received in lieu of the above technical assistance in whatever name is not taxable.
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> **79.** To support their above statement the noticee relied on the judgment of The CESTAT, West Zonal Bench, Mumbai, in the matter of M/s. Navinon Limited vs. Commissioner of Central Excise, Mumbai, in which the bench held that the payment of royalty cannot be insisted as a payment for a service. In fact, it is a share of product or profit reserved by the owner for permitting another the use of his property. Royalty payment for the use of technology and know-how cannot be equated with any services to be provided by the service provider.
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> **80.** On the basis of the above judgment, it can be concluded that the payment of royalty are not insisted as payment for a service provided. It is understood as a share of product or profit received by the owner for permitting another the use of his property. Royalty payments in the present case for the use of technology and know-how cannot be equated with any services to be provided by the Service provider. Similarly, in the instant case the payment received by the noticee on a percentage basis, which the department alleged that it should form part of the gross value under Section 67 for charging Service Tax, cannot be treated as a payment for providing the taxable service, since providing of technical assistance by the noticee to their franchisee cannot be equated to the provision of taxable services.**"**

18. In view of the above discussions, we find that there is no justification for levy of service tax on the amounts received by the assessee towards royalty, cost of manuals and certificates as well as advertisement reimbursement charges. Hence, the demand of service tax for the entire period from 01.07.2003 till 30.06.2012 is required to be set aside. In view of the above, the appeal filed by the assessee is allowed and the appeal filed by Revenue is dismissed.

[Dictated and Pronounced in the open court]

(Ashok Jindal)
Member (Judicial)

(V. Padmanabhan)
Member (Technical)

R S.