IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Service Tax Appeal No. ST/55444/2014-Ex [DB]

[Arising out of Order-in-Appeal No. 60/SM/ST/D-II/14 dated 30.07.2014 passed by the Commissioner of Central Excise (Appeal), Delhi-II.]

M/s. Image Advertising. …Appellant

Vs.

C. S.T., Delhi … Respondent

Present for the Appellant : Mr. Anil Kumar Khanna (Advocate)
Present for the Respondent : Mr. G.R. Singh, (DR).

Coram: HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)
HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing.19.07.2018
Pronounced on: 02..02.2018

FINAL ORDER NO. ___52706/2018___

PER: RACHNA GUPTA

The briefly stated facts relevant for the present appeal are as follows that the appellants are registered with the Service Tax Commissionerate for rendering advertising agency service falling under Section 65(105)(e) of the Finance Act, 1994 (the Act for shorts). During an audit of the appellant it was noticed by the Department that the appellant has wrongly availed the cenvat credit in respect of inputs and input services while constructing bus Queue Shelters, Public utilities such as toilet blocks, tree guards, railings, centers verges, pole kiosks, overhead gantries etc.

under various agreements that various government authorities as that of the Municipal Corporation of Delhi (in short MCD) it was revealed that the said cenvat credit has been utilized by the appellant for discharging the service tax liability under service category of advertising agencies services. The another short coming noticed by the Department was that the appellant has not paid the service tax on the payments received for providing advertising agency service to other advertising agencies namely M/s. Prime Site and M/s. Graphis Ads resultantly a show cause notice dated 19/04/2012 was served upon the appellants seeking recovery of wrongly availed cenvat credit and service tax not paid along with interest and penalties. The demand of the said show cause notice was confirmed by the order of additional Commissioner dated 16.12.2013. Commissioner Appeals vide the order under challenge has set aside the findings about cenvat credit availed by the appellants to have been wrong however while holding the appellant as the sub contractor of advertising agency has confirmed the demand qua the service tax liability for rendering advertising agency services and has also confirmed the demand of interest as well as the penalties. The present appeal has been filed against the confirmed demands.

2. We have heard Shri. Anil Kumar Khanna ld. Advocate for the appellant and Shri G.R. Singh ld. DR for the Department.

3. It is submitted on behalf of the appellant that vide the Show Cause Notices various allegations were leveled against the appellant one of them was of wrongly availing cenvat credit on the construction material used for the construction a per a agreement in their favour by the government authorities. The said demand has already been dropped vide the order under challenge and that Department has not filed an appeal thereof. The order to that extent has attained finality. The findings are prayed to be upheld. With respect to the demand of service tax, it has been submitted that the authorities below have wrongly held the appellant to be a sub contractor while fastening upon him the said liability. It is also submitted that the CBEC Circular no. 96/7/2007-ST dated 23.08.2007 has wrongly been relied upon retrospectively. The ld. Advocate has relied upon **Suchitra Components Ltd. Vs. Commissioner Of Central Excise, Guntur 2007 (208) ELT 321 (S.C.)** to impress upon that only beneficial circulars can be given retrospective effect. The impugned circular being oppressive in nature, the authorities below are alleged to have commit an error while applying it retrospectively. The order confirming the demand of service tax with appropriate interest and penalty

is therefore prayed to be set aside. Appeal is prayed to be disposed off accordingly.

4. While rebutting the submissions ld. DR has justified the order mainly relying upon para 5.3.12 of the order of original adjudicating authority. It is submitted that the Commissioner Appeal has also relied upon those findings while confirming the impugned demand of service tax on account of rendering advertising agency service along with the appropriate interest and penalty. Appeal is accordingly prayed to be rejected.

5. After hearing both the parties and perusing the entire record, we are of the considered opinion as follows:

from the show cause notice two issues were raised first was about the wrong availment of cenvat credit by the appellants on RCC pipe RCC Main pillar HR Sheet Conical Manhole, Cement HRC sheet etc used in fabrication of Structural support while executing the construction contract/ agreements in their favour and utilizing the same secondly about the demand of service tax for uduing advertising agency services along with proportionate interest and penalty. As far as the first issue is concerned the Commissioner (Appeals) has already dropped the demand and the department has not challenged the same therefore we hold that the first issue stand decided in favour of the appellant otherwise also we opine that that while dropping that demand the authority below has rightly relied upon the authority of Hon'ble Apex Court in the case of Maruti Suzuki Ltd. Vs. CCE, Delhi-Iii, 2009(240) ELT 641 (SC) hence we do not find any infirmity qua those findings the findings allowing the cenvat credit to the appellant are hereby confirmed.

6. With respect to the second issue of discharging tax liability as that of advertising agency services, it is an admitted case of the appellant that after entering into a contract with the government agency for constructing the bus queue shelters/ utility service as that of toilet blocks etc, and to use the said premises for show casing advertisements, the appellant entered into subsequent contracts with M/s. Prime Site and M/s. Graphis Ads both happened to be advertising agencies, to arrange for the advertisements to be so published/ displayed. The case of appellant is that since the appellant is not a advertising agency and has not rendered the advertisement agency service which otherwise has been rendered by M/s. Prime Site and M/s. Grphis Ads, neither he is the sub contractor of both the said companies as such appellant is not liable to pay the service tax on that account.

7. We observe from these admitted facts that that the findings of the authorities below holding the appellant as the sub contractor are erroneous on the face of the record. In fact the appellant contracted with both the advertising agency to arrange or prepare or design the

advertisements for their clients to be approached by them but for said advertisement to be displayed by the appellant at the sites to be constructed by him under the agreement with the MCD in his favour. Thus those two companies are rather the sub contractors of the appellant.

8. The appellant took the plea that they did not charge any service tax on the invoices raised on the advertising agencies in the year 2006-07 as no service tax was payable in that year as the services of advertising were provided by both the said agencies to their clients. But we observe that the impugned taxable service, w.e.f. 16.06.2005, has the meaning as any service provided or to be provided to a client by an advertising agency in relation to advertisement, in any manner and w.e.f 16.05.2008 the word client was replaced by any person. The expression advertising agency is defined under Section 65(3) of the Act to mean any person engaged in providing any service connected with the making preparation display or exhibition of advertising and that of the advertisement consultant. These definitions make it clear that scope of service which is included in the tax net extends not only to the person involved in making or preparing of advertisements but also includes the service by the person involved in display or exhibition of the advertisement.

9. From the admitted agreement of the appellant it is clear that the appellant had contracted with the M/s. Prime

Site and M/s. Graphis Ads for the making or preparation of the advertisements which were to be displayed by the appellant at the site to be constructed by him under an agreement in his favour by MCD. Thus, irrespective M/s. Prime Site and M/s. Graphis Ads had charged the service tax from their clients (for the preparation of the advertisements) and discharged their liability for rendering said part of advertising agency service but as far as the display of the advertisement of the said clients both the said advertising companies have made payment to the appellant as is apparent from the invoices raised, by the appellant himself on both those companies. Thus appellant being the main service provider was still liable to discharge the liability for the payments received by him from both the said advertising agencies. The fact that the service provided by the sub contractor are used by the main service provider for completion of his work, as in the present case, does not, in any way, alter the fact of provision of taxable service by the sub contractor though these may be in nature of input services, the service tax is still leviable on any taxable service provider.

10. Though the appellant has taken the plea that those payments are made in lieu of renting the property to both the advertising agency companies to display the advertisements of their clients but the perusal of the invoice of appellant falsifies the said submission as those amounts

are mentioned to have been received for displaying the advertisements. Thus irrespectively the advertisement were prepared by M/s. Prime Site and M/s. Graphis Ads for their clients but those are displayed by the appellant for which he has taken an amount, the appellant is equally a service provider to that extent as already held above and the amount received is the gross amount for calculating the service tax liability of the appellant. We accordingly, are of the opinion that the adjudicating authority below have rightly confirmed the said demand. We find no infirmity in the order to that extent accordingly we hereby confirm the demand. Even if the circular of 23.08.2007 is not taken into consideration the above discussion still holds good. The argument of the appellant to that effect is, therefore not sustainable. The authority relied upon is also not applicable for the said reason.

11. Now coming to the aspect of levy of the proportionate interest and the penalties, it is an apparent and admitted fact that the appellant has discharged his liability for the period 2007-2008 and 2010-11 qua the amount received for rendering the services of renting of immovable property but only after the issuance off the show cause notice to him that too without the payment of interest. From Section 75, of the Act payment of interest is a mandate in case there is delay in discharge of the tax liability. In view of said settled provision and the apparent and admitted delay on part of

the appellant we hold that there is not infirmity in confirming the demand of the interest from the appellant. Finally relying upon the Section 76 and Section 78 of the Act, we do not find any infirmity in the order where the proportionate penalties have been imposed and confirmed. We also find no infirmity when the adjudicating authority below has observed suppression of facts on part of the appellant. The admitted fact of making no payment of the tax liability by the appellant till the issuance of show cause notice to him is opined to be a sufficient positive act on part of the appellant which may amount to suppression with the whole intention of evading tax.

12. The Hon'ble Apex Court in the case of Anand Nishikawa Co. Ltd. Vs CCE Meerut 2005 (188) ELT 149 (SC) has held that whenever a correct information is not disclosed the only object thereof is the evasion of duty. There is nothing on record which may support the appellants of being under the bonafide belief of not being liable to pay tax. The certificates from both the advertising agency among the documents on the records including a certificate from DDB Mudra / a client, rather shows that the services of advertising were availed by them from the appellant against the payments made to the appellants. It is the service provider to discharge the service liability. Failure on his part to do same has rightly been considered as misrepresentation and suppression of facts. We therefore

find no infirmity when the proportionate penalties have been confirmed against the appellant, vide the order under challenge.

13. As a result of entire above discussion except modifying the order under challenge to the extent that appellant is not the sub-contractor, we hereby upheld the finding of the impugned order. Appeal is accordingly rejected.

(Pronounced in the open court on____02.08.2018__)

(**C.L. MAHAR**)
MEMBER(TECHNICAL)

(**RACHNA GUPTA**)
MEMBER (JUDICIAL)

Sakshi