CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH - COURT NO. – I

Service Tax Appeal No. 1485 of 2011
(Arising out of **Order-in-Review** No.01/2011(R)-Adjn.ST(Commr), dated 11.03.2011 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II)

Flytech Media Pvt Ltd., .. **APPELLANT**
3rd & 4th Floor,
Nagam Towers,
Minister Road,
Secunderabad,
Telangana – 500 003.

VERSUS

Commissioner of Central Tax .. **RESPONDENT**
Hyderabad – II
Kendriya Shulk Bhavan,
L.B. Stadium Road,
Basheerbagh, Hyderabad,
Telangana – 500 004.

APPEARANCE:
Shri Y Sreenivasa Reddy, Advocate for the Appellant.
Shri Wagh Chittaranjan Prakash, Authorised Representative for the Respondent.

CORAM: HON'BLE Mr. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE Mr. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30443/2023

Date of Hearing:12.12.2023
Date of Decision:12.12.2023

[ORDER PER: ANIL CHOUDHARY]

The appellant (FMPL for short) started their business in the year 2006 as an Advertising Agency and they were registered with the Service Tax Department providing service under the head 'sale of time or space' to their clients particularly by way of electronic bill boards operated by them. Accordingly, appellant was discharging the service tax liability and filing the returns.

2. Appellant entered into an agreement with one M/s Integrid Media Private Ltd., (IMPL) who were also in the business of advertising. In order to tap a wider market for the electronic bill boards, agreement dated 14.01.2007 was entered in the nature of Joint Venture/Partnership, with the understanding that this appellant shall set up the bill boards as it had license for such activity from the local authority, and IMPL would do the marketing and / or sale of time slots and the revenue so generated will be shared in agreed ratio. The opening recital of the agreement reads as follows:

'FMPL intends to outsource the selling of timeslots on these Five screens to corporate clients to IMPL, on the following terms and conditions as agreed upon between the parties hereto'.

Further, IMPL is given exclusive rights to sell advertisement time on the LED screens to corporate clients. Clause-1 further provides that IMPL was to finalise the sale agreement for corporate clients and be responsible for the recovery of revenue from them, for FMPL.

Further, provided – '**other clients who have market only in Hyderabad/Secunderabad such as (Meena Bazar, Mochi, Apollo Hospital etc) Educational Institutions based out of Hyderabad/Andhra Pradesh, live performance in the city, Film Promos and such other local activitIES would be handled by Flytech.**

In other words, as a thumb rule, clients who have market in Hyderabad/Secunderabad only, would be handled by Flytech and all other clients would be handled by IMPL.

3. The payment terms and modalities were provided in clauses 2-8 of the agreement.

Firstly, IMPL was to pay an amount of deposit Rs. 1.56 crores within 3 days of signing of the contract (clause 5), this amount was refundable by way of adjustment in 20 equal instalments beginning from July 2007. Secondly, IMPL guaranteed Flytech minimum revenue from the bill boards, and was to pay a minimum guaranteed amount of Rs. 1.25 crore spread in 12 instalments over the year long term of the agreement (clause-2). Post dated cheques were to issued for the purpose in terms of clause 7 of the agreement. When the revenue generated exceeded minimum guaranteed amount, IMPL was to retain a fixed amount of Rs. 20 lakhs per screen (LED board) per month, and share the remaining with the FMPL in the agreed ratio.

4. Clause – 9 of the agreement further provided that the bill boards would operate for at least 18 hours a day, throughout the year. Any down time exceeding 3 hours a day would result in pro-rata reduction of the minimum guarantee amount. The rational behind this clause was that if the boards were not functional, IMPL's clients who had booked timeslots, would naturally not pay for non-display of their advertisement and thus the revenue generation would be effected.

5. However, IMPL failed to market the bill boards as planned and the appellant continued to sell time slots to local clients and run the bill boards and also paid service tax thereon. IMPL wrote a letter to appellant dated 29.03.2007 and 02.05.2007 explaining the reasons for their failure and requested the appellant to convert the amount paid by them under the agreement into equity in the appellant company. The said business of selling time slots on the bill board was frustrated in August 2007, when the bill boards were shut down by Order of the High Court in a Public Interest Litigation, on the safety aspect, vide Order dated 28.08.2007, a copy of this order is enclosed in the appeal paper book. Thus, the appellant was also unable to provide the availability of bill boards to IMPL, for sale of advertisement or time slots.

6. Thereafter, the proposal of IMPL to convert their deposit into equity in the appellant company was approved by its Board of Directors vide resolution dated 15.04.2009, which was implemented and shares allotted to IMPL, and appropriate return in Form-II under Section 71 of the Companies Act was filed.

7. Pursuant to enquiry and investigation, during which the statement of Shri Venugopal Jambavat, Director of FMPL was recorded on 14.11.2008. It appeared to Revenue that the service of advertising, time and space in bulk, has been provided by appellant to IMPL, notwithstanding the fact whether IMPL would not sell the space and time, as provided. Hence, the amount of Rs. 1,29,48,897/- can only be considered as remuneration received by FMPL for 'advertising time and space' provided to IMPL. This fact is also supported by the statement of Shri J.V.Mohan, Director of IMPL. It further appeared that the amount of Rs. 1,50,00,000/- is the amount received by appellant for serviced to be provided to IMPL, which appear to be supported by the statement of Shri Aniruddha Kumar, CFO for IMPL, who had interalia stated – the amount of Rs. 1.5 crores is paid by IMPL to FMPL as an advance, and the said payment is as per the terms of the agreement. Thus, undisputedly total amount of Rs, 2,85,45,897/- is paid by IMPL to FMPL, and the same is in connection with the taxable service of sale of advertising time/space, and thus the same is exigible to service tax. Accordingly, Show Cause Notice dated 04.12.2008 was issued by the Additional Director of DGCEI, Hyderabad alleging suppression of facts with intention to evade payment of tax, requiring the appellant to show cause why the amount of Rs. 35,71,428/- be not demanded including cess on the amount of Rs.

2,91,70,478/- received by them in relation to the service of selling of advertisement space/time, provided/to be provided through their clients namely IMPL and others with proposal to appropriate Rs. 74,806/- already deposited on 29.04.2008. With further proposal to impose penalty under Section 78, Section 76 and 77 of the Finance Act.

8. The Show Cause Notice was contested and the demands were dropped by the Joint Commissioner interalia holding as follows:

> "15. I have gone through the records of the case and written and oral submission made by M/s FMPL, Hyderabad.
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> 16. M/s FMPL were engaged in operating electronic bill board in Hyderabad. They entered into an agreement dated 14.01.2007 with M/s IMPL and M/s IMPL, in pursuance of the said agreement, made certain payments to them. It is alleged in the Show Cause Notice that the said payments are in lieu of taxable service provided or to be provided and, accordingly, the service tax is chargeable under the category of "sale of space or time for advertisement". Refuting the allegation, M/s FMPL have submitted that the agreement with M/s IMPL was 'revenue sharing business contract'; the amount received by them was not in lieu of taxable services provided or to be provided.
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> 17. I have carefully considered the matter in dispute. The nature and essence of the agreement between M/s FMPL and M/s IMPL is the crux of the matter. What is to be decided is whether (i) the relationship between M/s FMPL and M/s IMPL can be said to be that of service provider and service receiver (ii) the activity/transaction in between FMPL and IMPL is a taxable service under 'Sale of space or time for advertisement' and so as to attract the service tax liability.
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> 18. Regarding (ii), I find that the agreement nowhere refers or affirms that any space or time is provided/sold to IMPL by FMPL. In fact, the very objective of the agreement makes it obvious that what has been granted to IMPL is "exclusive right of selling Advertising time to corporate clients.. to IMPL". Grant of exclusive right to sell is quite distinct and different from selling/providing space or time. In other words, by the agreement, FMPL has in no way sold space/time (or any specified share or part thereof) to IMPL for advertising, "but has only granted a exclusive marketing right. To fall under the taxable service of 'Sale of space or time for advertisement', FMPL should have sold/provided space/time to IMPL, which is not there in the instant case. By virtue of the exclusive marketing right granted to it, IMPL per se has not been given a defined share/part in the space, whether in bulk or whole or otherwise."
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> 19. The relationship between the two have to be ascertained from the agreement entered and the various correspondences between them. I have carefully perused the said agreement and after having perused the same, we have no doubt in our mind that the aforesaid agreement is a sort of partnership agreement where two persons have come

together and pooled their resources for their mutual benefit. The agreement is revenue sharing agreement and the revenue earned by such partnership is to be shared between them as per the agreed terms and conditions. A bare perusal of the agreement reveals that FMPL intended to outsource the selling right of timeslots to corporate clients to IMPL and FMPL have granted exclusive rights of selling advertising time to corporate clients by IMPL. The agreement further talks of sharing of revenue between the two in certain proportion after adjusting the minimum guarantee amount to FMPL and the fixed remuneration of IMPL. The relationship between them is not that of service provider and service receiver. My reasoning for arriving at such a conclusion is explained as under.

20. The opening paragraph of the said agreement entered between them stipulates as under:

> "whereas FMPL has bagged the contract for putting up LED screens in the city of Hyderabad – FMPL intends to outsource the selling of timeslots on those five screens to corporate clients of IMPL on the following terms and conditions".

21. The said paragraph expresses the objective of the agreement. The activity of selling the timeslots to corporate client is being outsourced to IMPL. In other words, the IMPL would be acting as a partner/agent who will bring corporate client to FMPL. This is further made clear by para 10 of the agreement which stipulates that IMPL shall be exclusive partners of FMPL for sale of commercial space to corporate clients. Clearly, the agreement is not for selling the space in bulk to IMPL. That the nature of the agreement is a revenue sharing partnership agreement is further clear from the first condition of the agreement which provides as under:

> FMPL hereby grants an exclusive right of Selling Advertising time to corporate clients on the Five Screens put up in Hyderabad, to IMPL. M/s IMPL shall be finalizing the sale agreements for all the five screens and shall be responsible for the recovery of the revenues from each screen from its corporate clients for M/s FMPL. Corporate clients would mean Body corporate within or outside Hyderabad/Andhra Pradesh (Visual soft, TV9, Maa-TV, Hero Honda, LG, Samsung, Pepsi etc) and selling of timeslots to such clients would be the exclusive domain of IMPL. Other clients who have market only in Hyderabad/Secunderabad such as stores (Meena Bazar, Mochi, Apollo Hospital etc). Educational Institutions based out of Hyderabad/AP live performance in the city, Film promos and such other focal activities would be handled by Flytech. As a thumb rule, clients who have market only in Hyderabad/Secunderabad would be handled by Flytech and all other clients would be handled by IMPL.

22. Clearly, IMPL would be handling corporate clients who would be putting up their advertisements on the bill boards. The agreement is in the nature of partnership business contract of pooling their resource for common good. It is in no way be interpreted that the FMPL has sold space to IMPL in bulk who in turn will sell it in retail. The agreement is not for providing taxable service by the service provider to service receiver. The relationship between them is that of partners and not of a provider of service and recipient of service.

That the agreement is for sharing of revenue is further clear from the condition 2, 3 & 4 which defines the commercial terms of their relationship as under:

Commercial Terms:

2. IMPL guarantees a minimum consideration to M/s FMPL by mode of minimum guarantee to the tune of rs. 1,25,00,000/- (Rupees One Crore Twenty Five Lakhs only) per screen per annum payable monthly.

3. The minimum guarantee amount shall be payable by IMPL to FMPL in 12 equal installments. After making the payment of Minimum Guarantee amount to FMPL, IMPL shall be eligible for fixed remuneration of Rs. 20,00,000/- (Rupees Twenty Lakhs only) per screen per annum from the revenues generated from each screen over and above the minimum guarantee amount.

4. The net revenue left over after making the payment of minimum guarantee amount and the fixed remunerations of IMPL will be shared between FMPL and IMPL in the following proportion.

(a) All Net Revenues, post minimum guarantee and IMPL, fixed Fee shall be shared in the ration of :

For revenues upto Rs. 2 crores.......	70:30 favoring FMPL
Revenues between 2.01 to 3.99 crores.....	75:25 favoring FMPL
Revenues between 4.00 to 6.99 crores...	73:27 favoring FMPL
Revenues upwards of 7 crores.......	72.5:27.5 favouring FMPL

23. The aforesaid conditions enumerate the manner of sharing of revenue between the two of them. The minimum amount guaranteed by IMPL is the assurance/commitment of bringing minimum business to FMPL. What is of utmost significance and in fact, the decisive tilting factor is the mutually agreed condition that IMPL is entitled to a fixed remuneration of Rs. 20 lakhs per screen per annum from the Net revenues earned. Such a provision/proposition can have no place in a situation of service-provider – receiver relationship. In effect, the said remuneration to IMPL is a clear indicator of recognizing their defined share in the common activity and in addition to the share in the net revenue as per the specified proportion/percentage. In other words, the terms of the agreement and the manner of transactions/remuneration envisaged therein, clearly reveal this to be a case where one person has made the investment in property/equipment and owns it and joins hands with another person having marketing potential/intangible asset, for the purpose of raising income from the combination of the assets. In this manner, the arrangement can only be described as a mutually agreed partnership business contract.

The agreement further talks of making certain payments by IMPL as under:

5. Within 3 days of execution of this contract Rs.1.56 crores shall be payable by IMPL to FMPL.

6. This advance shall be adjusted in 20 equal instalments starting July 2007. In case of early termination, M/s IMPL shall retain amounts payable to M/s FMPL towards minimum guarantee and revenues share upto the extent of unadjusted advance. In case the amount payable is less than the unadjusted advance, FMPL shall refund such amount within 15 working days of the termination of the agreement.

8. The revenue share as mentioned aforesaid shall be calculated within seven days of the end of the calendar month and paid after 90th day of the end of calendar month. IMPL shall pay 75% of this amount by way of a LC for 90 days by the 7th day of the following month. All discounting charges shall be to FMPL's account. All revenue share figures shall be streamlined/adjusted on a quarterly basis i.e. any excess/shortfalls on account of Minimum guarantees/revenue shares shall be adjusted from the total amounts payable/paid on a quarterly basis.

9. That the LED Boards would operated at least 18 hours a day and 365 days a year. Any down time exceeding 3 hrs per day would result in pro-rata reduction in Minimum Guarantee amounts.

10. The initial duration of the agreement shall be one year i.e. 01.01.2007 to 31.12.2007 and during this time, IMPL shall be exclusive partners of FMPL for sale of commercial time to corporate clients on LED Screens put up by them. During this period if FMPL desires to outsource the Retail Sales as well, IMPL shall have the first right to refusal in so far as these five screens are concerned.

13. IMPL shall submit to FMPL., all release instructions received from the advertisers along with revenue generated statement within seven days of the end of each calendar month along with Letter of credit for 90 days issuance period.

14. IMPL shall provide to FMPL advertising content in the format prescribed by FMPL from time to time.

24. As per the above conditions certain payments have been made by IMPL to FMPL and such payments have been referred as advances. However, this does not make the payment as advances for the services provided or to be provided. As noted above, the agreement is not for selling the advertisement space/time in bulk but that of sharing of revenue. Secondly, as rightly pointed out by FMPL, merely by referring the amount as advance, it does not become 'advance' for the taxable services to be provided. Reliance is placed on the decision of the Apex Court in the case of Moped Indis Limited Vs ACCE, Nellore [1986 (23) ELT 8 (SC)] has held as under:

It is true that the amount allowed to the dealers has been referred to in the agreement as commission, but the lable given by the parties cannot be determinative, because it is for the court to decide whether the amount is trade discount or not, whatever be the name given to it. If we look at the terms of the agreement, it is clear that the agreement was between the manufacturer and the dealers on principal to principal basis. The clauses of the agreement clearly show beyond doubt that under the agreement, the mopeds were sold by the manufacturer to the dealers and the dealers did not act as agents of the manufacturer for the purpose of effecting sales on behalf of the manufacturer. The relationship between the manufacturer and the dealers was clearly on principal to principal basis and in the circumstances it is difficult to see how the amount of commission allowed to the dealers in respect of different varieties of mopeds could be regarded as anything other than trade discount. The manufacturer charged to the dealer the price of the mopeds sold to them less the amount of commission in respect of different varieties of mopeds. These amounts allowed to the dealers were clearly trade discount liable to be deducted from the price charged to the dealers for the purpose of arriving at the excisable value of the mopeds.

25. The show cause notice relies on the depositions of Shri Aniruddha Mukharjee and Shri J.V. Mohan. Shri Aniruddha Mukharjee, CFO, IMPL in his statement have submitted that they buy advertising space in bulk on various bill board which they in turn sell in retail to various advertisers and that their agreement with FMPL also falls under this category. The statement of Shri Aniruddha Mukharjee and Shri Mohan run counter to explicit assertion made in the agreement as discussed above. What has been stated by them is their opinion about the nature of agreement. Their opinion cannot be determinative of the exact nature of the agreement. I have already held that for the reasons stated above, the relationship between the two parties is not that of service provider and service receiver. If the agreement was for sell of space in bulk, then surely the agreement would have provided for the amount of time, period and rate of space sold on the bill board. All these ingredients are missing in the agreement. On the contrary, agreement grants exclusive right to IMPL to sell the space to corporate clients and then also provides the manner of sharing revenue proceeds.

26. In fact the Board, in the context of movie theatres vide Circular No. 109/03/2009 dated 23.02.2009 has clarified as under:

"2.2. Another type of arrangement is where the contract beween the theatre owner and the distributor is on revenue sharing basis i.e. a fixed and pre-determined portion i.e. percentage of revenue earned from selling the tickets goes to the theatre owner and the balance goes the distributor. In this case, the two contracting parties act on principal-to-principal basis and one does not provide service to another. Hence, in such an arrangement the activities are not covered under service tax."

27. The ratio of the said circular is squarely applicable in the instant case. As clarified by the Board, in a revenue sharing contract like this, one contracting party does not provide service to another.

28. Sale of space or time for advertisement is defined vide Section 65(105)(zzzm) to "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 bill boards, public places, buildings, conveyances, cell phones, automated teller machines, internet; (ii) selling time slots on radio or television by a

person, other than a broadcasting agency or organization; and (iii) aerial advertising". The taxable service means "any service provided or to be provided 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 organization." In the instant case, no space has been sold to IMPL. In other words, no taxable service of the kind "sale of space or time for advertisement" has been provided. Accordingly, the liability to service tax is not attracted.

29. The agreement was made on 14th January 2007. However, as early as February 26th 2007, M/s IMPL wrote to FMPL that they are not commercially ready to market the outdoor space and that the payments made by them may be treated as a security deposits. A copy of this letter has been produced before the Joint Commissioner. Again the IMPL vide their letter dated 29.03.2007 requested to treat the amount as security deposit or return the same or convert into equity in FMPL. M/s FMPL vide board resolution dated 03.10.2008 have also agreed to convert the money into equity. Clearly, whatever little doubt one could have about the amount being an advance has also been set at rest by their decision to convert it into equity. Obviously, the question of charging service tax does not arise.

30. The agreement speaks of minimum guarantee amount, which the Show Cause Notice seeks to treat as consideration for the service provided or to be provided. In continuation to the findings discussed above, I find no merit in the above contention in the Notice. By its very nature and description and viewed in the overall scenario, the said amount of 'minimum guarantee' is a sort of security-cum-binding element. To the extent FMPL anticipates business coming through IMPL, its own share of marketing and use of the asset (owned by it) has to be reduced/curtailed or kept in reserve. Thus, this amount is more in the nature of binding liability/penalties on IMPL in case of their failure to bring corporate clients. However, it is undisputed that there were difficulties on both sides in implementing the agreement, M/s IMPL being unable to bring business and bill boards being closed down an account of High Court's order in August, 2007. Accordingly, FMPL have agreed to convert the said amount into equity. The said amount cannot be taken as the amount for the taxable services provided. It is also a fact that no service/timeslot has actually been provided to IMPL. In fact, consequent to High Court's Order, the business is reportedly closed down in August, 2007.

31. It is stated in the Show Cause Notice that after initiation of investigation on 02.04.2008 M/s FMPL paid a total amount of Rs. 77,431/- towards service tax for the month of May, June and July 2007. However, FMPL had neither paid interest in respect of delayed payment nor filed the ST-3 returns. It is nowhere on record that these payments had anything to do with the amount received from IMPL. The belated payment of service tax was on account of turmoil in the business leading to closure of the business. A charge sheet has also been filed against the Ex-Director Shri J.V. Mohan. Under these circumstances there exists reasonable cause for their failure to pay the Service Tax on time and the delay is

condonable under Section 80 of the Finance Act. They have now filed ST-3 returns for the entire period up to September, 2008 and also paid the appropriate service tax along with interest. I find that the company started its business in Dec, 2006. Immediately on commencement of business, they have taken the service tax registration and also filed the half yearly return for the half year ending 31st March 2007 after paying appropriate service tax with interest. (They have paid over Rs.7.0 Lakhs as service tax in that period). The monthly liability for the next month i.e. April, 2007 was also discharged. However, the service tax liability for the period May to July 2007 was paid only after the investigation was initiated by the DGCEI. The business was closed in August 2007 after Hon'ble High Court's Order. They have now filed returns for the subsequent period; copies of which have been produced before me. As stated above, the filing of PIL against the bill boards, High Court's Order, resignation of the Director and filing of Charge-Sheet against him, closure of the business were the factors for non-payment of service tax for the last three months (May-July 2007). Accordingly, I am satisfied that there existed reasonable cause for their failure to pay the service tax on time. Accordingly, I refrain from imposing any penalty by invoking Section 80 of the Act.

32. Accordingly, I pass the following Order:"

ORDER

The proceedings initiated against M/s Flytech Media Pvt Ltd., vide Show Cause Notice F.No. DGECEI/INT/HYRU/12-28/2008 dated 04.12.2008 issued by the Directorate General of Central Excise Intelligence, Hyderabad Regional Unit, Hyderabad are hereby dropped.

9. Pursuant to passing of the afore mentioned Order-in-Original, the Jurisdictional Commissioner reviewed the Order, and pursuant to issue of review notice dated 14.02.2010, took notice of the averments of the assessee, though there has been Novation of the agreement between the appellant and IMPL, and the original agreement is replaced with a new one, and thus the obligations under the original agreement stands discharged and need not be performed. The Commissioner further recorded finding, that in the instant case, there is no concrete evidence of the second contract i.e. conversion of the amount received by FMPL from IMPL, into equity in the company, has indeed been brought into effect. Accordingly, The Commissioner was pleased to upheld the show cause notice and confirm the demand, and further upheld the invocation of extended period by observing that the non-payment of service tax was found by the Department only upon enquiry and investigation done. Accordingly, he confirmed the demand of Rs. 35,71,428/- along with appropriation of Rs.77,043/- and further imposed penalty of Rs. 36 lakhs under Section 78 and further penalty of Rs.5,000/- under Section 77 of the Act.

10. Being aggrieved, the appellant assessee is before this Tribunal, interalia on the ground that impugned order is cryptic and bad, based upon mis-interpretation of facts. It is evident from the agreement entered into between the appellant and IMPL, that it was an agreement in the nature of Joint Venture/Partnership wherein the appellant was required to set up the bill boards at vantage points as it had the license from the local authority to put up such bill boards, and IMPL was to provide marketing support in selling the time slots or space, and were entrusted to collect the advertisement charges from the advertisers. The gross revenue earned was to be shared between the parties as per the sharing ratio mentioned in the agreement. It was not a case that the appellant sold any slots for advertisement and slots to IMPL, nor was any amount received towards such service provided or to be provided. Further, before the said agreement could be acted upon and business could be undertaken, due to Public Interest Litigation, the Hon'ble High Court imposed a ban on such activity of putting up electronic bill boards and selling of time slots, in the larger public interest. Thus, the whole contract had got frustrated and the business could not be done due to supervening impossibility. Thereafter, admittedly, the appellant was required to return the money received as deposit and / or advance to IMPL. However, the appellant was unable to return the funds, the parties mutually agreed to convert such funds to equity, and admittedly equity shares have been allotted by the Board of Directors of the appellant to IMPL, and in proof thereof the appellant have filed the requisite return (Form – I) before the Registrar of Companies. It is further urged that written agreement has got higher evidentiary value than oral statement. The Revenue have mis-guided itself by giving greater weightage to the statement recorded in the course of the investigation. Such statements are malafide and wrong, given due to on going dispute between the parties. Further, the issue of share in profits is also evident from clause – 9 of the agreement, which provides compensation/rebate for IMPL, for down time on the bill boards for (reasons applicable) to the appellant, evidently FMPL had entitlement for putting 13 screens in Hyderabad/Secunderabad and till the time of entering into the agreement, they are put up only 5 screens. Thus, FMPL had further scope of putting up 8 more screens which needed a considerable investment and also marketing support for sale of slots. Thus, it is evident from the agreement that appellant entered into Joint Venture/Partnership with IMPL for enhancement of the business by that joint effort and to share the increased revenue from the additional 8 boards to be put up in near future in the

mutual benefit. It is further evident from the agreement that there was stipulation to refund the deposit to IMPL in 20 equal instalments. Further, under the agreement, the promise made by IMPL to give a minimum fixed remuneration per board to the appellant per month, in no way vitiates the agreement of profit sharing or revenue sharing for the business to be carried out jointly by them for mutual benefit. The said amount of minimum guarantee is in the nature of security-cum-binding element, as the appellant was altering their position for huge investment in the additional 8 bill boards, at the assurance of the Joint Venture Partner – IMPL. Further, reliance is placed on the ruling of Apex Court in the case of Union of India Vs Mahindra & Mahindra Ltd., [1995 (76) ELT 481 (SC)] wherein it was held that – ordinarily the Court should proceed on the basis that the apparent tenor of the agreements, reflects the real state of affairs. From a plain reading of the agreement, it is evident that there is no stipulation to provide any service to each other and the agreement is in the nature of partnership for sharing the profits of the business. The Learned Counsel further relies on the findings of the Adjudicating Authority and prays for allowing their appeal.

11. It is also contended that in the facts and circumstances that the appellant have maintained proper records in the ordinary course of the business, was registered with the Department, and have been filing returns and the transactions are done through the banking channel. There is no case of any mis-representation, fraud and or any mis-conduct is made out, thus extended period of limitation is not available to Revenue.

12. Learned AR for Revenue relies on the impugned order.

13. Having considered the rival contentions, considering the facts on record and after going through the agreement between the parties, we find that the agreement is in the nature of Joint Venture/Partnership for sharing the profits of business to be carried out on by both the parties in mutual benefit. We further, take notice of the glaring fact on record, that the said business stood frustrated due to / Public Interest Litigation and the Order passed by Hon'ble High Court dated 28.08.2007, thus the said business could not be carried on and even the business of existing bill boards of the appellant had to be shut down in larger public interest. Thus, the agreement to carry on the business was frustrated due to supervening impossibility under the provisions of the contract Act, thus the parties were no longer required to perform the obligations, as the same cannot be performed.

Further, admittedly, in the changed circumstances, there has been Novation of agreement due to financial difficulty of the appellant, the parties agreed to convert the deposit made by IMPL to equity, which has admittedly been agreed upon.

14. In view of our afore mentioned findings and observations, we set aside the impugned Review Order and confirm the Order-in-Original. Accordingly, the appeal is allowed with consequential benefits.

(Operative part of this Order was pronounced
in court on conclusion of the hearing)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

jaya