IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL KOLKATA
EAST ZONAL BENCH, KOLKATA

Date of Hearing/Order 2.7.2018

Appeal No. ST/103/2009-DB

(Arising out of Order-in-Appeal No. 19/JSR/2009 dated 30.1.2009 passed by the Commissioner (Appeals), Central Excise & Service Tax, Ranchi)

M/s Sharp Advertiser — Appellant

Vs.

CCE & ST, Jamshedpur — Respondent

Appearance

None - for the appellant

Shri S. Mukhopadhyay, AR - for the respondent

CORAM: **Hon'ble Mr. P.K. Choudhary, Member (Judicial)**
Hon'ble Mr. Bijay Kumar, Member (Technical)

Final Order No.FO/A/77150/2018

Per Bijay Kumar :

Being aggrieved by the impugned order passed by Commissioner, Central Excise, Raipur, the appellant is preferred the present appeal.

2. The issue involved in this case is pertaining to the period 2001-2005, 2004-2005. The lower adjudicating authority has confirmed the

demand under Section 73 of the Finance Act, 1994 along with the penalty under the provisions of Section 76, 78 and 77 of the Act.

3. The issue involved in this case is regarding the classification of service provided by the appellant as to whether under advertising service /or not, under the provisions of the Finance Act, 1994. It is the submission of the appellant that they have not provided the advertising service but acted as a commission agent for the various newspapers for putting the advertisement for publication by purchasing of space. Such type of service according to appellant, does not fall within the purview of advertising service as classified under Section 65(3) of the Act and sub-clause (e) of Clause 104 of Section 65 as taxable service, which meant that any service provided, to a client, by advertising agency in relation to advertisements, in any manner.

4. With this background, we have perused the case record on behalf of the appellant and ld. AR for the Revenue.

5. It is the submission on record that the activity of the appellant does not fall within the purview of advertisement service as defined in the aforementioned Section of the Finance Act. The Section 65(2) of the Finance Act, 1994 defines advertisement as under :

> "Advertisement includes any notice, circular, label, wrapper, document, hoarding or any other audio or

> visual representation made by means of light, sound smoke or gas."

It is the contention of the appellant that both the lower adjudicating authority and Commissioner (Appeals) failed to appreciate the provisions of the law regarding the advertisement service. The appellant does not provide any advertising service as per the definition extracted above. The appellant only earns the commission out of obtaining material for the advertisement to be published in the various newspapers. It is also the assertion of the Advocate that the adjudicating authority has taken the figure from the balance sheet which appeared to be more than that shown in the half yearly return filed by the appellant. This in itself would not prove the fact that the appellant has provided any service. The service rendered cannot be merely derived from the figure of the balance sheet. In support of the same, ld. Advocate relied upon the decision in the case of ***Martin & Harris Laboratories Ltd. Vs. CCE, Gurgaon*** – 2005 (185) ELT 421 (Tri.-Del.) which is reproduced as under:

> *"In this case it was observed that clandestine removal- Discrepancy between production figure in RT-12 returns and balance sheet prepared in head office resolved by assessee- No other evidence existing either of clandestine removals of goods or excess of inputs- Held: Balance Sheet could not be taken sacrosanct document to prove clandestine removal-Rule 9, 173Q of Central Excise Rules, 1944-Rules 4 and 25 of the Central Excise Rules, 2002.*
>
> *Further, while allowing appeal, referring to the demand- limitation-Suppression, it was observed that since Balance sheet is a public document- extended period of limitation*

cannot be invoked by alleging suppression based on it – Section 11A of Central Excise Act, 1944."

The appellant also relied upon the Circular No. 64/13/2003/ST dated 28.10.2003, which provides that job work of merely bringing the order for advertisement/space selling without undertaking any other further activities as laid down in the definition of advertising service, such commission is not subjected to the tax.

6. On the other hand, the ld. AR justified the order on the ground containing in the impugned order.

7. We have considered the rival submissions and perused the appeal record. From perusal of the impugned order, it is evident that ld. Commissioner (Appeals) has not given any independent finding on the point made by the appellant in the appeal memorandum before him. In fact he is simply reproduced the order passed by lower adjudicating authority without applying the mind on the facts made before him by the appellant. Even otherwise, the activity being undertaken by the appellant does not fall within the purview of advertising service and also in contradiction to the CBEC circular referred (supra). But since the actual quantification cannot be done at this stage, we remand the matter to the Commissioner (Appeals) for this limited purpose. The Commissioner (Appeals) will hear the

matter afresh after giving the reasonable opportunity to the appellant and following the various decisions cited by him and also applied in the CBEC circular referred above.

8. In view of above, we set aside the impugned order and appeal is allowed by way of remand.

(Pronounced in Court)

Sd/	Sd/
(P.K. Choudhary)	(Bijay Kumar)
Member (Judicial)	Member (Technical)

RM