IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/85611/2015

[Arising out of Order-in- Appeal No: PUN-EXCUS-003-APP-115-14-15 dated 5th December 2014 passed by the Commissioner of Service Tax (Appeals), Pune.]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

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Saransh Ads … ***Appellant***

versus

Commissioner of Service Tax
Pune …***Respondent***

<u>*Appearance*</u>*:*

Shri Makrand Joshi, Advocate for appellant

Shri Dilip Shinde, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing:	**06/09/2018**
Date of decision:	**31/10/2018**

ORDER NO: A/87822 / 2018

Per: C J Mathew

M/s Saransh Ads is in appeal against the confirmation of tax liability of ₹ 17,10,110 that was held to have been evaded for the period from 2002-03 to 2005-06, along with appropriate interest, and penalty under section 78 of Finance Act, 1994 in order-in-appeal no. PUN-EXCUS-003-APP-115-14-15 dated 5th December 2014 of Commissioner of Service Tax (Appeals), Pune. This is the second round of appearance before the Tribunal and, on the former occasion, the matter had been remanded to the original authority with a direction to examine the various documents claimed to be in possession of the appellant as evidence of discharge of tax liability on accrual but sought to be recovered in the impugned proceedings on receipt basis and to consider the submission of the appellant that the tax liability reported in the statutory returns were an accurate reflection of the tax liability recorded in the books of accounts. In addition, the remand order directed a revisit of the tax held to be recoverable as provider of 'business auxiliary service.'

2. It is seen from the proceedings as recorded by the two lower

authorities that the specific direction of the Tribunal either was not, or could not be, complied with. It is contended by Learned Authorised Representative that, despite repeated intimations and reminders, representatives of the appellant failed to produce the original invoices or acceptable reconciliation statements that was claimed by them to be in their possession during the earlier round of litigation before the Tribunal. On the other hand, Learned Counsel for the appellant reiterated his earlier submission of being in possession of relevant records that had been submitted to the lower authorities but which was, steadfastly, ignored in the findings of the lower authorities. We perceive the same rigid obduracy on the part of both Revenue and the appellant in the proceedings before us but are unable to fathom the reasons. It would surely be in the interests of the appellant, notwithstanding their fervent submission that it was incumbent upon the jurisdictional service tax authorities to present definite, and supported, allegations against them, to produce documents claimed to be in their possession as proof of their compliance with discharge of tax liability under Finance Act, 1994. At the same time, we note a churlishness on the part of the adjudicating, and the appellate, authority in refusing to enumerate the documents submitted and the deficit therein that hindered compliance with the remand order of the Tribunal.

3. In this context, it would be worthwhile to recall some of the critical aspects of the proceedings initiated against the appellant. The

appellant is registered as a provider of 'advertising agency' service under the Service Tax Rules, 1994 and claims to be exclusively discharging its role as an 'accredited agency' with the Indian Newspaper Society-a pivotal organisation for the print media of the country. It is not in dispute that the appellant had been discharging self-assessed tax liability during the period covered by the show cause notice leading to the impugned proceedings. It is the claim of the appellant that, though the legal provisions did require otherwise, they had been discharging the tax liability on the value of services rendered by them as and when invoices were raised on the recipients of service. According to Learned Counsel for appellant, the proceedings were initiated on the misconception that the tax liability, to be discharged on receipt, had not been. The dispute, therefore, appears to centre around this claim and the refusal of the tax authorities to acknowledge that a service provider would do so.

4. It was alleged that the appellant had received ₹ 88,55,932 from 19 clients in 2005-06 with tax liability of ₹ 10,83,966 but of which appellant did remit only ₹ 18,449 as tax and ₹ 6,169 as interest on 3rd January 2007, it is the claim of the appellant that this amount, paid in good faith, represented a consideration that they were unable to reconcile and was not admission of culpability as alleged. While admitting to receipt of ₹ 88,55,932 during 2005-06, it is contended that those were fortuitous recoveries of dues written off in earlier years, but, nonetheless, not liable to be included in the notice as tax

liability had been discharged before the ‘write off’ in the relevant years. This was one aspect of the dispute in which attempted reconciliation was reported as having failed. We are unable to comprehend any difficulty in doing so. It should be easy enough to ascertain the claim of discharge of tax liability on accrual basis from the financial records. All that was required to be produced were the invoices pertaining to the payments received from these clients in 2005-06 and the corresponding challans for deposit in the relevant year coupled with the accounting entries of transfer of those very amounts to the ‘bad debt’ ledger.

5. The second unresolved aspect of the dispute is manifested in the demand of ₹ 2,66,604 allegedly short-paid as revealed from the remittance of service tax of ₹ 15,76,659 as ascertained from the returns for the period from 2002-03 to 2004-05 and the alleged liability of ₹ 18,43,263 ascertained by tax authorities from the ‘trial balance.’ Neither in the show cause notice nor in the proceedings before the lower authorities do we find any reference to the entry, or entries, in ‘trial balance’ from which the higher amount had been derived. We are not certain if the said amount has been shown as such in the ‘trial balance’ or if it has been computed by the application of the relevant rate of tax on the consideration reported therein. We can appreciate the angst of the appellant, articulated by Learned Counsel, in being asked to protest their compliance in the face of what, according to us also, appears to be sweeping incoherent allegation.

Indubitably, the appellant has not presented any reconciliation of the discrepancies between the computation derived from the 'trial balance' and the tax recorded as having been discharged in the statutory returns. At the same time, from the correspondence referred to in the orders of the lower authorities, it would appear that the show cause notice is sketchy on the nature of the allegation against the appellant. It should have been within the scope of the lower authorities, in the course of the reported correspondence, to throw light on the source of the computed figure on the basis of which the alleged deficit was formalised in show cause notice. It is but fair to expect the appellant to respond only thereafter.

6. Turning to the third aspect of alleged and unreported rendering of 'business auxiliary service' taxable under section 65(105) (zzb) of Finance Act, 1994 on the consideration received from the various newspaper establishments in which, as 'accredited agency' of Indian Newspaper Society, the appellant had placed advertisements as required by other advertising agencies lacking such accreditation, it would appear that the proceedings were initiated on the premise that this activity amounted to procurement of service for the client. In this context, a proper appreciation of the dispute can be formed from a narration of the role of 'accredited agency' in the media operations of the country. In such a vast, multicultural territory with a heritage of newspaper having contributed in the struggle for political independence and social reforms, the promotion of commercial

interests among the citizenry fell to the fourth estate; it has a reach that other forms may find difficult to rival. Considering the scope for oligopolistic pricing in the circumstances, and the numerosity of registered newspapers, it is the symbiotic relationship between the 'accredited agency' and the members of the Indian Newspaper Society that ensures the balance between fair pricing and the commercial instincts of the industry. In the context of taxation of services, and more particularly 'business auxiliary service', the nature of the commercial arrangement between the advertiser, the 'accredited agency' and the publishing house would necessarily have to be scrutinised. It would appear from the records that the two lower authorities have failed to ascertain the relationship between the three entities and the identification of the client from whom, or on whose behalf, consideration has been received by the appellant. From a perusal, it would appear that it is newspaper establishment that pays the appellant for acting as its agent. If that be the indicator of recompense for provision of service, it would appear that the appellant is not the provider of the service to the other agencies which is contrary to the surmise, and conclusion, in the findings of the two lower authorities. From this factual matrix alone, we can deduce that the lower authorities have, in their findings, misdirected themselves, in the determination to fasten tax on the consideration without compliance of the pre-requisite to fit the activity within the framework of one of the taxable services. We see no reason to perpetuate this in the absence of some worthwhile reason to believe that a consummation that would stand the test of appeal exists. Much as Learned Authorised Representative would have us decide the matter in the context of the decision of the Hon'ble High Court of Madras in *Adwise Advertising Pvt Ltd v. Union of India [2006 (2) STR 375 (Mad)]*, we find that the scope for application of the decision is patently non-existent on the available facts.

7. Considering the examination *supra*, we set aside the demands and the attendant detriments but remand the matter back to the original authority for a second time to enable the ascertainment of validity of the contention of the appellant on the discharge of tax liability. We do so reluctantly but are, nevertheless, compelled by the manner in which the lower authorities have avoided compliance with the directions of the Tribunal on the previous occasion. Hence, our specifically directed remand in this order.

8. Appeal is accordingly disposed off.

(Pronounced in Court on 31/10/2018)

(Ajay Sharma)	**(C J Mathew)**
Member (Judicial)	***Member (Technical)***

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