CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Service Tax Miscellaneous Application (EH) No. 85122 of 2019
(On behalf of Respondent)
Service Tax Miscellaneous Application (CO) of 91147 of 2015
(On behalf of Respondent)
in
Service Tax Appeal No. 86372 of 2015

(Arising out of Order-in-Original No. 19/ST-VI/RS/2014 dated 31.03.2015 passed by Commissioner of Service Tax-VI, Mumbai)

M/s. MSM Discovery Pvt. Ltd. **Appellant**
4th floor, Interface Bldg. No.7,
Malad Link Road, Malad (W),
Mumbai 400 064.

Vs.

Commissioner of S.T.–VI, Mumbai **Respondent**
115, New Central Excise Bldg.,
Churchgate,
Mumbai 400 020.

Appearance:

S/Shri Prakash Shah with Prasad Paranjape, Advocates for the Appellant
Shri Bidhan Chandra, Authorised Representative for the Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/86466/2019**

Date of Hearing: 15.05.2019
Date of Decision: 15.05.2019

PER: SANJIV SRIVASTAVA

The early hearing application filed by Revenue is allowed and the appeal is taken up for disposal.

2.1 This appeal is directed against order in original No 19/ST-VI/RS/2014 dated 31.03.2015 of Commissioner

Service Tax IV Mumbai. By the impugned order Commissioner has held as follows:

"44. In view of the foregoing, I pass the following order-

i. The services in relation to distribution of television channels undertaken by the noticee during the period 01.10.2006 to 31.01.2010 are classified under "broadcasting service" as defined under Section 65 (105)(zk) of the Finance Act, 1994, read with Section 65(15) and Section 65(16) ibid;

ii. The demand of Service Tax totally amounting to Rs 134,61,79,597/- (Rupees One Hundred and Thirty Four Crores Sixty One Lakhs Seventy Nine Thousand Five Hundred and Ninety Seven only) made under subject notice is determined and confirmed under Section 73(2) of the Finance Act, 1994, as payable by M/s MSM Discovery Pvt Ltd;

iii. I order recovery of the interest at appropriate rate from the due date, on the amount confirmed at para 44(ii) above, from M/s MSM Discovery Pvt Ltd under the provisions of Section 75 of the Finance Act, 1994;

iv. I impose penalty under Section 76 of the Finance Act, 1994 on M/s MSM Discovery Pvt Ltd for their failure to pay Service Tax for the period from 01.10.2006 to 09.05.2008 at the rate of 2% per month, subject to maximum service tax not paid for the period upto 09.05.2008;

v. I do not impose any penalty under Section 76 of the Finance Act, 1994 on M/s MSM Discovery Pvt Ltd for failure to pay Service Tax in respect of the period 10.05.2008 onwards, as penalty is being imposed under Section 78;

vi. I impose a penalty of Rs 5,000/- (Rupees Five Thousand only) under Section 77 of the Finance Act, 1994 on M/s MSM Discovery Pvt Ltd; and

vii. *I impose a penalty of Rs 134,61,79,597/- (Rupees One Hundred and Thirty Four Crores Sixty One Lakhs Seventy Nine Thousand Five Hundred and Ninety Seven only) on M/s MSM Discovery Pvt Ltd under provisions of Section 78 of the Finance Act, 1994, as it existed at the material time."*

2.2 Acting on the intelligence that appellants were indulging in evasion of Service Tax by not paying service tax on "subscription fees" collected from Multi System Operators and Cable Operators, investigations were initiated against them by Director General Central Excise Investigation.

2.3 As result of investigations undertaken a show cause notice dated 23.04.2012 was issued to them alleging that-

- They are acting "broadcasting agency or organization" as defined under Section 65 (16) of Finance Act, 1994;
- Their status as "broadcasting agency or organization" is evident from the fact that they are paying service tax under the said category in respect of channels which were obtained by them under distribution contracts with entities like TV Today Network;
- In the agreement dated 05.08.2002 between appellants and MSMPL & DCI, it is stated that appellants are an agent of MSMPL & DCI;
- Mere declaration by them in their invoices issued MSOs and Cos without the support of any clause in the agreement would not make them as agent of MSMPL or DCI;
- They were not merely collecting subscription charges on behalf of MSMI or DCI but were forming and offering bouquet of channels for distribution to MSOs and Cos by combining channels of MSMPL, DCI and TV Today Network Ltd;

- Even if MSMPL and DCI has paid Service Tax under "Broadcasting Services" that does not absolve them from their liability to pay service tax since it has been established that they are covered under the definition of "Broadcasting services"
- That they have collected the consideration towards providing these services along with applicable service tax, but have failed to deposit service tax so collected on the gross taxable value in terms of section 67 of The Finance Act, 1994;
- They were fully aware of their liability to pay service tax in respect of these service as they were paying service tax on the similar services rendered in case of TV Today Networks;
- Their representatives have admitted the fact about nonpayment of service tax on subscription charges collected towards provision of broadcasting services in respect of MSMPL and DCI;
- They had never disclosed the facts about not payment of service tax in respect of subscription charges for the MSMPL and DCI, and have thus suppressed the germane facts with intention to evade payment of service tax.

Accordingly notice asked the Appellants to show cause as to why:-

- Extended period under sub section (1) of Section 73 of the Finance Act, 1994 should not be invoked to demand service tax evaded by them;
- The services provided by them in relation to distribution of television channels belonging to MSMPL and DCI should not be classified under "broadcasting service" as defined under Section 65(105)(zk) of the Finance Act, 1994, read with Section 65(15) and Section 65 (16) ibid;

- Service Tax of Rs 134,61,79,597/- (Rupees One Hundred and Thirty Four Crores Sixty One Lakhs Seventy Nine Thousand Five Hundred and Ninety Seven only) not paid by them on “broadcasting service” provided during the period 01.10.2006 to 31.01.2010 should not be demanded and recovered from them under sub section (1) of Section 73 of Finance Act, 1994 read with Section 66 and Section 68 ibid;
- Interest should not be recovered from them under Section 75 of the Finance Act, 1994; and
- Penalty should not be imposed upon them under Section 76, 77 and 78 of the Finance Act, 1994.

2.4 The show cause notice was adjudicated by the Commissioner as per impugned order referred in para 1, supra. Aggrieved by the order of Commissioner, appellants are in appeal before tribunal.

3.1 In their appeal appellants have assailed the impugned order stating that-

- They are not Broadcaster for the channel distributed as an agent of MSMPL and DCI, hence the services provided by them are no covered under the category of Broadcasting services;
- Even the Ministry of Information and Broadcasting (MIB) which prescribes the policy guidelines for downlinking of Television channels do not recognize them as Broadcaster as one of eligibility criteria for the companies applying for permission with MIB is *“1.3 The applicant company must either own the channel it wants down linked for public viewing, or must enjoy, for territory of India, exclusive marketing/ distribution rights for the same, inclusive of the rights to the advertising and subscription revenues for the channel and must submit adequate proof at the time of application.”*

- In the agreement with cable operators it has been specifically stated that the Appellants act as an agent of MSMPL and DCI. *"2. <u>Agency:</u> The distributor is agent for Multi Screen Media Private Ltd ("MSMPL") (formerly known as SET India Pvt Ltd) and Discovery Communication India ("DCI"). Further, the distributor is well and sufficiently possessed of the right to license and sub license the services for distribution. Under this Agreement the Distributor has the requisite power and authority to enter into agreements and grant permission to carry or to distribute Services on Systems in India."*
- They function in two capacities one as an agent who merely collects the subscription revenue on behalf of MSMPL and DCI and other acting as a Broadcaster on his own account for third party broadcasters.
- They had as per the direction of Commissioner filed an affidavit, affirming that they acted as an agent for MSMPL and DCI for the purpose distributing specific channels. They had also submitted all the agreements also.
- They received agency commission for the services provided as an agent of MSMPL and DCI and on the agency commission received have discharged the service tax liability under the category of Business Auxiliary Service;
- Service Tax on the entire subscription revenue stands discharged under the category of Broadcasting services. As per the agreement dated 5.08.2002 they were required to collect the subscription charges on behalf of MSMPL and DCI and remit the same to tem along with service tax collected from MSOs/ Cos. At the end of every month a monthly statement was prepared by them in which the subscription revenue collected for a particular channel in that month was determined based on the

information received from MSOs/ Cos. The said statement was then submitted to MSMPL and DCI stating that the amount collected for their respective channels. On the basis of this statement MSMPL and DCI discharged their service tax liability. This facts was substantiated by submitting the CA Certificates from MSMPL and DCI certifying the amount of service tax discharged by them under the category of Broadcasting Services.

- Service tax once discharged by the principal cannot be demanded again from the agent {Jaipuria Infrastructure Developers Pvt Ltd [2014 (36) STR 696 (T-Del)], Federal Bank {2009 (13) STR 569 (T-Bang)], Katrina R Turcotte [2013 (31) STR 670 (T-Ahmd), Zaheerkhan B Khan [2014 (33) STR 75 (T-Mum)].
- The mechanism adopted by them in the present transaction is akin to that of an advertising agency. It is admitted that when the tax has been paid by the principal even though the same is collected by the agent and remitted to the principal, the tax cannot be again demanded from agent. {CBEC Circular No 341/43/2001-TRU dated 18.10.2001, Euro RSCO Advertising Ltd [2007 (7) STR 277 (T)]
- The demand is barred by limitation. In facts similar to present case it has been held that extended period cannot be invoked in following decisions-
    - SDL Auto Pvt Ltd [2013 (294) ELT 577 (T-Del)];
    - Yeshwant industries [2014 (313) ELT 567 (T)].
- Since service tax on entire subscription value has been discharged, they are not liable to pay any service tax. Accordingly the penalty imposed under section 76 cannot be sustained.
- Since they are not liable to pay any service tax, penalty could not have been imposed {Coolade

Beverages Limited [2004 (172) ELT 451 (ALL)]. Since the ingredients for imposition of penalty under section 78 are missing in the present case, no penalty could have been imposed under that section.

- Penalty could not have been imposed under Section 76 and 78 simultaneously. {First Flight Courier Ltd [2011 (22) STR 622 (P & H)], Punjab State Federation Coop Sugar Mills Ltd [2014 (36) STR 691 (T-Del)]}.
- Penalty under Section 77 could not have been imposed as they had been filing the service tax returns and disclosing the agency commission received by them from MSMPL and DCI.
- Even if the penalties were to be imposed benefit of section 80 should have been extended.
- Since there is no short payment or nonpayment of service tax interest could not have been demanded under Section 75.

3.2 Revenue has filed the cross objections to the Appeal. The cross objections are filed only to support the impugned order.

4.1 We have heard Shri Prakash Shah with Shri Prasad Paranjape, Advocates for the appellants and Shri Bidhan Chandra, Additional Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the appellants learned advocate submitted that-

- Appellants are a joint venture (JV) created in name and style of SET Discovery (Pvt) Ltd [now MSM Discovery)], by SET India Private Limited (SET now MSMPL) and Discovery Communications India (Pvt Co with Unlimited Liability) (Discovery or in short "DCI"), by the agreement dated 5th August 2002.
- At 4, the agreement provides *"Each partner appoints the JV Vehicle to provide the services in relation to*

the Channels and JV Vehicle shall, as from the date hereof, provide the services in relation to all of the channel on an exclusive basis. The services shall include in particular (but without limitation) marketing to operators of, the appointment of distributors to license (on behalf of JV Vehicle), the entering into agreements directly with operators in respect of the provision of suitable subscriber management services in respect of and the obtaining of carriage subscription basis in respect of channels in the territory."

- Agreement further provides-

"7.1 The JV Vehicle hereby agrees an undertakes, in each Accounting Month, to use its best efforts to collect any and all Distribution Revenues and A La Carte Revenue owed by the Operators. In each such Accounting Month the Distribution Revenues shall be distributed to each Partner as follows (irrespective of both the number of Channels of each Partner being distributed and the identity of the Channel or Channels to which the Distribution Revenue relate):

(a) Discovery shall be entitled to such percentage of Distribution Revenues, in respect of each Accounting Months as is applicable by virtue of Section 7.2 of the Term Sheet ("Discovery Distribution Revenue")

(b) SET shall be entitled to such percentage of Distribution Revenues, in respect of each Accounting Months as is applicable by virtue of Section 7.2 of the Term Sheet ("SET Distribution Revenue")

(or in either case, such other percentages as may be agreed from time to time by the Partners in accordance with the provisions of the Term Sheet)

In each such Accounting Month, the A La Carte Revenues shall be distributed to each Partner as follows:

(a) SET shall be entitled to the A La Carte Revenues deriving from the distribution of any of its channels (as set out at Section 11(b) of the Term Sheet "SET A La Carte Revenue").

(b) Discovery shall be entitled to the A La Carte Revenues deriving from the distribution of any of its channels (as set out at Section 11(b) of the Term Sheet "Discovery A La Carte Revenue")

For the purposes of this Agreement, the Discovery Distribution Revenue together with the Discovery A La Carte revenue shall be referred to as the "Discovery Share" and the SET Distribution Revenue together with the SET A La Carte revenue shall be referred to as the "SET Share".

The Discovery Share and the SET Share shall be paid to Discovery and ASET respectively in accordance with the provisions of section 8.

7.2 Within five (5) days after the end of each Accounting Month, the JV Vehicle shall deliver to each to each Partner a statement showing, in relation to each Channel, the total amount of Distribution Revenue and/ or A La Carte Revenues attributable to the distribution of such channel and collected by the JV Vehicle during the immediately preceding Account Month (together with cumulative figure for Distribution Revenues and A La Carte Revenues in respect of all Channels during such Accounting Month) (the "Monthly Statement")

8. Subject to Section 6(d) within ten (10) days after the end of each counting Month the JV Vehicle shall pay *(a) to Discovery the Discovery Share*

(b) to SET the SET Share

which (in each case) are attributable to the immediately preceding Accounting Month as set out in Monthly Statement.

12. Each Partner warrants and represents to JV Vehicle:

(a) that it has full right title and authority to enter in to this Agreement and to appoint the JV Vehicle ***as its sole an exclusive agent to provide the service.***

(b) that neither it nor any of its Affiliates shall itself, or shall directly or indirectly authorize any third party to provide the Services in the Territory at any time during the term.

13. The JV Vehicle warrants, represents and undertakes to the Partners that;

(a) it has full right title an authority to enter into this agreement.

(b) it shall undertake no other activities on behalf of the Partners other than the provisions of the Services;

(c) It shall at all times provide the Services to the best of its skill and ability and strictly in accordance with the terms of the Term Sheet which are applicable to the provisions of the services;

(d) (without prejudice to (c) above), it shall at all times during the Term market and distribute the Channels to Operators on a non discriminatory basis as between the Channels owned and/ or operated by each Partner and/ or any of its Affiliates; and

(e) it shall use all reasonable endeavours to maximize the levels of distribution, and the extent of carriage, received by each Channel in the Territory.

- Further in the agreements entered by them with MSO's/CO's also it has been specifically provided "2.

  Agency: ***The distributor is agent for Multi Screen Media Private Ltd ("MSMPL") (formerly known as SET India Pvt Ltd) and Discovery Communication India ("DCI")****. Further, the distributor is well and sufficiently possessed of the right to license and sub license the services for distribution. Under this Agreement the Distributor has the requisite power and authority to enter into agreements and grant permission to carry or to distribute Services on Systems in India."*
- Further as directed by the Commissioner during the Adjudication proceedings, they had filed the affidavit stating that they are acting as agents for SET and Discovery. Ignoring all the elaborate documents and submissions made by them Commissioner has in para 26, held that there is nothing on record to show that the noticee is an agent of MSMPL or DCI.
- In the invoices issued by them , they had clearly mentioned that *"2. MSM Discovery Private Limited (MSMD) distributes television channels and is an agent of Multi Screen Media Pvt Ltd and Discovery Communications India (DCI) for the distribution of channels distributed by Multi Screen Media Pvt Ltd and DCI".* Entire amount of Service Tax collected by them on such invoices under the category of "Broadcasting Services" has been remitted to the government account either directly by them or by Multi Screen Media Pvt Ltd and DCI.
- On the basis of the monthly statements prepared by them as per the agreement dated 5th October 2002, they have remitted the subscription charges

including service tax recovered as agent of Multi Screen Media Pvt Ltd and DCI to them. Both Multi Screen Media Pvt Ltd and DCI have in turn discharged the service tax liability in respect of the amounts remitted to them. On the remaining amount where the Broadcasting services were provided by them on their account i.e. in case of India Today TV Networks etc. they have paid the service tax. Thus entire amount of service tax has been paid. This fact has been supported by the CA Certificate produced by them before Commissioner. Further this fact is also verifiable fact from the jurisdictional officers of Multi Screen Media Pvt Ltd and DCI

- It is settled law that in respect of the same service transaction, service tax cannot be demanded both from the principal and agent.
- Undisputedly they have discharged the service tax in respect of the commission received by them from Multi Screen Media Pvt Ltd and DCI under the category of Business Auxiliary Service.
- The demand made against them is barred by limitation as all the facts where in the knowledge of department and they were regularly filling the service tax returns discharging the service tax liability in respect of Broadcasting Services rendered by them on their account and also the Business Auxiliary Service provided by them.
- Since no service tax is due from them penalties imposed under section 76, 77 and 78 of Finance Act, 1994 to cannot survive. In absence of any demand of service tax interest demanded under section 75 should also be set aside.

4.3 Arguing for the revenue learned Authorized Representative submitted-

- The definition of “Broadcasting agency or organization” as per Section 65(16) is wide amplitude and covers any agency or organization engaged in providing service in relation to Broadcasting in any manner. From the provisions of Section 65(15), 65(16) and 65(105)(zk) it is evident that appellants have provided Broadcasting services, in respect of which they have collected the service tax but not deposited the tax with the government.
- Appellants have entered into agreement with MSO’s/ CO’s for distribution of channel of MSMPL and DCI. They collected the subscription fees along with the service tax under category of Broadcasting Services.
- Thus appellants are provider of Broadcasting Services and were required to discharge service tax under that category.
- Appellants were not collecting subscription charges on behalf of MSMPL or DCI but were forming and offering bouquet of channel for distribution to MSO and Cable Operators by combining channels of MSMPL and DCI and T V Today Network and has not submitted any evidence to prove that they are not liable to pay service tax under category of broadcasting services in respect of subscription collected by them along with service tax.
- Taxable value of broadcasting services provided and declared in their periodical ST-3 returns by the Appellant excluded taxable value and service tax reflected in their consolidated invoices and pertaining to channels belonging to MSMPL and DCI, and distributed in bouquet arrangement,
- Appellants have only declared the agency commission received by them from MSMPL and DCI under business auxiliary services and paid service tax thereon.

- In the impugned order adjudicating authority has rightly held that obligation to pay the service tax I s on service provider and cannot be shifted to any other person.
- Since appellants have suppressed the value of taxable service provided by them while filing the ST-3 returns, adjudicating authority has rightly upheld the charge of suppression with intention to evade payment of tax. According extended period of limitation as per proviso to Section 73(1) has been rightly invoked.
- Penalty under Section 76 has been invoked for period prior to 10.05.2008, i.e. prior to amendment made in section 78, barring imposing penalty under section 76 and 78 simultaneously.
- Penalty under Section 78 has been rightly imposed as the appellants have suppressed the vital facts about the value of taxable service in their return and had not disclosed the correct aggregate taxable value and service tax payable as reflected in their invoices.
- Since appellants have failed to furnish complete, correct and proper information in the ST-3 returns filed by them penalty under section 77 is also justified.
- Since appellant have short paid the service tax, and amount demanded from them have not been paid within the prescribed period, the demand for interest under section 75 needs to be sustained.

5.1 We have considered the impugned order with submissions made in appeal. Cross objections and during the course of arguments.

5.2 Commissioner has in para 12 of impugned order framed following issues for consideration:-

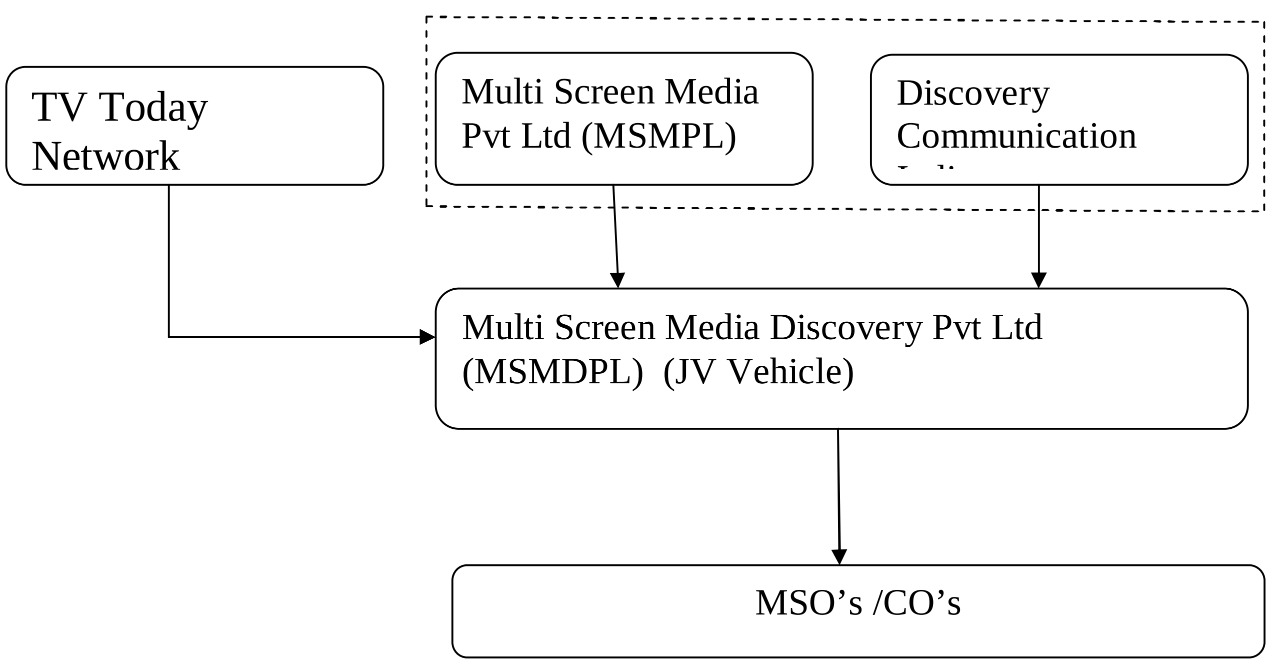
"12. The key issues to be considered in this case are

- *Whether the services provided by the noticee to MSOs/ Cable Operators in relation to distribution of television channels are classifiable under Broadcasting Service" under Section 65(105)(zk) of Finance Act, 1994 read with Section 65(15) and Section 65(16) ibid;*
- *Whether the noticee is liable to pay the entire amount collected as service tax from MSOs/ COS for the service provided;*
- *Whether the noticee's statutory liability to pay service tax on broadcasting service provided by them, for which Service Tax was charged and collected against their invoice, can be transferred or assigned to an independent entity in terms of an internal agreement overriding statutory provisions;*
- *Whether failure to declare true and correct details in ST-3 returns filed amounts to misdeclaration and suppression of material facts with intent to evade payment of service tax?"*

5.3 From the facts as stated above it is quite evident that undisputedly the recipient of services i.e. MSO's / CO's have received the services which are classifiable under the taxable category of "broadcasting services" as defined by Section 65(105)(zk) of Finance Act, 1994 read with Section 65(15) and Section 65(16) ibid. However the issue that needs to be determined is whether in respect of entire gamut of services received by the service recipients the service provider are appellants or in some case the appellants are the agent of service providers (i.e. MSMPL and DCI). For levy of service tax identification of service provider and service recipient is of prime importance before the liability to pay service tax can be assigned. In this case while the revenue contends that Appellant are the service provider whereas appellant contend that MSMPL and DCI are the service provider who have also discharged the service tax liability in respect of the services provided under the category of Broadcasting Services.

5.4 Appellants have contended that they are acting as agents of the service provider namely MSMPL and DCI for various purposes in relation to provisioning of services under the category of Broadcasting Services to MSOs/ COs. For rendering such service which include the collection of subscription charge they receive commission from MSMPL and DCI on which they discharge Service Tax under the category of "Business Auxiliary Services". Revenue also do not dispute that fact that appellants were discharging service tax on the commission received by them under the category of Business Auxiliary Service.

5.5 Before we proceed further it is necessary to understand the business mode of the Appellants and the relationships between various parties on the stage. Flow chart as below indicates the relationships.



5.5 From the flow chart as above, it is quite evident that appellant is joint venture of MSMPL and Discovery Communications India (DCI). Appellants have entered into agreement with MSO's/ CO's to provide the channels being distributed by MSMPL, DCI, TV Today Network etc. The channels being offered by the appellant are either in ala carte form or as bouquet of channel to the subscribers. In respect of the channels subscribed by the MSO/ CO, they are paying the subscription fee in respect of all the channels subscribed by them. While entering into agreement with the MSO/ CO the appellants have clearly indicated to the MSO/ CO that they are providing the channels of MSMPL and DCI as their agents, a fact which also appears on the invoices issued by the Appellants to MSO's/ CO's for collection of the subscription charges. In respect of the channels of TV Today Network, no such stipulation is made either in the agreement or the invoices issued. The subscription charges collected by the appellants from MSO's/ CO's are distributed on the basis of agreed formula in three part i.e. (i) those remitted to MSMPL (ii) those remitted to DCI (iii) those which are not remitted to either i.e. in respect of channels of TV Today Network.

5.6 The case of revenue against the Appellants in the present case is that respect of the subscription charges not remitted to MSMPL and DCI, the appellants have paid the service tax declaring the service provided as *"Broadcasting Agency Services"* as defined by Section 65 (105) (zk) read with Section 65(15) and 65(16) of Finance Act, 1994. However in the case of amounts remitted to MSMPL and DCI, appellants have not paid the service tax under the same category even though the amounts recovered as subscription charges were recovered against the same invoice, without indicating any bifurcation. Hence revenue contended that appellants should have paid the service tax on gross invoice value towards subscription charges. Appellant's contend that in respect of the amounts remitted to MSMPL and DCI, the entire amount of subscription including the service tax collected from the subscribers have been remitted to them. In turn MSMPL and DCI have paid the service tax on the amounts remitted to them by the appellants under the category of *"Broadcasting Agency Service"*.

5.7 Commissioner has in para 26 and 27 of impugned order recorded as follow:

"26. Even when the noticee is charging and collecting service tax towards taxable broadcasting services provided by them by raising invoices, they are contending that they being agents of MSMPL and DCI they are not required to pay service tax so collected, and the liability for payment of service tax on services provided by noticee rests with MSMPL and DCI to whom the noticee have remitted the amount so collected. Noticee has obtained Service Tax registration for "broadcasting services" and they have provided the taxable services and collected Service Tax towards such service from their customers. As per Section 65(7) of the Finance Act, 1994, assessee means a person liable to pay service tax includes his agent. As per Section 66 of Finance Act, 1994 read with Rule 6 of Service Tax Rules, 1994, any person who have provided taxable service is required to pay service tax on or before the due date. Thus the noticee having undertaken to discharge their service tax liabilities cannot assign it to any other person and even if they were agents as being claimed they were required to pay service tax charged and collected by them to the department in terms of Section 65(7) of Finance Act, 1994 read with Section 68 ibid and Rule 6 of Service Tax Rules, 1994. There is nothing on record to show that the noticee is an Agent of MSMPL or DCI. In any case, service provider is the person liable for paying service tax.

27. The noticee's claim that they were acting as agent of MSMPL and DCI, that the Service Tax collected against their invoice have been remitted to their said principals, that such income is not reflected in their books of account, that their principals are liable to pay service tax on taxable services provided by them even though service tax is collected by them., the payment of service tax by their *principal be verified, that they were receiving agency commission from their principles on which service tax is being paid by them under business auxiliary services etc are of no consequence since such claims or actions in pursuance of internal agreements between independent entities are in contravention of the explicit statutory provisions and not sustainable in law."*

5.8 Business Auxiliary Services under which the appellants have paid the Service Tax on the agency Commission has been defined by Section 65 (105) (zzb) read with Section 65 (19) of Finance Act, 1994. It is the claim of Appellants that the services provided by them as commission agent are covered by the definition of business auxiliary services as above as they have provided the services on behalf of their client namely MSMPL and DCI, and also they collected the subscription charges including service tax against the provision of such services from the MSO's/ CO's. For the provisioning of such service for and on behalf of their principals i.e. MSMPL and DCI, they have received the Commission on which they have discharged the service tax liability. For the broad casting services provided by their principals, their principals have discharged the service tax liability. We find that Commissioner has not considered the above argument of the Appellant and brushed aside the same stating that there is nothing on record to show that appellants have acted as agent of MSMPL and DCI. This finding recorded by the Commissioner brushing aside the arguments of the Appellants is without any basis and consideration of the agreement dated 5.08.2002, by which the Joint Venture Vehicle (MSMDPL was created) and the agreements entered between the appellants and MSO's/ CO's, the declaration made on the invoices issued by the appellant for collection of subscription charges. The finding recorded by the Commissioner has been recorded ignoring the fact that Appellants were paying service tax on the Commission received by them from their principals under the category of Business Auxiliary Services. The findings recorded by the Commissioner in this respect needs to be set aside and matter remanded back to him, to pass consider all the documents and arguments advanced by the appellants in this respect.

5.9 The second limb in support of the demand made is that appellants were paying the service tax in respect of the subscription charges collected in respect of the channels distributed by the TV Today Network under the category of "Broadcasting Service". This argument advanced by the revenue in support of the demand made needs to be reconsidered specifically by referring to the business models adopted by the Appellants for extending the services to service recipients i.e. MSO's/ CO's. Secondly a categorical finding needs to be recorded whether in case of TV Today Network, whether TV Today Network was discharging the service tax liability on the services provided by them for which appellants were collecting the subscription charges under the category of Broadcasting Services as was the case in respect of services provided on behalf of MSMPL and DCI by the Appellants. In absence of any finding recorded in this regards Commissioner has proceeded to confirm the demand by comparing two un-comparables i.e. oranges with apples. Service tax being contract/ transaction based levy the terms of contracts between the parties to the contract need to be examined and finding recorded before any demand can be made. In our view the matter needs to be remanded back to adjudicating authority for recording finding on this account also.

5.10 Since the above two issues strike at the root of the matter, we are not rendering any finding on the other issues raised by the appellants at this stage. Appellant's can raise all the issues before the adjudicating authority in de novo proceedings before the Commissioner.

6.1 In view of discussions as above appeal is allowed and matter remanded back to adjudicating authority for de novo consideration. We make it clear that all the issues raised in the show cause notice are kept open and should be considered afresh by the adjudicating authority. The cross objection filed by the Revenue is also disposed of.

6.2 Since the matter is quite old, adjudicating authority should complete the adjudication in de novo proceedings within six months of receipt of this order after extending the opportunity of hearing to the appellants.

(Order pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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