CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

REGIONAL BENCH - COURT NO. 02

Service Tax Miscellaneous Application (Cross) No. 91146 of 2014
(on behalf of Respondent)
in
Service Tax Appeal No. 88655 of 2014

(Arising out of Order-in-Original No. 30/ST/RN/CMR/MII/13-14 dated 26.03.2014 passed by Commissioner of Central Excise, Mumbai-II)

Commissioner of Service Tax, Mumbai-II ....**Appellant**
4th Floor, New Central Excise Building,
Maharshi Karve Road, Churchgate,
Mumbai-4000020

VERSUS

M/s. A.B. Corp Limited .....**Respondent**
Nort South Road,
Opp. St. Joseph High School,
Juhu, Mumbai - 400049

Appearance:

Shri Suresh Merugu, Authorized Representative for the Appellant
Shri Vipin Kumar Jain along with Shri Roshil Nichani, Advocates for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87683/2019

Date of Hearing: 02.05.2019
Date of Decision: 01.11.2019

Per: S.K. MOHANTY

Briefly stated, the facts of the present case, leading to this appeal, are as under:

1.1 The respondent herein, had entered into agreements with various corporate houses such as, ICICI Ltd., Pepsi Foods India Ltd., Dabur India Ltd., Cadbury India Ltd., in terms of which the Respondent, through Shri Amitabh Bachchan (also referred to as the model or the confirming party), was to promote and enhance the goodwill of brands of those companies. For this purpose, Shri Bachchan, inter alia, was required to act as a brand ambassador and in all public appearances, use his judgment in choice of language and general demeanor to create an atmosphere which would be conducive to promotional efforts; conduct himself during the term of this Agreement with due regard to public morals and conventions; in his public appearances, exercise his sole and exclusive discretion to promote the objectives of the agreements. The agreements further provided that during the term of the agreement and also during the cooling period, the companies shall have the right to use Shri Bachchan's name, voice and photographs for the purpose of publicity/advertisement of the products or services in any media and for or in the course of contests and other marketing campaigns.

1.2 During the relevant period, the Respondent had received a total amount of Rs. 28,74,00,000/- in lieu of the aforesaid brand promotion service provided by it. Receipt of such consideration was recorded as 'income from endorsement/ merchandise/brand ambassador' in the financial records maintained by it.

1.3 The Service Tax department, in this case, had issued the Show Cause Notice dated 05.02.2005 to the Respondent, alleging that since it had received the consideration for providing celebrities as models for advertising purposes, the service tax liability was required to be discharged under the taxable head of 'advertising agency service', defined under Section 65(3) of the Finance Act, 1994. It was further alleged that by making Shri Bachchan available to such companies, the Respondent had directly/indirectly done an activity which was in connection with the preparation of advertisements. The Notice had also sought to levy service tax on income received by the Respondent in relation to celebrity management, programs/voice overs and for conducting events under the head of 'advertising agency services'.

1.4 The matter arising out of the show cause notice was adjudicated by the learned Commissioner of Central Excise, Mumbai-II vide Order-in-Original dated 26.03.2014 (for short, referred to as the 'impugned order'), wherein the proposals made in the Notice were dropped. In support of dropping the proposed demand, the learned adjudicating authority has recorded the following observations:

(a) that the term 'advertising agency' is well understood in commercial parlance and it did not cover the service of a brand ambassador;

(b) that what was expected of the Respondent was only to provide the model for featuring in the advertisements and to discharge the role of a brand ambassador;

(c) that none of the activities rendered/associated with advertising agencies was rendered by the Respondent. The Respondent neither made or prepared advertising material nor rendered any service relating to display or exhibition of advertisement. The Respondent did not give advertising consultancy and also not considered as advertising agency in the trade parlance. Reliance was placed upon the decision of the Hon'ble Tribunal in the case of Board of Control for Cricket in India vs. Commr. of S.T., Mumbai - 2007 (7) STR 384 (Mum.) for the same;

(d) that insofar as the income from the other three categories were concerned, i.e. 'celebrity management', 'anchoring/voice overs' and 'events', the same was not for making, preparation or displaying or exhibition of advertisement and consequently, could not be taxed under the head of 'advertising agency services'.

2. Heard both sides and perused the case records.

3. The phrase 'advertising agency' has been defined under Section 65(3) *ibid* to mean "any person engaged in providing any service connected with the making, preparation, display or exhibition of advertisement and includes an advertising consultant". On careful reading of the definition of 'advertising agency', it transpires that the said taxable entry covers only

such agencies, which have the expertise and are engaged in the making or preparation of advertisement and deciding upon where and when to display the same. The Respondent in this case, had merely made the celebrity available for undertaking the brand promotion activities. The Respondent is neither engaged nor does has any expertise in making or preparing advertisements, so as to be taxed under the taxable head of 'advertising agency service'. The scope and ambit of such definition clause has been dealt with by the Hon'ble Madras High Court, in the case of Advertising Club vs. CBEC - 2006 (2) STR 457 (Mad.). The relevant observations of the Hon'ble High Court are extracted herein below:

> *"17. ....The present impost is, however, not on the person who give the advertisement but the impost is on the agency, which is a commercial concern and is engaged in providing the services connected with the making, preparation, display or exhibition of the advertisements in any manner - whether it be a newspaper advertisement or a hoarding or an audio or video advertisement. The advertising agency uses its expertise in making or preparing the advertisement so that it becomes an effective advertisement. It also decides as to where it should be displayed and on what occasions it should be exhibited. It selects the place, time as also the media for flashing the advertisements.....*
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> *21. In the first place, let us first see where a person gets his advertisement flashed in the press media or electronic media, can it be said to be a service. In our opinion, it could certainly not be said to be a service provided by the press media or electronic media. There is nothing done excepting flashing a prepared advertisement by the press media or for that matter, electronic media. The decision as to how and in what format the advertisement should be, how it should be projected, at what point of time it should be flashed, in which areas it should be exhibited or the manner in which it should be drafted and exhibited has got nothing to do with the press media or electronic media. That would be the task of “advertising agency” alone. Therefore, when we consider the situation where a client goes to the press media and asks for flashing of the advertisement and such advertisement is flashed in the media, this cannot be deemed to be a service provided by that media to such a client. Similarly, when a person approaches the electronic media and flashes an advertisement on the radio or television, as the case may be, the radio or television simply would flash the advertisement as per the instructions of the person concerned but such person will not get the advantage of*

the expertise of the advertising agency. Therefore, it cannot be said that the press media and electronic media provide the same service and, therefore, it cannot be complained that they should also be brought in the tax net like the advertising agencies....."

4. Further, the true scope of the taxable entry of 'advertising agency service' was also considered by this Tribunal in the case of Board of Control for Cricket in India (supra), wherein it was held that an advertising agency is an organization which specializes in providing services as media selection, creative work, production and campaign planning to its clients. Unless the person concerned also undertakes any activity relating to the marketing or preparation of an advertisement such as, designing, visualizing, conceptualizing etc., there could be no levy of service tax under such category of service.

5. For ascertaining the appropriate classification of service, we have examined the competing taxable entry of 'advertising agency service' vis-a-vis the 'brand promotion service', brought into the taxing net w.e.f. 01.07.2010 under Section 65 (105)(zzzzq) *ibid*. Taxable service under such category is defined to mean "any service provided or to be provided to any person, by or any other person, through a business entity or otherwise, under a contract for promotion or marketing of a brand of goods, service, event or endorsement of name, including a trade name, logo or house mark of a business entity by appearing in advertisement and promotional event or carrying out any promotional activity for such goods, service or event." The service categorized under Section 65 (105)(zzzzq) *ibid* takes within its ambit of establishing goodwill or value addition in respect of the brand associated with the company and not concerning with promotion of any specific product or service. Upon introduction of the Finance Bill, 2010 in incorporating the latter taxable entry, the Tax Research Unit of the Department of Revenue in the Ministry of Finance has issued the circular dated 26.02.2010, clarifying as under:

"4. Promoting a 'brand' of goods, services, events, business entity etc.

4.1 Commercial advertisement has taken different shapes and forms. Apart from the advertisements in print and visual media and sponsorship, one of the recent trends is to advertise a brand (i.e. of goods, services, events, business houses bearing a particular brand name or house name) usually by using a celebrity (such as sportsperson, film stars, etc.) to associate him/her with the brand. The intended impression that is created in the minds of customers or users is that the products and services of that brand have the level of excellence comparable to that of the celebrity. Unlike in case of advertisements using models, a brand ambassador works under a contract of a reasonably long period, where under he is not only required to advertise the goods or service in different media but also to attend promotional, product launching events, make appearances in public activities related to the brand or the brand holder or use such goods or services in public. The contractual amounts are substantial and it may not only involve an individual celebrity but a group of celebrities such as a cricket team or the actors of a successful film.

4.2 It is important to note that promotion or marketing of sale of goods produced, provided or belonging to a client and promotion or marketing of services provided by the client are already covered under Business Auxiliary Services (BAS). Such activities would continue to remain classified under BAS. The difference between the services classifiable under BAS and the newly proposed service is that the latter has a wider coverage in the sense that mere promotion of a brand would attract tax under this service even if such promotions cannot be directly linked to promotion of a particular product or service. Many companies/corporate houses (for example Sahara, ITC or Tatas) are associated with a range of activities including production/marketing/sale of goods, provision of services, holding of events, undertaking social activities etc. If the brand name/house mark etc. is promoted by a celebrity without reference to any specific product or services etc., it is difficult to classify it under BAS. Such activities, like mere establishing goodwill or adding value to a brand would fall under this newly introduced service."

6. The scope of work as per the agreement (supra) clearly provide that the Respondent through Shri Bachchan shall provide the brand ambassador service for various business houses. It is a settled principle of law that when a new head of service (brand promotion service) is created, without altering the scope of the existing head (advertising agency service), it means that the

newly introduced head of service was hitherto not taxable. Further, we also find that the disputed issue has been settled by this Tribunal, in the case of Commissioner of Service Tax, Delhi vs. Shriya Saran - 2014 (36) STR 641 (Tri.-Del.), wherein it has been held that an activity which enhanced the goodwill of a company was covered under 'brand promotion service', which became taxable only with effect from 01.07.2010. Thus, we are in agreement with the findings recorded in the impugned order that the services provided by the Respondent during the disputed period should not fall under the taxable entry of 'advertising agency service'.

7. In view of the foregoing discussions, we do not find any infirmity in the impugned order passed by the learned adjudicating authority. Accordingly, the appeal filed by Revenue is dismissed. The cross Objections filed by the Respondent stands disposed of.

(Order pronounced in the open court on 01.11.2019)

(S.K.Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Judicial)

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