CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.501

Service Tax Appeal No. 88243 of 2014

(Arising out of Order-in-Original No. 29/ST/RN/CMR/M-II/13-14 dated 12.03.2014 passed by the Commissioner of Central Excise, Mumbai-II)

M/s A B Corp Ltd. ....Appellant
13th North south Road, Opp.
ST. Joseph High School, Juhu
Mumbai- 400 049

VERSUS

CCE, Mumbai-II ....Respondent
9th Floor Piramal Chambers, JiJibhoy Lane
Lalbaug Parel, Mumbai-400 012

APPERANCE:

Shri Vipin Jain along with Roshal Nichani, Advocates for the Appellant
Shri Suresh Merugu, Joint Commissioner 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/87685/2019

Date of Hearing: 02.05.2019
Date of Decision: 01.11.2019

PER: S.K. MOHANTY

This appeal is directed against the impugned order dated 12.03.2014 passed by the learned Commissioner of Central Excise, Mumbai – II, wherein service tax demand of Rs. 1,94,51,213/- was confirmed along with interest and penalties were imposed on the appellant M/s AB Corp. Limited under Section 76, 77 & 78 of the Finance Act, 1994.

2. 1 Briefly stated, the facts of the case are that the appellant is an entertainment company, engaged *inter alia*, in the business of

production/ distribution of feature films, managing events and celebrity etc. for accomplishing the business purpose of various clients. During the disputed period, the appellant had entered into an agreement with M/s. New Kolkata International Development Pvt. Ltd. (for short, 'NKID'). In terms of the said agreement, the appellant, through Shri Amitabh Bachchan, has agreed for a term of three years to promote and enhance the goodwill of NKID. For this purpose, Shri Bachchan was required to endorse the products of NKID by making himself available for ad films, TVCs; allowing his name, signature, voice, photograph, to appear and to be used in any media/press conference/promotional events etc., in connection with the promotion of NKID products. The agreement records that NKID was engaged in construction in the real estate sector. The agreement defines ‘NKID products’ to mean and include but not limited to residential and commercial complexes, luxury hotels, infrastructure projects, amusement parks and setting up of educational institutes and related activities promoted by NKID. As per the terms of agreement, the appellant had received an amount of Rs.15,89,15,139/- in lieu of the said services, which was to be rendered for the specified period of three years.

2.2 The appellant did not pay service tax on the said amount received from NKID and also did not reflect the transaction particulars in the periodic ST-3 returns. During the course of EA-2000 audit, the department observed such irregularity of non-payment of service tax and accordingly, initiated show cause proceedings against the appellant, seeking for recovery of the service tax demand under the taxable category of “Business Auxiliary Service” (for short ‘BAS’), defined under Section 65(19) read with Section 65(105)(zzb) of the Finance Act, 1994. The show cause notice dated 12.03.2014 was adjudicated vide the impugned order dated 12.03.2014, in confirming the above adjudged demands on the appellant. By referring to the terms of agreement, the learned adjudicating authority has held that since the appellant had provided the services in promotion of the goods of NKID, such services are confirming to the definition of taxable entry of BAS. Further, he has also held that the newly introduced taxable service of 'Promotion of Brand Service' under Clause (zzzzq) of Section 65(105) *ibid* covered services provided in relation to 'brand, trademark or logo' of a company and not of 'products and services' of a company. In this context, the learned adjudicating authority has placed reliance on the Circular No. 334/1/2010-TRU dated 26.02.2010 issued by the CBEC.

3, Shri Vipin Jain, learned Advocate appearing for the appellant submitted that the appellant was not engaged in sales promotion or any connected activity, which directly linked with the sale of specific goods. In this context, he has referred to the show cause notice dated 12.04.2012 to state that there is no explicit mention of any particular project or product, whose sale or service was required to be promoted by the appellant. Thus, he submitted that since the entire endorsement activities pursuant to the agreement were meant for promotion of NKID's group of infrastructure and other projects, the services provided by the appellant should appropriately be classifiable under the taxable entry of 'Promotion of Brand service' and not under the 'Business Auxiliary Service'. Learned Advocate has relied upon the judgment of Hon'ble Calcutta High Court, in the case of Sourav Ganguly vs. Union of India – 2016 (43) S.T.R. 482 (Cal.) and the orders of this Tribunal, passed in the case of Jetlite (India) Ltd. vs. CCE, New Delhi – 2011 (21) S.T.R. 119 (Tri.-Del.) and CST, Delhi vs. Shriya Saran – 2014 (36) S.T.R. 641 (Tri.-Del.), to strengthen such submissions.

4. On the other hand, Shri Suresh Merugu learned AR appearing for the Revenue reiterated the findings recorded in the impugned order, to support confirmation of the adjudged demands on the appellant.

5. Heard both sides and examined the case records.

6. The issue involved in this appeal for consideration by the Tribunal is, whether the Brand Promotion Service rendered by the appellant to NKID during the period April' 2007 to March' 2010 was

taxable under the head BAS as promotion or marketing or sale of goods produced or provided by or belonging to the client.

7. The statutory provisions, relevant for resolving the present dispute, are extracted herein below:

" **Section 65 (19) "business auxiliary service**" means any service in relation to, —

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;]

[(v) production or processing of goods for, or on behalf of, the client;]

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, [but does not include any activity that amounts to manufacture of excisable goods].

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(b)"excisable goods" has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944 (1 of 1944);

(c)"manufacture" has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944)]"

"**Section 65(105)(zzb): "taxable service**" means any service provided or to be provided to a client, by any person in relation to business auxiliary service"

"**Section 65(105)(zzzzq): "taxable service"** means any service provided or to be provided to any person, by 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.

Explanation. — For the purposes of this sub-clause, "brand" includes symbol, monogram, label, signature or invented words which indicate connection with the said goods, service, event or business entity; "

8. On close reading of the above statutory provisions, it transpires that the scope and ambit of the defined services under BAS is confined only to the area of promotion or market of any particular or specific goods or services. In other words, when a famous personality is engaged in providing the services in relation to promotion or marketing or sale of a particular brand of product, let us say, detergent powder under the brand name of 'Surf', then such provision of service in fact, will be categorised under the taxable entry of BAS, for levy of service tax. On the contrary, when the said celebrity is engaged in endorsing the client's brand of products or services, in order to create an impression in the minds of customers or users that products or services of that brand have the level of excellence comparable to that of the celebrity, then in such eventuality, the services provided by such celebrity will not be exigible to service tax under the taxable category of 'BAS'. To exemplify the situation, assume that Mr. 'X', a sports idol is invited by a reputed corporate house to promote or to inform the public at a large about the variety of products dealt by it and the other benevolent instruments implemented by it namely, running of charitable hospitals, educational institutions etc., then in such case, the services provided by the sports personality will not be subjected to levy of service tax under the taxable entry of BAS. In such an eventuality, the said provision of services will be categorised as Brand Promotion service, as per Clause (zzzzq) of Section 65(105) *ibid*, liable for payment of service tax w.e.f. 01.07.2010, inasmuch as, such congregation of activities add to the brand value and are more analogous to promotion of brand of the goods and services dealt with by the company, than mere promotion or marketing or sale of clear-cut identified goods or services.

9. Consequent upon proposed changes made in the service tax law and procedures in the Union Budget 2010-11 with regard to inclusion of new taxable services, including 'Brand Promotion Service' (made effective from 01.07.2010), the Tax Research Unit of CBEC

vide Circular No. 334/1/2010-TRU dated 26.02.2010 has drawn the distinction between the scope and ambit of two competing services viz., BAS vis-a-vis Brand Promotion Service, which are as under:

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

10. Further, upon consideration of the distinctive features of both the disputed category of services, this Tribunal, in the case of Shriya Saran (supra) has held that if overall objective of the agreement is brand promotion and not mere promotion or marketing of any product or service, the same cannot be taxed under the head of BAS. The ratio laid down in the said decision has also been approved by the Hon'ble Calcutta High Court in the case of Sourav Ganguly (supra).

11. On proper scrutiny of the terms of agreement in question, it becomes apparent that Shri Bachchan was not engaged by the appellant to promote or market any particular or specific goods or services being provided by NKID, but to endorse the entire range of

NKID products, which spanned from residential and commercial complexes to luxury hotels, educational institutes, infrastructure projects etc. Such services, in our considered view, will not be categorised under the taxable entry of BAS and will more appropriately be classified under the specific head of taxable service viz. "Brand Promotion Service", liable for payment of service tax only with effect from 01.07.2010 and not prior to such effective date.

12. In view of the foregoing discussions and analysis, we do not find any merits in the impugned order passed by the learned Commissioner of Central Excise. Accordingly, by setting aside the same, the appeal is allowed in favour of the appellant.

(Order pronounced in the open Court on 01.11.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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