CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 89635 OF 2013

[Arising out of Order-in-Original No: 22/ST/Commr/2013 dated 31st July 2013 passed by the Commissioner of Central Excise, Aurangabad.]

Baba Trading Co
47/48 1st Floor, Market Committee, Shopping Centre
Kawa Road, Latur - 413512 … ***Appellant***

versus

Commissioner of Customs, Central Excise & Service Tax
Town Centre, N-5, CIDCO, Aurangabad ***…Respondent***

APPEARANCE:

Shri SS Gupta, Chartered Accountant for the appellant

Shri Onil Shivadikar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86748 /2021

DATE OF HEARING: 13/07/2021
DATE OF DECISION: 09/09/2021

PER: C J MATHEW

Impugning order-in-original no. 22/ST/Commr/2013 dated 31st July 2013 of Commissioner of Central Excise, Aurangabad, the cavil of M/s Baba Trading Company, against the saddling of liability of ₹ 1,91,91,761 under section 73 of Finance Act, 1994, along with applicable interest under section 75 of Finance Act, 1994, while imposing penalty of like amount under section 78 of Finance Act, 1994 for having failed to pay tax as provider of ‘franchisee service’, is that the adjudicating authority had been unable to appreciate the nature of the activity for which they had contractually engaged to make payments between October 2006 and March 2010 to Maharashtra State Road Transport Corporation (MSRTC). The transport undertaking of the Government of Maharashtra entrusted their ‘parcel, luggage, newspaper, courier and allied services’, facilitated to the public through the parcel booking offices at bus stations to be carried on roofs of buses, to the appellant as successful bidder of tender process which, in turn, was assigned to M/s Shri Sai Transport and Courier Pvt Ltd for consideration of ₹ 16,47,44,850 during the period of dispute. The original authority held that the appellant had granted ‘representational rights’, inherent in the contract so awarded, to the *de facto* operator and the amount received thereon was liable to tax under section 65 (105)(zze) of Finance Act, 1994 with the appellant as ‘franchisor’ and to M/s Shri Sai Transport and Courier Pvt Ltd as ‘franchisee’ within the meaning of section 65(48) of Finance Act, 1994. The determination that the contractual agreements among the three parties aggregated as ‘franchise’ was founded upon the terms and conditions of the arrangement and the presence of the marks, associated with the transport corporation and with the appellant, in the invoices issued by M/s Shri Sai Transport & Courier Pvt Ltd.

2. A proposition put forth on behalf of the appellant by Learned Chartered Accountant is that the ‘taxable service’ fastened on them by the adjudicating authority was legislatively intended only for agreements that transmit the same service from origin to final destination and through any intermediaries. According to him, the actual operator, M/s Shri Sai Transport & Courier Pvt Ltd, being a provider of ‘courier service’, and the owner of the buses and bus stations, being in the business of transporting passengers, precluded the mediatory role of the appellant from being characterized as ‘franchisee service’ for subjecting them to tax. We are unable to perceive any restrictive framework either in the description of the ‘taxable service’ or in the scheme of Finance Act, 1994 to lend credence to this proposition. Furthermore, save for the enunciation, Learned Chartered Accountant has not afforded us any insights through judicial precedent that could, conceivably, convince us to concur with him. The scheme of the levy, at that point in time, envisaged liability to tax of the concatenation of activity, of provider and of recipient in each commercial engagement that adhered to descriptions in section 65(105) of Finance Act, 1994.

3. According to Learned Chartered Accountant, taxability of

‘franchise agreement’ is predicated only upon assigning of ‘representational right’ to offer a specific service that is identified with the franchisor and contends that the decision of the Hon’ble High Court of Delhi in *Delhi International Airport P Ltd v. Union of India [2017 (50) STR 275 (Del)]*, elaborating the framework of this taxable service, clearly excludes the activity of the appellant from its ambit. Likewise, reliance is placed on the decisions of the Tribunal, in *Directi Internet Solutions P Ltd v. Commissioner of Service Tax, Mumbai [2014 (36) STR 849 (Tri-Mumbai)]* and in *Commissioner of Service Tax, Mumbai-I v. Bharat Petroleum Corporation Ltd [2018 (10) GSTL 364 (Tri-Mumbai)]*, which relegated the depiction of logo as subservient to the minutiae of agreement in determining conformity with section 65 (47) of Finance Act, 1994.

4. Drawing attention to the communication of Central Board of Excise & Customs dated 9th May 2011 addressed to the Chief Commissioner of Central Excise in F no. 137/123/2010-CX.4 on the leviability of tax upon license fee charged by Gujarat State Road Transport Corporation (GSRTC) from M/s Shri Sai Marketing & Trading Co for similar activity, and advising that ‘support services of business or commerce’ as the appropriate entry in section 65 (105) of Finance Act, 1994 to be invoked, which was relied upon by the Tribunal in *Commissioner of Service Tax, Ahmedabad v. Gujarat State Road Transport Corporation [2014 (33) STR 283 (Tri-Ahmd)]*,

he contended that the notice for recovery was faulty.

5. Learned Authorised Representative elaborated upon the ingredients in section 65(47) of Finance Act, 1994 after 16th June 2005 that, taken together, altered the approach to the levy by eliminating some of the hitherto restrictive determinants of 'franchise' and, according to him, the amended version intended the expression 'identified with franchisor' to qualify each of the foregoing activities. The principle expounded on this aspect of statutory interpretation by the Hon'ble Supreme Court, in *Union of India v. Ind-Swift Laboratories Ltd [2011-TIOL-21-SC-CX]*, thus

> *'17. ……………. The issue is as to whether the aforesaid word "OR" appearing in Rule 14, twice, could be read as "AND" by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word "OR" in between the expressions 'taken' or 'utilized wrongly' or has been erroneously refunded' as the word "AND". On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest.'*

was cited as the cornerstone of his proposition on misapplication of the decision of the Hon'ble High Court of Delhi in *re Delhi International Airport P Ltd* holding that

> *'57. The term "representational right" would necessarily qualify all the three possibilities i.e., (i) to sell or manufacture goods, (ii) to provide service, and (iii) undertake any process identified with the franchisor.'*

to the present dispute. Rooting for acceptance of the finding of the adjudicating authority on displaying of the logo of all three entities in the invoices, as well as on publicity hoardings, as evidence of the transfer of ‘representational rights’, he argued that the stipulation in the agreements on the limits of autonomy allowed to the *de facto* operator in relation to their bank accounts was also of significance. It was also pointed out that the appellant had imposed other restrictions too on the ultimate operator which detracted from claims of independent functioning. Reference was invited to the nature of the offerings of Maharashtra State Road Transport Corporation as narrated in their public documents.

6. The service sought fastened by the tax authorities on the appellant is that provided, or to be provided,

> *‘to a franchisee, by the franchisor in relation to franchise’*

as per section 65 (105) (zze) of Finance Act, 1994 and applied to the appellant as ‘franchisor’ with M/s Shri Sai Transport and Courier Pvt Ltd as ‘franchisee’ in relation to the agreement between them for undertaking activities outsourced by Maharashtra State Road Transport Corporation which was held to conform to

> *‘…….by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trademark, service mark, trade name or logo or any such symbol, as the case may be is involved;’*

in section 65 (47) of Finance Act, 1994. The appellant, admittedly, is the conduit that enabled M/s Shri Sai Transport and Courier Pvt Ltd to perform the service sought for by users. Doubtlessly, the keys for evaluating taxability as ‘representational right’ and ‘identified with the franchisor’; to deprive the activities other than ‘undertake any process’ from being qualified by the latter of the two would reduce the definition to consequence that was not intended in *re Delhi International Airport P Ltd.*

7. Franchise is a business model that affords access to market by riding on the back of a product or offering that is well-entrenched in the minds of consumers and for which the franchisor is entitled to recompense from the franchisee. Many national jurisdictions have special laws for governing such commercial engagement but we do not and remedies are enforceable only within the generality of Indian Contract Act, 1872. The expression is evocative of congruity of intent between two parties with stipulations that obligate, along with indebtment of, the beneficiary in exchange for specific offering from the benefactor. The range of contract is, thus, too vast for encapsulation within the confines of a statutory definition. The initial foray, effective from 1st July 2003, by incorporation of section 65(47) of Finance Act, 1994 subjected the consideration in transactions of a highly restricted business arrangement to tax. With effect from 16th June 2005, taxability was enlarged to accord primacy to

‘representational rights’ associated with the ‘franchisor’ in an agreement.

8. It must be borne in mind that several other ‘taxable services’ were incorporated along with the impugned service and the serendipitous overlap among various models of engagement among business entities is attributable to frailty of expressions and intent of exhaustive enumeration that manifested as imprecise boundaries posing impediment to judicial determination. Implicitly, and as laid down in the several decisions *supra*, it is the contents of the agreement that unveil the ‘franchisor-franchisee’ engagement by the congruity of intent to assign ‘representational rights’ of product, service or process by one to the other. The relationship intended by the agreement between the appellant and M/s Shri Sai Transport and Courier Pvt Ltd must find fitment within the framework of the definition for establishing that franchise was intended.

9. A brief overview of bus services in India would not be out of place as, unlike goods transport, ‘stage carriage’ of passengers was of sufficient import to ‘public policy’ even before representational governance was made fully operational and, in the infancy of the Republic, a national enactment, *viz*,. The Road Transport Corporations Act, 1950, enabled the federating states to participate in servicing of the travelling public. Chapter IV-A, comprising section 68-A to section 68-J was engrafted in 1956 in the Motor Vehicles Act, 1939 to

further empower state governments to nationalize bus routes. The monopoly of the state was, thus, instituted for transport of passengers by road for the larger good that was legislatively formulated thus

> *"Where any State transport undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State Transport Undertaking whether to the exclusion, complete or partial, of other persons or otherwise, the State Transport Undertaking may prepare a scheme giving particulars of the nature of the services proposed to be rendered, the area or route proposed to be covered and such other particulars respecting thereto as may be prescribed, and shall cause every such scheme to be published in the Official Gazette and also in such other manner as the State Government may direct."*

in section 68C of Motor Vehicles Act, 1939. Later versions of the law retained this empowerment and every state of the Union has actively pursued this objective.

10. The ubiquitous 'state transport corporations' are integral to the transport sector in India with nationalized bus routes acquiring a firm grip on the road network. Among the several operators offering transport of passengers and goods across the length and breadth of the country, nationalized operations, through the agency of 'transport corporations' – unified or disaggregated – are *numero uno*. Though

catering primarily to passengers, the roofs of ‘state transport buses’ piled with luggage and goods portrays our Indian way of life almost as much as our attire and spicy curries do. Not only does this serve a practical requirement, but they also represent an activity, with concomitant assurances, that resonates with the teeming millions that make for the diverse and dispersed populace of a nation.

11. Pragmatic considerations and the tyranny of the bottom-line have compromised the looming presence of these publicly owned behemoths and though the alienation of several of their activities was inevitable, the entrustment of agency to private entities did not necessarily divest ownership of the assets or oversight to a lesser, or larger, extent. The buses, as also the roofs, continue to belong to the corporation as do the established booking offices. It is uncontested fact that the appellant recompenses Maharashtra State Road Transport Corporation, in accordance with tender conditions, for exclusive access to the roofs of buses and the booking offices. It is also not controverted that this access has been transmitted, undiminished and of entire, to M/s Shri Sai Transport and Courier Pvt Ltd though, as safeguard of its own revenues and for fulfillment of contractual commitment to Maharashtra State Road Transport Corporation, the earnings are, to the extent of consideration agreed upon, not accessible to M/s Shri Sai Transport and Courier Pvt Ltd.

12. M/s Shri Sai Transport and Courier Pvt Ltd, though enabled to

operate on principal-to-principal basis with owners of luggage or goods to be carried on roofs of buses operated by Maharashtra State Road Transportation Corporation, are not, owing to the restrictive conditions of contract, in principal-to-principal business engagement with the appellant. Moreover, their survival in business is factored upon the customers who do not emerge randomly but with pre-conceived notions of their expectations from the carrier. Thus, the offering of M/s Shri Sai Transport and Courier Pvt Ltd to its customers are the services associated with Maharashtra State Road Transport Corporation to which they obtain rights by their agreement with the appellant who are delegates of the Corporation. The transport is effected by Maharashtra State Road Transport Corporation and it is that service which the appellant has enabled M/s Shri Sai Transport and Courier Pvt Ltd to offer to users. This 'representational right' is intended to be taxed by the 'taxable service' and the consideration thereof is liable to tax.

13. This is in consonance with principles elaborated in *Delhi Public School Society v. Commissioner of Service Tax, New Delhi [2013 (32) STR 179 (Tri.-Del.)]* by the Tribunal thus

> *'13. The aforesaid two decisions (Sultan Bros. and Byrom) afford no possible guidance to resolution of the issue whether the transactions involved in the present appeals fall within the taxable - "franchise service". It cannot be gainfully contended by the assessee that provision of buildings and infrastructure and footing of the expenditure therefore by the*

other parties to the agreements are the foundational premises of the enterprise nor does the contention commend acceptance that these are the essential integers of the enterprise. The dominant component of the enterprise is the provision by the assessee of the four ingredients of "franchise" service as per the definition upto 15-6-2005 and the ingredients of the definition subsequent thereto; namely granting of a representational right to provide service or undertake any process identified with the assessee. The fact that buildings and infrastructure are requisite for the pursuit of the enterprise would not derogate from the fact that without the transfer of the expertise; know-how; operational methodology; brand name and other incidents of the assessee's experience in the field, the enterprise would not have fructified. Fertilisation and impregnation of these core competencies of the assessee into the schools to be established and for their functioning, is all that the agreements envisaged.

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18. In view of the authoritative pronouncement by the Supreme Court in New Horizons Limited, reiterated in Faqir Chand Gulati, we are required to conclude that an agreement such as one in the present case which places the entire financial burden of establishing and maintaining the school, including the liability to fund the entire capital and non capital expenditure; under writing the entire financial liability; liability arising out of any litigation; and obligating further that all available and remaining assets on determination of the agreement would revert to the other party alone, would not tantamount to a joint venture arrangement, regardless of the description of the arrangement as a Joint Venture or a collaborative arrangement. The fact that the other party is required to pay

> *a specified amount to the assessee clearly and compellingly indicates that the assessee is remunerated for services provided to the other party to the agreement. Clearly therefore there is a service provided by the assessee to another, for consideration. There is no element of service to the assessee itself.*
>
> *Issue 'A' is accordingly answered against the assessee. We hold that the assessee does provide service, not to itself but to the other parties to the agreements…..'*

after narrating the principles of interpretation. The restrictions, and stipulation of operations, on M/s Shri Sai Transport and Courier Pvt Ltd does not permit applicability of the decision of the Tribunal in *re Directi Internet Solutions P Ltd* to the facts of the present dispute. We are unable to accept arguments, relating to use of logo or brand name, that rely upon the decision in *re Bharat Petroleum Corporation Ltd*.

14. The decision in *re Gujarat State Road Transport Corporation* that was based upon the clarification issued by Central Board of Excise & Customs is of no relevance to the present dispute which does not pertain to tax leviable on the State Road Transport Corporation. Each stage of rendering service is to be independently evaluated for taxability and the claim of appellant that they are a mere 'pass through' entity, relying upon the decisions of the Tribunal in *GR Movers v. Commissioner of Central Excise, Lucknow [2013 (30) STR 634 (Tri-Del)]* and *Commissioner of Central Excise, Meerut v. Moradabad Gas Service [2013 (31) STR 308 (Tri-Del)]*, does not

appear to sustain their claim for exclusion from tax. In these decisions, the transactions related to goods sold by service providers which has no bearing on the nature of service in the present dispute.

15. The taxability of the impugned service was in place since 2003. As far as the present dispute is concerned, the relationship between the appellant and M/s Shri Sai Transport and Courier Pvt Ltd has always been covered by the ‘taxable service’, as initially conceived, thus precluding any confusion engendered by the expansion in the amended definition of ‘franchise’ and the lack of certainty, as argued by Learned Chartered Accountant, does not appear to be an acceptable submission. Neither does the claim for discard of extended period; as the ‘taxable service’, incorporating essential elements of the service, did not offer an alternative even if subsequent introspection may have suggested otherwise. Mere correspondence does not evince absence of suppression or misrepresentation. Consequently, the plea for limiting the demand to the normal period lacks support.

16. The appeal is, accordingly, dismissed by affirmation of the impugned order.

(Order pronounced in the open court on 09/09/2021)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*