

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

**Service Tax Appeal No. 86777 of 2015
and
Cross Objection No. ST/CO/91180 of 2015**
(On behalf of Respondent)

(Arising out of Order-in-Original No. MUM-LTUNT-000-COM-2-5-15-16 dated 13.05.2015 passed by the Principal Commissioner of Central Excise & Service Tax, LTU, Mumbai)

Commr. of CE & ST (LTU), Mumbai

Appellant

8th floor, Centre-I, World Trade Centre,
Cuffe Parade, Mumbai 400 005.

Vs.

M/s. Asian Paints Ltd.

Respondent

Asian House, 6/A, Shanti Nagar,
Santacruz (E), Mumbai 400 055.

Appearance:

Shri Nitin Ranjan, Deputy Commissioner, Authorised Representative
for the Appellant

Shri V. Sridharan, Senior Advocate, for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. **A/86864/2021**

Date of Hearing: 22.09.2021

Date of Decision: 22.09.2021

PER: SANJIV SRIVASTAVA

This appeal is filed by Revenue against Order-in-Original No. MUM-LTUNT-000-COM-2-5-15-16 dated 13.05.2015 passed by the Principal Commissioner of Central Excise & Service Tax, LTU, Mumbai.

2.1 During the course of audit, it was observed that for the period April 2007 to June 2012, the respondent recovered certain income under the head "Home Solutions Operations". On verification, it was observed that this concept is one stop painting solution to the customers, wherein all the requirements, needs and concerns of the ultimate customer are met at a single place with the best of quality, standards and service levels

through independent service providers called ‘Home Solutions Service Provider’.

2.2 As per the arrangement for the provisions of home solution services through home solution service provider and the fact that consideration flowing from the service provider to the party in the form of major shares of provide, Revenue was of the view that these services will fall under a category of franchisee service as defined under Section 65(105)(zze) of the Finance Act, 1994. Accordingly a show cause notice dated 19.04.2011 was issued to the respondent asking them to show cause as to why:

“(i) The service provided by the noticee should not be classified as ‘Franchisee Services’, which are taxable services under Section 65(47) of Finance Act, 1994, as amended.

(ii) The Service tax amounting to Rs.5,98,66,424/- (Rupees Five Crore Ninety Eight Lakhs Sixty Six Thousand Four Hundred And Twenty Four only) including Ed. Cess and Secondary & Higher Ed. Cess, should not be demanded and recovered from them for the period 01.10.2005 to 31.12.2010, under the provision to section 73(1) of the Finance Act, 1994.

(iii) Interest should not be demanded & recovered from them under section 75 of the Finance Act, 1994.

(iv) Penalty should not be imposed on them under Section 76, 77 & 78 of the Finance Act, 1994 for contravention of the provisions of Rule 4, 5, 6, & 7 of the Service Tax Rules, 1994 read with section 66, 67, 68, 69 & 70 of the said Act.”

2.3 Three more show cause notices were issued to the respondent on the same issue, as detailed below:-

Sr. No.	SCN No.	SCN date	Amount	Period

1	LTU/MUM/CX/GLT-7/APL/179(2)Audit/10-11	03.02.12	8,25,737/-	Jan-11
2	LTU/MUM/CX/GLT-7/APL/179(3)Audit/10-11	01.03.12	1,45,38,242/-	Feb-11 to Dec-11
3	LTU/MUM/CX/GLT-7/APL/179(3)Audit/10-11	11.01.13	91,67,405/-	Jan-12 to Mar-12

2.4 After considering the submissions made by the respondent, the Commissioner has adjudicated the matter as per the order referred to in para 1 above.

2.5 Aggrieved by this order, Revenue has preferred this appeal.

3.1 We have heard Shri Nitin Ranjan, Deputy Commissioner, Authorised Representative, for the Revenue and Shri V. Sridharan, Senior Advocate for the respondent.

3.2 Arguing for the Revenue, learned AR submits that, -

- The agreement between the respondent and one of the home solution service providers, viz. M/s. Home Associates, reads as follows:-

1. *Service Provider is bound by an Exclusive contract with the Respondent.*
2. *Also, the Service Provider was required to use the Poster, Circulars and Promotional materials supplied by the Respondent, free of charge.*
3. *Service Provider shall be guided by the requirements of the Respondent regarding the quality of service.*

4. *The Respondent has provided the Software Application for capturing Customer data with the service provider providing the customer service.*
 5. *The service provider is required to provide Infrastructure, Equipments, Manpower, etc. as per the standards specified by the Respondent.*
 6. *Service provider was only supposed to use the material provided by the authorized dealers of the Respondent and has to use Painting Contractors from approved panel only.*
 7. *Service Provider was to provide 90% of the Net Payment to the Respondent subject to a maximum of Rs. 3 Lacs per annum.*
 8. *Service Provider shall provide the Cost of the Service with consultation with the Respondent.*
 9. *Employees of the service provider approach the customers as representatives of the Respondent. Also, the profit is shared with the Respondent in the ratio of 90:10, which is the normal practice in Franchise service.*
- In the Bills raised by the Service Providers, it has been clearly stated:

“For any queries call – customer care no 18000-209-5678 or email us at customercare@asianpaints.com”.
 - For all services provided by the service provider, one year warranty has been provided by Asian Paints Ltd.
 - Detailed reading of the agreement and reading of the process by which the ultimate customers procure the service and their execution, it can be concluded that home solution service providers are franchisee of the respondent bound by an

exclusive contract and also carry out those processes as defined by the respondent.

- The money received is deposited in the ratio of 90% towards the respondent and 10% towards the home solution service provider.
- He also relies on the FAQ on Home Painting Solutions as provided on the website of the respondent.
- The Commissioner has held that home solution service providers are not franchisees just for the reason that invoice provided to the consumers of home solution do not have brand seal of the respondent without going into other aspects such as contractual agreement, process of execution and the manner in which the payments are deposited.
- He further relied on circular No. B1/6/2005-TRU dated 27.07.2005 which was issued explaining the amendment made in the definition of franchisee services w.e.f. 16.06.2005. This circular states that the previous conditions been replaced by the single one that representational rights should be provided to the franchisee to sell or manufacture goods or provide service or undertake any process identified with the franchisor.
- Since home solution service providers are, as per the agreements, having such representational rights. They are covered by the definition of franchisee as per Section 65(47) of the Finance Act, 1994.
- Hence the order of the Commissioner needs to be set aside to this extent and appeal allowed.

3.3 Countering the argument, learned senior counsel submits that, -

- for considering home solution service provider as franchisee of the respondent, it needs to be shown that they are having the representational rights granted by the respondent. In absence of anything in the contract or execution of the same,

the home solution service providers could not have been considered as franchisee of the respondent. He refers to "CHITTY ON CONTRACTS Twenty-Seventh Edition, Volume II Specific Contracts, London, Sweet & Maxwell 1994." Essentials of franchise agreement are stated as follows:-

"Franchise agreements. Franchise agreements are those whereby the proprietor of a trade mark, business name or other distinctive marketing presentation (the franchisor) grants one or more parties (the franchisees) the rights to use the mark or other marketing format in the supply of goods or services and to present their premises in accordance with the distinctive layout or format associated with the franchisor. Each franchisee remains an independent trader bearing his own financial risk but he benefits from the goodwill associated with the franchisor's business. To the outside observer the franchisees' premises look uniform and sell products of the same appearance and quality. The franchisee normally undertakes to pay a royalty on sales from his premises and to buy at least part of his stock from the franchisor or from suppliers nominated by the franchisor. The franchisor provides know-how which may include staff training and guidance as well as allowing the franchisee to use the marketing image which usually has proven customer appeal.

Franchise agreements and Article 85. In the leading case of Pronuptia the Court of Justice considered the terms of a standard form franchise agreement for the well known bridal outfitters. The Court held that those clauses which were essential to the proper operation of the franchise system did not fall within Article 85(1). Thus, since it was essential that the franchisor be able to protect the know-how and other expertise that he provides to the franchisee, Article 85(1) is not infringed if the franchisee is not prohibited from opening a shop of the same nature in an area where he may compete with another member of the network. Similarly, since it is essential that the

uniformity of appearance and quality of the outlets in the franchise network is maintained, obligations on the franchisee to decorate his premises in a certain way or, in some circumstances, to buy his supplies of product from the franchisor are permissible. For those franchise agreements which do fall within Article 85(1), Regulation 4087/88 provides block exemption for agreements which contain restrictions not going beyond those set out in the Regulation.”

- The issue also in similar cases has been considered by this Tribunal on a number of occasions and a clear distinction was made between agency contract and the franchisor/franchisee contract. He would rely upon the following decisions in his support:-
 - Franch Express Network (P) Ltd. [2008 (12) STR 370 (Tri.-Chennai)] – Affirmed by Supreme Court [2016 (44) STR J60)].
 - Hindustan Shipyard Ltd. [2000 6 SCC 579].
 - Mahindra & Mahindra Ltd. [1995 (76) ELT 481 (SC).
 - Speed and Safe Courier Service [2008 (10) STR 337 (Tri.-Bang.).
 - Speed and Safe Courier Service [2010 (18) STR 550 (Ker.)].
 - Indian Gateway Terminal (P) Ltd. [2010 (20) STR 338 (Tri.-Bang)].
 - Popular Vehicles & Services Ltd. [2010 (18) STR 493 (Tri.-Bang)].
 - BPL Mobile Communications Ltd. [2007 (7) STR 440 (Tri.-Mumbai)] – Affirmed by Bombay High Court [(2008 (9) STR 349 (Bom.).

- Magnus Construction Pvt. Ltd. [2008 (11) STR 225 (Gau.)].
- Home Solution Retail India Ltd. [2009 (14) STR 433 (Del.)].
- Rohan builders Ltd. [2009 (13) STR 56 (Tri.-Bang)].
- Jetking Information Ltd. [2007 (7) STR 314 (Tri.-Mumbai)]
– Appeal admitted by Bombay High Court [2009 (13) STR J72 (Bom.)].
- Since there is nothing to show that home solution service providers were granted any representational rights by the respondent, the order of the Commissioner cannot be faulted with, and the appeal of Revenue is liable to be dismissed.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of hearing.

4.2 The Commissioner has in his order held as follows:-

“4.1 The primary question involved in these four notices is – whether the noticee was providing any service to the HSSPs, taxable vide clause (zze) of Section 65(105) of the Finance Act, 1994.

4.2 A careful perusal of the records of the case and particularly the agreement entered between the noticee and the HSSPs shows that the noticee has obtained services of HSSPs for the purpose of providing painting service to its customers. The arrangement, as explained by the noticee and as apparent from the agreements is as follows. The noticee comes to know about a potential customer (customer leads) through its helpline, branch offices, website, field force etc. The noticee passes this information to the HSSP of the area, who contacts the customer on behalf of the noticee and attempts to obtain the contract for painting for the noticee. The HSSP executes the contract and raises bill on the customer. In these bills it charges service tax to the customer under the heads commercial or industrial

construction service, construction of complex service or works contract.

4.3 Although the HSSPs raise bills on customer in their own name, they receive and hold the money on behalf of the noticee. However, the entire amount received from the customer remains property of the noticee. The money belongs to the noticee and the HSSPs are required to provide account to the noticee. The HSSPs are required to create a separate bank account for dealing with the money of the noticee. Clause 5(vi) of the agreement reads:

“All such amount collected and/or deposited by the Service Provider under this Agreement, thereunder shall be the property of the Company and shall be held by the Service Provider in trust for the Company or on behalf of the Company until satisfactorily accounted and settled the same. The collection shall not be used for any other purpose unless authorized by the Company in writing.”

The bank account is used only for

- Depositing the amounts received from customers,*
- Making payment to dealers & contractors,*
- Paying applicable taxes and*
- Remitting the surplus to the noticee.*

Thus, it is a kind of ‘custodial account’ opened on behalf of the noticee. The revenue earned from the activity belongs to the noticee and not to the HSSP. Therefore, when the HSSPs transfer the ‘gross contribution’ to the noticee, it is not in return of any service provided by the noticee to the HSSP. It is the revenue earned by the noticee from the customer remaining after covering the expenses on material, labour and taxes. Viewed in that perspective, the HSSP acts in a fiduciary capacity. They are custodian of the revenues earned by noticee from the customers.

4.4 *It is clear that the HSSPs execute the contract as a sub-contractor of the noticee. The noticee pays them for the work done. They work under supervision & guidance of the noticee. The third recital of the agreement reads:*

“The Company proposes to facilitate such Services to customer through independent service providers, who can promote, undertake and provide quality painting service to its customers under the Company’s guidance and supervision and desires to appoint such Service Providers in India.”

4.5 *Let’s consider the statutory definitions in the above background of facts.*

In terms of Section 65(105)(z) of the Finance Act, 1994 “taxable service” means any service provided or to be provided to a franchisee, by the franchisor in relation to franchise. The terms Franchise, Franchisor and Franchisee have been defined vide sub-sections 47 and 48 of the Section 65. They read as under:

Sec 65: In this Chapter, unless the context otherwise requires,

(47) “Franchise” means an agreement 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 trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved;

(48) “Franchisor” means any person who enters into franchise with a franchisee and includes any associate of franchisor or a person designated by franchiser to enter into franchise on his behalf and the term “franchisee” shall be construed accordingly;

4.6 *It would be naïve to contend that every agent, contractor or sub-contractor appointed by a person is a franchisee. All agents are not franchisee through the very purpose of agency is to represent another person. All sub-contractors are not franchisee, though they essentially carry out the same work as*

was required to be done by the principal contractor. To take an example, in the case of a contract awarded for setting up of a thermal power project, if the contractor in turn engages a sub-contractor who undertakes actual execution of the contract, it cannot be said that the sub-contractor is a franchisee. The fact remains that the sub-contractor acts as agent of the contractor and does, in that sense, represent the contractor. Yet, the sub-contractor is not disguised as the contractor. He retains his separate identity before the customer. The bills raised by the HSSPs on customers are in their own name and not in the name of the noticee. These bills do not contain logo of the noticee (although the bills raised by the HSSPs on noticee do contain the logo of the noticee). The customers know that the service contract is being executed by the HSSP. There is huge difference between representing 'Asian Paints' and saying that the HSSP is trained by 'Asian Paints' to execute the service contract. In order to be termed as 'franchisee', not only the HSSP should step into shoes of the noticee but has to surrender its own distinct identity before the customer. In case of a franchise arrangement, it is essential that the customer should get a feel that the service was being provided by the franchisor. In the present case, the HSSPs retain their identity. They enter into contract with the customer and bill him in their own name. the invoices raised by the HSSPs do not contain any reference to the brand name or logo of the noticee and do not indicate in any manner that the HSSPs have acted as franchisee of the noticee.

4.7 Commercially, in a Franchisee contract, the business of the franchisee remains independent of the franchisor. As stated in Chitty on Contracts, Specific Contracts, 27th Ed. At page 1089 (reproduced by the noticee in his reply)

"Each franchisee remains on independent trader bearing his own financial risk but he benefits from the goodwill associated with the franchisor's business. To the outside observer the franchisees' premises look uniform and sell products of the same appearance and quality."

Thus the risk of the business of franchisee remains that of the franchisee. The franchisee has to earn his own incomes and make his own expenditures. The franchisor does not take any responsibility of meeting expenses of the franchisee. In the present case, the HSSP is not responsible to meet his expenses. He receives customer leads from the noticee itself. He receives money from the customers and spends it only as a custodian. The money belongs to the noticee and the HSSP is liable to remit the surplus to the noticee after paying to dealers, contractors and the taxes. The HSSPs do not run risk of loss. If they have provided the service, they remain entitled to receive the fixed and the variable components of their charges. What would they loose is the 10% share in 'net contribution'. This in itself cannot convert them into status of a franchisee. I wholly agree with the submission of the noticee that in the nature of the contracts under consideration:

- (i) the commercial motivation of the Service Provider is to earn its fixed and variable consideration,*
- (ii) the commercial motivation of the Noticee is to earn profits from the Home Solutions operations, and*
- (iii) there is also no financial risk to the Service Providers.*

4.8 I therefore, hold that the noticee does not provide franchise service to HSSPs and is not liable to pay tax as 'franchisee' under clause (zze) of Section 65(105) of the Finance Act, 1994."

4.3 It is not settled law that unless and until representational rights have been actually transferred to the franchisee, the service tax could not have been levied under the category of franchisee services.

4.4 The Tribunal in the case of Sity Cable Network Ltd. [2020-TIOL-1379-CESTAT-DEL] has held as follows:-

"5.The amendment made in the definition of "franchise" under Section 65(47) of the Finance Act with effect from June 16, 2005

is the reason that has persuaded the Principal Commissioner to drop the demand of service tax for the period from July 1, 2003 up to June 16, 2005.

6.*It would, therefore, be necessary to reproduce the definition of “franchise” before and after the amendment. Prior to June 16, 2015, the definition of “franchise” was as follows :*

“65(47)”franchise” means an agreement by which -

(i) 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 trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved;

(ii) the franchisor provides concepts of business operation to franchisee, including know-how, method of operation, managerial expertise, marketing technique or training and standards of quality control except passing on the ownership of all know-how to franchisee;

(iii) the franchisee is required to pay to the franchisor, directly or indirectly, a fee; and

(iv) the franchisee is under an obligation not to engage in selling or providing similar goods or services or process, identified with any other person.”

7.*With effect from June 16, 2005, the definition of “franchise” under Section 65(47) is as follows :*

“65(47)”franchise” means an agreement 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 trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved.

8.A *“franchisor” has been defined under Section 65(48) of the Finance Act as follows :-*

“65(48)”franchisor” means any person who enters into franchisee with a franchisee and includes any associate of franchisor or a person designated by franchisee to enter into franchisee on his behalf and the term “franchisee” shall be construed accordingly.”

9.The taxable service under Section 65(105)(zze) of the Finance Act means a service provided or to be provided to a franchisee, by the franchisor in relation to franchise.

10.It would be seen from a perusal of the unamended and the amended definition of “franchise” that the amended definition contains only the first condition contained in the definition of “franchise”, as it stood prior to June 16, 2005, and the other three conditions have been omitted.

24.The dispute in the present appeal is with regard to the levy of service tax on Siti Cable with effect from June 16, 2005 under the amended definition of “franchise”. It has been defined under Section 65(47) of the Finance Act to mean an agreement by which the franchisee is granted a representational right to provide service or undertake any process identified with the franchisor, whether or not a trademark, service mark, trade name or logo or such symbol, as the case may be, is involved.

25.Thus, what is important to note is that the party should be granted a representational right to provide service or undertake any process identified with the franchisor. In other words, if the condition relating to “representational right” is not satisfied, there can be no “franchise” service.

26.“Representational right” means a right that is available with the “franchisee” to represent the “franchisor” and in that case the “franchisee” loses its individual identity and is known only by the identity of the “franchisor”.

27.The Delhi High Court in Delhi International Airport laid down the requirements for an agreement to be considered as “franchise” agreement and the observations are as follows :-

“55.For OMDA to constitute a franchise, it would have to satisfy the requirements of Section 65(47) of the Finance Act, which

inter alia requires that the franchisees (Petitioners) should have been granted representational right by franchisor (AAI).

56. Merely because, by an agreement, a right is conferred on a party to sell or manufacture goods or provide services or undertake a process, would not ipso facto bring the agreement within the ambit of a franchise. What is also required is to establish that the right conferred is a “representational right”.

The term “representational right” would 57. 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.

58. A representational right would mean that a right is available with the franchisee to represent the franchisor. When the Franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor. The individual identity of the franchisee is subsumed in the identity of the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor.”

(emphasis supplied)

28.*The Mumbai Tribunal in Global Transgene Limited [2013 (32) S.T.R. 86 (Tri. - Mum.)] also observed that the foremost requisite for a service to qualify as a taxable “franchise” service is that the franchisee should have been granted a representational right and that in a franchise transaction, the franchisee loses its individual identity and represents the identity of the “franchisor” to the outside world.*

29.*In Tata Consultancy Services Ltd., the Mumbai Tribunal observed that the grant of a representational right would imply that the person to whom such a right has been granted undertakes the entire activity as if it had been undertaken by the person granting such rights.*

30.*In National Internet Exchange of India, the Principal Bench of the Tribunal at Delhi, after examining the definition of “franchise”, observed as follows :-*

“Representational right permits the person to represent himself as someone else to the external world such that the external world feels that he is procuring goods or services from the brand owner 19 Service Tax Appeal No. 55357 of 2013 which can be termed as franchise rights. For the purpose franchise must surrender his own identity and in addition must step into the shoes of the franchisor.”

(emphasis supplied)

31.*The same view has been expressed by the Tribunal in National Internet Exchange and M/s. Easy Bill Ltd.*

32.*In the decision of the United States District Court, D. South Carolina, Florence Division in Englert, Inc. v. Leafguard USA [Civil Action No. 4:09-cv-00253-TLW. (D.S.C Dec 14, 2009)], decided on December 14, 2009, the Court emphasised that there must be a significant control over the method of operation of the party for the agreement to be called a “franchise” agreement.*

33.*An analysis of the agreement between Siti Cable and Ashirwad Cable clearly establishes that no “franchise” service has been rendered by Siti Cable to Ashirwad Cable for the following reasons :*

(i) The agreement is for the ‘right to use’ assets. Siti Cable provides equipment to the cable operators for rendition of cable operator services to their end customers. The consideration received by Siti Cable from the cable operator is also only in lieu of provision of such equipment/assets. The relevant clause of the agreement states that the cable operator would pay a certain sum for use of the ‘assets’. There is no explicit or implied intention to grant representational rights in the agreement. There is also no identified consideration for the right to use of logo. This right to use the logo is only an incidental aspect to the business of broadcasting of channels, and not the purpose of the agreement.

(ii) Siti Cable does not have any significant degree of control over the method of operation of the cable operators. The cable operators are free to negotiate contracts at their own end in

respect of pay-channels, advertisements, etc. This deviation itself evidences that the agreement between Siti Cable and the cable operators does not grant any representational right and that Siti Cable only to provide the hardware necessary for the cable operators to render cable network services.

34.*The decisions cited by the Learned Authorised Representative of the Department now need to be considered.*

35.*In Punjab Technical University, the agreement entered into between Punjab Technical University and the Learning Centers explicitly provided that the Learning Centers were authorized to take students by claiming and making it clear that the education they were providing was on behalf of Punjab Technical University. The Learning Centers were also allowed to advertise to that effect. It is in this context that the Tribunal observed :*

“4.....

From the foregoing there remains no doubt that LCs were authorized to take students by claiming and making it clear that the education they were providing was on behalf of the appellant. They were allowed even to advertise to that effect. It was because Learning Centers were representing the Appellant with regard to providing education, that the MOU cast strict obligations on learning Centers to ensure that the quality of education remained as per the standards of the Appellant. It also comes out from the MOU that RCs framed marketing strategies to be implemented by Learning Centers in consultation with the Appellant. As per the MOU, the format and style of any advertisement or hoarding to be placed by RCs/Learning Centers had to be done with the prior written approval of the Appellant lest these bring down or cast aspersions on or discredit the Appellant. Owing to the fact that Learning Centers represented the Appellant with regard to providing education, MOU laid down strict requirements of infrastructure, processes, qualifications of staff, etc. as elaborated in the MOU. Though the MOU states that it is not a franchise arrangement and is a model of public-private partnership for deciding classification of the service rendered thereunder, we have to see the nature, terms and conditions

thereof; it is immaterial as to what nomenclature is assigned to it. Thus, notwithstanding that the MOU states that it is not a franchise agreement, the aforesaid analysis leaves no doubt that it satisfies all ingredients of franchise as defined in section 65(47) of the Finance Act, 1994 in as much as Learning Centers were granted representational rights to provide service and to undertake various activities identified with the Appellant.”

(emphasis supplied)

36.*It is for the aforesaid reasons that the Tribunal held that the arrangement between Punjab Technical University and the Learning Centers was a “franchise” arrangement. This decision, therefore, does not help the Department.*

37.*In Amway India Enterprises, the Tribunal observed that the distributors/ABOs have not only been granted right to sell Amway products, but they have the representational rights to sell such products. This was for the following reason :*

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Thus, at the first contact, the distributor is expected to make himself known in a suitable fashion as an Amway distributor and provide information concerning his name and address as well as concerning Amway and the purpose of contact, including introduction of the prospect to the Amway business. Thus, it again becomes evident that the ABO has been given right to represent Amway business. Para 12.12 of the Guide also clearly states that “if the distributor makes a serious misrepresentation of Amway or the Amway business which in Amway’s opinion, is not likely to be satisfactorily remedied by corrective actions”, then Amway can terminate the authorization to operate as a distributor. Thus, only serious misrepresentation of Amway or Amway business can lead to termination of distributorship. In other words, he can, indeed should/is expected to, represent Amway in accordance with and to the extent allowed as per the Amway’s Business Starter Guide and Distributor Application and Terms and Conditions. In the Sections of the Starter Guide dealing with Social Media Policy, it is stated (referring to the ABOs) that “Remember, what you say reflects upon your and

Amway's reputation". Now Amway's reputation can be effected by what the ABOs says only when he is taken to represent Amway in some (however limited) capacity.

(emphasis supplied)

38.*The said decision is distinguishable for the factual aspect itself as neither does Siti Cable grant any representational right to the cable operators nor the cable operators are required make themselves known as Siti Cable franchisee/distributor."*

4.5 In case of Rackitt Benckiser (India) Ltd. [2021 (46) GSTL 41 (T)], Delhi bench again considered the same issue and has followed the same line of argument as was followed in the case of Siticable, supra. For sake of brevity we are not reproducing the relevant paras here. The issue has been dealt in this decision para 31 onwards, and after considering the decision of Hon'ble Delhi High Court in case of Delhi International Airport and other decisions on subject stated that for determination of the relationship of franchisor and franchisee, the necessary test is to consider the terms of agreement between the parties.

4.6.To examine whether the agreement of the Appellant with Home Solution Service Providers would fall under the category of a "franchisee" agreement, it would be necessary to examine the relevant terms of the agreement. One such agreement is available in the file and we refer to the said agreement for determining whether this agreement can be considered as the Franchisee Agreement or not, in terms of the test that emerges in the above decisions. In the present case, the terms of the agreement defines the parties as follows: -

"ASIAN PAINTS LIMITED, a company incorporated under the Indian Companies Act, 1913 and having its registered office at 6 A Shanti Nagar, Santacruz (East), Mumbai – 400 055, (hereinafter referred to as 'the Company' which expression shall, unless repugnant to the context or meaning thereof be deemed to include its successors and assigns) of the One Part

AND

Ms Pramila M Gandhi carrying on business in the name and style of M/s. Colour Speak Services, a proprietary firm, having its registered office at A-305, Kanara Business Centre, Laxmi Nagar, Off. Ghatkopar – Andheri Link Road, Behind Everest Gardens, Ghatkopar (East), Mumbai 400075, (hereinafter called ‘the Service Provider’), which expression shall, unless it be repugnant to the context or meaning thereof be deemed to mean and include their legal heirs, administrators, executors, successors and assigns, etc.) of the Other Part

1. *The Company is in the business of manufacturing and sale of paints and allied products.*
2. *As a part of its business, the Company also offers ‘one stop’ painting solutions to its customers through Asian Paints Home Solutions (hereinafter referred to as ‘Services’) with an objective of enhancing its customer’s equity by catering to painting needs.*
3. *The Company proposes to facilitate such Services to customers through independent service providers who can promote, undertake and provide quality painting service to its customers under the Company’s guidance and supervision and desires to appoint such Service Providers in India.*
4. *The Service Provider has represented to the Company that it has the necessary infrastructure to provide the said Services.*
5. *The Company, based on the said representations and assurances given by the Service Provider, has accepted the offer of the Service Provider, who undertakes to provide such Services to the customers in Mumbai on the terms and conditions mutually agreed to and set out hereunder.*

2. SCOPE OF WORK:

i) *The Service Provider shall provide the Services and address the painting needs of consumers in Mumbai and aid the customers to avail of a reliable painting service and provide complete turnkey solutions to customers.*

ii) *It shall be the sole responsibility of the Service Provider to provide the Services in terms of the desired quality and expectations of the Company through its work force including Sales Associates, Relationship Associates, Team Leaders, Office Assistants and Tele-callers. The role and responsibilities shall be determined by the Service Provider in consultations with the Company.*

iii) *The parties agree that the Services provided by the Service Provider under this Agreement shall be exclusively for the Company. However, the Company shall have the right to appoint any other Service Provider in Mumbai for the purpose.*

3. PERSONNEL OF THE SERVICE PROVIDER:

i) *The Service Provider shall manage all the operations in respect of the Services through its trained personnel in the city of Mumbai.*

ii) *The Service Provider shall also appoint his employees for customer interactions and execution of contracts at its sole discretion, provided they are efficient and can perform quality work as per the standards laid down by the Company. At no point of time the employees of Service Provider shall be considered as the employees of the Company.*

iii) *The personnel of the Service Provider shall typically consist of Sales Associates, Relationship Associates, Team Leaders, Office Assistants and Tele callers. New positions in the workforce may be created by the Service Provider depending on the business priorities and in consultation of the Company.*

iv) *The Service Provider personnel shall always be and remain the employees of Service Provider and the Company shall at no point of time be construed as their employer.*

v) The Service Provider and/or its staff shall not in any manner make any statement on behalf of the Company or in any manner bind the Company or hold out or represent that Service Provider is representing or acting as an agent of the Company. Service Provider hereby indemnifies and keeps the Company indemnified from all the claims whatsoever in this regard.

4. CONSIDERATION

i) For the Services provided by the Service Provider to the Company, the Company shall pay the Service Provider a fixed administrative charge of Rs.3,00,000/- (Rupees Three lakhs only) per month during the term of this Agreement.

5. SERVICE PROVIDER'S COVENANTS & OBLIGATIONS

i) The Service Provider submits that it has the full capacity, power and authority to enter into this Agreement, and to carry out and perform all it's duties and obligations as contemplated herein and has already taken and will continue to take all necessary and further actions, (including where applicable and without limitation, obtaining of all Governmental and other necessary approvals / consents / licenses in all applicable jurisdictions) and to authorize the execution, delivery and performance of this Agreement.

ii) The Service Provider undertakes to purchase the painting materials from an authorized dealer of the Company based on the requirements at the customers' site.

iii) It shall be the duty of the Service Provider to engage contractors for painting the site as per the requirement and shall ensure that such painting contractor is listed in the Applicator Panel duly approved by the Company for the purpose.

iv) The Service Provider undertakes that the aid Services provided and obligations to be performed pursuant to this Agreement shall be rendered and performed with utmost care and diligence and shall be in to the satisfaction of the consumer.

v) *The Service Provider submits that it shall collect charges from the customers based on the painting estimates, in advance on acceptance of order by the Customer. The amount so collected shall be inclusive of all taxes as may be applicable.*

vi) *The Service Provider will create a separate Bank Account for Home Solutions. The said Bank Account shall be used for the purpose of the following:*

- a) Deposit all the amount collected from the customers*
- b) Payment made to the dealers and contractors*
- c) Payment of taxes applicable for the purpose of Home Solution operations*
- d) Remittance of profit to the Company as per clause 5(x).*

vii) *The Service Provider shall, at the end of every month, deposit in the aforesaid Bank Account, whatever amount has been deducted by customers as TDS for the Service undertaken. The account of such deductions made by customers and the deposit made to the said Bank Account shall be provided to the Company every month.*

ix) *The Company and the Service Provider hereby agree that they shall share the net contribution in the ratio of 90:10 respectively, subject to a maximum sharing of Rs.3 lks per annum with the Service provider. Such net contribution shall be computed after the end of each financial year in accordance with the methodology which is more fully described in the Annexure I of this Agreement. In the event the Agreement is terminated before the end of the financial year during its tenure, there will not be any sharing of net contribution. The remittance of the profit to the Service Provider will be only on completion of the job undertaken by the Service Provider and upon sufficient evidence being submitted to the Company that the job is finished.*

6. COMPANY'S COVENANT:

i) *The Company shall provide to the Service Provider, the required information and the customer leads received through any or all of the following sources, to enable the Service Provider to undertake the job of painting as per the requirement of the customer:*

8. ADVERTISING AND INTELLECTUAL PROPERTY RIGHTS:

i) *The Service Provider shall make known the services of the Company in every way reasonably practicable. The Service Provider shall display in its offices, posters, circulars, or other promotional or publicity material supplied by the Company free of charge to the Service Provider, any such material of a permanent or valuable character and so designated by the Company, shall remain the property of the Company.*

18. RELATIONSHIP

It is agreed that this Agreement is between two independent parties and is purely on a principal-to-principal basis and does not create and shall not be deemed to create any employer-employee or principal agent relationship between Company and the Service Provider.”

4.7 The above terms of the agreement clearly provide that home solution service provider is barred from making any statement on behalf of the company or in any manner how to represent the respondent. When there is a specific clause in the agreement which bars the home solution service provider from representing the respondent, then how it has been claimed that such representational rights have been granted to the home solution service provider.

4.7 In the case of SKOL Breweries Ltd. [2014 (35) STR 570 (Tri.-Mumbai)], the Tribunal has held as follows:-

“8. Having considered the rival submissions, we find that as per the agreement between the parties, the risk of manufacture and sale lies with the appellant in respect of the Foster Brand beer

got manufactured by it from FIPL. It is evident from the contract that FIPL is only responsible for bottling, packing and dispatch as per the specification, terms, formula etc. as laid down by the appellant. Further, FIPL is bound to charge the price from the notified Indenter of the appellant as fixed by the appellant. Only for the risks associated with the manufacturing process fastened on FIPL (CBU), it cannot be said that as FIPL is responsible for proper quality, quantity and timely production, they are providing Franchise Service and/or IPR Service. Further, taking notice of the definitions which are reproduced below :-

“47. “franchise” means an agreement 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 trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved]

48. “franchisor” any person who enters in to franchise with a franchisee and includes any associates of franchisor or a person designated by franchisor to enter into franchise on his behalf and the term “franchisee” shall be construed accordingly.”

From the aforementioned definitions, it is crystal clear that in the facts and circumstances, no services have been provided by the appellant to FIPL under the classification of “Franchise Service” and “IPR Service”.

4.8 In view of the above discussions, nothing has been brought on record by which it can be stated that such representational rights were granted to the home solution service provider. The reliance placed by Revenue in the case of Australian Foods India Ltd. [2013 (287) ELT 385 (SC)] is totally misplaced as the Hon'ble Supreme Court in para 19 of the judgment, relied upon by Revenue, has clearly stated as follows:

“19. Hence, we hold that it is not necessary for goods to be stamped with a trade or brand name to be considered as branded goods under the SSI notification, discussed above. A scrutiny of the surrounding circumstances is not only

*permissible, but necessary to decipher the same; the most important of these factors being the specific outlet from which the goods is sold. However, such factors would carry different hues in different scenarios. **There can be no single formula to determine if a goods is branded or not; such determination would vary from case to case. Also, our observations must be limited to this notification and not supplanted to other laws with similar subject matter pertaining to trade names and brand names.***

In our view, this decision also does not help the case of Revenue, as this decision has not been rendered in the case where the issue was in respect of franchisee services but was in case of trade and brand name. Hon'ble Apex Court has in para 19 itself, relied upon by the revenue, cautioned against supplanting their observation in this decisions to other laws with similar subject matters.

6.1 In view of the discussions as above, the appeal filed by Revenue is dismissed and the order of the Commissioner is upheld.

6.2 The cross objections filed by the respondent are also disposed of.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)