CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO. 1

SERVICE TAX APPEAL NO. 87533 OF 2016

(Arising out of Order–in-Original No. 29-30/STC-V/SKD/16-17 dated 16.06.2016 passed by Commissioner, Service Tax-V, Mumbai)

M/s. Inox Leisure Ltd. **.... Appellant**
5th Floor, Viraj Towers,
Western Express Highway,
Andheri, Mumbai- 400069

Versus

Commissioner of Service Tax-V, Mumbai **.... Respondent**
4th Floor, Utpad Shulk Bhawan,
Plot No. C-24, Sector-E,
Bandra Kurla Complex, Bandra (East),
Mumbai-400051

APPEARANCE:

Shri Gopal Mudhra, Ms. Ginita Bodani and Shri Akash Khandelwal, Advocates for the Appellant
Shri Nitin Ranjan, Authorised Representative of the Department

CORAM :

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing/Decision: 14.03.2022

FINAL ORDER NO. A/85216/2022

JUSTICE DILIP GUPTA:

Inox Leisure Ltd[1] has filed this appeal to assail the order dated 16.06.2016 passed by the Commissioner, Service Tax-V, Mumbai[2] by which the demand of service tax has been confirmed with interest and penalty.

2. The appellant is engaged in the business of exhibiting cinematographic films across India in theatres owned by it or

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1. The appellant
2. the Commissioner

taken on rent. In this regard, the appellant acquires the rights/ license to exhibit the films at the designated theatres from various distributors by entering into separate license agreements for each film. The consideration towards such license is paid by the appellant as per the agreed percentage of box office collection. Such percentage varies from distributor to distributor, movie to movie and week to week after the release date.

3. The Department issued two show cause notices dated 14.10.2014 and 13.10.2015 proposing to recover service tax demand of Rs.65,46,68,211/- along with the applicable interest and penalty for the period July 2012 to December 2014. It was alleged that the agreement between the appellant and the distributors created an Association of Persons so as to undertake jointly the activities of screening of the films. The appellant, it was further stated, had provided services to the Association of Persons which appeared to be classifiable under "support services of business or commerce"[3].

4. The appellant filed a reply to the show cause notice but the demand was ultimately confirmed by the Commissioner by order dated 16.06.2016. The Commissioner noted that the bone of contention was whether the arrangement between the appellant and the distributors would lead to constitution of an Association of Persons or whether the same has to be treated on principal to principal basis. After placing reliance upon the judgment of the Supreme Court in **Faqir Chand Gulati** vs. **Uppal Agencies Pvt**

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3. BSS

Ltd[4], the Commissioner observed that there was no doubt that the enterprise created by the Agreement between the appellant and the distributor was a joint venture. The Commissioner also relied upon the Circular dated 13.12.2011 issued by the Central Board of Excise and Customs regarding the levy of service tax on distributors of films and exhibitors of movies to reject the contention of the appellant that the transaction was on a principal to principal basis and accepted the contention of the Department that the transaction lead to the emergence of new entity having the character of Association of Persons. The Commissioner ultimately held that the bouquet of services rendered by the appellant to the Association of Persons would fall under the category of BSS both, before the amendment and after amendment in the definition of BSS.

5. Shri Gopal Mundhra assisted by Ms. Ginita Bodani and Shri Akash Khandelwal, learned counsel for the appellant made the following submissions:

(i) The issue involved in the appeal has been decided in favour of the appellant in the following decisions of the Tribunal:

(a) **Inox Leisure Ltd.** vs. **Commissioner of Service Tax, Hyderabad**[5]

(b) **M/s. PVS Multiplex India Pvt. Ltd.** vs. **Commissioner of Central Excise, Meerut-I**[6]**;**

(c) **M/s. Moti Talkies** vs. **Commissioner of Service Tax, Delhi-I**[7]**;**

(d) **M/s. The Asian Art Printers (Sheila Theatre)** vs. **Principal Commissioner of Service Tax, Delhi-I**[8]**;**

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4. 2008 (12) STR 401
5. 2021 (10) TMI 893-CESTAT HYDERABAD
6. 2017 (11) TMI-156- CESTAT Allahabad
7. 2020 (6) TMI 87- CESTAT New Delhi

(e) **Shri Vinay Kumar, Proprietor of M/s. Regal Theatre** vs. **Principal Commissioner of Service Tax, Delhi-I**[9]**;**

(f) **M/s. Golcha Properties Pvt. Ltd.** vs. **Principal Commissoner of Service Tax, Delhi-I**[10]**;** and

(g) **Satyam Cineplexes Ltd.** vs. **Principal Commissioner of Service Tax, Delhi-I**[11]**;**

(ii) A revenue sharing arrangement in itself does not necessarily imply provision of service, unless service provider and service recipient relationship is established. In this connection reliance has been placed on the following decisions:

(a) **Mormugao Port Trust** vs. **Commissioner of Customs, Central Excise & Service Tax, Goa-(Vice-Versa)**[12]**;**

(b) **M/s. Old World Hospitality Limited** vs. **CST, New Delhi**[13]**;** and

(c) **Delhi International Airport P. Ltd.** vs. **Union of India & Ors.**[14]**;**

(iii) The impugned order to the extent it alleges that the appellant provided BSS to the distributors/or an unincorporated association of persons, therefore, deserves to be set aside;

(iv) No service tax is payable in the absence of provision of any service by the appellant to the distributor/producer/ unincorporated joint venture;

(v) It is settled law that unless the authorities provide evidence to the contrary, an agreement is required to be read in a manner that it reflects the true intention

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8. 2020 (12) TMI 1012- CESTAT New Delhi
9. 2020 (11) TMI 436- CESTAT New Delhi
10. 2020 (11) TMI 137- CESTAT New Delhi
11. 2020 (8) TMI 1222- CESTAT New Delhi
12. 2016 (11) TMI 520- CESTAT Mumbai
13. 2017 (2) TMI 1176- CESTAT New Delhi
14. WP(C) 2516/2008 & CM No. 15832/2011 dated 14.02.2017

of the parties as regards their respective roles and obligations;

(vi) The Commissioner failed to appreciate that the essential parameters laid down for existence of a joint venture are (a) joint ownership and control, (b) sharing profits and losses, (c) salaries commonly and jointly fixed, and (d) community of interest and intention. A joint venture or association of persons cannot be said to be constituted / created in the absence of such parameters. In support of this contention, reliance has been placed on the following decisions of the Supreme Court:

(a) **G. Murgugesan and Brothers** vs. **Commissioner of Income-Tax, Madras**[15]**;** and

(b) **Faqir Chand Gulati vs. Uppal Agencies Pvt. Ltd.**[16]**;** and

(vii) No service, much less a service in the nature of BSS was provided by the appellant.

6. Shri Nitin Ranjan, learned authorised representative appearing for the Department has, however, supported the impugned and contended:

(i) The appellant is not justified in asserting that the issue involved in this appeal stands decided in favour of the appellant in view of the earlier decisions of the Tribunal since these decisions are not in the context of BSS service provided by the appellant to the distributors/producers;

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15. **1973 (2) TMI 1- Supreme Court**
16. **2008 (7) TMI 159- Supreme Court**

(ii) The producers/suppliers of films require a theatre to screen the films and the appellant provides assistance and support for screening the films. Thus, the appellant extends support to the producers/suppliers of films by providing the infrastructure and this activity would fall under the definition of BSS; and

(iii) In view of the Circulars dated 23.02.2009 and 13.12.2011 issued by the Central Board of Excise and Customs in connection with service tax on movie theaters, the appellant is not justified in contending that service tax would not be leviable if revenue is shared between the appellant and the producers of films.

7. The contentions advanced by the learned counsel for the appellant and the learned authorised representative appearing for the Department have been considered.

8. 'Support services of business or commerce' has been defined in sub-section 104(c) of section 65 of the Finance Act to mean as follows:

> "65(104c) **"Support services of business or commerce" means services provided in relation to business or commerce and includes** evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational or administrative assistance in any manner, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.
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> Explanation.— For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle

> messages, secretarial services, internet and telecom facilities, pantry and security."
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> **(emphasis supplied)**

9. It is made taxable under section 65(105)(zzzq) of the Finance Act which is reproduced below:

> "65(105)(zzzq) 'taxable service' means any service provided or to be provided to any person, by any other person, in relation to support services of business or commerce, in any manner;

10. The issue that arises for consideration is whether the activity carried out by the appellant would be exigible to service tax under BSS. To appreciate this, it would be pertinent to refer to the agreement. The agreement in the present appeal is almost the same as the agreement in other appeals that have been decided including that in **Inox Leisure Ltd.** It would be seen from the agreement that the producer/distributor is engaged in the business of production and distribution of films, while the appellant is an exhibitor engaged in the business of exhibition of films and owns/operates a chain of multiplex theatres. The exhibitor decides which screens would play the motion picture, the numbers of shows, the show timings and the ticket pricing including the right to decide on a week to week basis, whether or not to continue to exhibit the motion picture. The distributor/producer had granted the exhibitor the non exclusive license to exploit the theatrical rights of a motion picture and each party was entitled to conduct its business in its absolute and sole discretion.

11. In the present case the Department has alleged that the appellant is providing infrastructure support services to the producers/distributors of films under BSS.

12. Such an arrangement between a distributor/producer and an exhibitor of films was examined by a Division Bench of the Tribunal in **Moti Talkies**. The Department alleged that the agreement was for 'renting of immovable property' as defined under section 65(90a) of the Finance Act. This contention was not accepted by the Tribunal and it was observed that the appellant did not provide any service to the distributors nor the distributors made any payments to the appellant as consideration for the alleged service. In fact, it was the appellant who had paid money to the distributors for the screening rights conferred upon the appellant. The observations of the Bench are as follows:

> "11. It is more than apparent from a bare perusal of the aforesaid agreements that they have been entered into between the appellant as an exhibitor and the distributors for screening of the films on the terms and conditions mentioned therein. The payments contemplated under the terms and conditions either require the exhibitor to pay a fixed amount or a certain percentage, subject to minimum exhibitor share or theatre share of effective shows in a week.
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> xxxxxxxxxxx
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> 16. It is very difficult to even visualise that the appellant is providing any service to the distributor by renting of immovable property or even any other service in relation to such renting. The agreements that have been executed between the appellant and the distributors confer rights upon the appellant to screen the film for which the appellant is making payment to the distributors. The distributors are not making any payment to the appellant. Thus, no consideration flows from the distributors to the appellant for the alleged service.
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> xxxxxxxxxxxx
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> 18. **It is not possible to accept the reasonings given by the Commissioner (Appeals) for confirming the demand of service tax under**

> **"renting of immovable property" for the simple reason that the appellant has not provided any service to the distributors nor the distributors have made any payment to the appellant as consideration for the alleged service. In fact, the appellant who has paid money to the distributors for the screening rights conferred upon the appellant.** The Commissioner (Appeals) completely misread the agreements entered into between the appellant as an exhibitor of the films and the distributors to arrive at a conclusion that the appellant was providing the service of "renting of immovable property."
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> **(emphasis supplied)**

13. Similar views were expressed by Division Benches of the Tribunal in **The Asian Art Printers, Shri Vinay Kumar, M/s. Golcha Properties** and **Satyam Cineplexes Ltd.**

14. What also needs to be noticed is that if the appellant was providing such a service, it would be the producers/ distributors who would be making payments to the appellant, but what comes out from a perusal of the Agreement is that in consideration for the distributor agreeing to grant to the appellant the license to exploit the theatrical rights of a motion picture, the appellant would have to pay such revenue share to the distributor as provided for in the said clause. In fact, the distributor agreed to grant to the Appellant the non exclusive license to exploit the theatrical rights of a motion picture during the term.

15. This issue had come up for consideration before a Division Bench of the Tribunal in **PVS Multiplex India.** The Bench observed that as the appellant was screening films on revenue sharing basis, the appellant was not liable to pay service tax on the payments made to the distributors for screening the films.

> **"7. Having considered contentions and on perusal of the facts on record, we are satisfied that there is no dispute of fact that the appellant have been screening films in their multiplex on Revenue**

> **Sharing basis, which is undisputed finding recorded by the ld. Commissioner in the impugned order.** Accordingly, we hold that the appellant is not liable to pay Service Tax for Screening of Films and payments to distributors in their theatre."
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> **(emphasis supplied)**

16. This apart, a revenue sharing arrangement does not necessarily imply provision of services, unless the service provider and service recipient relationship is established. This is what was observed by the Tribunal in **Mormugao Port Trust, Old World Hospitality** and **Delhi International Airport.**

17. In **Mormugao Port Trust,** the Tribunal explained that public private partnerships between the Government/Public Enterprises and Private parties are in the nature of joint venture, where two or more parties come together to carry out a specific economic venture, and share the profits arising from such venture. Such public private partnerships are at times described as collaboration, joint venture, consortium or joint undertaking. Regardless of the name or the legal form in which the same are conducted, they are essentially in the nature of partnership with each co-venturer contributing some of the resources for the furtherance of the joint business activity. The Tribunal held that such public private partnerships meet the test laid down by the Supreme Court in **Faqir Chand Gulati** vs. **Uppal Agencies Pvt Ltd**[17], for ascertaining whether or not the arrangement is one of joint venture. The relevant observations of the Tribunal in **Mormugao Port Trust** are reproduced below:

> "12 …………………….. In our view this arrangement in the nature of the joint venture where two parties have

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17. 2008 (12) STR 401

got together to carry out a specific economic venture on a revenue sharing model. Such PPP arrangement are common nowadays not only in the port sector but also in various other sectors such as road construction, airport construction, oil and gas exploration where the Government has exclusive privilege of conducting businesses. In all such models, the public entity brings in the resource over which it has the exclusive right, whether land, water front or the right to exploit the said land and water front, and the private entities brings in the required resources either capital, or technical expertise necessary for commercial exploitation of the resource belonging to the Government. These PPP arrangements are described sometimes as collaboration, joint venture, consortium, joint undertaking, but regardless of their name or the legal form in which these are conducted. These are arrangements in the nature of partnership with each co-venturer contributing in some resource for the furtherance of the joint business activity.

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15. An analysis of this judgment shows that in order to constitute a joint venture, the arrangement amongst the parties should be a contractual one, the objective should be to undertake a common enterprise for profit. Joint control over strategic financial and operative decisions was held to be the key feature of a joint venture. The other obvious feature of a joint venture would be that the parties participate in such a venture not as independent contractors but as entrepreneurs desirous to earn profits, the extent whereof may be contingent upon the success of the venture, rather than any fixed fees or consideration for any specific services.

17 The question that arises for consideration is whether the activity undertaken by a co- venture (partner) for the furtherance of the joint venture (partnership) can be said to be a service rendered by such co-venturer (partner) to the Joint Venture (Partnership). In our view, the answer to this question has to be in the negative inasmuch as whatever the partner does for the furtherance of the business of the partnership, he does so only for advancing his own interest as he has a stake in the success of the venture. There is neither an intention to render a service to the other partners nor is there any consideration fixed as a quid pro quo for any particular service of a partner. All the resources and contribution of a partner enter into a common pool of resource required for running the joint enterprise and if such an enterprise is successful the partners become entitled to profits as a reward for the risks taken by them for investing their resources in the venture. A contractor-contractee or the principal-client relationship which is an essential element of any taxable service is absent in the relationship amongst the partners/co-venturers or between the co-venturers and joint venture. In such an arrangement of joint venture/partnership, the element of consideration i.e. the quid pro quo for services,

> which is a necessary ingredient of any taxable service is absent.

18. The Civil Appeal filed by the Department **(Commissioner vs. Mormugao Port Trust)** against the aforesaid decision of the Tribunal was dismissed by the Supreme Court both on the ground of delay as well as on merits and the judgment is reported in **2018 (19) GSTL J 118 (SC)**.

19. The Circular dated 23.02.2009 issued by the Central Board of Excise and Customs, infact supports the case of the appellant. The relevant portion of the Circular, which is in connection with service tax on movie theatres, is reproduced below:

> 2.4. **The arrangement most commonly entered into between a theater owner and a distributor is that the theater owner screens the movie for fixed number of days under a contract. The proceeds earned through sale of tickets go to the distributor but the theatre owner receives a fixed sum depending upon the number of days of screening.** In this arrangement, the advertisement and display of posters etc. is done by the distributor. **Under this arrangement, the fixed amount contracted is given to the theater owner by the distributor irrespective of the fact whether the movie runs well or not.** However, there is no rental arrangement between the theater owner and the distributor as in the arrangement at paragraph 2.1 above. **A view has been expressed that in this arrangement, the theater owner provides 'Business Support Service' to the distributor and hence is liable to pay service tax on the fixed amount received by the theater owner.**
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> 2.5. The matter has been examined. By definition 'Business Support Service' is a generic service of providing 'support to the business or commerce of the service receiver'. **In other words the principal activity is to be undertaken by the client while assistance or support is provided by the taxable service provider. In the instant case the theatre owner screens/exhibits a movie that has been provided by the distributor. Such an exhibition is not a support or assistance activity but is an activity on its own accord. That being the case such an activity cannot fall under 'Business Support Service'.**
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> 3. In the light of above, it is clarified that screening of a movie is not a taxable service except where the distributor leases out the theater and the theater owner get a fixed rent. In such case, the service

> provided by the theater owner would be categorized as 'Renting of immovable property for furtherance of business or commerce' and the theater owner would be liable to pay tax on the rent received from the distributor. The facts of each case and the terms of contract must be examined before a view is taken.
> 4. All pending cases may be disposed of accordingly. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned."
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> **(emphasis supplied)**

20. The subsequent Circular dated 13.12.2011 issued by the Central Board of Excise and Customs, apart from the fact that it would not be applicable for confirming a demand for any period prior to 13.12.2011, would also not come to the aid of the Department. The relevant portion of the Circular is reproduced below:

> 9. **Thus, where the distributor or sub-distributor or area distributor enters into an arrangement with the exhibitor or theatre owner, with the understanding to share revenue/profits and not provide the service on principal-to-principal basis, a new entity emerges, distinct from its constituents. As the new entity acquires the character of a "person", the transactions between it and the other independent entities namely the distributor/sub-distributor / area distributor and the exhibitor etc will be a taxable service.** Whereas, in cases the character of a "person" is not acquired in the business transaction and the transaction is as on principal-to-principal basis, the tax is leviable on either of the constituent members based on the nature of the transaction and as per rules of classification of service as embodied under Sec 65A of Finance Act, 1994.
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> **(emphasis supplied)**

21. In view of the decision of the Supreme Court in **Faqir Chand Gulati** and the decision of the Tribunal in **Mormugao Port Trust,** no service tax can be levied on the appellant under BSS.

22. All the aforesaid issues were also examined at length by a Division Bench of the Tribunal in **Inox Leisure Ltd.** and the order passed by the Commissioner was set aside.

23. The Department filed Civil Appeal No. 1335 of 2020 (The Commissioner of Service Tax vs. Inox Leisure Ltd) before the Supreme Court and by order dated 28.02.2022, the Supreme Court dismissed the Civil Appeal holding that the Tribunal had taken an absolutely correct view, to which the Supreme Court agreed. The order passed by the Supreme Court is reproduced below:

> "No case is made out to interfere with the impugned order passed by the Customs, Excise and Service Tax Appellate Tribunal (for short, 'CESTAT'). The CESTAT has taken an absolutely correct view, to which we agree. Hence, the Civil Appeal stands dismissed."

24. Thus, for all the reasons stated above, it is not possible to sustain the confirmation of the demand by the order dated 16.06.2016 passed by the Commissioner. It is, accordingly, set aside and the appeal is allowed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.J. MATHEW)
MEMBER (TECHNICAL)

ARCHANA