# IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
# CHENNAI

REGIONAL BENCH – COURT NO. I

## Service Tax Appeal No. 153 of 2011

(Arising out of Order-in-Original No. 19/2010-S.Tax/Ch.IV dated 24.11.2010 passed by the Commissioner of Central Excise and Service Tax, Chennai-IV Commissionerate, M.H.U. Complex, No. 692, Anna Salai, Nandanam, Chennai – 600 035)

**M/s. Aniksha Productions Private Limited** **: Appellant**
No. 12, 12th Street, Nandanam Extension,
Chennai – 600 035

**VERSUS**

**The Commissioner of Service Tax** **: Respondent**
No. 692, Anna Salai, M.H.U. Complex, Nandanam,
Chennai – 600 035

**APPEARANCE:**

Smt. Radhika Chandrasekhar, Learned Advocate for the Appellant

Shri M. Ambe, Learned Deputy Commissioner for the Respondent

**CORAM:**

**HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)**
**HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 40050 / 2023**

DATE OF HEARING: 13.02.2023

DATE OF DECISION: 15.02.2023

**Order : [Per Hon'ble Mr. P. Dinesha]**

This appeal is filed by the assessee against the Order-in-Original No. 19/2010-S.Tax/Ch.IV dated 24.11.2010 passed by the Commissioner of Central Excise and Service Tax, Chennai.

2. Heard Smt. Radhika Chandrasekhar, Learned Advocate for the appellant and Shri M. Ambe, Learned Deputy Commissioner for the Revenue. After hearing both sides, the only issue that is to be decided by us is: whether the Revenue is correct in demanding Service Tax from the appellant on the fixed cost component as well?

3. Brief facts which are relevant, as could be gathered upon hearing both the sides and after going through the Show Cause Notice as well as the impugned Order-in-Original, *inter alia*, are that the appellant is engaged in producing tele-serials and programmes for broadcasting in television channels; that the appellant is paying Service Tax under the category of "Sale of Space or Time for Advertisement"; that the Revenue gathered intelligence that the appellant was not paying the entire appropriate amount of Service Tax; that the appellant had entered into agreements with television channels who allotted the time slot to the appellant for telecasting the tele-serials / programmes on chargeable basis (as slot fee); that the time slot would consist of time for telecasting the serial as well as commercial time for advertisement; that the broadcasters would charge fee for telecasting the serials whereas the commercial time for advertisement (known as "Free Commercial Time" – FCT) was given free to the programme producers; that the slot fee was to be paid in advance, which depended on the time slot and TRP ratings; that the FCT was sold by the appellant to advertising agencies under separate agreements, who would, in turn, sell the FCT to various customers for advertising their products / services; that as per Section 67(3) of the Finance Act, 1994 with effect from 01.05.2006, the taxable value would comprise the gross-amount charged for providing the service, which included any amount received towards the service before, during and after the provision of such service; that the appellant had only paid the Service Tax on the variable cost which was nothing but the cost received from the advertising agency; that the appellant had excluded the fixed cost collected from the advertising agency, which was nothing but the slot fee payable to the television channels for telecasting the programme and that therefore it was sought to be recovered, the Service Tax component on the fixed cost as well from the appellant vide Show Cause Notice dated 31.03.2009.

4. The appellant filed a detailed reply dated 02.06.2009 denying the Service Tax liability on various grounds, *inter alia* that in terms of the agreement between the appellant and the advertising agency, the appellant would raise invoice on the advertising agency for the telecast fee together with the tax component, which is called the fixed cost apart from variable cost together with Service Tax; that the advertising agency would thereafter make the payment directly to the television channel together with Service Tax component as well; that the appellant is only accounting the receipt in their books, for which there would be a journal entry; that there is no short-payment or nil payment of Service Tax insofar as the service involved is concerned as the same was routed through the advertising agency; including the ground of revenue neutrality. The Learned Commissioner, however, being not satisfied with the explanation of the appellant, vide impugned Order-in-Original, proceeded to confirm the demand of Service Tax after holding that based on the agreements entered into by the appellant with the advertising agencies, the fixed cost, i.e., the telecast fee, was collected by the appellant along with Service Tax and therefore the onus was on the appellant to discharge the same. The Learned Commissioner has not accepted the contentions of the appellant as regards revenue neutrality was concerned since, according to him, in the collection of revenue, correctness would prevail over neutrality and that the appellant should have collected the amount along with Service Tax and ought to have paid the Service Tax to the Government. Further, with regard to invoking the extended period of limitation for issuing the Show Cause Notice, the Adjudicating Authority has negated the arguments of the appellant holding that the collection of fixed cost / telecast fee was not made known to the Revenue as the same was not reflected in the periodical returns filed by the appellant which amounted to withholding of information which, according to him, was deliberate.

5. We have considered the rival contentions very carefully. Facts are not in dispute.

6. Section 73(1) of the Finance Act, 1994 prompts for issuing a Show Cause Notice for the recovery of Service Tax not levied or paid or short-levied or short-paid or erroneously refunded; but however, neither in the Show Cause Notice nor even in the impugned Order-in-Original do we see any allegation as to the Service Tax not levied or not paid or short-levied or short-paid or erroneously refunded. Further, there is also no dispute either in the Show Cause Notice or in the impugned Order-in-Original of the fact that the advertising agency had remitted the Service Tax component to the Government Exchequer. Section 73(1) could be invoked when the conditions prescribed in the proviso thereunder are satisfied. From the allegations in the Show Cause Notice and the discussions in the Order-in-Original, we fail to understand that when the Service Tax on the service involved stands remitted by the advertising agency, where is the question of fraud or collusion or even suppression. Therefore, invoking the provisions of Section 73(1), which is not automatic, needs to be justified in the first place by the Revenue. From a perusal of the Show Cause Notice or even the Order-in-Original, we do not find that the concerned authorities have justified the issuance of Show Cause Notice by invoking the extended period of limitation, but for a mere allegation that there was suppression. It is very much the settled position of law that allegations, howsoever strong, cannot take the place of proof.

7. When, therefore, the Government is not deprived of its dues, that is to say, when for a particular service on which the Service Tax was liable to be paid, the same has been paid, it makes no difference as to who has paid the tax. The appellant has claimed that the advertising agency has paid the applicable Service Tax on the impugned service, which has not been disputed either by the advertising agency or even by the Revenue and this is

precisely the reason for the Revenue not to urge that the Service Tax was not paid, but for only quoting Section 73(1). It is worthwhile here to note the observations at paragraph 9.3 of the Order-in-Original wherein the Adjudicating Authority himself has acknowledged that the Service Tax having been paid by the advertising agency, the appellant could enjoy the facility of CENVAT Credit. This, according to us, clearly tantamounts to the acceptance of the fact of payment of tax and the fact that the appellant is eligible to avail the CENVAT Credit sufficiently establishes that it is a revenue neutral situation.

8. In view of the above discussions, we are of the clear view that the appellant has to succeed on both the legal grounds and the Revenue has not justified the invoking of the extended period of limitation and also not been able to dislodge that it is the case of revenue neutrality.

9. In view of the above, the appellant should succeed and consequently, the impugned order is set aside.

10. In the result, the appeal is allowed with consequential benefits, if any, as per law.

(Order pronounced in the open court on **15.02.2023**)

Sd/-
**(P. DINESHA)**
MEMBER (JUDICIAL)

Sd/-
**(M. AJIT KUMAR)**
MEMBER (TECHNICAL)

Sdd