

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA
REGIONAL BENCH - COURT NO.1**

Service Tax Appeal No.75 of 2009

(Arising out of Order-in-Original No.36/Commr/ST/Kol/2008-09 dated 29.12.2008 passed by Commissioner of Service Tax, Kolkata.)

M/s. The Advertising Corporation of India Private Limited
(1/2, Old Court House Corner, 3rd Floor, Kolkata-700001.)

...Appellant

VERSUS

Commissioner of Service Tax, Kolkata

.....Respondent

(180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

WITH

Service Tax Appeal No.114 of 2009

(Arising out of Order-in-Original No.36/Commr/ST/Kol/2008-09 dated 29.12.2008 passed by Commissioner of Service Tax, Kolkata.)

Commissioner of Service Tax, Kolkata
(180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

...Appellant

VERSUS

M/s. The Advertising Corporation of India Private Limited
(1/2, Old Court House Corner, 3rd Floor, Kolkata-700001.)

.....Respondent

AND

Service Tax Appeal No.202 of 2009

(Arising out of Order-in-Original No.01/Commr/ST/Kol/2009-10 dated 30.04.2009 passed by Commissioner of Service Tax, Kolkata.)

Commissioner of Service Tax, Kolkata
(180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

...Appellant

VERSUS

M/s. The Advertising Corporation of India Private Limited
(1/2, Old Court House Corner, 3rd Floor, Kolkata-700001.)

.....Respondent

APPEARANCE

Ms. Rajashree Dutta, Advocate (Written Submission) for the Appellant/Assessee

Shri S.S.Chattopadhyay, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI ASHOK JINDAL, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)**

FINAL ORDER NO. 76682-76684/2023

DATE OF HEARING : 12 September 2023
DATE OF DECISION : 18.09.2023

Per : ASHOK JINDAL :

All the appeals are having common issue and filed by both the sides, therefore, all the appeals are disposed of by a common order.

2. The facts of the case are that the assessee is acting as advertising agency and engaged to procure advertisement for media only and earning commission @ 15% on the total bill raised on advertisement. The assessee is rendering service i.e. matter to be published in media towards advertisement. The revenue is of the view that the assessee is availing 85% exemption on the value of taxable service from payment of service tax without any authority of law during the impugned period and also not incorporated the entire value of taxable service in their ST-3 return as detected from their profit and loss accounts, resulting in non-payment of service tax. Therefore, two show cause notices were issued to the appellant to demand service tax and to impose penalty on the appellant. The adjudicating authority allowed the abatement of 85% of the value as per TRU letter dated 05.05.2008, but did not accept the claim of the assessee that the advertiser has paid service tax on behalf of the assessee and service provided to government agency is exempt and service tax is not levied on discount received by them. Therefore, both sides are in appeal against the impugned orders, whereas the assessee is challenging the confirmation of demand of service tax paid on their behalf by the advertiser and service provided to the government is exempt from

payment of service tax and no service tax is payable on the discount received by them. Revenue is in appeal on the ground that 85% abatement was not allowable to the assessee.

3. Heard the parties, considered the submissions.

4. We find that the facts of the case are not in dispute that the assessee is advertising agency and providing service in relation to the advertisement for print media and paying service tax on 15% of the total amount of commission received by them.

5. The said issue has been decided by this Tribunal in the case of Drishti Communication Private Limited Vs. C.C.E. & S.T.-Rajkot vide Final Order No.A/10016/2023 dated 05.01.2023, wherein the Tribunal observed as under:-

"4. We have considered rival submissions. We find that in the instant case M/s. Surya Publicity was providing Advertising Services to its client. M/s. Surya Publicity was not discharged any service tax liability as the same was liable for the levy of Service Tax. M/s. Surya Publicity was purchasing time and space in the newspaper / media companies through the appellant. The amount paid by M/s. Surya Publicity to the appellant for purchase of time M/s. Surya Publicity to the appellant for purchase of time and space was sought to be tax by revenue under the category of Advertising Service. It is seen that no evidence has been placed from record to establish that the appellant were providing "Advertising Agency Services." The role of appellant was limited to being an intermediary in the sale of space/ time for media agency on commission basis. In this regard the decision of Tribunal in case of H.K Associates is relevant. In the said decision following has been held.

"7.1 The issue to be decided is whether M/s. H.K. Associates have rendered the services of advertising agency to KBPL. It is not disputed that actual work of painting on the walls/advertisements were undertaken by various parties to whom M/s. H.K. Associates have paid the amount as mentioned earlier. No evidence have been relied upon to hold that M/s. H.K. Associates have conceived, designed, prepared the advertisements in question.

7.2 The amounts paid to M/s. H.K. Associates have been accounted under the category of advertisement and sales promotion expenses by KBPL. A portion of the sum so received was spent on advertisement by H.K. Associates. These facts alone cannot lead to an inference that M/s. H.K. Associates have rendered the services as advertising agency and the entire amount of about Rs. 9 crores received from KBPL has to be treated as representing payment for rendering advertising services.

7.3 We have also perused the notes given in the balance sheets of KBPL. For example, in the balance sheet for the year 1999-2000, a sum of Rs. 4,88,23,638/- is accounted as advertisement and sales promotion expenses. In the schedule Q to the balance sheet relating to the head "other expenses", there is a 'note' which clarifies as under :-

"Commission on sales amounting to Rs. 1,19,77,790.27 paid to M/s. Harmeet Kandhari & Associates, belonging to a relative of the directors of the company, has been clubbed with the Advertisement & Sales Promotion expenses."

Similar clarifications appear in the balance sheets for the other years as well. Whether commission on sales could be treated as advertisement and sales promotion expenses is a debatable point. However, this is not an issue to be decided by us. It suffices to say that the terms of the agreement produced and the entries in the balance sheets of manufacturing company and those of M/s. H.K. Associates support the claim by the learned advocate for the parties. The balance sheet of M/s. H.K. Associates also mentions these amounts only as commission on sales.

8. In view of the above, we find merit in the appeal of M/s. H.K. Associates and accordingly, allow the same. Inasmuch as the appeal of main party M/s. H.K. Associates is allowed on merit, the question of enhancement of penalty on M/s. H.K. Associates and imposition of penalties on other three parties as prayed for in the other appeals by the department does not arise."

The aforesaid decision of Tribunal has been upheld by Hon'ble Apex Court as reported in 2010 (19) STR J111 (S.C).

In view of aforementioned CBEC clarification and the decision of tribunal in similar circumstances the demand cannot be upheld, and is therefore set aside. The appeal is consequently allowed."

6. We further take note of the fact that in terms of Notification No.1/96-ST, the assessee is not liable to be included the amount paid for space and time in getting the advertisement published in print media. Therefore, the said amount is not includible in the value of taxable service provided by the assessee.

7. Further, on discount received by the appellant, no service tax is payable as the same has not been received in consideration of providing the taxable service by the appellant. It was further found that the advertisers themselves have paid service tax on behalf of the appellant, therefore, if the same is demanded from the assessee, it would be double taxation on the service and the said issue has been settled by this Tribunal in the case of Ms.Katrina R. Turcotte v. Commissioner of Service Tax, Mumbai-I in Service Tax Appeal No.387 of 2011 vide Final Order No.A/670/2012/CSTB/C-I dated 09.10.2012, wherein this Tribunal has observed as under:-

"6. In this case, the appellant has provided the service for promotion of product by agreeing as model herself for advertisement films, TB commercials, still photographing, footage, press advertisement, outdoor, packaging and sales material etc. The revenue is of the view that as the appellant is engaged in the activity of promoting/marketing or sales of the product manufactured by her client etc., therefore, the said activity falls under "Business Auxisiary Service". The liability of service tax has not been disputed by the appellant. The appellants contention is that appellant has appointed M/s. Matrix as their agent to receive payment on behalf of the appellant from the clients and thereafter discharge the service tax liability on the above activity. These facts are also not in dispute. As per the agreements, the payments are to be made by the clients in the name of M/s. Matrix and M/s. Matrix has to discharge service tax liability, thereafter the balance amount was to be paid to the appellant. In this set of facts, service tax

liability has been discharged by Matrix on the above said activity cannot be denied merely on the ground that it has paid under Advertisement agency Service. As M/s. Matrix has paid the service tax under the category of Advertisement Agency Service that does not mean that M/s. Matrix has not paid service tax on behalf of the appellant. Be merely paying the service tax liability under wrong head does not meant that service tax liability has not been discharged. The allegation of the revenue that service has been rendered by appellant but has not discharged the service tax liability is not sustainable as per section 65(7) of the Finance Act, wherein the 'assessee' means a person liable to pay service tax and includes his agent. In this case, appellant has appointed M/s. Matrix as per agent to discharge her service tax liability on her behalf and same has been discharged by M/s. Matrix.

As in the case in hand, the service tax has been paid by the advertisers on behalf of the appellant, therefore, same is treated as paid by the appellant. Accordingly, no demand is sustainable against the appellant .

8. We further take note of the fact that appellant has provided certain service to the Government agencies and claim that the same is exempt from service tax, we find that the said service has not been exempted from payment of service tax as observed by this Tribunal in the case of Prithvi Associates v. Commissioner of Central Excise, Mumbai [2006 (1) S.T.R. 32 (Tri.-Mumbai)], wherein the Tribunal has observed as under :-

6. *Definition of "advertisement" and advertising agency as appearing in Sections 65(2) and 65(3) of the Finance Act, 1994 is to the following effect :-*

"Advertisement" includes any notice, circular, label, wrapper, document, hoarding or any other audio or visual representation made by means of light, sound, smoke or gas;

"Advertising agency" means any commercial concern engaged in providing any service connected with the making, preparation,

display or exhibition of advertisement and includes an advertising consultant;”

As is clear from the above, advertisement includes any hoarding and advertising agency means any commercial concern engaged in providing any service connected with the display of advertisement. Admittedly, the appellant is an advertising agency engaged in advertisement of various products for which purposes they are listed with the Central Excise department and were paying the service tax. No distinction has been made in respect of the services provided to a private person or to State/Central Government agencies. In fact Service Tax Circular F. No. 341/43/96-TRU, dated 31-10-96 has clarified the scope of the service tax on the said services. It has been clarified that advertising agency means any commercial concern engaged in providing any service connected with the making, preparation, display or exhibition of advertisement and includes an advertising consultant. It is, thus, noticed that the scope of the service which is included in the tax net extends not only to any service connected with making, preparation of advertisement but also includes any service connected with the display or exhibition of advertisements. Inasmuch as, admittedly the appellants are a commercial agency making profit out of the activity of display of advertisements on behalf of the Government, the same would be covered by the definition of advertising agency. The fact that such advertisements were public interest advertisements and were meant for creating general awareness in the public does not make any difference. Advertisement is a public announcement, which can be made by way of display of any hoardings or otherwise. Advertisement is used to awaken, enlighten and activate the public at large concerning matter that effect the society generally. As such, the fact that these Government departments were releasing advertisements so as to create public awareness will not take away the status of the activity as advertisements and the appellants as advertising agency.

Therefore, we hold that on the services provided by the appellant to the Government, the appellant is liable to pay service tax. Accordingly, we pass the following order.

- i) The assessee is liable to pay service tax on the services provided to the Government of India and
- ii) Rest of the demand against the assessee are set aside.

In view of this, the appeal filed by the assessee, is partly allowed and the appeal filed by the revenue is dismissed.

(Order pronounced in the open court on 18.09.2023.)

Sd/

(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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