CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 87215 of 2016

[Arising out of Order-in-Original No: 03-04/ST-VI/RK//2016-17 dated 27th April 2016 passed by the Commissioner of Service Tax, Mumbai – VI.]

Sony Pictures Networks India Pvt Ltd … ***Appellant***
Interface, Building No. 7, 4th Floor,
Off Malad Link Road, Malad (West), Mumbai 400 064

versus

Commissioner of Service Tax ***…Respondent***
Mumbai – VI
1st Floor, Mahavir Jain Vidyalaya, CD Barfiwala Road
(Juhu Lane), Andheri (West), Mumbai 400 058

WITH

SERVICE TAX APPEAL NO: 87222 of 2016

[Arising out of Order-in-Original No: 03-04/ST-VI/RK//2016-17 dated 27th April 2016 passed by the Commissioner of Service Tax, Mumbai – VI.]

Man Jit Singh … ***Appellant***
Director,
Sony Pictures Networks India Pvt Ltd
Interface, Building No. 7, 4th Floor,
Off Malad Link Road, Malad (West), Mumbai 400 064

versus

Commissioner of Service Tax ***…Respondent***
Mumbai – VI
1st Floor, Mahavir Jain Vidyalaya, CD Barfiwala Road
(Juhu Lane), Andheri (West), Mumbai 400 058

AND

SERVICE TAX APPEAL NO: 87223 of 2016

[Arising out of Order-in-Original No: 03-04/ST-VI/RK//2016-17 dated 27th April 2016 passed by the Commissioner of Service Tax, Mumbai – VI.]

Andrew Kaplan … ***Appellant***
Director,
Sony Pictures Networks India Pvt Ltd
Interface, Building No. 7, 4th Floor,
Off Malad Link Road, Malad (West), Mumbai 400 064

versus

Commissioner of Service Tax ***…Respondent***
Mumbai – VI
1st Floor, Mahavir Jain Vidyalaya, CD Barfiwala Road
(Juhu Lane), Andheri (West), Mumbai 400 058

APPEARANCE:

Shri V Sridharan, Senior Advocate for the appellant

Ms Bidhan Chandra, Additional Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: A/87355-87357/2019

DATE OF HEARING: 09/08/2019
DATE OF DECISION: 18/12/2019

PER: C J MATHEW

These three appeals, of M/s Sony Pictures Networks India Pvt

Ltd (the erstwhile Multi Screen Media Pvt Ltd), of Mr Manjit Singh and of Mr Andrew J Kaplan, are preferred against order-in-original no. 03-04/ST-VI/RK//2016-17 dated 27th April 2016 of Commissioner of Service Tax, Mumbai – VI which disposed off two show cause notices for recovering CENVAT credit of ₹ 2,21,75,67,529 availed on certain of the 'input services' during 2010-13 and from April 2013 to September 2014 by the appellant-assessee. While the latter two challenge the imposition of penalties of ₹ 1,00,000 each under section 78A of Finance Act, 1994, the first appeal impugns the order of the original authority on the demand arising from the substantive issue coupled with the detriment of penalty of like amount under section 78 of Finance Act, 1994.

2. It is not in dispute that the appellant had been remitting service tax as a registered assessee and is, thereby, entitled to credit of eligible 'input services' deployed in rendering 'output services' and that some of these 'input services' are available to providers of 'broadcasting service.' According to Learned Counsel for the appellants, though 32 taxable services had been procured by them, the dispute is limited to credit of ₹ 2,21,58,24,907 availed on 12 taxable services which, according to service tax authorities, were utilised for the broadcasting of channels by the overseas entity and that arising from availment of credit of tax of ₹ 17,41,622 discharged on three services which allegedly are in the exclusion component comprising the definition of

'input service' in rule 2(l) of CENVAT Credit Rules 2004.

3. A brief narrative would assist in appreciating the jigsaw comprising the peculiar characteristic of the 'output service', the intricacies of determining the recipient of 'eligible input service' and the business model of 'dream merchants' rooted in the home culture but routed through foreign territory. Central to providing home entertainment through broadcasting signals is the facility of uplinking to, and downlinking from, communications satellites; the economics of the technology ensures that locations are critical for viability and these do not happen to be within the country. Viewership preferences dictate content; the artistic and directorial talent compels recourse to the production houses, as well as advertisers, from within the country. As one of the 'estates of the realm', capable of swaying emotions with the real often mimicking the reel, the industry is a magnet for governmental regulation. The consequence of the spatial disconnect between the uplink facility and the viewer, as well as among the several players, in bringing entertainment to the homes of the public is a regulatory mechanism through vicarious accountability.

4. Thus upon incorporation of 'broadcasting service', through section 65(105)(zk) of Finance Act, 1994, as a taxable service in 2001, it was the statutorily mandated 'agents' who were designated as the 'provider of service' fastened with liability for discharge of taxes

arising therefrom. Broadcasters derive revenues from sale of channel subscription to customers as well as from sale of slots to advertisers and sponsors; by and large, the same designated agents within the domestic territory acted on behalf of the overseas entities for performance of these commercial functions. The content requirement of the overseas uplink owner, whether of serials or of cinema, would also be sourced from, and through, the very same agents. The polemic lies in this combination of roles that inevitably overlap with the reception of signals from outside the country in the homes of the viewers as the only perceptible element.

5. From the point of view of Revenue, the appellant-assessee was appointed, through an advertising sales agreement dated 1st October 1995, as the exclusive agent of M/s MSM Satellite (Singapore) Pte Ltd for distribution of channels of the latter, sale of airtime slots for advertisements to be carried in these channels and to conclude agreements on behalf of such channels. Invoices were allegedly issued to the advertisers by the overseas entity but the collections, as well as the remitting of taxes, devolved on the appellant-assessee. After 29th March 2011, appellant-assessee contracted with M/s MSM Discovery for the distribution of channels; the revenues of the latter comprised 10% of the subscription collection to be retained while transferring the rest back to the overseas entity.

6. Learned Authorised Representative contends that the proceedings initiated against the appellant-assessee is grounded on their being an agent of the broadcaster and the liability to tax, stemming from a legal fiction, precluded availment of credit of tax paid on 'services' deployed for, and required by, the overseas entity to broadcast signals. It is alleged that entity located in Singapore is the owner of the channels, equipment, infrastructure and other facilities required for linking and, in the absence of such, the appellant-assessee cannot claim to be the provider of 'broadcasting service.' Our attention was drawn to the reliance placed by the adjudicating authority on the definition of 'input service' in rule 2(l) of CENVAT Credit Rules, which admits of no entitlement, other than provision of 'output service', for eligibility and the attendant embargo on availing credit of tax paid on 'input service' utilized for providing 'exempted services' as well as on receipt of 'input service' at any place other than that from which 'output service' is rendered. It is also evident from the impugned order that the adjudicating authority was inclined towards this conclusion by appellant-assessee failing to

> *'77… come forward with any evidence relating to receipt and actual consumption of such input services by the noticee themselves.…'*

It is also alleged that the credit of tax paid on 'rent-a-cab service', 'outdoor catering service' and 'club and association service', which are specifically excluded from the ambit of 'input services' after 1st

July 2012, is liable to be recovered. We shall revert to the other submissions made on behalf of Revenue at a later stage of the present order.

7. Central to any dispute on availment of CENVAT credit is the provision of ‘output service’ made manifest by the inclusion of the cost of such services in the assessable value on which tax liability was discharged. It is the case of the appellants that, in the backdrop of ambiguity of the extent of liability upon imposition of tax on the said service, the retrospective amendment effected to clarify the definitions did erase the overseas entity from the scheme of Finance Act, 1994. This eclipsing of the overseas entity, both for regulatory obligation as well as tax liability, is the foundation on which the case of the appellants rests.

8. In the present instance, the overseas entity is M/s MSM Satellite (Singapore) Pte Ltd. It is claimed by the appellant-assessee that sale of airtime slots is, and always has been, undertaken by them and that, insofar as sale of channels, which the appellant had, till 1st February 2010, undertaken, M/s MSM Discovery Private Limited was contracted solely for collecting revenue subscription from operators that were remitted to the overseas entity through them. Hence, their plea that the discharge of tax liability by them on the entire receipts from these sources should effect a closure of the controversy on being

a provider of ‘broadcasting service.’

9. It is also claimed that the engagement of production houses, as well as acquisition of cinema, even if ultimately vested with the overseas entity, is an independent business activity of their and, hence, when subsequently transacted, is ‘output service’ which, though not taxed for being exported, was, nevertheless, eligible for availment of credit of tax paid on ‘input services’. According to the appellants, the claim of export of ‘programme production service’ and ‘copyright service’ is undisputed as categorical intimation through ST-3 returns had not evoked any objections. In this context, the appellants advance the proposition that, in denying the CENVAT credit, the adjudicating authority has omitted to acknowledge the entitlement of ₹1,84,54,00,495 as credit of the tax liability incurred in procurement of ‘copyright services’, ‘sound recording services’, ‘TV/radio programme production service’ and ‘video tape production service’ which could not have been utilised by the overseas entity.

10. On behalf of the appellants, it is contended by Learned Counsel that the appellant is the provider of ‘broadcasting service’ fastened by the definitions of the taxable service as well as that of ‘broadcasting’ and ‘broadcasting agency or organization’ in section 65 (15) and section 65 (16) of Finance Act, 1994. It is further submitted that the tax liability has been discharged by the appellant as provider of this

service and not as an agent of mandatory imposition. The availment of credit of ₹ 37,04,24,412 is attributed to eight services, viz., 'advertising services', 'broadcasting service', 'event management service', 'mandap keeper service', 'management consultancy service', 'market research agency service', 'photography service' and 'sponsorship service', procured for marketing and promoting the various channels uplinked from Singapore and for sale of slots for advertisement and sponsorship which, according to Learned Counsel, are essential to rendering the 'output service.'

11. Learned Counsel also points out to the selective application of the scheme of CENVAT credit by the tax authorities which is apparent in the implied acknowledgement of credit availed of tax paid on 17 'input services', admittedly procured for utilization in common for rendering of taxable all 'output service', and which, under rule 6 of CENVAT Credit Rules, 2004, should have been proportionately reduced in the wake of exclusion of 'broadcasting service' as 'output service' of theirs.

12. On the three services that were held to be ineligible for availment, it is the submission of Learned Counsel that ₹ 11,56,322 pertains to corporate membership fee paid for various associations which are not personal in nature. It is also submitted that the availment of credit of ₹ 4,00,072 as recipient of 'outdoor catering

service' cannot be denied in view of the decisions of Hon'ble High Court of Bombay in *Commissioner of Central Excise, Nagpur v. Ultratech Cement Ltd [2010 (260) ELT 369 (Bom)]*. We face no difficulty in accepting this argument as tenable considering that the decision in *Hindustan Coca-Cola Beverages v. Commissioner of Central Excise, Nashik [2014-TIOL-2460-CESTAT-MUM]*, relating to the period after 1st April 2011, has held that exclusion is contingent only upon utilization for personal benefit which is not an allegation and, hence, warranting a finding on our part. Likewise, the denial of credit taken on tax paid as recipient of 'rent-a-cab' service, was not used for personal consumption but by the appellant-assessee. We are inclined to accept the submission as it is now settled law that the exclusions incorporated in April 2011 are intended to disallow those which are patently not for use in rendering 'output service.' The demand of tax purportedly relating to ineligible 'input service' for an amount of ₹17,41,622, therefore, fails.

13. Learned Authorized Representative made elaborate submissions by reference to various decisions. It is seen that none of these are directly applicable to the dispute before us but to various aspects of the submissions of the appellants that are claimed by Revenue to be incongruent with the objective of CENVAT credit scheme. In the circumstances, it would be appropriate for us examine the legal provisions and subject the cited decisions to the touchstone of the

conclusions therein.

14. The remaining controversy revolves around the contention of Revenue that ‘broadcasting services’ are rendered by a broadcaster located outside the country and that though, admittedly, broadcasting requires certain ‘input services’ entitling the provider of service to be eligible for credit of tax discharged, the agent of such broadcaster cannot lay claim to it. The overseas entity may well be the broadcaster of signals that are received at homes within the country. The tax liability, and eligibility to credit, cannot, however, be a legacy of such reality except when the broadcaster in Singapore has an existence in the statutory framework for regulation of broadcasting industry; it is legally non-existent and cannot broadcast to receivers in the country unless a contracted agent assumes vicarious responsibility. This surrogacy has been appropriated in the taxing statute too. Therefore, in the light of statutory recognition of the assessee-appellant in section 65(105)(zk) of Finance Act, 1994 as the source of the service intended to be taxed, there is no foundation for the premise that M/s MSM Satellite (Singapore) Pte Ltd is the provider of the service in India. With the obliteration of sector specific taxable services with effect from 1st July 2012, there is no identity ascribed to the provider of any service but intrinsic to the tax liability is the consideration on which it is to be discharged.

15. The issue to be considered, and resolved, in that context is the insistence on the part of Revenue that the responsibility for discharge of tax liability is distinct from provision of service which alone entitles availment of CENVAT credit. It is not disputed that the appellant-assessee has discharged tax liability but it has been held that such compliance is as a mere agent who does not consume the 'input service'; implicit in this hypothesis is that even the procurement of service is as an agent even though Learned Authorized Representative is unable to draw sustenance for deeming such agency in the taxing statute or in the CENVAT Credit Rules, 2004.

16. Under rule 3 of CENVAT Credit Rules, 2004, credit shall be allowed to

'a provider of taxable service',

inter alia, of

xxxxx

'(ix) service tax leviable under section 66 of Finance Act, 1994'

implying that the eligibility thereto has only two conditions, *viz*., leviability of tax and being provider of 'taxable service' which is defined only in Finance Act, 1994 and references to 'input service' is only in the context of specific exclusions in the said rule and in rule 6 or for determination of date on which such credit shall be allowed, thereby, requiring recourse to rule 2(k) of CENVAT Credit Rules, 2004. The schedule for taking of such allowable credit is governed by rule 4(7) of CENVAT Credit Rules, 2004 which is restricted to 'input

service' and subject to documentation prescribed in rule 9 of CENVAT Credit Rules, 2009. In the present dispute, Revenue has no cavil that the provider of 'broadcasting service' is entitled to CENVAT credit of the specified services. Therefore, it is not the entitlement of the 'broadcaster' within the scheme of CENVAT credit that is objected to but the claim of the appellant-assessee to that entitlement as 'surrogate' of provider of service.

17. There is no allegation that the disputed services are not 'input services' for a 'broadcaster' and, hence, the exclusions or the schedule, for which that definition is intended, are not relevant for deciding on eligibility in the dispute before us. The perception conflict between surrogacy and agency seems to be the genesis of the controversy; while the appellant-assessee claims to be the surrogate, Revenue is prepared only to concede status of agency for discharge of liability and, that too, as a legal fiction which excludes categorization as 'broadcaster.'

18. To be meaningful and relevant, the CENVAT credit scheme must address the issue of 'cascading effects of taxation' at each stage of discharge of tax levy in the chain of trade. The scheme straddles two indirect tax levies – duty of excise and tax on services – with the specific taxable events described in section 3 of Central Excise Act, 1944 and section 66 of Finance Act, 1994. Such straddling of diverse

levies is bound to infuse a generality which, nonetheless, does not detract from the objective of relieving the tax-payer from the burden of tax already discharged. In our opinion, the dichotomizing of the tax-payer from the provider of the service arises from lack of appreciation of the nuances of the two levies.

19. While both are intended to burden certain events with the burden of levy, the tangibility of one confers a simplicity of description that the other cannot aspire to. Manufacture is an activity that does not require any crutch of externalities for ascertainment but service is nothing but a figment that acquires corporeal significance only with identity of recipient and provider attended by making over consideration. *Ergo*, the inevitability of a definition, which cannot but include the provider of service but which, if overlaid on the template of the other eligible activity, *i.e.*, manufacture, in which 'manufacturer' is identified by construing from this very expression, will lead to irreconcilable anomalies. The levy on manufacture is crystallised on the product without having to take recourse to manufacturer making abundantly clear, by implication, that the manufacturer pays the duty and takes eligible credit. Likewise, in section 66 of Finance Act, 1994, there is no reference to any person but only to the taxable events described in section 65(105), and in the successor section 65B, even less so. The complexity of definition of taxable activity, necessitating human presence, is now sought to be

superimposed on the CENVAT credit scheme which recognises only the taxpayer within its ambit. The deployment of expressions in CENVAT Credit Rules, 2004 warrants recourse to Finance Act, 1994 only for interpreting expressions that are not defined therein. As the said Rules do not allude to 'taxable service' except with the qualification 'provider of', and is defined in rule 2(q) and rule 2(r) as a composite expression, which is not untrammeled, even the parent statute may be unable to afford an interpretation. By inclusive qualification, rule 2(r) of CENVAT Credit Rules, 2004 brings 'person liable to pay tax' within its ambit. For the period prior to 1st July 2012, as we have held *supra*, the provider of the service, as explicitly legislated in section 65(105)(zk) of Finance Act, 1994, is the agency in India. For the period thereafter, in the absence of any reference to such agency, the levy of tax from the appellant-assessee suffices to bring them within the definition of 'provider of taxable service' in CENVAT Credit Rules, 2004. Once the tax liability is accepted by the appellant-assessee and discharge thereof has been acknowledged by the State, the privileges arising from such cannot be denied save for express exclusion in the CENVAT Credit Rules, 2004. There is no recognition of agency within, or as a substitute, for person liable to tax. Non-taxability of the service is not conceded by Revenue and the tax, not being payable by the overseas entity, is statutorily recoverable from the appellant-assessee which would not have devolved on them

had they been merely a representative for discharging tax liability.

20. The levies devolve on the person liable to tax as laid out in the Service Tax Rules, 1994 and, in view of rule 9 of CENVAT Credit Rules, 2004, credit can be taken only by the entity burdened with the incidence of tax. That is the sole criteria of eligibility to take credit and not the process by which broadcast signals are received in India.

21. In the impugned service, while the transaction may be undertaken by an overseas entity, the provider of the same service, by the legal fiction of the definitions, of taxable service as well as the providing entity, is not the owner of the uplink facility but the appellant-assessee. That the tax liability has been discharged by the appellant-assessee is not in dispute. Consequently, there is no bar on the appellant-assessee availing the credit of tax paid by them on services procured by them. The law has erased the overseas entity out of existence and it is not within the competence of the adjudicating authority to breathe life into such erasure merely to deny the benefit of CENVAT credit. Therefore, the availment of credit on input services deployed for providing the ‘taxable service’, as opposed to the corresponding commercial contract, cannot be held to be outside the framework of law.

22. It is the contention of Learned Authorised Representative that the premises from which output service is rendered alone can be the

place of consumption or utilisation of the input service and that this essential requirement, prescribed in rule 3 of CENVAT Credit Rules, 2004, is lacking in the claim of the appellant-assessee. In support of this contention, reliance is placed on the decision of the Tribunal in *Mentor Graphics India Pvt Ltd v. Commissioner of Customs, Hyderabad [2019-TIOL-1756-CESTAT-HYD]*. We find that the issue in dispute in the cited decision was not about the rendering of output service by the assessee but of lack of evidence that the unregistered premises of an assessee, acknowledged as provider of output service, were also connected with such activity. In view of findings *supra*, pertaining to the single premises of the appellant-assessee herein, that service has been provided by the appellant-assessee, the submission fails.

23. According to Learned Authorised Representative, the decision of the Tribunal in *Star India Pvt Ltd v. Commissioner of Central Excise, Thane-I [2015 (38) STR 884 (Tri-Mumbai)]* and in *BBC World (I) Pvt Ltd v. Commissioner of Central Excise, Delhi-III [2009 (14) STR 152 (Tri-Del)]* having held that tax liability devolves on the entity in India by a deeming fiction should logically lead to the conclusion that such entities are not the real providers of service. We find ourselves unable to accept that proposition for the said decision was rendered, as pointed out by Learned Counsel, in the context of an assessee claiming that the discharge of tax liability, as broadcaster, by

debit of CENVAT credit arising from discharge of tax liability on ‘reverse charge’ for rendering of services by overseas entities. On the contrary, the finding therein that the agency in India is fastened with the liability of discharging tax would support the claim of the appellants herein. The decision of Tribunal in *Modiopon Ltd v. Commissioner of Central Excise, Ghaziabad [2009-TIOL-1161-CESTAT-MUM]* is also not relevant. Our findings *supra* on the absence of deeming fiction in the taxable entry discards consideration of this submission on behalf of Revenue.

24. The *catena* of decisions, pertaining as they do to the nexus between the ‘output service’ and ‘input services’, cited by Learned Authorised Representative traverse to the stage after determination of eligible manufacturer or provider of service. The case of Revenue being the denial of such status to the appellant-assessee is not furthered by the principles laid down in *Commissioner of Central Excise, Nagpur v. Manikgarh Cement [2010 (20) STR 456 (Bom)], Maruti Suzuki Ltd v. Commissioner of Central Excise, Delhi-III [2009 (240) ELT 641 (SC)], SBI Capital Markets Ltd v. Commissioner of Central Excise & Service Tax, LTU Mumbai [2012-TIOL-1161-CESTAT-MUM]* and *Telco Construction Equipment Company Ltd v. Commissioner of Central Excise & Custom, Belgaum [2013-TIOL-1942-CESTAT-BANG*].

25. Again, in our view, the reliance placed by Learned Authorised Representative on the decision of the Hon'ble Supreme Court in *Calcutta Chromotype Ltd v. Collector of Central Excise, Calcutta [1998 (99) ELT 202 (SC)]* is misplaced as the issue therein pertained to the assessable value of goods alleged to have been cleared through related person and, thereby, enunciating the scope for 'lifting of the corporate veil' but we take note of the observation that

> *'... The Court said that tax planning may be legitimate provided it is within the framework of law. Colourable devices, however, cannot part of tax planning. Dubious methods resorting to artifice or subterfuge to avoid payment of taxes on what really is income can no longer be applauded and legitimised as splendid work by a wise man but has to be condemned punished with severest of penalties. If we examined the thrust of all the decisions, there is no part on the authorities to lift the veil of company, whether a manufacturer or a buyer, to see it was not wearing the mask of not being treated as a related person when, in fact, both, the manufacturer and the buyer, are in fact the same persons..... It is, however, difficult to lay down any broad principle as to when corporate veil should be lifted or if on doing that, could it be said that the assessee and the buyer are related persons. That will depend on the facts and circumstances of each case and it will have to be seen who's calling the shots in the assessee and the buyer.'*

which suggests that this access is not to be applied across the board. In the present circumstance, the existence of a surrogate of the broadcaster is mandated by law and not just for the purposes of taxation. There can be no subterfuge or artifice when the State so legislates. The relationship between the overseas entity and the appellant-assessee is open and declared and the tax law sought to be invoked against the latter is not premised on the existence of a relationship between the two. The laudable morality that guided the

widening of investigative jurisdiction cannot be read out of context to impute an allegation that is not acknowledged in the law pertaining to levy of service tax.

26. In the light of findings that the appellant-assessee is not only *de facto* but also *de jure* provider of 'output service' as well as consumer of the impugned 'input service' and the lack of applicability of the various decisions cited by Learned Authorised Representative, we set aside the recovery ordered in the impugned order as well as the penalties on the appellant-assessee and the individual appellants. All three appeals are allowed.

(Order pronounced in the open court on 18/12/2019)

(Justice Dilip Gupta)
President

(C J Mathew)
Member (Technical)

**/as*