CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH
Court No. IV

SERVICE TAX APPEAL NO. 52864 of 2016

[Arising out of Order-in-Original No. DLISVTAX001COM0291516 dated 29.03.2016 passed by the Principal Commissioner OF Service Tax, New Delhi]

PRASAR BHARATI ... **APPELLANT**
(Broadcasting Corporation of India)
Doordarshan Bhawan
Copernicus Marg, Mandi House
New Delhi-110001.

VERSUS

COMMISSIONER OF SERVICE TAX DELHI ... **RESPONDENT**
17-B, I.A.E.A. House, I P Estate,
M G Marg, New Delhi 110002.

APPEARANCE:
Shri Rajeev Sharma Sr. Advocate and Ms Shruti Sharma, Advocate for the Appellant
Shri Nagender Yadav, Authorised Representative for the Department

CORAM:
HON'BLE SHRI P V SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MRS RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING: December 07, 2021
DATE OF DECISION: 09.03. 2022

FINAL ORDER No. 50240 /2022

PER RACHNA GUPTA

The appellants herein are engaged in the broadcasting service through Doordarshan Kendra, Trivandrum. While Broadcasting they also carry advertisements. Advertising agency service was brought under the Service Tax net by Government of India by Finance Act, 1996 vide Notification No. 06/1996 dated 01.11.1996 and the following were inserted in the service tax provisions (Chapter V of the Finance Act, 1994):

> **Section 65 (3) Advertising agency"** means any person engaged in providing any service connected with the making, preparation, display or exhibition of advertisement and includes an advertising consultant.
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> **Section 65(105) (e) Taxable Service"** means any service provided or to be provided to any person by an advertising agency in relation to advertisement, in any manner;

2. The appellant herein was only carrying the advertisements of the advertisers and broadcasting or telecasting them and not actually making the advertisements. While the service provided by an advertising agency was a taxable service, a question arises whether an amount paid by the advertiser only for the space in the print media or in electronic media would also be taxable. The Central Board of Excise and Customs issued a circular No. 341/43/96-TRU dated 31.10.1996 clarifying that '***the amount paid excluding the commission by the advertising agency for space and time in getting the advertisement published in the printing media or the electronic media would not be includable***' in the value of taxable service for the purpose of levy of service tax.

3. Officers of the Department felt that the service rendered by Doordarshan Kendra, Trivandrum were taxable but neither has a registration certificate been obtained nor has any tax been paid nor any return filed by Doordarshan Kendra. It was felt that this amounted to contravention of the provisions of section 68 of

Finance Act, 1994 and three following show cause notices were served upon the appellant.

	SCN No. and date	**For the period**	**amount**
1	5/2002 dated 1.4.2002	1998-1999 to 2000-2001	22.76 lakh
2.	20/03 dated 9.5.2003	2001-2002	65.78 lakh
3	39/03 dated 6.10.2003	2002-2003	68.74 lakh

4. The appellant later applied for Service Tax registration on 6.08.2003 and the registration certificate thereof was issued by the respondent. Thereafter, the three Show Cause Notices came under the jurisdiction of Commissioner of Service Tax, Delhi for adjudication who, by the impugned Order-in-Original No. 029/15-16 dated 29.3.2016 dropped the demand with respect to first two show cause notices. However, he confirmed an amount of Rs.36,92,874/- along with interest against the third Show Cause Notice No. 39/2003 dated 6.10.2003. He also imposed a penalty of Rs. 3,69,287/- under section 76 and a penalty of Rs. 10,000/- under section 77(1) of the Finance Act, 1994 on the appellant. It is against the said imposition that the present appeal has been filed.

5. We have heard Shri Rajeev Sharma and Ms Shruti Sharma, learned Counsels for the appellant and Shri Nagender Yadav, learned Authorised Representative for the Department.

6. It is submitted on behalf of the appellant that the show cause notice dated 6.10.2003 is for the period 2002-2003 and the appellant was not providing any taxable service during that period as such, is not liable to pay the service tax. However, for the demand has been confirmed on the ground that the appellant has mistakenly collected amounts as service tax from the advertisers

during September 2002 to March 2003, it has been held by the learned Commissioner that the appellant is liable to pay the amount so collected as tax, to the Central Government in terms of section 76A (2) of Finance Act. It is submitted that section 76A(2) was not in existence when the appellant collected the amounts as service tax; it was inserted by Finance Act, 2006. Therefore, this section has been wrongly invoked. The confirmation of demand is contrary to the Commissioner's own findings. Accordingly, the confirmation of the demand in the order is prayed to be set aside. Imposition of interest and penalty is also prayed to be set aside on the ground that once the appellant is not liable to pay the service tax the question of imposition of penalty and interest does not arise. The appeal is accordingly prayed to be allowed.

7. Rebutting the submissions of the learned counsel, learned Departmental Representative submitted that there is no denial of the fact that the appellant has collected service tax from the several other people/customers but has not deposited the same with the Government. Such an admission is sufficient proof for grave error of evading deposit to have been committed by the appellant. Therefore the demand has rightly been confirmed following the decision of Modern **Co-op Bank Ltd. vs CCE, Nasik** reported in **[2010(19) STR 697 (Tri-Chennai)].** He further submitted that recovering service tax from the service recipient and not paying the same to the department, has been held by this Tribunal to be considered as evasion of service tax with intention to evade the duty. Hence, no mistake has been committed by the Adjudicating Authority when the demand has been confirmed and penalty has been imposed and interest also has been demanded. Decision of CESTAT, Ahmadabad in the case of **IWI Cryogenic Vaporization System India vs. CCE & ST Vadodara II** reported as **[2016 (41) STR 290 (Tri-Ahmd)]** has also been relied upon. With these submissions, learned Departmental Representative has prayed for appeal to be dismissed.

8. We have heard rival contentions of the parties and perused the records. Advertisement involves broadly three activities. The first is the creative work where an expert conceptualises the advertisement and works out how it should be made in terms of words, symbols, pictures, models, dialogues, music, etc. The second is the actual making of the advertisement such as printing the banner, pamphlet, recording the advertisement jingle, making the video which constitutes the advertisement. The third activity is the actual carrying of the advertisement through media. This is done by newspapers, magazines, radio channels, television channels, etc. who all carry the advertisement and charge a price for the space in the newspaper or the time in the TV or Radio. Sometimes, the advertising agency may, in addition to creating the advertisement, also organise for the broadcasting or printing it. The agency will, of course, charge in such cases, both its commission and the amounts to be paid to the newspaper or broadcaster or telecaster carrying the advertisements.

9. Undisputedly, the appellant is involved in only the third activity of carrying the advertisements in its channels. CBEC Circular No. 341/43/96-TRU dated 31.10.1996 clarified that the amount paid for space and time in getting the advertisement published in the print or electronic media would not be included in the value of taxable service rendered by the advertisement agency and accordingly the service tax was payable only on the commission received by the advertisement agency. This has also been acknowledged in the impugned order. Hon'ble Madras High Court has, in the case of **M/s. Adwise Advertising Pvt. Ltd.** reported in [**1998 (97) ELT 35],** upheld the validity of the clarifications issued by CBEC and held the above circular as valid.

10. The Adjudicating Authority has found that although the appellant had collected from its customers an amount of Rs.36,92,874/- during September 2002 to March 2003 as service

tax, but it was not liable to pay the service tax. The adjudicating authority has still confirmed the demand invoking section 73A (2) of the Finance Act, 1994 along with the interest and also imposed penalty upon the appellant. Section 73A is a provision which requires any person who has collected any amount as representing service tax to deposit it with the Government. Sub-section (1) of this section requires any person who is liable to pay service tax who has collected excess amount to deposit it with the Central Government. Sub-section(2) requires any person who collected from anyone else any amount as service tax which is not required to be paid to deposit it with the Central Government. It reads as follows:

> **SECTION 73A. Service tax collected from any person to be deposited with Central Government**. — (1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made thereunder from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.
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> (2) Where any person who has collected any amount, which is not required to be collected, from any other person, in any manner as representing service tax, such person shall forthwith pay the amount so collected to the credit of the Central Government.
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> (3) Where any amount is required to be paid to the credit of the Central Government under sub- section (1) or sub-section (2) and the same has not been so paid, the Central Excise Officer shall serve, on the person liable to pay such amount, a notice requiring him to show cause why the said amount, as specified in the notice, should not be paid by him to the credit of the Central Government.
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> (4) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom the notice is served under sub-section (3), determine the amount due from such person, not being in excess of the amount specified in the notice, and thereupon such person shall pay the amount so determined.

> (5) The amount paid to the credit of the Central Government under sub-section (1) or sub- section (2) or sub-section (4), shall be adjusted against the service tax payable by the person on finalisation of assessment or any other proceeding for determination of service tax relating to the taxable service referred to in sub-section (1).
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> (6) Where any surplus amount is left after the adjustment under sub-section (5), such amount shall either be credited to the Consumer Welfare Fund referred to in section 12C of the Central Excise Act, 1944 (1 of 1944) or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B of the said Act and such person may make an application under that section in such cases within six months from the date of the public notice to be issued by the Central Excise Officer for the refund of such surplus amount.

11. Learned counsel for the appellant pointed out that Section 73A(2) could not have been invoked by the adjudicating authority because the period of dispute is 2002-2003 and Section73A(2) was introduced only in 2006. This section cannot be applied retrospectively. The confirmation of demand on this amount is therefore not justified. To our opinion, this argument is not sustainable because the fact remains is that the appellant has retained the amount collected from his customers in the name of service tax liability which otherwise was not to be collected and hence was not to be deposited with the Government. Irrespective that section 73(A)2 of Finance Act was not in existence at the relevant time but the collection as made by the appellant stands already prohibited in terms of Article 265 of Constitution of India. As per the said article, no tax shall be levied or collected except by Authority of law. It means that the right to levy or collect tax has not been given to anyone except with the authority of law. The tax therefore is not a voluntary payment which one may decide on its own nor anyone can collect, it suo moto. It is a payment extracted by legislative authority under Article 265, which acts as

an armour against arbitrary tax extraction. Even the Government on its own cannot levy tax by itself.

12. In the case of **Lord Krishna Sugar Mills vs Union of India reported in 1959 AIR 1124** the sugar merchants had to meet some export targets in a promotion scheme started by the Government and if it fell short of the target, an additional excise duty was to be levied on the short fall. The Supreme Court held that the Government had no authority of law to collect this additional excise tax. In view of the discussion as above, even in this case, the amount collected by the appellant cannot be demanded by the Government in the absence of any legal provision. However, it is equally true that the appellant itself was not entitled to collect the same from his customers. Retention of said amount by the appellant will definitely be unjust enrichment of appellant.

13. The doctrine of unjust enrichment was first observed in 1860s in **Rambux Chittenged vs Madhusudan Paul Choudhary's** case. The principle was later notified in the Indian Contract Act, 1872. This doctrine of unjust enrichment, a volatile and elusive judgement made hypothesis till the other day, became a hard and inescapable reality on the statute book in India in 1991 when Parliament accepted it and enacted the Central Excise and Customs Law (Amendment) Act, 1991. The amendments required every assessee seeking refund of an illegally recovered tax to prove that he had not passed on the burden of the tax to the customer or to any other person for one who had passed on the burden would not be entitled to the refund of money himself. Inevitably, therefore, although the debate on unjust enrichment had started much earlier and the question had been pending consideration in the Supreme Court from long before 1991, the amendments of 1991 provided a new legislative edge and exigency to the controversy and occupied the centre stage of

discussion in **Mafatlal Industries Ltd. vs Union of India** reported in **[1997 (5) SCC 536].**

14. The issue of unjust enrichment has not been a matter of concern in this country alone. It has attracted the attention of many a foreign jurisdiction also in recent times. Some foreign decisions approve of the doctrine, some do not. Some others only partly agree with it. The nine Judge judgement in Mafatlal is the Indian answer to a problem which has vexed Judges and lawmen alike throughout the liberal economies of the world. The judgement, of course, draws in great measure upon the wisdom and jurisprudence of various foreign court decisions but it also embellishes and distinguishes itself in the end with an ingenuity and sagacity which is also too native and which has now become synonymous with the extraordinary constitutional thinking and philosophy of this country.

15. Hon'ble Supreme Case in the case of **Indian Council for Enviro Legal Action vs. Union of India** reported as **[1996(5) SC 281]** defined unjust enrichment as a benefit to loss of another for the retention of money or property of another against the fundamental principles of justified and equity. The doctrine of unjust enrichment is essential to the subject of restitutions which incorporates repayment or reimbursement for benefits received from.

Indian Contract Act, 1972 provides various remedies for unjust enrichment under section 68 & 72 thereof. Section 72 is precisely applicable to the given circumstances. Hon'ble Justice Jeevan Reddy, author of Mafatlal Industries case (supra) has held in the said decision that section 72 is the rule of equality passing on to the burden in the course as held to be one of the equitable consideration. It is also held that it is for manufacture/ service provider to allege and point out that he has not "passed on the duty to a third party. This requirement flows not only because

section 72 incorporates the rule of equality but also that the central excise duty and the customs duty/ service tax and indirect taxes which are supposed to be and are permitted to be passed on to the buyers.

16. Hon'ble Apex Court in the case of **Mafatlal Industries** (supra) case observed that the Central Excise duty and Customs duty Law (Amendment Act 1996) required every assesse seeking refund of illegally recovered tax to prove that he has not passed on the burden of such tax to the customers or to any other person. The judgement attaches significance to the unethical consequences which would follow if no bar of 'unjust enrichment' is applied by the Courts. Article 265 of Indian Constitution and section 72 of Indian Contract Act are no doubt held to be read and understood in the light of philosophy and the core values of the Indian Constitution and in keeping with equality and given conscience. **In the words of Hon'ble Jeevan Reddy J.,**

> "the State should refrain from conferring from "an unearned and unjustifiable windfall" upon the assessee. It was held that person who has passed on the burden of levy should not be allowed to profiteer by ill gotten gains and unjustly enriched. It turns out that if the levy is not excisable, it is refundable to the person who has burdened the liability inordinately in the case of indirect tax. Such person will be enumerated and cannot be classified or identified. If the duty which is excisable is refunded to the person who had not burdened the liability , it will result in unjust benefit to him. In such cases such amount will be credited to the Consumer Welfare fund."

The Hon'ble High Court of Delhi in the case of **Padmavati vs. Harijan Sewak** CM(M) No.449/2002 decided on 6.11.2008 has expressed that while adjudicating the Courts should keep in view that it is the obligation and commitment of the Court to offset in

unjust enrichment and gratuitous increase made by any party. It was specifically held that the class of people who perpetuate illegal acts must be made to pay the sufferer not only the entire illegal gains made by them as cost to the persons deprived of their property / rights and also must be burdened with exemplary costs. Faith of the people in judiciary can only be sustained if the persons on the right side of law do not feel about wrong as real gainer. Thus it becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the reaped benefits. They must suffer the cost of all those years.

17. In the present case, it is true that no service tax was chargeable on the activity of the appellant, viz., carrying the advertisements in its broadcast and telecast. Therefore, the Government cannot collect service tax. It is also true that Section 73A(2) which mandated that any person who collects any amount as representing service tax to deposit it with the Government also did not exist at the relevant time. Thus, the Government had no authority to demand the amount.

18. However, it is equally true that the appellant had no authority under the Service tax law or any law for that matter, or on the principles of equity, to collect from its customers an amount representing it as service tax and retain it when no tax was payable. It is possible that the amount was collected under the mistaken belief that tax was payable. If so, the appellant should have deposited ‘the tax’ so collected with the Government as tax (pending the final outcome of the decision in the SCNs issued). Another possibility is that the appellant had not believed that tax is payable but had collected it from its customers by mistake. If so, it should have returned the amount to its customers. A third possibility is that the appellant knew that no tax was payable but since the SCNs were pending, as a matter of abundant precaution

to save itself from a tax liability at a later stage, collected the amounts as Service tax from its customers. If so, once the decision is made that no service tax is payable, the appellant should have returned the amounts so collected as tax to its customers. **It is clear that appellant has done none of the these but has retained the amounts collected from its customers as service tax. Now learned counsel for the appellant argues that in the absence of any provision, the Government cannot demand the amount collected either as tax or under section 73A(2) and the appellant has a right to keep the amount at the expense of the customers. Such retention thereof with the appellant is definitely an act against equity making the appellant unjustifiably enriched. The statutory provisions cannot be read as to imply that the appellant has a right to such unjust enrichment. Neither has the Government any right to recover tax (section 73) or any amount collected as representing tax (section 73A) in the absence of any legal provision nor has the appellant any right to collect from the customers any amount as representing tax and retain it. The amounts collected as tax must be returned to the persons from whom they were collected.**

19. Had the appellant collected the amounts from its customers as representing tax as a matter of precaution, it could have paid it as tax under protest. Once, it is decided that no tax is payable, the appellant could have repaid the customers and claimed a refund. If the appellant had claimed refund without returning the amounts in part or whole to its customers, such refund would have been sanctioned under section 11B and the amounts would have been credited to the Consumer Welfare Fund under Section 11B of the Central Excise Act as applicable to the provisions of Service tax by Finance Act, 1994. Section 11B, including

the provision of refunds being credited to the Consumer Welfare Fund were applicable during the period of dispute. Simply because the appellant retained the amounts with itself and has not deposited them with the Government should make no difference. Neither the Government nor the appellant has any right over the amounts collected from the customers as representing service tax in the absence of any legal provisions.

20. In view of the entire above discussion, the order under challenge confirming the demand with interest and imposing penalty upon appellant is hereby set aside. However, the appellant is directed to return the amount collected by it, under the garb of its liability to pay service tax when actually it was not liable, to all those customers from whom it was collected that too within a period of two months. If the appellant is unable to return the amount to any of its customers for any reason during said period, such amounts, still remaining with him, shall be deposited by the appellant in the Consumer Welfare Fund immediately after the expiry of said period of two months. A compliance report must be furnished by the appellant with the registry of this Tribunal within 15 days thereafter. The appeal however, is allowed but with directions to the appellant as above.

(Dictated and pronounced in the open court on 09.03.2022)

(P V SUBBA RAO)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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