CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No. 89858 of 2018

(Arising out of Order-in-Appeal No. 57/COMMR/DR.KNR/CGST&CEX/MC/2018-19 dt. 30.08.2018 passed by the Commissioner of GST & Central Excise, Mumbai Central, Mumbai)

M/s Star India Pvt. Ltd., Mumbai **.....Appellant**
Star House, 30th Floor, Urmi Estate, 95,
Ganpatrao Kadam Marg, Lower Parel-West,
Mumbai-400 013

VERSUS

Commissioner of GST & Central Excise **.....Respondent**
Mumbai Central, Mumbai
GST Bhavan, 115, Maharshi Karve Road,
Mumbai-400020

Appearance:

Shri Vinay Jain, Advocate for the Appellant
Shri Anand Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M.PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85930/2023

Date of Hearing: 17.02.2023
Date of Decision: 08.06.2023

Per : M.M. Parthiban

This appeal has been filed by M/s Star India Private Limited, Mumbai (referred to as Appellants) against the Order-in-Original No. 57/COMMR/DR.KNR/CGST&CEX/MC/2018-19 dt. 30.08.2018 (referred to as impugned order) passed by the learned Commissioner of GST & Central Excise, Mumbai Central, Mumbai.

2.1. Briefly stated, the facts of the case are that the appellant herein is registered with the jurisdictional Commissionerate under service tax registration No.AAACN1335QST001 for providing taxable services enumerated under the Finance Act, 1994.

2.2. During the course of EA 2000 audit on the appellant's financial records, statutory records submitted to the Department for the period 2008-2009 to 2010-2011, it was noticed by the Department that the appellants had entered into international transaction, with their international associate enterprises for the use and provision of services, and paid consideration to them for providing services in connection with brand registration/protection services, with sale of advertisement airtime; distribution of channels and the syndication of content; management services including services in relation to preproduction, postproduction, play out, uplinking and transmission of the channels of the appellant. Accordingly, the appellants had discharged service tax liability wherever applicable under reverse charge mechanism. On further scrutiny of the financial records of the appellant like form No. 3CEB submitted to Income Tax department in respect of international transaction entered with the associate enterprises, the Department had noticed that the appellants had paid Rs.29,10,442/- and Rs.170,36,25,836/- to M/s Star Television Productions Ltd. and M/s Satellite Television Asia Region Limited respectively, for availing the services like brand registration/protection services and for sale of advertisement air time, distribution of channels, syndication of content, for availing management services, respectively. In respect of such payments made towards the services availed by three foreign associate enterprises of the appellant, the Department had interpreted that the services were provided by the international associate enterprises, having the permanent address outside India and are received by the three companies which have been merged with the appellants having the fixed Establishment/permanent address or usual place of residence in India. Accordingly, the Department claimed that in terms of section 66A of the Finance Act, 1994 read with Rule 2(1)(d) (iv) of Service Tax Rules, 1994 & Rule 3 of Taxation of Service (Provided from outside India and received in India) Rules, 2006, the appellants are liable to pay service tax on the above payments under reverse charge mechanism and thus initiated show cause notice proceedings demanding service tax of Rs.17,57,73,236/- along with interest by invoking extended period of time, besides proposing imposition of penalties under section 76, 77 and 78 of the Finance Act, 1994.

2.3. On consideration of the written submissions made by the appellant and after giving personal hearing to the appellants on 16.8.2018 and 21.8.2018, the learned Commissioner had passed the impugned order confirming the adjudged demands besides imposition of equal amount of penalty under section 78 and penalty of Rs.5000/- for non-filing of return under section 77 of the Finance Act, 1994.

3. Learned Counsel for appellant submits that the appellant M/s Star India Private Limited, Mumbai had filed a proposal for a merger before the Hon'ble Bombay High Court, wherein it was proposed to inter alia merge three of their off-shore Channel companies who had establishments outside India viz., Star Asia Region FZ LLC, Dubai; Star Asian Movies Limited, British Virgin Islands; Star Television Entertainment Ltd., British Virgin Islands. He further submits the details of the case as follows. The scheme of merger was approved by the Hon'ble Bombay High Court on 18.2.2010. The appointed date for the operation of the merger is 01.4.2009. The effective dates of amalgamation of the foreign companies after compliance with the regulatory authorities for closure of accounts maintained with the respective Registrar of companies was 29.04.2010 in respect of Star Asia Region FZ LLC and 31.05.2010 in respect of the other two companies namely Star Asian Movies Limited and Star Television Entertainment Ltd. These three foreign companies were owners of satellite television channels. These foreign companies appointed M/s. Satellite Television Asia Region Limited, Hong Kong as an agent for advertisement sales and distribution of the channels India and abroad. For the agency and channel distribution services provided by M/s. Satellite Television Asia Region Limited, these three foreign companies paid commission. The provisions of section 92E of the Income Tax Act, 1961 required the appellants to report the expenses incurred in foreign currency in respect of the amount of commission paid by the above three foreign companies, which are being merged with the appellant company as the transactions pertains to FY 2009-2010 and FY 2010-2011, between the appointed date and effective date of merger, but were shown in the books of accounts of the appellant due to the said the merger of foreign companies with the

appellant. This compliance action of reporting to Income Tax department by the appellant has been taken as a basis for demand of service tax on such overseas/foreign currency payments by the Service tax department. He also submits that the demands raised by the department under the taxable category of 'business support services' for the above transaction is not legally sustainable in view of the clarification issued by the TRU, Ministry of Finance in letter No.334/4/2006-TRU dated 28.2.2006 providing the scope of imposition of levy under Business Auxiliary Service. Further it is stated by the counsel for the appellant that the foreign companies established outside India continued the function even after merger, as branches of the appellant. Accordingly these foreign companies will be treated as separate business/permanent establishment situated outside India. Thus he claimed that the services received by these companies located outside India from a service provider situated outside India cannot be said to have been received by the appellant in India. Hence the Counsel stated that the appellant is not liable to pay service tax in terms of section 66 A of the Finance Act, 1994. Further it is also claimed by the counsel for the appellant that the present demand invoking extended period is not sustainable since the appellant had intimated the Department about the merger of the three foreign companies with the appellant by letter dated 13.07.2010 and also submitted the order of the High Court along with the scheme of merger. The facts about the details of payment were also disclosed in the appellant's annual report for the year 2009-2010 and 2010-2011.

4. The counsel for the appellant also submitted that the demand confirmed by department on identical issue in respect of the services under the category of 'intellectual property rights' in their own case had recently been decided by this Tribunal in Appeal No.ST/86285/2016 vide Order dated 1.9.2022 allowing the appeals in their favour. Hence they pleaded that their appeal be allowed by setting aside the impugned order.

5. According to Learned Authorised Representative, as per the scheme of amalgamation/merger, the appointed day for the operation of the merger is 1.4.2009. During the period when the

proceedings are pending before the Court, the amalgamated or transferor company shall be deemed to have carried on the business for and on behalf of the transferee company with all the attendant consequences. On this basis and by reiterating the findings made in the impugned order, the Learned Authorised Representative had stated that the appellant is liable to pay service tax.

6. Heard both sides and perused the records of the case.

7. We find that the issue for consideration before us is whether the appellant are liable for payment of service tax in terms of section 66A of the Finance Act, 1994, in respect of services received by three foreign companies which are being merged with the appellant company, as briefly stated in paragraph 2.2 above. We also note that the said Section 66A was inserted through an amendment to the Service Tax legislation i.e., Finance Act, 1994 brought through the Finance Act, 2006 w.e.f. 18.04.2006. However, consequent to the introduction of Negative List in service tax legislation, the said legal provision under section 66A was withdrawn through amendment in Finance Act, 2012 brought w.e.f. 01.07.2012. Thus we find that during the disputed period the said legal provision of section 66A was having force of law. The said Section 66A of the Finance Act, 1994 is extracted below:

> *"66A. (1) Where any service specified in clause (105) of section 65 is,_*
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> > *(a) Provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and*
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> > *(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India,*
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> *such service shall, for the purpose of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India,*

and accordingly all the provisions of this Chapter shall apply:

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of the sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as a country from which the services provided or to be provided.

(2) Where a person is carrying on business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1. A person carrying on business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2. Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted."

On harmonious reading of the sub-section (1) and sub-section (2) of section 66A, we find that the legal provision has been carved out to enable for application of the Chapter V – Service Tax provisions for the purpose of charging service tax on taxable services received from outside India in certain circumstances described therein with few exceptions as provided therein under the first proviso to sub-section (1) and under sub-section (2) to Section 66A. Accordingly, we find that when a taxable service is provided by a service provider having a fixed establishment or permanent address or usual place of residence in a foreign country and such service is being received by a person having place of his business or fixed establishment or permanent address or usual place of residence, in India, then by treating that the service recipient had himself providing such service, the applicable service tax is payable. We

find that the exception provided in the first *provisio* of sub-section (1) from the charge of service tax in the above Section 66A is in relation to personal consumption by individuals, not concerning with services provided for the purpose of any business or commerce. Further, we find in sub-section (2) to Section 66A another exception has been made for the situation that where a service recipient is having a permanent establishment in India and is also carrying on business in a foreign country through another permanent establishment in that country, then these two business entities shall be treated as separate persons for the purpose of Section 66A. Accordingly we find that any foreign branch or foreign agency or overseas permanent establishment of the service recipient in India is also excluded from the charge of service tax under the provisions of Section 66A. Applying these legal provisions to the present case, it is evident that the three foreign companies/overseas business entities having their establishments out of India viz., Star Asia Region FZ LLC, incorporated in Dubai; Star Asian Movies Limited and Star Television Entertainment Ltd., incorporated in British Virgin Islands, even after their merger with the appellant company in India till their closure of their business abroad, could be treated as a branch or agency of the appellant and for service tax purposes they are separate persons from the appellant. Thus we find that the payments effected for the services received from another service provider abroad by the three foreign companies/overseas business entities which are proposed to merged with the appellant, is not amenable to charging service tax under section 66A of the Finance Act, 1994. Accordingly, we find that the order of the Commissioner of CGST & Central Excise, Mumbai Central, Mumbai confirming the adjudged demands is not legally sustainable.

8.1. Further we find that the issue is no more *res integra,* as the coordinate Bench of this Tribunal had already decided the issue for the show cause notice proceedings covering the earlier period for the very same appellants in its Order dated 1.9.2022 in the case of appellants in *Star India Private Limited Vs. Commissioner of Service Tax, Mumbai-II 2022 (9) TMI 167 – CESTAT MUMBAI.*

8.2 The relevant portion of the order in the above said case is extracted as below:

> *"8. Section 66A of Finance Act, 1994 is not a 'reverse charge' mechanism for convenience of tax collection within the taxable territory but a conceptual fiction to tax the recipient of service for according national treatment – obligations as well as privileges – to services procured from abroad. Having been incorporated for that special purpose, and deviating from the norm of taxability, it is intended to have restricted application and only to the extent provided for therein. The case built up the tax authorities is that the appellant appears, from their accounting treatment of the payments made to M/s Satellite Television Asian Region Limited, Hongkong, to be the recipient of 'intellectual property service' for 2009-10 and, hence, liable to tax. The entry in the accounts is not disputed; only the circumstances are. Hence, it now lies with us to ascertain if the records of payment from the 'appointed date' or from the 'effective date' is the more appropriate starting line for payment of tax by the appellant on the impugned consideration and, if it be the former, the extent to which section 66A of Finance Act, 1994 will operate for taxability.*
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> *9. There is no scope for Finance Act, 1994 to be concerned with restructuring or reconstruction of corporate entities as the tax is not, by and large, distinguished in terms of the character of the organization that is subject to tax; moreover, the tax liability crystallizes on rendering of a transaction in service and a provider (including deemed provider) becomes liable upon culmination of the taxable event. It is only when taxable event is sought to be reconstructed from the final accounts (and not from the ledger) that such speculative fastening is resorted to. The canvas is not unlike a palimpsest with tax authorities limiting themselves to the surface visual and the appellant insisting that the true picture lies beneath. The order of the Tribunal in re ITC Hotels Ltd, cited by Learned Authorized Representative, decided the issue of eligibility to refund arising from service rendered to self not being taxable consequent upon a merger of corporate entities comprising the provider and receiver of service in domestic transactions. The observation that*
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> > *'10. The law declared by the Apex Court is binding and is required to be followed. The submission of the learned DR that the ratio of the above judgment given in the context of income tax would not be applicable to the facts of the present case as there is no specific provision to that effect under the Central Excise Act or under the Chapter V of the Finance Act, 1994 cannot be appreciated inasmuch as the law declared by the Supreme Court is binding on all the Courts, in terms of the Article 141 of the Indian Constitution. The Hon'ble High Court of Delhi and the Kolkata having held the date of amalgamation as 1-4-2004 has to be considered as the correct date of amalgamation. If that be so, admittedly, the appellant cannot be held to be providing services to itself. The Tribunal in the case of Precot Mills - 2006-TIOL-818- CESTAT-BANG. = 2006 (2) STR 495 (Tri.-*

Bang.), has held that for leviability of service tax, there should be a service provider and a service receiver. No one renders service oneself, as such, there can be no question of leviability of service tax. Having held that the amalgamation is effective from 1-4-2004, the service provided by the respondent has to be considered as provided to himself, in which case, no service tax would arise against them. The order of the Commissioner cannot be faulted upon on this ground. At this stage, we may take into consideration the learned DR's reference to clause 7 of the scheme of amalgamation which is as follows:

> *"7. Savings of concluded Transactions : The transfer of the undertaking of the Transferor Companies under clause 4 above, the continuance of the proceedings under clause 5 above and the effectiveness of contacts and deeds under clause 6 above, shall not effect any transaction or the proceeding already concluded by the transferor companies on or before the effective date and shall be deemed to have been done and executed on behalf of the Transferee Company."*

By referring to the above clause, the contention of the learned DR is that any transaction or proceeding conducted by the transferor company on or before the effective date will not be affected by the scheme of amalgamation. However, we find that such clause stands incorrectly interpreted by the learned DR. A reading of the above clause is reflective of the fact that the action of the transferor company on or before the effective date shall be deemed to have been done and executed on behalf of the transferee company. As such, it is clear that the said clause supports the respondent's stand that any business conducted by the respondents is to be held as having been conducted on behalf of the transferee company. As such, the service tax provided to the ITC Ltd. and Ansal Hotels Ltd. have to be considered as having been provided on behalf of the transferee company viz. ITC. Ltd., in which case, no service tax liability would arise against the service provider.'

is far removed from attempting to fasten tax liability that does not accrue in the pre-amalgamated existence of the appellant herein by any stretch and the equation in a deeming fiction is invoked to construe importation of service. For one, reliance was placed on the decision of the Hon'ble Supreme Court in re Marshall Sons & Co (India) Ltd as the order impugned therein had held it to be applicable to the dispute therein. For another, in re Marshall Sons & Co (India) Ltd, it was not a case of not subjecting themselves to the tax jurisdiction but that of not offering the entirety of profits of the subsidiary company to tax by operation of the amalgamation scheme in much the same way that, in re ITC Hotels Ltd, tax authorities attempted to add an element of intra-group engagement as legally amenable to tax. In brief, the tax liability in their separated avatar was not in dispute in either of the two cases whereas in the dispute before us, the pre-amalgamated existence excluded the impugned transaction from the ambit of levy both under section 66 and section 66A of Finance Act, 1994. In re Marshall Sons & Co (India) Ltd, the relevant finding is

> *'14. Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation /transfer shall take*

place. The scheme concerned herein does so provide viz., January 1, 1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it - as has happened in this case - it should follow that the date of amalgamation/ date of transfer is the date specified in the scheme as "the transfer date". It cannot be otherwise. It must be remembered that before applying to the Court under Section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the court may take some time; indeed, they are bound to take some time because several steps provided by Sections 391 to 394-A and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamating units, i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with affect from the transfer date, the Transferor Company (Subsidiary Company) shall be deemed to have carried on the business for and on behalf of the Transferee Company (Holding Company) with all attendant consequences. It is equally relevant to notice that the Courts have not only sanctioned the scheme in this case but have also not specified any other date as the date of transfer amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the Income Tax Officer (impugned in the writ petition) were not warranted in law. The business carried on by the Transferor Company (Subsidiary Company) should be deemed to have been carried on for and on behalf of the Transferee Company. This is the necessary and the logical consequence of the court sanctioning the scheme of amalgamation as presented to it. The order of the Court sanctioning the scheme, the filing of the certified copies of the orders of the court before the Registrar of Companies, the allotment or shares etc. may have all taken place subsequent to the date of amalgamation/ transfer, yet the date of amalgamation in the circumstances of this case would be January 1, 1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal v. The Bank of Upper India Ltd. [AIR 1919 PC 9].'

and even more relevant to the context is

'15. Counsel for the Revenue contended that if the aforesaid view is adopted when several complications will ensue in case the Court refuses to sanction the scheme of amalgamation. We do not see any basis for this apprehension. Firstly, an assessment can always be made and is supposed to be made on the Transferee Company taking into account the income of both the Transferor and Transferee Company. Secondly, and probably the more advisable course from the point of view of the Revenue would be to make one assessment on the Transferee Company

> *taking into account the income of both of Transferor or Transferee Companies and also to make separate protective assessments on both the Transferor and Transferee Companies separately. There may be a certain practical difficulty in adopting this course inasmuch as separate balance-sheets may not be available for the Transferor and Transferee Companies. But that may not be an insuperable problem inasmuch as assessment can always be made, on the available material, even without a balance- sheet. In certain cases, best-judgment assessment may also be resorted to. Be that as it may, we need not purpose this line of enquiry because it does not arise for consideration in these cases directly.'*

The decision in re Usha International Ltd is on similar lines arising from a dispute on refund claimed in consequence of service being obliterated by merger after tax had to be paid owing to separate de facto, though not de jure, existence. It does not, therefore, appear that the specifics of the present dispute are amenable to disposal on the basis of the determination cited supra by Learned Authorized Representative. Parking that aspect for the nonce, we address ourselves to the charging provision invoked in the impugned order, viz., section 66A of Finance Act, 1994. In its 'no frills' declaration, liability to service tax arises when the components of any of the 'taxable services' enumerated in section 65(105) of Finance Act, 1994 can be clearly deduced from an identified activity undertaken for consideration by an overseas provider in transaction with a domestic entity. The case of Revenue is that M/s Satellite Television Asian Region Ltd, Hongkong was, on behalf of the appellant, paid by M/s Star Asia Region FZ LLC, M/s Star Asian Movies Limited and M/s Star Television Entertainment Ltd for use of their mark in the channels of the appellant. These marks were visibly exhibited on television screens eyeballed by viewers and it is moot if the deployment of the mark for which the impugned consideration was remitted is also done on behalf of the appellant who was a sub-agent for those who are deemed to have made the payment to M/s Satellite Television Asian Region Ltd, Hongkong. Indeed, on careful perusal of the impugned order, it is noted that the nature of service in the agreement entered into by the three amalgamating entities outside India with M/s Satellite Television Asian Region Limited, Hong Kong has not been determined by the adjudicating authority who has presumed that the consideration entered in the final accounts is for taxable service. Such determination is necessary as the agreement before the commencement of the amalgamation scheme was between two entities outside India and entirely beyond the ken of tax authorities. The absence of any efforts in that direction is demonstrative of any exercise undertaken to find fitment within the three-way determination envisaged in Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 without which section 66A of Finance Act, 1994 cannot be invoked.

10. In any case, deeming that the amalgamated entity came into being on 1st April 2009, the status of the amalgamating entities outside India needs to be borne in mind and it is not seen from the records that they have ceased to operate at those locations after the

appointed date. That would have been impossible considering that the effective merger occurred in April and May 2010. Therefore, the consequence of deemed amalgamation from 1st April 2009 would be to deem the foreign companies as overseas offices of the appellant. Section 66A(2) of Finance Act, 1994 and the Explanation therein make it abundantly clear that, for the purposes of the levy thereof, such units are to considered as independent; in such circumscribing circumstances, the procurement of services outside India by the branch or office of an Indian assessee does not fall within the purview of rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006. The Tribunal, in re 3iInfotech Ltd, has held that

> *'9. It was submitted on behalf of appellant that Section 66A(2) of Finance Act, 1994 segregates the entity in India from its business in another country for the purposes of taxation which disaggregation should also govern the commercial independence of each other. This was held to be so in re British Airways thus:*
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> > *'31. In this case, as is clear from the RBI's letter, BA, India are a branch office of 'BA, U.K.' permitted for operating air service. There is nothing in this letter from RBI from which it can be inferred that the branch office is only a temporary establishment for some limited purpose. A temporary establishment in India of a Company based abroad would be that establishment which is for a particular project after completion of which, it would get wound up. The 'BA, U.K.' have been allowed by RBI to set up branch office in India for operating air services subject to conditions as mentioned in the letter and the RBI's letter does not mention any period of validity of the permission or that the permission to set up branch, once granted, cannot be renewed. Therefore, the Department's contention that branch office of 'BA, U.K.' in India is not a permanent establishment is without any basis. The appellant BA, India, therefore have to be treated as a branch office in India of 'BA, U.K.' and in terms of Explanation to Section 66A, BA, India, would have to be treated as 'Business Establishment' of 'BA, U.K.' in India, which as discussed above, has to be treated as a 'Permanent business establishment' of BA, U.K. in India. By virtue of sub-section (2) of Section 66A, BA, India, who are a permanent business establishment in India of 'BA, U.K.' (head office), are to be treated as a person separate from the head office and they cannot be treated as part of the head office for the purpose of Section 66A. In this case, there is no dispute that:- (a) agreements are between 'BA, U.K.' and the CRS/GDS companies (located outside India and not having any branch or business establishment in India); and (b) the entire payment to CRS/GDS Companies have been made directly by the head office located outside India and no part of payment has been made by the branch office i.e. BA, India.*
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> > *xxxxxxx*
> >
> > *In my view, as discussed earlier paras, for the purpose of Section 66A, the airline head office - 'BA, U.K.' and its Indian branch office - BA, India cannot be treated as one entity in view of the provisions of Section 66A, but have to be treated as two different persons. Therefore, it would be wrong to treat the services received from CRS/GDS Companies by 'BA, U.K.', as the services received by their Indian branch-BA, India. Similarly the payments made to CRS/GDS companies by 'BA, U.K.' cannot be treated as payments made to CRS/GDS Companies by BA, India or on behalf of BA, India, unless it is proved that the services provided by CRS/GDS Companies were Indian branch specific services which satisfied the business needs of BA, India and the role of 'BA, U.K.' was of facilitator only.*
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> *Ld. Member (Technical) has also discussed in para-31 of the proposed order as to how the British Airways, India a branch office of British Airways, U.K. cannot be considered as a temporary establishment. The same is not for a particular project after the completion of which the same would get wound up. The same has been specifically permitted by RBI to carry on the air transportation activities and has to be held as a permanent establishment, in which case on account of the provisions of Section 66A, it has to be treated as a person separate from its head office.'*

It is the counter-argument of learned Authorized Representative that the Tribunal in re Torrent Pharmaceuticals Ltd. has determined the specific purpose of Section 66A(2) of Finance Act, 1994 as :

> *'5.5 Section 66A (1) above is talking of service provider and service recipient as 'persons' which has to mean as different business persons. Section 66A(2) and its Explanation I only make a clarification and to fix service tax liability on recipient of services under reverse charge mechanism that both the permanent establishments in India and abroad of a business person are to be treated as separate persons. The above clarification/distinction made in Section 66A in our opinion is only for making an identification to determine whether a service is provided and consumed in India or abroad. It is an accepted legal position that one cannot provide service to one's own self. If the 'permanent establishment' of the appellant abroad is treated as a service provider to its own head office in India then it will amount to charging service tax for an activity provided to one's own self. Similarly placed branches of the appellant undertaking similar activities in India will not be held so. Therefore, a comprehensive reading of Section 66A of the Finance Act, 1994, a permanent establishment situated abroad as a 'separate person', will be understood to have been prescribed only to determine the provision of service whether in India or out of India. Theoretically it could be possible that a person carrying business through a permanent establishment abroad may like to pay lower rate of local VAT/GST abroad to avoid service tax payment in India by showing the services to have been availed abroad. However, there is no likelihood of such avoidance in case of an assessee who is eligible to Cenvat credit in India for the service tax payable in India for which the assessee is entitled to Cenvat credit. It is also not the case of the of the Revenue that appellant is not capable of utilising Cenvat credit admissible as they have paid more than Rs.12,000 crores as taxes during the periods 2007-2008 to 2011-2012.'*

For a clearer appreciation of Section 66A(2) of Finance Act, 1994, we must place it in the context of the status of appellant as an 'export oriented unit' and the nature of the transaction that were subject to tax in the impugned order. In re British Airways, the issue for consideration was whether the existence of a business establishment of a foreign airline in India was sufficient to fasten tax liability on 'reverse charge' on consideration paid to foreign service provider arising from agreement of the overseas headquarters with the service provider. In re Torrent Pharmaceuticals, the issue for consideration was whether the services rendered by overseas branch was liable to tax owing to the disaggregation of branch and headquarters by Section 66A(2) of Finance Act, 1994. The present dispute is on entirely different footing, viz., that the payment for service rendered by foreign service provider, though claimed to be effected by branch in Dubai, was, in effect, made by the appellant. We draw a distinction in designating the Indian operation as appellant and the Dubai operation as branch.

10. We have addressed this issue in our decision in re Tech Mahindra which examined the nature of overseas branches of a software exporting entity headquartered in India. Having considered the provisions of Section 66A(2) of Finance Act, 1994 and the role of the overseas branches, we held that the symbiotic business and structural relationship is not susceptible to interpolation into the specific context of Section 66A and each transaction of the overseas branch would have to be scrutinized to ascertain if taxable service has been rendered by branch to headquarters and vice versa. The impugned order has overlooked the requirements of accounting standards which mandates that financials of the branch are to be included in the financials of the corporate entity that has established the branch. Such inclusions owing to accounting standards do not suffice to conclude that services were rendered by foreign service providers to the Indian headquarters. No effort has been undertaken by adjudicating Commissioner to ascertain the nature of the transactions for which payments were made by branch in Dubai and the demand in the impugned order lacks appropriate robustness in consequence.

11. Even if the payments are attributable to service rendered by foreign service providers to the appellant, the scope of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 needs ascertainment. We refer to our decision in re M/s. Tech Mahindra Ltd. wherein we have held that

> *'21. From the above, it is apparent that mere identification of a service and the legal fiction of separate establishment is not sufficient to tax the activities of the branch. The very existence of a branch presupposes some kind of activity that benefits the primary establishment in India and the organizational structure inherently prescribes allocation of financial resources by the primary establishment to the branch to enable undertaking of the prescribed activity. The books of accounts and statutory filings do not distinguish one from the other. The application of Finance Act, 1994 to such a business structure within India does not provide for a deemed segregation. Such a legal fiction in relation to overseas activities should, therefore, have a reason.*
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> *22. Section 66A of Finance Act, 1994 does not prescribe promulgation of any Rule for its administration. The two sets of Rules extracted supra are framed under the general provision in section 94 of Finance Act, 1994. Moreover, the Rules draw upon section 93 of Finance Act, 1994 in a manner akin to Export of Service Rules, 2005. It is noticed that the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 also mirrors the Export of Service Rules, 2005. That, however, cannot be taken as intent to tax the inflow of service merely because of a corresponding exemption accorded to the outflow of services. Reference to section 93 as an authority for prescribing the Rules would make it appear that the purpose of the said two sets Rules is to exclude from tax such services that do not fall within the three classifications predicating the import of service. The residuary provision in the Rules of 2006 make it clearly that such services have to be received by a recipient located in India for use in relation to business or commerce. The provisions of the successor Rules are no different.'*

We note that Section 66A of Finance Act, 1994 is a special enabling provision engineered to tax import of services, both to countervail the taxing of domestic transactions and to afford a national treatment to the service, and the determination of taxability is with reference to the Rules supra. The Rules draw its origin also from the

exemption powers devolving on the Central Government under Section 93 of Finance Act, 1994; accordingly, any situation that is not envisaged in the specific framework of taxability in Rule 3 is beyond the ambit of tax. The impugned order has erred in merely relying on the provisions of Section 66A(2) of Finance Act, 1994 and the non-exclusion of Section 65(105)(zzb) of Finance Act, 1994 from Rule 3 to conclude that tax liability arises.

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13. The other crucial aspect is receipt of service for use in relation in business or commerce which would, in most circumstances, be the key to determine if service was rendered to the recipient. There is no doubt that, on export, the scheme of taxation divests the tax element. Services rendered by foreign provider are subject to tax by the deeming fiction in Section 66A of Finance Act, 1994 that recipient is the provider of the service. The objective of taxing such services in relation to domestic activities of a recipient is well within the scheme of levy of service tax. Levy of tax through Section 66 of Finance Act, 1994 on all domestic entities receiving services from domestic providers is also within the scheme of taxation of services because the service is not attributable, at that stage, to domestic consumption or exports. Hence Cenvat Credit Rules, 2004 provide for monitoring of availment and grant of refund to exporters subsequent to discharge of tax liability. However, utilization of services which are patently in relation to goods/ services that have already been exported, it goes against the grain of procedural simplicity to collect the tax by deeming fiction merely for refunding it subsequently. From this it would appear that the reference to 'business or commerce' in Rule 3(iii) in Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 is restricted to 'business and commerce' in India not to 'business and commerce' outside India. We find no allegation in the notice or conclusion in the impugned order that service have not been used for business or commerce outside India.'

11. The impugned order has failed to identify the 'taxable service' that the erstwhile foreign entities had obtained from the foreign service provider without which the test of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 is not met. The adjudicating authority has failed to consider the deemed demutualization of amalgamated entity and amalgamating entities for the period prior to effective merger and has superficially applied the appointed date conundrum to the 'no brainer', and default, articulation in section 66A of Finance Act, 1994 without taking in the entire canvass of this special provision of law to charge tax on specifically intended transactions.

12.** The impugned order has failed to be in compliance with the mandate of section 66A of Finance Act, 1994 warranting it to be set aside. We do so and allow the appeal.**"

9. In view of the detailed findings rendered in the above order of the Coordinate Bench, we find that the impugned order of the Commissioner holding that the services have been received by the

appellant in as much as the three foreign companies have merged into the appellant with effect from 01.04.2009, and that the services being listed in Rule 3(iii) of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, thus such services are taxable when received by a recipient located in India for use in business or commerce, is not legally sustainable.

10. On the basis of above discussions and findings recorded in the preceding paragraphs, we are of the considered view that the impugned order of Commissioner of CGST & Central Excise, Mumbai Central, Mumbai confirming the adjudged demands are liable to be set aside as being not sustainable in law and therefore the appeals filed by the appellants deserve to be allowed.

11. In view of the above, we set aside the impugned order passed by the Commissioner of CGST & Central Excise, Mumbai Central, Mumbai Zone, and allow the appeals of appellants with consequential relief.

(Order pronounced in court on 08.06.2023)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha