(2001) 04 MAD CK 0015

In the Madras High Court

Case No : Writ Petition No''s. 18291 of 1996, 10611 of 1998, 1545 of 1999, 5430, 20213 and 20486 of 1999 and W.M.P. No''s. 25521 of 1996, 16226 of 1998, 2204, 7923, 29682 and 30088 of 1999

Advertising Club and Others APPELLANT

Vs

Central Board of Excise and Customs and Others RESPONDENT

Date of Decision : 30-04-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)
Finance Act, 1994 — Section 65, 65(48), 66, 67

Citation : (2001) 77 ECC 322 : (2001) 131 ELT 35 : (2003) 264 ITR 386 : (2001) 2 MLJ 656 : (2006) 2 STR 457 : (2007) 6 STT 196

Hon'ble Judges : V.S. Sirpurkar, J;A. Kulasekaran, J

Bench : Division Bench

Advocate : N.B.N. Swamy, Md. Ibrahim Ali, B.S. Gnanadesikan, Kempraj and K.Uppili, for the Appellant; M. Chandrasekaran, for K. Veeraraghavan, for the Respondent

Final Decision : Dismissed

Judgement

V. S. Sirpurkar, J.—This judgment shall dispose of W. P. No. 1545 of 1999, etc., since all the writ petitions involve a common question

regarding the ""constitutional validity"" of the ""service tax"" levied on the ""taxable service"" provided to a client by an ""advertising agency"" in relation to

advertisements"".

All the petitioners herein are interested in the business of advertisement. Some of them are ""advertising firms"" while the others are owning hoardings

in the city for the purposes of exhibiting the advertisements. Henceforth, the petitioners would be referred to in this judgment as ""advertising

agency"" for the sake of brevity.

By the Finance Act, 1994, the ""service sector"" was brought under the tax-net for the first time. The said Act was amended from time to time to

include the various services which were brought under the tax net. Under the scheme of the Act, the impost of the tax was against the persons who

provided the services and they had to collect and pay the same. Thus, this tax could be legitimately passed on to the customers, and more

particularly to the persons to whom the services were being offered.

2. The ""services"" offered by the ""advertising agency"" were included for the first time by Chapter VI of the Finance Act, 1997. The relevant

provisions, as they stand today, after all the amendments are as under :

65. Definitions. -- In this Chapter, unless the context otherwise requires,--

(1) ''advertisement'' includes any notice, circular, label, wrapper, document, hoarding or any other audio or visual representation made by means of

light, sound, smoke or gas ;

(2) ''advertising agency'' means any commercial concern engaged in providing any service connected with the making, preparation, display or

exhibition of advertisement and includes an advertising consultant ; (48) ''taxable service'' means any service provided,-- . . .

(e) to a client, by an advertising agency in relation to advertisements in any manner ;

66. Charge of service tax.--(1) On and from the date of commencement of this Chapter, there shall be levied a tax (hereinafter referred to as the

service tax), at the rate of five per cent. of the value of the taxable services referred to in Sub-clauses (a), (b) and (d) of Clause (48) of Section 65

and collected in such manner as may be prescribed.

67. Valuation of taxable services for charging service tax.--For the purposes of this Chapter, the value of taxable services, -- ...

(d) in relation to service provided by an advertising agency to a client shall be the gross amount charged by such agency from the client for services

in relation to advertisements ;

3. Leading arguments were addressed by Mr. N. B. N. Swamy, learned counsel appearing for the petitioner in W. P. No. 1545 of 1999 and his

arguments were adopted by the other learned counsel appearing for the petitioners in the other connected writ petitions.

The petitioners challenge these provisions on various grounds. Their first challenge relates to the ""legislative competence"" on the part of Parliament

to pass such a law. The contention is that the present tax amounts to a ""tax on advertisements"" and, therefore, would be covered under entry 55 of

the State List (List II).

It will be interesting to see the wording of entry 55 of the State List (List II), which reads as under :

55. Taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio or television.

In this behalf, our attention is also invited to entry 92 of the Union List (List I), which reads as under :

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

4. On this basis, a contention is raised that since all the advertisements are covered widely under the provisions of Section 65(48)(e) of the Finance

Act, this is nothing but a tax on all the other taxable services except those which are barred by entry 55 and, therefore, it was only a State

Government which has the ""legislative competence"" to levy such tax.

The second challenge to the constitutional validity of the impugned legislation is on the basis of Article 14 of the Constitution of India. The argument

is rather novel. The contention is that the Legislature has ""discriminated"" the advertising agencies like the petitioners vis-a-vis the press media and

the electronic media. The argument is that if a service is given as contemplated in the Act by the advertising agency, the advertising agency has to

pay the service tax. However, if such a client is served directly by the press media or the electronic media without the intervention of an advertising

agency though the client gets the identical service, the said press media or the electronic media is not taxed. This, according to learned counsel,

amounts to ""discrimination"" and, therefore, the provisions of the Finance Act are challenged on the ground that they contravene Article 14.

5. One other similar challenge for the ""discrimination"" is that in the matter of calculation of tax, the actual expenses towards the services regarding

the advertising are not excluded and the tax is charged on the ""gross amount"" charged by the advertising agency from its clients while, in the case of

other agencies such expenditure is allowed and is permitted to be deducted from the ""gross amount"" charged thereby, their tax liability is reduced

to a considerable extent. The case of the petitioners is that this also is arbitrary.

6. Mr. Chandrasekaran, learned senior counsel appearing on behalf of the respondents, argues that there is no question of this tax being beyond

the ""legislative competence"" of Parliament as the tax does not pertain to advertisements and it cannot be covered by entry 55, which is relied upon

by the petitioners. He further argues that this tax is of an entirely different nature and pertains only to the ""service sector"". According to learned

senior counsel, the ""service tax"" is entirely a different tax.

As regards the challenge regarding Article 14, learned counsel says that there is absolutely nothing discriminatory and that the service sectors like

the advertising agency form a different and independent class which can be brought under the tax net by Parliament and no complaint can be made

that the press media or the electronic media have not been brought under the service tax net. He points out that there is nothing comparable with

the services provided by the advertising agency, which is made taxable, and the services provided by the press media or the electronic media to

the clients. Learned counsel argues that the job done by the press media or the electronic media is not a ""service"" at all. Learned counsel further

argues that the nature of the tax and the constitutionality of the provisions cannot be determined from the ""permissible expenditure"" because that

amounts to the ""measure of tax"". Learned counsel also relies on the Division Bench judgment of the Gujarat High Court in Addition Advertising Vs.

Union of India, .

In this conflicting background, we will consider the rival claims.

In order to appreciate the contention that the service tax amounts to a tax on advertisements, we will have to first go to the language of the

concerned provisions and then determine the ""pith and substance"" of the taxing provisions. If the pith and substance of the taxing provisions can be

covered by entry 55, then certainly the contention of the petitioners would be liable to be accepted. For that purpose, the widest possible scope

will have to be given to the entry, which is relied upon by the petitioners.

7. We have already referred to the background of the ""service tax"". In this behalf, it will be better to see that the concept of ""service tax"" is a totally

novel concept which was introduced for the first time in the year 1994. Learned counsel for the respondent heavily relied on the address of the

then Finance Minister while introducing the concept of ""service tax"" for the first time.

In paragraph 87 of his speech, the then Finance Minister has referred to the fact that the ""service sector"", which accounts for 40 per cent. of our

Gross Domestic Product (GDF), was not subjected to taxation and that there was a need to widen the base for domestic indirect taxes. The

Finance Minister argued that there was no sound reason for exempting the service sector from taxation when ""goods"" are taxed and that in many

countries ""goods"" and ""services"" were treated alike for tax purposes. A reference was also made to the report of the Taxation Reforms Committee

suggesting tax on ""services"" for broadening the base of the indirect taxes. That is how the ""services"" offered to begin with by telephones, non-life

insurance and stock brokers came to be charged at the rate of 5 per cent. of tax. Eventually, a number of other services came to be included which

services were hitherto untaxed. This speech can be used by us to see the ""object of the service tax"" which would help us to understand the real

nature thereof. In this behalf, the observations of the apex court in the decision in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another,

are apposite. The apex court has approved the reference to the speech of the mover of the Bill to ascertain the object behind the legislation. The

relevant observations are found in paragraph 8 (AIR 1981 SC 1930) of the judgment, which are as under [1981] 131 ITR 608 :

Now, in this connection the speech made by the Finance Minister while moving the amendment introducing Sub-section (2) is extremely relevant,

as it throws considerable light on the object and purpose of the enactment of Sub- section (2). The Finance Minister explained the reason for

introducing Sub-section (2) in the following words :

''Today, practically every transaction of sale of property is for a much lower figure than what is actually received. The deed of registration mentions

a particular amount, the actual money that passes is considerably more. It is to deal with these classes of sales that this amendment has been

drafted.... It does not aim at perfectly bona fide transactions . . . but essentially related to the day-to-day occurrences that are happening before our eyes in regard to the transfer of property. I think, this is one of the key sections that should help us to defeat the free play of unaccounted

money and cheating of the Government.''

Now, it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is

being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the mover of the Bill explaining the

reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the

legislation and the object and purpose for which the legislation was enacted. This is in accord with the recent trend in juristic thought not only in

Western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically

relevant should be admissible. In fact there are at least three decisions of this court, one in The Sole Trustee, Lok Shikshana Trust Vs. The

Commissioner of Income Tax, Mysore, , the other in Indian Chamber of Commerce Vs. Commissioner of Income Tax , West Bengal II, Calcutta,

and the third in Additional Commissioner of Income Tax, Gujarat Vs. Surat Art Silk Cloth Manufacturers Association, where the speech made by

the Finance Minister while introducing the exclusionary clause in Section 2, Clause (15), of the Act was relied upon by the court for the purpose of

ascertaining what was the reason for introducing that clause. The speech made by the Finance Minister while moving the amendment introducing

Sub-section (2) clearly states what were the circumstances in which Sub-section (2) came to be passed, what was the mischief for which Section

52 as it then stood did not provide and which was sought to be remedied by the enactment of subsection (2) and why the enactment of Sub-

section (2) was found necessary. It is apparent from the speech of the Finance Minister that Sub-section (2) was enacted for the purpose of

reaching those cases where there was understatement of consideration in respect of the transfer or to put it differently the actual consideration

received for the transfer was, ''considerably more'' than that declared or shown by the assessee, but which were not covered by subsection (1)

because the transferee was not directly or indirectly connected with the assessee. The object and purpose of Sub-section (2), as explicated from the speech of the Finance Minister, was not to strike at honest and bona fide transactions where the consideration for the transfer was correctly

disclosed by the assessee but to bring within the net of taxation those transactions where the consideration in respect of the transfer was shown at a

lesser figure than that actually received by the assessee, so that they do not escape the charge of tax on capital gains by understatement of the

consideration. . . .

8. Be that as it may, it is clear that this is a ""tax on service"" and is entirely independent of and different from the existing taxes covered by the taxes

provided in List II. That itself would suggest that this cannot come within the arena of entry 55 of List II also.

When we consider the language of the provisions and more particularly Section 65(48)(e), the wording is more than clear to suggest that it is a

service"" provided to a client by the ""advertising agency"" in relation to advertisements, which is made taxable. Section 65(1) and (2) aptly suggests

as to what ""advertisement"" means and how and in what manner could an advertisement agency provide any service. It is to be noted that any

service, which is connected with the making, preparation, display or exhibition of advertisements, is taken into the tax net with the aid of Section

65(48)(e). It cannot even distantly fall under entry 55 of the State List (List II).

In this behalf, learned counsel for the petitioners very fervently argue that if the advertisement is not floated or given, there would be no question of

the tax and, therefore, this tax has to be described as a ""tax on advertisements"". The wording of entry 55 does not support the contention. When

we read the provisions of Section 65(1) and (2) and Section 65(48)(e), it is clear that this tax does not depend upon the advertisement. Even if the

widest possible interpretation is taken of entry 55, it cannot amount to a tax on advertisement. The impost of the tax on advertisement would be

essentially on a person who gives the advertisement or the media which publishes such advertisement. We are not concerned with the subject here.

The present impost is, however, not on the person who gives the advertisement but the impost is on the agency, which is a commercial concern

and is engaged in providing the services connected with the making, preparation, display or exhibition of the advertisements in any manner--

whether it be a newspaper advertisement or a hoarding or an audio or video advertisement. The advertising agency uses its expertise in making or

preparing the advertisement so that it becomes an effective advertisement. It also decides as to where it should be displayed and on what

occasions it should be exhibited. It selects the place, time as also the media for flashing the advertisements. While considering the challenge to a

notification whereby the commission received by the advertising agency from the media was included in the ""gross amount"" charged by the agency

and was made taxable, a Division Bench of this court, to which one of us (V. S. Sirpurkar J.) was a party, repelled the challenge while considering

this aspect of the services given by the advertising agency and we would choose to rely on that judgment in explaining the task undertaken by and

the services provided by the advertising agencies. The tax under the present provisions is essentially only for the services and that is where it stands

wholly distinct, separate and away from the territory chartered by entry 55 of the State List (List II). That tax simply cannot be called a ""tax on

advertisements"".

9. Learned senior counsel also argues that even if this tax is held to be integrally connected with the advertisements even then, the celebrated

judgment in Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others, , would aptly cover because the

aspect of service would be entirely different from the aspect of a tax on advertisements. We have referred to that judgment in detail while

considering the constitutional validity of the service tax against ""tour operators"". We rely on that judgment of the Supreme Court. After all, a tax on

service in relation to an advertisement would be entirely different and be an independent aspect of the tax which is charged because of the

advertisement appears or exists. For the abovesaid reason we are of the opinion that the challenge regarding the ""legislative competence"" must fail.

As regards the challenge under Article 14, it was pointed out by learned senior counsel for the department that in the matters of taxation, the

Legislature has a ""discretion"" and such a discretion has always been recognised and approved by the apex court. Under the discretion, according

to learned counsel, it would be for the Legislature to decide as to which particular ""class"" was to be taxed and which not to be taxed even if it is

held that the services provided by the advertising agencies and the press and the electronic media are identical.

In the first place, let us first see where a person gets his advertisement flashed in the press media or electronic media, can it be said to be a service.

In our opinion, it could certainly not be said to be a service provided by the press media or electronic media. There is nothing done excepting

flashing a prepared advertisement by the press media or for that matter, electronic media. The decision as to how and in what format the

advertisement should be, how it should be projected, at what point of time it should be flashed, in which areas it should be exhibited or the manner

in which it should be drafted and exhibited has got nothing to do with the press media or electronic media. That would be the task of ""advertising

agency"" alone. Therefore, when we consider the situation where a client goes to the press media and asks for flashing of the advertisement and

such advertisement is flashed in the media, this cannot be deemed to be a service provided by that media to such a client. Similarly, when a person

approaches the electronic media and flashes an advertisement on the radio or television, as the case may be, the radio or television simply would

flash the advertisement as per the instructions of the person concerned but such person will not get the advantage of the expertise of the advertising

agency. Therefore, it cannot be said that the press media and electronic media provide the same service and, therefore, it cannot be complained

that they should also be brought in the tax net like advertising agencies. As we have already pointed out that there is ample discretion in the

Legislature, which discretion has been recognised and approved by the apex court in the celebrated decision in Federation of Hotels and

Restaurant Association of India v. Union of India , wherein the following paragraph would highlight the subject (headnote of AIR 1990 SC) :

It is now well settled that though taxing laws are not outside Article 14, however, having regard to the wide variety of diverse economic criteria

that go into the formulation of a fiscal policy, Legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc.,

for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile,

discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. A Legislature does not, as an old saying goes, have to tax everything in order to be able to tax something. If there is equality and uniformity within each group, the law would not be

discriminatory. The Legislature can exercise an extremely wide discretion in classifying items for tax purposes so long as it refrains from clear and

hostile discrimination against particular persons or classes.

We do not find any ""hostile discrimination"" being even distantly spelt out as against the advertising agencies.

10. It was tried to be suggested that the advertising agency makes some expenditure for preparation or display of exhibition of advertisements

perhaps the staff of the advertising agency has to undertake the travel, has to get the assistance of the artists who are required to be paid and some

times the agency has to spend enormously in preparation of a proper advertisement but, such expenditure is not exempted. Learned counsel invited

our attention particularly to the extract of a trade notice No. 1 of 1996-ST, dated October 31, 1996. This seems to have been issued by the

Mumbai Commissionerate. In paragraph 2 thereof, the Department has taken a stand that in relation to an advertising agency, the service tax is to

be computed on the ""gross amount"" charged by the advertising agency from the client for services in relation to the advertisements, which would

include the gross amount charged by the agency from the client for making or preparing the advertisement material irrespective of the fact that the

advertising agency directly undertakes the making or preparation of advertisement or gets it done through another person. It is then pointed out in

the same notification that the amount paid by the advertising agency for the space and time in getting the advertisement published in the press media

or the electronic media would not be includible in the value of taxable service. However, the commission earned by it would undoubtedly be

includible in the gross amount charged. We have already pointed out that we have already taken the view that such commission can be legitimately

included. In paragraph 3 of this notification, the department has taken a view that any such expenditure cannot be excluded and would be taxable

as that would be the ultimate amount which would be paid by the client to the advertising agency for its services. It is also explained that any

market survey or research conducted by the advertising agency for the purposes of advertising involves expenditure and such an expenditure would also be included in the gross amount charged. Learned counsel points out that as against this there are some services wherein a concession

is given by deducting the expenditure incurred by an agency giving the services. Our attention was invited to the ""manpower recruitment agency

covered by Section 65(24) which means any commercial concern engaged in providing any service, directly or indirectly, in any manner for

recruitment of manpower, to a client. Our attention was invited to an extract of a trade notice No. 7/97-ST, dated July 4, 1997, issued by the

Mumbai Commissionerate wherein in paragraph 1.3 the following portion was relied upon :

1.3. Service tax on manpower recruitment agency shall be the gross amount charged to the client for services rendered in relation to the

recruitment of manpower excluding the amount incurred by the manpower recruitment agency on behalf of the client towards expenses which are

reimbursed on actual basis.

From this, learned counsel urges that in the matter of calculations there is a discrimination.

11. This was opposed by learned counsel appearing on behalf of the respondent on the ground that no fault can be found with the taxing provision

with reference to the ""measure of the tax"". Learned counsel argues that as to which would be and what would be the deductible amount would

essentially depend upon the words of the statute. In case of the advertising agency, learned counsel points out that if, on the basis of the evidence,

the concerned agency is able to prove that the amount charged would not come within the gross amount charged or any amount charged is actually

separate and independent of the gross amount charged or not in relation to an advertisement or any service offered by it then, there would be no

question of such an amount being charged for the purposes of tax. Similarly, learned counsel pointed out that in the matter of a manpower

recruitment agency also the wording of Section 67(j) is identical and comparable to the wording in Section 67(d). Mr. Chandrasekaran, learned

senior counsel, therefore, argued that it would be the discretion of the concerned authorities to decide as to what are the deductible amounts and

what are not the deductible amounts. Merely on the basis of the trade notices it could not be decided as to whether the provision itself is constitutional or otherwise. Learned counsel points out that the nature of the tax cannot be ascertained on the basis of its measure. The law

regarding this proposition is well-settled. In our opinion, learned counsel is right when he says the constitutional validity of the taxing provision

could not be decided on the basis of the ""measure of the tax"". Even otherwise, in our opinion, the question raised by learned counsel would not be

apposite to decide the constitutional validity of the provisions much less under Article 14 of the Constitution of India. We do not see anything

discriminatory"" in the relevant provisions. Learned counsel for the respondents invited our attention to the Division Bench judgment of the Gujarat

High Court in Addition Advertising Vs. Union of India, , wherein the provisions were challenged on the ground of violation of Article 14 and

Article 19(1)(g) of the Constitution of India as also on the ground of ""legislative competence"". The challenges were repelled by the Division Bench.

We are in respectful agreement with the Division Bench in holding that the taxing provisions cannot be faulted on the touchstone of Article 14 or on

the principle of ""legislative competence"".

In our view, the petitions have no merit and must be dismissed. They are accordingly dismissed. No costs. Connected W. M. Ps. are closed.

