

(2001) 04 MAD CK 0092

In the Madras High Court

Case No : Writ Petition No. 1545 of 1999, etc. 30 April 2001

Advertising Club

APPELLANT

Vs

Central Board of Excise and Customs

RESPONDENT

Date of Decision : 30-04-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g)

Citation : (2002) 121 TAXMAN 287

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

Bench : Full Bench

Advocate : N.B.B. Swamy, Md. Ibrahim Ali, B.S. Gnanadesikan, Kempuraj and K. Uppill, for the Assessee M. Chandrasekaran and K. Veeraraghavan, for the Revenue, for the Appellant;

Judgement

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".

2. 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.

3. BY the Finance Act, 1994, the "service sector" was brought under the tax-net for the first time. The 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 whom the services were

being offered.

4. 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;

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(48) "taxable service" means any service provided,

(a) to (d)**

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(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 service 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,-

(a) to (c)**

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(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;

5. Leading arguments were addressed by Mr. N.B.N. Swamy, the 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.

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

7. 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."

On this basis, a contention is raised that since all the advertisements are covered widely under the provisions of section 65(48)(e) this is nothing but a tax on all the other taxable services except those which are barred by Entry 55 and, therefore, it is only a State Government which has the "legislative competence" to levy such tax.

8. 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 the learned counsel, amounts to "discrimination" and, therefore, the provisions of the Act are challenged on the ground that they contravene article 14.

9. 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 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.

10. Mr. Chandrasekaran, the learned senior counsel appearing on behalf of the

respondents, argues that there is no question of this tax being beyond the "legislative competence" of the Parliament as the tax does not pertain to the advertisements and it cannot be covered by Entry 55, which is relied upon by the petitioners. He further argues that this tax is of entirely different nature and pertains only to the "service sector". According to the learned senior counsel, the "service tax" is entirely a different tax.

11. As regards the challenge regarding article 14, the 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 the 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. The learned counsel argues that the job done by the press media or the electronic media is not a "service" at all. The 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". The learned counsel also relies on the Division Bench judgment of the Gujarat High Court in *Addition Advertising v. Union of India* 1998 (98) ELT 14.

12. On these conflicting background, we will consider the rival claims.

13. 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, that widest possible scope will have to be given to the entry, which is relied upon by the petitioners.

14. 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. The 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.

15. 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 (hereinafter referred to as the GDP), was not subjected to the 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" are treated alike for the 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, 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 v. ITO AIR 1981 SC 1922 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 the judgment, which are as under :

8.....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, particularly every transaction of the 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 relates 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 provisions 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 is 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 the 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 sub-section (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 sub-section (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...." (p. 1930)

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 the List II also.

16. When we "consider the language of the provisions and more particularly of 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 suggest 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).

17. In this behalf, the 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 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 to be a "tax on advertisements".

18. The 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 Hotels & Restaurant v. Union of India* AIR 1990 SC 1637 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 details while considering the constitutional validity of the service tax against the "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 an advertisement appears or exists. For the abovesaid reason we are of the opinion that the challenge regarding the "legislative competence" must fail.

19-20. As regards the challenge under article 14, it was pointed out by the 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 the 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.

21. 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 the 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 of Federation of Hotels & Restaurant case (supra), wherein the paragraph would highlight the subject :

"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 item 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.

22. It was tried to be suggested that the advertising agency makes some expenditure for preparation of display of exhibition of advertisement, 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. The learned counsel invited our attention particularly to the extract of a Trade Notice No. 1 of 1996-ST, dated 31-10-1996. 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 print 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 expenditures would also be included in the gross amount charged. The 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 4-7-1997 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, the learned counsel urges that in the matter of calculations, there is a discrimination.

23. This was opposed by the 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". The 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, the 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 all by 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 such an amount being charged for the purposes of tax. Similarly, the 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. The 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, the 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 the 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 any "discriminatory" in the relevant provisions. The learned counsel for the respondents invited our attention to the Division Bench judgment of the Gujarat High Court in *Addition Advertising's ease* (supra) 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".

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