
(2001) 03 MAD CK 0016
In the Madras High Court
Case No : W.A. No. 1481 of 1997

Adwise Advertising Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 01-03-2001

Acts Referred:

Central Excises and Salt Act, 1944 — Section 37
Finance Act, 1994 — Section 65(16), 65(1A), 65(48), 67, 95

Citation : (2001) 131 ELT 529 : (2001) 2 MLJ 366 : (2006) 2 STR 375 : (2007) 6 STT 358

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

Bench : Division Bench

Advocate : Arvind P. Datar for R. Senthil, for the Appellant; V.T. Gopalan, Addl. Solicitor General for J. Madhanagopal Rao, Senior Central Govt. Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Sirpurkar, J.—This appeal is by the unsuccessful petitioner, whose petition challenging the Letter No. 341/43/96-TRU, dated 31-10-

1996, issued by the Central Board of Customs and Excise, New Delhi, was dismissed by the learned Single Judge. The letter, which is in the

nature of ""departmental instructions"", is challenged only insofar as a part thereof is concerned. That part declares that while the amounts paid by the

Advertising Agency"" for space and time in getting the advertisements published in the print media like Newspapers, Magazines, Journals, etc. or,

the electronic media like, Doordarshan, All India Radio, Private Channels, etc. Will not be includible in the value of the taxable service for the

purpose of levy of ""Service Tax"", however, the commission received by the Advertising Agency from the print media or from the electronic media,

as the case may be, would be includible in the value of the taxable service.

2. The main assault against this letter was that firstly, it was contradictory to Section 67(d) of the Finance Act, 1994 (hereinafter referred to as

The Act") and secondly, that the letter was providing something more and going beyond the real scope of the Act in defining the "Valuation of

taxable services" and was as such, bad in law. It was also tried to be suggested that such a circular could not be issued by the Government, which

had the effect of enlarging or changing the scope of the main provisions of the Act like Section 67(d) of the Act and that such power to change or

enlarge the scope of any provision of the Act existed only in the Parliament and as such, the letter/circular was ultra vires the powers of the

Government.

3. The learned single Judge has dismissed the writ petition on all counts. Hence, the present Appeal. Before we take up the matter for

consideration, few facts would be necessary and so also a glimpse of the relevant and connected provisions of the Act. First facts.

4. The petitioner is an Advertising Agency. It provides services connected with the making, preparation, display or exhibition of advertisements in

the print media like Newspapers, Magazines, Journals, etc. as also in the electronic media like Doordarshan, All India Radio, Private Channels,

etc. For all that, the petitioner gets paid by its clients, in whose interest and at whose instance the said advertisements are published or flashed, as

the case maybe.

4.1. Chapter V of the Finance Act, 1994 introduced levying of tax on services. By amendments made in 1996, the levy of this service tax was

extended to the services provided by the Advertising Agencies also. This is how the petitioner came in the dragnet of "Service Tax".

4.2. It is an admitted position that the petitioner is a member of the "Indian Newspaper Society" as its "Accredited Agency". Under the rules of

Accreditation of this Society, the Accredited Agency can retain or would get 15% commission on the value of the advertisements floated by it. The

impugned part of the letter/circular containing the explanation relates to this commission only and tends to declare that this commission would also

be taxable though the actual cost of advertisement paid to the media would be excluded. At this juncture, it will be better to have a glimpse at the

relevant provisions of the Act.

4.3. Section 65(1A) defines ""Advertising Agency"" as under:

Advertising Agency"" means a commercial concern engaged in providing any service connected with the making, preparation, display or exhibition of advertisement and includes an advertising concern"".

(emphasis supplied)

Section 65(16)(d) defines ""Taxable Service"" in respect of the Advertising Agency. The provision runs as under:

65(16) ""Taxable Service"" means any Service provided, -

(a) ...

(b)...

(ba)...

(c)...

(d) to a client, by an advertising agency in relation to advertisement in any manner:

(e) ...

(emphasis supplied)

Section 67(d) reads as under:

67. Valuation of taxable services for charging service tax : - For the purpose of this chapter, the value of taxable services, -

(a)...

(b)...

(c)...

(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:

(e)...

(emphasis supplied)

4.4 The precise portion, which has been challenged from out of the circular is as follows :

4. It is further to be clarified that in relation to advertising agency, the service tax is to be computed on gross amount charged by the advertising

agency from the client for services in relation to advertisements. This would, no doubt, 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 advertisements or gets it done through another person. However, the amount paid, excluding their own commission, by the advertising agency for space and time in getting the advertisement published in the print media (i.e. Newspapers, Periodicals, etc.) or the electronic media (Doordarshan, AIR, Private Channels, etc.) will not be includible in the value of service tax for the purpose of levy of service tax. The Commission received by the advertising agency would however, be includible in the value of the taxable service.

(emphasis supplied)

We have deliberately emphasized some portion in the above paragraph to show that it was precisely that portion which was under challenge before

the learned single Judge and is being assailed before us also.

5. The first contention of the learned senior Counsel appearing on behalf of the appellant, Mr. Arvind P. Datar, Pertains to the power of the

Central Government to issue such a letter/circular. Learned Counsel contends and in our opinion rightly that if any such letter/circular is

contradictory to the language of the provisions of the Act or effectively enlarges its scope then, the Central Government cannot issue such circular

and it would be for the Parliament alone to do the same. Learned Counsel contends that u/s 37(b) of the Central Excise and Customs Act, the

instructions could be issued only for two purposes, viz., (i) uniformity and classification of goods; and (ii) with respect to the levy of excise duty on

such goods. The contention is that both these eventualities were not available for issuing the impugned circular.

6. The learned senior Counsel then contends that u/s 95 of the Finance Act, there is a scope for issuing the directions but, the said directions could

be issued only by means of a "Notification" in the official gazette and even that Notification was bound to be tabled before the parliament. Learned

Counsel contends that such a circular or letter, as the case may be, which has the effect of completely altering the scope of the statutory provisions

itself cannot just be issued in the manner it has been done by the Central

Government and even no such directions can be given in the garb of departmental instructions".

7. The argument is undoubtedly correct. It is a basic principle that the provisions of an Act of Parliament cannot be altered or contradicted or in any manner changed by "Departmental Circulars". However, we would be required to consider this question only if the petitioner/appellant is successful in establishing that the impugned circular/letter had such effect of completely altering the provisions. The argument by the learned Counsel is that this circular/letter completely changes the scope of Section 67(d) of the Act, which we have quoted above. The learned Counsel argues that the scope of the provisions of the Act cannot be allowed to be changed. We are in complement with the learned Counsel but, for that the learned counsel would have to establish first that the impugned letter/circular has, in fact, the effect of changing or contradicting or amending the provisions of Section 67(d) of the Act. It will be therefore, be our first endeavour to see as to whether the said letter/circular could be said to have anything contrary to the provisions of Section 67(d) or to any other provisions of the Act or would have the effect of enlarging the scope of Section 67(d) of the Act.

8. The learned Counsel firstly points out that there is nothing in the language of Section 67(d) of the Act, which require any further explanation. The section itself is self-explanatory. The learned Counsel argues that while providing for the value of taxable services, the section considers that value to be the "gross amount" charged by the appellant advertising agency from its clients for services in relation to the advertisements. The first argument is this that any commission which the advertising agency gets is strictly between the "advertising agency" and the "advertising media" and this contract has got nothing to do with the clients of the advertising agency. The learned Counsel says that Section 67(d) considers only the transaction between the "advertising agency" and "its clients" and, therefore, any transaction in between the advertising agency and the media agency like Newspapers, Doordarshan, AIR etc. would be outside the scope of Section 67(d). The argument is clearly incorrect for the simple reason that the language of the provision clearly provides that the value of the taxable services provided by the advertising agency would be the

gross amount"" charged by the advertising agency from its clients in relation to the advertisements published or flashed, as the case may be. Now it is obvious that the so-called 15% commission, which the advertising agency is entitled to get or actually gets by way of practice, is ultimately a part of the gross amount charged from the clients. The learned Counsel was also fair enough to admit this. Once it is clear that the said commission is nothing but a part of the gross amount charged by the advertising agency from its clients in relation to the advertisements, issued by it, it will be clear that such a commission would be part and parcel of that gross amount and cannot be independently reckoned as such.

9. It will be seen in this behalf that selection of, a particular print media or a particular electronic media would also be a part of the services

because the advertising agency would be expected to advise its clients as regards the media through which such advertisements should be flashed.

Thus, locating or selecting a particular media would be a ""Service"", by the advertising agency ""in relation to the advertisements"". Now, it is an

admitted position that the total amount, which is described as ""Gross Amount"" spent by the clients for such services is chargeable except to the

extent of the actual charges of the advertisement charged by the media because it is obviously not a service rendered by the advertising agency.

The amount, which is spent for flashing an advertisement in a particular print media or electronic media, cannot be said to have been paid towards

the services rendered by the advertising agency. It is simply a consideration paid to that print media or electronic media, as the case may be, for

flashing that advertisement. However, when an advertising agency gets some ""Commission"", though out of the consideration received by the media,

it is because that advertising agency has selected that particular media for flashing the advertisement, which is nothing but a ""Service"" by that

advertising agency. ""In relation to the advertisement given to the client"", in whose benefit the said advertisement is flashed. Therefore, we have no

hesitation to hold that any commission earned by the agency even from the advertising media, if it forms a part of the gross amount charged by such

agency from the clients in relation to that advertisement, could be included in the value of the taxable service. When we see the impugned

circular/letter, it explains precisely this position and nothing more. Therefore, it cannot be said that such a circular/letter has the effect of enlarging

the scope of Section 67(d) of the Act, as is argued. We are in agreement with the learned single Judge, who has by making a reference to Section

65(16) of the Act commented upon the "Taxable Service" and has pointed out that the taxable service by an advertising agency is the service

provided to its clients in relation to the advertisements in any manner. We have already shown above that even "selecting or locating a particular

print media or electronic media" for flashing a particular advertisement would amount to a taxable service" by the advertising agency and any

commission earned" by it on that account even from such print media or electronic media, if it forms a part of the "Gross Amount" charged and

spent by the client, would be covered in Section 67(d) of the Act.

10. The learned senior Counsel then drew our attention to some other provisions of the Act and pointed out that whenever it is intended to include

the commission paid to the taxpayer into the value of taxable service, the legislature has specifically provided explicitly. The learned Counsel drew

our attention to the provisions of Section 67(a) and (k) of the Act. According to the learned Counsel, the language of that section is worth noting.

Section 67(a) of the Act reads as under :

67. Valuation of taxable services for charging service tax, -

(a) in relation to service provided by a stockbroker, shall be the aggregate of the commission or brokerage charged by him on the sale or purchase

of securities from the investors and includes the commission or brokerage paid by the stockbroker to any sub-broker.

(emphasis supplied)

From this, the learned Counsel contends that the brokerage paid by a stockbroker to any sub-broker has been specifically included and for that

purpose, the language of the section is specific. Such language is not to be found in contradistinction to this section in the concerned sub-section

(d). The learned Counsel also relied on the specific language of Section 67(h) and (k) of the Act; which reads as follows :

(h) in relation to service provided by a steamer agent to a ship line, shall be the gross amount charged by such agent from the shipping line for

services in relation to a Ship's husbandry or dispatch or any administrative work related thereto in relation to the booking, advertising or canvassing

of cargo, container feeder services, including the commission paid to such agent.

(k) in relation to service provided by an air travel agent to its customer, shall be the gross amount charged by such agent from the customer for

services in relation to the booking of passengers travel by air excluding the airfare but including the commission, if any, received from the airline in relation to such booking"".

(emphasis supplied)

The learned Counsel from this says that in relation to services provided by a steamer agent to a shipping line though it is the gross amount charged

by such agent from the shipping line for services in relation to a ship's husbandry or dispatch or any administrative work related thereto or in

relation to the booking, advertising or canvassing of cargo, container feeder services, including the commission paid to such agent, which is deemed

to be the value of the taxable service. The language of the section specifically provides that any commission earned by the agent would also be

included in the value of the taxable service. According to the learned Senior Counsel similar is the provision relating to the ""Air Travel Agents"" also.

11. There can be no dispute that there is such a specific language but, we cannot ignore firstly the total difference in the taxable service as provided

by Section 67(a), (h) and (k) on one hand and Section 67(d) on the other. The very nature of those services is different and again, where the

language of Section 67(d) of the Act, itself is clear and beyond any ambiguity so as to include any kind of commission earned by the advertising

agency as a part of the gross amount charged by that agency from its clients then, there would be no question of our looking to the other provisions

of the same Act for interpretation. We do not think that it would be necessary for us to fall back upon some other provisions of the Act, though of

the same Act, where the interpretation of Section 67(d) is absolutely clear and unambiguous. If the concerned circular had repeated something

which was axiomatic, it cannot be said that the said Circular has travelled beyond the scope of Section 67(d) of the Act.

12. The learned Additional Solicitor General, Mr. V.T. Gopalan, Vociferously supported the circular and contended that there is nothing in the

Circular which overrides the Act. He also pointed out that there was nothing binding about this circular and it can never be held to be binding on

the Courts or authorities. The learned Counsel pointed out that unless such a

specific case was brought in, it was futile to consider the scope of this circular. According to him, the writ petition itself was premature. The learned Counsel further argued that the very language of Section 67(d) of the Act was extremely to admit of any doubt. Besides this, the learned Counsel also took us to the definition of ""advertising agency"" and pointed out that a commercial concern which provided any service connected with the making, preparation, display or exhibition of advertisements would be held to be the advertising agency. The learned Counsel, therefore, argues and in our opinion rightly that selecting or locating a particular print media or electronic media for display or exhibition of advertisements would be a part of service provided by the advertising agency and if it gets paid for that purpose by way of a commission, it would be added to the value of the taxable service. The learned Counsel pointed out that similar is the language of Section 65(48). In view of our discussion, we would choose to agree with the learned single Judge, who has accepted the contentions on behalf of the state.

13. The learned senior Counsel for the appellant then relied on the law laid down by the Apex Court in Kerala Financial Corporation Vs. Commissioner of Income Tax, . The judgment is stated only for the purpose of canvassing that circulars of the Central Board of Direct Taxes cannot detract from or override the provisions of the Act. We have absolutely no difficulty on this proposition, but, we have to point out that even if this can be said to be a circular under the Act, it does not have the effect of overriding or detracting from any of the provisions of the Act. The judgment is, therefore, of no use to the learned Counsel.

14. In Gestetner Duplicators Pvt. Ltd. Vs. Commissioner of Income Tax, West Bengal, the learned senior Counsel relied on paragraph 10. This was again a case where the question of the binding nature of the circular was before the Apex Court and the Apex Court held in paragraph 10 that a circular or for that matter a view expressed by the Central Board of Revenue cannot detract from the legal position. In that case, the question was what is the effect of the circular issued on the real meaning of the term ""Salary"" and it was held that the Courts would choose to go with the real construction of the term ""Salary"" and not according to the view expressed by the Board or by the language of the said circular. We have

absolutely no difficulty with the proposition expressed. However, we have already pointed out that the circular in the present case is innocuous and

we are in agreement with the learned single Judge and the learned Judge also certified the circular to be innocuous.

14. In short, there is no merit in the appeal is ordered to be dismissed but without any orders as to the costs.