

(2021) 01 CESTAT CK 0037

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 10185 Of 2019

Shah Publicity @Hash C.C.E. And S.T.-Surat-I

Date of Decision : 29-01-2021

Acts Referred:

Finance Act, 1994 — Section 65(3), 65(105)(e), 65(105)(zk), 66D, 66D(g), 66F(3), 67, 75, 78, 83
Central Excise Act, 1944 — Section 9D

Citation : (2021) 01 CESTAT CK 0037

Hon'ble Judges : Ramesh Nair, J;Raju, Technical Member

Bench : Division Bench

Advocate : Hardik Modh, Ghanshyam Soni

Final Decision : Allowed

Judgement

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1. The issue involved in the present case is whether service rendered by the appellant is included in the expression of "selling of space of time slots,

for advertisement other than advertisements broadcast by Radio or Television" as placed in the negative list of service provided under Section 66D,

of the Finance Act, 1994 with effect from 01.07.2012 or not.",

1.1 The brief facts of the case are that the appellant did not discharge liability of Service Tax for the period starting from 01.07.2012 upto 30.09.2014,

by considering that service provided by them fall under negative list of Services under above category. An inquiry was initiated by the Headquarter,

Anti Evasion Branch of Surat-I Commissionerate against the appellant. After a detail investigation and collecting various documents viz. Form 26AS,"

ST-3 Returns and payment of Service Tax, Audited Balance Sheet, Bills issued for relevant period alongwith Work Order, the investigation was of the",

view that the appellant is not merely selling/renting of bare spaces to their

clients but providing additional services to its customers for displaying their, advertisements on the hoardings and kiosks and therefore, liable to service tax. Investigation also recorded statements from the partner of the", appellant Shri Yashwant Shah and contended that as per the statement and the statements taken from four customers, it reveals that the appellant is", engaged in providing the Advertising Services to their clients which is liable for Service Tax and does not fall under the Negative list. After detail, investigation a Show Cause Notice dated 13.06.2017 was issued invoking extended period. After considering the detailed reply submitted by the, appellant and providing Personal Hearing, the adjudicating authority passed the impugned order confirming the charges and allegation levelled in the", Show Cause Notice and demand of Service Tax, Interest and Penalty as proposed in the Show Cause Notice was confirmed. Therefore, the present", appeal filed by the appellant.,

2. Shri Hardik Modh, Learned counsel appearing on behalf of the appellant filed a detailed written submission on 26th December, 2020 which is taken", on record and on the basis of such submission he explained in detail the nature and model of the business of the appellant. He submits that the, consideration is charged on the basis of various parameters such as time period for displaying the advertisement, Site of the hoardings, location, etc.", He submits that the appellant is not involved in creating the advertisement. The advertisement material such as flex banner are printed by the clients, itself or the appellant suggests the name of the vendors from his empanelment who are engaged in printing of flex banners and like articles. The, appellant is never engaged in creating idea or printing flex banners for displaying the advertisements. The scope of services provided by the appellant, is restricted only to selling of space for the advertisements and ancillary services. He further submits that the flex banner/printed material bought by, the customer needs to be mounted on the hoardings/Bill boards. The service of mounting may be done by other vendors or by the appellant on the, basis of the scope of agreement with the respective clients. Wherever, the service of mounting of flex banner is provided by the appellant, Service tax", at the applicable rate is collected and paid by them. He submits that as per the agreements with respect to customers it is the responsibility of the, appellant to maintain the hoardings/bill boards/kiosk, etc. so that the wear and

tear of the structure is taken care of at time to time and advertisement",
can be viewed by the public for the agreed period.,

2.1 He pointed out that as per the Para F(2) of the Tender document floated by Surat Municipal Corporation, it is mentioned that the applicant is",

awarded the tender is the owner of structures constructed on the spaces provided by the SMC and it is their responsibility to maintain such structures.,

The electricity connection is taken by the appellant making the advertisement visible at night for which electricity charges are paid by the appellant. As,

per the contract with the SMC, the appellant has to maintain the structure so that it does not cause any harm to the general public. He submits that no",

separate consideration is charged from the client for maintenance of the advertisements or electrification as the same are already included in the,

consideration charged for displaying of the advertisements. He further submits that at the end of the agreed term, either the contract is renewed or it",

gets expired. In case of renewal of contract no further activity is carried out by the appellant except considering the element of discount or price,

reduction, if any, demanded by the customers. However, in case of expiry of contract the advertisement material i.e. Flex banners of the clients are",

removed and printing material containing contact details of the appellant are again mounted on the hoarding/bill board/kiosk, etc. at the cost of the",

appellant so as to make the media space available for new client.,

2.2 As regard legal provision he submits that the service of sale of space for advertisement other than advertisement by radio or televisions are,

taxable prior to 1st July, 2012. With the introduction of negative list of services with effect from 1st July, 2012, the above referred services were",

covered under the negative list as per the clause (g) of Section 66D of the Finance Act, 1994. From 1st October, 2014 the said services were again",

brought into tax net vide Finance (No.2) Act, 2014. The appellant regularly paid service tax on the said services prior to 01.07.2012 and post",

30.09.2014 and no Service Tax was paid on the said services during interregnum period 01.07.2012 to 30.09.2014. He referred to the definition of,

advertising agency and submits that advertising agency includes making, preparation, display or exhibition of advertisement and includes the advertising",

consultant. The appellant is providing service of displaying the advertisement through various mode such as hoarding, kiosk, etc. However, they are",

not providing the services like basic planning of advertising, preparing the detail exhibition program for advertisement. On the basis of planning, printing",

of the material for display or exhibition the service of selling of space or time slots for advertisements falls under negative list of Services specified,

under Section 66D (g). He submits that the words "selling of space or time slots" for advertisement are not defined in the act therefore, the",

meaning of these words is to be understood in commercial parlance.,

2.3 It is his submission that the respondent failed to appreciate that customer who intend to advertise their product, Services could approach to the",

advertising agency to advertise their product by providing duration and the time during which their advertisement should be displayed. If the advertising,

agency designs, visualizes or conceptualizes advertisement to be displayed or exhibited then he will be under the scope of taxable services. If a person",

is provided printed material or displaying it at the particular location for particular time then such service should fall under Negative list of service. He,

submits that the appellant is not engaged in designing or conceptualizing the advertisement of their customers for the disputed amount. The customers,

approached with their printed material to the appellant, the appellant in turn mounted the printed materials on the hoardings fixed at particular places",

for particular period as per the terms and conditions decided with the customers.,

2.4 He submits that the sale of space or time for advertisement other than in print media earlier introduced through the Finance Act, 2006. At the time",

of introduction of new service, the Joint Secretary, Ministry of Finance, Department of Revenue, Government of India issued a clarification on this",

service vide D.O.F. 334/4/2006-TRU dated 28.02.2006 which shows that advertisement on building covers under the scope of sale of advertising,

spaces.,

2.5 He submits that partner of the appellant Shri Yashwant Shah explained about the procedure/practice of the appellant for obtaining work order,

related to preparation and displaying of advertising materials and hoardings. He specifically mentioned that the appellant arranged/managed to display,

advertisements of their clients on the hoardings for the specific period and charge for the service rendered by them. Advertising agencies provides,

printed vinyl or flex which was mounted on hoardings by themselves or through the sub-contractors namely Aagam Publicity. He further states that in,

a case where advertising agency wanted the services or printing of the material of their clients, they have suggested the name of M/s. Milan Publicity", who did their work of printing their material on vinyl/flex. The appellant paid Service Tax on such transaction where they designed and printed, advertisement material and mounted on hoardings for which composite amount has been charged. Therefore, the amount which is in dispute is related", to providing space for advertisement and not for making or preparation or conceptualization or visualization of advertisement. He relied upon the, following judgments where it is held that if a person who has not designed, visualized or conceptualized in an advertisement to be displayed on the", hoardings, he cannot be said to have made or prepared any advertisement and therefore he would not be considered as advertising agency.",

â?¢ COMMISSIONER OF CENTRAL EXCISE Vs. TEAM UDP LTD. 2006 (3) STR 427;;

â?¢ REX ADVERTISERS Vs. COMMISSIONER OF SERVICE TAX- 2006 (2) STR 330 (T);,

â?¢ ZODIAC ADVERTISERS Vs. COMMISSIONER OF CENTRAL EXCISE- 2006 (3) STR 538;;

â?¢ AJANTA FABRICATION Vs. C.C.Ex 2006 (4) STR 605 (T);,

â?¢ MARKET CHASE ADVERTISING Vs. C.C.Ex 2008 (10) STR 598 (T);,

2.6 He also relied upon the following judgments wherein, it is held that a person permitted display of advertisement on its sight and raising invoice for",

realizing rental charges, then such activity will not bring a person under the definition of advertising agency.",

â?¢ C.C.Ex. Vs. AZAD PUBLICATIONS 2006 (3) STR 249;;

â?¢ C.C.Ex. Vs. THE INCODA 2004 (174) ELT 65 (T);,

2.7 He further submits that even if, it is considered as composite services of display of advertisements which includes mounting of the printed",

materials on the hoardings, lighting arrangements and maintenance of such advertise displays still fall under negative list of service provided under",

Section 66D(g). He submits that the appellant provided composite natural bundled services of displaying the advertisement that include mounting the,

printed material on the hoardings, making lighting arrangements and maintenance of such advertisement displays during the contracted period. The",

respondent contended that same bundled service will not cover under Negative list of service. He held that the appellant is liable for service tax as,

such services provided by the appellant are not considered as providing space for advertisement. The adjudicating authority held that the appellant,

provided advertising services and such services are not exempted nor fall under Negative list of service therefore, liable to pay Service Tax on a",

consideration received from the customer.,

2.8 Shri Modh submits that the respondent has not considered the fact that services provided by the appellant are not composite service and the same,

are naturally bundled as per Section 66F(3) of the Act. The appellant provided the main service of selling of space for advertisement and other,

services such as repair and maintenance or electrification of hoardings, etc. are ancillary to main service for which no separate consideration was",

charged by the appellant. Therefore, as per section 66F (3) which provides taxability of bundled services, the bundled services provided by the",

appellant would fall under Negative list. In support of his submission he referred the "Taxation of Services : An Education Guide" dated 20th,

June, 2012 issued by Central Board of Excise and Customs according to which large number of service receivers of such bundle of services",

reasonably expect service to be provided as a package then such a package could be treated as naturally bundled in the ordinary course of business,

and if the nature of service in such bundled services that one of the service is the main service and the other service combined with service are in the,

nature of incidental or ancillary service which help in better enjoyment of main service then the classification of service will be under the main service.,

In the present case, the appellant's main service is display of advertisement of their client and mounting, electrification and repair and maintenance",

of their hoarding is ancillary therefore, the correct classification of service is selling/renting of space for advertisement and the same is covered under",

Negative list during the relevant period.,

2.9 He further submits that the appellant provided the service in the ordinary course of business and the service of selling of space for advertisement,

is the service which gives essential character to the package of the service and, therefore, the charges are essentially required to be bundled with the",

single service namely selling of space for advertisement accordingly, the taxability of the said service will be as per provision of Section 66F(3) of the",

Act which is exempted as per Section 66D of the Act and, therefore, the

appellant had correctly paid service tax on the said services for the disputed", period. He placed reliance on the following judgments:-,

â?¢ SJP INFRACON LTD. Vs. C.C.Ex.- 2018 (12) TMI 253 (T),

â?¢ LOGIX INFRASTRUCUTRUE PVT. LTD. Vs. C.C.Ex.-2019 (25) GSTL 59.,

2.10 He further submits that the appellant did not provide service of mounting of flex banner on regular basis to the clients. Whenever the appellant,

provided such services to the vendors and charged separate amount, they charge Service Tax and deposit with the Central Government.",

3. Without prejudice to the above, he further submits that the appellant was responsible for maintenance of hoardings as per terms and conditions of",

the Tender documents entered with the Surat Municipal Corporation irrespective of facts whether the hoardings were given on rental basis or not,

therefore, it cannot be said that the appellant provided service for maintenance of hoardings to their customers as it was an obligation upon the",

appellant to maintain the hoardings as per the tender documents. Similarly, the appellant is duty bound to provide illumination on the hoarding without",

which they cannot provide the service of sale of space for advertisement as the said space cannot be visible at night in absence of electrification.,

Therefore, the same is cost for providing the service for the appellant not for rendering an additional service. He further submits that the respondent in",

holding that four customers agreed in their statements that the appellant designed and printed the advertising material of vinyl/flex material. The,

respondent ought to have appreciated that the authorized signatory of M/s. MADISON COMMUNICATION PVT. LTD. deposed that the appellant,

designed, conceptualized the advertisement material. He in his letter dated 4th September, 2016 stated that they ordered the appellant for displaying",

the advertisements on hoardings. The appellant in turn managed all work to mounting of the printed advertisement materials on the hoardings. A brief,

note to the letter clearly states that art work and creating work has been supplied by the client to the appellant. It reveals that the appellant did not,

provide all these services. He submits that Shri K.N. Prakash Shetty, Finance Controller & Authorized signatory of M/s. Kinetic Advertising India",

Pvt. Ltd. Which is an advertising agency in his statement dated 16th September, 2016 deposed that in most of the cases the main client (the company)",

provided the printed vinyl/flex and in other case they provided the design and in

that case the advertising agency themselves arranged to print the, advertisement on vinyl/ flex board. Work related to preparation/fabrication of hoardings structures and mounting of the printed materials on the, hoardings was carried out by the appellant. Shri K.N. Prakash Shetty further stated that they have contracted with the appellant for specific space for, hoarding for specific period as per client's requirement. He submits that as per the statement clearly reveals that appellant did not design,"

visualize, or conceptualize the advertisement material. He submits that Shri Vijay Surve, Chief Financial Officer and Authorized Signatory of M/s.",

Bates India Private Limited, Mumbai which is an advertising agency in his statement dated 19th September, 2016 also deposed the same facts.",

4. As regard the submission of Joint Secretary, Management Representative and authorized signatory of TGB Banquets & Hotels Ltd. he submits that",

the same cannot be relied upon as the appellant did not arrange printing of advertisement material of vinyl/flex board as stated in answer to question,

No.2 stated by him. Further, the managing partner of the appellant was not shown the statement of Shri Anup Sarkar whose statement was recorded",

after the statement dated 28.07.2016 & 21.11.2016, therefore, the statement of Shri Anup Sarkar cannot be relied upon. He further submits that from",

the almost 1500 Customers statements of only four customers were recorded and even out of four, three customers admitted that they provided the",

printed materials to the appellant who in turn mounted the printed materials on the hoardings. He further submits that the respondent erred in rejecting,

the request of the appellant seeking examination of four customers whose statements were relied upon for adjudication of the Show Cause Notice. He,

submits that merely because managing partner of the appellant was shown the depositions of four customers and he did not raise any objections at the,

relevant time does not mean that the appellant ought not to have granted cross examination of four customers particularly in a case the respondent,

placed reliance upon the depositions made by four customers. Since the cross examination of four customers have not been granted, their statements",

cannot be relied upon in view of the following decisions:-,

a. SWADESHI POLYTEX LTD. Vs. CCE,MEERUT- 2000 (122) ELT 641.",

b. BASUDEV GARG Vs. CC, NEW DELHI- 2013 (294) ELT 353 (DEL)",

c. J&K CIGARETTES Vs. CCE, 2011 (242) ELT 189 (Del.)",

d. ARYA FIBRES PVT. LTD. Vs. C.C.EX. 2014 (311) ELT 529 (T),

4.1 He submits that provisions of Section 9D of the Central Excise Act, 1944 is applicable in relation to Service Tax in terms of Section 83 of the",

Finance Act, 1994. He submits that Section 9D of the Central Excise Act provides that statement of any witness will not be considered as an",

evidence only if such person who made the statement has been examined as a witness by Central Excise Officer and thereafter having regard to the,

circumstances of the case decides whether it is appropriate to consider the statements of witness as an evidence. Therefore, it is an obligation upon",

the respondent to examine four customers before placing reliance upon their depositions. He placed reliance on the following judgments:-,

â?¢ ARYA FIBRES PVT. LTD. Vs. C.C.EX. 2014 (311) ELT 529 (T),",

â?¢ Telestar Travels Pvt. Ltd. Vs. Special Directorate of Enforcement, 2013 (289) ELT 3 (SC).",

4.2 On the issue of larger period of limitation, he submits that the same is not invocable as there was no deliberate intention on the part of the appellant",

to either not to disclose the correct information or to evade the payment of any tax. There was no positive act on the part of the appellant to evade the,

payment of any Service Tax. The appellant was under bona fide belief that no Service Tax is payable on the transaction in dispute. The appellant has,

not suppressed any information from the department and disclosed the information in their Service Tax returns therefore, the longer period for demand",

is not invocable. He placed reliance on the following judgments:-,

a. Commissioenr Vs. MEGHMANI DYES & INTERMEDIATE LTD.- 2013 (288) ELT 514 (Guj.),

b. SIMPLEX INFRASTRUCTURES LTD. Vs. COMMISSIOENR OF SERVICE TAX, KOLKATA- 2016-TIOL-779-HC-KOL-ST",

c. DELHI INTERNATIONAL AIRPORT LTD. Vs. COMMISSIONER OF CGST2019 (24) GSTL 403 (T),

d. BINJRAJKA STEEL TUBES LTD. Vs. COMMISSIOENR OF C.EX., 2016 (342) ELT 302 (T)",

4.3 He further submits that Interest and penalty under Section 75 &78 of the Act are not imposable as the demand itself is not sustainable. He placed,

reliance on the following judgments :,

â?¢ CCE Vs. HMM Ltd.,-1995 (76) ELT 497 (SC)",

â?¢ TAMINL NADU HOUSING BOARD Vs. CCE, -1994 (74) ELT 9 (SC)",

4.4 As regard charge of revenue that the appellant have deliberately changed the description of service in the invoice, he submits that the appellant did",

not change description of service to evade Service Tax with effect from 1st July, 2012. Since the nature of service was that of providing space for",

advertisement to the customers they changed the description accordingly in the invoice. In the statement of managing partner he never deposed that,

they have the description of the service to get undue benefit of non payment of Service Tax. As the Service provided by the appellant fall under the,

Negative list of Services, the appellant corrected the mistakes and changed the description. There was no any ill intention to evade Service Tax",

therefore, larger period of limitation ought not to have been invoked. He further submits that issue involved is interpretational in nature and the",

appellant interpreted that the services provided by them fall under Negative List of Services therefore, there is no contumacious conduct on the part of",

the appellant in withholding/suppressing information and the Service Tax Department had knowledge of the activities of the appellant especially when,

appellant has disclosed the details in their Service Tax Returns. The invocation of extended period of limitation and imposing penalty on the appellant is,

legally not sustainable.,

4.5 Without prejudice to submission made on merit of the case it is submitted that in view of principle of valuation provided under Section 67 of the,

Act, the benefit of cum tax price was not granted to the appellant. It ought to be considered that Section 67 of the Act provides that the gross amount",

charged for the Services is inclusive of the Service Tax payable in a case when no tax has been separately collected on service and taxes be,

demandd subsequently. Therefore, the money recovered from the service receiver would have to be considered as cum tax price. He placed reliance",

on the following judgments:-,

a. SRI CHAKR TYRES Vs. CCE (MADRAS)- 1999 (108) ELT 361.,

b. ROHIT DETECTIE & SECURITY AGENCY Vs. C.C.Ex.- 2009 (14) STR 689 (T),

c. GEM STAR ENTERPRISES (P) LTD. VS. CCE, 2007 (7) STR 342;",

4.6 Shri Hardik Modh, concluding his argument prays that in view of the submission made herein above the impugned order is not sustainable and the",

same may be set aside and appeal be allowed.,

5. On the other hand, Shri Ghanshyam Soni, Learned Joint Commissioner (Authorized Representative) appearing on behalf of the revenue reiterates",

the impugned order. He has also submitted the written submission dated 16.12.2020 wherein, he pointed out the important paragraph from the",

impugned order. He submits that the appellant is providing advertising agency services therefore, the same does not fall under the Negative list",

accordingly, liable for Service Tax. He placed reliance on the following judgments:-",

Steps,Particulars

Step

1","Location on rental basis for development of Media Space

Â· The Appellant identifies various vacant spaces such as Foot over bridges, poles, houses,

plots where hoardings / kiosks can be erected for display of the advertisements;

Â· The said vacant areas may be owned by private owners or. societies, trusts or Surat

Municipal Corporations (SMCâ??).

Â· Subsequent to identification of the vacant space, the Appellant enters in to lease / rental

agreement with the owners;

Â· As per the local rules and regulations, the Appellant needs to obtain permission from

Surat Municipal

Â· Corporation (SMC) through set procedure, pay license fees to fabricate and display

hoardings on the designated areas in private locations.

Â· The Appellant pays necessary license fees to SMC for displaying advertisement on the

hoardings for as specified period.

Â· In open space land of government the space is acquired via lender, DBOT, PPP or any

proposal approved by SMC.

2,"Creation of Media space / structures (hoardings) on the vacant areas for displaying

of advertisement both private and government land or spaces

Â· After obtaining permission from SMC, the Appellant constructs the structures at his own

cost in the form of hoarding / billboards required for mounting of advertisement materials

including fabrication, transportation and labour charges at its own cost;

Â· On construction of the structures, the same needs to be painted so that it can be saved

from rust;

Â· Structures are then erected on the identified vacant places taken on rent by the

Appellant and the electric connection is also obtained by the Appellant so that the said

Advertisement can be made visible at night. The charges for the electricity expenses and

deposit are incurred by the Appellant;

Â· Subsequent to which the Appellant puts flex banner disclosing their name and contact

details so that the prospective customer comes to know that the advertisement can be

place on the said space (hoardings/ billboards / kiosk, etc.) The flex banner for their own

use is printed and mounted on blank media space created by the Appellant at their own

cost;

Â· For carrying out the various activities of construction of structures, painting, printing of

flex banner, the Appellant incurs various expenses to solicit the clients for providing space

for displaying the advertisement on hoarding / billboards / kiosks;Â

Â· As per the tender offer with SMC, the ownership of the structure (i.e. hoardings /

billboard / kiosk) lies with the Appellant;

3, "Booking for sale of space for advertisements" Corporate and Government bodies

For SMC (Govt. Body)

¶ For various civic activities, public message the SMC also book space with the Appellant. The said activity was approved by the standing body and a resolution is passed by

Standing Committee of SMC to approve the activity and the related expenses; ¶ The

consideration for such activity is generally recovered by the Appellant by way of adjustment

against License fees payable to SMC.

For other corporate clients

¶ Various customers directly or through other advertising agents approach the Appellant

to display their advertisement materials on the hoardings. Billboards / kiosks, etc.

¶ The consideration is charged on the basis of various parameters such as time period for displaying the advertisement, size of the hoarding, location etc.

¶ The sites are proposed on individual rates to clients. The rates for sites are negotiable

and vary from clients depending on relations with client. In event of rates which are below

the benchmark value, is not disclosed on individual basis for commercial purpose and

therefore, sold as a package deal for disclosing it to another clients.

¶ Once the booking is confirmed, the space is blocked by way of mail /work order /

verbal communication, from clients.

¶ The advertising material such as flex banners are printed by the clients itself or the

Appellant suggest the name of the vendors from his empanelment who are engaged in

printing of the flex banners and the like articles. It is to be noted that the

Appellant is

never engaged in creating the idea or printing the flex banner for displaying the advertisement. The scope of service provided by the Appellant is restricted only to selling

of space for the advertisement and the ancillary services.

3, "Mounting of flex banners on the hoardings/ billboards

â?¢ The flex banner / printed material bought by the customer needs to be mounted on the

hoardings / bill boards. The services of mounting may be done by other vendors or by the

Appellant on the basis of the scope of the agreement with the respective clients.

â?¢ Wherever, the services of mounting of flex banner is provided by the Appellant, Service

Tax at the applicable rate is collected and paid by them.

Sr. No., Services

1, "Sale of space for advertisement on hoardings / billboards / kiosks, etc.

2, "Mounting of flex banners or other printing banners on the said hoardings / billboards /

kiosks, etc.

3, "Services of electrification of hoardings / billboards / kiosk, etc.

4, "Repair and maintenance services of hoardings during the contract period as mentioned in

the agreement / mutual consent with the clients

V) Advertising consultant connected with the above services.,

6.3 The making of advertisement includes basic planning of advertisement For eg: How to advertise, where to advertise, mode of advertisement, etc.",

which are decided on the basis of the requirement of the client. Preparation of advertisement includes preparing the detailed execution program for,

advertisement on the basis of planning, printing of the material for display or exhibition. Display/exhibition includes displaying the advertisement",

through various mode such as hoardings, kiosk, etc.",

6.4 We find that as regard the disputed amount on which the Service Tax was demanded does not relate to making of advertisement or preparation of,

advertisement. The appellant's activity is covered under the display of the advertisement through various modes such as hoardings, display board,"

kiosk, etc. this can be further get cleared from the invoices of the service raised by the appellant, samples of which reproduced below:-",

6.5 From the aforesaid sample invoices it is seen that the appellant is charging fixed amount on monthly basis towards display charges and the,

description provided in the invoice is media space. In the invoice there is no charges for the services such as making of advertisement or preparation,

of advertisement example for visualizing, conceptualizing, designing, etc. of the advertisement therefore, it is clear that the invoices raised by the",

appellant is not for making or preparation of advertisement but only for the display charges for the space used for display of such advertisement. The,

appellant has submitted that the printed material/flex is provided by the client therefore, there is no question of including the cost thereof in the media",

space invoice of the appellant. The appellant's service is confined to display of advertisement on the hoardings, boards, kiosk, etc. and charge for",

the same is as per the space provided.,

6.6 As per the advertising service display of advertising (in this case sale of space for advertisement) is one of the various advertising service but by,

virtue of entry provided in the negative list selling of space for advertisement is not taxable.,

6.7 In our view, if providing space for advertisement is taxed then the entry provided in the negative list under Section 66D (g) will become redundant.",

The appellant can be charged service tax only in case where they themselves developed printed vinyl/flex and display the same on their hoardings,"

board, kiosk, etc.",

6.8 Whereas, as per the facts available on record the concept of visualization, conceptualization, preparation of advertisement were done by some",

other persons and the appellant only provided the space for displaying such advertise therefore, the appellant's activity is clearly limited to",

â??Selling of space or time slots for advertisements other than advertisements broadcast by radio or televisionâ?. As per the facts, we find that in the",

present case Customers who intend to advertise their product/service do approach to the advertising agency to advertise their product by providing,

duration and the time during which their advertisement should be displayed. If

the advertising agency designs, visualizes, or conceptualizes", advertisement to be displayed or exhibited then he will be covered under the scope of taxable service. If a person is provided printed materials for, displaying it at a particular location for a particular time then such services would fall under negative list of service. In the present case the, appellant's activity is after receipt of printed materials they displayed it at their hoardings which clearly fall under the negative list as described, under section 66D(g) of Finance Act. There is no evidence on record that the appellant is engaged in designing or conceptualizing the advertisement, of their customers. The customers or advertising agency approach with their printed materials to the appellant, the appellant in turn mounts the printed materials on the hoardings fixed at a particular place for a particular period as per the terms and conditions decided with the customers. Therefore, appellant's activity merely of mounting of printed materials provided by their client on the hoardings and charge is made on a monthly basis or on a periodical basis, hence clearly covered under negative list. There is a clear distinction between the service of advertising agency or service of sale of time or space for advertisement. The entry of sale of time or space for advertisement was introduced through the Finance Act, 2006. The Ministry of finance vide D.O.F. No.334/4/2006-TRU dated 28.02.2006 clarified the said service as under:-

“Sale of Advertising Space or Time: Sale of media in television and Radio by a broadcasting agency or organization is taxable under, Section 65(105)(zk). Services provided by Advertising agencies are taxable under Section 65(105)(e).”

This entry proposes to levy service tax on sale of time or space for advertisement, excluding sale of space for advertisement in print media.”

Sale of advertising time in television and radio by any person other than broadcasting agency or organization is also covered under this, sub clause. Some of the other modes of advertisement covered under this mode are internet advertisement, advertisement on buildings, vehicles, etc., advertisement in motion pictures, television, serials, video and music albums, mobile phones, ATMs, films, & television serials (known as product placement). It may be noted that advertisement in print media is excluded.

6.9 As per the above clarification it shows that advertisement on building covers under the scope of advertising space. We further find the respondent, has heavily relied upon the statement of Shri Yashwant, Partner of the appellant, Statements of four customers. In this regard we find that Shri", Yashwant C. Shah, Partner of the appellant has categorically stated that the advertising agencies approach them to display advertisement of their", client. Advertising agency provides printed Vinyl or Flex which was mounted on the hoardings. With this statement it is clear that the appellant are not, engaged in creating, making or preparation of advertising material, they only mount the already prepared advertisement on the hoardings and charge", for same on monthly basis.,

6.10 A similar issue has come up in various case laws. In the case of Team UPD Ltd.-2006 (3) STR 427 (Tri.Chennai) it was held that appellant, allowed their site to be used for display of advertisement of other party against payment of rental charges. Appellants have not conceptualized", visualized and designed such advertisement not covered under the definition of advertising agency hence, no service tax leviable. The fact of the", present case is identical to the facts of the aforesaid judgments therefore, displaying the advertisement of other party alone cannot be taxed under the", head of Advertising Agency Service.,

6.11 In the case of REX ADVERTISERS Vs. COMMISSIONER OF SERVICE TAX-2006 (2) STR 330 (Tri.-Bangalore), it was held that act of", procuring hoardings space from Municipal Authorities for advertisement purposes in itself does not amount to taxable service under category of, Advertising Agency.,

6.12 In the case of ZODIAC ADVERTISERS Vs. COMMISSIONER OF CENTRAL EXCISE, 2006 (3) STR 538 in the facts that even the", assessee has done the screen printing of advertisement such as stickers, labels and cards printed on the direction of advertisers, it was held that no", creativity involved, no evidence to show services of preparation, making of display of advertisement were rendered. It was further held that execution", of all activities necessary to come under advertising agency hence, the appellant in that case does not fall under advertising agency, hence not liable", for service tax. In the present case also, the appellant is not involved in conceptualization, visualization, and designing of the advertisement, hence will",

not fall under the category of advertising agency.,

6.13 In view of the above judgments on the face of it, the case of the appellant is on much better footing therefore, the activity of selling of space for",

advertisement carried out by the appellant cannot be held taxable under the head of Advertising Agency Service.,

6.14 As regards the statements of four customers, we find that the appellant have categorically asked for the cross examination of the witnesses who",

have given the statements but the adjudicating authority giving a lame excuse rejected the request for the cross-examination. Section 9D mandatorily,

put obligation on the adjudicating authority to examine the witness before relying on the statements recorded during investigation.,

6.15 In our view even if, the appellant does not ask for the crossexamination, the adjudicating authority is duty bound that he must examine each and",

every witness whose statement he is going to rely upon for adjudication of the case. Since witnesses were not cross examined, their statement cannot",

be used as evidence. In that case only other documents available on record can be used for deciding the case. As per the documents as discussed,

above, we do not find that the appellant are engaged in visualizing, conceptualizing , creating, making, preparing the advertisement, these activities are",

done by advertising agencies who in turn provide the readymade advertising material to the appellant only for displaying on their hoardings. Therefore,",

firstly the statements particularly in the nature of the present case is not very relevant, secondly the same cannot be relied upon as the same has not",

passed the test of examination as mandatorily required under section 9D of the Central Excise Act, 1994 which is applicable in the case of Service",

Tax as per Section 83 of the Finance Act, 1994.",

6.16 This issue of cross examination has been considered in various judgments. In the case of BASUDEV GARG V. CC, NEW DELHI-2013 294",

ELT 353 (DEL), the Honâ??ble Delhi High Court held that the statements against assessee cannot be used without giving them opportunity of cross",

examining the deponent. It was further held that cross examination is valuable right of accused/ noticee in quasi judicial proceedings which can have,

adverse consequences for them. The noticee would have right to cross examine in terms of Section 9D. In another case the Honâ??ble Delhi High,

Court in the case of J&K CIGARETTES LTD VS. CCE, 2011 (242) ELT 189, held that right to cross examination is quasi judicial proceedings can",

be taken away in certain exceptional circumstances under Section 9D of the Central Excise Act, 1994 by specifying circumstances when statement",

already recorded can be considered as relevant. In the present case no such exceptional circumstances exist, it was observed that granting of",

opportunity of cross examination and passing reasoned order are conditions inbuilt in exercise of power of quasi judicial authority and such conditions,

not necessarily to be mentioned in provision. This tribunal in the case of Arya FIBRES PVT. LTD.- 2014 (311) ELT 529 (Tri.-Ahmedabad), held that",

rejection of request for cross examination of witnesses whose statements relied upon, amounts to violation of Principles of Natural Justice. As per the",

views expressed in the above judgments, as regard granting of cross examination it is based on clear statutory provision of Section 9D. The",

adjudicating authority was duty bound to allow the cross examination. Since he has not allowed the cross examination, the statements of witnesses",

cannot be relied upon hence, the same are discarded.",

7. We find that the respondent for holding that the appellant's activity is an activity of advertising agency, taking together in account the activity of",

displaying the printed advertisement on the hoardings, electrification and repair and maintenance thereof. As submitted by the appellant the main",

activity of the appellant is to display the readymade advertisement on the hoardings. Since the appellant is the owner of the hoardings, it is their",

obligation to provide the electrification and maintain the Wear and tear of the advertisement which are nothing other than the ancillary services which,

needs to be provided unavoidably along with main service i.e. sale of hoardings for advertisement therefore, merely because some ancillary services",

like electrification and repair and maintenance is provided by the appellant, the principal service of sale of space for advertisement will not change its",

classification.,

8. The appellant vehemently submitted that this is nothing but bundled service and in case of bundled service category of the service would be the,

nature of the principal service among the bundled service. In this case also even if, we consider that there is a bundled service of sale of space for",

advertisement, electrification, repair & maintenance of advertisement/ hoardings

as per the invoice of the appellant they are charging for providing the",
space on monthly basis and there is no variable cost of other ancillary services.
Accordingly, the service will be pre-dominantly sale of space for",

advertisement. The issue of bundled service has been considered by Allahabad Bench of this tribunal in the case of SJP INFRACON LTD.- 2018,

(12) TMI 253- CESTAT Allahabad wherein, it was held as under:-",

â??Valuation-bundled service-construction of residential complex service-inclusion of charges on account of External Development,

Charges, Club Building Charges, Fire Fighting Charges, Electrification Fitting Charges, Park Facing Preferential Location Charges,"

Electrical Sub Station Charges and such other charges in assessable valuebundling of services- Held that-provisions under sub Section (3),

of Section 66F has provided that whenever in ordinary course of business some service is naturally associatged with a single service which,

gives essential character to the entire package of service then such naturally associated service is treated as bundled service and the said,

bundled service is to be treated as single service which gives the entire package its essential character,

In the present case construction of residential complex service is the service which gives essential character to the package of the service,

and, therefore, the charges are essentially required to be bundled with the single service namely construction of residential complex service-",

appeal allowed-decided in favor of appellant.â??,

9. Applying the above ratio in the facts of the present case the sale of space for advertisement is the service which gives essential character to the,

package of service therefore, the charges are essentially required to be bundled with the single service namely, sale of space for advertisement. As",

per this settled legal provision merely because the essential service is sale of space for advertisement provided along with other ancillary services such,

as electrification and repair & maintenance of advertisement/hoardings, the service of sale of space for advertisement will not go out of its purview.",

10. As per our above discussion based on facts, legal provision, settled case laws, we are of the clear view that appellant has provided service of sale",

of space for advertisement on their hoardings/bill boards, kiosk, etc. and it is clearly covered under Negative List during the period 01.07.2012 to",

30.9.2014, accordingly demand for this period is set aside.",

11. As regard the demand for the period 01.10.2014 to March, 2016 the appellant has repeatedly submitted that from 01.10.2014 they have been",

paying Service tax regularly and there is no short payment of Service Tax rather there may be excess payment. It is observed that from the,

submission made by the appellant before the learned adjudicating authority and the finding in the impugned order that some service of sale of space,

was provided during the period 01.07.2012 to 30.09.2014 but the invoices were raised on or after 01.10.2014. The Adjudicating Authority since,

decided the matter on merit that service of the appellant is taxable he has not gone into the issue that in case service was provided prior to 30.09.2014,

and invoices were raised after 01.10.2014, Whether the service tax should be chargeable considering the date of service or the date of the invoices.",

12. In this regard we are of the clear view that the taxability of the service shall be as per the time of providing the service irrespective of the fact,

whether the invoice was raised at that time or at later stage. In the fact of the present case when service was provided during the period 01.07.2012,

to 30.09.2014 and even if invoices were raised subsequently, the said service will remain non taxable being listed in the negative list. On this issue our",

view is supported by the following judgments:-,

1. RELIANCE INDUSTRIES,- 2008 (10) STR 243 (Tri. Ahd.) which is upheld by the Honâ??ble Gujarat High Court recorded in 2010 (90) STR",

807 (Guj.),

2. Consultant Engineering Service India Pvt. Ltd.- 2013 (30) STR 586 (Del.),

13. Having held above we find that since the adjudicating authority has not properly seen the correct calculation. In view of the above observation the,

adjudicating authority has liberty to verify the calculation for the period 01.10.201 to March, 2016 and communicate if there is any demand payable by",

the appellant and in case of excess payment, the appellant shall be entitled for refund in accordance of law.",

14. The appellant also made their submission that the extended period of demand is not sustainable. In this regard we find that the appellant have been,

paying Service Tax on the service in question prior to 01.07.2012 and after 01.10.2014. They were under the bona fide belief that the service of sale,

of space for advertisement is covered under Negative List for the period from

01.07.2012 to 30.09.2014 and for this reason they were not discharging,
the Service tax on the said service. Moreover, the issue whether the service of
appellant falls under the entry of sale of space for advertisement in the",
negative list or otherwise is highly interpretive. As per various judgments as
discussed above, the issue of taxability of sale of space for advertisement",
had been decided in favour of assessess. Therefore bona fide belief with regard
to non taxability of sale of space for advertisement gets clearly,
established. The appellant were regularly filing their ST-3 returns. It was known
to the department that the appellant was paying Service tax prior to,
01.07.2012 and also started paying Service Tax from 01.10.2014 and
interregnum period the entry of space for advertisement was under Negative,
List. Therefore, we do not see any suppression of fact or the mala fide intention
on the part of the appellant for non-payment of service tax.",
Therefore, the demand for extended period is not sustainable not only on merit
but also on limitation. Having held so no penalty is imposable on the",
appellant for the same reason as discussed above.,
15. As per our above detailed discussion and findings, We allow the appeal in the
above terms.",
(Dictated & Pronounced in the open court on 29.01.2021),