(1997) 10 MAD CK 0039

Madras High Court

Case No: Writ Petition No. 18417 of 1996 and W.M.P. No. 25703 of 1996

Adwise Advertising Pvt. Ltd.	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision: Oct. 22, 1997

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 37B
- Customs Act, 1962 - Section 95

Citation: (1998) 97 ELT 35 : (2006) 2 STR 239 : (2007) 6 STT 348

Hon'ble Judges: S.S. Subramanian, J

Bench: Single Bench

Advocate: Shri Arvind P. Datar, for the Appellant; Shri R. Krishnamurthy, S.C. for K. Jayachandran, Addl. C.G.S.C., for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. In this writ petition, the petitioner seeks the issuance of a writ of declaration by declaring the impugned letter M.F. (D.R.) Letter No.

341/43/96-TRU, dated 31-10-1996 as ultra vires the provisions of Article 265 of the Constitution of India and Sections 6(d)7 and 95 of the

Finance Act, 1994 (as amended); and pass such further or other orders in the interest of justice.

2. In the affidavit filed in support of the writ petition, which is sworn to by the Managing Director of the petitioner Company it is stated that it is an

advertising agency and provides services connected with the preparation, display and or exhibition or advertisements in newspapers, magazines,

journals as well as on radio and television and the petitioner charges its clients for services in the preparation of advertisements.

3. As per the Finance Act, 1994, Chapter V, levying of service tax was introduced. Initially, it was imposed on telephone services. By

amendments made in 1996, the levy of service tax was extended to courier, pager and advertising services. Certain provisions of the Act are

reproduced in the Writ petition and the more relevant section is Section 65(16) of the Act which defines taxable service and Clause (d) thereon. It

reads as follows :-

to a client, by an advertising agency in relation to advertisements in any manner.

Section 67 stipulates the method for arriving at the value of taxable service. As regards advertising agency, Section 67(d) is relevant and it reads as

follows :

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.

The petitioner analysis the said section and has stated that the service tax is on the service provided by the advertising agency, the value shall be the

gross amount charged by the agency, the gross amount is that which is charged by the agency from the client and gross amount is charged for the

service in relation to advertisements. The levy of service tax on advertising services came into force on 1-11-1996. Instructions have been issued

as to how the same has to be computed. It reads thus :

It is further to be clarified that in relation to 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 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 such advertisement 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, private T.V. channels, AIR etc.) will not be includible in the value of taxable service for the purpose of levy of service tax.

The Commission received by the advertising agency would, however, be includible in the value of taxable service.

The petitioner challenges the last sentence in that paragraph. It is the case of the petitioner that u/s 37B of the Central Excise and Customs Act

(sic), the said instruction is invalid. Instructions could be issued only for two purposes, viz.,

(i) Uniformity and classification of goods, and

(ii) With respect to levy of excise duty on such goods.

It is said that first and second respondents cannot issue instructions to add or subtract any item contrary to the provisions of the Act. It is further

stated that the power to issue directions with regard to service tax has been conferred on the Central Board u/s 95 of the Finance Act, 1994 and

such directions could be issued only by means of a Notification in the official gazette which has to be tabled before the Parliament. It is not open to

the respondents to issue letters that completely after the statutory provision itself and no direction could be issued which goes beyond the scope on

the Act. It is further said that the power cannot be exercised so as to impose additional liability on the assessee. It is said that the impugned

instruction goes beyond the provisions of Section 67(d) of Chapter V of the Act. The value for levy of service tax is only the gross amount charged

from the client for rendering services in relation to the advertisements. The commission paid by the newspaper is only an income and it has nothing

to do with the services rendered to the client and, therefore, the instruction goes beyond the scope of the Act. It is said that while the Section seeks

to levy tax on the gross amount charged from the client, the impugned letter seeks to include the commission which is received by the advertising

agency from newspapers, magazines, Doordarshan, AIR etc. and, therefore, it is wholly without jurisdiction.

4. In the counter-affidavit filed on behalf of the respondents, which is sworn to by the Assistant Commissioner in the Office of the Commissioner of

Central Excise, Coimbatore, he challenges even the maintainability of the writ petition. It is said that the writ petition was filed only on the basis of

the mere apprehension and the petitioner has not so far been aggrieved by the mere issuance of a letter or instructions. The petitioner is not an

aggrieved person according to the respondents, to be an aggrieved person, the order must be adverse or prejudicial to the petitioner, which alone

can give cause of action for challenging the same in a Court of Law. It is said that prior to 1994, Customs and Excise duty means duty on goods

either manufactured or imported. To widen the base of domestic indirect taxes, to tap the rich and growing source of revenue, the policy was

adopted in the form of tax on services and the said tax was introduced as Chapter V in Finance Bill, 1994 which became Finance Act, 1994 and

the same was made applicable from 1-7-1994. Sections 64 to 96 were introduced and made applicable for the new levy of service tax. By virtue

of the amendment, which came into effect on 1-11-1996, certain other services viz. Advertisement, Advertising Agency, Courier Agency, Pager

and Telegraph authority were also included and they were made liable to service tax. The charge of service tax was fixed at 5% on the value of

taxable service rendered. ''Taxable service'' is defined as any service provided to a client, by an advertising agency, in relation to advertisements in

any manner. It is said that the petitioner has not challenged the validity of the amendment to the Service Tax. So long as the petitioner had not

challenged the validity of the amendment, viz. the vires and applicability of the Service Tax, he cannot challenge the clarification alone. The

clarification letter is initiated only to clarify the value to be adopted and the computation of taxable service. The method of arriving at the value of

the taxable service being a factual position, the same has to be dealt with by the authorities, only and before any order is passed, the petitioner

cannot question the valuation of taxable service. The writ petition is, therefore premature. In regard to Section 67(d) of Chapter V of the Licence

Act, it is said that tax is levied on the Agency for the gross amount charged by such agency from the client for services in relation to

advertisements. It is said that there is a subtle distinction between advertisement and services in relation to advertisements. Advertisement is the

end product whereas service is the means provided for arranging to get the advertisement made, prepared, displayed or exhibited. As per the

clarification, the gross amount charged for such service by the advertising agency from the client includes the commission received by the agency

and not the cost of space or time charged by the print [or] electronic media for getting the advertisement published or broadcasted. The

commission received by the advertising agency is on account of getting the advertisement displayed and levy in question is a service tax on service-

charges relating to an advertisement and not on the cost of advertisement. There is no repugnance between the clarification and the section

imposing tax. The clarification issued by the respondents is with regard to the value of the taxable service, which is contemplated u/s 67(d), and the

method to arrive at the value of the taxable service alone has to be clarified. It is not by clarification, the new tax is imposed, nor is it violative of

Article 265 of the Constitution of India. Therefore, they prayed for the dismissal of the writ petition.

5. A reply affidavit has been filed by the petitioner, wherein, it is stated that the petitioner charges amounts from the client towards preparation of

the advertisements in the print media in terms of charges for composing, block making, art work, etc., and when the advertisement is released in a

particular newspaper or journal, a commission is paid by the concerned newspaper/journal to the advertising agency. This forms part of the income

of the petitioner, which is subject to income tax. The service tax is on the amount which the petitioner collects from the client for rendering

advertising services and not nothing to do with the income earnestly the petitioner by way of commission. Therefore, any clarification that seeks to

levy service tax on income is totally outside the scope of the statutory provisions.

6. The learned Counsel for the respondents has also filed typed set of documents to contend that the commission amount is also part of the gross

amount collected from the client, though, part of it is treated as commission payable to the advertising agency. The advertisement bill, issued by

M/s. Kasturi & Sons Limited (Proprietors of the Hindu), dated 17-11-1996 along with the other bills are also appended.

7. The learned Counsel for the petitioner on the basis of the rules of accreditation argues that 15% commission is given by the newspapers and the

same is not part of the services rendered by the petitioner to his client. He also relies on the letter of the Indian Newspaper Society to all

accredited advertising agencies dated 26-8-1996. In the said letter, the Society makes reference to the rules Governing Accreditation of

Advertising Agencies and Rulings of the Society. Clause 32 of the Rules deals with payment of commission. It reads thus :

As and from the date of accreditation as above, the accredited advertising agency shall be entitled to receive from the members of the society, the

maximum and minimum commission of 15% in respect of advertisement business placed by it with such members. In the case of the provisionally

accredited advertising agency, the maximum and minimum commission shall be 10% of the advertisement business.

Further, that letter also makes reference to an agreement to be executed between the advertising agency and the society at the time of

accreditation. Sub-clause (d) of Clause 2 of the conditions of the agreement says :

That it will retain full commission earned as an advertising agency from members publication and that it will at no time pay or otherwise allow any

part of such commission to any advertiser or representative of any advertiser for whom it may be acting, or has acted as an advertising agency.

It is further said that advertising agencies are advised to strictly comply with the rules in regard to the payment of commission and not to insist for a

commission higher than what they are entitled to.

8. The argument of the learned Counsel for the petitioner is that part of the gross amount which concerns the advertisement is liable to the service

tax and not the commission paid by the publishers. Clause 4 of the impugned letter dated 6-11-1996 reads thus :

The Commission received by the advertising agency would, however, be includable in the value of taxable service.

This goes beyond the scope of the Act.

9. In this connection, we have to take into consideration Section 67(d) of the Finance Act. The Finance Act of 1994 (as amended by Finance Act

of 1996) is appended to the additional typeset of papers. Section 65 of the said Act denies what is meant by ""Advertisement"" and ""Advertising

Agency"". Section 67 of the Act deals with the valuation of taxable services for charging service tax and Section 68 deals with collection and

recovery of service tax. The ''Advertising Agency'' as defined u/s 66, Clause (sic) (1A) means :

any commercial concern engaged in providing any service connected with the making, preparation, display or exhibition of advertisement and

includes an advertising consultant.

Section 65(16) dealing with the ''taxable service'', so far as the petitioner is concerned, only sub-clause (d) is relevant, which reads thus :

to a client, by an advertising agency in relation to advertisements in any manner.

Section 67(d), which pertains to valuation of taxable services for charging service tax reads thus :

For the purposes of this Chapter, the value of taxable services, 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.

10. After having heard the rival contentions of both sides, the only question that has to be decided is, whether the clarification letter is in any way

inconsistent with Section 67(d) of the Finance Act. The validity of Section 67(d) of the Act is not disputed. The only argument is that in the guise of

the clarification, something more is now sought to be charged as service tax; that is, the commission which the advertising agency is getting from the

publisher, cannot be included and when the main section does not provide for the same, it could not be charged on the basis of the notification or

letter. The delegating authority cannot go beyond the Parent Act, is the sum and substance of the argument.

11. Learned Counsel for petitioner relied on the decision reported in Mannalal Jain Vs. The State of Assam and Others, . In Paragraph 12 of the

judgment, their Lordships held that :

The wisdom of issuing executive instructions in matters which are governed by provisions of law is doubtful; even if it be considered necessary to

issue instructions in such a matter, the instructions cannot be so framed or utilised as to provide the provisions of law. Such a method will destroy

the very basis of the rule of law and strike at the very root of orderly administration of law.

12. Learned Counsel also placed reliance on the decision reported in State of U.P. Vs. R.K. Srivastava and Another, for the very same purpose,

wherein the scope of a Circular was the matter in issue. Their Lordships said that ''if there is conflict between the body of the Act and the

Schedule, the former prevails.'' Learned Counsel also laid stress on Paragraph 32 of the judgment wherein the scope of Explanation was

considered by their Lordships. The relevant portion of Paragraph 32 reads thus :

.... An explanation is different in nature from a proviso for a proviso excepts, excludes or restricts while an explanation explains or clarifies. Such

explanation or clarification may be in respect of matters whose meaning is implicit and not explicit in the main section itself. In Hiralal Rattanlal Vs.

State of U.P. and Another etc. etc., , it was ruled that if on a true reading of an Explanation it appears that it has widened the scope of the main

section, effect be given to legislative intent notwithstanding the fact that the Legislature named that provision as an Explanation. In all these matters

courts have to find out the true intention of the Legislature. In D. G. Mahajan v. State of Maharashtra, (supra) this Court said that legislature has

different ways of expressing itself and in the last analysis the words used alone are repository of legislative intent and that if necessary an

Explanation must be construed according to its plain language and ''not an any a prior consideration''.

13. Reliance was also placed by learned Counsel in the decision of this Court reported in N.C. Rangesh and others Vs. Inspector General of

Registration and others, . In that case, a Circular issued by the Inspector General of Registration came for consideration. Under the Income Tax

Act, u/s 230A, permission has to be obtained from the Appropriate Authority if the value of the entire property happens to be more than Rs. 2

lakhs or s. 10 lakhs, as the case may be. The Inspector General of Registration, purporting to act under the Registration Act, directed his

Subordinates that even if an undivided share was sold the value of which was much less, but, taking into consideration the entire value, without

permission, the document should not be registered. The said instruction by the Inspector General of Registration was found to be invalid by this

Court. At page 281 of the Reports, K.S. Bakthavatsalam, J. considered the various decisions of this point and finally came to the conclusion that

the Instruction is not in the nature of clarification as was argued, and, on the basis of the Circular, the Sub-Registrar cannot refuse registration. The

learned Judge said that "though the Inspector General of Registration can issue directions u/s 60 of the Registration Act he cannot add something

to the provisions of the Income Tax Act.

14. On the basis of these decisions, learned Counsel submitted that the Instructions in this case have gone beyond the scope of Section 67(d) of

the Finance Act and, therefore, invalid. His further contention is that the commission of 15% which is now sought to be included by virtue of the

Instructions, is not contemplated in the Parent Act.

15. I do not think the said submission is correct even though at the initial stage, I was also of the same view. But, on going deeper into the Section,

and, taking into consideration the practice of the Advertising Agency, I feel that the impugned instruction is only in the nature of a clarification, and

it does not go against the intention of the Legislature. The reasons are given below.

16. I have already extracted Section 67(d) of the Act which says that,

For the purposes of this Chapter, the value of taxable services, -

(a) to (c) xxx

(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.

The gross amount received from the client includes 15% is not disputed. Learned Counsel only submitted that this 15% is the commission which

the Agency receives from the publishers. While considering the service tax, the Authorities have only to consider what is the actual amount

received by the Agency from the client, and how the Agency appropriates is not their concern. That is a matter between the publisher and the

agent. The taxing Authorities are not concerned with the arrangement between the publisher and agency. It is not disputed that if there is no

advertising agent, and the client directly deals with the publisher, there will be no deduction in the gross amount that is payable by the client. When

the advertising agent receives the gross amount, he receives it as the agent of the publisher. The consideration for that service by the agent with his

client is the gross amount actually received. Merely because the publisher permits the agent to retain a portion of that amount, it cannot be said that

it is not in respect of the services in relation to the advertisement.

17. The said argument is strengthened in view of the definition of ''taxable service'' as defined u/s 65(16) of the Act. As per the said Section,

''taxable service'' so far as advertising agency is concerned, is stated as ''any service provided to a client, by an advertising agency in relation to

advertisements in any manner''. This also strengthens the argument put forward by respondent.

18. The argument of learned Counsel that his commission is now taxed as ''service tax'' cannot be accepted in view of the definition in the Parent

Act. Learned Counsel for petitioner further submitted that whenever the commission is sought to be included, the same is provided in the Act itself

and so far as the advertising agency is concerned, the Statute is silent on the same. On that basis, it was argued that the contrary intention is

explicit. Learned Counsel brought to my notice Section 67(a) as it stood in 1994 wherein it is said that ''in relation to service provided by a stock-

broker, the value of taxable services shall be the aggregate of the commission of brokerage charged by him on the sale or purchase of securities

from the investors and includes the commission or brokerage paid by the stock-broker to any sub-broker''. Likewise, after amendment, in relation

to service provided by a steamer agent to a shipping 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 or in relation to the booking, advertising or canvassing of

cargo, container feeder services, including the commission paid to such agent, and, in relation to service provided by an air travel agent to a

customer, shall be the gross amount charged by such agent from the customer for services in relation to the booking of passage for travel by air

excluding the airfare but including the commission, if any, received from the airline in relation to such booking. I do not think the said argument also

could be accepted for a moment. When there is a definition regarding ''taxable service'' insofar as advertising agency is concerned, the Authorities

have to consider only that definition, and not to compare it with the other provisions of the Statute to verify whether there is any contrary intention.

The services rendered by others and the advertising agency are not the same, as per definitions under the Act.

19. Since the commission is also included in the gross amount received by the Agency from the client for services in relation to the advertisement,

the argument that the Instructions go against the statute, is not correct. Even without the impugned sentence, i.e., ''The commission received by the

advertising agency would, however, be includible in the value of taxable service'', the matter is not going to make any difference. It is only by way

of abundant caution, such a sentence has been incorporated, and that is not going against the provisions of the Act.

20. Learned Counsel for petitioner also relied on certain Sections of the Act and contended that it is only the Central Government that has the

Authority to interpret the Section to remove the difficulties. I do not think that there is any difficult in interpreting the Section, for, the wordings are

very clear. Section 95 of the Excise and Customs Act has also no relevance in this connection. In view of the interpretation given to Section 67(d)

of the Finance act, I do not think the impugned letter dated 31-10-1996 is ultra vires the provisions of Article 235 of the Constitution of India, nor

is it against Section 95 of the Finance Act. In that view of the matter, relief sought for, namely, issue of a writ of declaration that the impugned letter

is invalid, cannot be granted. Consequently, the writ petition is dismissed. No costs. W.M.P. for stay is also dismissed consequently.