CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70092 of 2019

(Arising out of Order-In-Appeal No.MRT-EXCUS-000-APPL-MRT-441-2018-19, dated-02/01/2019 passed by Commissioner (Appeals) CGST, Meerut)

M/s PVS Multiplex India Pvt. Ltd. .....Appellant
(328, Kishanpura, Baghpat Road, Meerut (U.P.) 250002)

VERSUS

Commissioner, Customs, Central Excise & Service Tax, Meerut ....Respondent
(2500004)

APPEARANCE:

Shri Vineet Dubey, Advocate for the Appellant
Shri A.K. Choudhary, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70367/2024

DATE OF HEARING : 04.03.2024
DATE OF DECISION : 01.07.2024

SANJIV SRIVASTAVA:

This appeal is directed against order in appeal No MRT/EXCUS/000/APPL-MRT/1441/2018-19 dated 02.01.2019. By the impugned order following has been held:

> *"7. In view of above discussion and findings, both the appeals bearing No. 29-ST/APPL-MRT/MRT/2018 dated 28.02.2018 filed by the department and No. 30-ST/APPL-MRT/MRT/2018 dated 05.03.2018 filed M/s. PVS Multiplex India Ltd., 328 Kishanpura, Baghpat Road, Meerut. (U.P) against the Order-in-Original No. 12/AC/Div.-I/MRT/2018 dated 28.12.18 are dismissed."*

2.1 Appellant is having Service Tax Registration No. AACCP8168 RST001 for providing "Renting of Immovable Property Service"

falling under erstwhile Section 65(105) (zzzz) of the Finance Act, 1994 ("the Act").

2.2 Appellant was also engaged in providing services of screening of films etc., in his multiplex, on revenue sharing basis, to the distributors of the films, He was, not paying Service Tax on the services provided in connection with the screening of the films.

2.3 The department had issued a show cause notice (SCN) dated 12.09.2014 for the period 2009-10 to 2012-13, demanding, inter-alia, Service Tax amounting to Rs. 72,92,717/- in respect of screening of films under the category of Business Support Service, which was confirmed vide order in original dated 15.03.2016, against which the appellant had preferred an appeal before the CESTAT, which was decided vide Final Order No. ST/A/71279/2017-CU(DB) dated 29.08.2017 holding as follows:

> *7. Having considered contentions and on perusal of the facts on record, we are satisfied that there is no dispute of ST Appeal No. 70563/16 fact that the appellant have been screening films in their multiplex on Revenue Sharing basis, which is undisputed finding recorded by the ld. Commissioner in the impugned order. Accordingly, we hold that the appellant is not liable to pay Service Tax for Screening of Films and payments to distributors in their theatre We also take notice that the appellant have disclosed the gross amount received from sale of tickets or exhibition of films in their profit and loss account on the credit side and have shown the amounts paid to the distributors on the debit side under the head 'film software expenses. So far the other head of service is concerned, we allow this appeal by way of remand to the ld. Commissioner, So as to reconcile the payments made by the tenants for the period prior to 30/09/2011. The appellant is also directed to reconcile their accounts and if any amount is payable by them for the period subsequent to 30/09/2011, calculate the same and after depositing the tax, if any, intimate to the Adjudicating Authority. As regards the other issue regarding differential tax demanded Rs.56,114/- as different accounting method in the financial accounts (accrual basis) and ST-3 return,*

which was on receipt basis, we remanded to the ld. Commissioner to reconcile and direct the appellant to provide the calculation, and to examine the same and be considered in accordance with law.

Thus, the appeal is allowed in part and remanded in part as indicated herein above. The appellant shall be entitled to consequential benefits in accordance with law. We also take notice of the fact that the amount of Rs 22,21,130/- was deposited by the appellant under VCES Scheme, the appropriation for the same have been granted by the ld. Commissioner in the impugned Order in Original."

2.4 SCNs dated 21.04.15 & 22.03.16 for demand of Service Tax of Rs. 26,99,899/- and Rs. 21,97,635/- respectively for the subsequent periods of 2013-14 and 2014-15 on the same issue were issued.

2.5 Both the show cause notices were adjudicated by common order in original dated 29.12.2017 holding as follows:

"ORDER

(i) I demand and order to recover Service Tax amounting to Rs. 26,99,899/- [Service Tax: Rs 2621252/-, Edu Cess: Rs 52425/-, SHE Cess: Rs 26213/-] and Rs. 21,97,635/- [Service Tax: Rs 2133625/-, Edu Cess: Rs 42673/-, SHE Cess: Rs 21337/-] for the period 2013-14 & 2014-15, respectively, from the party under Section 73 (1) of the Finance Act, 1994 along with interest on above said amount of Service Tax, at appropriate rate, from the party in terms of Section 75 of the Finance Act, 1994.

(ii) I however drop the proceedings for imposing penalty."

2.6 This order was challenged by both appellant and revenue before the Commissioner (Appeal). Both the appeals filed by revenue and the appellant were disposed of by the impugned order.

2.7 Aggrieved appellant has filed this appeal.

2.8 Appeal filed by the revenue has been dismissed vide Final Order No 71696/2019 dated 04.09.2019 on the ground of

monetary limit prescribed by F No 390/Misc/116/2017-JC dated 22.08.2019 for filing the appeal by revenue before the CESTAT

3.1 We have heard Shri Vineet Dubey, Advocate on the basis of Authorization (dated 23.01.2024 filed in court on 04.03.2024) given by Shri Harbir Singh, Advocate for the appellant and Shri A. K. Choudhary, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits that:-

- The appellant had not provided any support service to the film distributor as such there was no relevance of pre-negative service era.
- In case of Inox Leisure Ltd. [Final Order No A/85216/2022 dated 14.03.2022] after taking note of the order of Allahabad Bench in the case of appellant the issue has been considered for the period July 2012 to 2014, and matter has been decided again in favour of the assessee.
- The ground taken by the Commissioner (Appeal) was totally out of context.
- Hon'ble Supreme Court has vide order dated 28.02.2022 dismissed the appeal filed by the revenue against the order of CESTAT in case of Inox Leisure Ltd., wherein the same issue was involved.
- As matter is no longer res-integra the appeal should be allowed.

3.3 Learned authorized representative reiterated the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records the findings as follows:

"6. I have carefully gone through the facts and records of the case as well as the submissions made by the appellant no. 2. I find that the adjudicating authority has confirmed the demand by observing that the activity of exhibition of film by the appellant no. 2, on revenue sharing basis with the distributor, is

taxable service as there is no exemption nor the same is under negative list as declared in Section 66D of the of the Act. As per the arrangement made between the appellant no. 2 and the distributor, it is seen that there was an understanding to share revenue/profits in a pre-set percentage of the entire box office collection of the movies supplied by the distributor and screened in appellant's theatre and in such cases, the two parties to the said arrangement were not transacting on a principal-to-principal basis but were conducting business together as constituent members of a partnership having mutuality of interest and sharing common risks and rewards in a pre-determined manner. There is no dispute that the appellant no. 2 constructed multiplex for screening of movies/films and the distributor of films engaged appellant no.2 for screening of films purchased by him from producers on a consideration agreed by him. The contention of the appellant no. 2 that his appeal against the earlier demand was allowed by the Tribunal vide Final Order 29.08.2017 and the same was not limited to the period prior to Negative List Regime i.e. 1st July, 2012 but covered the period up to March,2013 is countered by the counter objections dated 27.04.2018 filed by the appellant no.1 stating that the above Final Order of the Tribunal largely pertained to the period of 2009-10 to 2012-13 i.e. pre negative list era while the present demand covered the period 2013-14 to 2014-15 i.e. post negative list era. According to appellant no.1, the exemption granted under SI. No. 47 of Notification No. 25/2012-ST dated 20.06.2012, on the above issue was not applicable for the period pertaining to 2013-14 to 2014-15 as the same was not available post implementation of negative list-based tax regime, and was made available only by inserting Sl. No. 47 in Notification 6/2015-ST dated 31.03.2015 effective from 01.04.2015.

6.1 I find that for the impugned period i.e. from 01.07.2012 to 31.03.2015, the Hon'ble High Court of Madras in the case of Mediatone Global Entertainment Ltd., Vs Chief CCE, Chennai reported as 2014 (34) STR (819) (Mad.) held that 'the variant modes of transaction between the distributor/sub-distributors of

films and exhibitors of movie and thus revenue sharing arrangement between them are neither in the "Negative List Services" nor exempted'. Hon'ble Tribunal has however not taken cognizance of the above judgement of the Hon'ble High Court which was passed much before the Final Order dated 29.08.2017 passed by the Hon'ble CESTAT

6.2 During the relevant period entry at serial no. (j) of the Section 66D of the Act, reads as under:

> ***66 D. Negative list of services**-The negative list shall comprise of the following services namely:-*
>
> *(j) "admission to entertainment event or access to amusement facilities'*

Section 65B (24) of the Act (before being omitted w.e.f. 01.06.2015 defined "entertainment event" as under-

> *'entertainment event' means an event or a performance which is intended to provide recreation, pastime, fun or enjoyment, by way of exhibition of cinematographic film e i circus, concerts, sporting event, pageants, award functions, dance, musical or theatrical performances including drama, ballets or any such event or programme."*

I find that what was exempted vide Section 66D (j) of the Act was admission to entertainment events only. The description of the said entry cannot be interpreted to mean exemption to the services provided by the appellant no. 2 to the film distributors for which the consideration was received by him by way of an arrangement of sharing of revenue generated from the sale of the tickets. The Hon'ble High Court of Madras, vide the case law cited supra, observed as under:

> ***50.** By a combined reading of Section 66D(j), Notification Nos. 25/2012-S.T., dated 20-6-2012 and 3/2013-S.T., dated 1-3-2013, it is clear that what is exempted is only an admission to entertainment events or access to amusement facilities or exhibition of cinema in a theatre. The variant modes of transaction between the distributor/sub-*

distributors of films and exhibitors of movie and the revenue sharing arrangement between them are neither in the "Negative List Services" nor exempted.

6.3 I find that the appellant no.2 was engaged by the distributor for screening of the picture/film/movie (copyrights of which were with the distributor) for which he was getting a consideration, on revenue sharing basis, for the screening of the picture/film/movie belonging to such distributor. It is therefore evident that the appellant no. 2 was engaged by the distributor for providing services in relation to exhibition of movie for which he received consideration. I further find that Notification No. 6/2015-ST dated 01.03.2015 w.e.f 01.04.2015, reads as under:

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 25/2012-Service Tax, dated the 20th June, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 467 (E), dated the 20th June, 2012, namely

46. Service provided by way of exhibition of movie by an exhibitor to the distributor or an association of persons consisting of the exhibitor as one of its members;";

(xii) after entry 46 so inserted, the following entry shall be inserted with effect from such date as the Central Government may, by notification in the Official Gazette, appoint, namely :-

47. Services by way of right to admission to,

exhibition of cinematographic film, circus, dance, or theatrical performance including drama or ballet;

From the above, it is evident that only from 01.04.2015 onwards the services provided by way of exhibition of movies by an

exhibitor to the distributor or an association of persons consisting of the exhibitor as one of its members were exempted from payment of Service Tax. For the present demand no such exemption was available.

6.4 As regards the appellant no. 2's contention of failure of the adjudicating authority to classify the category of taxable service and no mention of Negative List exemption in the SCN issued after 1st July, 2012, I find as per Section 65B(44) of the Act inserted by the Finance Act, 2012, w.e.f 01.07.2012 "Service" means any activity carried out by a person for another for consideration, and includes a declared service and shall not include..... Therefore, classification of taxable service was no more required. I find that the SCNs speak of, inter alia, contravention of the provisions of section 66B of the Act which states that 'there shall be levied a Service Tax other than those specified in the negative list. From the above it is evident that the demand of the Service Tax has been raised by appropriate reference to the applicable provision of law. The contention of the appellant no. 2, regarding this point is therefore not tenable."

4.3 From the perusal of the show cause notices which were issued to the appellant, it is quite evident that these show cause notices have been issued on the basis of the provisions of the Finance Act, 1994 as they existed before 01.07.2012, i.e. prior to introduction of levy of service tax on the services other than those specified in the negative list or exempted. The relevant para of the show cause notice dated 29.03.2016 are reproduced below:

> *"8. And whereas, the party is owner of three theaters and is engaged in providing the Service of screening of film supplied by a film distributor, which falls under any of the taxable service category of "renting of immovable property" or "Business Support Service" depending "Pon the arrangement between the film distributor and theatre owner, as clarified vide Board's Circutar No. 109/03/2009 dated 23d February,*

2009, This issue was further clarified vide Circular No. 148/17/2011-St dated 13-12-2011

9 As per above said clarifications and facts of the case, it came to notice that in the balance sheets, the amount received from screening of film has been shown as theatre income and payment to the film distributor has been shown as software expenses. It further appeared that the party had been showing the films on revenue sharing basis without transfer of copyright in their favour, which qualifies the taxable condition and thus the party appear liable to pay service tax on exhibition of film on the amount received under revenue sharing basis as provider of Business support service.

10 Further, the party has shown "A.C. Receipts (Theatre)" and "Maintenance Charges" in their Balance sheet, which they are collecting as theatre collection and expensing it for repairing & maintenance of "Air Condition" and "Theatre" respectively. This appear to have been done with the sole purpose of bifurcating the amount of sale of movie tickets, i.e. Theatre Receipt, A.C. Receipts (Theatre) and Maintenance Charges receipts. It appeared that the "A.C Receipts (Theatre)" and "Maintenance Charges" receipts is retained in full by the exhibitor (Theatre Owner) while the remaining amount of income on account of sale of movie tickets is being shared by each of the persons, which appeared liable to Service Tax under the category of Business Support Service" as per above said Circulars issued by CBEC

11. In view of above facts, the amount of Tax Dues not paid/short paid by the party, under various categories of services is summed up as under:

[Figure in Rupees]

S No	*Name of Service*	*Service Tax not paid/short paid inclusive of Cess*
1	*Sale of space or time for advertisement*	*1,83,214.00*
2	*Renting of Immovable Property*	*15,98,338.00*
3	*Amount claimed as Pure Agent which was in fact Renting of Immovable Property*	*20,99,179.00*
4	*Amount shown received as commission on sale*	*23,13,431.00*

	which was in fact Renting of Immovable property	
5	*Screening of film supplied by a film distributor falling under the category of Business Support Service*	*72,44,110.00*
	TOTAL	*134,38,272.00*

12. ***And whereas, on the above said issues and for the period 2008-09 to 2012-13, a SCN bearing C.No. V(15) Off/ Adj-l/ ST/-230/ 2013 dated 12.09.2014, has been issued to the party, by the Commissioner, Central Excise, Meerut -1, Meerut and another SCN bearing C.No V(15)Off/Adj./ST/97/2015/752 dtd 21.04.2015 for demand of Service Tax amounting to Rs 26,99,890/- for the period 2013-14 has been issued to the party, by the Joint Commissioner Central Excise & Service Tax Commissionerate Meerut (RUD-1).***

13. And whereas, the jurisdictional Superintendent of Service Tax vide letter C.No. V(30]SCN/ST/R-I/DMRT/PVS/303/2014 dated 25.02.2016 (RUD-2) requested the party to provide the details relating to the amount received during the financial year 2014-15 relating to Business Exhibition service, Sale of space or time for advertisement, Renting of immovable property amount claimed as pure agent, amount shown received as commission on sale, Screening of film (Theatre receipt) etc. The party vide letter dated 07.03.2016 (RUD-3) provided the Balance Sheet of Financial Year 2014-

14. Whereas, during the course of scrutiny of ST-3 returns for the period April,2014 to March,2015 (RUD-4) with the balance sheet for the year 2014-15 along with above said details provided by the party, it was observed that the party has paid Service Tax on the taxable value of Rs 1,50,60,754/- under the category of "Renting of immovable property". However, they have not paid any Service Tax on amount charged for screening of films, supplied by film distributor falling under the category of Business Support Service.

15. ….

16. And whereas, the party is the owner of three theaters and they are engaged in providing the Service of screening of film supplied by a film distributor. As per Board's Circular No 109/03/2009 dated 23' February, 2009, it has been clarified that the activity of screening of film supplied by a film distributor would fall under any of the taxable service category of 'renting of immovable property" or 'Business Support Service' depending upon the arrangement between the film distributor and theatre owner

17 Based on the representations received wherein it has been requested to clarify on the taxability of consideration earned by the distributors/sub-distributors/area distributors of Indian & Foreign films in the form of 'revenue share' from the exhibitors of the movie, and on revenue retained as percentage by the exhibitors of the movie from the sale of tickets, the C.B.E.C. issued Circular No. 148/17/2011-ST dated 13-12-2011 clarifying the issue, in following term:

Para 10 of the aforesaid Circular dated 13-12-2011, states as under:

"the arrangements entered into by the distributor or sub-distributor or area distributor etc. and the exhibitor or theatre owner etc, in exhibiting the film produced by the oroducer, the original copyright holder, the arrangements and their respective service tax classification is tabulated as under:

Type of Arrangement	*Movie exhibited on whose account*	*Service Tax Implication*
Principal-to-Principal Basis	*Movie being exhibited by theatre owner or exhibitor on his account -i.e. The copyrights are temporarily transferred*	*Service tax under copyright service to be provided by distributor or sub-distributor or area distributor or producer etc., as the case may be*
	Movie being exhibited on behalf of Distributor or Sub- Distributor or Area Distributor or Producer etc. - i.e. no copyrights are temporarily transferred	*Service Tax under Business Support Service / Renting of Immovable Property Service, as the case may be, to be provided by Theatre Owner or Exhibitor*
Arrangement under unincorporated	*Service provided by each of the person i.e. the 'new entity'/ Theater Owner or Exhibitor / Distributor or*	

partnership/ joint/ collaboration basis	*Sub-Distributor or Area Distributor or Producer etc., as the case may be, is liable to Service Tax under applicable service head*

18. In the above said Circular, it is further clarified that: -

"It is understood that the Circular dated 23.02.2009 has been misinterpreted to exclude all "revenue sharing' arrangements from the levy of service tax: Remuneration or .payment arrangements on basis of fixed or revenue sharing or profit sharing or hybrid ◦ versions of these may exist. However, the nature of transaction determines the leviability of service tax.

Each case may be looked into on its merits and decision be taken on case to case basis"

19. And whereas, from the above clarification, it came to notice that the activity of screening of film supplied by a film distributor falls under any of the taxable service category of "renting of immovable property" or Business Support Service' depending upon the arrangement between the film distributor, and theatre owner. To ascertain the leviability of Service Tax on the amount received on account of screening of film which has been shown in the Balance sheet as Theater Income, Shri Kalyan Singh, authorized representative of the party. was inquired in this regard during the course of his statement dated 18.10.2013 (Reply to Query No. 7). He stated that there was no written agreement between the party and the film distributor namely Mukta Movie Distributor and as per his knowledge, Mukta Movie Distributor purchases copy right of the film from the film producer and pays the service tax and exhibits the film in their theatre on revenue sharing arrangement. From the above fact as tendered by Shri Kalyan Singh, authorized signatory of the party the following two facts emerge namely:

A. M/s Mukta Movie Distributor purchased the copyright of film from producer. Copyright was not purchased by the PVS Multiplex i.e. exhibitor of film.

B. M/s PVS Multiplex exhibited the film in their theatre on revenue sharing arrangement on behalf of distributor as copyright was not transferred to them.

20. The above said facts further gain strength from the balance sheet where the amount received from screening of film has been shown as theatre income and payment to the film distributor has been shown as software expenses

21. As per para 10 of Circular dated 13.12.2011, in the arrangement "Principal to Principal basis" where the Movie being exhibited on behalf of Distributor or Sub-Distributor or Area Distributor or Producer etc.- i.e. no copyrights are temporarily transferred, the Service Tax Implication is under Business Support Service / Renting of Immovable Property Service, as the case may be, to be provided by Theatre Owner or Exhibitor. In the view of above said circular and considering the statement of Sh. Kalyan Singh it appears that M/s PVS Multiplex is showing the films on revenue sharing basis without transfer of copyright in their favour, which qualifies the taxable condition as mentioned above. Thus, it appears that the party is, liable to pay service tax on exhibition of film on the amount received under revenue sharing basis as provider of "Business support service"

22. And whereas, in the Balance Sheet (as reflected in ledger account of the party for the payment made to Film/Movies Distributor for the period 2014-15), the amount of share paid to ilm distributor has been shown as Software Expenses. The details of amount paid to M/s Mukta Movie Distributor/Movie distributors from the' theater income on account of the exhibition of movies are tabulated as under:

[Figure in Rupees]

Year	*Total Amount Collected as Theater Receipt*	*Amount paid to Film Distributor (Shown as Software Expenses in Balance Sheet)*
2014-15	*30600721*	*14902420*

23. Hence, it appears that the party is liable to pay Service Tax on Rs. 1,56,98,301.00 [Rs 3,06,00,721.00 - Rs.

1,49,02,420.00] for the year 2014-15. The details of the service tax liability outstanding on the party are elaborated as under:

[Figure in Rupees]

Year	*Total Amount Collected*	*Amount Paid to Film Distributor (Shown As Software Expenses in Balance Sheet)*	*Taxable Amount of Theatre Receipt*
1	*2*	*3*	*4=(2-3)*
2014-15	*30600721*	*14902420*	*15698301*

24. Further, the party has shown "A.C. Receipts (Theatre)" and "Maintenance Charges" in their Balance sheet. On being inquired about the same, the party submitted that they are collecting the said amount in theatre collection and expensing it towards repairing & maintenance of "Air Conditioner" and "Theatre" respectively. This appears to have been done with the sole purpose of bifurcating the amount of sale of movie tickets i.e. Theatre Receipt A.C. Receipts (Theatre) and Maintenance Charges receipts. It appears that the "A.C. Receipts (Theatre)" and "Maintenance Charges" receipt in full is retained by the exhibitor (Theatre Owner) and the remaining amount of income on account of sale of movie tickets is being shared by each of the persons, which appears liable to Service Tax. From this, it appears that it is not merely a renting of premises to the distributor but giving the support service, which is leviable to service tax under the category of 'Business Support Service" as per the Board's above said Circular.

[Figure in Rupees]

Year	*AC Receipts (Theatre)*	*Maintenance Charges*
2014-15	*NIL*	*2081907*

25. In view of the above, it appears that the party is liable to pay Service tax for the period 2014-15 on amount retained during the course of providing "Business Support Service" to film distributor as per chart mentioned below:

[Figure in Rupees]

Taxable Amount of Theatre Receipt	*AC Receipts*	*Maintenance Charges*	*Total Taxable Amount*

	(Theatre)		
15698301	*NIL*	*2081907*	*17780208*

Year	*Total Taxable Amount*	*Service Tax (@12%)*	*Education Cess (@2%)*	*H.S.Education Cess (@1%)*	*Total Service Tax*
2014-15	*17780208*	*2133625*	*42673*	*21337*	*2197635*

26. It further appears that the party had deliberately and willfully refrained from showing the amount received on account of screening of the movie in their ST-3 return with intent to evade payment of service tax. It appears that the party has not paid Service Tax to the tune of Rs. 21,97,635/- [Service Tax: Rs, 21,33,625.00; Edu. Cess: Rs. 42,673.00; SHE Cess: Rs 21,337.00] (Rupees twenty one lakh ninety seven thousand six hundred and thirty five only) for the period 2014-15.

27. From above said facts, it appears that the party has contravened the provisions of Rule 6 of the Service Tax Rules, 1994 read with provisions of Section 66/66B, Section 67 and Section 68 of the Finance Act, 1994, in as much as they failed to pay the service tax on the above said taxable services rendered by them to their clients. Thus, it appears that Service Tax amounting to Rs. 21,97,635/- [Service Tax: Rs. 21,33,625.00; Edu. Cess: Rs. 42,673.00; SHE Cess: Rs. 21,337.00] (Rupees twenty one lakh ninety seven thousand six hundred and thirty five only), as detailed in Annexure - A to this notice, for the period 2014-15, is demandable and recoverable from them in terms of Section 73(1) of the Finance Act, 1994 along with due interest there on in terms of Section 75 ibid.

28. Further, the party has willfully suppressed the value of the taxable services rendered by them from the department, with intent to evade the payment of Service Tax and short/not paid the Service Tax amounting to Rs. 21,97,635/- [inclusive Edu. Cess and S&H Edu. Cess] as applicable there for, to the Government exchequer along with interest due thereon, in contravention of provisions of Rule 6 of the Service Tax Rules, 1994 read with Section 66/66B 67 and 68 of the Finance Act,

1994. Accordingly, it appears that the party is liable for penalty in terms of Section 76 of the Finance Act,1994, for contravention of above said provisions."

4.4 From the above it is quite evident the show cause notice has not made any averment in respect of the definition of Service as per Section 65 B (44) as introduced by the Finance Act, 2012 or about the negative list. Thus we have no hesitation in holding that the impugned order has travelled beyond the show cause notice while upholding the demand made. We also do not find any relevance of the decision of Hon'ble Madras High Court in case of M/s Mediatone Global Entertainmenmt Ltd [2014 (34) STR 819 (Mad)] relied in the impugned as the said decisions has considered the provisions as introduced after introduction of negative list. The show cause notice defines the strict boundaries for adjudication and subsequent proceedings. Thus any order which travels beyond the boundaries laid down by the show cause notice is bad in law and needs to be set aside for the same reason.

4.5 We also find that the show cause notices have been issued completely on the basis of the earlier show cause notice dated 12.09.2014 for the period for the period 2008-09 to 2012-13. Order in original adjudicating the said show cause notice has been set aside by the Allahabad Bench vide its Final Order No. ST/A/71279/2017-CU(DB) dated 29.08.2017, referred in para 2.3 above and the matter remanded back to original authority for reconsideration of certain demands which are other than the demands in respect of screening of films and payments to the distributors in their theatre" . However the demand in the present two show cause notices is only in respect of the demands which have been set aside by this bench vide order dated 29.08.2017

4.6 We also note that issue for the period post 01.07.2012, was considered by the Mumbai Bench in case of INOX Leisure and bench has vide Final Order No A/85216/2022 dated 14.03.2022 has held as follows:

"3. The Department issued two show cause notices dated 14.10.2014 and 13.10.2015 proposing to recover service tax demand of Rs.65,46,68,211/- along with the applicable interest and penalty for the period July 2012 to December 2014. It was alleged that the agreement between the appellant and the distributors created an Association of Persons so as to undertake jointly the activities of screening of the films. The appellant, it was further stated, had provided services to the Association of Persons which appeared to be classifiable under "support services of business or commerce".

8. 'Support services of business or commerce' has been defined in sub-section 104(c) of section 65 of the Finance Act to mean as follows:

***"65(104c) "Support services of business or commerce" means services provided in relation to business or commerce and includes** evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational or administrative assistance in any manner, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.*

Explanation.— For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security."

(emphasis supplied)

9. It is made taxable under section 65(105)(zzzq) of the Finance Act which is reproduced below: "65(105)(zzzq) 'taxable service' means any service provided or to be provided to any person, by any other person, in relation to support services of business or commerce, in any manner;

10. The issue that arises for consideration is whether the activity carried out by the appellant would be exigible to service tax under BSS. To appreciate this, it would be pertinent to refer to the agreement. The agreement in the present appeal is almost the same as the agreement in other appeals that have been decided including that in Inox Leisure Ltd. It would be seen from the agreement that the producer/distributor is engaged in the business of production and distribution of films, while the appellant is an exhibitor engaged in the business of exhibition of films and

owns/operates a chain of multiplex theatres. The exhibitor decides which screens would play the motion picture, the numbers of shows, the show timings and the ticket pricing including the right to decide on a week to week basis, whether or not to continue to exhibit the motion picture. The distributor/producer had granted the exhibitor the non exclusive license to exploit the theatrical rights of a motion picture and each party was entitled to conduct its business in its absolute and sole discretion.

11. In the present case the Department has alleged that the appellant is providing infrastructure support services to the producers/distributors of films under BSS.

12. Such an arrangement between a distributor/producer and an exhibitor of films was examined by a Division Bench of the Tribunal in Moti Talkies. The Department alleged that the agreement was for 'renting of immovable property' as defined under section 65(90a) of the Finance Act. This contention was not accepted by the Tribunal and it was observed that the appellant did not provide any service to the distributors nor the distributors made any payments to the appellant as consideration for the alleged service. In fact, it was the appellant who had paid money to the distributors for the screening rights conferred upon the appellant. The observations of the Bench are as follows:

> *"11. It is more than apparent from a bare perusal of the aforesaid agreements that they have been entered into between the appellant as an exhibitor and the distributors for screening of the films on the terms and conditions mentioned therein. The payments contemplated under the terms and conditions either require the exhibitor to pay a fixed amount or a certain percentage, subject to minimum exhibitor share or theatre share of effective shows in a week.*
>
> *xxxxxxxxxxx*
>
> *16. It is very difficult to even visualise that the appellant is providing any service to the distributor by renting of immovable property or even any other service in relation to such renting. The agreements that have been executed between the appellant and the distributors confer rights upon the appellant to screen the film for which the appellant is making payment to the distributors. The distributors are not making any payment to the appellant. Thus, no consideration flows from the distributors to the appellant for the alleged service.*
>
> *xxxxxxxxxxxx*
>
> *18. It is not possible to accept the reasonings given by the Commissioner (Appeals) for confirming the demand*

> *of service tax under "renting of immovable property" for the simple reason that the appellant has not provided any service to the distributors nor the distributors have made any payment to the appellant as consideration for the alleged service. In fact, the appellant who has paid money to the distributors for the screening rights conferred upon the appellant. The Commissioner (Appeals) completely misread the agreements entered into between the appellant as an exhibitor of the films and the distributors to arrive at a conclusion that the appellant was providing the service of "renting of immovable property." (emphasis supplied)*

13. Similar views were expressed by Division Benches of the Tribunal in The Asian Art Printers, Shri Vinay Kumar, M/s. Golcha Properties and Satyam Cineplexes Ltd.

14. What also needs to be noticed is that if the appellant was providing such a service, it would be the producers/ distributors who would be making payments to the appellant, but what comes out from a perusal of the Agreement is that in consideration for the distributor agreeing to grant to the appellant the license to exploit the theatrical rights of a motion picture, the appellant would have to pay such revenue share to the distributor as provided for in the said clause. In fact, the distributor agreed to grant to the Appellant the non exclusive license to exploit the theatrical rights of a motion picture during the term.

15. This issue had come up for consideration before a Division Bench of the Tribunal in PVS Multiplex India. The Bench observed that as the appellant was screening films on revenue sharing basis, the appellant was not liable to pay service tax on the payments made to the distributors for screening the films.

> *"7. Having considered contentions and on perusal of the facts on record, we are satisfied that there is no dispute of fact that the appellant have been screening films in their multiplex on Revenue Sharing basis, which is undisputed finding recorded by the ld. Commissioner in the impugned order. Accordingly, we hold that the appellant is not liable to pay Service Tax for Screening of Films and payments to distributors in their theatre." (emphasis supplied)*

16. This apart, a revenue sharing arrangement does not necessarily imply provision of services, unless the service provider and service recipient relationship is established. This is what was observed by the Tribunal in Mormugao Port Trust, Old World Hospitality and Delhi International Airport.

17. In Mormugao Port Trust, the Tribunal explained that public private partnerships between the Government/Public

Enterprises and Private parties are in the nature of joint venture, where two or more parties come together to carry out a specific economic venture, and share the profits arising from such venture. Such public private partnerships are at times described as collaboration, joint venture, consortium or joint undertaking. Regardless of the name or the legal form in which the same are conducted, they are essentially in the nature of partnership with each co-venturer contributing some of the resources for the furtherance of the joint business activity. The Tribunal held that such public private partnerships meet the test laid down by the Supreme Court in Faqir Chand Gulati vs. Uppal Agencies Pvt Ltd [2008 (12) STR 401], for ascertaining whether or not the arrangement is one of joint venture. The relevant observations of the Tribunal in Mormugao Port Trust are reproduced below:

"12 …….. In our view this arrangement in the nature of the joint venture where two parties have got together to carry out a specific economic venture on a revenue sharing model. Such PPP arrangement are common nowadays not only in the port sector but also in various other sectors such as road construction, airport construction, oil and gas exploration where the Government has exclusive privilege of conducting businesses. In all such models, the public entity brings in the resource over which it has the exclusive right, whether land, water front or the right to exploit the said land and water front, and the private entities brings in the required resources either capital, or technical expertise necessary for commercial exploitation of the resource belonging to the Government. These PPP arrangements are described sometimes as collaboration, joint venture, consortium, joint undertaking, but regardless of their name or the legal form in which these are conducted. These are arrangements in the nature of partnership with each co-venturer contributing in some resource for the furtherance of the joint business activity. …….

15. An analysis of this judgment shows that in order to constitute a joint venture, the arrangement amongst the parties should be a contractual one, the objective should be to undertake a common enterprise for profit. Joint control over strategic financial and operative decisions was held to be the key feature of a joint venture. The other obvious feature of a joint venture would be that the parties participate in such a venture not as independent contractors but as entrepreneurs desirous to earn profits, the extent whereof may be contingent upon the success of the venture, rather than any fixed fees or consideration for any specific services.

17 The question that arises for consideration is whether the activity undertaken by a co- venture (partner) for the furtherance of the joint venture (partnership) can be said to be a service rendered by such co-venturer (partner) to the Joint Venture (Partnership). In our view, the answer to this question has to be in the negative inasmuch as whatever the partner does for the furtherance of the business of the partnership, he does so only for advancing his own interest as he has a stake in the success of the venture. There is neither an intention to render a service to the other partners nor is there any consideration fixed as a quid pro quo for any particular service of a partner. All the resources and contribution of a partner enter into a common pool of resource required for running the joint enterprise and if such an enterprise is successful the partners become entitled to profits as a reward for the risks taken by them for investing their resources in the venture. A contractor contractee or the principal-client relationship which is an essential element of any taxable service is absent in the relationship amongst the partners/co-venturers or between the co-venturers and joint venture. In such an arrangement of joint venture/partnership, the element of consideration i.e. the quid pro quo for services, which is a necessary ingredient of any taxable service is absent.

18. The Civil Appeal filed by the Department (Commissioner vs. Mormugao Port Trust) against the aforesaid decision of the Tribunal was dismissed by the Supreme Court both on the ground of delay as well as on merits and the judgment is reported in 2018 (19) GSTL J 118 (SC).

19. The Circular dated 23.02.2009 issued by the Central Board of Excise and Customs, infact supports the case of the appellant. The relevant portion of the Circular, which is in connection with service tax on movie theatres, is reproduced below:

> *2.4. The arrangement most commonly entered into between a theater owner and a distributor is that the theater owner screens the movie for fixed number of days under a contract. The proceeds earned through sale of tickets go to the distributor but the theatre owner receives a fixed sum depending upon the number of days of screening. In this arrangement, the advertisement and display of posters etc. is done by the distributor. Under this arrangement, the fixed amount contracted is given to the theater owner by the distributor irrespective of the fact whether the movie runs well or not. However, there is no rental arrangement between the theater owner and the distributor as in the arrangement at paragraph 2.1 above. A view has been expressed that in this arrangement, the theater owner provides 'Business*

Support Service' to the distributor and hence is liable to pay service tax on the fixed amount received by the theater owner.

2.5. The matter has been examined. By definition 'Business Support Service' is a generic service of providing 'support to the business or commerce of the service receiver'. In other words the principal activity is to be undertaken by the client while assistance or support is provided by the taxable service provider. In the instant case the theatre owner screens/exhibits a movie that has been provided by the distributor. Such an exhibition is not a support or assistance activity but is an activity on its own accord. That being the case such an activity cannot fall under 'Business Support Service'.

3. In the light of above, it is clarified that screening of a movie is not a taxable service except where the distributor leases out the theater and the theater owner get a fixed rent. In such case, the service provided by the theater owner would be categorized as 'Renting of immovable property for furtherance of business or commerce' and the theater owner would be liable to pay tax on the rent received from the distributor. The facts of each case and the terms of contract must be examined before a view is taken. 4. All pending cases may be disposed of accordingly. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned."

(emphasis supplied)

20. The subsequent Circular dated 13.12.2011 issued by the Central Board of Excise and Customs, apart from the fact that it would not be applicable for confirming a demand for any period prior to 13.12.2011, would also not come to the aid of the Department. The relevant portion of the Circular is reproduced below:

9. Thus, where the distributor or sub-distributor or area distributor enters into an arrangement with the exhibitor or theatre owner, with the understanding to share revenue/profits and not provide the service on principal-to-principal basis, a new entity emerges, distinct from its constituents. As the new entity acquires the character of a "person", the transactions between it and the other independent entities namely the distributor/sub-distributor / area distributor and the exhibitor etc will be a taxable service. Whereas, in cases the character of a "person" is not acquired in the business transaction and the transaction is as on principal-to-principal basis, the tax is leviable on either of the constituent members based on the nature of the

transaction and as per rules of classification of service as embodied under Sec 65A of Finance Act, 1994.

(emphasis supplied)

21. In view of the decision of the Supreme Court in Faqir Chand Gulati and the decision of the Tribunal in Mormugao Port Trust, no service tax can be levied on the appellant under BSS.

22. All the aforesaid issues were also examined at length by a Division Bench of the Tribunal in Inox Leisure Ltd. and the order passed by the Commissioner was set aside.

23. The Department filed Civil Appeal No. 1335 of 2020 (The Commissioner of Service Tax vs. Inox Leisure Ltd) before the Supreme Court and by order dated 28.02.2022, the Supreme Court dismissed the Civil Appeal holding that the Tribunal had taken an absolutely correct view, to which the Supreme Court agreed. The order passed by the Supreme Court is reproduced below:

"No case is made out to interfere with the impugned order passed by the Customs, Excise and Service Tax Appellate Tribunal (for short, 'CESTAT'). The CESTAT has taken an absolutely correct view, to which we agree. Hence, the Civil Appeal stands dismissed."

24. Thus, for all the reasons stated above, it is not possible to sustain the confirmation of the demand by the order dated 16.06.2016 passed by the Commissioner. It is, accordingly, set aside and the appeal is allowed.

4.6 Respectfully following the decision of Allahabad Bench in appellants own case and the decision of Mumbai Bench in case of M/s INOX Leisure we do not find any merits in the impugned order and set aside the same.

5.1 Appeal is allowed.

(Pronounced in open court on 01.07.2024)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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