Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal Nos 3532-3536 of 2020

M/s International Merchandising Company, LLC (Earlier Known as International Merchandising Corporation) — **Appellant**

Versus

Commissioner, Service Tax, New Delhi — **Respondent**

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

1. These appeals arise from a judgment dated 29 May 2020 of the Customs, Excise and Services Tax Appellate Tribunal[1] in a batch of service tax appeals. The appeals before the Tribunal arose from an order dated 1 August 2013 of the Commissioner (Adjudication) which dealt with five show cause notices dated 20 October 2009, 20 April 2010, 20 April 2011, 23 March 2012 and 23 April 2013. The first of the five show cause notices invoked the extended period of limitation.

[1] "Tribunal"

2. The appellant is engaged in providing diversified sports, entertainment and media services. It is registered with the jurisdictional service tax authorities under Chapter V of the Finance Act, 1994 for taxable event categories such as management consultant services, event management services, business auxiliary services, business exhibition services, and TV or radio programme production services. The appellant organizes events such as the Chennai Open Tennis Tournament and Lakme Fashion Week. It entered into various agreements, both domestic and international, with regard to the hiring of celebrities for appearances at the events, selling broadcasting rights, sharing IT services with group companies abroad, and secondment with group companies.

3. The appellant entered into an agreement on 1 January 2005 with an entity by the name of First Serve Entertainment[2] for the appearance of Mr Vijay Amritraj[3], a noted tennis player, in connection with the Chennai Open Tennis Tournament. On 3 January 2005, the appellant entered into an agreement with a tennis player of Thai origin, Mr Paradorn Srichaphan, for his participation in the same tournament.

4. The contents of the agreement with FSE for appearance and participation of VA are extracted below:

> "2. Appearance and Participation, IMC hereby engages First serve for appearance and participation of Amritraj of First Serve in connection with Chennai open. Amritraj will appear and participate in the opening and closing ceremonies and also play in the charity auction match at the Chennai open [and] **First Serve hereby accepts such engagement and agrees to cause Amritraj to**

[2] "FSE"
[3] "VA"

appear and participate in the Chennai open in accordance with all applicable laws and regulations.

3. Terms, (a) The term of this Agreement (the Term, subject to the provisions of sub section (b) immediately below) is five (5) consecutive years as of January 1, 2005 and concluding on December 31, 2009 unless terminated earlier as provided herein.

(b) If (I) IMC, in its reasonable judgment, determines that the Chennai open is no longer economically viable (meaning that IMC is no longer able to conduct the Chennai open as a going concern and must cancel the Chennai open in any year(s) during the Term due to economic losses due to, as an example, insufficient or non existent sponsorship income), or (II) the Chennai open is no longer held at the venue for any reason, then this Agreement will be automatically terminated by IMC without liability or father [sic] obligation of either party other than (if applicable) First Serve's pro rata repayment of any fee received for the cancelled Chennai open(s) during the Term, except for any obligation expressly intended to survive the termination of this Agreement. If economic circumstances change, or the Chennai open returns to its original venue and IMC intends to reinstate the Chennai open during the Term, then IMC shall promptly notify first serve and the parties shall discuss in good faith whether to reinstate this agreement.

4. Fees, in consideration for the participation of Amritraj, IMC agrees to pay First Serve an annual fee in the amount of US $ 140,000 (each a fee). Each fee will be paid to First Serve after the conclusion of the Chennai Open in each year upon the presentation of an invoice from First Serve to IMC, *** "

(emphasis supplied)

5. In November 2016, an agreement was executed between the appellant and Zee Telefilms to license the rights to broadcast the Chennai Open Tennis Tournament on Zee Sports channel in India. The relevant extracts of the License Agreement with Zee Telefilms are set out below:

"A. Programmes/Events

Licensor is the owner of an ATP Tour, Inc. ("ATP") Tour International Series event which shall be names "The Chennai Open Tennis Championships" ("the Event/Programme") or such other name to be determines by Licensor and Licensor has agreed to provide Licensee the right to broadcast the Event on Licensee's Satellite Television Channel "Zee Sports" in India oil [sic] the terms and conditions more particularly described herein.

B. Rights and Definitions: The following rights and terms shall be defined as set forth below for the purposes of this Agreement:

Designated Rights	Cable, satellite and terrestrial television
Licensed Period	From the date of commencement of the Event held in 2007 till the conclusion of the Event held in 2009
Licensed Territory	India
Licensed Language	English and Hindi

The above Rights with regards to the Event, **whose Programmes shall be produced and supplied by Licensor and which are granted to Licensee in the Licensed Language on an exclusive basis in the Licensed Territory**.

(emphasis supplied)

6. The appellant entered into an agreement with Trans World International on 16 September 2010 for the sale of telecast rights of the Chennai Open Tennis Tournament in territories outside India. The relevant extracts of the agreement between the appellant and Trans World International are as follows:

"WHEREAS

A) IMC owns the rights to organize, promote and conduct a men's international series tennis event in (the "Tournament"), once each year, at Chennai in India;

B) The company is the television arm of the International Management Group of companies and has agreed to sell telecast rights for the Tournament (the "Rights") in territories across world except India.

C) The parties have agreed to the terms under which the Company would perform such activities for sale of the rights globally except India and desire by this instrument to record their agreement.

It is agreed as follows:- ***

> 2. Activities to be performed by the Company:
>
> For the Chennai Open 2011, the company shall sell telecast rights in the Territory by using all reasonable commercial endeavours consistent with its best business judgment to maximize revenue for the Tournament.
>
> Relationship between company and IMC is on principle to principle basis. Company shall sell the rights to clients and collect the money from them."

7. The records of the appellant were audited by the officers of the Delhi Services Tax Commissionerate during May 2009 for the period 2004-2005 to 2007-2008. The Commissioner issued a demand of service tax to the appellants under various heads, including manpower recruitment or supply agency service under reverse charge, programme producer service, sponsorship service, and other services. Five show cause notices, as stated above, were issued to the appellant cumulatively for the period April 2004 to March 2012, which resulted in a common order of the Commissioner (Adjudication). The Commissioner adjudicated all the five show cause notices and confirmed the demand of service tax by an order dated 1 August 2013.

8. The Commissioner ruled that the consideration paid to FSE for appearance of VA for a sports tournament is taxable under the definition of "manpower recruitment or supply agency". The Commissioner observed that the source of supply of skilled manpower is outside India and has been received by the appellant in India. The Commissioner further ruled that any programme made by a programme producer and then offered for sale to different TV channels or broadcasters for relay is a taxable activity. The Commissioner concluded that the transaction made by the appellant with Zee Telefilms includes element of service and is taxable.

9. Aggrieved by the order of the Commissioner, the appellant lodged appeals before the Tribunal. The Tribunal by its judgment dated 29 May 2020 held against the appellant. It observed that the services provided by FSE were in the nature of supplying, recruiting, and providing players for sport events organized by the appellant. It held that such services will be covered under the definition of "manpower recruitment or supply agency" under section 65(105)(k) read with section 65(68) of the Finance Act, 1994. The Tribunal further relied upon the decision in **Board of Cricket Control for India** v. **Commissioner**[4] to uphold the order of the Commissioner imposing the demand of service tax under the category of programme producer services during the relevant period. The Tribunal did not accept the argument of the appellant that the Commissioner could not have invoked the extended period of limitation as the issues involved interpretation of legal provisions. On the issue of imposition of penalty on the appellant, the Tribunal directed the Commissioner to redetermine the amount of penalty in remand proceedings.

10. Mr S Ganesh, senior counsel appearing on behalf of the appellant submits that:

(i) The appellant identified VA for his participation in the tennis tournament and that it was at his behest that an agreement was entered into with FSE in terms of which VA would appear in or participate in the tournament conducted by the appellant;

[4] 2015 (37) ELT STR 785 (T-MUM)

(ii) FSE is not a supplier of manpower because VA is an identified person and hence the activity does not befit the description of manpower supply;

(iii) In the event that the appellant was to recruit VA directly, there would be no levy of service tax and hence in a situation where the appellant entered into an agreement with FSE at the behest of VA, the same position should obtain;

(iv) The contract between the appellant and FSE is a commercial contract and must hence be construed in a manner consistent with the commercial sense and understanding between the parties under the contract;

(v) The Central Board of Excise and Customs[5] has issued a circular dated 23 August 2007 clarifying this head of charge of service tax and the circular makes it clear that the trigger for the levy of service tax is the existence of an employer-employee relationship between the service provider and the person whose service is provided to the customer;

(vi) In the present case, the appellant intended to secure the presence of VA who is a famous tennis player for which purpose the appellant arrived at an understanding with VA, which was followed by a formal contract with a one-man company owned and controlled by him;

(vii) The Tribunal has based its conclusion on the premise that VA and his company constitute separate and distinct legal entities by disregarding

[5] "CBEC"

the provisions of the circular dated 23 August 2007 which specifies the requirement that the service provider and the person whose service is provided must be governed by an employer-employee relationship in order for the provisions of Section 65(68) to be attracted.

11. These submissions have been controverted by Mr N Venkataraman, Additional Solicitor General appearing on behalf of the respondent. The Additional Solicitor General submitted that:

(i) The provisions of Section 65(68) do not stipulate that there must exist an employer-employee relationship between the service provider and the person whose services are provided;

(ii) The circular dated 23 August 2007 issued by the CBEC must be understood in terms of its context: and

(iii) It would not be permissible to restrict the plain terms governing the definition in Section 65(68) by reference to the circular of the CBEC when the circular has been issued in a completely different context.

12. In the counter-affidavit filed by the respondent, it has been averred that the agreement between the appellant and FSE indicates that the latter has caused the participation of VA in terms of the requirement of the appellant. Therefore, the said activity was specifically covered under “manpower recruitment or supply agency” as defined under section 65(68) read with section 65(105)(k). As regards the demand of service tax on programme producer services, the respondent

averred that production of programmes for telecast on TV channels falls under the category of program producer services and was taxable.

13. The first issue which falls for determination bears upon the interpretation of the provisions of Section 65(68) read with Section 65(105)(k) of the Finance Act 1994. The definitions of "manpower recruitment or supply agency" and "taxable service" under section 65 of the Finance Act, 1994 are as follows:

> 65. Definitions – In this Chapter, unless the context otherwise requires, -
>
> ***
>
> (68) "manpower recruitment or supply agency" means any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise to any other person."
>
> ***
>
> (105) "taxable service" means any service provided or to be provided –
>
> (k) to any person, by a manpower recruitment or supply agency in relation to the recruitment or supply of manpower, temporarily or otherwise, in any manner;
>
> [Explanation – For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, recruitment or supply of manpower includes services in relation to pre-recruitment screening, verification of the credentials and antecedents of the candidate and authenticity of documents submitted by the candidate]

14. While analysing the rival submissions, it would be necessary to set out the essential ingredients of the definition contained in Section 65(68). The provision defines a "manpower recruitment or supply agency" to mean (i) any person engaged in providing any service; (ii) directly or indirectly; (iii) in any manner; (iv) for recruitment or supply of manpower; (v) temporarily or otherwise; and (vi) to any

other person. In other words, the definition encompasses a situation where a person is engaged in providing a service for the recruitment or supply of manpower to any other person. The definition incorporates a recruitment as well as a supply of manpower. The expression 'supply' is of a wider connotation than recruitment. Moreover, the width of the provision is abundantly clear by the use of the expressions "directly or indirectly", "in any manner" and "temporarily or otherwise".

15. In the present case, there can be no manner of doubt that FSE, which is admittedly a company with a distinct legal identity, had an agreement with the appellant in terms of which the services of VA were to be provided. There was undoubtedly nothing on the record to indicate that VA was an employee of FSE. The issue however is as to whether the definition which has been extracted earlier of "manpower recruitment or supply agency" must be constrained by a further requirement of the existence of an employer-employee relationship between the manpower supply agency and the person whose services are provided. Plainly, the definition does not incorporate such a requirement or condition.

16. But, the submission of Mr S Ganesh, senior counsel for the appellant is that the CBEC having issued a circular dated 23 August 2007, the excise authorities would be bound by the circular which has the effect of narrowing the ambit of the statutory definition contained in Section 65(68). There can be no doubt as a matter of first principle that the revenue is bound by its own circulars. Equally, it is necessary to understand the context in which the circular dated 23 August 2007 was issued by the CBEC. The circular narrates that after the introduction of service tax in 1994, several clarifications in the form of circulars, instructions and letters

were issued by the CBEC and the Directorate General Service Tax. The Union Government decided to undertake a comprehensive review of all the clarifications having due regard to the changes which have been brought about by statutory provisions and judicial pronouncements. A Committee was constituted for that purpose which invited the opinions of all stake holders. Following the report of the Committee, the Union government issued the circular so as to reflect the interpretation of the law and the current practice of the department. Yet, paragraph 8 of the circular clarifies that the circular would not override legal provisions. The relevant part of the circular which forms the subject matter of the submissions urged in the present case reads as follows:

	Issue	Clarification
010.02/ 23.08.07	Business or industrial organizations engage services of manpower recruitment or supply agencies for temporary supply of manpower which is engaged for a specified period or for completion of particular projects or tasks. In the case of supply of manpower, individuals are contractually employed by the manpower recruitment or supply agency. The agency agrees for use of the services of an individual, employed by him, to another	Employer employee relationship in such case exists between the agency and the individual and whether service tax is liable on such services under manpower recruitment or supply agency's service [section 65(105)(k)] not between the individual and the person who uses the services of the individual. Such cases are covered within the scope of the definition of the taxable service [section

	person for a consideration.	65(105)(k)] and, since they act as supply agency, they fall within the definition of "manpower recruitment or supply agency" [section 65(68)] and are liable to service tax.

17. The second column of the circular which has been extracted above deals with the issue while the third column contains the clarification. The issue which was flagged is that services of manpower recruitment or supply agencies are engaged by business or industrial organizations for the temporary supply of manpower which may be engaged either for a specified period or for the completion of particular projects or tasks. The question was whether service tax would be liable to be charged on such services under the 'manpower recruitment or supply agency' service. In other words, the issue which is dealt with is whether service tax would be attracted where at the behest of a business or industrial organization, the services of a manpower or supply agency is engaged for the supply of manpower for specified periods, projects or tasks. The clarification is that in such cases governing the supply of manpower, individuals are contractually employed by the manpower recruitment or supply agency. The agency agrees with another person to supply the services of that individual employed by the agency for a consideration. An employer-employee relationship exists between the agency and the individual and not between the individual and the person who uses the services of the individual. Such cases were held to be governed by the definition of "manpower recruitment or supply agency" in Section 65(68) and hence liable to

service tax. The CBEC circular dated 23 August 2007 deals with a situation where there exists a relationship of employer and employee between the agency which supplies the service and a person whose service is supplied. But it does not postulate that such a relationship must exist for the statutory definition to be attracted. Hence, the fact that there may be no relationship of employment between VA and FSE would not be dispositive for the purposes of the statutory definition in Section 65(68). For the above reasons, we are of the view that the decision of the Tribunal on this aspect of the matter cannot be faulted with.

18. The second submission which has been urged on behalf of the appellant by Mr S Ganesh, senior counsel relates to the definition of the expression "programme producer" in Section 65(86b) of the Finance Act 1994 as amended. Section 65(86b) is extracted below:

> "programme producer' means any person who produces a programme on behalf of another person."

19. The essence of the definition of "programme producer" is that a person must produce a programme on behalf of another person. The appellant had agreements with Zee Telefilms and with Trans World International. On examination of the terms of the agreement with Zee Telefilms, it becomes evident that the appellant licensed the right to broadcast the Chennai Open Tennis Tournament owned by the appellant on the Zee Sports television channel. Likewise, the agreement with Trans World International was a contract for the sale of telecast rights in territories outside India in relation to the Chennai Open Tennis Tournament. Plainly, the definition in Section 65(86b) was not attracted. The expression "programme producer" would implicate a situation where a person has produced a programme on behalf of

another person. In the present proceedings, the appellant produced the programmes and sold the telecast rights to Zee Telefilms and Trans World International. There was no production of a programme on behalf of the appellant either by Zee Telefilms Limited or by Trans World International. The factual position is not in dispute during the course of the hearing of the appeal.

20. The Tribunal relied upon its decision in the case of **Board of Control for Cricket in India** (supra). The extract from the decision which was relied upon by the Tribunal is set out below, insofar as it is relevant:

> 1. "6.2 As per clause 2.1, **BCCI has appointed the producer to exclusively produce the feed for and on behalf of BCCI and the feed means – the live and continuous clean audio and visual television signal of each match as described in detail in clause 3.2 of the agreement**. Clause 3.1 of the agreement deals with production services and reads as - "the producer must produce the feed for each match of the events as per the production/technical specification detailed in schedule 3, using the personnel specified in clause 5, using the equipment specified in schedule 3 and otherwise in accordance with this agreement." Clause 3.2 specifies that the feed for each match must be live, continuous and uninterrupted and should be in conformity with the specifications mentioned in sub-clauses (a) to (g) thereof. Clause 4 of the agreement deals with the other obligations of the producer and clause 5 deals with personnel who should be engaged for production. Clause 6 deals with production and technical specifications relating to the equipment, use of the equipment, camera and key camera positions and so on. Clause 9 deals with assignment of the copyright by the producer to BCCI in respect of all the sound recordings, broadcasting and transmissions and so on. For the services rendered, clause 10 of the agreement specifies the consideration to be paid by BCCI to the producer for the production of the feed which includes all statutory taxes and charges, import duties and tariffs on imported materials and equipment, rise and fall, relevant award costs and allowances for the personnel."
>
> (emphasis supplied)

21. The above extract indicates that in terms of the contract, BCCI had appointed the producer to exclusively produce the feed for and on behalf of BCCI for each match. This is the distinguishable feature of the decision of the Tribunal in

BCCI which is absent in the present case. Therefore, we are of the considered view that the Tribunal was in error in holding that the decision would apply squarely to the facts of the present case. The view of the Tribunal to that extent would have to be and is accordingly reversed.

22. The final submissions which need to be considered is whether (i) the extended period of limitation would stand attracted in the case of the first show cause notice; and (ii) whether a valid ground for the imposition of a penalty was made out. In this regard, reliance has been placed on behalf of the appellant on the decision of this Court in **Padmini Products** v**. CCE, Bangalore**[6] to submit that the extended period of limitation would not be attracted as the appellant has not acted with dishonest or fraudulent intent.

23. In paragraph 4.20 of its order, the Tribunal has specifically observed that the present case involves the interpretation of statutory provisions. Having said this, the Tribunal in the concluding paragraph of its decision held that since the matter was being remitted back to the Commissioner for re-determination of the quantum of demand, the amount of penalty would have to be re-determined in accordance with the duty demand confirmed in the demand proceedings.

24. We are of the considered view that the Tribunal having come to the conclusion that the issue turned upon an interpretation of the provisions of Section 65(68) and Section 65(86b) of the Finance Act 1994, there was no warrant to allow the invocation of the extended period of limitation and to direct the determination of the penalty following the re-quantification of the demand. The extended period

[6] (1989) 4 SCC 275

of limitation would clearly not stand attracted in respect of the first show cause notice dated 20 October 2009. The show cause notice shall hence have to be confined to the normal period of limitation excluding the extended period.

25. As far as the penalty is concerned, we are of the considered view that there was no warrant for the imposition of the penalty as the dispute in the present case essentially turned on the interpretation of the statutory provisions and their inter play with the circular issued by the CBEC. Finally, we also order and direct that the view of the Tribunal on the applicability of the provisions of Section 65(86b) of the Finance Act 1994 as amended has been reversed by this Court. On remand in pursuance of the impugned order of the Tribunal, the adjudicating officer shall abide by the above directions.

26. The appeals shall stand allowed in part in the above terms.

27. Pending applications, if any, stand disposed of.

…….J.
[Dr Dhananjaya Y Chandrachud]

…….J.
[Hima Kohli]

New Delhi;
November 01, 2022
CKB