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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAXAPPEAL NO: 86285 OF 2015

[Arising out of Order-in-Original No. 01-COMMR/ST-II/PK/2014-15dated 27th February 2015 passed by the Commissioner of Service Tax, Mumbai-II]

Star India Pvt Limited
Star House, Urmi Estate, 95, Ganpatrao Kadam Marg
Lower Parel (W), Mumbai - 400013 ***…Appellant***

versus

Commissioner of Service Tax,
Mumbai – II
115, New Central Excise Building
MaharshiKarve Road, Mumbai - 400020 ***…Respondent***

APPEARANCE:

Shri V Sridharan, Senior Advocate with Shri Somesh Jain, Chartered Accountant for the appellant

Shri Anand Kumar, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 85826 /2022

DATE OF HEARING:	09/03/2022
DATE OF DECISION:	01/09/2022

PER: C J MATHEW

This appeal of M/s Star India Pvt Limited, against the fastening

of levy of service tax of ₹ 52,37,68,283 under section 73 of Finance Act, 1994 for 2009-10, pertains to the payment of ₹ 508,51,28,961 received by M/s Star L, Hongkong for the use of the visibly recognizable mark of the latter along with the other recognizable channel mark – and alleged to be consideration for having received 'intellectual property service' from the overseas entity as culled out from the books of accounts of the appellant. The charging of interest under section 75 of Finance Act, 1994, the imposition of penalty of like amount under section 78 of Finance Act, 1994 and penalty under section 77 of Finance Act, 1994 in order-in-original no. 01-COMMR/ST-II/PK/2014-15 dated 27th February 2015 of Commissioner of Service Tax, Mumbai-II are also under challenge. To bolster the claim of the tax authorities, it was pointed out that tax on payment of ₹ 165,07,41,250 for the same facilitation had been duly discharged for 2010-11 in accordance with the stipulations in section 66A of Finance Act, 1994 on service procured from outside the country.

2. It was intimated by Learned Senior Counsel appearing for the appellant that they are in the business of rendering 'broadcasting services' and that the present demand pertains to the payments made during 2009-10 to M/s Star L, Hong Kong by M/s Star Asia Region FZ LLC, M/s Star Asian Movies Limited and M/s Star Television Entertainment Ltd, three foreign companies owning television

channels. According to him, the three entities had appointed M/s Satellite Television Asian Region Limited, Hongkong as their agent for advertisement sales and channel distribution in India either by themselves or through sub-agents and that the Hongkong entity delegated their agency for India, Nepal and Bhutan to the appellant. It is contended by him that, in pursuance of the agreement among the overseas entities, ₹ 77,14,25,490, ₹ 91,8745,099 and ₹ 339,49,58,373 (totalling ₹ 508,51,28,962) was paid by M/s Star Asia Region FZ LLC, M/s Star Asian Movies Limited and M/s Star Television Entertainment Ltd respectively to M/s Satellite Television Asian Region Ltd, Hongkong for use of the trademark of the latter and hence the recourse to section 65(105)(zzr) of Finance Act, 1994 along with section 66A of Finance Act, 1994 in the unique circumstances of a corporate re-structuring exercise that he proceeded to lay bare before us.

3. It would appear that the three foreign companies were sought to be merged with the appellant and the scheme had received the approval of the Hon'ble High Court of Bombay on 18th February 2010 with 1st April 2009 being the appointed date as laid out in the proposed scheme though the effective date of merger was 29th April 2010 for M/s Star Asia Region FZ LLC and 31st May 2010 for M/s Star Asian Movies Limited and M/s Star Television Entertainment Ltd. It is his contention that the payments made in the *inter regnum* by

these foreign companies to the other Hongkong entity and reflected in the redrawn accounts of the appellant as required after merger was sought to be taxed in show cause notice issued almost four years after the occurrence of the actual merger.

4. Learned Senior Counsel contends that their disclosure in Form 3CEB under section 92E of Income Tax Act, 1961 against ‘particulars in respect of transactions in intangible property’ has been hitched onto by service tax authorities without let for context in, or limitations of, the reporting system. According to him, the mandatory re-drawal of accounts consequent upon approval of merger had nothing to do with the ‘non-exclusive, non-transferable right to use the marks’ assigned to the appellant by M/s Satellite Television Asian Region Ltd, Hongkong in their agreement of 9th May 2006. A further contention of his is that the terms of the said agreement does not conform to the requirement in the definition of ‘intellectual property service’ in section 65(55b) of Finance Act, 1994 to bring it within the ambit of ‘taxable service’ in section 65(105) of Finance Act, 1994. Elaborating upon this submission, he stated that the licence was restricted to distribution and marketing of channels for which annual licence fee was consideration on which tax liability had been discharged; he relied upon adjudication orders pertaining to 2004-08, in notices issued to them as well as the now merged entities having dropped proceedings, for non-coverage under the alleged service description.

He drew attention to section 66A of Finance Act, 1994 to submit that even if, as a branch, the foreign companies did receive services, the levy is restricted to services received in India for which reliance was placed on decisions of the Tribunal in *3i Infotech Ltd v. Commissioner of Service Tax, Mumbai -III [2017 (51) STR 305]* and in *Infosys Ltd v. Commissioner of Service Tax, Bangalore [2014-TIOL-409-CESTAT-BANG]*. Additionally, he submits that every consequence of merger is governed by the order of the Hon'ble High Court which, in clause 8, has made it abundantly clear that all contracts, deeds, licences and approvals prior to the effective date remain unaffected in character as the transferee accepts and adopts these as if done and executed on its behalf.

5. Relying upon the filing by the appellant and which, according to Learned Authorized Representative, is admission that, effective from the appointed date, the expenses incurred are that of the transferee company, he argued that the demand was correctly raised. In the absence of definition of 'amalgamation' in Companies Act, 1956, he drew upon the contents thereof in section 2(1B) of Income Tax Act, 1961 and procedure of amalgamation in section 390 to 396A of Companies Act, 1956 to argue that an amalgamated or transferor company shall have been deemed to have carried on the business for and on behalf of the transferee company with all attendant consequences. He contended that the judgement of the Hon'ble

Supreme Court in *Marshall Sons and Company (India) Ltd v. Income Tax Officer [2002-TIOL-2570-SC-IT]* and those of the Tribunal in *Commissioner of Service Tax, Delhi – I v. ITC Hotels Limited [2012 (27) STR 145 (Tri-Del]* and in *Usha International Ltd v. Commissioner of Service Tax, New Delhi [2016 (43) STR 552 (Tri-Del)]* support the stand adopted in the impugned order that all tax consequences come into effect on the appointed date, and not on the effective date, of merger.

6. From the rival contentions, we take note that it is common ground that the impugned payment to M/s Satellite Television Asian Region Ltd had been made by the three foreign companies for 2009-10 and that it also coincided with the period commencing with the 'appointed date' in the scheme of merger as approved by the Hon'ble High Court of Bombay. Likewise, it is also not contested that the adjudicating authority, for reasons assigned in the impugned order, held that the consequence of merger on the appointed date was tantamount to acknowledging the overseas transfers as their own and, being consideration for 'taxable service', was liable to tax in the hands of the recipient as deemed provider of service. Once these contours are agreed upon, the task shifts to ascertainment of legislative intent of section 66A of Finance Act, 1994 which is the only recourse that tax authorities have in circumstances of remittance having been made outside the country; clearly, it is not rendering of service by a provider

in India to a recipient in India for if it were, section 66A of Finance Act. 1994 did not have to be the basis of taxability.

7. The scheme of tax on such procurement of service is governed by section 66A of Finance Act, 1994 and Taxation of Services (Provided from Outside India and Received in India) Rules, 2006. The scope and extent of taxability thereto had been considered by the Tribunal in *Coastal Gujarat Power Ltd v. Commissioner of Service Tax, Mumbai-I [2019 (24) GSTL 572 (Tri. - Mumbai)]* thus

> *'7. The primary ground in appeal seeking the setting aside of the impugned order is the exemption afforded by the two statutes, referred supra, in pursuance of constitutional obligation under Article 253, specifically covering their activities. As the issue of exemption of the taxable service received by the appellant is uppermost, we take note of the schema of the law relating to levy and collection of service tax. Like every statute enacted for collection of indirect taxation, Finance Act, 1994 is not without inherent exemption, viz., the extra-jurisdictional and that which is not the object of the levy. Other exemptions are, generally, avenues afforded by the taxing statute for deliberate exclusion and implementation of policy prescriptions through instruments such as rules and notifications. The distinguishing feature of this tax is the levy on consumption of service in the hands of persons which is dissimilar to other indirect tax vested with the Union. Owing to that distinction, the core of the scheme requires mechanisms vastly different from other statutes to dovetail with the taxable event, i.e. consumption of service. This is particularly so when one of the transacting entities is inherently exempt. National*

treatment is one of the pillars governing the international trading system and its ambit allows the imposition of tax, including countervailing taxes, at the boundaries; in relation to goods, the subject of tax and object of tax being identifiable, the mechanism of countervailing at the borders is universally acknowledged and operated through legislation for levy of customs duties. While tax on cross-border rendering of services is a necessary concomitant of scheduling of a domestic tax, its enforceability has to be predicated upon legal fiction owing to it being other than goods.

8. It is thus that Section 66A was inserted in the statute to enable a contrarian mechanism for levy and collection in specific situations. By such incorporation of, viz.,

> *'66A. Charge of service tax on services received from outside India. -*
>
> *(1) Where any service specified in clause (105) of section 65 is,*
>
> *(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and*
>
> *(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply :*
>
> *Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply :*
>
> *Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which*

> *the service is provided or to be provided.*
>
> *(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.*
>
> *Explanation 1. - A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.*
>
> *Explanation 2. - Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.'*

the legal fiction of taxable service and coalescing of recipient and provider in the same entity has been contrived and, notwithstanding the mutuality, the transaction captured in the tax jurisdiction. We see from the provision that there are two elements to the fiction with the existence of both as pre-requisite for other provisions of the Chapter to apply. These are the fiction of taxable service and the fiction of recipient being provider. Service originating outside the country, with the provider being jurisdictionally non-existent, inherently renders the circle of transaction flow incomplete. The free ends of the circle are brought together by deeming the activity as taxable and deeming the recipient to be the provider. In a domestic context, the contrarian mechanism of 'recipient pays' was in vogue though by transposing the object of tax. Therefore, except for outcome, 'reverse charge' is substantially different in Service Tax Rules, 1994 and in Section 66A of Finance Act, 1994. With this creation of a new breed of taxpayer, the existence, character and status of the provider was rendered irrelevant in the scheme of taxation thus extending the jurisdiction of Finance Act, 1994 to all and any taxable service subject to specific or general exemptions under Section 93 of Finance Act, 1994. To these we now turn our attention.

9. Exemptions specified under Section 93 of Finance Act, 1994 need not detain as none has been claimed as applicable to the appellant. In the pre-'negative list' regime, which is germane to the time-lines of this dispute, a general exemption was afforded to the services that were not enumerated in clause (105) of Section 65 of Finance Act, 1994. That is also not pertinent in this dispute. The claim of being outside the ambit of Section 65(105)(zm) of Finance Act, 1994, i.e.,

> *'to any person, by a banking company or a financial institution including a non-banking financial company, or any other body corporate or commercial concern, in relation to banking and other financial services'*

by being beyond the definitional pale of 'banking and other financial services' in Section 65(12) of Finance Act, 1994 has not been accepted by the adjudication Commissioner. We do not have to tarry here, too, for that claim warrants consideration only if a hitherto unobtrusive scheme of exemption, neither inherent nor appendaged, is not tenable. However, a closer perusal of the working of 'reverse charge' on 'import of service' may afford some insights for resolution of the dispute.

10. Invoking of rule-making powers under Section 94 of Finance Act, 1994 for notification of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 should have sufficed to confer vires to this subordinate legislation. Nevertheless, that the Central Government was also impelled to draw upon the exemption powers conferred by Section 93 is demonstrative of intent to afford exemption by these very Rules. The scheme of the Rules being

> *Taxation of Services (Provided from Outside India and Received in India) Rules, 2006*
>
> *Notification No. 11/2006-S.T., dated 19-4-2006*
>
> *(As notified vide Notification No. 37/2011-S.T., dated 25-4-*

2011, w.e.f. 1-5-2011)

In exercise of the powers conferred by sections 93 and 94, read with section 66A of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules, namely :-

1. Short title and commencement. - (1) These rides may be called the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions. - In these rules, unless the context otherwise requires -

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3. Taxable services provided from outside India and received in India. - Subject to section 66A of the Act, the taxable services provided from outside India and received in India shall, in relation to taxable services -

(i) specified in sub-clauses (d), (m), (p), (q), (v), (zzq), (zzza), (zzzb), (zzzc), (zzzh), (zzzr), (zzzy), (zzzz), (zzzza), (zzzzm), (zzzzu), (zzzzv) and (zzzzw) of clause (105) of section 65 of the Act, be such services as are provided or to be provided in relation to an immovable property situated in India;

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(ii) specified in sub-clauses (a), (f), (h), (i), (j), (l), (n), (o), (s), (w), (z), (zb), (zi), (zj), (zn), (zo), (zq), (zr), (zt) (zu), (zv), (zw), (zza), (zzc), (zzd), (zzf), (zzg), (zzi), (zzl), (zzm), (zzo), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf), (zzzzg), (zzzzh), (zzzzi), (zzzzk), (zzzzl) and (zzzzo) of clause (105) of section 65 of the Act, be such services as are performed in India :

xxxxx

(ii) specified in clause (105) of section 65 of the Act, but excluding -

(a) …..

(b) …..

(c) … …, be such services as are received by a recipient located in India for use in relation to business or commerce.

Provided that … … …

xxxxx'

makes it abundantly clear that it not only governs the determination of the import of services in the three categories but also limits the scope of taxation of import of services on 'reverse charge'. Accordingly all services provided from outside India are exempt except in circumstances that determine taxability supra. We take note that, unlike Section 65(105) which assigns equal importance to provider, recipient and activity, the recipient has been accorded overarching significance in the Rules supra reflecting the imperative for Section 66A, viz., the jurisdictional non-existence of the provider. The intent was to close the loophole that enabled escapement from tax that otherwise fastens on a transaction between two entities intra-jurisdiction. It is also an acknowledged rule of interpretation that surplusage cannot be presumed in a statute. The existence of reference to Section 93 of Finance Act, 1994 in the Rules supra cannot be presumed to be an error or an unintended intrusion. From a harmonious construction of the parent provision and the Rules supra, it would be reasonable to infer that the Rules exempt the application thereof when the identity of service provider is not obscured by jurisdictional blindside. We shall advert to this conclusion presently.

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15. Under Article 253 of the Constitution, legislation is necessary to render the Agreement enforceable. With such legislation, the immunities acquire force of law that prevail over any other law, even if contrary. It has been held that there is a constitutional obligation to enact laws in pursuance of international agreements and it has also been held that, till such enactment occurs, the agreements remain as unenforceable intentions. Conversely, every law enacted to

honour international agreements become binding on every authority in the country.

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23. The proposition in the impugned order that appellant is not covered by immunity even if the providers were premised on the fiction of Section 66A that the receiver of service is deemed to have rendered the service. The inference of the adjudicating Commissioner is that if the said service providers had an establishment or office in India, there would have been an exemption to tax because the service rendered by Asian Development Bank and International Finance Corporation are exempt. It cannot be lost sight of that it is the service that is taxable and, owing to its intangibility, the consummation of service is deemed to be complete when a receiver and provider exist. The proposition of the adjudicating Commissioner would create a new dimension to the tax, viz., the geographical location of the provider, which is not envisaged in Finance Act, 1994. The national treatment for service rendered by Asian Development Bank and International Finance Corporation is unconditional tax exemption but, according to the adjudicating Commissioner, the national treatment is exemption conditional upon discharge of threshold tax merely because the provider is located outside the country. Section 66A has been legislated in Finance Act, 1994 to accord national treatment to services provided from outside after discharge of tax at threshold so that there would be no distinction between service providers located within India and outside India. The fiction of merging provider and receiver is a legislative imperative as the provider based abroad is jurisdictionally non-existent in the eyes of the sovereign legislature.'

8. Section 66A of Finance Act, 1994 is not a 'reverse charge'

mechanism for convenience of tax collection within the taxable territory but a conceptual fiction to tax the recipient of service for according national treatment– obligations as well as privileges – to services procured from abroad. Having been incorporated for that special purpose, and deviating from the norm of taxability, it is intended to have restricted application and only to the extent provided for therein. The case built up the tax authorities is that the appellant appears, from their accounting treatment of the payments made to M/s Satellite Television Asian Region Limited, Hongkong, to be the recipient of 'intellectual property service' for 2009-10 and, hence, liable to tax. The entry in the accounts is not disputed; only the circumstances are. Hence, it now lies with us to ascertain if the records of payment from the 'appointed date' or from the 'effective date' is the more appropriate starting line for payment of tax by the appellant on the impugned consideration and, if it be the former, the extent to which section 66A of Finance Act, 1994 will operate for taxability.

9. There is no scope for Finance Act, 1994 to be concerned with restructuring or reconstruction of corporate entities as the tax is not, by and large, distinguished in terms of the character of the organization that is subject to tax; moreover, the tax liability crystallizes on rendering of a transaction in service and a provider (including deemed provider) becomes liable upon culmination of the

taxable event. It is only when taxable event is sought to be reconstructed from the final accounts (and not from the ledger) that such speculative fastening is resorted to. The canvas is not unlike a palimpsest with tax authorities limiting themselves to the surface visual and the appellant insisting that the true picture lies beneath. The order of the Tribunal in *re ITC Hotels Ltd,* cited by Learned Authorized Representative, decided the issue of eligibility to refund arising from service rendered to self not being taxable consequent upon a merger of corporate entities comprising the provider and receiver of service in domestic transactions. The observation that

> *'10. The law declared by the Apex Court is binding and is required to be followed. The submission of the learned DR that the ratio of the above judgment given in the context of income tax would not be applicable to the facts of the present case as there is no specific provision to that effect under the Central Excise Act or under the Chapter V of the Finance Act, 1994 cannot be appreciated inasmuch as the law declared by the Supreme Court is binding on all the Courts, in terms of the Article 141 of the Indian Constitution. The Hon'ble High Court of Delhi and the Kolkata having held the date of amalgamation as 1-4-2004 has to be considered as the correct date of amalgamation. If that be so, admittedly, the appellant cannot be held to be providing services to itself. The Tribunal in the case of Precot Mills - 2006-TIOL-818-CESTAT-BANG. = 2006 (2) STR 495 (Tri.-Bang.), has held that for leviability of service tax, there should be a service provider and a service receiver. No one renders service oneself, as such, there can be no question of leviability of service tax. Having held that the amalgamation is effective*

> *from 1-4-2004, the service provided by the respondent has to be considered as provided to himself, in which case, no service tax would arise against them. The order of the Commissioner cannot be faulted upon on this ground. At this stage, we may take into consideration the learned DR's reference to clause 7 of the scheme of amalgamation which is as follows :*
>
> > *"7. Savings of concluded Transactions : The transfer of the undertaking of the Transferor Companies under clause 4 above, the continuance of the proceedings under clause 5 above and the effectiveness of contacts and deeds under clause 6 above, shall not effect any transaction or the proceeding already concluded by the transferor companies on or before the effective date and shall be deemed to have been done and executed on behalf of the Transferee Company."*
>
> *By referring to the above clause, the contention of the learned DR is that any transaction or proceeding conducted by the transferor company on or before the effective date will not be affected by the scheme of amalgamation. However, we find that such clause stands incorrectly interpreted by the learned DR. A reading of the above clause is reflective of the fact that the action of the transferor company on or before the effective date shall be deemed to have been done and executed on behalf of the transferee company. As such, it is clear that the said clause supports the respondent's stand that any business conducted by the respondents is to be held as having been conducted on behalf of the transferee company. As such, the service tax provided to the ITC Ltd. and Ansal Hotels Ltd. have to be considered as having been provided on behalf of the transferee company viz. ITC. Ltd., in which case, no service tax liability would arise against the service provider.'*

is far removed from attempting to fasten tax liability that does not accrue in the pre-amalgamated existence of the appellant herein by

any stretch and the equation in a deeming fiction is invoked to construe importation of service. For one, reliance was placed on the decision of the Hon'ble Supreme Court in *re Marshall Sons & Co (India) Ltd* as the order impugned therein had held it to be applicable to the dispute therein. For another, in *re Marshall Sons & Co (India) Ltd*, it was not a case of not subjecting themselves to the tax jurisdiction but that of not offering the entirety of profits of the subsidiary company to tax by operation of the amalgamation scheme in much the same way that, in *re ITC Hotels Ltd*, tax authorities attempted to add an element of intra-group engagement as legally amenable to tax. In brief, the tax liability in their separated avatar was not in dispute in either of the two cases whereas in the dispute before us, the pre-amalgamated existence excluded the impugned transaction from the ambit of levy both under section 66 and section 66A of Finance Act, 1994. In *re Marshall Sons & Co (India) Ltd*, the relevant finding is

> *'14. Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation /transfer shall take place. The scheme concerned herein does so provide viz., January 1, 1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but*

merely sanctions the scheme presented to it - as has happened in this case - it should follow that the date of amalgamation/ date of transfer is the date specified in the scheme as "the transfer date". It cannot be otherwise. It must be remembered that before applying to the Court under Section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the court may take some time; indeed, they are bound to take some time because several steps provided by Sections 391 to 394-A and the relevant Rules have to be followed and complied with. During the period the proceedings are pending before the Court, both the amalgamating units, i.e., the Transferor Company and the Transferee Company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with affect from the transfer date, the Transferor Company (Subsidiary Company) shall be deemed to have carried on the business for and on behalf of the Transferee Company (Holding Company) with all attendant consequences. It is equally relevant to notice that the Courts have not only sanctioned the scheme in this case but have also not specified any other date as the date of transfer amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the Income Tax Officer (impugned in the writ petition) were not warranted in law. The business carried on by the Transferor Company (Subsidiary Company) should be deemed to have been carried on for and on behalf of the Transferee Company. This is the necessary and the logical consequence of the court sanctioning the scheme of amalgamation as presented to it. The order of the Court sanctioning the scheme, the filing of

> *the certified copies of the orders of the court before the Registrar of Companies, the allotment or shares etc. may have all taken place subsequent to the date of amalgamation/ transfer, yet the date of amalgamation in the circumstances of this case would be January 1, 1982. This is also the ratio of the decision of the Privy Council in Raghubar Dayal v. The Bank of Upper India Ltd. [AIR 1919 PC 9].'*

and even more relevant to the context is

> *'15. Counsel for the Revenue contended that if the aforesaid view is adopted when several complications will ensue in case the Court refuses to sanction the scheme of amalgamation. We do not see any basis for this apprehension. Firstly, an assessment can always be made and is supposed to be made on the Transferee Company taking into account the income of both the Transferor and Transferee Company. Secondly, and probably the more advisable course from the point of view of the Revenue would be to make one assessment on the Transferee Company taking into account the income of both of Transferor or Transferee Companies and also to make separate protective assessments on both the Transferor and Transferee Companies separately. There may be a certain practical difficulty in adopting this course inasmuch as separate balance-sheets may not be available for the Transferor and Transferee Companies. But that may not be an insuperable problem inasmuch as assessment can always be made, on the available material, even without a balance- sheet. In certain cases, best-judgment assessment may also be resorted to. Be that as it may, we need not purpose this line of enquiry because it does not arise for consideration in these cases directly.'*

The decision in *re Usha International Ltd* is on similar lines arising

from a dispute on refund claimed in consequence of service being obliterated by merger after tax had had to be paid owing to separate *de facto,* though not *de jur*e, existence. It does not, therefore, appear that the specifics of the present dispute are amenable to disposal on the basis of the determination cited *supra* by Learned Authorized Representative. Parking that aspect for the nonce, we address ourselves to the charging provision invoked in the impugned order, *viz*., section 66A of Finance Act, 1994. In its 'no frills' declaration, liability to service tax arises when the components of any of the 'taxable services' enumerated in section 65(105) of Finance Act, 1994 can be clearly deduced from an identified activity undertaken for consideration by an overseas provider in transaction with a domestic entity. The case of Revenue is that M/s Satellite Television Asian Region Ltd, Hongkong was, on behalf of the appellant, paid by M/s Star Asia Region FZ LLC, M/s Star Asian Movies Limited and M/s Star Television Entertainment Ltd for use of their mark in the channels of the appellant. These marks were visibly exhibited on television screens eyeballed by viewers and it is moot if the deployment of the mark for which the impugned consideration was remitted is also done on behalf of the appellant who was a sub-agent for those who are deemed to have made the payment to M/s Satellite Television Asian Region Ltd, Hongkong. Indeed, on careful perusal of the impugned order, it is noted that the nature of service in the

agreement entered into by the three amalgamating entities outside India with M/s Satellite Television Asian Region Limited, Hongkong has not been determined by the adjudicating authority who has presumed that the consideration entered in the final accounts is for taxable service. Such determination is necessary as the agreement before the commencement of the amalgamation scheme was between two entities outside India and entirely beyond the ken of tax authorities. The absence of any efforts in that direction is demonstrative of any exercise undertaken to find fitment within the three-way determination envisaged in Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 without which section 66A of Finance Act, 1994 cannot be invoked.

10. In any case, deeming that the amalgamated entity came into being on 1st April 2009, the status of the amalgamating entities outside India needs to be borne in mind and it is not seen from the records that they have ceased to operate at those locations after the appointed date. That would have been impossible considering that the effective merger occurred in April and May 2010. Therefore, the consequence of deemed amalgamation from 1st April 2009 would be to deem the foreign companies as overseas offices of the appellant. Section 66A(2) of Finance Act, 1994 and the *Explanation* therein make it abundantly clear that, for the purposes of the levy thereof, such units are to considered as independent; in such circumscribing circumstances, the

procurement of services outside India by the branch or office of an Indian assessee does not fall within the purview of rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006. The Tribunal, in *re 3iInfotech Ltd*, has held that

> *'9. It was submitted on behalf of appellant that Section 66A(2) of Finance Act, 1994 segregates the entity in India from its business in another country for the purposes of taxation which disaggregation should also govern the commercial independence of each other. This was held to be so in re British Airways thus :*
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> > *'31. In this case, as is clear from the RBI's letter, BA, India are a branch office of 'BA, U.K.' permitted for operating air service. There is nothing in this letter from RBI from which it can be inferred that the branch office is only a temporary establishment for some limited purpose. A temporary establishment in India of a Company based abroad would be that establishment which is for a particular project after completion of which, it would get wound up. The 'BA, U.K.' have been allowed by RBI to set up branch office in India for operating air services subject to conditions as mentioned in the letter and the RBI's letter does not mention any period of validity of the permission or that the permission to set up branch, once granted, cannot be renewed. Therefore, the Department's contention that branch office of 'BA, U.K.' in India is not a permanent establishment is without any basis. The appellant BA, India, therefore have to be treated as a branch office in India of 'BA, U.K.' and in terms of Explanation to Section 66A, BA, India, would have to be treated as 'Business Establishment' of 'BA, U.K.' in India, which as discussed above, has to be treated as a 'Permanent business establishment' of BA, U.K. in India. By virtue of sub-section (2) of Section 66A, BA, India, who are a permanent business establishment in India of 'BA, U.K.' (head office), are to be treated as a person separate from the head office and they cannot be treated as part of the head office for the purpose of Section 66A. In this case, there is no dispute that :-*
> >
> > *(a) agreements are between 'BA, U.K.' and the CRS/GDS companies (located outside India and not having any branch or business establishment in India); and*
> >
> > *(b) the entire payment to CRS/GDS Companies have been made directly by the head office located outside India*

and no part of payment has been made by the branch office i.e. BA, India.

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In my 31.3.1 view, as discussed earlier paras, for the purpose of Section 66A, the airline head office - 'BA, U.K.' and its Indian branch office - BA, India cannot be treated as one entity in view of the provisions of Section 66A, but have to be treated as two different persons. Therefore, it would be wrong to treat the services received from CRS/GDS Companies by 'BA, U.K.', as the services received by their Indian branch-BA, India. Similarly the payments made to CRS/GDS companies by 'BA, U.K.' cannot be treated as payments made to CRS/GDS Companies by BA, India or on behalf of BA, India, unless it is proved that the services provided by CRS/GDS Companies were Indian branch specific services which satisfied the business needs of BA, India and the role of 'BA, U.K.' was of facilitator only.

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Ld. Member (Technical) has also discussed in para-31 of the proposed order as to how the British Airways, India a branch office of British Airways, U.K. cannot be considered as a temporary establishment. The same is not for a particular project after the completion of which the same would get wound up. The same has been specifically permitted by RBI to carry on the air transportation activities and has to be held as a permanent establishment, in which case on account of the provisions of Section 66A, it has to be treated as a person separate from its head office.'

It is the counter-argument of learned Authorized Representative that the Tribunal in re Torrent Pharmaceuticals Ltd. has determined the specific purpose of Section 66A(2) of Finance Act, 1994 as :

'5.5 Section 66A (1) above is talking of service provider and service recipient as 'persons' which has to mean as different business persons. Section 66A(2) and its Explanation I only make a clarification and to fix service tax liability on recipient of services under reverse charge mechanism that both the permanent establishments in India and abroad of a business person are to be treated as separate persons. The above clarification/distinction made in Section 66A in our opinion is only for making an identification to determine whether a service is provided and consumed in India or abroad. It is an accepted legal position that one cannot provide service to one's own self. If the 'permanent establishment' of the appellant abroad is treated as a service provider to its own head office in India then it will amount to charging service tax for an activity provided to one's own

> *self. Similarly placed branches of the appellant undertaking similar activities in India will not be held so. Therefore, a comprehensive reading of Section 66A of the Finance Act, 1994, a permanent establishment situated abroad as a 'separate person', will be understood to have been prescribed only to determine the provision of service whether in India or out of India. Theoretically it could be possible that a person carrying business through a permanent establishment abroad may like to pay lower rate of local VAT/GST abroad to avoid service tax payment in India by showing the services to have been availed abroad. However, there is no likelihood of such avoidance in case of an assessee who is eligible to Cenvat credit in India for the service tax payable in India for which the assessee is entitled to Cenvat credit. It is also not the case of the of the Revenue that appellant is not capable of utilising Cenvat credit admissible as they have paid more than Rs. 12,000 crores as taxes during the periods 2007-2008 to 2011-2012.'*

For a clearer appreciation of Section 66A(2) of Finance Act, 1994, we must place it in the context of the status of appellant as an 'export oriented unit' and the nature of the transaction that were subject to tax in the impugned order. In re British Airways, the issue for consideration was whether the existence of a business establishment of a foreign airline in India was sufficient to fasten tax liability on 'reverse charge' on consideration paid to foreign service provider arising from agreement of the overseas headquarters with the service provider. In re Torrent Pharmaceuticals, the issue for consideration was whether the services rendered by overseas branch was liable to tax owing to the disaggregation of branch and headquarters by Section 66A(2) of Finance Act, 1994. The present dispute is on entirely different footing, viz., that the payment for service rendered by foreign service provider, though claimed to be effected by branch in Dubai, was, in effect, made by the appellant. We draw a distinction in designating the Indian operation as appellant and the Dubai operation as branch.

10. We have addressed this issue in our decision in re Tech Mahindra which examined the nature of overseas

branches of a software exporting entity headquartered in India. Having considered the provisions of Section 66A(2) of Finance Act, 1994 and the role of the overseas branches, we held that the symbiotic business and structural relationship is not susceptible to interpolation into the specific context of Section 66A and each transaction of the overseas branch would have to be scrutinized to ascertain if taxable service has been rendered by branch to headquarters and vice versa. The impugned order has overlooked the requirements of accounting standards which mandates that financials of the branch are to be included in the financials of the corporate entity that has established the branch. Such inclusions owing to accounting standards do not suffice to conclude that services were rendered by foreign service providers to the Indian headquarters. No effort has been undertaken by adjudicating Commissioner to ascertain the nature of the transactions for which payments were made by branch in Dubai and the demand in the impugned order lacks appropriate robustness in consequence.

11. Even if the payments are attributable to service rendered by foreign service providers to the appellant, the scope of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 needs ascertainment. We refer to our decision in re M/s. Tech Mahindra Ltd. wherein we have held that

> *'21. From the above, it is apparent that mere identification of a service and the legal fiction of separate establishment is not sufficient to tax the activities of the branch. The very existence of a branch presupposes some kind of activity that benefits the primary establishment in India and the organizational structure inherently prescribes allocation of financial resources by the primary establishment to the branch to enable undertaking of the prescribed activity. The books of accounts and statutory filings do not distinguish one from the other. The application of Finance Act, 1994 to such a business structure within India does not provide for a deemed segregation. Such a legal fiction in relation to*

> *overseas activities should, therefore, have a reason.*
>
> *22. Section 66A of Finance Act, 1994 does not prescribe promulgation of any Rule for its administration. The two sets of Rules extracted supra are framed under the general provision in section 94 of Finance Act, 1994. Moreover, the Rules draw upon section 93 of Finance Act, 1994 in a manner akin to Export of Service Rules, 2005. It is noticed that the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 also mirrors the Export of Service Rules, 2005. That, however, cannot be taken as intent to tax the inflow of service merely because of a corresponding exemption accorded to the outflow of services. Reference to section 93 as an authority for prescribing the Rules would make it appear that the purpose of the said two sets Rules is to exclude from tax such services that do not fall within the three classifications predicating the import of service. The residuary provision in the Rules of 2006 make it clearly that such services have to be received by a recipient located in India for use in relation to business or commerce. The provisions of the successor Rules are no different.'*

We note that Section 66A of Finance Act, 1994 is a special enabling provision engineered to tax import of services, both to countervail the taxing of domestic transactions and to afford a national treatment to the service, and the determination of taxability is with reference to the Rules supra. The Rules draw its origin also from the exemption powers devolving on the Central Government under Section 93 of Finance Act, 1994; accordingly, any situation that is not envisaged in the specific framework of taxability in Rule 3 is beyond the ambit of tax. The impugned order has erred in merely relying on the provisions of Section 66A(2) of Finance Act, 1994 and the non-exclusion of Section 65(105)(zzb) of Finance Act, 1994 from Rule 3 to conclude that tax liability arises.

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13. The other crucial aspect is receipt of service for use in relation in business or commerce which would, in most circumstances, be the key to determine if service was

rendered to the recipient. There is no doubt that, on export, the scheme of taxation divests the tax element. Services rendered by foreign provider are subject to tax by the deeming fiction in Section 66A of Finance Act, 1994 that recipient is the provider of the service. The objective of taxing such services in relation to domestic activities of a recipient is well within the scheme of levy of service tax. Levy of tax through Section 66 of Finance Act, 1994 on all domestic entities receiving services from domestic providers is also within the scheme of taxation of services because the service is not attributable, at that stage, to domestic consumption or exports. Hence Cenvat Credit Rules, 2004 provide for monitoring of availment and grant of refund to exporters subsequent to discharge of tax liability. However, utilization of services which are patently in relation to goods/services that have already been exported, it goes against the grain of procedural simplicity to collect the tax by deeming fiction merely for refunding it subsequently. From this it would appear that the reference to 'business or commerce' in Rule 3(iii) in Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 is restricted to 'business and commerce' in India not to 'business and commerce' outside India. We find no allegation in the notice or conclusion in the impugned order that service have not been used for business or commerce outside India.'

11. The impugned order has failed to identify the 'taxable service' that the erstwhile foreign entities had obtained from the foreign service provider without which the test of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 is not met. The adjudicating authority has failed to consider the deemed demutualization of amalgamated entity and amalgamating entities for

the period prior to effective merger and has superficially applied the appointed date conundrum to the ‘no brainer’, and default, articulation in section 66A of Finance Act, 1994 without taking in the entire canvass of this special provision of law to charge tax on specifically intended transactions.

12. The impugned order has failed to be in compliance with the mandate of section 66A of Finance Act, 1994 warranting it to be set aside. We do so and allow the appeal.

(Order pronounced in the open court on 01/09/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*