

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. 1

SERVICE TAX Appeal No. 51811 of 2016

(Arising out of Order-in-Original No. DLI-SVTAX-001-COM-021-15-16 dated 25.01.2016 passed by Principal Commissioner of Service Tax-New Delhi)

**M/s. Golcha Properties Pvt. Ltd.
(Golcha Cinema)**

3630, Netaji Subhash Marg,
Darya Ganj,
New Delhi- 110002

...Appellant

Versus

**Principal Commissioner of Service Tax,
Delhi-I**

17-B, IAEA House, IP Estate,
MG Marg, New Delhi-110002

....Respondent

APPEARANCE:

Mr. B.L.Narasimhan and Ms. Shagun Arora, Advocates for the Appellant
Mr. Vivek Pandey, Authorised Representative for the Respondent

**CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

Date of Hearing: September 2, 2020
Date of Decision: November 2, 2020

FINAL ORDER No.: 51572 / 2020

JUSTICE DILIP GUPTA

The Appellant, an owner of a cinema hall called 'Golcha Cinema' and engaged in the business of exhibiting films in this theatre, has assailed the order dated January 25, 2016 passed by the Principal Commissioner of Service Tax, Delhi¹ that confirms the demand of service tax under "renting of immovable property" service with penalty and interest proposed in the two show cause notices dated April 17, 2014 and April 22, 2015 for

1. the Principal Commissioner

the reason that the Appellant is providing service to the film Distributors by way of renting its theatre for screening the films.

2. The Appellant had entered into agreements with films Distributors under which the theatrical exhibition rights for exhibition of the films were transferred to the Appellant, either for a specified number of shows and period or in perpetuity. It is in exercise of such rights obtained from the Distributors that the Appellant exhibited movies in its theatre. In lieu of obtaining such rights, the Appellant agreed to share a specified percentage of Net Box Office Collection with the Distributors, subject to the conditions specified in the agreements. In one such agreement dated August 29, 2012 entered into between M/s. A.A. Films and the Appellant, the Appellant agreed to share 50%/40% of the Net Box Office Collection, with M/s. A.A. Films subject to a maximum theatre share of Rs.2,80,000/-.

3. The Department, however believed that the Appellant was providing various elements of inter connected services to the Distributors, such as renting/ letting/ leasing of theatre for exhibition of films; manpower to manage the theatre operations, provision of projector and other related equipment to screen the films; arranging of power supply and providing arrangements to collect the box office collections. According to the Department, the essential character of the bundle of services provided by the Appellant was in the nature of "renting of immovable property" service which would be taxable under section 65(105) (zzzz) of the Finance Act 1994² for the period up to June 30, 2012 and

2. the Finance Act

under section 66E(a) of the Finance Act read with section 66F(3)(b) of the Finance Act for the period from July 1, 2012 to March 31, 2014. The view of the Department was that copy rights of movies/ films were not transferred/ sold by the film Distributors, either temporarily or otherwise, and so the Appellant was only letting out its premises for exhibition of films to the Distributors.

4. The Appellant filed replies to the two show cause notices but the Principal Commissioner, by the impugned order dated January 25, 2016, confirmed the demand for the period October 2008 to March 2014.

5. The impugned order holds that service tax will be leviable under the head of 'renting of immovable property' and the relevant portion of the order is reproduced below:

9.18 I therefore come to a conclusion that while allowing the use of theatre, they have also provided the facility of projection of film on the said screen in terms of contract for which they are receiving remuneration as a share in Net Box Office Collections (NBOC). Had it been purely Principal to Principal relationship, rightful owner of the NBOC would have been exhibitor. Had it been purely Principal to Agent relationship, rightful owner of the NBOC would have been distributor who is owning the copyright of the film.

9.19 However, this situation is a mix of both and hence instead of a fixed rent, interest in net box office collection by way of sharing it after certain extent as defined in the agreement is being paid instead of a fixed rent, so as to promote business and protect their respective interest. The noticee, therefore, appears performing dual activities simultaneously viz. rendering taxable services to the Distributors on one hand and entertainment to the clients on other hand. Whereas they were paying tax for entertainment; they failed to pay tax on the services provided where they provided services to the Distributors in screening their films and in return the noticee received charges termed by them as Box Office collection share. The terms of contract also substantiate my findings.

9.20 In view of above, the noticee's plan that there is no provision of service and hence no service tax liability is found baseless and thus their activities are rendered liable to service tax under the major head 'Renting of Immovable Property', which is taxable under erstwhile Section 65 (105) (zzzz) of the Act ibid upto 30.06.2012. Further the service provided by the noticee to the Distributors remained taxable under clause (a) of Section 66E of the Act ibid as "Declared Services" and is not covered in the negative list as provided under Section 66D

of the Act after introduction of negative services regime w.e.f. 01.07.2012.”

6. The impugned order has also confirmed the demand for income under the heads “miscellaneous receipt”, “car parking higher”, “shots and slides” and “rent receipt” shown in the balance sheet.

7. Shri B.L.Narasimhan learned counsel appearing for the Appellant has made the following submissions:

(i) The Appellant is not providing ‘renting of immovable property’ services to the Distributors. For an activity to fall under ‘renting of immovable property’ services, the nature of the activity should be that of renting or letting or leasing or licensing or other similar arrangements of immovable property, for use in the course or furtherance of business or commerce. In the instant case, the immovable property i.e. the theatre is used and occupied by the Appellant in its own right to screen the film and at no point of time, the theatre is used by the Distributor;

(ii) A bare perusal of the agreements between the Appellant and the Distributors would make it abundantly clear that it is the Appellant who is making payments to the Distributors for grant of theatrical rights, which indicates both, the flow of service and consideration. Hence, no service tax can be levied on the Appellant, in absence of either a consideration or a service. In support of this submission, reliance has

been placed on a recent decision of the Tribunal in **Moti Talkies vs. Commissioner of Service Tax, Delhi-I³**;

- (iii) The agreements between the Appellant and the Distributors is on a revenue sharing basis and hence, no service tax is leviable;
- (iv) The Appellant is not providing any service to the Distributors;
- (v) Income under the heads 'Miscellaneous Receipts', 'Car Parking Hire', 'Shorts and Slides' and 'Rent Received' shown in the balance sheet are not leviable to service tax; and
- (vi) The extended period of limitation could not have been invoked in the present case. Hence, the demand till March 2012 is time barred.

8. Shri Vivek Pandey, learned Authorised Representative of the Department has however, supported the impugned order and made the following submissions:

- (i) As per CBIC Circular dated February 23, 2009, one type of arrangement prevalent between the theatre owner and the Distributor is that the theatre owner leases out the hall for screening of the movie to the Distributor and this kind of arrangement is taxable under 'renting of immovable property' service;
- (ii). The agreement between the appellant and M/s. Eros International Media Ltd dated September 22, 2010

uses the term "**Theatre Hire**" which signifies the intention of the two parties, that the theatre, which is an immovable property, is being hired by the exhibitor from the theatre owner for the purpose of screening of the movie;

- (iii). The balance sheets of the appellant have also classified this income received from distributors as "rent received", which also reflects the intention of the two parties. The Supreme Court has in **Associated Hotels of India Ltd. Vs R. N. Kapoor**⁴ held that the real test to decipher an agreement is the intention of the parties.
- (iv). Hiring of theatre will therefore fall under 'renting of immovable property' service at least, for all those agreements which use the term 'theatre hire' and therefore taxable;
- (v). The agreement between the appellant and M/S Associated Soapstone uses the term **monthly rent**. All such agreements are clearly taxable under 'renting of immovable property' service; and
- (vi). Even short-term renting of vacant land for business or commerce purpose is taxable under renting of immovable property service w.e.f July 1, 2010 in view of the judgment of the Allahabad High Court in **Commissioner of Service Tax, Noida vs Greater**

4. MANU/SCI0168/1959

Noida Development Authority⁵. Thus, car parking hire charges, whether in the open or inside the building, are taxable under this head.

9. The submissions advanced by learned counsel for the Appellant and the learned Authorised Representative of the Department have been considered.

10. It is not in dispute that the Appellant is the owner of a cinema hall. According to the Appellant, the theatrical exhibition rights were transferred to the Appellant under the agreements on the basis on which the Appellant exhibited the movies in the theatre. For obtaining such rights, the Appellant agreed to share a specified percentage of the Net Box Office Collection with the Distributors.

11. The show cause notice April 17, 2014 makes reference to the agreement dated August 27, 2012, executed between M/s. A.A. Films and the Appellant for exhibiting the film title "Student of the Year". It is this agreement which has been relied upon as Relied Upon Document No.7 in the show cause notice. No other agreement has been referred to as this show cause notice. The relevant portion of the show cause notice touching this issue is reproduced below:

"9.1 Whereas in the Agreements all the clauses are common which indicate that under no circumstances the Copyrights of any film, owned by a Distributor were sold/ transferred to the Exhibitor. The scrutiny of all the Agreements for exclusive Theatrical right, reveal that as per the following clauses the ownership and the claim of the film remained with the Distributor only, even when Theatrical rights were given in perpetuity. As a specimen among all the Agreement, the Agreement dated 29.08.2012 (RUD-7) with the distributor M/s. A.A. Films for exhibiting the film titled "Student of the year" is taken up to mention relevant clauses as discussed herein after."

5. 2015 (40) S.T.R 46 (All.)

12. It would, therefore be necessary to reproduce the relevant portion of the agreement:

"This agreement (Agreement) made and entered herein at Mumbai between A.A. Films, Mumbai (referred as 'Distributor') and the under mentioned Exhibitor (referred as 'Exhibitor') for the screening the Film on terms & condition mentioned hereunder:

| | | |
|---|---|--|
| <p>CIRCUIT: DELHI-UP EXHIBITOR/CONTROLLER: MR N.R SAINI THEATRE NAME & LOCATION: GOLCHA CINEMA DELHI</p> <p>ADVANCE: Rs/- FORMAT: PRINT</p> | <p>Run: 1st Week: 2 Wks Shows: 4 shows daily</p> | <p>FILM: STUDENT OF THE YEAR in Hindi Language RELEASE DATE: 19 OCT 2012 (Subject to simultaneous all India release) DISTRIBUTOR'S SHARE: Minimum Distributor's Share 50%, 40% of NBOC for 2 week respectively, Subject to Exhibitor Maximum Theatre share Rs.280000 (Rs. Two Eighty Thousands only) for 28 effective shows in a week. (Terms of Theatre share or percentage (%)) whichever beneficial to the distributor)</p> |
|---|---|--|

1. The Distributor hereby irrevocably assigns, in perpetuity to the Exhibitor, on an exclusive basis, the theatrical exhibition rights on 2D on 35MM Physical Print format and 1.5k/2K Digital Format Licensed Theatre(s) only at the location (and not outside) as mentioned above or as per details in Annex-1 only in relation to the above mentioned Film. No other rights whatsoever shall be to be assigned hereunder.

2. Net Box Office Collection (NBOC) shall be calculated as gross box-office receipts, less entertainment tax (if applicable, news reel hire (@0.3%) and municipal show tax (if applicable).

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6. Exhibitor shall retain the Distributor's Share in trust and pay, after adjustment of the Advance or non-refundable Minimum Guarantee, the Distributor's Share that may accrue to the Distributor ten (10) days of completion of every week to which it pertains, whether or not the bill pertaining to the exhibition is received by the Exhibitor, failing which the Exhibitor shall pay the Distributor's S along with interest at the rate of 18% p.a. computed on the delayed payment commencing from the stipulated date of payment till the actual date of payment or realization. It is further agreed that provision of interest shall not mean or entitle the Exhibitor to detain the due amount of the Distributor's Share. However, in the event of default by the Exhibitor in payment, the Distributor shall be entitled to recover all dues including (principal and interest) through the association of the concerned circuit. Timely Payment is essence of the Agreement.

Bonus/Rebate on Distributor Share:

| Net Collection for India territory in 6 National chains viz. Big, PVR, Inox, Fame, Cinemax and Fun (Benchmark amounts) | Terms (% of NBOC towards the Distributor Share of week 1,2,3 and 4 onward respectively) | Print clause |
|--|---|----------------------------------|
| Equal to or above 24.23 crores* | 52.5/45/37.5/30 | None |
| Below 24.23 crores* and above or equal to 13.85 crores* | 50/42.5/37.5/30 | None |
| Below 13.85 crores* and above or equal to 6 crores* | 50/40/35/30 | Prints-digital screens above 692 |
| Below 6 crores* | 47.5/40/37.5/30 | None |

13. The agreement entered into between the Appellant and M/s. A.A Film clearly indicates that the film Distributor had granted theatrical exhibition rights to the Appellant and in return of transfer of such rights, the Appellant had agreed to pay share 50%/40% share of Net Box Office Collection with M/s. A.A Films, subject to a maximum theatre share of Rs.2,80,000/.

14. The Principal Commissioner found that the Appellant had provided 'renting of immovable property' services. For an activity to fall under 'renting of immovable property' services, the nature of the activity should be that of renting or letting or leasing or licensing or other similar arrangements of immovable property, for use in the course or furtherance of business or commerce. In other words, where an immovable property is given for use by the service recipient or where there is a transfer of the right to enjoy property for a certain time for a consideration paid or promised or where there is granting of the right to use and occupy the immovable property by way of tenancy, lease, license, the transaction would be covered under the category of 'renting of immovable property' services. In the instant case, the immovable property i.e. the theatre is used and occupied by the Appellant in its own right to screen the films and at no point of time, the theatre is used by the Distributor.

15. Learned Authorised Representative of the Department has referred to certain other agreements. These agreements do not form part of the show cause notice and therefore, it will not be appropriate to examine them. The agreement with M/s. A.A.

Films that was enclosed as the seventh relied upon document has only to be examined. A perusal of the agreement between the Appellant and the Distributor would also make it abundantly clear that it is the Appellant who makes payment to the Distributor for grant of theatrical rights. This clearly indicates the flow of service and the consideration. Thus, as it is the Appellant who pays a fixed consideration to the Distributor, no service tax can be levied on the Appellant.

16. This issue also came up for consideration before a Division Bench of the Tribunal in **Moti Talkies**. It was held that the demand of service tax under 'renting of immovable property' service was not justified for the reason that the Appellant had not provided any service to the Distributor, nor the Distributor had made any payment to the Appellant as a consideration for the alleged service. The relevant portion of the decision is reproduced below:

" Agreements entered into between distributors and the Appellant, who is an exhibitor for screening pictures, have been considered to be agreements for "renting of immovable property" as defined under section 65(90a) of the Finance Act 1994, the Finance Act by the Department and accordingly, show cause notices have been issued to the Appellant demanding service tax. The demands made in the show cause notices have been confirmed by the Additional Commissioner (Adjudication) and the appeal filed by the Appellant to assail the said order has been dismissed by the Commissioner (Appeals). It is the dismissal of the appeal by the Commissioner (Appeals) by order dated 12 July that has led to the filing of this appeal.

2. The appellant is the owner of a cinema hall situated at Chandni Chowk, New Delhi and is engaged in the business of exhibiting films in its theatre. The copy right over the films is owned by the distributors. The appellant enters into agreements with the film distributors to obtain such copy rights under which the right to exhibit the films is transferred to the appellant, either temporarily or in perpetuity, depending upon the nature of the agreements between the parties.

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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.

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16. It is very difficult to even visualize 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.

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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.

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23. The position in law does not change with effect from 1 July, 2012 because even under section 66B of the Finance Act, service tax is levied on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another. Though, —renting of immovable property is a declared service under section 66E of the Finance Act, then too under section 67(1) of the Finance Act, the value shall, in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him. The appellant is not receiving any payment from the distributor and, therefore, no service can be said to have been provided by the appellant.”

17. It is, therefore, not possible to sustain the finding recorded by the Principal Commissioner that ‘renting of immovable property’ service had been rendered by the Appellant to the film distributors.

18. The Department has also levied service tax on an amount of Rs.57,03,906/- shown by the Appellant under the heads of ‘Car Parking Hire’, ‘Shorts and Slides’, ‘Rent Received’ and ‘Miscellaneous Receipts’ in its balance sheet under the category of renting of immovable property, for the period 2008-09

to 2013-20. The Appellant has submitted that the demand on these income heads is not sustainable for the reasons stated in a Table which has been reproduced below:

| Financial Year | Car Parking Hire | Rent Received | Miscellaneous Receipt | Shorts & Slides |
|----------------------------------|---|--|---|---|
| | Parking space rendered to users visiting the theatre | Rentals from office space | INR Charges; news reel charges; show tax collection; etc. | Advertisements exhibited between movies |
| 2008-09 | No service tax leviable as aggregate turnover was below Rs.10 lakhs by virtue of Notification No.8/2008-ST dated 01.03.2008 and amending Notification No. 06/2005-ST dated 01.03.2005 (Rs.3,21,413) | | | |
| 2009-10 | | | | |
| 2010-11 | Not taxable by virtue of exclusion provided for renting of land for parking purposes under Section 65 (105) (zzzz) of the Finance Act. | No service tax leviable as aggregate turnover was below Rs. 10 lakhs by virtue of Notification No.06/2005-ST dated 01.03.2005 (Rs. 4,84,814/-, after reducing car parking charge) | | |
| 2011-12 | | No service tax leviable as aggregate turnover was below Rs. 10 lakhs by virtue of Notification No.06/2005-ST dated 01.03.2005 (Rs. 9,48,502/-, after reducing car parking charge) | | |
| 2012-13 (30.06.2012) | | Service Tax Paid | Not Taxable under renting of immovable property service. | Not taxable under renting of immovable property service, as it amounts to sale of space or time for advertisement. |
| 2012-13 (from 01.07.2012) | Exempted as per Sl. No. 24 of Notification No. 25/2012-ST dated 20.06.2012 | | | Not taxable by virtue of Section 66D(g) of the Finance Act i.e. 'selling of space or time slots for advertisement, other than advertisements broadcast by radio or television'. |
| 2013-14 | Service Tax paid | Service tax paid | | |

19. Thus, for all the reasons stated above, the confirmation of the demands in the impugned order cannot be sustained and are set aside.

20. The impugned order dated January 25, 2016 is, accordingly, set aside and the appeal is allowed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

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