IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1180 OF 2015

Fun Multiplex Pvt. Ltd.	**}**	**Petitioner**
versus		
The Union of India and Ors.	**}**	**Respondents**

Mr. Rafique Dada-Senior Advocate with Mr.Sushant Murthy i/b. M/s. Economic Laws Practice for the Petitioner.

Mr. Pradeep S. Jetly with Mr. J. B. Bishra for the Respondents.

CORAM :- S. C. DHARMADHIKARI &
G. S. KULKARNI, JJ.

DATED :- JULY 6, 2015

P.C. :-

By this Writ Petition under Article 226 of the Constitution of India, the Petitioner claims a declaration that a Circular bearing No.148/17/2011-Service Tax, dated 13^{th} December, 2011, issued by Respondent No. 2 and an order-in-original dated 12^{th} February, 2015 passed by Respondent No. 3, are both *ultra vires* the Finance Act, 1994 and/or Articles 14, 19(1)(g), 21, 265 and 300A of the Constitution of India.

2) At the outset and before any arguments on merits were addressed, Mr. Jetly appearing for the Respondents raised a preliminary

objection to the maintainability of this Writ Petition. He would submit that against the order passed by Respondent No. 3, namely, the Commissioner of Central Excise, Thane II, an Appeal lies to the Appellate Tribunal. In that regard, our attention was invited to sub section (1) of section 86 of the Finance Act, 1994 as amended from time to time. It was submitted that whether the circular would govern the controversy or whether the controversy must be dealt with strictly in terms of the statutory provisions and the circular cannot override the same are contentions which can be raised conveniently before the Appellate Forum. The Appellate Forum is not thus prevented from considering all challenges to the impugned order and if appropriate grounds are raised in support of the ultimate prayer of quashing and setting aside the same.

3) Mr. Dada-learned Senior Counsel appearing for the Petitioner, however, submits that the order impugned in this Petition and prior thereto the show cause notice are founded only on the above Circular and that Circular is being relied upon throughout.

4) He would submit that this Circular, which is challenged in this Writ Petition and issued by the Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, New Delhi proceeds to create a relationship and styled as Association of

Persons, though non existent. This is a case where a business practice in the film industry has been recognised and throughout. If the business practice was that if the producer of the film, who owns the intellectual property rights of the film, temporarily transfers the rights to a person, who directly or indirectly enters into an agreement with the exhibitor, who is ordinarily a theater owner, then, these distinct acts and forming a chain leading to the ultimate viewer-ship of the film cannot be brought in and in the manner suggested by the Circular. The law clearly makes a distinction between an Association of Persons and wherever the law intended that Association of Persons and their acts are to be brought to tax, there are specific provisions, which are incorporated in the concerned statute. Therefore, reliance upon the general concept of joint venture and which is to be found in the Hon'ble Supreme Court's decision in the case of *New Horizons Limited vs. Union of India* reported in **1995 SCC 1 478** and in the case of *Gammon India Limited vs. Commissioner of Customs, Mumbai* reported in **2011 (269) ELT 289 (SC)** does not enable the authority to issue the Circular and thereafter bring the arrangement, which is ordinarily on a principal to principal basis, to tax as an Association of Persons or such other known legal entity. In the circumstances, no useful purpose will be served by going before the Appellate Tribunal. The Circular cannot be declared as ultra vires by that Tribunal.

5) We have taken note of Mr. Dada's contentions and at some length. With his assistance, we have perused the Petition and all Annexures thereto including the order passed by the Commissioner of Central Excise, Thane II. We have also perused the reply affidavit.

6) The Petitioner was proceeded against on the footing that it is engaged in the business of running, conducting, operating and managing multiplex theaters. They are exhibiting cinematographic films in the theaters taken on rental basis from others. For exhibiting the cinematographic films, the noticee has adopted revenue sharing arrangement with distributors, sub distributors or others. The Department/Revenue alleges that the the Petitioner, who was engaged in the activity of exhibiting cinematographic films either in the theatre owned by it or in the theatre taken on rent basis, is not paying Service Tax on the revenue retained by it. Therefore, certain documents were called for. The notice alleges that the invoices, in some of the cases by the film producers or the distributors and the arrangements thereafter arrived at to some of which the Petitioner was a party, reveal that nature of services and to the Association of Persons appear to be classifiable under the head business support services. That is how the notice to show cause was issued and for demanding Service Tax to the tune of Rs.40,41,21,978/-, interest and penalty thereon. The Noticee, namely, the Petitioner filed a detailed reply and denied and refuted the

allegations. Thereafter, at the oral hearing before the Commissioner, extensive arguments were canvassed and which touch some disputed facts and merits. The Commissioner's findings may refer to a Circular issued by the Board, but *prima facie*, it is not entirely based on the same. It is based on some understanding of the legal provisions by the Commissioner and their applicability to the given facts and circumstances. That may not be entirely accurate as urged before us. Similarly, the Hon'ble Madras High Court has also in somewhat similar backdrop clarified that merely making a reference to some Circular would not mean that the Appellate Tribunal cannot be approached or that the Appellate Tribunal will not view the matter in its entirety and in proper perspective. In the circumstances, we are not in agreement with Mr.Dada that the Petitioner cannot approach the appellate authority.

7) In order to take care of his apprehension, we clarify that in the event the Petitioner approaches the Appellate Authority by filing an Appeal and within a period of four weeks from today, the Appellate Authority, namely, the Tribunal shall entertain the Appeal and not dismiss it on the ground that it is barred by limitation. The Tribunal shall permit the Petitioner to raise all contentions including that the issue must be examined in the light of the arrangements, prevalent practices and customs peculiar to the film industry. Such arrangements

and which are in vogue for decades together do not create any relationship and which is assumed to be created by the Revenue. The Circular therefore will have no application and would not apply. Equally, an opportunity should be given to the Petitioner to rely upon such Judgments and decisions in order to support its submissions and distinguish those referred to in the Circular as well. Therefore, all contentions on the applicability of the Circular, its interpretation and particularly in the context of the legal provisions are kept open for being raised before the Tribunal. The Tribunal shall consider them and pass appropriate orders in accordance with law, after hearing the parties. Equally, it would be open for the Petitioner to seek such reliefs as are permissible in law and to apply for dispensation of the condition of pre-deposit of the tax amount. All contentions in regard to such interim prayers and application for stay of both sides are kept open.

8) We dispose of the Writ Petition with the liberty as above and clarify that our order shall not be construed as expressing any opinion, whether tentative or *prima facie*. The Appeal shall be decided on its own merits and in accordance with law. The Writ Petition is disposed of accordingly. No costs.

(G.S.KULKARNI, J.) **(S.C.DHARMADHIKARI, J.)**