Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

SERVICE TAX Appeal No. 445 of 2011-DB

[Arising out of Order-in-Original/Appeal No 84-85-2011-STC-KANPAZHAKAN-COMMR-A--AHD dated 08.04.2011 passed by Commissioner of Central Excise-SERVICE TAX - AHMEDABAD]

Cadila Healthcare Limited **...Appellant**

Zydus Tower,
Satellite Cross Road,
Ahmedabad, Gujarat

VERSUS

C.S.T.-Service Tax - Ahmedabad **...Respondent**

7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
CENTRAL EXCISE BHAVAN, AMBAWADI,
AHMEDABAD, GUJARAT-380015

WITH

1. **SERVICE TAX Appeal No. 446 of 2011 (Cadila Healthcare Limited)**
2. **SERVICE TAX Appeal No. 447 of 2011 (Cadila Healthcare Limited)**
3. **SERVICE TAX Appeal No. 619 of 2011 (Cadila Healthcare Ltd)**
4. **SERVICE TAX Appeal No. 620 of 2011 (Cadila Healthcare Ltd)**
5. **SERVICE TAX Appeal No. 360 of 2012 (Cadila Healthcare Limited)**
6. **SERVICE TAX Appeal No. 361 of 2012 (Cadila Healthcare Limited)**
7. **SERVICE TAX Appeal No. 362 of 2012 (Cadila Healthcare Limited)**
8. **SERVICE TAX Appeal No. 363 of 2012 (Cadila Healthcare Limited)**
9. **SERVICE TAX Appeal No. 364 of 2012 (Cadila Healthcare Limited)**
10. **SERVICE TAX Appeal No. 365 of 2012 (Cadila Healthcare Limited)**
11. **SERVICE TAX Appeal No. 366 of 2012 (Cadila Healthcare Limited)**
12. **SERVICE TAX Appeal No. 13465 of 2013(Cadila Healthcare Ltd)**
13. **SERVICE TAX Appeal No. 13466 of 2013(Cadila Healthcare Ltd)**
14. **SERVICE TAX Appeal No. 12947 of 2014(Cadila Healthcare Ltd)**

[Arising out of Order-in-Original/Appeal No 84-85-2011-STC-KANPAZHAKAN-COMMR-A--AHD dated 08.04.2011 passed by Commissioner of Central Excise-SERVICE TAX - AHMEDABAD]

[Arising out of Order-in-Original/Appeal No 87-2011-STC-KANPAZHAKAN-COMMR-A--AHD dated 11.04.2011 passed by Commissioner of Central Excise-SERVICE TAX - AHMEDABAD]

[Arising out of Order-in-Original/Appeal No OIA-215-2011-STC-KANPAZHAKAN-COMMR-A—AHD dated 12/08/2011 passed by Commissioner of Central Excise-AHMEDABAD]

[Arising out of Order-in-Original/Appeal No 210/2011/STC/KANPAZHAKAN/COMMR-A-/AHD dated 05.08.2011 passed by Commissioner of Central Excise-SERVICE TAX - AHMEDABAD]

[Arising out of Order-in-Original/Appeal No OIA-122-128/2012/STC/KANPAZHAKAN/COMMR-A-/AHDdated 17/04/2012passed by Commissioner of Service Tax-SERVICE TAX – AHMEDABAD]

[Arising out of Order-in-Original/Appeal No 146/2013-STC-/SKS/COMMR-A-/AHD dated 17.07.2013 passed by Commissioner of Central Excise-SERVICE TAX - AHMEDABAD]

[Arising out of Order-in-Original/Appeal No AHM-SVTAX-000-APP-079-14-15 dated 23.06.2014 passed by Commissioner of Central Excise-SERVICE TAX - AHMEDABAD]

APPEARANCE:
Shri Jigar Shah, Advocate for the Appellant
Shri T.G. Rathod, Additional Commissioner (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/11661-11675 / 2021

DATE OF HEARING: 01/03/2021
DATE OF DECISION:27/04/2021

RAMESH NAIR

The brief facts of the case are that the appellant M/s Cadila Health Care ltd. is a public limited company engaged in the business of manufacturing of pharmaceutical products as well as providing various services, i.e., Maintenance & Repair Services, Advertising Agency, Intellectual Property Services, Consulting Engineer, Management Consultants, Manpower Recruitment Agency, Business Auxiliary Services and IPR services, Scientific & Technical Consulting Services, Online information and Database Retrieval Services, Market Research Agency, Business Support Services, Clearing and Forwarding Services, Renting Of Immovable Property Services, Recovery Agents, Technical Inspection and Certification services, Banking&Financial Services which are classifiable under taxable services definition under section 65 of the Finance Act, 1994, for which they are registered with Service tax department. The appellant entered into a partnership agreement with a partnership firm M/s Zydus Healthcare wherein the appellant is a partner with 96% share and 2% each share of

other two partners namely Cadila Healthcare Staff Welfare Trust and German Remedies Ltd. In the partnership agreement, an addendum dated 01/04/2007 was added. As per the terms of the addendum of the partnership agreement, appellant agreed to provide certain services to firm partnership M/s Zydus Healthcare related to promotion and marketing of firm's product and various related services. The appellant towards the said services received remuneration from M/s Zydus Healthcare on which they have paid the service tax and also paid interest whenever there is a delay in paying the service tax. Subsequently, when they realised on the basis of their consultant's advice that the services provided by a partner to a partnership firm does not fall under the ambit of services as per Finance Act, 1994, they had filed for refund claims. The said refund claims were rejected by the Assistant Commissioner of Service Tax, Ahmedabad. Being aggrieved by the rejection of refund claim, the appellant filed appeals before the Commissioner (Appeals) which came to be rejected. Therefore, the present appeals filed by the appellant.

2. Shri Jigar Shah, learned counsel appearing on behalf of the appellant made various alternative submissions. He also reiterated the written submission dated 04/08/2019 filed by the appellant. Subsequently, he also filed additional submission dated 24/03/2021. He submits that the entire period of this case is prior to 01/07/2012 when there was no definition of person in the Finance Act, 1994.He submits that only with effect from 01/07/2012 vide section 65B (37) of Finance Act, 1994, 'person' was defined for the first time which included a firm. He referred to the definition of 'partnership' as provided under Section 4 of the Partnership Act, 1932 and submits that the partners and firm are one and the same. He submits that even if the definition of 'person' is considered in terms of section 3(42) of the General Clause Act, the same is inapplicable to partner/partnership firm. He also placed reliance on the Hon'ble Supreme Court judgment in the case of Dulichand Lakshminarayan vs Commr. Of Income Tax 1956 (29) ITR 53 wherein it was held that firm is not a person and definition in General Clauses Act of person is inapplicable to Partnership Act. He further submits that Hon'ble Supreme Court held that as per general concept of partnership, a firm is not an entity or a 'person' in law but merely an association of individuals who constitute the firm. Supreme Court further held that the definition of 'person' has occurring in section 3(42) of the General Clauses Act, 1897 cannot be imported as it would be repugnant to partnership law.

2.1 On further reliance on the judgment in the case of Commissioner of Income Tax vs R. M. ChidambaramPillai1977 (106) ITR 292(SC) he submits that firm is not a person. The Hon'ble Supreme Court once again analyzed legal status of partnership firms and its partners and it was again reiterated by the Supreme Court that a partnership firm has no legal existence separate from the partners, under the Partnership Act.

2.2 He submits that the Revenue's reliance on the State of Punjab v. Jullundur Vegetables Syndicate1966 AIR 1295 is not correct as in that case, under Sales Tax Act, a dealer of a firm is specifically defined. It is not applicable in the present case. Moreover, the judgment of State of Punjab v. Jullundur Vegetables Syndicate (supra) has been distinguished by the other bench in the case of Gopal Industries vs CCE, Indore 2007 (214) ELT 19 (Tri-LB). His further submission is that service tax was paid for services which is defined under section 65 (105)(zzb).The business auxiliary services applied for a service provided to a client by any person. Hence, two distinct persons are required to attract section 65(105)(zzb).Since in the present case, the services have been provided by the appellant who is a partner of Zydus Healthcare which is a partnership firm, no two distinct persons exist. Therefore, the service tax was not payable.

2.3 He placed reliance on the Law of Income Tax by A.C. Sampath Iyenger, 6th edition, 1973 pages 1063-1064, Vol-II and submits that in Income Tax Act, any income, salary, bonus, etc received by a partner for discharge of obligations as per the partnership deed is nothing but special share in the profits of the Partnership firm. He submits that the relevant part of the Law was expressly quoted with approval by the Hon'ble Supreme Court in the case of Commissioner of Income-Tax versus R.M. Chidambaram Pillai (1977) 106 ITR 292 (SC). Applying the ratio of this judgment in the present case also the remuneration received by the appellant is paid as per the partnership deed. Therefore, the same cannot be treated as consideration towards services provided in terms of Finance Act, 1994. He further submits that a contrary view taken by the Madras High Court in the case of Mathew Abraham versus Commissioner of Income-tax [1964] 51 ITR 467, 471 (Mad) which was overruled by the Hon'ble Supreme Court in the case of R.M. Chidambaram Pillai (supra). He further submits that the same law was laid down by Hon'ble Punjab & Haryana High Court in the case of Bhagwant Singh vs Commissioner of Income Tax AIR 1959 PH 594.

2.4 He further submits that partner's capital to a firm can be in the form of cash/asset. It can also be in the form of contribution of a skill and labour alone without contribution in cash. In support of this, he placed reliance on the judgment in the case of Chandrakant Manilal Shah and Another vs Commissioner of Income Tax, Bombay-II, 1992 AIR SC 66. He submits that the identical issue has been considered by this Tribunal in the case of Mormugao Port Trust vs Commissioner of Customs, Central Excise & Service Tax, Goa 217 (48) STR 69 (Tri- Mum.) which has been affirmed by Hon'ble Supreme Court in the case of Commissioner of Customs, Central Excise & Service Tax, Goa vs Mormugao Port Trust 218 (19) GSTL 118 (SC).

2.5 He further submits that the impugned activities of the appellants are its obligation as a partner as per partnership deed and not pursuant to separate contact of service. Hence, remuneration received is merely a special share of profits.

2.6 He submits that the refund was rejected in general on the ground that the appellant paid service tax on self assessment. They have not challenged the self assessment. Therefore, refund is not granted. In this regard, adjudicating authority has relied upon the judgment in the case of Collector of Central Excise, Kanpur Versus Flock (India) Pvt. Ltd. 2000 (120) ELT 205(SC). He submits that in the said case, the learned Assistant Commissioner after examining the contents of the product passed an order regarding classification of the goods. The assessee had not preferred an appeal against the said order and directly filed for refund. The Hon'ble Supreme Court in that context held that without filing an appeal, challenging the order of classification, refund is not maintainable. Therefore, considering the facts of the present case, Revenue's reliance in the case of Flock India Pvt. Ltd. (supra) is totally inapplicable. As regard the reliance in the case of Escorts Ltd. vs UOI &ors. 1994 Supp. 3 SCC 86, he submits that it is a Custom's case and solely based on Section 47(2) of the Customs Act. Therefore, the same is not applicable in the case of Service Tax. Reliance was made by Revenue in the case of M/S. Priya Blue Industries Ltd vs Commissioner of Customs (Preventive) 2004 (172) ELLT 145, the same is in respect of self assessment of Bills of Entry. Therefore, being a customs case judgment is not applicable. The Revenue further relied upon the judgment in the case of ITC vs CCE (IV) 2019 SC Customs (LB). He submits that again this is a case in respect of the assessment of Bills of Entry. Therefore, the

same is not applicable in the present case. He submits that refund claim is legally maintainable in Service Tax without filing appeal against self assessment. In the judgment of Rajasthan High Court in the case of Central Office, Mewar Palace Org. vs Union of India 2008 (12) ST 54 (raj) which has been expressly approved by the Hon'ble Supreme Court in the ITC's case. He further submits that there is no provision in the Finance Act, 1994 to file the appeal against self assessment in Service Tax. There is no order of assessment passed by any officer below the rank of Commissioner of Service Tax. As per section 85 of F.A, 1994 appeal can be filed before Commissioner (Appeals) only against the order passed by an officer below the rank of Principal Commissioner of Central Excise. There is no proviso under section 85 of Finance Act, 1994 corresponding to section 47 (2) of Customs Act, 1962. Therefore contention of the Revenue that the appellant should have been filed appeal instead of filing for refund claim is erroneous in the context of Finance Act, 1994. He also placed reliance on the judgment of High Court of Gujarat in the case of Mohhammad Farookh Mohammad Ghani 2010 (259) ELT 179 (Guj) wherein it was held that partnership firm and partners are one and the same. Therefore, applying the ratio of these judgments also, since there is no service provided by appellant to any other person, the service tax was not chargeable. With this above submission, he prays that the appeals may be allowed on both counts.

3. On the other hand, Shri T.G. Rathod, Learned Additional Commissioner (Authorized Representative) appearing on behalf of the Revenue reiterates the findings of the impugned order. He also filed a detailed written submission dated 04/03/2021 wherein he reiterated the finding of the impugned order. He submits that the appellant have filed refund claim without challenging the self assessment of service tax paid by them. Therefore, refund is not maintainable. In support of his submission, he placed reliance on the following judgments:

1. 2019-TIO-418-SC-CUS-LB- ITC Vs. CCE, Kolkata-V
2. 2015(329)ELT347 (Tri- Del) CCE, Bhopal Vs Presvels P Ltd.
3. 2010(259) ELT369(Bom)- Maharashtra Cylinders P Ltd. vs CESTAT, Mumbai
4. 2006 (4) STR 473 (Tri- Delhi)- KEC International Ltd. Vs.CCE, Jaipur-I
5. 2006(4) STR 585 (Tri- Chennai)-CCE, Chennai vs. E.I.D. Parry India Ltd.

6. 2002 (146) ELT 241 (SC)- Metal Forgings Vs. Union of India
7. 2020 (372) ELT 266 (Tri- Hyd)-Adani Power Ltd. vs. Commr. of CT Rangareddy-GST, Telangana
8. 2012 (28) STR 273 (Tri- Chennai)- CST, Chennai vs Hardy Exploration & Production (India) Ltd.
9. 2019 (31) GSTL 38 (MP)- Commissioner of CGST &C.Ex. Vs. National Fertilizers Ltd.

3.1 He further submits that the partners and partnership firms are clearly separate entities. Therefore, even though the appellant is a partner, but since provided services to the partnership firm, it is between two different entities. Therefore, the Service Tax was correctly payable. In this regard, he placed reliance on the following judgments:

1. 2008 (10) STR 529 (Tri- Kol)- Sushant Agarwal Vs. CC, (Port)
2. 1983 (13) ELT 1467 (SC)-Agarwal Trading Corporation & Ors. Vs ACC, Calcutta & Ors.
3. 2013 (287) ELT 26 (Guj.)-Sintex Industries Ltd. vs CCE
4. 2015 (323) ELT A71 (SC)- Mytri Enterprises vs Commissioner
5. 2004 (174) ELT 38 (tri- Mum)- Mytri Enterprises vs CC, Mumbai
6. 2016 (44) STR 391 (Guj)- Commissioner Vs Larsen and Toubro Ltd.)
7. 2016 (43) STR 141 (Tri- Mum)- Bank of Baroda Vs. CST, Mumbai-I
8. 2006 (4) STR 3 (cal)- M.N. Dastur & Co. Ltd. Vs. Union of India
9. 2015 (40) STR 1028 (Tri- Del)- Punj Lloyd Ltd. CCE, Rohtak
10. 2016-TIOL-2330-CESTAT-DEL- Kumar Infrastructure Development Pvt. Ltd. Vs. CCE, Meerut-I
11. 2015 (38) STR 884 (Tri- Mumbai)- Star India P Lt.dVs CCE, Thane-I
12. 2011 (272) ELT 513 (Bom)- Textoplast Industries Vs CC
13. 2017 (350) ELT 78 (Bom)- N Chittranjan Vs CESTAT
14. 2016 (335) ELT 225(Bom) Amritlakshmi Machine Works Vs CC, (Import) Mumbai
15. 2012 (27) STR 57 (Tri- Mum)- Ideal Road Builders Pvt. Ltd. Vs CC

3.2 He further submits that as regard the relationship between the Partner & Partnership firm, the appellant have relied upon the judgments which are not on the service tax matter, but it is on the issue of Income Tax.

Therefore, the same is not applicable. On this issue, he placed reliance on the following judgments:

1. 2006 (202) ELT 7 (sc)- Sneh Enterprises Vs. CC, New Delhi
2. 2007 (5) STR 161 (SC)-Hotel & Restaurant Association Vs Star India Pvt. Ltd.
3. 2009 (237) ELT 225 (SC)- CCE, Nagpur Vs. Shree Baidyanath AyurvedBhawan Ltd.

3.3 He further submits that the refund needs to be passed through the test of unjust enrichment as held in the following judgements:

1. 1997 (89) elt 247 (sc)- Mafatlal Industries Ltd. vs Union of India
2. A/12615/2018 dated 20.11.2018-India Medtronic P. Ltd. Vs CCE, Vadodara-I

4. We have carefully considered both sides and perused the records. The issue to be considered by us in the present case is that whether the appellant is liable to pay the Service Tax when the appellant is a partner and the service recipient is a partnership firm. If the appellant is not liable to pay the Service Tax, whether the Service Tax so paid by the appellant along with interest, is refundable, even when the assessment of payment of service tax was not challenged. The genesis of the issue is that whether the appellant is a service provider and the recipient M/s Zydus Healthcare is a service recipient having relationship of partner and partnership firm can be categorised as service provider and service recipient. The appellant has 96% share in profit and two other partners i.e., M/s Cadila Healthcare staff trust and M/s German Remedies have 2% each shares in the profit. All the three partners entered into a partnership deed dated 01/03/2007, and the said partnership deed was amended vide addendum dated 01/07/2007 As per the amended partnership deed, the appellant is a partner who undertook the activities related to marketing and distribution of the products of the partnership firm to enable the partnership firm to expand market's share and improve overall sales and earnings. In the partnership deed, the function of the appellant has been categorically stated which are extracted below:

A. *Providing services relating to Promotion and marketing of the Firm's products including providing of Marketing Infrastructure, product development and promotion, Information Data Base, IT and other*

system support and Inventory and supply chain management for the same.

B. *Functioning as "consignment and sales agent" of the firm for storage, sales and distribution of the Firm's productions throughout India and for the purposes of Sales Tax/VAT; either directly or through the clearing, forwarding and handling agents of the party of the first Part throughout India;*
C. *Collection of the moneys due to the Firm for the sales of products made by and on behalf of the Firm;*
D. *After sales services to the customers of the Firm*
E. *Selecting and appointing Stockiest for Distribution of the Firm's products;*
F. *Guiding and helping in procurement of inputs such as raw materials, packing materials, consumables, plant and machinery, equipments for the Firm;*
G. *Providing legal, technical and managerial assistance for the smooth and efficient conduct of the business of the Firm*

From the above terms of the partnership deed, the appellant in its capacity as partner of the partnership firm was obliged to carry out certain activities such as distribution of goods manufactured, marketing of the goods manufactured by the partnership firm, functioning as consignee and sales agent of the partnership firm, etc. In terms of the above conditions, the appellant has carried out the activities which were assigned to the appellant by the partnership firm in the capacity of the partner. These activities were not undertaken pursuant to a separate and independent contract for provision of services between the appellant of the partnership firm. Therefore, the activities carried out by the appellant for its partnership firm is part of its duties as a partner. In this arrangement, it cannot be said that the partner is a service provider and partnership firm is service recipient. It is also observed that the remuneration received by the appellant from the partnership firm has been accounted for as "Remuneration received from partnership firm". Any activity can be brought under the Service tax ambit under the Finance Act, the important aspect is that there should be existence of service provider and the service recipient and the service provider and the service recipient should be two different persons. In this regard, it is necessary to go through the definition of partnership provided in the section 4 of the Partnership Act, 1944.

> *"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting*

for all. Further, Persons who have entered into partnership are called individually called "partners" and collectively "a firm",

As per the above definition, it is clear that the same persons who are partners of the partnership firm are individually called as partners and the same very persons also called collectively as firm. Therefore, partners and partnership firm cannot be treated as two distinct persons.

4.1 It is also observed that in the Finance Act,1994 the term 'Person' was not defined prior to 01/07/2012. First time the term 'Person' in the Finance Act, 1944 was defined with effect from 01/07/012 vide section 65B(37) of the Finance Act, 1994 which included the firm. Therefore, prior to 01/07/2012, that is the period involved in the present case, the definition of 'Person' provided under section 65b(37) was not existing. Therefore, same cannot be made applicable retrospectively. Even prior to 01/07/2012, if the definition of 'Person' provided under General Clause Act is considered, the same is defined under section 3 (42) of General Clauses Act 1897 as under:

(42) "Person" shall include any company or association or body of individuals whether incorporated or not.

Even as per the definition of General Clauses Act, 'Person' does not include the partnership firm. Therefore, the service is taxable if it is provided to a distinct person. Such person does not include firms when the service is provided by a partner to the said partnership firm. With regard to a partnership firm, the term 'Person' has been considered by the Hon'ble Supreme Court in the case of Dulichand Lakshminarayan (supra) wherefrom the relevant portion of the judgment is extracted below:

As pointed out in Lindley on Partnership, llth Edition, at page 153, merchants and lawyers have different notions respecting the nature of a firm. Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, i.e., as a body distinct from the members composing it. In other words merchants are used to regard a firm, for purposes of business, as having a separate and independent existence apart from its partners. In some systems of law this separate personality of a firm apart from its members has received full and formal recognition, as, for instance, in Scotland. ***That is, however, not the English Common Law conception of a firm. English Lawyers do not recognize a firm as an entity, distinct from the members composing it. Our partnership law is based on English Law and we have also adopted the notions of English lawyers as regards a partnership firm****.*

….

Nevertheless, the general concept of partnership, firmly established in both systems of Law, still is that a firm is not an entity or "person" in law but is merely an association of individuals and a firm name is only a collective name of those individuals who constitute the firm. In other words, a firm name is merely an expression, only a compendious mode of designating the persons who have agreed to carry on business in partnership. ***According to the -principles of English jurisprudence, which we have adopted for the purposes of determining legal rights "there is no such thing as a firm known to the law" as was said by James, L. J. in Ex parte Corbett, In re Shand(1) In these circumstances to import the definition of the word "person" occurring in section 3(42) of the General Clauses Act, 1897 into section 4 of the Indian Partnership Act will, according to lawyers, English or Indian,, be totally repugnant to the subject of partnership law as they know and understand it to be. It is in this view of the matter that it has been consistently held in this country that a firm as such is not entitled to enter into partnership with another firm or individuals****.*

The similar issue raised in the above case was once again considered by the Hon'ble Supreme Court in the case of Commissioner of Income Tax vs R.M. Chidambaram Pillai (supra). The relevant portion of the order is reproduced below:

First principles plus the bare text of the statute furnish the best guidelight to understanding the message and meaning of the provisions of law. Thereafter, the sophisticated exercises in precedents and booklore. Here the first thing that we must grasp is that a firm is not a legal person even though it has some attributes of personality. Partnership is a certain relation between persons, the product of agreement to share the profits of a business. 'Firm' is a collective noun. a compendious expression to designate an entity, not a person. in income-tax law a firm is a unit of assessment, by special provisions, but is not a full person; which leads to the next step that since a contract of employment requires two distinct persons, viz., the employer and the employee, there cannot be a contract of service, in strict law, between a firm and one of its partners. So that any agreement for remuneration of a partner for taking part in the conduct of the business must be regarded as portion of the profits being made over as a reward for the human capital brought in. Section 13 of the Partnership Act brings into focus this basis of partnership business.

We may now embellish this brief judgment with some text-book references and citation of rulings. Is the firm a person or a mere shorthand name for a collection of persons, commercially convenient but not legally recognized? Under s. 3 of the Partnership Act it is not a person, but a relationship among persons. Lindley, on Partnership,(2) has this:

"The firm is not recognised by English lawyers as distinct from the members composing it. In taking partnership accounts and in

administering partnership assets, courts have to some extent adopted the mercantile view, and actions may now, speaking generally, be brought by or against partners in the name of their firm; but, speaking generally, the firm as such has no legal recognition. The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. In point of law,. a partner may be the debtor or the creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member, nor can he be employed by his firm, for a man cannot be his own employer."

The Indian law of partnership is substantially the same and the reference in counsel's submissions to the Scottish view of a firm being a legal entity is neither here nor there. Primarily our study must zero on the Indian Partner- ship Act and not borrow courage from foreign systems. In Bhagwanji Morarji Gokuldas(3) the Privy' Council ruled that the Indian Partnership Act went beyond the English Partner- ship Act, 1890, the law in India. attributing personality to a partnership being more in accordance with the law of Scoff and. Even so, Sir John Beaumont, in that case, pointed out that the Indian Act did not make a firm a corporate body. Moreover., we are not persuaded by that ruling of the Privy Council, particularly since a pronouncement of this Court in Dulichand Lakshminarayan vs The Commissioner Of Income Tax (1956) 29 ITR 535, 540,541; (1956) SCR154 (SC)strikes a contrary note. We quote:

"In some systems of law this separate personality of a firm apart from its members has received full and formal recognition as, for instance, in Scotland. That is, however, not the English common law conception of a firm. English lawyers do not recognise a firm as an entity distinct from the members composing it. 'Our partnership law is based on English law and we have also adopted notions of English lawyers as regards a partnership firm."

From the above both the judgments it has been settled that the firm is not a different entity or person in law than its partners. It is merely an association of individuals and a firm name is only a collective of those individuals who constitute a firm. With this law laid down by the Apex Court, it cannot be said that the appellant being the partner and M/s Zydus Healthcare being a partnership firm have relationship of service provider and service recipient.

4.2 The Revenue strongly relied upon the judgment of Hon'ble Supreme Court in the case of State of Punjab v. Jullundur Vegetables Syndicate (supra) to argue that as per the said judgment, a firm which is a dealer is a person. We agree with the submission of the learned counsel that in the said judgment, the facts were entirely different as the same was in context of Sales Tax. Under East Punjab Sales Tax Act, 1949, section 2(d) of the act

defined dealer, as including a firm. In the light of this definition, the Hon'ble Supreme Court held that for the East Punjab Sales Tax Act, firm is a person. It is on this basis the Larger Bench of CESTAT in the case of Gopal Industries, it was held that the partnership is a separate legal entity as opposed to Income Tax and Sales Tax. Therefore the judgment of State of Punjab v. Jullundur Vegetables Syndicate (supra) is clearly distinguishable. We further find that in the present case, the term Business Auxiliary Service which is one of the major services applies for a service provided to a client by any person. Hence, two distinct persons are required to attract section65 (105)(zzb) of the Finance Act, 1994. As discussed above, the appellant being a partner has discharged its duties pursuant to deed of partnership to a partnership firm M/s Zydus Healthcare. Therefore, there cannot be service provider and a service recipient relationship between partner and partnership firm. Hence, all the activities performed by the appellant in the capacity of partner to the partnership firm is not liable to service tax. Section 65(105)(zzb) clearly applies to services provided to a client by a person in relation to Business Auxiliary services. Therefore, recipient being a client to whom if service is provided by a person, both are distinct persons whereas in the present case the partner and partnership there are no distinct persons.

4.3 Learned Counsel also argued that any income received by a partner for discharge of obligation as per the partnership deed is nothing but special share in profits of the firm. This issue has been considered by the Hon'ble Supreme Court in the case of Commissioner of Income Tax vs R.M. Chidambaram Pillai (supra) wherein the para of law of Income Tax by AC Sampath Iyenger, 6th edition, 1973 pages 1063-1064, Vol-II was expressly quoted and approved. The same is reproduced below:

> *"Any interest, salary, bonus, commission or remuneration paid by a firm to any of its partners cannot be deducted by the firm as an expenditure in its profit-computation. The reason is this: The partners in a firm are ultimately entitled to the entire profits of the firm, according to their shares in the business. Therefore, the entirety of such profits should be brought to charge and no portion be exempted by giving the same away to a partner as his salary, bonus, commission, remuneration or interest. A partner is bound to find the necessary finances for the partnership and hence any interest on capital supplied by the partner is not deductible. A partner's rendering services to the firm stands on the same footing as his providing capital; only instead of in money, in kind. Further, no remuneration is permissible to a partner for his rendering services to the firm, since the carrying on of the business of the partnership is a primary duty*

which all the partners, or some of the partners acting for all, are required to do by the law relating to partnership.

The matter may be looked at another way too. In law, a partner cannot be employed by his firm, for a man cannot be his own employer. A contract can only be bilateral and the same person cannot be a party on both sides, particularly in a contract of personal employment. A supposition that a partner is employed by the firm would involve that the employee must be looked upon as occupying the position of one of his own employers, which is legally impossible. Consequently, when an arrangement is made by which a partner works and receives sums as wages for services rendered, the agreement should in truth be regarded as a mode of adjusting the amount that must be taken to have been contributed to the partnership's assets by a partner who has made what is really a contribution in kind, instead of contribution in money. Hence, all the aforesaid payments are non-deductible"

The aforesaid law was also declared by the Hon'ble Supreme Court in the R.M. Chidambaram Pillai (supra) case wherein the issue in consideration was that salary of partners in a partnership firm. The firm earned agricultural income which was exempted from Income Tax. Partners were paid salaries. Question arose whether the amount received by the partners is also an agricultural income? It was held by the Hon'ble Supreme Court, the salary paid is a form division of firm's profit. The relevant portion is extracted below:

The necessary inference from the premise that a partner- ship is only a collective of separate-persons and not a legal person in itself lends to the further conclusion that the salary stipulated to be paid to a partner from the firm is in reality a mode of division of the firm's profits, no person being his own Servant in law since a contract of service postulates two different persons.

….

Contrary views are not wanting in some rulings, but a catalogue of cases on the other side may be productive Of confusion and not resolution of conflict. We abstain from that enterprise and confine ourselves to the statement of the law that although, for, purposes of the Income-tax Act, afirm has certain attributes simulative of personality, we have to take it that a partnership is not a person but a plurality of persons.

The Hon'ble Supreme Court in the case of R.M. Chidambaram Pillai (supra) has further considered as below:

"What is the real nature of the salary paid to a partner visa vis the income of the firm? On principle, payment of salary to a partner represents a special share of the profits and is therefore part of the profits and taxable as such.

> *It is plain that salaries paid to partners are regarded by the Income-tax Act as retaining the character of profits and not excludible from the tax net, whatever the reason behind it be."*

A contrary view taken by the Hon'ble Madras High Court on the identical issue was overruled by Hon'ble Supreme Court in the aforesaid case by observing as follows:

> *"We regard this conclusion as unsound, the source of the error being a failure to appreciate that the salary of a partner is but an alias for the return, by way of profits, for the human capital--sweat, skill and toil are, in our socialist republic, productive investment---he has brought in for common benefit. The immediate reason for payment of salary was service contract but the causa causans is partnership."*

The Hon'ble Punjab & Haryana High Court in the case of Bhagwant Singh vs Commissioner of Income Tax 1959 PH Air 59 also dealt with the same issue. In the said case, the issue that arose for consideration was nature of salary drawn by the partner, which was held by the Hon'ble High Court that when the partnership agreement decides that one of the partners will receive salary for the services rendered by him to the partnership business, a contract is regarded as a contract of partnership and is not designated as contract of service. The Hon'ble High Court observes that partnership is an agreement between two or more persons to place their capital, labour and skill or some or other or all of them for the purpose of carrying on a joint business for their common benefit and dividing its profits in certain proportions. The privilege of profit sharing imposes on each partner but obligation to advance the interests of the partnership business to apply his time and attention of the management of its affairs and to devote his knowledge, skill and ability for the success of its enterprise. The relevant portion of the judgment is extracted below:

> *"The principle propounded above has received statutory recognition in India for Section 13 of the Partnership Act makes it quite clear that if the contract so provides, a partner may receive compensation for taking part in the conduct of the partnership business. Indeed a stipulation that an active partner shall receive a fixed salary is by no means uncommon in partnership agreements. When a partnership agreement recites that one of the partners will receive a salary for the services rendered by him to the partnership business the contract is regarded as a contract of partnership and is not designated as a contract of service. An agreement to share both profits and losses in addition to a salary points to the existence of a partnership and an*

agreement to share profits only in addition to a salary indicates the relationship of master and servant or principal and agent."

In all the above judgments, it is categorically held that any amount received by the partner from the partnership firm as per the obligation of the partnership deed would be treated as profit share in the partnership business. Applying the same ratio in the present case also, the appellant received remuneration from its partnership firm towards certain activities performance in terms of the partnership deed is nothing but profit in partnership sharing and the same cannot be treated as consideration towards provision of service under Finance Act, 1994.

4.4 In a partnership firm, partner's capital can be in the form of cash/asset. It can also be in the form of contribution of skill and labour alone without contribution in cash. This issue has been considered by Hon'ble Supreme Court in the case of Chandrakant Manilal Shah (supra). In the said case, the issue for deciding was the validity of the partnership between the Karta of a Hindu undivided family and one of his sons. The son had not brought any cash/asset as his capital contribution to the partnership but was contributing only his skill and labour. In this context, the Hon'ble Supreme Court observed as follows:

"The nature of consideration will depend on the nature of the contract between the two individuals. As is well known, the aim of business is earning of profit. When an individual contributes cash asset to become partner of a partnership firm in consideration of a share in the profits of the firm, such contribution helps and at any rate is calculated to help the achievement of the purpose of the firm namely to earn profit. The same purpose is, undoubtedly, achieved also when an individual in place of cash asset contributes his skill and labour in consideration of a share in the profits of the firm. Just like a cash asset, the mental and physical capacity generated by the skill and labour of an individual is possessed by or is a possession of such individual. Indeed, skill and labour are by themselves possessions. "Any possession" is one of the dictionary meanings of the word 'property'. In its wider connotation, therefore, the mental and physical capacity generated by skill and labour of an individual and indeed the skill and labour by themselves would be the property of the individual possessing them. They are certainly assets of that individual and there seems to be no reason why they cannot be contributed as a consideration for earning profit in the business of a partnership firm."

From the above observation of the Hon'ble Supreme Court it follows that remuneration received by a partner by employing his skill and labour as per partnership deed is also a profit. The profit in such circumstances can be a

special share in the profit. In the present case also, the appellant is a partner performing some duties for which he has an expertise, skill in the marketing and distribution of the goods manufactured by partnership firm M/s Zydus Healthcare. And as a remuneration, the appellant have been received the amount which is nothing else but a special share in the profit. Identical issue has been considered by this CESTAT in the case of Mormugao Port trust (supra) which was approved by the Hon'ble Supreme Court. The relevant portion of the judgment is reproduced below:

> *"13. Sometimes, the contracting parties, may conduct such joint venture in the name of a separate legal entity, while at times, such a joint venture is carried out under the individual names of the parties. Such informal arrangements are called by different names either as a consortium, collaboration, joint undertaking, etc. Regardless of the legal form or name that is given to such a Joint Venture, the same are arrangements in the nature of partnership but without the liabilities being joint and several."*

From the above judgment it can be seen that there was a joint venture and in the said joint venture, one of the partner provided services to a joint venture. Revenue's case was that the partner in the joint venture has provided services to the joint venture which amounts to service and liable to service tax. The Tribunal has held that any activity performed by the partner of the joint venture would not amount to service and not liable to Service Tax.

4.5 It is also observed that the impugned activities of the appellant are undisputedly its obligation as a partner as per partnership deed. There is no separate contract of services between the appellant and the partnership firm. Therefore, the remuneration received by the appellant is merely a special share of profits in terms of the partnership deed. Therefore, such remuneration cannot be considered as consideration towards any services between two persons, and, hence, not liable to Service Tax.

4.6 Revenue have strongly argued that appellant's refund is not maintainable on the ground that the self assessment of Service Tax payment has not been challenged by filing appeal before the Commissioner(Appeals). In this regard, he relied upon various judgments as cited in the submission of the learned Authorised Representative above. The Revenue has mainly relied upon the Larger Bench judgment of the Hon'ble Supreme Court in the

case of ITC Ltd. (supra). On careful reading of the said judgment, we find that the issue involved in the ITC case is that whether non filing of appeal against assessed Bills of entry will deprive the importer is right to file a refund claim under Section 27 of the Customs Act, 1962. In the Customs matter, the appellant needs to file appeal against any decision or order passed by the officer of Custom lower in the rank than the Principal Commissioner of Customs or Commissioner of Customs. An appeal can be filed before the Commissioner (Appeals) in terms of section 128 of the Customs Act. Unlike Service Tax, in customs even though self assessment is done by the assessee, but the same is verified and allowed the clearances by the Custom officer on the Bills of Entry. It is that Bills of entry which is treated as order of assessment and any aggrieved person can file appeal against such assessment order of Bills of entry. In the Service Tax matter, the assessee simply file the ST-3 return and no order is passed by the departmental officer which can be challenged by way of filing appeal before the Commissioner (Appeals). The appeal provision of the Service Tax matter is provided under section 85 of the Finance Act, 1994 which is reproduced below:

Appeals to the Commissioner of Central Excise (Appeals).

85. *[1][(1) Any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the [5][Principal Commissioner of Central Excise or] Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).]*

4.7 As per the plain reading of the above section 85(1), it provides for filing an appeal before the Commissioner (Appeals) only in case an order is passed by an officer below the rank of Principal Commissioner or Commissioner of Central Excise. In the case of self assessment of Service Tax, there is no order of assessment passed by any officer below the rank of Principal Commissioner or Commissioner of Central Excise. Therefore, there is no provision corresponding to section 47(2) of Customs Act, 1962 in the Finance Act, 1994. Therefore, there is a clear distinction between the assessment under Customs and Service tax. Therefore, ratio of ITC Ltd. case cannot be applied in the matter of Service Tax. We have also noticed that Hon'ble Supreme Court in the ITC case also considered the case of Central Excise duty where the assessments were provisional. In that case, final assessment order was also passed. The assessee paid the amount so demanded. The assessee not being aware of the particular benefit of notification at the time of finalisation of assessment does not claim it. He did

not appeal against a speaking order finalising provisional assessment and the assessee filed refund claim under section 11(b) of Central Excise Act, 1952 in respect of duty so paid. It is that refund claim which was rejected by the Supreme Court as not maintainable without challenging the order of final assessment. In these peculiar facts of the case, the Hon'ble Supreme Court has observed that instead of filing the refund claim, the proper remedy was to file the appeal. However, in the present case, there is no order of final assessment by the Service Tax authorities. Therefore, the reliance cannot be placed on case of ITC (supra).

5. We also observed that the judgment of Hon'ble Rajasthan High Court in the case of Central Office of Mewar Palace Org. Versus Union of India (supra) has been expressly approved by the Hon'ble Supreme Court in the case of ITC Ltd. (supra) as the Hon'ble Supreme Court stated that High Court judgment is not under provisions of the Customs Act. Therefore, unlike Customs, there is no express provision to file appeal against the self assessment of service tax by filing ST-3 return. Therefore, on the ground that appeal against the self assessment was not filed, the refund claim cannot be rejected.

6. The Adjudicating Authority as well as Commissioner (Appeals) also contended in their orders that the appellant have not satisfied the aspect of unjust enrichment as they have not filed any documents in this regards. On careful scrutiny of the documents in particular, the refund application, the relevant page of the refund application are reproduced below:

Zydus dedicated to life

Cadila Healthcare Limited

Regd. Office :
'Zydus Tower',
Satellite Cross Roads,
Ahmedabad 380 015. India.
Phone : +91-79-2686 8100 (20 Lines)
Fax : +91-79-2686 2364
www.zyduscadila.com

From the extracts of the judgment, it is very clear that the payment of consideration or remuneration as per agreed terms of deed received by a partner is nothing but a share of the profit. Thus when the firm has no independent legal existence, a firm cannot enter into an agreement with any of its own partners for receiving any services. Nor the partner can be considered as to have provided a service to a firm of which he is a partner. Partners of the firm are part and parcel constituting partnership and cannot be considered as independent and outside the partnership firm and any role played by the partner cannot be considered as a service outside the partnership agreement. The remuneration if any received by the partner either as share of profit or separately for his role in the partnership cannot be considered as payment received by him for any independent services provided to the firm itself. The amount paid to a partner is a percentage of earning of the business is not relevant as along as the partner is not considered as an entity different from partnership.

In view of the above CHL being a partner of firm is not rendering any service to ZH. Hence there cannot be any service tax implications in respect of the payments received by CHL from ZH for rendering any of the services.

In view of the above facts and settled legal position, it can be concluded that CHL is not required to pay service tax in respect of amount booked as Partner's remuneration from Partnership firm. Your Honour will appreciate that under bonafide belief CHL made payment of service tax of Rs. 3,96,55,000/- on gross amount of Rs. 38,50,00,000, vide GAR-7 Challans dated 06.01.2011. In light of the above submission CHL was not required to pay service tax. In other words, CHL has wrongly made payment of service tax to the Government which is required to be refunded to CHL.

Here it is pertinent to emphasis that CHL has not recovered amount of Rs. 3,96,55,000/- as service tax from ZH. In other words CHL has not passed on burden of service tax to ZH. Therefore, it is summarized that incidence of service tax has not been passed on ZH but the same has been borne by CHL. Therefore, doctrine of un-just enrichment will not apply in this case.

We state that for refund of service tax provisions of Section 11B of Central Excise Act, 1944 shall apply by virtue of Section 83 of Finance Act, 1994. Under Service tax no FORM has been prescribed for refund of service tax. Therefore, in the present refund claim we used FORM-R prescribed under erstwhile Central Excise Rules, 1944. We submit herewith refund claim in prescribed FORM-R duly filled with necessary details for your kind consideration.

Zydus
dedicated to life

Cadila
Healthcare Limited

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Ahmedabad 380 015 India
Phone : +91-79-2686 8100 (20 Lines)
Fax : +91-79-2686 2368
www.zyduscadila.com

FORM - R
Application for refund of Service Tax
[To be filed in Duplicate]

Ref: CHL/M/ST/BAS/11-12/05 Date: 11.04.2011

To,
The Deputy Commissioner of Service Tax,
Division-III,
APM Mall, Nr. Sachin Tower,
Satellite, Ahmedabad.

Subject: Refund claim of Service Tax for Rs.3,96,55,000/ - m/r.

Dear Sir,

1. We claim refund of service tax of Rs. 3.96,55,000/-[Rupees: Three Crore Ninety Six lacs Fifty Five Thousand] on the grounds mentioned in the covering letter.

   [a] Refund claim is made under the provisions of Section 11B of Central Excise Act, 1944 read with Section 83 of Finance Act, 1994. Grounds of refund are enumerated in the covering letter it self.

2. We enclose the documents in support of the claim as mentioned in covering letter.

3. The amount claimed was paid Vide G.A.R.-7 Challan dated 06.01.2011.

4. The payment of refund may please be made in our favour by a cross cheque on Cadila Healthcare Limited Treasury / by money order at Government cost.

5. We declare that no refund on this account has been claimed / received by us earlier.

6. We declare that the service tax for which refund has been claimed has not been charged / realised from any other person and a copy of the price-list , relevant Gate Pass (Central Excise) like documents and invoices are enclosed.

7. We undertake to refund on demand being made within six months of the date of payment of any rebate erroneous paid to us.

In the last second para on Pg 46 and Para 6 of Pg. 48, the appellant have clearly declared that they have not recovered the amount of Service Tax from Zydus Health Care and the burden of Service Tax was not passed on to the Zydus Health Care. It shows that both the authorities have ignored this

declaration made by the appellant. Therefore, the contention made by them that the appellant has not satisfied that the incidence of Service Tax, for which refund claim was made, has not been passed on is apparently erroneous.

7. As per our above discussion and finding, the appellant are entitled for the refund of the claim made by them. Accordingly, all the impugned orders are set aside and appeals are allowed with consequential relief, in accordance with law.

(Pronounced in the open court on 27.04.2021)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Diksha