IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL /2023
@ Diary No(s).5258/2023

COMMISSIONER OF CGST AND CENTRAL EXCISE **Petitioner(s)**

VERSUS

M/S EDELWEISS FINANCIAL SERVICES LTD. **Respondent(s)**

O R D E R

Delay condoned.

2. Heard Mr. Tathagat Sharma, learned counsel for the petitioner.

3. The challenge here is to the concurrent finding in favour of the assessee recorded by the Principal Commissioner GST which was upheld by the CEST Tribunal, through the impugned order on 16.02.2022. The learned counsel would submit that this case is similar to Civil Appeal No. 428/2020 @ Diary No.42703/2019 (*Commissioner of Service Tax Audit II Delhi IV Vs. M/S DLF Cyber City*

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Developers Ltd.). **and therefore the matter should be admitted and tagged with the pending case.**

4. Responding to the above, Mr. Bharat Rai Chandani, learned counsel for the assessee on caveat would read Section 65 (12) of the Finance Act, 1994 to point out that issuance of corporate guarantee to a group company without consideration would not fall within banking and other financial services and is therefore not taxable service. He would also read Section 65B (44) of the Finance Act 1994 to point out that the definition of service would indicate that it relates to only such service which is rendered for valuable consideration.

5. The counsel would next advert to paragraph 3.1.12 of the Commissioner's order where the following was recorded:-

> ***"further, the consideration can be of two types viz., monetary consideration and non monetary consideration. In the present case, the Assessee has argued that they have not received any consideration. In such case it's for the department to prove that the Assessee's claim is wrong. It is observed that nowhere in the Show Cause Notice, attempt has been made to prove that the Assessee received either monetary or non-monetary consideration in any form. It is not alleged or proved in the Show Cause Notice as to how the Assessee got any benefit from their***

subsidiaries in monetary or non-monetary terms for the Corporate Guarantees issued. Missing this vital point, valuation of the consideration using provisions of Section 67(1) of the Finance Act, 1994 become a futile exercise."

6. Mr. Rai Chandani then read paragraphs 8 and 9 of the judgment of the Tribunal, which are extracted below :-

"8. The criticality of 'consideration' for determination of service, as defined in section 65B(44) of Finance Act, 1994, for the disputed period after introduction of 'negative list' regime of taxation has been rightly construed by the adjudicating authority. Any activity must, for the purpose of taxability under Finance Act, 1994, not only, in relation to another, reveal a 'provider', but also the flow of 'consideration' for rendering of the service. In the absence of any of these two elements, taxability under Section 66B of Finance Act, 1994 will not arise. It is clear that there is no consideration insofar as 'corporate guarantee' issued by respondent on behalf of their subsidiary companies is concerned.

9. The reliance placed by Learned Authorised Representative on the 'non-monetary benefits' which may, if at all, be of relevance for determination of assessable value under section 67 of Finance Act, 1994 does not extend to ascertainment of 'service' as defined in section 65B(44) of Finance Act, 1994. 'Consideration' is the recompense for the 'contractual' undertaking that authorizes levy while 'assessable value' is

a determination for computing the measure of the levy and the latter must follow the former."

7. The above would suggest that this was a case where the assessee had not received any consideration while providing corporate guarantee to its group companies. No effort was made on behalf of the Revenue to assail the above finding or to demonstrate that issuance of corporate guarantee to group companies without consideration would be a taxable service. In these circumstances, in view of such conclusive finding of both forums, we see no reason to admit this case basing upon the pending Civil Appeal No. 428 @ Diary No.42703/2019, particularly when it has not been demonstrated that the factual matrix of the pending case is identical to the present one.

8. In consequence, the Civil Appeal stands dismissed.

9. Pending application(s), if any, stand closed.

.....J.

(HRISHIKESH ROY)

.....J.

(MANOJ MISRA)

NEW DELHI;

MARCH 17, 2023

ITEM NO.14 COURT NO.16 SECTION XVII-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL Diary No(s).5258/2023

(Arising out of impugned final judgment and order No.A/85986/2022 in STA No.87134/2018 dated 16-02-2022 passed by the Custom Excise Service Tax Apellate Tribunal, West Zonal Bench At Mumbai)

COMMISSIONER OF CGST AND CENTRAL EXCISE Petitioner(s)

VERSUS

M/S EDELWEISS FINANCIAL SERVICES LTD. Respondent(s)

(IA No.37195/2023-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT and IA No.37192/2023-STAY APPLICATION and IA No.37191/2023-CONDONATION OF DELAY IN FILING APPEAL)

Date : 17-03-2023 This petition was called on for hearing today.

CORAM : HON'BLE MR. JUSTICE HRISHIKESH ROY
HON'BLE MR. JUSTICE MANOJ MISRA

For Petitioner(s) Mr. N. Venkatraman, A.S.G.
Mr. Tathagat Sharma, Adv.
Mr. Mukesh Kumar Maroria, AOR
Mr. V.C. Bharathi, Adv.
Mr. Sidharth Sinha, Adv.
Mr. Pratyush Srivastava, Adv.
Mr. Bhuvan Kapoor, Adv.

For Respondent(s) Mr. Bharat Rai Chandani, Adv.
Mr. Aneesh Mittal, AOR
Ms. Komal, Adv.
Mr. Gaurav Titotia, Adv.
Mr. Deepak Kumar, Adv.

UPON hearing the counsel the Court made the following
O R D E R

Delay condoned.

The Civil Appeal is dismissed in terms of the Signed Order.

Pending application(s), if any, stand closed.

(DEEPAK JOSHI) **(KAMLESH RAWAT)**
COURT MASTER (SH) **ASSISTANT REGISTRAR**

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 87134 OF 2018
WITH
CROSS-OBJECTION NO: 86329 OF 2018

[Arising out of Order-in-Original No: ME/COMM/KCG/13/2017-18 dated 27th October 2017 passed by the Principal Commissioner of GST & Central Excise Mumbai East.]

Commissioner of CGST & Central Excise
Mumbai East
9th Floor, Lotus Info Centre, Parel, Mumbai - 400012 … ***Appellant***

versus

Edelweiss Financial Services Ltd
4th Floor, Edelweiss House, Off: CST Road, Kalina
Mumbai - 400098 ***…Respondent***

APPEARANCE:

Shri Nitin M Tagade, Joint Commissioner (AR) for the appellant

Shri Bharat Raichandani, Advocate for the respondent

CORAM:

HON'BLE MR ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 85986/2022

DATE OF HEARING: 16/02/2022
DATE OF DECISION: 16/02/2022

PER: C J MATHEW

Revenue is aggrieved by the dropping of proceedings, initiated against M/s Edelweiss Financial Services Ltd for having provided 'corporate guarantee' on behalf its subsidiaries located within and outside India and not discharging tax liability thereto as provider of 'banking and other financial services' for the period prior to, and after, 30th June 2012, in order-in-original no. ME/COMM/KCG/13/ 2017-18 dated 27th October 2017 of Principal Commissioner of GST & Central Excise, Mumbai East. The show cause notice had proposed recovery of ` 97,95,62,947/-, comprising ` 3,22,01,255/- towards provision of guarantee to overseas companies for which consideration had been received and of ` 94,73,61,692/- towards guarantees provided free of charge to their Indian subsidiaries, for rendering taxable service under section 65(105)(zm) of Finance Act, 1994 till 30th June 2012 and 'service' defined in section 65B(44) for the period thereafter till March 2015. The adjudicating authority had concluded that receipt of commission from overseas companies, being consideration for export of services, was not taxable and that, insofar as domestic facilitation was concerned, the definition in section 65(12) of Finance Act, 1994 did not extend to 'corporate guarantee' which, unlike 'bank guarantee', finds no specific enumeration as 'other financial services' therein, till 20th June 2012 and that for the period thereafter, absence of 'consideration' for facilitating 'corporate guarantee' excluded such activity from coverage within the definition of 'service' in section 65B(44) of Finance Act, 1994. The

respondent, M/s Edelweiss Financial Services Ltd, has filed a memorandum of cross-objections which is also taken up for disposal in the present proceedings.

2. Learned Authorised Representative, relying upon the grounds of appeal, submits that the characteristics of 'corporate guarantee' is not dissimilar to 'bank guarantee' and, thereby, liable to tax in like manner. He further contends that the as 'corporate guarantee' is very much within the reporting system established by the Reserve Bank of India in master circular dated 1st July 2013 (at paragraph 2.3.8.6), it is nothing but 'financial services' for the purpose of Finance Act, 1994. It was also contended that the discarding of the decision of the Tribunal in *Kaveri Agri Care Pvt Ltd v. Commissioner of Service Tax, Mysore [2011 (22) STR 220 (Tri.Bang.)]* is inappropriate as the observations therein on taxability of the service should not have been ignored by the adjudicating authority. He also contends that the scope of 'guarantees', examined by the Tribunal in Commissioner of *Central Excise & Service Tax (LTU), Chennai v. Neyveli Lignite Corporation Ltd [2017 (4) GSTL 145 (Tri.-Chennai)]*, reinforces the contention of Revenue that the 'taxable service' does encompass the activity.

3. Insofar as period after 1st July 2012 is concerned, it is contended by the Learned Authorised Representative that the emphasis placed by the adjudicating authority on 'consideration',

which lacks definition in Finance Act, 1994, is not correct inasmuch as the respondent herein, even if not benefitted monetarily, was recompensed by the improved credit rating of its subsidiary companies.

4. According to Learned Counsel for the respondent, the issue stands decided by the decision of the Tribunal in *DLF Cyber City Developers Ltd v. Commissioner of Service Tax, Delhi-V [2019 (28) GSTL 478 (Tri.-Chan.)]* holding that

> *'3. It is an admitted fact that the appellant-assessee has not received any consideration from either from the financial institutions or from their associates for providing corporate guarantee, in that circumstances, no service tax is payable by the appellant-assessee. Moreover, the demand raised in the show cause notices are on the basis of assumption and presumption presuming that their associates have received the loan facilities from the financial institution at lower rate, therefore, the differential amount of interest is consideration, but there is no such evidence produced by the revenue on that behalf. In that circumstances, we hold that the appellant-assessee are not liable to pay any service tax on corporate guarantee provided by the appellant-assessee to various banks/financial institutions on behalf of their holding company/associate enterprises for their loan or over draft facility under Banking and Financial Institutions after or before 1-7-2012.'*

5. It is also further contended that, in *Asmitha Microfin Ltd v. Commissioner of Customs, Central Excise. & Service Tax, Hyderabad-III [2020 (33) GSTL 250 (Tri. - Hyd.)*, the Tribunal did

observe that

> *'5. ……..Learned Counsel argued that these are corporate guarantees and we are not convinced. These are not the guarantees provided by a corporation for it's subsidiaries but are pure bank guarantees provided through banks by the service providers. Therefore, on merits, we find that the appellant received banking and financial services from abroad and is liable to discharge service tax under reverse charge mechanism.'*

which runs counter to the proposition put forth on behalf of Revenue.

6. The exclusion of 'corporate guarantee' extended by a holding company for the business activities of its subsidiary companies from the ambit of levy stands decided by the Tribunal in *re DLF Cyber City Developers Ltd.* It is also clear that, even if 'corporate guarantee' is, in practice, akin to 'bank guarantee', the definition of 'banking and other financial services', *viz.*

> *'a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or [commercial concern]*, namely :-*
>
> *xxxxx*
>
> *(ix) other financial services, namely, lending, issue of pay order, demand draft, cheque, letter of credit and bill of exchange, transfer of money including telegraphic transfer, mail transfer and electronic transfer, providing bank guarantee, overdraft facility, bill*

> *discounting facility, safe deposit locker, safe vaults, operation of bank accounts;";'*

in section 65(12) of Finance Act, 1994 amplifies 'other financial services' with specific enumeration without including 'corporate guarantee' therein. The legislative intent to exclude 'corporate guarantees' is, thus, unarguable. The monitorial engagement of Reserve Bank of India arises from its own statutory empowerment and to graft that supervision on a tax statute for determining tax liability is not tenable.

7. The adjudicating authority has, rightly, declined to be guided by the decision of the Tribunal in *re Kaveri Agri Care Pvt Ltd* as it is settled law that interim orders do not offer themselves as binding precedent and the lack of elaboration of the observation therein detracts from its employability to advance the case of Revenue. The decision of the Tribunal in *re Neyveli Lignite Corporation Ltd* deals with an entirely different set of facts and the explanation therein of 'guarantee', as commonly understood, for placing that dispute in a context is of no assistance here.

8. The criticality of 'consideration' for determination of service, as defined in section 65B(44) of Finance Act, 1994, for the disputed period after introduction of 'negative list' regime of taxation has been rightly construed by the adjudicating authority. Any activity must, for the purpose of taxability under Finance Act, 1994, not only, in relation

to another, reveal a ‘provider’, but also the flow of ‘consideration’ for rendering of the service. In the absence of any of these two elements, taxability under section 66B of Finance Act, 1994 will not arise. It is clear that there is no consideration insofar as ‘corporate guarantee’ issued by respondent on behalf of their subsidiary companies is concerned.

9. The reliance placed by Learned Authorised Representative on the ‘non-monetary benefits’ which may, if at all, be of relevance for determination of assessable value under section 67 of Finance Act, 1994 does not extend to ascertainment of ‘service’ as defined in section 65B(44) of Finance Act, 1994. ‘Consideration’ is the recompense for the ‘contractual’ undertaking that authorizes levy while ‘assessable value’ is a determination for computing the measure of the levy and the latter must follow the former.

10. In view of the settled law as enumerated *supra* and the inevitability of consideration as manifesting ‘taxable service’, we find no merit in the appeal of Revenue which is dismissed. Cross-objection is also disposed off.

(Operative Part of the Order pronounced in the open court on 16th February 2022)

(ANIL CHOUDHARY) **(C J MATHEW)**
Member (Judicial) ***Member (Technical)***

**/as*