

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL
CHANDIGARH**

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 1229 of 2011

[Arising out of Order-in-Original No. 04/ST/Commr/BK/2011 dated 03.05.2011 passed by the Commissioner (Appeals), Rohtak]

C.C.E; Rohtak
SCO No. 6 Sector 1, Rohtak

.....Appellant

VERSUS

Jindal Stainless Steel
O.P. Jindal Marg, Hissar (Haryana)

.....Respondent

APPEARANCE:

Present for the Appellant: Sh. Aneesh Deewan ,Authorized
Representative

Present for the Respondent: Ms. Krati Singh & Sh. Aman Singh
Advocates

**CORAM: HON'BLE MR. S. S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER
(TECHNICAL)**

FINAL ORDER NO. 60169/2023

DATE OF HEARING: 06.06.2023

DATE OF DECISION: 27.06.2023

PER S. S. GARG

The present appeal is directed against the impugned order dated 03.05.2011 passed by the Commissioner whereby the Ld. Commissioner has dropped the demand of service tax against the respondent. Revenue is in appeal against the said order.

2. Briefly the facts of the present case are that the respondent's company is engaged in the manufacture of inguts, blooms under chapter heading 7218 of the tariff. The respondent is holding company of PT Jindal Stainless Indonesia (Jindal Indonesia) holding 99.99% shares/voting rights in the said company. Respondent has executed corporate guarantees for the purposes of loans availed by Jindal, Indonesia from several banks and for this facility the respondent also charges certain consideration in the form of guarantee commission from Jindal, Indonesia for extending corporate guarantee. During the course of audit it was notice that the respondent has received the guarantee commission shown in their balance sheet during the period 2005-2006 to 2007-2008 and as per the Department the respondent is liable to service tax on the guarantee commission under the head business auxiliary services. Subsequently a show cause notice dated 27.09.2010 was issued to the respondent demanding service tax on guarantee commission under the category of banking and other financial services under Section 65(105)(zm) of the Finance Act, 1994. The respondent filed detailed reply to the show cause notice. After following the due process the Commissioner passed the impugned order by dropping the demand. Aggrieved by the said order, department has filed the present appeal and the respondent has filed the cross objections in the appeal filed by the Department.

3. Heard both the parties and perused the records.

4. Ld. DR submitted that the impugned order passed by the Ld. Commissioner is not sustainable in law as the same has been passed without properly appreciating the definition of banking and other financial services as provided in section 65(12) of the Finance Act, 1994 and the board circular issued from time to time amending the definition of banking and other financial services. He further submitted that the Ld. Commissioner has wrongly dropped the entire demand by accepting the defence of the respondent that the provisions of the Section 65 (12) of the Finance Act, 1994 apply only to those body corporate which is either banking company, financial institution or non banking financial company and hold that nothing has come on record that the respondent is either a banking company, financial institution or non banking financial company. He further submitted that the commissioner has wrongly relied upon the decision of the Hon'ble Tribunal in the case of ***Banswara Syntec Vs. Commissioner of Central of Customs - 2010 (18) S.T.R. 68 (Tri.-Del.)***. He also submitted that the commissioner has erroneously held that the body corporate has been covered under Section 65(12) but these are only those body corporate which is either banking company, financial institution or non banking financial company and that nothing has come on record that the respondent is either banking company, financial institution or non banking financial company. He also submitted that the Ld. Commissioner has failed to take note of the statutory provisions

that the definition of the banking and other financial services as per Finance Act, 2002 extended the levy of service tax even to a body corporate other than banking company or a financial institution including a non banking financial company and also failed to take note of instructions issued by the board vide letter dated 01.08.2002. He further submitted that the extended period has rightly being invoked because the respondent did not inform the Department that they are helping M/s Jindal Stainless Indonesia for arranging loans/ funds from various financial institutions and that they have given corporate guarantee for them.

5. On the other hand, Ld. Counsel for the respondent defended the impugned order and submitted that the show cause notice has failed to specify the category under which impugned services are taxable under BOFS in terms of Section 65 (12) of the Act. She further submitted that the impugned show cause notice is vague and inconclusive because the Department has failed to specify the sub-category under Section 65(12) of the Act under which the alleged services are taxable and in the absence of the same, the liability to pay tax cannot be fastened on the respondent. For this submission she is relied upon the following decisions:-

- *Micromatic Grinding Technologies Limited Vs. Commissioner of C.Ex. & S.T. Ghaziabad, 2019 (8) TMI 320 – CESTAT, Allahabad.*

- *Commissioner of C.Ex. Vs. Brindavan Beverages (P) Ltd. 2007 (6) TMI 4 – Supreme Court.*

- Commissioner of Cus. & C.Ex., Goa Vs. Swapnil Ashnodkar, 2018 (10) GSTL 479 (Tri. – Mum.)

6. She further submitted that the respondent is not a body corporate engaged in providing the banking services. She also submitted that section 65 (12) (a) of the Act clearly provides that the services under BOFS shall mean services specified under Sub-clause (a) provided by:

- a.** Banking Company; or
- b.** A financial institution including a non-banking financial company; or
- c.** any other body corporate or commercial concern.

She also submitted that the respondent is not a body corporate engaged in providing the banking service tax and therefore they are not liable to discharge the services under the BOFS, for this she also referred the circular dated 04.07.2006 wherein it was clarified that the word 'any other person' in Section 65(105)(zm) has to read by applying the principle of ejusdem generis with the preceding words. For this submission she relied upon the following judgments:

- *Banswara Syntec Vs. Commissioner of Central excise 2010 (18) S.T.R. 68 (Tri.-Del.)*.**
- *Kansai Nerolac Paints Ltd. Vs. Commissioner of Customs 2017 (52) STR 334 (Tri.-Mum.)***
- *Commissioner of Central Excise Vs. Mohanrao Shinde SSK Ltd. 2016 (46) STR 742 (Tri.-Mum.)*.**

7. It is her further submission that the corporate guarantee is not an activity that is covered under ambit of BOFS as per Section 65(12) of the Act. In support of this submission she relied upon the following decisions:-

- Commissioner of CGST & Central Excise Mumbai East Vs. Edelweiss Financial Services Ltd 2022 (2) TMI 1359 – CESTAT Mumbai upheld by Supreme Court at 2023 (4) TMI 170.

- Sterlite Industries India Ltd. Vs. Commissioner of GST & Central Excise 2019 (2) TMI 1249 – CESTAT Chennai.

- Infrastructure Leasing & Financial Services Ltd Vs. Commissioner of Service Tax – I 2021 (9) TMI 450 – CESTAT Mumbai.

She also submitted that even if it is assumed (but not admitted) that services in question qualify as BOFS, the same shall not be taxable as they qualify as export of service in terms of Rule 3 of Export of Service Rules, 2005 and for this submission she relied upon the following decisions :-

- Sara Sae P Ltd. Vs. Commissioner 2020 (12) TMI 701 - CESTAT New Delhi.

- Involute Engineering Pvt. Ltd. Vs. Commissioner 2020 (12) TMI 533-CESTAT, New Delhi.

8. She further submitted that the service in question qualify as export of service and therefore not liable to tax. She would further submit that the entire demand made in the show cause notice is barred by limitation because the period involved in the present case is between 2005-2008 and the show cause notice was issued on 24.09.2010. She also submitted that the Department itself was uncertain about the taxability of the

impugned services as the dispute involves interpretation of law and for this submission she relied upon the case of ***Bharat Hotels Ltd. Vs. Commissioner of Central Excise 2018 (12) GSTL 368 (Del.)***. She also submitted that no penalty can be imposed under Section 76,77 & 78 as the demand itself is not sustainable.

9. After considering the submissions of both the parties and perusal of the material on record we find that the only issue involved in the present case is whether the corporate guarantee commission received by the respondent for providing corporate guarantees for their subsidiary company PT Jindal Stainless Indonesia (Jindal Indonesia) would be exigible to service tax under the category of BOFS for the purpose of Finance Act, 1994. In order to appreciate the whole issue it would be useful to reproduce the definition of BOFS as appearing in Section 65(12) of the Finance Act, 1994.

"9.1 *For better understanding of the issue, it would be useful to reproduce the definition of BOFS as appearing Section 65(12) of the Finance Act, 1994.*

"Banking and Other Financial Services" means-

(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,*

(1) financial leasing services including equipment leasing and hire-purchase:

Explanation-For the purposes of this item, financial leasing" means a lease transaction where-

(i) contract for lease is entered into between parties for leasing of a specific asset;

(ii) such contract is for use and occupation of the asset by the lessee

(iii) the lease payment is calculated so as to cover the full cost of the asset together with the interest

charges, and

(iv) the lessee is entitled to own, or has the option to own, the asset at the end of the lease period after making the lease payment;

(i) Omitted (i) merchant banking services, (v) securities and foreign exchange (forex) broking, and purchase or sale of foreign currency, including money changing:

(V) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services,

(vi) advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy;

provision and transfer of information and data processing; and

(viii) banker to an issue services; and

(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 afe providing bank guarantee, overdraft facility bill discounting facility, safe deposit locker, safe auts, operation of bank accounts ;"

(b) foreign exchange broking and purchase or sale of foreign currency including many changing provided by a foreign exchange broker or and authorised dealer in foreign exchange or an authorised money changer, other than those covered under sub-clause (a).

[explanation. - For the purposes of this clause, it is hereby declared that "purchase or sate of foreign currency including money changing includes purchase or sale of foreign currency, whether or not the Explanation consideration for such purchase or sale, as the case may be, is specified separately;]

9.2 The taxable service is defined under section 65(105)(zm) as under:-

"Taxable Service" means any service provided or to be provided to any person, by a banking company or a financial institution including a non-banking financial company or any other body corporate or

commercial concern, in relation to banking and other financial services”

9.3 After analysis of the above definitions, the main take aways from the aforesaid definitions as applied to the facts of the appeal can be listed as under:-

- i. The inclusion of the word "other body corporate came about with effect from 10.9.2004, Itself i.e. right from inception*
- ii. The definition of BOFS under section 55(12) is a comprehensive definition and not an inclusive definition*
- iii. in Section 65(12)(a), the only persons who have been made liable to service tax under this category are banking company, financial institution (including a non-banking financial company) any other body definition corporate or a commercial concern.*
- iv. Further, after listing out the category of persons who would be exigible to tax under the category, the services provided by such persons which alone would be exigible to such taxes have been comprehensively and specifically listed out with the use of the words "namely”*

10. Further, we find that the respondent does not fit in the definition of body corporate because they are not engaged in providing banking services and this issue has been clarified by the board circular dated 04.07.2006 wherein it has been clarified that the word ‘any other person” in Section 65(105)(zm) has to be read with principle of ejusdem generis with the preceding words. Further, we find that in the case of **Banswara Syntec** cited (Supra), the Tribunal while considering the similar issue of whether release of land building as well as machinery would only come under banking and other financial

services or otherwise it was held that such amount received as lease rent would not be covered under Section 105 of banking and other Financial Services in the Finance Act, 1994. Next point involved is whether the corporate guarantee given by the respondent for its subsidiary is covered under the definition of BOFS. This issue has been considered in various decisions relied upon by the respondent cited (Supra), the Tribunal in the case of ***Sterlite Industries India Ltd*** (Supra) has examined this issue wherein it has been observed in para 6.6 which is reproduced hereinbelow:

6.6“From the facts on record, it is evident that the appellants did not provide bank guarantee to their associate companies in India, neither did they receive any "bank guarantee from parent company abroad What they provided / received was only a corporate guarantee to/from their associate companies for which exercise they had received / paid guarantee commission. The department has taken the view that Corporate Guarantee and Bank Guarantee are one and the same. We are however unable to agree to this proposition that a corporate guarantee is nothing but bank guarantee by another name. A bank guarantee is given by a bank on behalf of the customer to the beneficiary bank guaranteeing the payment in case of default by customer. A corporate guarantee is a guarantee given by the corporate to cover their own exposure or exposure of some other related entity to their bank Bank guarantees are issued by Bank on a regular basis as part of their business of Banking.It is

nobody's case that appellant is doing the business of providing corporate guarantee on a regular basis. The corporate guarantee that was entered into by appellant is only for the limited purpose of securing loans to its subsidiaries. Corporate guarantees are issued in order to safeguard the financial health of their associate enterprises and to provide it support. For banks, providing bank guarantee is part of their regular course of business and they charge rate on the higher side. Further, these are fool proof instruments of security of the customer and failure to honour the guarantee is treated as a deficiency of services of the bank under banking laws Corporate guarantee is actually an in-house guarantee and is not issued to customers generally".

11. The findings of the Tribunal is recorded in para 7 which is reproduced herein below:-

"Viewed in this light, we are of the considered opinion that the activity of issue of corporate guarantees by the appellant from their associate/subsidiary companies in India and also the procurement/receipt of corporate guarantee from their parent/associate company abroad will not come within the fold of section 65(12)(a) ibid and in particular sub-clause (ix) of that provision. The appellant succeeds on merit".

12. In view of these facts, we are of the view that since the services in question has been rendered outside India, the same is not taxable as they qualify as export of services in terms of rule 3 of export of service Rules, 2004. As far as invoking the extended period of limitation is concerned, we are of the view that the whole issue relates to interpretation of the law because

the Department was not certain of the taxability of the impugned services and the definition of banking and financial service was changed from time to time. Hence the extended period cannot be invoked and by that entire demand is barred by limitation as the demand pertains to the period 2005-2008 whereas the show cause notice was issued on 24.09.2010 which is beyond the normal period of limitation. Keeping in view, above discussion and by following the ratio of the cited cases (Supra) we are of the considered view that there is no infirmity in the impugned order passed by the Ld. Commissioner and we uphold the same by dismissing the appeal of the Department. In result, the appeal is dismissed.

(Order pronounced on _____)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)