

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

SERVICE TAX APPEAL NO.51376 of 2017

[Arising out of Order-in-Appeal No.187/ST/Appls-I/2016-17 dated 12.05.2017 passed by the Commissioner of Service Tax (Appeals-I) New Delhi].

M/s. Sowar Pvt. Ltd.

...Appellant

VERSUS

The Commissioner of Service Tax, Delhi-II ...Respondent

APPEARANCE:

Mr.Krishna Mohan Menon & Ms. Parul Sachdeva, Advocates for the appellant
Dr. Radhe Tallo, Authorised Representative for the Respondent

Coram:

HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)

HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION: 29/03/2023

FINAL ORDER NO. 50607/2023

DR. RACHNA GUPTA

Present appeal has been filed with narrow scope of determination to the effect as to whether activity of giving corporate guarantee is taxable as Banking and other Financial Services. The appellants herein are registered for providing services as that of maintenance or repair services, erection commissioning and installation service, business auxiliary service, renting of immovable property service. The Department while verifying their records for the period 2010-11 to 2014-15 observed that the appellant has given corporate guarantee on behalf of their associate enterprises M/s.

Scintrex Geo Physical Services (India) Pvt. Ltd. and M/s.HGS India Ltd., to Syndicate Bank, Vasant Vihar. The said activity of the appellant was alleged amounting to provide the Banking and other Financial Services and a show cause notice No.3/2016-17 dated 13.04.2016 was served upon the appellant proposing the demand of Service Tax alongwith interest and the proportionate penalty for providing said service. The said proposal has been confirmed by the original adjudicating authority vide order No.667 of 14.09.2016. The appeal thereof has been rejected vide Order- in-Appeal No.1/2016-17 dated 12.05.2017. Being aggrieved, the appellant is before this Tribunal.

2. We have heard Mr. Krishna Mohan Menon, Id. Counsel for the appellant and Dr. Radhe Tallo, Id. Authorized Representative for the Department.

3. Ld. Counsel for the appellant has submitted that the appellant decided to provide corporate guarantee to its associate companies for grant of working capital loans to both of its companies. However, admittedly no consideration was received by the appellant either from the Bank /Financial Institution or from their associate enterprises for providing the said corporate guarantee. It is submitted that the decision of the authorities below is based on assumptions. The finding that the corporate guarantee given by the appellant has benefited the associate enterprises in two ways, firstly in the form of lower rate of interest for their borrowing cost and secondly in the form of zero cost for the Corporate Guarantee to be provided to the lender and the lender also has benefitted as they have got business from the associate enterprises of the appellant, is nothing but merely

assumptions. Ld. Counsel has also mentioned that the issue involved herein is no more *res-integra*. Following decisions have been relied upon:-

1. DLF Projects Ltd. vs. CCE & ST, Gurgaon [2020 (38) G.S.T.L. 56 (Tri-Chan)]
2. DLF Cyber City Developers Ltd. vs. Commissioner of S.T., Delhi – IV [2019 (28) G.S.T.L.478 (Tri.-Chan)]
3. Sterlite Industries India Ltd. vs. Commi9ssioner of GST & C.Ex., Tirunelveli [2019 925) G.S.T.L. 277 (Tri-Chennai)]
4. As far as the meaning of consideration is concerned it is mentioned that the same has wrongly been interpreted by the adjudicating authorities, Id. Counsel has relied upon the case law in the case of **Bhayana Builders v.CST, Delhi – 2013(32) STR 49 (Tri-LB)**. The order under challenge is accordingly, prayed to be set aside and appeal is prayed to be allowed.
5. Ld. D.R., while submitting, has fairly conceded that the issue involved herein is no more *res-integra*. However, has impressed upon the findings in the order under challenge where the Commissioner (Appeals) has considered the activity of extending corporate guarantee as same as that of extending the bank guarantee. The appeal is, accordingly, prayed to be dismissed.
6. Having heard both the parties and perusing the record, we observe and hold as follows:-

For better understanding of the issue as already mentioned, it would be useful to reproduce the definition of Banking and Other

Financial Services (BOFS) as appearing in Section 65(12) of the Finance Act, 1994. It reads as:

"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 :

(i) 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;

(ii) Omitted

(iii) merchant banking services;

(iv) 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;

(vii) 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 transfer, providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults, operation of bank accounts;

(b) foreign exchange broking and purchase or sale of foreign currency including money changing provided by a foreign exchange broker or an 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 sale of foreign currency, including money changing" includes purchase or sale of foreign currency, whether or not the consideration for such purchase or sale, as the case may be, is specified separately;

The taxable service is defined under Section 65(105)(zm) also needs to be considered which reads 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".

Finally definition of 'Consideration' has to be seen which reads as follows:-

"consideration" includes

- (i) any amount that is payable for the taxable services provided or to be provided;*
- (ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;*
- (iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.]*

[(b) *****]

(c) *"gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay Service Tax, where the transaction of taxable service is with any associated enterprise.]*

7. The analysis of the definition of BOFS alongwith its taxability helps us to conclude that this definition is a comprehensive one instead of it being the inclusive one. It also clarifies that under service of BOFS only such persons can be made liable to service tax who can be classified in the category of being called as Banking/ non-banking Company, Financial Institutions, any other body corporate or a commercial concern. Above all, the definition carves out the list of category of the persons who would be excisable to tax under the category. Also the services provided by such persons which alone would be excisable to such taxes as have been comprehensively and specifically listed out as is apparent from the use of words "namely" / "means" in the said definition under section 65 (12) of the Finance Act. The present appellant do not fall under any of such categories/ lists, as there is no denial to the fact that appellant is not in business of financing, it is neither a banking nor a non-banking financial institute. Nor it is any other body corporate or commercial concern which is into the business of extending financial supports. This fact is sufficient for us to hold that appellant cannot be covered under the category of such persons who would be excisable to tax under the category of BOFS)

8. We further observe that any activity cannot be called as service unless and until there is an element of 'consideration'... Now the definition of service in Section 65 B (44) of Finance Act, 1944 becomes relevant. It reads as follows:-

Service means 'any activity carried out by a person for another for consideration and includes declared service but not includes the services listed in the negative list under section 66B of the Act'.

9. Reverting to the facts of the present case, we observe that the Show Cause Notice itself recites that the appellant has given the corporate guarantee on behalf of their group companies but has not charged any commission or interest or fees for providing the said corporate guarantee. Same is also apparent from the letter given by the Syndicate Bank from where was issued the impugned corporate guarantee that the loanee company has undertaken that no commission is paid by them to their corporate guarantor. Thus, it becomes clear that there is no element of consideration involved in the present case applying the definition of service, as mentioned above, to these facts in the present appeal. We hold that question of the activity of extending corporate guarantee by the appellant to its associate companies cannot be called as service in terms of above provision in section 65 B (44) of the Act.

10. The Larger Bench of this Tribunal in the case of **Bhayana Builders (supra)** has categorically held as follows:-

"(iv) The expression "consideration" occurring in the U.P. Imposition of Ceiling on Land Holdings Act, 1961 fell for consideration in Ku. Sonia Bhatia v. State of U.P. and Others - AIR 1981 SC 1274 the Court explained that since the expression "consideration" was not

defined in the U.P. Act, its meaning as derived from the definition of the expression in Section 2(d) of the Contract Act, 1872 could be considered. After considering the definition of the expression in the Contract Act and referring to Black's Law Dictionary; other dictionaries, English judgments and Corpus Juris Secundum, the Supreme Court held that : the in escapable conclusion that follows is that consideration means a reasonable equivalent for other valuable benefit passed on by the promisor to the promisee or by the transfer of to the transferee.

(v) Clearly, Section 67 of the Act deals with valuation of taxable services and intends to define what constitutes the value received by the service provider as "consideration" from the service recipient for the service provided. Implicit in this legislative architecture is the concept that any consideration whether monetary or otherwise should have flown or should flow from the service recipient to the service provider and should accrue to the benefit of the later. "Free supplies", incorporated into construction (cement or steel for instance), even on an extravagant inference, would not constitute a non-monetary consideration remitted by the service recipient to the service provider for providing a service, particularly since no part of the goods and materials so supplied accrues to or is retained by the service provider. Wherever a monetary consideration is charged for providing the taxable service and no non-monetary consideration forms part of the agreement between the parties, it is clause (i) that applies and the value of the taxable service would in such case be the gross amount charged by the service provider and paid by the service recipient."

11. We also observe that there is no evidence on record with respect to the observations of Id. Commissioner (Appeals) that the corporate guarantee given by the appellant has benefited the associate enterprises in two ways as quoted above. We further observe that issue is no more *res-integra* as has also been conceded on behalf of the department. The decisions relied upon by the appellant DLF Projects Ltd. (supra) and DLF Cyber City Developers (supra) have already held as follows:-

"4. It is an admitted fact that the appellant has not received any consideration either from the financial institutions or from their associates for providing corporate guarantee, in that circumstances, no service tax is payable by the appellant. 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 is not liable to pay any service tax on corporate guarantee provided by the appellant to various banks/financial institutions on behalf of their holding company/ associate enterprises for their loan or overdraft facility under Banking and Financial Institutions after or before 1-7-2012."

12. The facts of present case are identical and we find no reason to differ from this decision.

13. In view of entire above discussion, the order under challenge is hereby set aside. Consequent thereto, the appeal stands allowed with consequential benefit, if any.

[Dictated and pronounced in the open Court]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)