

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Appeal No. : ST/363/2011-CU[DB] & ST/95/2011

Dated: 09/10/2012

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
C.C.E. NOIDA
C-56/42, Sector-62, Noida-201307

C.C.E. NOIDA

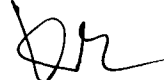
(Appellant)

VS

JUBILANT ORGANOSYS LTD.

(Respondent)

I am directed to transmit herewith a certified copy of Final Order No. ST/A/ST/A/631-632/2012-CU[DB] dated 05/10/2012 passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.


Assistant Registrar
CUSTOMS Appeal Branch

Copy To,

1. Respondent

JUBILANT ORGANOSYS LTD.
1A, SECTOR-16-A, NOIDA. (U.P.)

2. Advocate(s) / Consultant(s):

Sh. Deventra Sharma,
C/o Respondent

3. C.D.R

4. Bar Association, CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

7. Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9. Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

10. LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

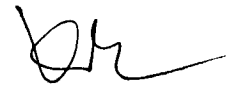
11. TaxIndiaOnline.com Pvt. Ltd., Unit No. 1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

12. Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Ameer Pet, Hyderabad - 500038

13. Office Copy

14. Gaurd File

15. M/s Jubilant Life Sciences Ltd
C/o Respondent


Assistant Registrar
CUSTOMS Appeal Branch

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.**

Date of Hearing : 30.8.2012
Date of Pronouncement : 05-10-12

For Approval & signature :

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	Yes
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

Service Tax Appeal No. 95 of 2011

[Arising out of the Order-in-Original No. 12/COMMISSIONER/NOIDA/2010-11 dated 29.11.2010 passed by the Commissioner, Central Excise, Noida)

M/s Jubilant Life Sciences Ltd.

Appellant

Vs.

CCE, Noida

Respondent

Appearance:

Appeared for ^{Appellant} ~~Appellant~~ : Shri Devendra Sharma, Consultant
Appeared for Respondent : Shri Pramod Kumar, Jt. CDR

Service Tax Appeal No. 363 of 2011

(Arising out of Order-in-Original No. 12/Commissioner/Noida/2010-11 dated 29.11.2010 passed by the Commissioner, Central Excise, Noida)

CCE, Noida

Appellant

Vs.

M/s Jubilant Organosys Ltd.

Respondent

Appearance:

Appeared for ^{Appellant} ~~JLSL~~ : Shri Pramod Kumar, Jt. CDR
 Appeared for Respondent : Shri Devendra Sharma, Consultant

CORAM: Hon'ble Ms. Archana Wadhwa, Member (Judicial)
 Hon'ble Shri Mathew John, Member (Technical)

Final Order No. S.T./A/1631-632/12-Cus dated.....

Per Mathew John :

Two appeals against the same adjudication order, one filed by assessee-appellant, namely Jubilant Life Sciences Ltd ("JLSL" for short), and the other filed by Revenue are being considered. JLSL is challenging the demand confirmed for the period from 18-04-2006. Revenue is challenging dropping of demand for the period prior to 18-04-06. In these appeals the dispute is about service tax payable on services received by for issue of Foreign Currency Convertible Bond (FCCB) in foreign countries for raising of funds in foreign exchange needed by JLSL. The service tax is being demanded from JLSL as a recipient of service in terms of provisions under Section 66A of Finance Act, 1994 since the service provider was located abroad.

2. A Show Cause Notice dated 21.5.2009 was in respect of services relating to issue of three series for FCCBs by JLSL. The

adjudicating authority dropped demand in respect of services received prior to 18-04-2006 relying on the decision of the Mumbai High Court in the case of **Indian National Ship-owners Association Vs. UOI** - 2009 (13) STR 235 (Bom.) that no liability would arise in such situation for period prior to 18.4.2006. This decision has been affirmed by the Apex Court and CBEC also has issued instructions accepting the decisions. So the appeal filed by Revenue is to be dismissed straight away.

3. Consequent to the position as above, the dispute about taxability of services relating to the first two series of FCCBs which happened prior to 18-04-2006 needs no further examination. In the third series of FCCB issued, M/s J.P. Morgan Securities Ltd. ("JPMS" for short), U.K. was acting as the Lead Manager. They were also the underwriters to guarantee full subscription for the issue. Initially JLSL did not pay any service tax on payments made to JPMS in this matter. When this matter was noticed during the audit conducted by the officers of Revenue there was discussion between the officials of JLSL and the audit team and both came to the conclusion that service tax is payable only on charges paid for services rendered by JPMS as a Lead Manager and not in respect of services rendered by JPMS as

an Underwriter. Based on such understanding JLSL paid an amount of Rs.22,91,734/- towards service tax and an amount of Rs.4,62,805/- as interest on 24.12.2007 and included such payments in the six monthly return for the period ending 31.3.2008.

4. Later investigations were conducted by Director General of Anti-Evasion, New Delhi. They were of the view that service tax should have been paid on the entire amounts paid to the JPMS and since JLSL had not paid such tax, a Show Cause Notice was issued demanding service tax for a full amount paid to JPMS taking a stand that extended period to time is invokable for making such demand because there was suppression of information on the part of JLSL in providing information to the department.

5. The difference in the stand of Revenue and the stand of JLSL at this stage is on account of the fact that Revenue seeks to classify the service provided by JPMS as "banking and financial services" made taxable under 65(105)(zm) of Finance Act, 1994 whereas JLSL's stand is that the part of the services on which service tax has not been paid by them is actually "Underwriting

Service” made taxable under Section 65(105)(z) of Finance Act, 1994. The difference in liability arises because as per the provisions of Taxation of Service (Provided from Outside India and Received in India) Rules, 2006 which is relevant for demanding service tax under Section 66A of Finance Act, 1994, the service of “Banking and Financial Services” is classified in one category and “Underwriting Service” is classified under another category and different criteria are laid down under the two categories. In the case of “Banking and Financial Services”, service tax becomes payable based on the location of the recipient of the service that is JLSL which is in India. In the case of Underwriting Service tax becomes payable only if the service is performed in India. In this case the issue of FCCB and underwriting of the issue was an activity undertaken outside India. Thus the crucial issue to be decided in this case is the classification of the service. So we proceed to examine this issue.

6. The services rendered by the JPMS under the contract with JLSL are briefly extracted below from the contract.

“2. SUBSCRIPTION

2.1 Subject to the terms and conditions of this Agreement:

- (a) *the Issuer agrees to issue the Bonds;*
- (b) *the Lead Manager, in order to facilitate an international offering of the Bonds, agrees to subscribe and pay and/or procure subscribers to pay for the aggregate principal amount of the Bonds at the Subscription Price on the terms of this Agreement.*

3. **CLOSING**

3.1 *At 10.00 am (London time) on the Closing Date :*

- (a) *the Lead Manager (whether or not it has procured any subscribers to pay) will pay (subject to and in accordance with paragraph (b) below) to the Issuer the net subscription moneys for the Bonds, being the amount payable for the Bonds at the Subscription Price less the underwriting commission and management fee referred to in clause 4 in relation to the Bonds and less the amounts specified in clause 5; and*
- (b) *the net subscription moneys for the Bonds shall be paid in U.S. Dollars in immediately available funds, by crediting the same to such account with such bank as the Issuer may have previously specified in writing to the Lead Manager, evidence of such payment taking the form of a confirmation by the common depositary referred to below that it has made the relevant payment to the Issuer. Such payment shall be made against delivery to or to the order of a common depositary (the Common Depositary) for Euroclear and Clearstream of the Global Bond representing the Bonds duly executed and duly authenticated as provided in, and otherwise complying with the provisions of, the Trust Deed. Such Global Bond will be held by the Common Depositary to the order of Euroclear and Clearstream for the credit of the accounts of the respective subscribers of the Bonds.*

4. **UNDERWRITING COMMISSION AND MANAGEMENT FEE**

4.1 In consideration of the agreement by the Lead Manager to procure subscription and payment for the Bonds as provided above, the Issuer shall pay to the Lead Manager the sum of:

- (i) an underwriting commission of 1.15% of the aggregate principal amount of the Bonds subscribed; and*
- (ii) a management fee of 0.10% of the aggregate principal amount of the Bonds subscribed.*

The Lead Manager shall be entitled to deduct such aggregate amount from the subscription money in respect of the issue of the Bonds payable under clause 3.

5. EXPENSES

5.1 the Issuer shall bear and pay all costs and expenses (together with VAT where applicable) incurred in connection with the Offering, including without limitation:

- (a) fees and expenses of the Issuer's lawyers, any reporting accountants and any professional advisors;*
- (b) fees and expenses of the Lead Manager's International lawyers;*
- (c) Lead Manager's out-of-pocket expenses incurred in connection with the issue and offering of the Bonds;*
- (d) fees and expenses incidental to the performance of its obligations under each of the Contracts;*
- (e) the printing and distribution of the Offering Memorandum;*
- (f) the printing and production of all other documents connected with the issue and distribution of the Bonds, the listing of the Bonds on the SGX-ST, the listing of the GDSs on LUX, the listing of the shares on the BSE*

and the NSE, listing agent's fees and the arrangements for signing this Agreement; and

- (g) Fees and expenses of the Trustee, any agent appointed under the Agency Agreement and the Depositary, including the legal fees and expenses of their respective lawyers/*

5.2 The Issuer Authorizes the Lead Manager to deduct from the subscription moneys for the Bonds as provided in clause 3 a sum of US\$210,000 with respect to the costs and expenses set out in clauses 5.1(b), (c) and (d) on the basis that the Lead Manager will provide an itemized account to the Issuer no later than the date falling 90 days after the Closing Date. The Issuer further authorizes the Lead Manager to deduct from the subscription moneys for the Bonds as provided in clause 3 a sum of US\$30,000 with respect to the costs and expenses set out in clauses 5.1(e) and (f), which costs and expenses the Lead Manager may settle as agent for the Issuer to the extent practicable and to the extent such sum is sufficient to cover such costs and expenses, and the Lead Manager shall provide to the Issuer an itemized account of such costs and expenses as settled and remit the balance of funds remaining after payment of such costs and expenses to the Issuer no later than the date falling 90 days after the Closing Date. For the avoidance of doubt, the Lead Manager shall not be deemed to hold such funds as a trustee, nor shall the Lead Manager be liable to the Issuer for any interest or other revenue or benefit arising from such funds. If the amount of costs and expenses deducted by the Lead Manager is less than the total itemized costs and expenses payable to or by the Lead Manager on behalf of the Issuer, the Issuer will reimburse the Lead Manager for the amount by which such costs and expenses exceed the sum deducted, and where the amount of costs and expenses deducted by the Lead Manager exceeds the total itemized costs and expenses payable to or by the Lead Manager on behalf of the Issuer, the Lead Manager will reimburse the Issuer for the amount by which the sum deducted exceeds such costs and expenses."

7. The definitions of the two different services under consideration are made taxable under different clauses of section 65 (105) of Finance Act, 1994. These and the definitions in section 65 of Finance Act, 1994 are reproduced below: as follows:

"(105) "taxable service" means any service provided or to be provided,

(a)---

--

(z) to a client by an underwriter in relation to underwriting, in any manner.

--

(zm) to a customer, 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;"

"(12) "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) --

(iii) merchant banking services;

(viii) banker to an issue services; and

--.

"(59a) "issue" means an offer of sale or purchase of securities to, or from, the public or the holder of securities;"

"(116) "underwriter" has the meaning assigned to it in clause (f) of rule 2 of the Securities and Exchange Board of India (Underwriters) Rules, 1993;"

"(117) "underwriting" has the meaning assigned to it in clause (g) of rule 2 of the Securities and Exchange Board of India (Underwriters) Rules, 1993;"

8. The finding of the adjudicating authority on this issue is given in para 5.3.10 of the adjudication order. We find that in the very lengthy order issued by the adjudication order, this is the only paragraph which is relevant for deciding the classification and taxability of the services under dispute. This para is re-produced below:

"5.3.10 A study of the agreement in question indicates that the service provider J.P. Morgan were appointed to perform a whole gamut of functions/activities normally performed by Merchant Bankers. In my view, merely carrying out the activity of underwriting, within the act of providing the service of a merchant banker, will not qualify as rendering only "underwriter's service" as contended by the party as the entire gamut of service rendered is to be considered in a comprehensive manner while classifying such service. Underwriting is just one of the jobs of a merchant banker and therefore any person who provides services as a merchant banker/lead manager has to provide underwriting service as well while the reverse

may not hold true for an underwriter. Accordingly, I hold that the services in respect of the FCCB-III were also similar as those in respect of other two FCCBs and were in the nature of 'Merchant banking'."

9. JLSL contests the finding of the Commissioner that Underwriting is part of the job of a Lead Manager. The Lead Manager's job involves only complying with the legal requirements for issue of the bonds giving publicity for the issue, soliciting clients, receiving and accounting money received from subscribers, listing of the bonds in stock exchanges etc. On the other hand underwriting involves giving guarantee that the issue will be fully subscribed and in the event of the issue not being subscribed fully by the public, the underwriter has to himself subscribe to the issue taking the entire risk on himself. For this guarantee a higher commission has to be paid. In the instant case, JLSL submits that in fact the issue was initially subscribed by JPMS themselves and thereafter they sold bonds in minor quantities to others, as and when market conditions improved. He points out that the service of Underwriting was made taxable from 16.10.98 itself whereas the services of Lead Manager Service covered by the entry for banking and financial services was taxed only from 19.5.2006. He also points out that the CBEC had issued

● circular during the period when Underwriting was taxable and Lead Manger Service was not taxable, stating that Underwriting Services, if provided by Lead Manager is liable to be taxed under Section 65(105)(z). He points out that the services done by JPMS under these two headings were specified in separate clauses of the agreement and charges for the two services were separately specified and there is no reason to bundle both the services together and classify it as Banking and Financial Services.

10.1 Further he points out that the Show Cause Notice and the Order-in-Original have distorted the definition of “merchant banker” as per Section 2(cb) of SEBI (Merchant Bankers) Regulations, 1992 while deciding the matter. He submits the correct definition of merchant banker is as follows :-

“Merchant banker” means any person who is engaged in the business of issue management either by making arrangements regarding selling, buying or subscribing to securities or acting as manager, consultant, advisor or rendering corporate advisory service in relation to such issue management.”

10.2. It is pointed out that the highlighted words of the above definition has been omitted in the definition reproduced in the

Show Cause Notice as under :-

“Merchant banker” means any person who is engaged in the business of issue management either by making arrangements regarding selling, buying or subscribing securities as manager, consultant advisor or rendering corporate advisory service in relation to such issue management”.

11. He argues that by omitting the highlighted words in the actual definition, a different meaning has been given that merchant banker subscribes to bonds themselves in the ordinary course of rendering such services. The distorted definition also gives the impression that subscribing to securities as a manager also is the business of a merchant banker. He argues that a merchant banker only makes arrangements for an issue and gives advisory services in relation to issue but does not subscribe to the issue in the ordinary course of business a a merchant banker.

12. The ld. AR for Revenue submits that the contract that was executed by JLST with JPMS is for a range of services relating to issue of FCCBs. Underwriting was only incidental to the activity undertaken by JPMS as a Lead Manger of the issue. He argues

● that the entire service under the contract has to be considered as one bundle of service and the nature of that bundle of services has to be decided with reference to the dominant character of the services rendered and if this criteria is adopted the services are correctly classifiable under banking and financial services which is covered by Section 65(105)(zm). He further submits that once the service is held to be classifiable under Section 65(105)(zm) the service will fall under category 3 of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 and hence it would become taxable.

13. We have considered arguments on both the sides. We are not in agreement with the argument of Revenue that the service of Underwriting has to be necessarily provided by merchant bankers. We also do not agree with the argument that providing Underwriting Service is incidental to the services rendered as a Lead Manager to the issue. This is basically because the latter involves basically organizing an event viz. issue of the FCCBs and the former involves financial risk to the underwriters and the two matters are totally different in nature. We are also not in agreement with the argument that the contract has to be

considered as a whole and classified considering it as a single service and subjected it to tax. This is because the services are distinct in nature and the contract lays down the services as distinct services with separate remuneration fixed for the two services. Further if at all it is to be considered as one single bundle we do not agree with the contention of Revenue that the dominant nature of the service is that of Lead Manager's services, since JPMS is earning a higher commission by underwriting the issue taking the risk involved. Further from the facts of the case as stated by JLSL, that the issue was wholly subscribed by JPMS, the Lead Manager service was a minimal part of the contract in this particular case. Further "Underwriting Service" is specified in a sub-clause of section 65 (105) which occurs earlier than the sub-clause in which Lead Manager's Service occurs. So going by the criterion laid down in Section 65A (c) of Finance Act, 1994, the service will get classified under "Underwriting Services". Therefore we hold the view that the "Underwriting Service" rendered by JPMS to JLSL is distinct from the Lead Manager service provided. Since the underwriter service is to be subjected to tax under Section 66A of Finance Act 1994 taking into consideration the place of performance as per Rule 3 of Taxation

of Services (Provided from Outside India and Received in India) Rules, 2006. In this case Underwriting was done outside India. So we do not see any reason to tax the impugned service.

14. JLSL also has a very strong case on the issue of time bar because they had placed the entire matter before his jurisdictional officers who audited their record and they had initially opined that the tax is payable only on services relating to Lead Manager Service and the same was paid and such payment was reported in the relevant ST-3 returns.

15. In view of the above findings, we set aside the impugned order to the extent of allowing the appeal filed by assessee-appellant and also reject the appeal filed by Revenue.

(Pronounced on... 5/10/12.....)

(~~Archana~~ Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)

RM