IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. III

Service Tax Appeal No. 64 /2010

[Arising out of Order-In-Original No. 45/PKJ/CCE/ADJ/09 dated 15.10.2009 passed by Commissioner of Central Excise, (Adjn) New Delhi]

M/s. Educomp Solutions Ltd. **Appellants**

Vs.

Commissioner of Central Excise **Respondent**
New Delhi

Appearance:
Shri Kamal Agarwal, Chartered Accountant for the Appellants
Shri Sanjay Jain, DR for the Respondent

CORAM:

Hon'ble Mr S K Mohanty, Member (Judicial)
Hon'ble Mr. B Ravichandran, Member (Technical)

Date of Hearing Decision: 11.01.2017

FINAL ORDER NO. 50408 /2017

Per B Ravichandran:

The appeal is against order dated 15.10.2009 of Commissioner of Central Excise (Adjn), New Delhi.

2. The appellants are engaged in providing technology based education products and services for kindergarten to 12^{th} grade education and paying Service Tax under various categories. Certain

inquiries were conducted by officers against the appellants for non-payment of Service Tax during the period 2006-2007 to 2007-2008 in connection with mobilization of funds in foreign exchange by issuing convertible bonds by using the services of foreign Merchant Banks. Revenue felt that the appellant failed to discharge the Service Tax on reverse charge basis under Section 66A of the Finance Act, 1994, in respect of Merchant Banking services availed by them in raising funds in foreign exchange, taxable under the category of "banking and other financial services" Proceedings initiated against the appellant concluded by the impugned order. The original authority confirmed the Service Tax demand of Rs.1,13,13,760/- and imposed equal amount of penalty under section 78 and further penalty of Rs.1000/- under section 77 of the Finance Act, 1994.

3. Learned Counsel appearing for the appellant submits that they have discharged the Service Tax on the banking commission paid by them to the Merchant Bankers in connection with mobilization of foreign exchange. The dispute is related to charges / commission paid towards "underwriting services" provided by the foreign merchant banks in mobilizing the said funds. He further submitted that in terms of the contract, underwriting service commission constitutes 99% of commission payable to Merchant Bankers who managed bonds. It is the plea of the appellant that such underwriting services is a separate category and cannot be taxed under Banking

and Financial Services during the material period. Reliance was placed on the decision of Tribunal in the case of ***Jubilant Life Sciences Ltd. vs. CCE Noida [2013 (29) STR 529 (Tri-Del)]*** where identical set of facts were examined and the Tribunal held that said services of underwriting cannot be taxed under Banking and Financial Services.

4. Learned AR submitted that the Commissioner in the impugned order examined the contract and the essential character of services is relating to mobilizing fund and is essentially merchant banking services. Further, he also submitted that the appellant failed to produce evidence for payment of Service Tax during proceedings before the original adjudicating authority. As such, their plea that they need not pay the tax is not contrary to in their earlier stand. Further, he also submitted that there are three lead managers and only two acted as underwriting managers. As such, commission paid to lead manager providing banking and financial services cannot be contested for Service Tax liability.

5. We have heard both the sides and perused the records.

6. In terms of the contract, relevant items of which were reproduced and examined in the impugned order, it is clear that underwriting commission constitutes 99%. The finding of the original authority that in composite contract the essential nature of the contract will decide the obligation of service. This principle has

not been appropriately applied to the facts of the present case. When 99% of the commission is towards underwriting services, remaining 1% commission will not determine the essential nature of commission service. Further, we note that identical set of facts were examined by Tribunal in the case of Jubilant Life Sciences Ltd. (supra) . The relevant portion of the finding are as below:

> ***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.*

7. Learned Counsel during the course of submissions categorically submitted that Service Tax on commission paid for various banking services other than underwriting has been discharged by the appellant and the same is not the point of dispute in this appeal.

8. As discussed above and following the decision of the Tribunal in identical set of facts as stated above, we find no merits in the impugned order. Accordingly the same is set aside. Appeal is allowed.

(dictated and pronounced in the court)

(S K Mohanty)
Member(Judicial)

(B Ravichandran)
Member(Technical)

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