IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.I

Appeal No.ST/86453/2014
[Arising out of OIO No.GOA-EXCUS-000-COM-006-13-14, dt.04.11.2013, passed by C.C.E., Goa]

Appellants: Commissioner of Central Excise, Goa

Vs

Respondents: Sesa Goa Ltd

Appearance:
For Assessee: Shri J.H. Motwani, Advocate
For Revenue: Shri M.K. Sarangi, A.C. (A.R.)

CORAM:
HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 16.10.2018
Date of Decision: 27.03.2019

Order No.A/85605/2019

Per: Dr. D.M. Misra

This is an appeal filed by the Revenue against OIO No.GOA-EXCUS-000-COM-006—13-14, dt.04.11.2013, passed by C.C.E., Goa.

2. Briefly stated the facts of the case are that the Respondents are engaged in providing various taxable services for which they are registered with the Service Tax department. On scrutiny of the records by the Department, it has been observed that the Respondent has entered into a "Subscription Agreement dated 24.09.2009 with M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC for issue of US $ 500,000,000 5% Convertible Bonds due 2014, convertible into equity shares of Sesa Goa Ltd. The Respondent under the said agreement agreed to pay M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC abroad, 0.75% of the aggregate principal amount of Bonds relating to US $ 500,000,000 as 'Management underwriting

commission and selling commission' for the service provided by them which are alleged to be classifiable under "Banking and other Financial Services"; whereas the said service has been claimed and booked in their books of accounts as underwriting services. The amount paid by the Respondent on this account on 31.10.2009 to M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC was Rs.18,00,37,500/- for issue of US $ 500,000,000 as Management Underwriting Commission and selling commission" was alleged to be paid to the Lead Manager for organizing, in raising capital funds through security bonds and that the activities are similar to that of 'merchant banking services' as per Circular 09.07.2001 and consequently fall under the scope of banking and other financial services. Consequently, demand notice was issued to the Respondent for recovery of the Service Tax amounting to Rs.1,85,43,863/- with interest and penalty. However, on adjudication, the learned Commissioner dropped the proceedings initiated against the Respondent, observing that the services rendered by them do not fall under the category of banking and other financial services as defined under Section 65(105)(zm) of Finance Act, 1994. Hence, the Revenue is in appeal.

3. The learned A.R. Shri M.K. Sarangi for the Revenue has submitted that the Respondent has entered into an subscription agreement dt.24.09.2009 with M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC (referred to as 'Joint Lead Managers') with respect to the services to be provided as joint lead manager in connection with the issue of 5% FCCB of US$ 500,000,000. The Lead Manager are to receive 0.75% of the bond amount for the service provided by them. It is his contention that as per the department, the service rendered by the respondent is classifiable under the category of 'banking and other

financial services', being a merchant banking services. Accordingly, the Respondents are liable to pay Service Tax under reverse charge basis under Section 66A on the service charges paid to the Lead Managers.

4. Countering the argument of the Respondent that the services rendered by them classifiable under "underwriting services", he has submitted that in such cases, the underwriter undertakes to subscribe and buy the entire lot himself and thereafter approach public at large to subscribe such offerings by the Company. The underwriting service is classifiable under Section 65(105)(z) of the Finance Act, 1994. Referring to the trade notice issued by the Mumbai Commissionerate, dt.13.10.1998. the learned A.R. has further submitted that no person can act as an underwriter unless he holds a certificate granted by SEBI under Rule 3 of SEBI underwriters Rules, 1993. Since M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC were not holding registration under the said Regulation, accordingly, the services rendered by them cannot be called as underwriter service.

5. Further analyzing the subscription agreement dt.24.09.2009 with the Joint Lead Manager, the learned A.R. submitted that the Respondents were required to pay "combined management and under writing commission and selling commission" of 0.75 % of the aggregate principal amount of the bond to the Lead Managers. As per Clause 7.2, the Joint Lead Manager would pay to the issuer the net subscription money for the bonds as per the commission agreed in Clause 8 of the said subscription agreement. He has further submitted that the argument of the Respondent that in view of Clause 4.1.33 of the said agreement no managerial service is offered by the Respondent, is a baseless argument as the nature of service is not an "underwriting service" as held in the case of Axis Bank Ltd Vs

Commissioner of Service Tax – 2014-TIOL-1926-CESTAT-MUM. It is based on the nature of job performed and in the impugned order, the Adjudicating Authority has not been gone into the terms of the agreement between the issuer and the Joint Lead Manager inter se, hence the order is bad in law.

6. Referring to Board's circular dated 09.07.2001, he has submitted that at Para 2.3, the merchant banking service has been explained as any service provided in relation to issue management, either by making arrangement regarding selling, buying or subscribing as manager, consultant, advisor or rendering corporate advisory service in relation to issue management, which inter alia, consists of service of underwriter and portfolio manager. Thus, merchant banking service covers bunch of services including underwriting. Unless the service provided is underwriting simplicitor, it will fall under the category of merchant banking service as per legislative intent. Hence, the said service shall be covered under Rule 3(iii) of Import Service Rules 2006, and as such the place of provision of service is not relevant.

7. Referring to Securities Exchange Board of India (Underwriters) Regulations, 1993, "underwriter" has been defined in Regulation 2(f) to mean a person, who engages in the business of underwriting of an issue of securities of a body corporate; as per the Regulation 2(fa), "underwriting" has been defined to mean an agreement with or without condition to subscribe security of a body corporate when the existing shareholders of such body corporate or the public do not subscribe to the securities offered to them. As per Regulation 15(3), the responsibilities of an underwriter has been explained which states that in the event of being called upon, every underwriter to subscribe for the security of a body corporate,

pursuant to an agreement referred to in Clause(b) pf Sub-regulation (1) Regulation 9A lays down that it shall subscribe to such securities within 45 days of the receipt of such intimation from such body corporate. From the said definition, it is apparent that the securities at the first instance should be offered to existing share holders or general public, and in the event of failing to get full subscription, which is the event on which role of underwriter starts. From the agreement in the present case, it is apparent that they do not fall within the definition of underwriter.

8. The Ld. A.R further submitted that as per the subscription agreement, the service providers were described as Joint Lead Manager. In the reply to the show cause notice, the Respondent has submitted that the underwriter undertakes to subscribe/buy the entire lot himself and there after get permission to approach public at large to subscribe to such offerings by the Company. Therefore, their role does not satisfy the definition of an underwriter mentioned in the SEBI Regulation. Further, in view of the compensation clause 8, where a "combined management and under writing commission and selling commission" of 0.75% aggregate of principal amount of the bond is paid by the Respondent to the Lead Managers, it negates the contention of the Respondent that the amount paid relates only to underwriting job.

9. The learned A.R., distinguishing the judgment in Jubilant Life Science case, has submitted that the Appellant was paying service tax on service received with respect to "Lead Manager" and not as "underwriter". The Hon'ble Tribunal held that both services are different and as per agreement, remuneration in respect of underwriting commission was 1.15% of bond subscribed and management fee was 0.1% of bond value. The Department proposed to classify the entire services under Lead

Manager service rather than underwriting service. Thus, the facts of the said case were totally different, hence not applicable to the facts of the present case. On the other hand, the decision of the Tribunal in the case of Axis Bank Ltd. Vs. CCE 2014-TIOL-1926-CESTAT-MUM, is applicable to the present case. In that case the Tribunal confronted with the question between competing entries of classification viz. merchant banking service vis-à-vis under writing service. It ultimately held that Axis Bank has issued and sold the GDRs to lead manager who in turn, to resell all or portion of the offered GDRs to subsequent purchasers, hence the said service cannot be considered as underwriting service.

10. Further referring to the Tribunal decision in the case of Sesa Sterilite Ltd Vs CCE dated 25.09.2017, he has submitted that show cause notice was issued to them for demand of service tax under underwriting of the firm as well as optional American Depository shares (ADS), commission paid was sought to be taxed under "underwriters service". There is no adjudication of the dispute whether the service rendered falls under the category of underwriting service or otherwise. The demand was set aside in view of Rule 3(ii) of Import Service Rules, 2006 and following the earlier decision in Jubilant Life Science Ltd.'s case. The case is different and more so the decision in the case of Jubilant Life Science was held *per incuriam* in Axis Bank Ltd's case as there was no adjudication on nature of service and its classification, hence, it is not applicable.

11. Per contra, the learned Advocate for the Respondent has submitted that the Revenue has failed to appreciate the activity undertaken by the Lead Manager viz. M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC which is classifiable under taxable category of underwriter service as defined under Section 65(105)(z) of Finance Act,

1994. Referring to the definition of underwriter service, prescribed under Rule 2(f) of SEBI (Underwriter) Rules, 1993, he has submitted that the services provided by the lead manager were in the nature of underwriter service. Referring to the judgment of Hon'ble Supreme Court in the case of UoI Vs Gosalia Shipping Pvt.Ltd – 1978 (113) ITR 307 (SC), the learned Advocate has submitted that for the purpose of determining the tax liability, true nature of the transaction is required to be derived and understood for which the contractual arrangement between the parties inter se is required to be understood. Thereafter, referring to the relevant clause of Subscription Agreement dt. 24.9.2009 particularly 1.1, 2.1, 8, 9.2 and Schedule 5, the learned Advocate has submitted that the nature and purpose of subscription agreement between the respondent as the issuer and M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC as underwriter were mainly to ensure 100% subscription of FCCB issue; the lead managers were under an obligation to remit full face value of the issue irrespective of whether the issue is fully subscribed by the general investors or not. In other words, the lead managers were obliged to subscribe and pay full issue price after deducting the aggregate underwriting commission and the respondent was required to pay the underwriting commission and selling commission 0.75% of the aggregate principal amount of bond.

12. The learned Advocate further submitted that from the terms and conditions of the agreement, it is manifestly clear that M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC appointed as under writer, who had agreed to undertake the financial risk of retaining the un-subscribed securities in the event they failed to achieve 100% subscription of the issue. There is no other service that M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC were

required to provide to the respondent. In support , the Ld. Advocate has referred to Clause 4.1.33 of the said agreement. It is their contention that the arrangement between the respondent and lead manager was to secure full subscription of the FCCB issue and the said activity is in the nature of underwriter service as defined under Section 65(105)(z) of Finance Act, 1994. Further, the learned Advocate has submitted that the underwriter services were fully performed outside India; hence would not constitute import of services in terms of Section 66A of Finance Act, 1994 read with Rule 3 of Taxation of Services (provided from outside India and received in India) Rules, 2006. Therefore, the Respondent cannot be subjected to service tax under reverse charge mechanism as held by the adjudicating authority. Revenue's present appeal to classify the services under taxable category of banking and other financial service is arbitrary, mis-placed and un-tenable.

13. Referring to the judgment of the Tribunal in Jubilant Life Science Vs CCE Noida – 2013 (29) STR 529 (Tri-Del), the learned Advocate for the Appellant submitted that the issue is no more res integra and the learned Commissioner has rightly placed reliance on the said judgment in arriving at the conclusion that the services provided by M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC are in the nature of underwriter service and hence not taxable. He has also referred to the judgment of the Tribunal in the case of Sesa Sterilite Vs CCE Tirunelveli [2018 (1) TMI 1213-CESTAT CHENNAI], Educomp Solutions Ltd vs CCE New Delhi [2017 (3) TMI 180 – CESTAT DELHI]. It is argued that in the aforesaid judgments, it is made clear that the services received by the Respondent from the foreign based service provider who had agreed to run a financial risk and to remit full face value of the issue price to the respondent irrespective of whether the issue is fully subscribed by the

general investor or not against the underwriter commission constitute underwriter service in terms of Section 65(105)(z) of Finance Act, 1994, hence, the Revenue's Appeal is untenable in law.

14. Further, distinguishing the judgment in the case of Axis Bank Ltd Vs CST Mumbai – [2015 (40) STR 993 (Tri-Mum)] which is heavily relied upon by the Revenue in support of their case, the learned Advocate submitted that the facts of the said case are totally different from the facts of the present case. Accordingly, the reliance placed on the said judgment by the Revenue is mis-placed. Further, he has submitted that in view of the observations of the Tribunal in Para 13 of the judgment in Axis Bank Ltd case, there is no different view taken by the Tribunal than that expressed in Jubilant Life Science's case which related to underwriter service whereas the issue in Axis Bank Ltd case pertains to determination of taxability of service provided by the lead managers which themselves purchase of whole of GDRs meant for public and offered for sale in full or part. Further, they have submitted that the appeal against the judgment in the case of Axis Bank Ltd is admitted by Mumbai High Court and is pending.

15. Further, the contention of the learned Advocate for the Respondent is that the present show cause notice was issued on 22.04.2013 demanding service tax for the period April 2009 to September 2009 invoking extended period of limitation. It is their contention that the proceedings/audit in relation to the instant case commenced from 28.04.2010 by DGCEI as well as local commissionerate. They have narrated the details of action taken from time to time by the department from the date chart for the period from 28.04.2010 to 24.07.2012. It is their contention that since all the facts have been within the knowledge of department and nothing has been suppressed, therefore invoking larger

period of limitation is unsustainable. They have referred to the following judgments:-

i) Jet Airways (I) Ltd Vs CST Mumbai – 2016 (44) STR 465 (Tri-Mum)

ii) Reliance Industries Ltd Vs CCE LTU – 2016 (44) STR 42 (Tri-Mum)

iii) Arviva Industries (I) Ltd Vs CCE Mumbai-III – 2005 (179) ELT 506 (Tri-Mum)

iv) Richardson & Cruddas (1972) Ltd Vs Collr. of C.E. Nagpur – 1999 (110) ELT 874 (Tri.)

v) Commissioner Vs Bentex Industries – 2004 (173) ELT A 079 (SC)

vi) Commissioner Vs Binny Ltd – 2003 (156) ELT A 327 (SC)

vii) CCE Vs Punjab Chem & Pharma – 2001 (135) ELT 227

16. Further, they have submitted that since the issue invoked in the present case is interpretation of law, also larger period of limitation cannot be invoked and referred to the Judgments in the case of i)NRC Vs CCE Thane – 2007 (5) STR 308 (Tri-Mum). ii) Shri Shakti LPG Ltd. Vs CCE Vishakapatnam - 2005(187)ELT487(Tri-Bang). Besides, when there is conflicting decision on the issue, extended period of limitation cannot be invoked. Reliance in this regard is placed on the case of Principal Commissioner Vs SKS Ispat and Power Ltd – 2018 (14) GSTL J75 (Chhatisgarh).

17. Heard both sides and perused the records.

18. The issue involved in the present appeal for determination is: whether the services provided by M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC, situated outside India, to the Respondent fall under the category of “Banking and other Financial services” as defined under Section 65(105)(zm) or under the category of

"Underwriter service" as defined under Section 65(105)(z) of Finance Act, 1994; and the amount paid by the Appellant to the said service provider leviable to service tax under reverse charge mechanism as per Section 66A of the Finance Act, 1994.

19. It is the claim of the Respondent that the services provided by both the aforesaid foreign service providers, the Lead Managers viz. M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC under the Subscription Agreement Dated 24.9.2009 fall under the taxable category of underwriter services and accordingly come within the scope of Rule 3(iii) of the Taxation of Services (provided from outside India and received in India) Rules, 2006, hence not liable to service tax. Revenue's argument, on the other hand, is that the services received by the Respondent from the Lead Managers M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC squarely fall under the definition of "Banking and other Financial services, particularly under the scope of "merchant banking services", hence, the amount paid to said service providers is chargeable to service tax under Section 66A of Finance Act, 1994.

20. Before considering the rival contentions, it is necessary to produce the relevant provisions of Finance Act,1994 which reads as follows:-

Sec. 65(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) 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 two parties for leasing of a specific asset,

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

(iii) merchant banking services;

(iv) securities and foreign exchange (forex) broking:

(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, advise on mergers and acquisitions and advise 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, over draft 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 authorized dealer in foreign exchange or an authorized money changer, other than those covered under sub-clause (a);

Section 105 (zm) reads as under:

(105) "Taxable Service " means any service provided or to be provided-

(zm) 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.

Sec.65(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;

Section 65 (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;

Rule 2(f) of the Security Exchange Board of India (Underwriter) Rules, 1993 defines 'Underwriter' as :- 'underwriter' means a person, who engages in the business of underwriting of an issue of securities of a body corporate."

Rule 2(g) of the SEBI (Underwriter) Rules, 1993 defines 'Underwriting' as :- 'underwriting' means an agreement with or without conditions to subscribe to the securities of a body corporate when the existing shareholders of such body corporate or the public do not subscribe to the securities offered to them."

Section (105)(z) reads as:

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

The principle of classification of Taxable Service is laid down under Section 65A of Finance Act,1994 which reads as under:-

> 65A. (1) For the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clause (105) of Section 65.
>
> (2) When for any reason, a taxable service is, prima facie, classifiable under two or more sub-clauses of clause (105) of Section 65, classification shall be effected as follows:-
>
> (a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;
>
> (b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, insofar as this criterion is applicable;
>
> (c) when a service cannot be classified in a manner specified in clause (a) or (b), it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration.

21. In order to determine the applicability of the aforesaid competing entries to the facts of the present case, it is also necessary to read the relevant conditions/clauses of the Subscription arrangement/agreement dated 24.9.2009 entered in to between the Respondent and the said M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC, the Lead Managers, who have provided the services to the Respondent, which is produced below:-

> "(1) SEA GOA LIMITED (the "Issuer")' and
>
> (2) GOLDMAN SACHS (ASIA) L.L.C. ("Goldman Sachs") and MORGAN STANLEY & CO. INTERNATIONAL PLC as Joint Bookrunners and Joint Lead Manager (the "Joint Lead Managers").
>
> The issuer and the Joint Managers wish to record the arrangements agreed between them in relation to an issue of US$ 500,000,000 5% Convertible Bonds due 2014 [the "Bonds", which expression shall, where the context so admits, include Bonds evidenced by a global certificate (the "Global

Certificate”) representing the Bonds]. Definitive Certificates, if required to be issued, will be in registered form in amounts of US$100,000 and integral multiples thereof. The Bonds will be convertible at the option of the holder thereof into fully paid equity shares ofmRs.1.00 each of the Issuer (the “Shares”) at an initial conversion price of Rs.346.88 per Share.

The Bonds are being offered and sold in an offering (the “Offering”) outside the United States in reliance on Regulation S(“Regulation S”) under the U.S. Securities Act of 1993 (the “Securities Act”).

1. Issue of the Bonds and Publicity

1.1. Agreement to Issue Bonds: The Issuer agrees to issue the Bonds on 30 October 2009, or such later date, not being later than 13 November 2009, as the Issuer and the Joint Lead Managers may agree (the “Closing Date”) to the Joint Lead Managers or as they may direct. The Bonds will be subscribed at a price equal to 100 per cent of the principal amount of the Bonds (the “Issue Price”).

1.2 The Contracts: The Issuer will, not later than the Closing Date, enter into (and provide the Joint Lead Managers with a copy of) (1) a trust deed (the “Trust Deed”) and (2) a paying and conversion agency agreement (the ”Paying and Conversion Agency Agreement “), each substantially such form as shall be agreed between the parties thereto. The Bonds will be issued in accordance with the terms of the Trust Deed and will be in the respective forms set out in its Schedules 1 and 2. This Agreement, the Trust Deed and the Paying and Conversion Agency Agreement are together referred to as the “Contracts”.

1.3 Offering Circular: The Issuer undertakes to prepare an Offering Circular (the “Offering Circular”) to be dated not later than three business days prior to the Closing Date or such other date as may be agreed between the Issuer and the Joint Lead Managers (the “Publication Date”) for use in connection with the listing of the Bonds on the Stock Exchange and hereby authorizes the Joint Lead Managers and their respective affiliates [as defined in Rule 501(b) of Regulation D under the Securities Act (“Regulation”)] to distribute copies thereof in connection with the offering and sale of the Bonds, subject to and in accordance with the terms of Clause 2.2.

1.4 Publicity: The Issuer confirms the arrangements made on its behalf by the Joint Lead Managers for announcements in respect of the Bonds to be published on such dates and in such newspapers or other publications as it may agree with the Joint Lead Managers.

1.5 Conditions: The terms and conditions of the Bonds (the “Terms and Conditions”) shall be in the form set out in Schedule 1 to this Agreement, with such changes as may be agreed in writing between the issuer and the Joint Lead Managers. The Terms and Conditions shall be consistent with a term sheet dated 24.09.2009 which shall form part of Schedule 1.

2. Agreements by the Joint Managers

2.1 Subscription: The Joint Lead Managers severally agree to subscribe and pay for the Bonds in the amounts set out in Schedule 5 at the Issue Price less the deductions referred to in Clause 8 on the Closing Date on the terms of this Agreement.

2.2. Restrictions: Each Joint Lead Manager severally and not jointly represents, warrants and agrees that it has complied and will comply with the terms set forth in Schedule 2.

2.3 Agreement Among Managers: The Joint Lead Managers agree as between themselves that they will be bound by and will comply with the International Capital Market Association Standard Form Agreement Among Managers version 2 (the "Agreement Among Managers") and further agree that references in the Agreement Among Managers to the "Lead Manager" shall mean Goldman Sachs and references to the "Settlement Lead Manager" shall mean Goldman Sachs.

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4.1.33

No Fiduciary Relationship: the issuer acknowledges and agrees that (i) the purchase and sale of the Bonds pursuant to this Agreement, including the determination of the issue of the Bonds and any related discounts and commission, is an arm's-length commercial transaction between the issuer, on the one hand, and the Joint Lead Managers, on the other hand; (ii) in connection with the Offering, each of the Managers is and has been acting solely as principal and is not the agent or fiduciary of the issuer or any of its stockholders, creditors, employees or any other party; (iii) each of the Managers has not assumed nor will it assume an advisory or fiduciary responsibility in favour of the issuer with respect to the Offering o the process leading thereto (irrespective of whether each of the Managers has advised or is currently advising the issuer on other matters) and each of the Managers has no obligation to the issuer with respect to the Offering except the obligations expressly set forth in this Agreement; (iv) each of the Managers and its respective affiliates may be engaged in a broad range of transactions that involve interests that differ from those of the issuer; and (v) none of the Managers has provided any legal, accounting regulatory and tax advisors with respect to the Offering and the issuer has have consulted its own legal, accounting, regulatory and tax advisors to the extent it deemed appropriate. This Agreement supersedes any prior agreement or understanding (whether written or oral) between the Issuer and Joint Lead Managers with respect to the subject matter of this Clauses;

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Closing

7.1 Issue of the Bonds: At 10.00 a.m. (London time) (or such other time as may be agreed by the Joint Lead Managers and the Issuer) on the Closing Date, the issuer will issue the Bonds and procure the entry in the register of Bondholders of the names of the persons designated by the Joint Lead Managers to be the holders of the Bonds and will deliver to the Joint Lead Managers or its order in such place as the Joint Lead Managers may reasonably require the Global Certificate duly executed and authenticated representing the aggregate principal amount of the Bonds. Delivery of the Global Certificate and the completion of the register of Bondholders shall constitute the issue and delivery of the Bonds.

7.2 Payment: Against such delivery the Joint Lead Managers will pay or cause to be paid to the Issuer the net subscription moneys for the Bonds (being the aggregate amount payable for the Bonds calculated at the Issue Price less the commission and concession referred to in Clause 8. Such payment shall be made by a depository (the "Common Depositary") common to Euroclear Bank S.A./N.V. as operator of the Euroclear System and Clear stream Banking, societe anonyme, on behalf of the Joint Lead Managers in US dollars in same day settlement funds for value on the Closing Date to such US dollar account outside India as shall be notified by the Issuer to the Joint Lead Managers not later than five days prior to the Closing Date; and

8. Commissions and Concession

The Issuer agrees to pay to the Joint Lead Managers a combined management and underwriting commission and selling commission of 0.75 per cent of the aggregate principal amount of the Bonds. Such commission and concession shall be deducted from the subscription moneys for the Bonds as provided in Clause 7.

9. Expenses

9.1 General Expenses: The Issuer agrees to pay:

All costs and expenses in connection with (a) the preparation, production and (where appropriate) printing of the Bonds, the Offering Circular (in proof and definitive form and any supplement of amendment thereto) and the listing particulars (if any), the Contracts and all other documents relating to the issue of the Bonds, (b) the initial delivery and distribution (including transportation and packaging but not insurance (other than to the place of distribution)) of the Bonds, (c) the listing of the Bonds on the Stock Exchange and the listing of the New Shares and (d) all advertising in relation to the issue of the Bonds approved by the Issuer and the Joint Lead Managers; and

(ii) the fees and expenses of the principal paying agent, the trustee and the other agents appointed under the Paying and Conversion Agency Agreement in relation to the preparation and execution of the Contracts (including, without limitation, the fees and expenses of the trustee's legal advisers), the Issue and authentication of the Bonds and the performance of their duties under the Contracts.

9.2 Joint Lead Managers' Expenses: The Joint Lead Managers agree to pay their own their own costs and expenses in connection with the Issue of Bonds including (without limitation) the fees and costs of Linklaters LLP, legal advisers to the Joint Lead Managers as to English law.

9.3 Payment: All payments due under this Agreement are to be made in US dollars and stated exclusive of any applicable Taxes. If any deduction or withholding for or on ... of Taxes is required to be made from any payment to the Joint Lead Managers, the…. Issuer shall pay an additional amount so that each Joint Lead Manager receives, free from any withholding, deduction, assessment or levy, the full amount of the payments set out herein.
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SCHEDUEL 5

JOINT LEAD MANAGERS' UNDERWRITING COMMITMENTS FOR THE BONDS

Joint Lead Managers	Principal Amount of Firm Bonds to be subscribed
Goldman Sachs (Asia) L.L.C.	US $ 250,000,000
Morgan Stanley & Co., International P/G	US $ 250,000,000

22. From the conditions of the Subscription Agreement dt.24.9.2009, it is clear that the Respondent pursuant to their foreign exchange

requirement and to attract the foreign investment decided to issue convertible bonds of value US$ 500,000,000, which are convertible into the equity shares of the Respondent on maturity, had approached M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC for issue of the Bonds who also to act as their underwriter. The said M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC, through the subscription agreement obliged for distribution of security issued to the public and if it cannot be sold, they would be required to retain the security themselves on the closure of the offer. The Respondent heavily relied upon Clauses 1.1, 1.2, 1.3, 2.1, 2.2, 4.1.33, 7.1, 7.2, 8 and Schedule 5 to the said subscription agreement in arguing that the essence and dominant nature of the subscription contract is that of underwriting service and not of consultancy or managerial service in relation to issue of Bonds, which are ancillary service. The learned Advocate for Respondent laying emphasis on Clause 4.1.33 of the said agreement has submitted that M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC were appointed as underwriter only, who agreed to undertake financial risk of retaining the unsubscribed securities in the event they fail to achieve 100% of the issue. There is no other major service that M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC were required to provide to the Respondents. The learned Advocate for the Respondent heavily relied upon the judgment of the Tribunal in the case of Jubilant Life Science (supra) which has been followed by the adjudicating authority in arriving at the conclusion that the services rendered by the Lead Managers are in the nature of Underwriters service and not Banking and other Financial service. In the said case, the issue was whether the service tax was leviable on the services received by the Appellant M/s Jubilant Life Science for issue of Foreign Currency

Convertible Bonds (FCCB) in foreign currency for raising funds in foreign exchange needed by them. For raising the funds, they entered into an agreement with M/s J.P. Morgan Securities Ltd, UK who was acting as a lead manager and also the underwriter for full subscription of the issue. In that case, the underwriting commission and management fees was separately agreed to be paid; the underwriting commission was agreed at 1.15% of aggregate principal amount of the bond subscribed, and the management fee at 0.1% of the aggregate principal amount of bond subscribed. The Appellant therein paid the service tax on the management fee, but disputed levy of service tax on the underwriting commission which the Revenue contended fall under the scope of Banking and other Financial Service. Analyzing the subscription agreement, and the competing taxable entries viz. 'banking and other financial service', and 'underwriter service', under the Finance Act,1994 this Tribunal observed as under:-

> **"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."

23. The contention of the Revenue is that the aforesaid judgment is not applicable to the facts and circumstances of the present case, inasmuch as there were no separate fees paid towards management fees and underwriter commission. It is the Revenue's contention that , on the other hand, the ratio laid down in the case of Axis Bank Ltd Vs CST Mumbai 2015 (40) STR 993(Tri.-Mum.) is applicable. The facts, in brief, in Axis Bank Ltd.'s case are that the Appellant therein offered Global Depositary Receipt (GDR) outside India by availing services of M/s City Groups Global Market Ltd and Goldman Sachs International. Both were functioning from London. The Appellant had paid certain fees/charges to such service providers for facilitating issue of GDR under the terms and conditions stipulated in the bond agreement dt.8.6.2007. Analyzing the definition of taxable entries vis-à-vis the purchase agreement dt. 8.6.2007 and 23.07.2007, the Tribunal observed as follows:-

> "10. From the above agreements it is evident that appellant has issued and sold the GDRs to Joint Lead Manager who in turn would resell all or a portion of the offered GDRs by making an offering to the subsequent purchasers. This is not what is envisaged in "underwriting" as defined under Finance Act, 1994. What is envisaged is to make offer to public or existing shareholders, whatever is not subscribed that has to be purchased/subscribed in terms of an agreement by a person i.e. underwriter. Thus, the Joint Lead Manager who purchased GDR's cannot be considered as underwriter providing underwriting service. Even the agreement dt.23.07.2007 is titled as "Purchase Agreement". We therefore hold the services provided by M/s Citi and M/s Goldman Sach Ltd are not underwriting service within the meaning of Finance Act, 1994."

24. A simple reading of the said judgment it is clear that this Tribunal came to the finding that since it is a resell agreement and no conditions laid for functioning as 'underwriter' defined under Finance Act,1994 i.e. to make offer to the public or existing shareholders and whatever is not subscribed that has to be purchased/subscribed in terms of agreement by the person i.e. underwriter. In the said case, since Joint Lead Manager has

purchased the GDR initially for resale subsequently, the Tribunal held that the service provided cannot be considered as an underwriter service, but fall under the category of Banking and other Financial Service providing the underwriting service.

25. In our opinion, there is no apparent conflict in the in the judgments of this Tribunal in Jubilant Life Science Ltd's case and Axis Bank Ltd's case on the concept of underwriter service or what constitute an underwriter service. It is clear that the role of an underwriter as defined under the relevant SEBI Rules adopted in the Finance Act,1994 on the issue of securities to shareholders or public is to bear the risk of non-subscription of securities/bonds offered and to subscribe that portion of the securities/bonds issued against the underwriting commission agreed to be paid to them. In the present case, it is clear that the Respondent issuer issued bonds of value of US $500,000,000 which are convertible into equity shares on maturity and the lead managers viz. M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC assumed the responsibilities to facilitate subscription of the bond by general investors outside India and in the event they fail to achieve 100% subscription of the general investors, the said lead mangers undertook to subscribe the unsubscribed bonds. This fact has not been disputed by the Revenue.

26. Therefore, in our opinion, the services provided by the foreign service provider are akin to the definition of the 'underwriting services' and not 'Banking or other Financial service', particularly merchant banking service. No doubt, under scope of merchant banking, the 'underwriting' is also as an activity, but considering the overall stipulation and conditions in

the subscription agreement dt.24.00.2009 between the Appellant and M/s Goldman (Sachs) Asia LLC & M/s Morgan Stanley & Co. International PLC, it could be safely inferred that even though the amount paid for the services by the Respondent has been described as 'Management underwriting commission and selling commission', but the core service provided by the Lead Managers is that of underwriter service and not managerial service for the issue of Bonds as is evident particularly clause 4.1.33 where under it is mentioned that none of the managers has to provide any legal, accounting, regulatory and tax advisors; clause 9 mentions the expenses that are to be borne by the issuer and the Lead Managers. Once, it is concluded that the service provided by the Respondent fall under the category of "underwriter service", the amount paid by the Respondent to the Lead Managers for the services performed outside India would come under the scope of Rule 3(iii) of Taxation of Services (provided from outside India and received in India) Rules, 2006 and accordingly not chargeable to service Tax as held by the Chennai Bench of this Tribunal in their own case vide Order No.42262/2017 dt. 25.9.2017.

27. In view of the above, the impugned Order is up-held and the Appeal filed by the Revenue being devoid of merit, accordingly dismissed.

(Order pronounced in Court on 27.03.2019)

(C.J. MATHEW)
Member (Technical)

(Dr. D.M. Misra)
Member (Judicial)

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