CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 86820 OF 2014

[Arising out of Order-in- Original No: 130-131/STC-I/SKS/13-14 dated 18th February 2014 passed by the Commissioner of Service Tax – I, Mumbai.]

Infrastructure Leasing & Financial Services Ltd
ILFS Finance Centre, Plot No. C-22, G-Block
Bandra-Kurla Complex, Bandra East, Mumbai - 400051 … ***Appellant***

versus

Commissioner of Service Tax – I
115 New Central Excise Building,
MK Road, Churchgate, Mumbai - 400020 ***…Respondent***

WITH

SERVICE TAX APPEAL NO: 86821 OF 2014

[Arising out of Order-in- Original No: 130-131/STC-I/SKS/13-14 dated 18th February 2014 passed by the Commissioner of Service Tax – I, Mumbai.]

Infrastructure Leasing & Financial Services Ltd
ILFS Finance Centre, Plot No. C-22, G-Block
Bandra-Kurla Complex, Bandra East, Mumbai - 400051 … ***Appellant***

versus

Commissioner of Service Tax – I
115 New Central Excise Building,
MK Road, Churchgate, Mumbai - 400020 ***…Respondent***

APPEARANCE:

Shri S S Gupta, Chartered Accountant for the appellant

Shri Nitin M Tagade, Joint Commissioner (AR) for the respondent

CORAM:

HON’BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON’BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86733-86734/2021

DATE OF HEARING: 09/07/2021
DATE OF DECISION: 07/09/2021

PER: C J MATHEW

Outlining the contours of the dispute, Learned Chartered Accountant urged that the grounds on which appeal for setting aside of order-in-original no. 130-131/STC/13-14 dated 18th February 2014 of Commissioner of Service Tax-I, Mumbai has been sought, *viz.*, that the taxable service that has been fastened upon them was not intended to include 'corporate guarantees' issued by them, that section 126 of the statute governing the transaction, *viz.*, Indian Contract Act, 1872, prescribes the date of issue as reference for enforceability and, thereby, excludes some of the guarantees from inclusion in value of 'taxable service' and that show cause notice is contrary to the judicial precedent resolving the impugned activity as providing of 'business auxiliary service', deserves to be accepted.

2. M/s Infrastructure Leasing & Financial Services Ltd, engaged in providing 'financial services', was found to have failed to discharge liability for the period from 2004-05 to 2009-10 on 'commission'

charged for providing ‘corporate guarantee’ to their customers despite specific inclusion in section 65(12)(ix) that defined ‘banking and other financial services’ for the purpose of levy under section 65(105)(zm) of Finance Act, 1994. Adjudication of two show cause notices, dated 23rd July 2009 and 29th September 2010, confirmed recovery of ₹ 2,01,03,661 under *proviso* to section 73(1) of Finance Act, 1994, along with interest thereon under section 75 of Finance Act, 1994, besides imposing penalty of like amount under section 78 of Finance Act, 1994 for the period from 2004-05 to 2008-09 and confirmed recovery of ₹ 94,08,029 under section 73 of Finance Act, 1994, along with interest thereon under section 75 of Finance Act, 1994, besides imposing penalty under section 76 of Finance Act, 1994 for 2009-10. In the present proceedings, all of these are challenged.

3. It is contended by Learned Chartered Accountant that the indiscriminating perception of all ‘guarantees’ as ultimately providing for release of funds in contracted contingencies appears to have stemmed from the conclusion that their submission of the dissimilarity of ‘corporate guarantee’ and of ‘bank guarantee’, in the exhaustive enumeration of ‘other financial services’, as distinction without difference, from the inconsequential deployment of the expression ‘bank’ in the guarantee granted to M/s Digvijay Investments Ltd and from an isolated instance of utilisation of limits sanctioned by their bank to the appellant for furnishing ‘guarantee’ in favour of a customer. It was argued that the

instrument referred to in the definition of the 'taxable service' is not legally amenable to segregation of 'bank' from 'guarantee' to render the former as redundant for which reliance is placed on

> *'5…….On a true construction of the language of the notifications dated July 31, 1959 and April 30, 1960 it is clear that all that is required for claiming exemption is that the cotton fabrics must be produced on power-looms owned by the co-operative society. There is no further requirement under the two notifications that the cotton fabrics must be produced by the co-operative society on the power-looms "for itself". It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different but that is not the case here. In this connection we may refer to the observations of Lord Watson in Salomon v. Salomon and Co., 1897 AC 22 at p. 38:*
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> > *"Intention of the legislature is a common but very slippery phrase, which, popularly understood may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."*
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> *It is an application of this principle that a statutory notification may not be extended so as to meet a casus*

omissus. As appears in the judgment of the Privy Council in Crawford v. Spooner, (1846) 6 Moo PC 1(9):

> *"......... we cannot aid the legislature's defective phrasing of the Act, we cannot add, and mend, and, by construction, make up deficiencies which are left there." Learned Counsel for the respondents is possibly right in his submission that the object behind the two notifications is to encourage the actual manufacturers of handloom cloth to switch over to power-looms by constituting themselves into co-operative societies. But the operation of the notification has to be judged not by the object which the rule-making authority had in mind but by the words which it has employed to effectuate the legislative intent. Applying this principle we are of opinion that the case of the appellant is covered by the language of the two notifications dated July 31, 1959 and April 30, 1960 and appellant is entitled to exemption from excise duty for the cotton fabrics produced for the period between October 1, 1959 to April 30, 1960 and from May 1, 1960 to January 3, 1961. It follows therefore that the appellant is entitled to the grant of a writ in the nature of certiorari to quash the order of the Assistant Collector of Central Excise of Baroda dated November 26, 1962 and the appellate order of the Collector of Central Excise dated November 12, 1963.'*

in the decision of the Hon'ble Supreme Court in *Hemraj Gordhandas v. HH Dave, Assistant Collector of Central Excise & Customs [1978 (2) ELT J 350 (SC)]*.

4. It was also pointed out on behalf of the appellant that the Tribunal, in *Olam Agro India Ltd v. Commissioner of Central Excise, Delhi –II [2018 (8) TMI 102 –CESTAT NEW DELHI]*, has elaborated upon 'corporate guarantee' to uphold the finding of the adjudicating authority therein that liability under Finance Act, 1994 devolves only as provider of 'business auxiliary service' because

> *'9. A corporate guarantee is used when a corporation agrees to be held responsible for completing the duties and*

> *obligations of debtor to a lender, in case the debtor fails to comply with the terms of the debtor- lender contract. Whereas a bank guarantee is a promise from a bank that the liability of the debtor will be met in the event the debtor fails to favour his contractual obligations. Therefore, the nature of corporate guarantee as well as of bank guarantee is one and the same i.e. for facilitation of the lending facilities. It was noticed that M/s Olam Agro India Ltd, Singapore, the parent company has executed corporate bank guarantee in favour of banks in India for facilitation of lending of funds to the appellant and in lieu of the said guarantee the appellant paid 1 per cent of value of guarantee as commission to their parent company at Singapore by way of foreign exchange remittance and their parent company provided them debit notes on quarterly basis. The copies of the said debit notes clearly indicate the transactions with regard to lending facilities in India and therefore through Corporate Guarantee Commission the appellant are chargeable to Service Tax. And the commission paid was taxable under 'Business Auxiliary Service'. Merely because the name of the guarantee has been changed from 'Bank' to 'Corporate' it cannot be said that it won't fall under 'Business Auxiliary Service' as defined under Section 65 (105) of the Finance Act, 1994.'*

and, relying upon the decision of the Tribunal in *Bank of Baroda v. Commissioner of Central Excise Jaipur –I [2014 (35) STR 359 (Tri-Del)]* which held that

> *'12. Principles of law are too well established to warrant an idle parade of familiar authority, that a show cause notice must set out succinct statement of the relevant facts and circumstances; a clear attribution of the charge and the appropriate provision of law under which the alleged liability*

> *of an assessee, is alleged to have arisen. These to fundamental attributes and non-derogable indicia of a valid show cause notice. The law is also well settled that failure of natural justice at the primary level cannot be cured by affording due process at the appellate stage. Since the show cause notice dated 23-10-2009 has clearly and unambiguously alleged the appellant provided only Business Auxiliary Service (in paragraphs 2 and 3), no conclusion could be recorded either at the primary or the appellate proceedings, that the transactions in issue are classifiable as Banking or other Financial Services. In fact neither the primary nor the Appellate Commissioner have concluded that the appellant had provided the other classified service. In fact both the authorities have failed to record a finding as to the taxable service provided.'*

it was contended that the tax liability could not be fastened without certainty of the 'taxable service' in application of mind by the authority issuing the show cause notice. Further reliance was placed on

> *'6. It is seen from the records that the appellant had registered themselves under Service Tax Rules, 1994 as provider of sound recording service. However, that by itself is not sufficient to operate as a conclusive ground of taxability. Levy under Finance Act, 1994 is not on the persona but on the activity; neither registration nor wherewithal for rendering the service can substitute for classifying the activity within the definition of the service. Learned Chartered Accountant has placed reliance on the decisions of the Hon'ble Supreme Court in Dunlop India Ltd. and Madras Rubber Factory Ltd. v. Union of India [1983 (13) ELT 1566*

(S.C.)] and of the Hon'ble High Court of Calcutta in Dalhousie Institute v. Assistant Commissioner, Service Tax Cell [2006 (3) STR 311 (Cal.)] as well as the decision of the Tribunal in Commissioner of Central Excise, Bhopal v. Mahakoshal Potteries [2005 (183) ELT 289 (Tri.-Del.)]. This then is a settled law. The tax collector must not only propose the classification as a pre-requisite for demand but also test the fitment of the activity within the definition itself. The discharge of tax liability on a former occasion or a claim entered will not suffice to impose the burden on the assessee for all time to come. Hence mere registration or even the operation of sound recording studio does not, by itself, bring the appellant within the fold of taxation.

7. *It is the contention of the appellant that they produced radio spots. Radio spots are mini-programmes that are intended to be broadcast for which the appellant would be engaged by an advertising agency or, at times, by the clients directly. On a perusal of the documents furnished by Learned Chartered Accountant, it would appear that most of the income emanates from the former. In any case, there is no dispute that the appellant produces an entire programme which is then submitted to the client for further use. These may well be in the nature of sub-contract by an advertising agency but is, yet, an independent one. There is no proposal to tax the activity as provision of 'advertising agency service'; the appellant is not required to choose between alternate classification as that is the responsibility of the tax collector. Fitment within an alternative classification suffices to erase the proposal in the notice but cannot crystallise liability unless the alternative was also proposed in the notice. We are, therefore, not required to test the activity of the appellant for fitment under a different classification.'*

in the decision of the Tribunal *in Radiowani v. Commissioner of Service Tax, Mumbai-I [2019 (21) GSTL 157 (Tri-Mumbai)].*

5. Learned Authorised Representative contends that, on their own admission, the appellant had issued 'bank guarantee' and on which liability had not been discharged. It was also argued that the function of the 'guarantees' are one and the same and that the decision in *re Olam Agro India Ltd*, having been appealed against, lacked value as precedent. He further exhorted us to accept the clear findings of the adjudicating authority in the impugned order.

6. We find that the decision in *re Olam Agro India Ltd* has established that commission earned by providing 'corporate guarantee' is taxable, as 'business auxiliary service', under section 65(105)(zzb) of Finance Act, 1994. The decisions of the Tribunal, in *re Bank of Baroda* and in *re Radiowani*, reinforce the imperative of certainty of tax, as reflected in the classification of service proposed by tax authorities in the show cause notice, and as the pivot for the fulcrum of adjudicatory competence.

7. It can be gauged from the narrative of the impugned order that, initially, the tax authorities had the same inclination but, for unfathomable reasons, a different 'taxable service' was invoked for initiating recovery proceedings. Consequently, there was patent lack of certainty of tax in the mind of the show cause notice issuing

authority.

8. On the issue of non-payment of tax on 'bank guarantee' issued by bank of the appellant to one customer against their limits, the impugned order has failed to set about determining the congruity of that facilitation within the definition of 'taxable service' in section 65(105)(zm) of Finance Act, 1994.

9. In view of our findings above, the impugned order is set aside and appeal allowed.

(Order pronounced in the open court on 07/09/2021)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*