

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

Service Tax Appeal No. 89484 of 2018

(Arising out of Order-in-Appeal No.MKK/11/RGDAPP/2018-19 dated 06.07.2018 passed by the Commissioner of Central Tax, Central Excise & Service Tax, Raigarh(Appeals)).

M/s Lehman Brothers Securities Pvt. Ltd.Appellant
203, The Empire Business Centre, Empire Complex,
414 Senapati Bapat Marg, Lower Parel,
Mumbai – 400 013.

VERSUS

Commissioner of Central Tax, Central Excise & Service Tax, Mumbai Central.Respondent
4th Floor, Central Excise Bldg., Churchgate,
Mumbai -400 020.

APPEARANCE:

Shri Bharat Raichandani, Advocate for the Appellant
Shri S.K. Hatangadi, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85285 / 2022

Date of Hearing: 17.02.2022

Date of Decision: 06.04.2022

PER: AJAY SHARMA

This appeal has been filed impugning the Order-in-Appeal No. MKK/11/RGDAPP/2018-19 dated 06/07/2018 passed by the Commissioner of Central Tax, Raigad(Appeals) by which learned Commissioner rejected the appeal filed by the appellant and upheld order of the Adjudicating Authority.

2. The issue involved in the appeal is whether the appellants are entitled for the refund claim of Service Tax paid by them 'under protest' under Reverse Charge Mechanism for the legal

consultancy services received by them for winding up of their business?

3. The appellant herein were into Business Auxillary Services, Management or Business Consultancy Services etc. and were paying Service Tax under Reverse Charge Mechanism for the legal consultancy service. Their ultimate holding i.e. Lehman Brothers holding Inc. USA filed a petition for bankruptcy in US in September, 2008 and Lehman Brothers Investment Pte. Ltd. Singapore, the immediate holding company was placed into creditors voluntary liquidation. Subsequently, the appellant entered into an international Asset Sale Agreement dated 29.09.2008 with Nomura Holding Inc. In terms of the said agreement, the employees and certain assets of the appellant were transferred to Nomura Holding Inc. They suspended their business activities and surrendered their licenses with National Stock Exchange and Bombay Stock Exchange and their financial statements were not being prepared on going concern basis. In order to closure and winding up of the business, the Appellant received certain Legal consultancy services and discharged Service Tax 'under protest' on the said services on reverse charge basis in terms of Notification No. 30/2012 dated 20.06.2012 as they were under bonafide belief that they are not liable to pay Service Tax since they have discontinued their business operations and ceased to provide any taxable service. After paying the Service Tax, the appellants have filled two refund claims total amounting to Rs. 5,37,140/- claiming exemption under Notification No. 25/2012-ST dated 20.06.2012. The department vide communication/ notice dated 04/11/2015 asked the appellant as to why the refund claims should not be rejected in view of the fact that the appellant is a '*business entity*'.

4. After considering the reply submitted by the appellant and hearing the submissions of the appellant, the Adjudicating Authority vide Order-in-Original dated 10/12/2015 rejected both the refund claims of the Appellant on the ground that the

claimant is a 'business entity' and hence exemption notification No. 25/2012-ST dated 20.06.2012 is not applicable to them as the exemption has been granted for service provided by an individual or an advocate or a partnership firm of advocates by way of legal services to any person other than 'business entity'. On appeal filed by the appellant, the Appellate Authority vide impugned order dated 06/07/2018 rejected the same after recording the finding that the appellant falls under preview of definition of 'business entity' as defined under section 65B(17) of the Finance Act 1994. They were 'business entity' at the time of receiving Legal Services from their domestic vendors and will remain the same till they are registered under the Companies Act, 1956 and therefore the exemption notification (supra) is not applicable to them.

5. Learned Counsel for the appellant submits that since the appellants were in the process of closing down their business activities therefore, for that purpose they received certain legal consultancy services like drafting of various agreements and attending hearing before courts of law etc. from domestic vendors for the closing down of business and discontinuance of business activity. Since the said legal consultancy services received were not towards any business activity undertaken by the appellant, hence no Service Tax was liable to be paid. Due to discontinuance of business or commercial activity, the Appellant had discharged all its employees also. Thus services are availed primarily for matters and activities in relation to closure of business and discontinuance of business activity. According to learned Counsel the appellant is not carrying out any activity relating to any industry or commerce or any other business or profession nor does the appellant have any intention to undertake any business. Merely because they are registered under the Companies Act, 1956 that does not mean that they will remain as 'business entity' till they are registered. Learned counsel further submits that since the appellant is not engaged in any other business or commercial activity, the provision of section 68(2) read with notification 30/2012-ST dated

20/06/2012 and section 65B(17) of the Finance Act will not be applicable and the appellant would not be liable to pay Service Tax under the Reverse Charge Mechanism for legal consultancy services received from domestic vendors. In support of his submission learned Counsel place reliance on the decision of Hon'ble Supreme Court in the matter of *Vijaya Laxmi Sugar Mills v/s CIT; AIR 1991 SC 2042* in which the Hon'ble Supreme Court has laid down that the activity undertaken in the course of winding up is not an activity for furtherance of any business carried on by the company before its winding up and the legal expenses incurred are not for the purpose of furtherance of business but in relation to closure of business. Hence the refund claimed is liable to be allowed. Similar views have been taken by the Hon'ble Supreme Court in the matter of *Liquidators of Pursa Limited v/s CIT, Bihar (1954) 1SCR 767* and Hon'ble High Court in the matter of *Mysore Standard Bank Limited. v/s CIT, 1962(64) ITR278*. Per contra learned Authorised Representative appearing on behalf of the revenue reiterated the finding recorded in the impugned order and prayed for dismissal of the appeal filed by the appellants. According to learned Authorised Representative, the appellants have not surrendered their Registration under the Companies Act, 1956 and they can ordinarily carry out activity related to business and, therefore, the appellant falls under the preview of 'business entity' as defined under section 65B(17) *ibid*. According to learned Authorised Representative, since the appellant are 'business entity' therefore, the exemption is not applicable in their case and they have rightly paid Service Tax under the Reverse Charge Mechanism as per notification (*supra*). He further submits that the period in dispute is from November, 2012 to August, 2013 and from February, 2014 to November, 2014, whereas according to the appellant they had no operative employees since 15/10/2008. If that is the position then why they sought legal consultancy service after so many years during the disputed period and this itself shows they were 'business entity'.

6. I have learned Counsel for the appellant and learned Authorised Representative for the Revenue and perused the case recordings including the written submissions filed by the respective sides. The first and foremost question is whether the appellant is a 'business entity'? The term 'business entity' is defined under section 65B(17) to mean "any person ordinarily carrying out any activity relating to industry, commerce or any other business or profession." Here ordinarily means normally or in normal course. Therefore, it can be said that 'business entity' is a person who ordinarily carries out activity for profit. However, if any person is not carrying out any activity for profit, then the person cannot be considered as 'business entity'. Therefore, for applicability of this definition the appellant has to normally or in normal course, indulged in any activity which is profit motivated.

7. Merely because the appellant is still registered under the Companies Act and has not get the said registration cancelled does not mean that they are carrying out business activity. It is nowhere the case of the Revenue that the appellant is indulged into any activity relating to its business after the year 2008. The learned Commissioner has specifically recorded in the impugned order that there is no dispute that the appellant have stopped their business activity and are in the process of winding up. But Still an apprehension has been recorded by the learned Commissioner that the appellant 'can' carry out activity related to their business as they have not surrendered their registration under the Companies Act, 1956 and therefore they fall under the preview of definition of 'business entity'. In my view the said apprehension of the learned Commissioner is totally unfounded as neither any document has been placed on record to show that the appellant indulged in any business activity during last so many years nor it is mentioned in the Show Cause Notice or in any of the case records that the appellant had earned any profit from their business activity during these years. The appellant cannot be saddled with any tax liability only on the basis of apprehension. It is the case of the appellant, which has not been denied anywhere by revenue, that they have discharged their

employees also at the time of closure of business. Profit or motive for profit is a pre-condition for application of section 65B(17) *ibid*, which I am unable to gather from the facts of this case. So far as the submission of learned Authorised Representative that after so many years of winding up or/ closure of business the appellant are availing legal consultancy services which raises suspicion, is concerned the same is also without any basis as no evidence has been placed on record by the department to substantiate it nor it is the case of the department anywhere in the show cause notice or before the authorities below. The decisions cited by learned Counsel also supports the case of the appellant.

8. In view of the discussions made herein above, I am of the considered view that the impugned order is liable to be set aside. Accordingly, the appeal is allowed with consequential relief, if any.

(Pronounced in open Court on 06.04.2022)

(Ajay Sharma)
Member (Judicial)

*YR/SR