

Jsn

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CENTRAL EXCISE APPEAL NO. 3 OF 2017

**The Commissioner of Central Excise,
Customs & Service Tax,
14th Floor, Air India Building,
Nariman Point, Mumbai – 400 021.**

...Appellant

Versus

**M/s. Kotak Mahindra Capital Co. Ltd.
229, 3rd Floor, Bhaktawar,
Nariman Point, Mumbai – 400 021.**

...Respondent

WITH

CENTRAL EXCISE APPEAL NO. 27 OF 2017

**The Commissioner of Central Excise,
Customs & Service Tax,
14th Floor, Air India Building,
Nariman Point, Mumbai – 400 021.**

...Appellant

Versus

**M/s. DSP Merill Lynch Ltd.
Mafatlal Centre, 10th Floor,
Nariman Point, Mumbai – 400 021.**

...Respondent

Mr. Pradeep S. Jetly, with Mr. Sham Walve, for Appellant in the both matters.

Mr. Rohan Shah, with Mr. Harsh Shah & Mr. Anay Banhatti, Ms. Sunchita Rungfa, i/b Economic Law Practice for Respondents in both matters.

**CORAM: A.S. OKA AND
RIYAZ I. CHAGLA, JJ.**

DATED: 6th September 2017

ORAL JUDGMENT :- (Per Riyaz I. Chagla J.)

1. We are disposing of the above Appeals preferred by the Revenue by this common order and judgment. The above Appeals have challenged the impugned orders passed by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai (for short “**Appellate Tribunal**”) dated 3rd February 2016 in Central Excise Appeal No. 3 of 2017 and 11st January 2016 in Central Excise Appeal No. 27 of 2017 respectively. Both of the impugned orders have answered the issue as to service tax being payable on “Merger and Acquisition Services” prior to 16th July 2001 under the category of “Management Consultancy Services” in the negative. For the sake of

convenience we are referring to the facts in Central Excise Appeal No. 3 of 2017.

2. The Respondent / Assessee is engaged in professional advisory / consultancy services, corporate advisory services, financial advisory services and consulting services in relation to “Merger and Acquisitions” to various customers / clients. The Respondent had provided these services without obtaining service tax registration and had not paid service tax on the amounts received by them from their customers / clients for the said services. The Appellant classified the said services as taxable services under Management Consultancy Services and issued show cause notice dated 10th April 2006 to the Assessee to show cause why service tax amounting to Rs.37,69,113/- for the period October 2000 to November 2001 under the provisions of Section 73(1) of Finance Act, 1944 is not payable by the Assessee. The Adjudicating Authority vide order dated 29th July 2008 held the services provided by the Assessee to be taxable under Management Consultancy Services and demanded service tax of Rs.37,69,113/- along with interest and penalty under the

provisions of the said Act. The Assessee preferred an Appeal before the Commissioner (Appeals). By order dated 31st January 2011, the Commissioner (Appeals) upheld the order of the Adjudicating Authority but waived the penalties imposed under the provisions of the said Act in view of Section 80 of the Finance Act, 1944. The Assessee preferred an Appeal before the Appellate Tribunal. By the impugned order dated 3rd February 2016, the Appellate Tribunal allowed the Appeal of the Assessee. The Appellant has challenged this impugned order.

3. Mr. Jetly, learned counsel appearing for the Appellant in both the Appeals has contended that service tax is payable on Merger and Acquisition Services prior to 16th July 2001 under the category of "Management Consultancy Services". Mr. Jetly relied upon a board circular No. 1/1/2001-ST (Section – 37-B) dated 27th June 2001, which was issued for taxable services and point No.10 of which reads thus:-

“10. Now, therefore, in exercise of the powers conferred under Section 37B of the Central Excise Act, 1944, (as made applicable to service tax by Section 83 of the Finance Act,

1994) the Board hereby clarifies that any services rendered in relation to Merger and Acquisition will be covered under the scope of taxable services provided by “management consultant” and these services will be liable to service tax accordingly.”

4. Mr. Jetly has drawn our attention to the definition of management Consultant which has been reproduced in the impugned order at paragraph 7, which reads thus:-

“Management Consultant means any person who is engaged in the providing any service, either directly or indirectly, in connection with the management of any organisation in any manner and includes any person who renders any advice, consultancy or technical assistance, relating to conceptualising, devising, development, modification, rectification or upgradation of any working system of any organisation.”

5. Mr. Jetly has contended that Merger and Acquisition Services come within the definition of Management Consultancy and would be included under Management Consultancy Services prior to 16th July 2001 and hence would be taxable. Mr. Jetly has contended that the introduction of Merger and Acquisition Services under the Banking and Financial Services with effect from 16th July

2001 makes no difference as Merger and Acquisition Services have been at all times a taxable service. Mr. Jetly has relied upon an order of the Appellate Tribunal in ***HSBC Securities & Capital Markets (I) P. Ltd. V. Commr. Of S.T. Mumbai***¹, paragraph 4 of which reads thus:-

“We have given careful thought to the various submissions made by both the sides. The various transactions which are covered by the said demand notice are listed in para-1 above. We have also gone through various agreements between the appellants and the various clients. (As detailed in para-1). On going through these agreements. It is found that the nature of service is purely advisory in nature. All the advices are relating to the financial restructuring relating to business of various clients. It is true that in few cases in addition to advices, certain executory functions have also been carried out. However, on going through such agreements, we find that these executory functions are consequent to the advice and also again followed up with further advice. It is because of the particular nature of the work/industry that such executory functions have been carried out. We are therefore of the considered view that main function has been advisory in nature and not execution, execution seems to be incidental to the advisory functions. In view of this position, we reject the appellant's contention that their activities are executory in nature and not advisory. In view of this conclusion, we find

1 2014 (33) S.T.R. 530 (Tri. – Mumbai).

that first nine case laws mentioned in Para 2 supports the case of Revenue rather than appellant.”

6. Mr. Jetly has submitted that the above decision has held in paragraph No.5 that advisory services in the field of finance is advisory in nature and would fall under the definition of Management Consultancy Services which is a wide definition and not restricted to any particular field of management. According to him, this decision would apply to the present case and that “Merger and Acquisition Services” falls under that “Management Consultancy Services” and hence is liable to service tax.

7. Mr. Rohan Shah learned counsel appearing for the Respondent has supported the impugned orders. He has submitted that a plain reading of the definition of “Management Consultant” it is clear that Management Consultant is to be read in connection with management of an organisation. He has contended that the mere introduction of “Merger and Acquisition Services” as a separate category under the “Banking and Financial Services” with effect from 16th July 2001 would show that “Merger and Acquisition

Services” were not included in the definition of “Management Consultant”. This service has been brought as a separate category for the first time and hence would be taxable under the Banking and Financial Services from 16th July 2001. Mr. Shah has also relied upon the decision of the Division Bench of this Court in ***Indian National Shipowners' Association V. Union of India***², where entry of (zzzzj) was brought in for the first time in Section 65 (105) of Finance Act, 1994 and paragraph 37 of the judgment reads thus:-

“Entry (zzzzj) is entirely a new entry. Whereas entry (zzzy) covers services provided to any person in relation to mining of mineral, oil or gas, services covered by entry (zzzz) can be identified by the presence of two characteristics namely (a) supply of tangible goods including machinery, equipment and appliances for use, (b) there is no transfer of right of possession and effective control of such machinery, equipment and appliances. According to the members of the 1st petitioner, they supply offshore support vessels to carry out jobs like anchor handling towing of vessels, supply to rig or platform, diving support, fire fighting etc. Their marine construction barges support offshore construction, provide accommodation, crane support and stoppage area on main deck or equipment. Their harbour tugs are deployed for piloting big vessels in and out of the

2 2009 (14) S.T.R. 289 (Bom.)

harbour and for husbanding main fleet. They give vessels on time charter basis to oil and gas producers to carry out offshore exploration and production activities. The right of possession in and effective control of such machinery, equipment and appliances is not parted with. Therefore, those activities clearly fall in entry (zzzzj) and the services rendered by the members of the 1st petitioner have been specifically brought to the levy of Service Tax only upon the insertion of this new entry.”

8. Mr. Shah has further contended that the services which were considered in that decision viz. mining services were held to be not taxable prior to the insertion of entry (zzzzj) in Section 65 (105) of the Act and drawing an analogy from this decision, Mr. Shah has submitted that the introduction of Merger and Acquisition Services with effect from 16th July 2001 as a separate category under the Banking and Financial Services would also be taxable only from the insertion of the new entry. The above decision of the Division Bench of this Court in ***Indian National Shipowners Association (Supra)*** has been affirmed by the Supreme Court in ***Union of India Vs. Indian National Shipowners Association***³.

3 2011 (21) S.T.R. 3 (SC)

9. Having considered the arguments, we find merit in the submission of the learned counsel for the Assessee that “Merger and Acquisition Services” having been introduced for the first time as a separate category under Banking and other Financial Services with effect from 16th July 2001 would show that the said service was never a part of Management Consultancy Services which has been in existence at all times. We are of the view that “Merger and Acquisition” is highly technical and a restrictive term and cannot be related to the managing of the affairs of the organisation which would come within the definition of “Management Consultant”. We are also of the view that the decision of Division Bench of this Court in ***Indian National Shipowners Association (Supra)*** would apply in the present case partially since that case has considered the issue of introduction of a new entry viz. mining service in the Finance Act and held that the levy of service tax on this service would be after the insertion of the new entry. We accordingly hold that service tax is payable on Merger and Acquisition Services only upon its insertion in the Banking and Financial Services with effect from 16th July 2001 and was not leviable prior thereto.

10. We accordingly dismiss the Appeals. There shall be no order as to costs.

(RIYAZ I. CHAGLA J.)

(A.S. OKA, J.)