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HIGH COURT OF CHHATTISGARH, BILASPUR

TAXC No. 126 of 2018

- M/s Shree Nakoda Ispat Limited Having Its Registered Office Near Railway Crossing, Mowa, Vidhan Sabha Road, Post Office Saddu, Raipur, Chhattisgarh

---- Petitioner

Versus

- The Commissioner Customs And Central Excise Central Excise Building Dhamtari Road, Tikrapara, Raipur, Chhattisgarh

---- Respondent

For Petitioner	:	Shri Abhyuday Singh, Advocate
For Respondent	:	Shri Maneesh Sharma, Advocate

Hon'ble Shri Ajay Kumar Tripathi, Chief Justice
Hon'ble Shri Justice Parth Prateem Sahu

Order on Board

Per Ajay Kumar Tripathi, Chief Justice
04.12.2018

1. The Origin of the present dispute lies in a demand-cum-show cause notice which was issued upon the petitioner- Company for non-payment of Service Tax, which according to the Assessing authority was payable in terms of the definition given in Section 65 (65) of the Finance Act, 2007 (for short, 'the Act, 2007').

2. The definition reads as under:

> "management or business consultant" means any person who is engaged in providing any service, either directly or indirectly, in connection with the management of any organisation or business in any manner and includes any person who renders any advice, consultancy or technical assistance, in relation to financial management, human resources management, marketing management, production management, logistics management,

procurement and management of information technology resources or other similar areas of management."

3. The petitioner- Company is manufacturer of Iron and Steel products and they decided to install a Captive Power Plant for which they entered into an agreement with a UK Company known as M/s Agrinergy Limited for assistance in implementing Clean Development Mechanism (CDM) as per Article 12 of the Kyoto Protocol. The services to be provided by the UK Company related to assistance in obtaining registration and certification of CDM projects including project designing, validation, registration and regular verification etc.

4. Not only this, in terms of the Agreement dated 07.12.2004, the said UK Company was also responsible for sale and management of certified emission reduction certificates (CERs), also known as carbon credits which can be bought and sold in international market. The obligations in terms of the agreement which is part of the show-cause notice is required to be reproduced for better clarity and appreciation.

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"**3. Service offered by agrinergy ltd**

The Service provider will assist the Project owner in obtaining registration and certification of the CDM project. The main steps involved in this process will be :

Production of Project Design Document (PDD) Validation of the project Registration with the CDM Executive Board Verification of the CDM project on an annual basis.

Validation and verification of the CDM project must be carried out by an independent entity (Designated Operational Entity or DOE) that has been accredited by the UN CDM Executive Board. The Service provider will arrange for these services.

The Service provider will produce the Project Design Document and will arrange for the registration of the project with the CDM Executive Board.

<u>The Service provider will market the CERs resulting from the CDM project and will endeavour to obtain the most favourable terms for the Project owner.</u> The Service provider will produce all documentation required to obtain a purchase contract for the CERs resulting from the CDM project. This includes the production of documents such as Project Idea Notes (PINs) that are required by the major institutional buyers of CERs.

<u>The Service provider will have responsibility for the sale and management of all CERs resulting from the CDM project. Sales of CERs can be made by the Service provider only with the prior approval of the Project owner.</u> Each sale will be governed by its own emission reduction sale contract. Any obligations inherent within these sales contracts will be borne by the Project owner. As part of the agreement the Service Provider will advise, assist and help obtain favourable terms for the Project owner so as to avoid any adverse legal/financial implications inherent in the emission reduction purchase contract.

The Service provider will have first marketing rights over all CERs, however if the Project owner achieves better terms than those proposed by the Service provider clause 5 will only apply to the terms quoted by the Service provider. Sales not transacted through the service provider must be notified at the earliest possible time by the Project owner to the Service provider.

4. Project costs

Costs incurred in project registration such as validation, verification and CDM executive board fees will be borne by the Project owner or the ultimate buyer of the CERs. In case these costs are borne by the

Project owner the cumulative outstanding amount will never exceed US$6,000 (six thousand) at any point in time during the contract.

5. Payment

The Service provider will be paid an initial one off fee of US$500 (US Dollars five hundred) and an on going fee equal to 7.5% of the total value of the CERs arising from the CDM project. Payments are to be made on an annual basis in the form of certified emission reductions or a cash equivalent depending on the wish of the Service provider.

6. Jurisdiction

This agreement is subject to Raipur jurisdiction. Any dispute arising out of the terms will be subject to the exclusive jurisdiction of the Raipur courts."

5. The Assessing authorities therefore initiated a proceeding raising a demand for recovery of Service tax on reverse charge basis for the consideration paid to the petitioner- Company to the foreign service provider. The Assessing authority confirmed the Service Tax liability along with penalty however on appeal, the Commissioner Appeal set aside the original order holding that CERs are goods sold by the petitioner- Company to the UK Company and therefore, relying on Circular of the Board dated 27.06.2011 it was held that the service provider acted as an agency and therefore not liable to tax. It was the opinion of the appellate authority that no service was provided by the UK Company which will bring it within the mischief of the definition of Section 65(65) of the Act, 2007.

6. The Revenue went in appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT) which in turn vide order dated 23.02.2018 reversed the order of the Appellate authority and held that the so called consultancy or the service provided in terms of the Agreement would come within the definition of

'Management or Business Consultant' as per Section 65(65) of the Act, 2007 and Service Tax was payable therein.

7. The submission of the counsel for the petitioner against the order dated 23.02.2018 of the Appellate Tribunal is that the authority should not have gone by the essence of the Agreement but the object behind such an arrangement. So far as providing consultancy on other aspects is concerned in relation to the certification of the CDM project etc., Service Tax has already been paid but so far as trading in carbon credits (CERs) is concerned, it will not come under the ambit of service.

8. The definition under Section 65(65) of the Act, 2007 is in the widest possible term. The Agreement thereafter will have to be read and interpreted from what had been agreed between the parties which in our opinion is unambiguous. Obligations were created in terms of the Agreement which have been reproduced in earlier part of the order where the UK Company was also obligated to provide services in marketing the CERs to beget favourable terms for the petitioner- Company. As a part of the service, the UK Company also had responsibility for the sale and management of the CERs etc., etc., details of which are part of Clause-3 of the Agreement reproduced earlier. We therefore are not required to interpret the Agreement and arrangement between the two entities as to what they agreed to and what they mean now, when the law has been set in motion, keeping in mind the broad definition given to the words 'Management' or 'Business Consultant'.

9. In the above factual matrix and the law, the view so taken by the Appellate Tribunal cannot be set to be erroneous. However, keeping in mind that such concepts and obligations which have been created in terms of the Kyoto Protocol

and the Agreement arising out of climate change, there has been some debate on such issue and no final opinion was available during the period such demand had been made, therefore, the Court could be inclined to hold that there may not be any occasion to impose penalty under Sections 76, 77 and 78 of the Act, 2007.

10. This variation in opinion between the Assessing Authority as well as the Commissioner Appeals is also a pointer to the fact that even within the authorities of the Revenue the obligation under the Act has been perceived differently.

11. The appeal is otherwise dismissed except to the extent in relation to the imposition of penalty as made by the Assessing Authority.

Sd/-
(Ajay Kumar Tripathi)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

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