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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision : 17.07.2018

+ **SERTA 19/2018**

RADICO KHAITAN LIMITED

..... Appellant

Through: Mr. L. Badri Narayanan, Advocate
with Mr. Yogendra Aldak, Mr. Karan
Sachdev, Mr. Shrey Ashat,
Ms. Apeksha Mehta and Mr. Kunal
Kapoor, Advocates.

versus

**PRINCIPAL COMMISSIONER OF GST & CENTRAL
EXCISE DELHI**

..... Respondent

Through: Mr. Harpreet Singh, Sr. Standing
Counsel for respondent with
Mr. Suresh Chaudhary, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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CM APPL. 27730/2018 (for exemption)

Allowed, subject to all just exceptions.

SERTA 19/2018 & CM APPL. 27729/2018 (for stay)

2. Issue notice.

3. Mr. Harpreet Singh, Sr. Standing Counsel for the respondent accepts notice.

4. The appellant's grievance in the present proceedings under Section 35G of the Central Excise Act, 1944 is that the final order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) remanding the matter for fresh adjudication by the Commissioner is erroneous, inasmuch as, the Tribunal failed to discharge its obligations to consider the record.

5. The appellant was issued with a show cause notice which alleged that it was receiving services from M/s Jefferies International Limited (JIL) and that for the period 2006-07 it was liable to pay service tax to the tune of ₹1,37,64,000/- and other amounts and penalties under the Finance Act, 1994. The show cause notice (dated 14.10.2011) was replied to and the allegations made by the Revenue were refuted. Apart from various submissions, the appellant contended that it had entered into an agreement dated 30.06.2006 with JIL and that the allegation with respect to its liability on account of a Memorandum of Understanding dated 20.04.2006 was not correct. The Commissioner accepted the assessee's contentions and dropped the demand discharging the show cause notice.

6. The relevant part of the order reflecting this aspect is as follows:-

“32. Now, the noticee has submitted the legal agreement dt : 30-06-2006 duly signed by them as well as by M/s Jefferies with their reply to the show cause notice and

has also produced the same for my perusal at the time of personal hearing. I find in the fact and circumstances of the present case the very first issue before me is whether the agreement dated : 30-06-2006 is a legal document are not as alleged in the impugned SCN, in as much as classification of services received by the noticee depends upon the sanctity of the said agreement as the same was discarded by the department ab-initio on failure of the noticee to produce the signed copy during the course of investigation.

33. I find it is an admitted fact that according to the balance sheet for the year 2006-07 the noticee had raised foreign currency convertible bonds of US dollars 50 millions and had incurred a foreign currency expenditure of Rs.11.47 crores for raising such bonds. Further the noticee had also entered into a memorandum of understanding on 20-04-2006 with M/s Jefferies London which is not a formal agreement but simply a letter of engagement singyfyng intention of both the parties. As per said MOU letter dt : 20-04-2006, Jefferies were to be engaged to act as legal manager and sole placement agent for the noticee in connection with the proposed structuring, issuance and sale of equity linked securities of the noticee company. However the said MOU Letter states in the opening para itself that the final terms and conditions governing the transactions shall be mutually agreed by the company and M/s Jefferies.

34. The letter signed by and exchanged between the noticee and Jefferies, inter alia contains the following clauses –

The company appoints Jefferies as its exclusive agent and Jefferies accepts the appointment and agrees

to act as the exclusive agent of the company and to use its commercially reasonable efforts to identify and introduce potential purchasers to the company in connection with the purchase of securities.

35 to 43 xxx xxx xxx

44. *Further I find the ibid letter of engagement dated 20-04-2006 was translated into a further legal agreement MOU between the parties vide subscription agreement dated 30-06-2006, duly signed, dated and delivered and is legally binding upon both the parties.*

45. *The subscription agreement dated 30-06-2006, inter alia, provides for the following clauses –*

(a) Preamble/Details

The issuer proposes, subject to the compliances all conditions set out herein. To issue US \$ 4,00,00,000 3.5% convertible bonds due 2011. In addition, the issuer grants the manager an option to subscribe or procure subscription for up to an additional US \$ 100,00,000 3.5% convertible bonds due 2011.

(b) Issue of the bonds (Clause 3)

The issuer undertakes to the manager (subject to the terms and in accordance with provisions of this agreement) to issue the firm bonds to the manager or as a manager may direct on the closing date.

(c) The option (Clause 4)

The issuer hereby grants to the manager an option to subscribe or procure subscription for all or any of the optional bank. This option shall be exercise during the option period in whole or in part, on one or more occasions, solely at the discretion of the manager by service on the issuer of option notice's on or before the

expiry of the option period, such option notice's shall be irrevocable and shall set forth the aggregate principal amount of optional bonds as to which the option is being exercised.

46 to 47 xxx xxx xxx

48. *Further M/s Jefferies have not issued any invoice for the underwriting services and the noticee has also not made the remittance from India. The payments has been made to M/s Jefferies by way of their appropriation out of the issue proceeds which is evidenced by them "cross receipt" (which is as per the provision of clause 5 of subscription agreement).*

49. *I further find that the subscription agreement dt : 30-06-2006 is the authentic, genuine and legally binding agreement and the so called agreement (letter of engagement) dated 20-04-2006 was not a binding agreement which is clearly evident from the following paras/language in the said letter dt : 20-04-2006.*

(A) The final terms and conditions governing the transactions shall be mutually agreed between the company and Jefferies.

(B) The terms of the transaction will be governed by one or more definitive agreements. This agreement is not intended to constitute a binding agreement to consummate the transaction or to enter into any agreement in relation to the transaction nothing in this agreement shall give rise to any underwriting or purchase obligation on the part of Jefferies in relation to the transaction. Similarly, nothing in this agreement shall give rise to any obligation on the part of the company to issue or sell the securities or to enter into any agreement in relation thereto.

50. Further, clause 21 of the agreement dt : 30-06-2006 states that “this agreement and the offering circular, constitute the entire agreement and understanding of the parties and supersedes any previous agreement between the parties relating to the subject matter of this agreement.

51. Accordingly reading of both the letter dt : 20-04-2006 and agreement dt : 30-06-2006 indicates that the agreement dt : 30-06-2006 is the only legal document following the letter dt : 20-04-2006. Both are genuine documents but the later one is legally binding and the one which has superseded the earlier one, i.e. dt : 20-04-2006.”

7. After considering these materials and on the basis of other reasons, the show cause notice was discharged. The appeal, which the Revenue preferred to the CESTAT, disputed the findings. The Revenue’s arguments in its grounds of appeal on this point are as follows:-

“The adjudicating authority failed to consider that the said letter dated 20.04.2008 was a relevant evidence in the present case and established the fact that the foreign service provider was indeed engaged and appointed by the notice as lead manager and sole placement agent for certain purpose and provision of services for raising FCCB of US\$50 Millions in the FY 2006-07. The adjudicating authority erred in taking into account only the agreement MOU between the said parties dated 20.04.2006. It is pertinent to take note of the relevant fact that the transaction between the parties were initiated only through letter agreement dated

20.04.2006 and it is relevant as to the purpose, the motive and the intention behind the transaction to be carried out between the parties. Also, it is not disputed that only the letter agreement dated 20-04-2006 was translated into a further agreement MOU between the parties vide subscription agreement dated 30-06-2006.

The adjudicating authority further failed to consider the essence and substance of the said further agreement dated 30.06.2006 that the essential purpose remained the same, i.e. to issue US \$ 40 Millions 3.5% convertible bonds due 2011. Also, it is pertinent to take note of the fact that even in terms of the agreement dated 30.06.2006, the foreign service provider remained the manager to the issue of FCCB for raising FCCB of US\$ 50 Millions. The notice granted only as option to the manager, i.e. the foreign service provider, to subscribe to the bonds and, moreover, this option was at the discretion of the said service provider. Thus, the Adjudicating Authority failed to appreciate that even in terms of the later agreement dated 30.06.2006 the relationship between the notice and the foreign service provider remained as that of an 'issuer of the FCCB' and 'manager to the issue of the FCCB', respectively. Thus, the 'underwriting' was only optional and only an optional accessory or auxiliary service vis-à-vis the essential service provided by the foreign service provider in relation to the raising FCCB of US \$ 50 Millions. Therefore, the findings of the Adjudicating Authority were perverse to the extent that in terms of the later and binding agreement dated 30.06.2006, the service provided were 'underwriting service' and not 'Banking and Other Financial service'."

8. In the impugned order the CESTAT noticed this aspect and remitted the matter for *de novo* fresh consideration by the Commissioner in the following terms.

“7. After hearing both the parties and on perusal of record, it appears that in the instance case the main controversy is pertaining to the agreement between the service provider and service recipient. It is the allegation that in the memorandum of understanding, the scope has been enhanced and the new document has been given at the time of adjudication. The contention of the department is that both the agreements has different contents. When it is so, then we set aside the impugned order and remand the matter to the original authority to verify the genuineness of the agreement and decided the issue denovo but by providing an opportunity of hearing to the respondent. Fresh evidence, if need be, may be admitted as per law.”

9. Before this Court, the appellant contended that given the nature of findings by the Commissioner and the limited nature of the appeal by the Revenue – which did not appear to indicate any dispute vis-à-vis the genuineness of the agreement of 30.06.2006, the open remand on all aspects, was not justified.

10. Learned counsel for the Revenue on the other hand submitted that the appellant had disclosed the existence of the agreement for the first time in the reply to the show cause notice and appears to have thereafter produced it and as a result it could not be verified. It was submitted that in view of these peculiar features, the remand order of

the Tribunal was in order. It is evident from the consideration of the record that the Commissioner rendered elaborate findings on both the genuineness of the document (agreement dated 30.06.2006) as well as on its interpretation. Given these facts, if the Tribunal was in doubt as to whether the document was genuine, the least that it could have done was to limit the findings on remand while retaining Revenue's appeal on the file. This Court notices that CESTAT has been repeatedly passing remand orders virtually abdicating its responsibility as an Appellate Court. This trend is unhealthy given that it is the final Court of fact and is required to adjudicate both on the issues of fact and law, especially in matters such as the present one i.e. where the appeal before it was by way of the first appeal.

11. In these circumstances, this Court hereby sets aside the impugned order. The Tribunal is hereby directed to render specific findings on the issue after taking into account the submissions of the parties and calling for a limited remand findings on the issue of genuineness of the document alone.

The appeal stands allowed in the above terms.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JULY 17, 2018

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