2013 (2) ECS (181) (Tri - Mum)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

WEST REGIONAL BENCH AT MUMBAI

M/s Kotak Securities Ltd.

Versus

Commissioner of Service Tax, Mumbai - I

Applications No. : ST/S/898/11 in Appeal No. ST/332/11

Arising out of : Order – in – Appeal NO. MI/AV/64/2011 dated 31.01.2011.

Passed by: The Commissioner of Central Excise (Appeals), Mumbai - I

Date of Hearing: 21.03.2013

Date of Decision: 08.04.2013

M/s Kotak Securities Ltd. Appellant

Versus

Commissioner of Service Tax, Mumbai - I Respondent

Represented by:

Shri J H Motwani, Advocate – Appellant

Shri S. Dewalwar, Addl. Cmmr.(AR) – Respondent

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HON'BLE SHRI P.R. CHANDRASEKHARAN, MEMBER (TECHNICAL)
HON'BLE SHRI ANIL COUDHARY, MEMBER (JUDICIAL)

"Therefore, research on equity is a product research. During the relevant time, the term Market Research Agency was defined in section 65 (69) of the Finance Act, 1994 as "any commercial concern engaged in conducting market research in any manner, in relation to any product, service or utility, including all types of customized and syndicated research services". We are of the view the equity research undertaken by the appellant falls within the scope of this definition and accordingly, the appellant is, prima facie, liable to pay service tax on the said activity." [Para 5.4]

"As held by this Tribunal and affirmed by the hon'ble apex court in the Nizam Sugar Factory Ltd. case, it is the date of knowledge that is relevant for computing the time limit. In this case, within one year from the date of knowledge, the department has issued the demand notice and therefore, prima facie, the question of time bar does not apply in the facts of the present case." [Para 5.5]

Per: Shri P.R. Chandrasekharan, Member (Technical)

1. The appeal and stay application are directed against Order – in – appeal No. MI/AV/64/2011 dated 31.01.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai.

2. The appellant, M/s Kotak Securities Ltd., Mumbai, is a joint venture company between M/s Kotak Mahindra Bank Ltd. and M/s Goldman Sachs Ltd. They have a research department which conducts equity research and prepare research reports on the financials of the companies listed on the bourses and the stock market performance of equity shares of such companies. In the Profit and Loss account for the years 99 – 2000 to 2002 – 03, they had shown "Free income / Research Fees received" amounting to Rs. 6,51,79,558/- on which no service tax, had been paid by the appellant company. The department was the view that the activity pertaining to research undertaken by the appellant would merit classification under the category of "Market Research Services" and the appellant is liable to pay service tax thereon. Accordingly, a show cause notice dated 3/3/03 was issued to the appellant demanding service tax of Rs. 32,58,978/- on the receipt of Rs. 6,51,79,558/- along with interest thereon and

also proposing to impose penalties under the provisions of the Finance Act, 1994. The notice was adjudicated and the activity undertaken by the appellant was classified under “Market Research Services” and the service tax demand of Rs. 32,58,978/- was confirmed along with interest thereon and also imposing penalties on the appellant firm under section 76 and 78 of the said Finance Act. The appellant preferred an appeal before the lower appellate authority who upheld the demand for service tax along with interest and the penalty under section 78 while setting aside the penalty under section 76. Hence the appellant is before us.

3. The ld. Counsel for the appellant made the following submissions : -

a) The equity related research inputs provided by the appellant to their external clients or M/s Kotak Mahindra Capital Company Ltd. (KMCC in short.) can not be construed as market research services as they do not pertain to research in relation to any product, service or utility or as customized or syndicated research services.

b) There is not element of service being rendered by the appellant to KMCC and the services are provided by the appellant and KMCC jointly of clients on a cost / revenue sharing basis. Sharing of cost / revenue can not be construed as consideration for service. Reliance is placed on the circular No. 109/3/2009 – ST dated 23.2.09 issued by the CBEC in the context of distribution of cine films. The amounts sought to be shared are in the nature of maintenance electricity, telephone, stationery, postage, staff costs, etc. which are clearly in the nature of expenses incurred for the equity research department / facility.

c) There is no service provider – client relationship between the appellant and KMCC. KMCC is an affiliate company of the appellant under common shareholding of the Kotak Mahindra Group.

d) Reimbursement of expenses for research facility are at actual and therefore, not liable to service tax.

e) The demand is barred by limitation as the appellant had vide letter dated 25.03.2004 and 7.09.2004 had submitted alls the details to the department and the show cause notice was issued on 3.3.2005. Therefore, the allegation of suppression of facts is not sustainable so as to invoke the extended period of time for confirmation of demand.

In view of the above the appellant prays for grant of stay.

4. The ld. Additional Commissioner (AR) appearing for the Revenue re – iterates the findings of the lower adjudicating and appellate authorities.

5. We have considered the rival submissions very care fully.

5.1. We have perused the agreement dated 23.4.2002 between the appellant and M/s KMCC. As per clause 4 of the said agreement "KMCC has requested KS (appellant) to assist it in the marketing issues managed by KMCC and to undertake research activities. The agreement also specifies the services to be provided by the appellant which are as follows : -

a) Marketing of issues managed by the KMCC ……..

b) Undertaking research activities either for specific clients or general research for the internal use of KMCC.

c) Sharing the services of Ms. Falguni Nayar…….. in respect of Corporate Finance Transactions.

The agreement also provides for sharing of income towards Public Issue, Marketing Activities and Private placement of securities between the appellant and KMCC equally and sharing the cost of Research Department in the ratio of 1:2 between KMCC and the appellant. Sharing of expenses on common usage of facilities is as per the details given in the annexure to the agreement.

From the above agreement it is evident that the appellant has been providing research support to KMCC and the consideration for the said service is by way of sharing of costs.

5.2. Allegation in the show cause notice is that the appellant has shown an income during the impugned period (October 2000 to March, 2003) in their P/L account Rs. 6,51,79,558/- under the head "Fee income / Research Fees" received. However during the said period, as per the evidence produced by the appellant before the lower appellate authority, the share of revenue towards IPO / Placement of securities etc. is only Rs. 3,75,000/-. Sharing of expenses for

common usage facilities cannot obviously come under Research Fees. So is the expense relating to sharing of the services of Ms. Falguni Nayar. In other words, neither before the appellate authority nor before this Tribunal, the appellant has presented any evidence to show that the amount received pertained to any activity other than "Research Activities" undertaken by the appellant for KMCC. In the absence of any such evidence produced by the appellant, the only conclusion that can be reached is that the income shown in the P/L account pertained to research activities undertaken by the appellant during the impugned period.

5.3. As regards the argument that the research fee received is towards sharing of expenses and hence can not be treated as consideration, this argument is not acceptable for the following reasons. When a service provider charges a consideration, he takes into account all the expenses incurred by him and includes an element of profit. Thus expenses are an integral part of the consideration charged. It may also happen that when the market is down, the service provider may not be able to make any profit but may be rendering the service at a loss. That does not mean that the amount received is not a consideration for the service rendered. Service tax is not a tax on income or profits but a tax on provision of service. Whatever amount is charged for such provision, service tax is payable, irrespective of whether any profit is made by the service provider in the said transaction.

5.4. Another argument has been raise that the service provided does not come under the category of 'Market Research Services' as they do not pertain to any product, service or utility. It is not in dispute that the appellant conducted equity research and prepared reports on the financials of the companies listed in the stock exchanges and the stock market performance of equity shares of such companies. Equities definitely come under the categories of products and considered as goods under the Sale of Goods Act, 1934. Therefore, research on equity is a product research. During the relevant time, the term Market Research Agency was defined in section 65 (69) of the Finance Act, 1994 as "any commercial concern engaged in conducting market research in any manner, in relation to any product, service or utility, including all types of customized and syndicated research services". We are of the view the equity research undertaken by the appellant falls within the scope of this definition and accordingly, the appellant is, prima facie, liable to pay service tax on the said activity.

5.5. The last issue for consideration is the issue of time bar. The argument is that show cause notice for demand of service tax for the period October, 2000 to

March, 2003 has been issued only in March, 2005 and hence the demand is time barred. It is on record that the appellant did not inform the department of the activities undertaken in this regard any time and only in March 2004 and September 2004 they informed the activities undertaken by them to the department subsequent to the department initiating investigation on the activities of the appellant. As held by this Tribunal and affirmed by the hon'ble apex court in the Nizam Sugar Factory Ltd. case, it is the date of knowledge that is relevant for computing the time limit. In this case, within one year from the date of knowledge, the department has issued the demand notice and therefore, prima facie, the question of time bar does not apply in the facts of the present case.

5.6. We also note that subsequently, the appellant has started paying service tax on the research activities undertaken by them. Invoices dated 27.3.2009 and 31.01.2013 produced before us, evidence this fact.

5.7. The appellant has not pleaded any financial hardship. Therefore, in the absence of a prima facie case in favour of the appellant, the balance of convenience lies in favour of Revenue and, therefore, as held by the hon'ble High Court of Andhra Pradesh in the case of SQL Star International Ltd. – 2012 (25) STR 113 (AP), pre – deposit of dues adjudged can be ordered.

6. In view of the foregoing, we are of the prima facie view that the appellant has not made out any case in their favour for grant of stay. Accordingly, we direct the appellant to make a pre – deposit of 50% of the service tax amount confirmed against them within a period of eight weeks and report compliance on 10.06.2013. On such compliance, the balance amount of dues adjudged against the appellant shall stand waived and recovery thereof stayed during the pendency of the appeal.

(Operative part of the order pronounced in the Court on 08.04.2013)