CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,
BANGLORE-560009

COURT - I

Service Tax Appeal No. 5 of 2010

[Arising out of the Order-in-Revision No. 10/2009/ST dated 16.10.2009 passed by the Commissioner of Central Excise, Customs and Service Tax, Cochin.]

M/s. Kitco Ltd. **....Applicants**
Ravipuram
Cochin – 682 018.

Vs.

The Commissioner of Central Excise and Service Tax **....Respondents**
C. R. Building,
I.S. Press Road,
Cochin – 682 018.

Appearance:

Mr. Paulose C. Abraham, Advocate **....For Applicants**
Mr. K. Vishwanatha, Superintendent (AR) **... For respondents**

CORAM:

HON'BLE DR. D. M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing : 06.04.2023
Date of Decision : 07.07.2023

FINAL ORDER NO. 20673 / 2023

Per: D. M. MISRA

This is an appeal filed against Order-in-Original No.10/2009-ST dated 16.10.2009 passed by the Commissioner of Central Excise, Customs and Service Tax, Cochin. Commissionerate.

2. Briefly stated the facts of the case are that the appellants are registered with the Department for providing various taxable services viz., Consulting Engineering, Market Research Agency,

Manpower Recruitment Agency, Management Consultant Service, etc., during the relevant period. Alleging that the appellant had provided 'Franchisee Service' during the period May 2006 to November 2006, by an agreement dated 20.5.2006, appellant entered with The Institute of Hotel Management Studies, Mars Complex, Poothole, Thrissur. A Show-cause notice was issued to them for recovery of service tax amounting to Rs.2,04,419/- for the said period with interest and penalty on 28.08.2007. On adjudication, the show-cause notice was dropped by the Assistant Commissioner. Later, a review by the Commissioner of Service Tax, notice was issued to the appellant in this regard under Section 84(1) of the Finance Act, and after affording an opportunity to the appellant, the Commissioner confirmed the demand and imposed penalties under Section 76, 77 and 78 of the Finance Act, 1994. Hence, the present appeal.

3. The learned advocate for the appellant has submitted that the appellant is an Engineering, Management and Technical Consulting firm. By an agreement with The Institute of Hotel Management Studies proposed a project item "KITCO Hotel Management Education Project" for imparting theoretical and practical knowledge in the field of hotel management. It is his contention that a careful reading of the said agreement, it is evident that the same is an arrangement whereby the appellant and The Institute of Hotel Management Studies have agreed jointly to offer training in hotel management, dividing various responsibilities between two of them. It is his contention that the arrangements are akin to joint

venture and cannot be considered to be franchisee agreement. He has forcibly argued that there is no grant of representational right by the appellant to The Institute of Hotel Management Studies and mere use of word 'Franchisee' in the said agreement is not determinative of the nature of the agreement. He further submitted that the appellant is not a hotel or hotel management institute and they do not have any specialised skill, knowledge or expertise in the hotel management or hotel management training. The hotel management/hotel management training is not associated with the appellant and their logo is not identified with such service. Thus, the basic requirement of the service in question being one identified with the appellant is not satisfied. Thus, there cannot be grant of any representational right so as to qualify as a 'franchisee service'. In support, he has referred to the judgment of this Tribunal in the case of **Mahanagar Telephone Nigam Ltd. Vs. CCE & ST, New Delhi: 2021 (50) GSTL 292 (Tri.-Del.)** and decision of Hon'ble Delhi High Court in the case of **Delhi International Airport P. Ltd. Vs. Union of India: 2017 (50) STR 275 (Del.)**.

4. Per contra, the learned Authorised Representative for the Revenue referring to the website of the appellant has submitted that M/s. Kitco Ltd. which was established in 1972 is the first technical consulting organisation rendering services on multi-disciplinary, multi-dimensional field and also expanding consultancy services in architectural, engineering, technical, management and financial sectors. He has submitted that they have got more than

250 well qualified and experienced professional in various projects and their HRD division has been undertaking various youth empowerment training programme for enabling the youth to attain wage employment in different sectors, etc. He has submitted that by agreement dated 20.05.2006 entered into by the appellant with The Institute of Hotel Management Studies for a project 'KITCO Hotel Management Education Project'. As per the said agreement, the institute conducted hotel management courses as per the syllabus, arranged for industrial training of the students and the appellant conducted the final examination and provided certification to the successful candidates. The entire course structure and curriculum was prescribed by the appellant and The Institute of Hotel Management Studies required to follow it strictly. The overall responsibility of conducting the course as per the agreement was on the institute which also required to submit reports/records to the appellant periodically or whenever required. The percentage of fee sharing has also been prescribed under the said agreement. Under Clause 2(b) of the agreement, a detailed 'Guidelines to Franchisees' was also issued to the institute, a copy of which even though asked to be presented during the hearing but not submitted by the appellant. The infrastructure and facilities for training at its own premises and its costs was the responsibilities of the institute and for using the Kitco logo / emblem, name board, etc., for exhibiting the same in the institute was the decisive factor to arrive at a conclusion by the adjudicating authority that the agreement is a 'franchisee agreement' since it granted representational right with the institute.

4.1 Further, referring to the definition and scope of the 'franchisee service', the learned Authorised Representative has submitted that after amendment brought into the said agreement with effect from 16.06.2005 it enlarged its scope thereby the main thrust was laid down on providing representational right by the franchisor to the franchisee. The terms and conditions of the agreement dated 20.05.2006 and the activities undertaken by the appellant clearly fall within the scope of the amended definition of 'Franchisee Service'. Supporting the findings of the adjudicating authority, that the appellant had clearly allowed the franchisee to use Kitco name, logo, emblem, and name board of the institute implies that the appellant granted representational right to the institute; the appellant was receiving 20% of the course fee and 50% of the examination fees, while the institute incurs all expenses involved in addition to providing infrastructure facilities and the appellant is immune to any losses arising out of the project. Revenue claimed that the same is a joint venture between the appellant and The Institute of Hotel Management Studies referring to clause 2(b) of the agreement. The learned Authorised Representative submitted that the relation between appellant and the institute is that of franchisor and franchisee. In support of his contention, the learned Authorised Representative referred to the judgments of the Tribunal in the case of **M/s. Delhi Public School Society vs. Commissioner of Service Tax: 2013 (32) STR 179 (Tri.-Del.)** and **M/s. CMC Ltd. Vs. Commissioner of Central Excise, Hyderabad: 2011 (23) STR 586 (Tri.-Bang.)**.

5. Heard both sides and perused the records.

6. The limited issue involved in the present appeal for determination is: whether the services provided by the appellant under written agreement dated 20.05.2006 with Institute of Hotel Management Studies, is a franchisee service attracting service tax or otherwise. The main argument of the learned advocate for the appellant is that the agreement dated 20.05.2006 entered between the appellant and Institute of Hotel Management Studies is in the nature of Joint Venture agreement and there is no relation of franchisor and franchisee between them.

7. On the previous date of hearing on 11.1.2023, the Bench directed the Appellant to place on record the document viz. "guidelines to franchisee" referred to in the said agreement dated 20.05.2006. However, the learned advocate for the appellant submitted that inspite of their best efforts they could not locate the said franchisee guidelines and the matter be decided on the basis of records.

8. It is his contention that mere mention of the words 'franchisee' in the agreement cannot be construed that the arrangement between the appellant and Institute of Hotel Management Studies is a franchisee agreement. The learned advocate submitted that the project to impart training in the area of hotel management to interested students has been mooted by the appellant and accordingly, the agreement for execution of the said proposal viz., project titled "KITCO Hotel Management

Education Project" for imparting theoretical and practical knowledge in the field of hotel management emerged and consequently the agreement dated 20.5.2005 executed.

9. To understand the implication of the arrangement between the appellant and the Institute of Hotel Management Studies, the crucial document which need to be analysed is the agreement dated 20.05.2006. The clause (1) indicates that the Institute will conduct the said course and the syllabus and training of the students will be prescribed by KITCO, who will conduct the final examination and provide certification to successful candidates. Clause (2) of the said Agreement stipulates the division of the work between the appellant and the Institute. The sub-clause (a) stipulates that the Institute will organise public campaign about the course through advertisements. Sub-clause (b) prescribes that the Institute will provide the premises for the said project at its own cost and responsibility: the infrastructure and facilities as detailed in the **guidelines to franchisee** issued to the Institute and would carry out modifications and alterations as directed by the appellant from time to time. The Institute will bear full responsibility including all expenses recurring or otherwise for maintenance and upkeep. No alterations or changes will be made to infrastructure without appellant's written consent. Sub-clause (c) and (d) prescribes strict adherence to the terms of the contract and guidelines of the project and also any additional instructions that may be issued by the appellant from time to time; the institute has to strictly adhere to the course structure and syllabus provided by the appellant. Sub-clause (f) indicates that the institute will be in-charge of the project

administration viz., collection of fees, arrangement of training, providing books and reference materials for conducting the course, etc. Sub-clause (h) stipulates that Institute will not utilise the name or logo of KITCO or KITCO Hotel Management Education Project in any materials, advertisements, hoardings, name boards, letter heads, etc., without prior and written approval from the appellant. Sub-clause (i) stipulates the Institute will obtain prior permission from appellant for releasing advertisement, etc. Further sub-clause (j) prescribes for submission of monthly reports and statements of accounts to appellant periodically. Clause (3) and (4) prescribes sharing of course fees between the appellant and the Institute.

10. A cumulative reading of the stipulations/conditions under the said agreement does not lead to an inference that the arrangement between the appellant and the Institute is that of a Joint Venture.

11. More or less similar circumstances were considered by this Tribunal in the case of The Delhi Public School Society vs. CST, New Delhi: 2013 (8) TMI 92 – CESTAT NEW DELHI. In that case, while summarising the arrangement between The Delhi Public School Society and several schools in Delhi and elsewhere in India, the Tribunal had an occasion to examine and lay down the characteristics in identifying between Joint Venture agreement and that of a franchisee. After referring to the principles relating to interpretation of the agreements laid down by the House of Lords in series of cases, the Tribunal observed:

> "In Para 4 (supra) we have reiterated the relevant clauses of the representative agreement relevant to the present lis. On a true and fair

> analyses of the agreements between the parties it is clear that no only is the assessee wholly immune to any losses arising out of the enterprise – the educational institution to be established pursuant to the agreement but has also no entitlement to any share in the profits arising therefrom. Any accretions to the enterprise, accruing as a result of profitable running of the schools would constitute assets which would be transferred only to the other party (not the assessee) vide clause 9 of the agreement. The participation of the assessee in the agreement of the schools, through its representation on the BoM is calibrated only for effectuation of the assesses perceived expertise and experience, in establishing and running quality English Medium Schools. For this service provided, the assessee receives remuneration as clearly indicated in clause 3 of the agreement. All financial inputs, obligations and liabilities, including liabilities arising out of any litigation in respect of the enterprise is to the account of the other party and to the exclusion of the assessee. In the totality of circumstances neither the indicia of a partnership or a joint venture is discernable from the terms and conditions of the agreements between the parties, particularly since there is neither a contribution of assets nor a sharing of profits and / or losses provided in the agreements between the parties. These normative ingredients of a partnership or a joint venture are absent."

12. Applying the principle laid down in the said judgment of the Tribunal, we find that there is no arrangement of sharing of profits and losses between the parties nor there is contribution of assets by the appellant in implementing the project; entire burden of raising the infrastructure, maintenance, etc., rests with the Institute only. Also, there is no participation in preparing the syllabus but exclusively under the control of the appellant. The Trade name or logo of the appellant has been used and displayed for advertisement of the course, and it cannot be liberally used by the Institute. In our opinion, therefore, the agreement is in the nature of franchisee agreement. It undoubtedly satisfies the basic criteria for attracting levy under the franchisee services, inserted through amendment dated 16.6.2005, that is, grant of representational right to sale or manufacture goods or provide service or undertake any processes identified by the franchisor, etc. In the present case, the Institute is given right to use their logo etc., and advertise the said project to attract students to join the

training programme and thereby representational right has been extended by the appellant to the Appellant.

13. The judgments cited by the learned advocate viz. Mahanagar Telephone Nigam Ltd. (supra) and Delhi International Airport Pvt. Ltd. (supra) in support of their plea that theirs is a joint venture, in our view, is misplaced. The said judgments are delivered in different set of circumstance, hence the principles laid down in the said cases is not applicable to the case in hand. In Mahanagar Telephone Nigam Ltd.'s case the appellant developed a land as a Core Knowledge Park and accordingly invited proposals for a Joint Developer Partner for implementation of the project. Similarly, in Delhi International Airport P. Ltd. (supra) also, the Airport Authority of India invited proposals for Long Term Operations, Management and Development Agreements for Delhi and Mumbai Airports and consequently, a Joint Venture agreement was entered into with the successful bitter viz., The consortium led by the GMR Group. Thus, the principles referred in the said judgments are totally on a different factual matrix, hence are not applicable.

14. We find that the demand is issued for normal period, on the basis of interpretation of the relevant provisions, in scrutinising the the claim of the assessee that that the arrangement with the institute is not a franchisee services, but joint venture agreement, hence imposition of penalty, in the facts of the present case under various provisions of Finance Act,1994, in our opinion is not sustainable and accordingly, set aside.

15. In the result, the impugned Order is partly upheld except the penalties imposed. The appeal is partly allowed to the extent mentioned above.

*(Order pronounced in Open Court on **07.07.2023**.)*

(D. M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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