CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

SERVICE TAX APPEAL NO. 51138 OF 2017

(Arising out of Order-in-Original No. ALW-EXCUS-O-I-O-COM-114/16-17 dated March 30, 2017 passed by the Commissioner of Central Excise and Service Tax, Alwar)

State Bank of Bikaner & Jaipur ... **Appellant**
(since merged with State Bank of India)
[SBBJ Head Office]
Tilak Marg, C- Scheme
Jaipur (Rajasthan)

VERSUS

Commissioner of Central Excise & Service Tax ...Respondent
Block-A, Surya Nagar
Alwar – 301 001
Rajasthan

APPEARANCE:

Shri Sanjay Khemani, Consultant for the Appellant
S/Shri J.P. Singh & Vivek Pandey, Authorised Representatives of the Respondent

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50737/2020

DATE OF HEARING: 26.02.2020
DATE OF DECISION: 05.08.2020

JUSTICE DILIP GUPTA :

The order dated March 30, 2017 passed by the Commissioner of Central Excise & Service Tax, Alwar[1] has been

---

1 the Commissioner

assailed in this Appeal filed by the State Bank of Bikaner & Jaipur[2], which has since merged with the State Bank of India. The Commissioner has confirmed the demand of Rs. 110,84,38,781/- towards service tax with interest under section 75 of the Finance Act, 1994[3] and penalty under section 78 of the Finance Act.

2. The Appellant Bank has been providing various financial services in India under the category of "banking & other financial services" as defined under section 62(12) of the Finance Act. Amongst the various services it provides, the Appellant Bank also provides banking services to the importers/exporters by facilitating the settlement of payment between them in connection with the import and export of goods/services. The Foreign Exchange Management Regulations require all foreign trade transactions to be necessarily routed through normal banking channels. For settlement of payment between the importer and exporter, banks of importer and exporter have to play their role in making and collecting the payments. If the banks of the importer and exporter are different, then the settlement transactions are governed by the URC 522 and UCP 600 protocols issued by International Chamber of Commerce. The protocols define the obligations of each party (i.e exporter, importer and their respective banks) to International trade. In the absence of any specific agreement to the contrary, all contracts are governed by these protocols.

---

2 the Appellant Bank
3 the Finance Act

3. In the case of export trade, as per the specific instructions of Indian exporter, the Appellant Bank provides services like sending export documents to the exporter's buyers bank, collection for payment of bill of exchange. Similarly, in the case of import trade, at the specific request of the importer, the Appellant Bank provides services like issue of Letter of Credit, acceptance of Bill of Exchange, providing documents of title of the goods to the importer, making payment of Bill of Exchange on due date. The Appellant Bank charges commission/fees for the provision of such services to the exporters/importers and pays service tax on such services. The rendering of such service by the Appellant is not in dispute in this Appeal.

4. It needs to be noted that for completion of an export or import transaction, at least two banks are involved. One bank is based in the country of the exporter and the other bank is based in the country of the importer. The bank with whom the importer or exporter, as the case may be, holds a bank account in a foreign country shall be referred to as the **Foreign Bank**. A **Foreign Intermediary Bank** is a bank in a foreign country that acts as an intermediary between the bank of the exporter and the bank of the importer in a foreign country, where the bank of the exporter and the bank of the importer do not have any direct banking relationship.

5. A transaction relating to realization of export proceeds involves two services :

(a) Services provided by the Appellant Bank to the exporter, for which it levies its own charges and service tax is collected and paid by the Appellant Bank; and

(b) Services provided by a Foreign Bank to the importer in a foreign country.

6. In an export transaction from India, the exporter submits the export documents to the Appellant Bank and informs the name and address of buyer's bank for sending the export documents against acceptance and payment of Bill of Exchange. The Appellant Bank forwards these documents to the Foreign Bank or the Foreign Intermediary Bank for collection of payment from the importer. If the exporter decides to bear all the bank charges, then the foreign bank charges its fees from the exporter for handling of export documents and collection of export proceeds. The foreign bank charges are then recovered from the exporter by deducting the foreign bank charges from the amount collected from the importer.

7. The audit team of the Department raised an objection that the Appellant Bank had not paid service tax on foreign bank charges under the reverse charge mechanism and sought details of such charges paid for the period from July 2012 to March 2015.

8. The Appellant Bank submitted that it did not maintain such data and despite its best effort could also not collect the details of foreign bank charges, as it was not recorded in its system. The Appellant Bank, however, provided the aggregate of the amount short realized on behalf of customers, which could be due to various reasons, like discrepancy charges, short shipment, discount allowed, early pay in, as agreed between exporter and importer. The said data was provided by the Appellant Bank for the Financial Year 2014-15.

9. However, a show cause notice dated February 08, 2016 was issued to the Appellant Bank stating that the Appellant Bank appeared to have not paid service tax amounting to Rs. 110,84,38,781/- during the period from October, 2010 to March, 2015 on foreign bank charges under the reverse charge mechanism in contravention of the provisions of sections 67 and 68 of the Finance Act read with rule 6 of the Service Tax Rules, 1994[4]. The relevant portion of the show cause notice is reproduced below:

> "6. **And whereas from the facts narrated above, it appears that the foreign banks have provided services of transfer/exchange of documents and transfer of money relating to exports made by exporters in India, who have received moneys through the assessee bank against their exports. It thus appears that the foreign banks have provided Banking & Other Financial Services as defined under clause (12) of Section 65 of the Finance Act, 1994 and taxable under sub-clause (zm) of clause (105) of Section 65 of the Finance Act, 1994 to the assessee**. Clause 12(a)(ix) of Section 65 of the Finance Act, 1994, as it stood prior to 1.7.2012, included the following services under the taxable category of Banking & Other Financial Services :

---

4 the Rules

> "(ix) other financial services, namely, lending, issue of pay order, demand draft, cheque, letter of credit and bill of exchange, transfer of money including telegraphic transfer, mail transfer and electronic transfer, providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults, operation of bank accounts,"

It follows that the services received by the assessee from the foreign banks appear to be financial services relating to letter of credit, bill of exchange and relating to transfer of money along with relevant documents including telegraphic transfer, mail transfer and electronic transfer which are specifically covered under the said clause (ix). For the post 1.7.2012 period, Section 65B(44) and 65B(51) of the Finance Act, 1994 categorically covers the said activity as a taxable service.

In terms of the provisions of Section 66A of the Finance Act, 1994 the assessee is liable to pay service tax on the value of such services treating such taxable services as if the assessee i.e the recipient had himself provided the service in India. **Since the services are neither covered in the negative list of services nor covered by exemption under notification no. 25/2012-ST dated 20.06.2012 it appears that the same are taxable in terms of Section 65B(44) and (51) of the Finance Act, 1994 with effect from 01.07.2012 and the assessee, being recipient of service in the taxable territory, is liable to pay service tax thereon in terms of Notification No. 30/2012-ST, dated 20.06.2012**. In view of the details provided by the assessee and the calculations made in terms of Section 72 of the Finance Act, 1994, it appears that the assessee have not paid service tax amounting to Rs. 110,84,38,781/- (Service Tax- Rs. 107,61,54,157 + Ed. Cess- Rs. 215,23,083/- + S. & H.E. Cess- Rs. 1,07,61,541/-) on the foreign bank charges amounting to Rs. 9,49,54,77,855/- paid by them during the period from October, 2010 to March, 2015 as per details given in Annexure-'A' to this show cause notice. However, the assessee appears to have not paid the said amount of service tax in contravention of the provisions of Section 67, 68 and 72 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 and the amount of service tax appears to be recoverable from them in terms of Section 73(1) of the Finance Act, 1994 along with interest under section 75 of the Finance Act, 1994."

[emphasis supplied]

10. The extended period for issue of show cause notice contemplated under the proviso to section 73(1) of the Finance Act was also invoked.

11. The Appellant Bank filed a detailed reply dated March 09, 2017 to the aforesaid show cause notice. It not only contended that the show cause notice issued on February 08, 2016 for recovery of service tax for the period October 01, 2010 to March 31, 2015 was time barred since the show cause notice did not contain any evidence to indicate that there was any willful suppression on the part of the Appellant Bank, but also contended that the service tax could not be levied either for the period prior to July 01, 2012 or for the subsequent period. In regard to the period prior to July 01, 2012, the Appellant Bank pointed out that the Foreign Bank did not transact business of banking in India and, therefore, would not fall within the definition of a "banking company" under section 65(11) of the Finance Act, which is a pre-requisite for any service to fall under the category of "banking & other financial services", as contemplated under section 65(12) of the Finance Act. It was also pointed out that the services rendered by the Foreign Bank are to the foreign buyers, on whose behalf it acts for making the payment to the Indian exporters through the Appellant Bank and, therefore, no service was provided by the Foreign Bank to the Appellant Bank. For the period post July 01, 2012, it was contended that the Appellant Bank is not required to pay any amount of service tax on a reverse charge mechanism because both the Appellant Bank and the Foreign Bank are acting as intermediary/agent while providing service to their respective customers. The Appellant Bank also contended that even if it is assumed that the Foreign Bank had rendered some service to the

Appellant Bank, then too the service is not for any consideration and, therefore, service tax could not have been charged from the Appellant Bank under a reverse charge mechanism.

12. The Commissioner, however, did not accept the contentions advanced on behalf of the Appellant Bank and confirmed the demand of service tax. The contention of the Appellant Bank that it had not received any service from the Foreign Bank was repelled by the Commissioner for the following reasons :

> "**20.1** …….**I find that the services viz. Letter of Credit, Bill of Exchange, Transfer of Money including Telegraphic Transfer, Mail Transfer and Electronic Transfer etc. have categorically been covered under clause (ix) of the Section 65(12) of the Finance Act, 1994 upto 30.06.2012 and with effect from 01.07.2012 under Section 65B(44) and 65B(51) of the Finance Act, 1994**. I further find that the assessee himself admitted that the foreign buyer through its banker in the foreign country opens an LC in favour of the Indian exporter with their bank i.e M/s SBBJ, that their duty is only to deliver the documents, as mentioned in the LC to the foreign bank and it is the sole responsibility of the exporter to provide to them all the documents; that the charges recovered by the foreign banker on account of any deficiency are directly on account of the exporter who bears the same. **Thus, I find that the Exporter cannot make the correspondence directly to the Foreign Bank. Since all the documents are routed through the assessee (M/s SBBJ) and no document is routed directly by the exporter to the foreign bank and furthermore, the exporter not aware about the services taken by the assessee (M/s SBBJ), therefore, I find that the services of foreign bank are received by M/s SBBJ**."
>
> **[emphasis supplied]**

13. The contention of the Appellant Bank that there was no agreement between the Appellant Bank and the Foreign Bank for

providing banking services was also not accepted and the relevant observations are as follows :

> "**20.2** ......I find that as per the provisions of Service Tax Law no where it has been mentioned that the written agreement is necessary for providing taxable service. As per the existing provisions of law both type of agreement i.e written as well as oral agreement is acceptable. Thus I find that the assessee (M/s SBBJ) is liable for payment of Service Tax under reverse charge mechanism under the provisions of in terms of the provisions of Section 66A of the Finance Act, 1994 and Notification No. 30/2012-ST, dated 20.06.2012 read with erstwhile Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 and Rule 2(1)(d)(i)(G) of the Service Tax Rules, 1994 under reverse charge mechanism."

14. In arriving at the aforesaid conclusion, the Commissioner relied upon a Trade Notice dated February 10, 2014 issued by the Commissioner of Service Tax-I, Mumbai. The Commissioner, therefore, held that the Appellant Bank availed the services of the Foreign Bank and was, therefore, liable to pay service tax on the bank charges/commission deducted by the Foreign Bank under the reverse charge mechanism, both before and after July 01, 2012. The relevant portion of the order is reproduced below :

> "**20.4** In view of the legal provisions as well as clarification issued after consultation with major Banks alongwith the representatives of IBA and FEDAI and relevant articles contained under URC522/URC600 which are being followed by all banks of world including M/s SBBJ, I find that M/s SBBJ have availed the services of the foreign bank and liable to pay service tax on the bank charges/commission deducted by the foreign banks under the reverse charge mechanism under the provisions of erstwhile Section 66A upto 30.06.2012 and with effect from 01.07.2012 under the provisions of Notification No. 30/2012-ST dated 20.06.2012. Hence, the contention of the assessee is not acceptable."

15. The Commissioner also did not accept the contention of the Appellant Bank that it was not a service recipient of the services rendered by the Foreign Bank. The Commissioner also did not accept the contention of the Appellant Bank that the extended period of limitation could not have been invoked, in the facts and circumstances of the case. The Commissioner, therefore, passed the following order :

(i) I order to invoke the provisions of Section 72 of the Finance Act, 1994 against M/s State Bank of Bikaner & Jaipur (SBBJ Head Office), Tilak Marg, C-Scheme, Jaipur for arriving at their Service Tax liability on foreign bank charges in relation to the services taxable under the category of Banking and Financial services received by them from foreign banks during the period from October 2010 to March 2015;

(ii) I confirm the demand of Service Tax amounting to Rs. 1,10,84,38,781/- (Service Tax- Rs. 1,07,61,54,157 + Ed. Cess- Rs. 2,15,23,083/- + S. & H.E. Cess- Rs. 1,07,61,541/-) under the proviso to Section 73 against M/s State Bank of Bikaner & Jaipur (SBBJ Head Office), Tilak Marg, C-Scheme, Jaipur and order to recover the same from them;

(iii) I order to recover the interest on the confirm demand of Service Tax of Rs. 1,10,84,38,781/- (as mentioned at (ii) above) at applicable rate from M/s State Bank of Bikaner & Jaipur (SBBJ Head Office), Tilak Marg, C-Scheme, Jaipur under provisions of Section 75 of the Finance Act, 1994;

(iv) I impose a penalty of Rs. 1,10,84,38,781/- (Rupee One Hundred and Ten Crore Eighty Four Lakh Thirty Eight Thousand Seven Hundred Eighty One only) on M/s State Bank of Bikaner & Jaipur (SBBJ Head Office), Tilak Marg, C-Scheme, Jaipur under Section 78 of the Finance Act, 1994.

16. Shri Sanjay Khemani, learned Consultant appearing on behalf of the Appellant Bank, made the following submissions :

(i) The services alleged to have been provided by the Foreign Bank to the Appellant Bank cannot fall under the heading 'banking & other financial services', as defined under section 65(12) of the Finance Act;

(ii) The foreign bank charges cannot be considered as 'consideration' received by the Appellant Bank and included in the value of services;

(iii) The Appellant Bank cannot be considered as the recipient of the service provided by the Foreign Bank;

(iv) The nexus between consideration (i.e. foreign bank charges) and the services provided by the Foreign Bank is established between the Foreign Bank and the exporter/ importer and not between the Foreign Bank and the Appellant Bank;

(v) The Foreign Bank and the Appellant Bank are co-service providers to the exporters/ importers;

(vi) The Trade Notice dated February 10, 2014 issued by the Commissioner of Service Tax, Mumbai, does lay down the correct legal position, and in fact runs contrary to the judgment of the Supreme Court in **State of Andhra Pradesh & Ors. vs Larsen & Toubro Ltd. & Ors.**[5];

---

5 2008-TIOL-158-SC

(vii) A Notice issued to the Appellant Bank by the Department on the same grounds for the period April 01, 2006 to March 31,2011 was dropped by order dated January 31, 2013 passed by the Additional Commissioner, Central Excise & Service Tax, Jaipur;

(viii) The larger period of five years contemplated under the proviso to section 73(i) of the Finance Act could not have been invoked in the facts and circumstances of the case as the conditions mentioned therein are not satisfied; and

(ix) Interest under section 75 of the Finance Act could not have been imposed upon the Appellant bank nor penalty could have been imposed under Section 78 of the Finance Act.

17. Shri J.P. Singh and Shri Vivek Pandey, learned Authorized Representatives of the Department, however, defended the order passed by the Commissioner and made the following submissions :

(i) The flow of service chain has to be examined in terms of the decision of the Larger Bench of the Tribunal in **Commissioner of Service Tax vs Melange Developers Pvt. Ltd.**[6];

(ii) The Tribunal, in **Greenply Industries Ltd. vs Commissioner of Central Excise, Jaipur-**

---

6 2019-TIOL-1684-CESTAT-DEL-LB

I[7]**,** which decision was relied upon by the Tribunal in four other cases, held in an identical case that an exporter cannot be the recipient of service from the Foreign Bank and it is the Indian Bank which receives the service from the Foreign Bank;

(iii) The Appellant Bank acted as guarantor for the Indian exporter in the financing of international trade, and, therefore, it cannot be a pure agent of the Indian exporter;

(iv) As per section 66A of the Finance Act, for levy of service tax on import of service under the reverse charge mechanism, the service recipient is deemed to be the service provider and all the restrictions/conditions of definition of taxable service apply only to the service recipient;

(v) The judgment dated November 22, 2019 of the Madras High Court in **BGR Energy Systems Limited vs Additional Commissioner of GST & Central Excise, Chennai**[8] is not applicable to the facts of present case as the facts are entirely different and the relevant case laws have not been considered; and

(vi) The present appeal is a case of import of service which is governed by section 66A of the Finance Act.

---

7 2015 (38) STR 605 (Tri-Del)
8 2019-VIL-574-MAD-ST

18. We have considered the submissions advanced by the learned Consultant for the Appellant and the learned Authorised Representatives of the Department.

19. As noticed above, the issue that needs to be decided is whether the Foreign Banks have provided any service of transfer/exchange of documents and transfer of money relating to exports made by the exporters in India, who receive money through the Appellant Bank against the said exports. According to the Department, the Foreign Bank provides "banking and other financial services", as defined under section 65(12) of the Finance Act, which is taxable under section 65(105)(zm) of the Finance Act at the hands of the Appellants under a reverse charge mechanism. The contention of the Appellant Bank is that no service has been provided by the Foreign Bank or the Foreign Intermediary Bank to the Appellant Bank and, therefore, the Appellant Bank cannot be asked to pay service tax on reverse charge mechanism and in any case there is no flow of consideration from the Appellant Bank to the Foreign Bank or the Foreign Intermediary Bank so as to make the alleged service to the Appellant Bank taxable.

20. To appreciate the aforesaid issue, it will be necessary to understand the nature of the transaction that takes place. The Appellant Bank has been providing banking services to the exporters by facilitating the settlement of payments relating to the export of goods. All such foreign trade transactions have necessarily to be routed through normal banking channels as is

provided for in the Foreign Exchange Management Regulations. The banks of the exporter and the banks of the importer, therefore, have an important role to play. There may be a situation where the banks of the exporter and the banks of the importer are different. In such a situation, the settlement of transaction is governed by the URC 522 and UCP 600 protocols issued by the International Chambers of Commerce. As per the specific instructions of the Indian exporters, the Appellant Bank provides services like sending of export documents to the banks of the exporter's buyers, for which the Appellant Bank charges commission/fees and pays service tax on such services provided to the exporter. There is no dispute on this issue. The dispute is with regard to the charges collected by the Foreign Bank or the Foreign Intermediary Bank.

21. To understand this issue, it will be useful to highlight the examples cited by the Appellant Bank in the context of foreign bank charges relating to Bills of Exchange. A typical case can be :

> M/s EXPORTER, India exports certain goods to M/s IMPORTER, Iraq for a consideration of $100,000 against a Letter of Credit opened by **X Bank**, being the Bank of M/s IMPORTER. M/s IMPORTER, Iraq provides the list of documents that are required to be presented along with the Bill of Exchange to **X Bank**. There are three possible situations about the bank charges to be borne by M/s EXPORTER and M/s IMPORTER and they can be as follows :

i. M/s EXPORTER shall bear all the bank charges for this transaction

or

ii. M/s IMPORTER shall bear all bank charges for this transaction

or

iii. M/s EXPORTER shall bear its bank charges and M/s IMPORTER shall bear its foreign bank charges

22. Each of these three situations shall be dealt with separately :

CONDITION (i)

(a) In this example, M/s EXPORTER and M/s IMPORTER agree that all the charges of realisation of export proceeds shall be borne by M/s EXPORTER.

(b) For realization of export proceeds, M/s EXPORTER draws a Bill of Exchange on **X Bank**.

(c) M/s EXPORTER approaches the Appellant Bank for collection of the Bill of Exchange of $ 100,000. The Appellant Bank charges Rs. 2,000 plus service tax of Rs. 300 for providing the service, which includes reimbursement of courier charges.

(d) The Appellant Bank forwards the Bill of Exchange with the requisite documents to **X Bank** with a direction to credit the proceeds to the Nostro account of the Appellant Bank with **A Bank,** after deducting bank charges of **X Bank** from the export proceeds.

(e) Assume that the Appellant Bank does not have any direct banking relationship with **X Bank** and the Appellant Bank sends the Bill of Exchange with the requisite documents through a Foreign Intermediary Bank. On due date, **X Bank** collects $100,000 from M/s IMPORTER and after deducting $ 20 as its own charges and $ 20 towards charges of the Foreign Intermediary bank, remits $ 99,960 to **A Bank**.

(f) **A Bank** deducts $8 towards its charges and credits $99,952 to the Nostro account of the Appellant Bank.

(g) The Appellant Bank, on sighting the credit in its Nostro account, credits M/s EXPORTER's bank account with the Appellant Bank, after converting USD into INR (say, $99,952*70 = Rs. 69,96,640/-). The Appellant Bank recovers its fees of Rs. 700 along with service tax of Rs. 105, which is debited to the M/s EXPORTER's bank account maintained with the Appellant Bank. The Appellant Bank also recovers service tax of Rs. 7,500/- on the conversion of foreign currency ($99,952) into INR (Rs. 69,96,640), as per the prescribed slab rate.

(h) The Appellant has, therefore, recovered and paid service tax of Rs. 7,905/- = (300+105+7,500) to the exchequer.

(i) The Appellant neither accounts for Foreign Bank charges of $48 = (20+20+8) equivalent to Rs. 3,360/- in its books of accounts nor it raises any debit note/invoice of the same on M/s EXPORTER.

(j) M/s EXPORTER accounts for the charges of Rs. 2,700/- = (2,000+700) levied by the Appellant, Rs. 7,905/- towards service tax collected by the Appellant and also foreign bank charges of Rs. 3,360/-, in its books of accounts.

(k) The Appellant is not aware whether M/s EXPORTER is making payment of service tax under the reverse charge on this amount of Rs. 3,360.

CONDITION (ii)

23. If M/s EXPORTER and M/s IMPORTER decide to opt for this condition, namely, that all bank charges shall be borne by M/s IMPORTER, then **X Bank** shall remit to **A Bank** $100,010 which shall credit the amount to the Nostro Account of the Appellant Bank in the manner described above. The Appellant Bank would then credit M/s EXPORTER's account with $100,000*70 = Rs. 70,00,000/-). In such a case, $48+$10 (equivalent to Rs. 700) will be recovered by the Foreign Bank from M/s IMPORTER, who will effectively make payment of $100,058. Since under this example, $58 is paid by M/s IMPORTER, out of which **$48** is retained by **Banks** located outside India, the same does not suffer any service tax, though the Appellant Bank makes a payment of service tax of Rs. 105 on $10 (USD equivalent of Rs. 700), as it treats this payment to have been received from M/s EXPORTER and not from the Foreign Banks. In this case, $48 is neither accounted in the books of M/s EXPORTER nor in the books of Appellant Bank.

CONDITION (iii)

24. If M/s EXPORTER and M/s IMPORTER decide to opt for this condition, namely, that the Appellant Bank charges shall be borne by M/s EXPORTER and foreign bank charges shall be borne by M/s IMPORTER, then in that case, **X Bank** shall remit to **A Bank** $100,000 for deposit in the Appellant Bank Nostro Account in the manner described above, which shall in turn credit to M/s EXPORTER's account with $100,000*70 = Rs. 70,00,000/-). In such a case, $48 will be recovered by the Foreign Bank from M/s IMPORTER, who will effectively make payment of $100,048. Since $48 is paid by M/s IMPORTER to banks located outside India, there is no question of any service tax thereon as Foreign Banks are not located in India. The Appellant Bank makes payment of service tax of Rs. 105 on $10 equivalent to Rs. 700 received from M/s EXPORTER. In this case also, $48 is neither accounted in the books of M/s EXPORTER or in the books of Appellant Bank.

25. According to the Appellant Bank, the following facts emerge from the aforesaid transactions :

(a) The exporter and importer decide the Foreign Bank.

(b) The exporter and importer also decide who will bear the charges.

(c) Bill of Exchange is drawn on the Foreign Bank by the Exporter and the Appellant Bank has to send the documents to the Foreign Bank on which Bill of Exchange is drawn.

(d) The foreign bank charges are deducted at source from the export proceeds realized and remitted to India.

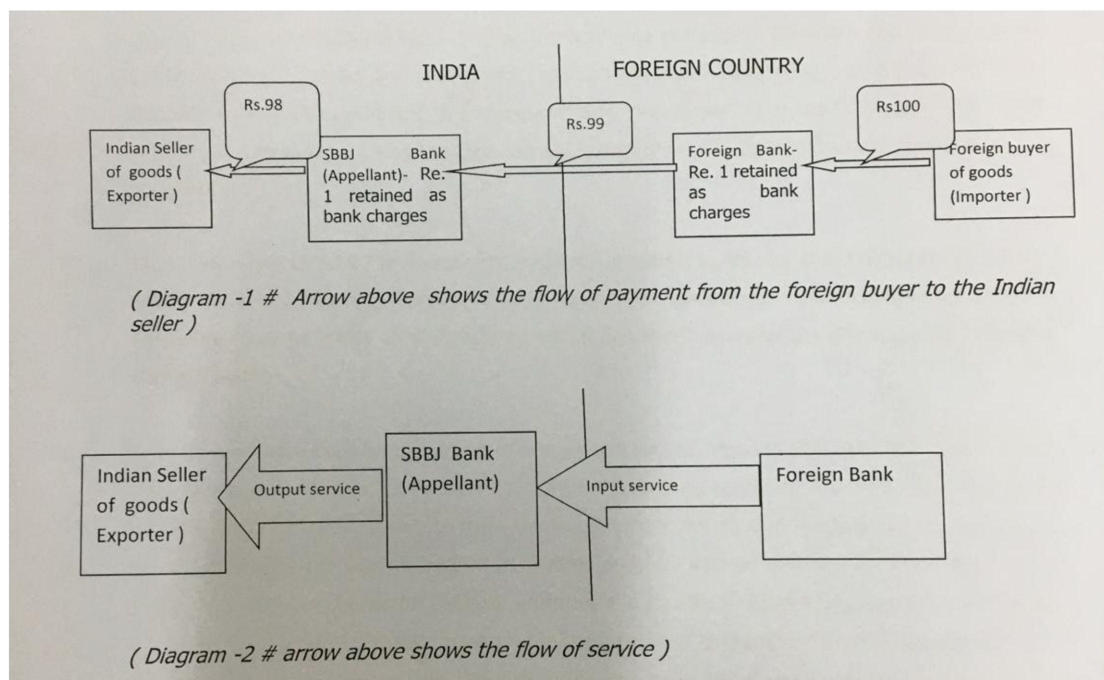
(e) The Appellant Bank charges the exporter separately for the services provided by the Appellant.

(f) The Appellant Bank pays service tax on the fees charged by it.

(g) The Appellant Bank and the Foreign Bank are providing trade facilitation services and act as an intermediary between the importer and exporter and do not provide any service to each other.

(h) There is no agreement between the Appellant Bank and the Foreign Bank and their relationship is governed by the international protocols.

26. Learned Authorised Representatives of the Department have presented a chart showing the flow of payments from the foreign importer to the Indian exporter and the flow of service from the Foreign Bank to the Appellant Bank. The two representations are as follows :



27. In the aforesaid diagram 1, it has been explained that the foreign importer of goods pays Rs. 100/- to the Foreign Bank, which after deducting Rs. 1/- as its bank charges forwards the remaining Rs. 99/- to the Appellant Bank. The Appellant Bank after deducting Rs. 1/- as its bank charges, forwards the remaining Rs. 98/- to the Indian exporter of goods. It has, therefore, been contended by the learned Authorised Representatives that the Foreign Bank provides a service (relating to transfer of money and Letter of Credit) to the Appellant Bank, which would be an input service for the Appellant Bank and the Appellant Bank, in turn, provides the same service to the Indian exporter, which would be an output service of the Appellant Bank. Thus, the Foreign Bank provides a service in relation to transfer of money and Letter of Credit, which is classifiable under section 65(12)(a)(ix) read with section 65(105)(xm) of the Finance Act. Thus, the only dispute in the present appeal, according to the Department, is as to whether the Appellant Bank or the Indian exporter is the service recipient of the service provided by the Foreign Bank. The Department contends that it is the Appellant Bank which is the service recipient and to support this contention, reliance has been placed on the decision of the Larger Bench of the Tribunal in **Melange Developers Pvt. Ltd.** Learned Authorised Representatives contended that the Larger Bench of the Tribunal upheld the principle that in a chain of services providers, the service flows from one to another and every link in that chain receives input service and provides output service. Each service provider in the chain has to pay service tax on its output service and take input

credit as per the Cenvat Credit Scheme. If this principle is applied to the present case and the flow diagram is seen, it becomes evident, according to the Department, that the service provided by the Foreign Bank is first received by the Appellant Bank. In this connection, the learned Authorized Representatives of the Department have also placed reliance upon the decision of the Tribunal in **Greenply Industries Ltd.** and contended that in a similar situation relating to foreign trade and import, the Tribunal has held that Greenply Industries had neither received any service from the Foreign Bank nor directly paid any amount to the Foreign Bank. They cannot, therefore, be treated as a service recipient and so no service tax can be charged from them under the reverse charge mechanism. In fact, it is the Indian Bank which had received services from the Foreign Bank, for which service tax cannot be demanded from Greenply Industries.

28. It is now necessary to examine the relevant provisions of the Finance Act to analyse the aforesaid submissions. For the period prior to July 01, 2012, the relevant provisions are section 65(12) and section 65(105)(zm) of the Finance Act. For the post July 01, 2012 period, the relevant provisions are section 65B(44) and section 65B(51) of the Finance Act.

29. Section 65(12) of the Finance Act defines "banking & other financial services" and it is as follows :

"**65(12) 'banking and other financial services'** means -

(a) following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or commercial concern, namely :—

(i) financial leasing services including equipment leasing and hire-purchase; Explanation.—For the purposes of this item, "financial leasing" means a lease transaction where—

(i) xxxx xxxx xxxx

(ii) xxxx xxxx xxxx

(iii) xxxx xxxx xxxx

(iv) xxxx xxxx xxxx

(ii) xxxx xxxx xxxx

(iii) xxxx xxxx xxxx

(iv) xxxx xxxx xxxx

(v) xxxx xxxx xxxx

(vi) xxxx xxxx xxxx

(vii) xxxx xxxx xxxx

(viii) xxxx xxxx xxxx

(ix) other financial services, namely, lending; issue of pay order, demand draft, cheque, letter of credit and bill of exchange; transfer of money including telegraphic transfer, mail transfer and electronic transfer; providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults; operation of bank accounts;"

30. The 'taxable service' under section 65(105)(zm) of the Finance Act is as follows :

"**65(105)(zm) 'taxable service'** means any service provided or to be provided to any person by a banking company or a financial institution including a non-banking financial company or any other body corporate or commercial concern, in relation to banking and other financial services;

31. Section 65B(44) of the Finance Act defines 'service' and section 65B(51) imposes tax on 'service'. They are as follows :

> "**65B(44)** "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-
>
> (a) an activity which constitutes merely,–
>
> (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
>
> (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution; or
>
> (iii) a transaction in money or actionable claim;
>
> (b) xxxxxxxx xxxxxxxx xxxxxxxx
>
> (c) xxxxxxxx xxxxxxxx xxxxxxxx
>
> Explanation 1.- xxxxxxxx xxxxxxxx xxxxxxxx
>
> Explanation 2.- xxxxxxxx xxxxxxxx xxxxxxxx
>
> Explanation 3.– xxxxxxxx xxxxxxxx xxxxxxxx
>
> Explanation 4.- xxxxxxxx xxxxxxxx xxxxxxxx

32. The 'taxable service' under section 65B(51) of the Finance Act is as under :

> "**65B(51)** '**taxable service**' means any service on which service tax is leviable under section 66B;"

33. The period involved in this appeal is from October, 2010 to March, 2015. Thus, it covers the period prior to July 01, 2012 and the subsequent period also. For the period prior to July 01, 2012, the show cause notice alleges that Foreign Banks provide services of transfer/exchange of documents and transfer of money

relating to exports made by the exporters in India and these exporters receive money through the Appellant Bank against the exports. Thus, the Foreign Banks provide "banking & other financial services" as defined under section 65(12)(a)(ix) of the Finance Act. For the period w.e.f July 01, 2012, the show cause notice alleges that the said service is covered by section 65B(44) of the Finance Act which is taxable under section 65B(51).

34. The issue that needs to be decided is whether the Appellant Bank is the recipient of the service said to have been provided by the Foreign Bank. The nature of the transactions that take place when an exporter in India exports goods to an importer outside India has been described in the preceding paragraphs. The Appellant Bank provides service to the exporters by sending the export documents to the bank of the importer abroad and collects payment. Thus, the role of the Appellant Bank is to settle the payment relating to export/import of trade. For performance of such activity, the Appellant Bank charges service tax to the exporters and there is no dispute about the said charges in this Appeal. The Appellant Bank cannot be said to be the recipient of service for the activities undertaken by the Foreign Banks situated outside India, the charges for which are deducted at source on the export bill. The Appellant Bank merely acts on behalf of the Indian exporter and facilitates the service. The Appellant Bank, therefore, would not be liable to pay service tax under the reverse charge mechanism.

35. This apart, service tax would be leviable only when an activity is considered to be a service and such service classifies as a 'taxable service' defined in section 65(105) of the Finance Act. Section 66 provides that service tax shall be levied at the rate of 12 per cent **of the value of taxable services** referred to in various sub-clauses of clause (105) of section 65. Section 67 deals with valuation of taxable service for charging service tax. It is reproduced below:-

> **"67.** (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall,-
>
> (i) in a case **where the provision of service is for a consideration** in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
>
> (ii) in a case **where the provision of service is for a consideration** not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;
>
> (iii) in a case **where the provision of service is for a consideration** which is not ascertainable, be the amount as may be determined in the prescribed manner.
>
> (2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.
>
> (3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.
>
> (4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.
>
> **Explanation.**—For the purposes of this section,—
>
> (a) "consideration" includes
>
> (i) any amount that is payable for the taxable services provided or to be provided;
>
> (ii) any reimbursable expenditure or cost incurred by the service provider and charged, in

> the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;
>
> (iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.
>
> (b) xxxxxxxxxxx
> (c) xxxxxxxxxxx"

(emphasis supplied)

36. It is, thus, clear that where service tax is chargeable on any taxable service with reference to its value, then such value shall be determined in the manner provided for in (i), (ii) or (iii) of sub-section (1) of section 67. What needs to be noted is that each of these refer to "where the provision of service is for a consideration", whether it be in the form of money, or not wholly or partly consisting of money, or where it is not ascertainable. In either of the cases, there has to be a "consideration" for the provision of such service. Explanation to sub-section (1) of section 67 defines "consideration" to include any amount that is payable for the taxable services provided or to be provided, or any reimbursable expenditure, or any amount retained by the lottery distributor or selling agent. It is clear from the aforesaid definition of "consideration" that only an amount that is payable for the taxable service will be considered as "consideration".

37. A Larger Bench of the Tribunal in **Bhayana Builders (P) Ltd. vs Commissioner of Service Tax**[9] observed that

---

9. 2013 (32) S.T.R. 49 (Tri.-LB)

"implicit in the legal architecture is the concept that any consideration whether monetary or otherwise, should have flown or should flow from the service recipient to the service provider and should accrue to the benefit of the latter." In the said decision, the Larger Bench made reference to the concept of "consideration", as was expounded in the decision pertaining to Australian GST Rules, wherein a categorical distinction was made between "conditions" to a contract and "consideration". It has been prescribed under the said GST Rules that certain "conditions" contained in the contract cannot be seen in the light of "consideration" for the contract and merely because the service recipient has to fulfil such conditions would not mean that this value would form part of the value of the taxable services that are provided.

38. The Supreme Court in **Commissioner of Service Tax vs. M/s Bhayana Builders[10],** while deciding the appeal filed by the Department against the aforesaid decision of the Tribunal, also explained the scope of Section 67 of the Act, both before and after the amendment, in the following words :

> "The amount charged should be for "for such service provided": Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words "for such service provided" the Act has provided for a nexus between the amount charged and the service provided. **Therefore, any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67.** The cost of free

10. 2018 (2) TMI 1325

> supply goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined."
>
> **(emphasis supplied)**

39. The aforesaid view was reiterated by the Supreme Court in **Union of India vs. Intercontinental Consultants and Technocrafts**[11] and it was observed:

> "**23.** Obviously, this Section refers to service tax, i.e., in respect of those services which are taxable and specifically referred to in various sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the "value of taxable services". Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.
>
> **24.** In this hue, the expression "such" occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing "such" taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such "taxable service". That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider "for such service" and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.
>
> **25.** This position did not change even in the amended Section 67 which was inserted on May 1, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of sub-section (1). Mandate of subsection (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider."

---

11. 2018 (10) GSTL 401 (SC)

40. What follows from the aforesaid decisions is that "consideration" must flow from the service recipient to the service provider and should accrue to the benefit of the service provider and that the amount charged has necessarily to be a consideration for the taxable service provided under the Act. It should also be remembered that there is marked distinction between "conditions to a contract" and "considerations for the contract". A service recipient may be required to fulfil certain conditions contained in the contract but that would not necessarily mean that this value would form part of the value of taxable services that are provided.

41. The Appellant Bank has not paid any consideration to the Foreign Bank as is clear from the factual position emerging out of the export trade and, therefore, also the Appellant Bank cannot be said to be the recipient of any service by the Foreign Bank.

42. Learned Authorized Representatives of the Department have, however, placed reliance upon the decision of the Tribunal in **Greenply Industries Ltd.,** which was subsequently followed in certain decisions, including **Raj Petro Specialities P. Ltd. vs CCE & ST, Silvasa**[12]. In these decisions, the issue was whether the Indian exporter was the recipient of service provided by the Foreign Banks. After referring to the Trade Notice dated February 10, 2014, the Tribunal held that the Indian exporter cannot be said to be the recipient of the service. In the present case, the issue is

---

12 MANU/CS/0078/2018

whether the Indian Bank of the exporter is the recipient of the service. It cannot be said that merely because the Indian exporter is not the recipient of service, the Indian Bank of the exporter has necessarily to be the recipient of service. This issue has to be examined independently. As noticed above, the Indian Bank, which is the Appellant Bank of the exporter, is not the recipient of service.

43. At this stage, it will be useful to reproduce the relevant portion of the Trade Notice dated February 10, 2014 issued by the Chief Commissioner, Central Excise, Mumbai Zone-I, as it is this Trade Notice that has been relied upon in the decisions referred to by the learned Authorized Representatives. The relevant portion of the Trade Notice is reproduced below :

> "5. The views of the banks that services provided by the foreign bank are received by the importer or exporter in India is not factually and legally correct because, for a person to be treated as recipient of service, it is necessary that he should know who the service provider is and there should be an agreement to provide service, which may be oral or written. In the present case, the importer and exporter does not even know who the service provider is, as they are not aware of the identity of the foreign banks which would be providing services. Exporter or importer in India does not have any formal or informal agreement with the foreign bank. Importer or exporter in India does not even know the quantum of charges which the foreign bank would be recovering. **Therefore, in view of the above mentioned factual position and also in view of the various articles of URC 522/UCP 600, it is clear that services are provided by the foreign bank to the bank in India. Further, Tribunals have also prima facie held that in such cases, services are provided by the foreign bank to the Indian bank and not to the Indian Exporter**. [M/s Gracure Pharmaceuticals Ltd. vs Commissioner of Central Excise, Jaipur-I – 2013 (32) STR 249 (Tri.-Del), M/s Gujarat Ambuja Exports Ltd. v. Commissioner of Service Tax, Ahmedabad – 2013 (30) STR 667 (Tri.-Ahmd.)].

> 6. It is therefore clarified that, in cases where the foreign banks are recovering certain charges for processing of import/export documents regarding remittance of foreign currency, the banks in India would be treated as recipient of service and therefore required to pay Service Tax.
>
> 7. All the banks are requested to follow the above mentioned clarifications and to also pay tax for the past period.
>
> 8. This Trade Notice is issued with the approval of Chief Commissioner, Central Excise, Mumbai-Zone-I."
>
> **[emphasis supplied]**

44. The aforesaid Trade Notice dated February 10, 2014 places reliance upon two interim orders passed by the Principal Bench at Delhi in **Gracure Pharmaceuticals Ltd. vs Commissioner of Central Excise, Jaipur-I**[13] and by the Ahmedabad Bench of the Tribunal in **Gujarat Ambuja Exports Ltd. vs Commissioner of Central Excise, Ahmedabad**[14]**.** Thus, it is based on *prima facie* views expressed by the Benches in the interim orders. It is also not clear whether the Appeals have been decided or not.

45. The aforesaid Trade Notice dated February 10, 2014 was examined by the Madras High Court in **BGR Energy Systems Limited** wherein the Writ Petitioner was an exporter who had entered into an agreement to export certain goods to an oil company situated in Iraq. For due performance of the contract, the Indian exporter was required to issue Advance Bank Guarantee as well as Performance Bank Guarantee. Both these guarantees had to be issued by a Bank in Iraq in favour of overseas customer of the Indian exporter. It was sought to be contended by the Writ

---

13 2013 (32) STR 249 (Tri.-Del)
14 2013 (30) STR 667 (Tri-Ahmd.)

Petitioner that in view of the Trade Notice dated February 10, 2014, only the Indian Bank was liable to pay service tax and not the exporter. On the other hand, it was sought to be contended by the Respondent that the Trade Notice relied upon by the Writ Petitioner was issued by the Mumbai Commissionerate in view of a stay order passed by the Tribunal and the Appeal was still pending before the Tribunal. The Madras High Court referred to the decision of the Supreme Court in **Commissioner of Central Excise, Bhopal vs Minwool Rock Fibres Ltd.**[15] and held that Departmental Circulars were not binding on the assessee or quasi judicial authority or courts. The High Court then examined whether the exporter or its Indian banker was liable to pay service tax for the service rendered by the Foreign Bank or the Foreign Intermediary Bank and in this connection observed that though the Indian exporter had not made any remittance to the Foreign Intermediary banks directly, but there could be no dispute that the expenses met out for rendering of such service to the Indian Bank were borne by the Indian exporter. Thus, it cannot be said that the bank of the exporter in India was the recipient of service provided by the Intermediary Bank or the Foreign Bank situated in Iraq. In fact, the Indian Bank of the exporter had only facilitated the service to be rendered by the Foreign Bank for the purpose of providing Bank Guarantee on behalf of the exporter. Thus, the Indian exporter could not shirk from its liability of paying service tax relatable to the bank guarantee, commission and realization

---

15 2012 (228) ELT 581 (SC)

charges involved in the case. The relevant portion of the judgment of the Madras High Court is reproduced below :

> "**18**. In this case, there is no dispute to the fact that the petitioner's bank in this country namely Indian Bank, Adyar has not furnished the bank guarantee to the foreign supplier of the petitioner. On the other hand, the Indian Bank approached the intermediary banks which are admittedly located outside this country, which in turn approached the bank situated in Iraq only for the purpose of furnishing bank guarantee on behalf of the petitioner to its foreign supplier at Iraq. Therefore, there is no doubt that though the event of furnishing the bank guarantee had taken place in three parts, the chain of events connecting those three parts will undoubtedly lead to an irrebuttable conclusion that all those three events were aimed only to provide the service to the petitioner, namely furnishing of bank guarantee to its foreign supplier. **As rightly pointed out by the authorities who passed the impugned order, the petitioner had incurred expenditure in foreign currency towards bank guarantee commission and export proceeds realisation charges paid to the intermediary banks situated outside India. Certainly, a taxable service has been provided to the petitioner namely, banking or other financial services**. It is the categorical finding of the authorities who passed the impugned orders that taxable service by way of issuing bank guarantee to the petitioner's customer at Iraq and by way of remitting the exports proceeds to the petitioner, had been performed by the intermediary banks for the petitioner. **Therefore, the petitioner cannot claim that they are not the recipient of the service. Though the petitioner had not made any remittance to the foreign intermediary banks directly, there cannot be any dispute that the expenses met out towards rendering of such service by the Indian Bank were borne by the petitioner. In other words, at no stretch of imagination, it can be said that the petitioner's Bank at Chennai, namely, Indian Bank, Adyar, is recipient of the service provided by the intermediary bank or the foreign bank situated in Iraq. Needless to say that the Indian Bank, Adyar, namely, the banker of the petitioner has facilitated the service to be rendered by the intermediary banks and the foreign bank in Iraq only for the purpose of providing bank guarantee on behalf of the petitioner. Therefore, the petitioner is not justified in shirking its liability to pay Service Tax relatable to the bank guarantee commission and realisation charges involved in this case**.
>
> **19. Further, as rightly pointed** out by the Appellate Authority in his order made in Appeal Nos. 489-492/2018, dated 17-9-2018, **the recipient of service involved in this**

> **case namely, furnishing of bank guarantee, is only the petitioner and not the banker. Since the service receiver is the petitioner and the place of provision of such service is also the location of the petitioner, which is within India, the Service Tax liability is rightly fastened on the petitioner**, with which, I find no reason to interfere. Since the only point raised in this writ petition is based on the trade circular issued by the Mumbai Commissionerate and that the said issue is answered against the petitioner as discussed supra, I find that both the writ petitions are devoid of any merit. Accordingly, both the writ petitions are dismissed. No costs. Consequently, connected miscellaneous petitions are closed”
>
> **[emphasis supplied]**

46. Thus also, neither the aforesaid Trade Notice dated February 10, 2014 nor the decisions relied upon by the learned Authorized Representatives based on the said Trade Notice can come to the aid of the Department.

47. Learned Authorised Representatives of the Department also placed reliance upon the Larger Bench decision of the Tribunal in **Melange Developers Private Limited.** The issue that arose in the said decision was as to whether a sub-contractor was liable to pay service tax, even if the main contractor had discharged the service liability on the gross amount. The Tribunal held that it is not open to a sub-contractor to contend that he should not be subjected to discharge of the service tax liability in respect of a taxable service when the main contractor has paid service tax on the gross amount. The Larger Bench observed that in the scheme of service tax, the concept of CENVAT Credit enables every service provider in a supply chain to take input credit on the tax paid by him which can be utilized for the purpose of discharge of tax on his output service. There was no dispute whether the sub-contractor

was required to pay service tax as submissions regarding revenue neutrality were made. The sub-contractor was providing a service to the main contractor. In the present case, it has been found that the Foreign Bank is not providing any service to the Appellant Bank. The issue of input credit on the tax paid for discharge of tax liability on output service does not arise at all as the issue involved in this Appeal is entirely different. Therefore, reliance placed on the aforesaid decision is totally misconceived.

48. It also needs to be noticed that the Department itself, in regard to a demand made against the Appellant Bank in a show cause notice dated October 18, 2011 on the same grounds for the period commencing April 01, 2006 to March 31, 2011, was dropped by the Additional Commissioner, Central Excise & Service Tax, Jaipur, by order dated January 31, 2013. The relevant portion of the order is reproduced below :

> "**5.3 I now examine the alleged liability M/s 'SBBJ' to pay Service tax on the charges recovered by the Foreign bankers under reverse charge mechanism as deemed service provider under the category 'Banking & Finances services'** as defined under Section 65(12)(ix) of the finance Act, 1994, in terms of Section 66A and Section 68(2) of the Act, 1994 read with Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 and Rule 3(iii) of the Taxation of Service (Provided from outside India and received in India) rules, 2006. **Here the SCN alleges that the foreign bank is a service provider to M/s SBBJ and thus M/s SBBJ is liable to pay Service tax in terms of Section 68(2) of the Act read with Rule 2(1)(d)(iv) of the Service tax Rules, 1994**.
>
> xxxxxx xxxxxx xxxxxx
>
> In view of the above, I find that services provided by a company which transacts the business of banking in India

is taxable under Section 65(105)(zm) of the Finance Act, 1994. **Since, the foreign bank does not transact the business of banking in India therefore they do not fall within the definition of a banking company which is a pre-requisite for covering their services under the Banking and financial services**. In other words, the service provided by the foreign bank does not fall under the said service as alleged under "banking and financial services in the notice. The definition of the person liable to pay service tax is applicable on the Service provider i.e the foreign bank which in this case does not fall within the definition of banking company and under this given situation, once the foreign bank is not a service provider within the definition of a banking company and thereby not rendering banking and financial services, the service receiver can not be fastened with the liability to pay tax. **As such M/s SBBJ, the alleged service recipient in India is not liable to pay service tax under reverse charge mechanism under Section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of the Rules ibid**.

5.4 Though in the light of findings as above, the notice does not require any further deliberations on the issue raised therein, however for the sake of discussion, I examine the second issue as to whether M/s SBBJ was a recipient of service to be made liable to pay service tax. I find that it is general practice that the exporters route their export documents through banking channel to ensure safe remittance and also to comply with the RBI guidelines and the FEMA provisions and that the Foreign based bankers usually deduct certain charges for one or other reason from the remittance made to the Indian bankers on account of the Indian exporters. **It is also a fact that the Indian bankers do not make any such charge to the foreign bankers on behalf of the exporters. In this case, I find that the assessee bank had played the role of mediator between the Indian exporter and the foreign based banker representing the foreign importer as an agent**. The assessee bank had collected the foreign remittances on behalf of his client by charging certain sum, which is liable to be taxed under 'Banking & Financial service' and there is no allegation of non-payment of service tax on such charges in the impugned notice. **The short received remittance because of deduction of some charge by the foreign based banker, which had been duly accounted for by the EOU as Foreign Bank charges in its books of accounts** (the detection was a result of audit of the records of the EOU). **There is no such entry as Foreign Bank charges in the books of accounts of the assessee in this respect, had the said**

> **charges were on their account, the same would have been reflected in their books of accounts and ultimately in their yearly final accounts also**. In case any such payment was made by the assessee in foreign currency even on behalf of their clients, they would have been show caused earlier for recovery of service tax on the entire such amounts paid by them. For the sake of arguments even if such charges were paid by the assessee bank to the foreign bankers, they would have been not liable to pay service tax as there is no allegation on them that they had taken reimbursement over & above the said charges paid to the foreign bankers and as such they had acted as pure agent of the Indian exporters.
>
> **Thus in the light of my findings as above that (i) the foreign bank does not fall within the definition of a banking company so as to classify their services within the ambit of Banking and Financial services and also (ii) that M/s SBBJ did not receive any services from the foreign bank, I conclude that the allegations raised against M/s SBBJ do not survive**."
>
> **[emphasis supplied]**

49. It would be seen from the aforesaid order of the Additional Commissioner that two reasons have been assigned for dropping the demand made in the show cause notice. The first is that the Foreign Bank does not transact business of banking in India and, therefore, would not fall within the definition of a "banking company", which is a pre-requisite for a service to be covered under 'banking & other financial services'. The second reason assigned by the Additional Commissioner is that the Indian Bank does not pay any amount to the Foreign Bank and, in fact, the Indian Bank only plays a role of a mediator between the Indian exporter and the foreign banker representing the foreign importer. This is a general practice that the exporters are required to follow by routing the export documents through a banking channel.

Thus, the Indian bank did not receive any service from the Foreign Bank. Learned Authorized Representatives of the Department have not stated that the aforesaid order of the Additional Commissioner has been set aside.

50. The inevitable conclusion that follows from the above discussion is that the Indian Bank is not the recipient of any service rendered by the Foreign Bank and, therefore, there is no liability to pay service tax on a reverse charge mechanism.

51. Thus, for all the reasons stated above, it is not possible to sustain the order dated March 30, 2017 passed by the Commissioner. It is, accordingly, set aside and the Appeal is allowed.

(Pronounced in the open Court on 05 August, 2020)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

Golay