

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI**

Appeal No.ST/708/2012

[Arising out of Order-in-Appeal No.104/2012 (MST) dt. 25.09.2012 passed by
Commissioner of Central Excise (Appeals), Chennai]

Spencers Travel Services Ltd.

Appellant

Versus

Commissioner of Service Tax,
Chennai

Respondent

Appearance :

Ms. P. Jayalakshmi, Advocate
For the Appellant

Shri K. Veerabhadra Reddy, ADC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi, C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 18. 01.2019

FINAL ORDER No. 40139 / 2019

Per Bench

The facts of the case are that appellants are a General Sales Agency (GSA) for a number of foreign airlines for passenger and / or cargo. Pursuant to enquiries conducted by the department, it appeared that in the said services appellant received Overriding Commission (ORC) in Indian currency. Department took the view that these ORC amounts are liable to service tax under

the category of 'Business Auxiliary Service' (BAS) under section 65 (19) of the Finance Act, 1994. Proceedings were initiated against the appellant vide SCN dt. 24.08.2006 inter alia, proposing demand of service tax of Rs.46,90,610/- with interest thereon as also imposition of penalty. In adjudication, original authority vide an order dt. 28.12.2006 held that appellants were not consciously aware of the service tax liability from 1.3.2003 to 09.09.2004, hence extended period cannot be invoked in this case as there was no suppression, fraud or intention to evade tax. Based on these findings, the adjudicating authority dropped the proposals in the SCN. Appellants however preferred appeal against the conclusions of the original authority that ORC amounts that was taxable under BAS. Vide the impugned order dt. 104/2012 dt. 25.09.2012, Commissioner (Appeals) following the decisions of *ETA Travel Agency Pvt. Ltd. Vs CCE Chennai* - 2007 (7) STR 454 (Tri.-Bang.) and *Translanka Air Travel Pvt. Ltd. Vs CST Chennai* - 2007 (7) STR 476 (Tri.-Chennai) held that appellant was liable to discharge service tax on the ORC amounts received from foreign airlines in Indian currency under BAS w.e.f. 1.7.2003. The order of the original authority was upheld to that extent without disturbing dropping of the SCN on limitation. Aggrieved, appellants are before this forum.

2. Today when the matter came up for hearing, on behalf of the appellants Ld. Advocate Ms. P.Jayalakshmi submits that they have filed appeal to the Commissioner (Appeals) only for clarity on merits. She submits that the issue is no longer *res integra* and the ratio has been laid down in a number of Tribunal decisions where it has been consistently held that ORC amounts received from foreign airlines even if it be Indian currency will have to be treated as Export of

Service and therefore would not be exigible to service tax liability. In particular, she placed reliance on Tribunal decision in *Arafaath Travels Pvt. Ltd. Vs CST Chennai - 2017 (7) GSTL 437 (Tri.-Chennai)*.

3. On the other hand, Ld. A.R Shri K. Veerabhadra Reddy submits that the order of Commissioner (Appeals) is restricted only to the conclusion that the ORC amounts received by the appellants would very much are liable to service tax. He also submits that the Tribunal decision in *Arafaath Travels Pvt. Ltd.* (supra) relied on Madras High Court decision in *Suprashes General Insurance Services & Brokers P. Ltd. Versus C.S.T., Chennai - 2017 (41) STR 34 (Mad.)* which decision have been appealed to and admitted by the Hon'ble Supreme Court.

4. Heard both sides and have gone through the facts of the case.

5.1 We find merit in the assertion of the Ld. Advocate that the issue in dispute is fully covered by the ratio of the decision of this very Bench in *Arafaath Travels Pvt. Ltd.* (supra) relied upon by the Ld. Advocate. Relevant portions of the said decision are reproduced as under :

“7.10 There is no dispute that the services of the appellant have been contracted by its office of Saudi Arabian Airlines located in Jeddah, Saudi Arabia. It is also clear that scope of these services to be provided by the appellant included “soliciting, promoting and selling passenger air transportation for Saudia, assistance in all operations likely to encourage traffic on Saudia’s Airlines. Evidently, these activities performed by the appellants are contracted to have beneficial impact on air transportation traffic on Saudi Airlines. Although the appellants have been contracted as Saudia’s GSA for the territory of Tamil Nadu, Andhra Pradesh, Karnataka and Kerala, appellant as a GSA is authorized to make sales over the services of Saudia and any other carrier with whom Saudia has interline traffic agreements. Soliciting and promoting of passenger air transportation is permitted to be done by the appellant on all lines awarded out by Saudia. Similarly, in the General Sales Agreement for Cargo

entered into between the Saudi Arabian Airlines Corporation, Jeddah Office and the appellant, like air passenger transportation, the appellant in the GSA Agreement for cargo is similarly required to provide commercial services to Saudia including soliciting, promoting and selling cargo and mailing transportation for Saudia and assisting in all operations to encourage traffic agreement of Saudia's lines. Evidently, the commercial services provided by the appellant, *inter alia*, soliciting, promoting and selling passenger air transportation and cargo and mail transportation for Saudia is very much a Business Auxiliary Service, ordered by Saudi Arabian Airlines, Jeddah, to benefit all such service flowing to Saudia's business.

8. Pursuant to number of disputes that had arisen on the condition "used outside India", the C.B.E. & C. had found it necessary to issue a Circular [No.] 111/05/2009-S.T., dated 24-2-2009. The C.B.E. & C. has advised in para-3 of the circular, that the law has to be read harmoniously so as to avoid contradictions within a legislation and accordingly, the meaning of the terms "used outside India" has to be understood in the context of the characteristics of a particular category of service as mentioned in sub-rule (1) of Rule 3 of the Export of Services Rules, 2005. The circular further gives an example of category of three services [Rule 3(1)(iii)] where it is possible that services may take place even when all the relevant activities take place in India so long as the benefits of the services accrue outside India. Board further clarifies that for Rule 3(1)(iii), the relevant factor is the location of the service receiver and not the place of performance. Viewed in this light, there can be no dispute that although the activities of the appellant take place in India, what is accruing outside India is the benefit in terms of business of the foreign company, namely, Saudi Arabian Airlines, Jeddah, Saudi Arabia. Therefore the service of the appellant will have satisfied this particular requirement in Rule 3(3) of the Rules.

9. The only issue, now remaining to be analysed is whether retention of the full amount of commission while making remittance to Saudia of all monies due for transportation sold during previous month would fall foul of the requirement in Rule 3(3) of the Rules that "payment for such service is received in convertible foreign exchange".

10. On this contentious issue (whether payment has been received in foreign exchange), Revenue has placed considerable reliance on the ratio of Tribunal's decision in *ETA Travels Agency Pvt. Ltd. v. CCE Chennai* vide Final order No. 452/2007, dated 20-4-2007 [[2007 \(7\) S.T.R. 454](#) (Tri.-Bang.)]. The lower authorities in these appeals have relied upon the said decision. We find that in the *ETA Travels* case, appellant therein had received commission from the airlines by way of credit notes. The credit notes mentioned the amounts in terms of Indian rupee and such amounts were credited to the appellant's bank account. The Tribunal held that no part of the overriding commission (ORC) was received by way of inward remittance in convertible foreign exchange. Hence ORC received cannot be considered as receipts of convertible foreign exchange. Ld. AR for Revenue has pointed out that this decision was followed by the Tribunal in

the case of *Translanka Air Travel Pvt. Ltd. v. CST, Chennai* - [2007 \(7\) S.T.R. 476](#) (Tri.-Chennai). While this may be so, however, the appellants have argued that *ETA Travels* decision has been stayed by the Hon'ble High Court of Madras in C.M.A. No. 2359/2007 vide order dated 26-10-2007. It has been confirmed by Revenue that the matter has still not been decided by Hon'ble High Court. We also note that the very same High Court of Madras, which is the jurisdictional High Court for this Tribunal, in a recent judgment in the case of *Suprashesh General Insurance Services & Brokers (P) Ltd.* - [2015] 62 taxmann.com 364 (Madras) = [2016 \(41\) S.T.R. 34](#) (Mad.) has addressed the very same controversy. The facts in *Suprashesh* are that appellant therein did not pay service tax for arranging reinsurance for Indian insurers from foreign reinsurers through foreign brokers on the ground that services were provided to a foreign company located outside India, therefore it amounted to export of service. Department argued that assessee's services were provided to Indian insurance companies and payment was also received in Indian rupee. Hence it was not an export of service for the purpose of Rule 3 of the Export of Services Rules, 2005. The High Court held that the services were provided/used in relation to commerce and industry, that the service recipient being foreign company was located outside India, it amounted to 'export of service' and there was no requirement to receive consideration in foreign exchange. The Hon'ble High Court placing reliance on the decision of the Hon'ble Apex Court in the case of *J.B. Boda & Co. (P.) Ltd.* [AIR 1987 SC 1543] and binding circular of the RBI dated 25-4-2003, *inter alia*, held in favour of the appellant therein. Similar views have also been expressed in a number of other decisions by the Tribunal, for example in the case of *Microsoft Corporation (I) (P) Ltd. v. CST* - [2011] 16 taxmann.com 258 (New Delhi-CESTAT) wherein it was *inter alia* held that Business Auxiliary Services of promotion of market in India for a foreign principal would amount to export of service and would be covered by the provisions of Export of Service Rules and are not liable to service tax. In the case of *Blue Star Ltd. v. CCE, Bangalore* - (2009) 18 STT 34 (Bang.-CESTAT) = [2008 \(11\) S.T.R. 23](#) (Tri. - Bang.) the facts were that the appellant therein took orders in India for the goods of foreign principals. Once the foreign supplier exports the goods to India and receives payment, a commission is paid to the appellant. The Tribunal held that the services rendered have been exported in terms of Rule 3(2) of the Export of Services Rules, 2005. In the case of *Sun-Area Real Estate Pvt. Ltd. v. CST, Mumbai-I*, - 2015 (5) TMI 885-CESTAT-Mumbai = [2015 \(39\) S.T.R. 897](#) (Tri. - Mum.) the Tribunal relying upon the Apex Court's judgment in the case of *J.B. Boda & Company Pvt. Ltd. v. CBDT* - AIR 1987 SC 1543 held that when out of the total payment to be made by the insurance broker in India to the foreign insurer, the same was reduced to the extent of his brokerage and remaining amount was remitted to foreign insurer in foreign exchange, such Indian rupees was obtained in lieu of foreign exchange the same will be deemed to be convertible exchange. The Tribunal's decision also took note of Foreign Exchange Management Act provision that if payment in Indian rupees is received through banking channel it's deemed to be convertible foreign exchange.

11. We are informed that CESTAT, Delhi in the case of *Bird Travels (P) Ltd. v. CCE, Delhi* - [2016 \(45\) S.T.R. 143](#) (Tri.-Del.), *inter alia*, placing reliance on decision in *ETA Travels* (supra) has taken a contrary view. However, by the principle of *stare decisis* this Tribunal is enjoined to follow the law laid down by the jurisdictional High Court of Madras in the case of *Suprashesh General Insurance Services* cited (supra). We are aware that the *Suprashesh* judgment has been appealed against by the department and the Hon'ble Apex Court after condoning the delay has issued notice, as reported in [2016 \(43\) S.T.R. J22](#) (S.C.), however as no stay of the *Suprashesh* judgment has been ordered by the Hon'ble Apex Court, we intend to follow the ratio thereof as laid down by the High Court of Madras.

12. No doubt, the proviso in Rule 3(3) of Export of Services Rules, 2005 does require that the payments are received in convertible foreign exchange. But viewed in the light of decisions discussed supra, and in particular, that of the Hon'ble Apex Court's judgment in *J.B. Boda & Company* (supra) and that of the Hon'ble High Court of Madras in *Suprashesh General Insurance Services* (supra), even when the said payment to the appellant has been received in Indian rupees, however, there is a saving of foreign exchange since appellant has retained that portion and not sent the same in foreign exchange to the service recipient along with the other sale proceeds. Outflow of foreign exchange has been reduced to the extent of the commission/payment retained by the appellant within India. Such retention will then have to be necessarily treated as saving of foreign exchange and by implication is akin to receipt of monies in convertible foreign exchange. Surely, the department would not have any dispute if the appellant had remitted entire proceeds to Saudia, Jeddah and in turn the commission, determined as a percentage of such proceeds, in convertible foreign exchange is transferred to them from Jeddah. In our view, the procedure of retaining the commission amount and only remitting the remaining portion of the proceeds, during the periods of dispute, would have the same end effect. In any case, we understand that the roundabout procedure insisted upon by the department is being followed by the appellants after this period of dispute. Nonetheless, in view of the foregoing discussions, we are of the considered opinion that even by retaining the amount of overriding commission while remitting the proceeds to their foreign client, without receiving it subsequently from the client in convertible foreign exchange. The conditionalities of Rule 3(3) of the Export of Services Rules, 2005 as amended and as was applicable during the different periods involved in these appeals will be deemed to have been satisfied by the appellant. Hence the services rendered by them to the foreign recipient will be nothing but export of Business Auxiliary Services which are exempted from liability to service tax."

5.2 Ld.A.R has submitted that the Madras High Court decision in *Suprashesh General Insurance Services & Brokers P. Ltd.* (supra) which was relied upon in the decision of *Arafaath Travels Pvt. Ltd.* (supra), has been appealed to and

admitted by the Apex Court. However, the fact remains that no stay has been granted against the operation of the order in *Suprashesh General Insurance* (supra). This being so, we find that ratio of *Arafaath Travels Pvt. Ltd.* (supra) and *Suprashesh General Insurance* (supra) would be applicable to the present appeal also, hence the impugned order to the contrary cannot sustain and will require to be set aside, which we hereby do. Appeal is allowed with consequential benefits, if any, as per law.

(dictated and pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi, C.S)
Member (Judicial)

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