CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-III

Date of hearing: 09.05.2017
Date of Pronouncement:26.05.2017

Appeal No. ST/1403/2010-ST[DB]

[Arising out of the Order-in-Original No. 34/RDN/2010 dated 12.07.2010, passed by the Commissioner of Central Excise, New Delhi]

CCE Delhi	…	Appellant
Vs.		
M/s. Thomas cook (I) Ltd.	...	Respondent

Appearance:

Present Shri B.L. Narsimhan, DR for the appellant
Present Shri Rachit Jain, Advocate for the respondent

Coram: Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

FINAL ORDER No. 53502/2017

Per V. Padmanabhan:

The appeal filed by Revenue is against the Order-in-Original No. 34/RDN/2010 dated 12.07.2010.

2. The brief facts of the case are that the respondent is engaged in rendering various travel-related services and is duly registered with the Service Tax Department for the same.

3. The Respondent issues travelers cheques, pre-paid cards, demand drafts and makes telegraphic transfers for travelers receiving its services and charges encashment services fees. In the process of issuing these instruments, the Respondent first buys foreign currency on its own and being the owner thereof,

issues the above instruments. Respondents claim is that such activities of the respondent, being in the nature of money changing, were made liable to Service Tax from 16.05.2008 and the Respondent has duly paid Service Tax on the same therefrom.

4. For the period from October, 2003 to March 2009, proceedings were initiated against the respondent vide SCN dated 20.04.2009, in pursuance to audit of records of the Respondent. It was alleged that the said activities of the Respondent are in the nature of foreign exchange broking taxable under Section 65(105)(zm) of the Act from October, 2003.

5. In the impugned order, the adjudicating authority, after analyzing the transaction, observed:

i) That the respondent does not carry out any broking activities, i.e. assisting in buying or selling foreign exchange on behalf of the client.

ii) That the respondent buys foreign exchange and sells the same and thus its activities are appropriately classifiable as money changing activities taxable from 16.05.200.

iii) That the demand of Service Tax of Rs.99,25,729/- for the period prior to 16.05.2008 is not sustainable.

iv) That the demand of service tax of Rs.8,39,038/- for the period from 16.05.2008 to 31.03.2009 already stands paid by the Respondent and is liable to be appropriated.

v) That there is no cause for imposing any penalty.

6. Against the impugned order, the Department has preferred present appeal on the grounds that:

a) Broking in foreign exchange refers to facilitating sale and purchase of foreign exchange between buyer and seller as intermediary. Foreign exchange broking is an activity performed as an intermediary on commission basis. The same is taxable under section 65(105)(zm) of the Act from October 2003.

b) The activities of the Respondent are in the nature of disbursing cash against the value of traveler cheque etc. wherein the Respondent acts as an intermediary. The transaction is not sale or purchase per se and thus is in the nature of broking.

c) Also non-imposition of penalty on the Respondent is improper.

7. The Ld. DR reiterated the grounds of appeal. Further, in his written submissions submitted on behalf of Revenue he emphasized the following points:

i) The respondent have collected charges towards service charges encashment of travelers cheque, demand drafts, telegraph transfers, etc. They have also issued such instruments by collecting commission. In this process they acted as an intermediary between the Bank and tourists. Unlike money changers, who always hold the title for the of hard currency, the respondents can never hold the title for instruments such as travelers cheques. The CBEC vide their circular dated 06.10.2007 has clarified this point and have further clarified that service tax is not leviable on money changing per se, but will be leviable on foreign exchange broking services.

ii) The activity engaged in by the respondent is in the nature of foreign exchange broker. They also indicate the consideration explicitly over the value of instrument unlike money changers who earn the difference between the sale and purchase rate on a particular day.

iii) The respondent have acted as an intermediary between the bank and the customers. Since the transaction is not on principal to principal basis, but involves the role of respondent as an intermediary, the respondent will be liable for service tax as a foreign exchange broker.

8. The Ld. Advocate argued the case for the respondent and supported the impugned order with the following main submissions:

i) The dispute in the instant case is whether the activity of the respondent is in the nature of foreign exchange broker or merely sale and purchase of foreign currency i.e. money changer. The activities of the respondent are different from the activity of foreign exchange broking. The foreign exchange broking is an activity as an intermediary to facilitate the sale or purchase of foreign currency between the buyer and the seller. The intermediary does not hold any ownership over such currency and his role is limited to facilitating the sale / purchase transactions in foreign exchange. In the case of the respondent, they sell the foreign currency to the customer in the form of demand draft, travelers cheques etc. but all the foreign currency is already owned by the respondent. The fee charge is not in the nature of any brokerage.

ii) The activities of the respondent are not covered within the definition of section 65 (105) (zm) until 15.05.2008. After the amendment to the above section w.e.f. 16.05.2008, the activity of the respondent became liable for service tax. The respondent has already paid the service tax w.e.f. this date.

iii) Without prejudice to the above, it was also argued that the respondent has not suppressed any facts and they were under the bonafide belief that their activities were not in the nature of foreign exchange broking and hence service tax was not paid till 15.05.2008. From the fact that the department has issued more than one circular on the subject, it is evident that the Department was also confused as to whether activities of money changing were covered under the scope of section 65 (105) (zm) prior to the amendment made on 16.05.2007.

iv) The dispute in the present case revolves around the question whether the activity carried out by the respondent will be covered within the category of "banking and other financial services" under section 65 (12) for the period upto 15.05.2008. The respondent has already paid the service tax for the period from 16.05.2008, after the amendments carried out to the said section. To appreciate the facts correctly, the relevant ratio of the Finance Act 1994 are reproduced below for the period upto 15.05.2008 and w.e.f. 16.05.2008.

Upto 15.05.2008

"Banking and other financial services" means:-

Section 65(12) a) The following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate, namely:-

i), ii), iii)………..iv) securities and foreign exchange (Forex) broking.

b) Foreign exchange broking provided by a foreign exchange broker other than those covered under sub-clause (a).

65 (105)(zm) to a customer, by a banking company or a financial institution including a non-banking financial company, in relation to a banking and other financial services.

After the amendment: w.e.f. 16.05.2008:-

"Banking and other financial services" means:-

Section 65(12) a) the 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), ii), iii)……………..iv) Securities and foreign exchange (forex) broking, and purchase or sale of foreign currency, including money changing.

b) Foreign exchange broking and purchase or sale of foreign currency, including money changing provided by a foreign exchange broker or an authorized dealer in foreign exchange or an authorized money changer, other than those covered under sub-clause (a).

Explanation: For the purposes of this clause, it is hereby declared that purchase or sale of foreign currency, including money changing" includes purchase or sale of foreign currency, whether or not the consideration for such purchase or sale, as the case may be, is specified separately.

Section 65 (105) (zm) 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."

9. For the period prior to 16.05.2008 the above services covered foreign exchange broking if it is provided by the categories of persons specified under section 65 (12)(a) under section 65(12)(b) it also covered the same activity if provided by a foreign exchange broker other than those covered in (a) above. There were doubts in the field formations whether the services of foreign exchange broker will also include the activity of money changer who is an authorized dealer of foreign exchange. The CBEC vide their circular dated 06.10.2005 clarified that the services provided by money changers in relation to foreign exchange is covered within the services under

section 65 (12). However, in the revised circular dated 12.05.2007, the CBEC changed its views and clarified the issue as follows:

> *"2. The issue has been examined by the Board. It was noted that 'money changing' and 'foreign exchange broking' are two distinct activities. Money changing is an activity of sale and purchase of foreign exchange at the prevalent market rates. On the other hand, foreign exchange broking is the activity performed as an intermediary, on a commission/brokerage basis, for facilitating the clients who wish to buy or sell foreign exchange. The foreign exchange broker providing foreign exchange broking service does not hold title to the foreign exchange. Accordingly, Board is of the view that service tax is not leviable on money changing per se, as such activity does not fall under the category of foreign exchange broking.*
>
> *3. The instruction issued earlier vide letter F. No. 341/44/2005-TRU, dated 6-10-2005 [2006 (1) S.T.R. (C69)] stands superceded."*

10. In the backdrop of the statutory provisions and clarifications as above, the issue to be examined is whether the activity undertaken by the respondent will be covered within foreign exchange broking or money changing. As per the circular dated 12.05.2007 if the activity is in the nature of money changing, service tax will not be leviable upto 15.05.2008.

11. The stand of the respondent is that they earned commission in respect of issue of letters of credit, demand draft,

drivellers cheque, telegraph transfers etc. It has been submitted that the respondent is not engaged as a broker for foreign exchange broking activity, but they purchase foreign exchange and sold the same in the form of demand draft, travelers cheque etc. Accordingly, they have submitted that the commission earned by them is not in the nature of broking in foreign exchange. The foreign exchange is purchased by them on their own account and not on behalf of any other principal.

12. However, the Revenue's view is that the respondent has acted as an intermediary between the customer and the bank, unlike money changers Revenue has contended that the respondent not only charges commission as a consideration for the services, but also indicate the same explicitly over and above the value of the instrument. Hence, it is Revenue's stand that the service will fall under foreign exchange broking.

13. We note that the respondent, for the purpose of issue of travelers cheque, demand draft, etc. purchased foreign exchange on their own account. Such foreign exchange is transferred to the customer in the form of instruments such as travelers cheque, and in the process certain commission is earned by the respondent. It is to be noted that the purchase of foreign exchange by the respondent is on their own account and not on behalf of the customer to whom it is ultimately transferred. To this extent, the respondent holds the title to the foreign exchange. Hence, we are of the view that the activity cannot be brought within the nature of foreign exchange broking. It is more in the nature of money changer who

purchases foreign exchange and sells the same at prevailing rates. The amount charged by the respondent from customers for issuing letter of credit, demand draft traveler’s cheque etc. is not earned by the activity of foreign exchange broking. In terms of the CBEC circular clarifying the issue dated 12.05.2007 such activity which falls within the nature of money changing, cannot be charged to service tax under section 65(12) read with 65 (105)(zm) for the period upto 15.05.2008. Consequently, the demand of service tax in this case is not sustainable and there is no infirmity in the impugned order dropping the service tax.

14. Before we part with the matter we also wish to record that the relevant definition was amended w.e.f. 16.05.2008 which has been reproduced (Supra). The activity of foreign exchange broking liable to service tax under the provisions of Finance Act has been explained and the activities of the respondent will fall within the said section from 16.05.2008. The Ld. Adjudicating authority has appropriated the service tax already paid by the respondent for the period from 16.05.2008.

15. In view of the above discussions impugned order is upheld and the Revenue’s appeal is rejected.

[Order Pronounced in the open court on 26.05.2017]

(V. Padmanabhan)
Member (Technical)

(S.K. Mohanty)
Member (Judicial)

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