# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
## REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

## APPEAL No. ST/1590/2010
*(Arising out of Order-in-Appeal No. 38/2010(H-III)ST, dated 19.04.2010 passed by CCCE&ST (Appeals-II), Hyderabad)*

ENSO SECUTRACK LTD .. APPELLANT

Vs.

CCE, C&ST, Hyderabad-II .. RESPONDENT

**Appearance**
Shri M.V.S. Sridhar, Advocate for the Appellant.

Shri Mallikharjun Reddy, Superintendent/AR for the Respondent.

**Coram:**
**Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)**

**Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

Date of Hearing: 30.10.2018
Date of Decision: 30.10.2018

## FINAL ORDER No. A/31405/2018

[Order per: Mr. P.V. Subba Rao]

1. This appeal is filed against Order-in-Appeal No. 38/2010(H-III)ST, dated 19.04.2010. The facts of the case in brief are that the appellants herein are engaged in the manufacture and trading of Electronic Cash Registers, Banking Automation Products, Electronic Surveillance Systems

etc. and are also engaged in providing Management, Maintenance and Repair services. Appellants had issued "Foreign Currency Convertible Bonds (FCCBs) in the international capital market through M/s Elara Capital Plc. London. These bonds were meant to raise capital in London for use in Mauritius. To facilitate this transaction, the services of M/s Elara Capital Plc. London were used and they were paid a commission at Brussels. The question which falls for consideration is whether or not the commission paid in Brussels by the appellant whose Registered Office is in Hyderabad when the capital was raised by the company in London for use in Mauritius, is chargeable to service tax under the head "Banking and Financial Services" under Reverse Charge Mechanism under section 66A of the Finance Act, 1994 read with Taxation of service (Provided from Outside India and Received in India) Rules, 2006. A show cause notice was issued to the appellant alleging that service tax is leviable on these services and proposing to recover same along with interest. It was also proposed to impose penalties under sections 76, 77 & 78 of the Finance Act, 1994. After following due process, the original authority confirmed the demand and imposed penalties as proposed except that no penalty was imposed under section 76.

2. Aggrieved, the Appellant preferred an appeal before the first appellate authority, who upheld the demand with interest and imposition of penalty under section 77 but reduced the penalty imposed under section 78

of the Act. Aggrieved by this Order-in-Original, the present appeal is preferred by the appellant.

3. Ld. Counsel for the appellant takes us through the facts of the case and submits that the Foreign Currency Convertible Bonds (FCCB) is a loan raised by them in London through the help of M/s Elara Capital Plc. London by paying a commission of USD 4,80,000/- in the month of May 2008. The entire amount which has been raised was invested in Mauritius. There is no dispute that the services in floating the loan have taken place outside the country and the amount was also invested outside the country. It is also not in dispute that the transaction fee was paid in Brussels and not in India. Simply because the Registered Office of the appellant is in India, it does not make them for chargeable to service tax in India, under Section 66A read with Taxation of Service (Provided from Outside India and Received in India) Rules, 2006. He also contended that they were under the bonafide belief that they were not required to obtain the registration certificate as they are not liable to pay service tax based on the expert advice received by them and therefore no penalty is imposable on them. He also submitted that CBEC Circular No. 56/5/2003, dated 25.04.2003 clarified that service tax is a destination based consumption tax and the same view was upheld by Hon'ble Supreme Court in the case of All India Federation of Tax Practitioners vs. Union of India [2007(7)S.T.R. 625 (S.C)]. In this case, neither the loan was raised in India nor was it used in India. The company which rendered the services with respect to floating of

loan by issue of FCCBs was also not located in India and the fee was also paid outside India. Therefore, no service tax is leviable on them.

4. Ld. DR reiterated the findings of the lower authorities.

5. We have considered the arguments on both sides and perused the records. Section 66A of the Chapter V of Finance Act, 1994 reads as follows:

***" 66A.Charge of service tax on services received from outside India, -***

*(1) Where any service specified in clause (105) of section 65 is,—*

*(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and*

*b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:*

*PROVIDED that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:*

*PROVIDED further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the* *provision of service is located, shall be treated as the country from which the service is provided or to be provided.*

*(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.*

*Explanation 1.— A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.*

*Explanation 2.—Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.]*

*3"(3) The provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint."*

6. Thus, levy of service tax under reverse charge mechanism came into force with the introduction of this section, w.e.f. 18.04.2006. The Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 were introduced by notification No. 11/2006, dt. 19.04.2006 laying down the procedure to be followed for levy and collection of this service tax under Reverse Charge Mechanism for the services provided from outside India but received in India. Rule 3 of these Rules which reads as follows, is relevant to the case in question.

*"**3. Taxable services provided from outside India and received in India**.–*

*Subject to section 66A of the Act, the **taxable services provided from outside India and received in India** shall, in relation to taxable services–*

*(i) specified in sub-clauses (d), (p), (q), (v), (zzq), (zzza), (zzzb), (zzzc), (zzzh), (zzzr), (zzzy), (zzzz) and (zzzza) of clause (105) of section 65 of the Act, be such services as are provided or to be provided in relation to an immovable property situated in India;*

*(ii) specified in sub-clauses (a), (f), (h),(i), (j), (l), (m), (n), (o), (s), (t), (u), (w), (x), (y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zza), (zzc), (zzd), (zzf), (zzg), (zzh), (zzi), (zzl), (zzm), (zzn), (zzo), (zzp), (zzs), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf), and (zzzp) of clause (105) of section 65 of the Act, be such services as are performed in India:*

*Provided that where such taxable service is partly performed in India, it shall be treated as performed in India and the value of such taxable service shall be determined under section 67 of the Act and the rules made thereunder;*

*(iii) specified in clause (105) of section 65 of the Act, but excluding–*

*(a) sub-clauses (zzzo) and (zzzv);*

*(b) those specified in clause (i) of this rule except when the provision of taxable services specified in clauses (d), (zzzc), and (zzzr) does not relate to immovable property; and*

*(c) those specified in clause (ii) of this rule, be such services as are received by a recipient located in India for use in relation to business or commerce.*

*[PROVIDED that where the taxable service referred to in sub clause (zzzz) of clause (105) of section 65 of the Act is received by a recipient located in India, then such taxable service shall be treated as taxable service provided from outside India and received in India subject to the condition that the tangible goods supplied for use are located in India during the period of use of such tangible goods by such recipient]".*

7. From the above, it is evident that the appellant being a company registered in India, is covered under the scope of Section 66A of Finance Act, 1994. However, the taxable services which are provided from outside India must be received in India for taxation to be applicable under Rule 3. In this case, there is no dispute that the loan was raised outside India and

used outside India although the parent company is located in India. The First Appellate Authority in the impugned order observed as follows:

> *"Thus, what is crucial is the services should be received by a recipient located in India for use in relation to business of commerce. No doubt in the instant case, the Appellants had issued "Foreign Currency Convertible Bonds (FCCBs) in the International capital market through M/s Elara Capital Plc. London and paid certain amount as "Transaction Fee" to them for the services rendered by them in relation to the arrangement of the said FCCBs and the money so raised was invested in Mauritius i.e. outside India. Thus, as rightly contended by the Appellants, the service was received and consumed outside India. However, by virtue of Rule 3(iii) of the Taxation of Services, Rules 2000 for leviability of service tax it merely requires that the service recipient should be located in India for use in relation to business or commerce. Though the money raised through FCCBs were invested outside India, it is in relation to business or commerce of the service recipient located in India. Hence I hold that they are liable to pay service tax under the reverse charge mechanism. As regards the reliance placed by them on the Board's Circular 56/5/2003, dated 25.4.2003, no doubt service tax is destination based consumption tax but the Appellants are liable to pay service tax under the reverse charge mechanism in terms of Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 and Section 66A of the Finance Act, 1994 read with the Taxation of Services (Provided from outside India and received in India) Rules, 2006."*

8. Thus, the first appellate authority held that although the loan was raised outside India for use outside India, service recipient is located in India and it can be linked to their business and commerce in the books of accounts and hence service tax is leviable. We do not agree with this view. Simply because the appellant company is located within India and the transactions which they made globally will also figure in their books of accounts, it would not mean that the services have been received in India. In this case the services were received in Mauritius and rendered in

London. Therefore, they clearly do not get covered by Rule 3 of Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 even if these transactions are reflected in the books of accounts of the head office in Hyderabad. Any transaction of a company in any of its places of business and commerce will get reflected directly or indirectly in the books of account of the Corporate Office and will effect their overall business result. This does not mean all these transactions are taking place or such services are being received in the location of the Corporate Office. Therefore, no service tax is leviable on the services in question. Consequently, the interest and penalties are also liable to be set aside and we do so.

9. The Appeal is allowed and the impugned order is set aside.

*(Operative portion of the order pronounced in open court on conclusion of hearing)*

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

vrg