CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 89458 of 2014

[Arising out of Order-in-Original No: 33/AC/COMMR/Th-II/ST/2014 dated 12th August 2014 passed by the Commissioner of Central Excise, Thane – II.]

HDFC Bank Ltd
Kamala Mills Compound, Trade World, C Wing, 10th Floor
Senapati Bapat Marg, Lower Parel, Mumbai - 400013 …***Appellant***

versus

Commissioner of Central Excise, Thane-II
4th Floor, Navprabhat Chambers, Ranade Road
Dadar (W), Mumbai - 400028 ***…Respondent***

APPEARANCE:

Shri Abhishek Rastogi, Advocate for the appellant

Shri M. Suresh, Joint Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/ 85818 / 2020

DATE OF HEARING: 11/09/2019
DATE OF DECISION: 11/09/2020

PER: C J MATHEW

Impugned in this appeal of M/s HDFC Bank Ltd is the finding of Commissioner of Central Excise, Thane-II that the 'mark-up', charged by them for recovery from the holders of credit cards issued by them towards transactions entered into with overseas merchant establishments, is provider of service intended to be taxed by section 65(105)(zm) of Finance Act, 1994 for a part of the disputed period from April 2002 to April 2007 and that intended by section 65(105)(zzzw) of Finance Act, 1994 for the remaining period. The primary challenge to order in-original no. 33/AC/COMMR/Th-II/ST/2014 dated 12th August 2014, confirming tax of ₹2,03,83,370 under section 73 of Finance Act, 1994, along with interest thereon under section 75 of Finance Act, 1994, and imposition of penalty of like amount under section 78 of Finance Act, 1994 on the appellant as provider of ‘banking or financial services’, defined in section 65 (12) of Finance Act, 1994, till 30th April 2006 and as provider of ‘credit card service’, defined in section 65(33a) of Finance Act, 1994, thereafter, is that the service, having been exported, is beyond the pale of taxation and that the activity, pertaining, as it did, to conversion of foreign exchange, was not liable to tax till the incorporation of section 65(105)(zzk) in Finance Act, 1994 to tax ‘purchase and sale of foreign exchange including money changing’ with effect from 16 May 2008 or, at best, when the expanded definition of ‘credit card service’ was rendered taxable with a separate, and specific, enumeration in May 2006.

2. This dispute is before us for the second time having, on the

former occasion, been remanded to the original authority *vide* order no. A/561/2012 dated 14th June 2012, on the application for inclusion of additional grounds, broached then for the first time in the proceedings commencing with issue of show cause notice, and that, now, are the primary grounds of challenge here. The holders of credit cards provided by the appellant, as issuing bank, procure goods and services from merchant establishments and the expenditure so incurred becomes due for payment by the holder to the appellant at the end of the agreed-upon cycle as indicated in the billing statement. The debt to the merchant establishment is transferred, at pre-determined discount, to an acquiring bank, *viz*., VISA or Mastercard, which is credited by the issuing bank with the invoiced amount and the said discount is split between them. In cross-border procurements, the inter-bank transaction is agreed to be effected at rates of exchange of the currencies involved that prevail on the date of the transaction and to which the issuing bank adds ‘mark-up’ while billing the holder of the credit card. It is this additional amount retained by the appellant that is bone of contention between the tax authorities and the assessee.

3. It is of interest to note that the scope of tax, as provider of ‘banking or other financial service’, has, during the period of dispute, undergone changes including the hiving out of ‘credit cards’ as separate taxable facility as elaborated by the Tribunal in *Standard Chartered Bank v. Commissioner of Service Tax, Mumbai-I*

[2015(40)STR104(Tri-LB)]. Likewise, the treatment accorded to export of services has also evolved during the period. Circular no. 36/4/2001 dated 8th October 2001 of Central Board of Excise & Customs (as it then was) clarified that statutory limits of geographical jurisdiction precluded tax on services provided beyond territorial waters while circular no. 56/5/2003 dated 25th April 2003 of Central Board of Excise & Customs (as it then was) clarified that, notwithstanding the rescinding of notification no. 6/99-ST dated 9th April 1999, which had exempted all receipts in convertible foreign exchange from tax under Finance Act, 1994, to subject, by notification no. 2/2003-ST dated 1st March 2003, all transactions of enumerated services consumed or rendered in India to tax irrespective of currency contracted for payment, services that were exported would continue to be exempted. Thus, till the notification of Export of Service Rules, 2005, tax treatment was, by and large, determined upon the territorial aspect of the transaction.

4. Export of Service Rules, 2005, as originally issued under section 94 of Finance Act, 1994 with effect from 15th March 2005 and, in acknowledgment of the complexity of determining the stage at which intangible services cross territorial frontiers, trifurcating the taxable enumerations in the context of the target of the activity, the place of performance and the location of the recipient, was amended by notification no. 28/2005-ST dated 7th June 2005 for incorporating

delivery and usage outside India as well as receipt of payment in convertible foreign exchange as conditions. Further amendments, effected by notification no. 13/2005-ST dated 19th April 2006, appropriated authority for the issuance of the Rules from section 93, besides the existing section 94, of Finance Act, 1994 while re-numbering the existing trifurcation within sub-rule (1) of rule 3 and the conditions of delivery-cum-use and payment in convertible foreign exchange under sub-rule (2) of rule 3 of Export of Service Rules, 2005.

5. These clarifications, including those issued after the disputed period, and amendments were brought to our notice by Learned Counsel in furtherance of his submissions that, for much of the period, currency of payment was irrelevant and that the activity was not 'credit card service' but 'purchase and sale of foreign exchange including money changing' that was taxable from the appellant only from 16th May 2008 by incorporation in section 65(12)(a)(iv) of Finance Act, 1994. Reliance is placed on the decision of the Tribunal in *SBI Cards and Payment Services Pvt Ltd v. Commissioner of Service Tax, New Delhi [2016 (41) STR 846 (Tri-Del)]*, in *Citibank NA v. Commissioner of Service Tax, Chennai [2009 (15) STR 727 (Tri-Chennai)]* and the ratio of the decisions of the Hon'ble High Court of Bombay in *Commissioner of Service Tax v. Reliance Money Express [2017 (10) TMI 853 (Bom HC)]* and of the Tribunal in *Paul*

Merchants Ltd v. Commissioner of Central Excise, Chandigarh [2013 (29) STR 257 (Tri-Del)], in *Cox & Kings India Ltd v. Commissioner of Service Tax, New Delhi [2014 (35) STR 817 (Tri-Del)]*, and in *Gati Ltd v. Commissioner of Central Excise, Hyderabad [2010 (19) STR 877 (Tri-Bang)]*. The last of these, being disposal of application for stay, is not relevant to this proceeding. The irrelevance of receipts in foreign exchange has been highlighted by reference to the finding of the Tribunal in *Nipuna Services Ltd v. Commissioner of Central Excise & Service Tax (A-II), Hyderabad [2009 (14) STR 706 (Tri-Bang)]* that

> *'16. We find that the condition of payment in foreign exchange is not mentioned in Rule 3 (1). When that condition is not mentioned, there is no requirement for services enumerated in 3 (1) for receipt of payment in foreign exchange rate so as to quality (sic) as export of Foreign Service. In other words, 3 (1) and 3 (2) appear to be independent. As far as the appellant is concerned, their services would squarely fall within the category of 3 (1) and therefore, the conditions given in 3 (2) would not be applicable to them. In fine, Notification dated 19-4-2006 has not changed the position as far as the appellant is concerned.'*

upon considering the amendment effected by notification no. 2/2007-ST dated 1st March 2007 as indication that

> *'17. 1 ……. the condition enumerated in sub- rule (2) are applicable to the services mentioned in sub- rule (1). This*

> *notification is effective from 1-3-2007. In other words, all the services which are mentioned in the sub- rule (1) including the services rendered by the appellant would be deemed to be treated as export of service only when the payment is received by the service provider in convertible foreign exchange. Alternatively, the appellant has to fulfil the condition of receipt of payment in convertible foreign exchange only with effect from 1-3-2007.……'*

urged before us.

6. It is the contention of Learned Authorized Representative that the decision in *re SBI Cards and Payment Services Pvt Ltd* was, in the light of decision of the Hon'ble Supreme Court in *Union of India v. West Coast Paper Mills Ltd [2004 (164) ELT 375 (SC)]*, in jeopardy owing to the appeal of Revenue having been admitted by the Hon'ble Supreme Court on 24th March 2017. He points out that the decision of the Tribunal in *Tata Steel Ltd v. Commissioner of Service Tax, Mumbai-I [2016 (41) STR 689 (Tri-Mumbai)]* had distinguished the decision in *re Cox & Kings India Ltd* cited by Learned Counsel and had, therefore, been inappropriately relied upon in the other decisions preferred on behalf of the appellant.

7. Learned Counsel for appellant has contended that the impugned order lacks acceptability owing to being cryptic and for inadequate acknowledgement of several issues pleaded in the adjudication proceedings. Considering the submissions, and elaborately too, made

before us, we think that no purpose will be served by directing the original authority to decide the matter for the third time. Before considering the merits of the rival submissions, it would be worthwhile to pause, and deliberate upon, the contention of Learned Authorized Representative that admission of an appeal deprives the decision impugned therein of status as binding precedent. Doubtlessly, the Hon'ble Supreme Court did, in *re West Coast Paper Mills Ltd*, take note that

> *'14. Article 136 of the Constitution of India confers a special power upon this Court in terms of an appeal shall lie against any order passed by a Court or Tribunal. Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgement of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgement is in jeopardy.'*

but its assistance to the proposition of Revenue is not immediately obvious.

8. The architecture of appellate ascendance under Customs Act, 1962, and replicated in Central Excise Act, 1944 as well as in Finance Act, 1994, leads all the way to the highest court in the land as a statutory prerogative and the trajectory of the argument of Learned Authorized Representative would have it that, in the event of appeal before superior *fora*, inferior appellate bodies are not bound by their

own rulings, even if in identical circumstances, and in disputes of the very same assessees. That surely goes against the grain of judicial consistency and cannot but contribute to erosion of the ideal of tax certainty. It would, therefore, appear that the context in which the Hon'ble Supreme Court did make that observation *supra* has been glossed over in the attempt to persuade us to discard some of the decisions of the Tribunal.

9. The dispute in *re West Coast Paper Mills Ltd* arose from a commercial engagement of the respondents therein with Indian Railways, as carrier of freight, that, having been placed before the Railway Rates Tribunal following revision of rates on 1st February 1964, was held to be unreasonable leading to special leave petition by the Indian Railways which was ultimately dismissed by the Hon'ble Supreme Court on 14th October 1970. A consequential application by M/s West Coast Paper Mills Ltd before the Hon'ble High Court, seeking issue of writ for refund of excess charged, was dismissed on 29th October 1973 with liberty accorded for filing of suit for recovery. The contention of Indian Railways, that these suits were barred by limitation, not having been accepted by the trial court and not having found favour with the High Court, was carried in appeal before the Hon'ble Supreme Court.

10. While considering the plea of the Indian Railways that the bar

of limitation operated with reference to the date on which the Railway Rates Tribunal pronounced its order, and in accordance with section 58 of Limitation Act, 1963, the Hon’ble Supreme Court, in doubt over the correctness of the law laid down in *PK Kutty Anuja Raja & another v. State of Kerala & another [JT 1996 (2) SC 167]*, referred the issue to a larger bench which opined that the said decision was not applicable for not having noticed certain crucial decisions and the doctrine of merger. In deciding upon the applicability of limitation, various aspects and circumstances, including the recourse to constitutional courts under writ remedies, were taken into consideration before holding that the logical, even in the absence of statutory, recourse must be completed before the ticking of the clock commenced was decided upon. Not only was the issue entirely different but even the reference to appeal rendering the order impugned being in jeopardy was not to preclude the applicability of precedent, however tentative it may be, in deciding upon a later dispute. Hence, the reliance on the decision in *re West Coast Paper Mills Ltd* to deprive another decision of its status as binding precedent is totally misplaced and need not concern us.

11. By issuing credit cards, a ‘customer-institution’ relationship between the holder and the appellant as a banking company. A Larger Bench of the Tribunal, in *re Standard Chartered Bank*, had, in a dispute pertaining to taxability of that component of discount charged

by the ‘acquiring bank’ from a ‘merchant establishment’ which was passed on to the ‘issuing bank’ and designated as ‘interchange fee’ as consideration for providing ‘banking and other financial services’, occasion to consider the scope of the activities pertaining to ‘credit cards’ within section 65(105)(zm) of Finance Act, 1994. The assessee therein contended that the transactions of the parties, other than that of ‘issuing bank’ with ‘card holder’, are not covered by the specified constituent. The observation therein that

> *‘26. On the basis of the above broad principles guiding interpretation including of taxing statutes we now proceed to analyse the ambit of credit card services in BOFS, the taxable service in issue. The identification of which of the transactions among the several transactions that occur during the use of a credit card, fall within the definition and enumeration of credit card services, appears to be a facially nebulous and substantially interpretative problematic issue.*
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> *27. On a literal construction of the relevant provisions it appears at first blush that any service provided to a customer by a banking company, etc. in relation to credit card services, is a taxable service. Acceptance of this construction would lead to infinite expansion of the taxable event. Not only would credit facilities provided by an issuing bank to the cardholder fall within the scope of the service but services such as receipt and processing of credit card applications; transferring of embossing data issuing bank’s personalisation agency; teller machine personal identification number generation; renewal or replacement of a credit card; change of address; payment updates and an statement generation; settlement of accounts*

> *transacted through credit card; services provided by the owner of trademarks or bank name to the issuing bank for use of the trademark or brand name; and a host of other services which are interspersed in the sequence of transactions occurring on the use of a credit card, would all these services provided in relation to credit card services. These services are expressly enumerated in sub- clauses (ii), (iii), (vi) and (vii) of Section 65 (33a), w.e.f 1-5-2006...'*

makes it abundantly clear that the ambiguity was restricted to the transactions that is not germane to the 'card holder'-'issuing bank' engagement and that too for the period prior to May 2006. The determination thereafter that

> *'40. On the basis of the principles and guidance derived from aforementioned authority we are compelled to the conclusion that in the context of BOFS, credit card services cover only such services as a provided by an issuing bank to cardholder. This conclusion is fortified by the clarification issued in Board's circular dated 9-7-2001, RBI Circular dated 12-12-2003, RBI Master Circular and the express and specific statutory explication of several services which Parliament has specified the included in card services, Incorporated in the definition of card services, for the subsequent period w.e.f 1-5-2006, in Section 65 (33 a.)....'*

again leaves no room for doubt, notwithstanding such in relation to other stakeholders, as to the taxability of the transaction between 'issuing bank' and 'cardholder' as provider of 'banking and other financial services' and as provider of 'credit card service' during the period of dispute. The Tribunal, in *re Citibank NA*, did not appear to have been placed in possession of the several aspects, including the extract *supra*, that were considered by the Larger Bench. In the circumstances, the sole issue remaining for consideration is the inclusion of recovery, over and above the reimbursement effected to the ‘acquiring bank’, by the ‘issuing bank’ from the ‘card holder’ which brings it within the scope of section 67 of Finance Act, 1994.

12. The amount recovered from the ‘card holder’, to the extent paid out by ‘issuing bank’ to ‘acquiring bank’, is not in dispute. The claim made on behalf of the appellant is that the ‘mark-up’ is also an element of the ‘foreign exchange’ rate for conversion of the invoice amount to Indian currency. This submission does not find favour as this ‘mark-up’ is, demonstrably, not shown separately, either as exchange rate or additionally, in the statement issued to the ‘card holder’. Exchange rate for reimbursement to ‘acquiring bank’ is contractually enshrined and, in the absence of any other cost associated with the conversion taxation to be borne by the ‘issuing bank’, is not an element of the rate for conversion of the invoice amount to domestic currency. The amount charged by the appellant from the ‘card holder’ is in excess of the purchase price contracted with the ‘member establishment’ for the goods or service transacted and as the ‘issuing bank’ escapes tax liability only to the extent of the purchase price, the ‘mark-up’ represents consideration for a service. This is, thus, liable to tax except if the consideration was, as claimed

by Learned Counsel, transacted for export of service.

13. It is contended by Learned Counsel that an identical dispute was settled in favour of assessee by the Tribunal in *re SBI Cards and Payments Services Ltd* and followed in *re Citibank NA.* In the first of the two, it is seen that the appeal was allowed with the finding that

> *'13. Considering the above discussion and findings we hold that the mark up charges accruing to the appellant when cardholder uses card to pay in foreign exchange abroad is not liable to service tax under 'Credit Card Services' during the impugned period. This conclusion is based on merit of scope of 'Credit Card Services' during the relevant period and lack of jurisdiction of charge.'*

which was arrived at with reference to decision of the Larger Bench in *re Standard Chartered Bank* and in *re Cox & Kings India Ltd*. We take note that, in *re Standard Chartered Bank*, the specific findings of the Tribunal on the 'interchange fee' appears to have been argued without drawing the attention to the elucidation of the unambiguous element of 'banking and other financial services' therein. Relying upon the congruity of the fact that the location of the recipient of service in the impugned purchase transactions and in the outbound tour impugned in *re Cox & Kings India Ltd* was, indisputably, outside India, the contention of the assessee that the service had been exported was accepted. The correctness of the decision in *re Cox & Kings India Ltd*, relied upon for excluding tax liability, was doubted by a coordinate bench of the Tribunal in the appeal of M/s Cox & Kings India Ltd against order-in-original no. 34/ST/SB/2011-12 dated 12th March 2012 of Commissioner of Central Excise & Service Tax, Mumbai and is yet to be settled. Furthermore, as pointed out by Learned Authorized Representative, the location at which the taxable service was used had been held to be irrelevant by the Tribunal in *re Tata Steel Ltd*, by a majority of two to one consequent upon reference to Third Member arising from difference of opinion between the constituents of the original Division Bench which did not extend to the applicability of the decision in *re Cox & Kings India Ltd*. Its precedential value appears to have been limited to 'outbound tours' in which the recipient of the enumerated service was outside India when the service was provided. We have no reason, therefore, to follow these decisions and are required to consider the merit of the submissions independently.

14. We are not familiar with the facts and circumstances of the dispute in *re SBI Cards and Payments Services Ltd* and in *re Citibank NA*. If the proposition put forth on behalf the appellants that transactions occurring outside India are outside the jurisdictional coverage of Finance Act, 1994 because the service has been exported is to be accepted, it must also be shown that the 'card holder' was on foreign soil when the card was used. In the digitalized economy, physical presence at the premises of a 'merchant establishment' is not

of essence. We find nothing on record that the impugned transactions were undertaken outside the country. Further, from the elaborate discussion in *re Standard Chartered Bank*, it is also made clear that the overt sale and purchase between ‘card holder’ and ‘member establishment’ is a sequence of ‘behind the scenes’ series of services from which the price of the sale is outside the pale of tax. None of these occur at the precise moment of the overt transaction and, therefore, must be adjudged on the performance thereof; only then can the principle of ‘destination based consumption tax’ find its true fulfillment. The billing occurs in India as does the payment to the ‘issuing bank’, and even the ‘rate of exchange’, though relevant to the date of transaction, is applied only when the ‘acquiring bank’ debits the ‘issuing bank’; the impugned transaction can only be subsequent to it. There is no evidence on record that the recipient of ‘banking and other financial service’, by being the ‘card holder’ was not in India when those services were rendered. The presumption of the ‘card holder’ being located outside the taxable jurisdiction is a stretch too close to the breaking point.

15. In the intangible world of service transactions, the location of recipient and flow of consideration in foreign currency are sure demonstration of exports. In the present dispute, there is no doubt that the recipients are domestically based and the claim of overcoming the first test by temporary location overseas is but a poor excuse. Learned

Counsel submits that, for the entire period of the dispute, repatriation of consideration in convertible foreign currency, was not a necessary qualification. Notification no. 6/99-ST dated 9th April 1999, circular no. 36/4/2001 dated 8th October 2001 of Central Board of Excise & Customs and notification no. 2/2003-ST dated 1st March 2003 do not address exemption to export of services but with taxability when the services are rendered in India even though clarifying for exemption, or otherwise, in the circumstances narrated therein. This is apparent from circular no. 56/5/2003 dated 25th April 2003 of Central Board of Excise & Customs which distinguishes exports for exemption despite domestic rendition of services being taxable even if transacted in convertible foreign currency. The essential qualification of export is the delivery thereof outside the territory of India and, in the absence of palpable markers, there can be no alternative to receipt of consideration in foreign currency as the underlying condition even if not articulated specifically. It was only with the notification of Export of Service Rules, 2005 that legislative silence on the means of acknowledgment was broken. Even then, it did not purport to grant exemption which was invoked only by Export of Services (Amendment) Rules, 2006 with the insertion of section 93 of Finance Act, 1994 as one of the empowering provisions. It would, therefore, appear that the Export of Service Rules, 2005, as originally issued, was intended to enable refunds under rule 5 of CENVAT Credit

Rules, 2004 and extended to exempt exports from tax upon the incorporation of taxability of services rendered in the reverse direction. Therefore, there is no statutory basis for arriving at the conclusion that delivery of service outside the tax jurisdiction could be established without corresponding inflow of convertible foreign currency.

16. The dispute in *re Nipuna Services Ltd* arose from a claim for refund of tax paid on input services used by the appellant therein for rendering services through its agent who received consideration in foreign exchange which was passed on to the provider of service after conversion. It was held therein by the Tribunal that it was only after the Export of Service (Amendment) Rules, 2007 had been notified that receipt in foreign currency was a necessary requirement in qualifying as ‘export’ for the purposes of rule 5 of CENVAT Credit Rules, 2004. That is not the issue in the present appeal which is solely on the controversy of exemption of the service that is claimed to have been exported from the jurisdiction of tax. The ‘mark-up’ charged by the appellant is neither received nor billed in convertible foreign currency and such being the determinant, along with location, for the rendering of service outside the tax jurisdiction, the claim of the appellant to be exempt from tax fails.

17. The complexity of exports and the lack of distinguishment for

exports during much of the period of dispute is obvious from our exposition *supra* and it may not be unnatural for an assessee to resort to superficial interpretation without intention to evade tax. We also find that the show cause notice, and the impugned order, lack convincing evidence of suppression or misrepresentation and, in the circumstances of discharge of tax liability, along with interest, for the period of dispute, it would have been appropriate for the proceedings to have terminated under section 73(3) of Finance Act, 1994 without issue of show cause notice. The imposition of penalty under section 78 of Finance Act, 1994 is not merited.

18. We, therefore, allow the appeal to the extent of setting aside the penalties.

(Order pronounced in the open court on 11/09/2020)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*