CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH - COURT NO. 01

Service Tax Appeal No. 85720 of 2016

(Arising out of Order-in-Original No. 46/STC-V/SKD/15-16 dated 22.12.2015 passed by Commissioner of Service Tax-V, Mumbai)

M/s HDFC Bank Ltd .....**Appellant**
Taxation Department Kamala Mills Compound,
Trade World C Wing, 10th Floor Senapati Bapat Marg,
Lower Parel, Mumbai-400013.

VERSUS

Commissioner of Service Tax-V .....**Respondent**
Mumbai
3rd Floor, Utpad Shulk Building, Bandra Kurla Complex, Bandra Mumbai-400051.

Appearance:

Shri Ananthan along with Lalitha, C.A for the Appellant
Shri Nitin M. Tagade, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M. M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87450/2023

Date of Hearing: 29.03.2023
Date of Decision: 29.03.2023

PER : S. K. MOHANTY

This appeal is directed against the impugned order dated 22.12.2015 passed by the learned Commissioner of Service Tax-V, Mumbai. Vide impugned order, the learned Adjudicating Authority has confirmed service tax demand of Rs.231.42 Crores in respect of the impugned service provided by the appellants during the period 16.05.2008 to 31.03.2011. Besides, impugned order has also confirmed the interest demands and imposed equal amount of penalty on the appellants under Section 78 of the Finance Act, 1994 and Rs.5000/- under Section 77 *ibid.* The adjudged demands were confirmed on the ground that the margin money/profit/Spread earned out of Foreign Currency (FC) transactions is to be treated as consideration for provision of the taxable service by the appellants and such amount should be chargeable to payment of service tax.

2. Briefly stated, the fact of the case are that the appellants herein are engaged in providing various taxable services, including Banking and other Financial Services, defined as taxable service under the Finance Act, 1994. During the disputed period, the appellants were engaged in the business of sale and purchase of foreign currency and earned profit out of said transaction. The service tax department interpreted that such activities undertaken by the appellants should be considered as a taxable service under the category of "Banking and other Financial Services" and accordingly, proceeded against the appellants for recovery of the service tax amount in respect of such taxable service provided by them. The department in this case, had not disputed the fact regarding the payment of service tax made by the appellants in respect of the service charges received by them from their customers and the service tax amount paid thereon. The dispute involved in this case only relates to earning of profit on the transaction of foreign exchange made by the appellants. The show cause notice issued in this regard was adjudicated by the department in confirming the proposals made thereunder.

3. Learned Chartered Accountant appearing for the appellants submitted that the issue arising out of the present dispute is no more *res integra,* in view of the decisions of this Tribunal in the case of *State Bank of Bikaner & Jaipur Vs. Commissioner of Central Excise, Jaipur-I* - 2011

(24) S.T.R. 425 (Tri. – Del.) and in the case of *State Bank of India Commercial Branch Vs. Commissioner of Central Excise, Jaipur* - 2015 (39) S.T.R. 307 (Tri. – Del.). He further submitted that in an identical case, pertaining to Andhra Bank, the Principal Commissioner of Service Tax, Hyderabad has dropped the proposals made in show cause notice, seeking confirmation of the adjudged demands in respect of the profit earned on the transaction of foreign exchange. He also submitted that said order dated 23.02.2017 passed by the Commissioner of Service Tax, Hyderabad was accepted by the Committee of Chief Commissioners and no appeal was filed before the appellate forum. Thus, he pleaded for setting aside the impugned order on the ground that the issue is no more open for any debate.

4. On the other hand, learned Authorized Representative appearing for the Revenue reiterated the findings recorded in the impugned order.

5. Heard both sides and examine the case records.

6. The incidence of levy of service tax is on provision of the taxable output service. In order to cover the activities under the service tax net, the prime requirement to be fulfilled is that there must be an involvement of the service provider and service receiver; and the provision of service should be for consideration either in monetary or otherwise form. In the present case, the facts are not under dispute that the appellants have provided the service of conversion of foreign currency and for that purpose, got the consideration and that the said consideration amount had been duly suffered with the service tax at the prescribed rate. However, the department has confirmed the service tax demand on the profit earned by the appellants on making the transaction in foreign exchange. Since, the element of profit earned is not in context

with any provision of taxable service, there is no scope for levy of service tax on such profit element earned by the service provider, owing to various reasons viz. fluctuation in currency rate etc. In other words, the profit element in question earned by the appellants is out of 'trading of the foreign currencies' and not as a consideration for the 'services rendered' towards purchase and sale of foreign currency, on which due service tax liability had already been discharged by the appellants. Since there is no element of any provision of service, by which the disputed profit margin, was generated, the said element of profit shall not be considered as a 'taxable value' for the purpose of levy of service tax.

7. We find that this Tribunal in the case of State Bank of India (supra) and State Bank of Bikaner and Jaipur (supra) has held that margin of profit is not taxable under the Finance Act, 1994 and it is only the gross value, which is recognised under the statute for sufferance of the tax element on the value of the services rendered, which admittedly, the appellants in this case, has duly complied with. Further, we also find that the adjudication Order dated 23.02.2017 (supra) passed by the Hyderabad Commissionerate in the case of Andhra Bank, in dropping the proposed demand made in the SCN, was also accepted by the Committee of Chief Commissioners, which is evident from the Order No.02/2023-RTI 17.01.2023 passed by the Assistant Commissioner, (CPIO), in the Office of the Chief Commissioner, GST & Customs, Hyderabad Zone. Since, upon proper analysis of the legal provisions, the competent authorities in some other Zone had decided not to agitate the matter further by way of filing appeal, consistency is required to be maintained in adopting the ratio that profit element on provision of the taxable service shall not be

subjected to levy of service tax inasmuch as such profit element is not a 'consideration' for provision of the taxable service.

8. In view of the foregoing discussions, we do not find any merit in the impugned order, insofar as it has confirmed the adjudged demands on the appellants. Therefore, by setting aside the impugned order, the appeal is allowed in favour of the appellants.

(Dictated and pronounced in the open court)

(S. K. Mohanty)
Member(Judicial)

(M. M. Parthiban)
Member (Technical)

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