CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.58602 of 2013

(Arising out of Order-in-Appeal No.44/ST/APPL/NOIDA dated 28/02/2013 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida)

M/s Samsung Electronics India Pvt. Ltd., ...Appellant
(B-1, Sector-81, Phase-II, Noida)

VERSUS

Commissioner of Central Excise &

Service Tax, Noida ....Respondent

(C-56/42, Sector-62, Noida)

WITH

Service Tax Appeal No.51941 of 2015

(Arising out of Order-in-Appeal No.NOI/SVTAX/000/APPL-2/158/2014-15 dated 25/02/2015 passed by Commissioner (Appeals-I) Customs, Central Excise & Service Tax, Meerut)

M/s Samsung India Electronics Pvt. Ltd., ...Appellant
(B-1, Sector-81, Phase-II, Noida)

VERSUS

Commissioner of Central Excise &

Service Tax, Noida ....Respondent

(The Commissioner Central Excise, Appeals-I, Meerut)

APPEARANCE:

Shri Atul Gupta, Advocate &
Shri Prakhar Shukla, Advocate for the Appellant
Shri Manish Raj, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NOs.70171-70172/2023

DATE OF HEARING : 27 September, 2023
DATE OF Pronouncement : 02 November, 2023

SANJIV SRIVASTAVA:

These appeals filed by the appellant are directed against the order in appeals as detailed in the table below, of the Commissioner (Appeal) Custom and Central Excise Noida. By the impugned orders Commissioner (Appeal) has upheld the order of original as detailed in the table.

Appeal No	Order in Appeal		Order in Original	
	No	Date	No	Date
ST/58602/2013	44/ST/APPL/NOIDA/2013	28.02.2013	27/Additional Commissioner /Noida/2012-13	26.09.2012
ST/51941/2015	NOI/SVTAX/000/APPL-I/158/2014-15	25.12.2015	11/2013-14/Asst Commr/NOIDA-III	17.04.2014

1.2 Original authorities have by their order in original held as follows:

A. 27/Additional Commissioner /Noida/2012-13 dated 26.09.2012

1. *I hereby confirm the demand of service tax amounting to Rs 8,89,477/- (Rupees eight lakh eighty nine thousand four hundred and seventy seven only) against M/s Samsung Electronics India Pvt. Ltd. B 1 Sector 81 Phase II Noida under section 73 (1) of the Finance Act, 1994.*
2. *I order to recover the above confirmed dues along with appropriate rate of interest as provided under section 75 of the Finance Act, 199*
3. *I also impose penalty of Rs 8,89,477/- (Rupees eight lakh eighty nine thousand four hundred and seventy seven only) upon M/s Samsung Electronics India Pvt. Ltd. B 1 Sector 81 Phase II Noida under section 76, 77 & 78 of the Finance Act, 1994.*

B. 11/2013-14/Asst Commr/NOIDA-III dated 17.04.2014:

1. *The demand of service tax for Rs. 3,19,058/- (Rupees Three Lac Nineteen Thousand & Fifty Eight only) as demanded under impugned SCN for the period 2010-11 &*

2011-12, U/s 66(A) read with proviso to section 73 (1) of Finance Act, 1994 is hereby confirmed. However on payment of total dues as adjudged hereto, the party may be eligible for Cenvat Credit as input service of Service Tax paid by them subject to provisions of CENVAT Credit Rules, 2004.

2. *I also confirm the demand of interest at appropriate rate U/s 75 of Fijnance Act, 1994 on the amount of Service tax demanded.*
3. *I impose penalty not less than two hundred/ one hundre rupees (prior to 8.4.11 & and after 8.4.11 respectively) upon the party, for every day during which such failure continues or at the rate of two/ one (prior to 8.4.11 & and after 8.4.11 respectively) per cent of such tax, per month, whichever is higher, starting with the first day after due date till actual payment of the outstanding amount of service tax, U/s 76 of Finance Act, 1994 for the reasons discussed above.*
4. *I impose penalty of Rs 10,000/- (Rupees ten thousand only) upon the party, U/s 77 (c) (i) & (ii) of Finance Act, 1994 for their failure to furnish information called by an officer in accordance with the provisions or rules made there under and their failure to produce documents called for by a Central Excise officer in accordance with the provisions of rules made there under.*
5. *I also impose mandatory equal penalty of Rs 3,19,058/- upon party U/s 78 of the Finance Act, 1994 (ibid) for will suppression of facts from Department with sole intent to evade service tax.*

2.1 Appellant is engaged in manufacture of goods falling under Chapter 85 of First Schedule to the Central Excise Tariff Act, 1985. They are also providing/ receiving taxable services, such as management consultant, consulting engineer, market research agency, maintenance and repair, business auxiliary service, IPR, GTA, BSS, renting of immovable property and Information Technology and Software services.

2.2 Appellant export their goods & such foreign customers remit the amount of export proceeds through foreign banks. During the course of audit it was observed that appellant had paid Rs 14,45,627/- as bank charges to the foreign banks during the financial year 2008-09 but did not paid any service tax on these charges.

2.3 From scrutiny of balance sheets for the period 2006-07 to 2009-10, it was observed that they had during this period paid Rs 74,35,000/- under the head "Expenditure in Foreign Currency" on which service Tax (including education cess and Higher Secondary Education Cess) of Rs 8,89,477/- was payable but not paid by the Appellant.

2.4 A show cause notice dated 24.10.2011 was issued to the appellant asking them to show cause as to why:

1. *Service tax amounting to Rs 8,89,477/- (Service tax amounting to Rs 8,66,280/- plus Edu Cess amounting to Rs 17,326/- plus HSEC amounting to Rs 5872/-) on the taxable amount of Rs 74,35,000/- paid to foreign banks in foreign currency on account of interest/ bank charges for the period from April 2006 to March 2010 should not be demanded and recovered from them under proviso to Section 73 (1) of the Finance Act, 1994.*
2. *Interest on delayed payment of service tax should not be demanded and recovered under section 75 of the Finance Act, 1994*
3. *Penalty should not be imposed upon them under section 76, 77 & 78 of the Finance Act, 1994, for the contravention of the provisions of finance Act, 1994/ Rules ibid.*

2.5 Demand cum notice to show cause dated 18.10.2012 was issued to the appellant for the subsequent period asking them to show cause as to why:

1. *Service tax amounting to Rs 3,19,058/- (Service tax amounting to Rs 3,09,764/- plus Edu Cess amounting to Rs 6,196/- plus HSEC amounting to Rs 3,098/-) on the*

taxable amount of Rs 30,97,645/-/- paid to foreign banks in foreign currency on account of interest/ bank charges for the period from April 2010 to March 2012 should not be demanded and recovered from them under proviso to Section 73 (1) of the Finance Act, 1994.

2. *Interest on delayed payment of service tax should not be demanded and recovered under section 75 of the Finance Act, 1994*

3. *Penalty should not be imposed upon them under section 76, 77 & 78 of the Finance Act, 1994, for the contravention of the provisions of finance Act, 1994/ Rules ibid.*

2.6 The show cause notice mentioned in para 2.4 was adjudicated by the Additional Commissioner vide his order dated 26.09.2012, referred at A in para 1.2. Appeal filed by the appellant before Commissioner (Appeal) was dismissed as per the impugned order which is subject matter of Appeal No ST/58602/2013.

2.7 The demand cum notice to show cause mentioned in para 2.5 was adjudicated by the Assistant Commissioner vide his order dated 17.04.2014, referred at B in para 1.2. Appeal filed by the appellant before Commissioner (Appeal) was disposed as per the impugned order, modifying order in original to the extent of setting aside the penalty imposed under section 76, which is subject matter of Appeal No ST/51941/2015.

3.1 We have heard Shri Atul Gupta and Shri Prakhar Shukla Advocates for the appellant and Shri Manish raj, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsels submit that:

- The issue involved in the matter is no longer res-integra and has been decided in the following cases holding that no service tax is payable in respect of these payments made.

- Greenply Industries Ltd [2015 (12) TMI 80 – CESTAT New Delhi.
- Clywin Knit Fashions [2017 (9) TMI 96 CESTAT Chennai.
- Dishman Pharmaceuticals & Chemicals Ltd [2023 (8) TMI 248 CESTAT Ahmedabad]
- M/s Aurbinda Pharma Ltd [2020 (12) TMI 2013 – CESTAT Hyderabad]
- Kalpataru Power Transmission Ltd. [2023 (69) GSTL 54 (Tri- Ahmd)]

➢ Reluying on various decisions Commissioner Service Tax Mumbai I with the approval of Chief Commissioner, Central Excise Mumbai Zone –I issued clarification vide Trade Notice No 20/2013-14-ST-I dated 10.02.2014, clarifying that these payments cannot be subjected to service tax.

3.3 Arguing for the revenue learned authorized representative reiterated the findings recorded in the impugned orders.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of arguments.

4.2 As the issue involved in both the appeals is same we are referring to the impugned order dated 25.12.2015 for further discussions. Impugned order observes as follows:

"At the outset, the issue to be decided by the appellate authority is whether the expenditure in foreign currency incurred by the appellants towards "corbank" charges paid to foreign bank (intermediary bank) stationed outside the country, but channelized through applicant's Indian Bank 9Bank of America), who engages the foreign bank, would be liable to Service Tax under Reverse Charge Mechanism as provide under Section 66A of the Finance Act, 1994.

The main contention by the adjudicating authority is that the appellant has received banking & Other Financial Services from the foreign bank and appellant has made payments in foreign currency to the foreign banks towards banking/ "corbank" charges. The adjudicating authority has stated that the said foreign bank has no office in India, hence the appellant, being the receiver of services from

the foreign bank, is liable to pay service tax on the said services under "Banking & Other Financial Services" under section 66A of the finance Act, 1994.

To discuss the issue, it would be proper to reproduce the relevant portion of section 66A of the Act, ibid.

…

The provisions of "Banking & Other Financial Services" as defined under section 65 (12) read with Section 65 (105) (zm) of the Act, are as follows:

…

On perusal of the above said definitions, it is clear that the 'expenditure' incurred by the appellant in foreign currency under the said transactions, shall be covered under "Banking & Other Financial Services". Further this office is of the strong opinion that for any service to be covered under reverse charge mechanism, the following two criteria are essential:

(i) The services should be provided from an establishment based outside India.

(ii) Recipient of such services should be in India.

Since the service recipient (the appellant) is in India receiving services from an establishment (foreign bank/ intermediary bank) outside India, the services shall be taxable under reverse charge category under Section 66A of the Finance Act, 1994.

For further clarity, I would try and elaborate the arrangements of transactions between the parties involved, namely the appellant, the Indian Bank and the Foreign Bank/ intermediary bank. The appellant in his appeal has submitted copies of the credit advices 7 corresponding invoices. I have gone through them & other relevant papers submitted by the appellant. Evidently, the goods have been consigned to the foreign buyers as well as foreign bank. It shows that the appellant has engaged foreign bank in transaction related to export. The foreign bank (intermediary bank) remits the payment to the

Indian Bank (Bank of America) of the appellant deducting 'corbank' charges. The Indian bank (bank of America) of the appellant credits the amount received from foreign bank in the account of appellant. Therefore it is clear that it is the foreign bank which deducts 'corbank' charges from the amount to be remitted to the appellant because the amount so deducted is in foreign currency. Thus I am of the opinion that the services provided by foreign bank to the appellant fall under the Banking & Other Financial Services and since the said service was provided from a foreign land to a client based in India, the appellant can be treated as receiver of services from a foreign service provider & therefore the appellant is liable to pay service tax in terms of section 66A of the act."

4.3 Following has been clarified as per Trade Notice No 20/2013-14 dated 10.02.2014 of Commissioner Service Tax –I Mumbai:

"During verification of the records of some of the banks, it has been noticed that, in the case of export and import transactions, where foreign exchange is required to be received in the country or to be remitted, the foreign banks charges a commission/fee from the bank in India, but no Service Tax is being paid thereon. These foreign banks are those with whom the importer or exporter in the foreign country holds a bank account or the said foreign bank is providing some services in relation to forwarding of documents and realisation of proceeds by way of remittances of money. As per the law, Service Tax is required to be paid by the recipient of services in India, in cases where services are provided by a foreign person. In order to examine the factual and legal position, a meeting of major banks along with representatives of Indian Banks' Association (IBA) and Foreign Exchange Dealers' Association of India (FEDAI) was held and their views were taken. After examination of the factual and legal position, the following clarification is issued.

2. Banks in India are providing services to their customers who may be exporters or importers. For the purpose of forwarding of documents and realisation of proceeds by way of receiving remittance in foreign currency or making payment in foreign currency, the banks in India have to obtain and utilise the services of foreign banks. It was explained to us, including by IBA, that there is no written agreement between banks in India and foreign banks for providing the said services. In fact, in a typical case of export from India, the exporter submits the documents to a bank in India and the said bank in turn forwards these documents to a foreign bank, which may be the banker of the importer in the foreign country or it may be the intermediary bank, which may in turn contact the banker of the importer in the foreign country. The said banker of the importer and/or the intermediary bank in the foreign country charges certain amounts and normally these charges are recovered by them by deducting from the total amount to be remitted to the Indian exporter. Further, in the case of import transactions, where the Bank in India, at the request of the importer, issues an LC, foreign bank charges are paid to the Foreign Bank. The foreign bank and/or the intermediary bank, as the case may be, deal only with the bank in India, and they only correspond and transact with the bank in India and not with the exporter. It is informed to us that since there is no formal agreement between the banks in India and foreign banks regarding the scope of their activity or the quantum of charges etc., all banks around the world, who transact in import and export transactions, subscribe to the "Uniform Rules for Collection of Commercial Paper, International Chamber of Commerce Brochure No. 522" (URC 522) effective from 1-1-1996/"Uniform Customs and Practice for Documentary Credits" (UCP 600), both issued by International Chamber of Commerce, effective from 1-7-2007, which provide Articles containing terms and conditions which are binding on all the parties subscribing

to them. Thus, the need for agreements between banks is superfluous, as they subscribe to the URC 522 and UCP 600, and only the rates of charges need to be periodically fixed.

3. While going through sample import-export documents obtained from the banks, it was noticed that some of the banks are affixing stamps on documents stating that the said transactions of forwarding of documents and realisation of proceeds by way of remittances of money are subject to URC 522/UCP 600. The banks in India appears to be following URC 522/UCP600 for transactions of forwarding of documents and realisation of proceeds by way of remittances of money.

4. In order to understand the obligations of the foreign banks, the banks in India and importer/exporter, the said URC 522/UCP 600 were examined. Article Nos. 4, 8, 10, 11, 16, 21, 26 of URC 522 and Article Nos. 3, 4, 7, 8, 9, 13, 37 of UCP 600, read with other relevant Articles in these two brochures are relevant for the present issue. A combined reading of these Articles shows that there is an implied contract between a bank in India and a foreign bank, whereby, the foreign bank recognizes only the Bank in India for providing their services and for collection of their charges. In case of any clarification on any issue regarding their activity, there is always correspondence between the foreign bank and the bank in India. Even the amount of charges collected by foreign bank is informed only to the bank in India. The exporter or the importer in India comes to know about these charges through their own bank in India. In fact the most interesting aspect is that the importer or the exporter in India is not even aware of the quantum of charges which are charged by the foreign bank. Further, in case of export transactions, if the remittance could not be paid by the foreign importer, in that case the foreign bank recovers the charges from banks in India only and in case of import transactions, if

the foreign exporter does not bear the foreign bank charges, the same are recovered by the foreign bank from the bank in India. The combined reading of the relevant articles in the said two internationally accepted conventions, undoubtedly show that services are provided by the foreign bank to the bank in India. Therefore, as per the Service Tax law, as a recipient of service, the bank in India, is required to pay Service Tax under erstwhile Section 66A of the Finance Act prior to 1-7-2012 and under the provisions of Notification No. 30/2012-S.T., dated 20th June, 2012 after 1-7-2012.

5. The views of the banks that services provided by the foreign bank are received by the importer or exporter in India is not factually and legally correct because, for a person to be treated as recipient of service, it is necessary that he should know who the service provider is and there should be an agreement to provide service, which may be oral or written. In the present case, the importer and exporter does not even know who the service provider is, as they are not aware of the identity of the foreign banks which would be providing services. Exporter or importer in India does not have any formal or informal agreement with the foreign bank. Importer or exporter in India does not even know the quantum of charges which the foreign bank would be recovering. Therefore, in view of the above mentioned factual position and also in view of the various articles of URC 522/UCP 600, it is clear that services are provided by the foreign bank to the bank in India. Further, Tribunals have also prima facie held that in such cases, services are provided by the foreign bank to the Indian bank and not to the Indian Exporter. [M/s. Gracure Pharmaceuticals Ltd. v. Commissioner of Central Excise, Jaipur-I - 2013 (32) S.T.R. 249 (Tri.-Del.), M/s. Gujarat Ambuja Exports Ltd. v. Commissioner of Service Tax, Ahmedabad - 2013 (30) S.T.R. 667 (Tri.-Ahmd.)].”

In the above clarification it has been clarified that the Indian Exporters are not the recipient of services from the Foreign Bank/ intermediary bank. As Indian Exporter's as per the above clarification are not receiving any ser5vices from the foreign bank/ intermediary bank, the entire foundation on which this demand has been made and upheld is demolished and the impugned orders need to be set aside only on this ground.

4.4 In case of Theme Exports Pvt. Ltd. [2019 (26) G.S.T.L. 104 (Tri. - Del.)] following the earlier decision in case of Dileep Industries, Delhi Bench held as follows:

"4. We find that the issue arising out of present dispute is no more res integra, in view of the decision of this Tribunal in the case of M/s. Dileep Industries Pvt. Ltd. v. CCE, Jaipur - 2017 (10) TMI 1231 - CESTAT, New Delhi. The relevant paragraphs in the said decision are extracted herein below :-

"4. After hearing both the parties and on perusal of record, it appears that the first issue is pertaining to the collection charges of the Indian bankers who in turn send the same to the appellant for collection to the foreign bankers. The department has demanded Rs. 2,37,087/- from the appellant. From the record, it appears that while exporting their goods, they lodged their bills for collection to the Indian Bankers who in turn send the same to the foreign banks. The foreign banks while remitting the money to the Indian Bank, deduct their charges for collection of bills which in turn are charged by the Indian Banks from the appellants. When it is so, then the appellant are not entitled to pay the service tax. The identical issue has come up before the Tribunal in the case of Greenply Industries Ltd. v. CCE, Jaipur (Final Order No. 50149/2014, dated 3-1-2014) where it was observed that:-

"4. We find that no documents have been produced showing that foreign bank has charged any amount from

the appellant directly. The facts as narrated in the impugned order clearly indicate that it is the ING Vyasa Bank who had paid the charges to the foreign bank. In view of this, the appellant cannot be treated as service recipient and no service tax can be charged under Section 66A read with Rule 2(1)(2)(iv) of the Service Tax Rules, 1994. Moreover, we also find that in appellant's own case for the previous period similar order had been passed by the original adjudicating authority and on appeal being filed against the same, the Commissioner (Appeals), vide his order-in-appeal dated 12-11-2008 has set aside that order and as per the appellant's counsel, no appeal has been filed against that order. In view of this, the impugned order is not sustainable, the same is set aside and appeal is allowed".

5. By following our earlier decision (supra), we allow the claim of the appellant in this regard."

4.5 In case of Kalpataru Power transmission Ltd [2023 (69) GSTL 54 (T-Del)] following has been held:

"5.2 The case of the department is that the Appellant was required to furnish Bank Guarantee in respect of the work of erection, commissioning and installation of high-tension power transmission towers abroad. For this the foreign banks charged bank guarantee commission. Also while remitting foreign currency earning in India, the foreign bank charged bank charges. These charges are in the nature of charges towards providing Banking and Financial Service and Service tax is sought to be paid on such charges paid by the Appellant. We find that no documents have been produced by the department showing that foreign bank has charged any amount from the appellant directly. Therefore, to presume that they are receiving services from the foreign bank is not correct. The facts as narrated in the impugned order clearly indicate that it is the Indian Banks who had paid the charges to the foreign banks. We find that the Appellant solely deal with the

Indian Bank and appellant do not have any kind of interaction with foreign banks. Clearly, in this matter service if any has been received it is by the Indian Bank and not by the appellant. Hence, amount charged by foreign banks to Indian banks prima facie cannot be considered as service received by the appellant. The following judgments relied upon by the appellant squarely applicable to the facts of the present matter :

- *Dileep Industries (P.) Ltd. - 2017 (10) TMI 1231*
- *Theme Exports(P.) Ltd. - 2019 (26) G.S.T.L. 104*
- *Greenply Industries Ltd. - 2015 38) S.T.R. 605*
- *Raymond Ltd., Final Order No. A/85816/2018, dated 23-3-2018 [2018 (19) G.S.T.L. 270 (Tri. - Mumbai)]*

In view of this, the appellant cannot be treated as service recipient and no service tax can be charged from them under Section 66A of the Finance Act."

4.6 In view of the above referred Trade Notice and the decisions as above we find that the issue involved in this case is no longer res-integra. The issue involved in the case is squarely covered by the above referred decisions and other decisions cited by the counsel for the appellant. Thus we do not find any merits in the impugned orders.

5.1 Appeals are allowed.

(Pronounced in open court on-02/11/2023)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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