Foreign Bank Charges - Who is the recipient of service in India?

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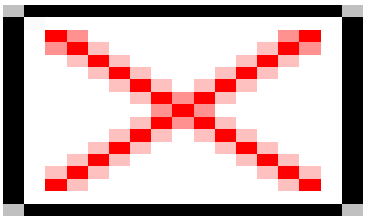

IN an export transaction from India, there are at leastÂ two banks, namely the Indian bank and the foreign bank, involved in processing of export documents and remittance of money as per RBI guidelines. When the foreign importer transfers money to the Indian exporter, the foreign and Indian banksÂ deduct their charges separately from such remittances. While the Indian bank is paying Service Tax / GST on its own charges, the foreign bank charges, even though passed on by the Indian bank and recorded in the books of accounts of the Indian exporter, has been going untaxed.Â

2. This issue was initially noticed by the Department during the audit of the Indian exporters. Foreign bank charges were found booked in their accounts. Show cause notices were issuedÂ to the Indian exporters demanding Service Tax under 'banking and other financial services' category [s.65(12) of the Finance Act, 1994] on foreign bank charges under reverse charge. But Department's effort to tax this area was thwarted by the Hon'ble Tribunal's Order datedÂ 3rd January, 2014Â in the case of Greenply Industries Ltd Versus Commissioner of Central Excise, Jaipur - 1 as reported in 2015(38)STR 605 (Tribunal Delhi). In this case, M/s. Greenply Industries Ltd had receivedÂ theirÂ export proceeds through ING Vyasa Bank. The Hon'ble Tribunal held that since no documents have been produced showing that foreign bank has charged any amount from the appellant directly and it is the ING Vyasa Bank who had paid the charges to the foreign bank, no Service Tax can be charged from the appellants (Indian exporter).

3. Subsequently, the Commissioner of Service Tax-I, Mumbai issued a Trade Notice No. 20/2013-14-ST-I on 10th February, 2014, in which a view was taken that the Indian importers and exporters are not liable to pay Service Tax as they are not aware of the identity of the foreign banks and they do not have any contact or agreement with them. In fact, as per the URC522/UCP600 norms (Uniform Rules for Collection of Commercial Paper, International Chamber of Commerce), there is an implied contract between a bank in India and a foreign bank whereby the foreign bank recognises only the bank in India for providing their services and for collection of the charges. It was, Â therefore, clarified that in cases where the foreign banks are recovering certain charges for processing of import/export documents regarding remittance of foreign currency, the banks in India would be treated as recipient of service and, therefore, required to pay Service Tax. Thereafter, it seems that many Commissionerates started following this Trade Notice andÂ issued Show Cause Notices to the Indian banks demanding Service Tax on foreign bank charges under reverse charge basis.Â

4. Board clarified the issue of Service Tax on remittancesÂ vide Service Tax Circular No.**163/14/2012-ST** dated 10.07.2012 by stating that any fee or conversion charges which are levied for sending such remittance from abroad are not liable to Service Tax as a person sending the money andÂ the company conducting the remittance are located outside India. In terms of the Place of Provision of Service Rules 2012, such services are deemed to be provided outside India and are not liable to Service Tax. However, in our view, the applicable Rule 9(a) [Place of Provision Of Specified Services] apply only to account holders of the foreign bank and, therefore, they are not applicable to the present issue involving the Indian bank and the Indian exporter, who is not necessarily an account holder of the foreign bank.Â Moreover, this circular stands superseded by Â another Service Tax Circular No**180/06/2014-ST** issued on 14.10.2014. This later circular has also not dealt with the issue of foreign bank charges.

5. However, in a recent case of M/s. SBBJ Vs. CCE & ST-Alwar reported as - **2020-TIOL-1175-CESTAT-DEL**, Hon'ble CESTAT, New Delhi has ruled that the Indian Bank is not the recipient of any service rendered by the foreign bank, and has, accordingly,Â dropped a Service Tax demand of Rs. 110 Crore pertaining to theÂ period October, 2010 to March, 2015.Â In this case, Department had demanded Service Tax from M/s. State Bank of Bikaner and Jaipur on foreign bank charges under reverse charge,Â based on

the said Trade Notice dated 10.02.2014 issued by the Commissioner ofÂ Service Tax-I, Mumbai.Â

6. In thisÂ SBBJ case,Â Hon'bleÂ Tribunal observed thatÂ this Trade Notice and other contrary Tribunal Judgements have been superseded by Hon'ble Madras High Court's Order dated 22.11.2019 in BGR Energy Systems Ltd - **2019-TIOL-2663-HC-MAD-ST** .Â In this BGR Energy case, Department had demanded Service Tax from the petitioner (an Indian contractor)Â on the foreign bank charges in relation to bank guarantee provided by the foreign bank in Iraq for enabling the petitionerÂ to enter into contract with an Oil Company situated in Iraq. The petitionerÂ was in appeal in MadrasÂ High court against confirmation of demand by the Additional Commissioner of GST and Central Excise, Chennai. The Hon'ble Madras High Court upheld the Service Tax demand by holding that the petitioner cannot claim that they are not the recipient of the service.

The High Court ***inter alia*** observed -

> ***"â€¦ThoughÂ the petitioner had not made any remittance to the foreign intermediary banks directly, there cannot be any dispute that the expenses made out towards rendering of that service by the Indian banks were borne by the petitioner. In other words, at no stretch of imagination, it can be said that the petitioners bank at Chennai, namely, Indian Bank Adyar, is the recipient of the service provided by the intermediary bank or the foreign bank situated in Iraq. Needless to say that the Indian bank, Adyar, namely the banker of the petitioner has facilitated the service to be renderedÂ by the intermediary banks and the foreign bank in Iraq only for the purpose of providing bank guarantee on behalf of the petitioner. Therefore, the petitioner is not justified in shirking its liability to pay Service Tax relatable to the bank guarantee commission and realisation charges involved in this case." [para 18 refers]Â***

7. Â Â The Indian exporters are also not paying Service Tax on foreign bank charges based on Hon'ble CESTAT Order in Green Ply Industries Limited 2015 (38) STR 605 (Tribunal Delhi). There is no appeal against Greenply Order andÂ the judgement has been followed subsequently by the Hon'ble Tribunal in several cases from 2014 to 2020, as Â listed below :

> ***i. Dileep Industries - Final Order dated. 3.01.2014 - CESTAT Delhi, 2017(10) TMI 1231 -CESTAT Del***
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> ***ii. Cylwin Knit Fashion- Final Order dated. 29.08.2017 -CESTAT, Chennai, 2017(9) TMI 96 _CESTAT Chennai***
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> ***iii. Theme Exports Pvt. Ltd. - Final Order dated. 09.04.2018 - CESTAT Delhi, 2019(26) GSTL 104 (Tri-Del)***
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> ***iv. Raj Petro Specialities Pvt. Ltd. - Final Order dated. 17.08.2018 - CESTAT Ahmedabad, MANU/CS/0078/2018 - 2019-TIOL-442-CESTAT-AHM***
>
> ***v. Aurobindo Pharma Ltd Vs. Commissioner of Central Excise Hyderabad-3,Â Final Order No. 30919/2020 dated 09.09.2020***

8. Â Â The above judgements given by the Hon'ble Courts has left theÂ question - who is the recipient of the service rendered by the foreign bank, unanswered. Thus,Â a situation has emerged in whichÂ both the Indian exporter and the Indian banksÂ have been held to be not liable for payment of Service Tax on the foreign bank charges for the periodÂ till 2017. A similar situation appears to be prevailing in the GST regime w.e.f. 01.07.2017.

9. The taxability of foreign bank charges in the GSTÂ regime is governed by sl. no. (1) ofÂ Notification No**10/2017-IGST(Rate)** , which specifies that for any service supplied by any person who is located in a non-taxable territory to any person other than non-taxable online recipient, the whole of Integrated Tax leviable under section 5 of the said Integrated Goods and Services Tax Act, shall be paid on reverse charge basis by the recipient of the such services.

10. Section 13 of the IGST Act deals with place of supply of services where location of supplier or location of recipient is outside India. Its sub - clause (8)(a) specifies that the place of supply of services supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders shall be the location of the supplier of services. This sub-section applies only to the account holders of the foreign bank, and therefore will not apply to the present issue involvingÂ Indian exporters or the Indian bank.Â

11. The gamut of the issue is not limited to import /export but to a host of other transactions where Indian entities are receiving services from foreign banks like filing of bank guarantees forÂ contracts abroad, external commercial borrowings, etc.Â Further, many similar appeals of both Indian exporters and banks are still pending at some regional benches of CESTAT. Departmental Authorised Representatives and Reviewing

Authorities may face a difficult task in justifying demand on either parties in view of judgements being on both sides. Hence, there is a need to ensure uniformity in Department's stand at different fora. It is hoped that future judgements of the Courts on this issue would be more comprehensive and would answer the question that if it is not the Indian bank or the exporter, who is the recipient of service provided by the foreign bank. To conclude, we can say that in all these cases the appeals may have been decided, but the legal clarity has not yet been attained.

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