आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan,Revenue Marg,Ambawadi,Ahmedabad-380015
☎ 26305065-079 : टेलेफैक्स 26305136 - 079 :
Email- commrappl1-cexamd@nic.in

DIN-20220164SW000033903B

5800 TO 5804

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/STP/381/2021-Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-61/2021-22**
दिनाँक Date : **12.01.2022** जारी करने की तारीख Date of Issue : **12.01.2022**

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original Nos. **28/ADC/2020-21/MLM dated 18.12.2020**, passed by the Additional Commissioner, Central GST & Central Excise, Ahmedabad-North.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Appellant- M/s. Central Bank of India, Central Bank Building, Plot No. 205, Lal Darwaja, Ahmedabad.

Respondent- Additional Commissioner, Central GST & Central Excise, Ahmedabad-North.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd **माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद** –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा 'कर्तव्य की मांग'(Duty Demanded) -

(i) (Section) खंड 11 D के तहत निर्धारित राशि;

(ii) लिया गलत सेनवैट क्रेडिट की राशि.

(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER IN APPEAL

The present appeal has been filed by Central Bank of India, Central Bank Building, Post No. 205, Lal Darwaja, Ahmedabad (in short '***the appellant bank***') against the OIO No: 28/ADC/2020-21/MLM dated 18.12.2020 (in short '*impugned order*') passed by the Additional Commissioner, Central GST, Ahmedabad North (in short '*the adjudicating authority* ').

2. The facts of the case, in brief is that, an inquiry was initiated by the officers of DGCEI, Indore (now DGGSTI) and it was noticed that the appellant bank were providing services to their customers (i.e. exporters) for processing of export documents and remittance of export proceeds. For this purpose they availed services of their counterpart foreign banks located in non-taxable territory. The foreign bank deducted/recovered the consideration for services so provided from the respective export proceeds realized and remitted only remaining amount to the appellant bank. As per Rule 3 of the Place of Provision of Service (POPS) Rules, 2012, the location of service receiver is the place of provision of service, therefore, the liability to pay service tax under reverse charge mechanism under Notification No. 30/2012-ST dated 20.6.2012, shall be on the service recipient bank in India. It appeared that the appellant bank were not discharging service tax liability under reverse charge mechanism on the services received for processing of export documents and realization of proceeds from the bank/financial institutions located in non-taxable territory. It appeared that during the period October, 2012 to March, 2017, amount of Rs.5,85,98,593/- was recovered/deducted by foreign bank on account of services provided to the appellant bank, on which service tax was not paid. Since the service provider is located in non taxable territory, service tax amount of Rs.76,22,909/- was to be recovered from the appellant bank.

3. A Show Cause Notice (SCN) No. 18/BhZU/ADG/ST/2018 dated 12.03.2018 was, therefore, issued proposing to treat the appellant bank as recipient of service provided by the foreign bank and making them liable to pay service tax amount of Rs.76,22,909/- under reverse charge mechanism on the taxable value amounting to Rs.5,85,98,593/-, under Section 73(1) of the F.A. 1994. Interest on the said service tax demand u/s 75; penalty u/s 76 for non-payment of service tax; penalty u/s 78 for failure to pay the service tax by restoring suppression and penalty u/s 77 for failure to furnish true and correct ST-3 return within the period specified u/s 70 of the Act ibid read with Rule 7 of the Service Tax Rules, 1994 was also proposed. The aforesaid SCN was adjudicated by the impugned order, wherein the appellant bank was treated as recipient of service provided by the foreign bank and confirming the service tax demand of Rs.76,22,909/- alongwith interest and making them liable to pay the said service tax under reverse charge mechanism on the taxable value amounting to Rs.5,85,98,593/-. Penalty u/s 76 was not imposed; however, equivalent penalty u/s 78 was imposed. Further, penalty of Rs.10,000/- was also imposed u/s 77.

4. Aggrieved by the impugned order, the appellant bank filed the instant appeal. They in their appeal memorandum as well as in the additional submission dated 11.11.2021, made following contentions;

- The charges collected by the foreign banks are in relation to processing of Import/Export documents on account of Importer/Exporter. The foreign bank collects the proceeds from the foreign customers after deducting its due charges and remits the proceeds to the Indian Bank/appellant bank. The appellant bank collects its charges for the services rendered to the exporter separately and discharges the tax dues thereon. They are merely collection agent on behalf of the exporter, hence, would fall under Rule 9 of POPS Rules, 2012, as they cannot charge tax from foreign bank, which is located outside the taxable territory.
- As there is no contract between the foreign banks, they cannot be considered as service provider / recipient. They placed reliance on Board's Circular No.163/14/2012-ST which clarified that such charges are not taxable as the place of supply is outside India. The demand is void, as legal provision not examined, hence interest not liable.
- As per Rule 7 of the Point of Taxation Rules read with Section 68(2), the point of taxation shall arise at the time of payment. Since the payment of charges levied by foreign bank is borne by Importer/exporter, appellant bank cannot be a recipient to pay taxes as no entry is debited to the Profit & Loss account of the bank.
- They also relied on the judgment passed by Apex Court in the case of Paper Products Ltd. 1999(8) TMI 70-SC and Dhiren Chemicals Industries-2002(139) ELT 3 (SC). Madras High Court decision in the case of BGR Energy Systems – 2019(11) TMI 1130. Honb'le Delhi CESTAT decision in State Bank of Bikaner & Jaipur (Appeal No. 51138/2017).
- Penalty u/s 78 also not imposable as malafide intention and suppression of facts with intent to evade service tax not established. They placed reliance on numerous decisions some of them are listed here, Apex Court's decision in the case of Rainbow Industries- 1994 (74) ELT 3(SC) 1994; Anand Nishikawa Co. Ltd.- 2005(188) ELT 149 (SC); EssEss Engineering 2010-TIOL-1447-CESTAT-Del; Rajasthan Spinning & Weaving Mills-2009 TIOL 63 ScEX; First Flight Courier Ltd- 2011 22 STR 622 (P&H) High Court.
- Penalty under Section 77 is also not imposable as the appellant bank being a Nationalized Bank and a Public Sector Undertaking and has no malafide intention in not complying the taxation rules & regulations. They were regular and punctual in submissions of their half yearly service tax returns and have fully complied with the provisions of Section 67, 68 & 70 of the F.A. 1994. Therefore the allegations were farmed on record without any evidence of such default, which is not sustainable.

5. Personal hearing in the matter was held on 12.11.2021 through virtual mode. Shri Anand A. Desai, Chartered Accountant, appeared on behalf of the appellant bank. He reiterated the submissions made in the appeal memorandum as well as in the additional submission dated 11.11.2021.

6. I have carefully gone through the facts and circumstances of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum, submissions made at the time of personal hearing as well as in the additional submissions dated 11.11.2021 made by the appellant bank. The issue that

needs to be decided under the present appeal is, whether the services provided by foreign bank is received by the appellant bank and whether they are liable to pay service tax under reverse charge mechanism as per Notification No.30/2012-ST dated 20.06.2012 or otherwise?

7. I have examined the facts of the case and I find that the appellant bank is providing services to the exporter by facilitating the settlement of payment between importer and exporter in connection with the import/export of goods. The Foreign Exchange Management Regulations require all foreign trade transactions to be necessarily routed through normal banking channels. If the banks of the importer and exporter are different, then the settlement transactions are governed by the URC 522 and UCP 600 protocols issued by the International Chamber of Commerce. In the case of export trade, as per the specific instructions of Indian exporter, the appellant bank provides services like sending export documents to the foreign buyer's bank, collection of payment for bill of exchange. The exporter submits the export documents to the appellant bank and mentions the amount in foreign currency to be collected from the importer through the importer's foreign bank. The bill of exchange is endorsed in the name of foreign bank and the appellant bank forwards these documents to the foreign bank or the foreign intermediary bank for collection of payment from the importer. The foreign bank on receiving the documents collects the payment from the importer and remits the funds to the appellant bank. The foreign bank charges its fees from the exporter for handling of export documents and collection of export proceeds by deducting their charges from the amount collected from the importer. The appellant bank in turn credits the (deducted) export proceeds to the account of the exporter in Indian Rupees for this service they in turn charge the exporter in INR, on which the appellant bank are discharging their tax liability. These are undisputed.

7.1 The contention of the department is that the appellant bank and the foreign banks have principal to principal relationship as per URC 522 and UCP 600 and that the services of foreign banks are availed by the appellant bank for their own consumption as without their services it would not be possible for the appellant bank to provide the service of realization of exports proceeds. If the remittance could not be paid by the foreign importer, then in that case the foreign bank recovers the charges from the appellant bank in India, thus, the services rendered by foreign banks are to the appellant bank in India as they do not recognize the clients /exporter of the appellant bank. The appellant bank is actual service recipient and the charges paid by them to the foreign bank needs to be included with their own charges and are required to pay service tax under reverse charge mechanism. The appellant bank, on the other hand, are contending that they are not the recipient of service as the actual charges are borne by the exporter and they are only acting as an agent for the exporter to realize the export proceeds from the importer and they claim that service tax is discharged on the charges charged from the exporter for their service.

7.2 To examine whether the service rendered by foreign banks to the appellant bank is a service or not, I will examine the definition of '**service**' defined under Section 65B (44) of the Finance Act, 1994.

*"**65B(44)** "**service**" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-*

(a) an activity which constitutes merely, -

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) xxx xxx xxx

(c) xxx xxx xxx

Explanation 1. - xxxx

Explanation 2. - xxxx

Explanation 3. - xxxx

Explanation 4. - xxxx

The '**taxable service**' is defined under Section 65B(51) of the Finance Act, as any service on which service tax is leviable under Section 66B;"

7.3 The foreign banks in the present case are providing the services of transfer/exchange of documents and transfer of money relating to exports made by the exporters in India and these exporters receive money through the appellant bank against the exports. Any activity shall qualify as service, if carried out against a consideration. Contention of the department is that the foreign bank is recovering the charges from the appellant bank as they are the recipient of the service and therefore under the reverse charge mechanism, the appellant bank is required to discharge the tax liability. But the moot point is whether the service rendered was against a consideration, if so then it would be a service. From the nature of transaction, it emerges that the charges of foreign bank are deducted from the export proceeds realized and remitted to the exporter i.e. the exporter bears the charges, thus the argument that the foreign bank was providing service to the appellant bank fails in this count, as no consideration or charges are recovered from appellant bank. The appellant bank is only playing a role of an agent to settle the payment relating to exports of trade. For this role whatever charges are collected from the exporter, the appellant bank is discharging their service tax liability, which is not disputed by the department.

7.4 The taxability of service or the charge of service tax has been specified in Section 66B of the Act, which is reproduced below;

SECTION 66B- Charge of service tax on and after Finance Act, 2012 *—There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen per cent.] on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.]*

In terms of Section 66B, a service is taxable, if provided within the taxable territory, and to determine the place where the services are provided or agreed to be provided, "**place of its provision**" shall be essential.

7.5 To determine the taxing jurisdiction for a service in the context of import or export of services, the Place of Provision of Services Rules, 2012 (POPS) were framed. Department has argued that in terms of Rule 3 of POPS Rules, 2012, the appellant bank is the recipient of service as the place of provision shall be the location of the service recipient. Hence, the value of taxable service received by the appellant bank from foreign bank should be added to their own charges in terms of Rule 5(1) of the (Determination of Value) Rules, 2006. For better understanding both the above mentioned provisions are reproduced below;

RULE -3. Place of provision generally *— The place of provision of a service shall be the location of the recipient of service:*

Provided *that in case of services other than online information and database access or retrieval services, where] the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.*

Rule 5(1) of the (Determination of Value) Rules, 2006, is as under;

RULE 5. Inclusion in or exclusion from value of certain expenditure or costs- *(1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said service.*

*[**Explanation**.- For the removal of doubts, it is hereby clarified that for the [the value of the telecommunication service shall be the gross amount paid by the person to whom telecommunication service is actually provided].]*

(2) Subject to the provisions of sub-rule (1), the expenditure or costs incurred by the service provider as a pure agent of the recipient of service, shall be excluded from the value of the taxable service if all the following conditions are satisfied, namely :-

(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;

(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;

(iii) the recipient of service is liable to make payment to the third party;

(iv) the recipient of service authorises the service provider to make payment on his behalf;

(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;

(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;

(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

Explanation 1. *- For the purposes of sub-rule (2), "pure agent" means a person who -*

(a) enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;

(b) neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;

(c) does not use such goods or services so procured; and

(d) receives only the actual amount incurred to procure such goods or services.

7.6 In terms of Rule 3(1) above, generally the place of provision of service shall be the location of the recipient of service. However, in the instant case, the recipient of service is not the appellant bank as they are not paying any consideration to the foreign bank. In the impugned order at Para 15, it is categorically stated that the ultimate service is consumed and utilized by the exporters in India, who pays for the same. Whatever expenditure or costs incurred by the service provider (foreign bank) in the course of providing service is recovered from the exporter from the export remittance, hence, cannot be treated as consideration paid by the appellant bank. Therefore, I find that such amount/charges borne by the exporter shall not be included in the taxable value of the services received by the appellant bank for the purpose of charging service tax under reverse charge mechanism. Even otherwise under Notification No.30/2012-ST dated 20.6.2012, the recipient of service located in the taxable territory is required to pay service tax in respect of any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory. In the absence of any contract agreed between the appellant bank and the foreign bank and unless the nexus between consideration and the service provided by the foreign bank is established, the tax liability under reverse charge mechanism, on such charges cannot be imposed on the appellant bank.

7.7 I find that the adjudicating authority also held that as per UCP 600 foreign bank only recognizes only Indian bank for providing their services and for collection of their

charges, hence the banks in India are recipient of the service. I find that such an argument is not sustainable, because all foreign trade transactions have to be routed through normal banking channels and the settlement of these transactions are governed by URC 522 & UCP 600 protocols and the charges collected were under the protocols issued by the International Chamber of Commerce. The aim of this protocol is to standardize international trade, reduce the risks of trading goods and services, and govern trade. Therefore, I find that such charges cannot be considered as a consideration against a service.

8. Hon'ble Larger Bench of the Tribunal in ***Bhayana Builders (P) Ltd.*** v. *Commissioner of Service Tax* [2013 (32) S.T.R. 49 (Tri. - LB)] observed that "implicit in the legal architecture is the concept that any consideration whether monetary or otherwise, should have flown or should flow from the service recipient to the service provider and should accrue to the benefit of the latter." Also Hon'ble Supreme Court in *Commissioner of Service Tax* v. ***M/s. Bhayana Builders*** [2018 (2) TMI 1325 = 2018 (10) G.S.T.L. 118 (S.C.)], while deciding the appeal filed by the Department against the aforesaid decision of the Tribunal, also explained the scope of Section 67 of the Act, both before and after the amendment, in the following words :

> *"The amount charged should be for "for such service provided": Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words "for such service provided" the Act has provided for a nexus between the amount charged and the service provided. Therefore, any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67. The cost of free supply goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined."*

8.1 The appellant bank have also placed reliance on the Madras High Court's decision in the case of **BGR Energy Systems** reported at 2020 (32) G.S.T.L. 186 (Mad.), wherein it was held that;

> *"... Therefore, the petitioner cannot claim that they are not the recipient of the service. Though the petitioner had not made any remittance to the foreign intermediary banks directly, there cannot be any dispute that the expenses met out towards rendering of such service by the Indian Bank were borne by the petitioner. In other words, at no stretch of imagination, it can be said that the petitioner's Bank at Chennai, namely, Indian Bank, Adyar, is 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 rendered 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."*

8.2 Similarly, I find that the decision of Honb'le CESTAT Principal Bench, New Delhi passed in the case of **State Bank of Bikaner & Jaipur** reported at 2021 (45) G.S.T.L. 293 (Tri. - Del.), relied by the appellant bank is squarely applicable to the present case, wherein it was held that;

" ***33.*** *The period involved in this appeal is from October, 2010 to March, 2015. Thus, it covers the period prior to July 1, 2012 and the subsequent period also. For the period prior to July 1, 2012, the show cause notice alleges that Foreign Banks provide services of transfer/exchange of documents and transfer of money relating to exports made by the exporters in India and these exporters receive money through the Appellant bank against the exports. Thus, the Foreign Banks provide "banking & other financial services" as defined under section 65(12)(a)(ix) of the Finance Act. For the period w.e.f. July 1, 2012, the show cause notice alleges that the said service is covered by Section 65B(44) of the Finance Act which is taxable under Section 65B(51).*

34. *The issue that needs to be decided is whether the Appellant bank is the recipient of the service said to have been provided by the Foreign Bank. The nature of the transactions that take place when an exporter in India exports goods to an importer outside India has been described in the preceding paragraphs. The Appellant bank provides service to the exporters by sending the export documents to the bank of the importer abroad and collects payment. Thus, the role of the Appellant bank is to settle the payment relating to export/import of trade. For performance of such activity, the Appellant bank charges service tax to the exporters and there is no dispute about the said charges in this Appeal.* ***The Appellant bank cannot be said to be the recipient of service for the activities undertaken by the Foreign Banks situated outside India, the charges for which are deducted at source on the export bill. The Appellant bank merely acts on behalf of the Indian exporter and facilitates the service. The Appellant bank, therefore, would not be liable to pay service tax under the reverse charge mechanism.***

49. *It would be seen from the aforesaid order of the Additional Commissioner that two reasons have been assigned for dropping the demand made in the show cause notice. The first is that the Foreign Bank does not transact business of banking in India and, therefore, would not fall within the definition of a "banking company", which is a pre-requisite for a service to be covered under 'banking & other financial services'. The second reason assigned by the Additional Commissioner is that the Indian Bank does not pay any amount to the Foreign Bank and, in fact, the Indian Bank only plays a role of a mediator between the Indian exporter and the foreign banker representing the foreign importer. This is a general practice that the exporters are required to follow by routing the export documents through a banking channel. Thus, the Indian bank did not receive any service from the Foreign Bank. Learned Authorized Representatives of the Department have not stated that the aforesaid order of the Additional Commissioner has been set aside.*

50. *The inevitable conclusion that follows from the above discussion is that the Indian Bank is not the recipient of any service rendered by the Foreign Bank and,* ***therefore, there is no liability to pay service tax on a reverse charge mechanism."***

(Emphasis supplied)

As no stay was granted by judicial forum on the issue decided vide above order of Honb'le Delhi CESTAT, and in the absence of any diverse judgment on the issue, I am left with no other option but to follow the judicial pronouncement made by Hon'ble Tribunal in the case of State Bank of Bikaner & Jaipur. Further, I find that the case law relied by the adjudicating authority in the case of M/s. GRACURE PHARMACEUTICALS LTD reported at 2013 (32) S.T.R. 249 (Tri. - Del.) is distinguishable on facts as there a show cause notice was issued on the ground that the pharmaceutical company have made certain payments to foreign banks for collection of export proceeds on which service tax was charged, whereas in the case on hand service tax has been charged on the appellant bank and not on the exporter. Further, I find that the said case law was also distinguished by Honb'le CESTAT Principal Bench, New Delhi, in the decision passed, in the case of State Bank of Bikaner & Jaipur, stating that views expressed by

the bench was in the interim order and whether the appeal has been decided or not, was not clear.

9. From the discussion made above, I find that in the instant case, the services provided by the foreign bank is not to the appellant bank but to the exporter and the appellant bank merely acts on behalf of the Indian exporter and facilitates the trade. Therefore, the appellant bank would not be liable to pay service tax under reverse charge mechanism as they have not paid any consideration to the foreign bank. In fact the charges of foreign bank are deducted from the export proceeds realized and remitted to the exporter who ultimately bears the charges. In view of the judicial pronouncement and above discussion, I find that the demand is not sustainable. When the demand is not legally sustainable, question of interest and penalty does not arise.

10. In view of the above, I set-aside the impugned order and allow the appeal filed by the appellant bank.

11. The appeal filed by the appellant bank stands disposed off in above terms.

(**Akhilesh Kumar**)
Commissioner (Appeals)

Date: .1.2022

Attested

(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,
M/s. Central Bank of India, - **Appellant**
Central Bank Building,
Post No. 205, Lal Darwaja,
Ahmedabad.

The Additional Commissioner, - **Respondent**
Central GST,
Ahmedabad North

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
4. Guard File.
5. P.A. File