

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNALCHENNAI**

SOUTH ZONAL BENCH

Service Tax Appeal No:40433 of 2015

[Arising out of Order-in-Original No: 34/2014-Commr dated 26th December 2014 passed by the Commissioner of Central Excise, Coimbatore.]

M/s. AKR Textile
No. 52, Kumar Nagar, Valayankadu Main Road
Tirupur – 641 603

...Appellant

versus

Commissioner of Central Excise & Service Tax
6/7 ATD Street, Race Course Road
Coimbatore – 641018

...Respondent

WITH

(i) Service Tax Appeal No: 40558 of 2015 (Poppys Knitwear Pvt. Ltd); (ii) Service Tax Appeal No: 41156 of 2015 (Coimbatore Best Corporation Pvt Ltd); (iii) Service Tax Appeal No: 42499 of 2015 (NSP Knitting Mills); (iv) Service Tax Appeal No: 40057 of 2016 (SCM Garments P. Ltd); (v) Service Tax Appeal No: 40065 of 2016 (Flower Knitting Mills); (vi) Service Tax Appeal No: 40066 of 2016 (Priyaa Knit Fabs); (vii) Service Tax Appeal No: 40107 of 2016 (Phoeniix); (viii) Service Tax Appeal No: 40111 of 2016 (SNQS International); (ix) Service Tax Appeal No: 40124 of 2016 (Ahill Knit Exports); (x) Service Tax Appeal No: 41512 of 2016 (SCM Garments Pvt Ltd); (xi) Service Tax Appeal No: 41536 of 2016 (Flower Knitting Mills); (xii) Service Tax Appeal No: 41537 of 2016 (Flower Knitting Mills); (xiii) Service Tax Appeal No: 41819 of 2016 (Clifton Exports P Ltd); (xiv) Service Tax Appeal No: 42493 of 2016 (Clifton Exports P Ltd); (xv) Service Tax Appeal No: 41085 of 2017 (Fashion Knits); (xvi) Service Tax Appeal No: 42048 of 2017 (Best Corporation P Ltd); (xvii) Service Tax Appeal No: 42049 of 2017 (Clifton Exports P Ltd); (xviii) Service Tax Appeal No: 42110 of 2017 (NSP Knitting Mills); (xix) Service Tax Appeal No: 42111 of 2017 (NSP Knitting Mills); (xx) Service Tax Appeal No: 42113 of 2017 (Royal Classic Mills P Ltd); and (xxi) Service Tax Appeal No: 42258 of 2017 (Fashion Knits)

[Arising out of Order-in-Original No. 33/2014 dated 26th December 2014 passed by the Commissioner of Central Excise, Coimbatore; Orders-in-Appeal No. 106/2015 dated 8th May 2015 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 144/2015 dated 26th October 2015 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 174/2015 dated 23rd November 2015 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 179/2015 dated 18th December 2015 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 191/2015 dated 18th December 2015 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 145/2015 dated 26th October 2015 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 192/2015 dated 18th December 2015 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 178/2015 dated 18th December 2015 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 150/2016 dated 4th July 2016 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 155-156/2016 dated 4th July 2016 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 162/2016 dated 3rd August 2016 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 265/2016 dated 7th December 2016 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 019/2017 dated 21st February 2017 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 179/2017 dated 16th August 2017 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 174/2017 dated 16th August 2017 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 177/2017 dated 16th August 2017 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 178/2017 dated 16th August 2017 passed by the Commissioner of Central Excise (Appeals), Coimbatore; Order-in-Appeal No. 175/2017 dated 16th August 2017 passed by the Commissioner of Central Excise (Appeals), Coimbatore; and Order-in-Appeal No. CMB-APP-176/2017 dated 16th August 2017 passed by the Commissioner of Central Excise (Appeals), Coimbatore.]

APPEARANCE:

Shri Niranjan JV, Advocate for the appellants

Shri L Nandakumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR P DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NOS. 40794-40815/2020

DATE OF HEARING:	12/12/2019
DATE OF DECISION:	08/10/2020

PER: C J MATHEW

Appeal against order-in-original no. 34/2014-Commr dated 26th December 2014 of Commissioner of Central Excise, Customs and Service Tax, Coimbatore pertains to fee charged by M/s Amsco Finance Ltd for 'third part payments' for exports effected by M/s AKR Textiles to buyer outside India. The arrangement between M/s C& A Buying, Germany, the overseas customer of appellant, and M/s Amsco Finance Ltd, agent of the entity in Germany, was for the latter to make payment to all overseas suppliers of the former on deduction of service fee of 3% from the invoice value of the goods for which consent of appellant was solicited by M/s Amsco Finance Ltd *vide* email dated 13th February 2008. Likewise, charges, amounting to ₹ 4,93,50,711, deducted by banks from the dues payable by M/s C&A Buying for transmitting the netted payments of M/s Amsco Finance Ltd to Indian Bank were also included, with the amount of ₹ 47,45,656 retained by M/s Amsco Finance Ltd, in computation of value of 'banking and other financial services', allegedly received from outside India by the appellant, for devolution of tax liability of ₹ 5,51,986 and ₹ 54,90,635 respectively, as 'deemed provider' of service under section 66A of Finance Act, 1994. The particular activity that brought the appellant within the taxable service in section 65(105)(zm) of Finance Act, 1994 was identified as 'cash

management’, incorporated in the corresponding definition in section 65(12) of Finance Act, 1994 with effect from 1st June 2007, provided by M/s Amsco Finance Ltd and ‘other financial services’, that had always existed in the definition, provided by the foreign banks.

2. For the period of dispute from 2008-09 beyond 1st July 2012 and introduction of ‘negative list’ regime till 2012-13, which erased the Rules framed under section 66A as well as section 65(105) of Finance Act, 1994 to be replaced by section 65B(44) of Finance Act, 1994 and Place of Provision of Service Rules, 2012 notified under section 66C of Finance Act, 1994, it was alleged that rule 3, and not rule 9, would be applicable as sub-rule (a) could not be pressed into service. In the impugned order, the proposed demand of ₹ 60,42,621 was confirmed under section 73(1) of Finance Act, 1994, along with appropriate interest under section 75 of Finance Act, 1994, while penalty of like amount was imposed under section 78 of Finance Act, 1994 besides invoking section 77 of Finance Act, 1994 for imposing other penalties all of which are under challenge in this appeal. Another 21 appeals, of twelve other similarly placed exporters with variation in amounts confirmed in the respective adjudication orders, as below

Sl. No	Appeal No	Name of the Appellant	Impugned Order No	Period of Dispute	Value		Service Tax	
					AFL (₹)	Bank (₹)	AFL (₹)	Bank (₹)
1	ST/40	AKR	34/20	01.04.2008	4745656	4930711	551986	5490635

	433/2 015	Textiles	14	to 31.03.2013				
2	ST/40 558/2 015	Poppys Knit wear P Ltd	33/20 14	01.04.2008 to 31.03.2013	75753694	4015690	8280463	435990
3	ST/41 156/2 015	Best Corporati on P Ltd	106- 2015	01.04.2008 to 31.03.2013	22161771	5790342	2391741	632710
4	ST/42 499/2 015	NSP Knitting Mills	144- 2015	2009 -10 to 2011- 12	-	12860376	-	1324620
5	ST/40 057/2 016	SCM Garments P Ltd.	175- 15	01.04.2008 to 31.03.2013	4436189	7024606	456927	770928
6	ST/40 065/2 016	Flower Knitting Mills	179/2 015	2009 - 2013	9378673	3165557	1025690	347757
7	ST/40 066/2 016	Priyaa Knit Fabs	191- 15	2009 -10 to 2012- 13	6825137	10647951	806971	1182307
8	ST/40 107/2 016	Phoenix	145- 15	2009 -10 to 2012- 13	3432858	5927920	353854	637412
9	ST/40 111 /2016	SNQS Inter- national	192- 15	2009 -10 to 2011- 12	6278940	2983254	697084	328392
10	ST/40 124/2 016	Ahil Knit Exports	178- 15	2009 -10 to 2011- 12	5809819	5254279	667587	586043
11	ST/41 512/2 016	SCM Garments P Ltd.	150- 16	2013-2014	-	1647445	-	203624
12	ST/41 536/2 016	Flower Knitting Mills	155- 16	2013-2014	-	1521437	-	188050
13	ST/41 537/2 016	Flower Knitting Mills	156- 16	2015-2015	-	1620026	-	200235
14	ST/41 819/2 016	Clifton Exports	162- 16	2013-2014	-	3543257	-	437947
15	ST/42 493/2 016	Clifton Exports	265- 16	2008 -09 to 2012- 13	9160023	13952985	960125	1496758
16	ST/41 085/2 017	Fashion Knits	019/1 7	2013-2014	4170778	2627722	515508	324786
17	ST/42 048/2 017	Best Corporati on P Ltd	179/1 7	2014-2015	4073632	1870688	503501	231217
18	ST/42 049/2 017	Clifton Exports	174/1 7	2014-2015	-	4447411	-	549700

19	ST/42 110/2 017	NSP Knitting Mills	177/ 2017	1.07.2012 to 31.03.2013	-	5846891	-	722676
20	ST/42 111/2 017	NSP Knitting Mills	178/2 017	1.04.2014 to 31.03.2015	-	25762324	-	3184223
21	ST/42 113/2 017	Royal Classic Mills P Ltd.	175/1 7	1.10.2013 - 31.03.2015	-	7543336	-	932356
22	ST/42 258/2 017	Fashion Knits	176/2 017	2008 - 2013	6825137	70495561	806971	7991346

are also disposed off in this proceeding.

3. According to Learned Counsel for the appellants, the agreement is entered into between the overseas buyers and the intermediary in Hongkong and that the consent of the appellants, the pivot of the case of service tax authorities, is a procedural exercise intended only to ensure reconciliation of remittance amount with export value and does not establish any contractual relationship with the appellants. It is also contended that, as per notification no. 29/2004-ST dated 22nd September 2004, the activity, to be construed, at best, as bill discounting for the period before introduction of ‘negative list’ regime, was exempted. It is further submitted that, for the period thereafter, specific coverage under section 66D(n)(i) of Finance Act, 1994 would take the activity out of the purview of tax.

4. Learned Authorised Representative took us through the flow of transactions and drew our attention to the specific findings in the adjudication orders that, irrefutably, placed the impugned deductions

by the overseas entities squarely within the tax net.

5. It has been pointed out that the levy of tax on charges deducted by overseas banks, in identical situation, has been held by the Tribunal, in *Rogini Garments and ors v. Commissioner of Customs, Central Excise & Service Tax, Coimbatore* [final order no. 41819-41832/2017 dated 29th August 2017], to be unsustainable in law. On perusal of the said order at

‘6. *The case of the department is that when the foreign bank deducts the charges towards transfer of foreign exchange to the Indian bank, since the same is deducted from the sale proceeds, it is a service rendered by the foreign bank to the appellants and that there is a service provider and service recipient relationship between the foreign bank and the appellant. It is to be noted that the foreign bank deducts such charges and transfers the foreign exchange to the Indian bank from where the appellant receives the money. The foreign bank in which the overseas buyer deposits the sale proceeds is chosen by the foreign buyer and not by the appellant, who is situated in India. By no stretch of imagination can such foreign bank be considered as a service provider for the appellant who in most cases would not even be aware of the identity of such foreign bank. The act of deduction of an amount as charges for transfer of the foreign exchange to the Indian bank from the sale proceeds of the appellant is only a facility for collecting such charges from the Indian bank. This cannot be considered as payment of charges for services by the appellant to the foreign bank. It is actual charges deducted being bank to bank transaction. The department by the Trade Notice dated 14.2.2014 has clarified*

the very same situation. The relevant portion is extracted as under:-

"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-1 -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.)]."

Similar issue was considered by the Tribunal in the case of Greenply Industries Ltd. (supra). The relevant portion is reproduced as under: -

"5. We have considered the submissions from both sides and perused the records. 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 from them 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 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 the appeal is allowed."

7. We have to say that the decision relied upon by the Id. AR in the case of Lupin Ltd. (supra), was rendered on 12.2.2013 which is much before the clarification issued by the Trade Notice and also the decision in the case of Greenply Industries (supra). Therefore, following the judicial discipline in the case of Greenply Industries (supra), and the facts being identical, the levy of service tax is unsustainable. The impugned orders are set aside and the appeals are allowed with consequential relief, if any.'

we find that the issue is no longer *res integra* and that demand pertaining to 'other financial services' has been erroneously confirmed in the orders impugned before us.

6. On the amounts retained by M/s Amsco Finance Ltd, which is sought to be taxed under 'cash management' within section 65(12) of Finance Act, 1994, the definition comes into play for services rendered by 'banking company or a financial institution including a non-banking financial company or any other body corporate or commercial concern' and the question that requires resolution is the nature of activity intended by 'cash management' which has been invoked in the show cause notice for the period prior to 1st July 2012. Admittedly, the omission by specific exclusion of such activity, effected on 1st June 2007, is the sole description that could be fastened on the appellants for taxability as deemed provider of service. From

the clarification in circular no. 96/7/2007-ST dated 23rd August 2007 of Central Board of Excise & Customs, issued soon after the legislative change, it would appear that the intent was limited to 'chit funds' as seen from

'Reserve Bank of India has clarified that the business of a chit fund is to mobilize cash from the subscribers and effectively cause movement of such cash to keep it working and, therefore, the activity of chit funds is in the nature of cash management.'

thus negating the recourse to section 65(105)(zm) as taxable service for which appellants were liable till 30th June 2012. On the other hand, this may have the scope of inclusion within the taxable service as 'bill discounting' for which exemption is afforded by notification no. 29/2004-ST dated 22nd September 2004 when provided to customers. As a customer of the provider of the service is not, under the notification, required to be an account holder, the benefit of such exemption is not deniable to the appellants.

7. For the period after 1st July 2012, the finding in the impugned order that

'20. For the period from 1st July 2012: -

Service tax demand related to M/s Amsco Finance Ltd; - It has been argued by M/s, AKR Textile that after the advent of negative regime, they are not liable to pay service tax under reverse charge. For which, they have reiterated what was

already stated and quoted in Issue 1 discussion. The argument put forth were already considered and were rejected as not tenable. From the records available and as per the legal position and in view of the clarification given in the CBEC Education Guide, para 5.3.3, M/s. AKR Textile are receiving the Banking and Financial service rendered by M/s Amsco Finance Ltd., and they are person who is making the payment of service fee for the service received. M/s C & A is neither receiving the service of M/s Amsco Finance Ltd nor paying the payment. It is M/s. AKR Textile (who are having a permanent establishment in the taxable territory) who are making the payment actually, hence, they are liable to pay service tax under Section 68 (2) of the Finance Act, 1994 for the receipt of service from the non-taxable territory to the taxable territory i.e. in India. Further it is held that it is not the mere transfer of money is involved the issue to attract the negative list . What M/s. AKR Textile is receiving the comprehensive Banking and Financial Service with effect from 1.7.2012 i.e. as stated earlier processing of export Invoices, making the prompt payment through assistance of customized portal created with the help of foreign banks etc. Hence, it is held that it is not the mere transfer of money to attract the exemption but the comprehensive Banking and Financial Service is involved in the issue in hand. Hence, it is held that M/s. AKR Textile are liable to pay service tax Under Section 68 (2) of the Finance Act, 1994 with effect from 1.7.2012.'

implies that the adjudicating has not ascertained the nature of the activity in terms of 'consideration' received to determine extent of service and the person 'for' whom such activity is provided by M/s Amsco Finance Ltd which are the essential characteristics for

conformity to ‘service’ in section 65B(44) of Finance Act, 1994. The significance of the architecture of the ‘negative list’ regime is elaborated thus

‘12. With this ontogeny, and, coincidentally, corresponding to the age of attainment of majority, the stage was set to give free rein to taxation of services by phasing out the classificatory regime to make room for the ‘negative list’ regime. Not unnaturally, the principal, and adjunct, machinery that had evolved till then were embedded in the new scheme of Finance Act, 1994, as section 66B, 66C, 66D and 66E, to resonate with

‘(44) ...any activity carried out by a person for another for consideration, and includes a declared service, but shall not include - ..’

assigned to ‘service’ in section 65B of Finance Act, 1994 not only to cover all ‘activities’ save those exogenic to, and excepted in, the definition but also those excluded out of, and exempted from, levy in ‘negative list’ or by notification. Also, here the expression ‘for another’, as substitute for ‘to any person’, eliminates the erstwhile touchstone of ‘recipient’ for determination of the rendering of service and thus conflates the definition and ‘service’ in its essential form; resort to ‘recipient’ was henceforth restricted to situations, specifically articulated, where such recognition is necessary for harmony with the charging provision. In the new scheme of tax, ‘consideration’, as also the ‘provider’, continued to be no less vital than before for discerning the service transaction even as ‘recipient’, with the obliteration of carefully crafted boundaries inherent to the definition of ‘taxable services’ by the generalized explication as the substituting of self-performance, had ceased to be.’

by the Tribunal in *Sabre Travels Network India P Ltd v. Commissioner of CGST & Central Excise, Mumbai Central* [final order no. A/85779-85783/2020 dated 11th September 2020] which may be usefully referred to.

8. It appears to us that, while ‘consideration’ is passed from appellants to the overseas entity, it is the overseas customer who is, contractually, bound to repatriate value of exports to the appellant and, instead of doing so, authorises M/s Amsco Finance Ltd as delegate to effect that responsibility. It is not the contractual responsibility of the appellants to collect the dues and, therefore, by no stretch can it be held that the mediation of M/s Amsco Finance Ltd is a substitution for the task that would, otherwise, fall to the appellants. If at all, the Hong Kong entity is an ‘intermediary’ within the meaning assigned in Place of Provision of Service Rules, 2012 to render the service, it has been performed in Hong Kong and, thus, not in the taxable territory. The demand for the period after 1st July 2012 also fails. Consequently, the liability for allegedly having received services provided by M/s Amsco Finance Ltd also does not sustain.

9. With the findings *supra* pertaining to the appeal of M/s AKR Textiles applicable equally to the several other appeals, the demands impugned therein also do not sustain.

10. Accordingly, all the orders impugned before are set aside and

appeals allowed.

(Order pronounced in the open court on 08/10/2020)

(P Dinesha)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*