A COMMISSIONER OF GST AND CENTRAL EXCISE

v.

M/s CITI BANK N. A.

(Civil Appeal No. 8228 of 2019)

B December 9, 2021

[K. M. JOSEPH AND S. RAVINDRA BHAT, JJ.]

Central Excise Act, 1944 - ss. 35L(1)(b) – Finance Act, 1994 – 65B(44), 65(33a), 67, 68 – Service Tax on interchange Fee – An internal audit group of the Service Tax Commissionerate found that respondent-bank was receiving interchange fee, which formed part of the gross amount billed to the customer – Show Cause Notices were issued to the Respondent – Respondent contended that it is not performing any service so as to render it exigible to service tax on the interchange service – Principal Commissioner found that respondent-bank was liable to pay service tax, penalty and interest on the amount of "interchange fee" received by it – The Tribunal set aside the order passed by the Principal Commissioner – On appeal, held: Per **K. M. Joseph, J.,***: The respondent, as issuing bank, was liable to pay service tax, u/s.68(1), being the service provider – Being liable to pay tax u/s.68(1), it was also liable to file the return including the amount of interchange fee – The measure of tax, which is found in s.67(1)(i), is entirely related to the service that the acquiring bank provided and agreed to provide – Likewise, the value of the service provided by the issuing bank, would be the value of service, for the purpose of s.67(1) – Therefore, respondent-bank was liable to include interchange fee and file return and pay tax on the same – It is also clear that Respondent, as issuing bank, provides service within the meaning of s.65(33a)(iii) – Respondent is paid Rs.2 as interchange fee – Interchange fee, therefore, is exigible to service tax – Per* **S. Ravindra Bhat, J. (dissenting)***:Respondent-bank, as issuing bank was providing service, as found by the Commissioner – However, this service was a part of a single unified service – of settling transactions – Which is provided by both the acquiring and issuing bank – Having characterized the service to be a single unified service – wherein service tax, by way of business convenience, is collected from/ remitted by the acquiring bank on the value (whole MDR which*

includes the interchange fee that is retained by the issuing bank) taxable for single service rendered by both the acquiring and issuing bank (respondent) cannot be called upon to pay service tax again as this would result in double taxation.

Referring the matter to Appropriate Bench, the Court

HELD: 1. Per K. M. JOSEPH, J. : It is clear that interchange fee is earned by the respondent as issuing bank. It may be true that the respondent may also be engaged in the credit card transaction both in its capacity as issuing bank and an acquiring bank. In such an event, the aggregate sum earned for the service rendered in its capacity as issuing bank and its capacity as acquiring bank, would become the measure of tax or, in other words, value of the taxable service but legally they are for separate services as the nature of service rendered by the issuing bank is different from the service rendered by the acquiring bank. The fee is also different. Undoubtedly, it would be dependant on the terms of the contracts in question. In a scenario, however, where the issuing bank and the acquiring bank are different, as is the case in the present case, it would be a case where both the issuing bank and the acquiring bank are rendering separate services as part of the credit card transaction. Indisputably, the interchange fee is no gift. Such a fee is not the subject matter of the service tax, falling under the transaction between the issuing bank and the card holder relatable to Clause (i) of Section 65(33a). The nature of the entire transaction, having been laid bare from the moment the card gets swiped in a transaction, till the amount is paid to the merchant establishment, there is, indeed, service performed by the issuing bank in relation to the settlement of the amount transacted through the card. As already noticed, the issuing bank, as part of its agreement with the card association and the acquiring bank, which is also under agreement with the card association, is engaged in the unique activity of being on the electronic platform hosted by the card association, which, admittedly, fixes the interchange fee and the amount to be earned by the issuing bank and acquiring bank and, under the auspices of which, transaction data, in millions, is processed by the issuing bank and it is only with the approval of the issuing bank that the

merchant bank permits the purchase using the card. This is on the clear understanding that the amount will be paid by appropriate debit and credit in the accounts maintained, both by the issuing bank and acquiring bank. Rs.2/-, in the example given, is, however, retained by the issuing bank and it is Rs.98/- which alone gets credited in the account of the acquiring bank. The actual payment is finally received by the merchant establishment on the agreed date on settling the account by the acquiring bank paying the amount, after deducting Rs. 5/- as amount of merchant discount. This amount of merchant discount is made up of Rs.2/- earned by the issuing bank. [Paras 54 & 55][485-E-H; 486-A-E]

2. It is inconceivable that without the role played by the issuing bank, which tantamounts to activity and, therefore, service, the very credit card transaction, would become possible. It is also clear that credit card system is fundamentally based on the issuing bank, undertaking the risk. Rs.98/-, in a transaction of Rs.100/-, gets debited from the account, which the respondent bank, as issuing bank, maintained. It is the funds of the issuing bank, which is utilised, in other words, to effect the payment. It is, therefore, clear that there is service rendered by the bank, which is in connection with Clause (iii) of Section 65(33a). It is another matter that under the agreement between the issuing bank and the cardholder, the cardholder would be paying the sum of Rs.100/- to the issuing bank, within the stipulated period and, if he does not pay, he would incur the liability to pay interest, as stipulated, under the terms of the contract. The fact remains that there is the risk undertaken, in the first instance, of making available the funds to satisfy and settle the amount transacted through the card to the merchant establishment. [Paras 56 & 57][486-E-H; 487-A]

SECTIONS 67 TO 70; WHO IS LIABLE TO PAY SERVICE TAX, OBTAINED REGULATION AND FILE RETURN?

3. As far as payment of service tax is concerned which is governed by Section 68 of the Act, the liability to pay service tax is cast on every person providing the taxable service to any person. Sub- section (2) contemplates a departure from the

mandate of Section 68(1) in that, in regard to taxable services as may be notified by the Central Government in the gazette, the service tax is to be paid by such person in the manner prescribed at the rate specified in Section 66 and the provisions of the chapter (which is in fact "persons responsible for payment of service tax") applies as if he is a person liable to pay service tax relating to such service. Section 68 must be read with Section 69, for it provides for the liability of a person to get registered. The liability is cast on the person liable to pay service tax under Chapter V. There is no case for the respondent that the case is governed by Section 68(2) for which the taxable service must be notified thereunder. That the person liable to pay tax under Section 68 must get himself/itself registered in the manner prescribed is made clear from Rule 4 of the Rules as it clearly provides that every person liable to pay service tax shall apply to get himself/ itself registered and the entire provisions of rules is premised upon the liability to get registered being on the person made liable to pay service tax. No doubt, endorsement of an existing registration may be possible. Section 70 also cast the liability on the person liable to pay service tax, to assess the tax due and furnish return. [Para 59][487-F-H; 488-A-C]

4. The contention of the Respondent, however, in regard to Section 67(1)(i), in its written submission before this Court, is that the expression "service provider" will include both issuing bank and the acquiring bank and the gross amount will be Rs. 5/ -, which includes the consideration of Rs.2/- payable to the issuing bank and Rs.3/- which is payable to the acquiring bank. This contention is qualitatively distinct from the case, which has been set up before the Commissioner and the Tribunal, in the sense that the case of the Respondent appears to have been that under Section 67, the service provider was to pay tax on the gross amount, for which it provided the service and the attempt has been to contend that no service, as such, was being provided by the issuing bank. I take it that this is, in effect, an implied admission that the issuing bank does provide service in the matter of settling of the amount transacted through the credit card, for which it earns Rs.2/- as interchange fees. Now, that it is contended that the expression "service provider", in Section 67(1)(i), will

include, the issuing bank and the acquiring bank, I would feel more reassured in our finding that, all throughout, the respondent was, indeed, as issuing bank, liable to pay service tax on the service contemplated under Section 65(33a)(iii). Section 67(1)(i), as already decoded by me, after its substitution by the Finance Act, 2006, provides that the value of taxable service will be the gross amount charged by the service provider for such service provided or to be provided by him. The contention that the gross amount would be Rs.5/-, which is made of Rs.3/- for the service provided by the acquiring bank and Rs.2/- payable to the issuing bank (interchange fee), overlooks the fact that the gross amount is predicated with reference to the service actually provided or to be provided by the particular service provider. Proceeding on the basis that the words "service provider", includes issuing bank and the acquiring bank, it is, therefore, clear that the gross amount to be charged by both the service providers, *viz*., the issuing bank and the acquiring bank, must be premised on the separate service provided or to be provided by them. The words "gross amount" cannot be the aggregate of the value of the services provided by the different service holders. The service, provided by the acquiring bank, is different from the service provided by the issuing bank. This is far too clear to require any further elucidation. The value of the service, which constitutes the measure of the tax, is dependant on the nature of the service. Apparently, the measure of the tax by way of value, has been fixed by the Card Association, with which, both the issuing bank and acquiring bank, have entered into separate agreements. The activity of the acquiring bank, and, therefore, the services rendered by the acquiring bank is distinct from the activity of the respondent bank and, therefore, the service is different and distinct. In law, therefore, there could not be a gross amount by adding the value of two distinct services by two different service providers. Expression "gross amount" is to be understood with reference to the service provided or to be provided by a particular service provider and the provision does not appear to me to embrace within its scope, adding of what would be different gross amounts for arriving at the gross amount of the service provided by a particular service provider. In this context, I may notice that

the words "gross amount charged" have been defined as, including payment in the many forms, which are mentioned therein, which includes debit notes, book adjustment and any amount credited or debited in any account. The interchange fee, in a transaction of Rs.100/-, is the amount of Rs.2/-, which remains to the credit of the respondent-issuing bank, when it suffers the debit of Rs.98/- only, in a transaction of Rs.100/-. In other words, the Respondent got paid Rs.2/-. It is only Rs.98/-, which makes its way into the account of the acquiring bank. The merchant establishment, no doubt, is paid Rs.94.30, in the example given by the Respondent, out of Rs.98/- received by the acquiring bank. From the above, it appears to be clear that the Respondent, as issuing bank, provides service within the meaning of Section 65(33a)(iii). It is towards the same that the Respondent is paid Rs.2/- as interchange fee. Interchange fee, therefore, is exigible to service tax. Admittedly, the respondent has not paid any service tax on the said amount. [Paras 61-63][488-E-H; 489-A-H; 490-A-B]

IS INTERCHANGE FEE INTEREST AND THEREFORE NOTCONSIDERATION FOR SERVICE?

5. The respondent is a Banking Institution. Undoubtedly, it falls to be regulated under the Banking Regulation Act. It is, in fact, a scheduled bank. Interestingly, the Interest Tax Act, 1978, provides for a charge in Section 4 on interest earned by a credit institution, which includes the respondent-bank. Undoubtedly, under Section 18, the tax paid on interest under the Interest Tax Act canbe deducted under the Income-Tax Act. If the interchange fee, has been regarded as interest, then, undoubtedly, it would have been brought to tax under the Interest Tax Act. The respondent has no case that tax has been paid on the interchange fee treating it as interest. It is inconceivable that there is a creditor and debtor relationship between the respondent as issuing bank and the Card Association or the acquiring bank or even the merchant establishment. The respondent cannot be described as a lender of money and the other three players, as just hereinbefore described, as borrowers. In the context of the relationship of the respondent as issuing bank, interchange fee cannot be described as compensation fixed by the parties for use

or forbearance of the borrowed money. In fact, the concept of borrowed money, is predicated on the existence of creditor-debtor relationship which is absent. Interest, in the context of the definition, in Law Lexicon by Ramanathan Iyer, places a time value on the funds or money involved and further, it would also involve the rate, at which, the interest is calculated. Again, this definition is apposite in the context of the relationship between a lender and a borrower. The nature of the service, I have unravelled, performed by the issuing bank includes the act of approval of the credit card transactions. It is an integral and indispensable part of a credit card transactions. It was partly for this service that the interchange fee is earned by the respondent as issuing bank. There is no scope for an implied contract as the interchange fee is apparently paid in terms of the contract. Quite clearly, there is no scope for applying equity as the basis for the interchange fee as interchange fee is payable under the contract and towards service rendered by the respondent. I am, in the circumstances, of the view that the contention of the respondent is meritless. [Paras 66, 69][490-G-H; 491-A-B; 493-C-G]

WHETHER CREDIT CARD TRANSACTION A TRANSACTIONIN MONEY?

6. The interchange fee is earned by the issuing bank as consideration for service which is provided by the issuing bank. The complex web of activities indulged in by the three main players namely the issuing bank, the card association and the acquiring bank culminates in the settling of the amount due to the merchant establishment which stood persuaded to make available goods and services initially on credit but on assurance that the credit card transaction will be taken to its logical culmination. It is clear that the active role which necessarily means the activity indulged in by the issuing bank is indispensable and at the heart of the transaction in the system under which though through machines available by the acquiring bank with the merchant establishment the Merchant gets paid. The issuing bank for each transaction must approve the transaction. The risk which is undertaken by the issuing bank which again makes available the funds and maintains the fund from time to time as per requirement and under

the contractual obligations is part of the service performed by the issuing bank. What is sought to be taxed under the act is the interchange fee and not the amount which is made available. Therefore, the contention of the respondent that it constitutes merely transaction in money involves overlooking the service provided by the respondent as issuing bank. There is clearly activity in relation to the use of money within the Explanation. [Para 73][496-B-F]

DEVIATION FROM SHOW CAUSE NOTICE [NUMBER ONE];

7. One of the contentions raised by the respondent is that in the Show Cause Notices issued by the Commissioner he proceeded on the basis of rejection of the version of the respondent that no service was being performed by the respondent bank as issuing bank towards the acquiring bank. However, it is pointed out that there is a deviation in the order and what is found is service is being performed by the issuing bank in terms of the agreement with the card association. A perusal of the order of the Commissioner does indicate that the respondent has defended the Show Cause Notices by contending that it was not performing any service to the acquiring bank. The Courts have not allowed an authority to go beyond the Show Cause Notice on the basis of the prejudice which is occasioned to the noticee. In this regard, I must notice that while the Show Cause Notice does indicate that the Commissioner had proceeded in a manner rejecting the contention of the respondent that they are not rendering any service to the acquiring bank has been not correct, there is indeed reference to the basis for the final finding indicated in the notice in indicating that the respondent has earned service income, *viz*., interchange fee, which is taxable under Section 65(105)(zzzw) read with Section 65(33a). Moreover, being a question of applying the law to certain facts which are not in dispute namely the manner in which the credit card system operates about which there is no dispute and on our finding that service is indeed provided by the respondent in relation to the settlement of the amount transactions under the credit card, in the facts of this case, the respondent should not succeed on this point. [Para 84][499-D-H; 500-A-B]

A **CERTAIN CIRCULARS; DOUBLE TAXATION**

8. Circular No. ST-51/13/2002 dated 07.01.2003, which was, in fact, relied upon by the respondent before the Commissioner, came to be issued in the light of doubts raised regarding classification of certain services, which appeared to fall under
B **two or more categories simultaneously. The above Circular contemplates that if the one service provider provides more than one taxable service, one registration is sufficient but is to be endorsed for all the taxable services. Further, tax liability will have to be discharged for each of the taxable services separately. In the context of the credit card transaction, as issuing bank for**
C **the cardholder, the respondent is providing taxable service to the card holder. That apart, if, under Section 65 (33a) of the Act, the respondent has been engaging in other services till 01.07.2012 and, thereafter, has been providing different services, it would have to discharge its tax liability of the taxable services**
D **separately. No doubt, the Circular, in paragraph-3, did go on to deal with the issue of correct classification of a particular service. But it is one thing to say that there is one service and the question is one of classification of that service and another to say that if there are more than one service provided by the same service provider, each of which is separately taxable, then, the service**
E **provider has to pay only one tax. It is clear that qua each of separate service provided, the service provider would be liable to pay tax separately. [Paras 86, 87][500-C, G-H; 501-A-C]**

EFFECT OF SERVICE TAX BEING A VALUE ADDED TAX

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9. As far as contention of the appellant that service tax is a value added tax, is concerned, there can be no quarrel. The service provided by each of the service provider in a chain of transactions where there is value addition, must bear the burden of service tax on the value of the service. The law also provides
G **for tax credit being availed. However, when it comes to the question relating to taxing a single service, it is clear that there cannot be taxation more than once. It is one thing to say, in other words, that when there are different services, provided under the taxing entry, each of the taxable services became taxable**

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under the previous regime, as also the framework after 01.07.2012, for the same service, the law does not permit repetition of the same tax on the same measure of tax, with regard to the same service. In other words, if for the services rendered by the respondent as issuing bank, it has earned interchange fee, which should constitute the measure of the tax, the acquiring bank, in terms of a practice followed, it has paid tax on the said amount, then, it would be illegal and unfair to tax the respondent all over again. It is another thing that, that the respondent is the person who was liable to pay the tax on the interchange fee, after filing return under Section 70 and treating the interchange fee as the value of the taxable service. These are all matters, which I am in agreement with the learned Additional Solicitor General. However, it is difficult to agree with the learned Additional Solicitor General that even if the acquiring bank has discharged the liability *qua* the interchange fee also, treating it as part of MDR, then, the respondent is liable to pay tax. I am conscious that the argument of the appellant involves the following reasoning. In law the respondent being found liable to pay tax on the interchange fee and, as admittedly, the tax has not been paid by it, it is not the lookout of the Department to consider, whether the payment of the tax by the acquiring bank, was effected, even assuming, it was on an amount including the interchange fee. But this involves, in effect, double taxation. [Paras 92 & 93] [503-A-G]

SHOW CAUSE NOTICE: DIVERGENCE FROM THE ORDEROF THE COMMISSIONER [NUMBER TWO];

10. Another aspect pointed out by the respondent is that in the Show Cause Notice, the Commissioner has proceeded on the basis that payment by the acquiring bank of service tax on the interchange fee, will not exonerate the liability of the respondent to pay the service tax. It is pointed out thereafter to go on to find that the respondent has not produced proof of payment, involves depriving the respondent of the opportunity to meet such a case and also to depart from the admitted position that acquiring bank has paid the tax. In other words, when the Commissioner proceeded on the basis in the Show Cause Notice that the payment, by the acquiring bank, will not detract from the

liability of the respondent, it is impermissible to turn around and find that the respondent has not proved that the acquiring bank has paid the tax. It may be true that the Show Cause Notice contains the statement that the fact of payment of service tax on the interchange fee by the acquiring bank, does not exempt the assessee from payment of service tax, on the consideration received by them towards rendering of service as each person is liable to pay service tax for the service rendered by them. Essentially, it would appear that the Commissioner was referring to the case of the respondent that acquiring bank had paid the tax on the interchange fee. No doubt, it does create the impression that the Commissioner proceeds, as if, there was payment by the acquiring bank, which was the case of the respondent during audit. As noted, there is also the case for the appellant that being a value added tax, even if, payment is made by the acquiring bank, the respondent would remain liable. It is to be noted that when the Order of the Commissioner was challenged before the Tribunal, no material is produced in support of the claim that the acquiring bank had discharged the liability even on the amount of interchange fee. [Paras 94 & 95][503-G-H; 504-A-E]

11. In this regard, it is apposite to notice that in the Appeal filed before the Tribunal, produced along with the Compilation No. 3, by the respondent, one of the grounds taken, no doubt, is that the impugned Order travelled beyond the scope of the SCNs. Thereunder, however, the complaint, which was sought to be made out was that in the SCN, the case set up by Commissioner was that the service was to the acquiring bank, whereas, the Order passed by the Commissioner was to the effect that service was provided to the Card Association. There is no ground taken in the Appeal, as such, in relation to the SCNs proceeding on the basis of the payment made by the acquiring bank, being accepted, and thereby, a new case being found in the Order. In the Order passed by the Tribunal, the Tribunal notices the complaint about the Commissioner departing from the SCN in terms of the ground in the Appeal, which have been set out. Last but not the least, it is relevant to notice the actual reasoning of the Tribunal, which led to the Order of the Commissioner being set aside. On the

basis of the said Order of the Tribunal, and finding no reason to differ from it, on this legal ground, the Order of the Commissioner was set aside. I may notice that in the said case, in paragraph-6, the Department, in fact did not dispute that service tax was being paid by the acquiring bank. In such circumstances, the argument of the respondent in this regard, does not appeal to me. I must notice that respondent has not produced any material to establish its case. [Paras 96, 97, 99 & 100][504-E-H; 505-D-E, G-H; 506-A]

WHETHER THE EXTENDED PERIOD OF LIMITATION IS AVAILABLE IN REGARD TO THE DEMAND UNDER SHOW CAUSE NOTICE DATED 24.04.2013?

12. The Commissioner has rejected the contention of the respondent that there is no positive act by it towards wilful suppression and there was only mere inaction by holding that the factum of receipt of interchange fee being not in dispute and the provisions being clear, the act of non-payment constituted a positive act. In the milieu of self- assessment, it is for the respondent to assess and declare the full details and pay tax. The Commissioner also rejected the case that the department had knowledge based on audit. It is found by him that the banking industry is ever evolving and with new business models and the Department cannot be faulted not knowing the implications. It was further found that the decisionsrelied upon by the respondent related to the period when classification lists, valuation lists and gate passes were to be approved. The assessment itself was done by the officers. It was further found that there was no effort made by the respondent at seeking clarification. I must notice that in the impugned order, that tribunal did not deal with the issue relating to the legality of the respondent availing the extended period. It instead has chosen to set aside the impugned order of the Commissioner on merits. [Paras 104-106][509-A-E]

13. Therefore, the upshot of the above discussion is as follows:

I) It is found that the respondent, as issuing bank, was providing service, as found by the Commissioner;

A **II) For the period prior to 01.07.2012, the service of the respondent, as issuing bank, squarely fell within Section 65(33a)(iii) of the Act;**

III) The contention of the respondent that interchange fee is to be treated as interest and, therefore, not
B **taxable under the Act is rejected;**

IV) The case based on the credit card transaction, being a transaction in money and, therefore, excluded from the definition of "service" in Section 65B(44), is unacceptable;

C **V) The Order of the Tribunal in *ABM Amro*, dealing with the position of an issuing bank, under the framework of the Act, is patently unsustainable;**

VI) In the facts of this case, I decline to dismiss the Appeal only on the ground that no Appeal was carried
D **against the Order in *ABN Amro*;**

VII) The respondent, as issuing bank, was liable to pay service tax, under Section 68(1), being the service provider. Being liable to pay the tax under Section 68(1), it was also liable to file the Return including
E **the amount of interchange fee;**

VIII) The acquiring bank was obliged to value the service, which it provided or agreed to provide. The measure of tax, which is found in Section 67(1)(i), is entirely related to the service that the acquiring bank
F **provided and agreed to provide. Likewise, the value of the service provided by the issuing bank, as found by me, and which would be the value of the service, for the purpose of Section67(1), is relatable to the services it provided. Therefore, the respondent bank**
G **was liable to include the interchange fee and file Return and pay the tax on the same;**

IX) While the service tax may be a value added tax, all that it can mean, is that, for separate services, tax is payable on each separate service. The concept of

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value added tax cannot mean that if the tax is already paid by the acquiring bank in this case, on the amount of interchange fee, for the service provided by the respondent as issuing bank, the respondent bank should be called upon to pay the service tax all over again. Such an exercise, would undoubtedly constitute double taxation;

X) The Tribunal has not considered whether there was suppression within the meaning of Section 73 of the Act by the respondent in relation to part of the period covered by Show Cause Notice dated 24.04.2013. I am also of the view that the respondent should be provided an opportunity to establish that the acquiring bank has discharged the tax liability in regard to interchange fee. [Para 109][509-G-H; 510-A-H; 511-A-C]

M/s ABN Amro Bank v. Commissioner of Central Excise and Customs **[2011] 2 SCR 874;** *Standard Chartered Bank And Ors. v. CST, Mumbai-i And Others* 2015 [40] S.t.r. 104 (Tri. - Del) : [2010] 13 Scr 381; *M/s ABN Amro Bank NV Presently Known As Royal Bank Of Scotland NV v. Commissioner Of Central Excise, Customs And Sevice Tax, Noida [Decision Rendered* On **23.7.2018] 2018-TIOL-2811-CESTAT / MANU/CN/0079/2018;** *Commissioner of Central Excise, Vishakhapatnam v. Mehta and Company* **(2011) 4 SCC 435 : [2011] 2 SCR 874;** *Association of Leasing & Financial Service Companies v. Union of India and others* **(2011) 2 SCC 352 : [2010] 13 SCR 381;** *Commissioner of Central Excise Nagpur v. Ballarpur Industries Ltd*. **(2007) 8 SCC 89: [2007] 9 SCR 650 / [2007] 215 ELT 489 (SC);** *Larsen & Toubro Ltd. v. Commissioner of Central Excise, Pune II* **(2007) 9 SCC 617 : [2007] 5 SCR 1141 2007 / [211] ELT 513 [SC];** *U.S. Tax Court in Capital One Financial Corporation and Subsidiaries v. Commissioner*, **133 TC No.8 (September 21, 2009);** *Ferro Alloys Corpn. Ltd. v. A.P. State Electricity Board*

and another **1993 Supp (4) SCC 136;** *State of Karnataka and others v. Karnataka Pawn Brokers Association and others* **(2018) 6 SCC 363 : [2018] 10 SCR 409;** *Union of India and others v. Kaumudini Narayan Dalal and another* **(2001) 10 SCC 231 : 2001 (4) SCALE 227;** *Commissioner of Central Excise v. Tata Engineering and Locomotives Co. Ltd.* **(2003) 11 SCC 193: 2003 (8) JT 557;** *Birla Corpn. Ltd. v. Commissioner of Central Excise* **(2005) 6 SCC 95 : [2005] 1 Suppl. SCR 821;** *Jayaswals NECO Ltd. v. Commissioner of Central Excise, Nagpur* **(2007) 13 SCC 807;** *Sri Krishna Das v. Town Area Committee* **(1990) 3 SCC 645 : [1990] 2 SCR 13;** *Union of India (UOI) and others v. Tata Iron and Steel Company Limited, Jamshedpur* **(1976) 2 SCC 123 : [1976] 2 SCR 1044;** *Commissioner of Central Excise, Aurangabad v. Bajaj Auto Ltd., Waluj, Aurangabad Through Its Vice-President (Materials) and others* **(2010) 13 SCC 117 : [2010] 14 SCR 184 - referred to.**

Case Law Reference

[2011] 2 SCR 874	**referred to**	**Para 34**
[2010] 13 SCR 381	**referred to**	**Para 39**
[2007] 9 SCR 650	**referred to**	**Para 41**
[2007] 5 SCR 1141	**referred to**	**Para 42**
[2018] 10 SCR 409	**referred to**	**Para 68**
[2005] 1 Suppl. SCR 821	**referred to**	**Para 79**
[1990] 2 SCR 13	**referred to**	**Para 90**
[1976] 2 SCR 1044	**referred to**	**Para 91**
[2010] 14 SCR 184	**referred to**	**Para 107**

Per S. RAVINDRA BHAT, J. (Dissenting) A

HELD: 1. The pre-existing definition of credit card services [Section 65(12)(ii)] merely mentioned "credit card services" as part of banking and financial services – without elaborating what *kind* of services were comprehended in the definition. The 2006 amendment segregated this, by omitting sub-clause (ii) of Section 65(12) and enacting a new Section 65(33a). A plain reading of Section 65 (33a) reveals that seven distinct heads of credit card services are now comprehended within the broad description of "credit card services". Each category – falling in sub-clause (i) to (vii) deals with a specific, *enumerated* service. The controlling expression *"credit card, debit card, charge card or other payment card services includes any services provided"* broadens the coverage of this *species* of service, in contrast with the pre-existing law. This inclusion by specific enumeration of *"debit card, charge card or other payment card service"* is an expanded class of card service. However, the further use of the term *"includes"* even while broadening (by enumeration of specific sub-categories) "credit card services" – also has the effect of limiting the coverage under Section 65(33)(a) to *only* the seven enumerated categories. This is apparent from the fact that after sub-clause (vii), there is no residuary provision authorising similar treatment to non-enumerated activities i.e., those not falling within sub-clauses (i) to (vii). In other words, the use of the expression *"includes"* while broadening – by specific enumeration of seven categories of card services – *also limits* the inclusive nature to those categories, and no more. The second incontrovertible feature is that each enumerated category falling within a sub-clause refers only to one kind of service. Thus, by sub-clause (i), the service referred to is the *issuing of a card* to a card holder; and by sub-clause (ii), the service of receipt, processing of applications, transfer of embossing data to the issuing bank's personal agency, ATM, PIN number generation, renewal or replacement of cards, change of address etc., - essentially forming separate and ancillary services to the issuing card. This service largely involves one business entity providing service to another. By sub-clause (iii) - which this case is B C D E F G H

concerned with - the service involved is *by any person*, [i.e., the issuing bank as defined in sub-clause (i)] and an acquiring bank, *to any other person* in relation to settlement of any amount transacted through "such card". The emphasis here: apart from other related issues, is with the service of settlement of any "amount transacted" through the card. It is significant to notice that the reference to the service provider "by any person" is broad and comprehends all categories of persons and entities mentioned in sub-clause (i) (bank, financial institution, etc.) having regard to the definition of "person" [in Section 65B (37)]. Such being the case, the reference to issuing bank would fall within the broad description of *"any person"*. In any case, having defined "issuing bank" widely, *per* sub-clause (i), Parliament need not have referred to *"any person, including issuing bank"*; the meaning would have been the same if sub-clause (iii) had referred only to an "issuing bank" in place of "any person". However, having regard to the essential nature of a credit card transaction, the inclusion is not directed as much to an issuing bank as to the specific reference to "an acquiring bank". That term is not defined elsewhere except in this sub- clause, and by the explanation wherein the acquiring bank is defined as a bank, company, financial institution, etc. who makes the payment to any person, who accepts such cards. Crucially, then, only in Section 65(33a)(iii) does service by *any person include* service by the issuing bank and the acquiring bank. The use of the conjunctive "and" [in Section 65 (33a) (iii)] is to be contrasted with the other sub-clauses- Parliament used the disjunctive "or" in all other sub-clauses. The clear intention for this difference was that service providers could be business entities providing more than one service under one sub-clause [such as sub-clauses (ii), (iv), (vi) and (vii)]. The use of the conjunctive "and" in clause (iii) therefore, is telling and consequently, should receive literal interpretation. Therefore, there is disagreement with the judgment of K.M. Joseph, J on this aspect. [Paras 19-22] [543-G-H; 544-A-H; 545-A-E]

2. There can be no debate that indisputably, Parliament, has to be attributed with full knowledge of the nature of credit card business models, where the primary objective of the entities

that provide service, is to ensure payment for the underlying transaction between the card holder and the provider of goods or services. Parliament would also know that there are three business entities whose joint or concurrent functioning is essential for settlement of each credit card transaction. The three business entities are the issuing bank, the acquiring bank and the network [such as Visa, Mastercard, or RuPay, etc., which has been kept out of the definition under Section 65(33a)]. These are crucial factors and consequently I am of the opinion that the conjunctive "and" should be read literally and be given the meaning conjunctively rather than disjunctively. The result, therefore, is that when a person (i.e., the issuing bank), and an acquiring bank, provide service to another person, in relation to settlement of any credit card transaction, *that service, by such person, and the acquiring bank,* amounts to a "credit card service"- per Section 65 (33a). The unified nature of the service, to another (be it the card holder or the merchant, who are participants in the primary transaction and therefore beneficiaries) is the subject matter of sub-clause (iii) of Section 65(33a). I am fortified in this conclusion also in the use of the term "or" in sub-clauses (iv), (vi) and (vii) which define services capable of being provided to another business entity or service provider, and not a customer. [Para 23][545-F-H; 546-A-B]

3. Justice Joseph in his judgment, relies on the contractual arrangements in question, to conclude that *"legally they are separate services as the nature of service rendered by the issuing bank is different from the service rendered by acquiring bank"*. In my opinion, the existence or otherwise of a contractual relationship is *per se* not determinative when a settlement of payment in relation to a credit card is involved. I say so because there is no contractual relationship between the acquiring bank and a card holder who might choose to use the device which is given to a merchant establishment by acquiring bank. Likewise, the merchant establishment need not have any pre-existing contractual relationship with the issuing bank. Neither the merchant establishment nor the card holder has any pre- existing relationship with the network provider whose role has been kept out of the definition clause. The network service provider (VISA,

Master Card, RuPay, etc.) in fact provides the platform for the completion of the transaction. The nature of the network's database, the software provided by it and the entire platform forms the entire basis of the credit card system, enabling smooth cashless settlement of the primary transaction – purchase of service or goods by the card holder from the merchant. The entire focus of the Section 65 (33a) – as well as Section 65 (105) (zzzw) which refers to taxable service in respect of credit card service – is *settlement of any transaction*. It cannot be construed as settlement of more than one transaction by one swipe. In other words, if Parliament had intended that the transaction for the purchase of goods or services permitted dissection of one whole transaction into two - one provided by the issuing bank and the other by the acquiring bank, it would have made that intention explicit appropriately, such as for instance, by using words, like *"as the case may be"*. The absence of such manifest intention in Section 65 (33a) on the one hand, and the use of the conjunctive "and" in Section 65 (33a) (iii), clearly manifesting the intention that the issuing bank (a "person") and an acquiring bank jointly provide the service, on the other - persuades me to hold that a dissection of one single transaction involving the purchase and sale of goods and services, is unwarranted. Therefore, with respect, I do not agree with Joseph, J's view that Parliament contemplated that apart from an *acquiring* bank, any other person including an issuing bank, may render a separate service. Equally, the reasoning that activities of a bank – which may be the same one that issues a card and is also an acquiring bank in a transaction – are legally separate services because the *nature* of service (based on their respective contractual frameworks)rendered by the issuing bank is different from that of the service rendered by the acquiring bank, with respect, would not beaccurate. Similarly, I do not agree with the reasons given by Justice Joseph (i.e., that interchange fee does not fall within the service contemplated (i) between issuing bank and card holder; and (ii) it is not a gift) as to why interchange fee is a separate service either. There are several problems with segregating the components of "service" by the issuing bank and service by the acquiring bank, under Section 65 (33a) (iii); they are elaborated as follows:

(a) In the event of segregation of the issuing bank's component, the service element would no longer be a credit card service, *but providing pure advance or credit of one kind, to the customer by the issuing bank* which then falls within the broad description of banking and financial services [Section 65 (12)].

(b) The segregation would ignore the reality of the business transaction which is the collection of a single MDR which includes two components i.e. the acquiring bank's fee, and the issuing bank's charge/ fee. The revenue admits that the MDR comprises both these fees. In these circumstances there is no warrant for discriminating the component which is retained by the issuing bank in the form of interchange fee, by saying that the issuing bank has to pay service tax on that as a separate element of its fee. The other anomaly would be that the data service provided by the card association (enabling use of software which facilitates instantaneous verification of the customer's credentials, authentication of the transaction and the authorization of payment) is not required to undergo a separate treatment, as is now insisted upon in the case of the segregated transaction with the issuing bank.

(c) There are predominantly only two contractual arrangements (as entered into by the card association) which involve interaction of simultaneous or sequential occurrence of four sub-transactions, i.e. (i) the swiping of the card by the card holder at the merchant establishment (which does not include any pre-existing contractual agreement, but evidences the finalisation of a promise of a contract); (ii) followed by release by the acquiring bank to the merchant establishment of the consideration (which is backed by a pre-existing contractual agreement by which the POS machine is kept with the merchant

establishment); (iii) the authentication of the customer's credit by the issuing bank (which has no relationship with the acquiring bank or the merchant establishment, but does so only with the card holder); and (iv) the facilitation of the entire transaction by the card association (which has no contractual relationship with the card holder or the merchant establishment, but does so only with the acquiring bank and issuing bank).

(d) If these are the different stages/ limbs/components of the transactions as may be variously described, wherein some are backed by pre-existing contractual agreements, while others are not – the singling out of one such service, i.e. the credit provided to the cardholder by the authentication of the transaction by the issuing bank, for separate treatment by insisting that it should once again be subjected to levy on a literal construction of sub-clauses (33a) and (105) (zzzw), would not be logical. If the revenue were to in fact insist this to be the correct interpretation, it should logically and in the same breath, also insist that the acquiring bank file separate returns for the amounts it receives and the amount it collects and transmits to the network, in the same manner separately, as is insisted upon in relation to the component of service rendered by the issuing bank, which forms a part of the whole service that is provided in this case. [Paras 25, 26][548-D-H; 549-A-H; 550-A-H; 551-A-B]

4. I agree with the reasoning of Justice Joseph, that the amount received by the issuing bank, as interchange income or fee, is not towards interest. However, as previously discussed, I do not agree with the conclusion, that the issuing bank provides a *separate* service. The role of the issuing bank in the service provided by the acquiring bank to the merchant establishment is part of a single unified service falling under clause (iii) of Section 65 (33a) and it cannot be broken up into its components and classified as separate services for classification. This is a well-

accepted principle of classification. There is, in reality, one unified service provided by the acquiring bank to the merchant establishment for which gross value of consideration is the merchant discount rate (MDR). This *single MDR includes the interchange fee*. Therefore, the issuing bank's service is subsumed into the service of the acquiring bank to make it a unified service to the merchant establishment. Evidently a merchant establishment does not have any contractual liability to pay inter-change fee to the issuing bank. [Para 27][551-B-C, E-F]

5. The facts of the present case, in my opinion closely reflect the situation envisioned by the CBEC. The service provided by the acquiring bank is similar to the composite service provided by a GTA. The service element provided by an issuing bank is an *integral part* which gets subsumed in the single unified service provided by the acquiring bank to a merchant establishment. The principle enunciated by CBEC (in the circular) that even if a composite service, consists of more than one service, should nevertheless be treated as a single service based on the main or principal service and accordingly classified, is also applicable in the case of service provided by the acquiring bank and issuing bank. The latter's role is subsumed into the service of the acquiring bank for which the gross consideration is received from the merchant establishment. The service element provided by the issuing bank in the credit card transaction at the merchant establishment is therefore not subject to service tax as it is incorporated in the service by the acquiring bank- as one service provided to the merchant establishment and the gross consideration (MDR) received by the acquiring bank includes the interchange fee shared with the issuing bank, by the acquiring bank. This is identical to the position in GTA service which was clarified by the Board in the above referred circular. This view is also supported by the newly enacted Section 66F(3) (b) which is effective from 1 July 2012, which states that naturally bundled services should be treated as provision of single service. The CBEC's circulars are binding on the revenue. Therefore, *interchange fee* earned by the issuing bank which forms an *integral part of service of the acquiring bank* to the merchant

establishment, cannot be subjected to service tax. A credit card transaction- towards settlement of payment of a transaction, in sum, is an indestructible integrated service, whose constituent parts are inseparable from each other. For the reasons outlined above, there is disagreement with Joseph, J's reasoning that Citibank had to independently file returns, in respect of the transaction by which interchange fees were collected. [Paras 29, 30][554-D-H; 555-A-B]

6. As noted earlier, the charge (under Section 66) is on the *"value of the taxable service referred….and collected in such manner as may be prescribed".* Valuation is in terms of the provision of Section 67, and Section 68 provides *who* has to pay service tax. Section 67 (1) enacts that the measure of tax levied, shall be on the consideration paid for the service, and provides for three contingencies. Section 67 (2) states that where the gross amount charged by a service provider, for the service provided includes service tax payable, the value of the taxable service shall be *"such amount as with the addition of tax payable, is equal to the gross amount charged".* Section 67 (3) says that the *"gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service."* Section 67 (4) – which is subject to the previous sub-sections enacts that *"the value shall be determined in such manner as may be prescribed."* The Service Tax (Determination of Value) Rules, 2006 was framed by the revenue, to assist the task of determining the value of services, to be taxed. Rule 2 (d) (i) defines what is provider of service. A co-joint reading of Section 67 and Rule 5 therefore establishes that the value of the entire service to the recipient is the basis of the service tax. Such being the case, if one accepts that the "gross amount" is the entire MDR – inclusive of the interchange fee, there is no mechanism, whereby the latter, i.e. the interchange fee can be brought into the tax net once again. Section 68, no doubt, enacts that a person providing a taxable service shall pay service tax at the rate prescribed in Section 66B and in the manner prescribed by the rules, and in accordance with the returns filed as may be prescribed under the rules. However, that is not the

determinative point – it is the charging provision, i.e. Section 65, which speaks of the levy being upon the *value* of the service. Therefore, I respectfully disagree with Justice Joseph's opinion that "*every person providing taxable service to any person shall pay service tax at the rate...*" which is based on the reasoning that because they are two different entities, they are *each separately* liable to pay service tax under Section 68 (despite settling the same transaction between the card holder and merchant establishment). [Paras 31-33][555-C-F; 558-E-H]

7. In the present case, the MDR is thus the "gross value"; *it includes the interchange fee*. In the circumstances, since the collection of service tax is by the acquiring bank, which remits it to the revenue, the insistence that both elements should be segregated and separate returns filed reflecting the interchange fee, with respect, serves no purpose other than increasing paperwork, and burdening both banks and revenue officials with more work. If it is the *aggregate amount* (of which the interchange fee, is one part, and the acquiring bank's amount, another part), the levy is satisfied. In such circumstances, the segregation of the whole MDR (which includes the interchange fee) by slicing it into two portions, i.e. the interchange fee and the acquiring bank's charge, *solely for the purpose of obliging all parties to reflect these in separate returns,* only complicates issues. The other interpretation, would lead to a different aggregate, whereby service tax is levied on the entire MDR and once again, on the interchange fee, the issuing bank separately collecting service tax, results in an amount exceeding 14% towards tax. Both interpretations, in my opinion, cannot support separate levies, which would be contrary to Section 65. I am also unable to agree with Joseph, J. about the true construction of the notification exempting transactions below ₹ 2000/- from payment of service tax. It reflects that legislative intent/understanding is also limited to only the acquiring bank paying service tax, on an aggregate amount. If it were otherwise, the object of granting exemption would be defeated because the acquiring bank would then be collecting (or, correspondingly, the issuing bank would be deducting) the proportion of tax leviable on the interchange fee,

thus resulting in a partial levy of service tax on the quantum of transactions (₹ 2000/- and below) which are clearly exempt. In my opinion, therefore, Joseph, J's opinion that by the exemption, the issuing bank cannot claim exemption on the ground that acquiring bank is exempted, therefore, is not accurate. It is also important to remember that *what* is taxed, is the *value* of the transaction and it is the transaction that is exempt, *not the service provider*. Therefore, the express use of only 'acquiring bank' is indicative that Parliament was well aware of how credit card transactions are conducted. [Paras 35, 36][561-E-H; 562-A-B, D-G]

8. Therefore, not in agreement with the reasoning of Joseph, J. that "service provider" under Section 67(1)(i) imply that both the acquiring bank and issuing bank are service providers, and the *gross amount* on which the tax is collected, is not the aggregate of the value of the services provided by the different service holders. The judgement of Joseph, J. with respect, is mainly concerned by the fact that Citibank retains ₹ 2 before crediting the rest of the money towards settlement of the transaction; and therefore, in the absence of proof that acquiring bank has paid service tax on amount including the interchange fee, it is liable to pay for the specific service provided by it, as a distinct service provider. As explained in the earlier portion of this judgment, the activity or part played by the issuing bank is undoubtedly a service. However, it is *part* of the service; by itself, and without the role of the acquiring bank, it becomes a pure advance or loan transaction. However, the provision of service by the issuing bank and the acquiring bank together, triggers the levy. In other words, the component of service by the issuing bank is just that – a part of a single unified service, which for business convenience is structured in a manner, that the issuing bank retains ₹ 2, and tax is paid on the overall service, in the hands of the acquiring bank. There is no revenue leakage. The manner in which the credit card transaction, particularly the *inter se* transaction between the issuing bank and the acquiring bank is fashioned is such that instead of releasing the entire amount, in the first instance, and claiming the interchange fee later, the issuing bank retains the component of interchange fee. [Para 37][562-G-H; 563-A-D]

9. For the sake of clarity and completeness, I have briefly summarised my position in relation to each of the conclusions drawn by Joseph, J. in his judgment (paragraph 109):

(A) <u>On Conclusion I</u>: I am in agreement that the respondent-Citibank, as issuing bank was providing service, as found by the Commissioner. However, this service was a *part* of a single unified service – of settling transactions – which is provided by both the acquiring and issuing bank (which in some circumstances may well be the same bank).

(B) <u>On Conclusions II, III, and IV</u>: I am in agreement with J. Joseph that prior to 01.07.2012, the service of issuing bank fell within Section 65 (33a) (iii); interchange fee cannot be treated as interest, as argued by Citibank; and lastly the case that credit card transaction, being a transaction in money and therefore excluded from the definition of "service" in Section 65B (44) is unacceptable.

(C) <u>On Conclusion VI</u>: I agree that the plea to dismiss the appeals *solely* on the ground that no appeal was carried against the Order in *ABN Amro* (supra) has no merit.

(D) <u>On Conclusion V, VII-X</u>: Service tax is undoubtedly a value added tax. However, having characterised the service to be a single unified service – wherein service tax, by way of business convenience, is collected from/remitted by the acquiring bank on the value (whole MDR which includes the interchange fee that is retained by the issuing bank) taxable for the single service rendered by *both* the acquiring and issuing bank – Citibank cannot be called upon to pay the service tax again as this would result in double taxation. In view of my previous discussion, I do not agree with the reasoning in *ABN Amro* (supra).

For the same reasons, I am of the opinion that the question of remand to the tribunal does not arise. The only point of contention seems to be whether they were reflecting the payment of service tax separately in their ledgers, as issuing and acquiring bank. However, as a result of the reasons already elaborated, this is rendered to be a purely academic question. A question of returns should not detain this Court, because the business reality

is that every bank is both an issuing bank and an acquiring bank, and it is nobody's case that the banks are not filing their returns on service tax. [Para 38][563-E-H; 564-A-D]

Mafatlal Industries Ltd v. Union of India **(1997) 5 SCC 536 : [1996] 10 Suppl. SCR 585 – followed.**

Govind Saran Ganga Saran v. Commissioner of Sales Tax **1985 Supp SCC 205;** *Association of Leasing and Financial Service Companies v. Union of India* **(2011) 2 SCC 352 : [2010] 13 SCR 381;** *Standard Chartered Bank & Ors. v. CST, Mumbai I & Ors.* **2015[40] S.T.R.104 (Tri. Del);** *ABN Amro Bank v. Collector of Central Excise* **2011 (187) ECR181 (Tri. Delhi);** *Royal Bank of Scotland) v. Commissioner of Central Excise* **2018 TIOL 2018 CESTAT.;** *Hyderabad Asbestos Cement Products & Anr. v. Union of India* **(2000) 1 SCC 426 : [1999] 5 Suppl. SCR 155;** *Green v Premier Glynrhonwy Slate Co.* **(1928) 1 KB 561;** *R v Oxfordshire County Council and Others, Ex Parte Sunningwell Parish Council* **1999 (3) All ER 385;** *Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central & Ors* **(2008) 14 SCC 1519;** *Union of India v. Inter Continental Consultants & Technocrats* **(2018) 4 SCC 669 : [2018] 10 SCR 309;** *Commissioner of Service Tax & Ors. v. Bhayana Builders Private Limited & Ors* **(2018) 3 SCC 782;** *Cosmic Dye Chemical v. Collector Of Central Excise* **(1995) 6 SCC 117;** *M/s Uniworth Textiles v. Commissioner of Central Excise* **(2013) 9 SCC 753 : [2013] 3 SCR 27 referred to.**

Case Law Reference

[1996] 10 Suppl. SCR 585	**followed**	**Para 7**
[2010] 13 SCR 381	**referred to**	**Para 7**
[1999] 5 Suppl. SCR 155	**referred to**	**Para 24**
[2018] 10 SCR 309	**referred to**	**Para 34**
[2013] 3 SCR 27	**referred to**	**Para 38**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 8228 of 2019.

From the Judgment and Order dated 16.11.2018 of the Hon'ble Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai in Appeal No.ST/40923 of 2017-DB.

With

Civil Appeal No. 89 of 2021.

Balbir Singh, ASG, Sree Kumar C. N., Sr. Adv., Zoheb Hossain, Rupesh Kumar, Anmol Chandan, Mukesh Kumar Maroria, B. V. Balaram Das, Advs. for the Appellant.

Arvind P. Datar, Sr. Adv., Kumar Visalaksh, Nishant Shah, Udit Jain, Ms. Sweta Rajan, Archit Gupta, Ms. Samyuktha Srinivasan, Mahfooz Ahsan Nazki, Advs. for the Respondent.

The Judgment of the Court was delivered by

K. M. JOSEPH, J.

1. These Appeals are maintained under Section 35L(1)(b) of the Central Excise Act, 1944, read with Section 83 of Chapter V of the Finance Act, 1994. They are directed against the Orders dated 16.11.2018 and 20.11.2019, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (hereinafter referred to as 'the Tribunal', for short).

2. By the impugned Orders, the Tribunal set aside the Final Orders, by which the Principal Commissioner Service Tax, Chennai, found the Respondent/Bank, liable to pay service tax, penalty and interest on the amount of the "interchange fee" received by it.

3. The Respondent is a Bank. It is registered with the Service Tax Commissionerate Chennai, under the category "Banking and other financial services, business auxiliary services, charge card and other card payment services, manpower recruitment or supply services, among other services". An internal audit of group of the Service Tax Commissionerate, Chennai found that it was receiving interchange fee, which formed part of the gross amount billed to the customer. Show Cause Notices were issued to the Respondent, calling upon it to show why it should not be visited with service tax on the interchange fee, besides penalty and interest. The notices covered periods prior to 01.07.2012 and also thereafter. The Respondent filed its explanation to

A which we shall refer to hereinafter. In short, its case is that the Respondent is not performing any service so as to render it exigible to service tax on the interchange service. The interchange fee is in the nature of interest it has earned in the credit card transaction with the customer. It is also contended that, in fact, the interchange fee has already been subjected to service tax in the hands of the acquiring bank. Therefore, it was B pointed out that if the Respondent is again visited with service tax, it would be plainly impermissible as it would amount to double taxation. It was rejecting the contentions of the Respondent that the Principal Commissioner found that the Respondent did perform services and it, therefore, earned the interchange fee. It is further found that there is no C evidence to show that the acquiring bank had paid tax on the amount which was earned as interchange fee by the Respondent. The case of interchange fee being interest and a 'transaction in money' was rejected.

4. The Tribunal, on the other hand, by the impugned Order, has essentially purported to place reliance on the Order passed by the Tribunal D in *M/s ABN Amro Bank v. Commissioner of Central Excise and Customs* dated 23.07.2018 and found that the Respondent is not liable, resulting in the Order of the Principal Commissioner being set aside.

5. Heard Shri Balbir Singh, learned Additional Solicitor General, on behalf of the Appellant and Shri Arvind P. Datar, learned Senior E Counsel, appearing on behalf of the Respondent.

6. Service Tax had its humble beginnings with the passing of the Finance Act, 1994 with only three taxable services. Over the years, a large number of taxable services came to be added by various Finance Acts. Before I refer to the taxable service in question, I must note the F statutory framework.

THE STATUTORY FRAMEWORK FOR SERVICE TAX

7. The statutory framework of the service tax in India is traceable to the Chapter V and Chapter VA of the Finance Act, 1994 (hereinafter referred to as 'the Act', for short). Section 64(3) provides that the Chapter G V, shall apply to taxable services provided on or after the commencement of the Chapter. The appointed day is 01.07.1994. Section 65 is the definition clause. Section 65, after being substituted by Finance Act, 2003 w.e.f. 14.05.2003, inter alia, provides for the following definitions, which I may notice. Section 65(7) defines "assessee" as meaning a person liable to pay the service tax and includes his agent. H

8. Section 65(105) defines "taxable service". Credit Card services was taxed as a part of banking and financial services. It was introduced w.e.f. 16.07.2001 under Section 65(10). On its introduction w.e.f. 16.7.2007, Section 65(12) defined banking and other financial service (BOFS for short), as including credit services.

9. There were certain amendments to this provision, which are not relevant to the present case, as credit card services continued as part of banking and financial services.

THE NEW REGIME USHERED IN BY VIRTUE OF THE INTRODUCTION OF SECTION 65(33A)OF THE FINANCE ACT, 2006.

10. By virtue of the Finance Act, 2006, credit card service was omitted from the definition of Section 65(12), which was the provision which defined banking and other financial services. With effect from 01.05.2006, Section 65(33a) came to be inserted and it reads as follows:

> "65(33a) "credit card, debit card, charge card or other payment card service" includes any service provided,—
>
> (i) by a banking company, financial institution including non-banking financial company or any other person (hereinafter referred to as the issuing bank), issuing such card to a card holder;
>
> (ii) by any person to an issuing bank in relation to such card business, including receipt and processing of application, transfer of embossing data to issuing bank's personalisation agency, automated teller machine personal identification number generation, renewal or replacement of card, change of address, enhancement of credit limit, payment updation and statement generation;
>
> (iii) by any person, including an issuing bank and an acquiring bank, to any other person in relation to settlement of any amount transacted through such card.
>
> Explanation.—For the purposes of this sub-clause, "acquiring bank" means any banking company, financial institution including non-banking financial company or any other person, who makes the payment to any person who accepts such card;
>
> (iv) in relation to joint promotional cards or affinity cards or co-branded cards;

A (v) in relation to promotion and marketing of goods and services through such card;

(vi) by a person, to an issuing bank or the holder of such card, for making use of automated teller machines of such person; and

B (vii) by the owner of trade marks or brand name to the issuing bank under an agreement, for use of the trade mark or brand name and other services in relation to such card, whether or not such owner is a club or association and the issuing bank is a member of such club or association.

C Explanation. —For the purposes of this sub-clause, an issuing bank and the owner of trade marks or brand name shall be treated as separate persons;"

[Section 65(33a) of the Act]

11. Still, I may also notice that Section 65(105) (zzzw) refers to
D any service provided or to be provided to any person by any other person, in relation to credit card, debit card, charge card or any other payment card service, in any manner, as a taxable service.

12. Till 01.07.2012, Section 66 of the Act was the charging section. It reads as under:

E

"66. Charge of Service Tax-There shall be levied a tax (hereinafter referred to as the Service Tax) at the rate of twelve per cent. of the value of taxable services referred to in sub-clauses (a), (d), (e), (f), (g.) (h), (i), (j), (k), (1), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zh), (zi), (zj), (zk),(zl),
F (zm), (zn), (zo), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz), (zza), (zzb), (zzc), (zzd), (zze), (zzf), (zzg), (zzh), (zzi), (zzk), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzr), (zzs), (zzt), (zzu), (zzv), (zzw), (zzx), (zzy), (zzz), (zzza), (zzab), (zac), (zzad), (zzze), (zzzf), (zzzg,) (zzzh), (zzzi), (zzzj), (zzzk), (zzz[3]), (zzzm), (zzzn), (zzzo),
G (zzzp), (zzzq), (zzzr), (zzzs), (zzzt), (zzzu). (zzzv), (zzzw), (zzzx), (zzzy), (zzzz), (zzzza), (zzzzb), (zzzzc), (zzzzd), (zzzze), (zzzzf), (zzzzg), (zzzzh), (zzzzi), (zzzzj), (zzzzk), (zzzzl), (zzzzm), (zzzzn), (zzzzo), (zzzzp), (zzzzq) (zzzzr) (zzzzs) (zzzzt) (zzzzu) (zzzzv) and (zzzzw) of clause (105) of section 65 and collected in such manner as may be prescribed."

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Provided that the provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint."

13. With effect from 01.07.2012, Section 66B was inserted as the charging section and it reads as follows:

"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 percent. 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."

Service has been defined in Section 65B(44). The Negative list is contained in Section 66D.

14. I have referred to these provisions as the impugned order covers periods embraced by Section 66 and 66B.

15. The next provision to bear in mind Section 67. Section 67 deals with valuation of taxable service for charging. It reads as follows:

"67. Valuation of taxable services for charging Service Tax. -

(1) Subject to the provisions of this Chapter. Service Tax chargeable on any taxable service with reference to its value shall, -

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money, with the addition of Service Tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of Service Tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

A (3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during
B or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner asmay be prescribed."

16. Section 68 deals with the persons responsible for payment of service tax and it reads as follows:
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"68. Payment of Service Tax. –

(1) Every person providing taxable service to any person shall pay Service Tax at the rate specified in section 66 in such manner and within such period as may be prescribed.

D (2) Notwithstanding anything contained in sub-section (1), in respect of "such taxable services as may be notified" by the Central Government in the Official Gazette, the Service Tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this
E chapter shall apply to such person as if he is the person liable for paying the Service Tax in relation to such service.

"*Provided* that the Central Government may notify the service and the extent of Service Tax which shall be payable by such person and the provisions of this Chapter shall apply to such person
F to the extent so specified and the remaining part of the Service Tax shall be paid by the service provider."

17. Section 69 deals with registration. It reads as follows:

"69. Registration. — (1) Every person liable to pay the service tax under this Chapter or the rules made thereunder shall, within
G such time and in such manner and in such form as may be prescribed, make an application for registration to the Superintendent of Central Excise.

(2) The Central Government may, by notification in the Official Gazette, specify such other person or class of persons, who shall
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make an application for registration within such time and in such manner and in such form as may be prescribed."

18. The relevant Rule in the Service Tax Rules 1994 is Rule 4.

19. Section 70 deals with furnishing of return and it reads as follows:

"70. Furnishing of returns. — (1) Every person liable to pay the service tax shall himself assess the tax due on the services provided by him and shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency and with such late fee not exceeding twenty thousand rupees, for delayed furnishing of return, as may be prescribed.

(2) The person or class of persons notified under sub-section (2) of section 69, shall furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed."

20. Rules 7 of the Rules deals with the Return. As I have already noted for the period prior to 01.07.2012, the Act imposed Service Tax on the value at the rate mentioned of the value of the taxable services which were referred to thereunder (various provisions enumerated in Section 65 clause 105) which included Section 65 (105)(zzzw), which reads as follows:

"(105) "Taxable service" means any service provided or to be provided –

(zzzw) to any person, by any other person, in relation to credit card, debit card, charge card or other payment card service, in any manner;"

21. Necessarily, this must be read with Section 65 (33a), which I have adverted to. This remained the scheme of service tax till 01.07.2012. For the period after 01.07.2012, there is a paradigm shift as Section 66B took over as the charging section and thereunder what is relevant is to ascertain whether there is a service and if there is service whether it is included in the negative list. If there is service and it is not included in the negative list and the service is provided or agreed to be provided in the taxable territory by one person to another the charge under section 66B is attracted. The method of collection is done in the manner provided in the Rules. Service has come to be defined in Section 66B (44) as follows:

A "(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

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(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

C (iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force."

D

THE DECISION OF THE TRIBUNAL IN STANDARD CHARTERED BANK AND ORS. V. CST, MUMBAI-I AND OTHERS[1].

22. The said decision is reported in 2015 [40] S.T.R. 104 (Tri. - Del). A larger Bench of the Tribunal (three Members) went on to consider whether the new definition of the credit card services under Section 65(33a) read with Section 65(105)(zzzw), was substantive or it was a continuation of the levy under Section 65(10) or Section 65(12). It also considered the question, whether provisions under Section 65(33a) would apply retrospectively from 16.07.2001.

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F 23. I notice the following views expressed by the Tribunal:

"27. On a literal construction of the relevant provisions it appears at first blush that any service provided to a customer by a banking company etc. in relation to credit card services, is a taxable service. Acceptance of this construction would lead to infinite expansion of the taxable event. Not only would credit facilities provided by an issuing bank to its card holder fall within the scope of this service but services such as receipt and processing of credit card applications; transferring of embossing data to the

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H [1] 2015 [40] S.T.R. 104 (Tri. - Del)

issuing bank's personalisation agency; teller machine personal identification number generation; renewal or replacement of a credit card; change of address; payment updation and statement generation; settlement of amounts transacted through credit card; services provided by the owner of trade marks or bank name to an issuing bank for use of the trade mark or brand name; and a host of other services which are interspersed in the sequence of transactions occurring on the use of a credit card, would all be services provided in relation to credit card services. These services are expressly enumerated in sub-clauses (ii), (iii), (vi) and (vii) of Section 65(33a), w.e.f. 01.05.2006. On Revenue's interpretation, these services are subsumed within credit card services on account of the "in relation to" phrase. Wherever an issuing bank hives of some of its activities in relation to credit card operations, such as receipt and processing of credit card applications and the like and these services are provided by a outside agency, these would nevertheless fall within the ambit of BOFS, though not statutorily so identified and expressed. The scope of credit card services and BOFS would therefore be perpetually nebulous and its contours indeterminate, assessees contend. Assessees also urge that acceptance of Revenue's interpretation would lead to perpetual ambiguity in ascertaining the range and variety of transactions falling within the ambit of credit card services and such interpretation should therefore be avoided on the principle of doubtful and ambiguous taxation and inchoate specification of the taxable event in a fiscal legislation.

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"44. Board circular dated 09.07.2001, a contemporaneous executive guidance issued to clarify the scope of credit card services proposed in Finance Bill, 2001 clearly explained the reach of this provision as services whereby credit facility is provided by banks; and no other services are mentioned in the circular. The Act has not defined even illustratively, the nature and variety of services which amount to credit card services. From the orders passed in several Commissionerates it is clear that quite a few, in fact several adjudicating authorities had considered the scope of credit card services as not extending to those provided by banks or financial institutions for which consideration in the nature of interchange fee or ME discount is received/retained by providing

banks. ABN Amro Bank/Royal Bank of Scotland, Standard Chartered Bank, HDFC Bank, HSBC Bank Limited, ICICI Bank, Citibank and American Express Bank had all considered the scope of credit card services as not extending to activities on which interchange fee or ME discount is received. It is inconceivable and would strain limits of logical inference to assume that all these banks consciously misconstrued the ambit of credit card services, with a view to evade tax.

For the above reasons as well we are compelled to the interpretation that the scope of services falling within the ambit of credit card services, notwithstanding the phrase "in relation to" in the enumerative provision of the Act during the relevant period, was ambiguous, uncertain and invites purposive, dynamic and strained interpretation.

The express enumeration of several services falling within the ambit of card services (including credit card services) post 01.05.2006, in drafting the definition of this service in Section 65(33a) eradicates the ambiguity and uncertainty regarding scope of services covered under card services. The Circular dated 28.02.2006 issued by TRU, Ministry of Finance to explain the ambit of services introduced by Finance Bill, 2006 clarifies (in para 3.19) as under:

> 3.19. CREDIT CARD RELATED SERVICES: Credit card services are presently taxable under banking and other financial services. The proposal is to tax comprehensively all services provided in respect of, or in relation to, credit card, debit card, charge card or other payment card in any manner. The major services provided in relation to such services are specifically mentioned under the definition "credit card, debit card, charge card or other payment card service".

The speech of the Hon'ble Finance Minister on 28.02.2006 while presenting the Budget for 2006-07 explains the purposes underlying introduction inter-alia of card services. At para 153 of the speech, the Hon'ble Minister states:

> I also propose to expand the coverage on certain services now subject to service tax. I do not wish to burden the house with the details which are available in the Budget paper.

The following is clear from Section 65(33a) read with Section 65(105)(zzzw) of the Act.

(a) The scope of service tax levy is extended to services provided in respect of other cards such as debit card, charge card or other payment card, apart from credit card;

(b) The several and intervening services which occur in the use of cards are enumerated in sub-clauses (i) to (vii) of the definition, clearly conveying the intention to cover these expressly enumerated services as taxable events under the provisions;

(c) In Section 65(105)(zzzw) while retaining the phrase "in relation to", the phrase "in any manner" is added. The precision and clarity of the detailed drafting methodology employed in the Finance Act, 2006, compels the inference that Parliament not only expressed the intention to expand the scope of the taxable service to cover services provided "in relation to" other cards as well but has further and expressly expanded the reach of taxation to services which otherwise may not indisputedly fall within the ambit of card services. Section 65(33a) thus excised ambiguity, uncertainty and inchoateness in the statutory text."

(Emphasis supplied)

24. I may notice the conclusion as set out:

"47. CONCLUSIONS:

We answer the reference dated 16.08.2013 as under:

(a) On point No. (i) in the order of reference, we hold that introduction of a comprehensive definition of "credit card, debit card, charge card or other payment service" in Section 65(33a) read with Section 65(105)(zzzw), by the Finance Act, 2006 is a substantive legislative exertion which enacts levy on the several transactions enumerated in sub-clauses (i) to (vii) specified in the definition set out in Section 65(33a); and all these transactions are neither impliedly covered nor inherently subsumed within the purview of credit card services defined in Section 65(10) or (12) as part of the BOFS;

(b) On point No. (ii) we hold that sub-clause (iii) in Section 65(33a) is neither intended nor expressed to have a retroactive reach i.e.

w.e.f. 16.07.2001. Services enumerated in these sub-clauses are not implicit in the scope of credit card services;

(c) On point No. (iii) of the reference, we hold that a Merchant/ Merchant Establishment is "a customer" in the context of credit card services enumerated in Section 65(72)(zm), subsequently Section 65(105)(zm) and a fortiori an acquiring bank is "a customer" of an issuing bank.

(d) On point No. (iv), we hold that ME discount, by whatever name called, representing amounts retained by an acquiring bank from out of amounts recovered by such bank for settlement of payments to the ME does not amount to consideration received "in relation to" credit card services."

THE DECISION OF THE TRIBUNAL IN M/S ABN AMRO BANK NV PRESENTLY KNOWN AS ROYAL BANK OF SCOTLAND NV V. COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SEVICE TAX, NOIDA [DECISION RENDERED ON 23.7.2018][2]

25. This decision is the relied upon order in the impugned order. The period in dispute in the said case was May, 2006 to February, 2008. I may notice paragraphs-2, 6, 8 and 9. On the said basis, the Tribunal proceeded to set aside the order impugned, which was demand for service tax along with interest and penalty.

"2. The facts of the case are that the appellant is a banking company and engaged in the business of issuance of 'credit cards' to their customers. The credit cards business having a system to operate, how the system is operated i.e., a bank issue the credit card is known as Issuing Bank to its customers When the customer uses that credit card, he goes to the Merchant purchase the goods by swiping the card, thereafter immediately transaction goes to the acquiring bank. The acquiring bank makes the payment to the merchant. At that time, the acquiring bank charges the certain amount for the service provided by them to the merchant. On that amount, the acquiring bank is discharging their service tax liability. Out of that amount of service retained by the acquiring bank, some amount is transferred to the issuing bank. The case of the

[2] 2018-TIOL-2811-CESTAT / MANU/CN/0079/2018

Revenue is that the issuing bank receiving certain commission from the acquiring bank, on that amount they are liable to pay service tax under the category of 'Credit Cards Services' under Section 65(33A) read with Section 65(105)(zzzuu) of Finance Act, 1994. To this effect the audit took place during the period from 2007-2008 and thereafter a show cause notice was issued to demand of service tax from the appellant for the period from May, 2006 to February, 2008 by way of show cause notice dated 19.09.2011. The matter was adjudicated and the demand of service tax was confirmed against the appellant alongwith interest and various penalties were imposed. Against the said order, the appellant is before this Tribunal.

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6. It is a fact on record that the acquiring bank is discharging his service tax liability on the amount in question, in that circumstances, no service tax is payable by the appellant (and the said fact has not been disputed by the learned AR during the course arguments) as held by the Hon'ble Allahabad High Court in the case of Commissioner of C. Ex. Lucknow vs. Chotey Lal Radhey Shyam reported at MANU/UP/3815/2017 : 2018 (8) G.S.T.L. 225 (All.).

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8. On going through the said definition, we find that if the appellant is receiving certain commission in relation to settlement of any amount, then and only then the said activity is covered under credit card services. Admittedly, the appellant is not engaged in any activity of settlement of the amount. In fact, the appellant is not the settlement agency and is acting only as issuing bank. It is admitted position by the learned Commissioner in the impugned order. In that circumstances, we hold that the amount received by the appellant does not qualify as the 'credit cards services'. Therefore, we hold that the demand against the appellant is not sustainable.

9. Moreover, we find that in this case show cause notice has been issued by invoking the extended period of limitation whereas the activity of the appellant was known to the Department much earlier and a show cause notice for the earlier period was also issued to them, in that circumstances, relying on the decision of the Supreme

Court in the case of Nizam Sugar Factory vs. Collector of Central Excise, A.P. reported at MANU/SC/8820/2006 : 2006 (197) E.L.T. 465 (S.C.) where as it held that the extended period of limitation is also not invocable, we hold that the demand is highly barred by limitation."

(Emphasis supplied)

SHOW CAUSE NOTICES

26. The first of the Show Cause Notice (hereinafter referred to as 'SCN', for short) is SCN No. 141 of 2013 dated 24.04.2013, which related to the period October, 2007 to June, 2012. The second SCN No. 258 of 2014 is dated 23.09.2014. This SCN relates to the period from July, 2012 to December, 2013. The third SCN No. 25 of 2015 dated 02.03.2015 related to the period January, 2014 to March, 2014. The fourth SCN No. 97 of 2015 dated 11.08.2015, covered the period April, 2014 to March, 2015. Apart from the first SCN, the later SCNs related to the period covered by Section 66B of the Act wherein the Negative List Regime was put in place.

27. Of relevance is the following paragraphs in SCN No. 141 of 2013 dated 23.04.2013:

"2. During the course of audit of accounts of the assessee conducted by Service tax Internal Audit Group of Service tax Commissionerate, Chennai, it was noticed that the assessee was issuing Credit Cards to its customers; that Credit Card transactions typically involve two banks - an issuing bank - and an acquiring bank; that issuing bank issues credit cards to its customers; that acquiring banks contract merchant establishments to accept credit card payment for the goods or services sold to the customers and to facilitate such transactions, the acquiring banks provide the required infrastructure like Card Swiping Terminal (Point of Sale Machines), payment gateway etc.; that assessee's Credit Card customers are using Point Of Sale (POS) machines installed by acquiring banks in various merchant/service establishments: that the acquiring banks make payments to the merchant establishments/ service establishments and charge them a pre-contracted rate known as Merchant Discount Rate (MDR) to facilitate the credit card transaction; that acquiring banks submit the transactions settled by Merchant establishments to the assessee (Issuing Bank)

through Card Association and in-turn the assessee makes payments to the acquiring banks through Card Association; that Card Association (Master Card, Visa and Diners Club International) acts as a bridge between the assessee (issuing bank) and acquiring banks; that Card Association provides the required network and platform to the issuing banks and acquiring banks for facilitating the cards transactions; that normally acquiring bank submits the transactions (settled by merchants) to the Card Association in a standard file format for onward submission to the assessee (issuing bank); that the standard file format contains details like card number, acquirer reference number, transaction amount, interchange fee, date of transaction, nature of merchant business etc, that based on the transaction details received from the Card Association, the assessee (issuing bank) bills the customer for gross amount and pays the gross amount less interchange fee (which is credited by the acquiring banks) by remitting the same through the card Association; that assessee (issuing bank) normally receives the gross amount from their customers based on the monthly billing statement with a due-date by which the payment needs to be made by the customer; In this regard it appears that the interchange fee is nothing but a share of the MDR earned by the assessee and forms part of their service income in relation to Credit card or other payment card services.

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4. On being pointed out by audit, the assessee vide letter dated 12.04.2013 stated that the gross amount of consideration received for taxable service under the taxing entry of "Credit Card Services", has already been subjected to service tax, in the hands of acquiring bank; that the interchange fee received by the issuing bank is just a share of the MDR received from acquiring bank; that issuing bank is not rendering any service to acquiring bank and hence no service tax is applicable on the proportionate share of MDR received by issuing bank in the form of interchange; that taxing the interchange as share of MDR, in Hands of issuing banks would amount to double taxation as the gross MDR has already been subjected to service tax; that since service tax was paid on the entire MDR, their liability, if any, should be adjusted accordingly. They also enclosed (1) a Note on Credit card transactions and

A applicability of Service tax and (2) an excel sheet showing the workings of the interchange earning and details of MDR. However, on their own accord, the assessee paid an amount of Rs.15,00,00,000/- towards Service Tax vide Challan No. 11046 dated 28/03/2013.

B "Para 5. The contention of the assessee that they are not rendering any service to the acquiring bank does not appear to be correct. When a credit card holder of the assessee (issuing bank) uses the card at a merchant establishment for making a purchase, the account of the merchant establishment is settled directly by the card issuing bank or through an acquiring bank. The fact of issue C of credit card by the assessee as the issuing bank only enables the customer to avail cashless purchase or service from the merchant establishment which is subsequently settled by the acquiring bank and the discount (interchange fee) so earned is shared with the assessee(card issuing bank). It therefore, appears D that the assessee have earned service income namely interchange fee in relation to credit card services and the interchange fee earned by the assessee appears to be taxable under Section 65 (105) (zzzw) of the Finance Act, 1994 read with Section 65(33a) ibid; The fact of payment of service tax on the interchange fee by the acquiring bank does not exempt the assessee from payment E of service tax on the consideration received by them towards rendering of service as each person providing service is liable to pay service tax for the services rendered by them."

28. I notice that in the second of the SCN dated 23.09.2014 also, which was, in fact, issued in continuation to the first SCN dated F 23.04.2013, and issued, proceeding on the basis that the respondent was still receiving interchange fee from the acquiring bank, which was not being subjected to service tax and paragraph 5 of the such Show Cause Notice repeats what has been stated in paragraph 5 of the first Show Cause Notice.

G **THE CONTENTIONS NOTICED BY THE COMMISSIONER**

29. The interchange fee has already been subjected to tax as the entire merchant discount, of which, the interchange fee is a part, has been taxed. The essential preconditions to tax under the Finance Act is that there should be a service, the service provider, service recipient and H there should be consideration for the service. It was contended by the

respondent that there is no service provided by the assessee to the acquiring bank. The contention was that the acquiring bank deducts the merchant discount and pays the balance to the merchant establishment. The discount so borne by the merchant establishment results in income the beneficiaries being the respondent and the acquiring bank. The amount due to the issuing bank is settled by retention, *i.e.*, the Card Association debits the account of the issuing bank and disperses the same to the acquiring bank. Payment to the Card Association is made separately by the issuing bank and the acquiring bank. There is contractual relationship between the merchant establishment and the acquiring bank. The issuing bank is not engaged in any service to the acquiring bank and the portion of the fee retained by the assessee is not in respect of any service being provided by the assessee to the acquiring bank. There is no service provider and service recipient relation between the issuing bank and acquiring bank. They are participants in the credit card transactions. For the service rendered by the acquiring bank to the merchant establishment, the acquiring bank pays service tax on the gross consideration. The disbursements made between the assessee and acquiring bank are not for any service provided by the assessee to the acquiring bank. The acquiring bank does not hire the assessee to provide any service. The interchange fee is not a consideration for any service. The interchange fee is nothing but a portion of the service tax paid merchant discount and is not a separate consideration paid to the assessee in lieu of any service. The perusal of Section 67 of the Act makes it clear that service tax is applicable on the gross amount charged by the service provider for a consideration received in monetary terms in relation to the provision of services. The value chargeable to service tax is by the mandate of law required to be restricted only to the consideration for the service rendered and no amount beyond this can legally be charged to service tax. Board Circular No. 65/14/2003 dated 05.01.2003 was relied upon. The consideration for the provision of credit card services is recovered by the acquiring bank from the merchant establishment and the portion of the same is in respect of service provided by the assessee.

30. Therefore, the gross amount charged for the credit card services is the merchant discount which will form the basis for the levy of service tax in terms of Section 67. All activities are undertaken by the participants to support a transaction where a merchant establishment is able to accept a payment from a credit card holder through the modality of credit cards. The gross value of the service rendered, having suffered

A service tax, the Show Cause Notices were impugned. There is reference to case law in support of the same. Only the value which has a nexus with the services rendered was liable to subject to service tax. Any attempt to levy service tax would amount to double taxation. There is no escapement of tax. There would be duality of same tax. Transaction in money (relatable to the Show Cause Notices for the period after the B negative list was introduced) is not liable to service tax was the contention. There is provision of service only in the first leg of the transaction wherein the acquiring bank pays the merchant establishment after deducting the merchant discount, which is subjected to tax. The subsequent transaction is purely transaction in money and there is no *inter se* provision of service C between the parties. The Show Cause Notices were alleged to be barred by limitation. There is no deliberate intention on the part of the assessee to not disclose correct information. The information about the interchange fee has been disclosed by the acquiring bank. In this case, there is interpretational issue. Likewise, the demand for penalty and interest was opposed. A case for penalty under Section 78 was not made out. There D was no *mens rea*. There is no supression by the respondent. In regard to later Show Cause Notices, there were certain supplementary contentions raised including that interchange fee is only in the nature of interest on loan.

E **FINDINGS OF THE COMMISSIONER**

31. The Commissioner, *inter alia*, has examined the terms of the relevant extracts of the agreement entered into between the respondent and VISA Worldwide, the Card Association. After referring to various Clauses in the Agreement, the Commissioner finds that a Card Association enters into an agreement with the issuing bank, merchant establishment F and acquiring bank, to facilitate the card transactions. The participation by the assessee enables provision of various services to the card holders by the issuing bank. That is, in view of the participation, the issuing bank is enabled to issue credit card and extend services at various merchant establishments, business/Government Entities. Card Association provides G the network for facilitation of the transaction flow and levy fee for various services.

32. I may notice the paragraph-8.7:

"8.7. To facilitate the transaction, when a person make a purchase using a card, the following limbs of transactions are involved the H Merchant establishment swipes the card of the person who has

been issued with such card by the 'issuing bank' in the 'Point of Sale' extended by the 'acquiring bank' who has agreed to settle the Merchant establishment, the amount for which purchase is made by the card Holder; when the card is swiped, the details of the Card, purchase details are transmitted to the issuing bank through the Card Association and is verified and retransmitted thereupon on approval the cardholder is enabled to make the purchase, the Merchant establishment furnishes the statement of purchases through such cards to the acquiring bank, who files the statement with the Card association; the card association debits the issuing bank the amount due to the acquiring bank less the interchange fee which accrues to the issuing bank for verifying and permitting the transactions. The acquiring bank releases the amount to the Merchant Establishment after deducting the MDR as agreed upon by them. The role of the Card associations in these transactions is vital and a11 the key players, the issuing bank, the acquiring bank and the Merchant establishment are in contractual agreement with the card associations. Apart from the contractual agreement with the card Associations, the issuing bank is in contractual agreement with the card holder for allowing the various credit limits for purchase of goods or services and return of the credit extended in due course at the appropriate rates of interest. Similarly, in certain cases the acquiring banks are in contractual agreements with the merchant establishments for providing the 'Point of Sale' and for crediting, the amount of purchase handled through the P0S. In the above transactions to facilitate the transactions, both the issuing, bank and the acquiring bank pays the card association at the rates agreed upon, the Merchant establishment accepts a discounted amount on the purchase enables by them through the POS of the Acquiring bank; the acquiring banks part with the interchange fee fixed by the contractual agreements with the card Associations to the issuing bank. The issuing bank collects the amount of purchase from the card holder as per the terms and conditions agreed upon by them with the card holder. In the case at hand it is evident that extending the POS to the Merchant establishment and paying, the discounted amount to the ME are covered by a contractual agreement between the acquiring bank and ME on one hand and Acquiring bank, and Card Association on the other hand; similarly the card holder 1s

A enabled to undertake transactions through the card vide the contractual agreements between the card, holder and the issuing bank on one hand and the issuing bank and Card Association on the other hand. The entire gamut of activities are covered under three compacts i.e. card association with both acquiring bank and issuing bank acquiring bank with ME and issuing bank with card holder. The charges involved in the extension of service's apart from payment of cost to the Merchant Establishment and repayment to the issuing bank by the card holder are (the MDR retained by the acquiring bank) the charged paid by the acquiring bank and issuing bank to the Card Associations; and the interchange fee retained by the issuing bank. I find that the interchange fees and for facilitating the purchase using the card and not for lending the money for the purchase as claimed by the assessee. The credit card is issued to facilitate credit purchase and in due course the credit extended is received back with appropriate interests from the card holder in line with the contractual agreement the issuing bank has with the card holder, while the interchange fee is the consideration that accrues to the issuing bank for verifying, facilitating and extending the purchase value in line with the contractual agreement the issuing bank; has with the card association and taking the risk for collection of amounts from the Card holder. In view of the above, I find that the interchange fee is a consideration received as are suit of contractual agreements with the card associations to facilitate purchase of goods or services. Therefore, I find that the argument that there is no service or service receiver provider relationship is not available or the fee is not a consideration as it is not negotiated upon do not hold merits. As per Section 67 of the Act, the gross value of the service is the amount received for provision of service. It is nowhere stipulated in law that the consideration must be negotiable. However, issuing bank while entering into agreement with the Card association agrees to abide by the rates and charges and therefore the argument that the consideration is not negotiated is not factual as by agreeing to the rates, they are negotiated. The definition of credit card services as it existed upto 30.06.2012, clearly states that the services provided the card associations to the issuing bank is a taxable service and effective from 01.07.2012, activity provided by one person to another for a consideration is a service."

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33. As regards the case of the respondent that service tax is paid by the acquiring bank on the MDR, it is stated that no proof has been produced by the respondent. To quote:

> "The interchange fee and the MDR are not the same amount. The assessee has stated that service tax is being paid by the Acquiring bank on the MDR but has not furnished any proof to that extent. Moreover, the interchange fee is the consideration given to the issuing bank for validating the e-transaction and the MDR is the consideration for the Acquiring bank for setting the Merchant Establishment."

34. Still further, the Commissioner went on to find, in regard to the question, whether there was suppression by the respondent relating to non-payment of service tax on interchange fee. It was found that the respondent had received interchange fee. It was further found that when the legal provision is clear and explicit, the act of not paying service tax revealed a positive act on the part of the respondent. Even if they were under the belief that the charges are not liable to service tax, they should have approached the Department with the details so that the Department could have examined the correctness of the claim. With the introduction of self-assessment, there being no ambiguity in the provisions of Statue, the onus of making proper assessment rests with the assessee under Section 70. The period of limitation would commence from the date of the knowledge of the Department. Reliance was placed on Judgment of this Court in *Commissioner of Central Excise, Vishakhapatnam v. Mehta and Company*[3]. Penalty was also found justified. Finally, the Commissioner proceeded to confirm the demand for service tax, interest under Section 75, penalty under Section 78 and also the penalty of Rs. 10,000/- under Section 77(2).

THE IMPUGNED ORDERS OF THE TRIBUNAL

35. The Tribunal, in Order dated 16.11.2018, passed a reasoned Order, which is impugned in Civil Appeal No. 8228 of 2019.

36. The said Order came to be followed by the Tribunal by passing the Order dated 20.11.2019, which is impugned in Civil Appeal No. 89 of 2021.

[3] (2011) 4 SCC 435

37. In Order dated 16.11.2018, the Tribunal dealt with the SCNs, which I have set out. The subsequent Order dated 20.11.2019, covers the period from April, 2015 to March, 2016. The Tribunal referred to the decision of the larger Bench in Standard Chartered Bank (supra). The said Judgment was found to be distinguishable.

38. There is no discussion, it was found, or counter response that Standard Chartered Bank (supra) is not applicable. The question of interchange fee was not involved in Standard Chartered Bank (supra). The Tribunal agreed with the contention of the Respondent that it was not the submission of the assessee in Standard Chartered Bank (supra) that interchange fee was not consideration for service and the Tribunal and, therefore, did not have any occasion to examine, whether or not, the activity of issuing bank was service and covered by the taxing entry for credit card services. The Tribunal went on to, on the other hand, derive support from the Judgment in ABM Amro (supra) after adverting to paragraphs- 6 to 8, finding that the issue has been conclusively decided by the Tribunal in ABM Amro (supra) against the Revenue. The said Order was followed and the Order of the Commissioner was set aside.

THE CONTENTIONS OF THE PARTIES

39. Shri Balbir Singh, learned Solicitor General, would, after adverting to the salient features of the credit card transaction, contend that the respondent, as issuing bank, is liable to pay tax on the interchange fee. He drew our attention to the definition as contained in Section 65(33a) of the Act. He emphasised that the definition clause devises the employment of the word 'includes'. He also took us to the Orders passed by the Tribunal in Standard Chartered Bank (supra) and ABN Ambro (supra). After the unravelling of the different dimensions of a credit card transaction made exigible to service tax expressly, he would contend that there was no scope for the contention of the respondent that there was no service rendered by it. Both for the period prior to 01.07.2012 and for the period thereafter, it was crystal clear that the respondent was rendering and continue to render service within the meaning of the Act and it is impossible to contend that the interchange fee is not liable to be taxed in the hands of the respondent. The interchange fee is the consideration that accrues to the issuing bank for verification, facilitation and extending the purchase value in line with the contractual agreement, the issuing bank has with the Card Association and also for taking the

risk of collection from the card holder. Interchange fee is, according to the appellant, consideration received as a result of contractual agreements with the Card Association to facilitate purchase of goods or services. The contention of the respondent that the activity is to be treated as a transaction in money, is disputed. The issuing bank is debited the purchase amount less interchange fee. The interchange fee is the service charge for allowing the transaction. The debited amount is a transaction in money. The service charge is demanded only on the interchange fee and not on the purchase amount. The Order of the Tribunal in ABN Ambro Bank (supra), cannot be relied upon being *per incurium*, as the same was rendered without appreciating the inclusive definition of 'credit card service' under Section 65(33a) read with Section 65(105)(zzzw) and Section 66B(44) of the Act.

40. The complaint of the respondent that there is double taxation, is disputed. Reliance is placed on the Judgment of this Court *in Association of Leasing & Financial Service Companies v. Union of India and others*[4], to contend that the service tax is the value added tax and service tax is imposed every time service is rendered to the customer/ client. The fallacy in the argument of the respondent that interchange fee is part of MDR, which has already suffered tax, is that, interchange fee is paid prior to the receipt of MDR. In other words, the deduction of MDR is done at the time of settling the money to the merchant establishment. This happens only after receiving the amount from the issuing bank, which is net of interchange fee. The interchange fee is the consideration given to the issuing bank for validating the e-transaction, whereas MDR is the consideration for the acquiring bank for settling the merchant establishment. MDR is fixed as the percentage of sale cost or service cost, whereas interchange fee is fixed by the Card Association, taking into account other aspects the cost of moving money, the time value of money in terms of current interest rates and the relative risks involved, etc.. They are two independent transactions. There are also two separate services forming part of credit card service. No service tax has been paid by the respondent on the amount received as interchange service towards rendering taxable service. The fact of payment of service tax by acquiring bank does not absolve the issuing bank from payment of tax on the consideration received by it. There is no double taxation. It is also contended that without prejudice to the said

[4] (2011) 2 SCC 352

A contention the respondent has not produced evidence to establish payment of tax by the acquiring bank on the interchange fee. It is also contended that the extended period limitation has been rightly invoked in respect of the SCN dated 24.03.2013. There was no basis for the respondent to form a bonafide belief that their activities are not liable to service tax. There was no Order of the Tribunal which could have persuaded the B respondent to think that it was not liable to pay tax. The definition in Section 65(33a) is unambiguous. No clarification was sought from the Department. Under the Regime of Self Assessment, the onus is only on the assessee to assess the tax liability honestly and as per law. It was only due to the verification of the accounts during audit, that the evasion C of respondent, came to light. During the investigation also, it was contended by the respondent that the service tax had been discharged by the acquiring bank but they did not submit any proof. The present was, therefore, a case of fraud, wilful misstatement and suppression.

41. The respondent, on the other hand, contended that in view of D there being no appeal against the Order of the Tribunal in ABN Ambro Bank (supra), there could be no pick and choose and the present Appeals are not maintainable. It is further contended that the Appeals are also not maintainable for the reason that the Commissioner had deviated from the Show Cause Notices and arrived at findings on matters which were E contrary to the case set up in the Show Cause Notice. It goes to two aspects. In the Show Cause Notice, it is stated, as already noticed, that even if the acquiring bank has paid tax, that would not absolve the respondent from its liability to pay tax. In other words, Show Cause Notice is based on acceptance of payment of service tax on the entire MDR, which includes the interchange fee, but in the impugned Order, F the finding is that the respondent has not proved such payment. Secondly, it is contended that whereas in the Show Cause Notice, the case of the Department is that the respondent, as issuing bank, is providing service to the acquiring bank, in the impugned Order, what is found is, that the interchange fee is by way of service to the card network. Reliance is G placed on Judgment of this Court in this regard in *Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd.*[5]. The nature of the credit card transaction is highlighted. It is pointed out that the acquiring banks incur expenditure on installing swiping machines at the different merchant establishments. They are also responsible for ensuring payment

H [5] (2007) 8 SCC 89 / [2007] 215 ELT 489 (SC)

to the service recipient within two days of transaction (T+2) as per the mandate of the Reserve Bank of India. Regarding the role of the issuing bank, it is stated that when the credit card is swiped by the card holder, on approval of the transaction, the entire chain of activities, is triggered. In the Table given, which consists of a transaction worth Rs.100/-, the card network debits the account of the respondent to the extent of Rs.98/-. This amount is remitted to the acquiring bank. Rs.2/- remains to the credit of the issuing bank and this sum is called interchange fee. This is the income of the issuing bank. The acquiring bank receives Rs.98/-. It remits Rs.94.30 to the merchant establishment. The acquiring bank retains its service consideration of Rs.3/-. At the rate of 14 per cent, 70 paise is payable as service tax on the total MDR of Rs.5/-. It is the case of the respondent that when the acquiring bank has paid the said amount of service tax, the respondent cannot be called upon to again pay tax. Millions of transactions are processed every day. There is minimum human intervention as it is technology, which facilitates it. The same bank can function as issuing bank and acquiring bank. For all transactions, where Citi Bank has functioned as acquiring bank, it has retained Rs.3/- from the merchant establishment as its fee but it has remitted 70 paise to Service tax authority. The service tax is collected from the merchant establishment and remitted to the Department.

42. Under Section 67(1) of the Act, the respondent contends, the gross amount, which is charged by the service provider, will be Rs.5/-. In the present case, the expression, 'service provider' will include both the issuing bank and the acquiring bank. The gross amount will be Rs.5/-, which includes Rs.2/- payable to the issuing bank and Rs.3/-, which is payable to the acquiring bank. Reliance is placed on Circular No. 51/13/2002 dated 07.01.2003 and Instruction bearing F.No. 150/1/94-CX4 dated 02.05.1996 issued by CBEC. Reliance is also placed on Department letter F. No. 341/18/2004-TRU(Pt.) dated 17.12.2004. It is submitted, on the basis of the analogy drawn, that the interchange fee cannot be taxed once again, as, under Section 65(33a)(iii), the service has been provided by both the issuing bank and the acquiring bank and charged accordingly. For the period after 01.07.2012, the transition to the Negative List did not mean that the credit card services could be split up into individual components and taxed again. The credit card services continue to be the taxable service. Section 67(1)(i) continued to levy service tax on the gross levy, *i.e.*, the MDR. There is no averment in the Show Cause Notice, calling upon Citi Bank to submit proof that the acquiring

A bank had paid the applicable service tax. The finding that the respondent has not proved the payment by the acquiring bank of the service tax on the amount, including the interchange fee, was without any opportunity. The finding is impugned as being absurd, as there is no mechanism for the acquiring bank to pay part service tax on only Rs.3/-. It is alleged to be contrary to Section 65(33a)(iii) and the Rules made thereunder. The B Indian Bank Association, in which there are Nationalised Banks as well, have represented about the practice of paying tax by the acquiring bank on the gross amount of MDR. It is further contended that the absurdity of the suggestion of the Department, can be illustrated with an example where a Bank is both the issuing bank and the acquiring bank. It earns a C gross MDR of Rs.5/-. It pays service tax on Rs.5/-. If the bank is again asked to pay separately on Rs.2/-, there would clearly be double taxation. The Department could have easily cross-checked by way of a sample check. Service tax is a passthrough levy. In other words, it can be used as an input tax credit for payment of output tax by the recipient. The D credit card service is an input service as far as merchant establishments are concerned. If the service tax on interchange fee is demanded once again, there is no mechanism to take the service tax credit, even though, it has to be treated as a service provided by the issuing bank. No specific invoice is issued by the issuing bank either on the acquiring bank or on the merchant establishment, since the issuing bank does not know the E identity of the merchant establishment or the acquiring bank. Neither the Act nor the Rules contemplate multiple payments. Service tax is payable only once on the gross service consideration. It is contended that the extended period of limitation for the period 2007-2015 could not have been invoked. The issue is interpretational. There was no suppression when facts are known to both sides. Reliance is placed on F *Ballarpur Industries Ltd. (supra)*, and *Larsen & Toubro Ltd. v. Commissioner of Central Excise, Pune II*[6].

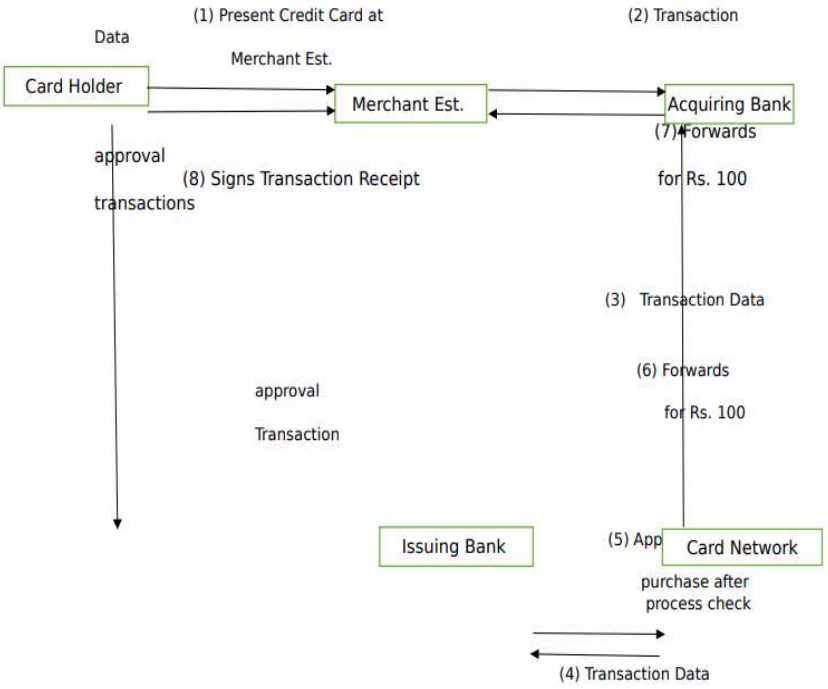
ANALYSIS

THE NATURE OF THE CREDIT CARD TRANSACTION

G 43. In the Counter Affidavit, filed on behalf of the respondent in Civil Appeal No. 8228 of 2019, the stand of the respondent in regard to the nature of the transaction appears to be as follows:

H [6] (2007) 9 SCC 617 2007 / [211] ELT 513 [SC]

"The manner in which a credit card purchase (transaction) occurs is diagrammatically described below:

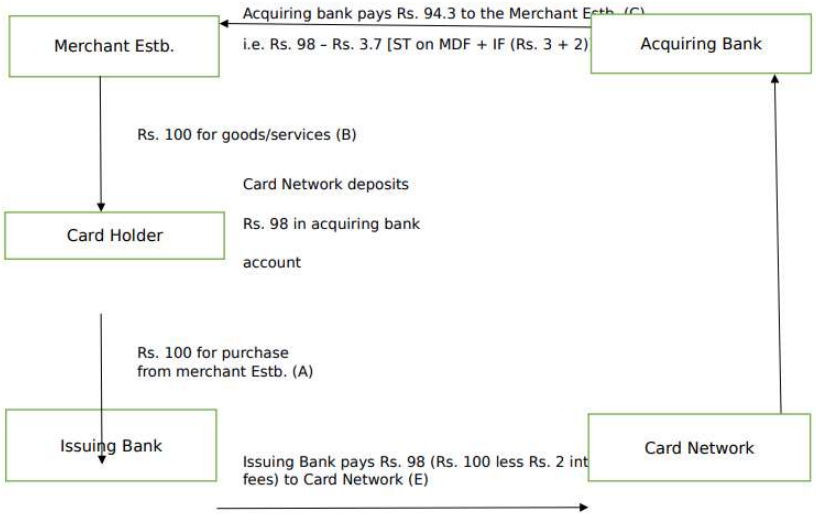


All above transactions are powered by a technological platform and take place in a matter of seconds.

9. The manner of settlement of credit card purchase transactions, i.e., money flow and service tax charged, is as follows:

A	Card Holder Purchased goods worth	Rs. 100.0
B	Merchant Estb. Sold goods worth	Rs. 100.0
C	Merchant Estb. Received payment from Acquiring Bank of	Rs. 94.3
	Short receipt on amount of charges of Acquiring Bank **and Issuing Bank (100 – 94.3):**	**Rs. 5.7**
	Break up of Rs. 5.7:	
D	MDR of Acquiring Bank	Rs. 3.0
E	Interchange fee earned by Issuing Bank	Rs. 2.0
D	Service Tax on MDR + Interchange fee	Rs. 0.7
	Total	**Rs. 5.7**

10. The above manner of settlement is diagrammatically depicted below:



11. In terms of the above diagram, the Appellant has sought to collect tax on interchange fees of Rs. 2 again in the hands of the Issuing Bank which has already been discharged in the hands of the Acquiring Bank.

12. xxx xxx xxx

13. xxx xxx xxx

14. Credit Card system: The credit card system was introduced to facilitate transactions between Merchant Establishments and Credit Card Holders. The system provided Card Holders with a convenient means to purchase goods and services without having to carry cash/ issue a cheque or have another form of credit, and enabled Merchant Establishments to reach 10 out to a larger customer base, with assured payment for goods or services and protection from fraud. In modern credit card transactions, following five parties are involved, namely:

i. Issuing Bank - The Issuing Bank issues credit cards and therefore, effectively lends monies to its Card Holders. The contractual relationship between an Issuing Bank and its Card Holders is spelt out in the cardholder agreement /

terms & conditions. Service fees recovered by the Issuing Bank from Card Holders for such service is charged to service tax.

ii. Credit Card Holders - The Card Holder is the customer to whom the Issuing Bank issues a credit card. The credit card evidences a potential line of credit established by the Issuing Bank using which the Card Holder may purchase goods or services at any Merchant Establishment.

iii. Acquiring Bank - The Acquiring Bank is a bank which recruits, screens, and accepts Merchant Establishments into a Card Network's network. They provide Point of Sale ('POS') machines to Merchant Establishments which enable Merchant Establishments to validate and accept credit card payments. The Acquiring Bank processes credit card transactions for Merchant Establishments within the respective Card Network and also operates as per the respective Network's Operating Regulations. Any service fees (typically Merchant Discount Fee/ MDF) from Merchant Establishment is fully charged to service tax.

iv. Merchant Establishment - The Merchant sells goods or services to Card Holders (buyers). The Merchant has no contractual relationship with the Card Holder's Issuing Bank. The Merchant is provided with POS machines by the Acquiring Bank to enable it to accept card payments, for a fee (Merchant Discount Fee / MDF) which is preagreed and deducted at the time of settlement of the transactions. For this, the Merchant operates a bank account with the Acquiring Bank for credit towards sales made to Card Holders.

v. Card Network - Card Networks provide the infrastructure /gateway system for electronic (credit card) transactions to effectuate (for example, Visa or MasterCard). They process transactions between Acquiring Banks and Issuing Banks, allowing purchases to be made, authorized and settled. Card Networks function as an interface between the Acquiring Banks and Issuing Banks, operating like an exchange or clearing platform. Thus, they have the key role in settlement of a Credit Card transaction. The Card

A Network prescribes Operating Rules and fixes the 'Interchange Fees' that Issuing Banks earn, besides managing interchange flow between banks. The Card Network in most cases is located outside India. The charges levied by Card Networks, whether to the Acquiring Bank or Issuing Bank therefore suffer service tax under reverse charge mechanism.

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15. In any credit card transaction, involving each of the five parties stated above, there arises the following distinct contractual (service) relationships, between:

C (i) the Issuing Bank and the Card Holder,

(ii) the Acquiring Bank and the Merchant Establishment,

(iii) the Card Network and the Issuing Bank,

(iv) the Card Network and the Acquiring Bank.

D

16. In each of these contractual relationships described above, services are provided by the former to the latter and service tax is charged on the consideration for the respective services, none of which is contested by the Petitioner:

E (i) service provided by the Issuing Bank to the Card Holder is charged to service tax ,

(ii) service provided by the Acquiring Bank to the Merchant Establishment is charged to service tax,

F (iii) services provided by the Card Network to the Acquiring Bank is charged to service tax, and

(iv) services provided by the Card Network to the Issuing Bank is charged to tax.

17. The payment by Merchant Establishments to the Acquiring G Bank (point (ii) above), known as Merchant Discount Fee includes a portion (known as Interchange Fees) that is shared by the Acquiring Bank with the Issuing Bank. It is the case of the Appellant -Department that the Issuing Bank receives Interchange Fees for services rendered to the Card Network, which has not suffered tax."

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44. In the reply of respondent to SCN 97/15, it is, *inter alia*, stated: A

You may notice that in the reply to the Show Cause Notice No. 97 dated 11.08.2015, which relates to the period April, 2014 to March, 2015, after Section 66B of the Act came into force.

"1.2 The Noticee provides various financial services including the Credit Card Services. In these credit card transactions, the Noticee issuing credit cards to customers is known as 'Issuing Bank'. Transactions involving purchase of goods and services are undertaken by such credit card holders by using such cards at various Merchant Establishments. B

The process flow of the said transaction is explained below: C

(i) The credit card is required to be swiped on electronic equipment's known as Point-of-Sale terminals in order to charge the said card holder for purchase of goods and services from the Merchant Establishment.

(ii) The said terminals are provided to the Merchant Establishments by the "Acquiring Bank" which enables validation and acceptance of payment by credit card. D

(iii) The Card Associations ('the Associations') such as VISA, MasterCard, etc. facilitate validation and settlement of transactions by providing a settlement platform to the Issuing Banks (i.e. the Noticee) and Acquiring Banks. The moment a card holder swipes the card at a Merchant Establishment, the online information is transmitted to the Issuing Bank (i.e. the Noticee) with the help of the Associations. The information regarding authenticity of the card holder is then sent back to the Merchant Establishment by the Association. The Association has an arrangement with the Issuing Bank (i.e. the Noticee) and the Acquiring Bank separately. *A copy of the Client Services and Trademark License Agreement between the Noticee and the Associations is attached hereio and marked as Exhibit B.* E F G

(iv) The Acquiring Bank makes payment to the Merchant Establishment in respect of the goods and services purchased by the customer after deducting a fee known as the 'Merchant Discount'. The 'Merchant Discount' is the H

gross amount of consideration received towards the activities undertaken by the Issuing Bank and the Acquiring Bank.

(v) Subsequently, the Association debits the pre-funded account of the Issuing Bank (i.e. the Noticee) on a net settlement basis (i.e. the Interchange Fee which is the share of the Issuing Bank is retained by the Issuing Bank).

(vi) The Issuing Bank, the Acquiring Bank and the Associations each play their own role to ensure that a transaction can be undertaken between the credit card holder and the Merchant Establishment.

(vii) The Issuing Bank subsequently collects the payment from the card holder. The Issuing Bank and Acquiring Bank further make the payment to the Associations and discharge Service tax under reverse charge mechanism on the same. *Proof of payment of Service tax by the Noticee under the reverse charge mechanism is attached hereto and marked as Exhibit C.*

(viii) The Merchant Discount which is the gross amount received from the Merchant Establishment is subjected to Service tax as per Section 65B (44) of the Finance Act, 1994 ('the Act'), in the hands of the Acquiring Bank."

THE PERIOD PRIOR TO 01.07.2012;

SECTION 66(33a) DECODED

45. Section 65(33a) was inserted by Finance Act, 2006 w.e.f. 01.05.2006. As already noticed, credit card services made its first appearance as part of banking and financial services under Section 65(10). Thereafter, it became part of Section 65(12), when it became part of the definition of the words "banking and other financial services" and it is finally, w.e.f. 01.05.2006, that Section 65(33a) made its debut. Section 65(33a) uses the word "includes any service provided under clauses (i) to (vii)". I must not be oblivious to the fact that quite apart from credit card, debit card and other payment card service, are also within the scope of Section 65(33a). It is apparent that Section 65(33a)(i) deals with the service provided by a banking company, financial institution, including non-banking financial company, or any other person or other

persons and which entities are described as issuing bank, issuing such card to a card holder. Apparently, this is the provision, which is apposite to capture the charge of service tax on the issuing bank for the service it renders to the card holder. In fact, there is no dispute that in regard to the service rendered to the respondent, in terms of the contract it has entered into, the respondent has been exigible and liable to pay service tax.

46. Now, I move on to clause (iii) of Section 65(33a), which is the pivotal provision. It contemplates any service provided by any person including issuing bank and an acquiring bank to any other person, in relation to the settlement of any amount transacted through such card. The Explanation to the said clause provides that, for the purpose of the sub-clause, acquiring bank has been defined as meaning any banking company, financial institution, including non-banking financial company or any other person, who makes the payment to any person who accepts such card.

47. Let us pause for a moment and examine the scope of Clause (iii) of Section 65(33a) with the aid of the Explanation. The said provision embraces within its scope any service provided by any person. Any person would include expressly an issuing bank and an acquiring bank. The service may be rendered to any other person. The context is, however, the service rendered must be in relation to settlement of any amount transacted through such card. I am in this case, called upon to consider the case of a credit card. I have already noticed the salient features of a credit card transaction. I have gleaned the five players in the whole transaction. The issuing bank issues the card to the card holder and the recipient becomes the card holder. There is, indeed, privity of contract between them. Other three players are the acquiring bank, the card association, the merchant establishment.

48. When a court examines a law, the court will not start with a presumption that the Legislature is not aware of ground realities and the complexities of transactions. The Legislature, on the other hand, I presume, knows how complex economic transactions are playing out, in fact, on the ground. Proceeding on the basis that Legislature has, indeed, divined what a credit card transaction entails, and who the players are, the different limbs of Section 65(33a), would assume meaning.

49. In the Explanation to Section 65(33a)(iii), in the context of the definition of the word "acquiring bank" for the purpose of clause (iii) of

A Section 65(33a), the acquiring bank is to be understood as the enumerated entities or any other person, who makes the payment to any person, who accepts such card. It is clear that in consonance with the very case of the respondent, that the expression "any person who accepts such card", would be the merchant.

B 50. Analysing Clause (iii) further, I notice that the Legislature has included both issuing bank and an acquiring bank. In other words, the word used in between issuing bank and an acquiring bank is not "or". In other words, Section 65(33a) contemplates service provided by any person including an issuing bank and an acquiring bank. It is service to any other person.

C 51. This means the service cannot be one rendered by an issuing bank to an acquiring bank. It must be service rendered by an issuing bank and an acquiring bank to any other person in relation to settlement of any amount transacted through such card.

D **IS THERE ANY SERVICE PROVIDED BY THE RESPONDENT AS ISSUING BANK IN A CREDIT CARD TRANSACTION?**

52. I have examined the features of a credit card transaction. Certain facts are not in dispute. When the card holder goes to a merchant and purchases goods and services utilising the credit card, it in its train sets into motion, on the electronic platform, the following events:

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The transaction data from the diagram produced by the respondent which I have adverted to is transmitted instantaneously from the merchant through the appliance installed in the shop of the merchant by the acquiring bank. It goes through the acquiring bank and the card network and it

F reaches issuing bank. The entitlement of the card holder being found, the issuing bank approves the purchase after process check and it goes back through the card network to the acquiring bank and from there it is forwarded to the merchant establishment. The transaction based on the credit card goes through. Lastly, the transaction receipt is signed.

G It is not disputed that the issuing bank earns Rs.2/- in the illustrated transaction of Rs.100/-. It is again clear that this amount does not enter the measure of service tax, which the issuing bank pays on the service rendered by the bank to the card holder. There is no such case.

It is not in dispute that both the issuing bank and an acquiring bank

H have entered into contracts with the card association. Equally, there is

privity of contract between the issuing bank and the card holder and there is also privity of contract between the acquiring bank and the merchant establishment.

53. It is the very case of the respondent, in the example of transaction of Rs.100/-, that card association debits the account of the respondent to the amount of Rs.98/-. This amount of Rs.98/- is remitted to the acquiring bank. Rs.2/- remains 'undebited' in the account of the issuing bank and is, undoubtedly, the interchange fee. The acquiring bank, which receives Rs.98/-, remits Rs.94.30 allegedly to the merchant establishment. The acquiring bank retains Rs.3/-, which is the consideration for 'its' service. The respondent, as issuing bank, retains Rs.2/-. The reason why the merchant establishment receives Rs.94.30 and not Rs.95/- that is, Rs.5/-, consisting of the value of the service rendered by acquiring bank and Rs.2/- for the interchange fee earned by the respondent as issuing bank, is that allegedly, 70 paisa is purportedly paid as service tax on the gross consideration of Rs.5. It is clear that under the Explanation to Section 65(33a)(iii) of the Act, the acquiring bank is treated as the bank which makes the payment to the person who accepts such card, which I have already found to be the merchant establishment. The Legislature has contemplated that apart from an acquiring bank, any other person including an issuing bank, may render service in relation to the settlement of the amount transacted through such credit card.

54. It is clear that interchange fee is earned by the respondent as issuing bank. It may be true that the respondent may also be engaged in the credit card transaction both in its capacity as issuing bank and an acquiring bank. In such an event, the aggregate sum earned for the service rendered in its capacity as issuing bank and its capacity as acquiring bank, would become the measure of tax or, in other words, value of the taxable service but legally they are for separate services as the nature of service rendered by the issuing bank is different from the service rendered by the acquiring bank. The fee is also different. Undoubtedly, it would be dependant on the terms of the contracts in question.

55. In a scenario, however, where the issuing bank and the acquiring bank are different, as is the case in the present case, it would be a case where both the issuing bank and the acquiring bank are rendering separate services as part of the credit card transaction. Indisputably, the interchange

A fee is no gift. Such a fee is not the subject matter of the service tax, falling under the transaction between the issuing bank and the card holder relatable to Clause (i) of Section 65(33a). The nature of the entire transaction, having been laid bare from the moment the card gets swiped in a transaction, till the amount is paid to the merchant establishment, there is, indeed, service performed by the issuing bank in relation to the B settlement of the amount transacted through the card. As already noticed, the issuing bank, as part of its agreement with the card association and the acquiring bank, which is also under agreement with the card association, is engaged in the unique activity of being on the electronic platform hosted by the card association, which, admittedly, fixes the interchange C fee and the amount to be earned by the issuing bank and acquiring bank and, under the auspices of which, transaction data, in millions, is processed by the issuing bank and it is only with the approval of the issuing bank that the merchant bank permits the purchase using the card. This is on the clear understanding that the amount will be paid by appropriate debit and credit in the accounts maintained, both by the issuing bank and D acquiring bank. Rs.2/-, in the example given, is, however, retained by the issuing bank and it is Rs.98/- which alone gets credited in the account of the acquiring bank. The actual payment is finally received by the merchant establishment on the agreed date on settling the account by the acquiring bank paying the amount, after deducting Rs. 5/- as amount of merchant E discount. This amount of merchant discount is made up of Rs.2/- earned by the issuing bank.

56. It is inconceivable that without the role played by the issuing bank, which tantamounts to activity and, therefore, service, the very credit card transaction, would become possible.

F

57. It is also clear that credit card system is fundamentally based on the issuing bank, undertaking the risk. Rs.98/-, in a transaction of Rs.100/-, gets debited from the account, which the respondent bank, as issuing bank, maintained. It is the funds of the issuing bank, which is utilised, in other words, to effect the payment. It is, therefore, clear that G there is service rendered by the bank, which is in connection with Clause (iii) of Section 65(33a). It is another matter that under the agreement between the issuing bank and the cardholder, the cardholder would be paying the sum of Rs.100/- to the issuing bank, within the stipulated period and, if he does not pay, he would incur the liability to pay interest, as stipulated, under the terms of the contract. The fact remains that H

there is the risk undertaken, in the first instance, of making available the funds to satisfy and settle the amount transacted through the card to the merchant establishment.

SECTIONS 67 TO 70; WHO IS LIABLE TO PAY SERVICE TAX, OBTAINED REGULATION AND FILE RETURN?

58. As far as the value of the taxable service is concerned, this is a matter which is governed by Section 67 of the Act. Since Section 66 imposed service tax on the value of the taxable service, Section 67 provides for how the value of the taxable service is to be determined. Section 67(1)(i) contemplates that in case where the provision of service is for a consideration in money, then the value will be the gross amount charged by the service provider for such service provided or to be provided by him. Section 67(1)(ii) deals with a situation where the provision of service is for consideration not wholly or partly consisting in money. Section 67(1)(iii) deals with a case where the consideration is not ascertainable. In such a case, the amount is to be determined in the manner prescribed by the Rules. Sub-section (3) declares that any amount received towards the taxable service before, during the service, and the provision of service shall be included in the gross amount. Sub-section (4) proceeds to declare that subject to provisions of sub-section (1), (2) and (3) the value shall be determined as may be prescribed. The Explanation Clause (C) to Section 67, as amended by the Finance Act, 2008, declares that gross amount charged includes, payment by cheque, credit card, deduction from account and any form of payment by issue of credit note or debit note or book adjustment, *inter alia*.

59. As far as payment of service tax is concerned which is governed by Section 68 of the Act, the liability to pay service tax is cast on every person providing the taxable service to any person. Sub-section (2) contemplates a departure from the mandate of Section 68(1) in that, in regard to taxable services as may be notified by the Central Government in the gazette, the service tax is to be paid by such person in the manner prescribed at the rate specified in Section 66 and the provisions of the chapter (which is in fact "persons responsible for payment of service tax") applies as if he is a person liable to pay service tax relating to such service. Section 68 must be read with Section 69, for it provides for the liability of a person to get registered. The liability is cast on the person liable to pay service tax under Chapter V. There is no

A case for the respondent that the case is governed by Section 68(2) for which the taxable service must be notified thereunder. That the person liable to pay tax under Section 68 must get himself/itself registered in the manner prescribed is made clear from Rule 4 of the Rules as it clearly provides that every person liable to pay service tax shall apply to get himself/itself registered and the entire provisions of rules is premised upon the liability to get registered being on the person made liable to pay service tax. No doubt, endorsement of an existing registration may be possible. Section 70 also cast the liability on the person liable to pay service tax, to assess the tax due and furnish return.

60. The charge of service tax under section 66 was on the value of taxable services as enumerated in Section 65(105). The measure of the tax is found located in Section 67. The person liable to pay the tax is governed by Section 68 and such person who is liable to pay service tax under Section 68 is also liable to get himself registered under Section 69 read with the Rules and such person that is the person liable to pay service tax must also assess the tax and file Return under Section 70, as prescribed in the Rules.

61. I have already explained the scope of Sections 67 to 70. The contention of the Respondent, however, in regard to Section 67(1)(i), in its written submission before this Court, is that the expression "service provider" will include both issuing bank and the acquiring bank and the gross amount will be Rs. 5/-, which includes the consideration of Rs.2/- payable to the issuing bank and Rs.3/- which is payable to the acquiring bank. This contention is qualitatively distinct from the case, which has been set up before the Commissioner and the Tribunal, in the sense that the case of the Respondent appears to have been that under Section 67, the service provider was to pay tax on the gross amount, for which it provided the service and the attempt has been to contend that no service, as such, was being provided by the issuing bank. I take it that this is, in effect, an implied admission that the issuing bank does provide service in the matter of settling of the amount transacted through the credit card, for which it earns Rs.2/- as interchange fees. Now, that it is contended that the expression "service provider", in Section 67(1)(i), will include, the issuing bank and the acquiring bank, I would feel more reassured in our finding that, all throughout, the respondent was, indeed, as issuing bank, liable to pay service tax on the service contemplated under Section 65(33a)(iii). Section 67(1)(i), as already decoded by me, after its substitution by the Finance Act, 2006, provides that the value of taxable

service will be the gross amount charged by the service provider for such service provided or to be provided by him. The contention that the gross amount would be Rs.5/-, which is made of Rs.3/- for the service provided by the acquiring bank and Rs.2/- payable to the issuing bank (interchange fee), overlooks the fact that the gross amount is predicated with reference to the service actually provided or to be provided by the particular service provider. Proceeding on the basis that the words "service provider", includes issuing bank and the acquiring bank, it is, therefore, clear that the gross amount to be charged by both the service providers, *viz*., the issuing bank and the acquiring bank, must be premised on the separate service provided or to be provided by them. The words "gross amount" cannot be the aggregate of the value of the services provided by the different service holders. The service, provided by the acquiring bank, is different from the service provided by the issuing bank. This is far too clear to require any further elucidation. The value of the service, which constitutes the measure of the tax, is dependant on the nature of the service. Apparently, the measure of the tax by way of value, has been fixed by the Card Association, with which, both the issuing bank and acquiring bank, have entered into separate agreements. The activity of the acquiring bank, and, therefore, the services rendered by the acquiring bank is distinct from the activity of the respondent bank and, therefore, the service is different and distinct. In law, therefore, there could not be a gross amount by adding the value of two distinct services by two different service providers. Expression "gross amount" is to be understood with reference to the service provided or to be provided by a particular service provider and the provision does not appear to me to embrace within its scope, adding of what would be different gross amounts for arriving at the gross amount of the service provided by a particular service provider. In this context, I may notice that the words "gross amount charged" have been defined as, including payment in the many forms, which are mentioned therein, which includes debit notes, book adjustment and any amount credited or debited in any account. The interchange fee, in a transaction of Rs.100/-, is the amount of Rs.2/-, which remains to the credit of the respondent-issuing bank, when it suffers the debit of Rs.98/- only, in a transaction of Rs.100/-. In other words, the Respondent got paid Rs.2/-. It is only Rs.98/-, which makes its way into the account of the acquiring bank. The merchant establishment, no doubt, is paid Rs.94.30, in the example given by the Respondent, out of Rs.98/- received by the acquiring bank.

62. From the above, it appears to be clear that the Respondent, as issuing bank, provides service within the meaning of Section 65(33a)(iii). It is towards the same that the Respondent is paid Rs.2/- as interchange fee. Interchange fee, therefore, is exigible to service tax.

63. Admittedly, the Respondent has not paid any service tax on the said amount.

64. In the context of Section 67 of the Act, I queried Shri Arvind Datar, learned Senior Counsel as to what would happen if a Notification is issued under Section 93 of the Act, exempting the acquiring bank from the levy of service tax payable by acquiring bank under Section 65(33a)(iii). Section 93 provides power to exempt from service tax on taxable services of any specified description, the whole or any part of the service tax leviable thereon. What would be the position, if the Central Government exempted the acquiring bank, specifically, from the service tax payable by it for the service within the meaning of Section 65(33)(iii)? Would the amount of interchange fee earned by the issuing bank, then be exempt and can the issuing bank seek shelter under such a Notification? This brings into sharper focus, the fact that the amount payable by the acquiring bank as service provider, is different from the amount payable by the issuing bank, the nature of the services being different and the measure of tax also different.

IS INTERCHANGE FEE INTEREST AND THEREFORE NOT CONSIDERATION FOR SERVICE?

65. Shri Arvind P. Datar, learned Senior Counsel, appearing on behalf of the Respondent, contended that interchange fee is actually akin to interest and it is not to be treated as a consideration for any service. He drew inspiration from Judgment of the U.S. Tax Court in *Capital One Financial Corporation and Subsidiaries v. Commissioner, 133 TC No.8 (September 21, 2009)*. The decision was rendered under the law relating to income-tax. The statutory framework contained in the Act is different from the law which was considered by the Court. It is inapposite to lift the principle from the leaves of foreign Judgment and apply it out of context.

66. The respondent is a Banking Institution. Undoubtedly, it falls to be regulated under the Banking Regulation Act. It is, in fact, a scheduled bank. Interestingly, the Interest Tax Act, 1978, provides for a charge in Section 4 on interest earned by a credit institution, which includes

the respondent-bank. Undoubtedly, under Section 18, the tax paid on interest under the Interest Tax Act can be deducted under the Income-Tax Act. If the interchange fee, has been regarded as interest, then, undoubtedly, it would have been brought to tax under the Interest Tax Act. The respondent has no case that tax has been paid on the interchange fee treating it as interest.

67. While on the question of interest, I may notice the discussion of this Court on the concept of interest in the Judgment in *Ferro Alloys Corpn. Ltd. v. A.P. State Electricity Board and another*[7]:

> "129. Strictly speaking, the word "interest" would apply only to two cases where there is a relationship of debtor and creditor. A lender of money who allows the borrower to use certain funds deprives himself of the use of those funds. He does so because he charges interest which may be described as a kind of rent for the use of the funds. For example, a bank or a lender lending out money on payment of interest. In this case, as already noted, there is no relationship of debtor and creditor.
>
> 130. We may now refer to *Halsbury*, 4th Edn., Vol. 32, para 108:
>
> "108. *When interest is payable at common law*.— At common law interest is payable (1) where there is an express agreement to pay interest; (2) where an agreement to pay interest can be implied from the course of dealing between the parties or from the nature of the transaction or a custom or usage of the trade or profession concerned; (3) in certain cases by way of damages for breach of a contract (other than a contract merely to pay money) where the contract, if performed, would to the knowledge of the parties have entitled the plaintiff to receive interest.
>
> Except in the cases mentioned, debts do not carry interest at common law."
>
> Consumption security deposit does not fall under any of the categories mentioned above. Para 109 says:
>
> "*Equitable right to interest*. — In equity interest may be recovered in certain cases where a particular relationship exists between the creditor and the debtor, such as mortgagor and

[7] 1993 Supp (4) SCC 136

A mortgagee, obligor and oblige on a bond, personal representative and beneficiary, principal and surety, vendor and purchaser, principal and agent, solicitor and client, trustee and beneficiary, or where the debtor is in a fiduciary position to the creditor. Interest is also allowed on pecuniary legacies not paid within a certain time, on the dissolution of a partnership, on the arrears of an annuity where there has been misconduct or improper delay in payment, or in the case of money obtained or retained by fraud. It may also be allowed where the defendant ought to have done something which would have entitled the plaintiff to interest at common law, or has wrongfully prevented the plaintiff from doing something which would have so entitled him."

This paragraph is also inapplicable to the present case."

68. The said view has been relied upon in judgment of this Court in *State of Karnataka and others v. Karnataka Pawn Brokers Association and others*[8]. In the said judgment, I may notice the following:

"*Issue (iii)*

29. To decide this issue we must first understand the concept of interest. It has been repeatedly held that interest is basically compensation for the use or retention of money. In *Halsbury's Laws of England*, 4th Edn., Vol. 32, "interest" has been defined as follows:

"127. *Interest in general*. —Interest is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. Interest accrues from day to day even if payable only at intervals, and is, therefore, apportionable in respect of time between persons entitled in succession to the principal."

30. According to *Law Lexicon*, by P. Ramanathan Aiyar, 3rd Edn. (2005) (p. 2402) Vol. 2:

" "Interest" means the time value of the funds or money involved, which, unless otherwise agreed, is calculated at the rate and on the basis customarily accepted by the banking community for the funds of money involved."

[8] (2018) 6 SCC 363

31. In *Words and Phrases* Permanent Edition, Vol. 22 p. 148, "interest" means:

"(*i*) "Interest" is compensation for loss of use of principal. *Jersey City* v. *Zink* [*Jersey City* v. *Zink*, 44 A 2d 825 : 133 NJ Law 437 (1945)] , A 2d p. 828".

(*ii*) "Interest" means compensation for the use or forbearance of money. *Commr. of Internal Revenue* v. *Meyer* [*Commr. of Internal Revenue* v. *Meyer*, 139 F 2d 256 (6th Cir 1943)], F 2d at p. 259."

69. It is inconceivable that there is a creditor and debtor relationship between the respondent as issuing bank and the Card Association or the acquiring bank or even the merchant establishment. The respondent cannot be described as a lender of money and the other three players, as just hereinbefore described, as borrowers. In the context of the relationship of the respondent as issuing bank, interchange fee cannot be described as compensation fixed by the parties for use or forbearance of the borrowed money. In fact, the concept of borrowed money, is predicated on the existence of creditor-debtor relationship which is absent. Interest, in the context of the definition, in Law Lexicon by Ramanathan Iyer, places a time value on the funds or money involved and further, it would also involve the rate, at which, the interest is calculated. Again, this definition is apposite in the context of the relationship between a lender and a borrower. The nature of the service, I have unravelled, performed by the issuing bank includes the act of approval of the credit card transactions. It is an integral and indispensable part of a credit card transactions. It was partly for this service that the interchange fee is earned by the respondent as issuing bank. There is no scope for an implied contract as the interchange fee is apparently paid in terms of the contract. Quite clearly, there is no scope for applying equity as the basis for the interchange fee as interchange fee is payable under the contract and towards service rendered by the respondent. I am, in the circumstances, of the view that the contention of the respondent is meritless.

THE PERIOD AFTER 01.07.2012

70. With the introduction of Section 66 B accompanied by the definition of service under Section 65B (44) and the legislature further providing for the negative list of services which stood excluded from the

A levy of service tax in Section 66 D, the question would only be whether there is any service and whether it is excluded under Section 66 D. The relevant part of Section 65 B (44) to the dispute in question reads as follows:

> "(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 withing the meaning of clause (29A) of article 366 of the Constitution; or
>
> (iii) a transaction in money or actionable claim;
>
> (b) a provision of service by an employee to the employer in the course of or in relation to his employment;
>
> (c) fees taken in any Court or tribunal established under any law for the time being in force."

The Explanation 2 originally read as follows;

> "Explanation 2.- For the purposes of this clause, transaction in money shall not include <u>any activity relating to the use of money</u> or its conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged."

The same came to be substituted in 2015 by the following: -

> "Explanation 2.- For the purposes of this clause, the expression 'transaction in money or actionable claim' shall not include –
>
> (i) Any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged."

71. I have already found in the context of Section 65(33a) that Legislature has recognised a wide spectrum of services which are H provided by different players in relation to a credit card transactions,

inter alia. I have further found that the issuing bank does indeed perform services without which the credit card transactions become impossible. No doubt under the new dispensation the four elements in order to constitute service are (i) an activity, (ii) by the service provider, (iii) to a service recipient and (iv) there must be consideration. This is undoubtedly apart from any declared service. I am of the clear view that all the ingredients in this case stand satisfied in the settlement of the amount transacted under the credit card apart from the service which is performed by the issuing bank qua the card holder which constitutes a separate service. The issuing bank under agreement with the card association indulges in the activities which consists of being part of the system which begins with the approval of the transactions which immediately culminates in the sale of goods or services by the merchant establishment to the card holder without payment by him and further by taking the risk of maintaining the requisite funds by which ultimately the acquiring bank makes available the amount to the merchant establishment.

WHETHER CREDIT CARD TRANSACTION A TRANSACTION IN MONEY?

72. The only argument which is raised otherwise is that it is transaction in money and therefore it is excluded from the definition of the word service. In the decision rendered by the Delhi High Court 2013 (30) S.T.R. 347, in the context of transaction of chit, the Court, *inter alia*, held as follows:

> "In a mere transaction in money or actionable claim, no service is involved; there is just the payment and receipt of the money.
>
> xxx xxx xxx
>
> A mere transaction in money represents the gross value of the transaction. But what is chargeable to service tax is not the transaction in money itself since it can by no means be considered as a service.
>
> xxx xxx xxx
>
> A clue to a proper interpretation of the exclusionary part of the definition is embedded in Explanation2. This Explanation carves out an exception to the exclusionary part of the definition by providing that any activity relating to the use of money or its conversion by cash or by any other mode, from one form, currency

A or denomination to another form, currency or denomination for which a separate consideration is charged shall not be considered as a transaction in money."

xxx xxx xxx

B 73. The interchange fee is earned by the issuing bank as consideration for service which is provided by the issuing bank. The complex web of activities indulged in by the three main players namely the issuing bank, the card association and the acquiring bank culminates in the settling of the amount due to the merchant establishment which stood persuaded to make available goods and services initially on credit C but on assurance that the credit card transaction will be taken to its logical culmination. It is clear that the active role which necessarily means the activity indulged in by the issuing bank is indispensable and at the heart of the transaction in the system under which though through machines available by the acquiring bank with the merchant establishment the Merchant gets paid. The issuing bank for each transaction must D approve the transaction. The risk which is undertaken by the issuing bank which again makes available the funds and maintains the fund from time to time as per requirement and under the contractual obligations is part of the service performed by the issuing bank. What is sought to be taxed under the act is the interchange fee and not the amount which E is made available. Therefore, I am of the view that the contention of the respondent that it constitutes merely transaction in money involves overlooking the service provided by the respondent as issuing bank. There is clearly activity in relation to the use of money within the Explanation.

IMPACT OF NOT CHALLENGING ABN AMRO (SUPRA)

F 74. The contention of the appellant is that appellant not having challenged the aforesaid decision, it is precluded from challenging the Order of the Tribunal following the said Order.

75. In this regard, I notice and consider the following case law G relied upon by the respondent.

76. In *Union of India and others v. Kaumudini Narayan Dalal and another*[9], noticing that the Revenue had accepted the Judgment of the High Court, it was found that it was not open to the Revenue except

H [9] (2001) 10 SCC 231

the assessee in that case and challenge its correctness in the case of other assessees, without just cause.

77. In *Commissioner of Central Excise v. Tata Engineering and Locomotives Co. Ltd.*[10], undoubtedly, in paragraph-9, the Court held as follows:

> "9. Apart from the question of interpretation of the notification, the appellant has not offered any explanation why the decision of the Tribunal dated 2-9-1998 in *Bajaj Auto case* in respect of an earlier year allowing the benefit of the 1986 notification in respect of the gauges manufactured and captively used in the factory of M/s Bajaj Auto, had not been challenged. We can, in the circumstances, conclude that the Tribunal's interpretation was accepted by the Revenue and they are precluded from taking an inconsistent stand now. (See *Union of India* v. *Kaumudini Narayan Dalal* [(2001) 10 SCC 231 : (2001) 249 ITR 219] .)"

78. The question involved in the said case, was whether the respondent assessees were entitled to the benefit of the Exemption Notification having regard to the terms of the Explanation contained in the Notification. This Court, proceeded to consider the case on merits and found that the goods in question were covered by the exemption Notification. It is thereafter that what has been stated in paragraph-9, was found to be reason to supplement the decision to uphold the impugned Order.

79. In *Birla Corpn. Ltd. v. Commissioner of Centra Excise*[11], the Court noted the submission of the appellant that in several decisions followed, the views of the Tribunal in two cases, referred to therein, and the law was fully settled. We notice the following paragraph:

> "5. In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving identical issue was not pressed and was therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in *Pepsico India Holdings Ltd.* [(2001) 130 ELT 193 : (2001) 42 RLT 800 (cegat)] cannot be permitted to

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[10] (2003) 11 SCC 193
[11] (2005) 6 SCC 95

A take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assessees in a quandary."

The Court, in fact, allowed the appeal of the assessee.

B 80. In *Jayaswals NECO Ltd. v. Commissioner of Central Excise, Nagpur*[12], an appeal was filed by the assessee. This Court found that the Department had accepted the decision of the CGAT concerning a Notification granting exemption and it purported to find that the Notification involved in the case before it, was the same, in content. Following the Order of the CEGAT, accepted by the Department, the C Court did not permit the Revenue to take a different stand.

81. I have noticed the Order passed in *ABN Amro* (supra). I would follow the course, which was adopted by this Court in *Tata Engineering and Locomotives Co. Ltd. (supra)*. I have already referred to the relevant paragraphs of the Order of the decision in *ABN Amro* (supra). In particular, D I have noticed, what has been held by the Tribunal in paragrapah-8. I am of the clear view that the view taken therein is completely incompatible with the statutory scheme under the Act, and the only conclusions possible, regarding the role of the issuing bank are, which I have already arrived at. In fact, I notice that even in the Written Submissions, it is stated, E *inter alia*, very fairly, as follows:

"8.2 Although the observations in Para 8 may not be entirely appropriate, and are eschewed, the finding that service tax cannot be levied twice, which is based on the Division Bench judgment of the Allahabad High Court, will still stand. Further, the finding F that the extended period of limitation cannot be invoked will also be applicable."

I have also noted the stand in the Written Submissions that under Section 67, both the acquiring bank and the issuing bank are service providers. It is also stated in the Written Submissions that, as under G Section 65(33a)(iii), the service has been provided by both the issuing bank and the acquiring bank and charged accordingly. I will deal with the aspect relating to double taxation and the extended period of limitation separately.

H [12] (2007) 13 SCC 807

82. However, as regards the exigibility of the respondent as issuing bank to service tax is concerned, I am of the view that the reasoning in paragraph-8 of the Order of the Tribunal, at all, does not commend itself as laying down the correct law.

83. No doubt, the respondent does point out that the contention of the learned Additional Solicitor General that no Appeal was preferred because there was issue of limitation/delay in the *ABN Amro* (supra) case and this is stated to be incorrect. It is stated that Appeal was filed within time. In the Appeal, one of the grounds taken is the premise on which *ABN Amro* (supra) was decided was different from the case of the appellant. It was also pointed out that the premise in the said case was that the fact of the acquiring bank paying service tax was not disputed by the Department. I would think that, in the circumstances of the case, I cannot reject the Appeals only on the ground that no Appeal was carried against *ABN Amro* (supra).

DEVIATION FROM SHOW CAUSE NOTICE [NUMBER ONE];

84. One of the contentions raised by the respondent is that in the Show Cause Notices issued by the Commissioner he proceeded on the basis of rejection of the version of the respondent that no service was being performed by the respondent bank as issuing bank towards the acquiring bank. However, it is pointed out that there is a deviation in the order and what is found is service is being performed by the issuing bank in terms of the agreement with the card association. A perusal of the order of the Commissioner does indicate that the respondent has defended the Show Cause Notices by contending that it was not performing any service to the acquiring bank. The Courts have not allowed an authority to go beyond the Show Cause Notice on the basis of the prejudice which is occasioned to the noticee. In this regard, I must notice that while the Show Cause Notice does indicate that the Commissioner had proceeded in a manner rejecting the contention of the respondent that they are not rendering any service to the acquiring bank has been not correct, there is indeed reference to the basis for the final finding indicated in the notice in indicating that the respondent has earned service income, *viz*., interchange fee, which is taxable under Section 65(105)(zzzw) read with Section 65(33a). Moreover, being a question of applying the law to certain facts which are not in dispute namely the manner in which the credit card system operates about which

A there is no dispute and on our finding that service is indeed provided by the respondent in relation to the settlement of the amount transactions under the credit card, I do not, in the facts of this case, think that the respondent should succeed on this point.

85. In this regard, it is relevant in this case to notice the stand of
B the respondent in the Written Submission before this Court, which acknowledges that the issuing bank and the acquiring bank are service providers within the meaning of Section 65 (33a)(iii).

CERTAIN CIRCULARS; DOUBLE TAXATION

86. Circular No. ST-51/13/2002 dated 07.01.2003, which was, in
C fact, relied upon by the respondent before the Commissioner, came to be issued in the light of doubts raised regarding classification of certain services, which appeared to fall under two or more categories simultaneously. The following was what was laid down:

> "2. The matter has been examined in the Board. It is hereby clarified that any service (transaction) can be taxed
>
> D only once, even if it appears to fall under two or more categories. Therefore, before levying service tax it is essential to determine under which category a particular service falls. It should be kept in mind that service tax is a tax on the service
>
> E provided and is recovered from the service provider (in some cases even from the service recipient). The position is akin to Central Excise duty which is charged on manufactured goods. Just as Central Excise duty cannot be charged twice on the same goods under two separate chapters/ headings/sub-headings of the Central Excise Tariff, so also Service tax cannot be charged twice
> F on the same service (transactions). However, one service provider may provide more than one taxable service. In such cases, the service provider need only take one registration, but it shall be endorsed for all the taxable services and tax liability will have to be discharged for each of the taxable services separately."

G 87. The above Circular contemplates that if the one service provider provides more than one taxable service, one registration is sufficient but is to be endorsed for all the taxable services. Further, tax liability will have to be discharged for each of the taxable services separately. In the context of the credit card transaction, as issuing bank for the card holder, the respondent is providing taxable service to the
H card holder. That apart, if, under Section 65 (33a) of the Act, the

respondent has been engaging in other services till 01.07.2012 and, thereafter, has been providing different services, it would have to discharge its tax liability of the taxable services separately. No doubt, the Circular, in paragraph-3, did go on to deal with the issue of correct classification of a particular service. But it is one thing to say that there is one service and the question is one of classification of that service and another to say that if there are more than one service provided by the same service provider, each of which is separately taxable, then, the service provider has to pay only one tax. It is clear that qua each of separate service provided, the service provider would be liable to pay tax separately.

88. As far as Circular dated 17.12.2004 is concerned, it related to service tax payable in respect of service provided to a customer by a goods transport agency in relation to transport of goods by road in a goods carriage. Paragraph-4.4 provided that Notification 35/2004 dated 03.12.2004 provided for certain categories of persons, which made payment towards freight being liable to pay the service tax. Paragraph-4.5 provided that in cases other than those mentioned in paragraph-4.4, service tax is to be paid by the goods transport agency. It is thereafter that the paragraph relied upon by the respondent, *viz*., paragraph 5.7 provided as follows:

> "5.7. If service tax due on transportation of a consignment has been paid or is liable by a person liable to pay service tax, service tax should not be charged for the same amount from any other person, to avoid double taxation."

89. The context for issuing the just hereinbefore mentioned instruction, was the fact that there is only one service and paragraphs-4.4 and 4.5 were mutually exclusive categories, and yet, if payment was made by one category, there would be clearly double taxation, if again, on the same service, the person in the other category, was made liable to pay tax.

90. While on double taxation, I may notice the Judgment of this Court in *Sri Krishna Das v. Town Area Committee*[13]:

> "28. We do not find any merit in the appellant's submission that there was double taxation in this case. The expression "double taxation" is often used in different senses, namely, in its strict

[13] (1990) 3 SCC 645

A legal sense of direct double taxation and in its popular sense of indirect double taxation. Double taxation in the strict legal sense means taxing the same property or subject matter twice, for the same purpose, for the same period and in the same territory. To constitute double taxation, the two or more taxes must have been (1) levied on the same property or subject matter, (2) by the same government or authority, (3) during the same taxing period, and (4) for the same purpose. "There is no double taxation, strictly speaking" says Cooley, "where (*a*) the taxes are imposed by different States, (*b*) one of the impositions is not a tax, (*c*) one tax is against property and the other is not a property tax, or (*d*) the double taxation is indirect rather than direct."

91. In *Union of India (UOI) and others v. Tata Iron and Steel Company Limited, Jamshedpur*[14], the assessee used duty paid ingot moulds and bottom stools, when they became unfit and remelt it with admixture with other non-duty paid scraps and hot metal in the manufacture of steel ingots. The claim of the assessee for exemption in terms of Notification, was rejected. The High Court granted relief. This Court held as follows:

"23. The High Court rightly held that the contention of the Revenue fails on two broad grounds. First, there cannot be double taxation on the same article. Counsel for the Revenue gave the example of excise duty on motor cars, in spite of the fact that there was duty on tyres and duty on metal sheets. The analogy is misplaced. In such cases the duty is on the end product of motor car as a whole. The duty on tyres and the duty on metal sheets do not enter the area of duty on motor car. Second, Notification No. 30/60 grants exemption to duty paid pig iron. The High Court rightly said that the Notification does not say that exemption is granted only when duty paid pig iron is used and that the exemption would not be available if duty paid pig iron is mixed with other non duty paid materials. If the intention of the Government were to exclude the exemption to duty paid pig iron when mixed with other materials then the notification would have used the expression "only" or "exclusively" or "entirely" in regard to duty paid pig iron. The object of the notification was to grant relief by exempting duty paid pig iron."

[14] (1976) 2 SCC 123

EFFECT OF SERVICE TAX BEING A VALUE ADDED TAX

92. As far as contention of the appellant that service tax is a value added tax, is concerned, there can be no quarrel. The service provided by each of the service provider in a chain of transactions where there is value addition, must bear the burden of service tax on the value of the service. The law also provides for tax credit being availed. However, when it comes to the question relating to taxing a single service, it is clear that there cannot be taxation more than once. It is one thing to say, in other words, that when there are different services, provided under the taxing entry, each of the taxable services became taxable under the previous regime, as also the framework after 01.07.2012, for the same service, the law does not permit repetition of the same tax on the same measure of tax, with regard to the same service. In other words, if for the services rendered by the respondent as issuing bank, it has earned interchange fee, which should constitute the measure of the tax, the acquiring bank, in terms of a practice followed, it has paid tax on the said amount, then, it would be illegal and unfair to tax the respondent all over again. It is another thing that, that the respondent is the person who was liable to pay the tax on the interchange fee, after filing return under Section 70 and treating the interchange fee as the value of the taxable service. These are all matters, which I am in agreement with the learned Additional Solicitor General. However, I am unable to agree with the learned Additional Solicitor General that even if the acquiring bank has discharged the liability *qua* the interchange fee also, treating it as part of MDR, then, the respondent is liable to pay tax.

93. I am conscious that the argument of the appellant involves the following reasoning. In law the respondent being found liable to pay tax on the interchange fee and, as admittedly, the tax has not been paid by it, it is not the lookout of the Department to consider, whether the payment of the tax by the acquiring bank, was effected, even assuming, it was on an amount including the interchange fee. But this involves, in effect, double taxation.

SHOW CAUSE NOTICE: DIVERGENCE FROM THE ORDER OF THE COMMISSIONER [NUMBER TWO];

94. Another aspect pointed out by the respondent is that in the Show Cause Notice, the Commissioner has proceeded on the basis that payment by the acquiring bank of service tax on the interchange fee,

A will not exonerate the liability of the respondent to pay the service tax. It is pointed out thereafter to go on to find that the respondent has not produced proof of payment, involves depriving the respondent of the opportunity to meet such a case and also to depart from the admitted position that acquiring bank has paid the tax. In other words, when the
B Commissioner proceeded on the basis in the Show Cause Notice that the payment, by the acquiring bank, will not detract from the liability of the respondent, it is impermissible to turn around and find that the respondent has not proved that the acquiring bank has paid the tax.

95. It may be true that the Show Cause Notice contains the
C statement that the fact of payment of service tax on the interchange fee by the acquiring bank, does not exempt the assessee from payment of service tax, on the consideration received by them towards rendering of service as each person is liable to pay service tax for the service rendered by them. Essentially, it would appear that the Commissioner was referring to the case of the respondent that acquiring bank had paid the tax on the
D interchange fee. No doubt, it does create the impression that the Commissioner proceeds, as if, there was payment by the acquiring bank, which was the case of the respondent during audit. As noted, there is also the case for the appellant that being a value added tax, even if, payment is made by the acquiring bank, the respondent would remain
E liable. It is to be noted that when the Order of the Commissioner was challenged before the Tribunal, no material is produced in support of the claim that the acquiring bank had discharged the liability even on the amount of interchange fee.

96. In this regard, it is apposite to notice that in the Appeal filed
F before the Tribunal, produced along with the Compilation No. 3, by the respondent, one of the grounds taken, no doubt, is that the impugned Order travelled beyond the scope of the SCNs. Thereunder, however, the complaint, which was sought to be made out was that in the SCN, the case set up by Commissioner was that the service was to the acquiring bank, whereas, the Order passed by the Commissioner was to the effect
G that service was provided to the Card Association. There is no ground taken in the Appeal, as such, in relation to the SCNs proceeding on the basis of the payment made by the acquiring bank, being accepted, and thereby, a new case being found in the Order. In fact, under the ground of 'Double Taxation', being tabooed, in paragraph-74, it is, *inter alia,* stated as follows:

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"74. The Impugned Order finds that the Appellant has not furnished any information in support of their claim of Service Tax being already paid on the interchange Fees by the Acquiring Bank on the Merchant Discount. IN this regard, the Appellant craves leave to refer to and rely on the relevant documents if and when produced. However, the Appellant contends that it requires to be appreciated that the Appellant does not have any privity of contact with the Acquiring Bank, and procuring the said documents will be challenging. While the Tax Department has the ability to obtain this information directly from the Acquiring Bank. The Tax Department has however not sought it or produced anyinfo4rmation / document or even alleged that the Acquiring Bank is not paying service tax on the Merchant Discount. The Impugned Order, in failing to appreciate this aspect has put the Appellant to hardship, resulted in double taxation, and also is contrary to the settled legal principles as also in the teeth of the cited decisions and is thus, erroneous and unsustainable, and therefore liable to be set aside."

97. I may also further notice that in the Order passed by the Tribunal, the Tribunal notices the complaint about the Commissioner departing from the SCN in terms of the ground in the Appeal, which I have set out. Last but not the least, it is relevant to notice the actual reasoning of the Tribunal, which led to the Order of the Commissioner being set aside, which is as follows:

"5.11 Be that as it may, we find that in a very recent decision of the Tribunal in the case of ABN Amro (supra), it has been categorically held that the amount received by the appellant does not qualify as credit card services that when acquiring bank has discharged service tax liability on the entire amount, no service tax is payable by the appellant and that the amount offered by the appellant does not qualify a credit. …"

98. Thereafter, reference is made to paragraphs-6 to 8 of *ABN Amro* (supra), which I have already referred to above.

99. On the basis of the said Order of the Tribunal, and finding no reason to differ from it, on this legal ground, the Order of the Commissioner was set aside. I may notice that in the said case, in paragraph-6, the Department, in fact did not dispute that service tax was being paid by the acquiring bank.

A 100. In such circumstances, the argument of the respondent in this regard, does not appeal to me. I must notice that respondent has not produced any material to establish its case.

WHETHER THE EXTENDED PERIOD OF LIMITATION IS AVAILABLE IN REGARD TO THE DEMAND
B **UNDER SHOW CAUSE NOTICE DATED 24.04.2013?**

101. The said Show Cause Notice relates to the period October, 2007 to June, 2012. The normal period within which the power under Section 73 of the Finance Act is exercised is 18 months from the relevant date. However, under the provisions of Section 73(4) if there is wilful
C suppression by a person then the period is enlarged to five years. The contention of the respondent was that there was no positive act by it. There was only mere inaction. It was further contended that the department was aware of the receipt of interchange fee by the respondent as issuing bank. There were audits. These arguments have been rejected by the Commissioner by relying on the law laid down by this Court in
D *Association of Leasing & Financial Service Companies* (supra). The aforesaid decision was rendered under Section 11 A of the Act. The relevant provisions of Section 11 A in this regard are *pari materia* with the corresponding provisions in Section 73 of the Act. Suppression is found in both statutes as a ground to extend the period. In the aforesaid
E judgment of this Court has held that the period begins with knowledge by the department.

102. While on suppression, I may notice the judgment of this Court again rendered under Section 11A of Central Excise Act and reported in *Bajaj Auto Ltd., Waluj, Aurangabad* (supra). In the said case, I need
F to notice the following paragraphs:

> "15. Section 11-A of the Act empowers the Central Excise Officer to initiate proceedings where duty has not been levied or short-levied within six months from the relevant date. But the proviso to Section 11-A(1) provides an extended period of limitation provided
G the duty is not levied or paid or which has been short-levied or short-paid or erroneously refunded, if there is fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the Rules made thereunder with intent to evade payment of duty. The extended period so provided is of five years instead of six months. Since the proviso
H extends the period of limitation from six months to five years, it

needs to be construed strictly. The initial burden is on the Department to prove that the situation visualised by the proviso existed. But the burden shifts on the assessee once the Department is able to produce material to show that the appellant is guilty of any of those situations visualised in the section.

16. Interpreting this provision, this Court in *CCE* v. *Chemphar Drugs and Liniments* [(1989) 2 SCC 127 : 1989 SCC (Tax) 245] held: (when the period prescribed was six months prior to it being made one year by the Finance Act, 2000 with effect from 12-5-2000): (SCC p. 131, para 9)

> "*9*. … In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11-A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. *Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability*, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case."
>
> (Emphasis supplied)

17. In *Cosmic Dye Chemical v. CCE [(1995) 6 SCC 117] it is held: (SCC p.119, para 6)*

> "*6*. Now so far as fraud and collusion are concerned, it is evident that the requisite intent i.e. intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful' preceding the words 'misstatement or suppression of facts' which means with intent to evade duty. The next set of words 'contravention of

A any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty'. *It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful*."

B (Emphasis supplied)

18. In *Anand Nishikawa Co. Ltd.* v. *CCE* [(2005) 7 SCC 749] this Court has observed: (SCC p. 759, para 27)

C "*27*. … we find that 'suppression of facts' can have only one meaning that *the correct information was not disclosed deliberately to evade payment of duty*. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that *mere failure to declare does*

D *not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression*."

(Emphasis supplied)

"19. In our view, on a reading of the relevant provision the extended period of limitation as provided by the proviso to Section

E 11-A(1) of the Act can only be invoked when there is a conscious act of either fraud, collusion, wilful misstatement, suppression of fact, or contravention of the provisions of the Act or any of the Rules made thereunder on the part of the person chargeable with duty or his agent, with the intent to evade payment of duty. In the

F present case, the Tribunal while considering this issue has not stated whether or not there were any such circumstances which would not allow the Revenue to invoke the extended period of limitation. It only observes in its order that since both the assessees are situated under the jurisdiction of the same division and as such it cannot be reasonable to conclude that the Revenue was

G not aware of the transactions. Since this is not what is envisaged under the proviso to Section 11-A(1) of the Act, we cannot agree with the reasoning and the conclusion reached by the Tribunal."

103. I further notice that in the said case this Court remanded the matter back to the tribunal observing that the tribunal is the final fact-

H finding authority.

104. The Commissioner has rejected the contention of the respondent that there is no positive act by it towards wilful suppression and there was only mere inaction by holding that the factum of receipt of interchange fee being not in dispute and the provisions being clear, the act of non-payment constituted a positive act. In the milieu of self-assessment, it is for the respondent to assess and declare the full details and pay tax. The Commissioner also rejected the case that the department had knowledge based on audit.

105. It is found by him that the banking industry is ever evolving and with new business models and the Department cannot be faulted not knowing the implications. It was further found that the decisions relied upon by the respondent related to the period when classification lists, valuation lists and gate passes were to be approved. The assessment itself was done by the officers. It was further found that there was no effort made by the respondent at seeking clarification.

106. I must notice that in the impugned order, that tribunal did not deal with the issue relating to the legality of the respondent availing the extended period. It instead has chosen to set aside the impugned order of the Commissioner on merits.

107. In this case, I would follow the course adopted by this Court in *Commissioner of Central Excise, Aurangabad v. Bajaj Auto Ltd., Waluj, Aurangabad Through Its Vice-President (Materials) and others*[15].

108. I am of the view that as the respondent has also a case that it was not provided with an opportunity to prove that the acquiring bank had discharged the tax' liability on the interchange fee also, an opportunity should be granted to the respondent to establish the same. I have also found that the Tribunal has not returned a finding as regards the question whether there was wilful suppression by the respondent in regard to part of the period covered by Notice dated 24.04.2013. I would think that this is a matter which calls for finding by the Tribunal.

109. Therefore, the upshot of the above discussion is as follows:

I. I find that the respondent, as issuing bank, was providing service, as found by the Commissioner;

[15] (2010) 13 SCC 117

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II. For the period prior to 01.07.2012, the service of the respondent, as issuing bank, squarely fell within Section 65(33a)(iii) of the Act;

III. I reject the contention of the respondent that interchange fee is to be treated as interest and, therefore, not taxable under the Act;

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IV. I hold that the case based on the credit card transaction, being a transaction in money and, therefore, excluded from the definition of "service" in Section 65B(44), is unacceptable;

C

V. The Order of the Tribunal in *ABM Amro* (supra), dealing with the position of an issuing bank, under the framework of the Act, is patently unsustainable;

VI. In the facts of this case, I decline to dismiss the Appeal only on the ground that no Appeal was carried against the Order in *ABN Amro* (supra);

D

VII. The respondent, as issuing bank, was liable to pay service tax, under Section 68(1), being the service provider. Being liable to pay the tax under Section 68(1), it was also liable to file the Return including the amount of interchange fee;

E

VIII. The acquiring bank was obliged to value the service, which it provided or agreed to provide. The measure of tax, which is found in Section 67(1)(i), is entirely related to the service that the acquiring bank provided and agreed to provide. Likewise, the value of the service provided by the issuing bank, as found by me, and which would be the value of the service, for the purpose of Section 67(1), is relatable to the services it provided. Therefore, the respondent bank was liable to include the interchange fee and file Return and pay the tax on the same;

F

G

IX. While the service tax may be a value added tax, all that it can mean, is that, for separate services, tax is payable on each separate service. The concept of value added tax cannot mean that if the tax is already paid by the acquiring bank in this case, on the amount of interchange fee, for the service provided by the respondent as issuing bank, the

H

respondent bank should be called upon to pay the service tax all over again. Such an exercise, would undoubtedly constitute double taxation;

X. The Tribunal has not considered whether there was suppression within the meaning of Section 73 of the Act by the respondent in relation to part of the period covered by Show Cause Notice dated 24.04.2013. I am also of the view that the respondent should be provided an opportunity to establish that the acquiring bank has discharged the tax liability in regard to interchange fee.

110. As regard, the question of interest and penalty is concerned, no doubt, the case of the respondent is that there was an interpretational issue. The practice in the banking industry, is relied on. In this regard, I would think that if the respondent is able to establish that the acquiring bank, indeed, discharged the tax liability on the interchange fee also, then, the respondent should not be visited with interest and penalty. Should it be otherwise, demand for interest and penalty will stand.

111. Resultantly, on the basis of the aforesaid findings, I allow the Appeals and remand the matter back to the Tribunal for considering:

a. Whether the finding of the Commissioner, which was challenged by the respondent, that there was suppression, in relation to the period covered by the Show Cause Notice dated 24.04.2013, was justified or not? In case it was found that it was not justified, it is for the Tribunal to pass appropriate Orders;

b. The Tribunal will provide an opportunity to the respondent to produce material to show that the acquiring bank had discharged the liability of the respondent as issuing bank with regard to the interchange fee for the period covered by the Show Cause Notices. Toward this end, I make it clear that the Tribunal will be free to permit the respondent to produce the material before the Commissioner and to call for a finding from the Commissioner;

c. It will be open to the Tribunal to call upon the appellant to call for the records from the acquiring bank to arrive at a proper finding in this regard;

A d. If the amounts are seen paid by the acquiring bank, then, necessarily, the Orders passed by the Commissioner will stand set aside. Conversely, should it not be proved that payment was made, the Orders of the Commissioner will stand subject to the finding relating to the availability of extended period under Section 73 in relation to the SCN dated 24.04.2013.

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112. The Appeals are allowed as above. There will be no order as to costs.

C **S. RAVINDRA BHAT, J.**

1. Having had the benefit of perusing the judgment authored by Justice Joseph, I find that I am respectfully, unable to agree on some of the reasoning and conclusions arrived at, and am therefore, penning my separate and dissenting judgment with regards to this matter.

D 2. The then Union Finance Minister, while first introducing service tax, in 1994 said that the *rationale* for its introduction, was that though the services sector accounted for 40% of the GDP, it was never taxed. Based on the recommendations of the tax reforms committee[16], the Finance Act, 1994 (hereafter 'the Act') imposed service tax of 5% initially only on 3 services namely telephone bills, non-life insurance and tax brokers. From this *regime* of levy on only 3 services the levy progressively increased to - in 1996, 3 more services (namely advertising agencies, courier agencies and radio pager services); and in 1997, to 15 wherein services like air travel agents, mandap keepers, man power recruitment agencies were brought into the tax fold.

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F 3. In 2003[17], Parliament inserted Article 268A into the Constitution, which provides that taxes on services shall be charged by the Union of India and be appropriated by the Union and the States. A new Entry 92C too was introduced in the Union List for the levy of taxes on services. The number of services subjected to the levy, burgeoned to 119 in 2011-12. With effect from 2012, there has been a paradigm shift in the levy of service tax - rather than levying tax on enumerated services, tax is imposed on all services *except those listed in the negative list*.[18] The

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[16] Dr. Raja Chelliah Committee on Tax Reforms

[17] By Constitution (Eighty- eighth Amendment) Act, 2003

H [18] Listed in the newly introduced Section 66D

negative list, in 2012 contained 39 different services exempt from service tax. Since then, this list has been modified each year.

4. Section 65 - as it stood originally, contained an almost exhaustive list of definitions, meant to delineate activities that were to be subjected to service tax levy. Each of these definitions were, in turn, also specifically marked as a "taxable service" under various sub-clauses of Section 65 (105). Service tax was made applicable on "banking and other financial services" (hereafter 'BOFS') from 16 July 2001. The relevant portions of the definition of BOFS – by Section 65 (10) as it originally stood, is reproduced below:

> *"banking and financial services" means the following services provided by a banking company or a financial institution including a non-banking financial company, namely:-*
>
> *...*
>
> *(ii) credit card services;*
>
> ****** *****"

By Finance Act, 2003 a wide range of activities were covered under the definition of BOFS in Section 65(12) - which, when enacted, read as follows:

> *"(12) "banking and other financial services" means*
>
> *(a) the following services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or 2[commercial concern], namely :—*
>
> *(i) financial leasing services including equipment leasing and hire-purchase;*
>
> *Explanation.—For the purposes of this item, "financial leasing" means a lease transaction where—*
>
> *(i) contract for lease is entered into between two parties for leasing of a specific asset;*
>
> *(ii) such contract is for use and occupation of the asset by the lessee;*
>
> *(iii) the lease payment is calculated so as to cover the full cost of the asset together with the interest charges; and*

A *(iv) the lessee is entitled to own, or has the option to own, the asset at the end of the lease period after making the lease payment;]*

(ii) credit card services;

(iii) merchant banking services;

B *(iv) Securities and foreign exchange (forex) broking, and purchase or sale of foreign currency, including money changing;*

(v) asset management including portfolio management, all

C *forms of fund management, pension fund management, 6[custodial, depository and trust services,*

(vi) **********

(ix) other financial services, namely, lending, issue of pay order, demand draft, cheque, letter of credit and bill of

D *exchange, transfer of money including telegraphic transfer, mail transfer and electronic transfer, providing bank guarantee, overdraft facility, bill discounting facility, safe deposit locker, safe vaults, operation of bank accounts;"*

5. On 1 May 2006, the entry for credit card services in the Act

E was omitted [from the definition of "banking and financial services", i.e. sub-clause (ii) of Section 65 (12)] and an altogether new taxable service of "credit card services" was introduced [Section 65 (105) (33a)]. Simultaneously, Section 65 (10) was amended. To appreciate the ambit of this new category, the relevant portions of the definition of Section 65

F (105) (33a) ('*credit card, debit card, charge card or other payment card service'*) are reproduced below:

"Section 65 Definitions: In this Chapter, unless the context otherwise requires,

(33a) "credit card, debit card, charge card or other payment

G *card service" includes any service provided,—*

(i) by a banking company, financial institution including non-banking financial company or any other person (hereinafter referred to as the issuing bank), issuing such card to a card holder;

H

(ii) by any person to an issuing bank in relation to such card business, including receipt and processing of application, transfer of embossing data to issuing bank's personalisation agency, automated teller machine personal identification number generation, renewal or replacement of card, change of address, enhancement of credit limit, payment updation and statement generation;

(iii) by any person, including an issuing bank and an acquiring bank, to any other person in relation to settlement of any amount transacted through such card.

Explanation.—For the purposes of this sub-clause, "acquiring bank" means any banking company, financial institution including nonbanking financial company or any other person, who makes the payment to any person who accepts such card;

(iv) in relation to joint promotional cards or affinity cards or co-branded cards;

(v) in relation to promotion and marketing of goods and services through such card;

(vi) by a person, to an issuing bank or the holder of such card, for making use of automated teller machines of such person; and

(vii) by the owner of trade marks or brand name to the issuing bank under an agreement, for use of the trade mark or brand name and other services in relation to such card, whether or not such owner is a club or association and the issuing bank is a member of such club or association.

Explanation. —For the purposes of this sub-clause, an issuing bank and the owner of trade marks or brand name shall be treated as separate persons;"

6. From 01.05.2006[19] (by the same amendment) credit card services, which were covered under a separate category in Section 65 (33a) became subjected to levy as a separate *taxable service,* by reason of insertion of Section 65 (105) (zzw). That provision reads as follows:

[19] Notification No. 15/2006 dated 25.04.2006.

A *"65*****

(105) "taxable service" means any service provided or to be provided-

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B *"(zzzw) to any person, by any other person, in relation to credit card, debit card, charge card or other payment card service, in any manner;"*

Credit card service was thus separately included as a taxable service. At the same time, "service" was defined, through Section 65B (44) (which begins with the expression, *"for the purposes of this chapter"*). The definition of service is as follows:

C *"(44) "service" means any activity carried out by a person for another for consideration, and*

includes a declared service, but shall not include—

D *(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

E *(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;

F *(b) a provision of service by an employee to the employer in the course of or in*

relation to his employment;"

Section 65B (7) – defines "assessee" to mean "a person liable G *to pay tax and includes his agent" and Section 65B (37) defines "person" as follows:*

"(37) "person" includes,—

(i) an individual,

H *(ii) a Hindu Undivided Family,*

(iii) a company,

(iv) a society,

(v) A limited liability partnership,

(vi) a firm,

(vii) an association of persons or body of individuals, whether incorporated or not,

(viii) Government,

(ix) a local authority, or

(x) every artificial juridical person, not falling within any of the preceding sub- clauses;"

"Declared services" *are defined under Section 65B (22) to mean "any activity carried out by a person for another person for consideration and declared as such under Section 66E". A service, therefore, to fall within the category of "declared services", has to satisfy two basic conditions conjunctively:*

a. it must be an activity by one person to another for consideration

b. it must be specified (i.e. declared) under Sec. 66E

7. Long ago, in *Govind Saran Ganga Saran v. Commissioner of Sales Tax*[20], this court held that the taxing statute identifies the subject of levy, or the *taxing event*;it then indicates the *person on whom the levy is imposed - and who has to pay the tax;* the third is the rate of the impost; and the last, is *"the measure or value to which the rate will be applied for computing the tax liability.*"[21] It was observed that:

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[20] 1985 Supp SCC 205

[21] Similarly, in *Commissioner of Income Tax v B.C. Srinivasa Setty* (1981) 2 SCC 460 this court highlighted that

> *"the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise, one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it."*

A *"If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity."*

B The various components that make up the levy of an indirect tax, such as excise duty, were described succinctly by this court in its nine-judge decision in *Mafatlal Industries Ltd v. Union of India*[22]*:*

C *"116. The levy under the Excise Act is an indirect tax (duty). A duty of excise is levied on the manufacture or* production *of goods. Ordinarily, it is levied on the manufacturer or producer of goods. (Since the levy is in relation to or in connection with the manufacture or* production *of goods, it may be levied even at a point later than manufacture or* production *of the goods.) The duty levied will form part of the total cost of the*
D *manufacturer or producer. The levy being a* component *of the price for which the goods are sold, is ordinarily passed on to the* customer*. It is a matter of common knowledge that every prudent businessman will adjust his affairs in his best interests and pass on the duty levied or leviable on the* commodity *to the consumer. That is the presumption in law."*

E In the context of service tax, this court had observed in *Association of Leasing and Financial Service Companies v. Union of India*[23] that:

F *"38…Today with technological advancement there is a very thin line which divides a "sale" from "service". That, applying the principle of equivalence, there is no difference between production or manufacture of saleable goods and production of marketable/saleable services in the form of an activity undertaken by the service provider for consideration, which*
G *correspondingly stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994."*

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[22] (1997) 5 SCC 536

H [23] (2011) 2 SCC 352

The principle that the levy, under the Finance Act, is an indirect tax, is brought home by Section 83[24] which make certain provisions of the Central Excise Act applicable to the Finance Act, 1994. Section 12B of the latter Act, raises a presumption that the duty has been passed on to the buyer of goods (in this case, the customer or service recipient).[25]

Scheme of the Act

8. Service tax provisions under the Act are based, on the following scheme. Firstly, Section 65 defines and provides for taxable services. Section 66 is the charging provision:

> *"66. Charge of service tax – There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent. of the value of taxable services referred to in sub-clauses (a), (d), (e), (f), (g,) (h), (i), (j),(k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (za), (zb), (zc), (zh), (zi), (zj), (zk),(zl), (zm), (zn), (zo), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz), (zza), (zzb), (zzc), (zzd), (zze), (zzf), (zzg), (zzh), (zzi), (zzk), (zzl), (zzm), (zzn), (zzo), (zzp), (zzq), (zzr), (zzs), (zzt), (zzu), (zzv), (zzw), (zzx),(zzy), (zzzz), (zzzza), (zzzzb), (zzzzc), 2[(zzzzd), (zzzze), (zzzzf), (zzzzg), (zzzzh), (zzzzi), 3[(zzzzj), (zzzzk), (zzzzl), 4[(zzzzm), (zzzzn), (zzzzo), (zzzzp),(zzzzq) (zzzzr) (zzzzs) (zzzzt) 5[,(zzzzu), (zzzzv) (zzzzv) and (zzzzw)] of clause (105) of section 65 and collected in such manner as may be prescribed."*

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[24] *"**SECTION 83. Application of certain provisions of Act 1 of 1944**.— The provisions of the following sections of the Central Excise Act, 1944, as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise :- sub-section (2A) of section 5A, sub-section(2) of section 9A, 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 15, 15A, 15B, 31, 32, 32A to 32P, 33A, 35EE, 34A, 35F, 35FF, to 35O (both inclusive), 35Q, 35R, 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40."*

[25] *"**SECTION 12B. Presumption that the incidence of duty has been passed on to the buyer.** — Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."*

A On and from 01.07.2012, under Section 66-B, the tax was levied in the following manner:

> *"66-B. Charge of service tax.— There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen per cent][26] on the value of all services, other than*
> B *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."*

Section 67 provides for the principles for determination of value of taxable service which is to be subjected to service tax. From 18.04.2006
C (w.e.f. 01.05.2006) this section reads as follows:

> *"67. Valuation of taxable services for charging service tax*
>
> *(1) Subject to the provisions of this Chapter, service tax chargeable on any taxable service with reference to its value shall,-*
> D
> *(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;*
>
> *(ii) in a case where the provision of service is for a*
> E *consideration not wholly or partly consisting of money, be such amount in money, with the addition of service tax charged, is equivalent to the consideration;*
>
> *(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as*
> F *may be determined in the prescribed manner.*
>
> *(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal*
> G *to the gross amount charged.*
>
> *(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.*

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[26] Substituted for "twelve per cent" by Finance Act, 2015 (20 of 2015), dt. 14.05.2014,
H w.e.f. 01.06.2015 vide Noti. No. 14/2015-ST, dt. 19.05.2015.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed

Explanation.-For the purposes of this section,-

4[(a) "consideration" includes-

(i) any amount that is payable for the taxable services provided or to be provided;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.]

3[***]

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and 2[book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.]

Section 68 reads as follows:

"68. Payment of service tax.—(1) Every person providing taxable service to any person shall pay service tax at the rate specified in Section 66-B in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), in respect of such taxable services as may be notified by the Central Government in the Official Gazette, the service tax

A *thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in Section 66-B and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service:*

B *Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider."*

C 9. What is noteworthy is that the charge (under Section 66) is on the *"value of the taxable service referred….and collected in such manner as may be prescribed".* Clearly, the levy is on the *value of taxable service,* and*,* more pointedly, the rate of tax is to be collected in such manner *as may be prescribed*.For the purposes of the present case, the value of the taxable service is the one enumerated in Section
D 65 (105) (zzzw).

Description of the credit card transaction

10. The history of the legislation, the position in law, both *before* and after the 2006 amendments, have all been elaborately- and, accurately, discussed by Justice Joseph. I concur with the factual narration. For the
E sake of completeness of this separate judgment, however, I would – under pain of charge of repetition, describe the underlying transaction. The characters, for a credit card transaction are set out below:

a. The cardholder – is the *holder* of the credit card

F b. The issuing bank – the *"banking company, financial institution including non-banking financial company or any other person"*[27] which issues the card to the cardholder after checking their creditworthiness.

c. The merchant establishment ("ME") – is the vendor from
G whom goods or the provider of services, against payment by credit card rendered *by the card holder.*

d. The acquiring bank – the bank that *acquires* the credit card slips from the ME, at whose premises it places its device ('point of sale' or "POS" machine)

H [27] Section 65 (33a) (i) of the Act

e. The card association – the association providing a platform for the credit card transaction and settlement of dues (such as Visa, MasterCard or RuPay)

11. The transaction flow - involved typically, when a credit card is used (swiped) for procuring goods or services, is described below:

(i) The cardholder purchases goods/services from the ME worth ₹ 100 and makes payment by credit/debit card. The ME receives the consideration for the goods/services from the acquiring bank. However, the acquiring bank deducts their fee (known as the 'Merchant Discount Rate' or "MDR") and remits the net proceeds to the ME (₹ 94.3).

(ii) The acquiring bank in turn receives the consideration for goods/services from the issuing bank. The issuing bank retains its share of MDR (known in banking idiom as *"interchange income"*) and remits the net proceeds (₹ 98/-) to the acquiring bank.

(iii) The remittance from the issuing bank to the acquiring bank takes place through card associations. The acquiring bank's share of the MDR is ₹ 3.

(iv) The service tax on the entire MDR amount (₹ 5) signifies ₹ 0.7, which is remitted to the tax authorities.

(v) The card-holder remits the gross consideration for the services (₹ 100) to the issuing bank within the agreed grace period days upon receipt of credit card statement. For debit card transactions, the amount is directly debited from the customer's account by the issuing bank.

12. In sum, for transaction that costs the customer ₹ 100/- (towards the goods they purchase or services they avail of) the total MDR is ₹ 5, out of which the issuing bank's share is ₹ 2 (interchange income) - which is retained by it. The balance MDR (₹ 3) is the acquiring bank's consideration for its role in the transaction.

13. The issue which this court has to decide is whether the service of settlement of an *"amount transacted"*, on behalf of the holder of a credit card – which involves several components, or elements of a unified service, are to be taxed as a whole or, in addition to the taxation of the entire transaction, a separate part of that service, i.e., by the issuing

bank, in the form of authorization of credit – to be released to the provider of goods or services – is *also* separately to be valued and subjected to levy.

CEGAT's rulings in Standard Chartered Bank and ABN Amro

14. A decision of the larger bench of CEGAT - *Standard Chartered Bank & Ors. v. CST, Mumbai-I & Ors.*[28] interpreted the question of service tax levy, for credit card services. This ruling was necessitated because another decision about the amended definition of credit card services, in its application for the pre-amended i.e., pre-2006 era was doubted. The previous decision, so doubted, was *ABN Amro Bank v. Collector of Central Excise*[29] (hereafter *"ABN-I")*. In *ABN-I,* the tribunal observed and held as follows:

> *"17.4. Interchange receipt was scrutinized by Revenue and show cause notice was issued making clear in para 1 of the show cause notice that the Appellant bank was engaged in providing credit card service and services "in relation" thereto was provided for the period from 01.06.02 to 31.04.06 and consideration was received for providing such services. Although, the receipts were routed through Master Card by the acquiring bank in the form of interchange fee, that became measure of taxation for levy of service tax in terms of provisions contained in Section 65(72)(zm) read with Section 65(10) of 65(12) of the Act as the case may be.*
>
> *17.5. In the defence reply filed by Appellant bank on 30.12.08, it was pleaded that "Merchant Establishment" from whom the Appellant received interchange fee through the acquiring bank cannot be equated to be Customs of ABN Bank. The Appellant did not rule out its activity of issuing credit card and getting the payment "in relation to" such cards facility provided to its customer and receipt of consideration from "acquiring bank" in terms of MasterCard policy. When the statement recorded as aforesaid was not discarded and modus operandi of the Appellant demonstrated that the Appellant bank had issued credit cards and use of such card by the card holder, customer earned share of interchange fees for*

[28] 2015[40] S.T.R.104 (Tri. - Del)
[29] 2011 (187) ECR181 (Tri.-Delhi)

the Appellant, there arose incidence of tax. Therefore, taxing gross value of taxable service so provided was rightly taxable in adjudication.

17.6. It may be stated that the object of interpretation of a statute is to discover the intention of the Parliament as expressed in the Act. The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. The charging section using the term "in relation to" extended its wing to embrace all connected and related services touching object of issue of credit card facility. Express statutory grant has taken within its fold all that is required to do, so as to make that grant effective. Accordingly, the charging section brought the service of credit card facility provided and its connected and related activities to fold of taxation.

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18. Findings made by this order as aforesaid arise on the basis of law in force at the material time and out of material facts as well as cogent evidence on record. Statement recorded in the course of investigation provides full proof of providing of taxable service by the Appellant. At no stage or point of time, the chain of evidence bringing the transactions of the customer till that is settled, was de-linked. The Appellant bank failed to discard the evidence of Revenue on record without leading any cogent evidence to the contrary. The Appellant bank had contractual obligation to the credit cardholders for the transactions to be made using the credit card who were issued such cards by the Appellant. Law being concerned with taxable events and when material facts and cogent evidence on record including attendant circumstances demonstrated such event, Appellant's contention that it got its share from "acquiring bank" has no difference to law since the statement recorded from Vice President brought the Appellant to the net of service tax as a card issuing bank providing taxable credit card service. Adjudication cess therefore be held to be justified and the Appellant is liable to service tax for the taxable service provided."

A The three-member bench of the CEGAT in *Standard Chartered* was constituted to resolve whether the ruling in *ABN-I* was correct. It would be useful to first set out the four questions which the tribunal was required to consider and answer: -

> *"3. The order dated 16-08-2013 referred the following*
B *questions of law:*
>
> *i) Whether the introduction of the new, comprehensive definition of "credit card, debit card, charge card or other payment care service" vide Section 65(33a) read with Section 65(105) (zzzw) by the Finance Act, 2006, is substantive and*
C *seeks to levy all the transactions covered by use of Credit/ Debit/Charge Card or is in continuation of the levy under Section 65(10) or (12), as the case may be, as held in ABN Amro decision in so far as credit card services are concerned?*
>
> *ii) Whether the sub-clause (iii) in the definition of taxable*
D *service viz. "credit card, debit card, charge card of other payment card service" in Section 65(33a) can be said to be applicable retrospectively, i.e., from 16 July 2001 when section 65(72)(zm) became effective?*
>
> *iii) Can 'merchants/merchant establishments' be considered*
E *'customer' as envisaged in Section 65(72)(zm) of the Finance Act, 1994 as it stood prior to 1-5-2006?*
>
> *iv) Whether Merchant Establishment Discount can be said to be 'received in relation to' credit card services when in fact in a particular transaction, the Acquiring bank receiving ME*
F *Discount may not have issued that particular credit card at all?"*

The tribunal observed that the context of the reference was that:

> *"5. A Division Bench of CESTAT in ABN Amro Bank v Union of India 2011 STR 529 (Tri-Del) concluded that the charging*
G *section (insofar as credit card services in BOFS brought the service of credit card facility provided and its connected and related activities to fold of taxation (para 17.6)"*

15. Here, it would be noteworthy to point out that the tribunal- in *Standard Chartered* (supra) did not have to decide any dispute which
H required the application of the *post amended* definition, i.e. Section 65

(33a). It was merely expounding the law in the context and background of the amendment, and more specifically its role in the interpretation of pre-amended definition i.e., credit card services as part of the banking and financial services under section 65 (10) of the Act. The tribunal considered several decisions both on the issue of service tax as well as the levy of tax on interchange fee. The tribunal considered decisions of the tax *regimes* in the European Union, United Kingdom, Canada and United States and noticed that the definition in those legislations on the one hand, as compared with the levy under the Act, on the other was not quite the same. Relevant parts of the tribunal's discussion are extracted below:

*"************* ************

In the series and sequence of interdependent transactions that occur in the use of credit cards, acquiring banks generate reports for merchant settlement which are also forwarded to issuing banks through the card association network. There after issuing banks settle the amounts payable to acquiring banks after retaining an interchange fee, which is shared with the card association. The continuity and regularity of such commercial intercourse between acquiring and issuing banks, in our considered view leads to the position of acquiring banks being customers of issuing banks. Issuing and acquiring banks are recognised participants in the nuanced business of credit card transactions.

The interdependent and seamless but distinct transactions that occur between the ME, an acquiring bank and an issuing bank therefore fall to be considered as a customary relationship amongst these parties. We are fortified in this conclusion by the circumstance that the Act specifies that the provider of credit card services is identified as a banking company, a financial institution including a non-banking financial company or any other body corporate or a commercial concern as well. In the circumstances, confining the expression "a customer", to an individual or an entity which has a savings or a current account with a bank, is textually inappropriate. Further, banking companies, in the current scenario of expanding commercial transactions undertake a variety of activities which were not conceived as

A *part of ancient or traditional banking activities. It would therefore be appropriate to conclude (in the context of BOFS), that a customer of a bank includes any person or entity having a continuum of relationship or transactional intercourse with a banking company, within the ambit of activities pursued by the later as a part of its authorised business. This is the interpretation we are persuaded to in the context of the definition and enumeration of BOFS as a taxable service. This is not to say that other statutes may not expand or restrict the scope of the expression, customer of a bank.*

B

C *We accordingly conclude that in the context of credit card services in BOFS, as the taxable service is defined and enumerated, acquiring bank and the ME could be considered to be a customer of the issuing bank and an acquiring bank, respectively.*

D *WHETHER INTERCHANGE FEE AND ME DISCOUNT FORM PART OF THE TAXABLE VALUE OF BOFS:*

20. Whether interchange fee or ME discount amount to consideration received for rendition of credit card services depends on whether services provided by an acquiring bank to the ME and those provided by an issuing bank to the acquiring bank fall within the ambit of services provided in relation to credit card services.

E

Relying on the Board Circular dated 09.07.2001, RBI Notification dated 12.05.2001 and RBI master circular on credit card operation of banks (referred to in the previous para), assessees contend that irrespective of whether ME or an acquiring bank is a customer of an acquiring bank and the issuing bank respectively, services provided by a bank other than to its card holder fall outside the ambit of services provided in relation to credit card services.

F

G ------

The several decisions, of EEC Courts and of the Court of Appeal notice and recognise existence of distinct contractual arrangements between an issuing bank and a card holder; the ME and an acquiring bank; an acquiring bank and the

H *issuing bank; and between issuing and acquiring banks and*

another entity which provides services such as netting - off services, as seen in the facts of FDR Limited. The existence of such distinct agreements and the legal consequences thereof were however considered in the context of the relevant legislation/norms, whether VAT legislation or Directives of EEC Council.

In the context of BOFS, in our considered view, these decisions provide if at all, guidance to this limited extent (and that is also the reality of the factual matrix), that reciprocal rights and obligations between an issuing bank and its card holder; between the ME and the acquiring bank; between acquiring and issuing banks; or between banks and the card association are predicated upon distinct contractual arrangements. The fact that services flow between these several players, which are sequential and interdependent for effectuation of credit card transactions, is indisputable. The problematic is however in identifying which among the such distinct but sequential and interdependent transactions amount to services provided in relation to credit card services, in the context of the definition and enumeration of BOFS, in relevant provisions of the Act.

SCOPE OF SERVICES PROVIDED IN RELATION TO CREDIT CARD SERVICES:

21. Under the Act and during the period in issue any service provided or to be provided, by a banking company, a financial institution including a non-banking financial company or any other body corporate to a customer, in relation to credit card services, is the taxable service we are concerned with. On a textual and grammatical construction, the integers of the taxable service are:

(a) The provider should be a banking company etc. and the recipient a customer of the provider; and

(b) The taxable rendition should be any service in relation to credit card services.

On a grammatical construction of the relevant provisions, since services provided by an acquiring bank to the ME and an issuing bank to the acquiring bank are as essential to

conclusion of transactions employing credit cards as are the services provided by an issuing bank to the card holder i.e. in issuing the credit card and the integral credit facility, it could be contended, as has been, that an acquiring bank and an issuing bank receive taxable consideration by way of ME discount and interchange fee.

Assessees however contend that services provided by an acquiring bank to the ME and those provided by an issuing bank to the acquiring bank are not credit card services but are bill discounting or settlement of payments services, in contra-distinction to services provided by an issuing bank to the card holder, which alone fall within the ambit of the taxable service, since the issuing bank extends credit facility to the card holder. To buttress this line of interpretation assessees refer to the definition of card services w.e.f. 01.05.2006.

22. As noticed earlier, card services were introduced w.e.f. 01.05.2006, defined in Section 65(33a). Section 65(105)(zzzw), the enumerative provision states that services provided to any person (not merely a customer), by any other person in relation to credit card, debit card, charge card or other payment card service in any manner is a taxable service (emphasis added). Clause (33a)(i) defines an "issuing bank" as a banking company, financial institution including a non-banking financial company or any other person (instead of, any other body corporate), which issues such a card to a card holder. Sub-clauses (ii) to (vii) of this provision enumerate categories of services which fall within the scope of the taxable service. Sub-clause (ii) enumerates receipt and processing of applications, transfer of embossing data to issuing bank's personalisation agency, automated teller machine personal identification number generation, renewal or replacement of card, change of address, enhancement of credit limit, payment updation and statement generation. Sub-clause (iii) enumerates services provided by any person including an issuing bank or an acquiring bank, to any other person in relation to settlements of any amount transacted through such card. The explanation under sub-clause (iii) defines an acquiring bank as one which makes payments to any person

who accepts such card. Sub-clause (iv) enumerates services provided in relation to joint promotional cards, affinity cards or co-branded cards. Sub-clause (v) enumerates services provided in relation to promotion and marketing of goods and services through such card. Sub-clause (vi) enumerates services provided to an issuing bank or the holder of such card, for making use of automated teller machines of the provider. Sub-clause (vii) enumerates services provided by the owner of trademarks or brand name to the issuing bank under an agreement for the use of the trade mark or brand name and other services in relation to such card, whether or not such owner is a club or association and the issuing bank is a member of such club or association. The explanation to this sub-clause (vii) states that for the purposes of this sub-clause, an issuing bank and the owner of credit card and brand name shall be treated as separate persons.

From the detailed specification of varieties of services defined as falling under card services, it is apparent that w.e.f. 01.05.2006 three significant changes are introduced, in contrast with the scope and definition of credit card services under BOFS. Finance Act, 2006 also deleted "credit card services" from the scope of BOFS in Section 65(12).

The changes introduced w.e.f. 01.05.2006 are:

(a) Card services include debit card, charge card or other payment card, apart from credit card;

(b) The scope of the service provider is expanded. The service provider is now "any other person" as well;

(c) The identity of the service recipient also stands expanded in sub-clause (zzzw);

(d) Any service provided by any person in relation to credit card, debit card, charge card or other payment card, in any manner, is now the taxable service;

(e) The nature and variety of services included within the ambit of card services is now specifically enumerated, notwithstanding use of "includes" prefixed in clause (33a) and a comprehensive clause "in any manner" in Section 65(105)(zzzw); and

(f) Services enumerated in sub-clauses (i), (ii), (iii), (vi) and (vii) could well be conceived as those provided in relation to credit card services as well.

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26. On the basis of the above broad principles guiding interpretation including of taxing statutes we now proceed to analyse the ambit of credit card services in BOFS, the taxable service in issue. The identification of which of the transactions among the several transactions that occur during the use of a credit card, fall within the definition and enumeration of credit card services, appears to be a facially nebulous and substantially interpretive problematic issue.

27. On a literal construction of the relevant provisions it appears at first blush that any service provided to a customer by a banking company etc. in relation to credit card services, is a taxable service. Acceptance of this construction would lead to infinite expansion of the taxable event. Not only would credit facilities provided by an issuing bank to its card holder fall within the scope of this service but services such as receipt and processing of credit card applications; transferring of embossing data to the issuing bank's personalisation agency; teller machine personal identification number generation; renewal or replacement of a credit card; change of address; payment updation and statement generation; settlement of amounts transacted through credit card; services provided by the owner of trade marks or bank name to an issuing bank for use of the trade mark or brand name; and a host of other services which are interspersed in the sequence of transactions occurring on the use of a credit card, would all be services provided in relation to credit card services. These services are expressly enumerated in sub-clauses (ii), (iii), (vi) and (vii) of Section 65(33a), w.e.f. 01.05.2006. On Revenue's interpretation, these services are subsumed within credit card services on account of the "in relation to" phrase. Wherever an issuing bank hives of some of its activities in relation to credit card operations, such as receipt and processing of credit card applications and the like and these services are provided by a outside agency, these would nevertheless fall within the ambit of BOFS, though not statutorily so identified and

expressed. The scope of credit card services and BOFS would therefore be perpetually nebulous and its contours indeterminate, assessees contend. Assessees also urge that acceptance of Revenue's interpretation would lead to perpetual ambiguity in ascertaining the range and variety of transactions falling within the ambit of credit card services and such interpretation should therefore be avoided on the principle of doubtful and ambiguous taxation and inchoate specification of the taxable event in a fiscal legislation.

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38. While services provided by an issuing bank to an acquiring bank and an acquiring bank to the ME are intermediary, ancillary and interdependent integers for effective use of credit cards, we are persuaded to the conclusion that these services though interdependent are distinct and are not intended to be covered within the purview of credit card services prior to 01.05.2006, notwithstanding the phrase "in relation to" employed in the enumerative provision. We are so persuaded since a contrary interpretation which accords unrestricted scope, locus and amplitude to credit card services would result in introducing a serious element of textual ambiguity, indeterminacy and inchoatness to the scope of the taxable event in BOFS. The formidable precedential authority adverted to in paragraph 23 and decisions in Naveen Chemicals and in Indian National Shipowners Association as well, posit adoption of an interprative principle which leads to clear and definite identification of the taxable event, to avoid doubtful taxation.39. In Collector of Central Excise, Guntur v. Andhra Sugar MANU/SC/0079/1988 : (1989) SUPP (1) SCC 144 the Apex Court pointed out that it is a well settled principle that the meaning ascribed by the authority issuing a notification is a good guide and a contemporaneous exposition of the position of law. K.P. Varghese v. I.T.O. Ernakulam MANU/SC/0300/1981 : (1981) 4 SCC 173, reiterated the established principle that the plain meaning of a statute cannot be relied upon where it results in absurdity, injustice or uncertainty (emphasis) and in such circumstances, the Court must construe the text having regard to the object and purpose which the legislature had in view in enacting

A *the provision, the context in which it occurs and with a view to suppress the mischief sought to be remedied by the legislation. Contemporaneous administrative exposition of the meaning of the statutory text in the speech by the Minister introducing the bill for enactment of the legislation in question is considered a legitimate aid to construction of a statute when the text is grammatically or contextually ambiguous. It is also a settled principle that a subsequent legislation on the same subject may in certain circumstances serve as a Parliamentary exposition of the former provision - vide Precedents referred to in paragraph 29 (supra).*

C *40. On the basis of the principles and guidance derived from aforementioned authority we are compelled to the conclusion that in the context of BOFS, credit card services cover only such services as are provided by an issuing bank to a card holder. This conclusion is fortified by the clarification issued in Board circular dated 09.07.2001, RBI circular dated 12.12.2003, RBI master circular and the express and specific statutory explication of several services which Parliament has specified to be included in card services, incorporated in the definition of card services, for the subsequent period w.e.f. 01.05.2006, in Section 65(33a). Credit card services is included in card services and stands deleted from BOFS, w.e.f. 01.05.2006. To interpret the several services specifically enumerated in Section 65(33a) and other services like those provided by credit information companies or telephone or internet network providers, which equally contribute to and are essential for effectuation of credit card transactions as also comprehended within BOFS, would lead to perpetual uncertainty and non-temporal inflation of the scope of credit card services in BOFS. Such interpretation must clearly be avoided, is the mandate of established interpretive principles.*

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G *The following is clear from Section 65(33a) read with Section 65(105)(zzzw) of the Act.*

(a) The scope of service tax levy is extended to services provided in respect of other cards such as debit card, charge card or other payment card, apart from credit card;

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(b) The several and intervening services which occur in the use of cards are enumerated in sub-clauses (i) to (vii) of the definition, clearly conveying the intention to cover these expressly enumerated services as taxable events under the provisions;

(c) In Section 65(105)(zzzw) while retaining the phrase "in relation to", the phrase "in any manner" is added. The precision and clarity of the detailed drafting methodology employed in the Finance Act, 2006, compels the inference that Parliament not only expressed the intention to expand the scope of the taxable service to cover services provided "in relation to" other cards as well but has further and expressly expanded the reach of taxation to services which otherwise may not indisputedly fall within the ambit of card services. Section 65(33a) thus excised ambiguity, uncertainty and inchoateness in the statutory text.

45. For the aforesaid reasons and analyses, we are of the considered view that paragraph 2.2 of the Board circular dated 09.07.2001 accurately captures the scope of credit card services under BOFS during the period 16.07.2001 to 30.04.2006 i.e. as meaning a service where the customer is provided credit facility for purchase of goods and services; whereby cash advances are also permitted upto specified limits; where for rendition of the service, the service provider collects joining fee, additional card fee, annual fee etc; and all these charges, including interest charges for the service rendered, form part of the value of the taxable service, in BOFS."

The conclusions recorded by the tribunal, in Standard Chartered (supra), are extracted below:

"47. CONCLUSIONS:

We answer the reference dated 16.08.2013 as under:

(a) On point No. (i) in the order of reference, we hold that introduction of a comprehensive definition of "credit card, debit card, charge card or other payment service" in Section 65(33a) read with Section 65(105)(zzzw), by the Finance Act, 2006 is a substantive legislative exertion which enacts levy

A *on the several transactions enumerated in sub-clauses (i) to (vii) specified in the definition set out in Section 65(33a); and all these transactions are neither impliedly covered nor inherently subsumed within the purview of credit card services defined in Section 65(10) or (12) as part of the BOFS;*

B *(b) On point No. (ii) we hold that sub-clause (iii) in Section 65(33a) is neither intended nor expressed to have a retroactive reach i.e. w.e.f. 16.07.2001. Services enumerated in these sub-clauses are not implicit in the scope of credit card services;*

(c) On point No. (iii) of the reference, we hold that a Merchant/
C *Merchant Establishment is "a customer" in the context of credit card services enumerated in Section 65(72)(zm), subsequently Section 65(105)(zm) and a fortiori an acquiring bank is "a customer" of an issuing bank.*

(d) On point No. (iv), we hold that ME discount, by whatever
D *name called, representing amounts retained by an acquiring bank from out of amounts recovered by such bank for settlement of payments to the ME does not amount to consideration received "in relation to" credit card services."*

16. The next decision of note is that of *ABN Amro Bank (presently*
E *known as Royal Bank of Scotland) v. Commissioner of Central Excise*[30] (hereafter referred to as *"ABN-II"*) which was on the question of whether interchange fee could be subjected to levy of service tax for a period *post* 2006. In fact, the precise period in question in the *ABN-II* was May, 2006 to February, 2008. The tribunal analysed the amended
F definition and concluded that ABN Amro Bank was not engaged in any activity for the settlement of amounts transacted; that it was not a settlement agency and therefore acted only as an issuing bank. On this brief analysis of the definition clause, and its understanding in *ABN Amro-II*,the CESATconcluded that interchange fee could not be subjected to separate taxation as a service falling under Section 65 (33a) (iii).

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Facts relating to the present appeals

17. The respondent, Citibank CA received four show cause notices, issued by the appellant (hereafter "the revenue") alleging non-payment

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H [30] 2018 TIOL-2018-CESTAT.

of service tax, for various periods, both after 2006, as well as after 2012. The details of the show cause notices, are set out below in tabular form:

Case No.	SCN	Date	Period in dispute
C.A. No. 8228/2019	SCN 141/2013	23.04.2013	Oct 2007 – June 2012
	SCN 258/2014	23.09.2014	Jul 2012 – Dec 2013
	Statement of Demand No. 25/2015	02.03.2015	Jan 2014 – Mar 2014
	Statement of Demand No. 97/2015	11.08.2015	April 2014 – May 2015
C.A. No. 89/2021	Statement of Demand No. 6725/2016	04.10.2016	April 2015-16

18. For the sake of completeness, extracts of the two show cause notices are reproduced below:

Show Cause Notice 1.

"2. During the course of audit of accounts of the assessee conducted by Service tax Internal Audit Group of Service tax Commissionerate, Chennai, it was noticed that the assessee was issuing Credit Cards to its customer; that Credit Card transactions typically involve two banks – an issuing bank - and an acquiring bank; that issuing bank issues credit cards to its customers; that acquiring banks contract merchant establishments to accept credit card payment for the goods or services sold to the customers and to facilitate such transaction, the acquiring banks provide the required infrastructure like Card Swiping Terminal (Point of Sale Machines), payment gateway etc.; that assessee's Credit Card customers are using Point of Sale (POS) machines installed by acquiring bank in various merchant establishments service establishments that the acquiring banks make payments to the merchant establishments/service establishments and charge them a pre-contracted rate known as Merchant Discount Rate (MDR) to facilitate the Credit card transaction; that acquiring banks submit the transactions settled by merchant establishments to the assessee (Issuing Bank) through Card Association and in-turn the assessee makes payments to the acquiring banks through Card Association; that Card Association (Master Card, Visa and Diners Club International)

A *acts as a bridge between the assessee (issuing bank) and acquiring banks; that card Association provides the required network and Platform to the issuing banks and acquiring banks for facilitating the cards transactions; that normally acquiring bank submits transactions (settled by merchants)*
B *to the Card Association in a standard file format for onward submission to the assessee (issuing bank); that the standard file format contains details like card number, acquirer reference number, transaction amount, interchange fee, date of transaction', nature of merchant business etc., that based on the transaction details received from the Card Association,*
C *the assessee (issuing bank) bills the customer for gross amount and pays the gross amount less interchange fee (which is credited by the banks) by remitting the Same acquiring through the Card Association; that assessee (issuing bank) normally receives the gross amount from their customers based on the*
D *monthly billing statement with a due-date by which the payment needs to be made by the customer; In this regard it appears that the interchange fee is nothing but a share of the MDR earned by the assessee and forms part of their service income in relation to Credit Card or other payment card services.*

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4. On being pointed out by audit, the assessee vide letter dated 12.04.2013 stated that the gross amount of consideration received for taxable service under the taxing entry of "Credit Card Services", has already been subjected to service tax, in
F *the hands of acquiring bank; that the interchange fee received by the issuing bank is just a share of the MDR received from acquiring bank; that issuing bank is not rendering any service to acquiring bank and hence no service tax is applicable on the proportionate share of MDR received by issuing bank in*
G *the form of interchange; that taxing the interchange as share of MDR, in the Hands of issuing banks would amount to double taxation as the gross MDR has already been subjected to service tax; that since service tax was paid on the entire MDR, their liability, if any should be adjusted accordingly. They also enclosed (1) a Note on Credit card transactions*
H *and applicability of Service tax and (2) an excel sheet showing*

the workings of the Interchange earning and details of MDR. However, on their own accord, the assessee paid an amount of Rs. 15,00,00,000/- towards Service tax vide Challan No. 11046 dated 28.03.2013.

5. The contention of the assessee that they are not rendering any service to the acquiring bank does not appear to be correct. When a credit card holder of the assessee (issuing bank) uses the card at a merchant establishment for making a purchase the account of the merchant establishment is settled directly by the card issuing bank or through an acquiring bank. The fact of issue of Credit card by the assessee as the issuing bank only enables the customer to avail cashless purchase or service from the merchant establishment which is subsequently settled by the acquiring bank and the discount (Interchange fee) so earned is shared with the assessee (card issuing bank). It therefore appears that the assessee have earned service income namely interchange fee in relation to credit card services and the interchange fee earned by the assessee appears to be taxable under Section 65(105) (zzzw) of the Finance Act, 1994 read with Section 65 (33a) ibid; The fact of payment of service tax on the interchange fee by the acquiring bank does not exempt the assessee from the payment of service tax on the consideration received by them towards rendering of service as each person providing service is liable to pay service tax for the services rendered by them.

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Show Cause Notice 2

"2.0 The issue in brief is that during the course of audit of accounts of the assessee conducted by Service tax Internal Audit Group of Service Tax Commissionerate Chennai, it was noticed that the assessee was issuing Credit Cards to its customers; that credit card transactions typically involve two Banks- an issuing Bank and an acquiring bank; that issuing bank issues credit cards to its customers; that acquiring bank Contract merchant establishments to accept credit card payment for the goods & services sold to the customers and to facilitate such transactions, the acquiring banks provide the required infrastructure like card swiping terminal (Point

or Sale machines), payment gateway etc.; that assessee's Credit Card customers are using point of sale POS) machines installed by acquiring banks in various merchant establishments/service establishments; that the acquiring banks make payments to the merchant establishments/service establishments and charge them a pre- Contracted rate known as Merchant Discount Rate (MDR) to facilitate the credit card transaction; that the acquiring banks submit the transaction settled by merchant establishments to the assessee (issuing bank) through card association and in-turn the assessee makes payments to the acquiring banks through Card Association; that. Card Association (MasterCard, Visa Card and Diners Club International) acts as a bridge between the assessee.(issuing bank) and acquiring banks, that Card Association provides then required network and platform to the issuing banks and acquiring banks for facilitating the cards transactions; that normally acquiring bank submits the transactions (settled by merchants) to the card association in a standard file format for onward submission to the assessee (issuing bank); that the standard file format contains details like card number, acquirer reference transaction number, amount, interchange fee, date of transaction nature of merchant business etc., that based on the transaction details received from the card association, the assessee {issuing bank) bills the customer for gross amount and pays the gross amount less interchange fee (which IS credited by the acquiring banks) by remitting the Same through the card association; that assessee (issuing bank) normally receives the gross amount from their Customers based on the monthly billing statement with a due-date by which the payments needs to be made by the customer; In this regard it appears that the interchange fee is nothing but a share of the MDR earned by the assessee and forms part of their service income in relation to credit card or other payment card services and the interchange fee was collected by them from the acquiring banks for the period from October' 2007 to June' 2012 and the Service Tax was not remitted on the same.

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5. The contention of the asseseé during the Course of audit of accounts that they are not rendering any service to the acquiring bank does not appear to be correct. When a credit card holder of the assessee (issuing bank) uses the card at a merchant establishment for making a purchase, the account of the merchant establishment is settled directly by the card issuing bank or through an acquiring bank. The fact of issue of credit card by the assessee as the issuing bank only enables the customer to avail cashless purchase or service from the merchant establishment which is subsequently settled by the acquiring bank and the discount (interchange fee) so earned is shared with the assessee (card issuing bank). It therefore appears that the assessee have earned service income namely interchange fee in relation to credit card services and the interchange fee earned by the assessee appears to be taxable as "service" as per Section 65B (44); the fact of the payment of Service tax on the interchange fee by the acquiring. bank does not exempt the assesssee from payment of Service tax on the consideration received by them towards rendering of service as each person providing service is liable to pay service tax for the services rendered by them."

Citibank's reply, dated 16.09.2013 to the fourth show cause notice, No. 97/2015 reflects its position:

"4.7. The Notice submits that while making payments to the Merchant Establishments for purchases made on credit by the card holders, the Acquiring Bank deducts the Merchant Discount and pays the balance to the Merchant Establishment. In other words, the Merchant Establishment bears fee for collection and receipt of monies towards the price of goods sold or services rendered. The fee (expense) so borne by the Merchant Establishment results in income, of which there are two beneficiaries/ claimants viz the Acquiring Bank and the Issuing Bank i.e. the Noticee). The share of revenue of the issuing Bank is settled by way of retention. The Association debits the account of the issuing Bank (i.e. the Noticee) and disburses the same to the Acquiring Bank. Payment of Association Fee to the Association is made separately by the issuing Bank and the Acquiring Bank. All the entities co-ordinate with each other to support the credit card transaction

A *between the credit card holder and the Merchant Establishment.*

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B *4.16 As submitted above, the Notice does not provide any services to the Acquiring Bank, and consequently, there is no service provider and a service recipient relationship between them. The Notice submits that the Participants i.e. Acquiring Bank and the Notice do not inter se play the role of role of a service provider and service recipient and any amount which may be exchanged by the inter se are not liable to Service*

C *tax. The Acquiring Bank and the Notice as the Issuing Bank do not have any contractual relationship. They are the Participants to the credit card transaction between the credit card holder and the Merchant Establishment and the Interchange Fee is only a portion of the tax paid Merchant Discount which is disbursed to the Notices for such*

D *participation.*

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4.30. In the present facts all activities are undertaken by the Participants to support a transaction where a Merchant

E *Establishment is able to accept a payment from a credit card holder through the modality of credit cards. The gross amount attributable in relation to such services i.e. Merchant Discount which is made available by the Merchant Establishment to the Acquiring Bank and includes the Interchange Fee which is the share of the Notice. This amount of gross consideration*

F *is in the instant case subjected to Service tax in the hands of the Acquiring Bank. There is only one single transaction in the present facts. The Merchant Discount is the consideration which is received in respect of this transaction. The Merchant discount is further distributed amongst the participants (i.e.*

G *the Issuing Bank and the Acquiring Bank). The consideration received by the participants in this single transaction is offered to tax in the hands of the Acquiring Bank.*

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4.33. It is required to be appreciated that the interchange Fee

H *is only a proportion of the gross of amount of the Merchant*

Discount which has already been subjected to tax in the hands of the Acquiring Bank. Hence, Service tax cannot be demanded on such interchange Fee.

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4.35. The Notice submits that the Commissioner has failed to appreciate the fact that the Interchange Fee due to the Issuing Bank is partial disbursal from the gross amount which has already suffered tax and is not liable to fresh levy of Service tax. This kind of levy would result in double taxation of the same consideration under the same taxing statute."

In this context, the prevailing understanding within the banking industry is also indicative, which can be gleaned from representations sent by the Indian Bank Association to the Central Board of Excise and Customs seeking clarification (which were filed by Citibank). An extract summarising the position:

"2. It may kindly be noted that when customers of issuing bank make purchases from a merchant establishment by using credit cards, the transaction passes through a payment cycle through the VISA/MasterCard settlement platform. The acquiring bank deducts a fixed predetermined percentage (generally up to 3%) from the amount paid to the merchant, which is thereafter shared between the parties involved in the transactions. As per the industry practice, instead of discharging service tax liability only on its own share of discount, the 'acquiring bank' discharges full-service tax liability on the entire interchange income on the transaction, including that on 'interchange' received by the card issuing bank. Thus, service tax is paid on the entire interchange income by the acquiring bank and there is no leakage of revenue."[31]

Interpretation of Section 65(33a)

19. The pre-existing definition of credit card services [Section 65(12)(ii)] merely mentioned "credit card services" as part of banking and financial services – without elaborating what *kind* of services were

[31] Letter dated 07.10.2010 sent by the Indian Bank Association to the Joint Secretary – TRU, Central Board of Excise and Customs.

A comprehended in the definition. The 2006 amendment segregated this, by omitting sub-clause (ii) of Section 65(12) and enacting a new Section 65(33a).

20. A plain reading of Section 65 (33a) reveals that seven distinct heads of credit card services are now comprehended within the broad B description of "credit card services". Each category – falling in sub-clause (i) to (vii) deals with a specific, *enumerated* service. The controlling expression *"credit card, debit card, charge card or other payment card services includes any services provided"* broadens the coverage of this *species* of service, in contrast with the pre-existing law. This inclusion – by specific enumeration of *"debit card, charge* C *card or other payment card service"* is an expanded class of card service. However, the further use of the term *"includes"* even while broadening (by enumeration of specific sub-categories) "credit card services" –also has the effect of limiting the coverage under Section 65(33)(a) to *only* the seven enumerated categories. This is apparent D from the fact that after sub-clause (vii), there is no residuary provision authorising similar treatment to non-enumerated activities i.e., those not falling within sub-clauses (i) to (vii). In other words, the use of the expression *"includes"* while broadening – by specific enumeration of seven categories of card services – *also limits* the inclusive nature to those categories, and no more.

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21. The second incontrovertible feature is that each enumerated category falling within a sub-clause refers only to one kind of service. Thus, by sub-clause (i), the service referred to is the *issuing of a card* to a card holder; and by sub-clause (ii), the service of receipt, processing of applications, transfer of embossing data to the issuing bank's personal F agency, ATM, PIN number generation, renewal or replacement of cards, change of address etc., - essentially forming separate and ancillary services to the issuing card. This service largely involves one business entity providing service to another. By sub-clause (iii) - which this case is concerned with - the service involved is *by any person*, [i.e., the G issuing bank as defined in sub-clause (i)] and an acquiring bank, *to any other person* in relation to settlement of any amount transacted through "such card". The emphasis here: apart from other related issues, is with the service of settlement of any "amount transacted" through the card. It is significant to notice that the reference to the service provider "by any person" is broad and comprehends all categories of persons and

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entities mentioned in sub-clause (i) (bank, financial institution, etc.) having regard to the definition of "person" [in Section 65B (37)]. Such being the case, the reference to issuing bank would fall within the broad description of *"any person"*. In any case, having defined "issuing bank" widely, *per* sub-clause (i), Parliament need not have referred to *"any person, including issuing bank"*; the meaning would have been the same if sub-clause (iii) had referred only to an "issuing bank" in place of "any person". However, having regard to the essential nature of a credit card transaction, the inclusion is not directed as much to an issuing bank as to the specific reference to "an acquiring bank". That term is not defined elsewhere except in this sub-clause, and by the explanation wherein the acquiring bank is defined as a bank, company, financial institution, etc. who makes the payment to any person, who accepts such cards.

22. Crucially, then, only in Section 65(33a) (iii) does service by *anypersoninclude* service by the issuing bank and the acquiring bank. The use of the conjunctive "and" [in Section 65 (33a) (iii)] is to be contrasted with the other sub-clauses- Parliament used the disjunctive "or" in all other sub-clauses. The clear intention for this difference was that service providers could be business entities providing more than one service under one sub-clause [such as sub-clauses (ii), (iv), (vi) and (vii)]. The use of the conjunctive "and" in clause (iii) therefore, is telling and consequently, in my opinion should receive literal interpretation. I, therefore, disagree with the judgment of K.M. Joseph, J on this aspect.

23. There can be no debate that indisputably, Parliament, has to be attributed with full knowledge of the nature of credit card business models, where the primary objective of the entities that provide service, is to ensure payment for the underlying transaction between the card holder and the provider of goods or services. Parliament would also know that there are three business entities whose joint or concurrent functioning is essential for settlement of each credit card transaction. The three business entities are the issuing bank, the acquiring bank and the network [such as Visa, Mastercard, or RuPay, etc., which has been kept out of the definition under Section 65(33a)]. These are crucial factors and consequently I am of the opinion that the conjunctive "and" should be read literally and be given the meaning conjunctively rather than disjunctively. The result, therefore, is that when a person (i.e., the issuing bank), and an acquiring bank, provide service to another person, in relation

A to settlement of any credit card transaction, *that service, by such person, and the acquiring bank,* amounts to a "credit card service"- per Section 65 (33a). The unified nature of the service, to another (be it the card holder or the merchant, who are participants in the primary transaction and therefore beneficiaries) is the subject matter of sub-clause (iii) of Section 65 (33a). I am fortified in this conclusion also in the use of the term "or" in sub-clauses (iv), (vi) and (vii) which define services capable of being provided to another business entity or service provider, and not a customer.

24. This court has, in several instances, dealt with what should be the approach, when reading the expression "and", commending a literal interpretation, rather than one, resulting in its being construed as a disjunctive "or". In *Hyderabad Asbestos Cement Products & Anr. v. Union of India*[32], this Court considered Rule 56-A of Central Excise Rules. The Court dealt with interpretation of conjunctive and disjunctive "and", "or". Proviso to Rule 56-A uses the conjunctive word "and". The provision permitted the Collector to allow a credit of the duty already paid on such material or component parts or finished product, as the case may be. Crucially, the proviso read as follows:

> *"Provided that no credit of duty shall be allowed in respect of any material or component parts used in the manufacture of finished excisable goods—*
>
> *(i) if such finished excisable goods produced by the manufacturer are exempt from the whole of the duty of excise leviable thereon or are chargeable to nil rate of duty, and*
>
> *(ii) unless—*
>
> *(a) duty has been paid for such material or component parts under the same item or sub-item as the finished excisable goods; or*
>
> *(b) remission or adjustment of duty paid for such material or component parts has been specifically sanctioned by the Central Government:"*

This court held that the language was forthright; so "and" had to be read conjunctively. Long ago, it was held in *Green v Premier Glynrhonwy Slate Co.*[33] that

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[32] (2000) 1 SCC 426

[33] (1928) 1 KB 561, p. 568

"You do sometimes read 'or' as 'and' in a statute. But you do not do it unless you are obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'."

In *R v Oxfordshire County Council and Others, Ex Parte Sunningwell Parish Council*[34], Section 22(1) of the Commons Registration Act 1965 contains a three-part definition of a town or village green, usually called classes (a), (b) and (c). They were:

"[a] land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years."

An argument was made that the requirement of having indulged in sports *and* pastimes, for 20 years, was *disjunctive* and not conjunctive. The House of Lords rejected this argument, and held that:

"The first point concerned the nature of the activities on the glebe. They showed that it had been used for solitary or family pastimes (walking, tobogganning, family games) but not for anything which could properly be called a sport. Miss Cameron said that this was insufficient for two reasons. First, because the definition spoke of "sports and pastimes" and therefore, as a matter of language, pastimes were not enough. There had to be at least one sport. Secondly, because the "sports and pastimes" in class c had to be the same sports and pastimes as those in respect of which there could have been customary rights under class b and this meant that there had to be some communal element about them, such as playing cricket, shooting at butts or dancing round the maypole. I do not accept either of these arguments. As a matter of language, I think that "sports and pastimes" is not two classes of activities but a single composite class which uses two words in order to avoid arguments over whether an activity is a sport or a pastime. The law constantly uses pairs of words in this way. As long as the activity can properly be called a sport or a pastime, it falls within the composite class."

[34] 1999 (3)All ER 385

A In *Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central-& Ors*[35] a similar question arose regarding Section 142 (2A) of the Income Tax Act:

> *"A bare perusal of the provisions of Sub-section (2A) of the Act would show that the opinion of the Assessing Officer that*
> B *it is necessary to get the accounts of assessee audited by an Accountant has to be formed only by having regard to: (i) the nature and complexity of the accounts of the assessee; and (ii) the interests of the revenue. The word "and" signifies conjunction and not disjunction. In other words, the twin conditions of "nature and complexity of the accounts" and*
> C *"the interests of the revenue" are the prerequisites for exercise of power under Section 142(2A) of the Act."*

25. Justice Joseph in his judgment, relies on the contractual arrangements in question, to conclude that *"legally they are separate services as the nature of service rendered by the issuing bank is*
D *different from the service rendered by acquiring bank"*. In my opinion, the existence or otherwise of a contractual relationship is *per se* not determinative when a settlement of payment in relation to a credit card is involved. I say so because there is no contractual relationship between the acquiring bank and a card holder who might choose to use the device
E which is given to a merchant establishment by acquiring bank. Likewise, the merchant establishment need not have any pre-existing contractual relationship with the issuing bank. Neither the merchant establishment nor the card holder has any pre-existing relationship with the network provider whose role has been kept out of the definition clause. The network service provider (VISA, Master Card, RuPay, etc.) in fact provides the
F platform for the completion of the transaction. The nature of the network's database, the software provided by it and the entire platform forms the entire basis of the credit card system, enabling smooth cashless settlement of the primary transaction – purchase of service or goods by the card holder from the merchant. The entire focus of the Section 65 (33a) – as
G well as Section 65 (105) (zzzw) which refers to taxable service in respect of credit card service – is *settlement of any transaction*. It cannot be construed as settlement of more than one transaction by one swipe. In other words, if Parliament had intended that the transaction for the purchase of goods or services permitted dissection of one whole

H [35] (2008) 14 SCC 1519

transaction into two - one provided by the issuing bank and the other by the acquiring bank, it would have made that intention explicit appropriately, such as for instance, by using words, like *"as the case may be"*. The absence of such manifest intention in Section 65 (33a) on the one hand, and the use of the conjunctive "and" in Section 65 (33a) (iii), clearly manifesting the intention that the issuing bank (a "person") and an acquiring bank jointly provide the service, on the other - persuades me to hold that a dissection of one single transaction involving the purchase and sale of goods and services, is unwarranted. Therefore, with respect, I do not agree with Joseph, J's view that Parliament contemplated that apart from an *acquiring* bank, any other person including an issuing bank, may render a separate service. Equally, the reasoning that activities of a bank – which may be the same one that issues a card and is also an acquiring bank in a transaction – are legally separate services because the *nature* of service (based on their respective contractual frameworks) rendered by the issuing bank is different from that of the service rendered by the acquiring bank, with respect, would not be accurate. Similarly, I do not agree with the reasons given by Justice Joseph (i.e., that interchange fee does not fall within the service contemplated (i) between issuing bank and card holder; and (ii) it is not a gift) as to why interchange fee is a separate service either.

26. There are several problems with segregating the components of "service" by the issuing bank and service by the acquiring bank, under Section 65 (33a) (iii); they are elaborated as follows:

(a) In the event of segregation of the issuing bank's component, the service element would no longer be a credit card service, *but providing pure advance or credit of one kind, to the customer by the issuing bank* which then falls within the broad description of banking and financial services [Section 65 (12)].

(b) The segregation would ignore the reality of the business transaction which is the collection of a single MDR which includes two components i.e. the acquiring bank's fee, and the issuing bank's charge/fee. The revenue admits that the MDR comprises both these fees. In these circumstances there is no warrant for discriminating the component which is retained by the issuing bank in the form of interchange fee, by saying that the issuing bank has to pay service tax

A on that as a separate element of its fee. The other anomaly would be that the data service provided by the card association (enabling use of software which facilitates instantaneous verification of the customer's credentials, authentication of the transaction and the authorization of payment) is not required to undergo a separate treatment, as is now insisted upon in the case of the segregated transaction with the issuing bank.

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(c) There are predominantly only two contractual arrangements (as entered into by the card association) which involve interaction of simultaneous or sequential occurrence of four sub-transactions, i.e. (i) the swiping of the card by the card holder at the merchant establishment (which does not include any pre-existing contractual agreement, but evidences the finalisation of a promise of a contract); (ii) followed by release by the acquiring bank to the merchant establishment of the consideration (which is backed by a pre-existing contractual agreement by which the POS machine is kept with the merchant establishment); (iii) the authentication of the customer's credit by the issuing bank (which has no relationship with the acquiring bank or the merchant establishment, but does so only with the card holder); and (iv) the facilitation of the entire transaction by the card association (which has no contractual relationship with the card holder or the merchant establishment, but does so only with the acquiring bank and issuing bank).

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(d) If these are the different stages/ limbs/components of the transactions as may be variously described, wherein some are backed by pre-existing contractual agreements, while others are not – the singling out of one such service, i.e. the credit provided to the cardholder by the authentication of the transaction by the issuing bank, for separate treatment by insisting that it should once again be subjected to levy on a literal construction of sub-clauses (33a) and (105) (zzzw), would not be logical. If the revenue were to in fact insist this to be the correct interpretation, it should logically and in the same breath, also insist that the acquiring bank file separate returns for the amounts it receives and the amount

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it collects and transmits to the network, in the same manner separately, as is insisted upon in relation to the component of service rendered by the issuing bank, which forms a part of the whole service that is provided in this case.

27. I agree with the reasoning of Justice Joseph, that the amount received by the issuing bank, as interchange income or fee, is not towards interest. However, as previously discussed, I do not agree with the conclusion, that the issuing bank provides a *separate* service. The role of the issuing bank in the service provided by the acquiring bank to the merchant establishment is part of a single unified service falling under clause (iii) of Section 65 (33a) and it cannot be broken up into its components and classified as separate services for classification. This is a well-accepted principle of classification. The relevant clause of Section 65 (33a) is reproduced below:

"(iii) by any person, including an issuing bank and an acquiring bank, to any other person in relation to settlement of any amount transacted through such card.

Explanation.— For the purposes of this sub-clause, "acquiring bank" means any banking company, financial institution including nonbanking financial company or any other person, who makes the payment to any person who accepts such card;"

There is, in reality, one unified service provided by the acquiring bank to the merchant establishment for which gross value of consideration is the merchant discount rate (MDR). This *single MDR includes the interchange fee*. Therefore, the issuing bank's service is subsumed into the service of the acquiring bank to make it a unified service to the merchant establishment. Evidently a merchant establishment does not have any contractual liability to pay inter-change fee to the issuing bank.

28. By way of analogy, a reading of Section 65A which stipulates how classification of taxable services shall be determined, including when it is classifiable under two or more sub-clauses of Section 65 (105), is indicative:

"65-A. Classification of taxable services.—(1) For the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of Section 65;

A *(2) When for any reason, a taxable service is, prima facie, classifiable under two or more sub-clauses of clause (105) of Section 65, classification shall be effected as follows:—*

(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general
B *description;*

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, insofar as this
C *criterion is applicable;*

[...]"

It would also be useful to notice that the Central Board of Excise and Customs (CBE&C) clarified by a circular[36] regarding service tax levy on goods transport by road service that ***composite service cannot***
D ***be broken up into its components.*** The circular *inter alia,* states that:

"3.Issue :GTA provides service to a person in relation to transportation of goods by road in a goods carriage. The service provided is a single composite service which may include various intermediary and ancillary services such as
E *loading/unloading, packing/unpacking, transshipment, temporary warehousing. For the service provided, GTA issues a consignment note and the invoice issued by the GTA for providing the said service includes the value of intermediary and ancillary services. In such a case, whether the*
F *intermediary or ancillary activities is to be treated as part of GTA service and the abatement should be extended to the charges for such intermediary or ancillary service?*

Clarification: GTA provides a service in relation to transportation of goods by road which is a single composite
G *service. GTA also issues consignment note. The composite service may include various intermediate and ancillary services provided in relation to the principal service of the road transport of goods. Such intermediate and ancillary services may include services like loading/unloading, packing/*

H [36] Circular No. 104/7/2008-S.T., dated 6-8-2008

unpacking, transshipment, temporary warehousing etc., which are provided in the course of transportation by road. These services are not provided as independent activities but are the means for successful provision of the principal service, namely, the transportation of goods by road. The contention that a single composite service should not be broken into its components and classified as separate services is a well-accepted principle of classification. As clarified earlier vide F. No. 334/4/2006-TRU, dated 28-2-2006 (para 3.2 and 3.3) [2006 (4) S.T.R. C30] and F. No. 334/1/2008-TRU, dated 29-2-2008 (para 3.2 and 3.3) [2008 (9) S.T.R. C61], a composite service, even if it consists of more than one service, should be treated as a single service based on the main or principal service and accordingly classified. While taking a view, both the form and substance of the transaction are to be taken into account. The guiding principle is to identify the essential features of the transaction. The method of invoicing does not alter the single composite nature of the service and classification in such cases is based on essential character by applying the principle of classification enumerated in section 65A. Thus, if any ancillary/ intermediate service is provided in relation to transportation of goods, and the charges, if any, for such services are included in the invoice issued by the GTA, and not by any other person, such service would form part of GTA service and, therefore, the abatement of 75% would be available on it.

4.Issue 2 :GTA providing service in relation to transportation of goods by road in a goods carriage also undertakes packing as an integral part of the service provided. It may be clarified whether in such cases service provided is to be classified under GTA service.

Clarification: Cargo handling service [Section 65(105)(zr)] means loading, unloading, packing or unpacking of cargo and includes the service of packing together with transportation of cargo with or without loading, unloading and unpacking. Transportation is not the essential character of cargo handling service but only incidental to the cargo handling service. Where service is provided by a person who

A *is registered as GTA service provider and issues consignment note for transportation of goods by road in a goods carriage and the amount charged for the service provided is inclusive of packing, then the service shall be treated as GTA service and not cargo handling service.*

B *5.Issue 3 :Whether time sensitive transportation of goods by road in a goods carriage by a GTA shall be classified under courier service and not GTA service?*

Clarification :On this issue, it is clarified that so long as, (a) the entire transportation of goods is by road; and (b) the
C *person transporting the goods issues a consignment note, it would be classified as 'GTA Service'."*

The above circular supports the view that a composite service cannot be broken up into components and classified as separate services.

29. The facts of the present case, in my opinion closely reflect the
D situation envisioned by the CBEC. The service provided by the acquiring bank is similar to the composite service provided by a GTA. The service element provided by an issuing bank is an *integral part* which gets subsumed in the single unified service provided by the acquiring bank to a merchant establishment. The principle enunciated by CBEC (in the
E circular) that even if a composite service, consists of more than one service, should nevertheless be treated as a single service based on the main or principal service and accordingly classified, is also applicable in the case of service provided by the acquiring bank and issuing bank. The latter's role is subsumed into the service of the acquiring bank for which the gross consideration is received from the merchant
F establishment. The service element provided by the issuing bank in the credit card transaction at the merchant establishment is therefore not subject to service tax as it is incorporated in the service by the acquiring bank- as one service provided to the merchant establishment and the gross consideration (MDR) received by the acquiring bank includes the
G interchange fee shared with the issuing bank, by the acquiring bank. This is identical to the position in GTA service which was clarified by the Board in the above referred circular. This view is also supported by the newly enacted Section 66F (3) (b) which is effective from 1 July 2012, which states that naturally bundled services should be treated as provision of single service. The CBEC's circulars are binding on the revenue.
H Therefore, *interchange fee* earned by the issuing bank which forms an

integral part of serviceof the acquiring bank to the merchant establishment, cannot be subjected to service tax. A credit card transaction- towards settlement of payment of a transaction, in sum, is an indestructible integrated service, whose constituent parts are inseparable from each other.

30. For the reasons outlined above, I am unable to agree with Joseph, J's reasoning that Citibank had to independently file returns, in respect of the transaction by which interchange fees were collected.

Sections 67 and 68

31. As noted earlier, the charge (under Section 66) is on the *"value of the taxable service referred….and collected in such manner as may be prescribed".* Valuation is in terms of the provision of Section 67, and Section 68 provides *who* has to pay service tax. Section 67 (1) enacts that the measure of tax levied, shall be on the consideration paid for the service, and provides for three contingencies. Section 67 (2) states that where the gross amount charged by a service provider, for the service provided includes service tax payable, the value of the taxable service shall be *"such amount as with the addition of tax payable, is equal to the gross amount charged"*. Section 67 (3) says that the *"gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service."* Section 67 (4) – which is subject to the previous sub-sections enacts that *"the value shall be determined in such manner as may be prescribed."* The Service Tax (Determination of Value) Rules, 2006 was framed by the revenue, to assist the task of determining the value of services, to be taxed. Rule 2 (d) (i) defines what is provider of service. Rule 5 prescribes as follows:

> *"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 value of the telecommunication service shall be*

A *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
B *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

C *(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
D *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
E *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;
F *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.

Explanation1.–For the purposes of sub- rule (2), "pure agent"
G *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
H *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.

Explanation2.– For the removal of doubts it is clarified that the value of the taxable service is the total amount of consideration consisting of all components of the taxable service and it is immaterial that the details of individual components of the total consideration is indicated separately in the invoice.

Illustration 1.– X contracts with Y, a real estate agent to sell his house and thereupon Y gives an advertisement in television. Y billed X including charges for Television advertisement and paid service tax on the total consideration billed. In such a case, consideration for the service provided is what X pays to Y. Y does not act as an agent behalf of X when obtaining the television advertisement even if the cost of television advertisement is mentioned separately in the invoice issued by X. Advertising service is an input service for the estate agent in order to enable or facilitate him to perform his services as an estate agent

Illustration 2.– In the course of providing a taxable service, a service provider incurs costs such as traveling expenses, postage, telephone, etc., and may indicate these items separately on the invoice issued to the recipient of service. In such a case, the service provider is not acting as an agent of the recipient of service but procures such inputs or input service on his own account for providing the taxable service. Such expenses do not become reimbursable expenditure merely because they are indicated separately in the invoice issued by the service provider to the recipient of service.

Illustration 3.– A contracts with B, an architect for building a house. During the course of providing the taxable service, B incurs expenses such as telephone charges, air travel tickets, hotel accommodation, etc., to enable him to effectively perform the provision of services to A. In such a case, in whatever form B recovers such expenditure from A, whether as a separately itemised expense or as part of an inclusive overall

fee, service tax is payable on the total amount charged by B. Value of the taxable service for charging service tax is what A pays to B.

Illustration 4. – Company X provides a taxable service of rent-a-cab by providing chauffeur driven cars for overseas visitors. The chauffeur is given a lump sum amount to cover his food and overnight accommodation and any other incidental expenses such as parking fees by the Company X during the tour. At the end of the tour, the chauffeur returns the balance of the amount with a statement of his expenses and the relevant bills. Company X charges these amounts from the recipients of service. The cost incurred by the chauffeur and billed to the recipient of service constitutes part of gross amount charged for the provision of services by the company X."

It is evident, from a reading of Rule 5 (1) that all costs and expenditure incurred, for providing the service, are included in the calculation of "gross amount". Further, *per* Explanation (2), *"the value of the taxable service is the total amount of consideration consisting of all components of the taxable service."*

32. A co-joint reading of Section 67 and Rule 5 therefore establishes that the value of the entire service to the recipient is the basis of the service tax. Such being the case, if one accepts that the "gross amount" is the entire MDR – inclusive of the interchange fee, there is no mechanism, whereby the latter, i.e. the interchange fee can be brought into the tax net once again.

33. Section 68, no doubt, enacts that a person providing a taxable service shall pay service tax at the rate prescribed in Section 66B and in the manner prescribed by the rules, and in accordance with the returns filed as may be prescribed under the rules. However, that is not the determinative point – it is the charging provision, i.e. Section 65, which speaks of the levy being upon the *value* of the service. Therefore, I respectfully disagree with Justice Joseph's opinion that "*every person providing taxable service to any person shall pay service tax at the rate...*" which is based on the reasoning that because they are two different entities, they are *each separately* liable to pay service tax under Section 68 (despite settling the same transaction between the card holder and merchant establishment).

34. This court, in its ruling in *Union of India v. Inter-Continental Consultants & Technocrats*[37] observed in this context, as follows:

> *"24. Section 66 of the Act is the charging section which reads as under:*
>
> *"66. Charge of service tax.— (1) There shall be levied a tax (hereinafter referred to as the service tax) @ 12% of the value of taxable services referred to in sub-clauses ... of Section 65 and collected in such manner as may be prescribed."*
>
> *25. Obviously, this Section refers to service tax i.e. in respect of those services which are taxable and specifically referred to in various sub-clauses of Section 65. Further, it also specifically mentions that the service tax will be @ 12% of the "value of taxable services". Thus, service tax is reference to the value of service. As a necessary corollary, it is the value of the services which are actually rendered, the value whereof is to be ascertained for the purpose of calculating the service tax payable thereupon.*
>
> *26. In this hue, the expression "such" occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing "such" taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as that amount is not calculated for providing such "taxable service". That according to us is the plain meaning which is to be attached to Section 67 (unamended i.e. prior to 1-5-2006) or after its amendment, with effect from 1-5-2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that the High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider "for such service" and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.*

[37] (2018) 4 SCC 669

A *27. This position did not change even in the amended Section 67 which was inserted on 1-5-2006. Sub-section (4) of Section 67 empowers the rule-making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above viz. the service tax is to be paid only on the services actually provided by the service provider."*

Again, in *Commissioner of Service Tax & Ors. v. Bhayana Builders Private Limited & Ors*[38] this court held that the transaction value, i.e., the total value of the service provided, is the *gross amount* for the purpose of levy of service tax:

"A plain reading of Explanation (c) which makes the "gross amount charges" inclusive of certain other payments would make it clear that the purpose is to include other modes of payments, in whatever form received; be it through cheque, credit card, deduction from account, etc. It is in that hue, the provisions mentions that any form of payment by issue of credit notes or debit notes and book adjustment is also to be included. Therefore, the words "in any form of payment" are by means of issue of credit notes or debit notes and book adjustment. With the supply of free goods/materials by the service recipient, no case is made out that any credit notes or debit notes were issued or any book adjustments were made. Likewise, the words, "any amount credited or debited, as the case may be", to any account whether called "suspense account or by any other name, in the books of accounts of a person liable to pay service tax" would not include the value of the goods supplied free as no amount was credited or debited in any account. In fact, this last portion is related to the debit or credit of the account of an associate enterprise and, therefore, takes care of those amounts which are received by the associated enterprise for the services rendered by the service provider.

16. In fact, the definition of "gross amount charged" given in Explanation (c) to Section 67 only provides for the modes

[38] (2018) 3 SCC 782

of the payment or book adjustments by which the consideration can be discharged by the service recipient to the service provider. It does not expand the meaning of the term "gross amount charged" to enable the Department to ignore the contract value or the amount actually charged by the service provider to the service recipient for the service rendered. The fact that it is an inclusive definition and may not be exhaustive also does not lead to the conclusion that the contract value can be ignored and the value of free supply goods can be added over and above the contract value to arrive at the value of taxable services. The value of taxable services cannot be dependent on the value of goods supplied free of cost by the service recipient. The service recipient can use any quality of goods and the value of such goods can vary significantly. Such a value, has no bearing on the value of services provided by the service recipient. Thus, on first principle itself, a value which is not part of the contract between the service provider and the service recipient has no relevance in the determination of the value of taxable services provided by the service provider."

35. These decisions – though rendered in different contexts, in my opinion, serve to highlight that the basis for levying service tax, is the total or "gross" value of the amount charged from the service recipient. In the present case, the MDR is thus the "gross value"; *it includes the interchange fee*. In the circumstances, since the collection of service tax is by the acquiring bank, which remits it to the revenue, the insistence that both elements should be segregated and separate returns filed reflecting the interchange fee, with respect, serves no purpose other than increasing paperwork, and burdening both banks and revenue officials with more work. If it is the *aggregate amount* (of which the interchange fee, is one part, and the acquiring bank's amount, another part), the levy is satisfied. In such circumstances, the segregation of the whole MDR (which includes the interchange fee) by slicing it into two portions, i.e. the interchange fee and the acquiring bank's charge, *solely for the purpose of obliging all parties to reflect these in separate returns,* only complicates issues. The other interpretation, would lead to a different aggregate, whereby service tax is levied on the entire MDR and once again, on the interchange fee, the issuing bank separately collecting service tax, results in an amount exceeding 14% towards tax. Both

A interpretations, in my opinion, cannot support separate levies, which would be contrary to Section 65.

36. I am also unable to agree with Joseph, J. about the true construction of the notification exempting transactions below ₹ 2000/- from payment of service tax. I base this, on a plain and textual reading B of the terms of the Notification 25/2012[39], which, *inter alia,* reads as follows:

> *"64. Services by an acquiring bank, to any person in relation to settlement of an amount upto two thousand rupees in a single transaction transacted through credit card, debit card,* C *charge card or other payment card service. Explanation. — For the purposes of this entry, "acquiring bank" means any banking company, financial institution including non-banking financial company or any other person, who makes the payment to any person who accepts such card.] inserted by Notification No.52/2016-ST, dated 8.12.2016."*

D

It reflects that legislative intent/understanding is also limited to only the acquiring bank paying service tax, on an aggregate amount. If it were otherwise, the object of granting exemption would be defeated because the acquiring bank would then be collecting (or, correspondingly, the issuing bank would be deducting) the proportion of tax leviable on E the interchange fee, thus resulting in a partial levy of service tax on the quantum of transactions (₹ 2000/- and below) which are clearly exempt. In my opinion, therefore, Joseph, J's opinion that by the exemption, the issuing bank cannot claim exemption on the ground that acquiring bank is exempted, therefore, is not accurate. It is also important to remember F that *what* is taxed, is the *value* of the transaction and it is the transaction that is exempt, *not the service provider*. Therefore, the express use of only 'acquiring bank' is indicative that Parliament was well aware of how credit card transactions are conducted.

37. I am therefore, not in agreement with the reasoning of Joseph, G J. that "service provider" under Section 67(1)(i) imply that both the acquiring bank and issuing bank are service providers, and the *gross amount* on which the tax is collected, is not the aggregate of the value of the services provided by the different service holders. The judgement of

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[39] https://www.cbic.gov.in/resources//htdocs-servicetax/st-notifications/st-notifications-2012/Mega_Exemption_Notification_22022018.pdf

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Joseph, J. with respect, is mainly concerned by the fact that Citibank retains ₹ 2 before crediting the rest of the money towards settlement of the transaction; and therefore, in the absence of proof that acquiring bank has paid service tax on amount including the interchange fee, it is liable to pay for the specific service provided by it, as a distinct service provider. As explained in the earlier portion of this judgment, the activity or part played by the issuing bank is undoubtedly a service. However, it is *part* of the service; by itself, and without the role of the acquiring bank, it becomes a pure advance or loan transaction. However, the provision of service by the issuing bank and the acquiring bank together, triggers the levy. In other words, the component of service by the issuing bank is just that – a part of a single unified service, which for business convenience is structured in a manner, that the issuing bank retains ₹ 2, and tax is paid on the overall service, in the hands of the acquiring bank. There is no revenue leakage. The manner in which the credit card transaction, particularly the *inter se* transaction between the issuing bank and the acquiring bank is fashioned is such that instead of releasing the entire amount, in the first instance, and claiming the interchange fee later, the issuing bank retains the component of interchange fee.

Conclusion

38. For the sake of clarity and completeness, I have briefly summarised my position in relation to each of the conclusions drawn by Joseph, J. in his judgment (paragraph 109):

(A) **On Conclusion I**: I am in agreement that the respondent-Citibank, as issuing bank was providing service, as found by the Commissioner. However, this service was a *part* of a single unified service – of settling transactions – which is provided by both the acquiring and issuing bank (which in some circumstances may well be the same bank).

(B) **On Conclusions II, III, and IV**: I am in agreement with J. Joseph that prior to 01.07.2012, the service of issuing bank fell within Section 65 (33a) (iii); interchange fee cannot be treated as interest, as argued by Citibank; and lastly the case that credit card transaction, being a transaction in money and therefore excluded from the definition of "service" in Section 65B (44) is unacceptable.

(C) **On Conclusion VI**: I agree that the plea to dismiss the appeals *solely* on the ground that no appeal was carried against the Order in *ABN Amro* (supra) has no merit.

A (D) **<u>On Conclusion V, VII-X</u>:** Service tax is undoubtedly a value added tax. However, having characterised the service to be a single unified service – wherein service tax, by way of business convenience, is collected from/remitted by the acquiring bank on the value (whole MDR which includes the interchange fee that is retained by the issuing bank) taxable for the single service rendered by *both* the acquiring and issuing bank – Citibank cannot be called upon to pay the service tax again as this would result in double taxation. In view of my previous discussion, I do not agree with the reasoning in *ABN Amro* (supra).

For the same reasons, I am of the opinion that the question of remand to the tribunal does not arise. The only point of contention seems to be whether they were reflecting the payment of service tax separately in their ledgers, as issuing and acquiring bank. However, as a result of the reasons already elaborated, this is rendered to be a purely academic question. A question of returns should not detain this Court, because the business reality is that every bank is both an issuing bank and an acquiring bank, and it is nobody's case that the banks are not filing their returns on service tax.

As regards the revenue's allegation of wilful suppression, the settled view of this court, is best explained from the following extract of a previous three judge ruling, in *Cosmic Dye Chemical v. Collector Of Central Excise*[40] where it was observed – in relation to Section 11A of the Central Excise Act, 1944, (which is in *pari materia* with Section 73 of the Finance Act, 1994) that:

> *"Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful."*

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[40] (1995) 6 SCC 117

This decision was followed in *M/s Uniworth Textiles v. Commissioner of Central Excise*[41] where it was stated that:

> *"The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso."*[42]

Therefore, with regards to the revenue's allegation of wilful suppression, I find no merit given that this was not the allegation or scope of the Show-Cause Notices issued. Moreover, the representations sent by the Indian Bank Association to the Joint Secretary, TRU, Central Board of Excise and Customs confirm that there was a lack of clarity with regards to the method of payment of this tax, for which there was an ongoing dialogue between the banking institutions and Central Government, negating any claims of "wilful suppression". One cannot also be oblivious of the fact that the position of law, was in a state of flux, at the relevant period. Hence, and in view of the reasons given above, the present case does not warrant remand to the Tribunal, and this dispute should, in my opinion, stand finally concluded at this stage.

39. Therefore, for the reasons already elaborated above – I am of the opinion that these appeals by Revenue ought to be dismissed.

Ankit Gyan Matter referred to Appropriate Bench.

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[41] (2013) 9 SCC 753

[42] Other decisions – i.e. *Padmini Products v. CCE* [(1989) 4 SCC 275], Tamil Nadu Housing Board v Collector Central Excise [1995] Supp (1) SCC 50, etc. have given similar reasoning.