
(2015) 07 MAD CK 0097

In the Madras High Court

Case No : Civil Miscellaneous Appeal Nos. 1058 and 1459 of 2009

Suprashes General Insurance Services and Brokers P. Ltd.

APPELLANT

Vs

Commissioner of Service Tax and Others

RESPONDENT

Date of Decision : 28-07-2015

Acts Referred:

Finance Act, 1994 — Section 65, 65(10)(zl), 65(105)(zl), 65(31), 65(46)

Finance Act, 2006 — Section 73(1)

Income Tax Act, 1961 — Section 80-O

Insurance Regulatory and Development Authority Act, 1999 — Section 2

Citation : (2015) 35 GSTR 57 : (2016) 41 STR 34 : (2015) 86 VST 160

Hon'ble Judges : R. Sudhakar and K.B.K. Vasuki, JJ.

Bench : Division Bench

Advocate : C. Natarajan, Senior Counsel for K. Ravi, for the Appellant; M. Santhanaraman, Standing Counsel, for the Respondent

Judgement

1. The assessee as well as the Department are before us challenging the order of the Tribunal dated November 17, 2008 made in Final Order No. 1287 of 2008 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai. This court, at the time of admission, admitted the above appeals on the following substantial questions of law:

"Civil Miscellaneous Appeal No. 1058 of 2009

(i) Whether in the facts and circumstances of the case, the services of the appellant reinsurance broker remunerated by the reinsurers situate outside India for securing reinsurance business for them is outside the Finance Act, 1994 for the period prior to the amendment by the Finance Act, 2006?

(ii) Whether in the facts and circumstances the reinsurance business procured for and remunerated by foreign reinsurers abroad is export of service and hence outside the Act being destined and consumed abroad?

(iii) Whether in the facts and circumstances of the case, the Tribunal is correct in

upholding the extended period of limitation relying upon the provisions of section 73 of the Act as it stood prior to Act 2 of 2004, whereas the proceedings for reassessment had been initiated and completed after the amendment of 2004?

Civil Miscellaneous Appeal No. 1459 of 2009

1. Whether the decision of the second respondent Tribunal is correct in restricting the demand of service for the normal period after September 10, 2004 on the ground that details were requested from the assessee by the Superintendent?
2. Whether the second respondent is justified in law in vacating the penalties imposed under sections 76 and 78 of the Finance Act, 1994 on the ground that the issue involved is highly interpretative in nature?"

We have heard Mr. C. Natarajan, the learned senior counsel, appearing for the assessee and Mr. M. Santhanaraman, the learned standing counsel, appearing for the Revenue.

2. The brief facts of the case are as follows:

The assessee/appellant, an insurance broker as well as reinsurance broker was issued with a composite licence No. CB-011/02 under the Insurance Regulatory and Development Authority (Insurance Brokers) Regulations, 2002 for both classes of broking by the Insurance Regulation and Development Authority. The assessee took service tax registration in Form ST-2, dated September 10, 2004 with a centralised registration at Chennai. It is stated that the assessee is remitting service tax for the "insurance auxiliary services" under section 65(55) of the Finance Act, 1994 in respect of broking done for the insurance (direct broking) to primary insurers and also in respect of inward reinsurance business, where the Indian insurance companies have been acting as reinsurers having regard to the charge under section 65(105)(zi) read with the definition of "insurer" under section 65(58) of the Finance Act. The assessee was remitting service tax on primary booking done to insurers carrying on such business in India and also where inward reinsurance business was put through. The assessee did not offer for tax the brokerage received from overseas reinsurers acting through overseas brokers.

3. In the above scenario, a show-cause notice came to be issued demanding service tax on the commission/brokerage received by the assessee. The Department was of the view that the commission/brokerage received by the assessee, on account of reinsurance ceded to other insurance companies, was liable to service tax under "insurance auxiliary service" vide section 65(46) of the Finance Act, 1994. The show-cause notice also proceeded on the basis that since there was suppression, the proviso to sub-section (1) to section 73 of the Service Tax Act was proposed to be invoked. The Department proposed to demand service tax with interest and penalty in the following manner:

"Therefore, M/s. Suprashes General Insurance Services and Brokers Private Limited are hereby required to show cause to the Commissioner of Service Tax,

VI Floor, MHU Complex, No. 692, Anna Salai, Nandanam, Chennai 600 035 within 30 days of the receipt of this show-cause notice as to why--

(a) an amount of Rs. 1,42,44,880 (rupees one crore forty two lakhs forty-four thousand eight hundred and eight only), being the service tax payment (service tax of Rs. 1,40,98,127 plus education cess of Rs. 1,46,753) as detailed in the enclosed annexure on the Commission received for reinsurance of policies ceded should not be demanded under the proviso to sub-section (1) of section 73 of the said Act read with erstwhile section 71(3) of the said Act;

(b) interest at the applicable rates should not be demanded on the above service tax and education cess from the due date till the actual date of payment from Suprashes under section 75 of the said Act;

(c) penalty should not imposed on M/s. Suprashes under section 76 of the said Act for every day of delay of payment of service tax and education cess from the due date till the actual payment of the service tax and education cess; and

(d) penalty under section 78 of the said Act should not be imposed on Suprashes for the contraventions and non-payment of service tax and education cess, mentioned supra."

4. In response to the said show-cause notice, the assessee filed a reply, inter alia, contending that the commercial brokerage was received from the reinsurer abroad for the services rendered in the course of the business, which would fall within the definition of "export of service" and, therefore, the liability of service tax does not arise.

5. The reply given by the assessee was repelled by the adjudicating authority holding that the nature of services rendered by the assessee in the present case are identified as reinsurer rendering consultancy and risk management services for reinsurance negotiation with reinsurer on behalf of the insurance company and that the only service rendered to the reinsurer is remittance of premiums for the reinsurance, for which he retains the commission. Hence, according to the adjudicating authority, the services were rendered and consumed in India and it was not exported. Further, there should be physical receipt of payment in convertible foreign exchange. The retention of brokerage amount before remitting the premium to foreign reinsurance company could not be termed as payment received in convertible foreign exchange.

6. The adjudicating authority further held that the decision of the Supreme Court in the case of J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, relied on by the assessee did not apply to the facts of the present case as it relates to section 80-O of the Income-tax Act and it would not have any application in so far as the provisions of the Service Tax Act. He further held that the retention of brokerage amount could not be termed as payment received in convertible foreign exchange. He, therefore, held that the services rendered by the assessee could not be treated as "export service" and, therefore, not entitled

to exemption under various notifications. For better clarity, the relevant findings of the adjudicating authority are as follows:

"20. It may be seen that the services are rendered purely to insurance companies in identifying reinsurer, rendering consultancy and risk management services for reinsurance negotiation with reinsurer on behalf of insurance company. The only service rendered to reinsurer is remittance of premiums for reinsurance for which he retains his commission. So the service is rendered and consumed in India and it is not exported. The Board also clarified in Circular No. 56/5/2003 , dated April 25, 2003 that service tax is destination based consumption tax and is not applicable on "export of services". Therefore, the service should be rendered and consumed outside India so as to qualify as "export of service". In this case, as already explained, Suprashed rendered service to insurers in India and the same is consumed in India only. Notification No. 6/1999-ST , dated April 9, 1999 which was in vogue up to February 28, 2006 also exempts the taxable services provided to any person in respect of which payment is received in India in convertible foreign exchange from the whole of service tax. As per this notification, exemption from service tax is available only when the payment for the service rendered is received in convertible foreign exchange. Therefore, there should be physical receipt of payment in convertible foreign exchange. The retention of brokerage amount before remitting the premium to foreign reinsurance companies cannot be termed as payment received in convertible foreign exchange.

21. The hon"ble Supreme Court in the case of J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, relating to income-tax relied on the relevant provisions of the Foreign Exchange Act, 1961. The decision rendered in J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, is applicable only to direct tax cases and no influence can be drawn that it is applicable to service tax cases. Here the notification is very specific and nowhere in the notification it is mentioned that such income is received in India in convertible foreign exchange or having been converted into convertible foreign exchange outside India, is brought in by or behalf of the Indian company in accordance with the relevant provisions of the Foreign Exchange Regulation Act, 1973, for the time being in force, (as mentioned in section 80-O of the Income-tax Act, 1961). Here, the relevant Act to be applied is the Foreign Exchange Management Act, 1999 (FEMA) and circulars issued by RBI. The Reserve Bank of India issued Notification No. 9/2000-RB , dated May 3, 2000 (paragraph 4(2)) provides a person shall be deemed to have repatriated the realised foreign exchange to India when he receives in India payment in rupees from the account of a bank or an exchange house situated in any country outside India, maintained with an authorised dealer. Since Suprashed have not fulfilled any of the above requirements, I am of the view that the retention of brokerage amount cannot be termed as payment received in convertible foreign exchange and the decision in J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, by the hon"ble Supreme Court is not applicable to the present case.

22. In view of the foregoing finding that the service rendered by Suprashes cannot be treated as "export of service", I hold that they are not entitled for any exemptions under Notification No. 6/1999-ST , dated April 9, 1999 up to February 28, 2003, Notification No. 21/2003-ST, dated November 20, 2003 and also under the Export of Service Rules, 2005, notified vide Notification No. 9/2005-ST, dated March 3, 2005 with effect from March 15, 2005."

7. The adjudicating authority also upheld the allegation of the Department with regard to suppression holding as follows:

"23. Since Suprashes have suppressed the receipt of commission earned under the capacity as reinsurance brokers, which are liable to service tax under the category of "insurance auxiliary service" with effect from July 16, 2001, the willful intention on their part to evade payment of service tax has been well established. Therefore, the service tax is liable to be demanded under the proviso to section 73(1) of the said Act. Similarly, interest is liable to be demanded under section 75 of the said Act, on the said service tax and education cess, as they have not paid on the due dates. Suprashes are liable to penalty under sections 76 and 78 of the said Act for the contravention mentioned supra."

8. Consequently, the adjudicating authority proceed to demand service tax as follows:

"(a) I confirm the demand of Rs. 1,42,44,880 (rupees one crore forty-two lakhs forty-four thousand eight hundred and eighty only), being the service tax payment (service tax of Rs. 1,40,98,127 plus education cess of Rs. 1,46,753) under the proviso to sub-section (1) of section 73 of the said Act.

(b) I also demand interest at the applicable rates on the above service tax and education cess from Suprashes under section 75 of the said Act;

(c) I impose a penalty of Rs. 200 per day on Suprashes from the due date of payment of service tax and education cess till the actual date of payment of the above demand under section 76 of the said Act. However, the penalty imposed under this section shall not exceed the service tax and education cess demanded in this order.

(d) I also impose a penalty of Rs. 1,42,44,880 (rupees one crore forty-two lakhs forty-four thousand eight hundred and eighty only), on Suprashes under section 78 of the said Act."

9. Aggrieved by the above said order of the adjudicating authority, the assessee pursued the matter before the Tribunal. The Tribunal, after analysing the provisions and after hearing the submissions of both sides came to the conclusion that the impugned demand pertains to brokerage received by the assessee from overseas reinsurer as a percentage on reinsurance premium paid to the reinsurer by the primary insurer during the said period. The Tribunal further held that demand in this case was on the total sum of the commissions paid by the overseas reinsurers to the assessee (reinsurer broker) as a

percentage of reinsurance premium received by the reinsurers from the primary insurers during the period of dispute.

10. On this factual scenario, the Tribunal came to hold that the nature of duties performed by the assessee was admittedly a reinsurance broker. The Tribunal further came to the conclusion that in the present case, the assessee was acting as an intermediary between the Indian insurance company and an overseas reinsurer and receiving commission from the overseas reinsurer. Referring to regulation 4 of the IRDA (Insurance Brokers) Regulations, 2002, the Tribunal held that the brokerage was the remuneration received by the assessee for arranging reinsurance with the foreign company for the Indian insurance company.

11. Yet another finding given by the Tribunal in paragraph 11 of the decision is contradictory to the conclusion arrived at by the Tribunal. For better clarity, we extract the same as follows:

"... By and large, what they provided was a service to the Indian insurance company. Of course, they also served the foreign company by remittance of the ceded premium (after deducting ceding commission and brokerage) to that company."

12. The Tribunal, distinguishing the decision of the Supreme Court in the case of J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, , held that there was no case of "export of service" and, therefore, the assessee was not entitled to the benefit of the Export of Service Rules, 2005 nor Notification Nos. 2/1999 dated February 28, 1999, 6/1999 , dated April 9, 1999 and 21/2003 , dated November 20, 2003 did not ensure to the benefit of the assessee. The Tribunal further held that to enable the assessee to get the benefit of the notifications, there must be physical receipt of remuneration in convertible foreign exchange and this did not happen in the present case. Therefore, there was no justification to rely upon the decision of J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, to contend that they should be deemed to have received "reinsurance brokerage" in convertible foreign exchange.

13. In so far as suppression is concerned, the Tribunal took a different view holding as follows:

"14. The show-cause notice invoked the proviso to section 73(1) of the Finance Act, 1994 on the ground of suppression of facts, etc., for recovery of service tax from the appellants for the period July 16, 2001 to June 30, 2005. It is not in dispute that the reinsurance brokerage received by the appellants was not included in the taxable value of "insurance auxiliary service" rendered by them to insurers (including reinsurers) for the purpose of payment of tax for the above period. According to the appellants, they did not suppress material facts before the Department. We think, in this context, it is relevant to consider the Superintendent's letter dated June 3, 2008 addressed to the appellants, which

reads thus:

"We request you to furnish the following particulars immediately:

1. Copies of reinsurance contract/agreement entered into by you with Indian/foreign insurance companies.
2. The list of insurance companies for which your company act/acted as reinsurer as stated in paragraph 20 of Order-in-Original No. 2/2007, dated January 31, 2007 and the details of reinsurance done by your company from July 2001.
3. Whether your commission payment was only from insurance companies or also from the reinsurer, was the payment received only in India, was it in Indian rupee, whether the payment was through your bankers."

It appears from the above letter that the show-cause notice was issued and the same was adjudicated upon without gathering all the relevant facts for the period of dispute. In this scenario, the allegation of suppression of facts is not sustainable against the assessee. Consequently, the demand for the period beyond the normal period of one year preceding the date of issue of show-cause notice cannot be sustained. However, for the period prior to September 10, 2004 (the date on which section 73(1) of the Finance Act, 1994 was amended), mere omission or failure of the assessee in the matter of filing returns, etc., was enough for the Department to invoke the larger period of limitation. Suppression of facts, etc., was not necessary. In the present case, omission of the appellants to include reinsurance brokerage in the taxable value for the period from July 16, 2001 to September 9, 2004 is not in dispute and the same was enough to invoke the proviso to section 73(1) of the Finance Act, 2006 as this provision stood prior to September 10, 2004. In the result, the tax liability of the appellants should be restricted to the normal period and beyond up to September 10, 2004 only. The learned Commissioner should requantify the demand accordingly.

15. We have however found a good case for vacating the penalties. By and large, the dispute agitated before us was highly interpretative of the various provisions of the Finance Acts, 1994 and 2006, the IRDA Act, 1999 and the IRDA (Insurance Brokers) Regulations, 2002. In the circumstances, it will not be just or fair to inflict any penalty on the assessee, who has consistently maintained that their liability to pay service tax on reinsurance brokerage received from overseas reinsurers arose only with effect from May 1, 2006 by virtue of the amendments brought to the relevant provisions of section 65 of the Finance Act, 1994 by the Finance Act, 2006."

14. Aggrieved by the order of the Tribunal, both the assessee as well as the Revenue are before this court.

15. Before we embark on the issue raised by the assessee as well as the Revenue, the relevant provisions need to be seen.

16. A plain reading of the above provisions makes it clear that by and large there

appears to be no major difference between the definition of "taxable service" relating to insurance auxiliary service and other definitions, namely, intermediary or insurance intermediary. It is not in dispute that the assessee, who is an insurance intermediary, is performing insurance ancillary service, which is a taxable service under the provisions mentioned above.

17. In this case, the period in dispute is as follows:

July 16, 2001 to March 31, 2002; 2002-2003; 2003-2004 up to May 13, 2003; 2003-2004 (from May 14, 2003 to March 31, 2004); 2004-2005 (from April 1, 2004 to September 9, 2004); 2004-2005 (from September 10, 2004 to March 31, 2005) and 2005-2006.

18. The core issue involved in this case is what is the nature of service performed by the assessee. Initially the assessee placing reliance on the decision of the Supreme Court in J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, tried to make a plea that the services rendered by them should be termed as "export of service" and the commission or brokerage received will come within the definition of "export of service" in India in convertible foreign exchange in terms of Notification Nos. 2/1999 , dated February 28, 1999 as amended by Notification No. 6/1999 , dated April 9, 1999, 9/2001, dated July 16, 2001, 13/2002 , dated August 1, 2002 and 2/2003 , dated March 1, 2003.

19. The relevant notifications are set out hereunder for better appreciation:

"Service tax--exemption when payment for taxable services is received in India in convertible foreign exchange--Notification No. 2/1999-ST superseded

In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 2/1999 -Service Tax, dated February 28, 1999, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in sub-section (48) of section 65 of the said Act, provided to any person in respect of which payment is received in India in convertible foreign exchange, from the whole of the service tax leviable thereon under section 66 of the said Act:

Provided that nothing contained in this notification shall apply when the payment received in India in convertible foreign exchange for taxable services rendered is repatriated from or sent outside India.

(Notification No. 6/1999-ST , dated April 9, 1999)

Service tax--Payment received in India in convertible foreign exchange--
Amendment to Notification No. 6/1999-ST

In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby makes the following amendment in the notification of

the Government of India, in the Ministry of Finance (Department of Revenue) No. 6/1999-Service Tax , dated April 9, 2001, except as respects things done or omitted to be done before such amendment, namely:

In the said notification, for the words, bracket and figures "taxable service specified in sub-section (48) of section 65 ", the words, bracket and figures "taxable service specified in sub-section (72) of section 65 " shall be substituted.

2. This notification shall come into force on 16th day of July, 2001.

(Notification No. 9/2001-Service Tax, dated July 16, 2001)

Service Tax--Exemption when payment for services is received in India in convertible foreign exchange--Amendment to Notification No. 6/1999 -Service Tax.

In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby makes the following amendment in the notification of the Government of India, in the Ministry of Finance (Department of Revenue) No. 6/1999 -Service Tax, dated April 9, 1999, except as respects things done or omitted to be done before such amendment, namely:

In the said notification, for the words, brackets and figures "taxable service specified in sub-section (72) of section 65 ", the words, brackets and figures "taxable service specified in clause (90) of section 65 " shall be substituted.

2. This notification shall come into force on 16th day of August, 2002.

(Notification No. 13/2002-ST , dated August 1, 2002) Service tax--Receipt of payment in foreign exchange--Notification No. 6/1999-ST, rescinded

In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby rescinds the notification of the Government of India in the erstwhile Ministry of Finance (Department of Revenue) No. 6/1999 -Service Tax, dated April 9, 1999, published in the Gazette of India, vide number G.S.R. 251(E), dated April 9, 1999, except as respects things done or omitted to be done before such rescission.

(Notification No. 2/2003-ST , dated March 1, 2003)."

20. Thereafter, on April 25, 2003, the Central Board of Excise and Customs issued Circular No. 56/5/2003 clarifying the issue that the service tax is destination-based consumption tax and it is not applicable on export of services. For better clarity the said circular reads as follows :

"Service tax on export of services--Clarifications Circular No. 56/5/2003-ST, dated April 25, 2003 F. No. 254/1/2003-CX-4 Government of India, Ministry of Finance (Department of Revenue), Central Board of Excise and Customs, New Delhi.

Subject: Non-levy of service tax on export of services--Regarding

The Central Government has issued Notification No. 2/2003, dated March 1, 2003 in the current years budget rescinding the earlier Notification No. 6/1999 , Service Tax dated April 9, 1999 which exempted taxable services from payment of service tax so long as payment for services rendered is received in convertible foreign exchange which is not repatriated outside India. Consequent to the issue of Notification No. 2/2003 cited above, service tax would be leviable on all taxable services consumed or rendered in India, irrespective of whether the payment thereof is received in foreign exchange or not.

2. In this regard various representations have been received by the Board raising apprehension that because of the withdrawal of the Notification No. 6/1999 , export of service would be affected as it would be costlier in the international markets.

3. The Board has examined the issue. In this connection I am directed to clarify that the service tax is destination based consumption tax and it is not applicable on export of services. Export of services would continue to remain tax-free even after withdrawal of Notification No. 6/1999 , dated April 9, 1999. Further it is clarified that service consumed/provided in India in the manufacture of goods which are ultimately exported, no credit of service tax paid can be availed or reimbursed at present as intersectoral tax credit between services and goods are not allowed.

4. Another question raised is about the taxability of secondary services which are used by the primary service provider for the export of services, since the secondary services ultimately gets consumed/merged with the services that are being exported no service tax would be leviable on such secondary services. However, in case where the secondary service gets consumed in part or toto for providing service in India, the service tax would be leviable on the secondary service provider. For this purpose both primary and secondary service providers would maintain the records deemed fit by them to identify the secondary services with services that are being exported.

5. A further question raised is relating to payments receivable in foreign exchange for the services performed prior to March, 1, 2003 when the rate of service tax applicable was five per cent but payments are received after March 1, 2003. The enhancement of the rate of service tax from five per cent to eight per cent would be applicable only when the finance bill is passed. If payments are received in the aforesaid case after the finance bill is passed, the rate of tax applicable would be five per cent so long as the billing has been made prior to the date of passing of the finance bill. If the billing is made subsequent to the date of the passing of the finance bill, the service tax would be applicable at the enhanced rate of eight per cent.

6. The field formations may suitably be informed.

7. Trade notice may be issued for the information of the trade.

8. The receipt of this circular may kindly be acknowledged.

9. Hindi version will follow."

21. Subsequent to the above circular, by Notification No. 21/2003 , dated November 20, 2003, the Government restored Notification No. 6/1999 dated April 9, 1999. The said circular reads as follows:

"Service tax--Services for which payment received in India in convertible foreign exchange exempted.

In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in sub-section (105) of section 65 of the said Act, provided to any person in respect of which payment is received in India in convertible foreign exchange, from the whole of the service tax leviable thereon under section 66 of the said Act.

Provided that nothing contained in this notification shall apply when the payment received in India in convertible foreign exchange for taxable services rendered is repatriated from, or sent outside, India.

(Notification No. 21/2003-ST , dated November 20, 2003)."

22. In this factual scenario, Mr. C. Natarajan, the learned senior counsel appearing for the assessee contended that the nature of services rendered by the assessee is "export of service" and, therefore, the Board's circular dated April 25, 2003 would squarely apply to the transaction in question, as the service tax is destination based consumption tax and it will not get attracted to "export of service", more particularly reinsurers as an intermediary falling under insurance ancillary service. To buttress this argument, the following contentions were raised.

23. The first and foremost contention is that the adjudicating authority as well as the Tribunal must construe the nature of services rendered by the assessee. According to the assessee, he performs the duties of a reinsurance broker as defined under regulation 4 of the IRDA (Insurance Brokers) Regulations, 2002. The definition of reinsurance broker and insurance broker defined under section 2 of the Insurance Regulatory and Development Authority (Insurance Brokers) Regulations, 2002 reads as follows:

"2. Definition.--(1) unless the context otherwise requires,--

(i) "insurance broker" means a person for the time-being licensed by the authority under regulation 11, who for a remuneration arranges insurance contracts with insurance companies and/or reinsurance companies on behalf of his clients.

Explanation.--The term "insurance broker" wherever it appears in these

regulations shall be deemed to mean a direct broker, a reinsurance broker or a composite broker, as the case may be, unless expressly stated to the contrary.

(m) "reinsurance broker" means an insurance broker who, for a remuneration, arranges reinsurance for direct insurers with insurance and reinsurance companies."

24. Mr. M. Santhanaraman, the learned counsel appearing for the Department, has laid much emphasis on the above said provisions. To buttress his plea, he submitted that primarily, the service is rendered to the reinsured within India. Regulation 19 of the IRDA (Insurance Brokers) Regulations, 2002 provides for remuneration of insurance broker and regulation 23 provides for segregation of insurance money. The said regulations read as follows:

"19. Remuneration.--(1) No insurance broker shall be paid or contract to be paid by way of remuneration (including royalty or licence fees or administration charges or such other compensation), an amount exceeding:

(A) on direct general insurance business--

(i) on tariff products:

(a) ten per cent of the premium on that part of the business which is compulsory under any statute or any law in force;

(b) 12 and half per cent of the premium on others.

(ii) on non-tariff products:

17 and half per cent of the premium on direct business.

(B) on direct life insurance business--

(i) individual insurance:

(a) 30 per cent of first year's premium.

(b) five per cent of each renewal premium.

(ii) annuity:

(a) immediate annuity or a deferred annuity in consideration of a single premium, or where only one premium is payable on the policy:

two per cent of premium.

(b) deferred annuity in consideration of more than one premium:

(i) seven and half per cent of first year's premium.

(ii) two per cent of each renewal premium.

(iii) group insurance and pension schemes:

(a) one year renewable group term insurance, gratuity, superannuation, group

savings linked insurance--

seven and half per cent of risk premium.

Note: Under group insurance schemes there will be no remuneration for the savings component.

(b) single premium--

two per cent of risk premium.

(c) annual contributions, at new business procurement stage--

five per cent of non-risk premium with a ceiling of rupees three lakhs per scheme.

(d) single premium new business procurement stage--

0.5 per cent with a ceiling of rupees five lakhs per scheme.

(e) remuneration for subsequent servicing:

(i) one year renewable group term assurance-- two per cent of risk premium with a ceiling of rupees 50,000 per scheme.

(C) on reinsurance business--(i) as per market practices prevalent from time to time.

Explanation.--For purposes of the procurement of business, an insurer shall not pay an agency commission, allow a special discount, and pay a remuneration to brokers for the same insurance contract.

(2) The settlement of accounts by insurers in respect of remuneration of brokers shall be done on a monthly basis and it must be ensured that there is no cross-settlement of outstanding balances.

23. Segregation of insurance money.--(1) The provisions of section 64VB of the Act shall continue to determine the question of assumption of risk by an insurer.

(2) In the case of reinsurance contracts, it may be agreed between the parties specifically or as part of international market practices that the licensed reinsurance broker or composite broker can collect the premium and remit to the reinsurer and/or collect the claims due from the reinsurer to be passed on to the insured. In these circumstances the money collected by the licensed insurance broker shall be dealt with in the following manner:

(a) he shall act as the trustee of the insurance money that he is required to handle in order to discharge his function as a reinsurance broker and for the purposes of this regulation it shall be deemed that a payment made to the reinsurance broker shall be considered as payment made to the reinsurer;

(c) give written notice to, and receive written confirmation from, a bank, or other institution that he is not entitled to combine the account with any other account, or to exercise any right of set off, charge or lien against money in that account;

(d) ensure that all monies received from or on behalf of an insured is paid into the "insurance bank account" which remains in the "insurance bank account" to remain in deposit until it is transferred on to the reinsurer or to the direct insurer.

(e) ensure that any refund of premium which may become due to a direct insurer on account of the cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the reinsurer directly to the direct insurer.

(f) interest on recovery/payment received shall be for the benefit of the direct insurer or reinsurer;

(g) only remove from the "insurance bank account" charges, fees or commission earned and interest received from any funds comprising the account;

(h) take immediate steps to restore the required position if at any time he becomes aware of any deficiency in the required "segregated amount".

(emphasis1 supplied)

25. In the above scenario, we have to consider the nature of transaction in the present case. The assessee is an insurance intermediary as defined under sections 65(31) , 65(46) and 65(55) of the Finance Act. LRDE, Government of India (Defence Department) wanted to move the radar and accessories by land on Government owned trailers/hired trailers-containerised cargo from Kolar Karnataka State to Chandrapur, Orissa. Hence, they approached the New India Assurance Co. Ltd. for insurance cover. LRDE, Government of India is the insured at the first instance. The goods were insured for a total sum of Rs. 340 crores and the period of insurance is between December 12, 2005 to February 12, 2006. In order to spread the insurance cover, they approached the assessee to give them the facility of spreading the insurance cover through the reinsurer. The assessee, a reinsurance broker/defined under the provisions of the Service Tax Act and the IRDA (Insurance Brokers) Regulations, 2002, took up the task of assessing the nature of business with the New India Assurance Co. Ltd. and in order to render advise on the basis of available reinsurance market and consultancy in risk management on reinsurance service and to provide service in the form of negotiation with the New India Assurance Co. Ltd. with the reinsurer, in the present case, a foreign company, entered into a series of negotiation with the New India Assurance Co. Ltd.

26. The documents, which have been referred to in the original proceedings may be relevant to understand the nature of transaction. The first of the mail is dated November 9, 2005 from the assessee company Mumbai to the Chennai Branch with regard to the subject marine cargo enquiry from New India a/c LRDE-Government of India, quoting the rate of premium as required by New India Assurance Co. Ltd. for the total value of the goods at Rs. 362.70 cores, of which New India Assurance Co. Ltd. wanted to retain Rs. 60 crores under own cover. Thereafter, for and on behalf of the foreign company-reinsurer, another mail was received on November 10, 2005 from Richmond John, Heath Lambert Group

stating that the underwriters have offered 60 per cent on certain terms, which includes commission including brokerage at 15 per cent. The said document reads as follows:

"Further to your today's e-mail have discussed with underwriters and have so far obtained 60 per cent support to the following:

(1) INR 3,027 million excess of loss to MR 600 million (i.e., USD 66,535,784 excess of loss to USD 13,188,262).

(2) Rate 0.0275 per cent payable on INR 3,027 million.

(3) Full wording to be agreed also underlying wording to be agreed by London Reinsurers, which please forward.

(4) Total commission your side including your brokerage 15.00 per cent.

Further to the above please advise how many vehicles will be carrying the Radar equipment. Will discuss with others tomorrow to obtain 100 per cent support to the above terms unless we hear otherwise from you. We await your further advices with much interest.

Kind Regards,

John."

27. Thereafter, after series of negotiation, it appears that the assessee wanted to part with portion of the cover based on part of the commission to the New India Assurance Co. Ltd. to sustain the business and, therefore, offered to take 7.5 per cent as cover including brokerage and passed on the benefit to the New India Assurance Co. Ltd. This is evident from the letter dated November 15, 2005, which reads as follows:

"Sub. : Marine Cargo Transit Insurance--A/c. LRDE Further to our communication dated November 11, 2005 providing you terms on XL basis, and subsequent discussions you had with our Mumbai Office Executives, we have persuaded the underwriters to provide terms on "proportional basis" and have now obtained concurrence for the lead underwriter for the same indicating "rate at 0.075 per cent (taxes/levies extra at actuals), ICC "A" including SRCC. All other terms and conditions remain unaltered, including R/I Commission at 7.5 per cent making the nett rate to you at 0.06937 per cent.

Trust this meets with your requirement and we request you to kindly confirm your FAC RI order in order to proceed to bind 100 per cent support.

We await your response."

28. Subsequent to the above correspondence, the New India Assurance Co. Ltd. made an offer to the assessee that they were willing to place the risk at 0.075 per cent premium less ten per cent RI commission on certain terms. This was subsequently confirmed by the assessee on November 18, 2005 stating as

follows:

"Further to our communication dated November 15, 2005 providing you terms on proportional basis, we are now forwarding herewith our complete quote slip reference No. SUPRA/MS/2411/2005/QTN/537, dated November 18, 2005.

We are pleased to advise that the RI Commission has been increased to ten per cent and trust this will enable you to stay competitive

Trust this meets with your requirement and we request you to kindly confirm your FAC RI order in order to proceed to bind 100 per cent support."

29. The above discussions were confirmed by the New India Assurance Co. Ltd. vide letter dated December 12, 2005, stating as follows:

"Re: Reinsurance of risk--LRDE (Bangalore) marine transit risk.

We confirm our discussions on the reinsurance quote for the above proposal. The risk has now been accepted by our Bangalore office. We are placing the risk with you at 0.075 per cent premium less ten per cent RI commission giving us the net rate of acceptance.

The policy details will be sent to you immediately on receipt from our Bangalore office."

30. Thereafter, Heath Lambert Group, the reinsurer, issued a cover note dated December 28, 2005 for a sum of Rs. 340 crores. Based on the said cover note, debit note was raised. The debit note states that the sum insured was Rs. 340 crores; rate of premium 0.075 per cent inclusive of SRCC; order premium is Rs. 21,01,200 RI commission ten per cent and the premium due to the reinsurer is Rs. 18,91,080 (taxes/levies extra at actuals). The bank details for payment has been stated as follows:

"Bank of India, Nariman Point Branch, Mumbai 500 021. Bankers MICR No. 400013043. Further credit to Suprasesh General Insurance Services and Brokers Pvt. Ltd. current account CD No. 4768."

31. The assessee forwarded the cover note and debit note to the New India Assurance Co. Ltd. on January 16, 2006 for processing the debit note for immediate payment. Thereafter, on January 19, 2006, the Heath Lambert Group raised a debit on the assessee in the following manner:

32. As a follow-up, another letter was issued by the assessee to the chief manager, Bank of India, Overseas Branch, Armenian Street, Chennai requesting the bank to remit the payment of Indian rupees 16,80,960 in equivalent US dollars, based on the debit note dated January 19, 2006. The details of the said letter reads as follows :

"We have to remit the payment of premium of INR 16,80,960 in respect of the above risk to M/s. Heath Lambert Ltd., London, who have sent their debit note No. MB3686005/0030201, dated January 19, 2006.

We would request you to kindly arrange for the remittance of Rs. 16,80,960 in equivalent LIS dollars debiting our current account No. 3967 with your Egmore Branch.

We give below the name and address of the beneficiary for your ready reference.

National Westminster Bank Plc (Comm. Rd., Sindon)

Swindon

Sort Code : 60-21-40-Swift: NWBKGB2L.

Beneficiary : Heath Lambert Group (Client money)

A/c No. 01007564

IBAN: GB89NWBK60214001007564 In this connection, we are enclosing herewith the following documents:

1. Copy of letter dated November 12, 2005 from M/s. The New India Assurance Co. Ltd., Mumbai.
2. Copy of the above mentioned debit note.

Kindly acknowledge and send us your confirmation for having effected above remittance."

33. The New India Assurance Co. Ltd., on the basis of the debit note dated January 16, 2006, issued a cheque dated February 14, 2006 for a sum of Rs. 18,91,080.

34. A careful reading of the above said documents reveals that the net premium payable by the New India Assurance Co. Ltd. to the reinsurer in London is Rs. 21,01,200. After extending the benefit of ten per cent commission, the net premium due to Heath Lambert Limited comes to Rs. 18,91,080. Under the terms of contract, for providing the service as reinsurance broker, which fact is not disputed, a sum of Rs. 16,18,960 alone is remitted to M/s. Heath Lambert Group as client money as set out by the assessee in the letter to the chief manager, Bank of India, Overseas Branch, Chennai dated January 25, 2006 as net premium, retaining the balance amount as commission/brokerage. This transaction is illustrative of series of transactions which had taken place over the period in dispute in the show-cause notice. In effect, in respect of remitting the entire amount to the reinsurer and getting the brokerage separately, the assessee, in this case, in relation to the trade practice prevalent in the trade internationally and following the practice and procedure that is followed by the reinsurance brokers with the reinsurance companies, the assessee had retained that portion of the commission or brokerage and remitted the balance to the reinsurance company at London.

35. In this situation, there arose a problem between the assessee and the Department. According to the Department, the amount was paid by New India

Assurance Co. Ltd. for the services rendered to them and since the nature of transaction undertaken by the assessee is primarily in relation to the client in India, namely, the New India Assurance Co. Ltd., it is not a case of export of service. To support this argument, it was contended that there is no receipt of convertible foreign exchange by the assessee in this transaction and, therefore, they would not fall within the parameters of Notification No. 6/1999 , dated April 9, 1999, 9/2001, dated July 16, 2001, 13/2002 , dated August 1, 2002 and 2/2003 , dated March 1, 2003.

36. The issue raised by the Department is sought to be repelled by the assessee by placing reliance on the decision in the case of J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, . The first contention is that the nature of services rendered by the appellant is reinsurer's brokerage and their service falls under the definition of "export of service", as primarily their business is to get the services of the reinsurer located abroad for the benefit of the client in India. To buttress this argument that the nature of business undertaken by the assessee is in the nature of service rendered to a foreign company, the decision in the case of J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, was relied upon.

37. In the case of J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, , the dispute arose under section 80-O of the Income-tax Act. The appellant therein was engaged in the brokerage business as reinsurance brokers, as in the present case. It received commission at three to six per cent relating to maritime and other insurance. The appellant in that case arranged for reinsurance of a portion of the risk with various reinsurance companies either directly or through foreign brokers. In return, the appellant-company received a percentage of premium received by the foreign company as its share of brokerage. In that case, the Oil and Natural Gas Commission insured all their offshore oil and gas exploration and production operations with the United India Insurance Company, Madras. In respect of this insurance risk, the appellant contacted Sedgwick Offshore Resources Ltd., London, who are brokers in London for placement of reinsurance business. The appellant therein furnished all the details about the risk involved, the premium payable, the period of coverage and the portion of the risk which is sought to be reinsured. The said London brokers contacted various underwriters and after getting confirmation about the portion of the risk the foreign reinsurers were prepared to undertake, informed the appellant about such reinsurance coverage. Thereafter, the Indian ceding company handed over the total premium to be paid by it to the foreign reinsurance company, to the appellant for onward transmission. When this amount was given to the appellant, the appellant approached the Reserve Bank of India with a statement showing the amount of foreign currency payable as reinsurance premium to the foreign parties after deducting the amount of brokerage due to the appellant. This balance amount after deducting the brokerage, was remitted to the London brokers with the permission of the Reserve Bank of India.

38. The appellant-M/s. J.B. Boda contended that amount of commission retained by it was a receipt of convertible foreign exchange without a corresponding foreign remittance within the meaning of section 9 of the Foreign Exchange Regulation Act. In that case, the Indian insurers make payment in rupees to the appellant-J.B. Boda for the amount of reinsurance premium to be remitted to the foreign company, furnishing all particulars with an advice to the appellant to approach the Reserve Bank of India for necessary permission to remit in US dollars the reinsurance premium abroad. Based on that request, by following the procedure prescribed and based on the agreement with M/s. Sedgwick Offshore Resources Limited, London, the appellant remitted the premium of US dollars 989,887.20 on January 11, 1984 to the Union Bank of India after retaining the fee of 71,004.48 dollars for the technical services rendered. The appellant therein claimed the said amount as income in terms of foreign exchange as per section 80-O of the Income-tax Act. The Income-tax Department, however, took a view that the income in question was generated in India and was not received in convertible foreign exchange as required under section 80-O and declined the grant of benefit. The challenge to the said proceedings was dismissed by the Delhi High Court and the matter was persuaded before the apex court.

39. Section 80-O of the Income-tax Act, as it then was reads as follows:

"80-O. Deduction in respect of royalties, etc., from certain foreign enterprises.-- Where the gross total income of an assessee, being an Indian company, includes any income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or a foreign enterprise in consideration for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee, or in consideration of technical services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee, under an agreement approved in this behalf by the Chief Commissioner or the Director-General and such income is received in convertible foreign exchange in India, or having been received in convertible foreign exchange outside India, or having been converted into convertible foreign exchange outside India, is brought into India, by or on behalf of the assessee in accordance with any law for the time being in force for regulating payments and dealings in foreign exchange, there shall be allowed, in accordance with and subject to the provisions of this section, a deduction of an amount equal to fifty per cent of the income so received in, or brought into, India, in computing the total income of the assessee:

Provided that the application for the approval of the agreement referred to in this section is made to the Chief Commissioner or, as the case may be, the Director-General in the prescribed form and verified in the prescribed manner before 1st day of October of the assessment year in relation to which the approval is first

sought:...

Explanation.--For the purposes of this section,--

(i) "convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the law for the time being in force for regulating payments and dealings in foreign exchange;

(ii) "foreign enterprise" means a person who is a non-resident."

40. The question that arose in that case was whether instead of remitting the amount to the foreign reinsurers first and receiving the commission due to the appellant later, the arrangement by which the appellant remitted the reinsurance premium, after retaining the fee due to it for technical services rendered, would satisfy the requirement of section 80-O of the Income-tax Act.

41. The contention of the Department before the apex court in that case was that the Central Board of Direct Taxes was justified in declining to approve the agreement submitted by the appellant since the income under the agreement is generated in India and is not received in convertible foreign exchange as required under section 80-O of the Act. This contention of the Department has got two components. First is the income under the agreement is generated in India and the second is that the income is not received in convertible foreign exchange as required under section 80-O of the Income-tax Act. Both contentions were repelled by the Supreme Court holding that the nature of business undertaken by the reinsurance broker in providing reinsurance to ONGC through the foreign company, namely, Sedgwick Offshore Resources Ltd., London, who is also a broker is in the nature of services rendered outside India.

42. On the issue as to whether the retention of the commission of brokerage by the appellant-J.B. Boda, the insurance broker would amount to receipt of convertible foreign exchange as required under section 80-O of the Income-tax Act, the Supreme Court placing reliance on circular No. 731, dated December 20, 1995 held that the premium that is payable to the reinsurer abroad is transferred through the medium of Reserve Bank of India in foreign exchange terms and the retention of the fee due to the appellant-J.B. Boda is in dollars for the services rendered. According to the Supreme Court, the retention of the amount by J.B. Boda would be a receipt of income in convertible foreign exchange to avoid unnecessary two-way traffic, i.e., to avoid formal remittance to the foreign insurers first and thereafter to receive the commission from the foreign reinsurer, as it may be an empty formality and a meaningless ritual. It is to be noted that in J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, , the amount was received by the appellant reinsurance broker in Indian rupees and thereafter by approaching the Reserve Bank of India necessary permission was sought for to convert the same into US dollars. In the present case, the amount is received by the assessee in Indian rupees and through the banking channels, the premium less the commission/brokerage is sent in foreign

exchange to the reinsurer abroad.

43. In answer to the issue raised before the Supreme Court in J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, , taking note of the nature of transaction, the Supreme Court clearly held that the view of the respondent/Department therein that in respect of reinsurance service, there is no generation of income in India, but it is only in relation to the services rendered outside India. This finding of the Supreme Court, which is in two components, has not been taken note of by the adjudicating authority as well as the Tribunal. Hence, we hold that the services rendered by the assessee in this case to the reinsurer abroad and the transaction with the foreign reinsurer would have to be necessarily accepted as "export of service". Once we hold that it is export of service, we will now look into the provisions of the Service Tax Act.

44. In so far as Notification Nos. 6/1999, dated April 9, 1999 and the rescinding Notification No. 2/2003, dated March 1, 2003 and subsequent Notification No. 21/2003 , dated November 20, 2003 are concerned, though relied upon by the assessee at the first instance in the light of J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, , we feel that may not be really necessary to resolve the issue raised in the present case, as all these notifications granted exemption from payment of service tax to any person, in respect of which payment is received, specified under sub-section (48) of section 65 of the Finance Act provided, to any person, in respect of which payment is received in India in convertible foreign exchange from whole of service tax.

47. This position does not really affect the case of taxable service. It is clarified by the Government of India, Ministry of Finance, vide circular dated April 25, 2003, which we have already referred to, emphasis can be made to paragraph 3, which we reiterate hereunder:

"3. The Board has examined the issue. In this connection I am directed to clarify that the service tax is destination based consumption tax and it is not applicable on export of services. Export of services would continue to remain tax-free even after withdrawal of Notification No. 6/1999 , dated April 9, 1999. Further it is clarified that service consumed/provided in India in the manufacture of goods which are ultimately exported, no credit of service tax paid can be availed or reimbursed at present as intersectoral tax credit between services and goods are not allowed."

(emphasis1 supplied)

46. This circular clarifies that service tax is destination based consumption tax and it is not applicable to export of service. They have clarified that export of service would continue to remain tax-free even after withdrawal of Notification No. 6/1999, dated April 9, 1999. In effect, if the destination based consumption tax is relatable to export of service, all these notifications will have no effect. This clarification gets the stamp of approval by the Supreme Court in the decision reported in All India Federation of Tax Practitioners and Others Vs. Union of India

(UOI) and Others, , wherein in paragraph 25, the Supreme Court held as follows (page 419 of 293 ITR) :

"On the basis of the above discussion, it is clear that service tax is VAT which in turn is both a general tax as well as destination based consumption tax leviable on services provided within the country."

47. A reading of the said circular issued by the Government of India which is binding on the Department makes it clear that the applicability of service tax will be only in relation to services provided within the country and not in relation to export of service. As a matter of fact, the substantial portion of the demand in the show-cause notice and the adjudication order falls outside the purview of the Export of Service Rules. On and from March 15, 2005, Export of Service Rules comes into operation. The period between March 15, 2005 to March 31, 2006, the Rules may apply and in the instant case up to March 31, 2006. However, it is now argued by Shri Natarajan, learned senior counsel appearing for the assessee, that in respect of term "export of taxable service" and any service which is taxable under clause (105) of section 65 of the Finance Act may be export without payment of service tax and the exclusion, "the export of taxable services" are enumerated under rule 3 of the Export of Service Rules, 2005.

48. The taxable service has been listed in rules 3(1) and 3(2) of the Export of Services Rules, 2005, which reads as follows:

"3. Export of taxable service.--The export of taxable service shall mean,--

(1) in relation to taxable services specified in sub-clauses (d), (p), (q), (v) and (zzq) of clause (105) of section 65 of the Act, such taxable services as are provided in relation to an immovable property which is situated outside India;

(2) in relation to taxable services specified in sub-clauses (a), (f), (h), (i), (j), (l), (m), (n), (o), (s), (t), (u), (w), (x), (y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zza), (zzc), (zzd), (zzf), (zzg), (zzh), (zzi), (zzj), (zzl), (zzm), (zzn), (zzo), (zzp), (zzs), (zzt), (zzv), (zzw), (zzx) and (zzy) of clause (105) of section 65 of the Act, such services as are performed outside India:

Provided that if such a taxable service is partly performed outside India, it shall be considered to have been performed outside India."

49. Section 65(10)(zl) does not find place in rule 3(2), neither it finds place in rule 3(3), Explanatory part of rule 3(3), namely, 3(3)(i) and 3(3)(ii). Export of taxable services include:

"(i) such taxable service which are provided and used in or in relation to commerce or industry and the recipient of such services is located outside India:

Provided that if such recipient has any commercial or industrial establishment or any office relating thereto, in India, such taxable services provided shall be treated as export of services only if--

(a) order for provision of such service is made by the recipient of such service from any of his commercial or industrial establishment or any office located outside India;

(b) service so ordered is delivered outside India and used in business outside India; and

(c) payment for such service provided is received by the service provider in convertible foreign exchange;

(ii) such taxable services which are provided and used, other than in or in relation to commerce or industry, if the recipient of the taxable service is located outside India at the time when such services are received.

Explanation.--For the purposes of this rule "India" includes the designated areas in the Continental Shelf and Exclusive Economic Zone of India as declared by the notifications of the Government of India in the Ministry of External Affairs Nos. S.O. 429(E), dated July 18, 1986 and S.O. 643(E), dated September 19, 1996."

50. There is some difficulty in identifying the particular clause because there are two 3(ii). The proviso to rule 3(3) does not get attracted to the present case, as the recipient of the taxable service is not located in India. According to the proviso, the recipient of such taxable services does not have commercial or industrial establishment or office relating thereto in India. In the present case, the reinsurance broker has rendered service outside India and does not fall within rule 3(3) and that fact is not disputed. Therefore, for this period on and from March 15, 2005, any taxable services which are provided and used, other than in or in relation to commerce or industry and the recipient of the taxable service is located outside India in terms of rule 4, there is no requirement of payment of service tax.

51. Yet another factor, which ensures to the benefit of the assessee is that in contrast to rule 3(3)(i)(ii) and (iii) and the proviso makes it clear that only in respect of the services relatable to proviso, if the payment received for such service by the service provider is in convertible foreign exchange, then it will be export of taxable service. Since the insurer in the present case does not fall within the ambit of proviso and as we have held that in the nature of transaction in question it is an export of service, as has been held by the Supreme Court in J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, , the Department was clearly in error in calling upon the assessee to pay service tax on commission/brokerage received by the assessee from the foreign reinsurer for the period in issue in the show-cause notice.

52. The learned standing counsel appearing for the Department placed much emphasis on IRDA (Insurance Brokers) Regulations stating that the definition on "reinsurance broker" clearly means that an insurance broker, who, for a remuneration, arranges reinsurance for direct insurers with insurance and reinsurance companies. In the present case, the assessee has acted as a

reinsurance broker with the New India Assurance Co. Ltd. and with the foreign company and his functioning as reinsurer is predominantly in relation to New India Assurance Co. Ltd. and not to the foreign reinsurer.

53. Though such a plea appears to be appealing, it was pointed out by the learned senior counsel appearing for the assessee that in Swiss Re's non-life branches manual with regard to reinsurance matters, the role of the reinsurance broker has been described as follows:

"6.4 Role and function of the reinsurance broker

The role of the reinsurance broker has been described as being:

". . . to professionally advise clients concerning the optimal reinsurance programme, proper retentions and adequate capacity based upon the broker's experience and knowledge of market availability. The resulting programme is then placed for the client with secure markets at competitive price or terms."

As an intermediary, the reinsurance broker seeks suitable reinsurers, on behalf and in the interest of primary insurers and their reinsurance requirements. He advises the primary insurer on adequate risk coverage, negotiates and finalises the placement of reinsurance contracts and handles administrative issues related to the reinsurance contract. In collaboration with the reinsured, the broker prepares all the details of the reinsurance submission (general information on the market and the reinsured, portfolio profile, exposure data, statistics, terms and conditions) and identifies the reinsurance market with the best conditions, from both an economic and solvency standpoint. The broker usually approaches a reinsurer, who is recognised as a well-known leader suitable for the type of business to be placed, and negotiates the final terms, which are summarised on the reinsurance slip. After the terms and conditions have been finalised with the leader, the broker places the entire business by approaching other reinsurers. The placement of treaties with high capacities or premium volumes, or large special facultative risks of a complex nature, is sometimes shared by and between two or more brokers, through different reinsurance markets, i.e., so-called co-brokering. After the business is successfully placed, the broker allocates the shares to the participating reinsurers (signing down in case of oversubscription) and prepares the reinsurance contract wordings. He also establishes the accounts, usually quarterly, on the basis of figures provided by the reinsured and transmits monies in settlement of balances due by either party. The correspondence between reinsured and reinsurer is channelled through the broker. It is vital for the reinsured and the reinsurer that the standard of organisation and administration of the reinsurance broker ensures reliability and efficiency, particularly with regard to contract and administration and handling of accounts, including cash loss settlements.

The services of reinsurance brokers are usually required for placing and properly spreading high exposure cat covers (e.g., natural perils such as windstorm and earthquake), taking advantage of their contact networks with reinsurance

markets worldwide.

The reinsurer pays the reinsurance broker a commission, called brokerage, which remunerates the broker for his services in placing and handling reinsurance contracts. The reinsurance brokerage is further justified since the broker saves reinsurer acquisition costs, which he would otherwise incur through direct marketing efforts. The brokerage is usually stipulated as a percentage of the reinsurance premium; it has recently started to take the form of a fee, especially in case of specialised types of reinsurance business. Brokerage rates tend to vary according to market conditions. As a rule, they are much lower for proportional than NP treaties since the latter normally generate lower premium volumes. Higher volumes of business tend to produce lower brokerage rates. In rare instances, brokerage is linked to treaty results.

Brokerage is not an integral part of the contractual relationship between reinsureds and reinsurers. However, when quoting for NP business, it constitutes one of the pricing elements used by the reinsurer.

Treaties placed through brokers usually include an intermediary clause for which two types with commentaries are included in section 2.3.8, general treaty clause."

(emphasis supplied)

54. We find that the functions of the reinsurance broker is no different from the definition contained in Swiss Re's non-life reinsurance manual. The assessee in this case has been conducting affairs of insurance and reinsurance for and on behalf of New India Assurance Co. Ltd. in terms of rule 4(c), (d), (e), (f), (g) and (h) of the IRDA (Insurance Brokers) Regulations, which are as follows:

"4. Functions of a reinsurance broker.--the functions of a reinsurance broker shall include any one or more of the following:...

(c) rendering advice based on technical data on the reinsurance covers available in the international insurance and the reinsurance markets;

(d) maintaining a database of available reinsurance markets, including solvency ratings of individual reinsurers;

(e) rendering consultancy and risk management services for reinsurance;

(f) selecting and recommending a reinsurer or a group of reinsurers;

(g) negotiating with a reinsurer on the client's behalf;

(h) assisting in case of commutation reinsurance contracts placed with them."

It is seen that there is also a further role on the part of the assessee, which has been indicated in regulation 4(i), (j), (k), (l) and (m), which are as follows:

"(i) acting promptly on instructions from a client and providing it written

acknowledgments and progress reports;

(j) collecting and remitting premiums and claims within such time as agreed upon;

(k) assisting in the negotiation and settlement of claims;

(l) maintaining proper records of claims; and

(m) exercising due care and diligence at the time of selection of reinsurers and international insurance brokers having regard to their respective security rating and establishing respective responsibilities at the time of engaging their services."

55. From the facts narrated, we have culled out that the role of the assessee is collecting and remitting the premium. There is also a commitment on the part of the assessee in relation to any claims that may arise from New India Assurance Co. Ltd. in respect of reinsurance contract. IRDA (Insurance Brokers) Regulations further casts a duty on the assessee as to how the money collected in relation to the reinsurance contract should be dealt with by the broker. The terms contained in regulation 23 speaks for itself that the role of the assessee as an insurance broker is not merely receiving and transmitting the amount as has been propounded by the adjudicating authority and the Tribunal. There is much more to be done by the Insurance broker even as per the IRDA (Insurance Brokers) Regulations, of which much emphasis has been made by the Tribunal in paragraph 15. If this is the role of the assessee, we fail to understand how the Tribunal could have said that it is just forwarding the premium amount to the reinsurer company. There is also a clear finding by the Tribunal that the assessee serves the foreign company in the course of the business, but the apprehension of the Department, confirmed by the Tribunal, is that most of the work done by the assessee is in relation to the Indian Insurance Company and, therefore, it is not an export of service.

56. That finding is a fallacy in the light of the findings given by the Supreme Court in J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, , as also the provisions of the Service Tax Act, more particularly, the binding circular of the Reserve Bank of India dated April 25, 2003. On the issue of non-receipt of the commission or brokerage in convertible foreign exchange, the adjudicating authority as well as the Tribunal have time and again misdirected themselves to hold that since the New India Assurance Co. Ltd. have paid the premium amount, it cannot be treated as receipt of amount in convertible foreign exchange and for this, Mr. M. Santhanaraman, the learned standing counsel appearing for the Department submitted that there is no specific agreement as in the case of J.B. Boda and Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, New Delhi, and, therefore, it stands distinguished.

57. Under RBI regulations, there was a requirement of such an agreement under law and the permission of the RBI has to be obtained before remitting the foreign exchange. That issue does not arise in the present case and the provisions of the

Service Tax Act do not impose such a condition. In any event, as we have held that the basis of the circular, which is clarified that Notification Nos. 6/1999 , dated April 9, 1999, 9/2001, dated July 16, 2001, 13/2002 , dated August 1, 2002 and 2/2003 , dated March 1, 2003 would not apply to export of service, the question of receiving the payment in convertible foreign exchange does not arise. Even the Export of Service Rules, 2005 do not put an embargo in relation to taxable service as specified in rule 3(3)(i), (ii) and (iii) of the Export of Service Rules. Therefore, we answer the substantial question of law Nos. 1 and 2 in Civil Miscellaneous Appeal No. 1058 of 2009 in favour of the assessee.

58. In view of the above, the other questions of law raised in the appeal filed by the assessee as well as in the appeal filed by the Revenue in relation to suppression and penalty does not arise. In the result, Civil Miscellaneous Appeal No. 1058 of 2009, is allowed and Civil Miscellaneous Appeal No. 1459 of 2009 is dismissed. No costs.

1Here printed in italics.