CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL No. 55146 OF 2013

(Arising out of Order-in-Original No. 35/Commr/MRT-1/2012 dated October 9, 2012, passed by the Commissioner, Central Excise, Meerut)

M/s Involute Engineering Pvt. Ltd. **.....Appellant**
C-4, Sara Industrial Estate Ltd.
Chakrata Road, Shankerpur Hakumatpur Sahas Pur
Dehradun

Versus

Commissioner of Central Excise And Service Tax **.....Respondent**
Opp., CCS University,
Mangal Pandey Nagar
Meerut – I

APPEARANCE:
Shri B. L. Narasimhan and Shri Kunal Aggarwal and Ms. Shagun Arora, Advocates for the Appellant
Shri Radhe Tallo, Authorised Representative for the Respondent

CORAM : HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE SHRI P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 51635/2020

Date of hearing: 07.12.2020
Date of decision: 14.12.2020

JUSTICE DILIP GUPTA :

This appeal is directed against the order dated October 3, 2012 passed by the Commissioner, Central Excise, Meerut-I[1] by which the demand of service tax amounting to Rs. 1,67,47,188/- has been confirmed with interest and penalty.

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1. **the Commissioner**

2. The period of dispute is 2006-07 to 2010-11 and the issue involved in this appeal is regarding demand of service tax on services rendered to foreign companies.

3. The appellant is engaged in rendering "business auxiliary service"[2] and represents various foreign companies in India, in lieu of which it receives commission. The services rendered by the appellant include procurement of orders for foreign companies; assistance in participation of tenders; negotiation with customers; collection of payments; and liaising activities. The appellant did not discharge service tax on the commission received in convertible foreign currency as it believed that the services rendered by it to foreign companies amounted to export of service under the "Export of Service Rules, 2005"[3].

4. During the course of audit of the records of the appellant for the period January, 2006 to March, 2009, the officers noticed that the appellant had received commission from abroad during the period from 2004-05 to 2008-09, which appeared to be taxable under BAS. Accordingly, a show cause notice dated October 21, 2011 was issued to the appellant. It was proposed to levy service tax since the services rendered by the appellant may not tantamount to export of service under the 2005 Rules for the reason that though the services were rendered to foreign companies, but the same were provided and used in India. The appellant filed a reply to the show cause notice and submitted that

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2. BAS
3. 2005 Rules

the services provided by the appellant, were export of services and so were not leviable to service tax.

5. The Commissioner, however, did not accept the explanation offered by the appellant and confirmed the demand by order dated October 3, 2012. After examining the provisions of Rule 3(2)(a) of the 2005 Rules, the Commissioner observed as follows :

> "4.7 A look into the provision of Rule 3(2)(a) reveals that the requirement of law is that the service is delivered outside India and used outside India. The notice has claimed that the services rendered by them amounts to export of service under the provisions of Export of Service Rules 2005 and therefore not liable to service tax. **It is true that export of service is not liable to pay service tax if it truly falls under 'export'. I observe that the word export finds mention in the Customs Act, 1962. In the said Act, Section 2(18) defines export as the activity of "taking out of India to a place outside India". Thus, it is a recognized to test to hold an activity to be an export. It is clear from above that exports involve a taking out of the country.** Admittedly, for an export, there invariably involves two terminals. Service generated in one terminal should t ravel outside to the second terminal for ending thereat. Only then can an export be said to have been made. Thus, the concept of export is clear and there is no ambiguity on this point."
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> **(emphasis supplied)**

6. The Commissioner, thereafter rejected the submissions advanced on behalf of the appellant that since the foreign clients were located outside India and did not have any office in India, the services rendered should be deemed to have been delivered outside India and used outside India and the observations are as follows:

> "4.9 I have considered the above submissions of the notice-company. Therefore, I proceed to examine the case on pure merits as to whether the services rendered in this case have actually been delivered outside India/provided from India and used outside India upto (28.02.2007)/w.e.f 01.06.2007). **I find that export of Services Rules clearly specify two separate set of conditions for a service to be qualified as export of service i.e the user(recipient) should be located outside India** {Rule 3(1) (iii)} and the use should also be outside India {Rule 3(2)(a)}. These two conditions have to be satisfied independently of each other. The conditions are to be satisfied not only exactly but truly also. It is observed that such services were provided by the Noticee-Company in India and were not

> provided elsewhere. The notice is on record that they are rendering the services of 'Commission Agent' falling under the category of BAS undertaking the activities as detailed in para 4.5(d). **Thus, it is inconceivable from the perusal of such activities that the above said services provided in India can even be delivered or used in a territory other than from where these have been provided.** There is no denying of the fact that the benefits in this case would definitely flow to foreign clients located outside but that does not lent credence that services have been used outside India."
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> **(emphasis supplied)**

7. The Commissioner thereafter examined the two Circulars dated February 24, 2009 and May 13, 2011 issued by the Central Board of Excise and Customs, New Delhi[4], and observed as follows :

> "4.12 **I have perused Circular** No. 111/05/2009-ST **dated 24.02.09 and Circular** No. 141/10/2011-TRU dated **13.05.2011 along with Export of Service Rules** as referred to by the notice. I find that the Export of Service Rules 2005 do not approve plea of export made by the noticee in view of Circular No.141/10/2011-TRU dated 13.05.2011. **The Rules envisaged that services have to flow abroad for consumption thereat so as to qualify to be export of service**. The Circular simply reinforces the fact & principle that what is not an 'export' cannot be imagined to be so. **It is observed that the noticee under took the promotion of market of foreign client in the Territory of India and that cannot be construed to be a service provided abroad**. The service of promotion of goods resulted in soliciting customers in Indian Territory only. Such service came to an end as soon as customers were solicited. Nothing has gone abroad to solicit the customers. **The origin and termination of promotion of goods is with the territory of India only and as such there was no export of service at all**. Moreover, the Export of Service Rules, 2005 also do not approve export of service plea of the noticee.
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> 4.13 I further find that the circular dated 13.05.2011 has removed the anomaly barring the plea of 'export' in absence of real export of service made by the noticee. **Therefore, I find that the activities undertaken by the Noticee is no export of service within the meaning of Rule 3(1)(iii) and Rule 3(2) (a) of Export of Services Rule 2005 as the condition of service being provided from India and <u>used outside India</u> is partially met i.e. provided from India.** The Noticee in its submissions too has not disputed the fact that the services rendered by them to their foreign clients are used and consumed in India but have pleaded for exemption on the ground that the benefits if such service have accrued outside India. Therefore, plea of export made by the notice has no basis under the law. Accordingly, in view of above discussion, I hold that he Noticee is liable to pay service tax on the amount of commission received

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4. CBEC

> from its foreign based clients in respect of services rendered as 'commission agent' under the category of BAS."
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> **(emphasis supplied)**

8. It needs to be noted that Rule 3(2) of 2005 Rules was amended w.e.f February 27, 2010. In regard to the period from February 27, 2010, the Commissioner observed as follows:

> "4.17 Further, the claim of notice that they have received Rs. 3,17,91,154/- as commission during the period from 27.02.2010 to 31.03.2011 and the service tax liability on the said amount alleged to be of Rs. 32,74,489/- is not payable by them in view of above amendment, was examined. **I find that the commission amount of Rs. 3,17,91,154/- claimed to have been received by them after 27.02.2010 is not found in consonance with the period of services rendered i.e. the assessee has not submitted the proof that the amount claimed to have been received by them after 27.02.2010 is in respect of services rendered after 27.02.2010 and not before that date i.e. the date on which the above said amendment was carried out.**
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> **(emphasis supplied)**

9. Shri B.L. Narasimhan, learned counsel for the appellant made the following submissions:

(i) The appellant is not liable to pay service tax on commission received from foreign companies and the findings recorded in the impugned order are clearly contrary to the principles laid down in various decisions that promotion and marketing of goods of foreign companies in India would qualify as export of service.

(ii) In support of this submission, learned counsel placed reliance upon the following decisions :

1. **Paul Merchants Ltd.** vs. **Commissioner of C. Ex, Chandigarh**[5];

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5 2013(29)STR 0257(Tri.Del)

2. **ABS India Ltd.** vs. **Commissioner of SERVICE Tax, Bangalore**[6];

3. **Blue Star Limited** vs. **Commissioner of Central Excise, Bangalore**[7];

4. **GAP International Sourcing (India) Pvt. Ltd.** vs. **Commissioner of Service Tax**[8];

5. **M/s IXIA Technologies (P) Ltd.** vs. **Commissioner of Service Tax, Kolkata** (vice-versa)[9];

6. **Microsoft Corporation (I) (P) Ltd.** vs. **Commr S.T, New Delhi**[10];

7. **Commissioner of Service Tax, Mumbai-VI** vs. **A.T.E Enterprises Private Limited**[11];

8. **Commissioner of Service Tax-VII** vs. **Wartsila India Limited**[12];

9. **Bentley Systems (I) Pvt. Ltd.** vs. **Commissioner of Service Tax, New Delhi**[13];

10. **M/s Sumitomo Corporation India Pvt. Ltd.** vs. **Commissioner of Service Tax, Delhi**[14];

11. **Verizon Communication India Private Limited** vs. **Assistant Commissioner of Service Tax, Delhi**[15];

12. **The Commissioner of Service Tax-IV** vs. **M/s Citi Bank**[16];

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6 2009(13)STR 65(Tri.-Bang.)

7 2008(11)STR 23 (Tri.-Bang.)

8 2014-TIOL-465-CESTAT-DEL

9 2019(10)TMI 1107-CESTAT-KOLKATA

10 2014(36)STR 766(TRI.-DEL.)

11 2018(8)GSTL 123 (Bombay)

12 2019(24) GSTL 547(Bombay)

13 2017-TIOL-3714-CESTAT-DEL

14 2017-TIOL-452-CESTAT-DEL

15 2018(8) GSTL 32(Delhi)

16 2018(9) TMI 584(Bombay High Court)

13. **M/s Daikin Air Conditioning India Pvt. Ltd.** vs. **CCE, New Delhi**[17];

14. **M/s Trinity Touch Private Ltd.** Vs. **Commissioner, Service Tax, Delhi**[18];

15. **M/s Fanuc India Pvt. Ltd.** Vs. **C.C.E & S.T, Bangalore-LTU**[19];

16. **Commissioner of S.T., Mumbai-VII** Vs. **Abbott Healthcare Pvt. Ltd.**[20];

(iii) The Commissioner has misread the Circular dated May 13, 2011 in as much as the said Circular provides that services would be used outside India if a benefit of such service accrues outside India and accrual of benefit should be tested beyond the factor of the person who pays for such service. This apart, the said Circular was issued on May 13, 2011 and, therefore, would not be relevant for the period in dispute; and

(iv) The 2005 Rules were amended w.e.f February 27, 2012 and the condition "such service is provided from India and used outside India" was deleted from Rule 3(2) of the 2005 Rules. Thus, for the period 2010-11, the only requirement is that the service recipient should be situated outside India and consideration is received in foreign currency. Since both the conditions have been satisfied, no service tax was payable by the appellant, as the service

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17 2018-VIL-17-CESTAT—CHD-ST

18 2018(8)TMI 1686-CESTAT, New Delhi

19 2020(1)TMI 316-CESTAT Bangalore

20 2019(31)GSTL 83 (Tri-Mumbai).

provided by the appellant to the foreign companies qualifies as export.

10. Shri Radhe Tallo, learned authorized representative of the Department, however, supported the impugned order and made the following submissions:

(i) The Commissioner was justified in confirming the demand of service tax for the service provided by the appellant from April, 2006 to February 26, 2010. Even for the period commencing February 27, 2010, the Commissioner was justified in confirming the demand of service tax since the appellant failed to correlate the receipt of commission with the period of service;

(ii) Appeals against some of the decisions or the Tribunal, on which reliance has been placed by learned counsel for the appellant, are pending in the High Court or the Supreme Court and so these decisions should not be taken into consideration. In support of this contention, reliance has been placed on the decisions of the Supreme Court in **Union of India** vs. **West Coast Paper Mills Ltd.**[21] and **Kunhayammed** vs. **State of Kerala**[22];

(iii) A Division Bench of the Tribunal in **ARCELOR Mittal Projects India Pvt. Ltd.** vs. **Commr. of S.T., Mumbai-II**[23] has referred the matter to the President of the Tribunal

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21 2004 (166) ELT 290 (SC)

22 2001 (129) ELT 11 (SC).

23 Order dated July 4, 2019 in service tax appeal No. 88483/2014

for constituting a larger Bench, as the view the Bench proposed to take was contrary to the views expressed by co-ordinate Benches of the Tribunal; and

(iv) The words "accrual of benefit" used in the Circular dated February 24, 2009 should be given a harmonious interpretation, keeping in mind the fact that during the period upto February 26, 2010, an explicit condition existed in the rule that the services should be used outside India.

11. The submissions advanced by learned counsel for the appellant and learned authorized representative of the Department have been considered.

12. In order to appreciate the rival contentions, it would be appropriate to reproduce the relevant portions of the 2005 Rules as they existed prior to and after the amendment made w.e.f February 27, 2010.

Prior to February 27, 2010

13. Rule 3 of the 2005 Rules deals with **export of taxable service**. Rule 3(1)(ii) specifies the taxable services provided in sub-clauses of clause (105) of section 65 of the Finance Act, 1944[24]. Sub-rule(2) of rule 3 of the 2005 Rules provides for two conditions to be satisfied for treating any taxable service as export of service and is reproduced below:

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24 the Finance Act

> **"3(2)** The provision of any taxable service specified in sub- rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-
>
> (a) such service is provided from India and used outside India; and
>
> (b) payment for such service is received by the service provider in convertible foreign exchange."

From February 27, 2010

14. Sub-rule (2) of rule 3 of the 2005 Rules was amended by Notification dated February 27, 2010 and the amended provision is as follows:

> **"3(2)** The provision of any taxable service specified in sub- rule (1) shall be treated as export of service when the following conditions are satisfied, namely:-
>
> (a) deleted
>
> (b) payment for such service is received by the service provider in convertible foreign exchange."

15. Rule 4 of the 2005 Rules provides that any service, which is taxable under clause (105) of section 65 of the Finance Act, may be exported without payment of service tax.

16. The Circular dated February 24, 2009 issued by the CBEC deals with applicability of the provisions of the 2005 Rules in certain situations. The relevant portion of the Circular is reproduced below:

> "In terms of rule 3(2) (a) of the Export of Services Rules 2005, a taxable service shall be treated as export of service if 'such service is provided from India and used outside India". Instances have come to notice that certain activities, illustrations of which are given below, are denied the benefit of export of services and the refund of service tax under rule 5 of the Cenvat Credit Rules 2004 (Notification No 5/2006-CE (N.T.) dated 14-3-2006 on the ground that these activities do no satisfy the condition 'used outside India',-
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> (i) Call centres engaged by foreign companies who attend to calls from customers or prospective customers from all around the world including from India;

(ii) Medical transcription where the case history of a patient as dictated by the doctor abroad is typed out in India and forwarded back to him;

(iii) Indian agents who undertake marketing in India of goods of a foreign seller. In this case, the agent undertakes all activities within India and receives commission for his services from foreign seller in convertible foreign exchange;

7. Foreign financial institution desiring transfer of remittances to India, engaging an Indian organisation to dispatch such remittances to the receiver in India. For this, the foreign financial institution pays commission to the Indian organisation in foreign exchange for the entire activity being undertaken in India.

The departmental officers seem to have taken a view in such cases that since the activities pertaining to provision of service are undertaken in India, it cannot be said that the use of the service has been outside India.

3. It is an accepted legal principle that the law has to be read harmoniously so as to avoid contradictions within a legislation. Keeping this principle in view, the meaning of the term 'used outside India' has to be understood in the context of the characteristics of a particular category of service as mentioned in sub-rule (1) of rule 3. **For example, under Architect service** (a Category I service [Rule 3(1)(i)], **even if an Indian architect prepares a design sitting in India for a property located in U.K. and hands it over to the owner of such property having his business and residence in India, it would have to be presumed that service has been used outside India. Similarly, if an Indian event manager** (a Category II service [Rule 3(I)(ii))] **arranges a seminar for an Indian company in U.K. the service has to be treated to have been used outside India because the place of performance is U.K. even though the benefit of such a seminar may flow back to the employees serving the company in India.** For the services that fall under Category III [Rule 3(1)(iii)], the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. **Thus, for Category III services [Rule 3(1)(iii)], it is possible that export of service may take place even when all the relevant activities take place in India so long as the benefits of these services accrue outside India. In all the illustrations mentioned in the opening paragraph, what is accruing outside India is the benefit in terms of promotion of business of a foreign company.** Similar would be the treatment for other Category III [Rule 3(1)(iii)] services as well.

> 4. All pending cases may be disposed of accordingly. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned. These instructions should be given wide publicity among trade and field officers."
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> **(emphasis supplied)**

17. When the 2005 Rules were amended w.e.f February 27, 2010, another Circular dated May 13, 2011 was issued by CBEC and the relevant portion is reproduced below:

> "Circular No. 111/05/2009-S.T. was issued on 24th February 2009 [2009 (13)S.T.R. C87] on the applicability of the provisions of Export of Service Rules, 2005 in certain situations. It had clarified on the expression "used outside India" in Rule 3(2)(a) of the Export of Service Tax Rules, 2005 as prevalent at that time. The condition specified in Rule 3(2) has been omitted vide Notification 6/2010-S.T. dated 27 Feb. 2010. In the context of the stated circular an issue has been raised, whether for the period prior to 28-2-2010 the requirement that the service should be "used outside India" invariably means the location of the recipient?
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> 2. In the stated circular it was inter alia, clarified that the words, "used, outside India" should be interpreted to mean that "the benefit of the service should accrued outside India". It is well known that services, being largely intangibles, are capable of being paid from one place and actually used at another place. Such arrangements commonly exist where the services are procured centrally e.g. audit, advertisement, consultancy, Business auxiliary services. For example, it is possible to obtain a consultancy report from a service provider in India which may be used either at the location of the customer or in any other place outside India. In a situation where the consultancy, though paid by a client located outside India, is actually used in respect of a project or an activity in India the service cannot be said to be used outside India.
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> 3. It may be noted that the words "accrual of benefit" are not restricted to mere impact on the bottom-line of the person who pays for the service. If that were the intention it would render the requirement of services being used outside India during the period prior to 28-2-2010 infructuous. These words should be given a harmonious interpretation keeping in view that during the period upto 27-2-2010 the explicit condition was provided in the rule that the service should be used outside India. In other words these words may be interpreted in the context where the effective use and enjoyment of the service has been obtained. The effective use and enjoyment of the service will of course depend on the nature of the service. For example effective use of advertising services shall be the place where the advertising material is disseminated to the audience though actually the

benefit may finally accrue to the buyer who is located at another place.

4. This, however should not apply to services which are merely performed from India and where the accrual of benefit and their use outside India are not in conflict with each other. The relation between the parties may also be relevant in certain circumstances, for example in case of passive holding/ subsidiary companies or associated enterprises. In order to establish that the services have not been used outside India the facts available should inter alia, clearly indicate that only the payment has been received from abroad and the service has been used in India. **It has already been clarified that in case of call centers and similar businesses which serve the customers located outside India for their clients who are also located outside India, the service is used outside India."**

(emphasis supplied)

18. A perusal of rule 3 (2) of the 2005 Rules, as it existed prior to February 27, 2010, would indicate that the provision of any taxable service specified in sub-rule (1) of rule 3 shall be treated as export of service when the following two conditions are satisfied:

(a) such service is provided from India and used outside India; and

(b) payment of such service is received by the service provider in convertible foreign exchange.

19. There is no dispute in the present appeal that the payment for the service was received by the appellant in convertible foreign exchange. The dispute is whether the service was provided from India and used outside India. The Commissioner has observed, for the period prior to February 27, 2010, that the appellant was providing services in relation to procurement of orders from customers located in India and these services cannot be delivered outside India. Thus, the appellant would not satisfy the condition of requiring the services to be used outside India and in this connection, the Commissioner placed reliance upon the Circular

dated May 13, 2011. Thus, the demand has been confirmed on the premise that the appellant was rendering services in relation to promotion of goods in India (including procurement of orders; collection of payment, etc.), and therefore, the services were being 'provided and used in India'. On this basis, the transactions have been held to not qualify as export of services in terms of rule 3(2) of the 2005 Rules.

20. Learned counsel for the appellant has placed reliance on various decisions of the High Court and the Tribunal to contend that the view taken by the Commissioner is not correct and so the appellant is not liable to pay service tax on the commission received from foreign companies.

21. Before examining the decisions referred to by learned counsel for the appellant, it would be necessary to reproduce what was stated by the appellant in reply to the show cause notice regarding the nature of service rendered by the appellant. The said reply is as follows:

> "2.1. The Noticee is registered with the Service Tax Department, for providing taxable service under the category of 'Business Auxiliary Service' vide registration No. AAACS2041NST001. A copy of the registration certificate is enclosed as **Annexure-1.**
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> 2.2 The Noticee represents various foreign companies in India. These companies do not have any business or any other offices in India. The Noticee promotes the business of such foreign companies in India and as a consideration, the Noticee receives commission from the foreign companies in convertible foreign exchange.
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> 2.3. The Noticee procures orders on behalf of such companies in India. Whenever an Indian company issues a tender, the Noticee sends across the same to the foreign companies and bids on behalf of the foreign companies under their instructions. Sample copies of tenders along with the applications made by the Noticee on the foreign companies are collectively enclosed as **Annexure-2.**

> 2.4 In the event, the application filed by the Noticee on that of the foreign companies is accepted, the Noticee procures orders from the Indian companies on behalf of the foreign companies. These purchase orders are raised in the name of the foreign companies. Sample copies of such purchase orders are enclosed as **Annexure-3.**
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> 2.5. Thereafter, the foreign companies export the goods from abroad to the customers in India and raise the invoice directly on the customers. Sample copy of the airway bill from foreign companies to the customer in India is enclosed as **Annexure-4.** The Noticee then raises an invoice for its commission on the foreign companies. A sample copy of such an invoice raised by the Notice is enclosed as **Annexure-5**. The commission is paid by the foreign companies in convertible foreign currency. Documents evidencing the fact that the payment was received by the Noticee in convertible foreign currency are enclosed as **Annexure-6.**
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> 2.6. As is clear from the above, the Noticee is giving technical support to such foreign companies for procurement of orders in India and promotion of goods dealt by the foreign companies. The Noticee assists the foreign companies for liasioning, preparing documents, obtaining tenders and follow up of the same. The Noticee negotiates the tenders on behalf of the foreign companies in India and ensures collection of payments through cheques, etc. on behalf of foreign companies."

22. It would be seen from the aforesaid factual position stated by the appellant in reply to the show cause notice that the appellant had been representing various foreign companies in India and these foreign companies did not have any business or any other office in India. The appellant promoted the business of such foreign companies in India and as a consideration for this service, received commission from the foreign companies in convertible foreign exchange. In fact, the appellant has also described the manner in which it had promoted the business of such foreign companies. The appellant has stated that it procured orders on behalf of such foreign companies in India and whenever any Indian company issued a tender, the appellant sent it to the foreign companies and also bid on behalf of the foreign companies

under their instructions. If the bid is accepted, the appellant procures orders from the Indian company on behalf of the foreign companies. The purchase orders are raised in the name of foreign companies. The foreign companies thereafter export the goods to the customers in India and the invoices are raised directly on the customers. The appellant thereafter raises an invoice for its commission on the foreign companies and receives the commission amount in convertible foreign currency. It is, therefore, clear that the appellant supports such foreign companies to procure orders in India. Such service is provided from India and used outside India. The service rendered by the appellant would, therefore, satisfy the twin conditions set out in rule 3(2) of the 2005 Rules as has also been clarified by the Circular dated February 24, 2009.

23. In **GAP International**, the service provided by the appellant therein was in relation to procurement of goods from India and for this purpose, the appellant conducted survey of the manufacturers of various products required by GAP, USA and recommended vendors who could supply the goods. The appellant also conducted inspection of the export consignments and issued the inspection certificates. It was, therefore, not in dispute that the services provided by the appellant were BAS. The dispute, however, was whether the services qualified as export in terms of the 2005 Rules and, therefore, not taxable in India. It is in this context that the Tribunal held that the services provided by the appellant were obviously meant for and were used by GAP, USA for their business and, therefore, these services would be treated

as exported out of India. The contention of the Department that the condition of "used outside India" were not satisfied was not accepted by the Tribunal. The relevant portion of the decision of the Tribunal is reproduced below:

> "6. **The service provided by the appellant to M/s GAP, U.S.A., is in relation to procurement of goods from India.** For this purpose, the appellant conduct the survey of the manufacturers of various products required by M/s GAP, U.S.A., and recommend the vendors who can supply the goods of the desired quality. They also conduct inspection of the export consignments and issue inspection certificates. In selecting the vendors they also examine not only the quality of their products, but also whether they conform to child labour norms, Pollution control norms etc. as compliance with these norms is important for their Principals. They also recommend the Transporters and logistic service providers for export of the products purchased. Thus, the services being provided by the appellant to their principal are the services in relation to procurement of the goods and there is no dispute that these services are Business Auxiliary Services covered by Section 65 (105) (zzb) read with Section 65 (19) of the Finance Act, 1994. **The only point of dispute is as to whether the services are taxable in India or the same are export of service outside India in terms of Service Rules, 2005 and for this reason are not taxable in India. Though the services have been performed in India, these services being Business Auxiliary Services are in respect of the business of the appellant□s principal located abroad. The services being provided by the appellant are obviously meant for and are used by M/s GAP, U.S.A. for their business. The services being provided by the appellant are covered by Clause (iii) of Rule 3 (1) of Export Service Rules, 2005, as these services are in relation to business or commerce and in terms of this clause, readwith sub-rule (2) of Rule 3, these services would be treated as exported out of India if the recipient is located outside India and the same have been delivered outside India and used India and payment for the same has been received by the service provided in convertible foreign exchange.** There is no dispute that the payment for these services has been received in convertible foreign exchange and the payment has been made by M/s GAP, U.S.A. located abroad, not having any establishment or branch in India. **The department's contention, however, is that the conditions of delivery outside India and use outside India are not satisfied, as the services have been performed in India and the same are not capable of being used in territory other than the place where the same have been provided.** According to the department most of the time, the provision and use of the services is happening simultaneously and it would be to naive to even conceive that services of merchandising, product integrity, vendor compliance, quality assurance, fabric sourcing and logistic support etc. provided in India can even be used remotely in a territory other than where

> the same have been provided. It has been pleaded that if M/s GAP, U.S.A. were even to try using these services in a place other than India, it will not be physically possible. It has also been pleaded that routing if payment for a service cannot determine the place of consumption.
>
> 7. **In our view the arguments of the department are absurd as the DR has not mentioned as to who is the consumer of the services in India, if the services, in question, provided in India by the appellant have not been used and consumed by their principal in U.S.A.** When the appellant identify the vendors for their principal abroad on the basis of the quality of their products, their manufacturing infrastructure, compliance with child labour laws and pollution control norms and also provide the services of inspection of the export consignments, besides identifying the logistic service providers for smooth transportation of the goods purchased to the port for their export, the user and beneficiary of all these services is their principal abroad. It would be absurd to say that the recipient and user of these services are the persons in India and not M/s GAP, U.S.A. for whom all these services provided by the appellant are meant, who have used these services for their business and have made payment for these service in convertible foreign exchange."
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> **(emphasis supplied)**

24. The Circular dated February 27, 2010 was found to be contrary to the provisions of rule 3(1) of the 2005 Rules.

25. In **A.T.E. Enterprises**, the following substantial questions of law were framed by the Bombay High Court:

> "(a)Whether the services provided by the Respondent herein, in accordance with various contracts entered into with overseas manufacturers, is classifiable under "Business Auxiliary Services" as defined under section 65(105)(zzb) of the Finance Act, 1994 and if so, whether the said services provided are to be treated as export of services or not?
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> (b)Whether the CESTAT was justified in passing the impugned order dated 7.1.2015 relying upon several judgements of the Tribunal which are not applicable in the facts and circumstances of the present case?"

26. To answer this, the High Court referred to the findings recorded by the Tribunal and the same are reproduced below:

> "8. We find from the records that the appellant does not engage himself in assembling and organizing of the imports. His duty as is ascertained from the agreement, indicates that he is supposed to procure the orders and pass it on to the overseas manufacturers; on receipt of such orders, the overseas

> manufacturers executes the same on his own and the consideration for such supplies is directly paid to the overseas manufacturers by the person who has placed the order. **The entire transaction in our considered opinion seems to be of only procurement of orders and the rendering of services, if any, by the appellant is towards the foreign or overseas manufacturers. In our view, this activity though culminates in supplies to Indian Company, cannot be considered as services provided in India. We are fortified in our view by the ratio of the Tribunal in the case of Vodafone Essar Cellular Ltd. (supra).**
>
> 9. In this case we find that there was an agreement between the appellant and the foreign telecom service provider as per which the appellant had agreed to provide telecom services to the customers of foreign telecom service provider when he is in India and using the appellant telecom networks. Revenue held a view that the consideration for services rendered in India is taxable under Business Auxiliary Service. The Bench after considering the provisions of 'Export Services Rules' and Board clarifications, and the decision of Microsoft Corporation (I) Pvt. Ltd. case held in favour of the assessee by recording as under:
>
> **(emphasis supplied)**

27. In arriving at the aforesaid conclusion, the Tribunal had relied upon decisions rendered by the Tribunal in **Paul Merchants** and **GAP International Sourcing.** The High Court held that no case had been made out by the appellant - Commissioner of Service Tax, Mumbai to interfere with the reasoning of the Tribunal.

28. In **Wartsila India**, it was noticed by the Bombay High Court that the respondent - Wartsila India was receiving commission from foreign based principals for promotion of sale of the products/goods in India. The Department was of the view that the services provided by the respondent would fall under the category of BAS chargeable to service tax. The case of the respondent assessee, however, was, and which case was accepted by the Commissioner of Service Tax, that the services rendered by the respondent to its foreign principals would constitute export of service covered by the 2005 Rules, and so no tax could be levied.

The Bombay High Court, after referring to the decision of the Bombay High Court in **A.T.E Enterprises** and the Circular dated February 24, 2009, dismissed the appeal that had been filed by the Department. The relevant portion of the decision of the High Court is reproduced below:

> "8. We find that the issue raised herein is no longer res integra. An identical nature of services as rendered by the respondent to its foreign clients, had come up for consideration before this Court in Commissioner of Service Tax, Mumbai v. ATE Enterprises (P) Ltd., 2018 (8) GSTL 123 (Bom.) **This Court followed its earlier decision in SGS India (P) Ltd. v. Commissioner of Service Tax 34 STR 554 (Bom.) and held that services of procuring orders and passing it to its overseas principal/parties and receiving payments for the same in foreign exchange, is an activity of export of services covered by the Export of Service Rules, 2005. Therefore, the issue stands concluded in favour of the respondent and against the Appellant by the decision of this Court in ATE. Enterprises (P) Ltd., (supra). Further, Circular No.111 of 2009 dated 24th February, 2009 issued by the C.B.E. & C also supports the case of the respondent**. Nothing has been shown to us as to why above Circular cannot be read in the manner in which the Commissioner of Service Tax and the Tribunal has read it.
>
> 9. The decision of the Tribunal in the case of Blue Star Ltd., rendered on 24th September, 2014 [2008(11)S.T.R.23 (Tribunal)] which was also a subject matter of appeal before this Court being Commissioner of Service Tax, Mumbai VII, Commissionerate v. M/s. Blue Star Ltd., (Central Excise Appeal No.173 of 2017). This appeal on an identical issue, was dismissed on 11 th September, 2018, as not giving rise to any substantial questions of law."
>
> **(emphasis supplied)**

29. The Delhi High Court in **Verizon Communication** approved the view taken by the larger Bench of the Tribunal in **Paul Merchants** and the relevant portion is reproduced below:

> "50. **The decision of Larger Bench of CESTAT in Paul Merchants Ltd. v. CCE, Chandigarh (supra) may be referred to at this stage**. The period with which the dispute in that case related to was between 1st July, 2003 and 30th June, 2007. It involved, therefore, the interpretation of the ESR, 2005 as amended and applicable during the said period. **There the**

assessees were intermediary agents providing money transfer services to foreign travellers who were the end user on behalf of their principals. The contention of the Department that this did not qualify as export of service was rejected by the CESTAT. It noted that the C.B.E. & C. had to issue a clarification Letter No. 334/1/2010-TRU, dated 26th February, 2010 acknowledging the difficulties that were faced by the trade in complying with the condition that the services had to be 'used outside India'. It was clarified that as long as the party abroad is deriving benefit from service in India, it is an export of service.

51. **In the considered view of the Court, the judgment of the CESTAT in Paul Merchants Ltd. v. CCE, Chandigarh (supra) is right in holding that "The service recipient is the person on whose instructions/orders the service is provided who is obliged to make the payment from the same and whose need is satisfied by the provision of the service. The Court further affirms the following passage in the said judgment in Paul Merchants Ltd. v. CCE, Chandigarh (supra) which correctly explains the legal position:**

"It is the person who requested for the service is liable to make payment for the same and whose need is satisfied by the provision of service who has to be treated as recipient of the service, not the person or persons affected by the performance of the service. Thus, when the person on whose instructions the services in question had been provided by the agents/sub-agents in India, who is liable to make payment for these services and who used the service for his business, is located abroad, the destination of the services in question has to be treated abroad. The destination has to be decided on the basis of the place of consumption, not the place of performance of Service."

(emphasis supplied)

30. Learned authorized representative of the Department has, however, placed reliance upon a order dated July 4, 2019 of the Mumbai Bench of the Tribunal in **ARCELOR Mittal** by which the Bench requested for referring the issues to a larger Bench.

31. It is seen from the aforesaid order that reliance has been placed on the decision of the Supreme Court in **GVK Industries Ltd. Vs. Income Tax Officer**[25] wherein it was held, in view of the provisions of the Income Tax Act, that even income earned by a foreign entity in respect of the business activities in India can be subjected to tax in India. It is also seen that aforesaid referring

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order distinguishes the decision of the Tribunal in **GAP International, ABS India Ltd., Paul Merchants Ltd**. and **Blue Star Ltd.**, but there is no reference in the order to the judgements of the Bombay High Court or the Delhi High Court in **A.T.E Enterprises Private Limited**, **Wartsila India Limited** and **Verizon Communication India Private Limited.** The aforesaid decisions of the Bombay High Court and Delhi High Court, as noticed above, support the case of the appellant. As the High Courts have already expressed views on the issue involved in this appeal, it will not be necessary to await decision on the reference made in **ARCELOR Mittal.**

32. The contention of learned authorized representative of the Department that since appeals have been admitted by the High Court and Supreme Court against some of the decisions of the Tribunal, on which reliance has been placed by learned counsel for the appellant, such decisions should not be taken into consideration cannot also be accepted. Learned authorized representative has not placed any decision of High Court or Supreme Court setting aside any of the decisions on which reliance has been placed by learned counsel for the appellant.

33. The Commissioner, in regard to the period post February 27, 2011 has recorded a finding that though the condition relating to service being used outside India has been omitted, but the appellant could not substantiate the quantum of services provided after February 27, 2010 and the consideration received thereon

and so the entire demand has to be confirmed. .

34. As noticed above, the only requirement after the amendment in rule 3 (2) of the 2005 Rules is that the service recipient should be situated outside India and consideration should be received in foreign currency. Both the conditions stand satisfied. Even otherwise, for the period prior to February 27, 2010, it has been held that no service tax could be levied. Thus, it was immaterial as to whether the appellant was able to substantiate the quantum of services provided after February 27, 2010 and the consideration received thereon.

35. Thus, for all reasons stated above, it is not possible to sustain the order dated October 3, 2012 passed by the Commissioner. It is, accordingly, set aside and the appeal is **allowed**.

[Order pronounced on **14.12.2020**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

Babita