CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 50281 of 2022

(Arising out of Order–in-Appeal No. C. No. 42/GST/DL-APPEAL-II/2020-21/71 dated 18.08.2021 passed by Commissioner (Appeals-II) Central Tax/Excise, Delhi)

Blackberry India Private Limited **...Appellant**
(Formerly Known as Research in Motion
India Private Limited)
Unit No. 216, 2nd floor, Square One,
C-2, District, Saket, New Delhi-110017

VERSUS

Commissioner of Central Tax/Excise **...Respondent**
Delhi

APPEARANCE:

Ms. Ashwini, Advocate for the Appellant
Shri Radhe Tallo and Shri Prashant Kumar Sinha, Authorized Representative of the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 24.11.2022
Date of Decision: 07.12.2022

FINAL ORDER NO. 51150/2022

JUSTICE DILIP GUPTA:

This appeal has been filed by M/s. Blackberry India Pvt. Ltd.[1] (formerly known as Research in Motion India Private Limited) to assail the order dated 18.08.2021 passed by the Commissioner (Appeals-II) Central Tax/Excise, Delhi[2] that upholds the order dated 31.08.2020 passed by the Assistant Commissioner. The refund claim

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1. **the appellant**
2. **the Commissioner (Appeals)**

filed by the appellant under rule 5 of the CENVAT Credit Rules 2004[3] was rejected by the Assistant Commissioner for the reason that the appellant had acted as an 'intermediary' between the service provider and the service recipient.

2. The appellant is a company incorporated in India and is engaged in the provision of marketing, administrative and support service to Blackberry Singapore in relation to Blackberry products. For this purpose, the appellant entered into an Agreement dated 03.09.2006 with Blackberry Singapore. It needs to be noted that 'Research in Motion India Private Limited' is now known as 'Blackberry India Private Limited' and 'Research in Motion Singapore Private Limited' is now known as 'Blackberry Singapore Private Limited'.

3. The relevant clauses of the Agreement dated 03.09.2006 are reproduced below:-

> "THIS AGREEMENT is effective as of the date specified in Schedule "A" (the **"Effective Date"**).
>
> **BETWEEN:**
>
> **RESEARCH IN MOTION SINGAPORE PTE**., a company organized under the laws of Singapore having its registered office at I International Business Park, # 02-11/12, The Synergy Building, Singapore, 609917 ("**RIM**")
>
> **AND:**
>
> **RESEARCH IN MOTION INDIA PRIVATE LIMITED**, a company registered in India and having its registered office at F-40, N.D.S.E Part 1, New Delhi, India, 110049 ("**Service Provider**")
>
> **WHEREAS:**
>
> A. RIM distributes certain products and services, including the BlackBerry solution, which includes handheld devices, accessories, software, and related

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3. 2004 Credit Rules

services (together with the associated proprietary and intellectual property rights) (the "**RIM Solution**").

B. Service Provider and RIM became parties to a Marketing Activities Agreement effective September 3, 2006, as amended and restated effective as of March 4, 2007 (the "**Amended & Restated MAA**"), **whereby Service Provider performs various promotion and marketing services as more particularly set out in Schedule A hereto or as otherwise requested by RIM from time to time** (the "**Services**").

C. RIM and Service Provider desire to amend and restate the terms and conditions of the Amended & Restated MAA as hereinafter set forth.

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3.3 Services.

The scope, quality and timeliness of the Services offered and provided by Service will conform to the guidelines that RIM and Service Provider may agree and establish from time to time.

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3. RIM's Assistance.

RIM will provide Service Provider, at Service Provider's request, with promotional and technical materials, training and assistance to perform the Services, including, but not limited to, access to the product, marketing and business development groups to help Service Provider perform the Services. Service Provider acknowledges that RIM may subcontract third party service providers to provide any such materials, training or assistance, in whole or in part. RIM will be entitled to charge Service Provider for such materials, training and assistance in accordance with RIM's then-current standard policies and rates. The training will be offered at the facility that RIM may designate. Unless otherwise agreed, Service Provider will bear all shipping, travel, lodging and other out-of-pocket expenses that may be incurred in providing such promotional and technical materials, training and assistance.

Article 4
Fees and Payment

4.1 Cost Plus Payments.

In exchange for providing the Services, RIM will pay to Service Provider a fee equal to the sum of all costs and expenses that Service Provider incurred in providing such Services (the "Costs"), plus the percentage or other fee set out in Schedule A (the "Cost Plus Fee"). Where applicable, taxes (as defined in Section 4.4) shall be added to the Cost Plus Fee and Approved Reimbursements. In respect of the period of time from the Effective Date to the commencement of the initial fiscal quarter or other period specified in Schedule A (the "**Cost Period**") and, thereafter, in respect of each Cost Period, **Service Provider will submit an invoice that sets forth the Cost Plus Fee that is due and payable for the Services** that have been rendered in that Cost Period and will separately identify those Services which are subject to taxes (as defined in Section 4.4) and those which are not. **RIM will pay the Cost Plus Fee and any applicable taxes to Service Provider within forty-five (45) days after receipt of such invoice.**

The Cost Plus Fee shall be reviewed by the parties on an annual or other basis as determined by the parties from time to time.

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4.3 **Charges for Assistance.**

RIM may submit a monthly invoice to Service Provider that sets forth the charges for the licenses, access, materials, training and assistance that RIM may have provided to Service Provider during the month then-ended in connection with the Services. Service Provider will pay each such invoice to RIM within forty-five (45) days after receipt thereof or, at RIM's request, Service Provider may offset against such amounts owing in respect of the Services.

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8.3 **Status of Parties.**

Service Provider and RIM are independent parties. Nothing in this Agreement will be construed to give either party the authority to direct or control the daily activities of the other party; or constitute the parties as employer and employee, franchisor and franchisee, partners, joint venturers, co-owners or otherwise as participants in a joint undertaking. Service Provider has no right or authority to assume or create any obligation of any kind, express or implied, on behalf of RIM, or waive any right, interest or claim that RIM may have against any other person."

(emphasis supplied)

"SCHEDULE A

1. Service:

The Services are:

- promotion and marking;
- technical marketing assistance; and
- other related services.

2. Cost Plus Fee:

   10%of the Costs

3. Cost Period:

Quarterly, with RIM's fiscal quarters and with the first quarter commencing on the first of RIM's quarters that commences on or after of Effective Date.

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4. It would be seen from the aforesaid that the appellant is required to provide the services to Blackberry Singapore in relation to technical marketing assistance of Blackberry products. The said services would involve the following activities:

(i) To create awareness and promotion of BlackBerry products and services packages in India;

(ii) To recommend appropriate advertising and promotions strategies, with specific reference to qualification, proposition and best practices prevailing in the market;

(iii) To participate in exhibitions and trade shows for marketing and promotion of the BlackBerry products and service packages;

(iv) To provide requisite knowledge and tools required for sales and promotion of BlackBerry devices and service packages;

(v) To equip the Indian carrier partners with the requisite technical knowledge and advise them on various technical issue; and

(vi) To provides market intelligence to BlackBerry Singapore and its Indian carrier partners, which helps them in effective decision making with respect to the India market.

5. The appellant claimed that as it was engaged in 'export of service' it filed refund claims for the period April 2012 to September 2013 in the following manner:

S.No.	**Relevant Period**	**Refund claimed**
1.	April 2012 to June 2012	Rs. 3,18,11,287
2.	April 2013 to June 2013	Rs. 2,89,94,208
3.	July 2013 to September 2013	Rs. 2,47,28,850
	Total Refund	**Rs. 8,55,34,345**

6. However, a show cause notice dated 22.01.2020 was issued to the appellant to show cause notice as to why the refund claims should not be rejected for the reason that the services provided by the appellant were intermediary services. The appellant filed a reply dated 24.01.2020 denying the allegations made in the show cause notice. The Assistant Commissioner, by order dated 31.08.2020, rejected the refunds claim primarily for the reason that the appellant provided intermediary service and, therefore, in terms of the rule 9 of the Place of Provision of Services Rule 2012[4], the place of supply of services would be the location of the service provider i.e. in India

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4. the 2012 Rules

and, therefore, appellant would not fulfill the condition set out in rule 6A of the Service Tax Rules 1994[5].

7. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals). The appeal was rejected by order dated 19.08.2021. The order holds that the appellant facilitated the services between the Indian customer and foreign firms and, therefore, the activity performed by the appellant would be that of an 'intermediary'. The relevant portion of the order passed by the Commissioner (Appeals) is reproduced below:

> "12. **I note, from the terms of the above said agreement, that service provider i.e. the appellant have provided the services, as mentioned in Schedule-A, to the various clients / customers in India and these services receivers are in India. In the present case, I note that the appellant has facilitated the services between Indian customers and foreign firm.** Appellant has provided the services in terms of the agreement as directed by the foreign firm**. In the present case, the appellant arranged for a provision of service, between the customers and foreign company, without material alteration in terms of the agreement. Thus, from the above, I find that the appellant acted as an intermediary between the service consumers in India and foreign company and in this way two kinds of services were involved at a moment.** I further note that the territory for rendering the said services is clearly mentioned as India in the said agreement. Further, under Rule 2(f) of Place of Provisions of Services Rules, 2012 and in terms of Rule 9 of Place of Provision of Services Rules, 2012 specified vide Notification No. 28/2012-S.T., dated 20-6-2012, place of provision of services to be location of service provider, therefore, **I find that said services rendered cannot be treated as export of services in terms of Rule 3 of Export of Services Rules, 2012** Also, condition No. (d) laid down in Rule 6(A) of Service Tax Rules, 1994 not satisfied. In view of above

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5. the 1994 Rules

> findings &various clauses of agreement with foreign company and various documents produced, I held that there is no infirmity in impugned order."
>
> **(emphasis supplied)**

8. For the period April 2012 to June 2012, i.e., prior to the negative list regime introduced w.e.f. 01.07.2012, the refund was rejected by the Assistance Commissioner on the ground that the export benefit was not extended to sub-clause (zzb) of section 65(105) of the Finance Act, 1994[6] relating to Business Auxiliary Service[7] under rule 3 of the Export of Service Rules, 2005[8]. For the period April 2013 to September 2013, the rejection of refund has been sustained by the Commissioner (Appeals) on the ground that the appellant is an 'intermediary' as it is engaged in facilitating the supply between the customers and the foreign company.

9. Ms. Ashwini, learned counsel appearing for the appellant submitted that the Commissioner (Appeals) committed an illegality in rejecting the refund claim of the appellant. In this connection, learned counsel pointed out that for the period prior to 01.07.2012, Commissioner (Appeals) failed to appreciate that rule 3 of the 2005 Export Rules does not exclude BAS from the ambit of export and in regard to the period post 01.07.2012, learned counsel submitted that the appellant is not an 'intermediary'. In this connection learned counsel placed reliance upon the certain decisions to which reference shall be made at the appropriate stage.

10. Learned authorized representative appearing for the department however supported the impugned order.

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6. the Finance Act
7. BAS
8. the 2005 Export Rules

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

12. The dispute relates to the refund claims filed by the appellant under rule 5 of the 2004 Credit Rules. The relevant portion of rule 5 is, therefore, reproduced below:

> **"5. Refund of CENVAT Credit:**
>
> A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette:
>
> Refund amount=(Export turnover of goods+ Export turnover of services) x Net CENVAT credit
> Total turnover
>
> xxxxxx xxxxxx xxxxxx
>
> **Explanation 1:** For the purpose of this rule,-
> (1) "export service" means a service which is provided as per rule 6A of the Service Tax Rules, 1994."

13. Since "export service" means a service which is provided as per rule 6A of the Service Tax Rules 1994[9], the said rule is reproduced:

> **"6A. Export of services.-**
>
> (1) The provision of any service provided or agreed to be provided shall be treated as export of service when,-
>
> (a) the provider of service is located in the taxable territory,
>
> (b) the recipient of service is located outside India,
>
> (c) the service is not a service specified in the section 66D of the Act,
>
> (d) the place of provision of the service is outside India,

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9. the 1994 Rules

(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and

(f) the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification."

14. As noticed above rule 6A of the 1994 Rules deals with export of services and sub-clause (d) of sub-rule (1) provides that the provision of service shall be treated as export of service when the place of provision of service is outside India. The place of provision of service is determined under the 2012 Rules. Rule 3 deals with place of provision generally. It is as follows:

"3. Place of provision generally.-

The place of provision of a service shall be the location of the recipient of service:

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

15. It would be seen that in terms of the rule 3 of the 2012 Rules, the place of provision of a service shall be the location of the recipient of service.

16. Rule 9, however, deals with place of provision of specified services and is as follows:

"9. Place of provision of specified services.-

The place of provision of following services shall be the

location of the service provider:-

(a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) online information and database access or retrieval services;

(c) Intermediary services;

(d) Service consisting of hiring of all means of transport other than, -

(i) aircrafts, and

(ii) vessels except yachts,

upto a period of one month."

17. In view of the provisions of rule 9 (c) of the 2012 Rules, the place of provision for 'intermediary services' would be the location of the service provider.

18. Rule 3 of the 2005 Export Rules is reproduced below:

"3(1) Export of taxable services shall, in relation to taxable services,-

(i) ……

(ii) ……

(iii) Specified in clause (105) of section 65 of the Act, but excluding,-

(a) Sub-clauses (zzz) and (zzzv);

(b) Those specified in clause (i) of this rule except when the provision of taxable services specified in sub-clauses (d), (zzzc), (zzzr), and (zzzzm) does not relate to immovable property; and

(c) Those specified in clause (ii) of this rule,

When provided in relation to business or commerce, be provision of such services to a recipient located outside India and when provided otherwise, be provision of such services to a recipient located outside India at the time of provision of such service:"

19. 'Business Auxiliary Service' is defined in section 65(19) of the Finance Act and it has been made taxable under section 65(105)(zzb) of the Finance Act.

20. The first issue that arises for consideration is as to whether the services provided by the appellant prior to 01.07.2012 can be termed as export of services.

21. The adjudicating authority, after referring to the provisions of rule 3(1) of the 2005 Export Rules, observed that BAS is excluded from the ambit of service. It is seen that BAS, which is taxable under section 65(105)(zzb) of the Finance Act, is not excluded. In terms of rule 3(1) of the 2005 Export Rules, all services under section 65(105) of the Finance Act are treated as export of service, except those expressly excluded. The Commissioner (Appeals), therefore, committed an illegality in holding to the contrary. The appellant is, therefore, entitled to refund for the period prior to 01.07.2012.

22. In regard to the period post 01.07.2012, the Commissioner (Appeals) rejected the refund claim by the appellant for the reason that the appellant was an 'intermediary'.

23. It is, therefore, necessary to determine whether the appellant provided 'intermediary services'.

24. The concept of "intermediary" was introduced in the 2012 Rules. 'Intermediary' has been defined in rule 2(f) as follows:

> "**2(f)** 'intermediary' means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account."

25. The communication dated 16 March 2012 by the Department of Revenue (Tax Research Unit) dealing with the Union Budget 2012 deals with 'intermediary services' and is as follows:

"3.7.7 What are "Intermediary Services"?

An "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an 'intermediary' is involved with two supplies at any one time:

(i) the supply between the principal and the third party; and

(ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

For the purpose of this rule, an 'intermediary' in respect of goods (commission agent i.e a buying or selling agent) is excluded by definition.

In order to determine whether a person is acting as an intermediary or not, the following factors need to be considered:-

Nature and value: An 'intermediary' cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the 'intermediary' to negotiate a different price. Also, the principal must know the exact value at which the service is supplied (or obtained) on his behalf, and any discounts that the 'intermediary' obtains must be passed back to the principal.

Separation of value: The value of an intermediary's service is invariably identifiable from the main supply of service that he is arranging. It can be based on an agreed percentage of the sale or purchase price. Generally, the amount charged by an agent from his principal is referred to as "commission".

Identity and title: The service provided by the intermediary on behalf of the principal are clearly identifiable.

In accordance with the above guiding principles, services provided by the following persons will qualify as 'intermediary services:-

(i) Travel Agent (any mode of travel)
(ii) Tour Operator
(iii) Stockbroker
(iv) Commission agent [an agent for buying or selling of goods is excluded

(v) Recovery Agent

Even in other cases, wherever a provider of any service acts as an agent for another person, as identified by the guiding principles outlined above, this rule will apply."

26. Rule 2(f) of the 2012 Rules, as noticed above, defines an "intermediary" to mean a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service to be called the main service or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his own account. The communication dated 16 March 2012 referred to above, also clarifies that an intermediary service is involved with two supplies at any one time namely:

(i) the supply between principal and the third party;
(ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

27. The said communication also mentions that in order to determine whether a person is acting as an intermediary or not, three factors namely nature and value, separation of value and identity and title have to be examined. In regard to the "nature and value", it states that an intermediary cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediary to negotiate a different price. Regarding "separation of value", it states that the value of service provided by an intermediary is invariably identifiable from the main supply of service that he is arranging. Generally, the amount charged by an agent from his principal is referred to as "commission". In regard to "identity and title", it provides that the

service provided by the intermediary on behalf of the principal are clearly identifiable and example of a travel agent, a tour operator, stock broker, commission agent and a recovery agent have been given.

28. The Commissioner (Appeals) observed that since the appellant had arranged for a provision of service between Blackberry Singapore and its customers without making any alteration it would be acting as an intermediary under rule 9(c) of the 2012 Rules and, therefore, the place of provision of service shall be the location of the service provider i.e. in India. According to the appellant, the place of provision of services shall be the location of the recipient of the service as provided under rule 3 of the 2012 Rules.

29. In the present case, what transpires from the Agreement is that the appellant, which is a service provider in India, performs various promotion and marketing services more particularly set out in Schedule A of the Agreement or as requested by Blackberry Singapore from time to time. In Schedule A, the services that are included are promotions and marketing; technical marketing assistance; and other related services. Under clause 2.4 of the Agreement the service provider could sub-contract the services, in whole or in part, to third party service providers provided it did not impose any additional liability on Blackberry Singapore and was consistent with the terms and conditions of the Agreement. Clause 4.1 of the Agreement provides that in exchange for providing the services, Blackberry Singapore will pay to the service provider i.e. the appellant a fee equal to the sum of all costs and expenses that the service provider incurred in providing such services plus 'Cost Plus Fee' as set out in Schedule A. For this purpose, the service provider

has to submit an invoice and Blackberry Singapore is required to pay within 45 days after receipt of such invoice. Clause 8.2 provides that all references to currency would be as provided in Schedule A and Schedule A provides that the currency would be US in dollars effective 01.04.2008. Under clause 8.3 of the Agreement, the service provider and Blackberry Singapore would be independent parties and nothing in the Agreement would be construed to give either party the authority to direct or control the daily activities of the other party or constitute the parties as employer and employee, franchisor and franchisee or as partners.

30. It would, therefore, transpire from the Agreement that:

(i) The appellant is engaged in providing marketing, administrative and support service to Blackberry Singapore, as an independent contractor;

(ii) The appellant is not an agent or broker of Blackberry Singapore. There is no relationship of principal and agent between Blackberry Singapore and the appellant. The arrangement between the appellant and Blackberry Singapore is on a principal-to-principal basis. Further, the appellant does not have any authority to represent or bind Blackberry Singapore, which further supports the fact that the appellant is not an agent of Blackberry Singapore and, therefore, is not an intermediary;

(iii) The appellant is not engaged in facilitating any supply between Blackberry Singapore and its Customers. The Agreement is only between the appellant and Blackberry Singapore wherein the appellant is providing the aforesaid services to Blackberry Singapore. The customers of Blackberry Singapore are not a part of the contract and the appellant at no point in time is involved in providing any service to the customers of Blackberry Singapore. The appellant

does not even have any knowledge about the final customers of Blackberry Singapore;

(iv) The appellant receives consideration on a Cost-Plus basis. The consideration is not dependent on the sale made by the Blackberry Singapore to their customers; and

(v) The appellant raises invoices on Blackberry Singapore for the services provided by it in US dollars and Blackberry Singapore has to make the payment within 45 days of the date of such monthly invoices.

31. The terms of the Agreement also per se do not create any relationship of principal and agent or employer and employee. An **agent** is a person employed to do any act for another or to represent another in dealing with third persons. The persons for whom such act is done, or who is so represented, is the principal. A **broker** is a middleman or an agent who, for a commission on the value of the transaction, negotiates for others the purchase or sale of stocks, bonds, commodities, or a property. These two situations do not arise in the present case.

32. An **intermediary** is a person who arranges or facilitates provision of the main service between two or more persons. The appellant is not involved in the arrangement or facilitation of the supply of service. The service provided by the appellant qualify for export since it is providing services to Blackberry Singapore, which is outside India and is receiving convertible foreign exchange for such services. The appellant is not privy to the Agreement entered into between Blackberry Singapore and its end customers. Merely because the appellant is charging Costs Plus on Blackberry Singapore would not mean it is an intermediary.

33. It would be pertains to refer to the decision of the Delhi High Court in **Verizon Communication India Pvt. Ltd.** versus **Asstt. Commr., S.T. Delhi-III**[10]. It is seen from a perusal of the aforesaid judgment that Verizon India had entered into a Master Supply Agreement with Verizon US for rendering connectivity services for the purpose of data transfer. Verizon US was engaged in the provision of telecommunication services for which it entered into contracts with the customers located globally. Since Verizon US did not have the capacity to provide such services across the globe, it utilized the services of Verizon India to provide connectivity to its customers. The issue, therefore, that arose before the Delhi High Court was whether the telecommunication services provided by Verizon India during the period April 2011 to September 2014 to Verizon US would qualify as 'export of services'. The department believed that the said services would not qualify as 'export of services'.

34. The Delhi High Court noted that in the process of gathering the data from the entities in India for transmission to Verizon US, Verizon India availed services of Indian telecommunication service providers like Vodafone and Airtel. These service providers raised invoices on Verizon India and Verizon India paid these service providers the requisite charges. Verizon India thereafter raised an invoice on Verizon US for the 'export of services' provided by it to Verizon US. Since the recipient of the service (Verizon US) was outside India, Verizon India treated it as an export of service and understood that it was exempted from service tax under the Export of Service Rules 2005. Verizon US, in turn, raised invoices on its customers in the US. The refund claims of Verizon India pertained to

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10. 2018 (8) G.S.T.L. 32 (Del.)

the period January 2011 to September 2014. The Delhi High Court pointed out that the 'recipient' of services is determined by the contract between the parties and this would depend on who has the contractual right to receive the services and who is responsible for the payment for the services provided to the service recipient; there was no privity of contract between Verizon India and the customers of Verizon US; such customers may be the 'users' of the services provided by Verizon India but were not its recipients; Verizon India may have been using the services of a local telecom operator but that would not mean that the services to Verizon US were being rendered in India; and the place of provision of such service to Verizon US remains outside India.

35. In this connection, the Circular dated 24.02.2009 was relied upon which is as follows:

> "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 service [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..."

36. The summary of the conclusions noted by the Delhi High Court are as follows:-

> **"54. To summaries the conclusions:**
>
> (i) It made no difference that Verizon India may have provided 'telecommunication service' and not 'business support services' since to qualify as export of service both had to satisfy the same criteria.

(ii) **The provision of telecommunication services by Verizon India during the period January, 2011 till 1st July, 2012 complied with the two conditions stipulated under Rule 3(1)(iii) of the ESR to be considered as 'export of service'. In other words, the payment for the service was received by Verizon India in convertible foreign exchange and the recipient of the service was Verizon US which was located outside India.**

(iii) **That Verizon India may have utilised the services of Indian telecom service providers in order to fulfil its obligations under the Master Supply Agreement with Verizon US made no difference to the fact that the recipient of service was Verizon US and the place of provision of service was outside India.**

(iv) The subscribers to the services of Verizon US may be 'users' of the services provided by Verizon India but under the Master Supply Agreement it was Verizon US that was the 'recipient' of such service and it was Verizon US that paid for such service. That Verizon India and Verizon US were 'related parties' was not a valid ground, in terms of the ESR or the Rule 6A of the ST Rules, to hold that there was no export of service or to deny the refund.

(v) The Circular dated 3rd January, 2007 of the C.B.E. & C. had no application to the case on hand. It did not pertain to provision of electronic data transfer service. It was wrongly applied by the Department. With its total repeal by the subsequent Circular dated 23rd August, 2007, there was no question of it applying to deny the refund for the period January, 2011 till September, 2014.

(vi) **Even for the period after 1st July, 2012 the provision of telecommunication service by Verizon India to Verizon US satisfied the conditions under Rule 6A(1)(a), (b), (d) and (e) of the ST Rules** and was therefore an 'export

> of service'. The amount received for the export of service was not amenable to service tax."
>
> **(emphasis supplied)**

37. It would also be appropriate, to refer to the decision of the Tribunal in **Verizon India Pvt. Ltd.** versus **Commissioner of Service Tax, Delhi**[11]. The Tribunal held that as the appellant had provided services under a contract to Verizon US which was located outside India and had raised invoices for such services and received remittance in foreign exchange, the appellant would satisfy the conditions set out in rule 6A of the 1994 Rules. The relevant portion of the decision is reproduced below:

> "30. xxxxxxxxxx Further, we find that the Hon'ble Delhi High Court has held, that its findings applied to post-Negative List also *i.e.* from July, 2012 onwards, as held by the Hon'ble High Court in its aforementioned judgment particularly in para-54 (supra). **Further, admitted facts are that the appellants have provided output services and raised invoices on principal to principal basis. The appellant has not been acting as intermediary between another service provider and Verizon US. This fact is also supported from the fact that the appellant has raised their bills for the services provided on the basis of cost plus 11% mark-up.** As the services have been provided by the appellant under contract with Verizon US, who are located outside India and have raised their invoices, for such services and have received the remittance in convertible foreign exchange, the appellant satisfies all the conditions, as specified under Rule 6A of Service Tax Rules, 1994, inserted w.e.f. 1-7-2012. xxxxxxxxxxxx
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> 31. **From perusal of the aforementioned ruling, it is evident that the services of the appellant to Verizon US do not merit classification under the category of 'intermediary services'.** Further, the Hon'ble High Court has held in the

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11. 2021 (45) G.S.T.L. 275 (Tri.-Del.)

> appellant's own case (supra) that the agreement between the related parties does not have any impact on the export of services. Further, the findings of the Commissioner (Appeals) that the service provided by the appellant do not qualify as export, as such services provided to the customers, have been consumed in India, is directly in conflict with the ruling of this Tribunal in the case of *Paul Merchants Ltd.* (supra). **Accordingly, we hold that the appellants have rendered services to Verizon US as principal service provider and not as an intermediary. Accordingly, we hold that the appellants are entitled to refund under Rule 5 of the Cenvat Credit Rules, 2004 read with the notification.** Thus, these appeals are also allowed with consequential benefit and the impugned orders are set aside."
>
> **(emphasis supplied)**

38. Learned counsel for the appellant also placed reliance upon a decision of the Chandigarh Bench of the Tribunal in **Service Tax Appeal No. 61877 of 2018** decided on 08.08.2022 [12]. After reproducing the definition of 'intermediary', the Bench observed that:

> "5. A plain reading of the aforesaid provision makes it clear that to attract the said definition there should be two or more persons besides the service provider. In other words an "intermediary" is someone who arranges or facilitates the supplies of goods or services or securities between two or more persons. It is thus necessary that the arrangement requires a minimum of three parties, two of them transacting in the supply of goods or services or securities (main supply) and one arranging or facilitating the said main supply. Therefore, an activity between only two parties cannot be considered as an intermediary service. **An intermediary essentially arranges or facilitates the main supply between two or more persons and does not provide the main supply himself. The intermediary does not include the person who supplies such goods or services or both on his own account. Therefore there is no doubt that in**

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12. M/s. BlackRock Service India Private Limited vs. Commissioner of CGST

cases wherein the person supplies the main supply either fully or partly, on principal to principal basis, the said supply cannot come within the ambit of "intermediary". Sub-contracting for a service is also not an intermediary service. The supplier of main service may decide to outsource the supply of main service, either fully or partly, to one or more sub- contractors. Such sub-contractor provides the main supply, either fully or a part thereof and does not merely arrange or facilitate the main supply between the principal supplier and his customers and therefore clearly not an intermediary. xxxxxxxxxxx

6. What we have gathered from the perusal of the agreement as well as submission of the learned Counsel is that the Support Services in relation to creation of clients account is limited to the performing of services on HLX systems and that too as a backend process. It is the specific case of the appellants that HLX does not have any clients in India. Maintenance, support or troubleshooting function, if any, the appellant is required to perform on requisition from HLX in order to ensure seamless access of services which means there is no requirement of any interaction, whatsoever with the clients of HLX and for performing all these services on behalf of HLX, the appellant receives a pre-agreed consideration from HLX in convertible foreign exchange. Commission is being paid to an intermediary not the transfer pricing, whereas the appellant herein was getting transfer pricing. There is nothing on record to show that the appellant is liasioning or acting as intermediary between the HLX and its clients. Therefore, the finding of the lower authorities that the appellant is an "intermediary" is misplaced. We are astonished to notice that although for earlier periods the then adjudicating authority allowed the refund claim of the appellant, but without looking into those orders and without giving any reason for not following the earlier orders, this time the concerned Authorities held otherwise by denying the credit."

(emphasis supplied)

39. The aforesaid discussion leads to the inevitable conclusion that the refund claimed by the appellant under rule 5 of the Credit Rules could not have been rejected by the Commissioner (Appeals).

40. Thus, for all the reasons stated above, the order dated 18.08.2021 passed by the Commissioner (Appeals) cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order Pronounce on **07.12.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO) MEMBER
(TECHNICAL)

JB