CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 50838 OF 2017

(Arising out of Order-in-Appeal No. 193,194 & 195/ST/Appeals-I/2016-17 dated 20.02.2017 passed by the Commissioner (Appeal-I) Service Tax, New Delhi)

Orbit Research Associates Private Limited **...Appellant**
Plot No. 8, Office No. 304,
Chopra House Complex
Community Centre, Preet Vihar
Delhi-110092

Versus

Commissioner of Service Tax (Appeals-I) **...Respondent**
17-B, IAEA House, M.G.Road,
I.P.Estate, New Delhi

APPEARANCE:

Shri S. Radhakrishnan, Advocate for the Appellant
Shri Rajeev Kapoor, Authorized Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

Date of Hearing: 27.04.2023
Date of Decision: 31.07.2023

FINAL ORDER NO. 50970/2023

JUSTICE DILIP GUPTA:

Orbit Research Associates Private Limited[1] has filed this appeal for setting aside the order dated 20.02.2017 passed by the Commissioner (Appeals-I), Service Tax, New Delhi[2] dismissing the three appeals filed by the appellant to assail the order dated 27.07.2016 passed by the Additional Commissioner of Service Tax[3]

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

adjudicating the two show cause notices dated 03.09.2014 and 31.03.2015 and the Statement of Demand dated 23.03.2016.

2. The two show cause notices and the Statement of Demand relate to the period from 01.07.2012 to 31.03.2015 and proposed to disallow the exemption claimed by the appellant from payment of service tax on 'export of service' by treating the service rendered by the appellant as 'business auxiliary service'[4] defined under section 65(105)(zzb) of the Finance Act 1994[5] to an entity situated in India. The show cause notice relied upon rule 3(2) of the Export of Service Rules 2005[6].

3. The main contention advanced by the appellant before the Commissioner (Appeals) was that the 2005 Export Rules would not be applicable for the period of dispute from 01.07.2012 to 31.03.2015 as they were superseded by the Place of Provision of Services Rules 2012[7], which came into effect from 01.07.2012 and that the services provided by the appellant would be 'export of service', both under the 2012 Rules and the 2015 Export Rules.

4. To appreciate this contention, it would be appropriate to refer to the show cause notice dated 03.09.2014 and the relevant portions are reproduced below:

> "6. Vide letter dated 04.08.2014 (RUD-3) **the assessee intimated that being Export of Service, hence the service is exempt and no service tax have been paid,** however, provided the information regarding total commission received from them from obroad to the tune of Rs. 32,55,304/- as Commission during the period 01.07.2012 to 31.03.2013.

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4. BAS
5. the Finance Act
6. the 2005 Export Rules
7. the 2012 Rules

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8. **Whereas from the above it appears that assessee had provided marketing services to foreign clients and the same is classifiable as BAS but the assessee did not pay service tax** on the same stating that the services provided by them falls under the category of 'Export of Services' and hence exempt from service tax.

9. xxxxxxxxxx. **Market was explored in India on behalf of foreign Principal to serve the target group of customers in this defined territory. There was no export of service at all made by the assessee. Therefore, by no innovative argument, the service provided in India can be converted into export of service.** When promotion of market was intended in respect of defined Territory that cannot be construed to be a service provided abroad. **The service of market promotion resulted in indentifying consumers in said Territory only. When no service was provided outside the defined territory, there was no export of service. The assessee received remuneration for promoting market in the said territory, when no service has gone out of said territory for consumption abroad, the Export of Service Rules, 2005 by no means approves export of service.** The Rules envisaged that services have to flow abroad for consumption there at to uphold the same to be export of service. The services involved in are Marketing Support Services for the marketing of foreign principles (Supplier). The Export of Service Rules, 2005, do not approve view of export made by the assessee in view of Circular No. 141/10/2011-TRU dated 13.05.2011. As the assessee rendered market promotion service to its foreign principal invited liability to Service Tax under Section 65 (105)(zzb) of the Act."

(emphasis supplied)

5. The second show cause notice and the Statement of Demand reiterate the reasons proposed in the aforesaid show cause notice dated 03.09.2014.

6. The Additional Commissioner, by order dated 27.07.2016, denied the exemption claimed by the appellant from payment of service tax and held that the services provided by the appellant would not be 'export of service' but would be classifiable BAS rendered to an Indian entity. The relevant portions of the order is reproduced below:

> "9. **I find that the Appellant have rendered market promotion service to its foreign principal identifying potential consumers in India and resultantly made themselves liable for service tax liability under section 65(105)(zzb) of the act.** In the present proceedings it is observed that the party took the activities of exploring market in India on behalf of foreign principal to serve the target group of customers in this defined territory.
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> 10. **Due to the efforts of the assessee the foreign based principle could sell his products in India. There was no export of service at all made by the party.** Therefore, by no innovative argument, the service provided in India can be converted into export of service.
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> xxxxxxxxxx
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> 13. **I observe that the party undertook market promotion in the territory of India for sale of the products of their foreign based principal. As the service provided by the party are category-III under Export of service Rule, 2005 the condition that the services provided by them had a foreign location have to be satisfied by them by proving that the services were provided abroad and not in India. However, I observe that the overall activities of the party as mentioned in the impugned SCNs resulted in provision of Business Auxiliary Services in India only, thereby making them liable to pay service tax under 'Business Auxiliary Service'.** Therefore, I hold them liable to pay service tax under 'Business Auxiliary Service'."
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> **(emphasis supplied)**

7. This order dated 27.07.2016 passed by the Additional Commissioner led to the filing an appeal by the appellant before the Commissioner (Appeals) and the main contention that was advanced was that the 2005 Export Rules referred to in the show cause notice were not applicable w.e.f. 01.07.2012 since they had been superseded by the 2012 Rules that came into effect from 01.07.2012. The Commissioner (Appeals), after noting the contention of the appellant that during the period of dispute, rule 3 of the 2012 Rules would be applicable and not rule 3(2) of the 2005 Export Rules, observed that to understand this issue the provisions of the 2005 Export Rules would have to be examined and observed that under rule 3(1) of the 2005 Export Rules, it was necessary that the taxable services that are provided and used should be in relation to commerce industry and the recipient should be located outside India. The Commissioner (Appeals), after observing that the 2005 Export Rules had been superseded, observed that under rule 3 of the 2012 Rules the place of provision of service shall be the location of the recipient of service. Thus, it was necessary to examine where the recipient of service was located and after noting paragraphs 11 and 12 of the order passed by the Additional Commissioner observed that the activities were performed by the appellant in India. The relevant portion of the order is as follows:

> "**From the above observation made in the impugned order it can clearly be seen that the appellant's activities are performed in the Indian Territory only.** The appellant, in response to the above observation has not put forth any concrete argument which can negate the same. On the contrary they stated that with effect from 01.10.2014 they fall under the definition of Intermediary Services and from

> that date as per Rule 9 of the "POPS" 12 they are discharging their Service Tax liability."
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> **(emphasis supplied)**

8. The Commissioner (Appeals), thereafter, observed that the appellant was not be an 'intermediary' and as the services provided by the appellant were within the territory of India, they had been correctly classified to be taxable under BAS. The relevant portion of the order is as follows:

> "Here it is important to point out that the appellant is dealing in overseas products like surface science test equipments, environmental analysis kits and equipments, chemical engineering equipment, life sciences and microbiology equipments, laboratory equipments etc. **The impugned order clearly says that due to the efforts of the appellant the foreign based principals could sell their products in India which means that the appellant are selling these precuts on behalf of the foreign principal by exploring market, identifying consumers and therefore the activities are such that the flow of these services is not flowing abroad for consumption. Accordingly, the respondent cannot be termed as a provider of mere advisory services like a commission agent or consignment agent etc. so as to be covered under intermediary services. I therefore, do not find myself in agreement with the contention of the appellant particularly when their grounds of Appeal, the appellant has not offered any elaborate discussion or any agreement to establishes them as an intermediary. As such, the services provided by them within Indian Territory have correctly been classified to be taxable under Business Auxiliary Service."**
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> **(emphasis supplied)**

9. The Commissioner (Appeals) also referred to rule 6A of the Service Tax Rules 1994[8] and the Circulars dated 13.05.2011 and 24.02.2009 and observed as follows:

> "**The above circular when seen in the light of the facts of the case clearly show that the each of the services involved in the subject issue are in fact the events and activities which are destined to be exhausted in India and become extinct soon after their performance.** I am of the opinion that what is material for levy is the activity or the event and the soil or territory on which such an event or activity gets performed and become extinct, **because the end user of the appellant's output services were located in India and the need of the customers is met by the appellant for and on behalf of their foreign principal, as such, the services so provided cannot be termed as 'export of service' because "location of the recipient" depends upon the other conjunct conditions, as applicable from time to time, which need to be independently satisfied for availing the benefit of an export.**
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> One must appreciate that the services provided by the appellant and the provisions of service is co-terminus with its consumption at the hands of the Indian consumers. There is no denying that these services once provided, are not capable of being used in a territory other than where they have been provided. The appellants have not produced any convincing evidence to the effect that the "Business Auxiliary services" are rendered to someone who is located outside India. **Irrespective of the fact, whether benefit of the services has accrued outside India, the appellant, as the facts exist, did not fulfill the condition of service "the recipient of service is located outside India",** which is clear in the light of the CBEC's clarification issued under Circular No. 141/10/2011-TRU dated 13.5.2011. From the contention of the appellant it seems as if they are trying to say that the condition 'provided the recipient

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8. the 1994 Rules

> of service is located outside India' can be construed to mean that it never existed as a condition for a service to qualify as export of service."
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> **(emphasis supplied)**

10. The decision of the Tribunal in **Wall Street Finance Ltd.** vs. **Commissioner of Service Tax, Mumbai**[9] was not followed by the Commissioner (Appeals) as according to the Commissioner (Appeals) the order of the Tribunal had not attained finality for the reason "there is nothing on record from where it can be gathered that the above cestat order had attained finality". The decision of the Tribunal in **Microsoft Corporation (I)(P) Ltd.** vs. **Commissioner of Service Tax, New Delhi**[10] was also not followed by the Commissioner (Appeals) for the reason that the Civil Appeal filed by the department against the said order had been admitted.

11. The Commissioner (Appeals) ultimately held:

> **"Accordingly, keeping in mind that during the period under dispute the condition with regard to the words 'the recipient of service is located outside India' was mandatorily required to be followed, the impugned Order-in-Original has correctly held that the services provided by the appellants are not 'export' as the performance, use and consumption of services happen simultaneously and these all happen in India only owing to which the recipient cannot be termed to have been located outside India.** As such, when there is no difference between the spirit of Rules 3 of ESR' 05, Rule 3 of the POPS Rules, 2012 and Rule 6A of Service Tax Rules, 1994, no intervention is warranted in the impugned order."
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> **(emphasis supplied)**

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9. 2015 (37) S.T.R. 642 (Tri.-Mumbai)
10. 2014 (36) S.T.R. 766 (Tri.-Del.)

12. The Commissioner (Appeals) also held that the extended period of limitation had been correctly invoked for the reason that the appellant could have sought clarification from the department, but such an effort was not made.

13. Shri S. Radhakrishnan, learned counsel for the appellant submitted that the Commissioner (Appeals) committed an illegality in confirming the demand in as much as the 2005 Export Rules relied upon in the show cause notice had been superseded by the 2012 Rules. Learned counsel, also submitted that even under the 2012 Rules, the services would be 'export of service' till 01.10.2014 and, therefore, not taxable.

14. Shri Rajeev Kapoor, learned authorized representative appearing for the department reiterated the findings recorded by the Commissioner (Appeals).

15. Before adverting to the issue, it needs to be noted that against the order passed by the Additional Commissioner the department had also filed an appeal before the Commissioner (Appeals) contending that the 2012 Rules would be applicable for the period in dispute and the same should be followed to determine the place of provision of service. The department also contended that the services rendered by appellant would fall under the category of "intermediary services" w.e.f. 01.10.2014 and would be taxable after this date. This appeal was allowed by the same Commissioner (Appeals) by order dated 22.02.2017 holding that:

> "9. In view of the foregoing discussions, I am of the opinion that the department has correctly opined that the adjudicating authority should have taken cognizance of Rule 6A of the Service Tax Rules, 1994 read with place of Provision of Services Rules, 2012 to

> determine the status of the services and should also have given findings on the aspect of intermediary of goods.
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> 10. In view of the foregoing discussions, the impugned order is modified to the above extent and the departmental appeal is allowed in full."

16. It cannot be doubted that w.e.f. 01.07.2012, the 2012 Rules would apply as is clear from rule 1(2). The notification also mentions that the 2005 Export Rules have been superseded.

17. Since "export service" means a service which is provided as per rule 6A of the 1994 Rules, the said rule is reproduced:

> **"6A. Export of services.-**
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> (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,
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> (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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> (e) the payment for such service has been received by the provider of service in convertible foreign exchange, and
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> (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
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> (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."

18. As noticed above Rule 6A of the 1994 Rules deals with export of services and sub-clause (d) of rule (1) provides that the place of provision of service should be outside India. The place of provision of service is determined under the 2012 Rules. Rule 3 deals with provision of place 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."

19. 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."

20. '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."

21. A bare perusal of rule 3 of the 2012 Rules would indicate that the place of provision of a service shall be the location of the recipient of service.

22. It would, therefore, have to be determined as to who is the recipient of service.

23. It is the case of the appellant that as a service provider to a foreigner supplier namely **M/s. Kruss GmbH, Hamburg, Germany**[11], the appellant is merely a canvasser of the products like surface science test equipments, environmental analysis kits and equipments, chemical engineering equipments, life sciences and microbiology equipments and laboratory equipments of the foreign supplier in India. The appellant explores the market, identifies the customers, and informs the foreign supplier regarding the potential customers situated in India. It is the foreign supplier who ultimately supplies the goods to the Indian customers. For the services rendered by the appellant to the foreign supplier, the appellant receives service charges called as commission charges in convertible foreign exchange. The appellant has treated this service as 'export of service' and, therefore, has not paid any service tax, since the services were rendered to a foreign supplier and the service charges were received in convertible foreign exchange.

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11. Kruss Germany

24. The Commissioner (Appeals) has, however, concluded that since the goods were ultimately sold to customers in India, the appellant was providing services in India and, therefore, the services provided would not be export of service.

25. The Commissioner (Appeals) completely failed to appreciate that so far as the appellant is concerned it was merely providing services to Kruss Germany (a foreign supplier) and the service charges were received by the appellant in convertible foreign exchange. The goods may have been ultimately supplied by Kruss Germany to an Indian entity on the basis of the market survey conducted by the appellant, but this would not mean that the appellant had rendered service to an Indian entity. The appellant would, therefore, clearly be a service provider and the foreign entity would be the service recipient. In terms of rule 3 of the 2012 Rules, the place provision of service is where the recipient of service is located and under rule 6A of the 1994 Rules and rule 3 of the 2012 Rules the place of any service is treated as 'export of service' when the provider of service is located in a taxable territory; the recipient of service is located outside India; and the payment for such service has been received by the provider of service in convertible foreign exchange.

26. The Commissioner (Appeals), therefore, committed an error in holding that the location of the recipient of service is in India. In fact the Commissioner (Appeals) also did not accept the contention of the appellant that w.e.f. 01.10.2014 the appellant would be an 'intermediary' and would be liable to pay service tax under rule 9 of the 2012 Rules. This finding resulted in the department filing an

appeal before the Commissioner (Appeals). As noticed above, it was the case of the department in their appeal that since the period involved in the present appeal was from 01.07.2012 to 31.03.2015, the 2012 Rules would be applicable and the appellant would be an 'intermediary' from 01.10.2014.

27. The aforesaid discussion has been made in the context of the 2012 Rules, though the contention of the appellant is that the demand should be set aside only for the reason that the show cause notice proceeds on the footing that the 2005 Export Rules would apply.

28. Even if the 2005 Rules were to apply, the issue stands decided in favour of the appellant by a larger bench of the Tribunal in **M/s. Arcelor Mittal Stainless (I) P. Ltd.** vs. **Commissioner of Service Tax, Mumbai-II** [12]. The factual position before the larger bench was that a prospective customer in India was approached by Arcelor India and the request was forwarded by Arcelor India to the foreign entity which ultimately supplied the goods to the Indian customers. For the service provided by Arcelor India to the foreign entity i.e. Arcelor France, Arcelor India received commission in convertible foreign currency. The department believed that service tax was leviable on this commission received by Arcelor India since the services were performed and consumed in India and they would not qualify as export of service. This contention was repelled by the larger bench and it was observed that though the goods were being supplied to customers in India, the actual recipient of BAS provided by Arcelor

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12. Service Tax Appeal No. 88483 of 2014 decided on 09.06.2023

India is Arcelor France. The relevant portions of the decision of the larger bench are reproduced below:

> "1. xxxxxxxxx. **A prospective customer in India is either approached by Arcelor India or a prospective customer contacts Arcelor India regarding stainless steel requirement, but in either case the request is forwarded by Arcelor India to the foreign steel mills with the technical requirements of the Indian customer.** Once the foreign mills and the Indian customer come to an understanding on the terms and conditions of supply, a written contract is executed between the Indian customer and the foreign mills or a purchase order is placed on the foreign mills. The documents are prepared by the foreign mills in the name of the Indian customer and the Indian customer, in turn, pays the foreign mills. **Thus, the goods directly pass from the foreign mills to the Indian customer.**
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> 2. A part of the commission received by Arcelor France, as the main agent, from the foreign mills is paid to Arcelor India based on the volume of sales in each quarter in convertible foreign currency. **A dispute arose in relation to such commission received by Arcelor India from Arcelor France for the period from April 2005 to January 2009.** According to Arcelor India, there is no privity of contract between it and the steel mills located outside India and it received the consideration only from Arcelor France. It, therefore, did not collect or pay service tax on the commission received from Arcelor France from April 2005 to January 2009. **The department, however, believed that service tax was leviable on the commission received by Arcelor India from Arcelor France since the services were performed and consumed in India and they would not qualify as 'export of service' under the Export of Service Rules, 2005. Arcelor India believed that it was not required to pay service tax on the commission received from Arcelor France as the service qualified as 'export of service'.**
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45. The 2005 Export Rules were introduced to achieve the destination based consumption tax concept and so exemption is provided from payment of service tax to services exported out of India. The 2005 Export Rules set out various conditions for a service to qualify as export of service. Basically, the service recipient should be outside India; service should be provided from India and delivered outside India; and payment should be received in foreign currency.

46. Prior to 19.04.2006, under rule 3(3) of the 2005 Export Rules, the export of taxable service would mean, in relation to taxable services, such taxable services which have been provided and used in or in relation to commerce or industry and the recipient of such service is located outside India. For the period between 19.04.2006 and 01.03.2007, export of taxable service in relation to business or commerce, is the provision of such service to a recipient located outside India when such service is delivered outside India, and used outside India; and payment for such service provided outside India is received by the service provider in convertible foreign exchange. However, as the phrase 'delivered outside India' in rule 3(2)(a) did not provide clarity with respect to intangible services, this expression was replaced w.e.f. 01.03.2007 by 'is provided from India and used outside India'. The Circular dated 29.04.2009 issued by CBEC clarifies that the relevant factor is the location of the service receiver and not the place of performance and the phase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. **The term 'used outside India', therefore, means that the service is provided to such a service recipient who is located outside India. It is the location of the service-recipient which determines where the service is used.** The use of intangible services should be seen with respect to the location of the service recipient and not the place of performance.

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47. Arcelor France and Arcelor India act as main agent and sub-agent for foreign mills and not as an

agent or service provider for the customers in India. There is no contractual relationship between Arcelor India and the customers in India. **Therefore, even though the goods in the form of steel products are being supplied to customers in India, the actual recipient of BAS provided by Arcelor India is Arcelor France.** Arcelor France has used the services of Arcelor India to provide services as main agents to the mills located outside India.

48. The reasoning adopted by the department is that the services of commission agent were used in India to cater to the Indian markets. It is not possible to accept this reasoning of the department. The Circular dated 24.02.2009 also categorically states that for the services to fall under rule 3(1)(iii) of the 2005 Export Rules, the relevant factor is the location of the service receiver. In other words, the place of performance of the service or the place where the customers of the service receiver are located is irrelevant.

49. As noticed above, it was the consistent view of the High Courts and the Tribunal that export of service would take place under rule 3(1)(iii) of the 2005 Export Rules if a person residing in India provides a service to a foreign entity to enable it to book orders for customers in India. This is for the reason that the foreign entity is located outside India and the payment is received by the person residing in India in convertible foreign exchange.

54. The four issues raised in the reference order have been dealt with extensively and as they are intermingled, the reference is answered in the following manner:

(i) Arcelor India, a service provider, is providing BAS service to Arcelor France, which is a service recipient. Arcelor India is, therefore, providing service to Arcelor France which is situated outside India and Arcelor India receives consideration in convertible foreign exchange. The service provided by Arcelor India is, therefore, delivered outside India and used

> outside India as is the requirement under the 2005 Export Rules prior to 01.03.2007 and Arcelor India provides services from India which are used outside India as is the requirement after 01.03.2007. It cannot, therefore, be doubted that Arcelor India provides 'export of service' as contemplated under rule 3 of the 2005 Export Rules; and
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> (ii) Arcelor France is an agent of the foreign steel mills and Arcelor India is its sub-agent. Arcelor India provides the necessary details of the customers in India to the foreign steel mills and, thereafter, the foreign steel mills and the Indian customers execute a contract for supply of the goods. The goods are directly supplied by the foreign steel mills to the Indian customers. Arcelor India also satisfies condition (b) of rule 3(2) as payments for such service have been received in convertible foreign exchange."
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> **(emphasis supplied)**

45. Thus, irrespective of whether the 2005 Export Rules or the 2012 Rules are applicable, the appellant would render 'export of service' which was not taxable till 01.10.2014, whereafter it became taxable as the appellant became an intermediary.

46. Even otherwise, the extended period of limitation could not have been invoked in the facts and circumstances of the case.

47. The reason given by the Commissioner (Appeals) to sustain the invocation of the extended period of limitation is that the appellant could have sought clarification from the department, but no effort was made. This reason was not found to be a good reason by the Delhi High Court in **Mahanagar Telephone Nigam Ltd.** vs. **Union of**

India and ors.[13] and the relevant portion of the judgment is reproduced below:

> "32. **As noted above, the impugned show cause notice discloses that the respondents had faulted MTNL for not approaching the service tax authorities for clarification.** The respondents have surmised that this would have been the normal course for any person acting with common prudence. **However, it is apparent from the statements of various employees of MTNL that MTNL did not believe that the amount of compensation was chargeable to service tax and therefore, there was no requirement for seeking clarifications. Further, there is no provision in the Act which contemplates any procedure for seeking clarification from jurisdictional service tax authority. Clearly, the reasoning that MTNL ought to have approached the service tax authority for clarification, is fallacious.**
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> 33. It is also important to note that MTNL had declared the receipt of compensation as income in its books of accounts. The final accounts of MTNL are in public domain. In the circumstances, the allegation that MTNL had suppressed any material facts from the Service Tax Department is wholly without any basis.
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> 34. **Mr. Harpreet Singh, learned counsel appearing for the respondents, submitted that the allegation that MTNL had suppressed material facts was based on non-disclosure of the receipt of compensation in its service tax returns.** However, he did not contest the contention that there is no provision in the Act to disclose receipt of any funds in the service tax returns, which are not regarded as consideration for rendering services (whether taxable or exempt). In the circumstances, there is no basis for the allegation that MTNL had suppressed any material facts. **Mere non-disclosure of a receipt, which a party believes is not chargeable to service tax, in the service tax returns, would not constitute**

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13. W.P. (C) 7542/2018 decided on 06.04.2023

suppression of facts within the proviso to Section 73(1) of the Act, unless it is, ex facie, clear that the receipt is on account of taxable services or it is unreasonable for any assessee to believe that the receipt does not fall in the net of service tax. In cases where there is a substantial dispute as to whether receipt of any amount is on account of taxable service – as in the present case – the nondisclosure of the same in the service tax return cannot, absent anything more, lead to the conclusion that the assessee is guilty of suppression of facts to evade tax.

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41. **In the facts of this case, the impugned show cause notice does not disclose any material that could suggest that MTNL had knowingly and with a deliberate intent to evade the service tax, which it was aware would be leviable, suppressed the fact of receipt of consideration for rendering any taxable service.** On the contrary, the statements of the officials of MTNL, relied upon by the respondents, clearly indicate that they were under the belief that the receipt of compensation/financial support from the Government of India was not taxable. Absent any intention to evade tax, which may be evident from any material on record or from the conduct of an assessee, the extended period of limitation under the proviso to Section 73(1) of the Act is not applicable. The facts of the present case indicate that MTNL had made the receipt of compensation public by reflecting it in its final accounts as income. **As stated above, merely because MTNL had not declared the receipt of compensation as payment for taxable service does not establish that it had willfully suppressed any material fact.** MTNL's contention that the receipt is not taxable under the Act is a substantial one. No intent to evade tax can be inferred by non-disclosure of the receipt in the service tax return.

42. **We agree with the contention that the impugned show cause notice was issued beyond the period of limitation and is, thus, liable to be set aside.**"

(emphasis supplied)

48. A perusal of the aforesaid judgment of the Delhi High Court reveals that when an assessee believes that the amount received was not chargeable to service tax, there is no requirement for seeking clarification, more particularly when the Finance Act also does not contemplate any procedure for seeking clarification from the jurisdictional service tax authority. The Delhi High Court also emphasised that it is only when an assessee knowingly and deliberately with an intent to evade payment of service tax, which it was aware would be leviable, suppresses receipt of consideration for rendering a taxable service, that the extended period of limitation can be invoked.

49. In the present case, the appellant, as is seen from the impugned order, had filed ST-3 Returns for the period from July 2012 to September 2014 and had shown the whole commission earned during the relevant period. The order also takes notice of the fact that the appellant had by a letter dated 31.07.2012 revealed to the department that it was providing services to the foreign entity for the products sold in India and that it had received commission payment for such services. It also needs to be noted that these facts had been brought to the notice of the department on 31.07.2012, but the show cause notice was issued to the appellant only on 03.09.2014.

50. Thus, for all the reasons stated above, the extended period of limitation could not have been invoked.

51. It is, therefore, evident that not only had the appellant rendered ‘export of service’, be it under the 2005 Rules or under the

2012 Rules, but the extended period of limitation also could not have been invoked in the facts and circumstances of the case.

52. The impugned order dated 22.02.2017 passed by the Commissioner (Appeals), therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order pronounced on **31.07.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

JB, Shreya