FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 03/08/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. ST/A/70604/2016-CU[DB] dated 07/06/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the **Finance Act, 1994 relating to Service Tax Act, 1994.**

Asstt. Registrar

	Application	Appeal	Name and Address of Appellant
1	ST/MISC/70120/2016	ST/3707/2012	**BARCO ELECTRONICS SYSTEMS PVT LTD** A-38, B&C, SECTOR-64, NOIDA, UP
			Name and Address of Respondent
2			C.C. & C.E. & S.T.-Noida C-56/42...SECTOR 62, NOIDA,UTTAR PRADESH-201307

Copy To
3Advocate(s) / Consultant(s):

V. Lakshmi Kumaran
5, JANGPURA EXTENTSION LINK
ROAD NEW DELHI-110014

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005
9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15
10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)
11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
14 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032
15 C.D.R. 16 Office Copy 17 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD

Misc. Application No. 70120/2016 &
S.T. Appeal No. 3707/2012

Arising out of O/O No. 18-/Commissioner/Noida/2012-13Dated 29.08.2012 passed by Commr. (Appeals) of Central Excise, Customs & S.Tax, Noida.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes

3. Whether His Lordship wishes to see the fair copy of the Order? : Seen

4. Whether Order is to be circulated to the Departmental Authorities? : Yes

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M/s Barco Electronics Systems Pvt. Ltd.

...APPELLANT(S)

VERSUS

Commissioner of Custom, Central Excise & Service Tax, Noida.

...RESPONDENT(S)

APPEARANCE

Shri Puneet Bansal, Advocate &
Shri Prateek Jain, Advocate — for the Appellant(s)
Shri Rajeev Ranjan, Joint Commissioner (AR) — for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)
DATE OF HEARING & PRONOUNCEMENT: 07.06.2016

FINAL ORDER NO.: 70604/2016

Per Mr. Anil Choudhary :

The appellant, M/s Barco Electronics Systems Pvt. Ltd., is in appeal against Order-in-Original No.18-/Commissioner/Noida/2012-13 dated 29.08.2012, passed Commissioner Central Excise, Customs and Service Tax, Noida, by which the claim of export of service had been denied, it was held that they have violated the provisions of the Act and Rules by not getting themselves registered under business auxiliary service and, further, the appellant failed to pay service tax on business auxiliary services by not declaring to the Revenue that they are receiving agency commission and accordingly have suppressed the facts from the Revenue and accordingly, a demand of Rs. 2,29,21,508/- was confirmed for the extended period 2006 -2011 along with interest and also penalty of equal amount jointly under Sections 76, 77 and 78 of Finance Act, 1994. Being aggrieved, the appellant has filed appeal before this Tribunal.

2. The issue in this appeal is whether services provided by the appellant as commission agent for sale of goods of its foreign principal M/s Barco Control Rooms GMBH, Germany on their behalf is to be treated as export of services under Rule 3 of Export of Service Rules, 2005 during the relevant period, i.e. 01.04.2006 to 31.03.2011.

3. The brief facts of the case are that, the appellant is registered with service tax Department, for providing taxable services, namely maintenance and repair service, erection, commissioning and installation services, business support services and GTA services vide registration No. AAACB5865FST001. The appellant had entered into an

agreement with Barco, Germany dated 17.12.2003. A copy of the agreement dated 17.12.2003 is enclosed with the appeal folder. The above agreement expired on 31.12.2006 and a new agreement dated 01.01.2007 was entered into which expired on 31.12.2009. After the expiry of the above agreement, the commission payable to the Appellant was governed by the Transfer pricing policy of the company.

4. According to the agreement with the foreign principle the relevant features of the agreement are as follows:-

> *"This agreement is made this 1st day of January, 2007, by and between: BARCO ELECTRONIS SYSTEMS PRIVATE LTD. A-38, B & C, Sector 64, Noida, a 100% Export Oriented Unit, having its registered office at 14, LSC Community Centre, Pushp Vihar, New Delhi, India, represented by Mr. Rakesh Vohra, Managing Partner, hereinafter referred to as "SUPPLIER"*
>
> *and*
>
> *BARCO CONTROL ROOMS GMBH (BCD), an existing company with limited liability registered under the laws of Germany having its office at An der Rossweid 5 D76229, Karisruhe, Germany, represented by Mr. Carl J Peeters. President of BCD hereinafter referred to as "Buyer"*
>
> *HAVING WITNESSTH:*

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WHEREAS BUYER is interested in obtaining from SUPPLIER services as described in Appendix 1, for hereinafter referred to as the "Services";

Appendix 1 Services to be provided by Supplier

The supplier provides he below listed services through its employees acting as a

Description: Sales Office India

Key responsibilities and Accountabilities

As a sales officer BCD the scope of work is managing, coordinating and developing the entire sales in the area of competence. The sales can be done direct from the Buyer to the customers or via the BCD sales offices in India.

The area of competence is: Indian region (including India, Bangladesh and Sri Lanka)

In detail, the service consists in:

- *Coordination between product base and dealer/NO*
- *Direct sales by Buyer to end user*
- *Customer contact and lead follow-up*
- *Selling strategies according with PB strategies*
- *Discount policies according with PB strategies*
- *Sales coordination within the other regions for international projects*

- *Sales and profit result in the region*
- *Coordination with the non sales team with the BU*

Appendix 2: Price of services listed in appendix 1

The Supplier will charge the Buyer on the basis of a commission on sales

The sales commission for the direct sales of the buyer to the end user is normally calculated on the difference between the buyer transfer price to India and the end user price. However, in practice, the end user price may fluctuate from project to project and many sometimes go below the Buyer transfer price to India due to discounts, etc.

Taking the aforesaid into consideration, the Buyer will provide a commission of average, 7% of the end customer sales price.

For sales from the buyer to the supplier (sales office India) no commission will apply!"

5. As per the agreement, 'BU' stands for business units of the appellant company all over the world and 'NO' stands for National Organization, which has been used to refer to the marketing divisions of the company. Further, 'PB' stands for product base used to refer to the manufacturing units of the appellant company. It is further stated that the appellant company is negotiating with the prospective

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customers of Barco, Germany and procuring the orders from the customers in India. For this purpose, the appellant interacts and liaises with the customers in India by explaining the details of the product of Barco, Germany and ensures that the customers place purchase order on Barco, Germany. Thereafter, Barco, Germany exports the goods from Germany to the customers in India and raises the invoices directly on the customers. The appellant then raises the invoices for its commission on Barco, Germany. The commission is based on an agreed percentage of the value of goods sold and the same is paid by Barco, Germany in convertible foreign currency.

6. The Range Superintendent with a letter 22-07-2009, directed the appellant to deposit the Service tax on the amounts Rs.4,28,23,582/- and Rs.2,82,17,588/- received during the financial years 2006-07 and 2007-08 respectively being commission received for providing services to Barco, Germany. The appellant replied stating that the said services fall in the ambit of 'export of service' as they satisfied all the conditions under the Export of Service Rules, 2005. Thereafter, summons were issued on the appellant with direction to submit the copies of ledger accounts of the foreign principal for the period 2006-07, 2007-08, in October, 2010 and also copies of agreements, copies of invoices, proof of remittance of foreign currency received in India, copy of orders for export of service etc. Accordingly, appellant gave the reply and submitted the documents as desired, thereafter, show cause notice dated 14-10-2011 was issued invoking the extended period of limitation demanding service tax at Rs. 2,29,21,508/- along with interest and

proposing penalty. The commission earned and remittance received is as follows:-

S.N.	Year (Rate of Service Tax)	Commission Received	Service Tax (Including cess)
1.	2006-2007 (12%)	28217588	3453833
2.	2007-08 (12%)	40222345	4971482
3.	2008-09 April, 2008 to 24.02.2009 (12%)	14731450	1820808
4.	24.02.2009 to 31.03.2009 (10%)	4660364	480017
5.	2009-10 (10%)	31510244	3245554
6.	2010-11 (10%)	86891417	8949814
	Total	**20,62,33,408**	**2,29,21,508**

7. The appellant appeared and contested the show cause notice stating that they have provided the services to their foreign principal located outside India and the services so provided have been received outside India and consumed outside India. Accordingly, the service provided by them is the export of service and hence, they are not liable to service tax in India. It was also contended that under the provisions of Rule 3(1) of Export of Service Rules, 2005, they fulfilled all the conditions prescribed under Rule 3(1) and 3(2) as they are a person located in India and have provided services to a person located outside India, such services are for business and commerce, such services have been delivered outside India and used outside India and further payment of such services, have been received in India in convertible foreign exchange. The SCN was adjudicated by the ld. Commissioner, who was pleased to confirm the proposed demand with interest and penalty observing that the ultimate outcome of provision of services by the appellant has reached the consumers in India

"buyers of the products of Barco, Germany" and, then, were ultimately to be consumed in India.

8. Further held, the services provided by appellant, were only to the benefit of the consumers of Indian Territory and the same were provided for and on behalf of their parent company in Germany and the end user of such services being located in India and need of such consumers being met by the appellant for and on behalf of foreign principal. Such services have been provided in India and, therefore, it does not fall under the provisions of export of services. So far as, the contention of the appellant that the provisions of services qualifying for the export of services, as clarified by C.B.E.C. Circular dated 24-02-2009 is also of no help, since the benefit of the services had accrued to consumers in India. Thus, the benefit of services is terminating in India only. As regards the invocation of extended period, it was held that the service by the appellant falls under the business auxiliary services and were liable to discharge the service tax liability and accordingly, it amounted to the suppression of information and accordingly, extended period of limitation is held invokable.

9. The ld. Counsel for the appellant, Mr. Puneet Bansal urges that the issue is no more res-integra and the same is squarely covered in favour of the appellant by the C.B.E.C Circular No. 111/05/2009/ST dated 24-02-2009 and also by the ruling of this tribunal in the case of Paul Merchant Ltd. Vs. C.C.E., Chandigarh : 2013 (29) S.T.R. 257 (Tri.-Del.) and also in Microsoft Corporation (I) (P) Ltd. Vs. C.S.T., New Delhi :2014 (36) STR 766 (Tri.-Del.) wherein also by majority, it

was held that whether the Indian subsidiary company have provided market development operations for foreign principal. It was business auxiliary services provided from India to a service recipient located outside India. Marketing operations in India were not at behest of any Indian customer or principal. Services were being provided under agreement to foreign recipient company to be used in their country and they may or may not result in any sales of product in Indian soil. Customer who paid for the impugned service in question of sales promotion was a foreign company and not person who bought its products in India, though he may also be a beneficiary of such service. Though, impugned service was for sale of product in India, they were export of services, not liable to be taxed in terms of Export of Service Rules, 2005, read with the Finance Act, 1994.

10. The ld. AR for the Revenue, relies on the impugned order.

11. Having considered the rival contentions, we find that the issue herein is squarely covered by the precedent ruling of this Tribunal in the case of Microsoft Corporation (I) (P) Ltd. (Supra). We also take notice of the fact of the C.B.E.C. Circular No. 111/5/2009-, S.T. dated 24-02-2009, the relevant portions which are quoted here 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

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[Notification No. 5/2006-C.E. (N.T.), dated 14-03-2006] on the ground that these activities do not satisfy the condition 'used outside India', -

(i) Call centres..

(ii) Medical Transcription..................................

(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.

(iv) Foreign financial institution ....

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.

2. The matter has been examined. Sub-rule (1) of rule 3 of the Export of Services Rule, 2005 categorizes the services into three categories:

(i) Category I [Rule 3(1)(i)] :...................................

(ii) Category II [Rule 3(1) (ii)]:...............................

(iii) Category III [Rule 3(1)(iii)] :For the remaining services(that would not fall under category I or II), which would generally include knowledge or technique based services, which are not linked to an identifiable immovable property or whose location of performance cannot be readily identifiable (such as, Banking and Other Financial services, Business Auxiliary services and Telecom services), it has been specified that would be 'export', -

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(a) If they are provided in relation to business or commerce to a recipient located outside India; and

(b) If they are provided in relation to activities other than business or commerce to a recipient located outside India at the time when such services are provided.

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(1)(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

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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." (emphasis supplied)

12. As per the law explained by the C.B.E.C. and the example quoted therein, it is explicit the services provided by the appellant is to their foreign principal who have paid for such services in convertible foreign exchange. Accordingly, we hold that appellant has satisfied both the conditions under the Rule 3 of Export of Service Rules of 2005. Accordingly, we hold that the appellant have exported the services in question and they are not liable to pay service tax under the Finance Act, 1994. Accordingly, the impugned order is set aside. The appellant will be entitled to the consequential benefits in accordance with law. The miscellaneous application for early hearing is accordingly disposed off.

(Operative part of the order was pronounced in the open Court).

-Sd/-
(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

-Sd/-
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(Ansari)

प्रमाणित प्रति / Certified True Copy

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सहायक रजिस्ट्रार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001