CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/232,233/2009-DB

[Arising out of Order-in-Original No. 113/2008 dated 15/12/2008 and No.114/2008 dt. 15/12/2008 passed by CCE&ST, Bangalore]

IBM India Private Limited
Subramanya Arcade No.12,bannerghatta Road Bangalore — Appellant(s)

Versus

C.C.E. & S.T.-Bangalore-ltu
100 FT RING ROAD JSS TOWERS,
BANASHANKARI-III STAGE,
BANGALORE,
KARNATAKA
560085 — Respondent(s)

Appearance:

Shri Harish Bindu Madhavan, Advocate — For the Appellant

Dr. J. Harish, Dy. Commissioner(AR) — For the Respondent

Date of Hearing: 04/09/2018
Date of Decision:01/01/2019

CORAM:
HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20017-20018 / 2018

Per : S.S GARG

Appellants have filed these two appeals against the impugned orders dt. 15/12/2008 passed by the Commissioner whereby the Commissioner has confirmed the demands along with interest and imposed penalties under Sections 76 and 78. Since the issue involved in both the appeals is identical, both the appeals are being disposed of by this common order. Details of the appeals are given below:-

Description	ST/232/2009	ST/233/2009
Period of dispute	December 2005 to September 2007	April 2007 to September 2007
Demand liability	Rs.15,11,26,201/-	Rs.9,85,11,431/-

Impugned order No.	No.113/2008 dt. 15/12/2008	No.114/2008 dt. 15/12/2008

For the sake of convenience, the facts of appeal No.ST/232/2009 are taken for discussion and decision.

2. The appellants are engaged in providing taxable service under the category of Business Auxiliary Service (BAS) defined under Section 65(19) of the Finance Act, 1994. The assessee had entered into an agreement with M/s. IBM World Trade Corporation, USA (hereinafter referred to as IBM, USA) in terms of which they were appointed as IBM USA's Business Partner in India for the purpose of marketing selected IBM products in the territory of India. The agreement stipulated payment of commission to the assessee in freely convertible foreign currency in consideration of the marketing / sales promotion services provided in India. As per the agreement for marketing support entered with IBM, USA, the assessee undertook various activities viz. promotion / marketing / sales / procurement of orders and provide marketing support to identify and promote the products of IBM, USA in India. These services provided by the assessee to IBM, USA appeared to be correctly classifiable under BAS covered under Section 65(19) of the Act, 1994, which is taxable with effect from 01/07/2003. M/s. Tata IBM, India were appointed as an IBM Business Partner in India for the purpose of marketing selected IBM products in India. Vide the agreement for the marketing support entered with IBM, USA, M/s. IBM India had agreed to identify customers in India who are entitled to zero or concessional duties (Zero Duty Customers) on the import of computer system and peripherals. IBM USA vide this agreement appointed M/s. Tata IBM on a non-exclusive basis to provide remote

marketing support in respect of computer products sold by IBM and carry out related activities to and in respect of such zero duty customers identified by M/s. Tata IBM for this purpose. They undertook to identify specified zero duty customers in India, complete the documentation of sales agreements and submit the same to IBM USA for acceptance. In consideration of the marketing services rendered, M/s. Tata IBM were paid a commission or fee equal to difference between the prices at which products are invoiced by IBM pursuant here to, duly adjusted for insurance, freight etc. wherever necessary, and the normal price at which M/s. Tata IBM is entitled to buy such products from IBM. The agreement further provided for identifying the parties to the agreement against any third party claims. The services provided by IBM India therefore appeared to have been provided and consumed within India insofar as, promotion of sales, marketing of IBM products is concerned. It appeared that IBM India failed to discharge service tax on such fee / commission received from IBM USA under the taxable category of BAS. Thereafter, after scrutiny of ST3 returns and other documents filed by the appellant, the Department issued the show-cause notice demanding the duty of Rs.15,11,26,201/- along with interest and penalty. The appellant filed reply to the show-cause notice and denied all the allegations in the show-cause notice and submitted that the impugned services undertaken by them amounts to export of services in terms of Export of Service Rules, 2005 and they were not liable to discharge service tax on the amount of commission received in respect of such services. The appellants have also submitted that during the relevant time, the provision of Export of Service Rules were amended by the Central Government twice. After considering the submissions of the appellant, the learned Commissioner confirmed the demand.

3. Heard both sides and perused material on record.

4.1. The learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the issue involved in the present case has been considered by various Benches of the Tribunal and it has been consistently held that the services provided by the appellant are export of service. He further submitted that during the relevant period, the appellant satisfied the following conditions so as to make their service as export of service.

i. Services provided by the appellant are in relation to commerce or industry.

ii. The service recipient i.e. IBM USA is located outside India;

iii. The consideration for rendering the sale promotion activities is received in convertible foreign exchange;

iv. Such services have been delivered and used outside India based on the following reasons;-

…. the appellant promotes products of IBM USA by identifying specified customers for IBM products in India.

…. Based on identification of customers, appellant would get potential orders for IBM USA's products.

…. Such orders are forwarded to IBM USA for its consideration.

…. IBM USA would analyse such orders and would then take a decision whether to sell its goods to such customers. The decision with respect to acceptance / rejection of an order is solely with IBM USA which is provided in Paragraph 4 at Page 2 of the

Agreement.

Further, IBM USA who is the sole decision maker, would take the decision to accept such order or not at US, using the information provided by the appellant.

4.2. He further submitted that the appellant satisfied all the conditions as required under Rule 3 of Export of Service Rules, 2005. He also relied upon the Board's Circular No.111/05/2009-ST dt. 24/02/2009 wherein the meaning of the phrase "used outside India" has been clarified in relation to different categories of taxable services. The relevant portion of the circular is extracted below:-

> *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.*
>
> ....
>
> *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.*

4.3. Learned counsel also submitted that in the appellant's own case for the previous period, this Tribunal in the Final Order No.20066/2016 dt. 20/01/2016 has decided the issue in favour of the appellant by holding that the appellants are not liable to service tax as the services rendered by them are export of services. He further submitted that this issue is no more res integra and has been settled in favour of the

assessee by the decisions mentioned below:-

i. Verizon Communication India Pvt. Ltd. Vs. Asst. Commissioner, ST [2018(8) GSTL 32 (Del.)]
ii. Microsoft Corporation (I) Pvt. Ltd. Vs. CST, New Delhi [2014(36) STR 766 (Tri. Del.)]

5. On the other hand, the learned AR reiterated the findings of the impugned order and submitted that the Commissioner has rightly decieed that the services of marketing the products of the foreign company in India is not a export of service as the service is performed in India.

6.1. After considering the submissions of both the parties and perusal of the material on record, we find that admittedly the appellants are providing the services to their foreign company situated outside India and their parent company does not have any commercial or industrial establishment or any office in India and the services by appellant are provided in relation to provision of service recipient i.e. IBM WTC. Further we find that the appellant satisfied all the conditions that are required under the Export of Service Rules, 2005. Further we find that there is no condition under Export of Service Rules, 2005 that the services performed in India would not qualify as export of service. The rules only provide that recipient of service should be situated outside India and thus specifically acknowledges that export of service can be provided in India. Further the sales commission was received in India in freely convertible foreign currencies. Therefore the appellants have fulfilled all the conditions of export of services as provided under Rule 3(1)(iii) of Export of Service rules. Further, we find that the Division Bench of the Tribunal in the appellant's own case cited supra has held in para 8 as under:-

> *8. As regards Point No. 2 of service tax liability on the various amounts received by the appellant for marketing of the services of the parent concern, we find that there is no dispute as to the fact that the appellant is rendering the services such as selling, obtaining orders, providing the market support to identify and promote the products of M/s IBM World Trade Corporation(parent concern), it is undisputed that these services are provided in India and hence it is the case of the Revenue that the sales commission received are chargeable for service tax liability. In our considered view this issue is also now settled by a majority order of the Tribunal in the case of Microsoft Corporation(I)(P)(Ltd) (supra). The same view has been expressed by following decisions of this Tribunal:*
> *1) Paul Merchants Ltd [2012-TIOL-1877-CESTAT-DEL]*
> *2)Gap International Sourcing (India) Pvt Ltd [2014-TIOL-465-CESTAT-Del]*
> *3) Blue Star Ltd Vs CCE Bangalore[2008-TIOL-716-CESTAT-BANG]*
> *4)ABS India Ltd Vs CST Bangalore [2008(17)STT 223 (Tri-Bang)]*
> *5)Lenovo India Pvt Ltd Vs CST Bangalore [2009-TIOL-911-CESTAT-Bang)]*
> *6) IBM India (P) Ltd Vs CCE, Bangalore [2010-TIOL-154-CESTAT-Bang]*
> *7) National Engineering Industries Ltd Vs CCE Jaipur [2008-TIOL-939-CESTAT-DEL]*
> *In view of the fact that the issue is now settled in favour of the appellant, we hold that the demand of service tax liability cannot be sustained.*

6.2. Further we find that in a majority decision, this Tribunal in the case of Microsoft Corporation (I) Pvt. Ltd. after considering various decisions of the High Court and the Supreme Court has come to the conclusion that the BAS provided by the assessee to their Singapore parent company was delivered outside India as such was used there and is covered by the provisions of Export of Service Rules and are not liable to service tax. It is relevant to be quoted from para 52, which is reproduced hereinbelow:-

> ***52.*** *Apart from the above, we note that there was identical issue was before the Bench of the Tribunal in the case of Gap International Sourcing (India) Pvt. Ltd. [2014-TIOL-465-CESTAT-Del]. Vide its detailed order and after considering the various decisions of the higher Court as also various circulars*

issued by the Board, it stand held that services of identifying the Indian customers, for procurement of various goods on behest of foreign entity is the service provided by a foreign entity and such service provided by a person in India is consumed and used by a person abroad. It has to be treated as export of services. I also take note of the Tribunal's decision in the case of Vodafone Essar Cellular Ltd. v. CCE, Pune [2013-TIOL-566-CESTAT-Mum = 2013 (31) S.T.R. 738 (T)] wherein it stand held that when the services is rendered to third party at the behest of the assessees' customers, the service recipient is assessees' customer and not the third party i.e. his customer's customer. As such, the services being provided at the behest of the foreign telecommunication services provided to a person, roaming India were held to be constituting export services under the Export of Services Rules, 2005. The said decision stand subsequently followed by the Tribunal in the case of CESTAT, Mumbai v. Bayer Material Science Pvt. Ltd. v. CST, Mumbai [2014-TIOL-1064-CESTAT-Mum]. Business Auxiliary services provided by the assessee to their members located outside India by marketing their product in India was held to be export of services inasmuch as the service was held to be provided to the foreign located person who was also paying to the assessee on such services in convertible foreign exchange.

6.3. We also find that in appeal No.ST/233/2009, the Commissioner has not given any findings on the BTO services (Business Process Outsourcing and call centre services) which also qualifies as export of service, though the show-cause notice was issued for BTO services and marketing sales promotion services under the BAS. Further we find that the BTO services also qualifies as export of services in view of the decision cited supra.

6.4. Further we find that the Hon'ble High Court of Delhi in the case of Verizon Communication India Pvt. Ltd. cited supra has considered various circulars issued from time to time by the CBEC and also considered various decisions of the Tribunal and the High Court and has come to the conclusion that the assessee is not liable to pay service tax as the service rendered by them fall under the definition of export of service. It is

pertinent to reproduce para 50 to 53 of the said decision, which is reproduced below:-

> **50.**The decision of Larger Bench of CESTAT in *Paul Merchants Ltd.* v. *CCE, Chandigarh* (supra) may be referred to at this stage. The period with which the dispute in that case related to was between 1st July, 2003 and 30th June, 2007. It involved, therefore, the interpretation of the ESR, 2005 as amended and applicable during the said period. There the assessees were intermediary agents providing money transfer services to foreign travellers who were the end user on behalf of their principals. The contention of the Department that this did not qualify as 'export of service' was rejected by the CESTAT. It noted that the C.B.E. & C. had to issue a clarification Letter No. 334/1/2010-TRU, dated 26th February, 2010 acknowledging the difficulties that were faced by the trade in complying with the condition that the services had to be 'used outside India'. It was clarified that "as long as the party abroad is deriving benefit from service in India, it is an export of service."
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> **51.**In the considered view of the Court, the judgment of the CESTAT in *Paul Merchants Ltd.* v. *CCE, Chandigarh* (supra) is right in holding that "The service recipient is the person on whose instructions/orders the service is provided who is obliged to make the payment from the same and whose need is satisfied by the provision of the service." The Court further affirms the following passage in the said judgment in *Paul Merchants Ltd.* v. *CCE, Chandigarh* (supra) which correctly explains the legal position :
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> "It is the person who requested for the service is liable to make payment for the same and whose need is satisfied by the provision of service who has to be treated as recipient of the service, not the person or persons affected by the performance of the service. Thus, when the person on whose instructions the services in question had been provided by the agents/sub-agents in India, who is liable to make payment for these services and who used the service for his business, is located abroad, the destination of the services in question has to be treated abroad. The destination has to be decided on the basis of the place of consumption, not the place of performance of Service."
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> **52.**In *Vodafone Essar Cellular Ltd.* v. *CCE* (supra), the CESTAT explained the arrangement lucidly in the following words :
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> "Your customer's customer is not your customer. When a service is rendered to a third party at the behest of your customer, the service recipient is your customer and not the third party. For example, when a florist delivers a bouquet on your request to your friend for which you make the payment, as far as the florist is concerned you are the customer and not your friend."

> **53.**The Department was also not justified in characterising the arrangement of provision of services as one between related persons viz., Verizon India and Verizon US. In doing so the Department was applying a criteria that was not stipulated either under the ESR or Rule 6A of the ST Rules.

7. In view of our discussion above, we are of the considered view that this issue is no more res integra in view of the ratios of the various decisions cited supra. Therefore by following the above said decisions, we set aside the impugned order by allowing both the appeals of the appellant, with consequential relief, if any.

(Order was pronounced
in Open Court on **.....**)

P. ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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