

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Service Tax Appeal No. 52799 of 2016

(Arising out of order in appeal No. 91/ST/APPEAL-II/MK/GGN/2016 dated 29.06.2016 passed by the Commissioner (Appeals-II) Service Tax, Delhi).

M/s Verizon India Pvt. Limited

Appellant

Unit No. 305, 3rd Floor, Aero City,
Asset No. 7, Worlodmark-3
Indira Gandhi International Airport
New Delhi.

VERSUS

Commissioner of Service Tax

Respondent

Engineering India Limited
Annexe Building 5th Floor
Bhikaji Cama Place
Delhi.

WITH

Service Tax Appeal No. 52800 of 2016

(Arising out of order in appeal No. 92/ST/APPEAL-II/MK/GGN/2016 dated 29.06.2016 passed by the Commissioner (Appeals-II) Service Tax, Delhi).

M/s Verizon India Pvt. Limited

Appellant

Unit No. 305, 3rd Floor, Aero City,
Asset No. 7, Worlodmark-3
Indira Gandhi International Airport
New Delhi.

VERSUS

Commissioner of Service Tax

Respondent

Engineering India Limited
Annexe Building 5th Floor
Bhikaji Cama Place
Delhi.

WITH

Service Tax Appeal No. 50476 of 2017

(Arising out of order in appeal No. 193/ST/APPEAL-II/MK/GGN/2016 dated 16.12.2016 passed by the Commissioner (Appeals-II) Service Tax, Delhi).

M/s Verizon India Pvt. Limited

Appellant

Unit No. 305, 3rd Floor, Aero City,
Asset No. 7, Worlodmark-3
Indira Gandhi International Airport
New Delhi.

VERSUS

Commissioner of Service Tax

Respondent

Engineering India Limited
Annexe Building 5th Floor, Bhikaji Cama Place, Delhi.

AND

Service Tax Appeal No. 51164 of 2017

(Arising out of order in appeal No. 57/ST/APPEAL-II/MK/GGM/2017 dated 30.03.2017 passed by the Commissioner (Appeals-II) Service Tax, Delhi).

M/s Verizon India Pvt. Limited

Appellant

Unit No. 305, 3rd Floor, Aero City,
Asset No. 7, Worldmark-3
Indira Gandhi International Airport
New Delhi.

VERSUS

Commissioner of Service Tax

Respondent

Engineering India Limited
Annexe Building 5th Floor
Bhikaji Cama Place
Delhi.

APPEARANCE:

Shri N. Venkataraman, Sr. Advocate for the appellant
Shri Amresh Jain, Authorised Representative for the respondent

CORAM: HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

FINALORDER NOs.50976-50979/2019

DATE OF HEARING: 29.01.2019
DATE OF DECISION: 02.08.2019

ANIL CHOUDHARY:

The issue in these appeals is (i) whether the appellants have exported their services and (ii) whether the appellants have provided services on 'principal to principal' basis, or as an 'intermediary' as defined in Rule 2(f) "Place of Provision of Service Rules, 2012 (POPS Rules for short) read with Rule 9 of the said Rules. The appellant, Verizon India, is registered as a Company and also registered with Service Tax Authorities providing output services under the category of Information Technology Software Service, Consultancy Engineering Service, Repairs and Maintenance Services, Business Support Services, etc. The appellants have been filing their returns regularly and maintaining proper records in the ordinary course of business.

2. The appellant has entered into a "Service Agreement" dated 14th December, 2007 in relation to the provision of "Business Services" ('the Agreement') with 'MFS Globnet Inc' (Globnet). Subsequently, Globnet has entered into a Novation Agreement with MCI Communication Services, Inc (USA) ('MCICS/Verizon US') whereby Globnet has novated the agreement in favour of Verizon US and Verizon US has assumed all of Globnet's rights and obligations under the Agreement. In terms of the Agreement, the Appellant (referred to as OpCo in the Agreement) is rendering Business Services including sales support, marketing, advertising, billing, etc. to Verizon US. The services provided by the appellant to Verizon US are reported as "Business Support Services" ('BSS') in the service tax returns and claimed as exports, in terms of the provisions of Rule 6A of the Service Tax Rules, 1994 ('ST Rules').

3. In respect of the Business Support Services exported, the appellant filed periodical refund claims of proportionate input service tax credit under Rule 5 of the Cenvat Credit Rules 2004 read with Notification No.27/2012-CE (NT). All these appeals relate to rejection of refund claim on export of service, as it appeared to Revenue that the appellant is providing the services to their principal located outside India as an 'intermediary' as defined under Rule 2 (f) of POPS Rules read with Rule 9(c) of POPS Rules, which provides – the place of provision of following services shall be the location of the service provider –

(a).....

(b).....

(c) Intermediary services

4. Further, Rule 2(f) defines intermediary - means broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter referred to as the "Main Service") or supply of goods, between the two or more persons, but does not include a person who provides the main service or supplies the goods on his own account". The details of the appeals and the period involved is as follows:-

Appeal No.	Period Involved	Impugned order
ST/52799/2017	Jan.2013 to March, 2013	OIA No. 91/ST/APPEAL-II/MK/GGN/2016 dated 29.06.2016
ST/52800/2017	April 2014 to June 2014	OIA No. 92/ST/APPEAL-II/MK/GGN/2016 dated 29.06.2016
ST/50476/2017	July 2012 to September, 2012 April 2013 to June 2013 July 2013 to September, 2013 October, 2013 to December, 2013 January, 2014 to March, 2014 July, 2014 to September, 2014	OIA No. 093/ST/APPEAL-II/MK/GGN/2016 dated 16.12.2016
ST/51164/2017	April, 2012 to June, 2012	OIA No. 57/ST/APPEAL-II/MK/GGM/2017 dated 30.03.2017

5. The following are the relevant provisions of the Agreement dated 14.12.2007 between the appellant (referred to as "OPCO in Agreement") and MFS Globe Net Inc., a Company registered in USA and having its place of business in USA). Verizon Communication is the holding company of MFS Globe Net Inc. The appellant is engaged in rendering the services and is located in India.

"Whereas -

2(F) *Globenet acknowledges that it requires Business Services of the kind provided by certain Verizon Group operating companies (including OpCo) with whom it has entered into such*

agreements. OpCo acknowledges that it requires Business Services of the kind provided by Globenet as required by OpCo.

2(G) *Consequently, the parties have agreed to enter into this Agreement to (i) to reallocate the risk between the parties to better reflect the matters set out in Recitals (E) to (F) inclusive and (ii) record the services provided by each party to the other in relation to the provision of services to Customers under the new business model, as well as the compensation to be provided by each party to the other in relation thereto.*

DEFINITIONS

Business Day – *a day (not being a public holiday in New York, USA or a Saturday or Sunday), on which banks in New York, USA are generally open for transaction of normal business;*

Business Services Fees - *the business service fees payable by each party hereto to the other party hereto as calculated pursuant to and as further described in Schedule 1;*

Business Services – *the provision of services, subject to and only the extent permitted by Local Regulations, including: sales support, marketing, advertising, billing, maintenance and engineering support, IT support, systems integration, legal, human resources, financial, executive and other administrative services, as well as any other services where a function or resource of one of the parties is used by the other party or benefits are shared by the parties and such telecommunications services outside the territory as are procured by Globenet and /or OpCo.*

Customers – persons (other than any member of the Verizon Group) who have entered or in the future enter into contracts with the Verizon Group for the provision of certain Business Services).

Telecommunication Services – the provision of voice and /or data transmissions and associated services which includes (but is not limited to) internet services and any other services which are ancillary to the provision of such telecommunication services;

2.Provision of Service

Reference in this Clause 2 (except Clause 2.1) to an obligation on Globenet to perform or not to perform an action shall be deemed to include an alternative obligation on Globenet to procure the doing or not doing of that action by any other person in a manner consistent with the then applicable standards of the Verizon Group.

2.1 Subject to other provisions of this Agreement, OpCo and Globenet agree that, in consideration of the Business Services provided by each party to the other, the Business Services fees will be paid by Globenet to OpCo or by OpCo to Globenet as set forth herein.

2.2 OpCo and Globenet agree that:

2.2.1 where it is requested that either OpCo or Globenet provide any Business Services hereunder to the other, OpCo or Globenet, as the case may be, shall provide all information and/or co-operation reasonably necessary to enable the other party to provide such services;

2.2.2. *they shall provide the Business Services in accordance with the Agreement and make all reasonable efforts to incur only reasonable costs in doing so (and either party may review such costs in the manner set out in Clause 3.10); and*

2.2.3 *where an obligation of the parties is required to be performed inside a territory other than the United States of America, it is agreed that such obligation shall not be performed by a member of the Verizon Group incorporated or organised within the United States of America.*

2.3 OpCo's Obligation

2.3.1. *If and when and only to the extent permitted by all applicable laws and regulations, OpCo shall perform the OpCo Functions (as required) with respect to rendering Business Services, such OpCo Functions to be provided from the effective date, within the Territory and on a continuous basis, 24 hours per day, every day of the year, unless otherwise agreed:*

2.3.1.2 *OpCo shall support in the Territory, the seamless provision of Business Services in countries around the world by the Verizon Group;*

2.3.1.2 *Opco shall make available, for the benefit of the Verizon Group, that portion of its services and products for which it is responsible pursuant to this Agreement;*

2.3.1.3 *OpCo shall enter into contracts with customers and suppliers in its own name and for its own account, either directly or by assignment;*

2.3.1.12 *Opco will, within guidelines set by Globenet, manage all aspects of the local customer service requirement including market research, sales proposals, developing pricing and contracts, billing, negotiation of service contracts identifying customer's network requirements, CPE procurement identification, installation of CPE, and sales support and service (including repair of network, as required)*

2.3.1.13 *to the extent the OpCo sales team maintains secondary customer relationships which support the efforts of Globenet, OpCo will manage aspects of the customer service requirement in the Territory including, but not limited to, serving as a local point of contact for relevant customers outside the territory, identifying the requirements of local customer operations, coordinating other local aspects of global contracts, ensuring compliance with local rules and regulations, and managing the availability of the local network; and'*

2.3.1.14 *OpCo will invoice customers located in the Territory with whom the OpCo has a direct contact.*

2.4 Globenet's Obligations

2.4.1 *Subject to its right to procure performance of the same in accordance with the first paragraph of this Clause 2 and if and when and only to the extent permitted by all applicable laws and regulations, Globenet shall perform the Globenet Functions with respect to rendering Business Services, such Globenet Functions to be provided from the Effective Date, outside the Territory and on a continuous basis,*

24 hours per day, every day of the year, unless otherwise agreed:

3. Fees and other sums due

3.1 *In consideration of the Business Services to be provided by each party to the other under this Agreement, Globenet and OpCo shall pay the Business Services Fees to the other party. The Business Services Fees shall be calculated in accordance with the provisions of Schedule 1 which fully sets out the method of calculating the Business Services Fee under the limited risk model implemented by this Agreement together with (in conjunction with the other provisions of this Clause) the assumptions and conventions applicable thereto.*

3.2 *On or before the tenth Business Day following the end of each calendar month (or as soon as reasonably practicable thereafter), each of OpCO and Globenet shall provide GTP Accounting with such financial information (together with such supporting documentation as they may reasonably request) as is reasonably necessary for the Business Services Fees, for such calendar month, to be calculated by GTP Accounting on behalf of Globenet and OpCo.*

3.9 Each party shall:

3.9.1 *make its accounting records for all Business Services provided under this Agreement available for inspection by the other party at all reasonable times; and*

3.9.2 *keep files of vouchers, invoices and receipts relevant to this Agreement, and shall provide copies of them to the other Party upon request.*

16.1 Neither of the Parties shall have any authority to bind or commit the other Party or any other member of the Verizon Group in any way, and nothing contained or implied in this Agreement shall constitute or be deemed to constitute a partnership, joint venture, enterprises or agency agreement between or among the Parties or between or among either Party and any operating company in the Verizon Group.

16.2 *without prejudice to the generality of the foregoing, the parties hereto are and shall remain independent contractors with respect to each other and shall at all times act on their own account only. In the performance of its services under this Agreement, OpCo shall not hold itself out as the agent of Globenet nor act in any way which will pledge the credit of Globenet or incur any liabilities on behalf of Globenet. In entering into contracts with customers in the territory, OpCo will enter into such contract with the customers in the Territory as principal in its own name and on its own account only and not as agent of any other member of the Verizon Group.*

Schedule –I to the Agreement

2.1 *The percentage outlined below reflect the arm's length price for Business Services as of the Effective Date of this Agreement based on the most recent data available at that time. Any of the percentages may be amended pursuant to Clause 3.10 of the Agreement from time to time in order to*

ensure that such percentages continue to represent arm's length prices for such Business Services.

2.1.1. *The Net Cost Plus Percentage shall mean 11 (eleven) percent.*

2.1.2. *The Operating Margin Percentage shall mean 11(eleven) percent.*

3.1 *The Business Services Fee payable to OpCo by Globenet for Business Services performed by OpCo pursuant to this Agreement shall include reimbursement for the following amounts (collectively, the Reimbursed Costs):*

3.1.1 *Non-Routine Bad Debt Expense;*

3.1.2 *Non-Routine Inventory Obsolescence Expense;*

3.1.3 *Certain losses from the sale of fixed assets used in the conduct of the Business as set forth in Clause 2.5.4 of this Agreement;*

3.1.4 *Certain asset impairment and restructuring costs related to the Business as set fourth in Clause 2.5.5 of this Agreement; and*

3.1.5 *Certain losses attributable to FX Risks as set forth in Clause 2.5.6 of this Agreement.*

4.1 *Calculation of the Business Services Fee Payable to OpCo.*

4.1.1 *The monthly Business Services Fee payable to OpCo by Globenet (or the Globenet amount as set forth in Clause*

3.6.2 of the Agreement) shall equal the sum of the following amounts: (a) OpCo's Value Added Costs incurred for the month; (b) the Reimbursed Costs for the month, and (c) the Target OpCo Return for the month.

4.2.1 *The monthly Business Services Fee payable to Globenet by OpCo (or the OpCo amount as set forth in Clause 3.6.1) shall equal (a) Operating profit before Transfer pricing, bad debt expense and inventory obsolescence expense for the month plus (b) the Business Services Fee payable to OpCo for the month as determined in Clause 4.1.1 of this Schedule one less (c) the Target OpCo Return for the month less (d) the Reimbursed Costs for the month.*

6. For the sake of convenience, we refer to the facts from Appeal No.ST/52799 of 2016 relating to the period Jan. 2013 to March, 2013. Pursuant to filing of the refund claims, the same were verified by the Asst. Commissioner, Service Tax, by verifying the nature and classification of services, agreement between the parties, input/output invoices for service, cenvat credit register, receipt of convertible foreign exchange, location of service recipient etc., was found to be in order. The appellants also furnished along with refund claim, Auditor's certificate issued under Notification No.27/2012-CE (NT), copies of input service invoices and service tax payment challans, VAT tax paid under Reverse Charge Mechanism along with Cenvat Credit Register. The Adjudicating Authority framed the issues for determination :-

"(i) Whether the assessee has filed the Refund application within time.

(ii) Whether documents have been submitted as per requirement of Notification No.27/2012-CE(NT) dated 18.06.2012 in support of the claim?.

(iii) Whether the assessee is entitled for applying refund as per Rule 5 of Cenvat Credit Rules 2004.

(iv) Whether the assessee has actually exported taxable services in terms of Rule 6 A of Service Tax Rules, 1994.

(v) Whether the assessee has actually realised full exports proceeds of the relevant period in convertible foreign exchange.

(vi) Whether the input services, on whose credit the refund is applied for, are used for providing the exported service.

(viii) Whether the Refund claim calculation is as per Notification No.27/2012 dated 18.06.2012 read with Rule 5 of Cenvat Credit Rules, 2004.

7. Further, the Adjudicating Authority examined the conditions laid down in Rule 6 A of Service Tax Rules, 1944, which are as under :-

Service Tax Rules, 1994: the conditions to be fulfilled for 'Business Support Services' to qualify as exports were prescribed in the Service Tax Rules which were as follows:

Condition 1: The service provider should be located in the taxable territory.

Condition 2: The service recipient should be located outside India;

Condition 3: The service should not be covered under Section 66 D of the Finance Act, 1994 for negative list of services.

Condition 4: The place of provision of services should be outside India

Condition 5: The payment for such services should be received by the service provider in convertible foreign exchange.

Condition 6: The service provider and the recipient should not be establishments of the same person.

Thereafter, he recorded his satisfaction as follows:-

Condition 1: The service provider i.e. VIPL is registered with the service tax authorities as its premise located in New Delhi. Therefore, Condition 1 is satisfied.

Condition 2: The service recipient i.e. MCI Communications Services Inc.US is located outside India. Therefore, Condition 2 is duly satisfied.

Condition 3: The services are not covered under the negative list. Therefore, condition 3 is also satisfied.

Condition 4: The place of provision of service has to be determined in terms of the Place of Provision of Service Rules, 2012 ('the POPS Rules'). Specific rules have been provided for different types of services like performance based services (in relation to goods/presence of individual), services in relation to immovable property, services relating to events etc. The place of provision of business support services is determinable under Rule 3 of the POPS Rules i.e. the location of the service recipient. The location of service recipient is defined under Rule 2(i) of the POPS Rules. In terms of the said rule the

location of service recipient who is not registered under service tax in India is determined basis the location of his business establishment/ fixed establishment using the services / establishment most directly concerned with the use of the services or the usual place of residence of such service recipient, as applicable. Since the Overseas group entities have their business establishments outside India and the services are received by such business establishments, the location of the service recipient shall be outside India. Thus, the place of provision of the subject services is outside India. Accordingly, Condition 4 is duly satisfied.

Condition 5: As stated above, the payment in respect of the above services has been received from the overseas entities in convertible foreign exchange. Accordingly Condition 5 is also satisfied.

Condition 6: The service provider and the recipient are separate legal entities and therefore, Condition 6 does not apply in the instant case.

8. Since all the six conditions mentioned in the Service Tax Rules are duly satisfied, the services provided under the Agreement qualify as exports. On going through the documents and BRCs, I find that the total amount as shown in export invoices has been realised in convertible foreign exchange.

9. The assessee provides the services mentioned above to MC Communications Services Inc., U.S.A. The services have been classified by the assessee under Business Support Services. On perusal of the agreements and the write up submitted by the party, it appears that party is supporting the business of overseas entities

and is covered under the ambit of Business Support Services. Therefore, the services are correctly classified under the category of Business Support Services.

10. On going through the export invoices and documents submitted as evidence for realisation of export proceeds, it is observed that the total amount as shown in export invoices was realised in convertible foreign exchange. Self certified statement including relevant BRCs evidencing the receipt of export proceeds invoices wise has also been annexed to the claim.

11. The assessee has furnished the following justification for use of input services for output services.

12. For providing the output service exported, the Adjudicating Authority observed that the appellants have used the following input services along with its nexus as follows:-

S. No	Input Services	Nexus with Output Service
1.	Courier Services	<i>These services are used by the Company in relation to transportation of time-sensitive documents and other articles related to rendition of output service. The business requires on-time transportation of such documents/articles and timely delivery is assured by a reliable courier agency. The courier services are therefore, availed to meet the time-lines in relation in relation to various business activities and the rendition of output services to customers. Accordingly, the said services qualify as input service.</i>
2.	Chartered Accountant Services	<i>The business requires to comply with numerous statutory laws and needs advise for which services provided by a Chartered Accountant are availed. Such services are integral to the seamless functioning of the business operation of the Company, Including the output services provided. Thus, such services qualify as input service.</i>
3.	Business Auxiliary Services	<i>These services are availed for managing corporate reputation, risk assessments and media management. These services are integral to the business operations and are important for managing the front office business operations of the Company.</i>
4.	Management, Maintenance or Repair Service	<i>These service are in relation to carrying out maintenance and repairs of the equipment's installed at customer premises for providing IT Support services. Such services ensures that business operations achieve higher efficiency level and minimum breakdown.</i>
5.	Equipment Rental Charges	<i>These services are in relation to the renting of the equipment's. The equipment obtained on rent are required by the Company for providing IT support services to its clients. Thus, service are the backbone of the IT support services provided by the Company. Services are therefore directly related to the business operations and hence qualify as input services.</i>

6.	<i>Manpower Recruitment service</i>	<i>Manpower is essential for rendition of output services and the manpower agencies assist in recruitment, selection and supply of manpower. These services help in recruitment of competent professionals who perform various activities in relation to the output services of the company. These services thus qualify as input service.</i>
7.	<i>Consultancy Service</i>	<i>This service is used for obtaining expert advices/consultancy for managing IT infrastructure, IT Platform, integration of information Technology and improving IT services. Therefore, these services are consumed in relation to providing an output service thus qualify as input services.</i>
8.	<i>Information Technology Software Service</i>	<i>These services are used for analysis, up gradation and installation of IT software at customer premises in relation to the information Technology software and data security. All these are therefore directly related to the business operations and hence qualify as input service.</i>
9.	<i>Installation Services</i>	<i>These service are availed for installing the equipment's at the customer premises for providing the IT support services. The services have a direct nexus with the rendering of the taxable output service and consequently quality as input services.</i>
10.	<i>Business Support Service</i>	<i>The company receives business support services from overseas entity in form of billing administration, IT support and consultancy, support and other business administrative support service.</i>
11.	<i>Legal Services</i>	<i>These services are in relation to the advice/assistance obtained for complying with the various statutory laws and for representing the Company at different legal forums. These services are vital for smooth functioning of business and for complying with government notified laws and hence qualify as input service.</i>
12.	<i>Software Services</i>	<i>These services are availed for managing IT security services at the customer premises. These services are availed for safeguarding the IT structure of the customers. The services have a direct nexus with the rendering of the taxable output service and consequently qualify as input services.</i>
13.	<i>Management Consultancy Service</i>	<i>This service is used for obtaining expert advices / opinions on business related matters, conducting studies & research. These services are in relation to advisory on finance, tax, supply chain and accounting aspects related to provision of efficient and optimum quality of output services. Therefore, these services are used in relation to providing an output service and thus qualify as input service.</i>

13. Thus, recording his satisfaction as to the export of services provided by the appellant, the Adjudicating Authority was pleased to grant eligible refund, by the order-in-original.

14. Thereafter, the said order was reviewed by the Commissioner of Service Tax as a Reviewing Authority, who merely relying on the definition of "Intermediary Service" as defined under Rule 9 of POPS Rules, which provides that in case of such service provided by 'intermediary', the place of provision of service shall be the location of the service provider". It appeared to Revenue that the appellant is providing service as intermediary and not as a principal on his own account and as such, the place of provision is in India within the

taxable territory, thus, it appeared that the services provided by the appellant to the MCI, USA are not export of service and hence, the appellant is not eligible to refund. Accordingly, the Revenue filed appeal before the Commissioner (Appeals). The Commissioner (Appeals) has been pleased to record the findings that in the instant case the main service is telecommunication service which is being provided by the group of companies of respondent – assessee to their clients. The respondent have been facilitating the provision of such services by the group companies to their clients. Further, Section 66 F provides for the principal of interpretation of specified description of services or bundled services, where a service is capable of differential treatment for any purpose based on its description the most specific description shall be preferred, over a more general description.

15. Accordingly, held it appears that the activities undertaken by the respondent/assessee are covered under the definition of “Intermediary services”. Thus, as alleged by the Revenue, the respondent /assessee will be covered under Rule 9 of POPS Rules and accordingly, the place of provision of service will be the location of service provider i.e. location of the respondent –assessee, which is in the taxable territory. Therefore, services do not qualify as export under Rule 6 A of Service Tax Rules, 1994, appears to be correct. Further,, role of the respondent-assessee appears to be that of facilitating of services between the group companies and the client. Though the respondent-assessee has been providing a bundle of services, the essential character of services appears to be that of intermediary services. It was further observed that the ruling of the

Hon'ble Supreme Court in the case of **CCE Vs. Mysore Elec. Ind. Ltd. - 2006 TIOL 153 (SC) – CX** relied upon by the respondent-assessee is not relevant to the appeal, as the classification of goods and services are different in nature. The Advance rulings relied upon by the respondent-assessee in the case of **Universal Service Vs. CST, Delhi-IV** and **Golden Web Services Vs. CST, Delhi-IV**, which has also not been found relevant as the services provided by these concerns were payment processing services (Business Support Services), supervision and quality of third party customer care services, marketing and promotional services. Whereas the respondent-assessee is providing telecommunication services (main service), market research, identifying customer, Net Pricing, billing and administrative support, etc. i.e. Business Support Services. Accordingly, the Commissioner (Appeals) was pleased to allow the appeal of the Revenue and set aside the adjudication order granting refund.

16. Being aggrieved, the appellants are before this Tribunal.

17. Ld. Counsel for the appellant urges that the issue to be decided by this Tribunal is –

Whether the activities undertaken by the appellant qualified to be 'intermediary services' , as specified under POPS Rules or not.

18. Ld. Counsel submits that in the review order and the impugned orders of the court below, reliance has been placed simply on the definition of 'intermediary service' with no discussion of the facts in question and it has been erroneously held that the activities undertaken by the appellant fall under the category of intermediary

services. It is further submitted that in order to be intermediary, three parties are essentially involved. The appellants submit that the services do not qualify as intermediary services, as only two parties are involved in the transaction under dispute viz. the appellant, Verizon India Ltd. and Verizon, USA. There is no tripartite agreement wherein the appellant acting as a facilitator between the Verizon - US and its customers in India. The appellants have provided the services on principal to principal (P2P) and on its own account. Referring to clauses 2.3.1.12/13/14 of Agreement, it is evident that the appellant is providing the services to Verizon,USA as a principal on its own account raising their own invoices. Further, neither by reasoning or by any documentary evidences, the Department is able to prove as to how the appellant facilitates the services between the Verizon, US and its customers in order to qualify as 'intermediary services'. Further, sofar the appellants have provided the direct services to domestic customers (within India) based on the mandate of Verizon, US, they have discharged the applicable service tax and thus, by virtue of aforementioned clauses, the appellant is not arranging or facilitating the provisions of any services between Verizon, US and the customers of Verizon, US. This fact is *ipso facto* proved by the clause 2.3.1.14 of the agreement, wherein it is clearly indicated that in case of direct services, the appellant will directly invoice the customer. Such facts are not in dispute and are supported by the Service Tax Returns filed before the department.

19. Further evidently under the terms of the Agreement and on perusal of the transaction, services are provided by the appellant to

Verizon, US on P2P basis. It is supported by paras 16.1 and 16.2 of the agreement, which have already been aforementioned.

20. Ld. Counsel further places reliance on the ruling of Delhi High Court in the appellant's own case (in Writ Petition) decided by the High Court by order dated 12.09.2017 reported at **2017-TIOL-1863-ST-DEL-ST**. The common issue before the Hon'ble High Court was – whether the services provided by Verizon India under the Master Supply Agreement with **MCI International Inc (Verizon , US)**, for rendering connectivity services for the purpose of data transfer, constitute export of tele-communication services, under the Finance Act, 1994 read with relevant Rules thereunder. The Hon'ble High Court took note of the fact that since Verizon, US does not have the capacity to provide such services, in all geographical or across the globe, it utilizes the services of the other entities including Verizon India to provide connectivity to its customers. Such customers is provided in the form of --

- (a) **Local Access** : where Verizon India facilitates provision of wire line telecommunication circuit between two Verizon Business designated locations.
- (b) **Bandwidth**: where Verizon India provides diverse wire line telecommunication circuit of a specified bandwidth at the designated locations.
- (c) **MPLS VPN**: wherein a virtual private network is established through a private line.

21. The Hon'ble High Court taking notice of the relevant provisions of the Act and the Rules and further taking notice of the CBEC

Circular No.90/01/2007, which provided that whether telephony service is provided to subscribers of international telephone service providers, who may be on a visit to India and are availing the inbound roaming services. The circular provided that such service to an inbound roamer is delivered and consumed in India and, therefore, is not an export of service. The Hon'ble High Court in para 44 and 45 held as follows:-

"44. What this Circular does is to indicate, in an Annexure thereto, the classification (by a three digit code) of services for the purposes of levy of service tax. The Annexure does not refer to "telecommunication services". This did not, however, mean that in relation to "telecommunication services", the earlier Circular dated 3rd January, 2007, continued to operate. Paragraph 6 of the Circular dated 23rd August, 2007 makes it explicit that, " all circulars", clarifications and communications issued from time to time stands superseded. There is nothing to replace what has been superseded as far as the Circular dated 3rd January, 2007.

45. In any event the Circular dated 3rd January, 2007 would in any event not apply to the services provided by Verizon India to Verizon US. In order to determine who the 'recipient' of a service is, the agreement under which such service has been agreed to be provided has to be examined. When the Master Supply Agreement between Verizon India and Verizon US is examined, it is plain that the recipient of the service is Verizon US and it is Verizon US that is obliged to pay for the services provided by Verizon India. "

22. The Hon'ble High Court in para-51 of the judgement held that the Tribunal is correct in placing the reliance on the ruling in **Paul Merchants Ltd. Vs. CCE, Chandigarh** in holding that "the service

receipt is the person, on whose instructions/orders, the service is provided and who is obliged to make payment for the same and whose need is satisfied by the provisions of the service." It is also observed that the Department was also not justified in utilising the arrangement of provision of service as one between the related persons. In doing so, the Department was applying a criteria that was not stipulated either under the Export of Service Rules or Rule 6A of Service Tax Rules. The Hon'ble High Court summaries its findings and conclusions as under:-

"54. (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 receipt of the service was Verizon US which was located outside India.

(iii) That Verizon India may have utilized 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 date 3rd January, 2007 of the CBEC 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 Service Tax Rules and was therefore an 'export of service'. The amount received for the export of service was not amenable to service tax.

55. The Court is satisfied, therefore, that in the present case, the denial of the refund of the Cenvat credit to Verizon India and the raising of a demand of service tax on the consideration received by it for export of telecommunication services to Verizon US are not sustainable in law. The impugned orders dated 12th September, 2016 passed by the Commissioner denying the refund of cenvat credit to Verizon India for the aforementioned period and the SCN dated 11th November, 2016 issued to it raising a demand of service tax for the export of services, and all proceedings consequent thereto, are hereby set aside. The result is that Verizon India will be able to reinstate the Cenvat credit in its books of accounts. The refund as claimed together with the interest due thereon will be processed and issued to Verizon India by the Department without delay."

23. Accordingly, in view of the aforementioned submissions and the ruling of the Hon'ble Delhi High Court in the appellant's own case, Id. Counsel states that the issue is no longer res integra and prays for allowing their appeal in their favour.

24. Ld. Authorised Representative for the Revenue has relied on the findings of the court below. He further states that the appellant is referred to as OPCO in the agreement, who is engaged in the provision of Business Support Services in the territory of India. The Business Services as per agreement is defined as follows:-

"Business Services": the provision of services, subject to and to only the extent permitted by Local Regulations, including: Sales support, marketing, advertising, billing, systems integration, legal human resources, financial, executive and other

administrative services, as well as any other administrative services, as well as any other services, where a function or resource of one of the parties is used by the other party or benefits are shared by the parties and such Telecommunication Services outside the Territory as are procured by Globenet and/or OpCO (i.e. the Appellant)."

25. Further the obligations of the appellant as per the agreement are given in Clause 2.3.1.12/13/14 (as aforementioned).

26. The customers are consumers of the services provided by the appellant, who are the third parties. The appellant belongs to Verizon Group of Companies. All such Group Companies are facilitating or arranging the services for and on behalf of the group companies in the territory where they are located and are dealing with the customers located in the territory. In other words, the appellant, OpCO arranged or facilitated the provision of services between the Verizon US and its customers. The appellant qualify as 'intermediary' between Verizon Group & its customers in the territory of India. For deciding the place of provision of services in the instant case (period starting from 1.7.2012), the relevant applicable rules are POPS Rules, 2012. As per Rule 9 of POPS, for certain specified services, which include intermediary services, the location of the service provider shall be the place of provision of service. Further, it is evident from Clauses 2.3.1.12/13/14 of Agreement that the appellant is a person, who arranges and facilitates the provision of service between the Verizon US and the customers in the territory of India.

27. The Id. Authorised Representative further submits that the ruling of Delhi High Court in the appellant's own case pertains to

Positive List Regime, before 30.06.2012. When there was no rules regarding POPS which came into operation only during Negative List Regime w.e.f. 1.7.2012 in the form of POPS Rules. Further, the recipient of service is the person, on whose instructions/orders, the service is provided and who is obliged to make payment for the same and whose need is satisfied by the provision of such services. In the instant case, due to applicability of Rule 9, 'place of provision of service rules (POPS Rules) is the location of service provider-appellant. Accordingly, the Id. Authorised Representative prays for dismissing the appeals.

28. Having considered the rival contentions, we find that so far the Appeal No.ST/51164 of 2017 relating to the period April, 2012 to June, 2012 is concerned, the same is for the Positive List Regime (prior to 30.06.2012) and thus, is squarely covered by the ruling of Delhi High Court in the appellant's own case (supra). Accordingly, this appeal is allowed in favour of the appellant with consequential benefit and the impugned order is set aside.

29. As regards the other three appeals, having considered the rival contentions and the facts on record, the case of Revenue is that the location of service provider/appellant is in India and further in terms of Rule 9 of POPS, the service provided, being intermediary services, the location of the service provider under Rule 9 of POPS, shall be the place of provision of services, provided to Verizon US. Further, case of Revenue is that as location or place of provision of service is in India, it does not amount to export of service and accordingly, the appellant is not eligible for export benefits (Refund of Input tax) and is liable for tax in India.

30. We find that the said stand of Revenue is wholly misconstrued and erroneous. Firstly, no demand notice was issued on the appellant refusing or questioning the status of the export of service to Verizon US, as declared in their ST-3 Returns. 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 judgement 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 6 A of Service Tax Rules, 1994, inserted w.e.f 1.7.2012. Reliance was placed by the appellant on the following judgements supporting their contentions:-

- (1) M/s. Evalueserve. Com Pvt. Ltd. Vs. CST, Gurgaon [Order No.A/60151/2018] dated 27th February, 2018.**
- (2) M/s. Sunrise Immigration Consultants Pvt. Ltd. Vs. Commissioner of Central Excise and Service Tax, Chandigarh [2018-TIOL-1849-CESTAT-CHD dated 16th March, 2018]**
- (3) GoDaddy India Private Limited as Commissioner of Service Tax, Delhi-IV [AAR/ST/08/2016] ['GoDaddy']**
- (4) Universal Services India Private Limited Vs. The Commissioner of Service Tax, Delhi-IV [AAR/ST/07/2016].**

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 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.

32. To sum up –

All the appeals are allowed with consequential benefit.

(Pronounced on 02.08.2019).

(Anil Choudhary)
Member (Judicial)

(Bijay Kumar)
Member (Technical)

Ckp

