CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. ST/90037/2014

(Arising out of Order-in-Appeal No. 647 & 648/ST-II/2014 dated 21.07.2014 passed by Commissioner of Central Excise & Service Tax (Appeals-IV), Mumbai zone-I)

Commissioner of Service Tax, Mumbai-II **Appellant**
4th floor, New Central Excise Bldg.,
M.K. Road, Churchgate,
Mumbai 400 020.

Vs.

Lamhas Satellite Services Ltd. **Respondent**
Tower No.1, 6th floor,
International Infotech Park,
Above Vashi Rly Station,
Vashi, Navi Mumbai 400 703.

WITH

Appeal No. ST/88704/2018

(Arising out of Order-in-Appeal No. 647 & 648/ST-II/2014 dated 21.07.2014 passed by Commissioner of Central Excise & Service Tax (Appeals-IV), Mumbai zone-I)

Commissioner of Central Excise, Belapur **Appellant**
CGO Complex, 10, CBD Belapur,
Navi Mumbai 400 614

Vs.

Lamhas Satellite Services Ltd. **Respondent**
Tower No.1, 6th floor,
International Infotech Park,
Above Vashi Rly Station,
Vashi, Navi Mumbai 400 703.

AND

Appeal No. ST/88925/2018

(Arising out of Order-in-Appeal No. SK/GST (Audit-II)/MUM/24 & 25 / Appeals Raigad/2018 dated 12.02.2018 passed by Commissioner of CGST & Central Excise (Audit-II), Mumbai)

Lamhas Satellite Services Ltd. **Appellant**
Tower No.1, 6th floor,
International Infotech Park,
Above Vashi Rly Station,
Vashi, Navi Mumbai 400 703.

Vs.

Commissioner of Service Tax, Mumbai-I **Respondent**
4th floor, New Central Excise Bldg.,
M.K. Road, Churchgate,
Mumbai 400 020.

AND

Appeal No. ST/89582/2018

(Arising out of Order-in-Appeal No. SK/GST (Audit-II)/MUM/24 & 25 / Appeals Raigad/2018 dated 12.02.2018 passed by Commissioner of CGST & Central Excise (Audit-II), Mumbai)

Lamhas Satellite Services Ltd. **Appellant**
Tower No.1, 6th floor,
International Infotech Park,
Above Vashi Rly Station,
Vashi, Navi Mumbai 400 703.

Vs.

Commissioner of Central Excise, Belapur **Respondent**
CGO Complex, 10, CBD Belapur,
Navi Mumbai 400 614

Appearance:

Shri Aditya Kumar, Advocate with Shri Vinay Bhushan, C.A. for the Appellant/Assessee
Shri M. Suresh, Authorised Representative for the Respondent/Revenue.

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. A/**86064-86067/2019**

Date of Hearing: 14.02.2019
Date of Decision: 04.06.2019

PER: SANJIV SRIVASTAVA

The appeals under consideration are detailed in the table below:

Appeal No	**Order in Appeal**	**OIO Date**	**Period**	**Refund**
ST/90037/2014	21.07.2014	16.01.2014	July 12 to Sep 12	8271193
ST/88704/2018		18.03.2014	Jan 13 to Mar	6642636

			13	
ST/88925/2018	12.02.2018	25.08.2015	July 13 to Dec 13	7828745
ST/89582/2018		20.08.2015	Jan 14 to Mar 14	5759660

1.2 Since by the order dated 21.07.2014, Commissioner (Appeal) had allowed the appeals filed by the appellant against the orders of jurisdictional Assistant/ Deputy Commissioner rejecting the refund application filed by the Appellants in terms of Rule 5 of the CENVAT Credit Rules, 2004, revenue has filed the first two appeals.

1.3 Since by the order dated 12.02.2018, Commissioner (Appeal) had rejected the appeals filed by the appellant against the orders of jurisdictional Assistant/ Deputy Commissioner rejecting the refund application filed by the Appellants in terms of Rule 5 of the CENVAT Credit Rules, 2004, assessee (Claimant) has filed the last two appeals.

1.4 As the issues involved in all the four appeals are identical all four appeals have been taken up together.

2.1 Lamhas Satellite Services Ltd (herein after referred as “claimant”) had been filing refund claim in terms of Rule 5 of CENVAT Credit Rules, 2004, for claiming the refund of accumulated credit against the export of services.

2.3 After consideration of the refund claim after issuing the show cause notice and taking into consideration the submissions of the claimant, jurisdictional Assistant/ Deputy Commissioner rejected the four claims filed by the claimant vide his orders dated 16.01.2014, 18.03.2014, 20.08.2015 and 25.08.2015.

2.4 Against these four orders claimant filed the Appeals before Commissioner (Appeal). Commissioner (Appeal) has vide his order dated 21.07.2014 allowed appeals filed by the claimant against the orders dated 16.01.2014 and 18.03.2014. However by the order dated 12.02.2018 he had rejected the appeals filed against orders dated 20.08.2015 and 25.08.2015.

2.5 Aggrieved by the order dated 21.07.2014 revenue is in appeal and aggrieved by the order dated 12.02.2018 claimant is in appeal.

3.1 In their appeal, revenue has assailed the order of Commissioner (Appeal) stating that-

i. Though the services provided by the claimant to Globe cast can be treated as export services, the services provided by them under agreement, in relation to distribution of Russia Today Channel, in India, cannot be considered as export of services, as in this case, the assessee had raised the export invoices for recovery towards Broadcasting charges under the category of Broadcasting Services. From the copies of invoices submitted it is apparent that both service provider and service recipient are located in India. Thus the place of provision of services is from within India and not outside India, hence it does not fulfill the conditions of Export of Services as per Rule 6A of Service Tax Rules, 1994.

ii. These services cannot be considered as export of services as they are provided in India for use in India, notwithstanding the fact that the claimant undertakes the activities on behalf of a person located outside India. In this consideration is paid by M/s Globecast to the claimant for actual recipient of channel. As far as distribution of Russia Today Channel is concerned both, the provider and the recipient of services are situated in India. This view has been upheld by Bombay High Court in case of Tech Mahindra Ltd [2014 (36) STR 341 (BOM)]

iii. Reliance placed by the Commissioner (Appeal) on the order in case of Gap International Sourcing (India) Pvt Ltd [2014-TIOL-465-CESTAT-DEL] is incorrect and improper.

iv. Thus the order of Commissioner (Appeal) allowing the appeals is not legal and proper and needs to be set aside.

3.2 In their appeal, claimant has assailed the order of Commissioner (Appeal) stating that-

i. They are conducting their business on their own behalf only and do not qualify as intermediary as defined under Place of Provision Rules, 2012 and held by Commissioner (Appeal). Since they do not qualify as “intermediary”, the place of provision of services will have to be determined as per Rule 3 and not as per rule 9(c) ibid.

ii. They satisfy all the conditions prescribed by Rule 6A of Service Tax Rules, 1994, for determining whether the service provided is ‘export of service’ or not. Since they fulfill all the conditions as laid down by Rule 6A, the services provided by them to Globecast should be considered as Export of Services and benefit of Rule 5 of CENVAT Credit Rules, 2004 be allowed to them.

iii. They rely on the decisions of Tribunal In case of Paul Merchants [2013) 29 STR 257 ()T) and that of Delhi High Court in case of Verizon Communications India Pvt Ltd [2018 (8) GSTL 32 (Del)] in their favour.

iv. Thus the order of Commissioner (Appeal) is erroneous not sustainable.

4.1 We have heard Shri Aditya Kumar Advocate for the Claimant and Shri M Suresh, Assistant Commissioner, Authorized Representative for the revenue.

4.2 Arguing for the claimant learned advocate submitted that-

i. Commissioner (Appeal) has gone beyond the scope of show cause notice and determined that the services provided by them were not export of services, by holding them as “intermediary”. There was no such charge in the show cause notice.

ii. The finding rendered by the Commissioner (Appeal) holding them as intermediary is without any basis.

iii. Commissioner (Appeal) has completely ignored vital clauses binding the parties in terms of agreement entered between them and the service recipient. He has ignored the clauses at 3A, 4A, 4B, 4D, 6A and 6B

iv. A proper analysis of these clauses will show that they are providing a whole gamut of valuable services to the foreign service recipient. As per the definition of intermediary as per the rules, intermediary must only be arranging for the facilitation of service between the service provider and service recipient and must not be providing the service on his own account. They are providing the service recipient located outside India the services on their own account and not on behalf of somebody else, nor they are acting as agent or broker, so as to fall within the mischief of "intermediary".

v. As per paragraph 4.1 of AS *9 "In an agency relationship, the revenue is the amount of commission and not the gross inflow of cash receivables or other consideration."* From their balance sheet of the relevant period it is quite evident they have shown the gross receivables in their book of accounts and not the commission.

vi. Even all the permission and licenses granted to them by Ministry of Information and Broadcasting has been granted to them in individual capacity and not in capacity of agent.

vii. In Re Godaddy India Web Services Private Limited [2016 (46) STR 806 (AAR)] it has been held in similar circumstances that the service provider located in India cannot be considered to be intermediary in terms of Rule 2(f) of the Rules.

viii. Eligibility to CENVAT Credit of service tax paid by them has never been disputed by the department, as no demands have been issued denying the credit. They could have always utilized the credit for paying the service tax in respect of services provided in India. However as they were exporting services they were not in position to utilize the credit.

ix. They rely on the decisions in case of Verizon Communication India Private Limited [2018 (8) GSTL 32 (DEL)] and Paul Merchants Ltd [2012 (12) TMI 424 –CESTAT Delhi (LB)], wherein the issue has been squarely decided in their favour.

4.3 Arguing for the revenue learned Authorized Representative while reiterating the order of Commissioner (Appeal) and the submissions made in the department appeal, stated-

i. In the present case for carrying the Russia Today channel various Channel Distribution Partners like Tata Sky DTH, Airtel DTH and various Hotel were receiving the consideration for providing the services. They were also charging service tax for providing the activity of transmission of 'Russia Today' channel in their DTH Network and Hotel Rooms. For providing the services they received consideration along with service tax from the claimant.

ii. Thus in terms of the definition of service as defined by Section 65B(44), the actual service provider are Channel Distribution Partners like Tata Sky DTH, Airtel DTH and various Hotel. Limited role assigned to the claimant was to receive the consideration from Globecast d in turn pay the same to Channel Distribution Partners.

iii. Based on the agreement entered into between the parties and various laws in force following is evident:

a. TV Novosti an autonomous nonprofit organization owns the channel "Russia Today." They have retained Globecast France (GCF) to arrange the distribution of the satellite delivered channel in

India on free to air basis via TV Broadcasting system. GCF has nominated Globecast Asia Services Pvt Ltd (Globecast) as a limited agent.

b. As per Indian laws, the down linking and distribution of channel in India via TV broadcasting system can only be implemented locally through a distributor partner arrangement between the channel owner (TV Novosti) and a domestic licensed entity (Indian Distributor). Thus on recommendation of GCF, claimant has been appointed as an Indian Distributor by channel owner. Thus claimant is the exclusive distribution partner for the channel in the matters relating to downlink and distribution of the channel in India on a free to air basis.

c. As per the channel distribution agreement between Globecast and claimant, claimant has enter into distribution agreements with each of the Indian distribution partners (Channel Distribution Partners) like Dish TV, Reliance Big TV, Sun Direct TV etc and other TV Broadcast system networks like Hotels. Form and substance of the television distribution agreement shall be approved by Globecast in writing prior to execution by the party and relevant channel distribution partner.

d. As per the agreement, Globecast shall forward the carriage fees payable by claimant to each channel distribution partner under relevant channel distribution agreement. Each such payments by the Globecast to claimant, and by the claimant to respective channel distribution partner is deemed as "Globecast Carriage Fee Payment." And "Lamhas Carriage Fee Payment" and together as "carriage fee payment".

e. All carriage fee payment are inclusive of all services and other applicable Indian Taxes.

f. From the agreement and the arrangement discussed above it is quite evident that claimant only acts a intermediary between Channel Owner, GCF, Globecast and various channel distribution partners.

g. As per rule 9 of Place of Provision of Service Rules, 2012, place of provision of service in case of intermediary services is in India. Thus in terms of sub clause (d) to Rule 6A, the services provided by the claimant cannot be called as export of service.

h. In the above factual matrix the services provided by the claimant do not constitute export of service and hence the benefit under Rule 5 of CENVAT Credit Rules, 2004 will not be admissible to them. Thus the order of Commissioner Appeal dated 18.07.2014 allowing the appeal needs to be set aside and order dated 12.02.2018 be upheld.

i. Same issue has been decided in favour of revenue in case of Tech Mahindra Ltd [2014 (36) STR 241 (Bom)] and M/s Excelpoint Systems (India) P Ltd [2018 (10) GSTL 254 (T-Bang)]

j. The decisions relied upon by the claimant are in respect of the law as was in force prior to 1.07.2012 and the entire scheme of law has been changed with effect from that date with introduction of Place of Provision of Service Rules, 2012. Hence these decisions are not applicable as the entire period involved is after this date.

5.1 We have considered the impugned order along with the submissions made in the appeals filed along with the submissions during the course of arguments and the written submissions filed.

5.2 The issue for our consideration in the present case is *"Whether the Services provided by the claimant to Globecast, located outside in respect of Broadcast of "Russia Today" channel in India is export of service or otherwise."*

5.3 Claimant had filed refund claim as provided for in terms of Rules 5 of CENVA Credit Rules, 2004, from time to time in respect of the services provided by them to

Globecast, claiming the services provided by them to be export of services. These refund claims have been rejected by the jurisdictional Assistant/ Deputy Commissioner. In case of first two refund claims the appeal filed by the claimant have been allowed by the Commissioner (Appeal) and revenue is in appeal against the said order in appeal. In respect of later two claims the appeals filed by the appellants before Commissioner (Appeal) have been rejected by him so the claimant is in appeal before us.

5.4 Claimant has in respect of the cases where the Commissioner (Appeal) has dismissed the appeals filed have raised a preliminary ground stating that by treating the service provided by them as intermediary services Commissioner (Appeal) has travelled beyond the scope of show cause notice. Thus the order of Commissioner (Appeal) is bad in law. For the purpose of verifying the submissions made it is worth reproducing the para 3 to 7 of Show Cause Notice (all show cause notices being identically worded) dated 27th October 2014.

> *"3.The accompanying documents furnished by the claimant have been scrutinized. It is seen that the claimant is appointed by M/s. GlobeCast as exclusive distribution partner for TV Channel 'Russia Today', in the matters relating to the downlink and distribution of the said Channel in India on a free-to-air basis via Channel Distribution Partners in India, like,DTH,CATV,SMATV,Hotels or other Television Broadcast System networks. The said Channel Distribution Partners in India accordingly broadcast the 'Russia Today' TV Channel on their network, M/s GlobeCast would pay carriage fees to the said Channel Distribution Partners through the claimant, which is inclusive of all the taxes. That is, M/s GlobeCast would remit the amount to the Claimant and the claimant would pay such fees to the Channel Distribution Partners. The amounts paid by M/s GlobeCast is in USD.*

4. It is further seen that the claimant was providing marketing and administrative support in connection with developing and maintaining a base of eligible channel Distribution Partners in India, for which M/s GlobeCast was paying them Profession Fees at the agreed rate, which is inclusive of all the taxes. Such Profession Fees was paid by M/s GlobeCast yearly in advance. Besides, the claimant was also required to monitor the signal distributed by each Channel Distribution Partner, for which the claimant receives service fee of 400 UJSD per month (inclusive of taxes) on quarterly basis.

5. From the foregoing, it is seen that the activities performed by the claimant are downlinking and distribution of the TV Channel 'Russia Today' in India though the Channel Distribution Partners, marketing and administrative support in connection with developing and maintaining base of eligible Channel Distribution Partners and to monitor the signal distributed by each Channel Distribution Partner. The 'Russia Today' TV Channel is downlinked through INISTA-4A Satellite and then by the Channel Distribution Partners, viz., Seven Star Dot Commissioner Pvt. Ltd., Dish TV (India) Ltd., Wire & Wireless (India Ltd., Indusind Media & Communication Pvt.Ltd., Sun Direct TV (P) Ltd., Reliance BIG TV Ltd., Hathway Cable & Dotcom Pvt. Ltd. Prasar Bharati and Bharti Telemedia Ltd. Thus, it appears that the activities performed by the claimant wee performed and consumed in India. The invoices raised by the claimant shows that they have been recovering amounts towards channel placement and promotion of 'Russia Tuday' on Reliance Big TV Hathway, Dish,TV, monitoring charges, downlinking and compliance recording of 'Russia TV' and for reimbursement of fee payable to Ministry of Information & Broadcasting of India. These invoices further go to prove that the *services are performed in India and the ‘Russia Today’ TV channel broadcast/aired by the aforementioned Channel Distribution Partners are viewed in India.*

6. Thus, the claimant is a ‘Broadcasting Agent’ providing services in relation to broadcasting of ‘Russia Today’ TV Channel in India and is acting as ‘intermediary’ between M/s GlobeCast and the Channel Distribution Partners in India. As aforestated the services are performed and also consumed in India. Therefore, in terms of the provisions of Rule 9 of the Point of Provision of Services Rules, 2012, the place of provision of service is in India and hence, he impugned services provided by the claimant cannot be treated as services exported.

7. Further, from the input service invoices issued by M/s Hathway, M/s Indusind Media & Communications and M/s Reliance Big TV Ltd., it is seen that these service providers have raised invoices for Channel Placement Charges/Carriage fee, which are not input services to the claimant. In fact these charges are reimbursed to the said service providers through the claimant by M/s GlobeCast for airing ‘Russia Today’ TV channel. It appears that no nexus exists between the services provided by the said service providers and the output services provided by the claimant.”

5.5 From the para’s reproduced from the show cause notice, it is established the notice has been issued treating that the services provided by the claimant have been provided in India and hence cannot be treated s export of service. In our opinion show cause notice has sufficiently disclosed the grounds for disallowance for treating the services to be provided in India. The only omission being no mention of the relevant provisions of Place of Provisions of Service Rules, 2012 in the Show Cause Notice. Since all the ingredients for making the said charge for treating the services to be provided in India have been brought out in the Show Cause Notice, not mentioning of the exact provisions of Place of Provision of Service Rules, 2012 in the Show Cause Notice cannot be fatal to the Show Cause Notice specifically when the case is in respect of Refund. Hon'ble Apex Court has in case of [] clearly laid down that mere non mention of/ wrong mention of the relevant provisions of law in the show cause notice cannot be fatal. We quote the relevant excerpts:

5.6 The clauses of the agreement between the claimant and Globecast relevant for considering the issue are reproduced below:

Agreement entered on 26.03.2010

AGREEMENT
BY AND BETWEEN
LAMHAS SATELLITE SERVICES
AND
GLOBECAST ASIA PTE LTD
(ACTING AS A LIMITED AGENT OF GLOBECAST FRANCE)
CONCERNING DOWNLINK AND DISTRIBUTION OF THE
RUSSIA TODAY TV CHANNEL IN INDIA

A. LAMHAS SATELLITE SERVICES LIMITED, a company incorporated under the Companies Act of 1956 of India and having its registered office at Tower-1, 6th Floor, International InfoTech Park, Above Vashi Railway Station, Vashi Navi Mumbai 400703 India, (together with its permitted successors and assigns "LAMHAS"); and

B. GLOBECAST ASIA PTE LTD a company incorporated under the laws of Singapore and having its registered office at North Bridge Road #12-02/05 Parkview Square Singapore 188778, (together with its permitted successors and assigns "GlobeCast")

WITNESSETH

WHEREAS, GlobeCast France (GCF) and the Autonomous Nonprofit Organization "TV-NOVOSTI" (TV-NOVOSTI) entered into an agreement dated 1st January 2006, under which TV-NOVOSTI retained GCF to arrange the distribution of the satellite-delivered TV Channel "Russia Today (RT) (the Channel) in India on a free to air basis via

Television Broadcast System (as defined therein) subject to the terms and conditions thereof (the "GCF/TV-NOVOSTI Agreement"); and

WHEREAS, under applicable Indian Laws and regulations, the downlink and distribution of the Channel in India via Television Broadcast System can only be implemented locally, through a distributor partner arrangement between the Channel owner (TV-NOVOSTI) and a domestic Indian-licensed entity (the 'Indian Distributor'); and

WHEREAS, GCF recommended that TV-NOVOSTI appoint LAMHAS as the Indian Distributor and accordingly TV_NOVOSTI and LAMHAS entered into a Distribution Partner Agreement dated 30th October 2008, under which TV-NOVOSTI appointed LAMHAS as its exclusive distribution partner for the Channel in India on a free to air basis subject to the terms and conditions thereof (the "TV-NOVOSTI/ LAMHAS Agreement"); and

WHEREAS, GCF and its affiliate GlobeCast entered into an InterBu Agreement dated 21st December 2008 under which GCF appointed GlobeCast as a de facto agent of GCF to provide certain services to GCF and the Indian Distributor to facilitate the performance of their respective obligations under GCF/TV-NOVOSTI Agreement and TV-NOVOSTI/ LAMHAS Agreement; and

WHEREAS, in furtherance of the foregoing, GCF has requested the GlobeCast, and GlobeCast and LAMHAS have agreed to enter into this Agreement.

FOR DUE AND FAIR CONSIDERATION RECEIVED, THE PARTIES HERETO HEREBY AGREE AS FOLLOWS:

1. CHANNEL DISTRIBUTION AGREEMENTS

A. LAMHAS shall enter into distribution agreement with each of the Indian distribution partners (collectively 'Channel Distribution Partners') listed in Annex 1 attached hereto and covering the material terms and conditions governing the distribution of the Channel in India on a *free to air basis via the direct to home, CATV, SMATV, Hotels or other Television Broadcast System networks specified in the agreement (each, such agreement deemed a "Channel Distribution Agreement").*

B. Each Channel Distribution Agreement shall contain such relevant terms as the type/ method of carriage, carriage service fees (and which for avoidance of doubt shall be inclusive of all service and other applicable Indian taxes), terms of payment, term of carriage service (service commencement and expiry dates), and other customary portions.

C. The form and substance of each Channel Distribution Agreement shall be approved by GlobeCast in writing prior to execution by LAMHAS and the relevant Channel Distribution Partner. For avoidance of doubt, the content of each Channel Distribution Agreement shall confirm to the relevant provisions of TV-NOVOSTI/ LAMHAS Agreement governing then distribution of the Channel in India. LAMHAS shall provide GlobeCast with a copy of each fully executed Channel Distribution Agreement promptly upon its execution.

D. The Channel Distribution Partner may be expanded to include new Partners from time to time subject to GlobeCast's prior written consent. LAMHAS shall enter into a new Channel Distribution Agreement with each such additional Channel Distribution Partner.

2. PAYMENT OF CARRIAGE FEES TO CHANNEL DITRIBUTION PARTNERS

A. GlobeCast shall forward to LAMHAS the carriage fee payable by LAMHAS to each Channel Distribution Partner under the Channel Distribution Agreement (each such payment by

GlobeCast to LAMHAS and by LAMHAS to the relevant Channel Distribution Partner deemed a "GlobeCast Carriage Fee Payment" and a "LAMHAS Carriage Fee Payment" respectively and together as "Carriage Fee Payments")

B. *GlobeCast shall pay GlobeCast Carriage Fee Payments consistent with the payment terms set forth in Channel Distribution Agreement and covering carriage provided by the relevant Channel Distribution Partner(s) during the commencing 12 month service period against invoices submitted by LAMHAS to GlobeCast. LAMHAS shall invoice Globe Cast therefor in each case at least thirty (30) days prior to the relevant GlobeCast Carriage Fee Payment due date.*

C. *GlobeCast shall ensure that LAMHAS receives each GlobeCast Carriage Fee Payment at least two (2) business days prior to the deadline by which LAMHAS is obliged to pay the associated LAMHAS Carriage Fee Payment to the Channel Distribution Partner within 24 Hrs of its receipt of the GlobeCast Carriage Fee Payment but in any case no later than the relevant payment deadline under the relevant Carriage Distribution Agreement.*

D. ***All Carriage Fee Payments shall be paid inclusive of all service and other applicable Indian Taxes.***

E. *GlobeCast shall pay all GlobeCast Carriage Fee Payments in United States Dollars (US$), in each case in an amount calculated consistent with a mutually-agreed US$/INR exchange rate determined within 24 hours of the intended GlobeCast Carriage Payment date (to minimize exchange rate fluctuations between said date and the corresponding LAMHAS Carriage Fee*

Payment date) based on quotations secured from at least two (2) nationally recognized financial institutions in India. LAMHAS shall use reasonable commercial efforts to negotiate a favorable exchange rate with the selected financial institution of not more than 5 paisa below the day's published InterBank rate for selling US$.

F. Provided that LAMHAS makes the relevant LAMHAS Carriage Fee Payment in a timely manner as required under the relevant Channel Distribution Agreement, then if as a result of an intervening exchange rate fluctuation or other bona-fide reason the converted INR funds received by LAMHAS is less than the required LAMHAS Carriage Fee Payment amount payable to the relevant Channel Distribution Partner, then LAMHAS shall receive a credit from Globe Cast, to be reflected in the immediately succeeding GlobeCast Carriage Fee Payment, for the actual INR shortfall amount. LAMHAS shall not be entitled to a credit from GlobeCast (and so shall bear the shortfall for its own account) if LAMHAS fails to make the relevant LAMHAS Carriage Fee Payment in a timely manner and the exchange rate fluctuation or other intervening cause occurs after the relevant LAMHAS Carriage Fee Payment deadline as stated in the relevant Channel Distribution Agreement.

G. If and to the extent that the conversion of any GlobeCast Carriage Fee Payment yields incrementally more INR under the relevant designated exchange rate than is required for the corresponding LAMHAS Carriage Fee Payment, then GlobeCast shall receive a credit *from LAHMAS, to be reflected in the immediately succeeding GlobeCast Carriage Fee Payment, for the actual INR incremental amount.*

H. Upon GlobeCast's request, LAMHAS shall provide GlobeCast with evidence of each Carriage Fee Payment exchange rate conversion transaction and/or confirmation of the amount of converted INR amount transferred to LAMHAS' relevant bank account.

I. Upon GlobeCast's request, LAMHAS shall provide evidence of each LAMHAS Carriage Fee Payment actually paid to a Channel Distribution Partner (including the amount, payment date, and recipient).

J. Provided that GlobeCast makes each relevant GlobeCast Carriage Fee Payment in a timely manner, LAMHAS shall be solely liable to the Channel Distribution Partner for any failure to make any LAMHAS Carriage Fee Payment to it in a timely manner, and agrees to fully indemnify GCF, GlobeCast, and TV-NOVOSTI for any losses suffered and expenses (including but not limited to attorneys' fees) incurred by any of them based on a claim brought against any of them by the relevant Channel Distribution Partner or other third party that is directly or indirectly based on such payment failure by LAMHAS.

K. GlobeCast shall fully indemnify LAMHAS for any losses suffered and expenses (including but not limited to attorneys' fees) incurred by LAMHAS based on a claim brought against it by the relevant Channel Distribution Partner or other third party that is directly or indirectly based on GlobeCast's failure to pay any

GlobeCast Carriage Fee Payment(s) to LAMHAS in a timely manner without just cause.

3. PAYMENT OF PROFESSIONAL FEES TO LAMHAS

A. LAMHAS agree to provide marketing and administrative support in connection with developing and maintaining a base of eligible Channel Distribution Partners during the terms hereof, in consideration for providing such support, GlobeCast shall, pay LAMHAS professional fees in the amounts listed in Annex 1 herein (collectively 'LAMHAS Professional Fees'). All LAMHAS Professional Fees shall be inclusive of all service and other relevant service tax.

B. Globecast shall pay LAMHAS Professional Fees in United States Dollars (US$) against LAMHAS submitted invoices quoted in United States Dollars (all consistent with Annex thereto). For the avoidance of doubt LAMHAS shall bear any and all US$/ INR exchange rate risk.

C. LAMHAS Professional Fees shall be paid by GlobeCast yearly in advance provided the LAMHAS Carriage Fee payment has been paid to the relevant Channel Distribution Partner in full. LAMHAS shall invoice GlobeCast therefor in each case at least thirty (30) days prior to the relevant LAMHAS Professional Fees Payment due date.

D. LAMHAS shall provide GlobeCast together with each invoice for LAMHAS Professional Fees, with confirmation notes subsequent to its physical verification of the Channel signal carried on the relevant Television Broadcast System networks under relevant Channel Distribution Agreement as per format.

4. OPERATION RELATED MATTERS

A. LAMHAS shall monitor the Channel signal distributed by each Channel Distribution Partner (for the avoidance of doubt, both those listed in Annex 1 hereto and any additional Partner(s) that may be added to the said Annex 1 from time to time, in accordance with this Agreement) and prepare and maintain such reports as are reasonably requested by GlobeCast. The required content and format of such report s shall be determined by GlobeCast in consultation with LAMHAS. And submitted by LAMHAS to GlobeCast on a quarterly basis along with each invoice for LAMHAS Professional Fees. LAMHAS shall only be required to monitor the Channel Distribution Partner distributed Channel in cases where LAMHAS is specifically able to view the Channel from its Vashi Teleport.

B. LAMHAS shall notify each relevant Channel Distribution Partner in writing of any Channel carriage outage monitored by LAMHAS and shall ensure that the said Partner takes all necessary and appropriate action, consistent with relevant Channel Distribution Agreement to restore the carriage service as soon as possible.

C. Globecast shall pay LAMHAS a service fee of Four Hundred United States Dollars 9US$ 400) per month for monitoring the Channel Signal distributed by each Channel Partner as set forth in Annex 1hereto against LAMHAS submitted US$ quoted invoices (collectively "LAMHAS Service Fees"). For the avoidance of doubt LAMHAS shall bear any and all US$/ INR exchange rate risk. LAMHAS Service Fees shall be paid by GlobeCast quarterly in advance, and LAMHAS shall invoice GlobeCast therefor in *each case at least thirty (30) days prior to the relevant LAMHAS Service Fees Payment due date.*

D. LAMHAS shall provide GlobeCast with quarterly reports disclosing the geographic statistics in which each Channel Distribution Partner is carrying the Channel in accordance with the relevant Channel Distribution Agreement, together with corresponding audited customer penetration figures and other statistics as GlobeCast may reasonably request.

5. TERMS AND TERMINATION

………………

6. MISCELLANEOUS

A. LAMHAS shall be responsible for securing and maintaining in good standing all necessary and appropriate regulatory licenses, approvals, permits and consents (collectively "Consents") as may be required by the relevant Indian authorities (including but not necessarily limited to those described in Article 2 (Registration of TV-NOVOSTI/ LAMHAS Agreement) for the downlinking and distribution of the Channel in India via Television Broadcast System networks. GlobeCast agrees to reimburse LAMHAS in US$ (at the exchange rate prevailing upon the date of payment as published by a reputed Indian Financial Institution reasonably determined by GlobeCast) for LAMHAS pre-approved direct and reasonable expense incurred in connection with securing such Consents from the Indian authorities rte in each case payable against LASMHAS submission of invoices therefor and associated documented receipts.

B. LAMHAS consistent with the LAMHAS/ TV-NOVOSTI Agreement shall, in relation to

GlobeCast, be solely responsible for the content of the Channel transmitted by the Channel Distribution Partners.

C. Nothing in this agreement shall be interpreted as preventing or restricting GlobeCast from freely entering into a similar agreement with another Indian Distributor with respect to any one or more channels (including but not limited to the Channel) to be distributed in India either during the term of this Agreement or after the termination for any reason whatsoever.

D. The agreement shall be governed ……….

E. ………….

F. This agreement does not create any right or benefit enforceable by any third party.

G. The parties shall not be entitled to assign or otherwise transfer any of its rights or obligations without the express written consent of the other party (except that GlobeCast may freely assign this Agreement to any affiliate, subsidiary or parent company)

H. ……….

I. ……..

5.7 From the agreement referred above it is quite evident that the agreements provide in detail the responsibilities of the parties to the agreement. It also provides for payments for various activities and manner of payment to. As per this agreement for certain services, i.e.-

i. Channel Carriage, the claimant enters into agreement with the Channel Distribution Partner on and behalf of GlobeCast. The Channel Distribution Agreement is entered into only after written prior approval of the agreement by Globecast.

ii. Channel Carriage Fees paid by the GlobeCast is as per the agreement entered into with the channel distribution agreement and the claimant receives the same from GlobeCast, and is obliged to pay it to the concerned Channel Distribution Partner within 24 hrs of receipt and in any case prior to the appointed date as per the Channel Distribution Agreement.

iii. For rendering all such services like maintaining the list of eligible channel distribution partners etc, GlobeCast pays a LAMHAS Professional Fees to the claimant.

iv. For monitoring the Channel Carriage, by the Channel Distribution Partner and reporting any outage to them, for maintaining all the documents in respect of such monitoring of channel carriage and submitting reports to GlobeCast, a service fees called LAMHAS Service Fees @ US$ 400 per month is paid to the claimant.

5.8 Rule 2(f) of Place of Provision of Services Rules, 2012 reads as follows:

“(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) between two or more persons, but does not include a person who provides the main service on his account.;”

In the present case the Channel Carriage for which Channel Carriage Fees is paid by GlobeCast, to Channel Distribution Partner through claimant is the main service which has been provided by the Channel Distribution Partner and not the claimant who has acted only to mediate the provision of service by the Channel Distribution Partner to GlobeCast. This service has in no manner been provided by the claimant to the GlobeCast. In our view the services of mediation of this nature are covered by the term “intermediary” as defined by Rule 2(f) of the Place Of Provision of Services Rules, 2012. Since these services are covered by the term intermediary, in term of Rule 9 ibid, the place of provision of these services will be the location of the service provider that is in India.

Hence these services cannot be considered as export of service as per Rule 6A of Service Tax Rules, 1994 which is reproduced below:

"6A. Export of services.-

(1) The provision of any service provided or agreed to be provided shall be treated as export of service when,-

(a) the provider of service is located in the taxable territory,
(b) the recipient of service is located outside India,
(c) the service is not a service specified in the section 66D of the Act,
(d) ***the place of provision of the service is outside India,***
(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and
(f) *the provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act"*

5.9 In terms of 6A(1)(d) for a service to qualify as export of service the place of provision service should be outside India. Since in the present case these services have been provided in India as per Place of Provision of Services Rules, 2012 they cannot be termed as export of services.

5.10 Claimant has argued relying on the decisions in case of Gap International and Verizon, that these services should be held to be qualify as export of services. For this reason we consider the said two decisions-

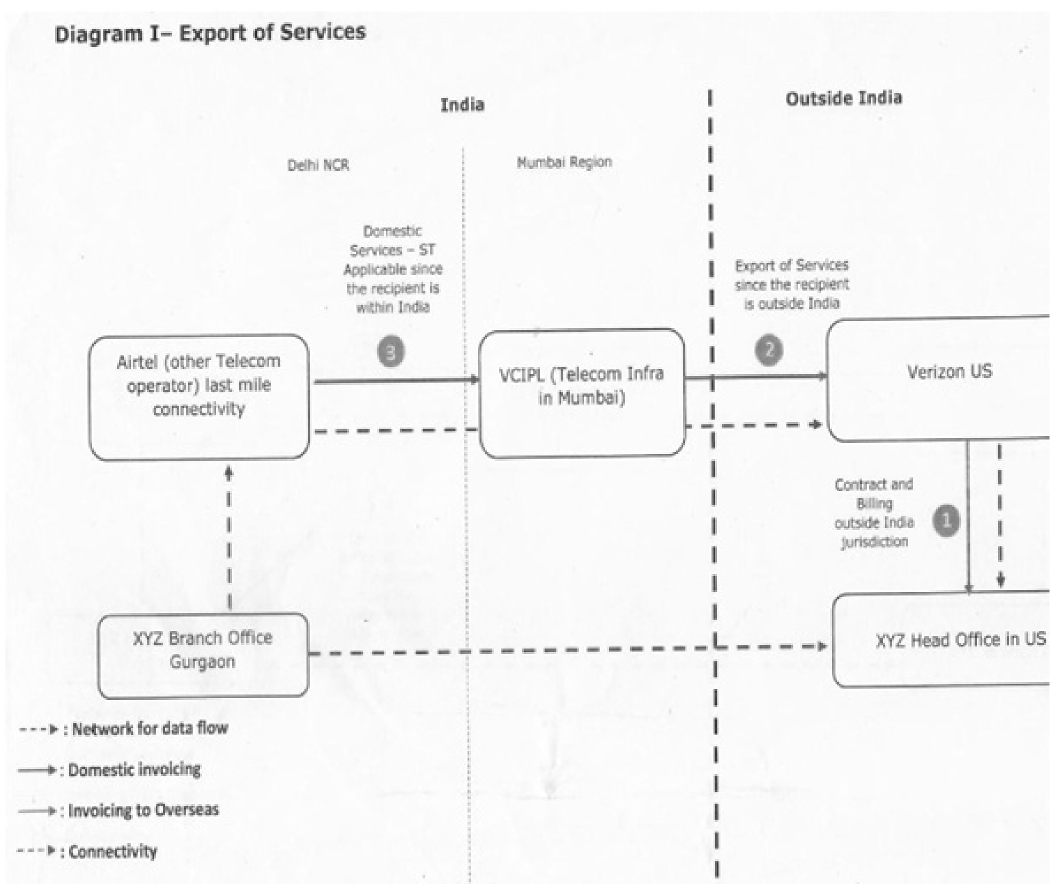
A. Gap International Sourcing (India) Pvt Ltd [2015 (37) STR 757 (T-Del)]

Said decision is in respect of the period 19.04.2006 to 31.05.2007. The said decision is in respect of law as it existed much prior to introduction of Place of Provision of

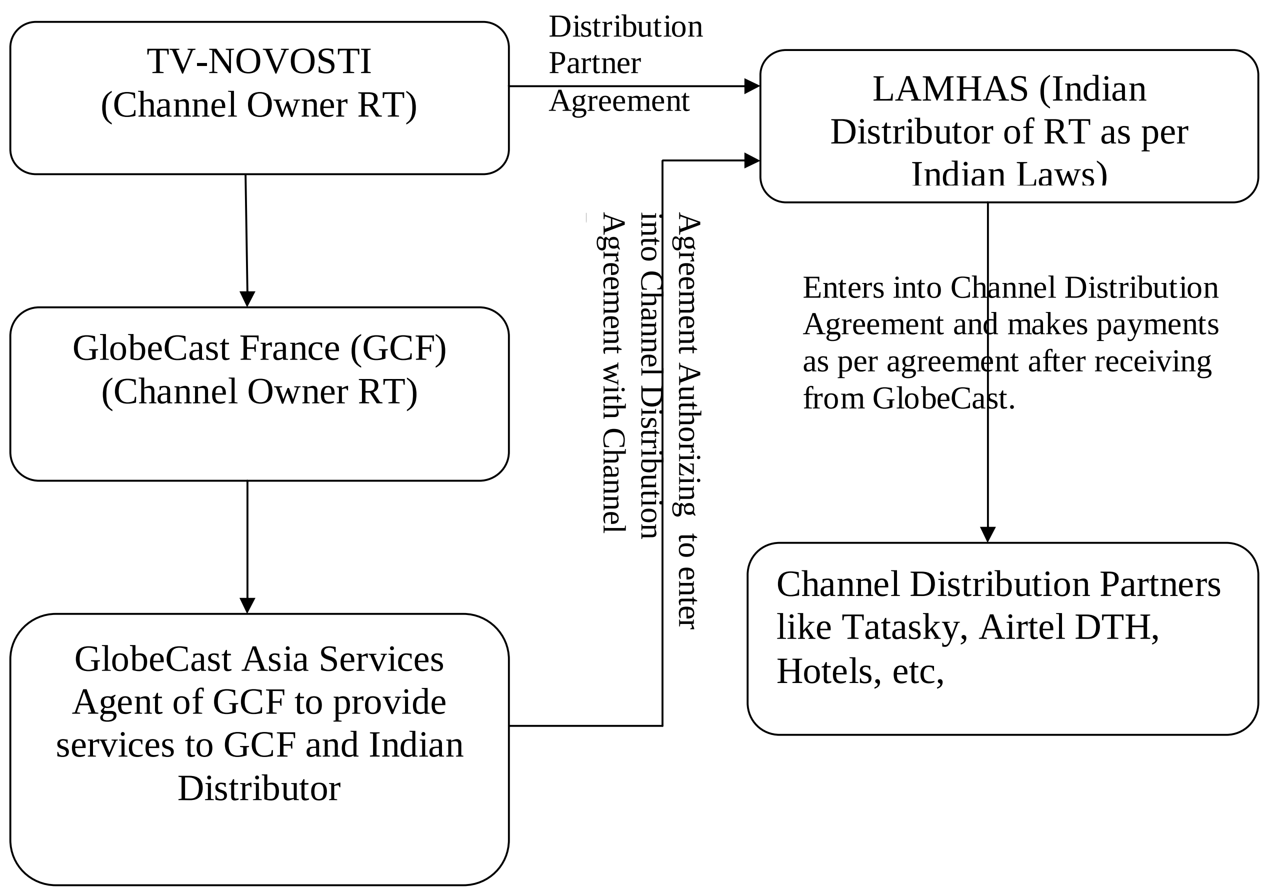
Services Rules, 2012 and Rule 6A of Service Tax Rules, 1994. Since this decision has been rendered in respect of the law existing then an without showing that the two provisions are in pari materia the said decision cannot be applied in this case. The concept of intermediary service has not even been the issue in that decision. Thus we find said decision is clearly distinguishable not applicable.

B. Verizon Communication India Pvt. Ltd [2018 (8) GSTL 32 (DEL)]

The facts of the case suggest that issue under consideration by Delhi High Court was not identical to the facts of present case. In case of Verizon, the scheme of provision of services has been depicted by High Court as follows:



The scheme of provision of the service in the present case is as per the flow chart below:



From the schemes as depicted above it is very clear that, the head office of the recipient of service was located outside India and was billed by the entity located in USA. Hence the services were held to be provided in USA. In the present case the except for routing the payment through LAMHAS, who have entered into the Channel Distribution Agreement with Channel Distribution Partners, the services of Channel Carriage were provided by the Channel Distribution Partners to TV-NOVOSTI directly. Hence the services provided by the LAMHAS in this respect qualify as “intermediary services”. In the case of Verizon Delhi High Court has not considered the rule 2(f) and Rule 9 of Place of Provision of Services Rules, 2012, hence the said decision do not pronounce/ enunciate law in respect of the said rules. In our view the said decision of Delhi High Court too is distinguishable.

C. Paul Merchants [2013 (29) ELT 257 (T-Del)]

This decision also is in respect of the law as it existed prior to introduction of Place Of Provision of Service Rules, 2012 and hence not applicable in the present case.

D. Further we do not find much support in favour of the Claimant in the decision of the Advance Ruling Authority in case of GoDaddy Web Services Pvt Ltd [2016 (46) STR 806 (AAR)]. In the said decision issue of intermediary services has been dealt as follows:

"8. *Revenue inter alia submits that various services i.e., marketing, event management services and collection of money from customer on behalf of GoDaddy US, proposed to be provided by the applicant to GoDaddy US are not a bundle of services; that there is involvement of the applicant with GoDaddy US as well as customers in India; that the services so provided appear to be covered under "Intermediary Services", which falls under Rule 9 of Place of Provisions of Service Tax Rules, 2012 (hereinafter referred to as POPS). Relevant provisions of law are extracted as under;*

Section 66F of the Finance Act, 1994;

Section 66F. Principles of interpretation of specified descriptions of services or bundled services. *- (1) Unless otherwise specified, reference to a service (herein referred to as main service) shall not include reference to a service which is used for providing main service.*

(2) 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.

(3) Subject to the provisions of sub-section (2), the taxability of a bundled service shall be determined in the following manner, namely :-

> *(a) If various elements of such service are naturally bundled in the ordinary course of business,*

it shall be treated as provision of the single source which gives such bundle its essential character :

(b) If various elements of such service are not naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which results in highest liability of service tax.

Explanation. - For the purposes of sub-section (3), the expression "bundled service" means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services.)"

Rule 9 of Place of Provision of Services Rules, 2012;

***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,

Up to a period of one month

***9.** The contention of Revenue is that the services proposed to be provided by the applicant are "intermediary services" as mentioned under Rule 9(c) of POPS. 'Intermediary' is defined under Rule 2(f) of POPS as under;*

(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.

Therefore, as per Section 66F(2) of Finance Act, 1994, more specific descriptions shall be preferred over a more general description. According to Revenue, in view of sub-section (3) ibid, service will not be taxed as bundled service, if the same is to be an "intermediary service".

10. *The definition of "intermediary" as envisaged under Rule 2(f) of POPS does not include a person who provides the main service on his own account. In the present case, applicant is providing main service, i.e., "business support services" to WWD US and on his own account. Therefore, applicant is not an "intermediary" and the service provided by him is not intermediary service. Further, during arguments, applicant drew our attention to one of the illustration given under Paragraph 5.9.6 of the Education Guide, 2012 issued by C.B.E. & C. Relevant portion is extracted as under;*

Similarly, persons such as call centers, who provide services to their clients by dealing with the customers of the client on the client's behalf, but actually provided these services on their own account', will not be categorized as intermediaries.

Applicant relying on above paragraph submitted that call centers, by dealing with customers of their clients, on client's behalf, are providing service to their client on their own account. Similarly, applicant is providing business support service such as marketing and other allied services like oversight of quality of third party customer care centre operated in India and payment processing services, on behalf of GoDaddy US. Therefore, these services provided by the applicant to GoDaddy US cannot be categorized as intermediary or services, as intermediary service.

11. *Applicant proposes to provide support services in relation to marketing, branding, offline marketing, oversight of quality of third party customer care centre and* *payment processing, on principal to principal basis. These services are proposed to be provided with the sole intention of promoting the brand GoDaddy US in India and thus augmenting its business in India. Therefore, these services proposed to be provided by the applicant, would support the business interests of GoDaddy US in India.*

12. *It has been submitted by the applicant that services to be provided by the applicant are not peculiar only in applicant's case but are provided by various Indian entities to their overseas customers in India as a single package. Further, supporting the business of GoDaddy US in India is the main service and processing payments and oversight of services of third party Call Centers are ancillary and incidental to the provision of main service, i.e., business support service. Further, applicant would provide said services as a package and the payment for the entire package would be a consolidated lump sum payment. Applicant submits that in view of all these indicators, service provided by them to GoDaddy US is a bundle of services, which is bundled in normal course of business. This point has not been controverted by the Revenue. We agree with the submissions of the applicant that proposed services are a bundle of services, bundled in normal course of business and not intermediary service."*

The issue under consideration of the Authority was in respect of bundle of services, and on examination of the services provided that the bundled services provided are the main services provided by the person concerned and hence cannot be treated as intermediary service. The present case is not a case of bundled services, naturally bundled, but is case of providing services which as per the contract itself are not bundled together and hence needs to be examined on its own. In the present case the "Channel Carriage Service" is in no way provided by the claimant on his own account, and hence is an intermediary service.

5.11 Revenue has relied on the decisions as follows:

A. In Excelpoint Systems (India) P Ltd [2018 (10) GSTL 9T-Bang)] following has been held:

"7.1 *After considering the submissions made by both the parties and the material on record, I find that it is necessary to decide the case to analyse the nature of the agreement between the appellant and its foreign entity/foreign company. Perusal of Buying Services Agreement effective from 1-4-2013 between the appellant and their foreign company in Singapore, the appellants are required to render the following services :-*

i. The provision of marketing support services which include of the following :-

a. Data collection and statistical and business analysis in relation to the company's products/customer market and sending across the data/reports to the company.

b. Liaising with the potential customers and receiving orders on behalf of the company;

c. Educating potential customers identified by the company or the suppliers of the company with a view to promote the products of the company;

d. Support the representation of the company on the orders status;

e. Assist the company on the collection of sale proceeds and resolve quality issue on sale; and

f. Execute specific advertising strategy formulated by the company to facilitate the sale of products and services in India.

ii. The provision of technical support services which include of the following :-

a. Advisory support provided to customers with regard to project design based on direction from the company;

b. Providing advice, clarification and technical assistance to customers on behalf of the company;

c. Provide the company's customers evaluation board and samples for product testing.

7.2 *I also find that the learned Commissioner (Appeals) has also analysed the various clauses of the agreement and has come to the conclusion that as per the agreement also appellant is engaged in providing project support services, consulting services, marketing on product, technical support services etc. to the foreign company. The learned Commissioner has also come to the conclusion on the basis of the relevant documents available on record that such services are rendered to the group company located outside India and the payment of such services is received by the appellant in convertible foreign exchange. Further the findings of both the authorities that the services rendered by the appellant fall under the definition of intermediary under Rule 2(f) of the Place of Provisions of Services Rules, 2012 and in terms of Rule 9 of the Place of Provision of Services Rules, 2012 specified vide Notification No. 28/2012, dated 20-6-2012 which is effective from 1-7-2012 in the case of intermediary service, place of provision of services shall be the location of the service provider and therefore the services rendered by the appellant cannot be treated as export of services in terms of Rule 3 of the Export of Services Rules, 2012. More so, as Condition No. (d) laid down in Rule 6(9) of the Service Tax Rules are not satisfied. The learned consultant tried to argue that the appellant does not fall in the definition of intermediary but I do not find force in his argument if I see the various clauses of the agreement between the appellant and the foreign company and after considering the various documents produced by the appellant on record, I am of the considered view that there is no infirmity in the impugned order which is upheld by dismissing the appeals of the appellant."*

5.12 Thus in our view the "Channel Carriage Fees" which is towards the Channel Carriage by Channel Distribution Partners cannot be added to the export turnover for determination of the refund of accumulated CENVAT Credit in terms of Rule 5 of the CENVAT Credit Rules, 2004. However the charges recovered as “Lamhas Professional Fee” and “Lamhas Service Fees” which are towards the services provided by Claimant to Globecast on their own account will continue to be part of the Export Turnover of the claimant.

5.13 In view of the our observations as above direct that the Refund Claims filed by the claimant in terms of Rule 5 of CENVAT Credit Rules, 2005 should be disposed off accordingly.

6.1 Thus the appeals filed by the revenue are allowed and matter remanded back to the original authority for re-determination of the amount of refund as per Rule 5 of CENVAT Credit Rules, 2004.

6.2 The appeals filed by the claimant are disposed of as per our observations in para 5.12 and 5.13 supra.

(Order pronounced in the open court on 04.06.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

tvu