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

Service Tax Appeal No. 86362 of 2015
ST/CO/91133 of 2015

(Arising out of Order-in-Original No. 03/AC/COMMR/Th-II/ST/2015 dated 04.03.2015 passed by Commissioner of Service Tax-VII, Mumbai)

Commissioner of Service Tax-VII Mumbai **Appellant**
115, New Central Excise Bldg.,
M.K. Road, Churchgate,
Mumbai 400 020.

Vs.

M/s. Abbott Healthcare Pvt. Ltd. **Respondent**
4, Corporate Park,
Sion-Trombay Road,
Mumbai 400 071.

Appearance:

Shri M. Suresh, Authorised Representative for the Appellant
Shri Sanjeev Sachdeva and Ms. Neha Gulati, Advocates for the Respondent

CORAM:

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

FINAL ORDER NO. **A/86306/2019**

Date of Hearing: 01.05.2019
Date of Decision: 01.05.2019

PER: SANJIV SRIVASTAVA

This appeal filed by the revenue is directed against the order in original No 03/AC/Commr/Th-II/ST/2015 dated 04.03.2015 of the Commissioner Central Excise, Thane-II. By the said order Commissioner has held as follows:

"The proceedings initiated vide Show Cause Notice No ST/Div-V/Gr.1/Abbot-H/2012 dated 13.10.2014 issued to M/s Abbott Healthcare Private Limited is hereby dropped."

2.1 Respondent herein is registered with the department for providing the services under category of Business Auxiliary Service, Business Support Service, Management Consultant Services, Consulting Engineer Services, Testing, Inspection & Certification Services, Maintenance or Repair Services, Transport of Goods by Road Services and Information Technology Software Services.

2.2 During course of Onsite post clearance audit (OSPCA) conducted at the premises of respondents, it was observed that they had received amounts as indicated in table below as reimbursement and shown as other income/ Misc Income in foreign currency.

Financial Year	Amount in Rs	Rate of Service tax (including cess) %	Service Tax Payable (including cess) ‘ Rs
2009-10	36,00,00,000	10.36	3,70,80,000
2010-11	56,00,00,000	10.36	5,76,80,000
2011-12	73,08,04,871	10.36	7,52,72,902
2012-13	96,45,27,000	12.36	11,92,15,537
Total	2,61,53,31,871		28,92,48,439

2.3 Explaining the said receipts respondents claimed that these amounts were received by them from their fellow subsidiary company M/s Abbott Logistics B V Netherland (ALOG) in respect of the losses incurred by them as per their mutual consent letter dated 26.09.2011. Respondents were trading in nutritional products in India. In order to increase its market share they had incurred certain operating expenses like advertisement for products traded by it and hiring marketing executives to manage its existing sales. However they incurred losses as the price at which they had imported the goods from ALOG and the operating expenses incurred by them was higher than the price at which the goods were sold by them. The said recoveries were made by them from ALOG in accordance with and to comply with Indian Transfer Pricing Code and OECD Transfer Pricing Guidelines for the respective years. These amounts were not received by them against provision of any service/ supply/ grant of right or any other arrangement between them and their foreign subsidiary. Respondents also submitted the supporting documents, arms length margin agreement and details of expenditure incurred by them in support of their claim. On going through the said documents it was observed that these documents were nothing but letters written by the respondent to Managing Director of ALOG for recovery of extraordinary expenses incurred by them and said arrangement was agreed upon by ALOG.

2.4 After taking note of the submissions made revenue was of the view that respondents had provided certain services in India for sale of goods in India. However the value for such services provided had been paid by the recipient of service not as consideration for the services provided but as reimbursement to compensate the loss incurred by them. There could have been no reason for ALOG to compensate the respondents for the losses incurred by them. Since these amounts were received as consideration for the services provided to ALOG in respect of sale of goods in India, the was leviable to service tax at applicable rates.

2.5 Revenue was also of the view that respondents had suppressed the fact of rendering services classifiable under the category of "Business Auxiliary Service" by camouflaging the real nature of transaction. Thus by not paying the Service Tax due in respect of these amounts received by them they had contravened the provisions of

Finance Act, 1994 and rules made thereunder with the intention to evade payment of service tax. Thus invoking the charge of suppression a show cause notice dated 13.10.2014 was issued to them asking them to show cause as to why-

i. The extended period envisaged under proviso to sub-section (1) of Section 73 of the Finance Act, 1994 should not be invoked to demand the Service Tax evaded by them for the reasons discussed in the SCN.

ii. Service Tax (including Education Cess and Secondary & Higher Education Cess) amounting to Rs 28,92,48,439/- (Rupees Twenty Eight Crore Ninety Two Lakhs Forty Eight Thousand Four Hundred and Thirty Nine only) as detailed above should not be demanded and recovered from them under proviso to Section 73(1) of the Finance Act, 1994.

iii. Interest at appropriate rate for the delayed payment of Service Tax should not be demanded from them under Section 75 of Finance Act, 1994.

iv. Penalty should not be imposed upon them under the provision of section 76 of the Finance Act, 1994 for failure to pay Service Tax in accordance with the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994.

v. Penalty should not be imposed upon them under the provision of sub-section (1) of Section 77 of the Finance Act, 1994 for failure to obtain registration under Section 69 of the Finance Act, 1994 read with rule 4 of Service Tax Rules, 1994.

vi. Penalty should not be imposed upon them under section 78 of the Finance Act, 1994 for suppressing the value of the taxable service with intent to evade payment of service tax.

2.6 After considering the submissions made by the respondents in their reply and during the course of personal hearing Commissioner had adjudicated the show cause notice as per impugned order, referred in para 1, supra.

2.7 Aggrieved by the order of Commissioner, revenue has preferred this appeal before the tribunal. Respondents have also filed their cross objections in the matter.

3.1 In their appeal revenue has assailed the order of Commissioner stating that-

i. The services provided by the respondents were provided and consumed by ALOG in India for marketing and sale promotion of nutritional products. These services have been rightly held to be classifiable under the category of Business Auxiliary service.

ii. After holding so adjudicating authority should have determined whether the services provided really constituted the export of service in accordance with the concept of export in Article 286(1)(b) of the Constitution of India and the decisions of Apex Court in case of Burmah Shell Oil Storage & Distribution Co of India Ltd, Association of Leasing & Financial Service Companies [2010 (20) STR417 (SC)], All India Federation of Tax Practitioners [2007 (7) STR 625 (SC)] and not solely on the basis of Export of Services Rules, 2005. In the arrangement between the respondents and ALOG, the term export foes not appear even once. These contracts are for performance of a service-delivery to the intended target audience with a view to extend the principal's and the respondents reach to the Indian market. The service performed in India is consumed in India and hence will attract service tax.

iii. Respondents being subsidiary for trading of goods supplied by foreign principal from abroad for sale thereof in India for a consideration in terms of certain agreed terms and advertisements as well as publicity was made for a consideration by such object of business promotion, as borne out of the letters dated 29.09.2010 and 26.09.2011.

iv. Applying the principle of equivalence as has been laid down aforesaid Apex Court in the case of Moti Laminates Pvt Ltd [1995 (76) ELT 241 (SC)] which is built into the concept of service tax under the Finance Act, 1994 there is no difference between production or manufacture of saleable goods and production of marketable/ saleable services in the form of an activity undertaken by the service provider for consideration, which correspondingly is consumed by the service receiver. It follows that service tax being a tax on an activity is also destination based value added tax, there is no ambiguity that taxable service provided in India is meant to be taxed under the provisions of Finance Act, 1994.

v. Meaning of "export" and existence of two termini is prerequisite for export of service. The assessees were intermediary to provide the service of trading of goods from abroad to the Indian market consumers and were producing advertising and publicity and other services for the goods supplied by the foreign principal. Destination based consumption of service ended with the performance thereof in India and that satisfies the performance based service tax concept as has been held by the Hon'ble Apex Court in the case of All India Federation of Tax Practitioners [2007 (7) STR 625 (SC)]. The adjudicating authority has failed to appreciate that the place of origin and termination of service is also decisive to determine the nature of service whether export and provision of taxable service as well as consumption thereof equally contribute to determine incidence of levy.

vi. The issue can be appreciated by likening the instance of service to a similar activity if hypothetically taken in context of export of goods. Just suppose the situation of export of goods, the equivalent scenario emerging would be like this. If an entity in India procures the goods from India and consumes them in India and raises a bill/ debit note on foreign entity against which the foreign entity makes the payment in foreign currency would not suggest export has taken place in actual terms. Applying the same analogy the services provided in the present case needs to be considered to be provided and consumed in India even if the payment in respect of these services is received in foreign currency.

vii. Adjudicating authority has relied upon the decisions in case of Microsoft Corporation India Pvt Ltd [2014-TIOL-1964-CESTAT-Del] which has relied upon the case of Gap International Sourcing (India) Ltd-which decision has been solely guided by the decision in case if Paul Merchants Ltd [2013 (29) STR 257 (T-Del)]. Adjudicating authority erred as the decision in case of Paul Merchant has not been accepted by the concerned Commissioner.

viii. For the period 1.07.2012 to 31.03.2013, adjudicating authority has dropped the demand in respect of intermediary services, under Rule 3 of Place of Provision of Service Rules, 2012, holding that the place of provision of service shall be the location of the service recipient of service and would consequently qualify as export of service, in ignorance of the provision of Rule 6A of Service Tax Rules, 1994 read with Rule 9(c) of the Place of Provision of Service Rules 2012.

ix. Adjudicating authority has also failed as a consequence of an inappropriate order of mis classification of the impugned service and thus has left other aspects unaddressed in respect of the interest liability, applicability of extended period and penal consequences. Thus the order is also contested herewith and all submissions, charges and evidences in SCN are pressed in the appeal.

3.2 The cross objections filed by the respondent are only in support of the impugned order and do not raise any matter against the issues decided by the adjudicating authority hence are not been listed separately. However the submissions made by the respondents therein which are in nature of the comments on the appeal filed by the revenue are taken into account in subsequent paragraphs.

4.1 We have heard Shri M Suresh, Joint Commissioner, Authorized Representative for the revenue and Shri Sanjeev Sachdeva along with Ms Neha Gulati, Advocates for the respondent.

4.2 Arguing for the revenue, learned Authorized Representative reiterated the grounds taken in the appeal. He submitted that in the present case the services provided by the respondents to ALOG cannot be considered as export of services in view of the arguments given in the appeal, and if the same are not export of service the same needs to be considered a service provided by them to the recipient of service within India and hence should be subject to levy of service tax. Order of Commissioner cannot be sustained because Commissioner has while holding that the services provided are within the category of taxable services, had allowed the benefit of export of service to the respondents.

4.3 Arguing for the respondents learned counsel submitted that issue-

i. Is squarely covered by the decision of tribunal in case of Paul Merchants. The decision of tribunal in case of Paul Merchants had been followed in the decisions of {Microsoft Corporation India Pvt Ltd. [2014-TIOL-1964-CESTAT-Del], Gap International Sourcing (India) Pvt Ltd [2014-TIOL-465-CESTAT-DEL], Vodafone Essar Cellular Ltd [2013-566-CESTAT-Mum], Bayer Material Science Pvt Ltd [2014-TIOL-1084-CESTAT-Mum], Alpine Modular Interiors (P) Ltd [2014 (36) STR 454 (T-Del)], Simpra Agencies [2014 (36) STR 430 (T-Del)], Wartsila India Ltd [2015 (37) STR 586 (T-Mum)}. The judicial precedence should be followed as has been held by Apex Court in case of Kamlakshi

Finance Corporation Limited [1991 (55) ELT 433 (SC)], Bombay High Court in case of Legrand (India) Pvt Ltd [2008 (2) Bom CR 387, Ralson Tyre Industries Ltd. [2007 (288) ITR 322 (SC)], Bhopal Sugar Industries [AIR 1961 SC 182], Khalid Automobiles [(1995) 4 SCC (Suppl) 652], DSM Anti Infectives India Ltd [2013 (292) ELT 433 (T-Del)].

ii. Post 1.07.2012 by rule 9(c) of POPS Rules, provide that in case of Intermediary services the place of provision of the service would be location of service provider. Rule 2(f) defines *"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 a service on his own account."* From the plain reading of the definition it is clear that an intermediary in respect of goods (such as commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by the definition. Respondent is the importer of goods and causes the sale of the goods on his account. There is no activity in respect of sale of goods which has been carried out by the respondents for ALOG, hence they cannot be said to be the intermediary. Commissioner has rightly applied the Rule 3 of POPS to hold that for the services provided the location of service recipient will be the place of provision of service.

iii. Since the beginning they had claimed that these amounts have been received by them from fellow subsidiary in respect of operating expenses incurred by them in order to manage the existing sales of the products imported and not for provision of any service. The said arrangement was for a limited purpose of maintaining arms' length margin from a transfer pricing perspective.

iv. There was no service provider and service recipient relationship between them and ALOG. All the advertisement and sales promotion activity of the goods imported by them were undertaken by them on their own account. Thus they were not providing any Business Auxiliary Service to the ALOG.

v. In absence of any suppression or misstatement by them extended period could not have been invoked as has been held by the following decisions:

   a. Studioline Interior Systems Ltd [2006 (201) ELT 250 (T-Bang)]
   b. TISCO Ltd [2006 (199) ELT 855 (T-Mum)}
   c. Jalla Industries [2000 (117) ELT 429 (T)}
   d. Parasad Polypack Company [2008 (224) ELT 326 (T-Chennai)]
   e. Rivaa Textile Industries Ltd [2006 (197) ELT 555 (T-Mum0]
   f. Mopeds India Ltd 1991 (56) ELT 241 (T)]
   g. Trinity Auto Components Ltd [2010 (257) ELT 548 (T-Mum)]

5.1 We have considered the impugned order with the submissions made in appeal and during the course of argument.

5.2 The very basis on which the appeal has been filed by the revenue is by establishing the case for export of service on the basis of some analogy drawn by them in respect of export of goods. Further they have referred to Article 286 (1) (b) to define the exports. They have also submitted that the issues in hand should have been decided by the Commissioner on the basis of these and not on the basis of Export of Services Rules, 2005. There cannot be argument as repugnant as this and that too from the revenue, seeking to deviate from the rules framed by them to levy tax on some activities. Article 286 of the Constitution reads as follows:

"286. Restrictions as to imposition of tax on the sale or purchase of goods

(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place

a) outside the State; or
b) in the course of the import of the goods into, or export of the goods out of, the territory of India

(2) ....

(3) ...."

Even with the wildest imagination we cannot figure out how this Article of Constitution helps us in resolving the controversy in hand and how the same can be applied for determining the case for export of services. Revenue has in appeal sought to compare the un-comparables i.e. goods with services or tangibles with intangibles. The reliance placed by the revenue on the decision in case of Moti Laminates {1995 (76) ELT 241 (SC)] is not only misplaced but is out of context. The issue under consideration in that case was vis a vis the marketability as the test for manufacture and leviability to Central Excise Duty. How that judgment is applicable in the present case is only for revenue to explain which they have failed to do so.

5.3 Commissioner has in para 32 of his order has recorded following finding-

"32. The facts of the case indicate that the noticee is a distributor of its fellow subsidiary ALOG, in India. Goods are imported by the noticee and distributed/ sold in India. The noticee claims this transaction to be on a principal to principal basis. The SCN alleges that if this claim of the noticee was true then the question of supplier of goods

compensating its buyer, the noticee, for the losses incurred by them would not arise. The SCN further goes on to allege that the said payments were received by the noticee in consideration of services rendered by them for sale of goods in India; these services were enumerated by the noticee in their letter dated 24.08.2014 to the department wherein they stated that they had incurred losses due to certain operating expenses, viz advertisements and hiring of marketing personnel to manage their business in India. The noticee on their part submit that these expenses are reimbursed by ALOG to enable them to continue to earn an arm's length margin in its existing trading business, as required under the Income Tax Act."

Thereafter in para 33 he examines the various agreements dated 29.09.2010, 26.09.2011, 25.09.2012 and 11.09.2013 and in para 34 he observes:

"34. On examining these agreements, it becomes clear that the noticee is a distributor for ALOG's products in India. The noticee imports them at a pre-determined price and distributes/ sells them in India. The noticee pays ALOG the price of the goods which it purchased from them. These facts are not in dispute. The noticee claims the same to be a principle to principle transaction. I see no cause to dispute the same at this stage. The noticee imported goods from a different entity and distributed/ sold it in India at a price which it deemed fit. In normal course of things the transaction would terminate here."

Then in para 37 and 38 he observes:

"37. Having observed the above, it is plain view that the noticee apart from being a distributor for ALOG also provided the services necessary to expand their business in India. Given the fact that the noticee and ALOG have mutual interest in as much as the noticee distributes the products supplied by ALOG, the services rendered by the

noticee benefitted both of them. Apportioned cost of the services rendered, mutually agreed upon, attributable to the benefits accruing to ALOG was arrived and paid. Though the noticee may claim otherwise and state that this amount paid by them was to ensure that they earn at an arm's length measure, the fact remains that services aimed at expanding ALOG's market in India was provided by the noticee to ALOG and remuneration commensurate with the same was tendered by ALOG to the noticee. Given the above discussions, I have no doubt that the noticee apart from distributing products imported from ALOG, also provided services to ALOG aimed at expanding their business in India for which ALOG paid the amounts mentioned in agreement discussed supra.

38. Further, I have examined Form No 3 CEB – Report from accountant to be furnished under Section 92E relating to international transaction(s). for the year 2009-10 in respect of the noticee. This transaction wherein the noticee paid ALOG Rs 36 crores is reflected therein as "Reimbursement of Extraordinary Expenses". The note therein given by the Chartered Accountant, Price Waterhouse & Co., is reproduced below"

"During the financial year 2009-10, the assessee has incurred certain extraordinary expenses on hiring key strategic resources additional sales force, mass media advertising, building infrastructure etc., for increasing its presence in the Indian market. Based on the mutual discussion over a period of time the associated enterprise has reimbursed the said extraordinary expenses to the assessee. The assessee contends that this recovery of INR 36,00,00,000 from its associated enterprise is commensurate with the business model followed by the assessee in India.

The assessee contends that based on economic and commercial factors surrounding the said international *transaction, the pricing of the international transaction at book values is consistent with the arm's length standard.*

Accordingly, it was considered reasonable to use the book values of international transactions as representative of arm's length price of all such transaction."

The above note makes it more than clear that the noticee has received these payments in question from ALOG as reimbursement for the specific services mentioned therein which were rendered by them to ALOG. There is no ambiguity here. Further, the contention of the noticee that the said payments were made to ensure that the noticee continued to earn an arm's margin appears to be incorrect and flawed. It is clear from the above note given by Chartered Accountant that the quantum of remuneration paid by ALOG to the noticee as reimbursement was merely consistent with the arm's length standard as against the noticee's claim during these proceedings that the payment was made to ensure that the noticee earned an arm's length margin. These two claims are distinct from one another.

39. Given the above, I find that the payments made by ALOG to the noticee were reimbursement for services rendered by them and the same happens to be consistent with the arms length standard. It is not the case that these payments have been made by ALOG to the noticee for them to earn at an arm's length margin, as claimed by the noticee. Mere insertion of a clause in an agreement, which in fact details the nature of services to be provided and the reimbursement of its expenses, to the effect that the amount required to be paid should not be construed to be towards any supply of goods or services, etc. will not annul the basic tenets of agreement. The clause appears to be inserted particularly with a view to meet exigencies such as present one. However, the same will not serve to veil *the true nature of the transaction necessitated by the agreements in question."*

Thereafter in para 40, 41 and he examines the scheme of transfer pricing and also the order passed under Section 92CA(3) of The Income Tax Act, 1961 dated 20,01,2014, in respect of financial year 2009-10 (A Y 2010-11). After all the examination he finally concludes in para 43 he concludes:

"43. In view of the above discussions, I reject the noticee's contention that these amounts were paid to the noticee to enable them to continue earning an arm's length margin and hold that these amounts were paid by ALOG to the noticee in return for services rendered by the noticee."

In para 44 and 45 after reproducing the definition of Business Auxiliary Services as per Section 65(19) of Finance Act, 1994 he has in para 46 and 47 recorded as follows:

"46. The services rendered by the noticee needs to be examined vis a vis the definition of BAS. At the cost of repetition, I reproduce the nature of service rendered by the noticee to ALOG, as per the agreements mentioned earlier, with the intent of expanding their business in India.

-The noticee carried out detailed analysis of nutritional market in India resulting in roll out of new products, acquisition of well established brands and also included exploration of manufacturing activities in India.

For rendering the above service, the noticee hired key strategic resources and additional sales work force, paid professional fees to recruitment consultants, advertised the products distributed by them (supplied by ALOG); and built infrastructure for future growth.

47. It can be seen that by carrying out the above activities the notice promoted, marketed and sold the *goods produced/ provided by their client ALOG; the notice procured services of several professionals which were input for them in working towards their objective of expanding their markets in India. These services would be squarely covered by sub clause (i) and (iv) of Section 65 (19) of the Finance Act, 1994 which defines Business Auxiliary Services. The noticee's claim that ALOG was not their client and hence the services rendered would not fall within the purview of the definition of BAS is incorrect. It is anybody's guess here as to whether ALOG would have paid the noticee these amounts in the event of noticee having failed to render the services mentioned in the agreements. I find that ALOG by virtue of the agreements referred to earlier, paid the noticee for the services that are elucidated therein. Them being associated enterprises would not alter this transaction as that between a service provider and a client. This is abundantly proven by the noticee's claim in the case of their business of distributing products procured from ALOG, which they claimed as a transaction on a principal to principal basis, which in effect implies that in that particular transaction the noticee was ALOG's client. Thus, if the relationship between the noticee and ALOG can be that of a client and supplier in the distributorship business, the same would hold good in the case of services rendered by the noticee to ALOG too, wherein the roles would be reversed. The submissions of the noticee that a client has to necessarily be an external person would not hold good. In view of the above discussions, I hold that the noticee has provided services falling under the category of Business Auxiliary Services to ALOG."*

5.4 Appellants have claimed that these amounts were received by them is respect of operating expenses incurred by them in order to manage the existing sales of the products imported and not for provision of service. This arrangement was for a limited purpose of maintaining arms' length margin from a transfer pricing perspective.

There is no dispute about the fact that the appellants were procuring the goods from ALOG and selling the same in Indian market. The relationship between ALOG and Appellant as far as the goods are considered was that of Buyer and seller. For selling the products in India appellants were required to explore and develop the market for the said goods in India. To develop and expand the market for these products in India, Appellants incurred certain expenses. These operating expenses were sought to be reimbursed by the ALOG to Appellant. It is settled law that such reimbursable expenses incurred cannot be included in the taxable value of services rendered. Hon'ble Supreme Court has in case of Intercontinental Consultants and Technocrats Pvt Ltd [2018 (10) GSTL 401 (SC)] has laid down the law as follows:

24.*In this hue, the expression 'such' occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing 'such' taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot a part of that valuation as that amount is not calculated for providing such 'taxable service'. That according to us is the plain meaning which is to be attached to Section 67 (unamended, i.e., prior to May 1, 2006) or after its amendment, with effect from, May 1, 2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that High Court was right in interpreting Sections 66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider 'for such service' and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service.*

25.*This position did not change even in the amended Section 67 which was inserted on May 1, 2006. Sub-section (4) of Section 67 empowers the rule making authority to lay down the manner in which value of taxable service is to be determined. However, Section 67(4) is expressly made subject to the provisions of sub-section (1). Mandate of sub-section (1) of Section 67 is manifest, as noted above, viz., the service tax is to be paid only on the services actually provided by the service provider.*

29.*In the present case, the aforesaid view gets strengthened from the manner in which the Legislature itself acted. Realising that Section 67, dealing with valuation of taxable services, does not include reimbursable expenses for providing such service, the Legislature amended by Finance Act, 2015 with effect from May 14, 2015, whereby Clause (a) which deals with 'consideration' is suitably amended to include reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service. Thus, only with effect from May 14, 2015, by virtue of provisions of Section 67 itself, such reimbursable expenditure or cost would also form part of valuation of taxable services for charging service tax. Though, it was not argued by the Learned Counsel for the Department that Section 67 is a declaratory provision, nor could it be argued so, as we find that this is a substantive change brought about with the amendment to Section 67 and, therefore, has to be prospective in nature. ...."*

5.5 Commissioner has in his order in para 49 referred to Rule 3 of Export of Services Rules, 2005 and noted that Rule 3(2)(a) was omitted by the Export of Services 9Amendment) Rules, 2010 w.e.f 27.02.2010. Prior to this omission clause (a) read as under

"(a) such service is provided from India and used outside India; and"

5.6 Taking into account the amendments made from time to time, he Commissioner has considered the period of demand i.e. from 2009-10 to 2013-14 into three periods viz (i) prior to 26.02.2010 (ii) 27.02.2010 to 30.06.2012 & (iii) 30.06.2012 onwards.

5.7 Revenue has in their appeal admitted that Commissioner was correct in classifying the services under the category of "Business Auxiliary Services". There cannot be any dispute about the fact that these services fall in the category III services covered by Rule 3(1)(iii) of the Export of Service Rules, 2005. Board has vide Circular No 111/05/2009 dated 24.02.2009 clarified as follows:

"3. .... For the services that fall under Category III [Rule 3(1)(iii)], the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus, for Category III services [Rule 3(1)(iii)], it is possible that export of service may take place even when all the relevant activities take place in India so long as the ***benefits of these services accrue outside India****. In all the illustrations mentioned in the opening paragraph, what is accruing outside India is the benefit in terms of promotion of business of a foreign company. Similar would be the treatment for other Category III [Rule 3(1)(iii)] services as well."*

In our view the circular very clearly lays down that during the material time for determination whether the Category III service is exported or otherwise the relevant factor is the location of the service receiver and not the place of performance. Commissioner thus applied the said circular to hold that the services prior 27.02.2010 were exported as the recipient of service provider was outside India. The fact not disputed by the revenue in their appeal. Thus we do not find any infirmity in the order of Commissioner for the period prior to 27.02.2010.

5.8 From 27.02.2010, the condition in respect of provision of service in India and usage outside India was omitted from the Export of Service Rules, 2005 in respect of category III services. Thus for determining whether a service provided which falls in Category III is Export of Service or not the relevant conditions to be satisfied were that-

- The services should be provided in relation to business or commerce to a recipient located outside India; and
- Payment for such services should be received by the service provider in convertible foreign exchange.

Commissioner has in impugned order found that both these conditions were satisfied in respect of the transactions under question and has accordingly held that the services provided by the appellant are export of services. Revenue has not disputed by stating that the conditions specified by the Export of Service Rules, 2005 were not satisfied, they have sought to state that the Commissioner should have decided the matter independently without referring to these rules, in terms of general definition of exports ort by referring to Article 286 of Constitution. We have already expressed our view on this approach in para 5.2, supra, and do not find any infirmity in the order of Commissioner for this period too.

5.9 With effect from 1.07.2012, the export of Service Rules, 2005 were rescinded and Place of Provision of Services Rules, 2012 put in place. It is the contention of the revenue that the services provided by the Appellant to ALOG are intermediary services, and hence the place of provision of service will be the location of service provider and not the service recipient. The relevant rules ibid are reproduced below:

2. Definitions - In these rules, unless the context otherwise requires,-

(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.;

3. Place of provision generally.-

The place of provision of a service shall be the location of the recipient of service:

Provided that in case where the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.

9. Place of provision of specified services.-

The place of provision of following services shall be the location of the service provider:-

(a) ....;

(b) ....;

(c) Intermediary services;

(d) ....

The term intermediary has been defined by the Rule 2(f) ibid and the phrase "intermediary services" used in Rule 9(c) will have to be interpreted accordingly. Revenue has not shown as to how the Appellant has acted as intermediary between the two persons namely service provider and service receiver of the main service. Since the nothing has been brought on record to show that appellants were providing the intermediary services to the recipient in manner as defined by Rule 2(f) we do not find any merits in the submissions of the revenue that place of provision of services in the present case will be location of service provider as per Rule 9. In our view commissioner has correctly determined the place of provision of service by application of Rule 3 as the location of the service recipient.

6.1 In view of discussions as above we do not find any merits in the appeal filed by the revenue and dismiss the same. Cross objections filed by the respondents are also disposed accordingly.

(Order pronounced in the open court)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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