

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 87767 OF 2017

[Arising out of Order-in-Appeal No: PK/46-48/MC/2017 dated 31st July 2017
passed by the Commissioner of Service Tax (Appeals), Mumbai – II.]

Sabre Travel Network India P Ltd
Urmi Estate, 14th Floor, 95 Ganpat Rao Kadam Marg
Mumbai – 400 013

... Appellant

versus

Commissioner of CGST & Central Excise
Mumbai Central
GST Bhavan, 115 Maharshi Karve Road
Opp: Churchgate Station, Mumbai – 400 020

...Respondent

WITH

(i) Service Tax Appeal No: 88114 of 2017 (Sabre Travel Network India P Ltd), (ii) Service Tax Appeal No: 88115 of 2017, (iii) Service Tax Appeal No: 87816 of 2017 with Service Tax Stay Application No: 93131 of 2017 (Commissioner of CGST, Mumbai Central v. Sabre Travel Network India P Ltd) and (iv) Service Tax Appeal No: 85728 of 2019 (Sabre Travel Network India P Ltd)

[Arising out of Order-in-Appeal No: PK/46-48/MC/2017 dated 31st July 2017
passed by the Commissioner of Service Tax (Appeals), Mumbai – II Order-in-Original No: 96/COMMR/DRKNR/CGST-CEX/MC/2018-19 dated 15th October 2018 passed by the Commissioner of Central Excise and Service Tax-Mumbai Central.]

APPEARANCE:

Shri S Thirumalai, Advocate for the assessee/appellant

Ms PV Sekhar, Additional Commissioner (AR) for Revenue

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/85779-85783/2020

DATE OF HEARING:	17/09/2019
DATE OF DECISION:	11/09/2020

PER: C J MATHEW

After dismissing application of Revenue for stay of operation of order impugned by them, we take up four appeals of M/s Sabre Travel Network (India) Private Ltd and one of Revenue for disposal by this common order as the issue in dispute, arising out of one order of original authority and one of first appellate authority, has identical origin. The appellant-assessee (formerly known as M/s Abacus Distribution System (India) Pvt Ltd), a subsidiary of M/s Sabre Asia Pacific Pte Ltd, Singapore, was appointed as ‘national marketing company’ of the parent entity through ‘sub-distribution agreement’ dated 6th June 1996 envisaging promotion, marketing and distribution of Abacus Computer Reservation System (CRS) in return for commission on each booking for air travel or accommodation effected on the system by subscriber travel agents in India. In addition, ‘marketing service fee’ was also to be received by them for providing assistance services in operating the computer reservation system (CRS) software.

2. Proceedings were initiated against the appellant-assessee for recovery of service tax that had not been discharged as ‘intermediary’

on 'commission' and 'marketing service fee' received for the period from 1st July 2012 to 31st March 2016 and which, in accordance with rule 9(c) of Place of Provision of Service Rules, 2012 that deems the location of the provider as the place of provision, has been rendered in the taxable territory. The proposal in show cause notice dated 19th April 2017 for recovery of ₹ 50,65,35,795, under section 73(1) of Finance Act, 1994, along with applicable interest under section 75 of Finance Act, 1994, was confirmed and penalty of like amount imposed under section 78 of Finance Act, 1994 with further penalty of ₹ 5000 under section 77 of Finance Act, 1994 *vide* order-in-original no. 96/COMMR/(DR. KNR)/CGST & CEX/MC/2018-19 dated 6th November 2018 of Commissioner of CGST & CEX, Mumbai Central. The assessee is in appeal against this order.

3. M/s Sabre Travel Network (India) Pvt Ltd had, in accordance with rule 5 of CENVAT Credit Rules, 2004, filed four applications for refund of ₹ 28,41,563, ₹ 37,12,591, ₹ 15,85,672 and ₹ 13,63,439, pertaining to each quarter between October 2013 and September 2014, claimed to be the accumulated credit of tax paid on 'input services' attributable to export of 'output services' to M/s Abacus International Pte Ltd, Singapore and to M/s Abacus Travel Systems Pte Ltd, Singapore; these were adjudicated by the competent authority in three orders. While that for October 2013 to March 2014, against 14 invoices, was summarily rejected for not being compliant with limitation of one

year from the relevant date, prescribed in section 11B of Central Excise Act, 1944 on the assumption of correspondence with export of goods, the other two orders held that three of the six invoices, raised on M/s Abacus International Pte Ltd, did not conform to conditions in rule 6A of Service Tax Rules, 1994, that one invoice in each application was barred by limitation of time, and that quantum of credit disallowed, for having been wrongly availed, was in excess of the eligible refund of ₹ 6918 and ₹ 7780 respectively and, therefore, warranted rejection *in toto*. The upholding of non-conformity with rule 6A of Service Tax Rules, 1994, *vide* order-in-appeal no, PK/ST-I/MUM/46-48/16-17 dated 31st July 2017 of Commissioner of Service Tax (Appeals), Mumbai-II, while setting aside the bar of limitation in some of the invoices has brought those disputes also to our doorstep. While the appeal of Revenue is limited to the finding in the impugned order that the claims, originally held to be time-barred, were eligible, that of the assessee challenges the finding that service rendered to M/s Abacus International Pte Ltd did not amount to export.

4. It may not be out of place to take note that similar proceedings to recover tax on 'commission', claimed to be proceeds of export of 'business auxiliary services' for the period from 2003 to 2010, was confirmed in adjudication but, having been discarded by the Tribunal in order no. A/1106-1108/14 dated 20th June 2014, is presently pending before the Hon'ble Supreme Court on appeal by Revenue. Notice was

also issued for recovery of tax on 'marketing fee' received between October 2006 and February 2010 which is yet pending for adjudication. For the period after February 2010, it appears that a conscious decision was taken not to issue notices as the condition of 'used outside India' was excluded in the relevant Rules for qualifying as export of service. The present proceedings, though, relate to the period after the 'negative list' regime was notified in July 2012, with Place of Provision of Service Rules, 2012 as the pivot for primary evaluation of one among the several conditions, stipulated in rule 6A of Service Tax Rules, 1994, to be fulfilled without exception for qualifying as export.

5. There is no dispute that, for want of exclusion from the definition of service, of enumeration in the negative list or of exemption under any notification, the transaction is otherwise taxable. The claim to being an exporter is based on the contract, asserted to be on principal-to-principal basis, which places the recipient in Singapore and obliges that entity to remit the dues in convertible foreign currency. The scope and terms of the contract were dealt with at length by Learned Counsel and, placing emphasis on the decision of Tribunal in the dispute for the earlier period, it is contended by him that recourse to 'intermediary' was prompted solely by the determination to saddle them with tax liability, despite the consideration being nothing but export proceeds realized in foreign currency, on the impugned transaction.

6. The thrust of arguments advanced by Learned Counsel for the appellant-assessee is the equivalence of the transaction, affirmed as exports by the Tribunal in the pre-‘negative list’ era, with those continued unchanged even thereafter. According to him, the new regime has merely broadened the tax base without any impact on existing assesseees and that tax authorities were not justified in denying the privileges that, in the erstwhile regime, had been their entitlement. Elaborate arguments and submissions were made by Learned Counsel on these lines and Learned Authorized Representative was no less forceful in urging that the impugned orders, except to the extent of the challenge mounted by Revenue against allowing refunds, be upheld.

7. The appellant-assessee has an agreement with the parent company, licenced for the Asia Pacific region by the owner, to market and promote computer reservation system (CRS) software in India. *Prima facie*, this should have been a ‘no brainer’ but the judicial time expended on disputes over taxation of computer reservation system (CRS) software is testimony to the complexity of the multiple transactions in the consummation of the airline operator - passenger engagement on e-commerce platforms and which bears bearing. No less important to the narration is the schema for acknowledging exports, essential for the privilege of being exempted from tax on intangibles and, more particularly, the changes wrought by the ‘negative list’ regime that was found by the tax authorities to warrant re-visit of tax

liability.

8. Computer reservation system (CRS) software is the platform that enables conflux of business interests of airline operators and of travel agents in the ticketing of passengers intending to travel on scheduled flights. The transaction between owners, or licencees, of the software and airline operators rendered, by the presence of both or even of the latter, in the domestic territory has been held by the Tribunal as taxable, in the hands of the provider – actual or deemed - of ‘online information and database access or retrieval’ service, in several decisions arising from proceedings initiated against airline operators. Prominent among these are *British Airways v. Commissioner of Central Excise* [2014-TIOL-979-CESTAT-DEL] and *Jet Airways (I) Ltd v. Commissioner of Service Tax, Mumbai* [2016 (8) TMI 989 - CESTAT MUMBAI]. Access to the system is provided to travel agents (subscribers) whose incentivizing through appropriate share of the ticket discounts offered by the airlines has been held by the Tribunal, in *D’Pauls Consumer Benefit Ltd v. Commissioner of Central Excise, New Delhi* [2017 (52) STR 429 (Tri-Del)], to be taxable consideration for rendering ‘business auxiliary service’ in the erstwhile regime. Entities, contracted by competing owners/licencees for marketing the use of their software platforms among travel agents in return for a share in the commission, were held by the Tribunal, in *Blue Star Air Travel Services Pvt Ltd v. Commissioner of Service Tax* [2018-TIOL-1233-CESTAT-AHM], to be

taxable for rendering of 'business auxiliary service' to the licenced holder of the software. The underlying web of transactions were segregated as different taxable services though, as pointed by Learned Counsel with reference the demand raised on the assessee herein for providing 'business auxiliary service', saved from liability to the extent of conformity with Export of Service Rules, 2005. Thus, even by the argument put forth by Learned Counsel, the impugned activities are conceded to be service in the new regime and taxable as well.

9. We now turn to the fitment of exports within the tax scheme as intangibility of services does not lend itself to as easy a discernment as in commodities. And yet, it must needs be for exclusion from tax without compromising taxability. In its truest sense, service is the satisfying of one's need through another person engaged as a 'provider', *sine qua non* in any service transaction, and afforded by accumulated capital. Till the imposition of the writ of the State on this sector of the economy, service attracted only statistical attention for which cross-border transactions could be identified by currency flow. With the increasing pressure on manufacturers and trading enterprises to scale up in size and to specialize in competencies for achieving cost optimality, its leverage could not be ignored by the State and, as always, tax was, so to speak, the foot in the door though, by and large, of little concern to the general populace and most service providers owing to the restricted base. The five-fold increase between 2000-01 and 2006-

07, encompassing about a hundred commonplace activities within the tax net, signposted the imminent transition to ‘negative list’ regime. The adroit easing of the ‘negative list’ phase into the sphere of tax administration was accomplished by incorporating parallel provisions in Finance Act, 1994 to reflect not just the foundational shift but also the culmination of carefully calibrated strategy to mitigate surefire resistance anticipated even at the genesis and to facilitate the evolution thereafter.

10. With taxpayer fatigue, engendered by prohibitively high rates, frenetic enforcement overreach and incessant adversarial litigation, threatening to enervate the economy, public soreness presaged anything but ready acquiescence to taxing of services. Not only would the broadening of the tax base have to be phased but the impediment of intangibility warranted definitional certitude of taxable services to forestall adversarial enforcement. Such enumeration, typical of classificatory regime of tax which inherently limited impost to specific services and describing the activity to be taxed, could not do without stipulating the recipient but for whom service would remain unfulfilled. The recipient, being the destination of the service and the source of the consideration, made manifest the rendering of service. The description of the levy as ‘destination based consumption tax’ by the Hon’ble Supreme Court in *All India Federation of Tax Practitioners v. Union of India* [(2007) 7 SCC 527] was the ray of sunbeam illuminating a dawn

that, at its meridian zenith, inspired the decision of the Tribunal in *Paul Merchants Ltd v. Commissioner of Central Excise, Chandigarh* [2012-TIOL-1877-CESTAT-DEL] to place the recipient inextricably within the context of tax on services. Not least of such pronouncements is the decision of the Hon'ble Supreme Court in *Union of India v. Intercontinental Consultants and Technocrats Pvt Ltd* [2018 (10) GSTL 401 (SC)] that restricted the taxable value to the extent of description of the taxable transaction manifested through provider and recipient.

11. That design, comprising specific descriptions, encapsulated within the provider-recipient engagement, and consideration, though difficult enough to administer in the domestic jurisdiction, nevertheless, did, inherently, facilitate exemption of exports as the legal eclipsing of the recipient from, and in, the tax jurisdiction could not survive definitional conformity. Two significant developments were to intrude on this simple artifice: maturation of the scheme of CENVAT credit by absorption of service tax within its fold and the according of national treatment to services procured from outside the tax jurisdiction. With taxable 'output services' as the pivot for setting off duties and taxes borne on procurement of goods and services, refund of accumulated credit, ascribed to exports, could be appended to the architecture of the tax only by positive evidence, and not by presumption, of consumption outside the domestic jurisdiction. Export of Service Rules, 2005, notified initially under the general rule-making powers conferred by

section 94 of Finance Act, 1994, afforded the required ascertainment to be eligible for refunds and it was only with the amendment of 2006 for bringing the Rules under the umbrella of the power of exemption, conferred by section 93 of Finance Act, 1994, that exports were depicted as mirror image of the flow that was deployed for comprehending cross-border transactions in the reverse direction to operationalize the legal fiction of section 66A of Finance Act, 1994. With that adjunct for identification of non-domestic transactions in service for either levy or exemption, as the case be, cross-border transactions were fully integrated into the tax system. The Point of Taxation Rules, 2011 enabled the shift from receipt-based to accrual-based liability. The legislated evolution of the scheme of tax was, thus, no less robust than the judicial.

12. With this ontogeny, and, coincidentally, corresponding to the age of attainment of majority, the stage was set to give free rein to taxation of services by phasing out the classificatory regime to make room for the ‘negative list’ regime. Not unnaturally, the principal, and adjunct, machinery that had evolved till then were embedded in the new scheme of Finance Act, 1994, as section 66B, 66C, 66D and 66E, to resonate with

‘(44) ...any activity carried out by a person for another for consideration, and includes a declared service, but shall not include - ..’

assigned to ‘service’ in section 65B of Finance Act, 1994 not only to cover all ‘activities’ save those exogenic to, and excepted in, the definition but also those excluded out of, and exempted from, levy in ‘negative list’ or by notification. Also, here the expression ‘for another’, as substitute for ‘to any person’, eliminates the erstwhile touchstone of ‘recipient’ for determination of the rendering of service and thus conflates the definition and ‘service’ in its essential form; resort to ‘recipient’ was henceforth restricted to situations, specifically articulated, where such recognition is necessary for harmony with the charging provision. In the new scheme of tax, ‘consideration’, as also the ‘provider’, continued to be no less vital than before for discerning the service transaction even as ‘recipient’, with the obliteration of carefully crafted boundaries inherent to the definition of ‘taxable services’ by the generalized explication as the substituting of self-performance, had ceased to be.

13. Impliedly, the obligation to recompense the provider devolves on the person who opted for hiving off the undertaking of an activity. Consequently, the extent, and not just the measure of value, of service, no longer bound by the description of activity, corresponds to the consideration which also represents the physical, and legal, capability for, as well as the value at which it is commercially viable to desist from, undertaking the activity by oneself. The expression ‘service’ in Finance Act, 1994 is the legal template of this economic arithmetic for

encompassing all intangibles in the marketplace. Description of a service, if warranted for any purpose related to taxation, would henceforth have to be inferred from the consideration. Ironically, the generality of definition of ‘service’ in section 65B(44) of Finance Act, 1994, with its emphatic ‘for another’ as the most apt approximation for ‘outsourcing’, could not, of itself, offer accommodation either for taxability, or non-taxability, of cross-border outsourcing or for policy compulsion of transferring the tax burden in domestic transactions and, hence, the device of Place of Provision of Service Rules, 2012 had to be crafted. Though, as is evident from the several rules, substantially concerned with replicating of the existing situational outliers that, by now, were inalienable from taxation of services, two new concepts found implantation within the scheme of tax under Finance Act, 1994; ‘intermediary’ and ‘main service’ with the former defined, in rule 2 of Place of Provision of Service Rules, 2012, as

‘ (f)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 on his account’.

Though ‘main service’ remains undefined, the designating of ‘service’, solely for the purpose of rule 9(c) of Place of Provision of Service Rules, 2012, as that, does firmly hem it into certain transactions expressly for preventing escapement from tax just as, despite ostensible superfluity, the intendment of the immediately preceding rule appears

to be. From the point of view of tax administration and assesseees, rule 3 and most of the other rules in Place of Provision of Service Rules, 2012 ensured business as usual with assurance of continuity. It would, thus, appear that, by the contrivance of both rule 8 and rule 9 of the said Rules, certain specific facets, hitherto unknown to the classificatory regime and bred from the generality of the definition of 'service', with the potential to unhinge the integrity of the charging provision and of rule 3, for taxing of transactions occurring in the 'taxable territory', were sheared for re-orientation in the interests of harmonious blending within the scheme of taxation. In the dispute before us, we are not concerned with rule 8 of Place of Provision of Service Rules, 2012; to the particular aspect that rule 9(c) was designed to address, we shall turn presently after taking into consideration the rival submissions as this very incorporation, as successor of 'business auxiliary service', is the sticking point in the controversy before us.

14. We have posited in our exposition *supra* that the scope of taxable service in the erstwhile regime was determined along the border of the provider-recipient transaction that frames the image suggested by the description and to which the consideration was subordinated as a measure of the value for tax. Almost all the enumerations were formulated in 'by – to' equations reflecting duality of provision and consideration flows in service transactions. The only exception was 'business auxiliary service', defined in section 65(105)(19) of Finance

Act, 1994 for expounding the scope of section 65(105)(zzb) of Finance Act, 1994, in which the business relationship of ‘client’ and ‘provider’ was rendered complete by utility to a third person. It was, probably, the complexity of this three-way transaction that prompted the adjudicating authority to equate it with the no less complex ‘intermediary’ in rule 9(c) of Place of Provision of Service Rules, 2012.

15. Learned Counsel did, from the outset, oppose this equivalence which, according to him, may apply to a much narrower construct of ‘business auxiliary service’ and we may safely concur with that proposition though not necessarily on degree of incongruity or its relevance to the dispute. That certain elements of ‘business auxiliary services’ need not necessarily be of direct benefit to third-parties, and, therefore, does not fit within ‘intermediary’, is apparent from the definition itself. Even otherwise, with the paradigm shift to the ‘negative list’, it is unavoidable that every activity, hitherto taxed or exempted for any reason, be re-evaluated through the prism, comprising ‘provider’, ‘for another’ and ‘consideration’, for conformity with ‘service’ described in section 65B(44) of Finance Act, 1994. Therefore, argument over legacy equivalence, or its lack thereof, either fully or partially, need not detain us for resolution of the present dispute. Nonetheless, for regularity, we look to the legal submissions made.

16. Learned Counsel contends that the definition of ‘intermediary’ *supra* does not cover the transactions of the appellant-assessee; according to him, the description therein is intended to be applied to agents, brokers and other similar middlemen which does not even begin to describe the role of the appellant-assessee. He contests the finding of the adjudicating authority that the said description, owing to untrammelled expansion by the incorporation of ‘*any other person, by whatever name called,*’ therein, is not limited by nomenclatures of the commercial marketplace; according to him, the principle of *ejusdem generis* governs the interpretation of such cluster enumeration and it is incorrect for unlimited construction to be placed on the said phrase. He drew our attention to the finding of the Tribunal, in *Acquire Services Pvt Ltd v. Commissioner of Service Tax, Delhi [(2014) 36 STR 1148 (Tri-Del)]*, that the activity, in the dispute upto 1st May 2006, was not ‘business auxiliary service’ and that the benefit of Export of Services Rules, 2005 was available, and held as squarely applicable to their dispute, decided in *Abacus Distribution Systems (India) Pvt Ltd v. Commissioner of Service Tax, Mumbai-I [2014-TIOL-1617-CESTAT-MUM]*. The rulings of the competent authority in the matter of *Go Daddy India Web Services Pvt Ltd [2016 (46) STR 806 (AAR)]* and of *Universal Services India Pvt Ltd [2016 (42) STR 585 (AAR)]* were also cited by him.

17. Learned Counsel relies on the decision of the Tribunal in *Sunrise*

Immigration Consultants Private Limited v. Commissioner of Customs, Central Excise & Service Tax, Chandigarh [2018 (5) TMI 1417-CESTAT Chandigarh holding that referral of potential students/customers of banks/educational institutions by the appellant for commission is not taxable as ‘intermediary’ , in *Evalueserve SEZ Pvt Ltd and Anr v. Commissioner of Customs, Central Excise & Service Tax, Chandigarh [2018 (12) TMI 1242-CESTAT Chandigarh]* holding that receipt of consideration from overseas client excluded them from tax as ‘intermediary’, in *Valmiki Consultants Pvt Ltd v. Commissioner of Customs & Central Tax, Hyderabad [2008 (11) TMI 1085-CESTAT Hyderabad]*, which followed the decision of the Tribunal in *re Sunrise Immigration Consultants Pvt Ltd* and other decisions of similar nature cited therein, in *Commissioner of Goods & Service Tax, Gurgaon – II v. Orange Business Solutions Pvt Ltd [2019-VIL-332-CESTAT-CHD-ST]* and in *Verizone India Pvt Limited v. Commissioner of Service Tax, Delhi [2019-VIL-527-CESTAT-DEL-ST]*. The commonality in all these decisions, either setting aside orders of the adjudicating authority or upholding of proceedings dropped by the adjudicating/appellate authority, is that taxability as ‘intermediary’ service was impugned before the Tribunal. These are, just as strikingly, similar in arriving at the respective decisions by referring to the agreements. The decisions in these disputes, based on scrutiny of each contract, are, therefore, not binding precedents but the ratio emerging therefrom, viz, that test of

conformity with description of ‘intermediary’ turns on the nature of the particular contractual engagement entered into with the overseas entity, may be usefully appropriated. After the hearings had concluded, Learned Counsel placed unsolicited written submission, appending the decision of the Tribunal in *Principal Commissioner, CGST, Delhi South v. Comparex India Pvt Ltd* [final order no. 50023/2020 dated 19th January 2020 disposing off appeal no. 51221/2019 against order-in-appeal no. 353/Central Tax/Apl-II/Delhi/2018 dated 18th March 2019 of Commissioner of Central Tax (Appeals-II), New Delhi] as of contemporary relevance, on record. Just as in the other decisions cited by Learned Counsel, this, too, affords the same ratio as the contractual arrangement for consideration in the agreement was the basis for the conclusion on escapement from tax.

18. Learned Authorized Representative emphasizes the conditions in the agreement which, according to her, subordinates the appellant-assessee to the overseas entity. Relying vastly upon the exposition on ‘intermediaries’ in Taxation of Services: An Education Guide of Central Board of Excise & Customs [published on 20th June 2012], she took us through the several questions and answers therein to support her contention that the assessee was, indeed, an intermediary as intended by the enactment. According to her, section 66C of Finance Act, 1994 is explicit in asserting that none of deeming fiction in Place of Provision of Service Rules, 2012 is invalidated merely because of

the location of provider and/or receiver outside the taxable territory. She also cited the decision of the Hon'ble Supreme Court in *Joint Commr of Income Tax, Surat v. Saheli Leasing & Industries Ltd [2010 (253) ELT 705 (SC)]* and in *Krishena Kumar and ors v. Union of India and ors [(1990) 4 SCC 207]*.

19. It may be germane that Learned Counsel sought to press into service the decision of the Tribunal in *Principal Commissioner of Central Excise, Pune-I v. Advinus Therapeutics Ltd [2016-TIOL-3138-CESTAT-MUM]* and, in particular, the proposition that

'12.....The 'negative list' regime was not intended to be either detrimental or beneficial to existing assessee is acceptable as such intent was specifically sanctioned by legislation. The respondent, prior 1st July 2012, was eligible for all benefits as the service rendered by them was treated as export with the recipient of service being outside the country. The corresponding provision in Place of Provision of Service Rules, 2012 is rule 3 which brings the service within the ambit of export of service in rule 6A of Service Tax Rules, 1994. The revenue has not made any submission of legislative intent to deprive a provider of 'scientific or technical consultancy service' in the erstwhile fishing of its status as export of service owing to change in the regime.'

as supporting of the applicability of earlier decisions to the 'negative list' era too. Therein, it was not that the Tribunal was not cognizant of the new dimension of service tax but that the onus was placed on Revenue to put forth the consequence of the transformation on the assessee and, taking note of their inability to do so, upheld the order of lower authority. In the present dispute, it falls upon the assessee to

alienate themselves from designation as ‘intermediary’ which, as we have pointed out *supra*, is a distinguishing facet, along with the subordination of the recipient to the contractual consideration, in ascertainment of the rendering, and the extent, of service in a scheme that may tax the hitherto untaxed activity. The decisions of the Authority for Advance Rulings (AAR), naturally, does not bind us and has little persuasive influence owing to the assurance being claimable only by the applicant and universal applicability contingent only with judicial validation by the appellate mechanism of the statute.

20. We may be pardoned for indulging in this lengthy portrayal of evolution of the tax and the progressive generalization of service converging in the present form; in its absence, the complication in assaying of export of services, in which denial arising from placement within the ‘taxable territory’, by recourse to Place of Provision of Service Rules, 2012, can be refuted only by establishing that ‘consideration’ corresponds to ‘main service’ on own account, could not have been contextually explicated. The appellant-assessee may not be factually incorrect in submitting that no consideration is received by them from the only other entity in the domestic territory, *viz.*, travel agents and that they are in receipt of consideration for provision of service to an overseas entity. However, the consequent proposition that this factual portrayal excludes the receipts from the purview of service tax is, in our view, unexceptionable only in the erstwhile tax regime in

which the enumeration of legislative intent to tax identified services implied a cluster of discrete activities with each evaluated for coverage on its own steam. In the new paradigm, every activity, save for specific exclusions, that involve a 'provider' and 'consideration', is 'service' but the absence of description, and, that too, qualified with 'any other person' therein, eliminates borderlines segregating each service. That absence is a deliberate consequence of superfluity of the extent of activities or 'service' in the general scheme of taxation and, conversely, where description is warranted, the span of activity is to be inferred from, 'consideration' paid for it. Thus, in normal circumstances, receipt of 'consideration' suffices for saddling the 'provider', subject to exclusions and exemptions afforded by section 66D and section 93, with levy of tax as 'service' rendered in 'taxable territory' under the authority of section 66B of Finance Act, 1994 much like it was in the classificatory regime. The 'out of normal' is the contriving, in specific circumstances, of 'taxable territory', under authority of section 66C of Finance Act, 1994 by recourse to Place of Provision of Service Rules, 2012 which is designed to locate the delivery of service within the 'taxable territory', by reference to provider, in rule 9, or recipient, in rule 8 and, in other rules, to triggering circumstances, for invoking section 66B of Finance Act, 1994. Superficial equivalence with commodity exports, by identification of recipient as claimed by appellant-assessee, does not, owing to statutory obliteration of recipient

in determining the rendering of ‘service’, suffice for exacting privileges without conforming to rule 6A of Service Tax Rules, 1994.

21. Therefore, unlike in the erstwhile regime in which exclusion from taxability was determined, whenever ‘consideration’ was received in foreign currency, by subjecting the description to the trifurcated categorization in Export of Service Rules, 2005, every activity conforming to the definition of ‘service’ in section 65B(44) of Finance Act, 1994, not excluded or exempted, is taxable to the extent of ‘consideration’ having been paid from within India to ‘provider’ within or outside India. Notwithstanding the generality of rule 3 which, by its emphasis on flow of ‘consideration’ as pointer to the location of recipient in the taxable territory, should exclude any payment received from outside India, particular applicability of any other rule in Place of Provision of Service Rules, 2012 that locates the service with a provider in India, as rule 9 does, is an exception to rule 3 by discountenancing the flow of consideration. It is in these circumstances that we hold that receipt of consideration from, or location of recipient, outside India, even as it is necessary under rule 6A of Service Tax Rules, 1994, does not suffice for coverage by rule 3 of Place of Provision of Service Rules, 2012. The submissions on behalf appellant-assessee on those grounds are tenable only if it is established that they are not covered by rule 9 of Place of Provision of Service Rules, 2012. We turn to that aspect now.

22. The activity of an ‘intermediary’ is not envisaged as any less of ‘service’ than contemplated by section 65B(44) of Finance Act, 1994 and this is evident from its definition in rule 2(f) of Place of Provision of Service Rules, 2012. While ‘main service’ on own account, implying adequate autonomy to negotiate ‘consideration’ to be passed on in the value chain to the next ‘provider’ and onwards until the sum of consideration is recovered in entirety from the ultimate consumer, is also no more and no less than ‘service’, the antithesis thereof, characterized by divesting of such autonomy and to be inferred from the nature of the ‘consideration’, will relegate the corresponding activity to that of ‘intermediary’ which is subordinate to a ‘main service’ on own account within which it is rendered. By designating of the activity of ‘intermediary’ as ‘service’ but not on its own account to be distinguished by provision of ‘main service’ on own account, it would appear that while being ‘provider’ – one of the two essential determinants of ‘service’ – the ‘consideration’ received, as it must for coverage under Finance Act, 1994, by the ‘intermediary’ is lesser than, or subordinate to, the consideration that corresponds to performance of the ‘main service’ on own account. Here, irrespective of the delivery of the ‘main service’ in the ‘taxable territory’ or otherwise, the ‘consideration’ received by the ‘provider’ in India is deemed to have been for service rendered in India. From this would emerge a pattern in which ‘services’ coalesce within a ‘main service’ detracting from

independent existence of each of them except for the description corresponding to ‘consideration’ of the coalesced ‘main service’ rendered on own account which is characterized by the recipient of service acknowledging only one provider for contractual consideration but yet carrying on business with other entities with whom the recipient of consideration has entered into separate contracts. This is the only chain of service providers that offers latitude for several entities to participate in transactions of ‘service’ that is ‘main service; the alternative model, and more commonplace, is the sequential coalescing of ‘main service’ on own account that progressively merges to extend the ‘consideration’ and the corresponding description of the ‘service’ provided. The argument on behalf of the appellant for exclusion of the former of the alternatives from the ‘intermediary’ intended in the Place of Provision of Service Rules, 2012 makes rule 9(c) otiose.

23. In transferring this template to the dispute before us, we observe that there is no broader span of activity than the ticketing/booking for access to service that is offered by the airline operator/hospitality provider to the traveler. It is common ground that the assessee was contracted by the overseas entity to promote and market the Abacus ‘computer reservation system’ (CRS) software among travel agents for enabling access to the offerings of airline operators and hospitality providers who had separately contracted with the overseas entity for access to the system at the other end. The assessee undertook the

responsibility of identifying travel agents who were designated as subscribers of Abacus 'computer reservation system' upon successful concluding of agreements with them. Thus are the subscriber and the airline operator/hospitality provider facilitated for providing travel solutions to the public. Upon the successful closure of booking, the overseas entity was recompensed with commission per transaction. Travel agents were, in turn, compensated by the overseas entity on per transaction basis to incentivize usage of the Abacus system. The consideration received by the assessee from the overseas entity for the contracted undertaking is also computed on per transaction basis. It is this networking of activities – the channel that links the airline operator/hospitality provider and the traveler - that pushes forward the business of travel, and hospitality, industry. Travel agents, by undertaking the activity of ticketing passengers and booking guests, render 'service', within the meaning of section 65B(44) of Finance Act, 1994, to airlines and hotels, on the back of the Abacus 'computer reservation system' and it is from the fare and tariff, respectively, recovered from the traveler through the subscriber, that airlines and hotels pay for the facilitation service. The airlines/hotels and the travel agents are not bound to each other and nor do either contract for exclusive use of the Abacus system. It is upon the volumes generated by the subscriber on Abacus that the licensee of the software is paid and it is from this payment that the assessee, as well as subscribing

travel agent, are compensated by the licensee which flows from the agreement of the licensee with the assessee and of the assessee with the travel agent. In all of these multiple transactions that enable a traveler to fly or occupy accommodation, the fare and tariff is in the public domain and the airline/hotel offers commission on that to the parent company of the appellant; 'consideration' for all other transactions pertaining to the ticketing/booking are constrained within this consideration to derogate from autonomy of negotiation and progressive summation of consideration to paid by the ultimate consumer thus derogating from the hallmark of 'main service' on own account. Consequently, the activity of the assessee-appellant rendered is 'intermediary service' taxable in the hands of the provider. Assessee-appellant is provider of the service and, hence, liability devolves on them in terms of rule 9 of Place of Provision of Service Rules, 2012.

24. We may, in addition to the legal scrutiny, subject the transaction of the appellant-assessee to the test of logic too. The key to comprehending the devolution of liability on 'intermediary' is the substitution that is the essence of 'service' as a concept. For the mobilization of travel agents as subscribers, catering to a market comprising of residents in India, the licensee of Abacus software would have to be established in India and the obvious economy derived from outsourcing to its Indian subsidiary has prompted the decision not to undertake that by themselves. As the surrogate of the licensee, claim for exemption available to exports fails despite the

rendering of service to the overseas entity because the activity is undertaken for the overseas entity in the taxable territory.

25. The impugned order has taxed two streams of consideration: ‘commission’ based on passenger bookings and fixed ‘marketing service fee’ and, while the former is consideration for ‘intermediary service’ as set out above, the nature of the latter is not clear. Though the adjudicating authority has not given much thought to its computation, it would appear from the invoices, that these have been billed as a standard amount. Nevertheless, in the narration of facts, the adjudicating authority has recorded that the dues under this head are netted; as netting out involves adjustment of flows in both directions and there is no ostensible reason for the assessee to pay the overseas entity, we are unable to decide the legality of subjecting the ‘marketing service fee’ to tax. We must also point out here that the adjudicating authority, while accepting the submission that the sum of the demands on the two streams of consideration is less than the total demanded in the notice, has, nonetheless, proceeded to confirm the total as proposed. Furthermore, in the context of our finding on the taxability of ‘commission fee’, with consequent denial of refund of accumulated credit, the assessee may be entitled to utilise such CENVAT credit in the discharge of tax liability.

26. Learned Counsel has also made submissions on the bar of

limitation and did plead for waiver of penalty under section 80 of Finance Act, 1994. Attention has also been drawn to the deficiency of evidence to sustain the invoking of section 78 of Finance Act, 1994. We also find that these submissions may require fresh consideration in the light of our finding that 'commission fee' is not consideration for export of service. Moreover, the appeal of the appellant-assessee on the rejection of refund claims stands partially decided on the basis of our findings but would yet remain incomplete unless the activity for which 'marketing service fee' is the consideration has been subjected to the test of conformity with 'intermediary' service. That portion of the refund claim that has been rejected on the ground of lack of nexus and bar of limitation will require to be looked into afresh in the light of several judicial pronouncements that have settled identical disputes.

27. For these reasons, we hold that the appellant-assessee has failed to discharge the tax liability on 'commission fee' received as 'intermediary' for marketing and promoting of 'computer reservation system' but liability thereon requires re-computation; the tax liability, if any, on 'marketing service fee' will have to adjudged upon by ascertainment from the details in the agreement. The availability of CENVAT credit for discharge of consequent liability will also have to be ascertained. Likewise, the refund sanctioning authority can discard the claims relating to 'marketing service fee' only after the competent authority has decided on the place of provision of service.

28. Therefore, while upholding the finding in the adjudication order, arising from the proposal to recover tax, to the extent of the confirmation that 'commission fee' is consideration for service rendered in India, we remand all other issues back to the respective original authorities for disposal in accordance with the law as set out by us and the directions recorded. The assessee is at liberty to raise their contentions pertaining to bar of limitation, invoking of section 80 of Finance Act, 1994 and entitlement to CENVAT credit before the adjudicating authorities concerned.

29. The appeals are disposed off accordingly.

(Order pronounced in the open court on 11/09/2020)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)