CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Miscellaneous Application No. ST/MISC/86423/2025
(On behalf of the Appellant)
in
Service Tax Appeal No. 85162 of 2017

(Arising out of Orders-in-Appeal Nos. MUM-SVTAX-002-APP-505 to 507-16-17 dated 28.10.2016 passed by the Commissioner (Appeals), Service Tax-II, Mumbai)

Wacker Chemie India Private Limited .... Appellants
Wacker House, CTS No.521, Village Pahadi,
Sonawala Cross Road, Opp. Misastry Industrial Estate
Goregaon (East), Mumbai – 400 064.

VERSUS

Commissioner of Service Tax-VI, Mumbai .... Respondent
Mahavir Jain Vidyalaya, CD Burfiwala Lane
Juhu Gali, Andheri (West),
Mumbai – 400 020.

WITH

Service Tax Appeal No. 85162 of 2017

(Arising out of Orders-in-Appeal Nos. MUM-SVTAX-002-APP-505 to 507-16-17 dated 28.10.2016 passed by the Commissioner (Appeals), Service Tax-II, Mumbai)

Wacker Chemie India Private Limited .... Appellants
Wacker House, CTS No.521, Village Pahadi,
Sonawala Cross Road, Opp. Misastry Industrial Estate
Goregaon (East), Mumbai – 400 064.

Versus

Commissioner of Service Tax-VI, Mumbai .... Respondent
Mahavir Jain Vidyalaya, CD Burfiwala Lane
Juhu Gali, Andheri (West),
Mumbai – 400 020.

AND

Miscellaneous Application No. ST/MISC/86424/2025
(On behalf of the Appellant)
in
Service Tax Appeal No. 85163 of 2017

(Arising out of Orders-in-Appeal Nos. MUM-SVTAX-002-APP-505 to 507-16-17 dated 28.10.2016 passed by the Commissioner (Appeals), Service Tax-II, Mumbai)

Wacker Chemie India Private Limited .... Appellants
Wacker House, CTS No.521, Village Pahadi,
Sonawala Cross Road, Opp. Misastry Industrial Estate
Goregaon (East), Mumbai – 400 064.

VERSUS

Commissioner of Service Tax-VI, Mumbai .... Respondent
Mahavir Jain Vidyalaya, CD Burfiwala Lane
Juhu Gali, Andheri (West),
Mumbai – 400 020.

WITH

Service Tax Appeal No. 85163 of 2017

(Arising out of Orders-in-Appeal Nos. MUM-SVTAX-002-APP-505 to 507-16-17 dated 28.10.2016 passed by the Commissioner (Appeals), Service Tax-II, Mumbai)

Wacker Chemie India Private Limited .... Appellants
Wacker House, CTS No.521, Village Pahadi,
Sonawala Cross Road, Opp. Misastry Industrial Estate
Goregaon (East), Mumbai – 400 064.

Versus

Commissioner of Service Tax-VI, Mumbai .... Respondent
Mahavir Jain Vidyalaya, CD Burfiwala Lane
Juhu Gali, Andheri (West),
Mumbai – 400 020.

AND

Miscellaneous Application No. ST/MISC/86425/2025
(On behalf of the Appellant)
in
Service Tax Appeal No. 85169 of 2017

(Arising out of Orders-in-Appeal Nos. MUM-SVTAX-002-APP-505 to 507-16-17 dated 28.10.2016 passed by the Commissioner (Appeals), Service Tax-II, Mumbai)

Wacker Chemie India Private Limited .... Appellants
Wacker House, CTS No.521, Village Pahadi,
Sonawala Cross Road, Opp. Misastry Industrial Estate
Goregaon (East), Mumbai – 400 064.

VERSUS

Commissioner of Service Tax-VI, Mumbai .... Respondent
Mahavir Jain Vidyalaya, CD Burfiwala Lane
Juhu Gali, Andheri (West),
Mumbai – 400 020.

WITH

Service Tax Appeal No. 85169 of 2017

(Arising out of Orders-in-Appeal Nos. MUM-SVTAX-002-APP-505 to 507-16-17 dated 28.10.2016 passed by the Commissioner (Appeals), Service Tax-II, Mumbai)

Wacker Chemie India Private Limited .... Appellants
Wacker House, CTS No.521, Village Pahadi,
Sonawala Cross Road, Opp. Misastry Industrial Estate
Goregaon (East), Mumbai – 400 064.

Versus

Commissioner of Service Tax-VI, Mumbai .... Respondent
Mahavir Jain Vidyalaya, CD Burfiwala Lane
Juhu Gali, Andheri (West),
Mumbai – 400 020.

APPEARANCE:

Shri Jay Chedda, Advocate along with Ms. Foram Chedda, Chartered Accountant for the Appellant

Shri Aditya Singh Parihar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/86818-86820/2025

Date of Hearing: 05.06.2025

Date of Decision: 19.11.2025

Per: M.M. PARTHIBAN

These appeals have been filed by M/s Wacker Chemie India Private Limited, Mumbai (herein after, referred to as "the appellants", for short) assailing the Order-in-Appeal No. MUM-SVTAX-002-APP-505 to 507-16-17 dated 28.10.2016 (herein after, referred to as "the impugned order") passed by the Commissioner (Appeals), Service Tax-II, Mumbai.

2.1 The brief facts of the case are that the appellants herein are engaged *inter alia*, in the business of promoting and distributing of the products of Wacker group entities located outside India. For the purpose of payment of service tax on taxable output services and for compliance with the Service Tax statute, they are registered with the jurisdictional Commissionerate under service tax registration No. AAACW7502MST0021. The appellants avail CENVAT credit of service tax paid on input services and utilise the same as provided for under the CENVAT Credit Rules, 2004.

2.2 The appellants had entered into three different agreements for providing services to M/s Wacker Chemie AG, Munich, Germany (referred to as 'Wacker Germany' for short). These are (i) 'Technical Service' agreement dated 01.01.2012, providing for promoting, demonstrating of Wacker products to prospective customers; testing of materials provided by Indian customers of Wacker Germany to ascertain the quantum and method of use, further improvement in the products, attending the queries of customers in relation to functionality, utility, use of the products. (ii) 'Sales Manager' agreement dated 01.04.2012, for engaging into appointment of suitable person as Sales Manager who would primarily look into solicitation of orders in India for Wacker Germany; and (iii) 'Corporate Key Account Management' agreement dated 01.07.2012, for rendering

services of scouting for new projects of Key account/clients of Wacker Germany; holding meetings and conducting workshops with such Key accounts; sales reporting; target setting and revision; project tracking and controlling; aligning strategy; data management and updating and regular roll out of the Key Account reports. For rendering these services, the appellants had raised monthly invoices and received the consideration for such services in convertible foreign exchange from M/s Wacker Chemie AG, Munich, Germany. The details of export turnover had been properly reflected in their ST-3 returns

2.3 During the period of dispute i.e., 2013-14 to 2016-17, the appellants have filed three refund claims in the prescribed manner before the jurisdictional authorities for a total amount of Rs.53,78,269/- under Notification No.27/2012-C.E. (N.T.) dated 18.06.2012 on the ground that they had exported 'Business Auxiliary Services' (BAS) without payment of service tax and therefore claimed the refund of unutilized CENVAT credit outstanding in their books of accounts in terms of Rule 5 of CENVAT Credit Rules, 2004. The department had initiated show cause proceedings for denial of refund of CENVAT credit, and in adjudication of these SCNs, had passed Orders-in-Original, one order dated 28.08.2014 and two orders both 25.03.2015 by granting total refund of Rs.49,15,836/- and in rejecting the refund of Rs.4,62,433/-. The details of these original orders are as follows:

Period of dispute	Amount of Refund claimed (in Rs.)	Refund sanctioned (in Rs.)	Refund claim rejected (in Rs.)
April, 2013 to June, 2013	16,93,490	15,83,965	1,09,525
July, 2013 to September, 2013	18,08,222	16,30,387	1,77,835
October, 2013 to December, 2013	18,76,557	17,01,484	1,75,073
Total	53,78,269	49,15,836	4,62,433

2.4 Being aggrieved by these orders, the department had filed appeal before the learned Commissioner (Appeals). In deciding the appeals, he had held that since the services like testing of material, demonstration of machinery were actually performed by the appellants in India; recipient of the service and appellants, being provider of services, both situated in India; and the appellants acting as agent of the foreign entity M/s Wacker Chemie AG, Germany, the provisions of Rule 4, 8 an 9 of the Place of Provision of Service Rules, 2012 (POPS) are attracted and therefore, by setting aside the original orders, he had allowed the appeals filed by the

department. Feeling aggrieved with the impugned order, appellants have preferred these appeals before the Tribunal.

3.1 Learned Advocate appearing for the appellants submitted that in terms of all the three agreements viz., 'Technical Service' agreement, 'Sales Manager' agreement and 'Corporate Key Account Management' agreement, the objective of the appellants was marketing and promoting of the goods of Wacker Germany, by securing orders from the customers located in India and forwarding the leads to Wacker Germany; advising the Indian customers on the quantum, formula and method of use of the products of Wacker Germany in order to achieve higher sales; demonstrating the process of application of products of Wacker Germany etc. Therefore, he claimed that the appellants had actually provided the services to Wacker Germany who is located outside India, and thus no service tax shall be liable to be paid by the appellants for such services provided Wacker Germany, who is a foreign entity located outside India.

3.2 Learned Advocate also submitted that in respect of the service of testing of the goods, such goods are not supplied by the Wacker Germany, and on the other hand these are supplied by the customers of Wacker Germany for reporting to them, provide feedback to Wacker Germany for further improvements in the product. Furthermore, he submitted that Wacker Germany do not have any fixed establishment in India, and the appellants act as sales manager for Wacker Germany. Hence, he stated that this would not qualify the condition of Rule 4(a) of POPS Rules, 2012 to claim that the goods are physically made available by the recipient of service i.e., Wacker Germany, in order to conclude that the place of provision of service was in India.

3.3 Learned Advocate submitted that in their case there is no involvement of any third party other than the appellants and Wacker Germany, in the agreements entered into and in provision of services. He stated that 'intermediary' as per definition given in Rule 2(f) of POPS Rules, 2012 require three persons i.e., service provider and service receiver, and the person who arranges and facilitates provision of service between these two persons. There is no such relationship in their transactions and the conclusion arrived at the impugned order that the appellants act as an 'intermediary' is factually incorrect. This aspect has also been clarified by

the Central Board of Indirect Taxes & Customs (CBIC) vide Circular No. 159 /15/2021-GST dated 20.09.2021.

3.4 Furthermore, learned Advocate submitted that the issue under dispute has been settled in a number of judicial pronouncements passed by this Tribunal and such orders affirmed by the Hon'ble High Court of Karnataka. In this regard, he relied upon the following case laws:

(i) *Principal Commissioner of Service Tax, Pune-I Vs. Advinus Therapeutics Limited* – 2017 (51) S.T.R. 298 (Tri. -Mumbai)

(ii) *Medgenome Labs Limited Vs. Commissioner of Central Tax, Bangaluru South Commissionerate* – 2022 (4) TMI 137 CESTAT Bangalore

(iii) *Commissioner of Central Tax, Bangaluru Vs. Medgenome Labs.* - 2023 (73) G.S.T.L. 586 (Kar.)

Thus, it is contended by the learned Advocate that the impugned order rejecting the refund claims sanctioned by original authority, cannot be sustained and prayed that their appeals be allowed.

4. On the other hand, learned AR appearing for the Revenue reiterated the findings recorded in the impugned order. He further stated that the appellants had carried out testing of materials like sand, cement, water etc., provided in India to promote the products of Wacker Germany, such services would be covered under Rule 4(a) of POPS Rules, 2012. He further stated that in case of the provision of service is determinable in terms of more than one rule, then the rules occurs later i.e., Rule 9 ibid would apply in as much as the appellants have acted as an agent providing services on behalf of their foreign client Wacker Germany, and thus it would be regarded as their services were provided by the appellants in India, and the liability to pay service tax is on the appellants.

5. Heard both sides and perused the case records.

6. We have examined the three agreements viz., Technical Service' agreement, 'Sales Manager' agreement and 'Corporate Key Account Management' agreement entered into between the appellants and the overseas entity viz., M/s Wacker Chemie AG, Munich, Germany, placed on record. Clauses in the agreements provide that the appellants shall promote and solicit orders from customers, but not authorised to enter into or conclude any contracts on behalf of the Wacker Germany; any sales to their customer will be effective only with the acceptance of Wacker

Germany. Further, such agreement do not provide that the appellants have any authority to negotiate or conclude pricing decisions, to sign any contracts, or to make any commitments on behalf of the overseas entity in order to claim that there are the agents of foreign entity. Furthermore, the consideration received by the appellants from overseas entity as a service provider, is not directly linked with the sale of products in India, but determined as a percentage as commission based on direct and indirect costs and expenses incurred by appellants; that the relationship between the parties as per the agreement is that of the independent contractor-contractee and not that of the agents. The content in the agreements clearly provide that no services were provided by the appellants to the end customers on behalf of the overseas entity. Thus, under such circumstances, it cannot be said that the appellants have acted as an intermediary in the dealings between the overseas entities and their customers in India, involving the service of facilitating or arranging the main supply between two principals.

7. We find that the disputed issue of what would qualify as an intermediary service, in the context of service tax statute and the definition under Rule 2(f) of POPS, 2012 had also been clarified in terms of CBIC clarification issued vide Circular dated 20.09.2021 (supra). In terms of the said circular, the essential element for consideration is that there should be (i) involvement of minimum of three parties, and (ii) there shall be two distinct supplies. While the main supply is between the two principals, which can be a supply of goods or services, the person providing an ancillary supply of intermediary service in arranging the main supply between those two principals shall alone qualify as a supplier of intermediary service. In the present case, as evident from the various clauses in the agreements, it is clearly proved that there is no involvement of three persons and further there is no element of separate 'main supply' and 'ancillary supply' involved in provision of services by the appellants. Therefore, the conclusion arrived at paragraph 12 of the impugned order that Rule 9 of POPS would apply to claim that the appellants have provided the intermediary services in India, in the case of services provided by the appellants to foreign entity i.e., Wacker Germany, and it shall not qualify as export of service are incorrect and contrary to the clarification issued by CBIC. Further, on careful reading of the clauses in the agreements vis-à-vis the statutory provisions, it is abundantly clear that the services rendered by the appellants has been provided to the overseas entity M/s

Wacker Chemie AG, Munich, Germany, who is located outside India; and thus such services having been delivered out of India shall qualify as export in terms of Rule 6A of the Service Tax Rules, 1994 read with Rule 3 of the Place of Provision of Services Rules, 2012.

8.1 In this regard, we find that the Co-ordinate Bench of this Tribunal have held in the case of *Medgenome Labs Limited* (supra) that testing of samples not provided by the service recipient cannot be treated as goods having been provided by them, and service tax cannot be charged as these would qualify as export of service. The relevant paragraph of the said order is quoted below:

> *"4.1 … As per Rule 3 of POPS Rules, the place of provision of service shall be the location of the recipient of service. In the present case, the location of the recipient of service is in abroad. Therefore, the service deemed to have been provided in abroad at the place of service recipient. In exception to the above Rule 3, the place of provision of service on the basis of performance is provided under Rule 4; according to which, if the services are provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service or person acting on behalf of the provider of service in order to provide the service, the place of provision of service shall be the location of the services which are actually performed. In the present case, it is beyond any doubt that the service recipient has not physically made available any goods to the appellant being a service provider. The service recipient has no connection in any manner with regard to the collection of samples. It is the appellant who on their own procured the samples from the hospitals and conduct the analytical tests. The appellant have only providing the test reports in electronic or web form to the recipient of service i.e. their foreign client. Therefore, the specific condition under Rule 4 that the service should be provided in respect of goods which must be physically provided by the recipient of service to the provider is not satisfied. Moreover, we also do not agree with the Revenue that the sample on which the test was conducted is goods. In the present case, the samples are blood and tissue extracted from the human body. The appellant have neither purchased the said goods nor is saleable. The appellant has paid the cost only for the service for extraction of the samples. Therefore, the sample, in our considered view, cannot be treated as saleable goods. For this reason also, the condition of Rule 4 is not satisfied. In view of the above, the place of provision of service is clearly the location of the recipient of service, which in the present case is country of appellant's clients. To qualify export of services, Rule 6A of Service Tax Rules, 1994 has provided certain conditions. The said Rule 6A is reproduced below:-*
>
> *Applying the above Rule in the fact of the present case, the provider of service i.e. the appellant is located in India which is the taxable territory, recipient of service i.e. client of the appellant is located outside India. The service is not specified in Section 66 of the Finance Act. As per the discussion made hereinabove, the place of provision of service is clearly outside India. There is no dispute that the payment of such services has been received by the appellant as a service provider in convertible*

foreign exchange. In view of the above, the appellant have clearly satisfied the conditions required for treating the service as export of service. Therefore, the appellant's service, being export of service, cannot be chargeable to service tax."

8.2 Against the above order, the department had preferred an appeal before the Hon'ble High Court of Karnataka. In the judgement delivered on 14.03.2023, the Hon'ble High Court by upholding the order of the Tribunal and has held the services provided by the appellant would be treated as export of service. The relevant paragraphs of the said judgement is given below:

"9. *One of the main contentions of the Revenue, that Rule 4(a) of the PoPS Rules will apply to assessee is untenable because, the Rule requires goods to be made physically available to the recipient by the provider. In the present case, no goods have been made physically available from the recipient to the provider.*

10. *Rule 6A of the Service Tax Rules specifies the conditions to be satisfied for treating a service provided as export of service. The CESTAT has rightly recorded that assessee has clearly satisfied the conditions required for treating the service as export of service.*

11. *In our view, the services provided by the assessee is an export of service under Rule 6A of the Service Tax Rules, and thus cannot be chargeable to service tax."*

9. Further, we also find, in the case of *Chevron Philips Chemicals India Private Limited* (supra), this Tribunal has held that when the contract do not provide for empowering the appellant to act as intermediary, and in the absence of essential element of principal-agent relationship not existing, the service liability as intermediary cannot be fastened on the appellant service provider. The relevant paragraph of the said order is extracted and given below:

"7. *We have examined the contract dated 14-9-2009 entered into between the overseas entity M/s CPC Global and the appellant. Clauses in the agreement provide that the appellant shall not be empowered to make any pricing decisions, to sign any contracts, or to make any commitments on behalf of the overseas entity; that the consideration received by the appellant from M/s CPC Global as a service provider, is not directly linked with the sale of products by the selling companies in India, but determined based on fees earned by M/s CPC Global; that the relationship between the parties as per the contract is that of the independent contractor-contractee and not that as agents. The content in the agreement clearly provide that no services were provided by the appellant to the selling companies or end customers on behalf of the overseas entity M/s CPC Global. Thus, under such circumstances, it cannot be said that the appellant has acted as an intermediary in the dealings between the overseas entity and their customers in India. To qualify as an intermediary, service as per the statutory provision, the*

essential element for consideration is that the parties to the contract should act as principal-agent and that the agent shall be in a position to represent and bind the principal. On reading of the clauses in the agreement vis-à-vis the statutory provisions, it is abundantly clear that the services provided by the appellant to the overseas entity qualify as export in terms of rule 6A of the Service Tax Rules, 1994 read with rule 3 of the Place of Provision of Services Rules, 2012.

8. *We find that by reading the contents of the said agreement dated 14-9-2009 entered into between the appellant herein and the self same overseas entity, this Tribunal in the case of the appellant itself, vide Final Order No. A/87373-87378/2019 dated 20-12-2019 has held that the appellant cannot be termed as an intermediary. The relevant paragraph in the said order is extracted herein below:-*

> *"17. For the period after 1-10-2014, on merit also, the appellant cannot be called as an 'intermediary'. On a simple reading of the agreement analyzed as above, it is clear that the appellants are appointed by their overseas counterpart CPC Global for sales promotion of the goods for their client in the defined territory. The appellant has no role in fixation of price nor they negotiate in any manner between CPC Global and their clients relating to sales promotion of the goods sold. Therefore, in my view, the appellant cannot be called as an intermediary. consequently, fall outside the amended definition of 'intermediary' under Rule 2(f) and Rule 9 of the POPS Rules, 2012. Similar view has been expressed by the Tribunal in the case of Lubrizol Advance Materials (supra) and R.S. Granite Machine (supra). This Tribunal in the case of Lubrizol Advance Materials has held as under:-*
>
> *"6. I find that the learned Commissioner (Appeals) has denied the benefit of export with effect from 1-10-2014 under the Place of Provision of Services Rules, 2012, holding that the appellant had facilitated supply of goods between its foreign counterpart and processing of goods and thus, it should be considered as an intermediary. On perusal of the contracts, I find that the service fee charged by the appellant to its overseas group entities for provision of service has no direct nexus with the supply of goods by the overseas group entities to its customers in India. Further, the appellant had provided the service to the overseas entities on principal to principal basis. Thus, the appellant cannot be termed as an intermediary between the overseas entity and the Indian customers. It is an admitted fact on record that the consideration received by the appellant for providing the services was based upon cost plus markup and is nowhere connected with the main supply of goods. In other words, the main supply may or may not happen and thus, cannot be directly correlated with the service provided by the appellant. Thus, the appellant is not acting as a bridge between the overseas group entities and supplies made to their customers in India and accordingly, it cannot be said that the appellant has provided intermediary service and should be governed under the provisions of rule 9 of the rules."*

Also, in the case of R.S. Granite Machine (supra), this Tribunal has held as under: -

> *5. The facts of the case as analysed elsewhere in this order, make it clear that obtaining/procuring order for its foreign Principals is the main service rendered by the appellant and consequently, rigors Rule 9 vis-à-vis Rule 2 (f) are not applicable. In view of the above, I am of the considered opinion that Rule 3 of POPS Rules would only apply and therefore the appellant cannot be fastened with tax liability. For the above reasons, demand as well as the impugned order are not sustainable and consequently, the same are set aside and the appeal stands allowed with consequential benefits if any, as per law."*

9. *In view of the foregoing discussions, we do not find any merits in the impugned order passed by the adjudicating authority in confirming the*

adjudged demands on the appellant. Therefore, by setting aside the impugned order, the appeal is allowed in favour of the appellant."

The department having been aggrieved by the above order, had filed Civil Appeal Diary No. 51950 of 2023 before the Hon'ble Supreme Court. In deciding the said appeal, the Hon'ble Supreme Court vide its judgement delivered on 29.01.2024 has upheld the order of the Tribunal and dismissed the appeal filed by the department.

10. In the case of *Advinus Therapeutics Limited* (supra), this Tribunal has come to an inescapable conclusion that location of actual performance of service being outside India and, even with special and specific provision of Rule 4 of Place of Provision of Services Rules, 2012, the performance of service being rendered outside India would render same to be export. The relevant paragraphs of the said order is given below:

"12. *It is an admitted fact that the respondent had been rendering services that were, in the erstwhile pre-negative list regime, taxable but for the provider being an Export Oriented Unit under the entry in Section 65(105)(za) of Finance Act, 1994. In the scheme of Export of Service Rules, 2005, the various taxable services had been categorized as object-based, performance-based and recipient-based for the purpose of exemption under Section 93 of Finance Act, 1994. Though those Rules are no longer valid for the purposes of Rule 5 of Cenvat Credit Rules, 1994, their guidance value cannot be discountenanced. The 'negative list' regime was not intended to be either detrimental or beneficial to existing assessees except where such intent was specifically sanctioned by legislation. The respondent, prior to 1st July, 2012, was eligible for all benefits as the service rendered by them were treated as export with the recipient of the service being outside the country. The corresponding provision in Place of Provision of Services Rules, 2012 is Rule 3 which brings the service within the ambit of export of service in Rule 6A of Service Tax Rules, 1994. Revenue has not made any submission of legislative intent to deprive a provider of 'scientific or technical consultancy service' in the erstwhile regime of its status as exporter of service owing to change in the regime.*

13. *In the context of a catena of judgments and decisions that exports are not taxable and, with the most palpable manifestation of export of invisibles being the receipt of convertible foreign exchange from a recipient of service located outside the country, that services are taxable at the destination, the scope of Rule 4 must necessarily be scrutinized to ascertain if there was, indeed, legislative intent to deny acknowledgement as exporter to a certain category of service providers that were so privileged tell them. There is no dispute that the recipient of service is located outside India and that the consideration is received in foreign convertible currency. Yet, Revenue insists that performance of service is in India. A service is not necessarily a single, discrete, identifiable activity; on the contrary, it is a series of invisibles that cater to the needs of a recipient; it is upon the consumption of the service by*

the recipient that service is deemed to have become taxable. This has been so held by the Hon'ble Supreme Court in All India Federation of Tax Practitioners v. Union of India & others [2007 (7) S.T.R. 625 (S.C.)] below :

> *'7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable on services provided within the country.'*

It would appear from the exposition in the judgment that the tax was intended as a levy on activities that would otherwise be performed by the recipient for itself. The new industry of hiving out or outsourcing of what was, conceivably, being done within the enterprise was intended to be subject to the new levy. In the matter of service rendered by respondent, this activity could, but for commercial viability, will be executed by the recipient within its own organization or the territory in which it exists. The satisfaction of the customer occurs upon an outcome which is possessed by the recipient. Hence, even if some of the activities are carried out in India, by no stretch can it be asserted that the fulfilment of the activity is in India. Therefore, the inescapable conclusion is that the location of the actual performance of the service is outside India and, even with the special and specific provision of Rule 4 of Place of Provision of Services Rules, 2012, the performance of service being rendered outside India would render it to be an export.

14. *In this context, the legislative intent of incorporating a special and specific provision in Rule 4 may yield further insights. The special provision, which may be seen as an exception to the general Rule 3, deals with services in respect of goods as well as those provided to individuals. Not unnaturally, the services that require the physical presence of the person is taxed where the consumer receives the service and not at his location which as per Rule 2(i)(iv) would be his usual place of residence. In what can be considered as a most telling example of the scope of this portion of Rule 4, we could do a lot worse than refer to a decision of the Hon'ble High Court of Delhi that, in the course of dealing with other, more weighty matters in Orient Crafts Ltd. v. Union of India [2006-TIOL-271-HC-DEL-ST = 2006 (4) S.T.R. 81 (Del.)], took note of, and answered, one of the submissions thus -*

> *'4. The contention of the learned Counsel for the petitioner, based on the interpretation of Section 66A of the Act, is that any service that is obtained by a person who has a fixed place of business in India is liable to tax for services availed by him in a foreign country. By way of an example, learned Counsel for the petitioner has cited that if such a person in India goes abroad, and has a haircut, he would be liable to pay service tax in India on the basis of Section 66A of the Act.*
>
> *5. We are not at all convinced by this argument of learned Counsel for the petitioner. The rules that have been framed by the Central Government make it absolutely clear that taxable service provided from outside India is liable to service-tax. In the example given by the learned Counsel for the petitioner, there is no question on the service of haircut having been received in India.'*

The intent in Rule 4 to remedy out some specific situations that would, otherwise, have enabled escapement from tax or leviability to tax where

Rule 3 of Place of Provision of Services Rules, 2012 may not serve to confer jurisdiction becomes increasingly obvious.

15. *Accordingly, we can infer that the location of performance of service in respect of goods is not an abstract, absolute expression for fastening tax liability on services that involve goods in some way; for that, Rule 3 would have sufficed. A contingency that is not amenable to Rule 3 has been foreseen and remedied by Rule 4 and in the process, the sovereign jurisdiction to tax is asseted. It is, therefore, not by the specific word or phrase in Rule 4(1) of Place of Provision of Services Rules, 2012 that the taxability is to be determined but from the mischief effect intended to be plugged. It is obviously not intended to tax any activity rendered on goods as to alter its form because that would be covered by excise on manufacture or be afforded privileges available to merchandise trade. The provision itself excludes goods imported temporarily for repairs but that does not, ipso facto, exempt goods imported temporarily for repairs from taxability which would, by default, be predicated by the intent in Rule 3. Consequently, a recipient in India would be liable to tax on such temporary imports for repairs while service to a recipient located abroad would not be taxable. This is in consonance with the privilege of exemption afforded to export of services. The special and distinct role of Rule 4 becomes clearer.*

16. *Not intended to tax the activity of altering goods supplied by the recipient of service or for repairs on goods, Rule 4(1) of Place of Provision of Services Rules, 2012 would appear, by elimination of possibilities, to relate to goods that require some activity to be performed without altering its form. The exemplification in the Education Guide referred supra renders it pellucid. Certification is an important facet of trade and such certification, if undertaken in India, will not be able to escape tax by reference to location of the entity which entrusted the activity to the service provider in India. This is merely one situation but it should suffice for us to enunciate that Rule 4(1) is intended to resorted when services are rendered on goods without altering its form that in which it was made available to the service provider. This is the harmonious construct that can be placed on the applicability of Rule 4 in the context of tax on services and the general principle that taxes are not exported with services or goods.*

17. *The goods supplied to the respondent, minor though the proportion may be, are subject to alteration in the course of research. It is not asserted anywhere that these goods, in its altered or unaltered form, are sent back to the service recipient; if it were, the provisions of Customs Act, 1962 would be invoked to eliminate tax burden. If the goods cease to exist in the form in which it has been supplied, it cannot be said that services have been provided in respect of goods even if it cannot be denied that services have been rendered on the goods. Consequently, the provisions of Rule 4(1) are not attracted and, in terms of Rule 6A of Service Tax Rules, 1994, the definition of export of services is applicable thus entitling the appellant to eligibility under Rule 5 of Cenvat Credit Rules, 2004.*

18. *By this elaboration, we have amplified our earlier decision in (re Sai Life Sciences Ltd.) that it is contrary to law to isolate an expression in a rule to deny the general principle built into all indirect tax statutes for exempting export of services from levy. Reiterating the consistent*

judicial stand, we hold the respondents to be entitled to refund of accumulated Cenvat credit."

11. Further, we also find, in a number of cases, this Tribunal has held that when the contractual arrangement do not provide for empowering the appellant to act as intermediary, the service liability cannot be fastened on the appellants service provider. The relevant paragraph of the said orders is extracted and given below:

(i) In the case of *Commissioner of Service Tax-VII Vs. Life Care Medical Systems* - 2018 (18) G.S.T.L. 587 (Bom.), the Hon'ble High Court of Bombay have held that it is not the place of performance, but the location of the service receiver which will make it an export of services and also found that the CBEC clarification is in favour of the appellants. The relevant paragraphs are as follows:

"6. We find that this Court in SGS India Pvt. Ltd. (supra) has held that where services were rendered in India to a foreign party, then such service is not liable to tax as it would be export of service. Further, in fact almost similar to this case, this Court has held that the Service Tax would not be payable in Commissioner of Service Tax v. A.T.E. Enterprises Pvt. Ltd., 2018 (8) G.S.T.L. 123 in respect of an Indian Agent, rendering the services of marketing the goods of a foreign party within India and receiving commission from the foreign party, as it is export service by following the decision of this Court in SGS India Pvt. Ltd. (supra). In fact, we find that the Central Board of Excise & Customs has issued a clarification by Circular No. 111/2009, dated 24th February, 2009 that in terms of Rule 3(1)(iii) of Export of Services Rules, 2005, it is not the place of performance but the location of the service receiver which will make it an export of services. It clarified that word 'outside India' to mean that the benefit should accrue outside India. The aforesaid Circular of [C.B.E. & C.] is completely in favour of the respondent.

7. In the above view, the question as proposed do not give rise to any substantial question of law. Thus, not entertained."

(ii) In the case of *IBM India Private Limited Vs. Commissioner of Central Excise & Service Tax* – 2020 (34) G.S.T.L. 436 (Tri.-Bang.), the Co-ordinate Bench of the Tribunal have by relying on various decisions of the Hon'ble Supreme Court have held that there is no liability to pay service tax in such a situation of export of services. The relevant paragraphs are as follows:

"6.4 Further we find that the Hon'ble High Court of Delhi in the case of Verizon Communication India Pvt. Ltd. cited supra has considered various circulars issued from time to time by the C.B.E. & C. and also considered various decisions of the Tribunal and the High Court and has come to the conclusion that the assessee is not liable to pay service tax as the service rendered by them fall under the definition of export of service. It is pertinent to reproduce paras 50 to 53 of the said decision, which is reproduced below :-

50. The decision of Larger Bench of CESTAT in Paul Merchants Ltd. v. CCE, Chandigarh (supra) may be referred to at this stage. The period with which the dispute in that case related to was between 1st

July, 2003 and 30th June, 2007. It involved, therefore, the interpretation of the ESR, 2005 as amended and applicable during the said period. There the assessees were intermediary agents providing money transfer services to foreign travellers who were the end user on behalf of their principals. The contention of the Department that this did not qualify as 'export of service' was rejected by the CESTAT. It noted that the C.B.E. & C. had to issue a clarification Letter No. 334/1/2010-TRU, dated 26th February, 2010 acknowledging the difficulties that were faced by the trade in complying with the condition that the services had to be 'used outside India'. It was clarified that "as long as the party abroad is deriving benefit from service in India, it is an export of service."

51. In the considered view of the Court, the judgment of the CESTAT in Paul Merchants Ltd. v. CCE, Chandigarh (supra) is right in holding that "The service recipient is the person on whose instructions/orders the service is provided who is obliged to make the payment from the same and whose need is satisfied by the provision of the service." The Court further affirms the following passage in the said judgment in Paul Merchants Ltd. v. CCE, Chandigarh (supra) which correctly explains the legal position :

"It is the person who requested for the service is liable to make payment for the same and whose need is satisfied by the provision of service who has to be treated as recipient of the service, not the person or persons affected by the performance of the service. Thus, when the person on whose instructions the services in question had been provided by the agents/sub-agents in India, who is liable to make payment for these services and who used the service for his business, is located abroad, the destination of the services in question has to be treated abroad. The destination has to be decided on the basis of the place of consumption, not the place of performance of Service."

52. In Vodafone Essar Cellular Ltd. v. CCE (supra), the CESTAT explained the arrangement lucidly in the following words :
"Your customer's customer is not your customer. When a service is rendered to a third party at the behest of your customer, the service recipient is your customer and not the third party. For example, when a florist delivers a bouquet on your request to your friend for which you make the payment, as far as the florist is concerned you are the customer and not your friend."

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

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

(iii) In the case of *Commissioner of Service Tax, Mumbai-Vi Vs. A.T.E. Enterprises Private Limited* – 2018 (8) G.S.T.L. 123 (Bom.), the Hon'ble High Court of Bombay have held that since the services are rendered to the

foreign clients, it amounted to export of services. The relevant paragraphs are as follows:

> ***"8.*** *The learned counsel appearing for the respondent has relied upon the judgment in the Commissioner of Service Tax, Mumbai-II v. SGS India Pvt. Ltd. [2014 (34) S.T.R. 554 (Bom.)].*
>
> > *"24. It is in that sense that the Tribunal holds that the benefit of the services accrued to the foreign clients outside India. This termed as 'export of service'. In these circumstances, the Tribunal takes a view that if services were rendered to such foreign clients located abroad, then, the act can be termed as 'export of service'. Such an act does not invite a Service Tax liability. The Tribunal relied upon the circulars issued and prior thereto the view taken by it in the cases of KSH International Pvt. Ltd. v. Commissioner and B.A. Research India Ltd. The case of the present respondent was said to be covered by orders in these two cases. To our mind, once the Hon'ble Supreme Court has taken the view that Service Tax is a value added tax which in turn is destination based consumption tax in the sense that it taxes non-commercial activities and is not a charge on the business, but on the consumer, then, it is leviable only on services provided within the country. It is this finding and conclusion of the Hon'ble Supreme Court which has been applied by the Tribunal in the facts and circumstances of the present case.*
> >
> > *25. The view taken by the Tribunal therefore, cannot be said to be perverse or vitiated by an error of law apparent on the face of the record. If the emphasis is on consumption of service then, the order passed by the Tribunal does not raise any substantial question of law."*
>
> ***9.*** *The Division Bench of this Court in Commissioner of Service Tax, Mumbai v. Maersk India Pvt. Ltd. [2015 (38) S.T.R. 1121 (Bom.)] held that "the observations reported in 2014 (34) S.T.R. 554 (Bom.) (supra) aptly apply in the present case. The situation shows that the consideration by the Tribunal about service by the respondent-assessee to a foreign recipient being outside the purview of the collection of service tax, can seldom be flawed, the question sought to be raised in the appeal as such stand answered accordingly. The appeal fails and stands dismissed with no order as to costs."*

12. In view of the foregoing discussions and on the basis of the orders passed by the Co-ordinate Benches of the Tribunal and judgements delivered by the Hon'ble High Courts of Karnataka, Bombay and upheld by the Hon'ble Supreme Court as above, the impugned order dated 28.10.2016 passed by the Commissioner (Appeals), Service Tax-II, Mumbai, does not stand the legal scrutiny. Therefore, the rejection of refund claims filed by the appellants which were sanctioned to them vide three original orders by setting them aside, in the impugned order is not legally sustainable and thus is liable to be set aside.

13. In the result, the impugned order dated 28.10.2016 is set aside and the appeals filed by the appellants are allowed in their favour, with consequential relief, as per law.

14. Miscellaneous applications are also stand disposed of.

(Order pronounced in open court on 19.11.2025)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha