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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C) No. 11569/2016**

Reserved on: August 28, 2017
Date of decision: September 12, 2017

VERIZON COMMUNICATION INDIA PVT. LTD. ... Petitioner
Through: Mr. N. Venkataraman, Sr. Advocate
with Mr. R. Satish Kumar, Advocate.

Versus

ASSISTANT COMMISSIONER, SERVICE TAX, DELHI III,
DIVISION-XIV & ANR. ... Respondents
Through: Mr. Sanjeev Narula, Sr. Standing
Counsel with Mr. Abhishek Ghai, Advocate.

WITH

+ **W.P. (C) No. 11572/2016**

VERIZON COMMUNICATION INDIA PVT. LTD ... Petitioner
Through: Mr. N. Venkataraman, Sr. Advocate
with Mr. R. Satish Kumar, Advocate.

Versus

ASSISTANT COMMISSIONER, SERVICE TAX,
DELHI III, DIVISION-XIV & ANR. ... Respondents
Through: Mr. Sanjeev Narula, Sr. Standing
Counsel with Mr. Abhishek Ghai, Advocate

WITH

+ **W.P. (C) No. 11575/2016 & CM No. 45598/2016**

VERIZON COMMUNICATION INDIA PVT. LTD ...Petitioner
Through: Mr. N. Venkataraman, Sr. Advocate
with Mr. R. Satish Kumar Advocate.

Versus

COMMISSIONER, SERVICE TAX COMMISSIONERATE,
DELHI III ... Respondent
Through: Mr. Sanjeev Narula, Sr. Standing
Counsel with Mr. Abhishek Ghai, Advocate.

AND

+ **W.P. (C) No. 11577/2016**

VERIZON COMMUNICATION INDIA PVT. LTD. Petitioner
Through: Mr. N. Venkataraman, Sr. Advocate with
Mr. R. Satish Kumar, Mr. Prateek Gupta,
Advocates

versus

ASSISTANT COMMISSIONER, SERVICE TAX, DELHI III, DIVISION-
XIV & ANR. ...Respondents
Through: Mr. Abhishek Ghai, Advocate with Mr.
Sanjeev Narula, Sr. Standing Counsel.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

J U D G M E N T

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Dr. S. Muralidhar, J.:

1. These four writ petitions by Verizon Communication India Pvt. Ltd.

('Verizon India'), under Article 226 of the Constitution raise a common issue viz., whether the services provided by Verizon India under a Master Supply Agreement it has with MCI International Inc. (hereinafter referred to as 'Verizon US'), for rendering connectivity services for the purpose of data transfer, constitutes export of telecommunication services under the Finance Act, 1994 ('FA') read with the relevant rules thereunder?

The background

2. The question arises in the following background. Verizon India is a company incorporated under the provisions of the Companies Act, 1956 and is registered with the Service Tax Department ('Department') under the category of 'Business Support Services'. Verizon India entered into a Master Supply Agreement with Verizon US for rendering connectivity services for the purpose of data transfer. Verizon US is a company located outside India, *inter alia* engaged in the provision of telecommunication services for which it enters into contracts with its customers located globally.

3. Since Verizon US does not have the capacity to provide such services in all geographical areas across the globe, it utilises the services of other Verizon entities including Verizon India to provide connectivity to its customers. It is stated that such connectivity is provided in the form of:

(a) Local Access: where Verizon India facilitates provision of wire line telecommunication circuit between two Verizon Business designated locations.

(b) Bandwidth: where Verizon India provides diverse wire line

telecommunication circuit of a specified bandwidth at the designated locations.

(c) MPLS VPN: wherein a virtual private network is established through a private line.

4. Verizon India states that in order to provide the above services, it has obtained the National Long Distance ('NLD') and International Long Distance ('ILD') licences from the Government of India. Verizon India does not provide voice/telephony services but only data transfer service. It is stated that in order to provide wireless voice telephony services, separate licence and spectrum is required. It is stated that Verizon India did not have to obtain such licence or spectrum as those services are not provided by it.

5. Verizon India further clarifies that it is not privy to the contracts entered into by Verizon US with its customers in the US. Verizon India maintains that even if the services rendered by it are considered to be telecommunication services, the criteria for determining if there is an export of services under the Export of Service Rules 2005 (ESR) is the same. Verizon India contends that it satisfied the twin requirement under the ESR for the service rendered by it to Verizon US to be considered to be an export of service viz., the recipient of the service is located outside India and the payment for the service rendered is received by Verizon India in convertible foreign exchange.

Rejection of the Petitioner's refund applications

6. Verizon India filed fifteen applications before the Assistant

Commissioner, Service Tax under Rule 5 of the Cenvat Credit Rules, 2004 read with Notification No. 5/2006-CE (NT) dated 14th March 2006 and Notification No. 27/2012-CE (NT) dated 18th June 2012 claiming refund of unutilized Cenvat credit lying in its account on the ground that it had used various input services in providing output services viz. Business Support Services, exported out of India to Verizon US in the aggregate sum of Rs. 1,34,34,31,667. Five of these refund claims were for the period from January 2011 to March 2012; one for period April to June 2012 and nine for the period July 2012 to September 2014.

7. The refund claims were rejected by the Assistant Commissioner, Service Tax by three separate orders dated 12th September 2016 on the ground that the services provided by Verizon India do not qualify as 'export of services' as they are provided within India. Reference was made to Circular No. 90/1/2007-Service Tax dated 3rd January 2007 and Circular No. 141/10/2011-TRU dated 13th May 2011.

Present petitions

8. The challenge in three of the present petitions viz., W.P. (C) Nos. 11569, 11572 and 11577 of 2016 is to the above three orders dated 12th September 2016 passed by the Respondent rejecting the Petitioner's refund claims. The fourth petition, Writ Petition (Civil) No. 11575 of 2016 challenges a show cause notice ('SCN') dated 11th November 2016 issued to Verizon India by the Department demanding service tax in the sum of Rs. 2,65,25,46,712 (including education cess and secondary and higher education cess) along with applicable interest and penalty in respect of the amounts received by

Verizon India from Verizon US towards export of services. The case of the Department is that telecommunication services rendered by Verizon India during the period April 2011 to September 2014 do not qualify as ‘export of services’.

9. While issuing notice on these writ petitions on 7th December 2016, this Court passed interim order as far as Writ Petition (Civil) No. 11575 of 2016 was concerned to the effect that during the pendency of the said writ petition the Department should not pass any final orders on the impugned SCN although the proceedings may continue.

The nature of service provided by the Petitioner

10. Before examining the relevant provisions of the Finance Act, 1994 (FA), it is important to understand the nature of the service provided by Verizon India to Verizon US. Typically, customers of Verizon US, located in the US, will engage Verizon US to carry and collect data from their Indian entities. Under the Master Supply Agreement entered into between Verizon India and Verizon US, Verizon India provides to Verizon US connectivity service.

11. In the process of gathering the data from the entities in India for transmission to Verizon US, Verizon India avails of the services of a telecommunication services providers like Vodafone and Airtel. These service providers raise invoices on Verizon India which includes the service tax component. Verizon India pays these service providers the requisite charges including the service tax thereon. Verizon India thereafter raises an invoice on Verizon US for the export of the business support services provided by it to Verizon US. Since the recipient of the service (Verizon

destination-based consumption tax. It is a Value Added Tax (VAT). The following observations of the Supreme Court in *All India Federation of Tax Practitioners v. Union of India 2007 (7) STR 625 (SC)* makes this POSITION clear:

“6. At this stage, we may refer to the concept of "Value Added Tax" (VAT), which is a general tax that applies, in principle, to all commercial activities Involving production of goods and provision of services. VAT is a consumption tax as It is borne by the consumer.

7. In the light of what is stated above, it is dear 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 only on services provided within the country.** Service tax is a value added tax".

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17. As stated above, the source of the concept of service tax lies in economics. It is an economic concept. It has evolved on account of Service Industry becoming a major contributor to the GDP of an economy, particularly knowledge based economy. With the enactment of Finance Act, 1994, the Central Government derived Its authority from the residuary Entry 97 of the Union List for levying tax on services. The legal backup was further provided by the Introduction of Article 268A In the Constitution vide Constitution (Eighty-eighth Amendment) Act, 2003 which stated that taxes on services shall be charged by the Central Government and appropriated between the Union Government and the States. Simultaneously, a new Entry 92C was also Introduced In the Union List for the levy of service tax. As stated above, as an economic concept, there is no distinction between the consumption of goods and consumption of services as both satisfy human needs. It is this economic concept based on the legal principle of equivalence which now stands incorporated in the Constitution vide Constitution (Eighty-eighth Amendment) Act, 2003. **Further, it is important to note, that "service tax" is a value added tax which**

in turn is a general tax which applies to a commercial activities involving production of goods and provision of services. Moreover, VAT is a consumption tax as it is borne by the client.”
(emphasis supplied)

13. The above observations were reiterated subsequently by the Supreme Court in *Association of Leasing and Financial Services Companies v. Union of India 2010-(20) STR-417 (SC)* as under:

“In *All India Federation of Tax Practitioners'* case (supra), this Court explained the concept of service tax and held that service tax is a Value Added Tax ('VAT' for short) which in turn is a destination based consumption tax in the sense that it is levied on commercial activities and it is not a charge on the business but on the consumer. That, service tax is an economic concept based on the principle of equivalence in a sense that consumption of goods and consumption of services are similar as they both satisfy human needs. Today with the technological advancement there is a very thin line which divides a "sale" from "service". That, applying the principle of equivalence, 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 stands consumed by the service receiver. It is this principle of equivalence which is inbuilt into the concept of service tax under the Finance Act, 1994. **That service tax is, therefore, a tax on an activity.** That, a service tax is a value added tax. The value addition is on account of the activity which provides value addition, for example, an activity undertaken by a chartered accountant or a broker is an activity undertaken by him based on his performance and skill. This is from the point of view of the professional. However, from the point of view of his client, the chartered accountant/broker is his service provider. The value addition comes in on account of the activity undertaken by the professional like tax planning, advising, consultation etc. It gives value addition to the goods manufactured or produced or sold. Thus, service tax is imposed every time service is rendered to the customer/client. This is clear from the provisions of Section 65 (105) (zm) of the Finance Act, 1994 (as amended). **Thus, the taxable event**

is each exercise/activity undertaken by the service provider and each time service tax gets attracted. The same view is reiterated broadly in the earlier Judgment of this Court in *Godfrey Phillips India Ltd. v. State of U.P.* (2005 (2) SCC 515 in which a Constitution Bench observed that in the classical sense **a tax is composed of two elements: the person, thing or activity on which tax is imposed. Thus, every tax may be levied on an object or on the event of taxation. Service tax is, thus, a tax on activity whereas sales tax is a tax on sale of a thing or goods**". (emphasis supplied)

Relevant provisions of the Finance Act 1994

14. Under Section 64 (3) of the FA, the entire Chapter V which pertains to service tax applies only to 'taxable services'. The expression 'taxable services' has been defined under Section 65B (51) of the FA to mean the services which are subject to tax as per Section 66B of the FA. In turn Section 66B talks of levy of service tax on services provided in the 'taxable territory' which expression is defined under Section 65B (52) of the FA to mean the territory to which Chapter V applies. That takes us to Section 64 (1) of the FA which makes it clear that Chapter V applies to whole of India except the State of Jammu and Kashmir. Service tax is leviable, therefore, only in the taxable territory i.e. India.

15. Up to 1st July 2012, 'taxable service' was defined under Section 65 (105) of the FA to mean any service provided or to be provided in a range of situations. Relevant to the case on hand, it is necessary to examine two such types of services. The first is 'telecommunication service' and the other is 'business support services'. While the case of Verizon India is that it provides 'business support services' to Verizon US the case of the Department is that it is providing 'telecommunication services'. It must also

be noted that in these writ petitions, Verizon India has taken the stand that it makes no difference if the services provided are classified as 'telecommunication services' since 'business support services' fall under the same export criteria. Nevertheless, both provisions as they stood prior to 1st July 2012 need to be referred to.

16. Under Section 65 (105) (zzzx) of the FA the provision of service to "any person, by the telegraph authority in relation to telecommunication service" would be a 'taxable service'. Section 65 (111) states that "telegraph authority" has the meaning assigned to it in sub-section (6) of Section 3 of the Indian Telegraph Act, 1885 (13 of 1885) and includes a person who has been granted a licence under the first proviso to sub-section (i) of section 4 of that Act.

17. Section 65 (109) (a) of the FA defined 'telecommunication service' as under:

"telecommunication service" means service of any description provided by means of any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence or information of any nature, by wire, radio, optical, visual or other electro-magnetic means or systems. Including the related transfer or assignment of the right to use capacity for such transmission, emission or reception by a person who has been granted a licence under the first proviso to sub-section (1) of section 4 of the Indian Telegraph Act, 1885 (13 of 1885) and includes —

(i) voice mail, data services, audio text services, video text services, radio paging;

(ii) fixed telephone services including provision of access to and use of the public switched telephone network for the transmission and switching of

voice, data and video, inbound and outbound telephone service to and from national and international destinations;

(iii) cellular mobile telephone services including provision of access to and use of switched or non-switched networks for the transmission of voice, data and video, inbound and outbound roaming service to and from national and international destinations;

(iv) carrier services including provision of wired or wireless facilities to originate, terminate or transit calls, charging for interconnection, settlement or termination of domestic or international calls, charging for jointly used facilities including pole attachments, charging for the exclusive use of circuits, a leased circuit or a dedicated link Including a speech circuit, data circuit or a telegraph circuit;

(v) provision of call management services for a fee including call waiting, call forwarding, caller identification, three-way calling, call display, call return, call screen, call blocking, automatic callback, call answer, voice mail, voice menus and video conferencing;

(vi) private network services including provision of wired or wireless telecommunication link between specified points for the exclusive use of the client;

(vii) data transmission services including provision of access to wired or wireless facilities and services specifically designed for efficient transmission of data; and

(viii) communication through facsimile, pager, telegraph and telex, but does not include service provided by —

"(a) any person in relation to online information and database access or retrieval or both referred to in sub-clause (zh) of clause (105);

(b) a broadcasting agency or organisation in relation to broadcasting referred to in sub-clause (zk) of clause (105); and

(c) any person in relation to internet telecommunication service referred to in sub-clause (zzzu) of clause (105)".

18. Section 65 (105) (zzzq) of the Act defines 'Business Support Services' as a service provided "to any person, by any other person, in relation to support services of business or commerce, in any manner."

19. Further Section 65 (104c) of the FA defined the expression ' support services of business or commerce' to mean:

"services provided In relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment services. Information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational or administrative assistance in any manner, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

Explanation. For the purposes of this clause, the expression "infrastructural support services" includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security."

20. The above definitions are relevant only to the extent of understanding the stand of the Department in relation to the refund claims of Verizon India. It is stated that in the first instance the Department sought to classify the services provided by Verizon India as 'online information and database access or retrieval services'. When Verizon India pointed out that they were not, the Department sought to classify it as 'Supply of tangible goods services.' When Verizon India again protested, the Department took the stand that it was providing 'telecommunication services' and not 'business

support services.'

21. The FA underwent several changes with effect from 1st July 2012. The concept of 'negative list of services' was introduced by inserting Section 66D in the FA. The charging provision Section 66 was replaced by Section 66B of the FA which stated that service tax would be levied on the value of the services "other than those specified in the negative list" that have been provided or agreed to be provided in the taxable territory by one person to another. These provisions, therefore, made it explicit that for service tax to be levied in terms of Chapter V of the FA, the services had to be provided within the taxable territory.

22. Section 66 C FA stated that the central government may by rules determine the place of provision of service. The central government accordingly made the Place of Provision of Service Rules 2012 (POPS Rules). Rule 3 of the POPS Rules is applicable when the other rules do not apply. Thus while Rule 4 of the POPS Rules is concerned with performance based services, Rules 5 to 8 and 10 to 13 relate to event based services. Rule 9 applies to specified services like banking, intermediary services etc. Provision of telecommunication services does not have a specific rule and so Rule 3 of the POPS Rules, which is the default option, applies. In terms thereof, the place of provision of telecommunication service shall be the location of the recipient of service.

23. On the strength of Rule 3 of the POPS Rules, it is argued by Verizon India that since the recipient of the service provided by it is Verizon US, which is located outside India, there is an 'export of service'. The case of the

Department, on the other hand, is that Verizon India is providing telecommunication services in India. This is the nub of the controversy.

Export of Services

24. While there is a clear definition in the Customs Act, 1962 as to what constitutes 'export', the FA itself does not define 'export of services'. Section 94 (2) (f) of the FA enables the central government to make rules for 'determining export of taxable services'.

25. The question as to what constitutes 'export' of goods has engaged the Supreme Court in the context of statutes pertaining to sales tax or customs duty. In ***Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. Commercial Tax Officer (1960) 11 STC 764 (SC)*** it was explained that export of goods means taking the goods out of the country. The goods must have a foreign destination. In ***State of Kerala v. The Cochin Coal Company Ltd. 1961 (12) STC 1 (SC)*** it was held that there had to be two termini for an export of services to take place. The two termini were those between which the goods were intended to move or between which they were intended to be transported and not a mere movement of goods out of the country without any intention of their being so moved in specie to some foreign port.

26. In the context of services, when services are provided outside the 'taxable territory' i.e. where the service provider is in India and the recipient of the services is located outside India there would, in normal parlance, be an 'export of services'. In exercise of its powers under Section 94 (2) (f) of the FA, the central government made the ESR. Rule 3 (1) (iii) of the ESR *inter alia* provided that when business support services [as defined under

Section 65 (105) (zzzq)] or 'telecommunication service [as defined in Section 65 (105) (zzzx)] are provided to a recipient located outside India, then it would be treated as 'export of taxable services.' Under Rule 4 of the ESR, "any service which is taxable under clause (105) of Section 65 may be exported without payment of service tax."

27. This position underwent changes from time to time. Between April 19, 2006 to February 28, 2007 the requirement to be fulfilled for treating services rendered as export of services was as under:

- (a) The service recipient was located outside India;
- (b) Such service was delivered outside India and used outside India and
- (c) Payment for such service, provided outside India was received by the service provider in convertible foreign exchange.

28. For the period from 1st March 2007 to 26th February 2010, the criteria for the provision of service to be considered as export of service were as under:

- (a) The service recipient was located outside India;
- (b) Such service had to be provided *from* India and *used* outside India;
- (c) Payment for such service, *provided* outside India, was received by the service provider in convertible foreign exchange.

29. Finally, for the period from 27th February 2010 to 30th June 2012 the criteria for considering the provision of taxable services to be export of services was simplified and only two conditionalities were required to be satisfied, viz.,

- (i) the service recipient was located outside India; and

(ii) payment for such service was received by the service provider in convertible foreign exchange.

30. At this juncture it is required to be recalled that the refund claims of Verizon India are for the period from January 2011 to September 2014. Some part thereof fell within the period 27th February 2010 till 30th June 2012 when Rule 3 of the ESR (as amended) applied and only two criteria, as noted hereinbefore, had to be fulfilled. The ESR was, with effect from 1st July 2012, replaced by Rule 6A of Services Tax Rules 1994 ('ST Rules') which reads as under:

“6A (1) The provision of any service provided or agreed to be provided shall be treated as export of service when –

- (a) the provider of service is located in the taxable territory,
- (b) the recipient of service is located outside India,
- (c) the service is not a service specified in Section 6D of the Act,
- (d) the place of provision of the service is outside India.
- (e) The payment for such service has been received by the provider of service in convertible foreign exchange; and
- (f) The provider of service and recipient of service are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of Section 65B of the Act.

(2) Where any service is exported, the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.”

31. For the period prior to 1st July 2012, while there is no dispute that payment for the service rendered by Verizon India has been received by it in convertible foreign exchange there is a dispute as to whether the recipient of

the service is located outside India. According to Verizon India, the recipient of the service is Verizon US whereas the Department's case is that the recipient of the service is an Indian entity from whom electronic data is collected or to whom data is transmitted.

32. Even for the period post 1st July 2012, it is not in dispute that Rule 6A (1) (a) of the ST Rules is fulfilled inasmuch as Verizon India, which is the service provider, is located in the taxable territory i.e. India. There is also no difficulty as far as the criteria at Rule 6A (1) (d) of the ST Rules is concerned since 'telecommunication service' is not in the negative list under Section 66D of the FA. Rule 6A (1) (e) of the ST Rules is also fulfilled since payment for the service rendered by Verizon India has been received by it in convertible foreign exchange. There is also no dispute as regards Rule 6A (1) (f) of the ST Rules. The controversy is regarding Rule 6A (1) (b) and (d) of the ST Rules are fulfilled. In other words can it be said that (i) the recipient of the service is located outside India and (ii) the place of the provision of service is outside India. While Verizon India asserts that the answers to both questions are in the affirmative, the Department asserts the contrary.

The case of the Department

33. The impugned order dated 12th September 2016 as well as the resultant SCN dated 11th November 2016 encapsulates the case of the Department. According to it, on a study of the Master Supply Agreement between Verizon India and Verizon US, it is plain that Verizon is providing Verizon US 'telecommunication services' and not 'business support services'. The

invoices raised by Verizon India on Verizon US give describe the services as 'Provision of Network Capacity International Interconnect'. Secondly, Verizon India and 'Verizon US' are 'related parties'. The provision of services is entirely within India and, therefore, the services provided by Verizon India cannot be termed as 'export of services'.

34. Mr. Sanjeev Narula, learned Senior standing counsel for the Department further explained that the Department relies on Circular No. 141/10/2011-TRU dated 13th May, 2011 issued by the Central Board of Excise and Customs (CBEC) which, *inter alia*, clarified that "where the consultancy, though paid by a client located outside India, is actually used in respect of a project or an activity in India the service cannot be said to be used outside India." Reliance is also placed on Circular No. 111/05/2009 dated 24th February, 2009.

35. Mr. Narula contends that Verizon India's role was to provide connectivity services and operational support in prescribed way and manner as required by Verizon US "to render telecommunication services to its customers when visiting India." Further, he did not agree that the Circular No.90/1/2007 ST dated 3rd January, 2007 has been repealed by the Circular No. 96/7/2007-ST dated 23rd August, 2007 and is, therefore, no longer applicable. According to him, the Circular dated 23rd August, 2007 "nowhere mentions the services provided by the party and claimed as export by them."

Case of Verizon India

36. On the other hand, the case of Verizon India, as articulated by Mr.

Venkataraman, learned Senior counsel appearing on its behalf, is based on the major premise underlying service tax viz., it is a destination based consumption tax. According to him the Department's case is based on a misconception of the 'recipient' of the service. According to him there is a distinction between the 'user' of a service and its 'recipient'. This had to be determined strictly with reference to the underlying contract between Verizon India and Verizon US. He submits that the Department cannot impute a contract between Verizon India and the customers of Verizon US or their counterparts in India when there is none.

37. Mr Venkataraman points out that the Department has applied the Circular dated 3rd January 2007 which no longer applies. In any event that Circular was concerning telephony services and not electronic data transmission service. Mr Venkataraman clarified that although Verizon India had classified the services provided by it under the category of 'Business Support Services' while the Department had classified it under 'telecommunication services', it made no difference to the refund claims since the same export of services rules applied to both types of services. Thus, even if the export of Verizon India's services were tested by classifying them as 'telecommunication services', Verizon India still met the export criteria and no service tax can be levied on such services.

38. Mr. Venkataraman referred to a number of decisions of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) including ***Paul Merchants Ltd v. CCE, Chandigarh (2012(12) TMI 424 - CESTAT, Delhi (LB), Vodafone Essar Cellular Ltd. v. CCE, Pune-III 2013-TIOL-566-***

CESTAT-Mum and Microsoft Corporation (I) (P) Ltd. v. Commissioner of Service Tax, New Delhi 2014-TIOL-1964-CESTAT-DEL.

Analysis and Reasons

39. The refund claims of Verizon India pertain to the period January 2011 to September 2014. For the period prior to 1st July 2012, under Rule 3 (1) (iii) of the ESR, two conditions were to be fulfilled for the provision of telecommunication service by Verizon India to be considered export of service. One of the conditions was that payment for the service had to be received by Verizon India in convertible foreign exchange. On this there is no issue. The only question is whether under the Master Supply Agreement the recipient of the service can be said to be Verizon US and whether the place of provision of such service can be said to be within India?

40. For the period after 1st July 2012, the issue is regarding the compliance with Rule 6A (1) (b) and (d) of the ST Rules. What requires to be examined is who can be said to be the 'recipient of the service' and whether the place of the provision of service is outside India.

41. The stand of the Department as can be gleaned from the order dated 12th September 2016 is the telecommunication services are provided within India and hence there is no 'export of service'. In the counter affidavit filed to these writ petitions it is contended that the recipient of the service i.e. Verizon US is present in India through its subscribers and, therefore, the condition that the 'recipient is located outside India' is not fulfilled. In support of this plea reference is made to the Circular dated 3rd January 2007.

42. Circular No. 90/1/2007 dated 3rd January, 2007 concerned provision of telephony services to subscribers of international telephone service providers who may be on a visit to India and are availing the inbound roaming services. The said Circular clarified that a telephone connection did not necessarily mean providing a telephone instrument or providing sim card. Even if a number was allocated temporarily to an inbound roamer and used internally it remained a service of a telephone connection. It was clarified that during the period of roaming, "the Indian Telecom service provides telephone service to an international inbound roamer. This service to an inbound roamer is delivered and consumed in India and, therefore, is not an export of service."

43. The said Circular dated 3rd January 2017 did not deal with telecommunication services involving transfer of electronic data. Then came the Circular No. 96/7/2007-ST dated 23rd August, 2007. This was on the basis of the report of the Committee chaired by Shri T.R. Rustagi, former Commissioner of Customs & Central Excise and Director General (Inspection). On the basis of comments received, the CBEC issued the above circular. Paragraph 6 of the said circular reads thus:

"6. This circular supersedes all circulars, clarifications and communications, other than Orders issued under Section 37B of the Central Excise Act, 1944 (as made applicable to service tax by section 83 of the Finance Act, 1994), issued from time to time by the CBEC, DG (Service Tax) and various field formations on all technical issues including the scope and classification of taxable services, valuation of taxable services, export of services, services received from outside India, scope of exemptions and all other matters on levy of service tax. With the issue of this circular, **all earlier clarifications issued on technical issues relating to service tax stand withdrawn.**"

(emphasis supplied)

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

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

46. The position does not change merely because the subscribers to the telephone services of Verizon US or its US based customers 'use' the services provided by Verizon India. Indeed in the telecom sector, operators have network sharing and roaming arrangements with other telecom service providers whose services they engage to provide service to the former's subscribers. Yet, the 'recipient' of the service is determined by the contract

between the parties and by reference to (a) who has the contractual right to receive the services; and (b) who is responsible for the payment for the services provided (i.e., the service recipient). This essential difference has been lost sight of by the Department. In the present case there is no privity of contract between Verizon India and the customers of Verizon US. Such customers may be the 'users' of the services provided by Verizon India but are not its recipients.

47. Also, for providing such service Verizon India might use the services of a local telecom operator. That does not mean that the services to Verizon US are being rendered in India. All these steps are taken by Verizon India as part of its contract with Verizon US to provide services to Verizon US located outside India. The place of provision of such service to Verizon US remains outside India. This is made explicit by Circular No. 111/5/2009 dated 24th February, 2009, which clarified:

“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 service [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...”

48. Circular No. 141/10/2011 dated 13th May, 2011 also throws light on this aspect. It was issued to clarify the position prior to 28th February, 2010 and became necessary in view of the question raised whether for the period prior thereto the requirement that the service should be “used outside India” invariably meant the location of the recipient. It was clarified that the words

‘accrual of benefit’ was not restricted to mere impact on the bottom-line of the person who pays for the service. It had to be given a harmonious interpretation in the context where the effective use and enjoyment of the service has been obtained.

49. The position becomes even clearer in the post July 2012 period during which the POPS Rules 2012 apply. As already noted provision of telecommunication services does not have a specific rule and so Rule 3 of the POPS Rules, which is the default option, applies. In terms thereof, the place of provision of telecommunication service shall be the location of the recipient of service.

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 Assesseees 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 CBEC 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.

Summary of conclusions

54. To summarise the conclusions:

(i) It made no difference that Verizon India may have provided 'telecommunication service' and not 'business support services' since to qualify as export of service both had to satisfy the same criteria.

(ii) The provision of telecommunication services by Verizon India during the period January 2011 till 1st July 2012 complied with the two conditions stipulated under Rule 3 (1) (iii) of the ESR to be considered as 'export of service'. In other words, the payment for the service was received by Verizon India in convertible foreign exchange and the recipient of the service was Verizon US which was located outside India.

(iii) That Verizon India may have utilised the services of Indian telecom service providers in order to fulfil its obligations under the Master Supply Agreement with Verizon US made no difference to the fact that the recipient of service was Verizon US and the place of provision of service was outside India.

(iv) The subscribers to the services of Verizon US may be 'users' of the services provided by Verizon India but under the Master Supply Agreement it was Verizon US that was the 'recipient' of such service and it was Verizon US that paid for such service. That Verizon India and Verizon US were 'related parties' was not a valid ground, in terms of the ESR or the Rule 6A of the ST Rules, to hold that there was no export of service or to deny the refund.

(v) The Circular dated 3rd January 2007 of the CBEC had no application to the case on hand. It did not pertain to provision of electronic data transfer service. It was wrongly applied by the Department. With its total repeal by the subsequent Circular dated 23rd August 2007, there was no question of it applying to deny the refund for the period January 2011 till September 2014.

(vi) Even for the period after 1st July 2012 the provision of telecommunication service by Verizon India to Verizon US satisfied the conditions under Rule 6A (1) (a), (b), (d) and (e) of the ST Rules and was therefore an 'export of service'. The amount received for the export of service was not amenable to service tax.

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

56. The four petitions are accordingly allowed, but in the circumstances, with no orders as to costs. The pending application is disposed of.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

SEPTEMBER 12, 2017

Rm/rd

