CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 85569 of 2016

(Arising out of Order-in-Original No. 36/ST-V/SKD/15-16 dated 12.11.2015 passed by the Commissioner of Central Excise & Service Tax-V, Mumbai.)

Paul Foskey **…. Appellant**
Director, Marriott Hotels India Private Limited
Unit 2-4, Ground Floor, Dynasty Business Park-A
Andheri Kurla Road,
Andheri (East), Mumbai – 400 059.

Versus

Commissioner of Service Tax-V **…. Respondent**
4th Floor, Utpad Shulk Bhawan,
Plot No.24C, Sector-E, Bandra Kurla Complex
Bandra (East), Mumbai – 400 051.

WITH

Service Tax Appeal No. 85570 of 2016

(Arising out of Order-in-Original No. 36/ST-V/SKD/15-16 dated 12.11.2015 passed by the Commissioner of Central Excise & Service Tax-V, Mumbai.)

Rajeev Menon **…. Appellant**
Area Vice President, Marriott Hotels India Private Limited
Unit 2-4, Ground Floor, Dynasty Business Park-A
Andheri Kurla Road,
Andheri (East), Mumbai – 400 059.

Versus

Commissioner of Service Tax-V **…. Respondent**
4th Floor, Utpad Shulk Bhawan,
Plot No.24C, Sector-E, Bandra Kurla Complex
Bandra (East), Mumbai – 400 051.

WITH

Service Tax Miscellaneous Application No. 86138 of 2025

(on behalf of Appellant)

AND

Service Tax Appeal No. 85571 of 2016

(Arising out of Order-in-Original No. 36/ST-V/SKD/15-16 dated 12.11.2015 passed by the Commissioner of Central Excise & Service Tax-V, Mumbai.)

Marriott Hotels India Private Limited **…. Appellant**
Unit 2-4, Ground Floor, Dynasty Business Park-A
Andheri Kurla Road,
Andheri (East), Mumbai – 400 059.

Versus

Principal Commissioner of CGST & Central Excise .... Respondent
9th Floor, Lotus Infocentre,
372, Narmawala Estate, Station Road,
Parel (East), Mumbai – 400 012.

APPEARANCE:

Shri V. Sridharan along with S/Shri Vinay Jain, Shyam Mangokia Advocates for the Appellants

Shri Shashank Kumar Yadav, 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/86892-86894/2024

Date of Hearing: 04.08.2025

Date of Decision: 03.12.2025

Per: M.M. PARTHIBAN

These appeals have been filed by M/s Marriott Hotels India Private Limited, Mumbai, the appellant company; Shri Paul Foskey, Director of the appellant company and Shri Rajeev Menon, Area Vice President of the appellant company (herein after, referred together as "the appellants", for short) assailing the Order-in-Original No. 36/ST-V/SKD/15-16 dated 12.11.2015 (herein after, referred to as "the impugned order") passed by the Commissioner of Central Excise & Service Tax-V, Mumbai.

2. Appellant company has filed this miscellaneous application seeking for change of name and address of the respondent arising on account of change in territorial jurisdiction of the Service Tax authorities after introduction of GST regime vide Notification No.13/2017-C.E. (N.T) dated 09.06.2017 and as the appellants-assessee presently comes under their jurisdiction. As the revised name and address of the respondent correctly reflect the revised jurisdictional departmental authorities, under whose jurisdiction the appellants-assessee is functioning for the purpose of indirect taxes viz., Service Tax/ GST, the miscellaneous application filed by the appellants is allowed. The prayer made by the Appellant is considered and the revised name and address of the respondent is duly incorporated for the purpose of disposal of the appeals. Registry is directed to incorporate the following changed name and address of the respondent in the appeal records for the purpose office records.

"Principal Commissioner of Central Goods Service Tax (CGST)
& Central Excise, Mumbai East Commissionerate,

9th Floor, Lotus Infocentre,
372, Naramwala Estate, Station Road,
Parel (East), Mumbai – 400 012".

2.1 The brief facts of the case are that the appellant company M/s Marriott Hotels India Private Limited (Marriott India, for short) is an incorporated company established in August, 1993 under the Companies Act, 1956 and is a subsidiary of Marriott Worldwide Corporation, USA; the ultimate parent company being Mariott International Inc., USA. For the Asia Pacific region, their group company M/s Luxury Hotels International of Hong Kong Limited (hereinafter referred to as 'Marriott Hong Kong', for short) is overviewing the Marriott branded hotels and its sub-regional Marriott entities in turn perform similar function of overseeing the operations for a particular sub-region. The appellants are engaged *inter alia*, in the business of providing hospitality services, management services to various hotels operating under the Marriott International Chain of hotels including the taxable category of services viz., "Business Support Services (BSS), Management Consultancy service. 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. AABCM 0274GST003.

2.2 Directorate General of Central Excise Intelligence, Mumbai Zonal Unit (DGCEI) had conducted an investigation of the records maintained by the appellants, including search of the office premises under panchanama proceedings dated 10.05.2012, recording of statements of persons concerned etc. The department had observed that in respect of aforesaid services provided by the appellants in relation to various hotels operating in India through their foreign group companies, no service tax was paid. Accordingly, the department claimed that the appellants were providing taxable services of 'Business Auxiliary Service' (BAS) in terms of Section 65(105)(zzb) of the Finance Act, 1994 during pre-negative list regime and as 'service' under Section 65B(44) of the Act of 1994 during post negative-list regime, and thus had failed to pay appropriate service tax to the government exchequer.

2.3 On the above basis, the department had initiated show cause proceedings demanding service tax on taxable services provided by the appellants during April, 2009 to August, 2014 on the following specific grounds by issue of Show Cause Notice dated 20.10.2014:

(i) Rs.24,56,15,175/- on the taxable services provided by the appellants in respect of remuneration received from Marriott Hong Kong (Annexure-A to SCN);

(ii) Rs.5,05,41,954/- in respect of remuneration of employees of hotel owners, since these persons are key persons who run the Marriott brand hotels as per the standards of Marriott group, and the same is includable in the operators fee being service cost for payment of service tax (Annexure-B to SCN);

(iii) Rs.3,67,12,501/- in respect of reimbursement of charges made in foreign currency towards services received from foreign entities/affiliates of Marriott group of companies (Annexure-C to SCN);

under Section 73(1) ibid along with interest and for imposition of penalty on the appellants under Sections 76, 77, 78 ibid. Further, specific proposals were also made in the SCN for imposition of penalty on appellants Shri Paul Foskey, Director and Shri Rajeev Menon, Area Vice President, of the appellant company under Section 78A of the Act of 1994. The matter arising out of the show cause notice dated 20.10.2012 was adjudicated vide the impugned order dated 12.11.2015 in confirming all the proposed demands made therein and appropriated Rs.57,83,724/- paid during investigation. Further, the impugned order also imposed mandatory penalty on the appellant company under Section 78, Rs.10,000/- under Section 77 ibid and also imposed penalty of Rs.1,00,000/- each on the appellants employees S/Shri Paul Foskey, and Shri Rajeev Menon. Feeling aggrieved with the impugned order, appellants have preferred this appeal before the Tribunal.

3.1 Learned Advocate appearing for the appellants submitted that most of the hospitality related services are provided by the appellants through their various Marriott group companies specialized in each area of hotel management, hospitality and such services are provided to Marriott managed properties such as JW Marriott, Courtyard, Renaissance, Ritz Carlton etc., which are owned by independent Hotel Owners. In this business model, once a prospective hotel owner agrees to partner with Marriott group, various Marriott group companies / affiliates enter into various agreements with each hotel owner for distinct purposes. These are:

(i) Technical Service Agreement (TSA), for reviewing the design of the hotel and assistance in developing and construction of hotel as per Marriott standards with M/s Marriott International Design & Construction Services Inc. (MIDCS)

(ii) License and Royalty agreement (LRA), for obtaining a license to use the brand names with Marriott International Licensing Company B.V. (MILC) / Global Hospitality Licensing SARL (GHL)

(iii) International Market Program & Participation Agreement (IMPPA), for participating in advertising, promotional and marketing activities carried outside India, with MILC/GHL

(iv) Training and Computer system Agreement (TCSA) / Electronic Technology and Services Agreement (ETSA), for providing assistance related to system and technology with Renaissance Services B.V. (RSBV)

In the all the above cases, consideration for such services was specified under each agreement and applicable service tax had been paid by the hotel owners on Reverse Charge Mechanism (RCM) basis, wherever applicable, on the consideration payable by hotel owners to overseas Marriott entities. There is no dispute with respect to such transactions, and the appellants have submitted certificates from the hotel owners stating that they have discharged their service tax liabilities on these payments made to other Marriott group entities.

3.2 Learned Advocate further stated that the appellant company also entered into operating agreements with hotel owners who agreed to run / operate the hotel under a Marriott brand. The operation agreement enabled appellant company to operate and manage the hotel property belonging to the hotel owners as per Marriott system/standards. The key activities stipulated in the operation agreement are (i) recruitment and supervision of Hotel employees; (ii) establish prices for various services provided by the Hotels; (iii) managing funds (payables/ receivables) of the Hotel; (iv) establishing/monitoring administrative policies; (v) arrange and supervise marketing/ advertisement programs; (vi) overview and maintain the Hotel property at all times and (vii) various other operation related oversight / overview services. The consideration for these services were defined in the agreement as a fixed percentage (generally 0.25%) of the gross revenue of a property. The appellant company duly discharged service tax on this consideration.

3.3 He further stated that the appellant company also entered into shared services agreements with various hotel owners to provide certain services such as reservation services, e-commerce services and other shared services. The purpose of these agreements was to achieve cost

efficiency and effectiveness in performance of certain common services which were required by each hotel owners. This was achieved by pooling funds and managing the resources by a common person i.e. the appellant company. The appellants had duly discharged service tax on these costs recovered from participating hotel owners.

3.4 Furthermore, the appellant company had also entered into an Intercompany Commercial Services Agreement ('ICA') with Marriott Hong Kong for providing business development and support services by appellant company to Marriott Hong Kong. Under the said agreement, the appellant received consideration of all relevant costs plus a markup of 10%. As per the agreement with Marriott Hong Kong, the appellants had provided Business development services, Marketing/ advertisement services; Hotel and other lodging support services through their various departments of hospitality services.

3.5 It is submitted by the learned Advocate that with respect of demand of service tax on the amount representing remuneration received from Marriott Hong Kong, during the disputed period April, 2009 to August, 2014, the same are not liable to service tax for the following reasons:

(i) During April, 2009 to February, 2010, the demand was made by the department on the ground that the services fall under the category of BAS and as per Rule 3(1)(iii) the location of recipient is relevant; since the hotel owners who are the ultimate recipient of services are situated in India, and the appellant company is responsible for payment of service tax on RCM basis, since these cannot be equated to export of service, in such cases. However, he submitted that these services were rendered by the appellants only to their group company Marriott Hong Kong, and the payments for the same were received by the appellants from them. These have been established through specific contractual clauses as per the agreements entered into between them. The location of the ultimate beneficiary is not relevant in the case, as has been held by the Hon'ble Supreme Court in the case of *Paul Merchants Vs. Commissioner of Central Excise, Chandigarh* – 2013 (29) S.T.R. 257 (Tri. Del.) and *Arcelor Mittal Stainless (I) Pvt. Ltd. Vs. Commissioner of Service Tax* – 2023 (8) TMI 107.

(ii) For the period 01.03.2010 to 30.06.2012, since the only essential condition of Rule 3(2)(b) of the Export of Service Rules, 2005, being the value of services provided is required to be received by the service provider in convertible foreign exchange, having been fulfilled and the condition of Rule 3(2)(a) ibid having been omitted, there is no ground for sustaining the demand of service tax on the appellants.

(iii) For the period 01.07.2012 to 30.06.2012, for confirmation of demand in the impugned order, it has invoked Rules 3,4,7 and 8 of Place of Provision of Services Rules. 2012, whereas the SCN had only invoked Rule 5 and the other rules have not been invoked in the SCN. There is clear distinction between the services provided by them with respect to 'operations agreement' with prospective hotel owners for operation and management of hotels; and with the 'intercompany commercial services agreement' where overview and support services are rendered to their group company Marriott Hong Kong. Therefore, the conclusion arrived at by the learned Commissioner in equating both these services are factually incorrect and not supported by any evidence.

(iv) With respect to demand of service tax on remuneration of hotel employees by including it in the cost of services, learned Advocate submitted that the definition of 'service' provided under Section 65(B)(44) ibid specifically excludes it from the scope of service, and therefore, the same cannot be added as a cost of service, by way of colouring it a different nature.

(v) The amount paid to foreign entities is in the nature of cost allocation, and such arrangements between group entities cannot be considered as provision of service by one company to another.

3.6 He further stated that as regards the amounts received from the foreign entities, such amounts have also been shown in the appellant's financial records; but, as such services are being provided to recipients located outside India and the payment was received in foreign currency, these were covered under Export of Services Rules, 2005, and there was no requirement for payment of service tax. However, these have not been considered while confirming the demand of service tax. In respect of the removal of the condition of 'provided outside India' in the Export of Services Rules, 2005, vide Notification No.30/2007 dated 22.05.2007, learned Advocate submitted that the Central Board of Excise & Customs (CBEC) had vide Circulars No. 141/10/2011-TRU dated 13.05.2011, No.111/05/ 2009-ST dated 24.02.2009 have clarified that so long as the benefits of the services accrue outside India, there is no levy of service tax. Therefore, he claimed that the adjudged demands upheld by the learned Commissioner (Appeals) is contrary to the instructions issued by CBEC and therefore it is liable to be set aside.

3.7 Furthermore, learned Advocate submitted that the issue under dispute has been settled by the decision taken by the Larger Bench of the Tribunal in the case of *Arcelor Mittal Stainless India Pvt. Ltd. Vs.*

Commissioner of Service Tax, Mumbai-II – 2023-TIOL-469-CESTAT-MUM-LB. Thus, he claimed that the department cannot take different stand for the same disputed issue in agitating the appeal before the Tribunal. Thus, it is contended by the learned Advocate that the impugned order upholding confirmation of the adjudged demands cannot be sustained.

4. On the other hand, learned AR appearing for the Revenue reiterated the findings recorded in the impugned order. He submitted that the appellants have not fulfilled the requirement of Rule 3(1)(iii) of Export of Service Rules, 2005 and Rule 6A of the Service Tax Rules, 1994 to claim that the services rendered by them to Marriott Hong Kong, could be treated as exports. The agreements entered into by the appellants viz., 'operations agreement' with prospective hotel owners and 'intercompany commercial services agreement' with Marriott Hong Kong are functionally the same, but structured in an artificial manner, but it directly supports the hotels situated in India. Reimbursement of expenses and consideration for management service, though shown as salaries, are required to be added to the value of services, but was undervalued by suppression of facts with an intention to evade service tax by the appellants and therefore invocation of extended period is appropriate. Therefore, he submitted that the impugned order is sustainable.

5. Heard both sides and perused the case records alongwith appeal paper books submitted in part of the appeal records.

6. The issues for consideration before the Tribunal is to determine the following:

(i) whether the services provided by the appellants to their group entity Marriott Hong Kong and other entities located abroad would amount to export of services or otherwise? and the receipt of amounts earned by them for such services, are liable for levy of service tax or otherwise, during the disputed period in terms of the Finance Act, 1994 and the rules made thereunder?

(ii) whether the operating fee received by the appellants from hotel owners under the "operation agreement' is includable in the value of services provided by the appellants and whether these are liable for levy of service tax or otherwise?

(iii) whether the reimbursement expenses received in convertible foreign currency by the appellants from their group entities/companies located abroad is liable for levy of service tax or otherwise?

(iv) whether the extended period of limitation is invokable for confirming the adjudged demands on the appellant company and the employees viz., Director, Area Vice President of the appellant company and are liable to penalty under Section 78A of the Finance Act, 1994.

7.1 We have examined the documents placed on record and the appeal papers, wherein the appellants and the overseas entities viz., M/s Luxury Hotels International of Hong Kong Limited (earlier known as Marriott Asia Pacific Management Limited); Marriott International Design & Construction Services, INC, Maryland, United States of America; are engaged in a contractual relationship for various services under 'Intercompany Commercial Service Agreement'. Further, the appellants have also entered in to 'technical services agreement' for planning, designing, construction, furnishing and equipping the hotel with the current standards of quality, durability and efficiency established by Marriott International Hotel Design Guide; 'operating agreement' to manage and operate the hotel, 'shared services agreement for market communications' and 'shared services agreement' for sales with individual hotel owners. Furthermore, we have also examined various agreements such as 'International Marketing Program Participation agreement'; 'License and Royalty agreement'; 'training and computer systems agreement' entered into between Marriott group entities viz., Marriott International Licensing Company, B.V. Amsterdam for international advertising, marketing, promotion and sales program; license of courtyard trademarks; training program, reservation systems, property management systems and other systems; e-commerce services, with individual hotel owners. Besides this, there is also a 'agency agreement' between Marriott Asia Pacific Management Limited, Hong Kong and Marriott International, Mary Land, USA.

7.2 On going through above referred agreements, it reveals that the various agreements have the following different purposes, viz.,

(i) Technical Services Agreement is for reviewing the design of the hotel and assistance in developing and construction of hotel as per Marriott standards; and this is entered into between the Marriott USA entity i.e., Marriott International Design & Construction Service Inc. and the hotel owner (placed at Pg.158-212 of Vol. IV of paper book)

(ii) License and Royalty agreement (LRA) for obtaining a license to use the brand names, 'Courtyard' trade mark for hotel services and other related goods and services; and this agreement is entered into between the Marriott Netherlands entity i.e., Marriott International Licensing Company B.V. and the hotel owner (placed at Pg.42-61 of Vol. IV of paper book)

(iii) International Marketing Program & Participation Agreement for participating in the advertising, promotional and marketing activities carried outside India; and this agreement is entered into between the Marriott Netherlands entity i.e., Marriott International Licensing Company B.V. and the hotel owner (placed at Pg.20-41 of Vol. IV of paper book)

(iv) Training and Computer system Agreement / Electronic Technology and Services Agreement for providing assistance related to training programs, computer systems and technology for reservation, property management and other systems; and this agreement is entered into between the Marriott Netherlands entity i.e., Renaissance Services B.V. and the hotel owner (placed at Pg.138-157 of Vol. IV of paper book)

(v) Standard Services for E-Commerce Services Agreement for providing services related to equip, organize and designate the staff to provide shared services; and this agreement is entered into between the Marriott Netherlands entity i.e., Renaissance Services B.V. and the hotel owner (placed at Pg.231-252 of Vol. IV of paper book).

Since, in all the above agreements, the appellants are not contractually engaged with other entities and the services are provided by the overseas entities, there is no dispute with respect to levy or short payment of service tax by the appellants in the present case. Further, the individual hotel owners have also stated that in respect of import of such services received from foreign entities, the respective hotel owners have discharged the service tax liability on the service charges under Reverse Charge Mechanism.

7.3 There are certain agreements such as the following, where the appellants are engaged directly with the hotel owners and other Marriott group entities. These are as follows:

(i) 'Operating agreement' is engaged by the hotel owner upon completion of the construction, furnishing and equipping of the hotel, before the opening date of the hotel, for authorising the appellants to supervise, direct and control the management and operation of the hotel in accordance with the laid down standards of Marriott group; such services also included

recruitment and supervision of hotel employees, establish prices for various services provided by the hotels; manage funds (payables/ receivables) of the hotel, Establish/ monitor administrative policies, arrange and supervise marketing/ advertisement programs, overview and maintain the hotel property at all times and various other operation related oversight/ overview services. The consideration for such services are paid to the appellants exclusive of applicable taxes. The consideration for such services are fixed as a percentage of gross revenue of a property. Further, the hotel owner is responsible for payment of all taxes directly into the government account as specifically provided for in clause 11.27 therein (placed at Pg.62-137 of Vol. IV of paper book).

(ii) The appellants have also entered into 'shared services agreements' with various hotel owners to provide certain services such as reservation services, e-commerce services and other shared services. The purpose of such agreement was to achieve cost efficiency and effectiveness in performance of certain common services which were required by each hotel owners, in order to maintain the established standards of Marriott. (placed at Pg. 213-230 of Vol. IV of paper book). This was achieved by pooling funds and managing the resources by a common person i.e., the appellant company.

(iii) The appellants had entered into an 'Intercompany Commercial Services Agreement' with Marriott Hong Kong entity for providing business development and support services by appellants to them. Under the said agreement, the appellants received consideration of all relevant costs plus a markup of 10%. As per the agreement with Marriott Hong Kong, the appellants had provided following services viz., (a) Business development services for developing a customer network within the specified region and held meeting/ discussions with various potential hotel property owners and prospective real estate developers to join a Marriott branded hotel chain and operate the hotel under a Marriott brand; (b) marketing/ advertisement services involving marketing activities to maximize general public recognition, acceptance and use of the Marriott hotels worldwide to increase demand, and position Marriott as the leading global hotel company. (c) Hotel and other lodging support services including all support services required by Marriott Hong Kong for overviewing the management and operation of Marriott hotels in the specified region. Such services were performed by the appellants through its various departments. The outcome

of the functions performed in various service areas are reported to Marriott Hong Kong including the details relating to information of sales, customer satisfaction and other variables.

7.4 Therefore, the dispute is limited to the question of liability for payment of service tax in respect of services provided through the above mentioned agreements at paragraphs 7.3 (ii) & (iii). In the impugned order, learned Commissioner had come to the conclusion that though the Marriott group is benefited by the services provided by the appellants, since the appellants provide such services which are incidental and ancillary for the establishment and running of the hotels in India, and the greatest proportion of the services provided by the appellants are received by Marriott brand of hotels owners in India, these would not qualify for being considered as exports in terms of the Export of Services Rules, 2005 read with Rule 7 of the Place of Provision of Services Rules, 2012. It is a fact on record that the services have been provided by the appellants to their Marriott Hong Kong entity. In terms of the Export of Services Rules, 2005 for the period prior to the amendment of Rule 3(2)(a) w.e.f. 01.03.2010, i.e., prior to 01.03.2010, in order to comply with the Rules of 2005, for treating the service provided to an entity abroad as 'export of service', the following twin conditions are required to be satisfied viz., (i) such service shall be provided from India and used outside India; and (ii) payment for such service is received by the service provider in convertible foreign exchange. However, subsequent to the amendment w.e.f. 01.03.2010 by omitting the Rule 3(2)(a) *ibid*, the only condition for treating the service as export is the receipt of consideration for the services provided in convertible foreign exchange.

7.5 In the present case, the receipt of foreign exchange from the Marriott Hong Kong/Marriott foreign entities by the appellants are not in dispute, as the same has been duly recorded in their books of accounts and have been declared to the government authorities. On careful perusal of the various agreements entered into between the appellants with the Marriott foreign entities, it transpires that the relationship between the parties is that of the independent contractor-contractee. The content in the agreements clearly provide that no services were provided by the appellants to the end customers/hotel owners, 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. Further, wherever certain services are directly provided by the appellants to the hotel owners, separate agreements have been entered into and applicable service tax have been discharged by them. On careful examination of the nature of arrangements between the appellants and the foreign entities vis-à-vis the statutory provisions, it is abundantly clear that the services provided by the appellants to the overseas entities qualify as 'export' in terms of Rule 3 of the Export of Service Rules, 2005. This is for the reason that in respect of the services provided by the appellants to their overseas entities, such output services have enabled those overseas entities to gain from those services in establishing quality and standards of services as established by Marriott Brand. 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.

7.6 We find that Ministry of Finance, Central Board of Excise & Customs (CBEC) in clarifying the expression 'used outside India' in Rule 3(2)(a) of Export of Service Rules, 2005 had stated that the accrual of benefit and their use outside India should be looked into for determining whether the services qualify as export even when they are performed from India. Further, it is not in doubt that the foreign inward remittances for such services have been received by the appellants and have also been duly accounted in the books of accounts maintained by them. The relevant Circular of CBEC issued in this regard is extracted herein below:-

"Circular No. 141/10/2011-TRU,
dated 13-5-2011

F. No. 280/26/2011-CX8A(Pt.)

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : Applicability of the provisions of the Export of Services Rules, 2005 in certain situations.

Circular No. 111/05/2009-S.T. was issued on 24th February 2009 [2009 (13) S.T.R. C87] on the applicability of the provisions of the Export of Services Rules, 2005 in certain situations. It had clarified on the expression "used outside India" in Rule 3(2)(a) of the Export of Services Rules, 2005 as prevalent at that time. The condition specified in Rule 3(2)(a) has since been omitted vide Notification 6/2010-S.T., dated 27 Feb. 2010. In the context of the stated Circular an issue has been raised, whether for the period prior to 28-2-2010 the requirement that the service should be "used outside India" invariably means the location of the recipient?

2. In the stated Circular it was inter alia, clarified that the words, "used outside India" should be interpreted to mean that "the benefit of the service should accrue outside India". It is well known that services, being largely intangibles, are capable of being paid from one place and actually used at another place. Such arrangements commonly exist where the services are procured centrally e.g. audit, advertisement, consultancy, Business Auxiliary Services. For example, it is possible to obtain a consultancy report from a service provider in India, which may be used either at the location of the customer or in any other place outside India or even in India. In a situation 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.

3. It may be noted that the words "accrual of benefit" are not restricted to mere impact on the bottom-line of the person who pays for the service. If that were the intention it would render the requirement of services being used outside India during the period prior to 28-2-2010 infructuous. These words should be given a harmonious interpretation keeping in view that during the period upto 27-2-2010 the explicit condition was provided in the rule that the service should be used outside India. In other words these words may be interpreted in the context where the effective use and enjoyment of the service has been obtained. The effective use and enjoyment of the service will of course depend on the nature of the service. For example effective use of advertising services shall be the place where the advertising material is disseminated to the audience though actually the benefit may finally accrue to the buyer who is located at another place.

4. This, however should not apply to services which are merely performed from India and where the accrual of benefit and their use outside India are not in conflict with each other. The relation between the parties may also be relevant in certain circumstances, for example in case of passive holding/ subsidiary companies or associated enterprises. In order to establish that the services have not been used outside India the facts available should inter alia, clearly indicate that only the payment has been received from abroad and the service has been used in India. It has already been clarified that in case of call centers and similar businesses which serve the customers located outside India for their clients who are also located outside India, the service is used outside India.

5. Besides above, to attain the status of export, a number of conditions need to be satisfied which are specified in Rule 3(1) and Rule 3(2) of Export of Services Rules, 2005. The Circular No. 111/05/2009-S.T. explained the expression "used outside India" only and the other conjunct conditions, as applicable from time to time, also need to be independently satisfied for availing the benefit of an export.

6. These instructions should be given wide publicity among trade and field officers. Please acknowledge receipt. Hindi version follows."

On plain reading of the CBIC circular, particularly the clarification at paragraph 4 establish that accrual of benefit from the services provided by

the appellants and their use for the benefit of foreign entity would qualify for export.

8.1 In this regard, we find that in the case of *Arcelor Mittal Stainless (I) P. Ltd.* (supra), the Larger Bench had examined the identical issues under dispute, in a greater detail and have answered all the questions raised on the doubt whether such services would qualify for 'export' or not, in the context of the liability for payment of service tax. The relevant paragraphs of the said decision of the Larger Bench of the Tribunal is extracted and given below:

> *"M/s. Arcelor Mittal Stainless International India Pvt. Ltd. Arcelor India, the appellant, is a wholly-owned subsidiary of Arcelor Mittal Stainless International, Paris, France Arcelor France. It was appointed as a sub-agent by Arcelor France, a commission agent for steel mills situated outside India, for procuring sale orders for the products manufactured by these mills from customers across the world. Arcelor France does not have any office in India. A prospective customer in India is either approached by Arcelor India or a prospective customer contacts Arcelor India regarding stainless steel requirement, but in either case the request is forwarded by Arcelor India to the foreign steel mills with the technical requirements of the Indian customer. Once the foreign mills and the Indian customer come to an understanding on the terms and conditions of supply, a written contract is executed between the Indian customer and the foreign mills or a purchase order is placed on the foreign mills. The documents are prepared by the foreign mills in the name of the Indian customer and the Indian customer, in turn, pays the foreign mills. Thus, the goods directly pass from the foreign mills to the Indian customer.*
>
> ***2.*** *A part of the commission received by Arcelor France, as the main agent, from the foreign mills is paid to Arcelor India based on the volume of sales in each quarter in convertible foreign currency. A dispute arose in relation to such commission received by Arcelor India from Arcelor France for the period from April 2005 to January 2009. According to Arcelor India, there is no privity of contract between it and the steel mills located outside India and it received the consideration only from Arcelor France. It, therefore, did not collect or pay service tax on the commission received from Arcelor France from April 2005 to January 2009. The department, however, believed that service tax was leviable on the commission received by Arcelor India from Arcelor France since the services were performed and consumed in India and they would not qualify as 'export of service' under the Export of Service Rules, 2005 the 2005 Export Rules. Arcelor India believed that it was not required to pay service tax on the commission received from Arcelor France as the service qualified as 'export of service'. However, Arcelor India paid service tax under protest during investigation for the period April, 2005 to January, 2009 with interest, but subsequently filed refund claims. The refund claims were rejected, against which the present appeal was preferred before the Tribunal.*
>
> *xxx xxx xxx xxx*

6. *The division bench, accordingly, referred the following questions of law to be determined by a larger bench of the Tribunal:*

> *(i) What is extant and scope of phrase "such taxable services which are provided and used in or in relation to commerce or industry and the recipient of such services is located outside India" used in Rule 3(3)(i) of Export of Services Rules, 2005 upto 18-4-2006.*
>
> *(ii) What is extant and scope of phrase "such service is delivered outside India and used outside India" used in Rule 3(2)(a) of Export of Service Rules, 2005 from 19-4-2006 to 28-2-2007.*
>
> *(iii) What is extant and scope of phrase "services provided from India and used outside India" used in Rule 3(2)(a) of Export of Services Rules, 2005 from 1-3-2007 onwards.*
>
> *(iv) Whether the services rendered to foreign entity located outside India for development of its business in India will qualify as Export of Service in terms of the above phrases used in the Export of Services Rules, 2005 from time to time and the decision of Apex Court in case of GVK Industries?*

7. *What has to be examined is whether the service provided by Arcelor India would be 'export of service' under the 2005 Export Rules, but before proceeding to analyse the various legal provisions and the decisions, it would be useful to briefly consider the history of 'export of services' under the service tax law.*

xxx *xxx* *xxx* *xxx*

50. *Arcelor France and Arcelor India act as main agent and sub-agent for foreign mills and not as an agent or service provider for the customers in India. There is no contractual relationship between Arcelor India and the customers in India. Therefore, even though the goods in the form of steel products are being supplied to customers in India, the actual recipient of BAS provided by Arcelor India is Arcelor France. Arcelor France has used the services of Arcelor India to provide services as main agents to the mills located outside India.*

51. *The reasoning adopted by the department is that the services of commission agent were used in India to cater to the Indian markets. It is not possible to accept this reasoning of the department. The Circular dated 24-2-2009 also categorically states that for the services to fall under rule 3(1)(iii) of the 2005 Export Rules, the relevant factor is the location of the service receiver. In other words, the place of performance of the service or the place where the customers of the service receiver are located is irrelevant.*

52. *As noticed above, it was the consistent view of the High Courts and the Tribunal that export of service would take place under rule 3(1)(iii) of the 2005 Export Rules if a person residing in India provides a service to a foreign entity to enable it to book orders for customers in India. This is for the reason that the foreign entity is located outside India and the payment is received by the person residing in India in convertible foreign exchange.*

53. *The division bench, while making the reference, intended to deviate from this settled position of law only because, in its considered view, the*

decision of the Supreme Court in GVK Industries. The division bench, after recording a finding that there was no dispute that Arcelor India was providing BAS to Arcelor France, noted that the dispute was only as to whether the service rendered by Arcelor India will qualify as export of service in terms of the 2005 Export Rules. The division bench concluded that since the services provided to Arcelor France was for developing its business in India, the services received by Arcelor France, even though it is located outside India, would be in relation to business activities in India in view of the decision of the Supreme Court in GVK Industries. Reliance placed by the division bench on GVK Industries, as noticed above, is misplaced. The decision of Supreme Court in GVK Industries is based on an interpretation of Explanation (2) to section 9(1)(vii)(b) of the Income-tax Act, under which the income is deemed to have accrued in India. The Finance Act and the 2005 Export Rules do not contain a provision providing a deeming fiction. The distinguishing features of the decision of the Supreme Court in GVK Industries have been pointed in the earlier paragraphs of this order. The decision of the Supreme Court in GVK Industries, therefore, cannot be applied to the facts of the present case.

54. *The four issues raised in the reference order have been dealt with extensively and as they are intermingled, the reference is answered in the following manner:*

(i) *Arcelor India, a service provider, is providing BAS service to Arcelor France, which is a service recipient. Arcelor India is, therefore, providing service to Arcelor France which is situated outside India and Arcelor India receives consideration in convertible foreign exchange. The service provided by Arcelor India is, therefore, delivered outside India and used outside India as is the requirement under the 2005 Export Rules prior to 1-3-2007 and Arcelor India provides services from India which are used outside India as is the requirement after 1-3-2007. It cannot, therefore, be doubted that Arcelor India provides 'export of service' as contemplated under rule 3 of the 2005 Export Rules; and*

(ii) *Arcelor France is an agent of the foreign steel mills and Arcelor India is its sub-agent. Arcelor India provides the necessary details of the customers in India to the foreign steel mills and, thereafter, the foreign steel mills and the Indian customers execute a contract for supply of the goods. The goods are directly supplied by the foreign steel mills to the Indian customers. Arcelor India also satisfies condition (b) of rule 3(2) as payments for such service have been received in convertible foreign exchange."*

Accordingly, the Co-ordinate Bench of the Tribunal in the Final Order No. 86375/ 2023 dated 14.09.2023, on the basis of the decision of the Larger Bench as above, have held that the activity of the appellant is export of service; and have set aside the order confirming the adjudged demands on the appellant therein.

8.2 We also find that in the case of *Commissioner of Service Tax, Mumbai -VII 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 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."*

Therefore, we find that the conclusion arrived at by the learned Commissioner in the impugned order for confirmation of adjudged demands, by denial of such activity as export of services rendered by the appellants to their foreign entity, does not stand the legal scrutiny.

9.1 On perusal of various agreements entered into by the appellants with their foreign entities, it also transpires that the services provided by the appellants to Marriott Hong Kong is not pertaining to any immovable property; the nature of the services provided by the appellants are pertaining to the monitoring and overview of the operation of all the hotels in the specified region. Further, the activities under the agreement are not pertaining to any specific immovable property. These services have been

held as Business Auxiliary Service (BAS) by Commissioner for period prior to 01.07.2012. The scope the phrase 'Business Auxiliary Service' has been defined under the Finance Act, 1994 as follows:

> *"Section 65. In this Chapter, unless the context otherwise requires,—*
>
> *Section 65(19) business auxiliary service" means any service in relation to—*
> *(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or*
>
> *(ii) promotion or marketing of service provided by the client; or*
>
> *(iii) any customer care service provided on behalf of the client; or*
>
> *(iv) procurement of goods or services, which are inputs for the client; or*
> *Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;*
>
> *(v) production or processing of goods for, or on behalf of, the client;*
>
> *(vi) provision of service on behalf of the client; or*
>
> *(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision*
>
> *and includes services as a commission agent, but does not include any activity that amounts to manufacture of excisable goods."*

9.2 On careful reading of the definition of BAS as above, and the scope of services enumerated under various category therein, it clearly transpires in order to come under the scope of BAS, there shall be (i) a service provider (ii) a service receiver and (iii) a client, and the services should augment the various activities such as production, sales promotion, marketing etc. In the present factual matrix of the case, the appellants is a service provider and the Marriott Hong Kong entity is the service receiver. However, there is no client exist in terms of the contractual arrangement between the service provider and service receiver. Therefore, we are of the considered view that the services provided by the appellants do not fall under the category of BAS.

9.3 We find that the dispute in respect of similar issue relating to status of overseas office vis-à-vis branches/head office and the jurisdiction to classify the services under Section 65(105) of Finance Act, 1994, the

receipt of 'business auxiliary service' by the assessee appellant from its branches and the inclusion of reimbursable expenses for computation of gross receipts under Section 67 of Finance Act have been dealt in detail by this Tribunal in the case of *Tech Mahindra Ltd., Milind Kulkarni Vs. Commissioner of Central Excise, Pune – 2016 (44) S.T.R. 71 (Tri. -Bom.).* In the aforesaid case, the Tribunal has held that transfer of funds is nothing but reimbursements and taxing of such reimbursement would amount to taxing of transfer of funds which is not contemplated by Finance Act, 1994 and therefore set aside the demand of tax as having been made without authority of law. In view of the categorical decision of the Tribunal, the issues under dispute in the present case is no more open to debate, and a different view cannot be taken by this Tribunal. The relevant paragraphs of order of the Tribunal in the case of Tech Mahindra Ltd., Milind Kulkarni (supra) is extracted and given below:

> *"9. The primary planks of the confirmation of demand in the impugned older are that the appellant and its branches are different persons, that the purpose and activities of the branches are for rendering service to the head office in India, that the payments made to the branches are not reimbursements but are taxable consideration for taxable service and that there has been suppression of facts by the appellant.*
>
> *xxx xxx xxx xxx*
>
> *12. At the core of the dispute are four issues, viz., the status of overseas branches vis-à-vis the head office and the limitation thereof, the jurisdiction to classify the services under Section 65(105) of Finance Act, 1994, the receipt of 'business auxiliary service' by the assessee appellant from its branches and the inclusion of reimbursable expenses for computation of gross receipts under Section 67 of Finance Act. All of these are to be required to be answered to sustain the confirmation of demand by the adjudicating authority.*
>
> *13. That the branch and head office are distinct entities for the purpose of taxation cannot be a matter of dispute. The law relating to taxation of service, an indirect, destination-based tax, is constitutionally restricted to India. In the scheme of Chapter V of Finance Act, 1994, the incidence of tax on services is to be borne by the recipient of service and levy is enforced on the provider of service. As the tax can be collected only from a service-provider within the jurisdiction, undertakings beyond the territory are beyond the ambit of the statute irrespective of the nature of the structural form or the linkage-organic or contractual. In such a taxing law, an entity that is beyond the jurisdiction of the statute has an existence independent of the taxable entity. A branch is, therefore, an entity distinguishable, for purposes of Finance Act, 1994, from its head office.*

14. Consequently, an entity that is not subject to a domestic taxing statute is not amenable, by any stretch of argument, to scrutiny for conformity with the provisions of that statute. Activities of the overseas entity cannot be subject to ascertainment of classification of services in Section 65(105) of Finance Act, 1994. More so, as tax authorities are bereft of wherewithal to scrutinize the activities of such an entity and there is, indeed, no cause to embark upon such a venture either. Undoubtedly, such entities are subject to tax in the territory in which they operate. We notice that decisions of this Tribunal in Torrent Pharmaceuticals Ltd. v. Commissioner of Service Tax, Ahmedabad [2015 (39) S.T.R. 97 (Tri.-Ahmd.)] and KPIT Cummins Infosystems Ltd. v. Commissioner of Central Excise, Pune-I [2014 (33) S.T.R. 105 (Tri.-Mumbai)] have considered the subjection to tax by another State for deciding on exclusion from tax levied by the laws of India. A note of caution must be recorded here: this acknowledgement of evidentiary value is not intended to be construed as a condition sufficient for exemption. As the Tribunal expressed in re Torrent Pharmaceuticals Ltd. :

> *'5.8 … … … Therefore, payment of VAT abroad will be an indicator to decide whether service is provided and consumed outside India or has been consumed/received in India. The agreements/documents available with the appellant have to be accepted for the purpose of determining place of providing and consumption of service in India... ' That it is to be taken as an indicator arises from the absence of cross border tax facilitation that extends availment of credit beyond the tax frontiers of the country. For these reasons, it is neither feasible nor necessary to delve into the activities of the overseas entity except where the tax liability of the assessee is sought to be mitigated on grounds of discharge of tax abroad. Correspondingly, the refund of any tax abroad is not necessarily detrimental to the assessee without a clear understanding of the tax laws under which refund was sanctioned. The principles and procedures of the tax statute in India should not be presumed to apply to the overseas tax law for crystallising tax liability in relation to activity that has been undertaken by the overseas entity.*

15. However, that does not foreclose the jurisdiction over or preclude necessity of examining an overseas activity from the point of view of the recipient of service. Section 66A of the Finance Act, 1994 has been specifically enacted to tax services received by an assessee as though the assessee has provided the service to itself. And in providing the framework for such 'tax shifting', various organizational forms may have to be disaggregated - accordingly, a branch in another country is deemed to be an establishment distinct for the purposes of ascertaining the receipt of service. Therefore, notwithstanding the identifiability of all the essential factors relevant to charge of tax, viz., supplier, customer, supply and place of provision, tax becomes leviable to the extent that receipt of service in India is established. The 'business auxiliary service' that the impugned order has found to have been rendered by the branch office of the appellant-assessee has to cross this hurdle.

16. Section 66A of Finance Act, 1994 taxes all taxable services received by a person who 'has his place of business, fixed establishment, permanent address or usual place of residence in India' from 'a person

who has established or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India' Revenue has alleged that Explanation 1 in sub-section (2) having designated branches as business establishment overseas and Section 66(2) mandating that - (2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section. tax liability devolves on the appellant-assessee.

17. Tax-shifting arises from the nature of the levy. It is now well settled that service tax is a destination-based indirect tax; its incidence is borne by the recipient of the service though mechanics of the collection are entrusted to the provider of the service. As a provider who is not within the tax jurisdiction of this country cannot be subject to such entrustment 'reverse charge' is resorted to. Furthermore, akin to the import of goods, equivalence requires that the tax be collected as though it was a domestic transaction with responsibility devolving on the taxable entity in the country.

18. A commercial organization establishes its subordinate formations to further the commercial activity that the principal body is engaged in. Commercial feasibility mandates that such branches exist to render services or to facilitate placement of goods. Therefore, to posit that the overseas branches render services does not require genius of a high order. At the same time, reasonable intelligence suffices to identify the recipient of the service and the nature of the service rendered.

19. The appellant-assessee has established branches for furthering its commercial objectives. The benefit of assigned activities of the branch will, undoubtedly, accrue to the appellant. There is no dispute that it is the appellant-assessee who enters into contractual agreements with overseas customers for supply of 'information technology services' which have 'off-shore' components rendered directly to the overseas entity by the appellant-assessee. 'On-site' activity is undertaken by deputing employees working at the site of the customer. These employees are, without doubt, on the rolls of the appellant assessee which, save for the specific and limited role of Section 66A(2), encompasses the branches within its corporate structure. As Section 66A(2) is limited to being a charging section in a specific context, it is not elastic enough to govern the corporate intercourse and commercial indivisibility of a headquarters and its branches. Therefore, any service rendered to the other contracting party by branch as a branch of the service provider would not be within the scope of Section 66A. Merely because there is a branch and that branch has, in some way, contributed to the activities of the appellant-assessee in discharging its contractual obligations, the definition of 'business auxiliary service' in Section 65(19) of Finance Act, 1994 may not apply. That is where the impugned order has erred in not reading Section 65(105) along with Section 66A and Rules framed for the purpose of charging tax on services received from abroad. Unless both are applied together, the jurisdiction to tax would be in question.

20. It would be worthwhile to look at the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 xxx xxx xxx xxx

21. From the above, it is apparent that mere identification of a service and the legal fiction of separate establishment is not sufficient to tax the activities of the branch. The very existence of a branch presupposes some kind of activity that benefits the primary establishment in India and the organizational structure inherently prescribes allocation of financial resources by the primary establishment to the branch to enable undertaking of the prescribed activity. The books of accounts and statutory filings do not distinguish one from the other. The application of Finance Act, 1994 to such a business structure within India does not provide for a deemed segregation. Such a legal fiction in relation to overseas activities should, therefore, have a reason.

22. Section 66A of Finance Act, 1994 does not prescribe promulgation of any Rule for its administration. The two sets of Rules extracted supra are framed under the general provision in Section 94 of Finance Act, 1994. Moreover, the Rules draw upon Section 93 of Finance Act, 1994 in a manner akin to Export of Service Rules, 2005. It is noticed that the Taxation of Services (Provided from Outside India and Received in India) Rules, 2005 also mirrors the Export of Service Rules, 2005. That, however, cannot be taken as intent to tax the inflow of service merely because of a corresponding exemption accorded to the outflow of services. Reference to Section 93 as an authority for prescribing the Rules would make it appear that the purpose of the said two sets Rules is to exclude from tax such services that do not fall within the three classifications predicating the import of service. The residuary provision in the Rules of 2006 make it clearly that such services have to be received by a recipient located in India for use in relation to business or commerce. The provisions of the successor Rules are no different.

23. The catena of judgments cited for both sides, viz., British Airways v. Commissioner of Central Excise (Adjn) [2014-TIOL-979 CESTAT-Del = 2014 (36) S.T.R. 598 (Tri.-Del.)], Torrent Pharmaceuticals Ltd. v. Commissioner of Service Tax [2015 (39) S.T.R. 97 (Tri.-Ahmd.)] and Infosys Ltd. v. Commissioner of Service Tax [2014-TIOL-409-CESTAT-Bang = 2015 (37) S.T.R. 862 (Tri. Bang.)] does support the proposition that a service is taxable under Section 66A of Finance Act, 1994 only when such service is rendered in India. The question that arises then in the context of the present dispute is whether the branch renders a service is rendered in India within the meaning of the above statutory provisions. A forced disaggregation merely for the purpose of tax when similar domestic structures are not taxed and when commercial soundness calls for establishment of branches would be clearly inequitable.

24. Hence, the legislative intent of this legal fiction may have to be ascertained. In doing so, the goals of the appellant as an exporter cannot be far from our mind.

25. Section 66A requires taxing of taxable services rendered by an overseas branch to its head office and the two sets of Rules limit tax demand only to the extent that these services are received in India in relation to business or commerce. A plain reading would make it

apparent that the services referred to must be for pursuit of business or commerce in India. The two sets of Rules provide for availment of Cenvat credit of the tax paid by the Indian entity on 'reverse charge basis.' As an exporter, the Indian entity is entitled to claim refund of taxes lying unutilized in Cenvat credit account. There is no dispute that the activities of the branch are in connection with the export activity of the appellant-assessee. That the legislature would prescribe the collection of a tax merely for the purpose of refunding it subsequently does not pass the test of reason. More so, as there is no inference of any monitorial aspect in undertaking such an exercise. An exporter who operates through branches is clearly not the target of the legal fiction of branches being distinct from head office. The proposition that the intent of Section 66A in taxing the activity rendered by an overseas branch to its headquarters in India is limited to the local commercial or business activities of the head office is thereby confirmed. Consequently, mere existence as a branch for the overall promotion of the objectives of the primary establishment in India which is essentially an exporter of services does not render the transfer of financial resources to the branch taxable under Section 66A.

26. The legal fiction of service rendered by overseas branch to its primary headquarters would appear to be intended to prevent escapement from tax by resort to branches specifically to take advantage of the principle of mutuality. When a service to be rendered in India by the primary establishment is deliberately routed through an overseas branch or when a service that would otherwise be contracted from an overseas entity is, instead, sourced through an overseas branch, this legal fiction will come into play. The transaction of the appellant-assessee and the branches which is under dispute before us being related to exports is unambiguously not intended to be taxed as it has nothing to do with business or commerce in India.

27. We do not need to examine whether the flow of funds from the head office to the branch is consideration or reimbursement as the test of services having been received in India fails. Nevertheless, we do so. A branch, by its very nature, cannot survive without resources assigned by the head office. The business of the appellant-assessee is such that credibility in the eyes of its overseas clients lies in the name and style of the appellant-assessee. It cannot be substituted by any other entity. The activity of the head office and branch are thus inextricably enmeshed. Its employees are the employees of the organization itself. There is no independent existence of the overseas branch as a business. The economic survival of the branch is entirely dependent on finances 19 provided by the head office. Its mortality is entirely contingent upon the will and pleasure of the head office. The transfer of funds - by gross outflow or by netted inflow - is, therefore, nothing but reimbursements and taxing of such reimbursement would amount to taxing of transfer of funds which is not contemplated by Finance Act, 1994 whether before 2012 or after.

28. In view of our findings above, the demand of tax in the impugned order is without authority of law and does not survive. The penalties imposed on the assessee-appellant and the principal officers are also set aside. All appeals are, consequently, allowed." 8.2 We also find that this Tribunal in the case of Steel Authority of India Limited Vs. Commissioner

of Service Tax, New Delhi in Final Order No.50397/ 2020 dated 26.01.2020 had held that charging section is Section 66 of the Finance Act, 1994 and not Section 66A ibid. The provision of Section 66A is only to determine whether the provision of service is in India or out of India. Therefore, it was held unless that charge of service tax is proved under Section 66 ibid, there cannot be levy of service tax only on the basis of Section 66A ibid. The relevant paragraphs of the said order is extracted and given below:

> *"20. It is clear from the aforesaid two decisions that section 66A (1) refers to 'service provider' and 'service recipient' as 'persons' which would mean different business persons. Section 66A(2) and its Explanation I only fix service tax liability on a recipient of service under a reverse charge mechanism by treating the permanent establishments in India and abroad as separate persons. This only clarifies whether a service is provided and consumed in India or abroad. If the 'permanent establishment' is treated as a 'service provider' to its own head office in India then it will amount to charging service tax for an activity provided to own self. Therefore, a comprehensive reading of Section 66A of the Act, would indicate that a permanent establishment situated abroad as a 'separate person', is only to determine whether the provision of service is in India or out of India. The contention of the Appellant, therefore, deserves to be accepted.*

21. The Commissioner (Appeals) also observed that section 66A is an independent charging section for levy of service tax on services provided or to be provided to a person located in India. This observation of the Commissioner (Appeals) is not correct. The charging section is section 66 of the Act and not section 66A, as was observed by the Allahabad High Court in Glyph International Ltd. v/s Union of India

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23. The confirmation of demand under the impugned order, therefore, cannot be sustained."

9.4 In the impugned order, learned Commissioner has also held that the appellants have undervalued the taxable value of services by not including the remuneration paid to the key personnel/employees and confirmed the demand of service tax thereon. In this regard, we find that the appellants were only required to identify, recruit, hire and supervise the senior hotel employees who may perform activities, in order to ensure that the standards and quality of Marriott standards are maintained. It is a fact on record that the Director of Finance and General Manager were in full time employment with the hotel owners and not that of the appellants. Even if these salaries are considered as includible in the value of consideration under the operating agreement, it would be in the nature of costs incurred as a pure agent. As per Rule 5(2) of the Service Tax (Determination of

Value) Rules, any expenses incurred as a pure agent is to be excluded from the value of service. Therefore, there is no merit for inclusion of the remuneration paid to the employees of hotel owners, in the value of taxable services provided by the appellants. Further, in terms of definition under Section 65B(44) of the Act of 1994, the term 'service' inter alia, shall not include *"(b) a provision of service by an employee to the employer in the course of or in relation to his employment*". Thus, such inclusion of remuneration paid to employees of hotel owners, in the value of services provided by the appellants to their foreign entity, on the ground of under valuation, does not stand the legal scrutiny and therefore it is liable to set aside.

9.5 On the aspect of confirmation of demands on the reimbursements made to overseas entities, we also find that the Tribunal in the case of *Haldiram Marketing Pvt. Ltd. Vs. Commissioner, CGST, GST Delhi East Commissionerate* – 2023 (71) G.S.T.L. 414 (Tri. Del.) have held that sharing of expenditure by associated enterprises cannot be held to be treated as service rendered by one to another. The relevant paragraph of the said order is extracted and given below:

> *"26. The goods of the associated enterprises are also being sold from same premises and certain portion of the rent is received from the associated enterprise. The associated enterprises is benefiting with respect to the space. This arrangement would, therefore, fall under the category of sharing of expense. In this connection reference can be made to the decision of the Supreme Court in Gujarat State Fertilizers & Chemicals Ltd. v. Commissioner of C. Ex. 2016 (45) S.T.R. 489 (S.C.)/[2016] 76 taxmann.com 357/59 GST 240 (S.C.). In M/s. Historic Resort Hotels (Pvt.) Ltd. v. CCE, Jaipur-II 2017 (9) TMI 1066-CESTAT New Delhi = 2018 (9) GSTL 422 (Tri.) a division of the Tribunal also held that sharing of expenditure cannot be treated as service rendered by one to another."*

9.6 We further find that in the Civil Appeal filed by the department against the aforesaid order of the Tribunal holding that the sharing of expenditure cannot be treated as services, the Hon'ble Supreme Court had dismissed the appeal filed by the department, by upholding the order of the Tribunal. The extract of the said judgement of the Hon'ble Supreme Court is given below:

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6147 OF 2023
(@DIARY NO.31248 OF 2023)

COMMISSIONER OF CGST, CST DELHI EAST **Appellant(s)**

VERSUS

M/S HALDIRAM MARKETING PVT. LTD. **Respondent(s)**

O R D E R

Delay in filing the civil appeal is condoned.

Having heard learned Additional Solicitor General for the appellant, we do not find any merit in the civil appeal.

Hence, the civil appeal is dismissed.

Pending application(s), if any, shall also stand disposed of.

. . . . . .,J
[B.V. NAGARATHNA]

. . . . . .,J
[UJJAL BHUYAN]

NEW DELHI,
SEPTEMBER 25, 2023

10. We also find that the Hon'ble Supreme Court in the case of Commissioner of Service Tax-III, Mumbai Vs. Vodafone India Limited - (2025) 33 Centax 152 (S.C.) have held the mere fact that the beneficiary of the service is located in India would not be a determinant factor for the levy of service tax under the Rules as the service is, in fact, provided to a recipient located outside India. The relevant paragraphs of the said judgement dated 06.05.2025 delivered by the Hon'ble Supreme Court is extracted and given below:

> ***"2.*** *The orders passed by CESTAT in all these appeals have been in favour of the respondents-assessees. The CESTAT has held that the services provided by the respondents-assessees have been in fact exported out of India. Consequently, service tax is not payable by the assessees on such services so exported, vide Rule 4 of the Export of Service Rules, 2005 ("Rules", for the sake of brevity). It has also held*

that the assessees had rightly availed payment of CENVAT credit on inputs and input services used for providing such services vide Rule 5 of the Rules.

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4. *The policy governing taxability of export of service was initiated in the year 1999 and in the year 2003, it was reiterated. Since service tax is a destination-based consumption tax, services that were exported out of India were not meant to be taxed. The benchmark in the year 1999 was, whether payment was received in convertible foreign exchange. Ultimately, in the year 2010, the benchmark again came to be fixed as receipt of payment in convertible foreign exchange.*

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8. *In response to this submission, learned Senior counsel and learned counsel for the respondents submitted that service tax is a contract-based levy and therefore, it is the contract which determines the relationship between a service provider and a service recipient. Even if certain beneficiaries may be located in India, the service provider has no contractual relationship with such beneficiaries. There is no privity of contract between the beneficiary and the service provider. Therefore, the mere fact that the beneficiary of the service is located in India would not be a determinant factor for the levy of service tax under the Rules as the service is, in fact, provided to a recipient located outside India.*

8.1 *It was further contended on behalf of the respondent assessees that various preparatory activities, such as sourcing vendors, identifying customers etc. may occur in India but such activities alone would not mean that the service has not been exported to a party located overseas. Even if the customer has requested for some service within India, what is of significance is to whom the service is provided and where the recipient of the service is located and secondly, from whom the payment in convertible foreign exchange is received and whether, the recipient is located outside India.*

8.2 *Learned senior counsel and learned counsel for the respondents contended that the reasoning in Paul Merchant is correct and CESTAT has rightly found that the Revenue has conflated the two categories and is subjecting category (III) services to the rigors of the performance-based services under category (II) of the Rules. It was therefore their contention that the present appeals may simply be dismissed.*

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12 *. We have analyzed the nature of the activity of the respondent-assessee in light of the parameters delineated in the proviso to sub-rule (3) of Rule 3 and as to, whether, the CESTAT was right in granting benefit of the exclusion from taxable services to the activities of the respondent assessee as being an activity of export of service. We find that the CESTAT in all these cases has rightly analyzed the activity and granted the relief."*

11. In view of the foregoing discussions and on the basis of the order passed by the Co-ordinate Benches of the Tribunal and judgements delivered by the Hon'ble High Court of Bombay and Hon'ble Supreme Court as above, the impugned order dated 12.11.2015 passed by the Commissioner, does not stand the legal scrutiny. Therefore, the adjudged demands along with interest and imposition of penalty on the appellants, in impugned order is not legally sustainable and thus is liable to be set aside.

12. In the result, the impugned order dated 12.11.2015 is set aside and the appeals filed by the appellants are allowed in their favour.

(Order pronounced in open court on 03.12.2025)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(M.M. PARTHIBAN)
MEMBER (TECHNICAL)

Sinha