F.No.196/06/ST/13-RA
F.No.196/17-20/ST/13-RA

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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuff Parade,
Mumbai- 400 005

F.No.196/06/ST/13-RA \ 917
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Date of Issue: 24/01/2018

ORDER NO. 01-05 /2018-ST /ASRA/Mumbai DATED 23.01.2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicants :

Sl.No.	Applicant	Revision Application No.
1.	M/s Vodafone West Limited (formerly known as Vodafone Essar Gujarat Limited), Ahmedabad	196/06/ST/13-RA
2.	M/s Vodafone Cellular Limited(formerly known as Vodafone Essar Cellular Limited) Coimbatore	196/17-20/ST/13-RA

Respondent : 1. The Commissioner of GST & CX, Ahmedabad South Commissionerate, Ahmedabad,
2. The Commissioner of GST & CX, Coimbatore Commissionerate. Coimbatore, Tamilnadu.

Subject : Revision Applications filed, under section 35EE of the Central Excise ACT, 1944 (made applicable to Service Tax vide Section 83 of the Finance Act, 1994) against the Order in Appeal No.199/2012(STC)/AK/Commr(A)/Ahd dated 03.09.2012 passed by Commissioner (Appeal-IV), Central Excise, Ahmedabad and Orders-in-Appeal No. CMB-CEX-000-APP-123 to CMB-CEX-000-APP-126-13 dated 27.03.2013 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore, respectively.

ORDER

These five Revision Applications have been filed by 2 Applicants namely M/s Vodafone West Limited (formerly known as Vodafone Essar Gujarat Limited), Ahmedabad and M/s Vodafone Cellular Limited (formerly known as Vodafone Essar Cellular Limited) Coimbatore against Orders-in-Appeal No. 199/2012(STC)/AK/ COMMR(A)/AHD dated 03.09.2012 and CMB-CEX-000-APP-123 to CMB-CEX-000-APP-126-13 dated 27.03.2013 respectively whereby Commissioner (Appeals) upheld the Order in Original passed by original jurisdictional authority and rejected the appeals filed by the Applicants .

2. The Applicants are providing telecom services, under licence from the Department of Telecommunication, Government of India, to its customers in India and the Applicants also provide services to the Foreign Telecom Operators (FTO) i.e. the telecom services provisional located and operating from outside India. The Applicants provide services to the FTO by providing telecom services to the subscribers of the FTO visiting or roaming in India, commonly called as International inbound roaming (IIR) services. For providing International inbound roaming (IIR) services the Applicants had entered into agreements with various FTOs (its Customers) having their permanent establishment and entire business operations located outside India.

3. It is the contention of the Applicants that International inbound roaming (IIR) services provided by them to the subscribers of the FTO during their visit to India qualify as export of services under Rule 3(1)(iii) of Export of Services Rules, 2005. The Applicant therefore claimed rebate under Rule 5 of Export of Services Rule, 2005 read with Notification No.11/2005-ST dated 19.04.2005. The Applicants filed periodical rebate claims of service tax paid on the IIR services provided by them to the subscribers of the FTO during their visit to India claiming the same to be export.

4. The rebate claim of Rs. 75,01,161/- for the period October 2010 to March 2011 was filed by M/s Vodafone West Limited (formerly known as Vodafone Essar Gujarat Limited), Ahmedabad on 29.09.2011 under Rule 5 of Export of Services Rule, 2005 read with Notification No.11/2005-ST dated 19.04.2005 before the Deputy Commissioner Service tax, Division I, Ahmedabad who vide Order in Original No. SD-01/Rebate/24/DC/11-12 dated 27.12.2011 rejected the same.

5. Being aggrieved by the aforesaid Order in Original No. SD-01/Rebate/24/DC/11-12 dated 27.12.2011 the Applicant preferred an appeal before Commissioner (Appeal-IV), Central Excise, Ahmedabad, who vide Order in Appeal No. 199/2012 (STC)/AK/Commr(A)/Ahd dated 03.09.2012 rejected the appeal of the Applicant and upheld the impugned Order in Original on the following grounds that :

- service of International inbound roaming (IIR) was provided by the Applicant to international inbound roamers during their visit in India and thereby the service is delivered and consumed in India hence, the provision of the service was not abroad and the roamer was beneficiary of such service;

- since the services were consumed exclusively within India, Circular No. 111/2/2009-ST dated 24.02.2009 does not apply the Applicant's case;

- Notification number 36/2007 – ST dated 15.06.2007 read with Circular No. 90/01/2007-ST dated 03.01.2007 specifically provide that Service tax is leviable on such service from 15.01.2007;

- in presence of specific taxability of the subject services as provided vide the above Circular and Notification, the submission that international inbound roamer is subscriber of the home location network abroad and not of the Applicant is not sustainable;

- the contention of the Applicant that above Circular dated 03.01.2007 has been withdrawn by Circular No.96/7/2007-ST dated 23.08.2007 is incorrect as the latter is totally silent about taxability of international inbound roaming services, thus, Notification 36/2007-ST dated 15.01.2007 also equally applies;

- the Applicant has not satisfied all the conditions required for qualification of subject services as export as explained vide Circular 141/10/2011-TRU dated 13 May 2011;

- there is no authority to levy service tax on export of services when such tax is recovered by the service provider as in the applicant's case. Hence the Applicant is liable to pay the tax collected from the client to the Government under Section 73 A of the Finance Act. 1994 ;

- the Order In Original issued by Deputy Commissioner. Division-II. Service Tax Mumbai sanctioning rebate claim in similar matter in case of group entity of the Applicant (operating in the Mumbai circle) cannot be relied upon since the adjudicating authority has not discussed place of consumption of the service and the various citations relied upon by Applicant are not squarely applicable to the present case; and

- the services were consumed by international inbound roamer and the financial considerations in convertible foreign exchange were received from the Foreign Telecom Operators. Such services can not be treated export of service and it cannot be concluded that the taxable service are received by Foreign Telecom Operator

6. Being aggrieved by the said Order in Appeal No. 199/2012 (STC)/AK/Commr(A)/Ahd dated 03.09.2012 the Applicant has preferred the present Revision Application (RA No. 196/06/ST/13-RA) under Section 35 EE of Central Excise Act, 1944 made applicable to Service Tax vide Section 83 of the Finance Act, 1994(as amended by the Finance Act, 2012) before

Central Government on the various grounds as enumerated in the application.

7. Similarly, M/s Vodafone Cellular Limited (formerly known as Vodafone Essar Cellular Limited), Coimbatore, filed refund claims amounting to (i) Rs.3,88,29,693/- for the period June 2006 to March 2010, (ii) Rs.67,08,656/- for the period April 2010 to March 2011, (iii) Rs.4,90,041/- for the period April 2011 to June 2011 and (iv) for Rs.4,72,140/- for the period October 2011 to March 2012 under Rule 5 of Export of Services Rule, 2005 read with Notification No.11/2005-ST dated 19.04.2005 before the Assistant / Deputy Commissioner of Central Excise and Service tax, Coimbatore III Division. However, all these rebate claims filed by the Applicant were rejected by the Assistant / Deputy Commissioner of Central Excise and Service tax, Coimbatore III Division vide Order in Original Sl. No. R-19/2011 (AC) dated 28.10.2011, R_/2012 (AC) dated 11.05.2012, R 17/2012-(DC) dated 30.11.2012 and 18/2012-(DC) dated 30.11.2012 mainly on the grounds that International inbound roaming services, whether inbound or outbound are taxable vide the definition of telecommunication service as provided under Section 65(109a) of the Finance Act and by virtue of the said interpretation, roaming service is taxable in all cases, irrespective of the location of the recipient or beneficiary of the service; due to above the Applicant has not fulfilled the provisions of Rule 3(1) and Rule 5 of the Export Rules and hence is not an export of service; that as per circular No. 90/1/2007-ST dated 03.01.2007 the services provided by the Applicant are taxable; that Circular No. 111/5/2009-ST dated 24.02.2009 does not apply the Applicant's case since the roaming services are clearly specified as taxable vide circular dated 03.01.2007.

8. Being aggrieved by the aforesaid Orders in Original the Applicant preferred an appeal before Commissioner of Customs, Central Excise & Service Tax (Appeals) Coimbatore, who vide Order in Appeal No. CMB-CEX-000-APP-123 to CMB-CEX-000-APP-126-13 dated 27.03.2013 rejected the

appeal of the Applicant and upheld the impugned Orders in Original mainly on the grounds that :

- though the recipient of the subject services is the FTO located outside India, the services have been utilized by the subscribers of the FTOs within India and thus the Applicant has not complied with the conditions of the Export Rules requiring the services to be used outside India pertaining to services rendered up to February;
- the case laws cited by the Applicant cannot be relied upon since the precedents do not deal with the issue being dealt with in toto;
- benefit of the services in terms of Circular No 111/05/2009-ST dated 24.02.2009 accrues to the subscriber of the FTO and not to the FTO
- the Applicant has adjusted foreign currency receivables against foreign currency payables and thereby received only net foreign currency and therefore, the Applicant has not satisfied the condition stipulated under the Export Rules for receipt of consideration in foreign currency.

9. Being aggrieved by the said Order in Appeal No. CMB-CEX-000-APP-123 to CMB-CEX-000-APP-126-13 dated 27.03.2013 the Applicant has preferred the present Revision Application (RA No. 196/17-20/ST/13-RA) under Section 35 EE of Central Excise Act, 1944 made applicable to Service Tax vide Section 83 of the Finance Act, 1994(as amended by the Finance Act, 2012) before Central Government on the various grounds as enumerated in the application.

10. The issue involved in both set of these Revision Applications being common, they are taken up together and are disposed of vide this common order. Before proceedings further, Government observes from the copy of the Certificate of Incorporation appended to Revision Application No. 196/17-20/ST/13-RA that the name of the Applicant, Vodafone Essar Cellular Limited has been changed to Vodafone Cellular Ltd. w.e.f. 16.11.2011.

11. A personal hearing in both these cases was held on 28.12.2017 and Shri Prasad Paranjape and Shri Arun Jain, Advocates, duly authorized by the Applicants appeared for hearing and reiterated the submissions made in respective Revision Applications and also filed further written submissions dated 28.12.2017 and a compendium of case laws. In view of the same the advocates pleaded that the instant Revision Applications be allowed and the Order of the Commissioner (Appeals) be set aside..

12. Government has carefully gone through the relevant case records available in case files, perused the impugned Orders-in-Original and Orders-in-Appeal and considered oral & written submissions made by the Applicants in their Revision Applications as well as during the personal hearing.

13. In their further submissions dated 28.12.2017 the Applicants stated as under :-

- *We write to you on behalf of our clients, Vodafone Celluar Limited (Applicant No.1) and Vodafone Essar Gujarat Limited (Applicant No.2), collectively referred as the Applicants have filed two separate Revision Applications against two separate Orders-in-Appeal mentioned above. Since the issue involved is common in both the Applications, we are filing these common Written Submissions, which may be considered while adjudicating both the Applications filed by Applicant No.1 and Applicant No.2.*

- *Our clients reiterate the submissions made in their respective Applications, and wish to make further additional submissions which may kindly be taken on record and considered.*

- *Our clients, viz. Applicant No.1 and Applicant No.2 had filed rebate claims, seeking of refund of service tax paid on exported services, under Rule 5 of Export of Services Rules, 2005 read with Notification No.11/2005-ST dated 19 April 2005. It is the contention of our clients*

that the Inbound International Roaming (IIR) services provided by them to the Foreign Telecom Operators (FTO) by providing connectivity to their subscribers while travelling in India qualify as export of service under Export of Services Rules, 2005 and hence they are entitled for rebate of service tax on such exported services.

- *The said claims were rejected on various counts by the Original Authorities.*

- *However, the Learned First Appellate Authority rejected the claim finally on the following grounds:*

  (a) IIR services provided by our clients do not qualify as export;

  (b) Due to netting of consideration receivable by our clients from the FTO vis-a-vis the consideration payable by our clients to the FTO, our clients have failed to receive the foreign exchange and therefore they have not fulfilled the condition of export and accordingly not entitled for the rebate claim.

  (c) The claims are time barred

- *Without prejudice to submissions already made in the Applications, with respect to the first ground of denial, we wish to place on record various judgments of the Hon'ble CESTAT by which in the case of our clients or their group companies on the very same issue, on merits, the Hon'ble CESTAT has held that IIR services do qualify as export and are entitled for rebate under Notification No.11 /2005-ST dated 19 April 2005. It is also worthwhile to note that when one of the orders of the Hon'ble CESTAT were carried in appeal before the Hon'ble Supreme Court, the Hon'ble Supreme Court by its order dated 02.12.2014 has specifically refused to grant stay. A copy of the order of the Hon'ble CESTAT along with copy of the order of the Hon'ble Supreme Court, are placed at pages 13-15 of the compilation being handed over during the hearing.*

- *We refer to following judgments which have held that IIR services qualify as export and place copies of the same in the compilation:*

  (a) Vodafone Essar Cellular Ltd. vs. Commissioner of C.Ex.Pune - III reported in 2013 (31) STR 738 (Tri Mumbai)

  (b) Vodafone Cellular Ltd. Vs. Commissioner of C.Ex.Pune III reported in 2014 (34) STR 890 (Tri Mumbai)

- *Since the Hon'ble CESTAT has already decided that IIR services qualify as export, we humbly submit that the ratio of the said judgment may please be applied in the present case and rejection of rebate claims on this ground may kindly be set aside. At this juncture we wish to draw your attention to the judgment of the Hon'ble Supreme Court in the case of Union of India vs. Kamlakshi Finance Corporation reported at 1991 (55) ELT 433 (SC), where the Hon'ble Supreme Court has held that the order needs to be followed unless the same has been suspended by a competent court. In the present case when the Hon'ble Supreme Court has explicitly denied stay, the Revenue is bound to follow the ratio laid down by the Hon'ble CESTAT.*

- *It is important to note that on an application the Hon'ble Tribunal by its Order dated 30.10.2014 reported at 2015 (38) STR 482, was pleased to direct the Revenue to process the rebate claims at the earliest.*

- *The Appellants therein have subsequently received the rebate claims along with applicable interest thereby indicating that the service tax department has implemented the Orders of the Hon'ble CESTAT, due refusal to grant stay by the Hon'ble Supreme Court.*

- *With respect to netting of consideration, we submit that the Hon'ble CESTAT has held that even in the case of netting off, it will be considered that the gross amount is deemed to have been received, by following the judgment of the Hon'ble Supreme Court in the case of J B*

Boda 86 Co. Pvt. Ltd. Reported in 1997 (223) ITR 271 (SC). The judgments being relied by us allowing netting of are as under:

(a) National Engineering Industries Ltd. vs. Comm. Of C.Ex Jaipur reported in 2016 (42) STR 537 (Tri Del)

(b) Jubilant Oil and Gas Pvt. Ltd. vs. Commissioner of Central Excise , Noida reported in 2017 TIOL 2343 CESTAT -ALL

(c) Suprasesh General Insurance Services 86 Brokers Pvt. Ltd. vs. The Commissioner of Service Tax and Anr. Reported in 2015 TIOL 225 - HC-MAD-ST.

- *In view of the above ratio, rejection of the rebate claims on the ground that our clients have netted off foreign exchange receipts is not tenable and deserves to be set aside.*

- *Without prejudice to the above and in any case, the Learned Lower Authorities ought to have allowed the rebate applications at least to the extent of netted off receipt of the foreign exchange.*

- *With respect to time barring, we fairly submit that the Hon'ble CESTAT in its judgment dated 18.03.2013 - 2014 (34) STR 890 in para 5.3 has held that the rebate claims filed after one year from the date of payment of service tax will be barred by limitation. While the assesse has challenged the said judgement by filing an appeal, in the absence of any stay, the said order of the Hon'ble CESTAT will prevail. However, we reserve the right to contest the said issue before the appropriate forum, as we believe that in the absence of specific clause in Notification No.11/2005-ST, applying any limitation, the period of limitation of Section 11B of the Central Excise Act, 1944 cannot be read into it.*

- *Lastly, we submit that the present rebate claims being filed on account of export of services, applying the provisions of section 11B of the*

Central Excise Act, 1944 made applicable to Finance Act, 1944 and read with the Hon'ble CESTAT's judgment dated 18.12.2013 (Para 5.2), principles of unjust enrichment will not be applicable to the present rebate claims.

- *In view of the submissions made in the respective Applications as well as made hereinabove and during the present hearing, we request that the rebate claims filed by our clients may kindly be allowed and ordered to be sanctioned along with applicable interest.*

Vide its further letter/submissions dated 28.12.2017, the applicants stated that they relied upon the judgement of Hon'ble CESTAT which have held that International Inbound Roaming (IIR) Services will qualify as export, these judgements were passed in identical facts and circumstances and with respect to other telecom circles/group entities belonging to the Applicants. These judgements held IIR service to be export following the ratio of Hon'ble CESTAT judgement in the case of Paul Merchants Ltd Vs. Commissioner-2013(29)STR 257. The Applicants also stated that they refer to and rely upon the judgement dated 28.08.2017 of the jurisdictional High Court in Central Excise Appeal No.40/2016 which has expressly proved the ratio in the case of Paul Merchants (suprs) and granted benefit to the services impugned therein. They , further relied on two more case laws Principal Commissioner of Bombay Vs M/s Qindia Investment Advisory Pvt. Ltd -2017-TIOL-2171-HC-Mum-ST and Verizon Communication India Pvt. Ltd. Vs Assistant Commissioner Service Tax, Delhi-III (WP No. 11569/2016 Order dated 12.09.2017).

14. Government observes that in all, there are 15 rebate claims filed by the both the Applicants as detailed below:

Summary of Rebate Claims

Sl. No.	OIO No./date	Period Involved	Amount in Rs.	Date of the application	Date of receipt
Vodafone Essar Cellular Ltd., Coimbatore (name changed to Vodafone Cellular Ltd.)					
1	Sl.No.R-19/2011 (AC) dated 28.10.2011	06/06 to 03/07	61,15,739.00	27-11-2010	29-11-2010
2		04/07 to 03/08	1,12,83,731.00	27-11-2010	29-11-2010
3		04/08 to 03/09	86,81,403.00	27-11-2010	29-11-2010
4		Apr-09	7,37,134.00	28-06-2010	30-06-2010
5		May-09	13,43,102.00	31-05-2010	01-06-2010
6		Jun-09	7,81,274.00	28-06-2010	30-06-2010
7		07/09 to 09/09	28,19,625.00	28-06-2010	30-06-2010
8		10/09 to 03/10	70,67,665.00	29-07-2010	29-07-2010
9	Sl.No.R/2012 (AC) dated 11.05.2012	04/10 to 06/10	24,14,084.00	28-02-2011	14-03-2011
10		07/10 to 09/10	10,72,515.00	28-02-2011	14-03-2011
11		10/10 to 12/10	13,27,006.00	28-09-2011	30-09-2011
12		01/11 to 03/11	19,05,051.00	28-09-2011	30-09-2011
13	Sl.No.(R)17/2012(DC) dated 30.22.2012	04/11 to 06/11	4,90,041.00	19-03-2012	21-03-2012
14	Sl.No.(R) 18/2012-(DC) dated 30.11.2012	10/11 to 03/12	4,72,140.00	28-06-2012	28-06-2012
	TOTAL		**4,65,10,510.00**		
Vodafone West Ltd.					
15	SD-01/Rebate /24-Dc/11-12 dated 27.12.2011	10/10 to 03/11	**75,01,161.00**	31-10-2011	31-10-2011
		GRAND TOTAL	**5,40,11,671.00**		

15. Government observes that the rules governing export of services during the disputed period namely June 2006 to December 2012 have undergone several changes. Telecom Services, which form the subject matter of the present case, fall under Rule 3(1)(iii) of Export of Services Rules, 2005. Rule 3 (2) of Export of Services Rules, 2005 provided for the following conditions to qualify as export during the period July 2006 to February 2010.

(i) The service receiver should be located outside India,
(ii) Service should be delivered outside India,
(iii) Service should be provided from and used outside India,
(iv) Consideration should be received in convertible foreign currency.

However, from March 2010 onwards the only condition for qualification of any taxable service as export is "payment of such service is received by the service provider in convertible foreign exchange".

16. Government observes that one of the grounds for rejection of rebate claims of the applicants by the lower authorities has been that the roaming services are utilized only in India and not outside and hence the condition provided for services under Export of Services Rules, 2005, that the service provided from India should be used outside India, to qualify as export of service has not been fulfilled. In this regard Government observes that this issue has been duly deliberated by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) West Zonal Bench Mumbai in its Orders in the following cases involving Applicants' group companies .

- Vodafone Essar Circular Ltd. Vs Commissioner of C.Ex.Pune-III [2013(31)S.T.R.738(Tri.-Mumbai)],
- Vodafone Cellular Ltd. Vs Commissioner of C.Ex.Pune-III [2014(34)S.T.R.890 (Tri.-Mumbai)],
- Commissioner of Service Tax, Mumbai-I Vs Vodafone India Ltd. [2015(37)S.T.R.286 (Tri.-Mumbai)].

While holding that International Inbound Roaming (IIR) Services provided by the applicants in the case Vodafone Essar Circular Ltd. Vs Commissioner of C.Ex.Pune-III [2013(31)S.T.R.738(Tri.-Mumbai)], qualify as export of services, CESTAT observed as under :-

5.2 *Export of Service Rules, 2005 defines export in respect of taxable services. For this purpose, the services have been categorized into 3. Category 1 deals with specified services provided in relation to an immovable property situated in India. Category II deals with specified taxable services where such taxable service is partly performed outside India and states that when it is partly performed outside India, it shall be treated as performed outside India. Category III deals with services not covered under category I and II. The telecom services fall under category III. As far as category III services are concerned, the transaction shall be construed as export when provided in relation to business or commerce to a recipient located outside India and when provided otherwise to a recipient located outside India at the time of provision of such service. The additional conditions required to be satisfied are such services as are provided from India and used outside India; and consideration for the service rendered is received in convertible foreign exchange. As observed earlier, the service is rendered to a foreign telecom service provider who is located outside India and therefore, the transaction constitutes export and we hold accordingly.*

5.3 *The Board's clarification vide Circular No. 111/5/2009-S.T., dated 24-2-2009 makes this position very clear. Para 3 of the Circular which is relevant is reproduced verbatim below :-*

"3. It is an accepted legal principle that the law has to be read harmoniously so as to avoid contradictions within a legislation. Keeping this principle in view, the meaning of the term 'used outside India' has to be understood in the context of the characteristics of a particular category of service as mentioned in sub-rule (1) of rule 3. For example, under Architect

*service (a category I service [Rule 3(1)(i)]), even if an Indian architect prepares a design sitting in India for a property located in U.K. and hands it over to the owner of such property having his business and residence in India, it would have to be presumed that service has been used outside India. Similarly, if an Indian event manager (a category II service [Rule 3(1)(ii)]) arranges a seminar for an Indian company in U.K., the service has to be treated have been used outside India because the place of performance is U.K. even though the benefit of such a seminar may flow back to the employee serving the company in India. For the services that fall under Category III [Rule 3(1)(iii)], the relevant factor is the location of the service provider 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 accrues outside India. Thus for category III services, 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 .....**

Thus what emerges from the above circular is that when the appellant rendered the telecom service in the context of international roaming, the benefit accrued to the foreign telecom service provider who is located outside India since the foreign telecom service provider could bill his subscriber for the services rendered. This is the practice followed in India also. When an Indian subscriber to, say, MTNL/BSNL goes abroad and uses the roaming facility, it is the MTNL/BSNL who charges the subscriber for the telecom services including service tax, even though the service is rendered abroad by the foreign telecom service provider as per the agreement with MTNL/BSNL.

5.4 *The Paul Merchant's case (supra) relied upon by the appellant dealt with an identical case. The question before the Tribunal in that case was when Agents/Sub-agents in India of Western Union Financial Services,*

Panama, makes payments to an Indian beneficiary on behalf of the customer of Western Union in foreign country, whether the services rendered by the Indian Agents/Sub-agents should be treated as export or not under Export of Service Rules, 2005. By a majority decision, it was held that "the service being provided by the agents and sub-agents is delivery of money to the intended beneficiaries of the customers of Western Union abroad and this service is 'business auxiliary service', being provided to Western Union. It is the Western Union who is the recipient and consumer of this service provided by their Agents and sub-agents, not the persons receiving money in India." The ratio of the said decision applies squarely to the facts of the present case before us. Once the ratio is applied, it can be easily seen that the service recipient is the foreign telecom service provider and not the subscriber of the foreign telecom service provider who is roaming in India.

Government also observes that in other two cases relied upon by the applicants, viz. Vodafone Cellular Ltd. Vs Commissioner of C.Ex.Pune-III [2014(34) S.T.R.890 (Tri.-Mumbai)], and Commissioner of Service Tax, Mumbai-I Vs Vodafone India Ltd. [2015(37)S.T.R.286 (Tri.-Mumbai)], Tribunal , Mumbai has upheld its own stand and the ratio laid down in the case of Vodafone Essar Circular Ltd. Vs Commissioner of C.Ex.Pune-III [2013(31)S.T.R.738(Tri.-Mumbai)] discussed above.

15. On perusal of the aforesaid Orders of the CESTAT, Government observes that while holding that International Inbound Roaming (IIR) Services qualify as export, the CESTAT has followed the ratio of Principal Bench, Tribunal, New Delhi's Order in Paul Merchant's case reported in 2013 (29) S.T.R. 257 (Tri. - Del.). The Applicant in its submissions has relied on the judgement dated 28.08.2017 of the Hon'ble High Court of Bombay in the case of Commissioner of Service Tax v/s. Reliance Money Express Ltd., (Central Excise Appeal No. 40 of 2016) where the Hon'ble High Court while

holding that the money transfer services provided by the respondent to their customers and recipient in India, the benefit of which had accrued outside India to Western Union Finance Services Inc. USA would fall under the category of "Export of Service", observed the reliance placed by the Appellate Tribunal on the case of Paul Merchants Limited (supra) as "not misconceived". Hon'ble Delhi High Court in the case of Verizon Communication India Pvt. Ltd. v/s. Asst. Commr., Service Tax, Delhi-III & others (Order dated 12.12.2017 in W.P.(C) No. 11569/2016) has endorsed the views expressed in the Paul Merchants case (supra) as well as in the CESTAT order in Applicant's group company's case where the CESTAT had held that the International Inbound Roaming (IIR) services qualify as export.

16. Government further observes that other ground for rejection of rebate claims of the applicants by the lower authorities has been that as per circular No. 90/1/2007-ST dated 03.01.2007 the services provided by the applicant are taxable; that Circular No. 111/5/2009-ST dated 24.02.2009 does not apply the Applicant's case since the roaming services are clearly specified as taxable vide circular dated 03.01.2007. In this connection Government observes that the issue regarding applicability of Circular No.90/1/2007 dated 03.01.2007 has also been deliberated in Hon'ble Delhi High Court in the case of Verizon Communication India Pvt. Ltd. v/s. Asst. Commr., Service Tax, Delhi-III & others, supra. The relevant paras of the said Order are reproduced below :

> *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 2007 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 ail 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."

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.*

Hon'ble High Court New Delhi at para 47 of its Order also observed as under:-

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".*

By applying the ratio of above judgement, Government holds that the Circular No.90/1/2007 ST dated 03.01.2007 which was withdrawn vide Circular No.96/7/2007-ST dated 23.08.2007 cannot be applied to the Applicants' case and reliance placed by the Applicants' on the Circular No. 111/5/2009-ST dated 24.02.2009 to show the services provided by them qualify as export, is precise.

17. Government also notes that the Appellate Tribunal in its Final Order Nos. A/1381-1385/2014-WZB/C-I(CSTB), dated 21-8-2014, reported in 2015 (37) S.T.R. 286 (Tri. - Mumbai) (Commissioner v. Vodafone India Limited) (supra) had held that the telecom services provided to the customers of the foreign telecom service provider as International inbound roamers, while they are in India, have been held to be the services provided to the foreign telecom service providers for which consideration has been received in convertible foreign exchange and hence, such services are covered under export of services in terms of the Export of Services Rules, 2005 and the assessee was entitled to the refund/rebate of Service Tax paid in respect of such transactions. The then Commissioner of Service Tax-III, Mumbai has filed Civil Appeal vide Civil Appeal Diary No. 38259 of 2014 against the

(अजित कुमार)
आयुक्त (रिविजन एप्लीकेशन) एवं पदेन अपर सचिव, भारत सरकार
Pr. Commr. (RA) & ex-Officio Additional Secretary to the Govt of India
Mumbai
मुंबई

CESTAT Final Order Nos. A/1381-1385/2014-WZB/C-I(CSTB), dated 21-8-2014 which has been admitted by the Hon'ble Supreme Court on 2-12-2014 after condoning the delay. While admitting the appeal, the Supreme Court passed the following order :

"Delay condoned.
Admit.
Tag with S.L.P. (C) No. 29712 of 2014.
No stay.

[Commissioner v. Vodafone India Limited - 2015 (38) S.T.R. J431 (S.C.)]

18. In view of the above precedent judgements, specifically of the jurisdictional Hon'ble Bombay High Court and the CESTAT in Paul Merchants supra, are squarely applicable to the present case and as such no other stand is required to be taken in the present applications having identical facts and circumstances. Moreover, there is no stay granted by the Apex Court against CESTAT Final Order Nos. A/1381-1385/2014-WZB/C-I(CSTB), dated 21-8-2014 , hence Government is of the considered opinion that the ratio of the CESTAT decision is applicable to the present applications.

19. Accordingly, Government holds that the International Inbound Roaming IIR services provided by the Applicants qualify as export and accordingly they are entitled to rebate as claimed by them.

20. Government also observes that Rule 3(2)(a) of Export of Services Rules, 2005 has been omitted with effect from 27-2-2010. The words "such service is provided from India and used outside India; and" were omitted with effect from 27-2-2010 by Notification No. 6/2010ST, dated 27-2-2010. Thereafter, the only condition remained to be satisfied and for the purpose of being qualified or termed as export of taxable service is that any taxable service specified in sub-rule (1) of Rule 3 shall be treated as such when the payment

for such service is received by the service provider in convertible foreign exchange. Therefore, notwithstanding the aforesaid submissions, Government is of the opinion that the rebate claim for the period from 27.02.2010 onwards shall be allowed even on this count.

21. Another ground on which the Commissioner (Appeals) has rejected rebate claims of the Applicants has been that the Applicant has adjusted foreign currency receivables against foreign currency payables and thereby, received only net foreign currency and therefore, the Applicant has not satisfied the condition stipulated under the Export Rules for receipt of consideration in foreign currency. The Applicants have contended that when they are entitled to receive foreign exchange into India and also liable to remit foreign exchange outside India, when they receive only the net amount, the balance amount, though not received physically but netted off against their foreign exchange liability, is considered as constructive receipt of foreign exchange. Hon'ble Supreme Court in case of J.B.Boda & Co. Pvt. Ltd. v/s. Central Board of Direct Taxes reported in (1997) 1 SCC 719 considered the issue as to whether the retention of the commission of brokerage by the appellant - J.B.Boda , the insurance broker would amount to receipt of convertible foreign exchange as required under Section 80-O of the Income Tax Act. The Supreme Court placing reliance on the circular No.731 dated 20.12.1995 held that the premium that is payable to the re-insurer abroad is transferred through the medium of Reserve Bank of India in foreign exchange terms and the retention of the fee due to the appellant J.B.Boda is in dollars for the services rendered. The Supreme Court held that the retention of the amount by J.B.Boda would be a receipt of income in convertible foreign exchange to avoid unnecessary two-way traffic, i.e., to avoid formal remittance to the foreign insurers first and thereafter to receive the commission from the foreign reinsurer, as it may be an empty formality and a meaningless ritual. The ratio of the judgement of the Hon'ble

Supreme Court in J.B.Boda supra has also been followed by the High Court /CESTAT in following cases relied on by the Applicants.

- National Engineering Industries Ltd. Vs CCE 2016(42)STR 537 (Tri.Del)
- Jubilant Oil and Gas Pvt Ltd Vs CCE 2017-TIOL-2343-CESTAT-ALL
- Suprasesh General Insurance Services & Brokers Pvt Ltd Vs CCE 2015-TIOL-225-HC-MAD-ST

22. In view of the ratio settled by the Hon'ble Supreme Court and followed by High Court / CESTAT, the Government holds that denial of rebate claims on account of netting off of foreign exchange payable by the Applicants against the foreign exchange receivable by them on this count is not legally sustainable. Government also finds that in case of export of service, the principles of unjust enrichment would not be applicable as specifically provided in Section 11B of the Central Excise Act, 1944, read with Section 83 of the Finance Act, 1994. This factum is further supported by the CESTAT Final Order Nos. A/31-39/2014-WZB/C-I(CSTB), dated 18-12-2013 [2014 (34) S.T.R. 890 (Tri. - Mumbai)] in the Applicants own group company.

23. Government further observes that issue of limitation period / time bar has been discussed by the Tribunal in its Order 18-12-2013 [2014 (34) S.T.R. 890 (Tri. - Mumbai)] in the following words:

> *" We notice that the provisions of Section 11B of the Central Excise Act, 1944, which deals with refund of excise duties has been made applicable to Service Tax vide Section 83 of the Finance Act, 1994. This would imply that the time-limit of one year from the date of payment of tax for filing of the refund claim would apply in respect of Service Tax refunds also. Even if it is argued that there is no specific time-limit set out in Notification 11/2005-S.T., it is a settled position in law that though the law is silent on the time-limit applicable, a reasonable time-limit has to be read into the law. The decision of the Hon'ble Apex Court in the case of Citadel Fine Pharmaceuticals and the Hon'ble Bombay High Court in the case of Everest Flavours Ltd. and other decisions of*

the Hon'ble Apex Court relied upon by the Revenue would support this contention.

24. From Summary of Rebate claims (para 13 above) filed by the Vodafone Essar Cellular Ltd., Coimbatore (now Vodafone Cellular Ltd.), it is observed that some of the claims covered under Order in Original SI.No.R-19/2011 (AC) dated 28.10.2011 passed by Assistant Commissioner, Coimbatore-III Division may be hit by time –bar. This aspect has not been considered either by the lower adjudicating authority or by the Commissioner (Appeals). Therefore, the lower adjudicating authority is required to verify the date of payment of Service Tax in respect of the claims pertaining to Order in Original SI.No.R-19/2011 (AC) dated 28.10.2011 and check whether the refund claims have been filed beyond the period of one year from the date of payment of Service Tax and if so, the Applicants will not be entitled for any refund at all for that period.

25. In view of the foregoing, Government holds that

- the International Inbound Roaming IIR services provided by the Applicants qualify as export and accordingly they are entitled to rebate as claimed by them;
- the Circular No.90/1/2007 ST dated 03.01.2007 is not applicable to the Applicants' case;
- the net amount received by the Applicants against their foreign exchange liability, is to be considered as constructive receipt of foreign exchange and denial of rebate claims on account of netting off of foreign exchange payable by the Applicants against the foreign exchange receivable by them on this count is not legally sustainable;
- the unjust enrichment principles also would not apply as the services rendered would amount to export of services.

26. In view of the foregoing, Government sets aside the impugned Order in Appeal No. 199/2012(STC)/AK/Commr(A)/Ahd dated 03.09.2012 passed by Commissioner (Appeal-IV), Central Excise, Ahmedabad and Orders-in-Appeal No. MB-CEX-000-APP-123 to CMB-CEX-000-APP-126-13 dated 27. 03. 2013 passed by the Commissioner of Customs, Central Excise & Service Tax (Appeals), Coimbatore.

27. However, Government is of the opinion that the matter should be remanded back to original authority for ascertainment of fact regarding the date of filing of the rebate applications and if the applications were filed within the stipulated time limit, then to decide the matter in line with the observations recorded above. Therefore, the matter is accordingly remanded back to the original authorities to arrive at the quantum of rebate and limitation period as per the provisions of Section 11B of the Central Excise Act, 1944. Remand is for the limited purposes of looking into time bar issue only and with directions to pass the appropriate speaking orders on the impugned rebate claims within eight weeks from the receipt of this order.

28. Revision applications thus succeed in above terms.

29. So ordered.

23.1.2018

(ASHOK KUMAR MEHTA)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

SANKARSAN MUNDA
Asstt. Commissioner of Cus (Exp)

ORDER No. 01-05/2018-ST /ASRA/Mumbai DATED 23.01. 2018

To,

1. M/s Vodafone West Limited, (formerly known as Vodafone Essar Gujarat Ltd.) Vodafone House, Pralhadnagar, Off S G Highway, Ahmedabad-380051.

2. M/s Vodafone Cellular Limited (formerly known as Vodafone Essar Cellular Limited), 1046, Avinashi Road, Coimbatore, 640018.

Copy to:

1. The Commissioner of GST & CX, Ahmedabad South Commissionerate, Near Govt. Ploytechnic, Ambawadi, Ahmedabad, 380 015
2. The Commissioner of GST & CX, (Appeals) Ahmedabad, Near Govt. Ploytechnic, Ambawadi, Ahmedabad, 380 015.
3. The Deputy Commissioner, Division VI, Vastrapur, 1st Floor, APM Mall, Near Seema Hall, Anand nagar Road, Satellite, Ahmedabad.
4. The Commissioner of GST & CX, Coimbatore Commissionerate. GST Bhavan,6/7, A.T.Devaraj Street, Race Course Road, Coimbatore, Tamil Nadu, 641 018
5. The Commissioner, GST & CX (Appeals), Coimbatore, 6/7 A.T.Devraj Street, Race Course Road, Coimbatore, Tamil Nadu, 641 018
6. The Deputy Commissioner of GST & CX, Coimbatore III Division, 1441 ELGI Building, Third Floor, Trichy Road, Coimbatore 641 018.
7. Sr. P.S. to AS (RA), Mumbai
8. Guard file / Spare copy.