REGISTERED SPEED POST

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
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F.No.196/18/ST/14-RA/721 Date of Issue: 28/01/2021

ORDER NO. 02/2021-ST(SZ)/ASRA/Mumbai DATED 21.01.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

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.595/2014 dated 11.09.2014 passed by Commissioner of Central Excise (Appeal-II), Bangalore

Applicant : M/s Cadence Design System (India) Pvt. Ltd., Bangalore.

Respondent : Commissioner of Service Tax, Bangalore.

ORDER

This revision application has been filed by M/s Cadence Design System (India) Pvt. Ltd., Bangalore (hereinafter referred to as 'the applicant') against the Order in Appeal No. No.595/2014 dated 11.09.2014 passed by Commissioner of Central Excise (Appeal-II), Bangalore

2. The brief facts of the case are that the applicant is registered with Service Tax under the category of "Business Auxiliary Services". The applicant filed a rebate claim on 31.03.2010 for Rs. 90,58,371/- (Rupees Ninety Lakh Fifty Eight Thousand Three Hundred Seventy One only) seeking rebate of service tax paid on the taxable services exported by them during April 2009 to September 2009, under Rule 5 of Export of Service Rules, 2005, read with Notification No. 11/2005-ST dated 19.4.2005.

3. The applicant was issued a show cause notice dated 14.05.2010 by the Assistant Commissioner of Service Tax, Bangalore (Original Adjudicating Authority) seeking to deny rebate claim due to non-submission of various documents specified therein. After due process of law, the Original Adjudicating Authority denied rebate of Service Tax on business auxiliary services exported, vide Order in original No. 621/2010 dated 27.10.2010 holding that the applicant failed to fulfill the conditions laid down under Export of Service Rules 2005, read with Notification No. 11/2005-ST dated 19.4.2005, and also on the following grounds:-

- The applicant had not furnished the Declaration stating that taxable service has been exported in terms of Rule 3 of the Export of Service Rules, 2005 along with documents evidencing export of taxable service.

- FIRCs have no cross reference to the export invoices raised. Applicant has failed to establish correlation between the export invoices and FIRCs and hence conditions prescribed in the Export of Service Rules, 2005, not fulfilled and hence, no documentary evidence of receipt of payment against the taxable services exported.

- Export Invoices do not confirm to the requirement of Rule 4A of Service Tax Rules, 1994, inasmuch .as it does not contain the classification of service-and service tax payable.

4. On being aggrieved by the aforesaid Order in Original the applicant preferred an appeal before Commissioner of Central Excise, (Appeal-II), Bangalore who vide Order in Appeal No.595/2014 dated 10.09.2014 rejected

the appeal of the applicant and upheld the impugned Order in Original by observing as under :-

There is no dispute that during the material period, the appellant promoted sale of goods manufactured by Cadence Design Systems, Ireland. The Business Auxiliary Service shall be treated as export of service only when the following conditions, as it existed prior to 27/02/10, are satisfied: (i) When such service is provided from India and used outside India & (ii) Payment of such service is received by the service provider in convertible foreign exchange. In the instant case service is being rendered in India and consumed in India, and in terms of the Rules existing at the relevant point of time, and the Board's clarification issued vide Circular No. 141/10/2011-TRU, dated 13-5-2011, only when the user and the use of the service are located outside India, the transaction amounts to export and not otherwise. The ratio of the decision of Hon'ble Tribunal in the case of Microsoft Corporation (India) Pvt. Ltd. v/s. Commissioner of Service Tax, Delhi [2009(15) S.T.R. 680], wherein it is held that if the ultimate outcome of service is exhausted in India, there is no export of services, inasmuch as the benefit of service is terminated in India and merely because the service recipient is situated abroad, it cannot be said that service has been used outside India. This decision has been upheld by the Hon'ble High Court of Delhi in the same case reported in [2009 (16) S.T.R. 545.]. Even in the case of Life Care Medical Systems V/s. Commissioners of Service Tax, Mumbai-II [2013(29)STR129(Trib-Mumbai)], the Hon'ble Tribunal has expressed the same view which is squarely applicable to the instant case. Hence, the appeal does not succeed and as the impugned order does not warrant any interference, I uphold the same as legal and proper.

5. On being aggrieved by the impugned Order in Appeal the applicant has preferred the present Revision Application mainly on the following grounds:

5.1 On the facts and the circumstances of the case, the impugned Order-in-Appeal passed by the Ld. CCE (A) is liable to be set aside as it is contrary to the facts on record and passed without proper consideration of submissions made. The impugned order suffers from unspeaking brevity and serious legal infirmities and is hence, not a speaking order. The Ld CCE (A) has passed the impugned order without assigning any valid and cogent reasons as to how these services are consumed in India.

5.2 At the outset the impugned order passed by the CCE(A) is ex facie illegal, bad, erroneous and liable to be set aside as the Ld. CCE(A), has raised an issue in the impugned order which was not raised earlier by the Adjudicating Authority. It is relevant to note that the Adjudicating Authority has objected and thereafter rejected the rebate claim only on the ground of documentation. The rebate claim was rejected based on the following alleged grounds:-

- The claimant has not furnished the Declaration stating that taxable service has been exported in terms of Rule 3 of the Export of Service Rules, 2005

- FIRCs have no cross reference to the export invoices raised. Applicant has failed to establish correlation between the export invoices.

- Export Invoices do not comply with Rule 4A of Service Tax Rules.

5.3 In this connection it is relevant to note that while the Ld. CCE(A) has accepted that the aforesaid documents have been furnished by them, the Ld. CCE(A) has still rejected the entire refund claim on the ground that the services were not used outside India. It is humbly submitted that this allegation was never raised earlier and hence traverses beyond the scope of show cause notice.

5.4 It is an established position in law that orders beyond the scope of SCN are not sustainable. They would like to highlight the judgments in the following cases :-

- Saci Allied Products Limited vs Commissioner of C. Ex. Meerut (2005-183- ELT-225-SC)

- Vikram Jain vs Commissioner of Customs (2006-205-ELT-735-Tri.-Bang)

- Bhagwati Silk Mills v Commissioner Of Central Excise Surat, [2006 (205) E.L.T. 182 (Tri. - Mumbai)];

- Philips India Ltd v Commissioner of Central Excise,[2005 (191) E.L.T. 1028 (Tri. - Mumbai)];

- Manikya Plastichem Pvt Ltd. v. Commissioner of C. Ex, Bangalore [2003 (160) E.L.T. 273 (Tri. - Bang.)].

In addition the fact that this allegation was never raised also establishes that the appellant were never given this opportunity to explain and hence the Ld. CCE(A) has acted against the principles of natural justice by not giving an opportunity of being heard. In view of the aforesaid, it is most humbly prayed that the impugned order needs to be declared void ab-initio and quashed since it is in gross violation of the principle of natural justice, in order to avoid further litigations in this respect.

5.5 It is not in dispute that the services rendered are taxable under the category of Business Auxiliary Services and during the period of dispute the conditions that need to be fulfilled to qualify as exports were as below:

1. The recipient of services is located outside India;
2. The services are provided from India and used outs de India; and
3. The consideration for the aforesaid services is received in convertible foreign exchange.

In the current instance it is an admitted fact that the payments are received in convertible foreign exchange and is provided to recipient

outside India. The only condition that has been disputed is the fact that the services are not used outside India. It is relevant to note that under BAS, the recipient of the taxable services is the person on whose behalf the service is provided i.e., in the instant case Cadence Ireland. The technical support services are provided by the Company from India and are received by Cadence Ireland, an entity located outside India and such services are used by Cadence Ireland in relation to its business outside India.

5.6 The technical support services provided by them are in the nature of providing technical support to customers of Cadence Ireland, in relation to the products supplied by Cadence Ireland. The technical support services are provided by the Company on real time basis to customers of Cadence Ireland. The Company does not have any contractual obligation to the customers of Cadence Ireland and the ultimate beneficiary of such services is Cadence Ireland, an entity located outside India.

5.7 Circular 111/05/2009 - ST dated February 24, 2009 has also clarified 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. In this case even though the services are rendered in India, the benefits are accrued to Cadence Ireland located outside India. Hence, the same would qualify as export. Further reliance can be placed on the judgment in the case of Muthoot Fincorp Ltd. Vs. CCE, Vishakapatnam 2010(17) S.T.R. 303 (Tri-Bang.) wherein the clarification provided by the aforesaid circular was upheld and on similar facts it was held that as long as the benefit accrues outside India, the same should qualify as export. Hence the same clarifies the term used outside India and the only allegation as raised by the Ld. CCE(A) should be quashed.

5.8 As per the aforesaid Board Circular it is the location of the receiver that would be relevant to decide the export service. The phrase used outside India' appearing in Export of Service Rules, 2005 is to be interpreted to mean that the benefit of the service should accrue outside India and it is possible that export of service may take place even when the relevant activities take place in India so long as the benefits of these services accrue outside India. Accordingly benefit of promotion of business of a foreign company accrues outside India, for which they are not liable to tax under the Act.

5.9 In light of the aforesaid discussion it is most respectfully submitted that service tax is a contract based levy and is levied on the commercial activities undertaken by the service provider. Further, in context of services, the receipt, consumption and delivery of the service is the same, and accordingly the place of consumption and hence, the place of taxation, would be the same as the place of receipt of service. Given that the provision of technical Support Services by the Appellant impacts the business and operations of overseas entity located in Ireland, these services are clearly delivered and used outside India by Cadence Ireland.

The aforementioned condition of "provided from India and used outside India" was omitted with effect from 28 February, 2010, vide Finance Act, 2010. The above amendment clears the intention of the Government to extend the benefit of rebate of service tax paid by exporters on exported services. In addition the above amendments, clarificatory amendments have been given by this Hon'ble Tribunal vide its order in the case of GAP International Sourcing (India) Pvt. Ltd [2014 TIOL 465 CESTAT]. Therefore. if some service covered by Rule 3(1)(iii) of Export Rules, i.e. service in relation to business or commerce, has been provided by a person in India to a company located abroad not having any branch or establishment in India for use in its business, the service provided in India shall be treated as export, if the payment has been received in convertible foreign exchange.

5.10 At Para 5.2 of the impugned order the CCE(A) has observed that ratio of the Hon'ble Tribunal in the case of Microsoft Corporation (India) Pvt. Ltd. [2009 (15) STR 680] wherein it has been held that if the ultimate outcome of service is exhausted in India, there is no export of services, in as much as the benefit of service is terminated in India and merely because the service recipient is situated abroad, it cannot be said that services has been used outside India. At the outset we would like to submit that the above observation is without any basis and the appellant craves leave to produce copies of the service requests and other documents at the time of personal hearing for the purpose. Without prejudice to the same we would like to highlight that the above decision relied upon by the Ld. CCE(A) was issued in the context of marketing operations done and is a stay order which has now attained finality. The order given by the Larger Bench has differed and has held that these services are being provided to the Singapore Recipient company to be used by them in Singapore, may be for the purpose of the sale of their product in India. The same thus have to be held as export of services. In fact while holding the above view the Third member has placed reliance on the decision made in Paul Merchant Ltd.. Vs CCE [2013 (29) STR 257 LB] wherein it was held by majority that the services provided by the agents and some agencies being delivery of money to the intended beneficiary of the customer of the western units abroad, which may be located in India and the services provided to the western unit being in the nature of BAS is the service recipient and consumers of services.

5.11 It is submitted that the above findings do not appear to be in conformity with the various subsequent orders of this Hon'ble Tribunal in the case of Vodafone Essar Cellular Limited [2013 (31) S.T.R. 738 (Tri.-Mumbai)], Vodafone Cellular Ltd, Vodafone Essar Cellular Ltd Vs. Commissioner Of Central Excise Pune-III [2014-TIOL-319-CESTAT-Mum], GAP International Sourcing (India) Private Limited [2014-TIOL-465-CESTAT-Del] and the recent order of this Hon'ble Tribunal in the case of M/s Alpine Modular Interiors (P) Ltd. Vs CST (Adjudication), New Delhi, 2014-TIOL-517-CESTAT-DEL.

5.12 In the case of Alpine Modular (supra) it was also held that the contention of revenue to ignore the above judgments was unacceptable, and held that once any judgment was pronounced by a Tribunal, it becomes binding on the adjudicator at a lower level in the hierarchy.

5.13 Thus, the above order of the Hon'ble Tribunal held that BAS provided to an overseas entity qualify as 'export of service', by relying on the orders in the cases of Paul Merchants and Gap International (Sourcing). It would be absurd to contend that the user of these services are the persons in India, when the user and beneficiary of the services is the principal located abroad i.e. Cadence Ireland, for which all these services are provided and are meant for, which has used the services for its business outside India and has made payment for services in convertible foreign exchange. As regards the reliance on the Board Circular no. 141/10/2011 dated 13 May 2011, which clarified that for the period prior to 27 February 2010, the condition regarding 'use outside India' needed to be independently satisfied we would like to highlight that this Circular has no significance in law since earlier Circular dated February 24, 2009 is binding on Adjudicating Authority following the ratio laid down by the Hon'ble High Court of Gujarat in the case of Indichem V. UOI-1996(88) ELT 35 (Guj) holding that Board cannot issue circular to make the Order of the tribunal nugatory and also following the decision in Kishan Chemicals V UOI - 1996 (88) ELT 648 (Del) for the same proposition. It is further pleaded that latest Circulars should not guide the decision of the Tribunal in present appeal.

5.14 The same authority while for the prior period has held that the aforesaid services qualify as exports, in subsequent period has questioned the export characterization. It is a settled position of law that different view is justified only when there is change of law or any other binding decision of superior forum warranting such change. There has to be a consistency and if issue is decided in favour and has attained finality for earlier period the same department in that case is precluded from questioning its correctness in subsequent period. Reliance in this respect can be placed on the following decisions:-

- Collector of Central Excise, Pune v. Tata Engineering & Locomotives Co. Ltd. reported in (2003) 11 SCC 193;
- Berger Paint India Limited v. Commissioner of Income Tax, Calcutta reported in (2004) 12 SCC 42 = 2004 (165) E.L.T. 488 (S.C.);
- Birla Corporation Limited v. Commissioner of Central Excise reported in (2005) 6 SCC 95 = 2005 (186) E.L.T. 266 (S.C.); and
- Jayaswals Neco Limited v. Commissioner of Central Excise, Nagpur reported in 2006 (195) E.L.T. 142 (S.C.).

6. A personal hearing in this case was held through video conferencing on 11.12.2020. Ms. Krittika Gupta, Consultant, duly nominated by the applicant

appeared online for hearing and reiterated the submissions made during the previous hearing that case law of Microsoft Corporation (India) Pvt. Ltd. v/s. Commissioner of Service Tax, referred to in impugned Order in Appeal is now in their favour by virtue of Order in case of same appellant in [2014 (36) S.T.R. 766 (Tri.-Del.)] wherein Tribunal by a majority had held that sales promotion under Business Auxiliary Services provided by the Indian subsidiary company to foreign based principal amounts to export of services as service recipient situated abroad although sales promotion of products was done in India and products sold in India. She requested for allowing rebate contending that services qualify as exports.

7. Government has carefully gone through the relevant case records available in case files perused the impugned Order-in-Original and Order-in-Appeal and considered the submissions made by the applicant. The dispute in the present case is whether the services rendered by the applicant to Cadence, Ireland, will qualify as Export of Services in terms of Export of Service Rules,2005 as applicable during the relevant time.

8. Government observes that the Original Adjudicating Authority denied rebate of Service Tax on business auxiliary services exported, vide Order in original No. 621/2010 dated 27.10.2010 holding that the applicant failed to fulfill the conditions laid down under Export of Service Rules 2005, read with Notification No. 11/2005-ST dated 19.4.2005, on the grounds mentioned at para 3 supra.

9. Thus, it is clear that the Adjudicating Authority rejected the rebate claim of the applicant purely on the ground of documentation. It is the contention of the applicant that while the Commissioner (Appeals) had accepted that the aforesaid documents have been furnished by them, he still rejected the entire refund claim on the ground that the services were not used outside India; and that this allegation was never raised earlier and hence Order in Appeal traverses beyond the scope of show cause notice.

10. From the impugned Order Government observes that on being aggrieved by the Order in Original No. 621/2010 dated 27.10.2010, the applicant preferred the appeal, inter alia on the grounds, that

1) The impugned order is a non-speaking order, which lacks any cogent reason for denying the rebate of service tax paid,

2) The Declaration stating the services were exported in terms of Rule 3 of the Export of Service Rules, 2005 was filed with the rebate application,
3 They have filed the statement correlating the export invoices with the FIRCs along with relevant export invoices and corresponding FIRCs, and
4) The export invoices raised were in conformity with Rule 4A of the Service Tax Rules,1994 and they only render Business Auxiliary Service to M/s. Cadence, Ireland, which qualifies as exports as per the Export Rules.

In view of the above, the applicant contested that procedural infirmities is not a bar to deny substantial benefit, and appealed to set aside the impugned order and sanction their rebate claim before, Commissioner (Appeals).

11. Government observes that as per Section 35 A (3) of the Central Excise Act, 1944 / Section 128A (3) of the Customs Act, 1962, the Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against. Accordingly, the Commissioner (Appeals) has passed the impugned Order based on the documentary evidence produced before him by the applicant and hence the same cannot be set aside on the grounds that it is contrary to the facts on record and passed without proper consideration of submissions made. Moreover, CBEC vide its Instructions issued under F.No. 275/34/2006-CX.8A dated 18.02.2020 has informed that Hon'ble Supreme Court in the case of MIL India Ltd.[2007(210)ELT.188(SC)], while noting that the powers of remand had been taken away, has also categorically stated that the Commissioner (A) continues to exercise the power of adjudicating authority in the matter of assessment and the Commissioner(A) can add or subtract certain items from the order of assessment made by the adjudicating authority and the order of Commissioner (A) could also be treated as an order of assessment. Hence, Government finds that the impugned Order passed by the Commissioner (Appeals) is a fair Order passed in accordance with the provisions of the Act. In view of the aforesaid discussion, the reliance placed by the applicant on the case laws at para 5.4 supra is not appropriate hence does not require any discussion.

12. The Commissioner (Appeals) in the impugned order while rejecting the appeal filed by the applicant, interalia observed that during the material period, the appellant promoted sale of goods manufactured by Cadence Design Systems, Ireland; that the Business Auxiliary Service shall be treated as export of service only when the following conditions, as it existed prior to 27/02/10, are satisfied: (i) When such service is provided from India and used outside India & (ii) Payment of such service is received by the service provider in

convertible foreign exchange; that in the instant case service is being rendered in India and consumed in India, and in terms of the Rules existing at the relevant point of time, and the Board's clarification issued vide Circular No. 141/10/2011-TRU, dated 13-5-2011, only when the user and the use of the service are located outside India, the transaction amounts to export and not otherwise. The applicant on the other hand has relied upon the various case laws cited supra in support of their contention that the services were rendered in India, the benefits are accrued to Cadence Ireland located outside India and hence would qualify as export. Further, as regards the reliance on the Board Circular no. 141/10/2011 dated 13 May 2011 by the Commissioner (Appeals) in the impugned Order, which clarified that for the period prior to 27 February 2010, the condition regarding 'use outside India' needed to be independently satisfied, the applicant contended that this Circular has no significance in law since earlier Circular No.111/5/2009-S.T.,dated 24-2-2009 is binding on Adjudicating Authority following the ratio laid down by the Hon'ble High Court of Gujarat in the case of Indichem V. UOI-1996(88) ELT 35 (Guj) holding that Board cannot issue circular to make the Order of the Tribunal nugatory and also following the decision in Kissan Chemicals V UOI -1996 (88) ELT 648 (Del) for the same proposition. It is further pleaded that latest Circulars should not guide the decision of the Tribunal in present appeal.

13. Government observes that the applicant is incorporated under the Companies Act, 1956 as a Private Limited Company and engaged in the business of providing marketing support services and technical support services to Cadence Design Systems, Ireland (Cadence, Ireland), a group company located outside India. Cadence Ireland are engaged in the business of developing, marketing, licensing, supporting and exporting computer aided design and engineering software and related non- software products. The applicant has entered into two separate agreements with Cadence Ireland for providing Marketing support services and technical support services for its products in India. The technical support services provided by the applicant are in the nature of post sales technical support to customers of Cadence Ireland in relation to the products supplied by Cadence Ireland. Such services are provided by the applicant on behalf of Cadence Ireland. The payment for such services is received by Cadence India from Cadence Ireland in convertible foreign exchange. These technical support services provided by the applicant fall under the category of "Business Auxiliary Service (BAS) specified in Section 65(105)(zzb) of the Finance Act, 1999.

14. The applicant has claimed rebate of service tax paid on the Business Auxiliary services (BAS) rendered during 1st April 2009 to 30th September 2009, under Rule 5 of Export of Service Rules, 2005, read with Notification No. 11/2005-ST dated 19.4.2005. The applicant has contended that the services provided by them are in the nature of providing technical support to customers of Cadence Ireland, in relation to the products supplied by Cadence Ireland; that the technical support services are provided by the Company on real time basis to customers of Cadence Ireland; that the Company does not have any contractual obligation to the customers of Cadence Ireland and the ultimate beneficiary of such services is Cadence Ireland, an entity located outside India; that in this case even though the services are rendered in India, the benefits are accrued to Cadence Ireland located outside India, hence, the same would qualify as export. The applicant has relied upon the C.B.E. & C. Circular No. 111/5/2009-S.T., dated 24-2-2009 which provides that in terms of Rule 3(1)(iii) of Export of Services Rules, 2005, it is not the place of performance but the location of the service receiver, which would make it an export of services. It is also clarified that words 'outside India' mean that benefit should accrue outside India; whereas the Commissioner (Appeals) has held that the activity undertaken by the applicant is within India. Therefore, it cannot be considered as export in terms of Rule 3 of the Export of Services Rules, 2005.

15. Government observes that the applicant themselves have admitted that the services rendered by them are taxable under the category of 'Business Auxiliary Services' and during the period of dispute the conditions that need to be fulfilled to qualify as exports were as below:

1. The recipient of services is located outside India;
2. The services are provided from India and used outside India; and
3. The consideration for the aforesaid services is received in convertible foreign exchange.

16. Government observes that Commissioner (Appeals) has not disputed the fact that the services have been provided by the applicant to Cadence, Ireland a group company, which is located outside India and the payment against such services has been received in convertible foreign Exchange. What Commissioner (Appeals) has disputed is that the services provided by the applicant to Cadence Ireland have been consumed within India and hence it does not amount to Export of Service.

17. In this connection, Government refers to a recent Order dated 17.05.2019 passed by Hon'ble CESTAT, West Zonal Bench, Mumbai in Appeal No. ST/86398/2015 filed by M/s Croda India Company Pvt. Ltd. reported in 2019-TIOL-2651-CESTAT-MUM. In this case one of the issues before Hon'ble Tribunal for consideration was whether the charges recovered by the Appellants as Commission for sale of goods of associated group of Companies abroad are leviable to service Tax under Category of Business Auxiliary Service provided in India or to be treated as export of services for claiming exemption from payment of service tax during the relevant period. The period involved was from 2008-09 to 2012-13. The Hon'ble CESTAT after examining Export of Services Rules, 2005 as amended from time to time (upto period 30.06.2012), Place of Provision of Service Rules,2012 (for the period after 30.06.2012), CBEC Circular No.111/05/2009 dated 24.02.2009, Circular No. dated 13.05.2011 as well as the case laws relied upon by the appellant therein observed as under :-

4.4.5 Thus there is no dispute about the facts that the services provided by the appellant to their associated group companies abroad are in relation to marketing and promotion of the sale of the goods of those associated companies in India. Though the receiver of the service is located outside India he uses these services for promoting the sale of goods in India. In our view the services rendered in relation to marketing and sales promotion of goods in India have been used by the associated group companies in India. It is only as result of such usage of services in India that the sales of the these associated group company goes up in India.

4.4.6 In terms of Export of Service Rules, 2005 as they existed prior to their amendment by Notification NO. 06/2010-ST, dated 27/02/2010, Rule 3(2)(a), specifically prescribed the condition of "use outside India" as determining factor to treat the services as export of services. The phrase used in the said rule is "used outside India" and not "beneficiary of service outside India". In the present case though the beneficiary of service is located outside India, but the use of service is in India for sales promotion of the goods of the beneficiary. The sales promotion of the goods needs to be looked qua the market in which the goods are sold or intended to be sold and not qua the location of manufacturer/ beneficiary of service. The same is the crux of the two circulars issued by CBEC.

Hon'ble CESTAT in the said Decision distinguished most of the case laws relied upon by the applicant in the present case and also relying on Hon'ble Bombay High Court's judgment dated 15.09.2014 in Tech Mahindra Vs CCE Pune-III [2014(36) STR 241 (Bom)] further observed as under :-

4.4.9 In light of discussions and the Bombay High Court decision in case of Tech Mahindra as above we are of the view that services provided by the appellants were provided for the sale of goods of the associated group companies in India and were thus used in India. According for the

period prior to 27.02.2010 the benefit of export of services as claimed by the appellant in respect of commission received by them for sale of goods in India from associated group companies cannot be extended to them.

4.4.10 From 27.02.2010, the condition of "use outside India" has been removed by way of omission of clause "a" of sub-rule (2) of Rule 3 of Export Of Service Rules, 2005. When the said condition has been omitted the only conditions to be satisfied for considering the service to qualify as export of service are in respect of the location of "service recipient" and "the receipt of consideration in convertible foreign exchange". Admittedly in the present case the service recipient is located outside India and the payments toward considerations for providing the service are received in convertible foreign exchange. In our view the benefit of export of services cannot be denied to the Appellant from 27.02.2010 onwards till 30.06.2012.

This order has been passed in the context of "Business auxiliary service' the same service which has been rendered by the applicant in these proceedings. Hence the ratio of the same can also be applied to the instant Revision application.

18. It may not be out of place to mention here that Hon'ble Tribunal(Mumbai) vide its Interim Order dated 04.07.2019 in Arcelor, Mittal projects India Pvt. Ltd. Vs Commr of ST, Mumbai-II [reported at 2019 (28) G.S.T.L. 315 (Tri.-Mumbai)] by relying on decision of Apex court in case of *GVK Industries Ltd.* v. *Income Tax Officer* [Order dated 18-2-2015 in Civil Appeal No. 7796 of 1997, reported at [2015] 54 taxmann.com 347 (S.C.) = 2017 (49) S.T.R. 513 (S.C.)], has dissented with the contra views taken by the coordinate Benches of Tribunal while deciding rebate of service tax paid on services rendered prior to 27.02.2010 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 and the said service would amount to export of services under Rule 3(iii) of Export of Services Rules, 2005***" (in most of the case laws referred and relied upon by the applicant also) and referred the subject matter to the Hon'ble President for constituting Larger Bench to determine amongst other issues, "*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?*

19. Hon'ble Tribunal, at para 5.9 of its aforesaid order, after discussing paras 22 to 27 of Hon'ble Apex court's decision in case of GVK Industries Ltd. v. Income Tax Officer, supra observed as under:-

'In view of the principle of law stated by the Apex Court in the above decision its crystal clear that the services received or provided by the foreign entity even if he is located outside India are in relation to his business activities in India. We are very clear that in the present case the services received by the AMSI, France from the appellant, were for development of their business in India and hence were used / consumed by them in India. The concept of residency outside for the purpose of taxation has been given a go by the Apex Court in this decision. Hence the foremost condition that needs to be satisfied by the appellant for claiming the services to be export of service is vis-a-vis the usage/consumption of service by the service recipient. If the consumption of service is in relation to the activities of foreign entity/resident located outside but for his business in India, then the appellant will not be entitled to the benefit of export of service as the service is not exported as provided for by the Export of Services Rules, 2005 as they existed at material time'.

20. As regards reliance placed by coordinate Benches of Tribunal on Board Circular 111/05/2009 - ST dated February 24, 2009 which was had clarified 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, the Hon'ble Tribunal, at para 5.11 of its aforesaid order, observed as under:-

"The said decision relies upon the decisions in case of Blue Star and ABS International and also two circulars issued by the C.B.E. & C. We are not in agreement with the law laid down by the decisions as stated in para 5.10 above. Secondly the circulars are only clarification and not exposition of law. They have got limited validity. The circular of 2009 was issued with reference to the provisions of Export of Services Rules, 2005 as they existed then. Without even referring to the Export of Services Rules, 2005 and the manner in which they got amended Tribunal has chosen to make the said circular applicable from 2003 onwards. Such an approach is contrary to the law laid down by the Apex Court in case of Ratan Melting & Wire Industries [2008 (231) E.L.T. 22 (S.C.)] stating as follows :

> *"6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."*

21. Government also observes that the various case laws relied upon by the applicant at para 5.11 supra have been challenged before higher appellate foras as under:-

Case law Relied upon by the applicant	Appeals filed before High Court Supreme Court	Status
Vodafone Essar Cellular Limited [2013 (31) S.T.R. 738 (Tri.-Mumbai)],	Hon'ble Bombay High Court admitted the C.E.A. No.3/2015 filed by Commr., C.Ex.& S.Tax, Pune-III on grounds	Pending before Hon'ble High Court

GAP International Sourcing (India) Private Limited [2014-TIOL-465-CESTAT-Del =2015(37)S.T.R. 757(Tri. Delhi)]]	Hon'ble Supreme Court admitted the Civil Appeal No. 6556 of 2015 with C.A. No. D 18755 of 2015 and C.A. No. 1469 of 2017 filed by Commissioner of Service Tax-II against the CESTAT Final Order reported in 2015 (37) S.T.R. 757 (Tri.-Del.) [Gap International Sourcing (India) Pvt. Ltd. v. Commissioner]. 2017(52S.T.R. J199(SC)	Pending before Hon'ble High Court

As regards case law of Alpine Modular Interiors (P) Ltd. Vs CST (Adjudication), New Delhi, 2014-TIOL-517-CESTAT-DEL.=2014(36) S.T.R.454 (Tri-Del.), the same was relied upon by Hon'ble Tribunal, Mumbai in Commr. of Service Tax, Mumbai-VII Vs Abbot Healthcare Pvt. Ltd.[(2019(31)G.S.T.L. 83 (Tri.-Mumbai)] while holding in its Order dated 01.05.2019 *that services provided by assessee are classifiable under category of "Business Auxiliary Services" and fall in Category-III services covered by Rule 3(1)(iii) of Export of Services Rules, 2005; thus, for period prior to 27-2-2010, C.B.E. & C. Circular No. 111/05/2009-S.T., dated 24-2-2009 was applicable and service amounted to export of service as recipient of service was located abroad and payment for services was received in foreign exchange; that Place of provision of service was abroad and not India.'.* A Civil Appeal Diary No. 5151 of 2020 has been filed by Commissioner of Service Tax-VII, Mumbai against the said CESTAT Final Order dated 1-5-2019. [As reported in Commissioner v. Abbott Healthcare Pvt. Ltd. - 2020 (38) G.S.T.L. J26 (S.C.)] India. In all the aforesaid matters, appeals are pending before Apex Court / High Court. Hence, reliance cannot be placed on these case laws.

22. As regards the contention of the applicant at para 5.14 supra that the same authority while for the prior period has held that the aforesaid services qualify as exports, in subsequent period has questioned the export characterization and that it is a settled position of law that different view is justified only when there is change of law or any other binding decision of superior forum warranting such change, Government observes that the Commissioner (Appeals) was inclined to take a view, which he has taken in the impugned order, on the basis of Hon'ble High Court of Delhi' s judgment reported [2009 (16) S.T.R. 545] as well as Hon'ble Tribunal's Order in Life Care Medical Systems V/s. Commissioners of Service Tax, Mumbai-II reported as 2013(29)STR129 (Trib-Mumbai), expressing the same view which is squarely applicable to the instant case. Hence, there is no cause made for interfering with the Commissioner (Appeals) order for having taken a different view, if any. Hence, the reliance placed by the applicant on various case laws at para 5.14 above, on these grounds is also not tenable.

23. Relying on recent case laws discussed at paras 17 to 20 supra, as well as in view of discussion in foregoing paras, Government holds that rebate of service tax paid on the taxable services exported by the applicant during the period April 2009 to September 2009, under Rule 5 of Export of Service Rules, 2005, read with Notification No. 11/2005-ST dated 19.4.2005 is rightly held inadmissible by the Commissioner (Appeals). Government, therefore does not find any reason to interfere with or modify the Order in Appeal No.595/2014 dated 11.09.2014 passed by Commissioner of Central Excise (Appeal-II), Bangalore and upholds the same.

24. The revision application is rejected being devoid of merits.

Shrawan 21/01/2021

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

ORDER No. 02/2021-ST(SZ) /ASRA/Mumbai DATED 21.01.2021

To,

M/s Cadence Design System (India) Pvt. Ltd,
2nd Floor,3-B Building,
RMZ Ecospace, Sarjapur Outer Ring Road,
Opp. Pratham Motors, Bangalore - 560103

Copy to:

1. Principal Commissioner Of Goods & Services Tax, Bengaluru East, TTMC BMTC Bus Stand Complex Hal Airport Road Domluru, Bengaluru-560071.
2. Commissioner Of Central Goods & Services Tax, Bengaluru Appeals-I, Traffic & Transit Management Centre : BMTC Bus Stand : Hal Airport Road, Dommaluru, Bengaluru-560071
3. The Assistant / Deputy Commissioner, Goods & Services Tax, Bengaluru East Commissionerate, TTMC BMTC Bus Stand Complex Hal Airport Road Domluru, Bengaluru-560071.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file.
6. Spare copy.