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
8th Floor, World Trade Centre, Cuff Parade,
Mumbai- 400 005

F.No.199/06/ST/14-RA /2918 Date of Issue: 02/06/21

ORDER NO. 09 /2021-ST(WZ)/ASRA/Mumbai DATED 19.05.2021 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.271/2011 dated 31.03.2011 passed by Commissioner of Central Excise (Appeals-II), Bangalore.

Applicant : Commissioner of Service Tax, 4th Floor, Service Tax Commissionerate, TIMC, BMTC Building, Old Airport Road, Domlur, Bangalore.

Respondent : M/s Makino India Pvt. Ltd., Bangalore.

ORDER

This revision application has been filed by Commissioner of Service Tax, Domlur, Bangalore (hereinafter referred to as 'the applicant') against the Order in Appeal No.271/2011 dated 31.03.2011 passed by Commissioner of Central Excise (Appeals-II), Bangalore

2. The brief facts of the case are that the M/s Makino India Pvt. Ltd., Bangalore (respondent) is registered under the category of Management, Maintenance or repair services, Business Auxiliary services, Erection and installation services. They filed a rebate claim for Rs.5,63,588/- on 19.12.2008 covered by their debit notes/invoices raised between the period from 14.06.2007 to 30.11.2007 and on 31.12.2007 for which they have realized their amounts during the period 14.12.2007 to 19.03.2008, i.e. for having provided Business Auxiliary service, said to qualify as export under the provisions of Export of Services Rules, 2005, and the said taxable services has been exported and payment of service tax was made for October 2007 to March 2008 and April 2008 to September 2008. They claimed rebate of service tax paid on such services in terms of Rule 5 of Export of Service Rules, 2005 read with Notification No.11 /2005-ST dt.19-04-2005.

3. They were issued with Show Cause Notice dtd. 16.03.2009 proposing rejection of their claim on the grounds that the claim made in respect of export of services prior to 19.12.2007 has been hit by Limitation of time; that the description of services exported is not there in export invoices; that the Invoices does not confirm with the requirement under Rule 4A of Service Tax Rules, 1994; that, the copy of agreement with foreign client and the usage of service provided outside India, as per provisions not submitted. The original authority rejected the rebate claim on the grounds of limitation as well as on merits of the case vide Order in Original No.284/2009 dated 28/29.07.2009.

4. On being aggrieved by the aforesaid Order in Original the respondent preferred an appeal before Commissioner of Central Excise, (Appeal-II), Bangalore who vide Order in Appeal No. 271/2011 dated 31.03.2011 (impugned Order) set aside Order in Original No.284/2009 dated 28/29.07.2009 and allowed the appeal filed by the respondent.

5. On being aggrieved by the impugned Order, the applicant department preferred the appeal against the same before CESTAT, Bangalore on 30.08.2011. The CESTAT, Bangalore, vide Final Order No.20125/2014 dated 30.01.2014

rejected the department's appeal on the ground that the same was not maintainable as the appeal pertained to rebate of service tax paid and used in the export of services and the CESTAT has no jurisdiction to entertain the appeal.

6. In view of the aforesaid background, the applicant department filed the present Revision Application against the impugned order mainly on the following grounds:

6.1 The Commissioner (A) in the said Order allowed the rebate holding the criteria that- in case of export of services, the "relevant date" is the date when payment of services exported has been received by the assessee; that the limitation of time under Section 11B is applicable to refund cases and not for rebate; that debit notes can be considered as export documents in the absence of export invoices; and that services rendered by the assessee can be considered as export of services (The service involved is Erection / installation of CNC machines imported from M/ s Makino, Singapore for customers in India - such taxable activity happens inside the territory of India and therefore is not exported).

6.2 The Commissioner (A) has erred in deciding the limitation of time under Section 11B of the Central Excise Act, 1944 to Export of Services, Rules, 2005. It is very important to examine the relevant portion of the provisions of Acts and Rules. The provisions of certain Sections, viz. 9C, 9D, 11B, 11BB, 11C of Central Excise Act, 1944 as in force from time to time shall apply so far as may be, in relation to service tax as they apply in relation to duty of excise.

6.3 Section 93A of the Finance Act, 1994 is governed by the provisions of Section 11B of the Central Excise Act, 1944, under which the period of limitation allowed is one year from the relevant date. As per Sub-section 5 of Section 11B of Central Excise Act, 1944, "relevant date" means:

(a) In the case of goods exported out of India, where a refund of excise duty paid is available irrespective of the goods themselves, or as the case may be, the excisable materials used in the manufacture of such goods -

(i) If the goods are exported by sea or air, the date on which the ship or the aircraft in which the goods are loaded leaves India, or

(ii) If the goods are exported by land, the date on which such goods pass the frontier; or

(iii) If the goods are exported by the post, the date of dispatch of goods, by the post office concerned to a place outside India,

(iv) In any other case, the date of payment of duty ....

6.4 From the above, it is very clear that the provisions of Section 11B of Central Excise Act are applicable to the claim of rebate filed under the Export service rules, 2005 and any contrary view will be against the provisions of Law. The Export of Services Rules, 2005 are only rules framed under Section 93 of Finance Act, 1994, which is beneficial scheme and not independent of the provisions of the Finance Act. Thus the provisions of Export of Service Rules cannot over-ride the provisions contained in the Finance Act, 1994. The provisions of Section 83 of Finance Act, 1994, clearly stipulates that the provisions of Section 11B of Central Excise Act are applicable to service tax matter - as they apply in relation to a duty of excise - without exception. There is a specific definition for the word "refunds" under Section 11B of Central Excise Act, 1944 which includes "rebate" in the said provisions of law itself. Thus it is very clear that the said provisions are applicable to service tax matter also - whether it is refund of excise tax paid or refund/ rebate of tax paid on export services or refund of input services tax paid on inputs. In other words, the said provisions of Section 11 B are to be read as if the words "goods, excisable matters and excise duty" are replaced by the words "service input or input services and duty/service tax" respectively. Just because no time limit is prescribed specifically under the Export of Service Rules, 2005, it does not mean that it is open to anybody without any time limit, to claim such rebate. It is a settled law that when time limit is prescribed under any Act, the same is applicable to the rules framed there under also. It is also a settled law that provisions of Rules / Notification should be interpreted so as to give effect to the legislative intention and the interpretation which leads to absurd should be void. The provisions of Section 11B is applied to all refund cases as held by various judicial forums, in plethora of cases.

6.5 Thus, it is abundantly clear that the time limit prescribed under Section 11B of Central Excise Act, 1944 is very much applicable to the rebate/refund filed under the provisions of Rule 4 & 5 of the Export of Service Rules, 2005. Hence, the relevant date for whatever rebate under Export of Services Rules, 2005, is the actual date of export of service, in terms of sub-section (5)(B)(a)(i) of Section 11B of Central Excise Act, 1944, and not the date of receipt of payment for the services exported. As such, the rebate claimed in the instant case is hit by limitation of time.

6.6 Further, the assessee has not fulfilled the conditions prescribed under (2)(a) of Rule 3 of Export of Service Rules and the services is provided in India and is used in India only. As such, the services cannot be considered as exported services. (The service involved is that of Erection / installation of CNC machines imported from M/ s Makino, Singapore for customers in India - such taxable activity happens inside the territory of India and therefore is not exported).

6.7 Further, the debit notes submitted along with the claim are not the documents prescribed under Rule 4A of Service Tax Rules, 1994. Hence the contention of the claimant that since the debit notes contains all the

ingredients required under Rule 4A of Service Tax Rules, 1994 and hence would qualify as invoice cannot be accepted, and therefore is not a valid export document to support the claim of the assessee.

6.8 Therefore, it is prayed that the operation of Order-in-appeal No. 271/2011 dated 31-03-2011 setting aside the Order-in-Original may please be stayed and rebate granted as a consequential relief may please be held as in-eligible on the grounds of appeal submitted above and / or to pass such order as deemed fit in the facts and circumstances of the case.

7. The respondent Company filed cross objections dated 16.06.2014 contending mainly as under :-

7.1 **Limitation of time under Section 11B of the Central Excise Act,1944:**

As per Rule 3(2)(b) of Export of Services Rules, 2005 the provision of any taxable service shall not be treated as export of service until the consideration is received in convertible foreign exchange. Thus the export would be recognized or complete only on receipt of the convertible Foreign Exchange towards the subject services. Therefore it must be inferred from the aforesaid provisions the taxable services shall not be considered to have been exported, until the consideration is received in convertible foreign exchange. Thus the relevant date of export of services is provided by the Export of services Rules, 2005 itself. Consequently, when the relevant date of export is provided by the parental law (original law) itself there is no necessity to draw the reference from the other law. The said understanding would be substantiated by use of the sentence, "so far as may be in Section 83 of the Finance Act,1994". Thus, the date of export is the date of receipt of convertible foreign exchange and not the date of export services.

The provisions of Section 11B of Central Excise Act, 1944 would apply as and when required and to the extent possible, only in the absence of such provisions on service tax law. Therefore, when Rule 3(2) of Export of Service Rules specifically provides that taxable service shall not be treated as export until the consideration is received in convertible foreign exchange the question of invoking Section 11B does not arise.

The application of the provisions in Section 11B of Central Excise Act, 1944 to Section 83 of the Finance Act,1994 (which provide for the certain provisions of Central Excise Act,1944 which are made applicable to Service Tax) is necessary wherever there is vacuum in service tax law as to certain procedures or provisions with respect of export of services. It is very evident from the Export of Services Rules, 2005 that the relevant date of export is the date of receipt of convertible foreign exchange, in terms of Rule 3(2)(b) of Export of Services Rules, 2005 as explained above. In such situation, there is no mandate for service tax law to refer to Section 11B of Central Excise Act, 1944.

Supreme Court in case of DR. Pratap Singh and anr. Vs Directorate of Enforcement has held that the expression "so far as may be" was always construed to mean that the provisions may be generally followed to the extent possible.

In terms of Explanation to Rule 5 which clearly states that output services shall be exported in terms of Export of Services Rules, 2005 and as stated in foregoing paras, taxable service shall not be considered to have been exported, until the consideration is received in convertible foreign exchange.

They would like to draw attention to the following case laws:

a. Hon'ble CESTAT, Mumbai in case of Commissioner of Central Excise Pune-I Vs Eaton Industries Pvt. Ltd.[2011(22)S.T.R. 223 (Tribunal, Mumbai)] on analysis of Rule 5 of the CENVAT Credit Rules, 2004 and Rule 3(2) of the Export of Service Rules, 2005 has upheld that, relevant date for claiming of service tax paid on input services used in providing output services which are exported shall be the date when payment for services exported has been received by the assessee.

b. Bechtel India Pvt. Ltd.[2013(7) TMI 490-CESTAT New Delhi] Para No. 7 of the Order is reproduced.

c. Hyundai Moor India Engineering Pvt. Ltd.[TS-207-Tribunal-2014-ST]

CESTAT Bangalore rules 1 year limitation for filing refund under Rule 5 of CENVAT Credit Rules to be computed from 'date of receipt of consideration; In case of services, till law was amended, liability to pay tax arose only when consideration was received. Hence, relevant date for calculating time limit under Notification No. 5/2006-CE(NT) r/w Sec 11B of Central Excise Act would be consideration receipt date; Absent production of contrary ruling by Revenue, applies co-ordinate bench ruling in Eaton Industries which held that service rendition date nor relevant for limitation purpose.

7.2 Assuming but not admitting that the time limit of 1 year prescribed under Section 11B of the Central Excise Act, 1944 is applicable to the rebate claim under the provisions of Rule 4 and 5 of Export of Service Rules 2005, however insofar as it relates to the relevant date for rebate claim in terms of sub-Section (5)(B)(a)(i) of Section 11B of Central Excise Act 1994 is not acceptable. In this regard your kind attention is drawn to the Explanation B given to sub-Section 5 of Section 11B of the Central Excise Act, 1944. [To materialize the fact the respondent has reproduced the Section 11B including sub paras a) to f)].

From the above it is abundantly clear that the entire sub-Section is articulated with reference to goods. The above reproduced provisions clearly bring in the clarity on the concept of relevant date of export from the view point of goods but not services. The said provisions enshrined in Explanation B to the Sub-Section 5B of Section 11B clearly provide for the relevant date in relation to the physical export of the goods. The application of the same provisions or understanding on the same lines is not practically applicable or possible in relation to provision of services as the ascertainment of completion stage of services would generally not be possible at one point of time. Specifically, insofar as services charged in invoices, the ascertainment of each point of time of completion of

provision of services in relation to such invoices raised would not be practically possible.

Without prejudice to what has been stated above they reiterate that Section 83 of the Finance Act 1994 provides for the application of Section 11B, so far as may be, to the service tax as it applies in relation to the Excise duty. In this regard, we submit that that the provision of Section 11B of Central Excise Act 1944 would apply as and when required and to the extent possible, only in the absence of such provisions In the service tax law. In this connection, we wish to submit that the service tax law, in the form of Export of Services Rules, 2005, provides for when would the export of services are complete. The same is clearly provided for by Rule 3(2) of the Export of Services Rules, 2005. Rule 3(2) provides that the provision of any taxable service shall not be treated as export of service until the consideration is received in Convertible foreign Exchange. Thus, it would be correct to understand that the export would be recognized or complete only on receipt of the Convertible Foreign Exchange towards the subject services. Thus, the relevant date of export of services is provided by the Export of services Rules, 2005 itself. Consequently, when the relevant date of export is provided by the parental law (original law) itself there is no necessity to draw the reference from the other law. The said understanding would be substantiated by use of the sentence, "so far as may be" in section 83 of the Finance Act, 1994. Thus, the date of export is the date of receipt of Convertible Foreign Exchange and not the date of export of services.

Further to the above, Section 11B of Central Excise Act 1944, provides for various relevant dates for export of excisable goods under various modes of export. In this regard, the same analogy or situation is not applicable in the same form to the export of services, as the services cannot be exported in any of the forms provided under section 11B of the Finance Act, 1994. Your kind authority is requested to appreciate that the words, "so far as may be" would be understood to mean "as may be required" and "to the extent Possible", as mentioned supra, in the absence of such provisions in service tax law. The application of the provisions in section 11B of Central Excise Act 1944 to Section 83 of the Finance Act, 1994 is necessary where ever there is a vacuum in service tax law as to certain procedures or provisions with respect of export of services. It is very evident from the Export of services Rules, 2005 that, the relevant date of export is the date of receipt of Convertible Foreign Exchange, in terms of Rule 3(2) of the Export of Services Rules, 2005. In such situation, there is no mandate for service tax law to refer section to 11B of the Central Excise Act 1944.

Without prejudice to what is stated above, insofar as it relates to the relevant date, it would be worthwhile to note the time honoured legal maxim - "***lex non cogitadimpossibilia***, which means the law does not compel a person to do the impossible. The Hon'ble Supreme Court has invoked this principle in numerous cases, for instance, vide Vinod Krishna Kaul v. UOI [1996] 1 SCC 41, Manohar Joshi v. Nitin Bhaurao Patil [1996] 1 SCC 169, Mohammed Gazi v. State of M.P. [2000] 4 SCC 342 and Industrial Finance Corporation of India Ltd. v. Cannanore Spinning and Weaving Mills Ltd. [2002] 5 SCC 54. As the services cannot be exported by any of the modes specified in Section 11B, the relevant date mentioned

therein would not be made applicable to the export of services effected in terms of Export of Services Rules, 2005.

Without prejudice to what has been stated above, in view of the inapplicability of Explanation B to sub-section 5 of Section 11B, assuming but not admitting that the relevant date mentioned in the residual clause is applicable to their case, then the date of payment of service tax on export of services would be considered to be the relevant date. Accordingly, they had filed the refund application within a Year after the payment of service tax on export of services, it would be incorrect to allege and reject the refund application on the premise of time bar.

Further, the learned Commissioner of Service Tax (Applicant) has mentioned in the grounds of appeal that just because no time limit is prescribed in the Export of Services Rubes, 2005 it does not mean that it is open to any body without time limit to claim such rebate. In this regard we humbly submit before your kind authority that the issue is not with regard to the time limit of 1 year as mentioned in Section 11B. They are in agreement with regard to the time limit of 1 year. However, the reckoning of 1 year time limit from the "relevant date" as provided or explained vide Explanation B to sub-section 5 of Section 11B is practically or legally or logically not applicable. Thus, the understanding or allegation of the learned Commissioner of Service tax (Applicant) that respondent does not agree to the applicability of 1 year time limit is not is not correct. In this regard, they humbly submit that the learned officer has wrongly merged or clubbed two different issues or things, Viz., "1 year time limit" and the "relevant date" to reckon such 1 year, into one, which is not acceptable.

Further it may be noted that the exporter of service is required to attach the evidence of receipt of payment against taxable service exported and for which rebate is claimed failing which the application filed would be incomplete and hence would not be entitled to make the application for rebate before the Service Tax authorities.

Without prejudice to what has been stated above, in view of the inapplicability of Explanation B to sub-Section 5 of Section 11B, assuming but not admitting that the relevant date mentioned in the residual clause is applicable to our case, then the date of payment of service tax on export of services would be considered to be the relevant date. Accordingly, we had filed the refund application within a Year after the payment of service tax on export of services and therefore it is incorrect to allege and question the validity of time limits of the refund application.

7.3 **The condition prescribed under Rule 3 (2) (a) of Export of Service Rules has not been fulfilled.**

They are engaged in the business of providing promotion or marketing of products manufactured by our principal viz., Makino Asia Pte Limited, Singapore including manufacture and supply of fixtures and tools for CNC machines In India. They provide turnkey solutions to customers of Makino Asia Pte Limited, Singapore

in India including installation and commissioning of machinery supplied by our principals and servicing of such machinery during warranty period. The above two service provided by the respondent is classifiable under the category 'business auxiliary service'. The service provided by them is classifiable under the category of 'Business Auxiliary Service' is not disputed in the present case. They had applied for rebate of service tax towards commission for installation and commissioning service and warranty service which was rejected by the Assistant Commissioner but allowed by the Commissioner Appeals-II upon an appeal made by them. Against this order the Commissioner of Service Tax (Applicant) has made an application under Section 35EE of Central Excise Act, 1944 read with Section 83 of Finance Act, 1994 against the order made by the Honorable Commissioner Appeals II. The submission with regard to fulfillment of condition of Rule 3 (2) (a) of Export of Service Rules is as under:

They entered into an agreement with Makino Asia Pte Ltd, Singapore (referred to as client, in short) on 01.04.2006 for provision of the following services:

a. Installation and commission of machines sold by our client on their behalf

b. Warranty and modification services on machines sold by our client on their behalf.

In relation to the above, they submit their client, viz., Makino Asia Pte Limited, Singapore enters into a single consolidated contract for supply, erection and installation of CNC Machines to its customers located in India. After having undertaken the supply, Makino Asia Pte Limited, Singapore sub-contracts certain engineering activities of erection and installation servicing of the machines during the warranty period to them. They undertake the same on behalf of the client and strictly in terms of the guidelines laid down by and the instruction of the client. They submit that such services squarely falls within the scope and ambit of Business Auxiliary Services which are provided by them to their client located In Singapore which is not in dispute. The client (i.e. Makino Asia Pte Limited, Singapore) situated in Singapore is responsible for undertaking the said activities. Hence, there is a liability cast on Makino Asia Pte Umited, Singapore, to discharge the contractual obligation with respect to its clients in India. Consequently, there is a liability created in the books of the Makino Asia Pte Limited, Singapore, In this regard, in a situation where Makino Asia Pte Limited, Singapore, fails to discharge/perform the said activities either on its own or through some other person, it would trigger the liability of non performance of the contract. In this regard, they are approached by Makino Asia Pte Limited, Singapore, to undertake the said activities of Installation and commissioning and warranty service of the equipment on their behalf. They do not have any contractual obligation with the buyer of such equipment. They are responsible to their client, viz., the seller of the equipment, situated outside India while discharging its functions. It may be noted that they undertake the contract in terms of the instructions obtained from the

client from time to time. The seller of the equipment (overseas client) in turn is responsible to the buyer in India.

The respondent has also submitted pictorial diagram to depict the nature of transaction.

In this regard, they submitted that

- the services are provided to the our client situated outside India does not have any place of business in India nor has any fixed establishment, permanent address or usual place of residence in India and has fixed establishment, place of business or usual place of residence outside India.
- They have provided such services from India.
- The services provided by them are used by their client situated outside India.
- They have received the consideration for provision of such services inconvertible foreign exchange.

In relation to the above, they submit that the above conditions as prescribed under the provisions of Export of Services Rules, 2005 with respect to Business Auxiliary Services are fulfilled and thus the said services qualify as exports.

In relation to the above, they wish to reiterate submissions made supra insofar as it relates to these services:

a. **Situs of the client**: In this regard, they confirm that the services are provided to our client in Singapore. Further, they confirm that our client does not have any commercial establishment or office in India and thus, this condition is fulfilled.

b. **Provision of services**: The expression 'provision of services' has apparently not been defined in the Service Tax provisions. However, in terms of the common understanding and connotation of the word 'provision', it is understood that the location where the service provider is situated and from where the services are offered would be deemed to be the place from where the services are provided. Thus, in the instant case, services provided by them would be considered to have been provided from India since the personnel employed to undertake the activities mentioned supra would be doing the same from respondent's premises in India.

c. **Use of services**: The expression 'use of service' has also not been defined in the Service Tax provisions. The word 'use' has been defined in the Law Lexicon as 'the usage of an article whether or not it undergoes a visible change in form or substance'. **It would include not only an active user but also embraces passive users. In effect, it suggests that the same should result in an action or an enjoyment on part of the person who is the beneficiary.**

In this regard, they submitted that the services provided by them would result in providing services to and used by their client in Singapore, based on which the

obligations of Makino Asia Pte Limited, Singapore to its end customers are fulfilled. It is relevant to note that the payment for erection, installation and commissioning and warranty services is made by the buyer in India to the machine seller outside India i.e. Makino Asia Pte Limited, Singapore. The buyer in India would never make any payment to them in relation to the activities undertaken by them. Thus, their client is the beneficiary of the said services since it would tantamount to discharge of his obligation to the end customers.

The expression "used outside India" is used in consonance with and in context to the contractual relationships between the service provider and its client/customer. In the present case, it must be appreciated that the service recipient is their client i.e. Makino Asia Pte Limited, Singapore who is situated outside India and that the services are used by the client in discharge of its contractual obligations with its customers. The mere fact that the end customer is situated in India does not alter the fact that the services provided by them are not used outside India.

d. **Consideration for services**: They confirm that the consideration for the services is received in convertible foreign exchange which is not dispute.

In view of the above, they humbly submitted that the services provided by the them on behalf of their client, would absolve clients (Makino Asia Pte Limited, Singapore who is located outside India) from all their obligations, both financial and otherwise and keeps them away from all the above issues in relation to non performance of the contract. Hence, it would be appropriate to state that the location where the subsequent / consequent activity in the chain of events is triggered and where the benefits of the service provided accrue, is essentially and necessarily the location where the services are used, viz., in Singapore in respect of transaction in question.

Further, in this regard, they again draw support from the below mentioned judgement:

a. M/s. Menon Associates-2014 (2) TMI 439 — CESTAT New Delhi-The The respondent has reproduced paras No. 6 and 7 of the Order;

b. M/s Alpine Modular Interiors (P) Ltd. 2014 (4) TMI 489-CESTAT New Delhi. The respondent has reproduced paras No. 7 to 9 of the Order;

c. M/s GAP International Sourcing (India) Pvt. Ltd. 2014 (3) TMI 696-CESTAT New Delhi. The respondent has reproduced paras No. 7, 8.4 8.5 (part), 8.6 & 10 of the Order;

d. In the case of M/s Paul Merchants Limited and others Vs CCE, Chandigarh – 2013 (29) S.T.R.257 (Tri.-Del), the Principal Bench New Delhi has held that money transfer by a pearson abroad to his beneficiary in India through Agents / sub Agents in India who receive commission from the person remitting the money from abroad in

convertible foreign exchange falls within the meaning of export of services;

e. IBM India (P) Ltd. 2010 (19) S.T.R. 520 (Tri.-Bang.) The respondent has reproduced para No. 7 of the Order;

f. Fanuc India Pvt. Ltd. 2011(21) S.T.R 438 (Tri.-Bang). The respondent has reproduced paras No. 5 & 6 of the Order;

g. ABS India Ltd., Vs CST, Bangalore - 2009 (13) STR 65 (Tri. - Bang.): In this case, the Indian company is the principal and the Singapore Company is a subsidiary. The appellant, who is the Indian Company, booked certain orders for the Singapore Company. It cannot be said that these booking of the orders indicate service being rendered in India. It is not correct. And also because the appellant books the orders for the Singapore Company, we have to consider that the service Is delivered only to the Singapore Company. The recipient of the service is a Singapore Company. When the recipient of the service is Singapore Company, It cannot be said that service is delivered in India and the benefit of the service is derived only by the recipient company (emphasis supplied). Because of the booking of the orders, the Singapore Company gets business. Therefore, the service is also utilized abroad. In terms of Rule 3(2) of the Export of Services Rules, 2005 the service rendered is indeed a service, which has been exported. In such circumstances, the appellant is not required to pay the service tax.

h. Blue Star Limited Vs. The Commissioner of Central Excise 2008 (11) S.T.R. 23 (Tribunal Bangalore). The Hon'ble Bangalore CESTAT has held, in the context of allotting refund of unutilized CENVAT credit on export of market support service, that the market support services shall be considered to have been exported in terms of Rule 3(2) of the Export of Service Rules, 2005.

i. Further, in the case of M/s Tandus Flooring India Pot Ltd v/s The Commissioner of Service Tax, Lalbagh Road, Bangalore - Ruling No AAR/ that Marketing and sales support AR/ ST/ 03/2013, it has been ruled that services in India to a firm in China and USA (outside India) amounts to export of services.

They reiterate their client enters into contracts with its customers in India for installation and commissioning service and warranty service of identified equipments. The discharge of contractual obligation of respondent client would be sufficient action which has resulted by the use of the services provided by the respondent to its client.

Further, amendment in the Export of Service Rules, 2005 by way of Notification No. 06/2010 - ST, dated 27.02.2010 in Finance Act, 2010,omitting clause (a) of Rule 3(2) which read as below before amendment:

(a) such service is provided from India and used outside India:

The amendment though prospective will give an essence on the developments in the service tax law which is attributable to the working of the service industry in India and intention to clarify the ambiguity pertaining to the conditions to qualify as export under of Export of Service Rules, 2005.Consequent to the amendment, following conditions are to be fulfilled in case of services classifiable under 'Business Auxiliary Services' and other services falling in the clause (iii) of Rule 3(1) of Export of Services Rules, 2005:

a) Taxable services are provided in relation to business or commerce.

b) The recipient of service to be located outside India.

c) Payment for such service is received by the service provider in convertible foreign exchange.

7.4 In view of the above, the services provided by them on behalf of Makino Asia Pte Limited, Singapore would absolve Makino Asia Pte Limited, Singapore from all their obligations, both financial and otherwise and keeps them away from all the above issues in relation to non performance of the contract. Their services are essentially and necessarily used by their client in Singapore. Thus, the services provided by them are used / utilized outside India and thereby, this condition is also fulfilled.

7.5 Further to the above explanations, the Circular No. 111/05/2009 dated 24.02.2009 issued also uphold the submissions made by them supra. The CBEC has clarified that "for the services that fail under category III (Rule 3(1)(iii), the relevant factor is the location of the service receiver and not the place of performance. It goes further to clarify that, 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 services (Rule relevant possible that export of service may take place even when all the relevant activities take place in India so long as the benefits outside India.

7.6 In respect of services provided by call centers who attend to calls from customers or prospective customers from all around the world including from India, it is clarified that the same qualifies as exports since the benefit of the service provided by the call centre in India accrues to the foreign company on whose behalf the questions are answered by the call centers.

7.7 In relation to the above explanation, the circular further states that "similar would be the treatment for services outlined under category III (Rule 3(1)(iii) services as well." Accordingly, the benefit of provided by them accrues to their client (viz., Makino Asia Pte Limited, Singapore) outside India (viz., in Singapore) by way of discharge of contractual obligations between the client and his end customer. It is not relevant where the end customer is located or where the activities are undertaken by them.

7.8 Further, it is apparent from the fact that the end customer makes the payment to Makino Asia Pte Limited, Singapore, towards the services received by them from Makino Asia Pte Limited, Singapore, and not to them. Further, they receive consideration for the services provided from Makino Asia Pte Limited, Singapore. This re-emphasizes that the services are provided by us and are received by their client outside India making the payment for the same to them. Further, it is pertinent to note that the Export of Services Rules, 2005, envisages the provision of taxable services from India for use outside India. In this regard, they humbly submit that their services are provided from India and used outside India as detailed supra.

7.9 In view of the above, Business Auxiliary services (warranty commission) provided by them would qualify as export of services in terms of Export of Services Rules 2005 and therefore entitled for rebate. Accordingly, the allegations made by the Commissioner of Service Tax are highly prejudiced in the interest of revenue and lack application of law to the said transactions in a just and equitable manner and liable to be quashed.

7.10 **Debit notes cannot be considered as export documents in absence of export invoice:**

Rule 4A provides that the every person providing taxable service shall Issue an Invoice, a bill or, as the case may be, a challan signed by such person or a person authorized by, him in respect of such taxable service provided or to be provided and such invoice, bill or, as the case may be, challan shall be serially numbered and shall contain the following, namely:-

i. the name, address and the registration number of such person;

ii. the name and address of the person receiving taxable service;

iii. description, classification and value of taxable service provided or to be provided; and

iv. the service tax payable thereon.

In relation to the above, they submit that the said debit note contains all the ingredients as required under Rule 4A of Service Tax Rules, 1994 and hence would qualify as a Invoice for the purposes of the above provisions.

7.11 The above detailed submissions made by them before the Hon'ble Commissioner Appeals has been appreciated by the Hon'ble Commissioner Appeals in the right spirit keeping In mind the relevant provisions of service tax provision and central excise law. The Commissioner Appeals has applied his mind and allowed the relief after giving a detailed reasoning for the same.

7.12 In view of the above facts, our explanations and with support of judicial precedents referred to supra, they are entitled to claim the rebate of service tax paid on inputs used for providing output services which are exported and accordingly the Order in Appeal No. 271/2011 dated 31.03.2011 is correct and

need not be set aside as prayed by the learned Commissioner of Service Tax and the Revision Application filed by Commissioner of Service Tax needs to be quashed.

8. The respondent Company had also filed additional written submissions dated 27.02.2020 during the previous personal hearing contending therein as under :-

A. Issue - Limitation of time under Section 11B of Central Excise Act, 1944: As per Rule 3(2) of Export of Services Rules, 2005 the provision of any taxable service shall not be treated as export of service until the consideration is received in Convertible foreign Exchange. Thus, we submit that it would be correct to understand that the export would be recognized or complete only on receipt of the Convertible Foreign Exchange towards the subject services and not the date of export of services. They also additionally place reliance on the following judgments in support of our submissions:

1. C.C, C.E. & S.T., Hyderabad-IV Versus Hyundai Motor India Engg. (P) Ltd. - 2015 (39) S.T.R. 984 (A.P.) - The Honble Andhra Pradesh High Court upheld the order of the order of the Hon 'ble CESTAT order - TS-207-Tribunal-2014-ST / 2015 (39) S.T.R. 1019 (Tri. - Bang.) (paras No. 2 & 3 of the said judgment reproduced).

2. C.C.,C. EX. & S.T., Hyderabad-IV Versus Hyundai Motor (I) Engineering (P) Ltd. - 2017 (49) S. T.R. 385 (A.P.) – (para No.7 of the judgment reproduced).

3. C.C.E., CUS. & S.T., Bengaluru Versus Span Infotech (India) Pvt. Ltd. - 2018 (12) G.S.T.L. 200 (Tri. - LB) – (paras No. 9 to 13 of the Order reproduced).

B. Issue - The condition prescribed under Rule 3 (2) (a) of Export of Service Rules, 2005 has not been fulfilled - They reiterate our submissions made in our Memorandum of Cross Objection dated 16.06.2014 regarding fulfillment of conditions Rule 3 (2) (a) of Export of Service Rules. 2005. They additionally place reliance on the following judgements in support of our submissions:

1. PRIME ENERGY PVT. LTD. Versus COMMISSIONER OF SERVICE TAX, NEW DELHI - 2016 (45) S.T.R. 459 (Tri. - Del.) – (Paras No.2 & 3 of the Order reproduced).

2. SIMPRA AGENCIES Versus COMMISSIONER OF CENTRAL EXCISE, DELHI-II - 2014 (36) S.T.R. 430 (Tri. - Del.) - (para No. 6 of the Order reproduced).

C. Issue - Debit notes cannot be considered as export documents in absence of export invoice -

They reiterate their submissions made in our Memorandum of Cross Objection dated 16.06.2014. They place reliance on the following judgments in support of their submissions:

1. COMMISSIONER OF C. EX. & S.T., NOIDA-II Versus TEREX EQUIPMENT PVT. LTD. - 2019 (20) G.S.T.L. 94 (Tri. - All.) (Paras No. 1 & 5 of the Order reproduced).

2. M/S. EMMES METALS PVT. LTD. VERSUS COMMISSIONER OF CENTRAL EXCISE, MUMBAI - 2016 (5) TMI 1046 - CESTAT MUMBAI (Para No.5 of the Order reproduced)

The above case laws though are in the context of CENVAT credit, the said case laws would be equally applicable for determining that where debit note contains all the ingredients as required under Rule 4A of Service Tax Rules, 1994 it would qualify as a invoice for the service provider.

In view of the explanations and with support of judicial precedents referred to in Memorandum of Cross Objection dated 16.06.2014 and submission supra they submitted that they are entitled to claim the rebate of service tax paid on input services used for providing output services which are exported and accordingly the Order-in-Appeal 271/2011 dated 31.03.2011 is correct and need not be set aside as prayed by the learned Commissioner of Service Tax, Bangalore (now learned Commissioner of Central Goods & Service Tax. Bangalore).

9. A personal hearing in this case was held through video conferencing on 02.02.2021. Nobody appeared for the said hearing on behalf of the applicant department. Shri Siddeshwar Yelamali, CA, Authorized Representative, appeared online for hearing on behalf of the respondent company and reiterated their submissions. He contested all 3 grounds of the department i.e. (i) On limitation, (ii) Service provided is not export of service and (iii) Documents not proper. Regarding issue of limitation he relied upon Hon'ble CESTAT, Mumbai in case of Commissioner of Central Excise Pune-I Vs Eaton Industries Pvt. Ltd.[2011(22)S.T.R. 223 (Tribunal, Mumbai)] wherein CESTAT, Mumbai upheld that, relevant date for claiming of service tax paid on input services used in providing output services which are exported shall be the date when payment for services exported has been received by the assessee. He also referred to the CBEC Circular No. 111/05/2009 dated 24.02.2009 which has clarified that "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 and that the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. He also relied on CESTAT (Delhi) Orders mentioned at para 8(B) (Sl.No. 1 & 2) supra. Regarding debit notes submitted along with the claim which according to the applicant department, are not the documents prescribed under Rule 4A of Service Tax Rules, 1994, he submitted that debit note contains all the ingredients as required under Rule 4A of Service Tax Rules, 1994 and hence it would qualify as a invoice for the service provider. In view of his aforesaid submissions, he requested foe upholding the Commissioner (Appeals) Order.

10. 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 oral & written submissions made by the applicant in their Revision Application as well as cross objections/written submissions/Synopsis alongwith the case laws filed/submitted by the respondent company.

11. Government observes that after being aggrieved by the impugned Order-in-Appeal, the applicant department initially filed appeal before Tribunal, Bangalore. The Tribunal Bangalore, vide Final order No. 20125/2014 dated 30.01.2014 dismissed the same on the ground of non-maintainability and lack of jurisdiction. On receipt of the said CESTAT order, Department filed the instant Revision Application and pleaded therein that since the appeal was inadvertently filed before the Tribunal, there is a delay in submitting the Revision Application, which may please be condoned.

12. Government first proceeds to discuss issue of delay in filing this revision application. The chronological history of events is as under.

(a) Date of receipt of impugned Order-in-Appeal dated 31.03.2011	03.05.2011
(b) Date of filing of appeal before Tribunal	30.08.2011
(c) Time taken in filing appeal before Tribunal	3 months & 27 days
(d) Date of receipt of Tribunal order dated 30.01.2014	28.02.2014
(e) Date of filing of revision application	02.04.2014
(f) Time taken between date of receipt of Tribunal order to date of filing of revision application	1 month & 5 days

From the above factual position, it is clear that applicant has filed this revision application after 5 months and 2 days when the time period spent in proceedings before CESTAT is excluded. As per provisions of Section 35EE of Central Excise Act, 1944 the revision application can be filed within 3 months of the communication of Order-in-Appeal and the delay up to another 3 months can be condoned provided there are justified reasons for such delay.

13. Government notes that Hon'ble High Court of Gujarat in W.P. No. 9585/11 in the case of M/s. Choice Laboratory vide order dated 15-9-2011, Hon'ble High Court of Delhi vide order dated 4-8-2011 in W.P. No. 5529/2011 in the case of

M/s. High Polymers Ltd. and Hon'ble High Court of Bombay in the case of M/s. EPCOS India Pvt. Ltd. in W.P. No. 10102/2011 [2013 (290) E.L.T. 364 (Bom.)] vide order dated 25-4-2012, have held that period consumed for pursuing appeal bonafidely before wrong forum is to be excluded in terms of Section 14 of Limitation Act, 1963 for the purpose of reckoning time limit of filing revision application under Section 35EE of Central Excise Act, 1944. The ratio of above said judgment is squarely applicable to this case. Government therefore keeping in view the above cited judgments considers that revision application is filed after a delay of 2 months & 2 days which is within condonable limit. Government, in exercise of power under Section 35EE of Central Excise Act, 1944 condones the said delay and takes up revision application for decision on merit.

14. The issues to be decided in the present case is (i) whether the rebate claims filed by the respondent company were barred by limitation of time, (ii) whether services rendered by the respondent to its client M/s Makino Asia Pte Limited, Singapore, would qualify as Export of Services in terms of Export of Service Rules,2005 as applicable during the relevant time and (iii) whether the debit notes issued by the respondent is a valid export document and confirm with the requirement under Rule 4A of Service Tax Rules, 1994.

15. The core issue that comes up for decision in this matter firstly is, whether the respondent has fulfilled the conditions prescribed under Rule 3 (2) (a) of Export of Service Rules, 2005 to consider services rendered, to constitute same as export of services.

16. Government observes that the respondent had filed a rebate claim on 19.12.2008 for Rs.5,63,588/- for refund/rebate of service tax paid for providing Business Auxiliary Services in terms of Rule 5 of Export of Service Rules 2005 read with Notification No. 11/2005 dated 19.4.2005. In the instant case the claimant has claimed the rebate of service tax paid for providing export of services covered by debit notes raised between the period 14.6.2007 to 30.11.2007 and on 31.12.2007.

17. The respondent has contended that they entered into an agreement with Makino Asia Pte Ltd, Singapore (referred to as client, in short) on 01.04.2006 for provision of the following services:

a. Installation and commission of machines sold by our client on their behalf ;

b. Warranty and modification services on machines sold by our client on their behalf.

Their client, viz., Makino Asia Pte Limited, Singapore enters into a single consolidated contract for supply, erection and installation of CNC Machines to its customers located in India; that after having undertaken the supply, Makino Asia Pte Limited, Singapore sub-contracts certain engineering activities of erection and installation servicing of the machines during the warranty period to them; that they undertake the same on behalf of the client and strictly in terms of the guidelines laid down by and the instruction of the client; that such services squarely falls within the scope and ambit of Business Auxiliary Services which are provided by them to their client located in Singapore which is not in dispute; that the client (i.e. Makino Asia Pte Limited, Singapore) situated in Singapore is responsible for undertaking the said activities, hence, there is a liability cast on Makino Asia Pte Limited, Singapore, to discharge the contractual obligation with respect to its clients in India; that consequently, there is a liability created in the books of the Makino Asia Pte Limited, Singapore that in a situation where Makino Asia Pte Limited, Singapore, fails to discharge/perform the said activities either on its own or through some other person, it would trigger the liability of non performance of the contract; that they are approached by Makino Asia Pte Limited, Singapore, to undertake the said activities of Installation and commissioning and warranty service of the equipment on their behalf; that they do not have any contractual obligation with the buyer of such equipment; that they are responsible to their client, viz., the seller of the equipment, situated outside India while discharging its functions; that they undertake the contract in terms of the instructions obtained from the client from time to time; that the seller of the equipment (overseas client) in turn is responsible to the buyer in India.

18. Government observes that Commissioner (Appeals) while allowing the appeal filed by the respondent observed that :-

> *"the appellant has entered into contract with foreign client for carrying out activities of supply, erection and installation of CNC machines to its customers located in India and the said service provided in India and used in India for which appellant received 'Commission' termed it "Warranty-MA-Commission" as description of service in their export document i.e. Debit Note. In the light of Board Circular No 111/05/2009-ST, the appellant service fall under category III (Rule 3(1)(iii)' it is possible that export of service may take place even when all the relevant activities take place in India as long as the benefits of these services accrue outside India' and therefore there is no dispute in export of service, then the document debit note as explained supra can be taken as the*

export invoice. Hence, the appellant are eligible for rebate of service tax discharged by them'

19. Government observes that the respondent themselves have admitted that the services rendered by them are taxable under the category of 'Business Auxiliary Services' and during the relevant period and upto 27.02.2010 the conditions that need to be fulfilled to qualify as export of service 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.

20. In the instant case service is being rendered by the respondent and the same is consumed in India and in terms of clarification issued vide CBEC Circular No. 141/10/2011-TRU, dated 13.05.2011, only when the user and the use of services are outside India, the transaction amounts to export of service and not otherwise. This circular provided further clarification to interpret the condition 'used outside India' to qualify as export (in the context of earlier in CBEC Circular No. 111/5/2009-S.T., dated 24-2-2009) as follows:

- *the expression 'accrual of benefit' is not restricted to mere impact on the bottom-line of the person who pays for the service as this interpretation would defeat the requirement of services being used outside India;*
- *the expression 'used outside India' may be interpreted in the context of the situs of the effective use and enjoyment of the service. The same would be dependent on the nature of service.*

The said Circular also illustratively explained the above principles in the following manner:-

- *In the case of a consultancy service, though the service may be paid for by a client located outside India, if such service is used with respect to a project or an activity in India, such service cannot be said to have been used outside India.*
- *Effective use of advertising service shall be the place where the advertising material is disseminated to the audience, though the benefit of such advertisement may finally accrue to the buyer located at another place.*
- *In the case of call centres and similar businesses catering to clients located outside India, if the customers (of the client) are also located outside India, the service is used outside India.*

21. In this connection, Government also refers to Hon'ble CESTAT, West Zonal Bench, Mumbai's Order dated 17.05.2019 passed 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 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 respondent 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 respondent in these proceedings. Hence the ratio of the same can also be applied to the instant Revision application.

22. 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 respondent 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?*

23. 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'.

24. 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."*

25. Government also observes that the various case laws relied upon by the respondent in this issue are not applicable as clarified hereunder:-

Case law Relied upon by the respondent	Remarks
Prime Energy Pvt. Ltd. Vs Commissioner of Service Tax, New Delhi 2016 (45) S.T.R. 459 (Tri. - Del.)	Commissioner of Service Tax, Delhi-I filed Civil Appeal No. 3117 of 2016 (Civil Appeal Diary No. 3715 of 2016)against the CESTAT Final Order No. A/50643/2015-SM(BR), dated 5-3-2015 as reported in 2016 (45) S.T.R. 459. The said appeal was dismissed on 06.02.2019 by Hon'ble Supreme Court due to monetary limits and not on merits. Hence, CESTAT Order cannot be treated as precedent. Also, in view of recent Orders od CESTAT, Mumbai discussed at paras 21 & 22

	Supra, which have taken a contrary view, reliance of the respondent on this case law is misplaced
Simpra Agencies Vs Commissioner of Central Excise, Delhi-II 2014 (36) S.T.R. 430 (Tri. - Del.)	In view of recent Orders od CESTAT, Mumbai discussed at paras 21 & 22 Supra, which have taken a contrary view, reliance of the respondent on this case law is misplaced. Also distinguished by CESTAT Mumbai in 2019-TIOL-2651-CESTAT-MUM (Para 21 Supra).
Commissioner of Service Tax, Delhi Vs Menon Associates 2014 (34) S.T.R. 793 (Tri. - Del.)	Commissioner of Service Tax, Delhi filed Central Excise Act Case No. 93 of 2014, before Hon'ble Delhi High Court which vide judgment dated 31-10-2014 returned the appeal as 'not maintainable'. Hence, CESTAT Order cannot be treated as precedent. Also, in view of recent Orders od CESTAT, Mumbai discussed at paras 21 & 22 Supra, which have taken a contrary view, reliance of the respondent on this case law is misplaced.
Alpine Modular Interiors (P) Ltd. Vs CST (Adjudication), New Delhi, 2014-TIOL-517-CESTAT-DEL= 2014 (36) S.T.R.454 (Tri-Del.)	This case 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 amounted to export of service as recipient of service was located abroad and payment for services was received in foreign exchange. However, 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 such an event, as ruled by the Hon'ble Apex Court in UOI v. West Coast Paper Mills Ltd. -2004 (164) E.L.T. 375 (S.C.), once the appeal having been filed and entertained by the Supreme Court, the judgment of lower court is in jeopardy. Hence, reliance of the respondent on this case law is misplaced.
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(52 S.T.R. J199(SC). In such an event, as ruled by the Hon'ble Apex Court in UOI v. West Coast Paper Mills Ltd. -2004 (164) E.L.T. 375 (S.C.), once the appeal having been filed and entertained by the Supreme Court, the judgment of lower court is in jeopardy. Also distinguished by CESTAT Mumbai in 2019-TIOL-2651-CESTAT-MUM (Para 21 Supra). Hence, reliance of the respondent on this case law is misplaced.
Paul Merchants Limited and others Vs CCE, Chandigarh – 2013 (29) S.T.R.257 (Tri.-Del),	Hon'ble P&H High Court admitted the STA No. 5 of 2013 filed by Commissioner of Central Excise, Chandigarh-I against the CESTAT Final Order No. ST/A/699/2012-Cus.(PB), dated 21-11-2012 as reported in 2013 (29) S.T.R. 257. Still pending decision. Also distinguished by CESTAT Mumbai in 2019-TIOL-2651-CESTAT-MUM (Para 21 Supra). Hence, reliance of the respondent on this case law is misplaced.
ABS India Ltd., Vs CST, Bangalore - 2009 (13) STR 65 (Tri. - Bang.): & Blue Star Limited Vs. The Commissioner of Central Excise 2008 (11) S.T.R. 23 (Tribunal Bangalore).	Both these case laws have been duly distinguished by 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)]. (Referred & relied at para 22 supra). Also distinguished by CESTAT Mumbai in 2019-TIOL-2651-CESTAT-MUM (Para 21 Supra). Hence, reliance of the respondent on these case laws is misplaced.
IBM (I) Pvt. Ltd. Vs CCE, Bangalore 2010 (19) S.T.R. 520 (Tri. - Bang.), Fanuc India Pvt. Ltd. 2011(21) S.T.R	In view of recent Orders od CESTAT, Mumbai discussed at paras 21 & 22 Supra, which have taken a contrary view, reliance of the respondent on these case laws is misplaced. Also distinguished by

438 (Tri.-Bang).	CESTAT Mumbai in 2019-TIOL-2651-CESTAT-MUM (Para 21 Supra).
Tandus Flooring India Pvt. Ltd. Vs Commissioner of Service Tax, Bangalore, Ruling No. AAR/ST/03/2013	Authority for Advance Rulings, New Delhi after considering the provisions of Rule 6A of Service Tax Rules, 1994 as well as the Rule 3 of the Place of Provision of Services Rules, 2012 held that the provision of service by the applicant to the two recipients named above will amount to export of service within the meaning of Rule 6A of Service Tax Rules, 1994. As the present case relates to Rule 3(i) (III) / Definition 3(2)(a)(b) Export of Service Rules, 2005. Business Auxiliary Services till 27.02.2010 to qualify as export of service, required that (i) the service should have been provided to a person outside India and should have been used outside India and (ii) the payments should have been received in convertible foreign exchange. Thus the issue in the said case is different on facts as well as on questions of law and hence reliance placed on the same is also misplaced.

26. Relying on recent case laws discussed at paras 21 to 24 supra, as well as in view of discussion in foregoing paras, Government holds that during the material time the respondent has not satisfied the condition relating to 'services used outside India' so as to constitute export of service as defined in the Export of Service Rules, 2005 and hence they are not eligible for rebate of Service Tax paid during the relevant period under Notification No. 11/2005 dated 19.04.2005.

27.1 **LIMITATION:**

Government observes that the adjudicating authority while rejecting the rebate claim of the respondent on limitation of time had held that the time limit prescribed under Section 11B of Central Excise Act, 1944 is very much applicable to the rebate/refund filed under the provisions of Rule 4 & 5 of Export of Service Rules, 2005; hence the relevant date for whatever rebate, under Export of Service Rules 2005 is the actual date of export of service, in terms of Sub-section (5)(B) (i) of Section 11B of the Central Excise Act and not the date of receipt of payment for the services exported as contended by the assessee (respondent). Whereas, Commissioner (Appeals) while allowing the appeal filed by the respondent, relying on the case of Commissioner of Central Excise Pune-I Vs Eaton Industries Pvt. Ltd.[2011(22)S.T.R. 223 (Tribunal, Mumbai)] held that the relevant date is the date when payment of services exported has been received by the assessee (respondent). The applicant in its Revision Application has contended that the relevant date for whatever rebate under Export of Services Rules, 2005, is the actual date of export of service, in terms of sub-section (5)(B)(a)(i) of Section 11B of Central Excise Act, 1944, and not the date of receipt of payment for the services exported and as such, the rebate claimed in the instant case is hit by limitation of time.

27.2 Government observes that different authorities have interpreted relevant date for export of service in a different manner. In the following cases which are relied upon by the respondent, it has been held that export is complete only when foreign exchange is received in India accordingly relevant date of export of services should be date of receipt of foreign exchange:

- Eaton Industries Pvt. Ltd. [2011(22)S.T.R.223(Tribunal,Mumbai)],
- M/s Bechtel India Pvt. Ltd. Versus CCE (2014 (34) STR 437 – Tribunal Delhi),
- Hyundai Moor India Engineering Pvt. Ltd.[TS-207-Tribunal-2014-ST],
- C.C.,C. EX. & S.T., Hyderabad-IV Versus Hyundai Motor (I) Engineering (P) Ltd. - 2017 (49) S. T.R. 385 (A.P.)
- C.C.E., CUS. & S.T., Bengaluru Versus Span Infotech (India) Pvt. Ltd. - 2018 (12) G.S.T.L. 200 (Tri.-LB)

Government observes that all the aforesaid judgments were delivered in the context of refund of Service tax where the refund applications were filed by the assessees under Rule 5 of the Cenvat Credit Rules, 2004 read with Notification No.27/2012-CE(NT) dated 18.06.2012. Section 11B of the Central Excise Act. 1944 read with Section 83 of Finance Act, 1994 lays down the limitation period of one year from the relevant date. Explanation B to Section 11B defines the 'relevant date' under clauses (a) to (f). However, clauses (a) to (ec) of Explanation B to Section 11B cannot be made applicable for the purpose of calculating relevant date for filing rebate / refund claim for export of services as they specifically relate to the export of goods and the only clause which can be made applicable is residual clause (f) wherein it has been provided that the relevant date would be the date of payment of duty. Further, the question of refund of accumulated CENVAT credit will arise only when export of services is completed. In terms of Rule 3(2) of Export of Services Rules, 2005 the provision of any taxable service shall not be treated as export of service until the consideration is received in Convertible foreign Exchange. As in cases of refund of Service Tax claimed under Rule 5 of the Cenvat Credit Rules, 2004, there is no payment of service tax and therefore the aforesaid authorities have rightly held that export is complete only when foreign exchange is received in India and accordingly relevant date of export of services in such cases should be date of receipt of foreign exchange. Unless services are provided for export & foreign exchange is received in India, it cannot be said that the service provider has accumulated CENVAT credit & for the same reason refund under

Notification No. 05/2006 CE(N.T.) can be given only when both these conditions are fulfilled.

27.3 In cases of rebate of service tax, the relevant provisions of Notification No. 11/2005-S.T., dated 19th April, 2005 reads as under.

> ***Export of Services - Rebate of Service tax and Cess on taxable services exported to any country other than Nepal and Bhutan - Conditions and procedures***
>
> *In exercise of the powers conferred by rule 5 of the Export of Service Rules, 2005 (hereinafter referred to as the said rules), insofar as it relates to export of taxable services to the countries other than Nepal and Bhutan, the Central Government hereby directs that there shall be granted rebate of the whole of the service tax and cess paid on all taxable services exported in terms of rule 3 of the said rules, to any country other than Nepal and Bhutan, subject to the conditions, limitations and procedures specified hereinafter, -*
>
> *2. Conditions and limitations :-*
>
> *(a) that the taxable service has been exported in terms of rule 3 of the said rules and payment for export of such taxable service has been received in India in convertible foreign exchange;*
>
> *(b) that the service tax and cess, rebate of which has been claimed, have been paid on the taxable service exported;*
>
> *(c) the amount of rebate of service tax and cess admissible is not less than five hundred rupees; and*
>
> *(d) that in case, -*
>
> *(i) the service tax and cess, rebate of which has been claimed, have not been paid; or*
>
> *(ii) the taxable service, rebate on which has been claimed, has not been exported, the rebate paid, if any, shall be recoverable with interest as per the provisions of section 73 and section 75 of the Finance Act, 1994 (32 of 1994) as if no service tax and cess have been paid on such taxable service.*

From the aforesaid provisions of notification, the conditions and limitations for granting the rebate of the service tax paid on services exported are that the taxable service should have been exported and the payment for such services should have been received in convertible foreign exchange and the service tax and cess have been paid on taxable service exported. Hence, one of the conditions for

granting rebate of service tax is its payment and therefore in terms of clause (f) of Explanation B to Section 11B of the Central Excise Act. 1944 read with Section 83 of Finance Act, 1994 the relevant date for rebate of service tax should be, the date of payment of service tax on the taxable services exported. CBEC in its Circulars dated 21 December 2007 and 30 December 2008 (Frequently Asked Questions on Service Tax issued by CBE & C) have also clarified at points 6.4 and 6.3 respectively, as under:-

6.4/6.3 What is relevant date for calculation of limitation period in respect of filing refund claims relating to Service Tax?

"The "relevant date" for the purpose of refund as per Section 11B of the Central Excise Act, 1944 which is applicable to Service Tax also, is the date of payment of Service Tax. Thus, the limitation period of one year is to be calculated from the date of payment of the Service Tax".

In Volkswagen India Pvt. Ltd Vs Commissioner of Central Excise Pune-I [2016(41) S.T.R. 716(Tri-Mumbai] CESTAT , Mumbai while dealing with the identical issue *(Refund of Service Tax - 'Business Auxiliary Services' and 'Business Support Services' exported to foreign customers - Limitation - Relevant date for filing refund claim - Notification No. 11/2005-S.T. -),* relying on same Bench's Order in the case of Vodafone Cellular Ltd. [2014-TIOL-319-CESTAT-MUM = 2014 (34) S.T.R. 890 (Tribunal)] wherein it was held that *if the refund claim are filed beyond the period of one year from the date of payment of service tax, the refund claim are liable to be rejected,* Tribunal, Mumbai held that relevant date for refund in the case of rebate should be from the date of payment of service tax on the taxable services exported.

In view of the aforesaid discussion, Government holds that the reliance placed by the respondent on case laws mentioned at para 27.2 supra, is misplaced. Government therefore, holds that the relevant date in the case of rebate should be from the date of payment of service tax on the taxable services exported.

28.1 **Debit Notes to be considered as export documents in the absence of export invoice.**

Government observes that the original authority has rejected the contention of the applicant that since the debit notes contain all the ingredients as required under Rule 4 A of Service Tax Rules, 1994 they would qualify as invoice.

Commissioner (Appeals) while allowing the appeal filed by the respondent has observed that *"if the proof of receipt of FIRCs is correlated with the debit note/ export of service/ ST3 return, I am of the opinion that debit note documents can be considered for export documents, in the absence of export invoices"*.

28.2 Government observes that Tribunals all over (also in case laws relied upon by the respondent) have taken a consistent view that Cenvat credit can be allowed on the basis of debit notes if they contain the information as required under Rule 4A of Service Tax Rule 1994. In CCE & ST Noida-II Vs Terex Equipment Pvt. Ltd. [2019(20) G.S.T.L. 94(Tri.-All.) which is relied upon by the respondent, the Tribunal in earlier part of litigation remanded the issue back to the Original Authority for examining as to whether the debit notes contained all the information which is required to be mentioned in an invoice in terms of Rule 4A of the Service Tax Rules, 1994 and if this is so, the Cenvat credit has to be allowed.

28.3 Government therefore holds that the admissibility of debit notes in the absence of export invoices will be dependent on whether they contain information as required under Rule 4A of Service tax Rules, 1994.

29. In view of the discussion in foregoing paras, Government modifies and sets aside Order in Appeal No.271/2011 dated 31.03.2011 passed by Commissioner of Central Excise (Appeals-II), Bangalore.

30. Revision Application is allowed in the above terms.

19/5/21

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

ORDER No. 09 /2021-ST(SZ) /ASRA/Mumbai DATED 19.5.2021

To,

Principal Commissioner of Goods & Services Tax, Bengaluru East,
TTMC, BMTC Bus Stand Complex,
Hal Airport Road Domluru,
Bengaluru-560071.

Copy to:

1. M/s Makino India Pvt. Ltd.,No.11, Export Promotion Industrial Park, Opp.Sri Sathya Sai Heart Hospital,Whitefield Road, Bangalore-560 066.
2. Commissioner Of Central Goods & Services Tax,Bengaluru Appeals-I, TTMC, BMTC Bus Stand Complex Hal Airport Road Domluru Bengaluru-560071.
3. Assistant Commissioner , CGST Bangalore East Division- : 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.