F. No. 196/01/ST/17-RA
196/02/ST/17-RA
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REGISTERED
SPEED POST

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196/02/ST/17-RA
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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue.....

Order No. 36-38/2018-CX dated 09-4-2018 of the Government of India, passed by Shri R. P. Sharma, Principal Commissioner & Additional Secretary to the Government of India, under Section 35 EE of the Central Excise Act, 1944 read with section 83 of Finance Act, 1994.

Subject	:	Revision Application filed under section 35 EE of the Central Excise Act, 1944 read with section 83 of Finance Act, 1994, against the Orders-in-Appeal Nos.NOI/SVTAX/OOO/APPL-I/190/2016-17, NOI/SVTAX/OOO/APPL-I/192/2016-17 and NOI/SVTAX/OOO/APPL-I/193/2016-17 all dated 25/10/2016 passed by the Commissioner of Central Excise (Appeals-I), Meerut.
Applicant	:	M/s Innodata India Pvt. Ltd.
Respondent	:	Commissioner of Service Tax, NOIDA

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ORDER

Three Revision Applications No. 196/01/ST/17-RA, 196/02/ST/17-RA and 196/03/ST/17-RA dated 17/01/2017 have been filed by M/s Innodata Pvt. Ltd., NOIDA (hereinafter referred to as the applicant) against the Orders-in-Appeal Nos. NOI/SVTAX/OOO/APPL-I/190/2016-17, NOI/SVTAX/OOO/APPL-I/192/2016-17 and NOI/SVTAX/OOO/APPL-I/193/2016-17, all dated 25/10/2016, passed by the Commissioner of Central Excise (Appeals-I), Meerut, whereby the respondent's appeals against the orders-in-original have been allowed.

2. The brief facts leading to the present proceeding before the Government are that the applicant had filed rebate claims under notification no. 39/2012-ST dated 20/06/2012 in respect of Service Tax paid on the input services utilized in export of service under Rule 6A of the Service Tax Rules, 1994. The exported service was earlier classified as "Online Information and Database Access or Retrieval Services" (hereinafter referred to as OIDAR service) by the applicant which was taxable under 65(105)(zh) of the Finance Act, 1994. Subsequently when negative list based service tax was introduced from 01/07/2012, the applicant described the exported service as "Business Support Service" in place of OIDAR services and claimed rebate of service tax in respect of inputs/input services by claiming that the services had been exported as per Rule 6A of Service Tax Rules, 1994 which had been inserted with effect from 01/07/2012. The rebate claims were sanctioned by the jurisdictional Deputy Commissioner accepting the classification of the exported services as Business Support Service. However, the Commissioner of Central Excise

reviewed the sanctioning orders of the Deputy Commissioner and appeals were filed on his behest before the Commissioner (Appeals) on the ground that the exported services were OIDAR services only and as per Rule 9 of the Place Of Provision of Services Rules, 2012, the place of provision in case of OIDAR services was the location of the service provider. Thus the OIDAR service provided by the applicant in India could not be stated to have been exported. Accepting the appeal of the revenue, the Commissioner (Appeals) has set aside the order-in-original of the Deputy Commissioner and as a result the applicant has approached the central government by filing the present revision application.

3. The applicant has filed the present revision applications mainly on the ground that the services exported by them are Business Support Services only and are not the OIDAR services as they are only providing BPO and KPO services to their principals in USA, the data processed by them are owned by their principals and they are not providing right of access to any person which is core ingredient of the OIDAR service.

4. A personal hearing was held on 26/02/2018 in these cases which was attended by Sh. Kishore Kunal, Advocate, from the applicant side and furnished compilation of legal provisions and case laws. Sh. Naresh Tiwari, Assistant Commissioner, attended the personal hearing from the respondent side and submitted additional submissions to assert that orders of the Commissioner (Appeals) are correct and the revision application filed by the applicant are not maintainable.

5. The Government has examined the matter and has found that the Commissioner (Appeals) has set aside the rebate sanctioning orders of the Deputy Commissioner mainly on the ground that the service exported by

the respondent is OIDAR service as the applicant has primarily provided data in electronic form only through a computer network and place of provision of OIDAR is the location of service provider which is India in this case. As a result the OIDAR service provided by the applicant in India to its overseas customers cannot be considered to have been exported. On the other hand the applicant has averred that the service provided by them is Business Support Service (BSS) and not the OIDAR service as is classified by the Commissioner (Appeals). Thus, the proper classification of the services provided by the applicant is the main issue.

6. While the "Business Support Service" is not defined in the Finance Act, 1994, after its amendment in 2012 in the wake of negative list based service tax regime introduced with effect from 01/07/2012, OIDAR service is defined in Section 65(75) of the Finance Act, 1994 as providing data or information, retrievable or otherwise, to any person in electronic form through a computer network. Further OIDAR service has been defined in Rule 2(1)(ccd) of Service Tax Rules, 1994 as "service whose delivery is mediated by information technology over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology and includes electronic services such as advertising on the internet; providing cloud services; provision of e-books, movie, music; software and other intangibles via telecommunication networks or internet; providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network; online supplies of digital content (movies, television shows, music , etc); digital data storage and online gaming."

7. Thus the following ingredients are required for calling any service as OIDAR service—

(i) there should be provision of data or information to any person.

(ii) the provision of data or information must be in electronic form and through a computer network and

(iii) the provision of data or information must be without involving much of the human intervention.

Applying the above essential ingredients to the services provided by the applicant, it is cannot be denied that data/information was provided by the applicant to M/s Innodata Inc. in USA in electronic form only through a computer network and with minimal human intervention. The applicant has certainly claimed that they hire experts in various fields for processing the date at this end to stress upon a point that human intervention is involved in the service provided by them. But even if it is accepted as true, the government finds that the engagement of the experts is only minimal and that is also for processing the data only and not for delivery thereof to their overseas customer. The flow of data from their end to the American company is fully automated and no human intervention is involved. Thus, the service provided by the applicant has all the above mentioned ingredients and characteristics of OIDAR service. The applicant has also emphasized that ownership of data and free access to it are core elements for being an OIDAR service. But this contention is not supported by the definition of OIDAR as discussed above. Even retrievability of the data is also not a condition as per the definition of OIDAR service. Moreover, after the data/information were transferred by their overseas customers to the applicant for further processing, the ownership of such processed

data/information vested with the applicant only until these were transmitted to their customers in USA. Even in the definition of OIDAR service under Rule 2(1)(ccd) of Service Tax Rules, 1994, the service of "online supply of digital content" has been given as one of the seven examples of OIDAR. The online processed data provided by the applicant to its customers are manifestly digital contents only. *Above all, the applicant itself had classified their services as OIDAR service prior to 01/07/2012 and its classification was changed only when the place of provision of OIDAR services was declared as location of the service provider under new Rule 9B of Place of Provision of Services Rules, 2012, by virtue of which OIDAR service all of a sudden came out of the category of exported services even when these were supplied abroad for consideration in foreign exchange.* The applicant has tried to justify their change of classification on the pretext of Education Guide Note 5.9.5 and CBEC's circular no. 202/12/2016-ST dated 09/11/2016. But on examination thereof, the government finds that the Guidance Note as well as the CBEC circular have simply reiterated the essential characters of the OIDAR service only, as mentioned above, and clarified that using the internet or some electronic means of communication just to communicate or facilitate outcome of service does not always mean a person is providing OIDAR service. Thus, nothing new has been stated in relation to OIDAR service for the first time in these two documents because of which the applicant was impelled to change the classification of the service. Rather the apparent reason for changing the classification of the services provided by the applicant from OIDAR to BSS is the new Place of Provision of Service Rules, 2012, as discussed above. This is further corroborated by the fact that BSS

is not even mentioned in the Finance Act, 1994, in force with effect from 01/07/2012 and even the applicant has not elaborated as to how they are supporting the business of overseas customers to call their service as BSS. Instead the applicant is processing the data independently and providing the same to the overseas customer on principal to principal basis as a separate service and not as a supportive service to any person. They have not even produced any copy of the contract with the company in the USA to support their claim that they provided any BSS.

8. Invocation of the principle of *res judicata* to question the correctness of the order-in-appeal is also not found to be relevant in the present context as the classification of the service has been changed by the applicant only and the dispute arising from the said change of classification has not been yet settled so far by a competent court/authority. The appellate/revisionary process is still going on. This principle is invokable only when an issue is repeatedly agitated before a civil court even after the issue was finally decided by a competent court earlier. But no such case is found by the government in present proceeding.

9. Their reliance on several decisions to support their claim that they did not provide OIDAR services is also completely misplaced for the reasons discussed below against each decision:-

(a) M/s Dewsoft Overseas Pvt. Ltd. Vs CST [2008(12)STR730(Tri-Del)]

In this case the services were related to the teaching and coaching through interactive website and did not involve mere data transfer. Whereas in the present case the service is relating

to transfer of processed data only and no other service is provided.

(b) SBI Vs CST [2015(37)STR 340(Tri-Mum)], M/s United Telecom Ltd. Vs CST[2009(14)STR 212(Tri-Bang)], M/s Philips Electronic Vs CST[2013 TOIL 1655 CESTAT Mad]

In these cases, the data was not provided by any person from India to any person abroad and instead the data was accessed by companies in India from their own data maintained abroad.

(c) M/s Thomson Reuters India Pvt. Ltd Vs CST[2015 (38) STR1014 (Tri-Mum)]

In this case the issue was not regarding classification of services as OIDAR and the issue was whether collecting, collating, verifying data and transmission of same to the foreign sister concern was management or repair service. But in the present case the issue is whether the transmission of the processed data to the foreign customer through electronic media is OIDAR or not.

(d) CST Vs Clix for Steel, Appeal No. 57/87815/2013

In this case the issue to be decided was whether e-trading of steel could be considered as OIDAR service and the same was held in negative on the ground that the respondent did not provide any data or information and did not charge any consideration for any service.

10. The applicant has also cited several other decisions in the context of *res judicata* and reclassification of the goods/services by the department but these are not found pertinent here as principle of *res judicata* is not

found applicable, reclassification of the service is not sought by the department and rather it is resorted to by the applicant only.

11. Considering the above narrated facts and the legal backdrop, the government does not find any fault in the order of the Commissioner (Appeals) and accordingly the revision application is rejected.

9.4.18

(R. P. Sharma)
Additional Secretary to the Government of India

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G.O.I. Order No. 36-38/18-Cx dated 9-4-2018

Copy to:-

1. Commissioner of Service Tax, NOIDA, C-56/42, Renu Tower, Sector 62, NOIDA
2. Commissioner of Central Excise (Appeals-I), Meerut.
3. PA to AS(RA)
4. Guard File
5. Spare Copy.

9/4/18
NIRMALA DEVI
(Section officer) (Revision Application unit)